SYSTEMATIC SERIES EDITED BY THE UNIVERSITY FACULTY OF POLITICAL SCIENCE IN COLUMBIA COLLEGE.

POLITICAL SCIENCE

AND

COMPARATIVE CONSTITUTIONAL LAW

VOLUME II

GOVERNMENT

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BOSTON, U.S.A., AND LONDON
PUBLISHED BY GINN & COMPANY
1891

Entered at Stationers' Hall.

Typography by J. S. Cushing & Co., Boston, U.S.A.

Presswork by Ginn & Co., Boston, U.S.A.

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PART II. BOOK III.

THE CONSTITUTION OF GOVERNMENT.

DIVISION I.—THE FORMS OF GOVERNMENT.

CHAPTER I.

THE TESTS OF GOVERNMENTAL FORMS.

IN my book upon the state I endeavored to show that the conception of the forms of state is vitiated, and the current nomenclature employed to give expression to the conception rendered almost useless, by the confounding of the ideas of state and government. The same criticism must be made as regards the usual and orthodox notions of the forms of government. The absence of the clear and correct distinction between state and government is as fatal in the latter case as in the former. In consequence of its absence in the literature of this subject, I am compelled to break new ground in this case, as in the former, or even more completely than in the former. I am compelled also to create, in large degree, a new nomenclature upon this topic, which may appear, in some respects, clumsy, but which I hope to make clear.

I. My first canon of distinction will be the identity or non-identity of the state with its government. From this standpoint government is either *immediate* or *representative*.

1. Immediate government is that form in which the state exercises directly the functions of government. This form of government must always be unlimited, no matter whether the state be monarchic, aristocratic or democratic; for the

state alone can limit the government, and, therefore, where the state is the government, its limitations can only be self-limitations, *i.e.* no limitations in public law. Nothing prevents immediate government from being always despotic government in fact, except a benevolent disposition. It is always despotic government in theory.

Immediate government may be monarchic, aristocratic or democratic, according as the form of state with which it is identified is monarchic, aristocratic or democratic. History does not show that there is much difference between the first and the last, from the standpoint of liberty. The first is, I think, the more favorable to liberty. Happily immediate democratic government cannot be extended over a great territory or a great population. The restraints of family ties and neighborhood thus serve as limitations, in fact, upon its despotic tendencies. Were these removed, no more oppressive system could be conceived. Revolt is the only relief of the subject of immediate government in any case, where the government will not yield, and revolt against democratic government is a far more desperate and hopeless movement than revolt against a monarch. On the other hand, history shows immediate aristocratic government to be more favorable to liberty than either of the other forms, but possessed of far less active power. It has neither the volume of strength of the democracy nor the concentration of the monarchy. It is seldom, however, that the complete identity of state and government actually occurs, except in the monarchy, and even there it is ordinarily more apparent than real.

2. Representative government is, in general definition, that form in which the state vests the power of government in an organization or in organizations more or less distinct from its own organization.

Representative government may be limited or unlimited. If the state vests its whole power in the government, and reserves no sphere of autonomy for the individual, the gov-

ernment is unlimited; it is a despotism in theory, however liberal and benevolent it may be in practice. If, on the other hand, the state confers upon the government less than its whole power, less than sovereignty, either by enumerating the powers of government, or by defining and safeguarding individual liberty against them, the government is limited, or, as we now usually say, it is constitutional as to form.

Representative government may be monarchic, aristocratic or democratic, according as one or a few or the mass of the population of the state are made eligible by the state to hold office or mandate.

Naturally, a monarchic state will have a monarchic government, an aristocratic state an aristocratic government, and a democratic state a democratic government. This is not a scientific necessity, however, and, as a fact, it does not always or even generally occur. It frequently happens that a democratic state has a monarchic government. This is the real character of Cæsarism, of Bonapartism. A monarchic state may conceivably have a democratic government; but I know no real instance of such a combination in practice. On the other hand, the monarchic state frequently has an aristocratic government. In fact, a truly successful monarchy must always have a real aristocracy for its governmental representatives. It must gather about it the natural leaders of the people and govern through their collective wisdom and support. The democratic state can hold poor talent in governmental authority through the artificial medium of the ballot; but the monarchic state has nothing, in last instance, to rely upon but the influences of superior genius and capacity. The power of numbers and brute force stands naturally against it. Again, an aristocratic state may have a monarchic government. In fact, the transition of the state from the monarchic to the aristocratic form generally leaves the different parts of the political system in this relation. We might say that this is almost a necessity to the existence

and perpetuity of the aristocratic state. An aristocratic state with an aristocratic government is always in danger of dissolution. The reasons for this are, in the first place, that the natural power of numbers and brute force is against the aristocracy, and, in the second place, that the aristocracy has not the religious influence of the monarchy over the masses. It has the intellectual power; but intellectual power alone tends rather towards schism, and schism in the governing body destroys the faith and then the loyalty of the masses.

Lastly, a democratic state may have an aristocratic government; and I do not see why, in any condition of society except the perfect, or nearly perfect, this is not the best political system for all states which have attained the democratic form. It is, theoretically at least, government of the people, for the people, and by the best of the people. The transition of the state from the aristocratic to the democratic form generally and naturally produces, momentarily at least, this relation between state and government, but it is very difficult to maintain this relation with any degree of permanence. The mature democracy always tends to the establishment of democratic government, and the immature to the creation of the Cæsar, the Bonaparte, or the "boss."

II. My second canon of distinction is the consolidation or distribution of governmental power.

The first alternative which arises in the application of this canon is between the *centralized* and *dual* systems of government.

1. Centralized government is that form in which the state vests all governmental authority in a single organization. In this form there is no constitutional autonomy in the localities, no independent local government. The local government is only an agency of the central government, established, modified and displaced by the central government at its own will. This form is best suited for states of small or moderate territorial extent and having a perfectly homogeneous popu-

lation; *i.e.* completely national states. In such states the period of variety in political and juristic conceptions will have been overcome, a national consciousness will have been developed and recognized as the basis of truth, a national opinion is readily formed. History demonstrates that all states tend more or less towards the production of this form in the course of their development into national states. When this form shall have been once really and naturally attained, it is a mark of retrogression to exchange it for the dual system. There are other conditions, however, than those of a narrow territory and a perfected nationality which require this form of government. A state whose population consists of different and hostile nationalities is necessitated to adopt this form in greater or less degree. A reasonable and predominant consensus cannot be developed in the localities where such an ethnical condition prevails. A governmental umpire outside of and supreme over the localities must hold the balance and control the war of nationalities. Again, a state having a population which is politically unripe, incapable of local self-government, is forced to adopt this form. A dual system under such conditions would mean dissolution and chaos. Both of these conditions, however, are to be regarded as temporary. The transition from the centralized to the dual form in such cases would be an evidence of advance in the political development of the population. The dual form is, in such cases, the natural connecting link between the temporary centralized form and the permanent centralized form.

2. Dual government is the form in which the state distributes the powers of government between two classes of organizations, which are so far independent of each other, that the one cannot destroy the other or limit the powers of the other or encroach upon the sphere of the other as determined by the state in the constitution. Both are completely subject to the state. Either may be changed or abolished at

will by the state. Neither is in essence an agency of the other, although it is conceivable, and often true, that the one may and does employ the other as agent.

The dual form is subject to a subdivision. It may be confederate government or federal government. Confederate government is the form in which, as to territory and population, the state is coextensive in its own organization with the organization of the local government. Federal government is the form in which, as to territory and population, the state is coextensive in its own organization with the organization of the general government. In the confederate system there are several states, an equal number of local governments, and one central government. In the federal system we have one state, one central government and several local governments.

The confederate system is clearly a transient form. It does its proper work in the period of transition from the condition of several sovereignties to that of a single sovereignty over the combined territory and population.

The federal system is not so clearly transient, although it can hardly be regarded as the ultimate form. Its natural place is in states having great territorial extent, inhabited by a population of tolerably high political development, either in class or in mass, but not of entirely homogeneous nationality in different sections. When these ethnical differences shall have been entirely overcome, something like the federal system may, indeed, conceivably remain, but the local governments will become more and more administrative bodies, and less and less law-making bodies. In fact, it looks now as if the whole political world, that part of it in which the centralized form of government obtains as well as that part still subject to the federal form, were tending towards this system of centralized government in legislation and federal government in administration. I do not feel sure that this is not the form of the future, the ultimate, the ideal form, at least for all great states.

The difficulty of the federal form in practice is the fact that it generally confuses the common consciousness as to the position of the sovereignty, the state. In the confederate system we know where the state is. In the centralized system we have no uncertainty upon this point. In the federal system, on the contrary, the divergence of views in regard to this subject creates the most burning question of practical politics, one which is seldom solved except by bloodshed. I think that most of the difficulty lies in the manner in which the state ordinarily distributes the powers of government between the central and local governments. That manner may briefly be described as follows: the state, the sovereign, first limits the powers of the two governments in respect to the individual, *i.e.* it creates the domain of individual immunity; then it enumerates the powers of the general government, and leaves all remaining powers without specification to the local organizations. This appears to many minds like a residuary sovereignty in the local organizations. It requires patient reflection and successful discrimination to attain a point of view from which it is clearly seen that there can be no such thing as residuary sovereignty; that sovereignty is entire or not at all; and that what is left by the state to the local organizations, in this manner of distribution, is only the residuary powers of government. The fact, furthermore, that the localities, the commonwealths, may organize themselves as quasi-constituent bodies, and create other organizations representative of themselves, and confer upon these organizations the immediate exercise of the governmental powers left to themselves by the state, and may forbid to their agents the exercise of some of these powers altogether, — all this adds greatly to the confusion of thought upon the subject. It appears as if these quasi-constituent bodies had something more than residuary governmental powers, since they do not exercise those powers immediately themselves. This something more is usually conceived as a part of the sovereignty,

to say the least. It requires more than superficial thinking to reach the principle that sovereignty cannot be partly here and partly there, but is a unit undivided and indivisible.

If the state should designate in the constitution the whole domain of individual immunity against both the general and the local governments, and construct in detail the organization of the local government as well as that of the general government, this difficulty would largely disappear. So long, however, as the usual method is observed, great effort of mind will be necessary to comprehend its real signification.

The second alternative arising from the application of my second canon of distinction is between what I will term *consolidated* government and *co-ordinated* government.

3. Consolidated government is the form in which the state confides all governmental power to a single body. If this body be a single natural person, then the government is monarchic. If it consist of a number of natural persons, then the government is aristocratic or democratic, according as the number of persons is narrower or wider, whom the state makes eligible to hold voice and vote in the governing body.

4. Co-ordinated government is that form in which the state distributes the powers of government, according to their nature, between separate departments or bodies, each created by the state in the constitution, and, therefore, each equally independent of, but co-ordinated with, the other or others. In consolidated government, the single body always finds it necessary, in the exercise of its different functions, to create chief agencies, corresponding in number and character with the functions to be exercised, and to govern through these; but these agencies are entirely dependent upon the will of the single body both as to their powers and their existence. In co-ordinated government, on the other hand, each department created by the state, in the constitution, has an inde-

pendent existence as against every other department, and is furnished, or should be furnished, by the constitution with the means to maintain its own proper existence and powers against the possible encroachments of the others.

Consolidated government is the ideal form for the perfect condition of human society; but for any other condition it tends to result, sooner or later, in crude and arbitrary government.

Co-ordinated government is the form now almost universal in the great states of the world. It is the form which conduces best to promote and preserve a steady and natural development of an already advanced, though still imperfect, political society. It tends to emancipate government from the spirit of one-sidedness, partiality and radicalness. It has doubtless come to remain, so far as human thought can penetrate the future.

III. My third canon of distinction is the tenure of the persons holding office or mandate. Viewed from this standpoint government is either *hereditary* or *elective.*

1. Hereditary government is the form in which the state confers the powers of government upon a person, or upon an organization or organizations composed of persons, standing in a certain family relation to his or their immediate predecessors. The state determines, in the constitution, what the relation shall be. Four general solutions of this problem meet us in political practice, *viz;* ancienneté, ancienneté in the male line, primogeniture, primogeniture in the male line.

The principle of ancienneté makes the oldest member of the family of the deceased the successor, without regard to sex.

That of ancienneté in the male line makes the oldest male member of the family of the deceased his successor.

The principle of primogeniture makes the oldest immediate descendant of the deceased the successor; or, if the deceased have no descendant, the principle makes the oldest immedi-

ate descendant of the nearest ancestor of the deceased the successor; or, if the immediate descendant of the deceased shall have died before his ancestor, leaving issue, the principle makes the first born among this issue the successor; or, if the oldest immediate descendant of the nearest ancestor of the deceased shall have died before the latter, leaving issue, this principle makes the first born among this issue the successor, etc.

The principle of primogeniture in the male line follows the same law of succession as that just described for simple primogeniture, only excluding the female altogether from the succession, and from the transmission of the succession.

There are some modifications of these four chief norms to be found in practice.

The most important is that which prefers the males of the same parentage only before the females, but admits the females of the same parentage with the last male holding power, before the males of a more remote parentage. This is the English principle in the descent of the crown, as we shall see further on.

Another modification permits the immediate holder of power to designate before his or her decease the member of his or her family who shall succeed. This rule has the advantage, when conscientiously and intelligently applied, of securing the most capable member of the family for the succession; but it is liable to great abuse, and generally prevails only in arbitrary and despotic systems.

Of all of these species of hereditary tenure, primogeniture in the male line appears the most useful and successful. It comports best with the other principles of the modern political systems. It contains no element of personal arbitrariness, and yet it is calculated to secure as good capacity as the family possesses.

2. Elective government is that form in which the state confers the powers of government upon a person, or upon an

organization or organizations composed of persons, chosen by the suffrage of other persons enfranchised by the state, and holding the powers thus conferred for a distinct term and under certain conditions.

Election may be direct or indirect; *i.e.* the suffrage-holders may vote immediately for the person to hold power, or for another person or other persons who shall vote for the person to hold power.

Election may also be by general ticket or by district ticket; *i.e.* each suffrage-holder may vote for a number of persons representing a larger division of territory and population, or for a single person representing a smaller division.

Election may be by single or cumulative vote; *i.e.* where the election is by general ticket, each suffrage-holder may cast his vote for each of a number of persons, to the number to which the division is entitled in the particular governmental body, or he may distribute among a less number of persons a number of votes equal in the aggregate to the whole number of persons to which the division is entitled in the particular governmental body, or he may cast this entire number for one person.

This is hardly the place to enter upon a discussion of the merits of these several methods of election. I shall touch briefly upon this subject again when we come to examine the provisions of constitutional law regarding it.

IV. My fourth and last canon of distinction is the relation of the legislature to the executive.

Viewed from this standpoint government is either *presidential* or *parliamentary*.

1. Presidential government is that form in which the state, the sovereign, makes the executive independent of the legislature, both in tenure and prerogative, and furnishes him with sufficient power to prevent the legislature from trenching upon the sphere marked out by the state as executive independence and prerogative. There may be several degrees in

the principle of executive independence. The executive may be made only politically independent of the legislature, which would signify that neither he nor his agents are responsible to the legislature for the executive policies or acts. He may, again, be made entirely independent of the legislature, which would signify that the legislature could not even impeach him for high crime or misdemeanor. He may, again, be made independent of the legislature, except he commit some particular crime of a very heinous nature as, for example, high treason. He may be furnished with an absolute veto upon the acts of the legislature, or a suspensive veto, or a veto which may be overridden by an increased majority. We will not take these degrees of independence into account at this point of our reflections. We will regard the requirements of the principle as substantially fulfilled, if the legislature cannot ordinarily originate the executive tenure or terminate it simply on account of political disagreement, and if the executive is furnished by the state with the independent power to defend his prerogatives partially if not completely against the possible encroachments of the legislature.

This is a highly practical form of government. In the first place, it is conservative. It fixes the weight of responsibility upon a single person; and there is nothing like this to produce caution, deliberation, and an impartial regard for all interests concerned. In the second place, it is energetic. One capable person can come to an agreement with himself, while a half-dozen or more are haggling over questions of precedence and procedure. In the third place, it is powerful. That one poor commander is better than two good ones is the *bon mot* often quoted, of one of the most powerful commanders whom the world has ever produced. A single capable personality is not lamed and limited by a division of counsel and a divergence of views. He may listen to many counselors; they may assist him in reaching his

determination; but that determination does not require the consensus of different wills, and when once made it must be obeyed.

On the other hand, it is quite possible that the independence of the executive may produce a deadlock between the executive and the legislature. For example, the executive may veto a legislative act and the legislature may refuse to pass the appropriations until the veto be withdrawn. The state may, however, reduce this danger to a minimum by commanding, in the constitution, the separation of questions concerning appropriations from all other questions, and by vesting in the executive the power to execute the laws by his own ordinances, if the legislature should fail to enact the measures for their execution. This objection to the presidential form does not weigh heavily against its advantages.

The advantages of presidential government are especially manifest in those states in which a great variety of views and interests prevail, or in which governmental power is distributed among two or more independent organizations, or in which active defense against foreign invasion is a chief necessity. When *all* of these conditions coexist, any other form than very strong presidential government will inevitably meet with speedy and miserable failure.

2. Parliamentary government is that form in which the state confers upon the legislature the complete control of the administration of law. Under this form the legislature originates the tenure of the real (though perhaps not the nominal) executive, and terminates it at pleasure; and under this form the exercise of no executive prerogative, in any sense and manner unapproved by the legislature, can be successfully undertaken.

This is the general statement of the principle; but a little scrutiny will reveal the fact that in practice a still farther adjustment, a second differentiation, so to speak, is necessary. This results from the fact that most legislatures con-

sist of two houses. In legislation the required concurrence of two independent bodies to the validity of any act is advantageous, but in administration it is unendurable. Hence the control of the administration by the legislature is bound to become, in practice, control by one house of the legislature; and this control naturally gravitates to that house which, by the law or custom of the constitution, has the greater power over the revenues of the government.

This is in some respects, and under certain conditions, an admirable system. Its chief excellence is that it maintains permanent harmony between the different branches of the government; but in gaining this result, it sacrifices entirely the independence of the executive, and destroys practically the independence of one of the two houses of the legislature. Legislation is thus made comparatively easy; but at the risk of an unsteady and an inconsistent administrative policy. Another great advantage which this system offers is the better information of the legislature upon all subjects concerning which it must act, through the presence and voice of the heads of the administration in the chambers. Legislation is neither initiated nor shaped, as in the other system, by the heads of a half-hundred legislative committees — by men, that is, who are commonly inexperienced and often visionary. To some minds this advantage is balanced, in some degree at least, by the disadvantage of an undue administrative influence thus gained over the legislature. This reflection would have more value if the executive in the parliamentary form were a really independent department; but since, in fact, it is nothing more than the grand committee of the reigning party in the legislature, or in that house which controls the administration, this point may be disregarded in estimating the worth of the system.

The parliamentary form, however, is not one which is suitable or possible for all conditions of men. In fact, its suc-

cessful operation is dependent upon peculiar and unusual conditions. I can conceive of but two phases in the development of political society to which it is really applicable.

The one would be a practically perfect constitution of society, in which the whole population of the state should be highly and nearly equally intelligent, universally self-contained, and moved by a pure spirit of justice. In such a society it must be presumed that the best would always be chosen to exercise the powers of government, and that, where all were so good, the best would need no artificial checks and balances to preserve them from committing wrong or error. Such a perfect society has never existed, does not now exist, and will not appear in the near future. We must not at present build our constitutional law upon any such presupposition. If this were the only condition for the existence of parliamentary government, we might dismiss the further consideration of this form as an ideal of the distant future.

There is, however, one other stage in the evolution of the state at which the parliamentary form of government naturally appears and may work successfully. At this stage the political system consists of three dominant institutions: first, a kingship, *i.e.* an hereditary executive, with reserved dominant powers, possessing the sincere devotion and loyalty of the masses; second, an established religion under the headship of the crown, through which the morality of the masses may be preserved and their attachment to the crown secured and perpetuated; and, third, limited suffrage, through which the intelligent, conservative and moderate classes shall be the bearers of the political power. The most cursory glance at the working of parliamentary government will manifest at once the necessity of these institutions, in these relations. How, for example, can the leaders of the majority in the legislature, or in one house thereof, govern with any degree of vigor and success, unless

the majority which supports them be stable and resolute, and the opposition be benevolent and forbearing? How, with the present degree of popular intelligence in even the most advanced states, can these qualities be secured in a legislature whose members are chosen by an universal or a widely extended suffrage? Experience teaches us that such a legislature is inclined to be fractious, impatient and rash. But, again, how can a legislature proceeding from a distinctly limited suffrage govern the great mass of the unenfranchised, except through the medium of a kingship with its prehistoric legitimacy; and how can the power of that idea of legitimacy be maintained, save through the influence of a religion loyal to the crown and possessed of controlling power over the popular conscience? Lastly, how can the chiefs of the legislative majority govern at all, if the wearer of the crown may change its prerogatives at pleasure from dormancy to activity, and interfere at any and every point with their movements, or refuse at pleasure the royal sanction to their acts? It is evident, I think, that, at any stage in the development of the political world much short of the perfect stage, these are the conditions and relations essential to the successful working of parliamentary government. Any considerable change in them will undoubtedly impair its usefulness and endanger its existence.

CHAPTER II.

THE APPLICATION OF THE TESTS.

LET us now test the constitutional law of the United States, England, Germany and France by the canons set forth in the preceding chapter, and see if we can thereby determine the general form of government obtaining in each.

I. *The Form of the Government of the United States.*

1. This is substantially *representative* government. The organization of the state is substantially distinct from the organization of the government. It is true that the same personnel is made use of, to some degree, in both cases,[1] but it is under different forms of combination. I have already fully demonstrated in the first book of this part of my treatise (vol. I, p. 142 ff.) that the organization of the state in our system is far from being perfect or even satisfactory, but it is sufficiently so to sustain the proposition that in the political system of the United States the state and the government are not identical; *i.e.* that the government is representative. The government of the United States is, further, *limited* representative government. Any argument to sustain this proposition would be superfluous. The merest glance at the text of the constitution is ample proof of the statement. Finally, the government of the United States is *democratic* representative government. Eligibility to office and legislative mandate are limited only by citizenship, age and residence.[2] Citizenship is the privilege of no class,[3] the required

[1] Constitution of the United States, Art. V.

[2] United States Constitution, Art. I, sec. 2, § 2; Art. I, sec. 3, § 3; Art. II, sec. 1, §. 5.

[3] United States Constitution, Amendments, Art. XIV, sec. 1.

age is low and the gaining of residence is subject to no artificial hindrances.

2. The government of the United States is *federal* government. By this I do not mean that the central government alone is a federal government. It is true that this term is generally applied to it, but I think this arises from the mistaken assumption that it is the government of a federal state. I think I have shown that there is no such thing as a federal state; that, in what is usually called the federal system, one state employs two separate and largely independent governmental organizations in the work of government. What I mean, therefore, in the proposition that the government of the United States is federal government, is that the whole governmental system is federal and that the central government is one of two governmental organizations employed by the state.

Furthermore, the government of the United States is *co-ordinated* government. The constitution establishes a legislative, an executive and a judicial department, distributes the powers of the central government between them,[1] and ordains that the local governments shall maintain a corresponding form.[2]

3. The United States government is *elective* government. The constitution prescribes the principle of election for the holders of legislative mandate,[3] and for the chief executive officer[4] in the central government, and commands the maintenance of the corresponding form in the local governments.[5] The appointment by the political departments of the subordinates of the chief of the executive department and of the members of the judicial department is no

[1] United States Constitution, Arts. I, II, III.
[2] *Ibid.* Art. IV, sec. 4.
[3] *Ibid.* Art. I, sec. 2; Art. I, sec. 3.
[4] *Ibid.* Art II, sec. 1, § 2; Amendment XII.
[5] *Ibid.* Art. IV, sec. 4.

modification in principle of the elective form of government. It simply removes the holders of such offices one or more degrees from the immediate process of election in the establishment of their tenure. An abstract of the tenure must show, in every such case, that its origin is in election.

4. The United States government is *presidential* government. The tenure of the executive is ordinarily independent of the legislature, both in origin and in termination.[1] Only upon failure of the regular electors to elect may a branch of the legislature act, and then not as legislature, but as a central board of electors;[2] and only upon the commission of high crime or misdemeanor may the legislature undertake to terminate the tenure.[3] These powers of the legislative bodies over the executive tenure must be regarded as exceptional. The ordinary rule of the constitution is the entire independence of that tenure. It is quite true that a legislature so disposed could take advantage of defects in the ordinary law of election of the executive, and decide that there had been no election in the ordinary manner, and thus secure the power of election to the lower house; but it is not to be presumed that the two houses would unite in any such conspiracy against the intent of the constitution. Neither is it to be presumed that the two would conspire to expel an obnoxious executive from office under the pretext that he had committed a crime or misdemeanor. These provisions were intended to meet extraordinary exigencies; and it is to be presumed that they will never be resorted to except under the direst necessity and in a spirit of patriotic sincerity.

Further, the executive head of the United States government is completely independent of the legislature as to his political policy. His council or cabinet of advisers are his

[1] United States Constitution, Art. II, sec. 1, § 2; Amendment XII; Art. II, sec. 1, § 1.

[2] *Ibid.* Amendment XII.

[3] *Ibid.* Art. II, sec. 4.

own agents, responsible politically to him only. The defeat of a proposition made by him, or by any one or all of them, to the legislature, or a vote of censure passed by the legislature upon him or them, do not call for his resignation or their resignations. Nothing of the sort is provided or intimated in the remotest degree in the constitution. The political independence of the executive over against the legislature is complete.

Lastly, the executive head of the United States government is furnished by the constitution with the power to defend his prerogatives against any possible attempt of the legislature to encroach upon them. It is true that his veto power upon the legislative acts is not absolute, on the one side, nor limited to those measures touching executive prerogative, on the other;[1] but the majority required to overcome it is so large that the defense is practically complete. If so extraordinary a majority can be united against the executive in the legislature, it is rather to be presumed that the executive is mistaken in claiming that the measure would encroach upon his constitutional prerogative. At the same time, we must consider that the unlimited scope of the veto power gives the executive the means of opposing, and probably defeating, any measure of administrative law or ordinance which he may regard as unconstitutional or useless or impracticable, no matter whether it touches his prerogative or not. This is sufficient to secure the independence of the executive. The veto power in his hands, however, is not limited, either in theory or practice, to the cases above noted. Any act of the legislature which requires the concurrence of the two houses is made subject by the express words of the constitution to the presidential veto.[2] A wise and considerate executive will be sparing in its use against measures which neither infringe his constitutional prerogative nor

[1] United States Constitution, Art. I, sec. 7, §§ 2 and 3. [2] *Ibid.*

concern the ways and means of administration, but he is not restrained by the constitution from the most lavish and prodigal employment of this power. That is left entirely to his own discretion and his own judgment and sense of propriety.

It is difficult to find a term or a concise phrase to express this representative, limited, federal, co-ordinated, elective, presidential form of government. The qualities of representation, limitation, distribution of powers between independent departments, co-ordination of departments and election must be regarded as the essential elements of what is known as the republican form of government. I think these, when based upon a democratic form of state, constitute the republican form. If then we substitute for these the term republican, I think we shall have brought the phrase which designates the form of the United States government into its most concise wording, *viz;* the federal presidential republic. This is a thoroughly consistent form. All of its elements belong to one and the same general system of practical political science, *viz;* the popular sovereignty system. No serious future conflict between these parts need therefore be apprehended.

II. *The Form of the Government of France.*

1. This government is *representative.* The state is organized in the constitution as a National Assembly, separate from and supreme over the government.[1] It is true that the National Assembly constitutes itself out of the personnel of the legislature, but it organizes that material into an entirely different body from the legislature, a body possessing sovereign power over the legislature and over the whole government.

The French government is, further, practically *unlimited* representative government. There is not a single immunity from governmental power secured to the individual by the

[1] Loi constitutionnelle relative à l'organisation des pouvoirs publics, 25 février. 1875, Art. 8.

constitution. There is not a single express limitation of any sort in the constitution upon the powers of the government. There is but a single implied limitation, *viz;* that the government cannot change the constitution; but the fact that the legislature may, at its own discretion, transform itself into National Assembly,[1] *i.e.* into the body which may change the constitution, makes this implied limitation practically nugatory. Finally, the French government is *democratic.* Eligibility to office and to legislative mandate is conditioned only upon age and the possession of civil and political rights.[2] The required age is moderately low, the suffrage is what is generally considered universal,[3] and citizenship is not subject to any artificial limitation.

2. The French government is *centralized* government. There is no trace in the constitution of a distribution of governmental powers between a central government and local governments; *i.e.* no such distribution is made by the state. Whatever local autonomy may exist is statutory and may be changed or swept away by the central government at pleasure. The centralization is in principle absolute, and may be so in practice at the will of the government. The French government is, however, *co-ordinated* government. The constitution establishes a legislative department and an executive department, draws the line of distinction between their functions and prescribes the principles of their correlation.

3. The French government is *elective* government. The members of the lower house of the legislature are chosen by universal suffrage and direct election.[4] The members of

[1] Loi constitutionnelle relative à l'organisation des pouvoirs publics, 25 février, 1875, Art. 8.

[2] Loi du 9 décembre, 1884, Art. 4; Loi electorale politique, 30 novembre, 1875, Art. 6.

[3] Loi constitutionnelle relative à l'organisation des pouvoirs publics, 25 février, 1875, Art. 1, § 2.

[4] *Ibid.;* Loi electorale politique, 30 novembre, 1875, Art. 1.

the Senate are chosen by electors chosen by the people.[1] The President is chosen by the members of the legislature in National Assembly,[2] and all officers, judicial, administrative and military, are appointed by the President.[3] The French system is, at last, entirely uniform and consistent in this respect.

4. The French government is *parliamentary* government. The constitution vests the election of the executive in the joint assembly of the two legislative bodies.[4] The two legislative bodies, the one acting as a court and the other as prosecutor, may also depose the President from office upon a conviction of high treason.[5] On the other hand, the President is not made politically responsible to the legislature. It is not necessary that he should be personally in political accord with the majority in the legislature. The constitution creates, however, a politically responsible ministry, and requires that every act of the President shall be countersigned by a minister.[6] The real executive power is thus placed in the hands of the ministry, not by the act of the executive himself, but by constitutional provision. Moreover, the President has no veto power by which to defend his ministry, or even his own prerogatives, against the majority in the legislature. He may ask for a reconsideration of a measure, but the repetition of the vote by the absolute majority is all that is necessary to overcome this opposition.[7] This is certainly parliamentary government. The constitutional provisions in

[1] Loi du 9 décembre, 1884, Art. 6.

[2] Loi constitutionnelle relative à l'organisation des pouvoirs publics, 25 février, 1875, Art. 2.

[3] *Ibid.* Art. 3, § 4.

[4] *Ibid.* Art. 2.

[5] *Ibid.* Art. 6, § 2; Loi constitutionnelle sur les rapports des pouvoirs publics, 16 juillet, 1875, Art. 12, § 1.

[6] Loi constitutionnelle relative à l'organisation des pouvoirs publics, 25 février, 1875, Art. 6, § 1; *Ibid.* Art. 3, § 6.

[7] Loi constitutionnelle sur les rapports des pouvoirs publics, 16 juillet, 1875, Art. 7, § 2.

regard to this matter contain, however, one practical difficulty. They make the ministry responsible politically to the *two* chambers. I have already demonstrated that this may become a practical impossibility.[1] Different political majorities in the two chambers will always bring it to that. This is just what has happened in the practice of the French system; and, by the inevitable course of history, the political responsibility to the two chambers, created by the constitution, has become in practice a political responsibility to the Chamber of Deputies, the lower house of the legislature. This result has not been attained without the most serious struggle between the three bodies concerned, *viz;* the President, the Senate, and the Chamber of Deputies. A brief *resumé* of its history may aid us to comprehend the existing status. The first President under the present constitution, the Marshal MacMahon, was elected by the Constituent Assembly which framed and adopted the constitution. He was elected *before* the constitution was put into force, to hold office for seven years, from May, 1873; and the constitution, subsequently formed, not only contains an express ratification of this act, but provided that during MacMahon's term no revision of the constitution should take place save through his initiation. The majority in the Constituent Assembly belonged to the monarchic parties, and MacMahon's ministry was under the premiership of the Duc de Broglie, a Legitimist. The Republicans, however, won steadily almost all the seats in the Constituent Assembly made vacant by death or resignation after the middle of the year 1873, and in 1876 they found themselves in majority. They immediately voted the dissolution of the Constituent Assembly and the call of the first legislature under the new constitution; *i.e.* they voted to place the new constitution in force. The majority returned to the first legislature was republican in the Chamber of Depu-

[1] p. 13 ff.

ties, but monarchic in the Senate. MacMahon, very much against his inclination, felt obliged to dismiss de Broglie and form a ministry of Republicans, first under Dufaure and then under Simon; *i.e.* the President acquiesced in the theory that the ministers must be in political agreement with the majority in the Chamber of Deputies, and must resign when they lose its support. In the existing condition of the membership of the two chambers, this was a great triumph for the Republicans. It at once raised the question, however, between the Senate and the Chamber of Deputies, concerning their respective powers over the administration. The Senate denied most vigorously that the control of the administration was exclusively in the Chamber of Deputies, and asserted that it had equal powers in this respect with the Chamber of Deputies. Certainly, whatever political science may have to say about the impossibility of this double executive responsibility in practice, the constitutional law of France justified the claim of the Senate. The President took advantage of the situation, and in May, 1877, he reinstated de Broglie as Premier. The Chamber of Deputies immediately passed a formal vote of distrust. The President met this by adjourning the chambers for one month, as was certainly his right by the letter of the constitution. Upon their re-assembly, on the 16th of June, the President asked the consent of the Senate to dissolve the Deputies. This was given, and the date of the new election was set by the President for the 14th of October. The policy of the President and his monarchically disposed friends was to give themselves as much time as possible to fill the offices with Monarchists, and through these control the elections. To their great surprise and disappointment, the Republicans won in the uneven conflict, and held the majority in the new chamber. The President and de Broglie now sought to govern by the aid of the Senate, but the Orleanists in that body refused to support them, and de Broglie was forced to resign. The President then appointed a ministry

under the premiership of General Rochebouët, the members of which were connected with neither of the legislative chambers. The Deputies resolved at once to take no notice of its acts or its existence, and delayed the vote upon the budget. The President saw himself compelled either to submit or resort to the *coup d'état.* After much hesitation and not a little attempt at intrigue, he finally resolved to yield. On December 13, 1877, he called the Republican, Dufaure, to the head of the ministry and gave him unconditional power to rule with the majority in the Chamber of Deputies. This was the great turning-point in the development of the French constitution. Through these events the subordination of all other branches of the government to the Chamber of Deputies was pronounced. The realization of this relation has been swift and radical. At the beginning of the year 1879, the Senate was partially renewed, in the manner prescribed by the constitution, and the Republicans secured the majority in this body also. President MacMahon now gave up all hope of producing a reaction, and on the 30th of January, 1879, he resigned, and the Republican, Grévy, was chosen as his successor. Grévy never disputed the supremacy of the Chamber of Deputies over the administration. He constantly took his ministry from the majority in that house, and dismissed it whenever that majority manifested distrust. At last the Chamber of Deputies asserted and exercised the power to force the President to resign by the general declaration that the Chamber of Deputies would support no minister appointed by him.

The practice has fully realized in the French system what the theory of parliamentary government requires. There is now no longer any question that the administration must be in political accord with the Chamber of Deputies, no matter what the political majority in the Senate may be.[1]

[1] The recent resignation of M. Tirard and his colleagues on account of lack of support in the Senate accords, indeed, with the requirements of the constitu-

It is even more difficult than in the case of the United States to designate concisely the form of this representative, unlimited, democratic, centralized, co-ordinated, elective, parliamentary government. The elements of representation, of general eligibility, of election and of departmental distribution of powers are, as we have seen, constituent parts of the republican form. On the other hand, the quality of unlimitedness is, according to American ideas, the negation of republicanism. American political science cannot regard any system of government as republican against whose powers the constitution does not construct a domain of individual immunity. If we should use the word republic at all in characterizing the French form, it would have to be qualified as follows, *viz;* the unlimited, centralized, parliamentary republic. If this does not mean, in political science, the despotism of the lower house of the legislature, then I confess that I know not what it does mean.

III. *The Form of the German Imperial Government.*

1. The German government is *representative* government. It is true that the state is organized out of the personnel of the legislature. It is also true that the state follows the same system of procedure as the legislature. The only distinction between the act of the state and the act of the legislature is in the difference of majority necessary to the validity of the respective acts.[1] This is very confusing, as I have already explained; but it is sufficient to take the German government out of the category of immediate governments; *i.e.* of systems in which the state and government are identical.

Furthermore, the German government is a *limited* government. The constitution creates a sphere of individual immunity, and then enumerates the powers which the government

tion, but not with sound political science nor with the precedents of French practice.

[1] Reichsverfassung, Art. 78.

may exercise;[1] and the principle of interpretation followed in the practice is that what is not granted, either expressly or by reasonable implication, is denied.[2]

Lastly, the German government is partly *democratic* and partly *monarchic.* No restrictions as to qualifications for membership in either house of the legislature are to be found in the constitution; and the act of the legislature, in regard to this subject, only requires a moderate age, citizenship, the full enjoyment of civil rights and short residence, for membership in the lower house, and makes no requirements for membership in the upper house.[3] On the other hand, only one person in the entire Empire is eligible to the office of the presidency, *viz;* the King of Prussia.[4]

2. The German government is *federal* government. This proposition is to be taken in the same sense as in the case of the United States government, *viz;* that the whole governmental system of Germany consists of two separate and substantially independent parts, the Imperial central government and the commonwealths; that to each is assigned by the constitution a particular and, in large degree, independent sphere; that the sphere of the central government is definitely marked out in the constitution, while the sphere of the commonwealths comprehends all the remaining powers of government; and, finally, that neither of the two governments can be regarded, in origin or in the substance of its existence, as the agency of the other, and that therefore neither can legally destroy the other.

The German government apparently retains many elements of the confederate system. This is due to the fact that the state has not received a satisfactory and thoroughly sovereign organization in the constitution. The constitution does

[1] Reichsverfassung, Arts. 3, 4, 11, and 35.

[2] Schulze, Lehrbuch des deutschen Staatsrechts, zweites Buch, S. 12.

[3] Bundesgesetzblatt, 1869, S. 145. Reichsverfassung, Art. 20.

[4] Reichsverfassung, Art. 11.

not fully express the actual conditions. In fact, the powers of the commonwealths are far more limited in the German system than in that of the United States. The legislatures of the German commonwealths have been reduced much nearer to the position of administrative boards than have the corresponding bodies in the governmental system of the United States. The powers conferred upon the central government in the German constitution are more numerous and wide-reaching than those conferred upon the central government in the constitution of the United States. On the other hand, the organization of the state in the system of the United States is far more complete and commanding, and likewise the organization of the official system of the central government. In the German system, as we have seen, many things are excepted from the power of the state under its ordinary organization in the constitution; and, as we shall see, the central government is made to depend very largely upon the commonwealth officials in the execution of Imperial law. Still we must consider, I think, that the governmental organization of Germany has passed the boundary line between confederatism and federalism. It is now substantially a federal form, but still more of the debris of the old system of 1815–1866 must be swept away before this change can be clearly and consistently expressed in the terms, phrases and provisions of the constitution.

The German Imperial government is also *co-ordinated* government. The constitution creates a legislature and an executive, distributes powers between them and determines the principles of their correlation.[1]

3. The German government is, as to tenure, partly *elective* and partly *hereditary*. The constitution prescribes the tenure of election for the members of the lower house of the legislature,[2] and the tenure of hereditary right for the

[1] Reichsverfassung, Arts. 4–18, 20–32.

[2] *Ibid.* Art. 20.

executive[1] (*i.e.* so long as that shall be the tenure of the King of Prussia), while the tenure of the members of the upper house of the legislature, if such we may term the Federal Council, is made to depend upon the will of the princely heads of the twenty-two commonwealths in which the hereditary principle prevails in the chief executive office, and of the senates of the three city commonwealths.[2] The Federal Council is made by the constitution to consist of the representatives of these several personages and bodies, and these personages and bodies are severally left to designate their representatives in any manner they may choose. Naturally the hereditary executives appoint them and the senates elect them. No one principle of tenure, therefore, is exclusive in the organization of the Federal Council. Finally, the Imperial officials, both civil and military, are appointed by the Emperor.[3] From the standpoint of tenure, accordingly, the system is not simple but mixed. The government cannot be classed, from this point of view, under any one consistent form.

4. The German Imperial government is *presidential* government. The constitution makes the Emperor entirely independent of the legislature, both as to the origin and termination of his tenure.[4] It creates no ministry responsible to the legislature. It confers upon the Emperor a sphere of independent prerogative, and vests in him the power to preserve this sphere from legislative encroachment. He may declare any legislative act which menaces his prerogative to be an amendment to the constitution, and he may prevent the passage of any such amendment by means of the voices in the Federal Council which he, as King of Prussia, instructs and controls.[5] Moreover the Emperor, as King of Prussia, is vested by the constitution with the power of abso-

[1] Reichsverfassung, Art. 11.
[2] *Ibid.* Art. 6.
[3] *Ibid.* Art. 18.
[4] *Ibid.* Art. 11.
[5] *Ibid.* Arts. 6, 17, and 78.

lute veto over all legislation in reference to military and naval affairs and in reference to taxation and the ordinances of administration of the Imperial tax-system.[1] He is further vested with the power to call, open, adjourn and prorogue the legislature, and (with the consent of the Federal Council) to dissolve the Diet. Lastly, the constitution confers upon him the power to appoint all the members of the committees in the Federal Council for the army and the navy, except only the Bavarian member in the committee for the army.

This is certainly presidential government, and very strong presidential government. It really places in the hands of the executive the balance of governmental power.

It is utterly impossible to find a concise phrase by which to designate this representative, limited, partly democratic, partly monarchic, federal, co-ordinated, partly elective, partly hereditary, presidential form of government. It contains the republican elements of representation, limitation, departmental distribution of powers and election, but these are counterbalanced by monarchic and hereditary elements. It defies the power of science to invent any term or simple phrase which will characterize it.

From the scientific point of view we should be obliged to condemn this form as containing not only heterogeneous but hostile elements. From the scientific point of view we should be compelled to predict conflict *à l'outrance* between the elements that compose it. Practically, however, it appears to be a most excellent form for the present needs of the great German state. It has produced and secured more individual liberty than the German people have ever heretofore enjoyed, and at the same time it has developed a greater power than Europe has witnessed since the era of Napoleon I. So long as the monarchic and hereditary elements in this form pursue, as at present, a popular policy, the conflict with the republican

[1] Reichsverfassung, Arts. 5, 35, and 37.

elements may be successfully avoided. If, however, they should abandon this line of action and give themselves over to a policy of reaction and oppression, the predictions of science would be speedily realized.

IV. *The Form of the English Government.*

1. The English government is *immediate* government; *i.e.* the organization of the state and the organization of the government are identical.[1] No organization of the state behind the constitution has framed the constitution, organized the state within the constitution, laid out a realm of individual immunity, constructed a government and vested it with powers either enumerated or residuary. Consequently the English government is unlimited. There is no such thing as an unconstitutional act of the Parliament, and there can be no such thing. Whatever the Parliament ordains is in fact and in law constitutional; and whatever the Crown ordains, provided it has not been forbidden or otherwise ordained by the Parliament, and provided the ordaining of it has not been placed by the Parliament in other hands, is also constitutional. No judge can pronounce the acts of these bodies unconstitutional. The judges of the high courts have seats in the House of Lords, and are consulted whenever any question of the organic law is in issue, but their advice may be disregarded with perfect impunity. They have influence within the legislature, but they have no power over the legislature, either to nullify its acts or defeat their execution in a particular case. Any judge making any such attempt may be removed by a petition of the Parliament to the Crown. The liberty of the individual is thus completely at the mercy of the Parliament. This is utterly despotic government in theory, however liberal and benevolent it may be in practice.

The English government is mixed: it is at once *demo-*

[1] Dicey, The Law of the Constitution, p. 35 ff.

cratic, *aristocratic* and *monarchic*. The qualifications for membership in the lower house of the Parliament exclude no considerable part of the adult male population.[1] Neither is the upper house to be regarded, as a body, wholly aristocratic in principle. Almost any man in England is eligible to a seat in that body; *i.e.* the Crown may call whom it will in England into the House of Lords.[2] On the other hand, by the acts of Union with Scotland and Ireland, this unlimited power of the Crown in the creation of peers in Scotland and Ireland is denied; and hence the eligibility of any persons in Scotland and Ireland to seats in the House of Lords, or to positions in the bodies of peers of Scotland and Ireland who elect representatives to the House of Lords, except they belong to the very narrow classes designated by the acts of Union with Scotland and Ireland, is also denied. As to the Lords of Parliament representing the peers of Scotland and Ireland, the form of government is therefore aristocratic; while as to the Lords of Parliament from England and Wales the form is democratic, the lowest commoner being eligible thereto at the will of the Crown. On the other hand, eligibility to the executive power is monarchic — provided always that we consider the wearer of the crown to be the real executive power. Only one person in all the Empire is, at any one time, eligible by law to this station.[3] The wearer of the crown is, however, hardly to be considered the real executive.[4] In practice, this person must permit the representatives of the party in majority in the lower house of Parliament to exercise the crown prerogatives, and eligibility to positions in the ministry is in principle democratic. In fact, the English government,

[1] Anson, Law and Custom of the Constitution, p. 70 ff.

[2] *Ibid.* p. 177 ff.

[3] Gneist, Das englische Verwaltungsrecht, S. 653; Statutes 12 and 13 William III, chap. 2.

[4] Bagehot, The English Constitution, p. 80.

in its present actual form, is very nearly democratic. The monarchic and aristocratic elements are much more semblance than reality.

2. The English government is *centralized* government. I do not mean, of course, that there is no local government in the British Empire that is separate and distinct from the central government; I mean that there is no local government that is independent of the central government, no local government which the central government cannot legally modify, change, or even destroy.[1] There is no organization of the state back of both central government and local governments, creating both, distributing to each its powers and guaranteeing the existence and powers of each against the powers of the other. The state is organized in the central government, and its acts are legally indistinguishable from the acts of the central government. All local government is therefore statutory in principle, not constitutional. It can, therefore, be regarded only as agency of the central government. There is self-government in the English system, but no independent local self-government. There is no federalism in this system. The English government is, however, *co-ordinated.* The custom of the constitution, as Sir W. R. Anson calls it, presents us with a legislative department and an executive department which we may regard as co-ordinated branches of the government; *i.e.* as departments neither of which can legally destroy the other without the consent of that other.[2] The ordinary judiciary, though by the custom of the constitution a department, and a most important department, is not a co-ordinate department; *i.e.* it may be destroyed by the legislature and executive without its own consent. In principle it has only a statutory existence, not a constitutional existence. The custom of the constitution also distributes powers between the different depart-

[1] Dicey, The Law of the Constitution, p. 126 ff.

[2] Bagehot, The English Constitution, pp. 101, 157, 198.

ments, but it does not firmly secure the executive or the judicial powers against the encroachments of the legislature. It oes not secure the ordinary judicial powers by any power of resistance conferred upon the judiciary itself. The resistance of the Crown alone can defend the judiciary against the legislature, and that may be finally overcome.[1]

3. The English government is partly *elective* and partly *hereditary* government. The members of the lower house of the Parliament hold exclusively by the elective tenure.[2] The members of the upper house hold, for the most part, by hereditary right,[3] and the executive holds by hereditary right;[4] — provided always that we regard the wearer of the crown as the real executive. If, however, we hold the ministry to be the real executive, then we have an elective executive. All other officials, both civil and military, are appointed by the executive.

4. The English government is *parliamentary* government.[5] This is so distinctly its principle that the other elements of its form have been largely ignored in the popular view. The House of Commons has complete control of the administration. It is true that the letter of the law attributes to the Crown the exclusive power to call, open, adjourn and prorogue the Parliament and dissolve the House of Commons; but as a fact it is the ministry which exercises these powers, and the ministers, as we have seen, are but the chiefs of the party in majority in the House of Commons. It is also true that the letter of the law attributes to the Crown an absolute veto power upon all legislative acts; but this power has not been employed since 1707. Resting from the outset upon the custom of the constitution, it has been about

[1] Gneist, Das englische Verwaltungsrecht, S. 1214.
[2] Anson, Law and Custom of the Constitution, p. 70 ff.
[3] *Ibid.* p. 168 ff.
[4] Statutes of Parliament, 12 and 13 William III, chap. 2.
[5] Bagehot, The English Constitution, p. 69 ff.

extinguished by a *non-user* of nearly two centuries. Lastly, it is true that the Crown has the power to call new members into the upper house of the legislature; but this power again is really exercised by the ministry.

This is the logical and necessary outcome of a system of government which recognizes the political responsibility of the executive through a ministry to the legislature. By shrewd manipulation of that natural hostility which generally prevails between the two houses of the legislature, the executive may stave off this result for a time, but not forever. We must always be prepared for this final outcome when we establish the principle of ministerial responsibility to the legislature.

I can no more find a concise phrase to characterize this form than the other two just preceding. As we have seen, it is immediate, unlimited, partly democratic, partly monarchic, centralized, co-ordinated, partly elective, partly hereditary, parliamentary government.

It contains, apparently, fewer republican elements than either the French or German forms. Even if we regard the ministry as the real executive, and thus eliminate hereditary tenure from the executive department, still we have hereditary tenure in the upper house of the legislature and unlimitedness in the government, both of which elements are inimical to the republican idea. If we should go even further and deny to the House of Lords any parity of powers with the Commons, and discard this body from our calculation, there would still remain the identity of the state with the government and the consequent unlimitedness of the government over against the individual; and unlimited power, however liberally and benevolently exercised, still stamps the government, legally and scientifically, as a despotism. On the other hand, the terms monarchy and aristocracy are even less applicable than republic. The adjective "parliamentary" does not seem to me an adequate description of this form of

government; but I am unable to coin a phrase that shall be at once concise and descriptive. The difficulty of finding any scientific name for the English system of government goes to show that there are hostile elements in its make-up which must, sooner or later, come to combat *à l'outrance* if each should undertake to hold its own.

V. *Comparison of the Preceding Forms.*

As I have indicated at the beginning of this division of my work, it is impossible to say which of these forms of government is, under all conditions, the best. Each presupposes and serves, as I have already pointed out, a different situation of the political society, a different phase in the development of the state. There are, however, several tendencies which have become manifest, in the course of the world's recent history, in respect to forms of government. These tendencies have revealed themselves with distinctness in our examination of the four constitutions.

The first of these is that the modern political world is drifting away from monarchic government; *i.e.* from the form which places all governmental power in the hands of a single person. There is now no such form of government this side of Russia.

The second is that it is drifting away from aristocratic government. Of the four forms which we have examined only one contains any aristocratic elements, *viz;* the English; and in the English form it is more apparent than real.

The third is that it is drifting away from hereditary government. Two of the four great typical forms are entirely rid of it, and one of the other two has found the means of making the power of this element nugatory. In only one is it a real, active and powerful element; and it owes its preservation and power there to its popular policy, to the great principle of its greatest founder: "Ich bin der erste Diener meines Staates." I would not venture any prediction that it will give way in the German system, at least not within

the near future. I only affirm that the construction of the great governmental systems of the present shows that the trend of the age is away from hereditary government.

The fourth is that it has begun to drift away from unlimited government. It has begun to distinguish between the state and the government, and to give to the individual a constitutional sphere of immunity against the powers of the government. The system of the United States has gone far in this direction. That of Germany has made a beginning. That of France has become conscious of the want of it; while in England the expression "unconstitutional act of Parliament" is a form of speech which is now not infrequently heard.

The fifth is that the modern world is beginning to manifest some dissatisfaction both with completely centralized government, and with federal government.

The sixth and last is that it is beginning to manifest some dissatisfaction both with strong presidential government and with parliamentary government.

Towards what form the political world is tending is not so easy to discern. The drift away from monarchic, aristocratic, unlimited, hereditary forms would, I think, indicate a tendency, at least, towards republicanism. I do not believe it is utopian to predict that the republican form will live after all other forms have perished. The mysticism and credulity are being surely dispelled which make these forms necessary, useful or possible; and the popular intelligence and virtue are being developed which will make republicanism possible and, at last, necessary everywhere.

Whether it will be centralized or federalized republicanism is a question more difficult to answer; and most difficult of all is the query as to whether presidential or parliamentary government will be the general form of the future.

As I have said, the world manifests some dissatisfaction with both centralized and federalized government, and with

both presidential and parliamentary government. In the existing centralized systems the tendency is manifest towards federalization in administration, while in the federalized systems, the tendency is manifest towards centralization in legislation. Again, in the presidential systems, the tendency seems towards some closer connection of the executive and the legislature in procedure, while in the parliamentary systems the tendency is, on the other hand, towards a greater independence of the executive. The form of the future will doubtless be the resultant of all of these tendencies and will satisfy them all.

It is a hazardous venture to prophesy what the form of the future will be. It seems to me, however, that that form will be a republic, with centralized legislation and federalized administration. Its executive will be independent in tenure, and will exercise a veto power, a military power and an ordinance power active enough and strong enough to defend his constitutional prerogatives and initiate and direct the measures of administration. But he will be bound to keep his cabinet of advisers in political accord with the lower house of the legislature. He will be bound to change them as that majority changes; either immediately, or after a dissolution of that body by his order, approved by the upper house of the legislature, and after the return of the same party majority by the electors. He will also be bound to approve the acts of the legislature which do not, in his judgment, trench upon his prerogative or contain unsound or disadvantageous measures of administration.

Which of the great states of the world will arrive at this form first and win for itself the prestige of becoming the example for all the rest, in the development of the world's political civilization is a question which the future must decide; but I do not think it chauvinistic to say that the governmental system of the United States seems to me to be many stages in advance of all the rest in this line of

progress. In spite of all the difficulties and the discouragements which surround us in our, in many respects, crude and undeveloped society, it seems to me evident that the destiny of history is clearly pointing to the United States as the great world organ for the modern solution of the problem of government as well as of liberty.

DIVISION II.—THE CONSTITUTION OF THE LEGISLATURE.

CHAPTER I.

THE CONSTRUCTION OF THE LEGISLATIVE DEPARTMENT OF THE GOVERNMENT OF THE UNITED STATES.

1. *The General Principle of the Legislative Organization.* The constitution establishes the bicameral system,[1] with substantial parity of powers in the two chambers as to legislation. The only inequality is the exclusive right of the lower house to originate the bills for the raising of revenue.[2] With this single exception, which itself is simply an imitation of the British principle, each house may originate any measure of legislation and each may reject the measures originated in the other. The regular term in the House of Representatives is two years; in the Senate, six years. The change of mandates is, in the former case, total; in the latter, partial, by thirds.

2. *The Suffrage from which the Legislature proceeds.* The constitution provides that the members of the lower house shall be chosen by those persons in the several commonwealths who are qualified to vote for the members of the most numerous branch of the legislatures of their respective commonwealths,[3] and that the members of the upper house shall be chosen by the legislatures of the respective commonwealths.[4]

[1] United States Constitution, Art. I, sec. 1.
[2] *Ibid.* Art. I, sec. 7, § 1.
[3] *Ibid.* Art. I, sec. 2, § 1.
[4] *Ibid.* Art. I, sec. 3, § 1.

Unless these provisions are modified by some other clause or clauses of the constitution it follows, of course, that that part of the people of the United States resident within those parts of the territory of the United States not yet favored with the federal system of government has no constitutional representation in the legislature of the United States; that the members of the lower house are elected directly by the immediate holders of the suffrage; that the members of the upper house are elected indirectly by the holders of the suffrage, through the media of the legislatures of the respective commonwealths; and that the qualifications for the suffrage and the whole procedure of the elections are regulated wholly by commonwealth law. A search of the text of the constitution will discover but three modifications: one in reference to the qualifications for the exercise of the suffrage, another in reference to the regulation of the elections, and a third in reference to the final determination of the elections.

The first is the principle of the fifteenth amendment, which prohibits a commonwealth, as well as the government of the United States, from making race, color or previous condition of servitude a disqualification for the possession of the suffrage. This is negative language and does not directly confer upon any one the privilege of suffrage. It simply guards the individual against any discriminations in reference to the suffrage which may be attempted by the commonwealths, or by the government of the United States, on account of race, color or previous condition of servitude.[1] This restriction, however, may indirectly confer suffrage: if, for example, a commonwealth law confers suffrage upon *white* persons having such and such qualifications, this provision of the fifteenth amendment would then operate to confer it upon other persons, not white, having the same qualifications.[2]

[1] United States *v.* Reese, 92 U. S. Reports, 214.
[2] Neal *v.* Delaware, 103 U. S. Reports, 370.

The restriction upon the power of the commonwealths over the process of election is contained in Article I, section 4, paragraph 1, which provides that Congress may at any time, by law, make regulations prescribing the times, places and manner of holding elections for the members of the lower house of the legislature of the United States and prescribing the times and manner of holding elections for the members of the upper house, or may alter any regulations made by the commonwealths in respect to these things. It will thus be seen that the legislature of the United States may regulate the whole process of election of the members of that legislature except as to the places of choosing the members of the upper house, the senators. It may not require the commonwealth legislatures to convene for the purpose of electing the senators at any other places than those fixed by the respective commonwealths.

The Congress has exercised this power in some degree. It has fixed the times for holding the elections for senators and representatives.[1] The general rule established by it for the election of senators, as to time, is the second Tuesday after the meeting and organization of the commonwealth legislature chosen next preceding the expiration of the senatorial term concerned. In case of accidental vacancy, it is the second Tuesday after the meeting and organization of the legislature next following the accident or, if the legislature be in session, the second Tuesday after it shall have received notice of the vacancy. The general rule established by Congress for the election of representatives, as to time, is the Tuesday next following the first Monday in November, every second year after the year 1876. In case of accidental vacancy, it is such time as the respective commonwealths may designate, limited only by the constitutional command that upon vacancies happening, the executive of

[1] United States Revised Statutes, secs. 14, 16, 17, 25, 26.

the commonwealth shall issue writs of election to fill the same.[1]

As to the regulation of the manner of the elections, the legislation of Congress is as yet very fragmentary, and in some respects inharmonious. It has provided that all votes for representatives to Congress must be by written or printed ballot.[2] It has provided that, upon the written application of two citizens of good standing of any town or city having 20,000 inhabitants, or of ten citizens of good standing of any county or parish in any congressional district, made to the judge of the circuit court of the United States for the circuit in which such city, town, county or parish may be situated, prior to any registration of voters for an election of a representative to Congress or prior to any election at which a representative is to be voted for, expressing the desire to have such registration or election or both guarded and scrutinized, the judge shall open the court at the most convenient point in the circuit ten days before the registration or the election, and keep it open for the transaction of the business connected with the registration or election or both, up to and including the day following the election; that the court shall appoint for each election district or voting precinct of the city, town or congressional district, from which such application as above mentioned shall have been made, two persons of different political parties, as supervisors of elections; that if the circuit judge is unable to perform this duty, he shall designate one of the United States district judges within his circuit to perform the same;[3] that such supervisors shall attend the registration of the voters, and have power to challenge any person offering to register or to cause any name registered to be marked for challenge and to take measures for the detection and exposure of any fraud in the registra-

[1] United States Constitution, Art. I, sec. 2, § 4.
[2] United States Revised Statutes, sec. 27.
[3] *Ibid.* secs. 2011, 2012, 2013, 2014.

tion;[1] that they shall attend the elections and remain by the ballot boxes from the time that the polls are open until the proper and requisite certificates or returns shall have been made; that they shall challenge any vote concerning the legality of which either of them shall have any doubt, shall personally scrutinize and count each ballot and shall make report to the person appointed by the circuit court of the United States as chief supervisor of the elections in that circuit, of the proceedings at the registry and election.[2]

Congress has also provided that, upon application in writing by two citizens of a city or town of 20,000 inhabitants or more, made to the United States marshal for the judicial district in which the city or town may be situated, prior to an election at which representatives to Congress are to be chosen, the said marshal shall appoint special deputies to aid the supervisors in the discharge of their duties; that the marshal and his deputies or, in their absence, the supervisors shall have power to summon the *posse comitatus* to their aid in case of necessity; that the marshal and his deputies or, in their absence, the supervisors shall have power to arrest, without process, any person undertaking in their presence to commit a fraud against the laws of registration or election, and shall bring such person immediately before a commissioner, judge or court of the United States for examination of the charge made against him, etc.[3]

The mode of electing senators has been much more fully regulated by Congress. It is a far easier subject to deal with. The statute prescribes *viva voce* vote, separate action of the two houses upon the first day of voting, and vote in joint assembly at least once every day after the first day until a senator shall be elected. It prescribes, further, that upon the separate vote a majority in each house shall be necessary to elect; that upon the vote in joint assembly a

[1] United States Revised Statutes, sec. 2016.

[2] *Ibid.* secs. 2017, 2018. [3] *Ibid.* secs. 2021, 2022, 2023, 2024, 2025.

majority of all the members elected to both houses must be present and vote to form a quorum, and that a majority of such a quorum shall elect, etc.[1]

Under the constitution Congress might occupy this whole ground as to the manner of holding elections for the members of the United States legislature. It is not unlikely that it will make advances upon this line in the near future.

The modification in reference to the final determination of the elections is found in Article I, section 5, paragraph 1, which provides that each house shall be the judge of the elections of its own members. This power is entirely unlimited in each house. Each house may reject anybody who claims to be elected and seat anybody who shall have been voted for.

3. *The Principle of Representation in the Legislature.*

It would perhaps be more correct to speak of the principles of representation, since the two houses of the legislature do not rest upon the same principle. In the lower house the principle is the census of the population.[2] The original provision of the constitution excluded Indians not taxed from the enumeration; counted all unfree persons at three-fifths of the same number of free persons; and prohibited representation of a population numbering less than 30,000, except the whole population of a commonwealth should number less than 30,000, in which case it should have one representative.

This original principle has been modified by two subsequent constitutional provisions. The first is the thirteenth amendment, abolishing slavery, which has made the earlier rule in reference to the counting of unfree persons obsolete. There are now no unfree persons in the United States, and there can be none, as the constitution now stands. Each person now counts for one. The second modifying provision is that clause of the fourteenth amendment which declares that "representa-

[1] United States Revised Statutes, sec. 15.

[2] United States Constitution, Art. I, sec. 2, § 3.

tives shall be apportioned among the several States" (commonwealths) "according to their respective numbers, counting the whole number of persons in each State" (commonwealth), "excluding Indians not taxed"; and that, when the right to vote at any election for presidential electors or representatives in Congress, or for the executive or judicial officers of a commonwealth or members of the legislature thereof, is denied to any of the male inhabitants of the commonwealth being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the representation of such commonwealth shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such commonwealth. The Congress has not created the means and measures for carrying this threatened reduction of representation into execution, nor have the courts given judicial interpretation to the words of the clause. We therefore do not know whether in order to warrant the reduction of representation the denial or abridgment of the right to vote must be by a law of the commonwealth, or by an officer of the commonwealth, or whether the act of a combination of private persons, which the commonwealth either cannot or will not control, would come within the meaning of the provision. The language is that whenever the right to vote *is* denied, etc. It does not designate by whom. In the previous section of the article it is expressly provided that the denials, deprivations and abridgments there spoken of must be made by the commonwealth in order to warrant the interference of the government of the United States in behalf of the person receiving injury. What does the omission of this phrase in the second section indicate? Is it fortuitous, or was it intended to make the commonwealth responsible, in this case, for the unlawful acts of its citizens? Sound political science would approve the latter interpretation; but we must await the legislation of Congress and, after

that, the final adjudication of a case in point by the Supreme Court, before we can pronounce this to be the settled principle of our public law.

Under these constitutional directions and limitations, the Congress must fix by legislation the whole number of representatives of which the lower house shall be composed, and distribute the same among the different commonwealths. This cannot be done once for all time. The representation must be readjusted, probably, after every census. The act now in force, *viz;* that of February 25, 1882,[1] fixes the whole number of members of the House of Representatives at 325, and distributes them among the commonwealths in the ratio of one to about 150,000 inhabitants. This gives the several commonwealths a representation varying from one to thirty-four. This apportionment act requires, as the general rule, that the members from each commonwealth shall be "elected by districts composed of contiguous territory, containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of representatives to which such State" (commonwealth) "may be entitled in Congress, no one district electing more than one representative." To the commonwealths is left, then, only the construction of such districts. The Congress must find the constitutional warrant for this measure either in the clause which provides that "representatives shall be apportioned among the several States" (commonwealths), etc., or in the clause which provides that Congress may prescribe regulations as to the times, places and manner of holding elections for representatives. It would be a little strained, I think, to profess to find the power in the first of these clauses. The language is that "representatives shall be apportioned among the several States" (commonwealths), etc. It does not even declare who shall apportion them. We derive the power of Congress to

[1] United States Statutes at Large, vol. 22, p. 5 ff.

do this from implication. It does not seem to me, however, that this clause confers upon Congress any power, either express or implied, to direct the commonwealths how they shall distribute their quotas internally. It seems to me that the power of Congress is exhausted, so far as this clause is concerned, when it distributes to the several commonwealths their respective numbers. The power must be found then, if at all, in the latter clause. I think it cannot be reasonably doubted that the power to determine the *manner* of holding the Congressional elections includes the power to prescribe the *scrutin d'arrondissement* or district ticket as against the *scrutin de liste* or general ticket, or *vice versa;* but does it include the power to require the commonwealths to construct the districts of contiguous territory and of as nearly equal population as is practicable? It is perhaps too late to raise any doubts upon this point. Congress has certainly gone no farther than a sound political science would justify, — indeed, not so far as a sound political science would justify. It is desirable, however, that the constitution should be more explicit upon this very important subject.

The principle of representation in the upper house, the Senate, is commonwealth equality.[1] The constitution secures this equality even against amendment in the ordinary manner.[2] That is, the state, the sovereignty, as it was organized back of the constitution, undertakes to secure the principle of commonwealth equality in the Senate, against the state, the sovereignty, as organized within the constitution. This is confused and unnatural. It is not possible that this restriction could stand against a determined effort on the part of the state within the constitution to overthrow it. It is a relic of confederatism, and ought to be disregarded. It may be good political science now and in the future that the principle of commonwealth equality should prevail in the Senate, but

[1] United States Constitution, Art. I, sec. 3, § 1. [2] *Ibid.* Art. V.

the state as organized in the constitution must be the final judge of this. No constitution is complete which undertakes to except anything from the power of the state as organized in the constitution. Such a constitution invites the reappearance of a sovereignty back of the constitution; *i.e.* invites revolution.

The constitution provides that there shall be two senators from each commonwealth. This exact number is not defended against change by the ordinary process of amendment. It may be made more or less than two, but it must be the same number for each commonwealth.

Lastly, the representation in both houses is uninstructed. The constitution expressly provides, as to the Senate, that each senator shall have one vote.[1] This would be meaningless, if the senators were under the instruction of the commonwealth legislatures. We know, from experience, that a commonwealth is sometimes represented by senators, or a senator, of different politics from the majority in the existing legislature, and that no such legislature pretends to control the opinions and votes of such senators. *A fortiori* the members of the lower house are uninstructed. Their immediate constituencies have no means of instructing them if they would, and it cannot be pretended that the governments of the commonwealths from which they are chosen could instruct them. This, again, would allow the party in majority in the commonwealth legislature to instruct the members elected to Congress from the commonwealth, even when these members belonged to a hostile party; which would be absurd. The principle is that each senator and each representative represents the whole United States, according to his own intelligence and judgment, and that there is no constituency in the United States which can demand a control over its representative in either house of the Congress, or require his

[1] United States Constitution, Art. I, sec. 3, § 1.

resignation. There is no word in the constitution in reference to the resignation of a legislative member. It might well be questioned whether a member can constitutionally resign. The doctrine held by the constitutional law of the country, to which the framers of the constitution of the United States looked for guidance, was that he could not. It is, as we shall see later, the doctrine still maintained by that law. Custom, however, permits resignation of membership from Congress, but I am unable to find any constitutional or statutory basis for the custom.

4. *The Qualifications of Members.*

So far as the constitution makes express provision in detail in regard to the subject, the qualifications are three in number, and only three. They are age, citizenship and inhabitancy. To be eligible to membership in the lower house, one must be twenty-five years of age or over, must have been for seven years a citizen of the United States, and must be an inhabitant of the commonwealth in which he is chosen.[1] To be eligible to membership in the upper house, one must be thirty years of age or over, must have been for nine years a citizen of the United States, and must be an inhabitant of the commonwealth in which he is chosen.[2] By implication the constitution makes the male sex also a qualification.[3]

No rules are provided in the constitution for determining a dispute in regard to the age of a person elected to either house, or in regard to the citizenship and the period of citizenship of such a person, or in regard to his place of residence. The determination of all such questions is left to each house for its own members, under the general principle of Article I, Section 5, that each house shall be the judge of the qualifications of its own members. Neither house, however, nor the whole Congress, nor the

[1] United States Constitution, Art. I, sec. 2, § 2.
[2] *Ibid.* Art. I, sec. 3, § 3. [3] *Ibid.*

commonwealths, can subtract anything from these constitutional qualifications. I do not think that either of these bodies can add anything, in principle, to these constitutional qualifications. Certainly the commonwealths cannot add anything in principle or in detail. They have attempted to do so, but Congress has always disregarded these attempts.[1] If the Congress can add anything by law, or if either house can do so through the power of judging of the qualifications of its members, it must be something already existing, by reasonable implication, in these constitutional qualifications. For example, I think it certain that either house might reject an insane person, *i.e.* might require sanity of mind as a qualification; or might exclude a grossly immoral person, *i.e.* might require fair moral character as a qualification. On the other hand, neither house nor the whole Congress could make race or color or previous condition of servitude qualifications; and no power short of the sovereign, through amendment of the constitution, can make any religious test a qualification.[2]

The constitution expressly creates two disqualifications, *viz;* the holding of office contemporaneously;[3] and participation in insurrection or rebellion against the United States, or the giving of aid and comfort to the enemies of the United States, after having taken an oath as a member of Congress or of a commonwealth legislature, or as an officer of the United States government or of a commonwealth, to support the constitution of the United States.[4] The Congress may remove the latter disqualification by a two-thirds vote of each house. This is, therefore, rather a statutory than a constitutional disqualification; its continuance, in any case, depending not upon the will of the sovereign, but upon the will of the government.

The commonwealths cannot add to or subtract from these

[1] Story, Commentaries on the Constitution (4th ed.), vol. i, p. 444 ff.
[2] United States Constitution, Art. VI, § 3.
[3] *Ibid.* Art. I, sec. 6, § 2. [4] *Ibid.* Amendments, Art. XIV, sec. 3.

disqualifications. On the other hand, the Congress may, by law, or either house may, in the exercise of the power to judge of the qualifications of its members, make anything a disqualification that is reasonably implied in the constitutional provisions in regard to this subject. Certainly they may make the corrupt use of his powers by a legislator a disqualification; and they have done so.[1]

5. *The Rights and Privileges of Members.*

Members have the constitutional right to a compensation for their services, to be paid out of the treasury of the United States.[2] What the amount of the compensation shall be, how it shall be reckoned, and when paid, are all matters to be determined by congressional statute. The constitution certainly intends that the Congress shall be reasonable in its measures upon this subject; but I do not conceive that it vests any power in the judicial department to determine upon the reasonableness of these measures, either at the instigation of a member or of an individual citizen. It is to be presumed that the members will do fairly by themselves in the matter of regulating their own salaries; and the prospect of an offended constituency has certainly thus far constrained them to consider the interest of the people also.

Furthermore they are privileged from arrest during their attendance upon the sessions of their respective houses and in going to and returning from the same, except upon charges of treason, felony or breach of the peace.[3] Reasonable delays in going and coming and reasonable deviations from the nearest course are allowed and protected by this privilege; and the privilege begins from the date of the election, *i.e.* it is operative before the member takes his seat or is sworn.[4] It could, therefore, happen that a person claiming to be elected would participate in this privilege, although the house

[1] United States Revised Statutes, sec. 1781.
[2] United States Constitution, Art. I, sec. 6, § 1. [3] *Ibid.*
[4] Story, Commentaries on the Constitution (4th ed.), vol. i, p. 609 ff.

to which he claimed to be elected should subsequently deny his claim. This is sound in principle. The privilege should be enjoyed by any such person, while in attendance upon the house in the prosecution of his claim and in going to and returning from the seat of government for this purpose. It is true that the privilege may be abused; but the harm which could come from its abuse would be slight in comparison with that which might arise from its denial.

They have, finally, the freedom of speech and debate in their respective houses.[1] The exact wording of the constitution is that for any speech or debate in either house they shall not be questioned in any other place. This means that only the house itself can call a member to account for what he says in the house. It means that he is not subject to any prosecution for libel or slander before the courts for what he says in the house to which he belongs, or in its committees, or for the official publication of what he says.

6. *The Assembly and Adjournment of the Legislature.*

The constitution orders the annual assembly of the legislature. It fixes the day of assembly upon the first Monday of December, but authorizes the legislature to change this date, by law, if it will. The constitution does not forbid more than one assembly of the legislature each year and it expressly empowers the executive to call extraordinary sessions. This signifies that there may be as many sessions of the Congress as the Congress or the executive may determine; and that the Congress, as well as the executive, is authorized by the constitution to order its own assembly at any time it may deem expedient and desirable.

The constitution does not expressly vest the general power of adjournment of the Congress in any body. It impliedly vests the power in the two houses, in agreement with each other, in the express limitations which it places upon the

[1] United States Constitution, Art. I, sec. 6, § 1.

power. Article I, section 5, paragraph 4, provides that "neither house shall, during the session of Congress, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting"; and Article II, section 3, provides that the executive may adjourn both houses, in case of disagreement between them with respect to the time of adjournment, to such time as he shall think proper. These limitations certainly recognize the general power of adjournment as residing in the two houses in agreement with each other, and the power of adjournment from day to day and for as long a period as three days in each house separately.

Finally, the constitution does not provide for any such procedures as the formal opening or closing of a session, or for prorogation or dissolution. The houses, therefore, *separately* arrange the ceremonies of opening and closing to suit themselves, under the power to make their own rules of order and procedure; the houses, *in agreement*, adjourn *sine die* or prorogue the session under their general power of adjournment; and there is no such thing as a dissolution of either house of the Congress, except by the legal expiration of the terms of its members.

7. *The Principle of the Quorum.*

The constitution fixes the quorum of each house at an absolute majority of the members to which each house is entitled by the existing law of representation;[1] *i.e.* one more than half the number of members assigned by this law to each house may undertake legislation. The constitution does not expressly provide as to how the presence of a quorum shall be determined; but it seems to me to imply, in the power of each house to force the presence of members in order to form a quorum, that physical presence is the test, whether or no the members present all act. Such has not

[1] United States Constitution, Art. I, sec. 5, § 1.

been the general practice, however, to this time. It has been regarded as necessary that a quorum shall not merely be present, but shall also act.

8. *The Internal Organization of the Legislative Houses.*

The constitution vests the independent power of internal organization in each house, by conferring upon each the right to elect its own officers [1] and to determine its own rules of discipline and procedure, and by giving each house power to compel attendance of members. This is the general principle; but the constitution limits these general powers in four respects, *viz;* it makes the Vice-President the presiding officer of the Senate;[2] it requires at least a two-thirds majority of a quorum to expel a member from either house in the administration of its rules of discipline;[3] it requires each house to keep a journal of its proceedings, and to publish the same from time to time,[4] except such parts as in the judgment of the house concerned demand secrecy; and it requires the record of the yeas and nays upon the journal of either house, in regard to any question, at the desire of one-fifth of the members present.[5] Within these limits each house is entirely free to form its own parliamentary law, at its own will and discretion, in so far as concerns its own members. The only question is how far it can make its will in this respect valid upon outsiders. Each house may certainly expel outsiders from its chamber at will. The publicity of procedure required by the constitution is entirely satisfied by the keeping of the journal. On the other hand, the Supreme Court has decided that the constitution confers no general power upon either house to punish outsiders for contempt. The Court holds that the general power to punish for contempt is in its nature a judicial power; that Congress, or either house thereof, can exercise it in the determination of those matters

[1] United States Constitution, Art. I, sec. 2, § 5; *Ibid.* Art. I, sec. 3, § 5.
[2] *Ibid.* Art. I, sec. 3, § 4.
[3] *Ibid.* Art. I, sec. 5, § 2.
[4] *Ibid.* Art. I, sec. 5, § 3.
[5] *Ibid.* Art. I, sec. 5, § 3.

only concerning which the constitution confers judicial power upon Congress, or either house thereof; that these matters are but four in number, *viz;* the punishment of its own members for disorderly behavior or for failure to attend its sessions, the decision of contested elections, the determination of the qualifications of members, and the impeachment of the officers of the government; that where the examination of outsiders as witnesses is necessary to the performance of these duties, the Congress, or either house, may summon outsiders as witnesses and may punish persons summoned for failing to appear or for any contempt in the course of the proceedings.[1] The Court further holds that, in the case either of members or outsiders, the punishment must be confined, in time, to the session during which the condemnation occurs and cannot be graver than imprisonment during the remainder of the session.[2]

9. *The Mode of Legislation.*

The general principles are that either house may initiate legislation upon any subject; that any project introduced under any form must, to become law, be passed by a simple majority vote (*i.e.* a majority of those voting, a quorum being present) of each house and approved by the executive, or not vetoed by the executive within ten days from the date of its presentation to him (Sundays not counted), provided the session does not expire before the end of this period; and that a project vetoed by the execution must be repassed by a two-thirds vote of each house (*i.e.* by a two-thirds vote of those voting, a quorum being present), that house voting first in which the bill originated, and both houses voting by yea and nay, and entering the vote upon their journals.[3]

There are but two exceptions to these general principles. One requires that all bills for raising revenue shall originate

[1] Kilbourn *v.* Thompson, 103 U. S. Reports, 168.
[2] Anderson *v.* Dunn, U. S. Reports, 6 Wheaton, 204.
[3] United States Constitution, Art. I, sec. 7, § 2; *Ibid.* Art. I, sec. 7, § 3.

in the House of Representatives and confines the power of the Senate in regard to revenue bills to the function of amending the bills originated in the House.[1] The constitution does not expressly require that all projects for raising revenue shall be by bill, though I think this is implied in the language of this clause. If, however, an attempt should be made to enact a law for the raising of revenue, which should not be proposed in the form of a bill, it is manifest that the proposition must also originate in the House of Representatives. The other exception is that a resolution to adjourn — which, as we already know, requires the concurrence of the two houses, if the adjournment is for a longer period than three days or to any other place than that in which the houses shall be at the time sitting, — is not subject to approval or disapproval by the executive.[2]

All the details of the process, such as the conditions under which an individual member may propose bills, resolutions, etc., the reading of the bills, their reference, the reports thereon, their order upon the calendar, the rules of debate thereon, etc., are determined by each house for itself under the power to construct its own parliamentary procedure. These therefore are subjects with which we have nothing to do in a work devoted strictly to the general principles of political science and constitutional law.

[1] United States Constitution, Art. I, sec. 7, § 1.
[2] *Ibid.* Art. I, sec. 7, § 3.

CHAPTER II.

THE CONSTRUCTION OF THE LEGISLATIVE DEPARTMENT OF THE ENGLISH GOVERNMENT.

1. *The General Principle of Legislative Organization.*

The custom of the constitution recognizes the bicameral system, with general parity of powers in the two chambers. The only inequality in this case is the exclusive right of the lower house to control the budget, both as to taxation and appropriation. This places the balance of power, certainly, in the House of Commons.[1] The regular period of mandate in the Commons is seven years, and the change of mandates is total. In the House of Lords the mandates are, for the most part, permanent.

2. *The Sources from which the Legislature proceeds.*

These are different for the two houses. The lower house proceeds from suffrage, while the upper proceeds from hereditary right, suffrage, appointment and office.

The suffrage which is the basis of the lower house has been brought out of great confusion into some order by the Representation of the People's Act of 1884.[2] This act does not pretend to regulate the whole subject. It is to be taken in connection with all previous acts, but it removes the inconsistencies of the previous law and makes a fairly uniform, homogeneous and intelligible law of suffrage for the entire kingdom.

The qualifications which must be possessed by the individual to authorize him to vote for a member of the House

[1] Anson, Law and Custom of the Constitution, p. 224 ff.

[2] Statutes of Parliament, 48 Victoria, c. 3.

of Commons are briefly as follows: The individual must be of the male sex.[1] He must be twenty-one years of age.[2] He must be a citizen, either by birth or naturalization.[3] He must own an interest in real estate of the following character and value, *viz;* in English counties and English towns which are counties, freehold estate of inheritance or in occupation or acquired by marriage settlement, devise, benefice or office, of the clear yearly value of 40 shillings, or if not of inheritance nor in occupation nor acquired by marriage settlement, devise, benefice or office, of the clear yearly value of 5 pounds sterling; or copyhold, or any tenure other than freehold, of the clear yearly value of 5 pounds sterling; or leasehold, if originally created for a term of not less than 60 years, of the clear yearly value of 5 pounds sterling, or if for a term of not less than 20 years, of 50 pounds clear yearly value. A sub-lessee or assignee, if in occupation, has the same rights as to suffrage as the original lessee.[4]

In Scotch counties, the requirements are proprietorship, by any tenure, of lands and heritages of the yearly value of 5 pounds sterling; or life-leasehold, of the clear yearly value of 10 pounds sterling; or leasehold, if originally created for so long a term as 57 years, of the clear yearly value of 10 pounds sterling; or leasehold, if originally created for a term of not less than 19 years, of the clear yearly value of 50 pounds sterling.[5]

In Irish counties, the law requires freehold, of the net yearly value of 5 pounds sterling; or life-leasehold, of the clear yearly value of 20 pounds sterling; or the whole life-tithe rent charge upon a rectory, vicarage or chapelry, of the clear yearly value of 20 pounds sterling; or leasehold, originally created for a term of at least 60 years, of the clear yearly value of 10 pounds sterling; or leasehold, originally

[1] Anson, Law and Custom of the Constitution, p. 108.
[2] *Ibid.*
[3] *Ibid.* pp. 109, 110.
[4] *Ibid.* p. 103 ff.
[5] *Ibid.*

created for a term of at least 14 years, of the clear yearly value of 20 pounds sterling.[1]

If the individual owns no such interest in real estate, he must have occupied, for twelve months before registration for any election, lands or tenements within the county or borough in which he registers, of the yearly value of 10 pounds sterling. He must have resided, if registering in an English borough, during six months of the year previous to registry, in the borough or within seven miles of it; if registering in a Scotch borough, the whole year. He must have paid his poor rates, due in respect to such premises before a certain date, upon the 5th of the previous January in England, upon the 15th of the previous May in Scotland, and upon the 1st of the previous January in Ireland; and if the lands or tenements lie within an English or Scotch borough, he must have paid all other taxes due up to a certain date in the twelve months preceding the election.[2]

Or he must be an inhabitant, occupier of a dwelling-house, or a part of a house arranged as a separate dwelling, which dwelling must have been rated and the rates paid up to a certain date within the twelve months previous to the election.[3]

Or he must have been a lodger, for twelve months previous to a certain date within the twelve months previous to the election, in the same house; and his lodgings, unfurnished, must be of the clear yearly value of ten pounds sterling.[4]

Or he must be a freeman of a town which, previous to the year 1832, could confer suffrage in that manner, *i.e.* by making one a freeman; but he must at present have acquired his freedom by birth or servitude, and must have resided for the twelve months previous to registration for an election within at least seven miles of the town.[5]

[1] Anson, Law and Custom of the Constitution, p. 104. [2] *Ibid.* p. 104 ff.
[3] *Ibid.* p. 104 ff. [4] *Ibid.* p. 105 ff. [5] *Ibid.* p. 107.

Or he must be a liveryman of one of the city companies of the city of London.[1]

Or, lastly, he must be a member of the governing body of the University of Oxford, or Cambridge, or London, or Edinburgh, or St. Andrews, or Aberdeen or Dublin.[2]

In addition to these qualifications, we must allude briefly to the many disqualifications before we can claim to have anything like a complete view of the very complex law of suffrage out of which the lower house of the British legislature proceeds.[3]

Possession of a peerage is a disqualification, except in the case of the holder of an Irish peerage, who has been already elected and is serving as a member of the House of Commons. The holding of police office or of office concerned with elections is a disqualification. Unsoundness of mind also disqualifies. Conviction of treason or felony disqualifies until the punishment is served or pardon obtained. Conviction of corrupt practices at an election disqualifies for seven years. The receiving of parochial relief during the twelve months preceding the last day of July previous to any election is a disqualification to vote at that election. Joint tenancy is a disqualification as to all but one where all rest upon the tenancy to qualify, unless the tenancy "has been acquired by descent, marriage, marriage settlement or will, or is in the actual occupation of the owner for the purpose of carrying on trade or business." Joint occupation of lands and tenements in counties is also a disqualification as to all but two, where all rest upon the occupation to qualify, unless the occupation has been acquired in the same manner as described for joint tenancy.

This is a very confusing system, and gives rise to many difficulties in its application to concrete cases. It is a product of history, and a very irregular one. It is hardly re-

[1] Anson, Law and Custom of the Constitution, p. 107.
[2] *Ibid.* [3] *Ibid.* p. 108 ff.

garded by anybody as definitive. It is already radical enough to bring great strain upon the constitution, and yet not radical enough to be logical and uniform.

The sources from which the membership of the upper house proceeds are, as I have already indicated, four in number, *viz;* inheritance, election, royal appointment and ecclesiastical office.

Any person whose ancestor sat in Parliament for England, by virtue of a royal summons, issued since 1295, or thereabout, has the hereditary right to a seat in the House of Lords,[1] or rather the hereditary right to be summoned to that House. The word ancestor in this connection must be taken in its public law meaning. It does not mean that all the descendants of an ancestor who sat in Parliament by royal writ have this right; the right pertains to that one only upon whom, by the law of descent regulating the transmission of this right, the inheritance may, at the given time, have fallen. This law is primogeniture with preference of the male line and abeyance of the right to sit in Parliament during the time that there is no male heir, *i.e.* transmission of the right by females, but no exercise of it save by males.[2]

Sixteen persons whose ancestors sat in the House of Lords in the Scotch Parliament, by virtue of royal writs of summons, before the union of this Parliament with the English Parliament, and who are chosen by a majority of all the persons upon whom, at any given moment, this inheritance has fallen, have the right to seats in the House of Lords during the existence of the Parliament for which they are chosen.[3] This electoral right must have been exercised, however, since the year 1800; otherwise it is lost.[4] Twenty-eight persons whose ancestors sat in the House of Lords of the Irish Par-

[1] Stubbs, Constitutional History of England, vol. ii, pp. 203, 204.
[2] Encyclopædia Britannica, vol. xviii, Art. Peerage, p. 467.
[3] Anson, Law and Custom of the Constitution, p. 170.
[4] Statutes of Parliament, 10 and 11 Victoria, c. 52.

liament before the union of that body with the English Parliament, and who are chosen by a majority of all the persons upon whom, at any given moment, this inheritance has fallen, have the right to seats for life in the House of Lords of the Parliament of the United Kingdom.[1] The words ancestor and inheritance must be taken in these cases in the same sense as in the first case.

Any person summoned by royal writ at the pleasure of the Crown has the right to a seat in the House of Lords for his own life with transmission of the same to his heirs;[2] but such person cannot under any conditions have a seat in the body of Scotch peers who elect the sixteen representatives of that body to the House of Lords, and he cannot have a seat in the body of Irish peers who elect the twenty-eight representatives of that body to the House of Lords, unless he be one of those persons who shall have been appointed by the Crown, in accordance with the act of union between Ireland and Great Britain, to Irish peerages in lieu of Irish peerages becoming extinct.[3]

Two persons, eventually four, may be appointed by the Crown to seats in the House of Lords for life or so long as they discharge the judicial duties devolving upon them as Lords of Appeal in Ordinary.[4]

Two archbishops and twenty-four bishops have the right to seats in the House of Lords by virtue of their ecclesiastical office.[5]

The law of elections is in all respects statutory. The law of inheritance and appointment, as the source of legislative mandate, is also statutory in the sense that it is subject to modification, change and even abolition by statute.

The custom of the constitution does not secure to each

[1] Anson, Law and Custom of the Constitution, p. 170.
[2] *Ibid.* p. 177. [3] *Ibid.* p. 177 ff.
[4] Statutes of Parliament, 39 and 40 Victoria, c. 59.
[5] Anson, Law and Custom of the Constitution, pp. 170, 197 ff.

house complete independence in passing upon the credentials of its members. The power to determine questions of disputed elections, claimed and exercised by the House of Commons from 1604 to 1868, was assigned by statute to the Court of Common Pleas, and is now exercised by the Queen's Bench division of the High Court;[1] while the House of Lords has no right to decide the claims to an old peerage unless upon reference of the case from the Crown.[2] In all other cases it may pass upon the credentials of its members.

3. *The Principle of Representation in the Parliament.*

Each house rests upon its own principle, so that the exact title of this section would be the principles of representation in the Parliament. Furthermore, we find more than one principle applied in the representation of each house.

In the Commons, the ancient principle was the distribution of the representation by royal charters or franchises among the organized communities, *i.e.* the counties, the cities, the boroughs and the universities, two members for each. This equality of representation among the communities, originally regarded as just in the main, began in the course of time to be felt to be unjust. The doctrine of the French revolution, that the individual instead of the local organization is the unit of politics, changed this feeling into a definite idea. The reform act of 1832 was the first great step towards the introduction of the new idea into practice. In this act Parliament asserted the exclusive right to distribute the representation. The power of the Crown to control the representation by the granting of charters and franchises to the local organizations was definitely and finally set aside. Still the Parliament did not, at that time, undertake to carry out the idea completely by basing representation upon numbers. It disfranchised those local organizations which had become depopulated and increased the representation from those which had become

[1] Anson, Law and Custom of the Constitution, p. 150 ff.

[2] *Ibid.* pp. 204, 205.

populous, but the local organization remained the political unit. The Representation of the People's Act of 1867 followed the same principle. The Redistribution Act of 1885, however, has given consistent form to the new idea.[1] It cuts up the local governmental organizations, the counties, cities and boroughs, into election districts, each containing on the average about 54,000 inhabitants; and it ordains that each district shall send one representative. This is in principle representation upon the basis of numbers. This is the logical consequence of the doctrine of popular sovereignty. The act of 1885 still permits some modifications of the principle and a few exceptions to the principle. It allows towns containing more than 15,000 and less than 50,000 inhabitants to be reckoned as one election district and send one member, and those containing more than 50,000 and less than 165,000 are entitled to be formed into two districts and send two members, one from each district. It does not disfranchise the Universities of Oxford, Cambridge, Dublin, London, Glasgow and Aberdeen, and Edinburgh and St. Andrews, although the constituency in none of these exceeds 7000. We must remember, however, that a university constituency means voters, not, as in other cases, all persons. These are the modifications as to the population necessary to form the districts. The exceptions to the principle of district representation are the Universities of Oxford, Cambridge and Dublin, the city of London, and those towns which before the act of 1885 were entitled to two members and also contain a population of more than 50,000 and less than 165,000. In these cases the representation is still upon the basis of the local governmental organization; *i.e.* population does not determine the number of members, except in the last case, and these constituencies are not divided into districts. For example, Oxford University with a constituency of 6000 sends

[1] Statutes of Parliament, 48 and 49 Victoria, c. 23.

two members and elects them upon a general ticket, Cambridge with a constituency of 7000 does the same, and Dublin with a constituency of but 4000 does the same. The number of members of the House of Commons according to this act is now 670.[1]

Lastly, the general principle upon which this act proceeds is that each member represents the whole Empire, not a particular local organization nor exclusively a particular constituency. The member is under no obligation, therefore, to follow instructions from the voters or the inhabitants of the district from which he is chosen. They have no legal means of enforcing any instructions. They cannot demand his resignation. In fact, a member cannot resign. He may be appointed by the chancellor of the Exchequer to the stewardship of the Chiltern Hundreds, or of the manors of East Hendred, Northstead or Hempholme or to the escheatorship of Munster, and if he accepts the office he thereby vacates his seat. He may then resign the office and free himself from public duties. In case of the insanity of a member, the constituency that elected him may petition the House to consider the question of his disqualification; and the House may proceed thereupon, as well as upon its own motion, to declare the seat vacant on account of mental disqualification.[2] This, however, cannot be considered a legal means of enforcing instructions from a constituency upon a member. The fear of defeat at the next election may, of course, influence the member to bow before the instructions of his constituents, but that creates no legal necessity to regard them. Legally, he is simply referred to his own judgment and his own conscience. This is uninstructed representation.

The only legal rules which exist for the distribution of the representation in the House of Lords are that the number of members from Scotland shall be 16; the number from Ire-

[1] Almanach de Gotha, 1890, p. 745.

[2] Anson, Law and Custom of the Constitution, p. 71 ff.

land 28; the number of ecclesiastics, 26; and the number of the Lords of Appeal in Ordinary shall be 2, eventually 4. The whole number of members of the House of Lords is at present about 541.[1] It would be strained to assume that these numbers represent the relative interests involved. Upon such an assumption we should be obliged to consider that the secular interests of England were greatly over-represented as contrasted with those of Scotland or Ireland, or with the ecclesiastical or judicial interests of the entire Empire. This certainly cannot be regarded as the principle of the distribution of the representation in this house. It would be nearer the truth to regard the members of this house as representing the interests of the country over against those of the towns. We must remember, however, that many of these Lords of Parliament own great blocks of city property, while a very large proportion of the persons belonging to the constituencies of the House of Commons are owners of country land. We cannot then say that what they represent is exclusively the interests of the country as against those of the towns. In fact, I think we must come to the conclusion that the Lords represent, in principle, the interests of the whole Empire, and of all classes, as truly as the Commons. They differ from the Commons only in the manner of their selection.

They are also uninstructed representatives. With the exception of those chosen by the Peers of Scotland and of Ireland, it cannot be said that they have any particular constituencies. They cannot be required by any body to resign on account of opinion and votes, or for any other reason; in fact, there is no such thing as the resignation, surrender or alienation of membership in the House of Lords. A Scotch member may lose his seat as a representative of the Peers of Scotland by accepting a peerage of the United Kingdom,

[1] Almanach de Gotha, 1890, p. 745.

i.e. a peerage conferred by royal appointment; a bishop may vacate his seat by resigning his episcopal office; a Lord of Appeal in Ordinary may lose his seat by ceasing to discharge the judicial duties associated with his appointment, and any peerage may be forfeited by attainder or extinguished by act of Parliament.[1] None of these things can, however, be regarded as resignation in the ordinary sense, certainly not as resignation caused by the discontent of any constituency with the act or opinion of a representative in the House of Lords. There is not even the influence of a new election, except in the case of the sixteen Scotch members, to affect them. They are in a position to think and to act with great independence.

4. *Qualifications of Membership.*

The qualifications or positive requirements for holding a seat in the House of Commons are but three, *viz;* the male sex, the full age of twenty-one years and the quality of citizen or subject, either by birth or naturalization. The first of these requirements rests upon custom, which, therefore, either house might change through the exercise of its residuary power to judge of the qualifications of its members. The second and third, however, rest upon statutes of Parliament and cannot be modified by either house alone.[2]

The disqualifications or negative requirements are more numerous. Incurable insanity; the possession of a peerage, except an Irish peerage whose possessor is not a Lord of Parliament (such a person being able to sit in the Commons for any county or borough of Great Britain); possession of clerical office in the established churches of England or Scotland or in the Roman Catholic Church; possession of certain secular offices, such as those concerned with the return

[1] Anson, Law and Custom of the Constitution, p. 201. Encyclopædia Britannica, vol. xviii, p. 467, Art. Peerage.

[2] Statutes of Parliament, 7 and 8 William III, c. 25; *Ibid.* 5 Anne, c. 8; *Ibid.* 4 George IV, c. 55.

of the elections, with the collection of the revenues or the auditing of public accounts or with the administration of property for public objects; possession of judicial office, or of any office created since the 25th of October, 1705, when not specially excepted from the rule by act of Parliament; receipt of a pension, *i.e.* "a grant of royal bounty repeated more than once in three years," excepting "civil service and diplomatic pensions"; holding a government contract; conviction of felonious crime, or of corrupt practices at a parliamentary election; the state of bankruptcy: all these are made, by various statutes, disqualifications for occupying a seat in the House of Commons.[1] Appointment to almost any other office than those mentioned above, removes the person appointed from his seat in the Commons, but if re-elected *after* his appointment, he may hold both his office and his mandate.

The qualifications and disqualifications for membership in the House of Lords are not so numerous; but so far as they go, they are similar to those which obtain in the House of Commons. A Lord of Parliament must be of the male sex.[2] He must be of the full age of twenty-one years.[3] He must be a British subject, and it is not quite clear that naturalization will make an alien a subject for this purpose.[4] The disqualifications, in the case of the Lords, are conviction of felonious crime and the state of bankruptcy.[5]

Lastly, refusal or failure to take the oath of allegiance disqualifies from sitting and voting in either house, but does not vacate the seat.[6]

5. *The Rights and Privileges of Members.*

The members of the House of Commons are privileged from arrest, during the session and for forty days before the

[1] Anson, Law and Custom of the Constitution, p. 71 ff.
[2] Encyclopædia Brittannica, vol. xviii, p. 467, Art. Peerage.
[3] Anson, Law and Custom of the Constitution, p. 191.
[4] *Ibid.* p. 191. [5] *Ibid.* pp. 191, 192. [6] *Ibid.* pp. 57, 58, 193.

opening and forty days after the closing of the same, except the arrest be for the commission of an indictable offence or for contempt of court. Members elected subsequent to arrest and while in confinement have the privilege of liberation from the same, except the arrest and confinement be for the above-mentioned causes. The privilege extends also to exemption from witness service and jury service during the same period.

The members of the House of Commons have perfect freedom of speech and debate in the House. They cannot be legally dealt with for anything said in the House by any court or body outside of the House. If, however, they cause their words or speeches to be published, they are subject to prosecution for libel, like any private persons.[1]

The members of the House of Lords are, if peers, exempt from arrest, at all times,[2] "except in case of treason, felony or refusal to give security for the peace."[3] This is by virtue, however, of the quality of peerage. As Lords of Parliament they have only the same exemption as the members of the House of Commons.[4] The privilege extends, however, to the households of the Lords during the session and for twenty days before the beginning and twenty days after the close of the same.[5]

The members of the House of Lords have perfect freedom of speech and debate in the house; and I do not think that the decision in Stockdale *v.* Hansard (making the members of the House of Commons liable to prosecution for libel in case their words are defamatory of private character and in case they cause the publication of these words) is held to apply to the

[1] Anson, Law and Custom of the Constitution, pp. 139 ff., 146; May, Parliamentary Practice, pp. 112, 122, 142, 143.

[2] Encyclopædia Britannica, vol. xviii, p. 311, Art. Parliament.

[3] Anson, Law and Custom of the Constitution, p. 203.

[4] *Ibid.* p. 203; May, Parliamentary Practice, p. 122.

[5] Anson, Law and Custom of the Constitution, p. 203.

members of the House of Lords. Honor and gentlemanly breeding are, in their case, relied upon to protect private individuals against their abuse of the privilege. Each member of the House of Lords has the privilege of having his dissent entered in the form of a protest upon the journal of the House.[1]

The Peers have, finally, the privilege of access, individually, to the person of the wearer of the crown. This is rather a privilege of the peerage than of lordship in Parliament. It is rather as councillors than as legislators that they may approach the throne.[2]

6. *The Summons, Opening, Adjournment, Prorogation and Dissolution of the Parliament.*

The Parliament is summoned, opened and prorogued by the Crown exclusively. These acts, therefore, would not be referred to, at this point, except for the fact that in performing them the Crown proceeds by the advice of the Prime Minister, who is but the head of the cabinet and, as such, the representative of the party in majority in the House of Commons. It is then really the House of Commons, through its leaders, which has assumed the power to move the Crown to these acts.

Statute requires the meeting of Parliament at least once in three years.[3] Adjournment, *i.e.* cessation of the business of either house for a short period of time (as distinguished from prorogation, *i.e.* the termination of a session), may be undertaken by either house independently of the other or of the Crown. It is held that the Crown cannot compel either house to adjourn nor terminate an adjournment before the time fixed by the house itself.[4]

The dissolution of the Parliament may now be effected in only two ways, *viz;* by expiration of the mandates of the

[1] Anson, Law and Custom of the Constitution, p. 203.
[2] Anson, Law and Custom of the Parliament, pp. 203, 204.
[3] May, Parliamentary Practice, p. 42 ff.
[4] Anson, Law and Custom of the Parliament, p. 64.

members of the House of Commons, at the end of seven years from the first assembly of the Parliament, and by order of the Crown terminating the mandates of the members of the existing House of Commons and ordering new elections. The former method of dissolution was until recently somewhat modified by the demise of the Crown, either during a parliamentary term or a dissolution. The statute of 30 & 31 Victoria, c. 102, has now removed this modification entirely. The latter method of dissolution is formally effected by the exercise of a Crown prerogative; but, as a fact, the act is provoked by the Prime Minister, the chief representative of the majority party in the House of Commons. It should therefore be at least referred to, in this connection. It is possible, indeed, that the ministers may lose the support of the majority in the House of Commons, and may still move the Crown to order a dissolution of Parliament, by convincing the Crown that the majority of the constituencies of the House of Commons no longer support the views of the majority in the existing house.[1] This can only be determined by the new election. The ministers can exercise this influence over the Crown, however, only by virtue of having been the leaders of the majority in the House of Commons, and through the view that the failure to receive the support of that majority, in the particular case, is accidental and can be repaired by going to the constituencies.

7. *The Principle of the Quorum.*

The number of members whose presence is necessary in order to proceed lawfully with business is fixed by each house for itself. This subject belongs, therefore, under the topic of the organization and rules of procedure of each house. I refer to it here only to preserve the heading for the examination of other constitutions, which determine the quorum by constitutional law. The quorum in each house is placed at an

[1] Bagehot, The English Constitution, p. 83.

arbitrary number, and a very low number, *viz;* 40 in the Commons and 3 in the Lords.[1]

8. *The Internal Organization of the Houses of Parliament.*

The House of Commons elects its own speaker.[2] In his absence, the chairman of the committee of ways and means acts as speaker.[3] In the House of Lords the speaker is, by the custom of the constitution, the Lord Chancellor, a member of the ministry, *i.e.* one of the chiefs of the party in majority in the House of Commons. He may, therefore, be a commoner; and for this, among other reasons,[4] the woolsack upon which the speaker sits is placed outside of the limits of the house. In the absence of the Lord Chancellor one of the deputy speakers appointed under the great seal, *i.e.* nominally by the Crown, may preside. If none of these be present, the Lords may elect a speaker for the occasion. The other officers of both houses are permanent and appointed by the Crown.[5]

Each house has entire and exclusive control of its rules of procedure.[6] Each house has in like manner the exclusive power of fixing and regulating its rules of discipline. Even though Parliament should undertake to control this subject by statute, the ultimate interpretation of the statute is made by each house for itself, and no court can interfere with or inquire into the same. Nothing short of a crime committed in the House of Commons, or by its order, will warrant the intervention of the regular judicial power;[7] and not even under these circumstances will the judicial power intervene in the case of the House of Lords.

In the exercise of its disciplinary powers either house may fine, commit to prison or expel a member. Each house may also commit an outsider for contempt. A commitment by the

[1] May, Parliamentary Practice, p. 220.
[2] Anson, Law and Custom of the Constitution, p. 55 ff., 132.
[3] *Ibid.* p. 132. [4] *Ibid.* p. 202 ff. [5] *Ibid.* pp. 133, 203.
[6] *Ibid.* pp. 155, 156, 205. [7] *Ibid.* p. 155.

House of Commons is limited to the duration of the session. It therefore cannot order imprisonment for any fixed period, since prorogation or dissolution may be ordered at any time. The House of Lords, on the other hand, may commit for a definite time, and if this time has not expired at the date of prorogation, the prisoner is not released by prorogation.[1]

9. *The Mode of Legislation.*

As we have already seen, in dealing with this topic in the constitution previously treated, there are three general stages in the process of legislation. The first is the initiation of the project, the second is the passage of the same through the houses, and the third is the executive approval. In the British system there are three general methods of initiating a project, dependent upon the character of its subject-matter. If the project contains public matter only, and does not propose the raising or appropriation of money, it may be originally proposed in either house and by any member thereof. In the Commons, the member must have fulfilled the form of asking leave of the house to bring in the bill, and have received permission to do so. In the Lords, this is not necessary.[2]

There are, however, two exceptions to this manner of initiating legislation upon public matters not affecting taxation or appropriation, *viz;* bills relating to religion and those relating to trade. Such propositions must be first considered in committee of the whole house, and introduced into the house upon recommendation of the committee.[3] Any member may introduce the subject in the committee.

If the project proposes the raising or appropriation of money, it can be introduced only in the committee of the whole of the House of Commons, and, in the case of appro-

[1] Anson, Law and Custom of the Constitution, pp. 156, 157, 192, 205; May, Parliamentary Practice, p. 104 ff.

[2] May, Parliamentary Practice, p. 484.

[3] Anson, Law and Custom of the Constitution, pp. 225, 226.

priations, only by a minister of the Crown; in the case of taxation, if the project imposes new burdens, only by a minister of the Crown.[1]

Finally, if the project relates to a private matter, it is initiated by a petition on the part of the person or persons concerned, which must be deposited in the Private Bill Office of the House of Commons by the 21st of December of the year before the bill is to be brought to consideration in the House. Examiners, appointed by the House of Lords and by the Speaker of the House of Commons, must scrutinize the petition and indorse it as having fulfilled or not fulfilled the forms required by the standing orders of the House of Commons for the presentation of the petition. Three days after the indorsement has been made, whether it be affirmative or negative, the petition is presented by some member to the House of Commons.[2]

The mode of procedure in the passage of projects through the two houses is also conditioned in some degree by the content of the propositions. A public bill not touching revenue and supply may be modified, amended and rejected by either house at will.[3] A money bill cannot be modified, amended or rejected by the House of Lords.[4] A private bill may be modified, amended and rejected by either house at will; but both houses act in this case as much like courts as like legislative bodies. They examine witnesses, and hear arguments from counsel for and against the bill, etc.[5]

Lastly, the approval of the Crown is necessary in all cases, and its disapproval would be legally fatal to any measure. As a fact, however, the approval is now never withheld, and has not been since the year 1707.[6]

[1] Anson, Law and Custom of the Constitution, p. 230; May, Parliamentary Practice, pp. 624, 625.

[2] Anson, Law and Custom of the Constitution, pp. 241, 242.

[3] *Ibid.* p. 224 ff.

[4] *Ibid.* p. 231; May, Parliamentary Practice, pp. 595, 603.

[5] Anson, Law and Custom of the Constitution, p. 242 ff.

[6] *Ibid.* p. 252 ff.

CHAPTER III.

THE CONSTRUCTION OF THE GERMAN IMPERIAL LEGISLATURE.

1. *The General Principle of Legislative Organization.*

The constitution adopts the bicameral system, with substantial parity of powers in the two bodies, in so far as legislation is concerned.[1] I am perfectly aware that the German commentators upon the constitution will object to the Federal Council (*Bundesrath*) being designated as an upper house of the legislature, and to the statement that it is only equal in power with the Diet (*Reichstag*).[2] I do not intend by my proposition to affirm that the Federal Council is *only* the upper house of the legislature, or that it has not other than legislative powers. I mean that it acts as a legislative body, and that in legislation it and the Diet have equal powers as to the initiation and adoption of projects. I am sure the text of the constitution and the practice of legislation will sustain me in this statement. Article 5 declares that the legislation of the Empire shall be exercised by the Federal Council and the Diet, and that a majority vote of the two assemblies shall be necessary and sufficient for the making of the imperial laws. Article 7, section 1, provides that the Federal Council may initiate legislation, and Article 23 makes the same provision in regard to the Diet. The anxiety of particularistic commentators to show that the Federal Council is the sovereign in the whole system, the state, has, it appears to me, led them into a confusion of ideas

[1] Reichsverfassung, Art. 5.

[2] Von Rönne, Das Staatsrecht des deutschen Reichs, Bd. I, S. 194 ff.; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 45 ff.; Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 215 ff.

and of language upon this subject. They feel that the constitutional power of the Diet to reject the projects of the Federal Council does not well comport with their doctrine of the sovereignty of the Council. It certainly does not; and an unbiased mind will be more likely to deny that doctrine than to accept the fanciful attempts to explain away the plain and express language of the constitution. This instrument, as we have seen, declares that the legislation of the Empire shall be accomplished by these two assemblies; that each may initiate projects upon any subject falling within the legislative power of the imperial government, and that each may reject the projects initiated by the other. The fact that the Federal Council holds powers which are not legislative cannot deprive it of its legislative character, any more than the possession of judicial powers by the British House of Lords or the possession of administrative powers by the Senate of the United States can take these bodies out of the category of legislative assemblies. The Federal Council of the German Empire, it is true, has more extra-legislative powers than either of the bodies just mentioned; but that does not affect the principle. From the legislative point of view the Council is a legislative body, and has no more power in this respect than the Diet. Of its other powers we have spoken, and shall speak further, under the proper headings.

The regular period of mandate in the Diet is five years, and the renewal of the Diet at each election is total.[1] In the Council, on the other hand, the mandate of each representative depends upon the will of the commonwealth which sends him.

2. *The Sources from which the Legislature proceeds.*

The Diet rests upon the direct suffrage of all resident citizens of the German Empire (*Reichsangehörige*), of the male sex, who have attained the age of twenty-five years.

[1] Reichsverfassung, Art. 24; Reichsgesetzblatt, 1888, S. 110.

These are the qualifications. The disqualifications are active service in the army or navy; subjection for any reason to guardianship, or to a process of bankruptcy or insolvency; reception of poor relief within a year preceding the election, and judicial condemnation to the loss of political or civil rights.[1] This is manhood suffrage, pure and simple,[2] with the requirement of a little more maturity than is demanded in England and America and, as we shall see, in France. The entire law of elections for members of the Diet is regulated by imperial statute and is not, therefore, constitutional law, except only the direction that the ballot shall be secret.[3]

The Federal Council, on the other hand, rests upon appointment. The governments of the twenty-five commonwealths of the Empire choose the members of this body. We mean by the term governments, in this case, the twenty-two princely executives and the senates of the three city commonwealths. In those commonwealths in which the princely executives administer government through ministries responsible to the respective legislatures, the appointment of the representative or representatives of the commonwealths in the Federal Council proceeds through the ministries and is thus, more or less, controlled by the respective legislatures. In legal form, however, it is the princes who make the appointment.[4]

3. *The Principles of Representation.*

In the Diet the representation is not distributed by the constitution, but by statute. It is distributed according to the census of the population, upon the ratio of one representative to every 100,000 of the population. This is the general rule, which however is subject to the modifications

[1] Bundesgesetzblatt, 1869, S. 145; 1870, S. 647; 1870, S. 654; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 76.

[2] Reichsverfassung, Art. 20.

[3] *Ibid.*

[4] Reichsverfassung, Art. 6; Laband, Das Staatsrecht des deutschen Reichs, in Marquardsen's Handbuch, S. 40.

that the lines of the electoral districts must not cross the lines of the commonwealths, that a residue of more than 50,000 inhabitants in any commonwealth shall send one representative, and that the population of every commonwealth shall send at least one representative. The electoral districts are fixed by Imperial statute; the question of district ticket or general ticket is likewise determined by Imperial statute, — at present, in favor of the former, — and, as I have already said, the whole procedure of the elections is subject to Imperial regulation.[1] The number of members of the Diet stands, at this moment, at 397.[2] The representation is uninstructed. This is expressly declared in the constitution, which provides that the members of the Diet are representatives of the whole people, and are not bound by any instructions; *i.e.* each member is referred wholly to his own judgment and conscience in the direction of his voice and vote.[3]

Representation in the Federal Council, on the other hand, is distributed by the constitution. The ratio is somewhat artificial, but has an historical justification in that (except in the case of Bavaria) it holds to the distribution adopted for the German Confederation by the Vienna Acts of 1815. The representation of Bavaria is increased above the number to which that commonwealth was entitled in the Diet of the Confederation, not on account of any relative increase of strength either in territory or population, but from considerations of policy connected with the formation of the present constitution. The number of members, or rather of voices and votes, is now 58. Of these, Prussia has 17, Bavaria 6, Saxony 4, Württemberg 4, Baden 3, Hesse 3, Brunswick 2, Mecklenburg-Schwerin 2, and the others 1 each.[4] Alsace-Lorraine does not and cannot have a vote in this body, because

[1] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 293 ff.
[2] Almanach de Gotha, 1890, p. 404.
[3] Reichsverfassung, Art. 29.
[4] *Ibid.* Art. 6.

it is not a commonwealth.[1] The representation in this body is instructed, and no uninstructed voice can be counted. This is expressly provided in the constitution. The constitution also directs that the votes shall be given by commonwealths. It results that the vote of a commonwealth cannot be divided, and that the entire vote of the commonwealth may be given by a portion of the voices to which the commonwealth is entitled. The Council, however, will accept without question the declaration of the representatives of any commonwealth as to the fact and tenor of their instructions. If they misrepresent the commonwealth, the commonwealth may deal with them as it judges proper, but it cannot escape the obligation incurred by their vote under the plea of *ultra vires*.[2]

4. *The Qualifications for Membership in the Diet and Federal Council.*

The constitution contains no provisions upon this subject. By statute, German citizenship for a year before the date of the election, the attainment of the twenty-fifth year, and the male sex, are made qualifications for membership in the Diet.[3] On the other hand, the determination of the qualifications for membership in the Federal Council are, impliedly, left to each commonwealth in the case of its own representative or representatives.

Disqualifications are prescribed, however, by the constitution for membership in either body, and by statute also for membership in the Diet. The constitutional disqualifications are, in regard to membership in the Diet, the holding of a seat, at the same time, in the Federal Council,[4] or the holding of an Imperial or commonwealth civil office, at the same time.[5] The latter disqualification does not obtain, if the

[1] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 49.

[2] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, SS. 226, 229.

[3] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 77; Wahlgesetz, § 4. Bundesgesetzblatt, 1869, S. 145 ff.

[4] Reichsverfassung, Art. 9.

[5] *Ibid.* Art. 21.

election to the seat in the Diet shall have been subsequent to the appointment to office, and it may be removed by a re-election to the seat after the appointment to the particular office.[1] It is also implied in the constitution that the reigning princes of the several commonwealths are disqualified from holding seats in the Diet, since they instruct the members of the Federal Council.[2]

The constitutional disqualification, in regard to the members of the Federal Council, is simply the holding of a seat, at the same time, in the Diet.[3]

The statutory disqualifications for membership in the Diet are the same as those for the exercise of the suffrage, with two exceptions: military officers and soldiers in active service may be chosen, and residence within the Empire at the time of the election is not required.[4]

5. *The Rights and Privileges of Members.*

The members of the Diet are exempted by the constitution from trial or arrest upon a criminal charge during the session of the Diet, except by consent of the Diet, unless the member be seized in the commission of the criminal act or upon the day next following. The members are also exempt from arrest on account of debt during the session, without the consent of the Diet. If they should be already under trial at the opening of the session or under arrest upon criminal charge or under arrest for civil cause, they have the constitutional right, upon demand of the Diet, to a release from arrest and to a suspension of trial during the continuance of the session.[5] It will be remarked that these provisions do not protect the members of the Diet against arrest in execution of a judgment already pronounced against them.[6]

[1] Reichsverfassung, Art. 21.

[2] Laband, Das Staatsrecht des deutschen Reichs, Bd. I, S. 293.

[3] Reichsverfassung, Art. 9.

[4] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 77; Wahlgesetz, § 4; Bundesgesetzblatt, 1869, S. 145 ff. [5] Reichsverfassung, Art. 31.

[6] Laband, Das Staatsrecht des deutschen Reichs, Bd. I, S. 330 ff.

The members of the Diet are exempted, by the constitution, from any legal responsibility to any body, except to the Diet itself, for words spoken or votes given in the Diet.[1] The language of the constitution requires that the words shall have been spoken in the course of legislative business and in connection therewith.

Finally, the members of the Diet have the privilege by the constitution of freedom from insult while in the exercise of their public powers or on account of the exercise of their public powers.[2] This privilege, however, is not enforceable through Imperial organs. The constitution simply declares that such offences shall be punished by each commonwealth, in the case of the members elected from it, and shall be dealt with by each commonwealth in accordance with the laws of the commonwealth protecting its own legislators or officers against such offences.[3]

The constitution confers this same privilege upon the members of the Federal Council.[4] It also confers upon the members of the Federal Council the extra-territoriality of foreign ministers when in attendance upon the sessions of that body and makes it obligatory upon the Emperor to protect them in the enjoyment of this privilege.[5] Laband seems to think that this privilege does not extend to the Prussian members of the body,[6] since they would be within the territory subject to the Prussian King and therefore under his protection, but the constitution makes no such exception. Its words are general, and it throws upon the Emperor, not upon the Prussian King, the duty of sustaining the privilege.

Finally, the constitution confers upon the members of the Federal Council the right to appear in the Diet, and to be heard there in expressing the views of the government

[1] Reichsverfassung, Art. 30. [2] *Ibid.* Art. 74.
[3] *Ibid.* [4] *Ibid.* [5] *Ibid.* Art. 10.
[6] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 224.

which the member represents, upon any subject under consideration in the Diet; and that, too, even though the matter shall have been already passed upon in the Federal Council, and passed upon in a manner contrary to the views expressed.[1] The members of the Federal Council, however, are not protected by the constitution against the governments from which they hold their mandates. They are accountable to their respective commonwealth governments for their conduct and votes in the Council.[2]

There are certain other rights and privileges secured to the members of these bodies by statute, but I will not undertake to enumerate them in a work upon constitutional law. It is my purpose to expose gaps in the constitutional law rather than to undertake to fill them by the provisions of statute law.

6. *The Assembly, Adjournment, Prorogation and Dissolution of the Legislature.*

The constitution does not accord to the legislative bodies any independent control over these subjects, except, perhaps, adjournment from day to day.

The Emperor is vested with the power of calling, opening, adjourning and proroguing both bodies and of dissolving the Diet.[3] The constitution, however, places limitations upon the Imperial prerogative in regard to these acts, both directly and through requirements that one or the other of these bodies shall participate in the exercise of these powers. For example, the Emperor must call these bodies annually;[4] in case of a dissolution of the Diet, he must order the elections within sixty days from the date of the dissolution and call the new Diet to assemble within ninety days of the same date.[5] The consideration of these points belongs more properly under the division devoted to the executive powers.

[1] Reichsverfassung, Art. 9.

[2] Laband, Das Staatsrecht des deutschen Reichs, Bd. I, S. 225.

[3] Reichsverfassung, Art. 12 & Art. 24. [4] *Ibid.* Art. 13. [5] *Ibid.* Art. 25.

The following limitations, however, must be treated in this connection, *viz;* the power of the Diet to prevent its adjournment by the Emperor[1] more than once during the same session, or for more than thirty days; the power of the Federal Council to prevent the dissolution of the Diet;[2] and the power of the Federal Council to cause its own assembly.[3] It results from the first of these limitations that the Diet has a constitutional power of independent re-assembly thirty days after an adjournment by Imperial order, and that it is under no legal obligation to obey a command of the Emperor to adjourn for a second time during the same session. The second limitation deprives the Emperor of arbitrary power over the tenure of the members of the Diet, and makes it presumable that no dissolution will be undertaken without good and sufficient cause. In fact, the Diet is dissolved by the Federal Council rather than by the Emperor. The third limitation makes it obligatory upon the Emperor to call the Federal Council when this is demanded by one-third of the voices in that body.

7. *The Principle of the Quorum.*

The constitution fixes the quorum of the Diet at the majority of the legal number of members.[4] On the other hand, the constitution makes no provision whatsoever in regard to the quorum of the Federal Council. Some of the commentators conclude from this that, if proper notice has been given to the members, the presence of the president of the Federal Council or his substitute at a meeting of this body is all that is necessary to make it competent to do business.[5]

8. *The Internal Organization of the Legislative Bodies.*

The constitution vests in the Diet the power to determine finally upon the election of its members, to choose all its own

[1] Reichsverfassung, Art. 26.
[2] *Ibid.* Art. 24.
[3] *Ibid.* Art. 14.
[4] *Ibid.* Art. 28.
[5] Von Rönne, Das Staatsrecht des deutschen Reichs, Bd. I, SS. 204, 205.

officers, to frame its own rules of procedure and to regulate its own discipline.[1] The Diet is thus made independent of any other parts of the government in respect to these matters. It is, however, limited by two provisions of the constitution, *viz;* that the sessions of the Diet shall be public, and that true reports of the proceedings of the Diet in public sittings shall not subject the reporter to prosecution. The language of the two provisions may be so construed as to deny to the Diet any power, upon any occasion, to hold a secret sitting, and it may be so construed as to allow it in exceptional cases. The commentators do not agree in their interpretations. Schulze holds that it is a general principle of parliamentary law that, under certain circumstances, a legislative body may hold secret sittings, even though publicity of procedure be the general rule; and he declares that this view is recognized in the second of these provisions, which, in ordaining the freedom of publication of the public sittings, implies that there may be secret sittings.[2] Laband, on the other hand, holds that the common law of parliamentary procedure upon a given point cannot be followed against a plain mandate of the constitution, and that the language of the second provision refers not to possible secret sittings of the Diet, but to the sittings of the commissions and divisions of the Diet.[3] Laband also claims that in the exercise of its discipline, the Diet cannot expel a member.[4] The Diet undoubtedly has the power to commit one of its own members or an outsider for contempt.

On the other hand, the Federal Council does not enjoy the same constitutional independence over against the executive department of the government. The constitution makes the Chancellor of the Empire, appointed by the Emperor, the

[1] Reichsverfassung, Art. 27.

[2] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 85.

[3] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 323.

[4] *Ibid.* Bd. I, S. 316.

president of the Federal Council, and gives the Chancellor the power to designate his substitute, in his own absence, from among the members of the Council. In the "Schlussprotokoll" to the agreement between the North German Union and Bavaria concerning the admission of the latter into the union, is contained the assurance from the representative of the Prussian King that, in case Prussia should be prevented from occupying the presidency of the Federal Council, the Bavarian government would be regarded as succeeding to that right.[1] Laband interprets this as meaning that the Chancellor in designating his substitute as presiding officer of the Federal Council must prefer the members from Bavaria before those from any other commonwealth, except Prussia.[2] If the Chancellor should fail to make a substitution, I suppose that the Bavarian representative might take the chair by virtue of this agreement. If the Chancellor should be absent having designated no substitute, and no representative from Bavaria should be present, then the body would be compelled either to elect a presiding officer or to separate because of incapacity to organize. I do not find this exigency provided for by the organic law or treated by the commentators. From the standpoint of political science I should say that under such circumstances, the power of the Council to elect its presiding officer ought certainly to be recognized.

Moreover, the constitution virtually appoints three of the five members of the committee on foreign affairs in the Federal Council by ordering that Bavaria, Saxony and Württemberg shall always have seats therein; and it also virtually appoints the chairman of this committee by ordering that the chairmanship shall belong to Bavaria.[3] It also virtually appoints one member of the standing committee for the

[1] Bundesgesetzblatt, 1871, S. 23.
[2] Das Staatsrecht des deutschen Reiches, Bd. I, S. 255.
[3] Reichsverfassung, Art. 8.

army and fortifications by ordering that Bavaria shall always have a seat therein.[1]

Again, the constitution vests in the Emperor the power to appoint all the members of this committee (on the army and fortifications), except the Bavarian member, and all the members of the standing committee for the navy.[2]

Lastly, the constitution limits still further the power of the Federal Council over its own internal organization by commanding the forming of seven standing committees in that body, *viz;* for the army and fortifications, for the navy, for customs and taxation, for commerce and intercourse, for railroads, post-office and telegraph, for the judiciary and for the exchequer; and it ordains that, in each of these committees, at least four commonwealths besides Prussia shall be represented, and that each commonwealth shall have but one voice in these committees.[3]

The constitution contains no further provisions in reference to the election of officers or the power to determine rules of procedure and discipline. We must conclude that all residuary powers of this nature belong to the Federal Council. We must go upon the presumption that every legislative body has all the powers recognized by the universal principles of parliamentary law, unless the constitution or the statutes direct otherwise. The Federal Council has assumed these powers, and nobody has disputed its exercise of them.[4]

9. *The Mode of Legislation.*

The constitution vests the power of initiating legislation exclusively and equally in the Federal Council and the Diet.[5] That is, the Emperor has no power to initiate legislation. He may, as King of Prussia, cause his representatives in the Federal Council to do so, but that is another thing. The

[1] Reichsverfassung, Art. 8. [2] *Ibid.* [3] *Ibid.*

[4] Von Rönne, Das Staatsrecht des deutschen Reichs, Bd. I, S. 208.

[5] Reichsverfassung, Art. 5.

proposition signifies, further, that either the Federal Council or the Diet may originate a project of law upon any subject falling within the domain of Imperial legislation as marked out by the constitution. The Diet is not favored above the Federal Council in regard to financial legislation, nor the Council above the Diet in regard to other subjects of legislation. By project of law, in this connection, I intend statute law, as distinguished from propositions for constitutional amendment. I have already explained the functions of these two bodies in reference to the latter subject.

The constitution expressly declares that *each member* of the Union may originate projects of law in the Federal Council, and that the president is obliged to submit the same to deliberation.[1] By the phrase "member of the union" is not meant each individual person who may sit in the Federal Council, but each commonwealth represented therein. The project, of course, must be moved in the Federal Council by a representative of the commonwealth, or, more properly, by *the* representative of the commonwealth in that body; *i.e.* where a commonwealth sends more than one person to the Council, the one who introduces the proposition acts for the others in their common capacity as bearers of the instructions of the commonwealth.

The constitution confers no such right upon any member or group of members in the Diet. It leaves that wholly for the Diet to determine in its rules of procedure. The Diet requires for every project the preliminary support of fifteen members. It allows changes of the project to be proposed before or during the second reading by any member; but during the third reading it requires for such proposals of change the preliminary support of thirty members.[2]

The constitution provides, further, that the resolutions of the Federal Council upon projects of legislation shall be pre-

[1] Reichsverfassung, Art. 7, § 2.

[2] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 534.

sented to the Diet in the name of the Emperor and in the form in which they shall have been passed in the Federal Council, and shall be supported before the Diet by members of the Federal Council or by commissioners appointed by the Council.[1] This provision is held by the commentators to mean that the Emperor has no power to pocket the resolutions of the Council or delay unreasonably their presentation to the Diet or change in any manner their contents.[2] Laband contends, however, that the Emperor has the constitutional power to determine whether the resolutions of the Federal Council have been passed by that body in the manner prescribed by the constitution, and if, in his opinion, they have not, to refuse their transmission to the Diet. To this end he may not only inspect the formulæ, signatures and attestations necessary to perfect the resolutions, but may examine, and base his determination upon, the contents of the resolutions. For example, if the Federal Council should pass a resolution and clothe it with all the proper and legal forms, signatures and attestations, and deliver it to the Emperor or his representative to be transmitted to the Diet, and the Emperor, upon examining the contents of the resolution, should determine that it involved a change of the constitution, and should find that as many as fourteen voices had been cast against its passage, he may refuse to transmit it to the Diet, and it therewith fails.[3] I cannot reconcile this proposition with the doctrine held by the same jurist that the Federal Council is the sovereign in the Empire, even when acting in ordinary legislation. If its own interpretation in regard to the character of the projects which it sends to the Diet is not final, I do not see what becomes of its alleged sovereignty.

The constitution provides, further, that for the passage of a

[1] Reichsverfassung, Art. 16.

[2] Laband, Das Staatsrecht des deutschen Reichs, Bd. I, SS. 536, 537.

[3] *Ibid.* Bd. I, S. 537, Anmerkung.

law the agreement of the Federal Council and Diet, by a simple majority vote in each body, is necessary and sufficient.[1] This is the general principle. It excludes the veto of the Emperor upon legislation. There is, however, one exception to this principle, *viz;* that the Prussian representation in the Federal Council — which means the Prussian King — has an absolute veto upon all projects in reference to the military and naval system and the Imperial taxes.[2] There is also one modification of the principle, *viz;* that in voting upon the projects in reference to subjects which do not by the constitution affect all the commonwealths, only the voices of the commonwealths affected shall be counted in the Federal Council.[3] For example, Bavaria is not affected by the Imperial taxation of domestic spirits and beer. When this subject is being voted upon in the Federal Council, the Bavarian voices are, therefore, not to be counted.

The constitution also directs that, in case of a tie in the Federal Council in voting upon any subject, the voice of the Prussian representation shall be decisive.[4] I have already stated that the vote of each commonwealth in the Federal Council must be solid.

The commentators, Laband, Meyer, Zorn and Schulze, have undertaken, upon the basis of a distinction between the process of fixing the contents of the law and the act of attaching the sanction to the law, to demonstrate that, after all, the Federal Council alone is the lawgiver in the Imperial system, since it alone has the power to attach the sanction.[5] They profess to find the constitutional warrant for this position in Article 7, paragraph 1, which reads that the Federal Council may resolve upon projects to be laid before the Diet, and upon

[1] Reichsverfassung, Art. 5, § 1, and Art. 28.

[2] *Ibid.* Art. 5, § 2. [3] *Ibid.* Art. 7, § 4. [4] *Ibid.* Art. 7, § 3.

[5] Laband, Das Staatsrecht des deutschen Reichs, Bd. I, S. 538 ff; Meyer, Lehrbuch des deutschen Staatsrechtes, S. 413; Zorn, Das Reichs-Staatsrecht, Bd. I, S. 111 ff; Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, SS. 117, 118.

projects passed by the Diet and laid before it (the Council). It seems to me that an unprejudiced mind would find in this expression only the right to initiate legislation and to pass upon the projects initiated by the other legislative body. The older commentators, Westerkamp and von Rönne, did not find any further meaning in it.[1] Moreover, I cannot reconcile the above doctrine with the actual practice. The sanction is defined by these commentators to be the attachment of the formula of command to the bill. "Sanction ist Ertheilung des Gesetzesbefehls."[2] Now, every law which has yet been passed by the Imperial government has had its formula of command attached to it expressly by the Emperor. This is the exact transcript: "Wir . . . von Gottes Gnaden Deutscher Kaiser, König von Preussen zc. verordnen hiermit im Namen des deutschen Reichs, nach erfolgter Zustimmung des Bundesraths und des Reichstags, was folgt." If it be the attachment of this formula that designates the lawgiver, then the Emperor, not the Federal Council, is the sole Imperial lawgiver. This line of reasoning has not escaped the notice of these commentators. They have undertaken to break its force by simply asserting and undertaking to demonstrate that the formula used in practice is erroneously expressed, and does not correspond with what they claim to be the legal relation of the different bodies participant in the act of legislation. They labor to show that this act of attaching the formula of command is a substantial and discretionary, not a merely formal and necessary act; and that the authority to attach it is not to be found under the power vested in the Emperor by the constitution, to promulgate the laws.[3] We know, however, that the Emperor alone, in the act of promulgation, attaches the formula of command. As a fact, no distinction is discoverable, in the text of a law,

[1] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. I, S. 239.
[2] Zorn, Das Reichs-Staatsrecht, S. 111.
[3] Reichsverfassung, Art. 17.

between sanction and promulgation. We know, still further, that promulgation is not merely publication. The constitution provides for publication as something following promulgation.[1] Moreover, these very commentators find in the Emperor's prerogative of promulgation a discretionary power to look into the contents of any measure passed by the Federal Council and the Diet, and to determine whether, in his opinion, it be constitutional, and if not, to refuse to promulgate it.[2] To an American jurist, accustomed to the simple formula, "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled," — a formula attached, as a matter of course, to any measure which the two houses shall have agreed to establish as law, — all these attempted substantial distinctions between the agreement upon the contents of the project, the attaching of the formula of command, and the promulgation, appear very labored. They appear to be a juristic attempt to give the Federal Council a position of power unwarranted by the text of the constitution, the history of its formation, or the actual relations of the political society of the German state.

[1] Reichsverfassung, Art. 17.

[2] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 549 ff.

CHAPTER IV.

THE CONSTRUCTION OF THE FRENCH LEGISLATURE.

1. *The General Principle of Legislative Organization.*

The constitution establishes the bicameral system with substantial parity of powers in legislation.[1] The one inequality is to be found in the provision that the projects of law respecting the finances must be presented *first* to the Chamber of Deputies.[2] This means that all the measures of finance, when not originated by the executive, must proceed from the Chamber of Deputies, and when originated by the executive must be laid *first* before the Chamber of Deputies, and passed by it before they can be presented to the Senate.

There is no question that the Senate has the power to reject *en bloc* the money bills passed by the Deputies. The only question is whether the Senate may amend them. The constitution makes no provision upon this point. The Senate, however, has asserted the power to strike out or decrease a tax or an appropriation; to increase either; and to restore a credit asked for by the executive, but stricken out by the Deputies.[3] I am not aware that the Senate has ever inserted a new tax or appropriation; *i.e.* one contained neither in a bill originated by the Deputies nor in an executive proposal submitted to the Deputies. We may say, I think, that the Senate has claimed and exercised full power of amendment over the money bills, but that the Deputies have always

[1] Loi constitutionnelle, du 25 février, 1875, relative à l'organisation des pouvoirs publics, Art. 1, § 1.

[2] Loi constitutionnelle du 24 février, 1875, relative à l'organisation du Senat, Art. 8.

[3] Lebon, Das Staatsrecht der französichen Republik, S. 71.

disputed this power and have always expressly reserved the principle, while, in many cases, acceding to the specific changes made by the Senate.[1]

The regular period of mandate in the Chamber of Deputies is four years, and the change of mandates is total. In the Senate, on the other hand, the period is nine years, and the change gradual, by thirds. These two points, however, are not regulated by constitutional law, but by ordinary statutes.[2]

2. *The Sources from which the Legislature proceeds.*

The constitution provides that the Chamber of Deputies shall be chosen by universal suffrage, under the conditions and in the manner fixed by statute.[3] There existed at the time of the establishment of the constitution a statute which defined universal suffrage to be the suffrage of all male citizens of France twenty-one years of age.[4] This statute of 1874 is referred to and incorporated in the general statute regulating the election of the members of the Chamber of Deputies.[5] This latter statute requires as additional qualification only a residence, for the six months immediately previous to the election, in the commune in which the person offers his vote.[6] Neither the constitution nor the statutes prescribe any disqualifications, but an Imperial decree of February 2, 1852, is still law upon this subject. It disqualifies all persons condemned to the loss of their civil or political rights; all who have been specially forbidden by the courts to exercise the suffrage; all persons condemned for larceny, fraud, cheating, abuse of confidence, embezzlement of public money, vagabondage, mendicancy; those subject to guardianship; those declared in bankruptcy, etc.

[1] Lebon, Das Staatsrecht der französichen Republik, S. 71.

[2] Loi organique du 30 novembre, 1875; Loi du 9 décembre, 1884.

[3] Loi constitutionnelle du 25 février, 1875, relative à l'organisation des pouvoirs publics, Art. 1, § 2.

[4] Loi du 7 juillet, 1874.

[5] Loi organique du 30 novembre, 1875, sur l'election des Députés, Art. 1, § 1°.

[6] *Ibid.* Art. 1, § 2°.

The constitution makes no provision in reference to the time, place and manner of holding the elections for the members of the Chamber of Deputies, except in the case of a dissolution of the Chamber by order of the President. In that case, the constitution requires the holding of the elections within two months from the date of the dissolution.[1]

The constitution makes no provision whatsoever in regard to the source or sources out of which the Senate shall proceed. This subject is therefore now regulated wholly by statute. It was otherwise in the original constitution. The constitution of 1875 provided in very minute detail for the production and construction of the Senate, but an amendment of the year 1884 abolished the first seven articles of the constitutional law of 1875 relative to the organization of the Senate.[2] The statute which takes the place of these constitutional provisions was enacted December 9, 1884, and ordains that the senators shall be chosen by electoral colleges in the several départements. These colleges consist of the members of the Chamber of Deputies elected from the particular *département*, the councilors of the *département*, the councilors of the *arrondissements* in the *département*, and representatives chosen from each *commune* in the *département* by the board of councilors of the *commune*.[3] The number of representatives from each commune in the departmental college is based upon the number of councilors of the particular commune, and the number of councilors of each commune is based, in some degree, upon the population of the commune.[4] The councilors of the départements, the arrondissements and the communes are elected by universal suffrage, as are the members of the Chamber of Deputies from the départements; so that we may say the Senate now proceeds from universal suffrage and indirect vote. This construction of the Senate

[1] Loi constitutionnelle du 13 août, 1884, Art. 1, § 2.
[2] *Ibid.* Art. 3.
[3] Loi du 9 décembre, 1884, Art. 6.
[4] Lebon, Das Staatsrecht der französischen Republik, S. 62, Anmerkung 3.

may, however, be changed at any time by another statute. The existence and powers of the Senate still rest upon constitutional law, but not its composition. The time, place and manner of holding the senatorial elections are also subjects of ordinary legislation and have no rightful place in a work strictly devoted to constitutional law. The statute of 1884 reserved the terms and tenures of the senators elected under the constitutional provisions previously in force;[1] but this again is only a statutory reservation and may be changed by a simple legislative act at any moment.

The constitution vests in each chamber the power to determine finally questions of disputed elections and makes each chamber the only body to which the resignation of its members can be offered.[2]

3. *The Principle of Representation.*

The constitution makes no provision on this point as to either chamber. The matter is therefore regulated wholly by ordinary statute. The general principle distributes the representation in both chambers according to population, although, in both chambers, territorial considerations are taken into account. France is divided, for the purposes of administration, into 87 *départements*. The colonies of France are divided into 10 *départements*. The *départements* are again divided into *arrondissements* to the number of 573. These latter divisions contain, as nearly as is convenient, equal populations, and are the basis of the representation in the Chamber of Deputies, one deputy being chosen from each arrondissement. This is what is called in France *le scrutin d'arrondissement*. The whole number of deputies is 573.[3]

On the other hand, the statute regulating the distribution of the representation in the Senate[4] takes the département

[1] Loi du 9 décembre, 1884, Art. 1, § 2.
[2] Loi constitutionnelle du 16 juillet, 1875, Art. 10.
[3] Almanach de Gotha, 1890, p. 696.
[4] Loi du 9 décembre, 1884, Art. 1.

for its territorial basis. The départements differ very widely from each other as to population; consequently the number of senators assigned to each département differs in somewhat the same ratio. One département elects 10 senators; one elects 8; ten départements elect 5 each; twelve elect 4 each; fifty-two elect 3 each; ten elect 2 each; eight elect 1 each. Four of the ten colonial départements are not represented in the Senate at all.

The voting in the electoral colleges of the départements is according to the principle of *scrutin de liste* or *scrutin de département; i.e.* each one of the electors votes for as many persons as are to be chosen at the election from the département. The fact, however, that the senatorial terms expire by thirds makes the election of but a single person necessary or possible at any one time in the majority of the départements. The number of senators is fixed by this statute at 300.

Lastly, the constitution contains no provision in regard to the question whether the members of the legislative chambers are bound by instructions from their constituents. There is a statute which declares that the members of the Chamber of Deputies are not,[1] but I find no statute even which guarantees the like independence to the members of the Senate. We may say, however, that custom has established the principle of uninstructed representation in both cases.

4. *The Qualifications of Members.*

The constitution makes no provision whatever upon this subject. It is therefore left entirely to statutory regulation.

By statute every voter is declared to be eligible to membership in the Chamber of Deputies who shall have reached the age of twenty-five years;[2] *i.e.* shall have completed his twenty-fifth year on or before the day of his election.

By statute, citizenship, the attainment of the fortieth year

[1] Loi organique du 30 novembre, 1875, Art. 13.
[2] *Ibid.* Art. 6.

and full enjoyment of civil and political rights are made the qualifications for membership in the Senate.[1]

These statutes prescribe also certain disqualifications in addition to those implied as negations of the above-mentioned qualifications. They disqualify the members of the families who have reigned in France from seats in either chamber.[2] They disqualify military persons in active service, either in the army or the navy, from seats in either chamber;[3] except that, in the case of the Senate, the marshals, the admirals, the staff-officers remaining in the active service beyond the period required by law but having no command, the staff-officers of the reserve, the members of the territorial army and military persons generally who belong to the reserve, even though they may be doing actual service, are admitted to seats;[4] and except that, in the case of the Chamber of Deputies, the members of the territorial army and of the reserve of the home army, even though they may be doing actual service, are admitted to seats.[5] These statutes further disqualify from seats in either house all persons holding at the time of election, or having held within six months previously, high office in the judicial administration or in any branch of the civil, educational or ecclesiastical administration, which would enable them to exercise an undue official influence upon their own elections.[6] Finally, these statutes disqualify from seats in either chamber persons holding any salaried office whatsoever.[7] Excepted from this rule, however, are the ministers, under-secretaries of State, ambassadors and plenipotentiaries; the prefect of the Seine, the prefect of

[1] Loi du 9 décembre, 1884, Art. 4.

[2] Loi du 16 juin, 1885, Art. 4; Loi du 9 décembre, 1884, Art. 4, § 2.

[3] Loi organique du 30 novembre, 1875, Art. 7; Loi du 9 décembre, 1884, Art. 5.

[4] Loi du 9 décembre, 1884, Art. 5, § 2.

[5] Loi organique du 30 novembre, 1875, Art. 7, § 4.

[6] *Ibid.* Art. 12; Loi organique du 2 août, 1875, Art. 21.

[7] Loi organique du 30 novembre, 1875, Art. 8; Loi du 9 décembre, 1884, Disposition transitoire.

the police, the first president of the Court of Cassation, the first president of the Court of Accounts, the first president of the Court of Appeals at Paris, the *procureur général* of the Court of Cassation, the *procureur général* of the Court of Accounts, and the *procureur général* of the Court of Appeals at Paris, the archbishops, bishops, presidents of consistorial bodies, the grand rabbis, the university professors and temporary incumbents generally.[1] These officials may be chosen to the Senate and take their seats without resigning their offices, and persons already holding seats in the Senate may accept such offices without resigning or vacating their seats. These officials may also be chosen to the Chamber of Deputies and may take their seats without resigning their offices. If, however, a member of the Chamber of Deputies be appointed to one of these offices and accepts the appointment, he thereby vacates his seat; but he may be re-elected and, after re-election, may hold the office and the mandate at the same time. The ministers, under-secretaries of State and persons holding any office temporarily, *i.e.* for a term of not more than six months, are excepted from this requirement. They may hold mandate and office at the same time without re-election.[2]

Each chamber, however, is vested by the constitution with the ultimate power to pass upon the eligibility of its members.[3]

5. *The Rights and Privileges of Members.*

The constitution provides that no member of either chamber shall be arrested or tried during the legislative session upon a charge of crime or misdemeanor, save by authority of the chamber to which he may belong, unless he be taken in the commission of the act; and that a member under arrest or on

[1] Loi organique du 30 novembre, 1875, Art. 8, § 3, Art. 9; Loi du 9 décembre, 1884, Disposition transitoire.

[2] Loi organique du 30 novembre, 1875, Art. 11.

[3] Loi constitutionnelle du 16 juillet, 1875, Art. 10.

trial, at the opening of a session, must be liberated and his trial suspended during the continuance of the session upon the demand of the chamber to which he may belong.[1] The constitution provides, further, that no member of either chamber shall be prosecuted or in any manner held legally responsible for the opinions he may express or the votes he may give in the exercise of his legislative functions.[2]

The constitution does not give the members of either house the right to payment for their services. The statutes do; but that does not make the principle of compensation a constitutional principle.

6. *The Assembly, Adjournment, Prorogation and Dissolution of the Legislature.*

The constitution vests in the legislature the power of self-assembly, but fixes the day upon which the assembly for the regular session of the year shall take place, *viz;* the second Monday in January of each year.[3]

The constitution further requires that the legislature shall remain in session for at least five months of each year, and that the session shall open and close for both houses at the same time.[4]

The constitution also vests in the legislature the power to move the President to call an extra session of the legislature, by making it obligatory upon him to do so when it shall be demanded by an absolute majority of the members of each chamber. The demand, however, must be made between sessions, not simply during the period of an adjournment.[5]

The power of adjourning from day to day and for short periods during the session is exercised by each chamber, although no express warrant for the practice is to be found in the text of the constitution. The constitution vests in the President the power of adjournment, but limits the same, as

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 14. [2] *Ibid.* Art. 13.
[3] *Ibid.* Art. 1, § 1. [4] *Ibid.* Art. 1, § 2; Art. 4. [5] *Ibid.* Art. 2.

to duration, to one month and, as to number of adjournments, to two.[1] The chambers may therefore reassemble at the end of the month without any call from the President and may disregard a third order of the President to adjourn during the same session.

The chambers have no power to prorogue themselves; *i.e.* to close their session. I mean they have no direct power to do so; but the fact that the President exercises this power through a ministry responsible to the Chamber of Deputies, gives that chamber the indirect power to secure the termination of a session after the five months required by the constitution shall have expired.

It may be said, of course, that the Chamber of Deputies may also, in this manner, cause the dissolution of the legislature. It must be remembered, however, that for dissolution the President must have the consent of the Senate.[2] The subserviency of the ministers to the will of the Chamber of Deputies does not alone suffice to secure dissolution.

7. *The Principle of the Quorum.*

The constitution has nothing to say in regard to the principles of the quorum and majority in the process of legislation. It fixes the majority necessary in each chamber to proceed to a revision of the constitution.[3] It fixes the majority necessary in the National Assembly to revise the constitution and elect the President.[4] It fixes the number of members of each chamber who may require of the President the convocation of the legislature.[5] It fixes the majority necessary to vote a public session in regard to a subject which has been considered in secret session.[6] In all of these cases it fixes the majority at one more than the half of the legal number of voices. This is what I term the absolute majority. From

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 2, § 2.
[2] Loi constitutionnelle du 25 février, 1875, Art. 5, § 1.
[3] *Ibid.* Art. 8, § 1. [4] *Ibid.* Art. 8, § 3; Art. 2, § 1.
[5] Loi constitutionnelle du 16 juillet, 1875, Art. 2, § 1.
[6] *Ibid.* Art. 5, § 3.

these precedents, we might possibly conclude that the constitution intends the principle of the absolute majority in the passage of ordinary laws. We might, on the other hand, conclude that these cases are intended as exceptions to the general principle of parliamentary law that the quorum is the absolute majority of the legal number of voices, and that the majority of those voting, a quorum being present, is sufficient to pass a project of law. The French chambers have apparently interpreted the constitution as leaving to each of them the power to determine the principles of the quorum and majority according to its own discretion, except in the cases expressly reserved. I draw this conclusion from the fact that in practice they have adopted in some respects different principles; *i.e.* they have not followed, in all respects, the general principles of parliamentary law.

The Chamber of Deputies requires for a quorum that one more than the half of the legal number of members shall be present. The Senate requires that one more than the half of the legal number of members shall not only be present, but vote upon the question. Both chambers require one more than the half of those voting to pass the project. A tie is counted in the negative. In neither chamber is a quorum necessary for discussion, but only for voting.[1]

8. *The internal Organization of the Legislative Chambers.*

The constitution accords to each chamber the power to elect its bureau of officers, and declares that the term of these officers covers the regular session at the beginning of which they are chosen, and any extraordinary sessions which may be called before the opening of the next regular annual session.[2] The constitution also accords to each chamber the power to determine its own rules of procedure and discipline. It does not expressly vest these powers in the chambers. It simply limits them in two respects. We must conclude,

[1] Saint Girons, Manuel de droit constitutionnel, pp. 314, 315.

[2] Loi constitutionnelle du 16 juillet, 1875, Art. 11.

therefore, that it impliedly vests these powers under these express limitations. The limitations are, that the sittings of each chamber shall, as a rule, be open to the public,[1] but that a certain number of members in either chamber, the number to be fixed by the chamber itself in its rules of procedure, may demand that the chamber go into secret committee and that the chamber may yield to the demand;[2] and that the ministers shall at all times have the right to enter either chamber and shall be heard whenever they demand it.[3]

The constitution does not vest in the chambers, either expressly or by way of specific implication, a power to punish outsiders for contempt. As a result of general implication, however, we must conclude that each chamber possesses such a power, and can be divested of the power in question only by way of agreement with the other chamber; *i.e.* by the enactment of a law regulating this matter. Such a law, however, may be abolished in the manner of its enactment; *i.e.* at the pleasure of the two chambers. We find this implication in the principles that, in the French system, the constitution creates no domain of liberty for the individual against the government, and does not enumerate the powers of the legislature, and in the fact that the legislature has not deprived the individual chambers of this power recognized to all legislative chambers by the general principles of parliamentary law.

9. *The Mode of Legislation in the French System.*

Legislation may be initiated generally by either chamber,[4] or by the President through the ministry.[5] There is but a single modification of this principle, *viz;* that financial legislation must be considered and passed upon first in the Cham-

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 5, § 1.
[2] *Ibid.* Art. 5, § 2.
[3] *Ibid.* Art. 6, § 2.
[4] Loi constitutionnelle du 24 février, 1875, Art. 8.
[5] Loi constitutionnelle du 25 février, 1875, Art. 3.

ber of Deputies.[1] This provision of the constitution must be interpreted as placing the initiation of financial legislation in the President and in the Chamber of Deputies. The Senate cannot initiate such legislation. The Senate, however, claims and has exercised the power to amend all bills and projects of this nature. The Chamber of Deputies has denied this power to the Senate, in principle, in the extent claimed, but, in practice, has accepted many amendments imposed by the Senate upon the financial measures sent to it from the Chamber.[2]

All measures, wherever and however initiated, must be passed, in all parts, by both chambers, in order to their legal validity. The passage by both houses is, moreover, sufficient to give them legal validity; *i.e.* the President has no veto upon the acts of the legislature. Generally, he must promulgate all laws passed by the chambers within one month from the date of their transmission to him.[3] If either chamber declares urgency in promulgation, he must promulgate the law declared urgent within three days from the date of its transmission to him.[4]

Within these respective periods the President may, by a message giving reasons, demand a reconsideration of the measure or measures, and the chambers are bound by the constitution to give ear to the demand.[5] A repassage of the measures by the regular majority vote is sufficient, however, to overcome the President's objections. This power to cause reconsideration is thus not a veto power. It is certainly, however, a conservative provision, and has advantages without any corresponding disadvantages.

[1] Loi constitutionnelle du 24 février, 1875, Art. 8.
[2] Lebon, Das Staatsrecht der französischen Republik, S. 71.
[3] Loi constitutionnelle du 16 juillet, 1875, Art. 7, § 1.
[4] *Ibid.*
[5] *Ibid.* Art. 7, § 2.

CHAPTER V.

COMPARATIVE STUDY OF THE STRUCTURE OF THE LEGISLATIVE DEPARTMENT.

If now we compare the provisions of these four typical constitutions in regard to the construction of the legislative department, we shall find, in general, a substantial agreement, with some diversity, however, in regard to important details.

1. We may say that modern constitutional law has settled firmly upon the bicameral system in the legislature, with substantial parity of powers in the two houses, except in dealing with the budget; and that, in the control of the finances, a larger privilege is regularly confided to the more popular house; *i.e.* the house least removed in its origin from universal suffrage and direct election. The *occasion* of the establishment of the bicameral legislature may be different in the different states, but the *cause* is one and the same everywhere. The primary purpose of the legislature is to ascertain what the law ought to be; to determine, not what the will of the people commands, but what the reason of the people, the common consciousness, demands. The legislature must be so constructed as best to fulfil this purpose. Now the interpretation of the common consciousness is a far more difficult matter than the registry of the popular will. It requires research, reasoning, the balancing of opinions and interests, the classification of facts and the generalization of principles. A single body of men is always in danger of adopting hasty and one-sided views, of accepting facts upon insufficient tests, of being satisfied with incomplete generalizations, and of mistaking happy phrases for sound principles.

Two legislative bodies do not always escape these crude and one-sided processes and results, but they are far more likely to do so than is a single body. There is a sort of natural and healthy rivalry between the two bodies, which causes each to subject the measures proceeding from the other to a careful scrutiny and a destructive criticism, even though the same party may be in majority in both. In this conflict of views between the two houses lies in fact the only safeguard against hasty and ill-digested legislation when the same party is in majority in both houses. A disagreement between the majorities in such a case is far more likely, also, to lead to a deeper generalization of principle than when the struggle is between the majority and the minority in each house; since the majority in each house will be much more inclined to look into the real merits of the question in the former than in the latter instance, and will come to a decision far more independent of partisanship.

The necessity of a double, independent deliberation is thus the fundamental principle of the bicameral system in the construction of the legislature. A legislature of one chamber inclines too much to radicalism. One of three chambers or more would incline too much to conservatism. The true mean between conservatism and progress, and therefore the true interpretation of the common consciousness at each particular moment, will be best secured by the legislature of two chambers.

There is another reason for this system, which, though less philosophic, is fully as practical. It is that two chambers are necessary to preserve the balance of power between the legislative and executive departments. The single-chamber legislature tends to subject the executive to its will. It then introduces into the administration a confusion which degenerates into anarchy. The necessity of the state then produces the military executive, who subjects the legislature to himself. History so often presents these events in this sequence, that

we cannot refrain from connecting them as cause and effect.

The two chambers, on the other hand, are a support in the first place to the executive power, and therefore in the second place to the legislature. By preventing legislative usurpation in the beginning, the bicameral legislature avoids executive usurpation in the end.

The *occasion* of the adoption of the bicameral system in these different states was, undoubtedly, to secure the representation of diverse and possibly conflicting interests. The antitheses of peerage and commonalty, of monarchism and republicanism, of confederatism and nationalism, gave the occasion for establishing the bicameral legislative system in these different states. Such occasions, however, may change and wholly disappear without necessarily affecting the soundness of the principle. The *cause* remains, and can be removed only by such elevation of the culture and character of the legislative members as will render them unerring interpreters of the common consciousness without the help of opposition, and by such elevation of the culture and character of the constituencies as will lead them to elect only such persons to bear the legislative mandate. The disappearance of the peerage, of monarchism or of confederatism is then no sufficient reason for the abolition of the bicameral legislature. Its usefulness and necessity depend upon a different reason — a reason which will persist until the culture and character of mankind are so elevated as to make it of little consequence whether the legislature be composed of one chamber or a half-dozen.

Upon the same fundamental principle rests the different lengths of the legislative terms in the two houses. The short term and total change tend to produce a body too hasty in action, too prompt in innovation. The long term and gradual change, on the other hand, tend to produce a body too prone to adhere to precedents, too averse to striking out upon new

paths. Either alone would be likely to interpret but one side of the common consciousness. Either alone would be likely to destroy in the end the foundations of its own existence; for true conservatism requires the constant repair of the old, and true progress the constant adjustment of the new. The difference in the terms of the two houses makes the legislature a far more faithful interpreter of the consciousness of the state; preserves it from provoking revolution by holding too long to the forms of a past phase of social and political development, and from provoking reaction by a too sudden and radical formulation of the existing phase. The difference of terms, accordingly, rests both upon sound philosophy and successful practice.

The one exception to the parity of powers in the two chambers — the larger powers of the more popular chamber in financial legislation — is not contained at all in one of the four constitutions, and not in equal degree in the other three. This distinction arose originally, so far as these four states are concerned, in the British constitution, and was due to the fact that the constituencies (if we may so call them) represented in the upper house were largely exempt from taxation. Naturally, the representatives of those who paid the taxes came to be regarded as holding the exclusive power to vote the taxes and the expenditures. Where this cause of the discrimination fails, there is neither reason nor policy in the further maintenance of the discrimination. It is destructive, in the end, to the bicameral system. The chamber having the exclusive control of the purse will obtain control of legislation, and will finally reduce the other chamber to the position of a registering body. This result has been very nearly reached in the British legislature. There is no reason whatever for a discrimination of this sort in the legislatures of the United States and of France. Neither house in these bodies contains any member who represents an exempted constituency. It is true, however, that this discrimination is made,

in some degree, in the constitutions of the United States and of France. I think it rests in both cases upon an imitation of the English example. In France it has given rise to many serious struggles between the two chambers, which as yet have settled no principle. In the United States it has been largely ignored in practice. In the German system it disappears altogether. I think we must regard it as a fortuitous discrimination. It rests upon no sound philosophy. A sound philosophy would recommend that the state withdraw exemptions, and establish complete parity of powers between the two houses of the legislature. It is only thus that the full benefit of the bicameral system can be attained.

2. These four typical states are in substantial harmony upon the question of the source from which the lower houses of their legislatures proceed. In all four, the source is universal suffrage, or a suffrage very nearly universal. By universal suffrage is meant the suffrage of all resident loyal male citizens, of mature age, suffering no civil disability. In the qualifications established by the four states, we find differences of detail corresponding with the differences of history and environment; but in each the existing system is based upon the fundamental principle above stated. None of them, however, regards the suffrage as a private right of the individual, but as a public function conferred by the constitution upon certain individuals. None of them, therefore, regard the electorate as the source of the legislative power. The state, through the constitution, confers the legislative power. The electors simply designate the persons who shall participate in the exercise of the power.

The four systems which we have examined agree also in the mode of electing the members of the lower houses, at least so far as the general principles are concerned. These general principles are direct ballot, district ticket and relative majority. These principles have not been reached without considerable experiment with their opposites. The indirect

vote, the *viva voce* vote, the general ticket and the absolute majority have been tried again and again, in every form of combination, but have all, at last, been discarded as either vicious or impracticable. In the constitution of this chamber, the aim must be to bring the elected as close as possible to the original electors, and to secure an honest, independent and intelligent vote. The indirect vote creates too wide a separation between the original holders of the suffrage and the holders of the mandates in the lower house; the *viva voce* vote may deprive the voter of his independence, and is also impracticable where the number of voters is large. The general ticket subjects the voter too completely to the direction of the machine; and the requirement of the absolute majority, *i.e.* the majority of all voting or of all registered, is inconvenient and, in some cases, unattainable. Two of the four constitutions require for election in *first instance* a majority of all voting; but when this fails, one of the two constitutions accepts the principle of the plurality at the second election, and the other limits the voting, in the second election, to the two persons who shall have received the highest number of votes upon the first ballot. We may say, therefore, that decision by plurality is a general principle of the constitutional law of the present day in the election of the members of the lower house of the legislature.

In the construction of the upper houses, however, the same uniformity does not exist. No two of them proceed from the same immediate source. It may be said, however, that they all proceed from the same ultimate source. The British Lords of Parliament are all appointed by the Crown, either immediately or remotely. But at the present time the Crown issues the patent under the advice of the ministry, and the ministry is composed of the chiefs of the majority in the House of Commons and is responsible to that body. The members of the German Federal Council are appointed immediately by the executive heads of the commonwealths of the

Empire. These executive heads act under the advice of a ministry, the members of which are, in greater or less degree, responsible to the legislatures of the respective commonwealths. The members of the Senate of the United States are chosen immediately by the legislatures of the several commonwealths; and the members of the French Senate are chosen by a college of electors, chosen in part directly, and in part indirectly, by the original holders of the suffrage. It may, therefore, be said that the upper houses of all these legislatures proceed ultimately from the original holders of the suffrage.

They therefore differ from each other and from the lower houses rather in respect to the manner in which their members are chosen than in respect to the ultimate source of their mandates. The manner of their choice is, in all cases, indirect. The degree of indirectness varies, and the organs employed in the selection differ in number and in character. But the purpose of the indirect choice is the same in all cases, *viz;* to balance the radicalness of the direct popular choice by the conservatism of the indirect, without breaking away from the ultimate popular source of all the institutions of the modern state. The great and controlling purpose of every system for selecting legislative members is to discover and bring together the real political aristocracy of the state for the interpretation of the common consciousness of right and policy. The system of direct popular election has its virtues and its vices. It keeps the legislator in touch with the popular feeling, but, if not checked and neutralized, it tends to the production of demagogues and phrase-makers. On the other hand, the system of indirect choice may, if it be not skilfully regulated, produce an excessively conservative body. It may also produce a very weak body. Properly regulated, however, it is as likely, to say the least, to bring the true aristocracy to the front as is the direct system. Certainly the senators of the United States and of

France will not suffer by comparison with the members of the more popular chambers in these states. It can hardly be said that the methods of selecting the upper houses in England and Germany have proved so successful in practice as those of the United States and of France, although the membership of the House of Lords and of the Federal Council has been and is of high quality, and has generally manifested great legislative capacity. The difficulty with these bodies, when compared with the senates of France and of the United States, is simply that the immediate base on which they stand is narrower. The consciousness of this tends to produce a timidity which is highly detrimental to the development of legislative capacity. A Senate, for example, composed entirely of members appointed immediately by the executive, even though for a life term, is generally too much inclined to preserve an artificial harmony. The method of selection of its members is too one-sided. The hereditary principle gives great individual independence to the members as against each other, and as against the other governmental organs; but such a tenure tends to arouse popular hostility to the existence of the body, and membership in such a house appears to rest too much upon accident. Election by electors chosen by the original holders of the suffrage gives the broadest foundation for an upper house. This method of choice confers upon the legislators so chosen all the courage that direct election would give them, and provides most efficiently against crudeness, one-sidedness or accident.

A legislature composed of two houses, the one proceeding from direct popular election, the other from indirect, at one remove, ought among a fairly cultivated people to produce the most perfect legislation possible; because it is calculated to bring out the legislative talent of the state both on the side of progress and on that of conservatism, and to give it strength to act with courage and independence.

Upon the question of confiding to each house of the legis-

lature the ultimate power of determining the elections of its members, there is distinct disagreement between the English practice and the constitutional law of the other three states. The statutes of Parliament confer this power upon the courts. In this way a non-partisan decision is obtained in cases of contested elections; and the great difficulty is avoided of determining, when an election has completely renewed a legislative body, what members shall organize the house prior to the decision of conflicting claims to seats. Sound political science supports the English practice, and it is to be hoped and expected that it will, ere long, be universally adopted.

3. In regard to the principles of representation, there is more harmony in these four systems than is at first apparent.

In all four legislatures the distribution of the representation in the lower houses is made according to population. Some regard is paid to the permanent administrative or local governmental divisions; but the resultant modifications are concessions to convenience, merely, and do not represent any compromise of the principle of proportionality.

In all four legislatures the distribution of the representation in the upper houses is made with but little regard to the census of the population. In England and in the United States, no regard at all is paid to the principle of proportionality; in Germany, not much; in France, considerable. If there is any one controlling principle applicable to all these cases, it is the representation of local governmental organizations. In the Senate of the United States, this is the exclusive principle. In the German Federal Council, it is the dominant principle. In the French Senate, considerable regard is paid to the census of the population in determining the number of senatorial seats to be assigned to each *département;* but within the département the effect of this concession to proportionality is modified by a very great discrimination in favor of the less populous *communes* as regards the number

of representatives accorded them in the electoral colleges. In England alone no regard seems at present to be paid to local governmental or administrative organizations in the distribution of the seats in the upper house. If we look, however, to history, we shall find that the representation of England in the House of Lords was originally very closely connected with the local organizations; while the number of seats in that house now occupied by representative peers from Scotland and Ireland is fixed by statute, and is thus defended against the power of the Crown on the one side, and the accidents of extinction on the other. These statutes are based far more upon territorial considerations than upon the idea of proportionality.

We may say then, I think, that *the* principle controlling the distribution of seats in the upper houses of the legislatures of these typical systems is the representation of the local governmental or administrative organizations. This is a most valuable principle. It tends to preserve the real fruits of the historic development of the state. It gives opportunity for the exertion of a larger influence by the cultured minority; and it gives more security to the rights of that minority. Many of the greatest statesmen have been brought forward through the influence of this principle. The organizations which have not the strength of numbers have been compelled to search diligently for their best talent in order to maintain, in fact, their legal equality. The principle, however, is frequently assailed as mediæval and contradictory to the doctrine of popular sovereignty. From the view which we take of the province of legislation, *viz;* the interpretation of the reason of the state rather than the registration of the popular will, this objection appears irrelevant. Something more conclusive than the demand for proportionality must be adduced before we can be called upon to admit that this system of distributing representation is faulty. If the less populous community were always the more cultured, this

would certainly be a better distribution than the principle of numbers could afford. It is because the less populous community may chance to be also the less cultivated that the system is in some degree unreliable. It would not, therefore, serve as the exclusive system of distribution; *i.e.* the system for both legislative chambers. When, however, it is balanced by the principle of distribution according to population in the other house, there is every reason to believe that it contributes powerfully to the production of sound legislation, and that it is a most wholesome check upon the radical tendencies of mathematical politics.

Lastly, all four of these typical constitutions agree substantially upon the principle of uninstructed representation. The contrary principle is adopted in but a single case, *viz;* in that of the German Federal Council. Its universality in practice is strong proof of its soundness. From the standpoint of philosophy it is unassailable. As I have already said, legislation is the expression of the common consciousness of right and policy; the legislator is the interpreter of that consciousness; and he should always be chosen solely in view of his ability to interpret it correctly. Any duress upon his intellect and conscience will confuse them and destroy his powers of correct interpretation. The views of a constituency should always be taken into account as contributing to the make-up of the consciousness of the state, but the *will* of a constituency has no place in the modern system of legislative representation. Instructed representation is a legitimate principle in a system of confederated states. In such a system the confederate government is composed of members representing states, and acting as mere mouthpieces for the expression of the will of these states. The state consciousness is interpreted by other organs. Instructed representation is, therefore, one of the tests of confederatism. It marks the Federal Council, therefore, as a confederate institution. When the confederatism of the

German constitution shall be entirely overcome, instructed representation will disappear.

4. *Qualifications and Disqualifications of Legislative Members.*

This can hardly be treated as a topic of the constitutional law of either England or France, since the matter is regulated in both of these states by ordinary statutes. The German constitution also makes but scant provision upon the subject. That of the United States alone provides for it with any degree of fulness.

Citizenship, male sex, mature age, and residence somewhere, at least, within the country, appear to be the natural positive requirements of eligibility. The practice in all four of these states has very nearly settled down upon these as the necessary qualifications.

There is much more divergence in regard to disqualifications. The practice in all these states disqualifies insane persons, criminals, persons under guardianship, persons deprived of their civil rights or political rights, persons holding government contracts, etc. It is also the practice in all that the same person cannot at the same time be a member of both houses. This is expressly provided in the German constitution.

The chief divergence in the different systems is to be found in the principle of the incompatibility of office and legislative mandate. The constitution of the United States forbids wholly the combination of United States office and United States legislative mandate; *i.e.* it disqualifies any United States officer, either executive or judicial, from holding a seat in either branch of the legislature. The German constitution unseats any member of the Diet who is appointed to a salaried office, either in the Empire or in a commonwealth; but this disqualification may be removed by re-election subsequent to the appointment. The members of the Federal Council, acting always under instructions, are

of course unaffected, as to their legislative independence, by the holding of office at the same time with mandate. The English and French statutes and practice prohibit those officials from holding mandates whose official positions would give them an undue influence over their own elections, and disqualifies many others whose routine work would be interfered with by membership in the legislature, or rather whose legislative usefulness would be impaired by the requirements of their offices. Appointment to office of any sort regularly unseats a representative, but he may be re-elected after appointment. Naturally these restrictions do not apply to the House of Lords.

It will thus be seen that the United States has adopted a principle not recognized by the other states. In the system of the United States, office and mandate are made entirely incompatible by the constitution. In the systems of the other three states, it is evidently the view that the membership of certain officials in the legislature is a great aid to intelligent legislation. All agree, certainly, upon the desirability of the membership of the ministers. The French practice does not even require their re-election subsequent to appointment. The tendency of the French legislation, however, is towards the total exclusion of all officials except the ministers. This would not be so radical a solution of the question as that contained in the constitution of the United States, but it would be regarded in Europe as radical enough. And yet, if the rule obtaining in the United States were generally adopted, the ultimate result might be quite conservative. The American rule would make parliamentary government impossible, and might thus lead ultimately to the greater independence of the executive power, both in France and England.

The presence of the heads of the executive departments in the legislative chambers is, certainly, an advantage whenever the ways and means of administration are the subjects

of legislation; and if they are to be present, they should be members; otherwise they will fail to receive the rights and privileges necessary to the preservation of their dignity and independence.

I do not see that the membership of the ministers in the legislature necessarily leads to parliamentary government. If the constitution should provide that the ministers shall be politically responsible only to the executive head of the government, and should make the executive head independent of the legislature, and should vest in the executive head the means to prevent legislative encroachment upon the executive prerogatives, it seems to me that the membership of the ministers in the legislature would add to their independence rather than subtract from it. I do not feel sure that, while the systems of England, Germany and France show a tendency to approach that of the United States upon the subject of incompatibility between office and mandate in all respects except in the case of the ministers, the constitutional law of the United States may not be improved by adopting their principle in this case, so guarded, however, as to prevent the legislature from making such use of its powers over its own members as to encroach upon the domain of executive independence.

5. *Rights and Privileges of Members.*

There is direct and evenly balanced contradiction between these four systems upon the subject of the pay of members. Two, those of the United States and France, provide, the first by constitutional law and the second by statute, that the legislative members shall be salaried. The other two provide no pay for the members. The German constitution forbids it for the members of the Diet. Where the constitution permits or commands compensation, it is left to the legislature to fix the amount, time of payment, etc., by statute. We must conclude from this variety in the practice, that the question of compensation for legislative service is

as yet practically unsolved. There are strong considerations both for and against compensation. It is claimed that the system of gratuitous service in the legislature secures a better and more independent class of legislators, since only men of independent means can take such positions, and since men of independent means are most likely to be men of superior intelligence and integrity.

There is much to be said in criticism of this proposition. In the first place, there are many other ways for a legislator to make money out of his position than by a regularly fixed salary, paid out of the governmental treasury; and some of these ways are very crooked. In the second place, it is not at all sure that rich men will not pursue gain in these ways. The spirit engendered by money-getting is not infrequently one of insatiable avarice. Lastly, it is not at all certain that wealthy men are men of superior intelligence. There is no doubt that the successful management of private business is good evidence of superior intelligence. The inheritance of wealth, however, furnishes no necessary evidence of superior intelligence. It gives the fortunate young man great opportunities, if he will but use it correctly. It must not be forgotten, however, that it furnishes him with the means of indulgence and dissipation, inducing habits of life far more hostile to mental and moral improvement than are the disabilities of poverty.

On the other hand, it is claimed that moderate salaries for legislative service will secure a better and more independent class of legislators; since men of intelligence and integrity, whether possessing independent means or not, will be enabled to take these positions, and since all temptation to employ questionable means for gaining a livelihood while in the service of the state will be removed.

This seems to me the stronger consideration. But it cannot be gainsaid that the attachment of any salary to legislative service is calculated to excite the cupidity of per-

sons who have no qualifications as legislators, and to make legislative seats pecuniary prizes to be grasped at, rather than posts of responsibility to be conferred only upon those best fitted to fill them; nor is it certain that a fair compensation will always deter men from pursuing additional gain through tortuous paths. If the illicit means of legislative compensation should be cut off, by restraining the legislature from entering the domain of private business, a moderate salary for legislative service would not only be fair, but, it seems to me, would be calculated to secure better talent and to preserve a higher integrity among legislators. It would enable the constituencies to select from a wider range and it would remove, at the same time, the remaining causes of temptation. It would enable the state to escape the necessity of identifying its governmental aristocracy with its wealthy class; *i.e.* it would enable the state to avoid becoming a plutocracy. Finally, it would do justice to the principles of democracy, as against the reign of class.

The four systems agree in providing, by constitutional law and custom, the privilege of freedom from arrest for the members of the legislature during the session and for a reasonable period before and subsequent to the same. It will be observed that this privilege is in no case absolute. In the systems of England and the United States, the member may be arrested upon charge of the commission of an indictable offence. In those of Germany and France, he may be arrested, if taken in the commission of the crime or misdemeanor or immediately afterwards; and, by consent of the chamber to which he may belong, he may be arrested at any time. It seems to me that, in these divergences of detail, the better reason is with the practice of England and the United States. The individual member is possibly not so widely privileged from arrest as in the other two systems, but he is certain of his privilege so far as it extends, and the extent

of the same is also certain and fixed. The principle of the other two systems is doubly liable to abuse. The public may be made to suffer if the chambers see fit to shelter dangerous characters; and, on the other hand, the minority in a chamber, finding itself accidentally in majority, might procure and permit the arrest of members of the majority for party reasons.

Lastly, the four constitutions agree in providing that the legislative members shall have perfect liberty of speech and debate in the chambers and in the committee rooms of the legislative bodies; *i.e.* that they shall not be held responsible for their words in these places when discharging their legislative duties, except by the house to which they may belong. The fullest and most complete ventilation of every plan, object and purpose is necessary to wise and beneficial legislation. This could never be secured if the members should be held under the restraints imposed by the law of slander and libel upon private character. There is no doubt that this privilege may be grossly abused, since every word used in debate, and frequently something more, is now reported to the public; but the danger to the general welfare from its curtailment is far greater than that to individuals from its exercise. The German constitution seeks to privilege the legislative member in his public character against insult; and the French Deputy Chamber has just passed a bill to the like effect. This is carrying the privilege of members too far. If representatives may say anything they will against private character in the chambers, without fear of prosecution under the law of libel and slander, it seems to me only fair that other persons should be allowed to say anything they will about the representatives under the restrictions imposed by that law. Respectfulness both in word and attitude toward those holding governmental powers is very desirable; but there is only one way in which these persons can really command respect, *viz;* by blameless conduct.

6. *The Powers of the Legislature over its own Assembling, Opening, Adjournment, Prorogation, and Dissolution.*

In regard to this subject, the law and practice of the United States government differ quite radically from those of the other three governments. The constitution of the United States requires the annual assembly of the legislature upon a day fixed by the constitution, but subject to change by statute. The constitution also empowers the executive to call extra sessions and to adjourn the legislature when the two chambers of that body cannot themselves agree upon the time of adjournment. The constitution fixes, finally, the time of dissolution of the legislature at the expiration of the mandates of the members of the lower house. Everything further is left to the legislature as a whole, or to the separate houses. That is to say, the legislature of the United States has, under the constitution, the powers of self-assembly, self-opening, self-adjournment, and self-prorogation or close of session. The executive cannot as a rule interfere in any of these matters.

In the English system, on the other hand, the legislature cannot accomplish any of these things independently, except mere temporary adjournment. The Crown calls, opens, adjourns, prorogues, and dissolves the legislative bodies. The Crown does so, indeed, under the influence of the ministers, and the ministers are supposed to represent the will of the majority in the Commons; but the Crown may legally act in respect to these things under the advice of a ministry which has lost the leadership in the House of Commons. Legally, therefore, it is the Crown which does all these things. Actually, it is the House of Commons which prompts the Crown to act.

The German and French systems strike, legally, the mean between those of England and the United States. They accord to the legislature more control over its own sessions than does the English custom, but less than does the con-

stitutional law of the United States; and where they vest powers in the executive in regard to these matters, they either prescribe the manner in which the powers shall be exercised, or require the joint action of the executive and of one branch of the legislature in their exercise.

If any principles touching these matters can be said to be established in the general practice, they are as follows: non-permanence in the legislature; general periodicity of assembly, either by order of the constitution or according to the necessities of government; and substantial self-control in the legislature, modified only by such power of executive interference as will keep the legislature in touch with the constituencies, prevent its neglect of duty and check too violent conflicts in the houses.

7. *The Principle of the Quorum.*

This topic is made a subject of constitutional provision in regard to but three of the eight legislative houses whose construction we are analyzing, *viz;* the Senate and House of Representatives of the United States, and the Diet of the German Empire. In the other five cases the question is left to the determination of each house, as a matter of internal procedure. This is, certainly, a defect. It exposes the state to the danger of a double legislature on the one side, or a stoppage of all legislative action on the other, at the caprice of an undefined number of members of each house. A revision of these constitutions should not overlook this point.

In those cases where the quorum is fixed by the constitutions there is substantial agreement upon the principle that the presence of a majority of the legal number of members in the house is necessary and sufficient to the transaction of legislative business. This principle is also adopted as a rule of procedure by both houses of the French legislature. The French Senate requires not only the presence of the majority of its members, but also their votes, for or against a motion.

The quorum of the absolute majority, *i.e.* the majority of the legal number of members, may be said to be the modern principle in general legislation. Its reason is that the majority represents in this respect the whole, and is vested with the powers of the whole. If this were not the principle, legislative action would be exposed to the tricks and stratagems of the minority to an unbearable degree.

The three legislative houses which do not follow this principle, *viz;* the two houses of the British Parliament and German Federal Council, must be regarded as exceptional cases. There are reasons of convenience and reasons of state which make the rule unnecessary in these cases. In both houses of the British Parliament legislation is controlled so completely by the ministry that there is no opportunity for either body to be captured by a minority of the members. The ministers represent the majority in the House of Commons; *i.e.* a majority quorum of the House of Commons is present in the ministry. It is not, therefore, necessary to hold to a majority quorum in the houses, and it would, frequently, be inconvenient. The exception in these cases is therefore more apparent, as I have shown, than real. In the case of the German Federal Council it would be a constant threat to the efficiency of the Imperial legislature, if the activity of the Council could be suspended by the failure of the commonwealth governments to send their representatives. The natural excuses for absence, which exist in regard to membership in the other legislative houses, do not exist in this case. The members of the Federal Council are mere instruments. They hold at the pleasure of the commonwealth governments sending them. They can be relieved at any moment. If they are compelled to be absent, other persons can be immediately substituted. The absence of members from the Federal Council can, as a rule, only mean a particularistic hostility to the Empire on the part of the commonwealth governments whose representatives do

not appear. It would be a poor political science which did not provide against the abuse by the commonwealths of such a control over Imperial legislation. The practice of regarding the Federal Council as competent to do business upon the appearance of the Chancellor or his substitute at a regularly called meeting fully provides against this danger. At the same time the rule creates no hardships for the commonwealths nor does it expose the Council to the caprice of a minority. The peculiar character of the Federal Council makes the majority quorum unnecessary and possibly dangerous.

8. *The Principles of Internal Organization and Procedure.*

The general constitutional principle upon this subject is that each house shall determine for itself its internal official organization, its rules of discipline, and its rules of procedure. This principle, however, is placed under a variety of limitations in all four of the constitutions. The purpose of these limitations may be said to be threefold, *viz;* the maintenance of intercourse between the legislature and the executive, the information and protection of the public, and the protection of the individual member against the tyranny of the legislative body.

Accordingly, in three out of four of the upper houses of the legislatures which we are considering, a part of the official bureau is filled either by express constitutional direction or by executive act; and in one of the four lower houses, all the officials of the house except the speaker are appointed by the executive. In seven of the eight houses, publicity of procedure is required either by constitutional law or custom. In every case, the expulsion of a member for violating the rules of order and procedure is either prohibited, or permitted only by vote of an extraordinary majority. In every case, finally, the power to try and punish an outsider for contempt is limited both as to the extent of the power and the gravity of the penalty. The four systems do not exactly agree upon the details of these limitations; but in principle and in purpose, the limitations are substantially identical.

Within the domain thus bounded, each house is permitted to develop its parliamentary practice according to its own judgment and convenience. This is certainly good political science. Any other principle would result to a greater or less degree in the destruction of legislative independence. The parliamentary practice developed by these eight legislative houses is substantially uniform. We may say that upon this subject we have a *jus gentium.* The body of this law, however, is neither constitutional law nor statute law. The consideration of its details, therefore, does not come within the scope of this work.

9. *The Mode of Legislation.*

Upon this subject, or at least upon its main features, the four systems under examination are in substantial harmony. They agree in conferring the initiation of legislation upon each house; in requiring the approval of both houses to the validity of a project; in making the vote of a majority of the members voting upon the project, a quorum being present, necessary and sufficient; and in according to the executive certain influence and power upon the course of legislation. These are the general principles. They are subject, however, to some exceptions; and the point last noted, the participation of the executive in legislation, will need some explanation.

The exceptions are as follows. In all these systems, except the German, the initiation of financial legislation is vested, wholly or partly, exclusively or primarily, in the lower houses. In the German Federal Council certain bills cannot be passed without the consent of the Prussian representatives, and certain other bills cannot be passed without the consent of the representatives of the commonwealth particularly affected. In the French Senate a majority of the whole number of voices to which the body is legally entitled must vote upon the project in order to effect its passage.

The first of these exceptions is not obsolete, indeed, but anachronous. There is a practical and necessary reason for

its continued existence in the English system, but nowhere else. That reason is to be found primarily in the principle of parliamentary government. In complete parliamentary government a rejection of the budget by either house of the legislature means the resignation of the ministry. If, then, the House of Lords could reject the budget, it could defeat government by the party in majority in the House of Commons; *i.e.* it could render real parliamentary government an impossibility, since real parliamentary government is government by the leaders of the majority in the lower house (or at least in one house) of the legislature. The mere amendment of the budget might not have this extreme effect, but it would greatly embarrass parliamentary government. The ultimate reason for the exception, however, is to be found in the fact that the House of Commons contains the exclusive representation of that part of the population which bears the burden of taxation.

It might be said that the same primary reason for the exception exists in the French system, since this also is a system of parliamentary government; but, as we have seen, the parliamentary system in France is, to a greater or less degree, artificial. The exclusive control of the administration by the Chamber of Deputies is not a provision of the constitution. It is not conceded in principle by the Senate. The ultimate reason for the exception is altogether lacking in the French system. The Senate represents the bearers of the burdens of the state, just as truly as does the Chamber of Deputies.

The second of the exceptions above noted (*viz;* the power of a particular commonwealth to defeat legislation in the German Federal Council) rests upon no scientific principle. The exception in favor of the minor commonwealths is a remnant of confederatism, which in the further development of the system must disappear. The special exception in favor of the Prussian representation in the Federal Council rests, however, in the absence of a veto power in the Emperor,

upon a practical necessity. Particularism has been and still is the bane of German politics. The Prussian commonwealth is more German than the Empire; and in the Prussian commonwealth the royal house is more German than the people. The King of Prussia must therefore be vested with the power to prevent the disintegration of the Empire, whether disintegration be attempted by constitutional amendment or by the denial of the means and measures for executing the provisions of the constitution and the laws made in accordance therewith. It would be more scientific to vest this power in the Emperor in the form of a veto power; but as that has not been done, the method adopted is the only alternative.

The third exception, contained in the rules of procedure of the French Senate, is, possibly, a valuable modification of the ordinary rule. There is certainly nothing contrary to the ordinary principles of representative government in the requirement that a majority of the legal number of members must vote upon a project in order to its adoption. It may make legislation more difficult; but this may prove an advantage. It is certainly a check upon hasty and fortuitous legislation. The French principle may be a principle of the future. It has long been the general practice in the Congress of the United States; but I do not think it is required by the principle of the constitution.

Upon the general principle of executive participation all these systems are in accord; but they differ as to the manner of the participation. The English system legally vests both the initiation and the veto of legislation in the executive; in practice the initiation is almost exclusive, but there is no veto. The system of the United States vests in the executive a limited veto, but no initiation. The French system vests in the executive a right of initiation and power to require reconsideration. In Germany, neither initiation nor veto is directly vested in the Emperor; but in his quality of Prussian King,

he exercises both powers indirectly — a general power of initiation and a partial veto.

There is much to be said in favor of the French solution of this problem. It certainly best comports with the philosophy of a democratic state. It has logical consistency and regularity. It gives opportunity for the direct aid of the administrative officials in legislation without subordinating the legislature in any degree to the executive will. On the other hand, it hardly gives the executive sufficient means to protect his prerogative against a grasping legislature. The French legislature is not the best body with which to make trial of this system. It can be fairly tested only with a legislature in which calmness, moderation, good judgment and loyalty generally prevail. It seems to me, however, of all these systems, to be the one which contains the idea of the future.

CHAPTER VI.

THE POWERS OF THE ENGLISH AND FRENCH LEGISLATURES.

In two of the four systems which we are considering, *viz*; the English and the French, the subject of legislative powers can be dealt with very briefly. In both cases the legislature has all the powers not denied to it by the state. The distinction between the two cases lies in the fact that in the English system the state is organized in the legislature, so that nothing can be denied to the legislature by the state; while in the French system the state has an independent organization which can deny, and has denied, certain powers to the legislature by vesting them in other bodies. This distinction, however, does not require us to enumerate the powers of the French legislature any more than those of the British. We need only say that Parliament may legislate upon *any* subject, and the French chambers may legislate upon any subject not otherwise ordered by the state.

It is not necessary, therefore, that we should dwell longer upon these two cases. In the further consideration of legislative powers, we may address our whole attention to the constitutions of the United States and of the German Empire. These are the two which establish federal governments. These distribute the legislative power, or rather the governmental powers generally, between two sets of organs. Necessarily, then, the powers of one or the other of these sets of organs must be enumerated. The powers of both might be enumerated; and then the individual would be constitutionally exempt from the direction of government in regard to anything not enumerated. This, however, would

be a clumsy and an impracticable arrangement. It is far better that the state should enumerate the powers of one of the two sets of organs and regard the other as holding such powers as it (the state) shall not have forbidden to it, either directly, or by vesting them exclusively in the other set of organs.

The constitutions of the United States and of Germany have both followed this principle. We will now examine the powers of the legislatures of the general governments of these two states and extract from the same, if possible, the principle of the distribution of legislative powers, in the federal system, between the general government and the commonwealths.

CHAPTER VII.

THE POWERS OF THE CONGRESS OF THE UNITED STATES.

1. *Legislation in respect to Foreign Relations.*

The constitution vests in the Congress the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures upon land and water";[1] also, "to define and punish piracies and felonies committed upon the high seas, and offences against the law of nations."[2]

By the term "Congress" is meant here the legislative power. All these things must, therefore, be done by legislative act; *i.e.* they must be done by agreement between the two houses and the President, or by the extraordinary majority in the houses necessary to overcome the President's disapproval.[3] The term "war" here signifies the prosecution of rights through force by the United States against a foreign state.[4] The phrase "letters of marque and reprisal" means commissions issued to officers or private individuals authorizing them to take property or persons belonging to or subject to a foreign state wherever found.[5] The phrase "captures upon land and sea," comprehends all persons and things taken by virtue of war. The terms "piracies, felonies, and offences against the laws of nations" may signify anything which the legislature of the United States describes by these terms, in so far as its laws apply to the citizens or subjects of the United States;[6] but, when they are made applicable to the

[1] United States Constitution, Art. I, sec. 8, § 11.
[2] *Ibid.* § 10.
[3] *Ibid.* Art. I, sec. 7, §§ 2, 3.
[4] The Prize Cases, U. S. Reports, 2 Black, 635.
[5] Wheaton, International Law, p. 350, Boyd's edition.
[6] United States *v.* Smith, U. S. Reports, 5 Wheaton, 153.

subjects of foreign states, the definitions and regulations of Congress must conform to the general principles of international law. The phrase "high seas" signifies, at this point, tide waters below low-water mark.[1]

The legislative power of the Congress in reference to all these things is *exclusive.* Neither the other departments of the general government, on the one side, nor the commonwealths, upon the other, possess any concurrent powers with the legislature of the general government in reference to any of these matters, except, perhaps, in meeting defensively the attack of a foreign state.[2] The executive and judicial departments of the general government and the commonwealths are, therefore, confined to the function of carrying into execution the will of the Congress upon these matters. They may not resist the same in any manner, except through a judicial controversy involving the assertion of a private right secured by the constitution against the powers of the Congress over these matters.

2. *Legislation in respect to Foreign Commerce.*

The constitution vests in the legislature of the general government the power "to regulate commerce with foreign nations," *i.e.* foreign states.[3]

The Court has defined commerce to be both intercourse and traffic, and the regulation of commerce to be the prescribing of the rules by which intercourse and traffic shall be governed.[4]

This power is exclusive to the legislature of the United States as against the commonwealths. In two respects, however, and only two, the Congress may, if it will, confer the power to regulate foreign commerce upon the commonwealths. It may authorize them to lay duties or imposts

[1] United States *v.* The Pirates, U. S. Reports, 5 Wheaton, 184.
[2] United States Constitution, Art. I, sec. 10, §§ 1, 2; *Ibid.* Art. II, sec. 2, § 1.
[3] *Ibid.* Art. I, sec. 8, § 3.
[4] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. Reports, 196.

upon imports or exports and upon tonnage.[1] This authorization must, however, be express, and can in no case be inferred from the failure of Congress to regulate the particular point. The failure of Congress to regulate foreign commerce upon any point only signifies that, as to that point, the regulation is left to free agreement between the private parties concerned.[2] Any article of foreign commerce is thus protected against the power of the commonwealths from the moment, in the case of an export, that this quality attaches to it, and to the moment, in the case of an import, when it is divested of the same; *i.e.* from the moment, in the first case, when it is delivered to the first common carrier for exportation,[3] and to the moment, in the second case, when it has passed into the hands of the purchaser of the unbroken package from the original importer, or has been broken up for retail by the original importer.[4] There are two limitations, however, upon the exclusive power of the legislature of the general government to regulate commerce with foreign nations, *viz;* the power of the commonwealths to tax imports and exports for the absolutely necessary expenses incurred in the execution of their inspection laws[5] and the power of the commonwealths to impose police regulations upon traffic and intercourse generally.[6] These two limitations, however, are themselves subject to restrictions. In the first case, Congress may revise and control the inspection laws of the commonwealths, and the net produce of all taxes laid by the commonwealths upon imports and exports must be paid into the treasury of the

[1] United States Constitution, Art. I, sec. 10, § 2.

[2] Henderson *v.* The Mayor of New York, 92 U. S. Reports, 259; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. Reports, 196.

[3] Coe *v.* Errol, 116 U. S. Reports, 517; Turpin *v.* Burgess, 117 U. S. Reports, 504.

[4] Brown *v.* Maryland, U. S. Reports, 12 Wheaton, 419.

[5] United States Constitution, Art. I, sec. 10, § 2.

[6] New York *v.* Miln, U. S. Reports, 11 Peters, 102; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. Reports, 196; Morgan's Steamship Company *v.* Louisiana Board of Health, 118 U. S. Reports, 455.

general government;[1] and in the second, the legislation of Congress will displace the police regulations of the commonwealths as far as they touch the same subject.[2] Exactly what this realm of police regulations is, within which, in the absence of legislation by Congress, the commonwealths may act upon foreign commerce, has not been distinctly marked out by the Court. As I have already pointed out in other connections, the police power of the commonwealths is the "dark continent" of our jurisprudence. It is the convenient repository of everything for which our juristic classifications can find no other place. The Court has indicated negatively and rather confusedly that, in regard to commerce, it is what does not "admit of one uniform system or plan of regulation" for the whole United States.[3] Whatever, therefore, does admit of an uniform regulation is purely a regulation of commerce, in regard to which the commonwealths may in no event act at all.

Theoretically, the power to regulate commerce with foreign states is not vested in the legislature of the general government to the exclusion of the treaty-making department of that government, *viz;* the President and the Senate. The President and the Senate may, by way of treaty, regulate commerce between the United States and a particular foreign state. The treaty may cover ground not preoccupied by legislation, and it will displace all anterior legislation covering the same ground.[4] In like manner legislation subsequent to the treaty will abrogate the treaty provisions upon the same subject.[5] This legislation will then be the law within the United States instead of the provisions of the treaty. The

[1] United States Constitution, Art. I, sec. 10, § 2.

[2] Henderson *v.* The Mayor of New York, 92 U. S. Reports, 259; Morgan's Steamship Company *v.* Louisiana Board of Health, 118 U. S. Reports, 455.

[3] Cooley *v.* Wardens of the Port of Philadelphia, U. S. Reports, 12 Howard, 299; Henderson *v.* The Mayor of New York, 92 U. S. Reports, 259.

[4] Foster *v.* Neilson, U. S. Reports, 2 Peters, 253.

[5] The Cherokee Tobacco, U. S. Reports, 11 Wallace, 616.

foreign state may indeed regard this legislation as a violation of the entire treaty — of those parts not displaced by legislation as well as of those which have been so displaced — and may regard the *ex parte* act as a just cause of war; but that is another matter; we have then a question of diplomacy between states. The subsequent legislation is the law in the United States, and must be executed by every official and obeyed by every subject.

As a matter of fact, such a supersession of legislation by treaty and of treaty by legislation is, in large degree, prevented by the participation of the President and the Senate in both legislation and treaty-making.

3. *Legislation in respect to Internal Commerce.*

The constitution confers upon the legislature of the general government the power to "regulate commerce among the several States" (commonwealths) "and with the Indian tribes."[1]

Commerce among the commonwealths is traffic, transportation and intercourse between two points situated in different commonwealths.[2]

The regulation of such commerce is exclusive to the legislature of the general government, both as against the commonwealths and as against the other departments of the general government; and when the Congress does not regulate by law the different parts of this subject, it is to be concluded that the regulation of such parts is left to the private parties immediately concerned, to be accomplished by contract.[3]

The Court has also interpreted the carrying of telegraphic messages from a point within one commonwealth to a point within another as "commerce among the States" (commonwealths), and has declared the regulation of the same to be

[1] United States Constitution, Art. I, sec. 8, § 3.

[2] Wabash, St. Louis & Pacific R.R. Co. *v.* Illinois, 118 U. S. Reports, 557.

[3] *Ibid.;* Robbins *v.* Shelby County Taxing District, 120 U. S. Reports, 489.

an exclusive power of the legislature of the general government.[1]

There is but a single limitation upon the exclusive power of the Congress to regulate commerce among the commonwealths, *viz;* the power of the commonwealths to impose police regulations upon all traffic and intercourse.[2] The definition of the domain of the police power of the commonwealths in this respect must be held to be the same as in the case of commerce with foreign states, *viz;* matters which do not in their nature, or on account of circumstances, admit of uniform regulation for the whole United States. These police regulations of the commonwealths will, however, be superseded by the legislation of Congress upon the same subjects.[3] They hold, therefore, only where the Congress has not occupied the ground, and only until Congress sees fit to do so.

The regulation of commerce with the Indian tribes is likewise the regulation of all traffic and intercourse with them, and is also exclusively vested in the legislature of the general government. It does not matter, in the interpretation of this clause of the constitution, that the tribe is located temporarily or permanently within the territorial limits of a commonwealth. The existence of the tribal organization furnishes the sole test. In fact, with the act of March 3, 1871, Congress virtually asserted complete and exclusive jurisdiction over all Indians organized as tribes, and located either within the territories of the United States or upon reservations within the commonwealths.[4] The effect and purpose of this act and of the comprehensive act of 1885[5] are to vindicate the sovereignty of the United States over all persons resident within the territory of the United

[1] The Telegraph Co. *v.* Texas, 105 U. S. Reports, 460.
[2] The R.R. Co. *v.* Fuller, U. S. Reports, 17 Wallace, 560.
[3] Cardwell *v.* American Bridge Company, 113 U. S Reports, 205.
[4] United States Revised Statutes, sec. 2079.
[5] United States Statutes at Large, vol. 23, 385.

States, and to do away with the farce of dealing with the Indians by treaty. The Court has pronounced these statutes constitutional and valid.[1] Therefore commerce now between the Indian tribes and the commonwealths is of the same nature as commerce among the commonwealths, and not of the nature of commerce with foreign states.

We may also class the power of Congress over the postal service with, but not under, the power to regulate commerce with foreign nations and among the commonwealths. I say with, but not under, because this power extends to postal communication within a single commonwealth, as well as among the commonwealths and with foreign states, and because the Congress has interpreted its power in this respect as authorizing it not simply to regulate the postal business, but to authorize the administration to do the postal business, and to do it exclusively; *i.e.* Congress has claimed and exercised the power of establishing a governmental monopoly of the postal business over all governmental postal routes, and, since Congress may declare every route a governmental postal route, the monopoly is complete at the option of the Congress. The Court has ratified the interpretation which the Congress has placed upon its power in this respect.[2] The provision of the constitution upon which the power is based is scant, to say the least.[3] It is now settled practice and law, however, that the postal business is a general governmental monopoly; that the Congress may determine, in first instance, what is postal matter and what is not, and may provide wholly and independently for the receiving, carrying and delivery of the same. Congress may not, however, transgress other provisions of the constitution in accomplishing this end. When, for example, Congress excludes

[1] United States *v.* Kagama, 118 U. S. Reports, 375.
[2] *Ex parte* Jackson, 96 U. S. Reports, 727.
[3] United States Constitution, Art. I, sec. 8, § 7.

any matter from the mail, it cannot prohibit the carriage of this matter in some other way than by the mail. If it could, it might, in this way, prevent the circulation of newspapers and pamphlets containing opinions contrary to those entertained by the majority of the members of the Congress at any particular time. This would certainly be an abridgment of the freedom of the press, which is forbidden to the Congress by Article I of the amendments.[1] Again, Congress must not so exaggerate the conception of mail matter as to claim the express business as a governmental monopoly. It cannot prohibit from carriage in other ways than through the United States mail anything which was not regarded as mail matter at the time of the formation of the constitution.[2] Lastly, in determining whether or not a specific letter, package or parcel shall be rejected from the mails, the Congress cannot authorize the post-office officials to violate that provision of the constitution which guarantees the papers and effects of individuals against unreasonable searches and seizures. Letters and sealed packages, upon which the proper postage is affixed, cannot be opened except by virtue of a regular search warrant. They are legally as inviolable in the mail as in the domicile of the sender.[3]

Whether, under the power to establish post offices and post roads, the legislature of the United States may make the telegraph a governmental monopoly cannot be regarded as entirely settled, although the Congressional act of 1866[4] and the decision of the Supreme Court in the case of The Pensacola Telegraph Company *v.* The Western Union Telegraph Company[5] seem to indicate that both the Congress and the Court interpret the constitution as vesting this power in Congress. There is this distinction to be remarked, however, between the postal and the telegraph monopolies, *viz;* that the first does not necessarily require that the government should

[1] *Ex parte* Jackson, 96 U. S. Reports, 727. [2] *Ibid.* [3] *Ibid.*
[4] United States Revised Statutes, sec. 5267. [5] 96 U. S. Reports.

own or possess the roads, railroads, boats, or even the cars, stage-coaches, wagons, etc., over which or upon which the mails may be carried, while the latter would require the possession of the telegraphic lines. I know it is claimed that the government may own the post roads,[1] and, if the claim be valid, this distinction would make no difference; but I do not think it is settled law that the government may build, buy and own railroads, for example, under the power of Congress to establish post offices and post roads. It seems to me that it must still be regarded as an open question whether the Congress has the power to make a governmental monopoly of the telegraphic business of the country. The advantage or disadvantage of doing so is a question of political economy with which we have in this work nothing to do.

Finally, along with but hardly under the power to regulate commerce, we may class the power of Congress to fix the standards of weights and measures.[2] This cannot be claimed as an exclusive power of the legislature of the general government as against the commonwealths. Congress may occupy the ground whenever it sees fit, and the acts of Congress will displace the acts of the commonwealths upon this subject; but until Congress acts, the commonwealths may regulate the system of weights and measures. They have always fixed these standards, and the fact that they have adopted a common system has made it unnecessary for Congress to legislate upon the subject. The Congress has, however, taken an initial step in such legislation. It has made it lawful for any person to employ the metric system, but has not made it obligatory.[3] I think this is an unfortunate beginning. It may introduce great confusion where we now have substantial uniformity. Under existing conditions, it is certainly better either to do nothing at all, or to make some system obligatory as well as lawful.

[1] Story, Commentaries on the Constitution, 4th edition, vol. 2, p. 61 ff.

[2] United States Constitution, Art. I, sec. 8, § 5.

[3] United States Revised Statutes, secs. 3569, 3570.

4. *Legislation in respect to the Monetary System.*

The constitution confers upon the legislature of the general government the power "to coin money and regulate the value thereof and of foreign coin,"[1] and the power to "borrow money."[2] At the same time it forbids the commonwealths to coin any money or make anything but gold and silver coin a tender in payment of debts, or to emit bills of credit.[3] A little scrutiny of these provisions will make it manifest that the power to regulate the monetary system of the United States is conferred exclusively upon the legislature of the general government. The commonwealths are directly forbidden to create either a metal or a paper currency. The Congress is vested expressly with the power to create metal money, and impliedly with the power to create paper money.[4] It is vested expressly with the power to regulate the value of all metal money and, impliedly, with the power to regulate the value of the paper money which it may create or authorize; and it is vested, impliedly, with the power to make anything it will a legal tender in payment of any debt.[5]

The expression that "no State" (commonwealth) "shall make anything *but* gold and silver coin a tender in payment of debts" would appear, at first view, to authorize the commonwealth to make gold and silver legal tender, even though the Congress should fail to make them legal tender, or should make some other metal legal tender, or should make only gold or only silver legal tender. It must be kept in mind, however, that gold and silver are gold and silver *coin* only by virtue of a quality impressed upon them by an act of Congress. Congress may withdraw this quality at any time;

[1] United States Constitution, Art. I, sec. 8, § 5.
[2] *Ibid.* Art. I, sec. 8, § 2.
[3] United States Constitution, Art. I, sec. 10, § 1.
[4] Juilliard *v.* Greenman, 110 U. S. Reports, 421.
[5] *Ibid.*

and what *was* gold and silver coin, and might have been made legal tender, then becomes only gold and silver, and cannot be made legal tender by the commonwealths.

Again, the power vested in Congress by the constitution to coin money, is a general power and does not limit Congress in the choice of the metal to which it will give the quality of money. Congress may therefore choose some other metal than gold or silver and impress upon it exclusively the legal tender quality. Any person compelled by the laws of a commonwealth to accept anything else could go to the courts of the United States for relief; and it is to be presumed, from the reasoning of the case just cited, that relief would be granted. The same situation would be created if a commonwealth should undertake to make debts payable either in gold or in silver, when the Congress made only gold or only silver legal tender; or if a commonwealth should undertake to make debts payable only in gold or only in silver, when the law of Congress made both legal tender.

Lastly, if Congress should give both gold and silver the quality of money without making either legal tender, or should confer the legal tender quality upon some other metal, but not exclusively, I suppose the commonwealths might then make gold and silver coin legal tender.

From this analysis it will appear that the provision which declares that no commonwealth "shall make anything but gold and silver coin a tender in payment of debts" can hardly be held to confer upon the commonwealths a concurrent power with the Congress in this respect. Substantially, the creation and regulation of the monetary system of the United States is an exclusive power of the legislature of the general government.

5. *Legislation in respect to Inventions and Discoveries.*

The constitution vests in the legislature of the general government the power to secure "for limited times, to authors and inventors, the exclusive right to their respective

writings and discoveries."[1] In virtue of this authority the Congress has created the patent and copyright systems of the United States, and regulates and controls the same exclusively. So vast has this body of United States law become as to employ the entire attention of a great number of capable practitioners.

It can hardly be said that this power is exclusive to the Congress as against the commonwealths, in the sense that if the Congress had not occupied the ground the commonwealths might not do so. While the commonwealths cannot probably amend or supplement the patent and copyright laws of the United States, there is no reason for asserting that, in the absence of any patent and copyright legislation by Congress, the commonwealths may not pass laws to protect the inventions and writings of their own citizens, which will hold until displaced by the legislation of Congress upon the subject. Of course such protection would be very inadequate, as it would not reach beyond the boundaries of the particular commonwealth.

6. *Legislation in respect to Naturalization.*

The constitution vests the Congress with the power to establish "an uniform rule of naturalization throughout the United States."[2] The power to establish a single statute of naturalization for the whole United States is, of course, an exclusive power of the Congress. The commonwealths could not do that even though the Congress should not regulate the subject at all. It is, indeed, conceivable that every commonwealth might pass exactly the same statute of naturalization and that the courts of every commonwealth might give to the statutes of the respective commonwealths exactly the same interpretation and an uniform rule be attained in this manner. It is not, however, at all likely that they would. Moreover, the commonwealth naturalization could not give the full rights and privileges of citizenship. It could only

[1] United States Constitution, Art. I, sec. 8, § 8. [2] *Ibid.* Art. I, sec. 8, § 4.

give such as pertain to the individual as a resident of the particular commonwealth. The purpose of naturalization, *viz;* to gain the full rights and privileges of citizenship, could not thus be attained.

It is also conceivable that the President and Senate might conclude identical treaties with all foreign states upon this subject, which, in the absence of legislation by Congress, or if made subsequent to legislation by Congress, would establish an uniform rule of naturalization. This is also an extreme improbability. Practically, then, the power to establish *an uniform rule* of naturalization is vested exclusively in the legislative department of the general government.[1]

It is not quite so manifest, however, that the power of the Congress over naturalization generally is exclusive. Naturalization conferred under the statutes of Congress has this great advantage: that it confers upon the person receiving the same both those rights and privileges of citizenship which stand under the guaranty and protection of the general government, and those which stand under the guaranty and protection of the commonwealth in which the person may chance to reside. But so far as the constitution is concerned, it is difficult to see why the commonwealths may not, even during the existence of such congressional statutes, confer, in whole or in part, those rights and privileges of citizenship which stand under their exclusive control and protection, upon terms more favorable to the alien than those contained in the congressional statutes. Many of the commonwealths do so.[2]

It is also difficult to see, so far as the constitution is concerned, why the President and Senate may not by treaty with a particular foreign state establish for the subjects of that state a different rule of naturalization from that prescribed generally by the statutes of Congress.

[1] Chirac *v.* Chirac *et al.*, U. S. Reports, 2 Wheaton, 259.

[2] Stimson, American Statute Law, titles, "Alien," "Naturalization," "Suffrage."

Lastly, in case the Congress should not have regulated the subject by statute, *a fortiori* there would seem to be no reason, from the standpoint of the constitution, why the commonwealths might not act, each for itself, in so far as its powers extend, or why the President and Senate might not proceed by treaty.

From the standpoint of political science, however, this possible alternation in the control of this subject is not to be approved. The dictum of political science would be the exclusive control of the subject by the legislation of Congress, which would mean that aliens should remain aliens until Congress should see fit to provide for their naturalization.

7. *Legislation in respect to Bankruptcy.*

The constitution vests the Congress with the power to "establish uniform laws on the subject of bankruptcies throughout the United States."[1] The same considerations are applicable to this topic as to that of naturalization. A single statute of bankruptcy for the whole United States can, of course, be enacted only by the legislature of the general government, and uniformity could hardly be attained in any other way. The establishment of *uniform laws* upon the subject is, therefore, practically an exclusive power of the Congress. If, however, there should be at any particular time no congressional statute regulating the subject, it is difficult to comprehend, from the standpoint of the constitution, why the commonwealths may not undertake to establish bankrupt laws. In practice the constitution has been interpreted to permit this, and the Court has approved the practice.[2] The cases hold, of course, that a commonwealth bankrupt law cannot affect the rights of non-residents, and

[1] United States Constitution, Art. I, sec. 8, § 4.

[2] Sturges *v.* Crowninshield, U. S. Reports, 4 Wheaton, 122; Ogden *v.* Saunders, U. S. Reports, 12 Wheaton, 213; Boyle *v.* Zacharie, U. S. Reports, 6 Peters, 348; Gilman *v.* Lockwood, U. S. Reports, 4 Wallace, 409.

cannot discharge past indebtedness as between residents, and that, upon the enactment of a general law by the Congress, the operation of such a commonwealth law would be entirely suspended. There is no such reason in political science for the exclusive control of bankruptcy as for that of citizenship. Citizenship is a fundamental political concept, and its principle determines in large degree the whole character of the state, while bankruptcy is a subject of minor concern and of temporary importance.

8. *Legislation in respect to Crime.*

The constitution vests the Congress with the power to provide for the punishment of counterfeiting the securities and current coin of the United States,[1] and to declare the punishment of treason.[2] These are the only crimes concerning which the power of legislation is conferred upon the Congress, except the crimes committed on the high seas and offences against international law, which I have already considered, and crimes committed in the territories and districts which do not enjoy commonwealth government, which I shall consider further on; *i.e.* these are the only crimes committed within the *commonwealths* concerning which Congress has the power to legislate. There are no specific limitations placed by the constitution upon the power of Congress to legislate for the punishment of counterfeiting the securities and current coin of the United States; but in legislating upon this subject, Congress may not over-step those general limitations upon the powers of the government, which I have treated in the previous division of this work.

This power of the Congress cannot be said to be exclusive. The constitution does not deny the exercise of this power to the commonwealths, and there is no reason in political science which would forbid it so long as the action of the commonwealths does not hinder that of the general government upon the subject. The Court takes this view of the question.[3]

[1] Art. I, sec. 8, § 6. [2] Art. III, sec. 3, § 2.
[3] Fox *v.* Ohio, U. S. Reports, 5 Howard, 410.

As to the crime of treason, however, the power of legislation by Congress is somewhat closely hedged about with constitutional restrictions. This is both rational and proper. Treason is the criminal concept through which the government may unrighteously rid itself of its political opponents. A party in opposition to the governing party is an absolute necessity to the preservation of liberty. The governing party must not be allowed to silence the arguments of the opposition through criminal prosecution. It must not be allowed to treat peaceable opposition to its policies as disloyalty to the country, as treason against the state. It is not impossible that the policy and practice of the governing party itself may at times approach nearer to treason than those of the opposition. The constitution, therefore, does not vest Congress with the power to define treason. It undertakes to do that itself. It declares that "treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." [1] The interpretation of the phrases "levying war" and "adhering to their enemies" is a matter wholly for the Court.[2] The Court is thus empowered to defend the individual against prosecutions for any extraordinary treasons which the Congress might attempt to construct. The constitution also prescribes the rule of evidence necessary to convict for treason, *viz;* the testimony of two credible witnesses to the same overt act, or confession of the accused in open court.[3] The legislation of Congress is thus most carefully confined to the fixing of the punishment; and in this sphere it is subject to the restriction that it cannot decree corruption of blood or forfeiture as a punishment except during the life of the person attainted.[4] This language re-

[1] United States Constitution, Art. III, sec. 3, § 1.

[2] *Ex parte* Bollman and Swartwout, U. S. Reports, 4 Cranch, 75; Hanauer *v.* Doane, U. S. Reports, 12 Wallace, 342; Carlisle *v.* United States, U. S. Reports, 16 Wallace, 147. [3] United States Constitution, Art. III, sec. 3, § 1.

[4] *Ibid.* Art. III, sec. 3, § 2.

quires some explanation. The conceivable penalties for treason as crime against the sovereign are six: fine, confiscation of estate, either real or personal, or both; imprisonment; exile; torture; and death. Corruption of blood is rather an incident of forfeiture of estate than a separate penalty. It is the incapacity to inherit, or to pass an inheritance, in consequence of a conviction of treason.[1] Congress may make the punishment of treason to consist in a fine of a given amount, and may authorize the sale of any property of the person convicted in satisfaction of the fine, without incurring any constitutional obligation to restore the amount of the fine or any part thereof to the heirs of the convicted person. If, however, Congress makes the confiscation of the property of the convicted person the penalty, then the government, as the representative of the sovereign, has, according to the constitution, a life estate, and only a life estate, in the property possessed by the convicted person at the time of the conviction, and also in such as may come to him afterwards; *i.e.* a life estate measured by the life of the person convicted. It is, of course, understood that the convicted person must have as much as a life estate in such property, and that his property of less than life estate can be held by the government for this corresponding period only. The government may transfer this estate to another person, but the transfer cannot enlarge the estate. The grantee takes, at the most, only a life estate, measured by the life of the convicted person. At the death of this person, the confiscated property must be restored to his lawful heirs. Death clears his blood. After his death, his heirs can inherit both from him and through him. Any other principle would cause the infliction of punishment upon his heirs, *i.e.* according to modern legal conceptions, upon innocent persons.[2]

It must be always kept in mind, however, that the general

[1] Bouvier, Law Dictionary, Art. "Corruption of Blood."

[2] Bigelow *v.* Forrest, U. S. Reports, 9 Wallace, 339.

government may capture property in time of war from those whom it regards as enemies, and that Congress may make absolute disposition of such captures, without any constitutional obligation to make restitution thereof at any time to anybody. In civil war the United States is both sovereign and belligerent, and may thus choose between its power to confiscate property as punishment for treason or as prize of war. When it follows the latter course, the judgment of the prize court in condemnation of the captured property transfers the whole estate in the property to the government, and no claim for restitution, in such case, is warranted by the constitution.[1]

It will be noticed lastly that the constitution defines treason only as against the United States, and therefore it is to be inferred that Congress is vested with the power to declare the punishment of treason against the United States only. Whether there can be such a thing as treason against a commonwealth, which is not, at the same time, treason against the United States, one may most seriously doubt. If there can be, then, so far as the provisions of the constitution are concerned upon this subject, the commonwealths may also define and punish treason against themselves. From the standpoint of political science, however, one would be obliged to regard the attribution of such a power to the commonwealths as too dangerous to be advantageous. It puts them in a position to suppress loyalty to the United States in case they themselves should become treasonable. Treason is crime against the sovereign pure and simple, and the sovereign in our political system is the United States alone. It is a crime, therefore, which should be dealt with only by the general government.

9. *Legislation in respect to Revenue and Expenditures.*

The constitution vests the Congress with the power to

[1] The Prize Cases, U. S. Reports, 2 Black, 659; Miller *v.* United States, U. S. Reports, 11 Wallace, 268.

lay and collect taxes,[1] and appropriate money.[2] By a subsequent clause the levy of a tax upon articles exported from any of the commonwealths is forbidden.[3] With this exception Congress may, so far as the express provisions of the constitution are concerned, lay and cause to be collected every species of tax, which the wit of man can devise, upon any object. The Supreme Court however has declared that the general principles of the constitution forbid the Congress to tax the necessary governmental instrumentalities of the commonwealths, such as the salaries of officers and the revenues of municipal corporations, on the ground that such a power would enable the Congress to destroy the commonwealths, which nothing short of the amending power, the sovereignty, should be able to do in a federal system of government.[4] The United States courts determine, of course, in what these necessary instrumentalities, in any particular case, consist.

The constitution gives Congress full discretion to determine also the amount of the tax. On the other hand, it places two limitations upon the method of the levy, *viz;* if the tax be direct, *i.e.* if it be a poll tax or a tax upon real estate,[5] it requires that it shall be laid within the commonwealths according to population;[6] and if the tax be indirect, *i.e.* if it be any other form than poll or real estate tax, it (the constitution) requires that it shall be laid according to the principle of uniformity.[7] The Court has interpreted the word uniformity to mean, in this connection, the same rate upon the same article wherever found.[8]

[1] United States Constitution, Art. I, sec. 8, § 1.

[2] *Ibid.* Art. I, sec. 9, § 7.

[3] *Ibid.* Art. I, sec. 9, § 5.

[4] Collector *v.* Day, U. S. Reports, 11 Wallace, 113. United States *v.* Railroad Co., U. S. Reports, 17 Wallace, 322.

[5] Hylton *v.* United States, U. S. Reports, 3 Dallas, 171. Springer *v.* United States, 102 U. S. Reports, 586.

[6] United States Constitution, Art. I, sec. 2, § 3; *Ibid.* Art. I, sec. 9, § 4.

[7] *Ibid.* Art. I, sec. 8, § 1.

[8] Head Money Cases, 112 U. S. Reports, 580.

The exact language of the constitution in the clause vesting the tax power is that "Congress shall have power to lay and collect taxes, duties, imports and excises, *to pay the debts and provide for the common defence and general welfare of the United States.*" Some students of the constitution have fancied that the latter part of the clause contains a definition of the purpose of taxation and a resultant limitation upon the tax power of the Congress. They have inserted the words "*in order*" after the word excises, and make the clause read, "Congress shall have power to lay and collect taxes, etc., *in order* to pay the debts," etc. Theoretically this may be the correct interpretation. I think it is. The difficulty appears when we descend to the practice. The voting of the tax is not the time generally when its specific purpose is revealed. The tax is usually voted for the general purpose of filling the treasury. We must look to the appropriation bill to find whether the public moneys are being devoted to public or private purposes. The constitution would have followed a more logical arrangement had it imposed this limitation, therefore, upon the power of the Congress to appropriate money. As a limitation upon the power to tax, it is practically inoperative.

In regard to the power to appropriate money, the constitution provides that the appropriations for the army shall not be for a longer period than two years.[1] It imposes no other restriction upon the Congress unless we transfer to this place the limitation of the purposes of taxation. This, as I have just pointed out, is its natural place. In this connection the restriction would be, at least, less vague. It is still difficult, however, to see how it could be enforced. When the Congress makes an appropriation, it must be always presumed to be for a legitimate purpose. The courts could not enjoin the Congress from making the appropriation, and I can conceive no way whereby any individual tax-payer could secure

[1] United States Constitution, Art. I, sec. 8, § 12.

damages from any person immediately benefited by the appropriation. The individual tax-payer's interest would be too vague to form the basis for such a suit.

The power of Congress over taxation is *exclusive* only in reference to duties and imposts upon exports and imports not connected with the execution of commonwealth inspection laws, and duties upon tonnage.[1] So far as the express provisions of the constitution are concerned, the commonwealths may tax everything else, to any amount and in any manner they may deem proper. The Court, however, has decided that the commonwealths cannot tax the property of the United States and the instrumentalities of the general government, and that when both Congress and the commonwealths tax the same subjects, the general government has precedence and must be first satisfied.[2]

In connection with the power to tax, reference should be made to the power of Congress to take private property for public purposes, the power of eminent domain. The constitution does not expressly vest this power in the Congress. The constitution simply declares that private property shall not be taken for public use without just compensation being made therefor.[3] The Court has decided that Congress possesses the power subject to this restriction.[4]

It is a power which the commonwealths also possess.[5] It is not, therefore, exclusive to the Congress. In case, however, both Congress and a commonwealth should undertake to exercise it upon the same property, the right of Congress would, of course, take precedence.

10. *Legislation in respect to the Military System.*

The constitution vests in the Congress the power to raise

[1] United States Constitution, Art. I, sec. 10, §§ 2 and 3.

[2] McCulloch *v.* Maryland, U. S. Reports, 4 Wheaton, 316; Dobbins *v.* Commissioners of Erie County, U. S. Reports, 16 Peters, 435; Bank Tax Cases, U. S. Reports, 2 Wallace, 200; Van Brocklin *v.* Tennessee, 117 U. S. Reports, 151.

[3] United States Constitution, Amendments, Art. V.

[4] United States *v.* Jones, 109 U. S. Reports, 513.

[5] Boom Co. *v.* Patterson, 98 U. S. Reports, 403.

and support armies; to provide for and maintain a navy; to provide for organizing, arming and disciplining the militia, and calling the militia into the service of the United States; to make rules for the government and regulation of the land and naval forces and of the militia when in the service of the United States.[1] The power to construct the entire military system of the United States, both land and naval, is thus conferred upon the Congress with but a single limitation, *viz;* that the army appropriation shall not at any one time provide for a longer period than two years.[2] The only limits to the military power which Congress may create, are physical ones. The manner of recruitment of the forces is subject to its own discretion. It is placed under no restrictions in the enactment of the laws for the government of the forces or of the code of tactics for their discipline. There is an apparent limitation upon its power to provide for the calling of the militia into the service of the United States. It is contained in the latter part of the clause vesting this power, and defines the purpose for which it may be exercised, *viz;* "to execute the laws of the Union, suppress insurrection and repel invasions."[3] But this is no real limitation, since the definition comprehends all conceivable purposes for which the military power can be naturally used. Moreover, Congress may bring every arms-bearing person into the service of the United States in another form of organization than militia, *i.e.* in a form of organization not requiring, at any point, the participation of the commonwealths. The commonwealths are expressly prohibited from keeping a standing army or ships of war, in time of peace, without the consent of the Congress.[4] What they may do in this respect, in time of war, is not provided in the constitution, but the fact that, in time of war, the general government may assume dictatorial

[1] United States Constitution, Art. I, sec. 8, §§ 12–16.

[2] *Ibid.* Art. I, sec. 8, § 12.

[3] *Ibid.* Art. I, sec. 8, § 15.

[4] *Ibid.* Art. I, sec. 10, § 3.

powers puts this question, so far as law is concerned, in the discretion of the general government.

The Court has gone so far as to express the opinion that the commonwealths cannot even obstruct the powers of Congress in the creation of military forces by prohibiting the people from keeping and bearing arms.[1] The constitution forbids the general government to infringe upon the right of the people to keep and bear arms, but this provision cannot be invoked against the attempt of a commonwealth to do the same thing. The inhibition upon the commonwealth is derived from the power of the Congress to construct the whole military organization of the United States.[2] It is thus, at last, manifest that Congress has complete and exclusive control in the construction, organization and government of the whole military system and force of the United States. It is empowered by the constitution to do everything in regard to the military system which can be accomplished by legislation; *i.e.* it may do everything, except assume the functions of executive commandership. Those belong, as we have seen, to the President. What these functions are, in detail, which the constitution prohibits the Congress from exercising, by expressly vesting the power to exercise them in the President, I elsewhere attempt to point out. I will only say here that from the order of arrangement of the provisions of the constitution, it would appear that one function naturally belonging to commandership appears to be conferred upon the Congress, *viz;* the power to suspend "the privilege of the writ of habeas corpus." The constitution does not expressly vest this power in the Congress or in any other organ. It simply declares that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[3]

[1] Presser *v.* Illinois, 116 U. S. Reports, 252.
[2] *Ibid.*
[3] United States Constitution, Art. I, sec. 9, § 2.

This clause is contained in that article of the constitution which treats of the Congress. For this, among other reasons, it is held by many students of the constitution that the power to suspend the privilege of this writ is conferred upon the Congress. As we have seen, both the Congress and the President have exercised the power. It may be that the framers intended it to be a power of the Congress only; if such be the case, I think their political science upon this point was bad. I regard the power to suspend the privilege of the writ of habeas corpus as belonging to the general power of establishing martial law, and I think I have demonstrated that this power belongs to the President alone as commander-in-chief. Martial law is simply the suspension of ordinary law. It may be in whole or in part, in one district or another, as the exigencies of the moment may require. A military power dependent upon the exigencies of the moment cannot, in good political science, be held by the legislative department and exercised by legislation. It belongs, naturally, to the executive. Moreover, the suspension of ordinary law by a statute is far more dangerous to liberty than its suspension by executive command. The statutory suspension is far more permanent and wide-reaching in its effect, and it relieves the executive of the responsibility necessary to the moderate and judicious exercise of dictatorial power.

11. *Legislation in respect to the Organization and Procedure of the Courts.*

The constitution expressly vests in Congress the power to constitute tribunals inferior to the Supreme Court.[1] With the exception of the Supreme Court, the whole judicial system of the general government is thus subject to the legislation of Congress. Congress ought to create a sufficient number of inferior courts to do, with the Supreme Court, the whole judicial business of the general government; but if Congress should create no inferior courts, there is no method

[1] United States Constitution, Art. I, sec. 8, § 9.

of redress provided by the constitution save the elections. The courts once established, however, and the judgeships created, endowed and filled, Congress may not so abolish these offices as to deprive the incumbents of their compensation, either in whole or in part, during their good behavior; *i.e.* during their lives, unless they resign or are expelled from office by a judgment upon impeachment.[1]

The constitution impliedly vests the Congress with the power to create the judgeships of the Supreme Court and endow them. The language of the constitution is that "the judicial power of the United States shall be vested in one Supreme Court,"[2] etc. The Supreme Court itself seems thus to be created by the constitution and, therefore, not subject to any power of Congress to constitute or abolish it; but the constitution does not itself create the judgeships in this Court nor expressly declare what organ shall do so. Without the judgeships, however, the Court would be only an abstraction. From the clause which alludes to the general power of the Congress to provide for the establishment of all offices not established by the constitution and for the method of filling the inferior offices,[3] we infer that the Congress is vested with the power to create the judgeships of the Supreme Court in such number as it shall deem proper. Once established, however, and filled, the Congress has no power to abolish them during the good behavior of the existing incumbents (*i.e.* during their lives, unless they resign or are removed by judgment upon impeachment) nor to diminish the compensation attached thereto. It is a question whether Congress has the power to abolish the judgeships of this Court at the legal expiration of the respective terms of the existing incumbents. It seems to me that it has, although this might reduce the Supreme Court to an abstraction again. The Congress ought, certainly, to maintain these offices in suffi-

[1] United States Constitution, Art. III, sec. 1.
[2] *Ibid.* [3] *Ibid.* Art. III, sec. 2, § 2.

cient number to do the business of the Court; but if it should not do so, I see no redress save at the elections. The only imperative command which the constitution issues to the Congress upon this subject is that there shall be but one Supreme Court. Judicial unity is absolutely required, but everything else is left to the discretion of the legislative body.

The constitution, further, expressly confers upon the Congress the power to regulate the appeal and removal of causes from the courts of the commonwealths, and from the inferior courts of the general government, to the Supreme Court.[1] This is also a discretionary power in the Congress. There is no doubt that Congress is under a stronger moral obligation to act when its action is necessary for the completion and regulation of the governmental machinery than when it has to deal with questions of policy merely, or even of individual rights; but it is placed under no stronger legal obligations. By inaction it may thus defeat many of the fundamental purposes of the constitution without any redress, except such as may be secured at the elections.

The constitution also expressly vests the Congress with the power to prescribe the manner in which the acts, records and proceedings of any commonwealth shall be proved in every other commonwealth, and the effect of the same, and impliedly confers the power to provide rules for the return of fugitives from the justice of one commonwealth who have sought asylum in another. The exercise of these powers also is discretionary with the Congress, although the failure to make such provisions would create great difficulty and confusion. In the absence of such provisions we should be forced to have recourse to the principles of international law to guide us in regard to matters of internal concern.

Of course all the powers included under this eleventh topic are subject to the exclusive legislation of the Congress

[1] United States Constitution, Art. II, sec. 2, § 2.

as against the commonwealths. It transcends the powers of the commonwealths entirely to create the organs and offices of the general government or regulate their powers, or to prescribe the relations between commonwealths.

The Congress may, however, in the exercise of these powers, come into contact, if not collision, with the other departments of the general government; *e.g.* with the President, in prescribing the duties and responsibilities of those officers whose offices are not created by the constitution, and with the Court, in regulating the judicial procedure in the appeal and removal of causes. The Congress has asserted, in practice, full control of these subjects, although a sound political science would guard jealously the President's control over the executive officials, and would assign in very large degree to the domain of the rules of the Supreme Court the regulation of appeal and removal.

12. *Legislation in respect to Territories, Districts and Places not under the Federal System.*

The constitution vests in the Congress the exclusive power of legislation for the district of the seat of the United States government, not to exceed ten miles square; for all places purchased by the general government within the commonwealths, with consent of the legislatures of the respective commonwealths, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings;[1] and for the territory of the United States not yet erected into commonwealths.[2]

Of course exclusive legislation carries with it the exclusive jurisdiction of the government whose legislative department is vested with the power of exclusive legislation.

Congress is not limited in its legislative power over these places, districts and territories, either by a division of its power with a local legislature, or by an enumeration in de-

[1] United States Constitution, Art. I, sec. 8, § 17. [2] *Ibid.* Art. IV, sec. 3, § 2.

tail of the subjects in regard to which it may legislate. It is limited in its legislative power for such places only by the constitutional restrictions which create individual immunities against the general government. What these immunities are I have already set forth in the second book of this part of my treatise.

It has never been seriously questioned that Congress has full and exclusive legislative power over the district of the seat of the general government, and over those places purchased by the general government for the needful works and buildings of the government within the limits of the commonwealths. It is necessary that the legislatures of the commonwealths, to which such places and districts originally belonged, should give consent to the acquirement of the property in the same by the general government, and should cede jurisdiction over the same. This once accomplished, however, it has always been the settled principle that the legislative power of the Congress thereover is general and exclusive. The Congress may create local legislative bodies for such districts, and confer upon them powers of purely municipal legislation; but these powers may, at any moment, be withdrawn by the Congress, and their exercise must at all times be subject to the supervision of the Congress. It cannot erect these districts into commonwealths, *i.e.* it cannot give them a constitutional existence, as local self-governments, independent of the power of the Congress in matters of local concern.[1] Of course the Congress may again cede these places and districts to the commonwealths from which they were obtained, or to any other commonwealth, when the government ceases to use them for those purposes for which the constitution authorizes their acquisition, and in this manner the Congress may extinguish its power of exclusive legislation over them; but so long as the general government

[1] Stoutenburgh *v.* Hennick, 129 U. S. Reports, 142.

makes use of them, no commonwealth powers can be created by Congress within them.

On the other hand, it was strenuously denied during the confederatizing period of our history, *i.e.* from 1820 to 1860, that Congress possesses full and exclusive legislative power in the territories other than the places and districts above mentioned. Several theories were advanced in regard to the relation of these parts of the territory of the United States to the general government. The immediate purpose of all these theories was to limit and hold in abeyance the powers of the general government; the ultimate purpose was the advancement of the slavery interest. With the disappearance of slavery, these theories have all disappeared, and there is now no longer any question that Congress has full and exclusive legislative power in these parts, limited only by the restrictions imposed by the constitution in behalf of individual liberty.[1]

The constitution, however, expressly vests in Congress the power to erect commonwealth governments in these parts;[2] and by so doing Congress limits its own legislative power in these parts to the subjects enumerated in the constitution.

The clause of the constitution which empowers Congress to create new commonwealths reads as follows: "New States" (commonwealths) "may be admitted by Congress into this Union; but no new State" (commonwealth) "shall be formed or erected within the jurisdiction of any other State" (commonwealth), "nor any State" (commonwealth) "be formed by the junction of two or more States" (commonwealths) "or parts of States" (commonwealths), "without the consent of the legislatures of the States" (commonwealths) "concerned, as well as of the Congress." The language of the principal paragraph of this clause is not well chosen. It appears to confer upon the Congress

[1] National Bank *v.* County of Yankton, 101 U. S. Reports, 129.

[2] United States Constitution, Art. IV, Sec. 3, § 1.

the power to connect foreign states with this Union by an act of legislation. Nothing of the sort was intended by the framers. An examination of the debates of the Convention will show that they had reference only to the erection of new commonwealths within the territory belonging at any given moment to the United States.[1] The only constitutional way in which a foreign state can be annexed to the United States is by a treaty between the foreign state and the United States or by conquest in war. After the annexation has been accomplished through treaty or conquest, the form of local government to be erected in the new territory is to be determined by the legislation of Congress. There is no reasonable doubt that the admission of Texas into this Union by the legislation of the Congress was in plain disregard of the prescripts of the constitution, and was occasioned by the fact that the two-thirds majority in the Senate, necessary to secure annexation by treaty, could not be obtained, while a simple majority in both houses and the President favored it. They called their legislation a joint resolution.[2] It was, however, approved by the President; and the line between a joint resolution approved by the President and a statute is very shadowy; and, were this line distinct, the joint resolution is no more the method prescribed by the constitution for the annexation of foreign territory than is the statute.

The only limitation upon the power of the Congress in erecting new commonwealths within the United States is when the new commonwealth is formed out of territory already under commonwealth government. In such case the consent of the legislature or the legislatures of the commonwealth or commonwealths concerned is necessary. Where the new commonwealth is erected in territory not yet under the federal system, then the power of the Congress is plenary and exclusive.

[1] Elliot's Debates, vol. i, p. 274; vol. v, pp. 128, 157, 190, etc.

[2] United States Statutes at Large, vol. 5, p. 797 ff.

Congress alone shall determine when the conditions and circumstances of a population in any part of such territory are such as will justify the vesting of such population with commonwealth powers. Congress ought not to pass its enabling act until it is clear that such a population is fully prepared to exercise the powers of local self-government and to participate in the general government. When this moment has arrived, Congress ought not to withhold its enabling act. This is a matter, however, of political ethics, not of constitutional law; and the Congress alone must judge when the proper requirements shall have been fulfilled to warrant the change from consolidated to federal government in any part of the territory of the United States. I think, however, we may say that the Congress is *constitutionally* bound not to clothe with commonwealth powers any population which is unrepublican in its character — nor perhaps any population which is unnational in character. But of this character again the Congress alone must be the judge. The conclusion is that the constitution recognizes no natural right to commonwealth powers in any population, but views these powers as a grant from the sovereign, the state, which latter employs the Congress to determine the moment from which the grant shall take effect.

When the Congress discharges this function, however, the commonwealth powers, both as to local government and participation in general government, are vested in the given population by the constitution, not by the Congress. I cannot convince myself that the Congress has the right to determine what powers the new commonwealth shall or shall not exercise, although I know that the Congress has assumed to do so in many cases.[1] I think the constitution determines these questions for all the commonwealths alike. Certainly a sound political science of the federal system

[1] United States Statutes at Large, vol. 13, p. 31, sec. 4; *Ibid.* vol. 13, p. 48, sec. 4; *Ibid.* vol. 18, p. 474, sec. 4, etc.

could never countenance the possession of such a power by the Congress. Its exercise might lead to interminable confusion. In fact, its possession is inimical to the theory of the federal system. As we have seen, that system can only really obtain, where the power-distributing organ exists back of both the general government and the commonwealths.

The most difficult question pertaining to this subject concerns the power of Congress to withdraw from a given population the commonwealth powers, or rather to determine the existence of conditions under which the constitution withdraws them. I think it entirely evident that the commander-in-chief has, under the constitution, the power to suspend self-government among any population inhabiting districts which are the theatre of war, no matter whether the enemy be foreign invaders or rebellious subjects. It is also the function of the commander to determine when the war ceases in the given districts. When he does so, it would appear logical for the ordinary *ante-bellum* status to revive spontaneously. Again, there is no doubt that the forcible resistance of a commonwealth itself, *i.e.* of the legally established commonwealth government, to the authority of the central government, destroys the conditions upon which the possession of commonwealth powers rests. Such a commonwealth, if successful in its resistance, may become an independent state, but from the moment when it begins such resistance, it ceases in sound political theory to be a commonwealth under the constitution. From the standpoint of political science it is from that moment only a territory inhabited by a rebellious population seeking to construct for itself an organization foreign to the United States. The suppression of the rebellion by the military power restores the authority of the general government only. It subjects such a population, therefore, to the centralized system of government. In such a case, the suspension of martial law restores only the ordinary government of the United States

over unorganized territory.[1] It remains then with the Congress to legislate exclusively for such territory and to determine how long this status shall continue. It remains exclusively with the Congress to erect new commonwealths within such territory. It remains with the Congress to fix anew the boundaries and the populations of these new commonwealths. From the standpoint of political science these would be entirely new creations. They should not be regarded as continuations or restorations, even though the boundaries should be identical and the populations substantially the same.

Lastly, the constitution expressly confers upon Congress the power, and imposes upon it the duty, to maintain republican government in every commonwealth. The exact wording of the constitution is "that the United States shall guarantee to every State" (commonwealth) "in this Union a republican form of government," etc.[2] The Court has interpreted the phrase "United States" to mean, in this connection, the Congress;[3] and the plain meaning of the whole clause is that Congress shall determine in what republican government, within a commonwealth, consists, and shall deprive any unrepublican commonwealth organization of the powers of government.

It does not appear to me to be required by the constitution that Congress, before acting, shall wait for application from any person or organization of persons within the commonwealth. I think it may proceed of its own motion. The power of the general government to protect a regular commonwealth government against domestic violence, upon application made by the commonwealth legislature or, in case the legislature cannot be convened, by the governor, is distinct

[1] United States Statutes at Large, vol. 14, p. 428 ff. Mississippi *v.* Johnson, U. S. Reports, 4 Wallace, 475. Georgia *v.* Stanton, U. S. Reports, 6 Wallace, 51

[2] United States Constitution, Art. IV, sec. 4.

[3] Luther *v.* Borden, U. S. Reports, 7 Howard, 1.

in theory from that of preserving a republican form in every commonwealth.

While the federal *system* is indestructible, under the constitution, by the governmental act either of the general government or of a commonwealth, the question whether the population inhabiting a given district shall be under the federal system, or shall be subject exclusively to the general government, is a question for Congress to determine. The Congress may declare the existence of those conditions which, according to the spirit of the constitution, work the destruction of a particular commonwealth, and the Congress may thereupon exercise exclusive legislation over the given district, although no act of the Congress can expunge the federal system from the constitution. The failure of the jurists to distinguish between the abstract proposition and the concrete rule upon this subject has produced an endless amount of confusion in their reasoning.[1]

13. *Legislation in respect to Administrative Measures.*

Finally, the constitution vests in Congress the power "to make all laws which shall be necessary and proper to carry into execution all powers vested by the constitution in the government of the United States, or in any department or officer thereof."[2]

What the political scientists term the ordinance power, the power to create the ways and means for the execution of governmental powers, is thus vested, exclusively, in the legislative department of the government. Neither the President nor the Court can execute the powers vested in them by the constitution, if the constitution does not itself provide the ways and means, until the Congress enacts the necessary ordinances. The Congress, therefore, may lame and destroy the action of the other departments of the government, may

[1] See the Virginia Coupon Cases, 114 U. S. Reports, 269.

[2] United States Constitution, Art. I, sec. 8, § 18.

even defeat the purpose of the constitution, and there is no help for it save at the elections.

The controversy over the extent of the power conferred upon Congress by this provision has been long and exhaustive, and a result has been finally reached which is clear and unequivocal. It has at last been fully decided that Congress has the power to authorize and enact any appropriate ways and means, not forbidden by the constitution, which are adapted or conducive to the execution of any of the powers of the government, and which, in the judgment of the Congress, will be most advantageous in producing the desired result.[1] The Court will determine, in any particular case regularly brought before its bar, whether the particular means involved are appropriate, adapted or conducive to the end sought; but it has rightly manifested the disposition to defer to the views of the Congress upon these points, so long as the action of Congress does not violate other provisions of the constitution.

[1] Juillard *v.* Greenman, 110 U. S. Reports, 421.

CHAPTER VIII.

THE POWERS OF THE GERMAN IMPERIAL LEGISLATURE.

1. *Legislation in respect to Foreign Relations.*

The constitution confers upon the Imperial legislature the power to ratify treaties with foreign states, whenever a treaty deals with matters which, according to the provisions of the constitution, are subject to Imperial legislation.[1] A treaty in regard to such matters cannot be made binding upon the Empire in any other manner. As a rule, a treaty in regard to such matters can be made and ratified only by the organs of the general government. There is, however, one exception to this rule, *viz;* that the commonwealths may make treaties with their immediate foreign neighbors in regard to the postal and telegraph communication across the boundary between them.[2]

Both the provision and the exception may easily lead to ugly complications.[3] Who shall separate the matters that are assigned by the Imperial constitution to the domain of Imperial legislation from those that are not thus assigned? Who shall determine whether a treaty regulation between a commonwealth of the Empire and a foreign state includes anything more than the regulation of boundary communication? The constitution does not solve these problems or specifically vest any organ of the government with the power to solve them. The Emperor alone is in position to exercise such a power, and I suppose that a just appreciation of the spirit of the constitution would attribute it to him.

[1] Reichsverfassung, Art. 11, § 3. [2] Bundesgesetzblatt, 1871, S. 25 ff.

[3] Laband, Das Staatsrecht des deutschen Reiches; Marquardsen, Handbuch, S. 109 ff.

2. *Legislation in respect to Foreign Commerce.*

The constitution confers upon the Imperial legislature the power to regulate commerce and intercourse between the Empire, its citizens and subjects, and foreign states, their citizens and subjects.[1] This power is not in all respects exclusive to the Imperial legislature. As the general rule, indeed, we may say that the power is concurrent with that of the commonwealths, subject always to the fundamental principle enunciated in Article 2. of the constitution, *viz;* that the Imperial legislation shall take the precedence of, and displace and exclude, the legislation of the commonwealths upon the same subject, provided always the subject be one upon which the Imperial legislature may constitutionally act.

This general statement is, however, limited by two exceptions and by one modification. To the commonwealths of Bavaria and Württemberg is reserved the power to regulate *exclusively* their postal and telegraphic intercourse with their immediate foreign neighbors.[2] The Imperial legislation is *exclusive* in regard to customs,[3] and in regard to postal and telegraphic intercourse with foreign states,[4] except in the cases just mentioned; and the tolls or charges which may be levied and collected by the commonwealths for the use of the harbor privileges and maritime establishments, located within their respective borders, are restricted to the amounts necessary to maintain the same in good order and repair.[5]

3. *Legislation in respect to Internal Commerce.*

The constitution confers upon the Imperial legislature the power to regulate commerce and intercourse between the commonwealths.[6] The constitution does not make this power exclusive to the Imperial legislature except when such commerce and intercourse is mediated by the post-office and the telegraph.[7] In all other cases, the commonwealths

[1] Reichsverfassung, Art. 4; §§ 1, 2 & 7; Art. 35 & 54. [2] *Ibid.* Art. 52, § 3.
[3] *Ibid.* Art. 35, § 1. [4] *Ibid.* Art. 52, § 2. [5] *Ibid.* Art. 54, §§ 2 & 3.
[6] *Ibid.* Art. 4, §§ 1, 3, 8, 9, 10; Art. 45 & 48; Art. 52, § 2; Art. 54. [7] *Ibid.* Art. 52, § 2.

may act, in respect to this subject, concurrently with the Imperial legislature, under the limitation that the Imperial legislation takes the precedence of, and displaces and excludes, the legislation of the commonwealths, when directed to the same point. Furthermore, as in the case of commerce and intercourse with foreign states, the constitution prohibits the commonwealths from levying and collecting charges for the use of harbor privileges and maritime establishments located within their respective borders beyond the amounts necessary to maintain the same in good order and repair.[1]

The constitution confers upon the Imperial legislature the power to regulate commerce and intercourse *within* the commonwealths, in so far as the same shall be mediated by the railways, the post-office and the telegraph.[2] From this power of the Imperial legislature the commonwealth of Bavaria is exempted as to the regulation of the internal railway system, except in the case of the railways constructed or chartered by the legislature of the Empire for the general defense or the general welfare.[3] Since the Imperial legislature is the body which must determine when the necessity for such construction or authorization to construct arises, the constitutional exemption of Bavaria may be made substantially nugatory by Imperial legislation.[4] The commonwealths of Bavaria and Württemberg are exempted as to the regulation of the internal postal and telegraphic systems, in so far as the fixing of the charges and ordinances of administration is concerned.[5]

This power of regulating commerce and intercourse *within* the commonwealths through the railway, postal and telegraphic systems of communication is not exclusive to the Imperial legislature in the case of the railway system, but is

[1] Reichsverfassung, Art. 54, §§ 2 & 4.

[2] *Ibid.* Art. 4, §§ 8 & 10. [3] *Ibid.* Art. 41, § 1.

[4] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 204.

[5] Reichsverfassung, Art. 52, § 2; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 194.

so in the cases of the postal and telegraphic systems.[1] The commonwealths have, therefore, the power of legislation in reference to the railway system concurrently with the Imperial legislature, subject always to the modification that the Imperial legislation takes the precedence of, and displaces and excludes, the legislation of the respective commonwealths when directed to the same point.[2]

The constitution confers upon the Imperial legislature the power to restore roads and waterways,[3] and to build railroads[4] in the interest of the common defence and the general intercourse.

As I have already pointed out, the fact that the Imperial legislature may determine freely and finally what waterways, roads and railroads are to be regarded as necessary to the common defence and general welfare makes the limitation illusory from the standpoint of powers. The Imperial legislature may enact the construction of any waterways, roads or railroads anywhere in the Empire. This power is of course concurrent with that of the respective commonwealths, under the modification always that the Imperial laws take the precedence of, and displace and exclude, those of the respective commonwealths when directed to the same point.[5]

The constitution confers upon the Imperial legislature the power to regulate the system of weights and measures for the entire Empire.[6] This power is one which the commonwealths may also exercise in the absence of Imperial legislation upon the given subject, but the Imperial legislation will always displace and exclude the acts of the commonwealths when directed to the same point.[7]

4. *Legislation in respect to the Monetary System.*

The constitution confers upon the Imperial legislature the power to regulate the monetary system, in respect to

[1] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, SS. 194, 204.
[2] Reichsverfassung, Art. 2. [3] *Ibid.* Art. 4, § 8. [4] *Ibid.* Art. 41.
[5] *Ibid.* Art. 2. [6] *Ibid.* Art. 4, § 3. [7] *Ibid.* Art. 2.

the coinage of money,[1] the emission of bills of credit[2] (*i.e.* paper currency), the banking system,[3] and the borrowing of money or the assumption of security under any form of indebtedness which that legislature may determine.[4]

The power to borrow money or assume a guaranty on the credit of the Empire is, of course, exclusive to the Imperial legislature. On the other hand, the commonwealths have still the power of concurrent action in reference to coinage, the emission of bills and the regulation of the banking system, under the limitation always that the Imperial legislation upon these subjects takes the precedence of, and displaces and excludes, that of the respective commonwealths.[5]

5. *Legislation in respect to Crime.*

The constitution confers upon the Imperial legislature the power to regulate criminal law, private law and judicial organization and procedure within the Empire.[6] The extent of the power conferred is thus expressed in an amendment to Article 4, paragraph 13. The original provision was not so comprehensive. It read: "The law of contracts, criminal law, the law of commerce and exchange and judicial procedure," shall be subject to Imperial legislation. These categories do not cover the whole domain of private law. Consequently we find other provisions of the original constitution bearing upon this subject. Paragraphs 5 and 6, Article 4, confer legislative power over patents and copyrights; paragraph 1, Article 4, confers it in regard to insurance, domicile and settlement, and the pursuit of industries; paragraph 16, Article 4, in regard to the press and the right of association; and paragraphs 11 and 12, Article 4, in reference to the certification, effect and execution of the judicial proceedings of one commonwealth within another, and requisi-

[1] Reichsverfassung, Art. 4, § 3. [2] *Ibid.* Art. 4, § 3. [3] *Ibid.* Art. 4, § 4.
[4] *Ibid.* Art. 73. [5] *Ibid.* Art. 2.
[6] *Ibid.* Art. 4, §§ 11, 12, 13, und Verfassungsänderung, Reichsgesetzblatt, 1873, S. 379.

tions made by one commonwealth upon another. All of these provisions, except perhaps the last, may now be regarded as comprehended by the general language of the amendment to Article 4, paragraph 13.

To this all-comprehensive power of the Imperial legislature over the entire system of criminal law, private law and judicial procedure, there is one exception. The power to regulate its own law of domicile and settlement is reserved to the commonwealth of Bavaria.[1] This is a provision of the original instrument, and it might be argued that the amendment of 1873 above mentioned abolishes it, since the amendment expresses the last will of the sovereign. It is distinctly declared, however, in the introductory words to the amendment, that the amendment shall take the place of paragraph 13, Article 4 of the constitution. It does not prescribe, indeed, that its effect shall be limited to that article and paragraph. I have not found any commentator who claims that the amendment abolishes the above-mentioned exception in behalf of Bavaria, and the practice still follows the original provision; but there is certainly here an important hermeneutical question, and a technical way open for disposing of one of those annoying immunities, whenever the public opinion may strongly favor its removal.

The power of the Imperial legislature in this entire domain is, however, not exclusive. The commonwealths may act, in the absence of Imperial legislation, upon any subject of this category, under the modification, however, that Imperial legislation will, at any time, displace and exclude that of the respective commonwealths, when directed to the same point.[2]

6. *Legislation in respect to Citizenship.*

The constitution confers upon the Imperial legislature the power to regulate the subject of citizenship.[3] I have already pointed out, in another connection, that the commentators upon the constitution deny that there exists any citi-

[1] Reichsverfassung, Art. 4, § 1. [2] *Ibid.* Art. 2. [3] *Ibid.* Art. 4, § 1.

zenship of the Empire antecedent to and independent of citizenship within a commonwealth. I have also expressed my dissent from this view, because of this very provision of the constitution, and because the inhabitants of Alsace-Lorraine are citizens of the Empire without being citizens of any commonwealth of the Empire. I think the commentator Zorn is inclined to break with the others upon this point. He, through his study of the American and Swiss systems upon this subject, has been able to preserve himself, in some degree, from elevating a mere historical custom to a scientific necessity.[1]

The commonwealths may still exercise concurrent power upon this subject, under the modification always that the Imperial legislation will displace and exclude that of the respective commonwealths when directed to the same point.[2]

7. *Legislation in respect to Medical and Veterinary Practice.*

The constitution confers upon the Imperial legislature the power to regulate the whole subject of medical and veterinary practice within the Empire.[3] This is a most sweeping provision, and has no limitation, as von Rönne remarks, save in the consciousness of the Imperial legislators as to the necessity or usefulness of the measures they may enact.[4]

The commonwealths may also exercise legislative power upon this subject, under the limitation of Article 2, to which allusion has been so often made.

8. *Legislation in respect to Revenue and Expenditures.*

The constitution confers upon the Imperial legislature the power to regulate the customs and the excises upon domestic productions of salt, tobacco, spirituous liquors, beer, sugar and syrup.[5] It may levy taxes to any amount upon *all* articles exported or imported, for purposes of revenue or

[1] Zorn, Das Reichs-Staatsrecht, Bd. I, S. 259.
[2] Reichsverfassung, Art. 2. [3] *Ibid.* Art. 4, § 15.
[4] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Ab. 2, S. 100.
[5] Reichsverfassung, Art. 4, § 2; Art. 35, § 1.

protection or both, and upon the specific articles just mentioned, independent of their commercial destination.

This power is exclusive to the Imperial legislature. As the rule, the commonwealths have no power to regulate the customs or levy export or import duties, or to regulate or levy excises upon the above-mentioned articles. Bavaria, Württemberg and Baden, however, are exempted from this Imperial power. The taxation of the spirituous liquors and beer produced in these respective commonwealths is reserved to each of them exclusively. There can be, as the constitution now stands, no Imperial taxation of these subjects in these three commonwealths. The constitution expresses the intention of disposing of this exception so soon as possible, but it still remains.[1]

The Imperial legislature cannot tax any other subjects. It is restricted to those enumerated. If it cannot raise a sufficient revenue from these, the constitution provides a system of requisitions upon the respective commonwealths according to their populations. It vests in the Chancellor the power to determine arithmetically the quota of each commonwealth, under the limitation that the aggregate amount required from the commonwealths shall not exceed the total amount appropriated by the legislature for the expenses of the government, less the amount accruing from the Imperial customs and excises.[2] The constitution, however, imposes upon each commonwealth the duty of paying annually into the Imperial treasury 225 thalers (675 marks) for each soldier which that particular commonwealth is held by law to furnish to the army.[3] Bavaria alone is excepted from this duty, but must spend a proportional amount upon its army corps.[4]

The power of fixing the budget of expenses as well as of

[1] A law has been passed by the Imperial legislature for uniform taxation of liquors, and this law has been accepted by these three commonwealth legislatures. [2] Reichsverfassung, Art. 70. [3] *Ibid.* Art. 62, § 12.
[4] Bündnissvertrag mit Bayern, Bundesgesetzblatt, 1871, S. 9 ff.

income, *i.e.* the power of making the appropriations, is vested by the constitution in the Imperial legislature. This power is, of course, exclusive to the Imperial legislature both as against the commonwealths and the other departments of the Imperial government itself. The constitution declares that, as the rule, the appropriations shall be voted annually, but permits the legislature to make them for a longer time in special cases.[1]

The intention of this provision undoubtedly was, and is, to allow the legislature to vote the appropriations for the army for a number of years at once. The military position of Germany in the centre of Europe, with exposed frontiers on all sides, makes it necessary that the military system and strength of the Empire should not be subject in fact to an annual vote of the legislature; while the modern constitutional principle requires, on the other hand, that, as a matter of law, it should be.

9. *Legislation in respect to the Army and Navy.*

The constitution confers upon the Imperial legislature the power to regulate the military and naval systems of the Empire.[2] The constitution itself prescribes certain fundamental norms, which the legislature may not alter or transgress in its statutes upon this subject. These constitutional requirements are as follows: Every male German is obliged to serve in the army and navy, and must discharge that duty personally;[3] those serving in the army must belong, as the rule, for seven years from the completion of the twentieth year of age, to the standing army — three years in the active service and four years in the reserve;[4] they must also belong for five years more to the *Landwehr* of the first call (*Aufgebot*); and, after that, until the beginning of the thirty-ninth year of age, to the *Landwehr* of the second call; but the *Landwehr* of the second call cannot be required to drill,[5] or to go

[1] Reichsverfassung, Art. 71.
[2] *Ibid.* Art. 4, § 14.
[3] *Ibid.* Art. 57.
[4] *Ibid.* Art. 59.
[5] Verfassungsänderung des Art. 59; Reischgesetzblatt, 1888, S. 11 ff.

to camp in time of peace, or to obtain any permission in order to emigrate;[1] finally, every male German between the ages of seventeen and forty-five, who does not belong to the branches of the service above mentioned, shall belong to the *Landsturm*[2] which shall serve, as the rule, only for defense, and, in time of peace, is not subject in any respect to the military code.[3]

In regard to the navy, the constitutional requirements are that all German sailors and all male Germans employed in marine service are subject to duty in the navy, but are freed thereby from duty in the army;[4] that the distribution of the quotas among the commonwealths shall be in proportion to the sea-faring population holding citizenship in the respective commonwealths;[5] and that the harbors of Kiel and Jade shall be Imperial harbors.[6]

The Imperial legislature may thus prescribe the peace footing of the army, construct the army budget, and enact the code for the government of the army.[7] As respects the navy, the legislative power extends apparently only to the fixing and voting of the appropriations for its construction and maintenance.[8] The legislature may, of course, fix the peace footing of the army and vote the army and navy budgets annually if it so determines; but, as I have already pointed out, this would not correspond with the natural conditions and necessities of the great German state. More extended and permanent provisions are required as a matter of policy. As a matter of fact, the imperial legislature has dealt with these subjects septennially instead of annually.

The legislation in respect to the navy is exclusive to the Imperial government and subject to no exceptions. No com-

[1] Verfassungsänderung des Art. 59; Reischgesetzblatt, 1888, S. 11 ff.
[2] *Ibid.* [3] *Ibid.*
[4] Reichsverfassung, Art. 53, § 4.
[5] *Ibid.* Art. 53, § 5. [6] *Ibid.* Art. 53, § 2.
[7] *Ibid.* Arts. 60 & 61, § 2; *Ibid.* Art. 62, §§ 3 & 4.
[8] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 285.

monwealth of the Empire may legislate at all upon this matter.[1]

The legislation in respect to the army is also exclusive to the Imperial government.[2] The constitution ordained, in the beginning, the immediate introduction of the entire Prussian legislation into the Imperial army except that part referring to religious services and observations.[3] This, however, was to hold only until an harmonious organization of the whole German army should be attained, and was then to give way to Imperial legislation upon the subject.[4] Bavaria was exempted wholly from the introduction of the Prussian military code during this transition period, and allowed to retain her own military legislation.[5] Württemberg was partially exempted.[6] In both cases, however, the existing commonwealth laws were to give way to the Imperial legislation whenever that should be enacted.

10. *Legislation in respect to Administrative Measures.*

The constitution confers upon the Imperial legislature the power to provide the measures for the execution of the laws, *i.e.* the ordinances. The clause of the constitution in reference to this subject is expressed in negative language. It reads as follows: "The Federal Council shall have power to pass the general administrative ordinances necessary to the execution of the Imperial laws, unless otherwise provided in the Imperial laws."[7] This language has led the commentator Laband to make the following distinctions and lay down the following propositions, *viz;* that in a formal sense there are two classes of ordinances, or measures for the execution of

[1] Reichsverfassung, Art. 53, § 1; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 285.

[2] Reichsverfassung, Art. 63; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 257.

[3] Reichsverfassung, Art. 61. [4] *Ibid.* Art. 61, § 2.

[5] Bündnissvertrag mit Bayern, v. 23, Nov., 1870; Bundesgesetzblatt, 1871, S. 9 ff.

[6] Militair-Konvention zwischen dem Nordd. Bunde und Württemberg, 21–25 Nov., 1870, Bundesgesetzblatt, 1870, S. 658. [7] Reichsverfassung, Art. 7, § 1, ¶ 2.

laws, — the one containing prescripts binding upon the ordinary subjects of the state, the other containing only directions by superior to inferior officials; that the former are substantially laws, and cannot, therefore, in a constitutional system be issued except by the legislature or by some organ or person to whom the legislature may, in each specific case, delegate the power; that in the German Imperial system the former species of ordinances can be issued only by such organ or person as the legislature specifically designates and invests with the power thereto, but that the second kind of ordinances may be issued by the Federal Council unless the Imperial legislature makes some other provision therefor.[1] Zorn, on the other hand, ignores this distinction between ordinances which contain prescripts binding upon the ordinary subjects of the state and those which contain only directions from superior to inferior officials, and, therefore, claims for the Federal Council the power to issue the former as well as the latter, in the absence of any provision made by the Imperial legislature therefor.[2] Laband seems to confess that the practice is against him.[3] We need not, for our purpose, go further into this discussion. It is entirely evident that the primary and, so far as the commonwealths are concerned, the exclusive power to issue, either directly or indirectly, the ordinances for the execution of the Imperial laws is in the Imperial legislature, and that the Federal Council has only a residuary power in this respect, dependent for its exercise upon the implied permission of the legislature. Some exceptions to this rule in behalf of the Emperor are provided in the constitution, which will be considered when we come to treat of the powers of the Emperor.

[1] Laband, Das Staatsrecht des deutschen Reichs; Marquardsen's Handbuch, S. 85 ff.

[2] Zorn, Das Reichs-Staatsrecht, Bd. I, S. 129.

[3] Laband, Das Staatsrecht des deutschen Reichs; Marquardsen's Handbuch, S. 90, Anm. 1.

11. *Legislation in respect to Imperial Territory not under the Federal System.*

The Imperial legislature has exclusive legislative power in Alsace-Lorraine. There is no provision of the constitution which expressly and specifically confers the power, but it springs out of the necessity of the case. Alsace-Lorraine is not a commonwealth of the Empire. It is an Imperial territory, and its relation to the Imperial government is the same as that of the territories of the United States to our central government. The Imperial legislature has naturally, from time to time, made provision for more or less local government in Alsace-Lorraine; but such government has always rested upon an Imperial statute, which might be changed or abolished by a subsequent act of the Imperial legislature, and all the laws made by such local organs can only be regarded as Imperial laws enacted by virtue of a delegated power from the Imperial legislature.[1]

Alsace-Lorraine came to the German Empire through conquest in successful foreign war. The precedent established by the Imperial legislature in making full disposition in regard to the same, and also the precedent established by the Imperial legislature in making disposition of the war indemnity paid by France to the Empire,[2] fixes the custom of the constitution that the Imperial legislature shall make disposition of all captures in war.

12. *Legislation in respect to Representation.*

The constitution confers upon the Imperial legislature the power to fix by statute the election districts for the Diet.[3] The constitution does not require that any notice shall be taken of the commonwealth lines in making such distribution; and it distinctly and expressly declares that each member of the Diet represents the entire Empire.[4] Nevertheless,

[1] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 367.
[2] Zorn, Das Reichs-Staatsrecht, Bd. I, S. 120.
[3] Reichsverfassung, Art. 20, § 2. [4] *Ibid.* Art. 29.

the Imperial legislature has not created any districts which cross commonwealth boundaries.[1]

13. *Legislation in settlement of Constitutional Conflicts within the Commonwealths.*

The constitution confers upon the Imperial legislature the power to decide, by statute, constitutional conflicts *within* any commonwealth, provided no constitutional organ shall have been created by the commonwealth for such decision, and provided one party shall have appealed the question to the Federal Council, and the Federal Council shall not have been able to effect the settlement thereof by mediation. Upon the failure of the Federal Council to dispose of the question in this manner, the constitution requires that the Federal Council shall initiate legislation upon the subject and that it shall then be determined by ordinary legislation.[2]

Conflicts of a political character *between* commonwealths must be finally determined by the Federal Council alone, when appeal shall be made to it by one of the parties.[3] This, however, is one of the judicial powers of the Federal Council, which I shall treat under the title of the Judiciary.

[1] Bundesgesetzblatt, 1869, S. 145; Reichsgesetzblatt, 1873, S. 373.
[2] Reichsverfassung, Art. 76, § 2.
[3] *Ibid.* Art. 76, § 1.

CHAPTER IX.

COMPARISON OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE GERMAN EMPIRE UPON THE SUBJECT OF LEGISLATIVE POWERS.

In contrasting the powers of the central legislatures in the two federal systems of government, *viz;* that of the German Empire and that of the United States, — two points stand out quite saliently.

1. The first is that, while the German Imperial government is far less centralized in administration, as we shall see in detail further on, it is far more centralized in legislation. This appears most significantly in the realm of private law. The entire system of private law, both substantive and formal, and the entire system of judicial organization are made subject to Imperial legislation. In the jurisprudence of the United States, on the other hand, this domain is assigned for the most part to the commonwealths.

The explanation of this difference lies undoubtedly in the fact that the system of private law in the United States, upon its substantive side at least, is in very large degree, and always has been, harmonious. It was derived from a common source, *viz;* the English common law, and has been developed more by judicial decision than by legislative acts; *i.e.* it has been chiefly developed by that branch of government which seeks more than any other to establish and perpetuate legal harmony. Through the reception of the Roman law, canon and civil, in the later middle ages the German commonwealths gained, indeed, a common basis for their private law; but in the seventeenth and eighteenth centuries this common

law was overridden by local statutes and codes, apparently fashioned more with the purpose of establishing peculiarity and variety than of perpetuating harmony and uniformity. This status corresponds only with the system of a confederacy of states, and therefore, when the transition from the confederate system to that of the consolidated state with a federal government was accomplished for the German Empire, the Imperial legislature was of course empowered to create a common private law by legislation, *i.e.* by Imperial codification.[1] There is no reasonable doubt that, should the commonwealths in the United States introduce any considerable degree of variety into their private law, the legislature of the central government would sooner or later be authorized and required to codify the whole system of private law for the United States.

2. The other point of special contrast is the fact that, while the legislative power of the Imperial government extends much further than that of the government of the United States, it is not, on the other hand, so exclusive as that of the government of the United States, so far as the latter goes.

There are undoubtedly two reasons for the more extensive concurrent legislative power in the German commonwealths. The first is the fact, already noted, that the Imperial legislature may, if it will, oust the commonwealths from the legislative control of almost every subject of any importance. The second is the fact that, in the whole political and juristic system of the German Empire, there is but a very narrow and confused conception of a realm of constitutional civil liberty into which *no* government shall intrude. The idea rather prevails that some government must be able to regulate and control everything; if not the central government, then the commonwealths. This view is not, however, peculiar to the German system. It is common to the whole

[1] Munroe Smith, Political Science Quarterly, vol. 2, no. 1; vol. 3, no. 1.

of Europe. It is in this respect that the United States has made greatest advance over all the European states. It is a far greater advance in constitutional law than the change from the hereditary to the elective executive. At the present time, however, we do not seem fully to appreciate this merit of our own system. The exaggerated notions of the police power of the commonwealths, which are becoming current in our judicial decisions, are threatening the constitutional immunities of the individual with impairment, if not with destruction.

It will be seen from this comparison, however, that in a federal system of government it is hardly possible to draw the line exactly and permanently between the subjects which should be brought under the legislative power of the central government and those which should be left to the commonwealths. We can certainly say that the powers vested in the central legislature should include, at the least, the regulation of foreign relations, of commerce and intercourse both with foreign states and between the commonwealths, of the monetary system, the military and naval systems and the postal system. But as the state becomes more and more completely nationalized, the legislative powers of the central government must naturally extend with the growing harmony of view upon all essential subjects; until at last, with the complete nationalization of the state, the commonwealths will be seen to be, in their essence, divisions of administrative autonomy; and commonwealth legislation will be seen to be, in its nature, administrative ordinance. That is to say, federalism in legislation will pass away with the complete nationalization of the state, and there will remain only the principle of local autonomy in administration.

DIVISION III. — THE CONSTITUTION OF THE EXECUTIVE.

CHAPTER I.

THE CROWN OF GREAT BRITAIN.

I. *The Tenure of the Crown.*

The present royal house, *i.e.* the house of Brunswick, received the crown by virtue of an act of Parliament, *viz.*; 12 and 13 William III, c. 2. This act provided that upon the death of King William and of Queen Anne without issue the crown should pass to Sophia, the electress and duchess dowager of Hanover. Sophia was a granddaughter of King James I, through his daughter Elizabeth, the Queen of Bohemia, and she was the nearest relative of King James I, who held to the Protestant religion.[1] The act of Parliament did not elect an entirely new family to the throne, but it passed over the branch to which the crown would have descended according to existing laws and customs, and conferred it upon a different branch of the family. No act of Parliament has ever undertaken to do more than this; but if the Parliament can constitutionally do this, there is no reason which can be adduced to prevent it from electing an entirely new royal family. It may undoubtedly do so if it will. It is not likely that an entirely new family would be able to command the loyalty and respect of the masses in the same degree as a branch of the old, and it would therefore be unwise to select

[1] Blackstone, Commentaries upon the Laws of England, Bk. 1, c. 3, p. 216

such a family so long as descendants of the old royal house remained, who were otherwise qualified to wear the crown; but that is a question of policy, not of constitutional powers. It looks therefore as if the crown were held merely by an ordinary statute of Parliament. This is true in form, but not in substance. In substance and reality the tenure of the crown is constitutional. I arrive at this conclusion by the following course of reasoning. The crown has, in its absolute veto over the acts of the two legislative bodies, the legal power of self-preservation. This veto power cannot be legally overcome in any possible way except by the election of a new House of Commons upon the direct issue. Such a House of Commons is then not merely a legislative chamber, but the state in sovereign organization; and when it acts upon the question which formed the issue at the election, it makes constitutional law as distinguished from ordinary statute law, for it can then legally compel both Lords and King to bow to its will. It is thus clear that the crown rests upon that portion of the English law, which we term the constitution. There is, however, this peculiarity about the question when viewed from an American standpoint, *viz;* that this constitutional tenure may be modified, changed, or even destroyed by an ordinary statute, provided the wearer of the crown at the particular moment shall agree to the same. No American executive could thus substitute, at will, statute law for constitutional law and confound the distinction between these domains of law. It is true that the legislatures in the American system may encroach temporarily upon the constitutional prerogatives of the executives, but their acts in this respect remain statute law and are never regarded as parts of the constitution.

II. *The Law of Succession to the Crown.*

The family or the branch of the family wearing the crown holds, as we have seen, by a constitutional act of Parliament. The succession *within* the family is regulated by the com-

mon law, under certain statutory limitations. These limitations belong, logically, under the head of personal qualifications of the successor. This is the statement of Blackstone.[1] It does not, however, completely answer the question as to the source of the law of succession within the family. We may ask who made this immemorial custom and caused it to be received as law. I think the reply must be that the royal family itself did this, that the law of succession within the family is what is called upon the continent house-law. The custom was created before the legislature and judiciary became the exclusive law-making powers, during the period when general acquiescence in the acts of the royal house made law. I think Blackstone himself indicates this view, though he does not expressly declare it.[2] Bishop Stubbs seems to me to entertain the same idea.[3] Whatever may have been the source of the law, it is now certainly subject to modification and change by acts of Parliament, though these acts, for the reasons above stated, must be regarded as having the character of constitutional law.

The existing law of succession is lineal, primogenial descent, with preference of males over females among brothers and sisters of the whole or half blood (provided in the latter case they derive their relationship from the wearer of the crown), and with full right of representation. Lineal descent means descent from parent to child, as against collateral succession, from brother to brother, etc. Counting only from the last wearer of the crown, lineal descent as here intended may not be absolute, since there may be no lineal descendants of that person. In such a case the crown would, by the present law, pass laterally. It might even ascend in order to pass laterally; *e.g.* an uncle would succeed his nephew, in case the latter had neither children, brothers or sisters. Counting

[1] Blackstone, Commentaries on the Laws of England, Bk. 1, c. 3, p. 191.
[2] *Ibid.* Bk. 1, c. 3, pp. 197, 198.
[3] Stubbs, Constitutional History of England, vol. 1, p. 340 ff.

from the last wearer of the crown then, the lineal descent may be only preferential. On the other hand, counting from the first member of the family who wore the crown, the rule of lineal descent is absolute. Succession cannot be derived through an ancestor of the first wearer of the crown. For example, the grandsons of the first wearer of the crown may succeed one another, though they be sons of different fathers; but the nephews or grand-nephews cannot succeed at all, nor can title be derived through them. The throne becomes vacant when there are no longer lineal descendants of its first occupant.

The term primogenial defines itself. It means, of course, the eldest among those of equal degree. The limitations upon the principle of primogeniture in the English law of royal succession are that the male members of the same parentage are all preferred before the female, even though the latter be earlier born than the former, and that among children of the half-blood those not of the blood of the wearer of the crown are not regarded at all in determining the precedence of birth.

Lastly, the phrase "full right of representation" signifies that upon the death, renunciation or incapacity of the next heir to the crown, the right will pass to his or her own heir of the body in preference to any other heir of the momentary occupant of the throne. For example, if the first son of the King or Queen should die before the King or Queen, leaving only a daughter or daughters, that daughter or the first born of those daughters would be the next heir to the crown in preference to any son of the reigning King or Queen. *A fortiori*, the rule would be the same if the Crown Prince should die leaving a *son*, or if the other children of the reigning King or Queen were daughters, etc.

Of course, only the children born in lawful wedlock can be considered in the succession to the crown. The law of marriage applicable in the case of members of the royal

family is the general law of England, made more stringent by an act of Parliament termed the Royal Marriage Act. This act provides that no lineal descendant of George II, except the issue of princesses married to foreigners, shall, under twenty-five years of age, contract a marriage without the consent of the wearer of the crown given under the great seal; and that no such descendant above twenty-five years of age shall marry without having given twelve months' notice to the Privy Council, nor against the disapprobation of both houses of Parliament expressed within this period.[1] Marriages entered into by members of the royal family contrary to these provisions are illegal, and the issue is excluded from the succession to the crown.

III. *The Personal Qualifications of the King or Queen.*

These qualifications relate to age, to mental sanity, and to religion. The general principle of the constitution is that the crown passes to the legal successor immediately upon the death of the predecessor, without any process or ceremony of transference or coronation, and even without the knowledge of the successor. The ancient French rule, "le mort saisit le vif," is the rule of the English law upon this subject.[2] The purpose of this rule is, of course, the avoidance of interregnum, and its reason is the necessarily uninterrupted flow of hereditary descent. Nevertheless, we gather from the more recent regency acts that the successor cannot personally exercise the royal powers until the eighteenth year of age shall have been completed,[3] and that the royal powers will be put in regency in case of the pronounced insanity of the King or Queen regnant.[4] In regard to the religious qualifications, the statutes of Parliament are direct and peremptory. They provide that no papist nor any one married to a

[1] 12 George III, c. 2.

[2] Blackstone, Commentaries upon the Laws of England, Bk. 1, c. 3, p. 196.

[3] 1 William IV, c. 2; 3 and 4 Victoria, c. 52.

[4] 51 George III, c. 1.

papist can inherit, possess or enjoy the crown;[1] and that the wearer of the crown shall join in the communion of the Church of England as by law established.[2]

Whether the marriage of the King or Queen to a papist after accession to the throne would disqualify from further exercise of the royal powers and work abdication or place the royal powers in regency, is not clearly declared in these statutes; but it is to be inferred that it would be tantamount to abdication, and that the crown would pass in the same manner as if the King or Queen regnant had died.

Whether the conversion of the Queen Consort or Prince Consort would effect the same result is more doubtful, but I think this is fairly to be concluded from a free interpretation of the spirit of these statutes.

IV. *The Regency.*

There are no general principles of the common law or of statute law regulating this subject. Lord Coke even held that, legally, the wearer of the crown could never be regarded as a minor;[3] *i.e.* that the principal occasion for the creation of a regency could not, from the standpoint of the English law, have any existence. The regencies in English history have all been specially created as exceptional interruptions of the general sequence of constitutional events. They have been, for the most part, established by special acts of Parliament. It seems to me, however, that so long as there is no general statute upon the subject, the general principle of the constitution would give the King or Queen regnant the power to constitute a regency by an order in Council. The Crown, as will be shown below, may do anything which the Parliament has not by statute forbidden it to do, or which the Parliament has not itself covered by legislation, or which the Parliament has not, by statute, authorized some other body to do. This power of the Crown is usually

[1] 1 William and Mary, St. 2, c. 2. [2] 12 and 13 William III, c. 2.
[3] Coke upon Littleton, 43 a; Coke, 4 Institutes, 58.

called sovereignty, but I call it the residuary power of government. This residuary power may be permanently narrowed by ordinary statute, if the Crown permits, or by constitutional act, if the Crown resists. Inasmuch as neither of these things has as yet happened in respect to the question of regency, I do not see why it is not now a constitutional power of the Crown to create a regency without parliamentary approval. It is not at all probable that the Crown would undertake to do so. It is not likely that the Crown would resist a regency act originating in Parliament. I am inquiring, however, what the Crown may constitutionally do, not what the Crown may find it politic to do.

I have deferred to this point the consideration of one question that may arise regarding the succession, because of its natural connection with the subject of the regency, *viz;* the question of the succession in the case of the death of the King, without living issue or with only female issue, leaving a pregnant widow. It seems to me that the only scientific solution of this question is to place the Crown in regency until the birth of the child. So far, however, as we may be said to have any precedent in the English law governing these cases, the feudal law governing the descent of estates is slavishly imitated, and the crown devolves immediately upon the next heir *already born*, subject to divestment upon the birth of a better claimant.[1] This is certainly not a very safe procedure. The willingness to step down and out, after having attained the elevation of royalty, is not always to be counted upon. The hair-splitting distinction of the feudal law between the rights of the infant *in ventre sa mere* and of the infant one second after birth, should give way, in public law at least, to measures for the avoidance of plain practical dangers to the state. The Roman law does not make this distinction at all, and no one can say that the Roman law is less logical than the English.

[1] 1 William IV, c. 2.

In case of the absence of the successor from the kingdom at the death of the King or Queen regnant, provision has been made by statute of Parliament for the placing of the Crown under the guardianship of certain high officials in the church and the government until the return of the new King or Queen regnant.[1]

If the King or Queen regnant should journey out of the kingdom, he or she may, in default of Parliamentary provision, appoint justices or lieutenants for the guardianship of the kingdom during his or her absence.[2]

V. *The Character and Privileges of the Crown.*

All the writers upon the English constitution agree in attributing to the Crown the character of irresponsibility, immaculateness and immortality. Upon this absolute perfection of the royal character rest the following privileges of the wearer of the crown:

The King or Queen regnant cannot be called to account for anything by any magistracy or any body.[3] This privilege is frequently termed sovereignty, or, at least, it is said that it cannot be a consequence of anything but sovereignty. This seems to me, however, to be a loose conception of sovereignty. It is not, in the sense here employed, a power in the King to make his own will valid over any and every body, but simply a power to prevent anybody's will from being made valid over him. It is simply an absolute personal exemption from the powers of government. It is the royal immunity from any governmental control. This is not sovereignty, as I use the term in this treatise. I cannot call the King of England sovereign. Sovereignty is an attribute of the state; and the King is now but a part of the government.

This absolute inviolability of the King and his exemption from accountability are not easily comprehended by the

[1] 1 Victoria, c. 72.

[2] Bowyer, Commentaries upon the Constitutional Law of England, p. 142 ff.

[3] Blackstone, Commentaries upon the Laws of England, Bk. 1, c. 7, p. 242.

democratic mind. The democratic sense is continually posing the question: "But if the King should murder or steal, is it reason that he shall not be brought to justice?" It is not satisfied with the reply that from the standpoint of legal presumption the King cannot murder or steal. It can accept the principle that the state can do no wrong, because the consciousness of the state gives the last and most authoritative interpretation of right and wrong to which the world has yet attained, but the King is not now the state in the English constitution. It can also accept the principle that, for practical political reasons, the King should be exempt from the jurisdiction of any magistrate or body over his person; but it cannot comprehend why it is not sound public law that the King, if guilty of crimes, may be impeached and deposed from office, and after that tried and punished like any other person. It does not appreciate the objection that this would impair the absolute sacredness of the royal person and tend towards the substitution of an elective executive. It does not understand why the person of the King should be absolutely sacred. It considers that a reasonable limitation upon the formal sacredness of royalty may make it really more sacred, and that it is always a sound and conservative political science which admits frankly the possibility of change in the organization of the government when the consciousness of the state deliberately demands it. It is difficult, indeed, to meet these postulates of democratic philosophy, and it is easy to see that the supporters of the absolute sacredness of royalty are still standing upon the principle that the Crown is sovereignty instead of constitutional office.

As I have said, the inviolability of the royal person is simply an immunity, an exemption of the royal person from governmental jurisdiction. It is so far a negative conception. The doctrine of the royal perfection has, however, a positive side. While no magistrate or body can entertain a cause in which it is sought to make the royal person defend-

ant, the royal person may, on the other hand, prosecute a subject, and in such a process the doctrine of the royal perfection would require that in the royal person there can be no negligence. Common law prescriptions and statutes of limitation cannot, therefore, be pleaded in bar of royal rights.[1] I do not regard this, either, as being an absolutely necessary consequence of the principle of royal perfection. All royal rights to property at least must be made valid through the acts of the royal officials. It is no detraction from the King's perfection to impute negligence to his officials. The Parliament has taken this view of the subject in modern times, and has limited the time during which the royal rights to property can be asserted.[2]

Finally, the descent of the crown upon a person already attainted of treason or felony will, in consequence of the immaculate character of the crown, purge the corruption of the blood.[3] Why conviction for treason or felony, or even the more grievous misdemeanors, should not disqualify from the succession and cause the descent upon the next heir unattainted, is difficult for a simple mind to comprehend. Of course, it would be legally possible if such a power were vested in the houses of Parliament or in the courts, to defeat hereditary succession altogether, by accusing and convicting all the heirs of the existing King or Queen regnant before his or her death; but such a thing would be a practical impossibility, unless all the heirs had in fact committed grievous crime, and it might be a practical impossibility even then. As I have already remarked, the fiction of the perfection of the royal character may be so exaggerated as to defeat its real object, and to diminish the dignity and influence of the Crown.

Whether the regent enjoys the same privileges as the King or Queen regnant, is questionable. If we regard the royal

[1] Blackstone, Commentaries upon the Laws of England, Bk. 1, c. 7, p. 247.
[2] Bowyer, Commentaries on the Constitutional Law of England, p. 142 ff.
[3] Blackstone, Commentaries upon the Laws of England, Bk. 1, c. 7, p. 247 ff.

privileges from the standpoint of the public interests solely, and interpret the same in the light of those interests, the regent should certainly stand, for the time, completely in the place of the King or Queen regnant. If, however, we view these privileges from the standpoint of the supposed requirements of sovereignty, they cannot be claimed by the regent. The English law cannot be said to have established any general principle upon this subject. In case of the constitution of the regency by a special statute of Parliament, this question might be solved for that particular instance by the provisions of the statute.

It would be sound public law to attribute to the justices or lieutenants guarding the state in the absence of the wearer of the crown the like privileges, for the time being, with the wearer of the crown. Here again, the English law cannot be said to have established any general principle. The question is one to be specially decided in each case.

CHAPTER II.

THE DUTIES AND POWERS OF THE CROWN.

I. The duties of the Crown, according to the commentators upon the constitution, are best understood by referring to the coronation oath. The statutes upon this subject require the King or Queen regnant to swear to govern the kingdom and the dominions belonging thereto according to the statutes, laws and customs of the same; to execute law and justice in mercy; to maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion established by law; to preserve the settlement of the Church of England within England, Ireland, Wales and Berwick and the territories belonging thereto; to preserve the Protestant religion and the Presbyterian church-government in Scotland; and to preserve to the bishops and clergy of the realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them.[1] Of course, the disestablishment during the present reign of the Church of England in Ireland must modify the coronation oath when next administered.

It must not be understood that the King or Queen regnant has no right to govern until coronation shall have been performed and this oath shall have been sworn. Such a principle would produce an interregnum between the death of the predecessor and the coronation of the successor. Neither must it be understood that the duties expressed in the coronation oath do not rest upon the King or Queen regnant

[1] 1 William & Mary, St. 1, c. 6; 5 Anne, c. 8.

before the coronation. The royal duties and powers are exactly the same before this ceremony as after it.[1] We must be careful not to confound the practices of elective with those of hereditary government.

The substance of the coronation oath may be stated in fewer words than those of the oath itself. It means, simply, that the King or Queen regnant must govern according to law upon all points covered by law, and with benevolence and patriotism upon all points not covered by law. The oath makes no distinction between statute and common law as to their obligatory power upon the Crown in the administration. The courts, therefore, may hold the royal officials within the boundaries of either branch of the law, in the same manner and to the same degree. Whether they have power to impose their conception of the royal duty, in that side of the administration unregulated by law, upon the royal officials, is questionable. That the Parliament, as court of impeachment, has this power, is less doubtful; and there is no doubt that the House of Commons has this power by virtue of its control of the administration through the Cabinet.

Blackstone cites and approves Locke's definition of the royal prerogative, as "the discretionary power of acting for the public good where the positive laws are silent," and says that if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner.[2] According to this view, somebody's idea of the public good is imposed upon the royal discretion, and it is made the duty of the Crown to keep within the limits of that idea. The question all-important to the prerogative is: Who, according to the constitution, formulates this idea? Blackstone indicates that it is the Parliament, as court of impeachment. It seems to me far more scientific to attribute this power to

[1] Blackstone, Commentaries upon the Laws of England, Bk. 1, c. 6, p. 236.
[2] *Ibid.* Bk. 1, c. 7, p. 252.

the House of Commons in the exercise of its sovereign control over the administration through the Cabinet. The constitutional discretion of the Crown cannot logically be limited by a branch of the government : if this were possible, the discretion would not be constitutional. It seems to me that the Crown must have the power, in the domain of its constitutional discretion, to defend and execute its own idea of the public good against every power except the state, *i.e.* a House of Commons elected upon the issue of the ministerial resistance to the royal will. The fact that the practice of impeaching ministers has long since fallen into desuetude is, I think, good evidence that the common feeling, if not the common consciousness, is working towards the view which I have endeavored to express.

II. There is no subject of England's constitutional law that has received less satisfactory treatment at the hands of the commentators than the powers of the Crown. They all attempt an enumeration of these powers, without distinction as to their sources; *i.e.* they do not separate those powers which are constitutional from those which are merely statutory. This is a capital fault. The English Crown has a double character as to powers. It is, in the first place, executive. It executes the statutes of the Parliament and the judgments of the courts. But it is more than executive. It is general residuary government. The powers of the Crown originated in the period when the Crown was the state, *i.e.* was sovereign. When the sovereignty shifted from the Crown to the aristocracy and then to the people, the Crown remained government; but its powers gradually decreased as the sovereignty imposed upon it fresh limitations. The sovereignty has withdrawn from the Crown almost the whole legislative power, but not the whole; almost the whole judicial power, but not the whole; and has required that the Crown shall neither violate nor suspend any law in the course of administration. It will thus be seen that, in addition to its

purely executive power, the Crown is still possessed of some fragments of what was once its sovereignty. The aggregate of these fragments is what I term the general residuary powers of government; and I define this sphere, negatively, as follows: The Crown may do anything which the Parliament has not forbidden it to do, or the doing of which the Parliament has not itself assumed, or the power to do which the Parliament has not vested exclusively in some other body. The Crown has therefore the power, by orders in council, to regulate any matters not regulated by the statute or common law, provided the Parliament has not forbidden it to do so, either directly or by vesting some other body with the power. *A fortiori,* the Crown may ordain, in council, the measures for executing the laws, provided the Parliament shall not itself have created these measures or vested the power to do so in some other body.

So far as these regulations and ordinances of the Crown limit the sphere of free action between individuals, they are, in character, legislation.[1] The power of the Crown to create them is a fragment of the legislative power, the whole of which was in the Crown when the Crown was the state.

The Crown has, furthermore, by virtue of this general residuary power of government, the power to pronounce judgments, in council, upon all controversies not subject to the jurisdiction of the ordinary courts, provided the Parliament shall not have forbidden it to do so, directly or by vesting the power to pronounce judgment in such cases in some other body. This is a fragment of the judicial power, the whole of which was in the Crown when the Crown was the state; the whole of which remained in the Crown, even after the Crown became government, until the larger part of it was withdrawn by the state.

Of course the state has encroached much less upon the executive powers of the Crown than upon its legislative and

[1] Jellinek, Gesetz und Verordnung, S. 240.

judicial powers. The natural character of the Crown in the modern state is executive. The Crown, therefore, still possesses almost the whole of the executive power which it held when it was the state; *i.e.* when it was sovereign. In fact, the Parliament has expressly recognized by statute some executive powers of the Crown which the Crown had not asserted very positively or effectively when it was sovereign. The change which has been wrought in the executive powers of the Crown lies chiefly in the control exercised over them by the House of Commons through the Cabinet, which I shall consider more fully later.

It would be a comparatively easy task to enumerate the powers conferred upon the Crown by acts of Parliament. It is more difficult to set forth its residuary powers. All that we can do is to indicate, in a general way, the sphere of powers not yet withdrawn from the Crown. As I have shown above, the conception of this sphere is negative; it cannot be satisfactorily defined from a positive standpoint. It contains, however, all that we can term, in any sense intelligible to the American student, constitutional powers. The powers conferred by the Parliament in the ordinary manner of legislation are certainly statutory, since they may be withdrawn by the Parliament in the same manner. It will be said, of course, that the residuary powers of the Crown can also be withdrawn by ordinary acts of Parliament, and that therefore this test will not serve to distinguish the constitutional from the statutory powers of the Crown. To this I answer that the Crown can legally defend its residuary powers by its absolute veto. I shall be met again, however, by the reply that the Crown may legally defend in this same manner the powers conferred upon it by ordinary statute, but that practically its veto power has ceased to exist. I confess that the test is not very reliable; but I contend that while the Crown has probably lost, by disuse, its veto in the latter case, it ought not, in good political science,

to be deemed to have lost it in the former. If the Crown has no means of protecting its residuary powers — powers not conferred by any act of Parliament — against an ordinary act of the legislature or of any other part of the government, then the Crown cannot now be said to have any constitutional powers at all; and if it has no constitutional powers, it cannot be considered as having any constitutional existence. The Crown is not a person or a name merely, but an aggregate of powers.

My contention is, therefore, that the Crown still has an absolute veto power upon all attempts of any other part of the government to trench upon the domain of its residuary powers and that this veto power should be exercised by the Crown until the state, through a House of Commons elected upon the issue, shall have commanded the submission of the Crown; but that the Crown has lost, by long disuse, the veto power upon ordinary statutes not touching the royal powers, or touching only such as have been conferred by ordinary statute.

I would say, furthermore, that any power conferred upon the Crown by a House of Commons elected upon that particular issue should be regarded as a constitutional power of the Crown, and should be defended through the absolute veto of the Crown against any attempt of the Parliament to withdraw, limit or modify it by an ordinary statute.

I hold, therefore, that the English constitution does afford us a legal test for distinguishing between the constitutional and the statutory powers of the Crown, and that the Crown would be sustained by sound political science in making this test practical.

Were this distinction generally accepted, I should be inclined to make it the basis of my classification of the royal powers. Since in fact, however, it is generally ignored by the commentators, I shall group the powers of the Crown under

four heads, according to the subjects which they comprehend, *viz;* powers in regard to international relations, powers in respect to legislation, powers of internal administration, and judicial powers. I shall, however, indicate which of these powers are, in my opinion, constitutional, and which are statutory.

1. *The Control of Foreign Affairs.*

The Crown has the sole and exclusive power of declaring and making war and of issuing letters of marque and reprisal, of making treaties of peace and alliance, and treaties and conventions upon all other subjects, and of appointing, sending, and receiving ambassadors, ministers and consuls, and of issuing passports and safe-conducts.[1] In a sentence, the whole power of the government in reference to foreign affairs and relations is vested in the Crown. There is but a single limitation upon the royal discretion in this entire sphere, *viz;* the statutory provision that, in case the crown should come to any person not being a native of the kingdom, no war should be undertaken for the defense of any dominions or territories not belonging to the Crown of England without the consent of Parliament.[2]

I regard the prerogatives of the Crown in this sphere as being constitutional. They were not conferred by statutes of Parliament. They originated in the state, when the Crown was the state, and they have not been withdrawn by the state or surrendered by the Crown. They are, therefore, prerogatives in the defense of which the absolute veto of the Crown may be used and should be used. The Crown should yield its prerogatives in this sphere only at the demand of the state; *i.e.* at the demand of a House of Commons elected upon this issue.

2. *The Powers of the Crown in Legislation.*

The Crown has the sole and exclusive power to summon,

[1] Bowyer, Constitutional Law of England, p. 157 ff.; Gneist, Das englische Verwaltungsrecht, S. 654.

[2] 12 and 13 William III, c. 2.

open and prorogue the Parliament, and dissolve the House of Commons before the legal expiration of the mandates of its members.[1] It has the power also to initiate legislation upon any subject, and to veto absolutely all projects of legislation passed by the houses of Parliament. I have elsewhere explained all of these terms and procedures. I will only say here, as to the veto power of the Crown, that it has not been used since the year 1707.[2] Is it to be regarded as extinguished by disuse? We know it to be a fundamental principle of the English constitution that the Crown can lose no rights by its own negligence. The loss of certain royal rights by the negligence of an official might be consistent with this principle, but not the loss of a prerogative which the wearer of the crown alone can exercise. We cannot then, according to the principle of English jurisprudence, regard this power as having lapsed. It exists, *de jure*, as truly as it ever did. Law and fact, however, seem to be in conflict upon this subject; and, to settle the question satisfactorily, we must have recourse to the reasons of political science. The dictum from this standpoint, I think, must be that where no royal prerogative established by the constitution is affected by an act of the houses of Parliament, the veto power of the Crown should be regarded as extinguished by disuse; but that where such royal prerogatives are affected, the veto power cannot be abolished save by the express declaration of the state itself. Political science neither permits the eternal reign of a fiction of law after its reason has disappeared, nor the overthrow of a sound principle by a generalization from negative precedents.

3. *The Military Powers of the Crown.*

The Crown has sole and exclusive command over the army and navy — terms which of course include all branches of the armed force. This general power includes the special authority to enlist the men; to appoint, dismiss, promote and

[1] Anson, Law and Custom of the Constitution, Part I, p. 47 ff.

[2] *Ibid.* p. 255.

degrade all officers;[1] to organize the forces; to issue rules and regulations for the government of the forces, wherever the Parliament shall not have covered the ground by statutes; to govern the forces, dispose of them and direct them in battle and conflict;[2] also to establish forts and strongholds and garrison the same.[3] The commentators also place under the military functions of the Crown the power to designate, establish and control ports, wharves, lighthouses, beacons, buoys, etc.[4] These are the ways of entrance into the country; and as the defence of the country against the entrance of foreign powers is the duty of the Crown, so the power to command the frontiers must be its right. The commentators also place under this head the powers of the Crown to prohibit the exportation of arms and ammunition, to license the importation of gunpowder, to prohibit subjects from leaving the country, and to recall them to the country. It seems to be doubted by some of England's greatest jurists if the military prerogative of the Crown contains the power to establish martial law under any circumstances in any part of the British state. Lord Chief Justice Cockburn in a charge to a grand jury took the position that it does not,[5] but his reasoning appears to me very bad both in law and political science. No statute of Parliament has ever denied this power to the Crown or vested it in any other organ or occupied the ground itself. It must therefore be legally in the Crown, as a residuary power of government. Good political science would always accord to the executive head of the government the power to govern temporarily according to his own discretion, whenever and wherever, by reason of insurrection or invasion, the safety of the state in his opinion may demand

[1] Todd, Parliamentary Government in England, vol. I, p. 530, Second Edition.
[2] *Ibid.* vol. I, p. 520 ff; Bowyer, Constitutional Law of England, p. 167 ff.
[3] *Ibid.*; Gneist, Das englische Verwaltungsrecht, S. 654.
[4] Bowyer, Constitutional Law of England, p. 169.
[5] Todd, Parliamentary Government in England, vol. I, p. 548 ff.

it. I do not believe that the dictum of the learned justice is the law of England upon this point. It was not a regular judicial decision; and if it had been, we must remember that judicial decision is, in the English system, no absolute determiner of the royal prerogative. The commentator Forsyth has reviewed exhaustively the opinions of the English jurists and statesmen upon this subject, and has declared, as his conclusion, that the Crown has the power to establish martial law in case of strict necessity.[1]

I regard this class of powers as constitutional. None of them was conferred by act of Parliament. There is a statute of Parliament which *declares* these powers to belong solely and exclusively to the Crown;[2] but this statute cannot be said to have conferred them. It simply proclaimed the assumption of these powers by the Long Parliament to be a usurpation of the constitutional powers of the Crown. They were held by the Crown when the Crown was the state, *i.e.* when the Crown was sovereign, and they have neither been withdrawn by the state, under its later forms of organization, nor surrendered by the Crown. They are, therefore, safeguarded by the absolute veto power of the Crown, which may be and should be exercised against any attempts to impair them proceeding from any other source than the state itself.

4. *The Powers of the Crown in Civil Administration.*

The Crown has the sole and exclusive power of appointing all the officials of the government. It has also, except in the case of the judicial officers and a few others, the power of removal.[3] It has even the power to create new offices and to determine the amount of remuneration which shall be attached to them.[4]

The only limitations which the spirit of the constitution

[1] Forsyth, Cases and Opinions on Constitutional Law, p. 188 ff.

[2] 13 Charles II, c. 6.

[3] Todd, Parliamentary Government in England, vol. I, pp. 609 & 630.

[4] *Ibid.* vol. I, p. 609 ff.

places upon the exercise of these powers are, that no tax may be imposed thereby,[1] nor any office created which is inconsistent with the constitution.[2] One other limitation has been set up by Chitty in his work on the prerogative, *viz;* that the consent of Parliament is necessary to legalize any change made by the Crown in the usual form of granting ancient offices.[3] I confess I cannot quite see the reason for this. The Parliament has not, so far as I can find, enacted any such limitation. The Crown is still, according to all the authorities and the universal practice, the general source of office. If the power of the Crown is not limited in this respect by statute or custom I am unable to comprehend upon what principle of law or of political science Chitty's limitation is based. The limitation, furthermore, that the Crown shall not create any office inconsistent with the constitution or prejudicial to the subject is difficult to construe. Who shall determine when this inconsistency or prejudice arises? Is not this a question for the Crown itself until the state speaks? If so the limitation is, until then, a mere self-limitation, and this dictum of the learned commentator is only the expression of his opinion as to what the Crown ought or ought not to do.

By virtue of the fact that the Crown is the source of all office, it is likewise the source of all honor and dignity.[4] Honor and office, if not identical, are naturally and historically very closely connected. Whenever we find honors and dignities not connected with existing offices they represent offices that have ceased to exist. The Crown has, therefore, the sole and exclusive power to create peers, grant all degrees of nobility, knighthood, etc.[5] With these powers of conferring office and honor, the commentators usually connect

[1] Todd, Parliamentary Government in England, vol. i, p. 610.
[2] *Ibid.* [3] p. 81.
[4] Bowyer, Constitutional Law of England, p. 174.
[5] *Ibid.;* Gneist, Das englische Verwaltungsrecht, S. 654.

that of granting corporate franchises of a private character. This latter power has been greatly limited by the Parliamentary statutes forbidding the creation of monopolies by the Crown.[1]

All of these powers, in the extent in which they at present exist, are what I term constitutional powers, and, as such, are safeguarded by the royal veto.

The Crown has the power to establish and regulate public markets, fairs, the system of weights, measures, and the coinage.[2] This power, however, has been limited by several statutes. In fact, nearly the whole subject of weights and measures is now regulated by statute.[3] This power of the Crown is now reduced substantially to the regulation of public markets, and the coining of money out of material and according to the standard prescribed by Parliament.[4] What remains of this power, however, is what I term a constitutional power. It was not conferred by statute. It is therefore safeguarded by the veto power of the Crown.

5. *The Powers of the Crown over the Established Church.*

The Crown has the power to appoint the bishops, archbishops, and other principal dignitaries of the Established Church.[5] It has the power to convene, prorogue and dissolve convocation, *i.e.* the ecclesiastical Parliament of the realm, and to license, restrain and veto its proceedings.[6] It has finally the power to license the assembly and proceedings of diocesan synods.[7]

These functions are all statutory.[8] They were introduced among the royal powers at the time of the Reformation. It

[1] 21 James I, c. 3.

[2] Bowyer, Constitutional Law of England, p. 176 ff.; Gneist, Das englische Verwaltungsrecht, S. 654.

[3] 5 George IV, c. 74; 4 & 5 William IV, c. 49.

[4] Bowyer, Constitutional Law of England, p. 177.

[5] Todd, Parliamentary Government in England, vol. i, p. 501 ff.

[6] *Ibid.* p. 504.

[7] *Ibid.* p. 505.

[8] 24 Henry VIII, c. 12; 25 Henry VIII, c. 19 & 20; 26 Henry VIII, c. 1.

is true that the power of appointing to the great church offices was vested in the Crown by the Statute of Provisors, in the twenty-fifth year of the reign of Edward III,[1] but the matter was so doubtful in the sixteenth century that it was thought best to settle it by a new enactment. I consider then that the royal supremacy over the church is not of a constitutional character, and should not be regarded as belonging to that part of the royal powers which is safeguarded by the veto power.

6. *The Judicial Powers of the Crown.*

The Crown has power to hear and decide all cases and controversies appealed to it from the colonial, ecclesiastical, and admiralty courts, and from the Lord Chancellor's court of lunacy and idiocy. By the statute 16 Charles I, chapter 10, the general judicial power of the Crown was withdrawn through the dissolution of the Court of Star Chamber and the Court of Requests; and by the statute 3 and 4 William IV, chapter 42, all that is left of the judicial power of the Crown is vested in a committee of the Privy Council, called the judicial committee.[2] The judicial power of the Crown, in its present form and extent, is therefore statutory, and not, according to my view of the constitution, protected by the absolute veto. The commentators all speak of the Crown as the source of justice and peace generally; but that only means, at present, that justice is administered in the name of the Crown, and by officials who receive their appointments from the Crown. It does not mean that the Crown has any power to pronounce judgments, either immediately or through officials subject to the royal instructions, except in the cases above specifically mentioned.

Lastly, the Crown has the power to pardon criminal offences; *i.e.* to excuse a person from a penalty imposed in a criminal proceeding, or to commute the penalty, and also to

[1] Bowyer, Constitutional Law of England, p. 182.

[2] Dicey, The Privy Council, p. 69.

remit fines and forfeitures in so far as their remission does not impair the vested rights of third persons.[1] The power of the Crown to pardon runs even against the Parliament itself when acting as a court of impeachment.[2]

III. *The Organs through which the Crown makes use of its Powers.*

The commentators usually say that the Crown legislates through the Parliament and administers through the Council. It seems to me that the conditions which once justified this statement are now too remote, too purely a matter of history, to sustain the proposition that the English legislation is, at present, enacted *by* the Crown *through* the Parliament. It would be about as true to existing relations to say that the President of the United States legislates through the Congress. I do not, therefore, refer to the Parliament as an organ through which the Crown exercises its powers. I refer wholly to the Council.

What now is the Council, through which every act of the Crown must be done in order to be clothed with legal validity? Nominally, it is, next to the Crown itself, the oldest institution of the English constitution, *viz;* the Privy Council. Really, it is only that part of the Privy Council which is known in common parlance as the Cabinet. What then is the Cabinet? It requires some boldness to undertake a definition or a description of this body after so learned a man as Professor Dicey has said, "that while the Cabinet is a word of every-day use, no lawyer can say what a cabinet is."[3] Bagehot, however, is not so modest as Professor Dicey. He has undertaken to define the Cabinet. He calls it, first, "a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation";[4] and, again,

[1] Blackstone, Commentaries on the Laws of England, Bk. I, p. 269.
[2] Anson, Law and Custom of the Constitution, Part I, p. 305.
[3] Dicey, The Privy Council, p. 68.
[4] Bagehot, The English Constitution, p. 81.

he designates it, "as a combining committee, a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state." [1] Only one of these propositions, the first, is a definition of what the Cabinet is. The other is a statement, rather, of one of the most important things which it does. I do not think either the definition or the statement satisfactory. Professor Gneist calls the Cabinet the Council of Ministers, *i.e.* those members of the Privy Council, who are the heads, for the time being, of the executive departments.[2] This, however, is merely a statement of its composition. Todd refers to, rather than defines, the Cabinet as the connecting link between the Crown and Parliament.[3] This is again only a statement of one of the chief things which it accomplishes. We must regard the Cabinet from the threefold standpoint of history, composition, and powers, before we can gain a conception of it in any degree adequate.

1. Historically the Cabinet sprang from the Privy Council. It is almost impossible to follow minutely the genesis of this most curious and powerful organ. We can, however, indicate the chief stages in its development. The Privy Council was originally composed of members chosen by the Crown and dismissed by the Crown at pleasure. By its advice and through its aid, the Crown governed in every direction.[4] The rise of the regular courts of law in the twelfth century, and of the Parliament in the thirteenth and fourteenth centuries, withdrew from it, in an increasing degree, the judicial and the legislative functions, but left it in possession of its administrative functions.[5] It regained much of its other and earlier powers through the energy of the Tudors, but by the middle of the Stuart régime it had become essentially an administrative organ, though possessed still of many fragments of the

[1] Bagehot, The English Constitution, p. 82.
[2] Gneist, Das englische Verwaltungsrecht, S. 660.
[3] Todd, Parliamentary Government in England, vol. i, p. 3.
[4] Dicey, The Privy Council, p. 6. [5] *Ibid.* p. 8 ff.

legislative and judicial powers. The attempt of the Stuarts to restore to it its ancient prerogatives brought the revolution of 1640–88, which fixed upon it definitely its administrative character, though still leaving to it some of the fragments of the legislative and judicial powers.

During the Tudor period it had suffered at least two important changes in its internal organization. Down to that epoch, it was customary for every branch of its business to be transacted by the whole body. In the year 1553, King Edward VI separated the Council into five commissions, or committees, and assigned a distinct branch of the public business to each.[1] These committees are the earliest forms of the present ministerial or executive departments. The other change wrought by the Tudors was the introduction into the Council of the private secretaries of the King or Queen regnant, as mediators of all the business between the Crown and the Council.[2] It is easy to see how the attachment of a secretary to each of the committees of the Council would create ministerial departments, with a secretary at the head of each as the channel of communication between each and the Crown. I cannot assert that this was actually the course of the development, but it appears to me very probable. Under such a form of organization the unity of the administration would be expressed only in the Crown. The administration would be independent and monarchic. The full Council would not be much more than a debating society. The way was now open, however, for the Crown to create a new unity within the Council, if it should choose to do so, by bringing together, as a single and separate body, the secretaries or heads of the executive committees of the Council. It was something of this sort that Charles II did

[1] Dicey, The Privy Council, p. 39; Todd, Parliamentary Government in England, vol. i, p. 91.

[2] Dicey, The Privy Council, p. 40; Todd, Parliamentary Government in England, vol. i, p. 91.

in the year 1679.[1] He desired to get rid of the endless debates in the full Council, and do the public business with more ease, secrecy and despatch. He did not feel able to dispense with the Council altogether and govern through the separate heads of the departments, so he formed a cabinet, or lesser Council, out of the heads of the ministerial departments, adding a very few others, high in his confidence, whom we would now designate as ministers without portfolios, and began the transaction of the public business with and through them alone. At first this was felt to be a dangerous innovation, and two attempts at least were made to restore the Council to its former position. Both failed, simply because the Cabinet proved itself to be much better adapted to the wants of practical administration than the full Council.[2]

If the change from administration by the full Council to administration by the Cabinet meant danger to political liberty, this danger must be met in some other way than by the restoration of the powers of the Council. King William III led the way to the solution of the question when he took his ministers from among the dominant party in the Parliament. His intention in having the Crown represented in the Parliament by ministers who were the leaders of the majority, at least in the House of Commons, was undoubtedly to gain a strong hold upon the Parliament and secure a more ready and generous vote of supply to the Crown. What he really did was much more than this: it was to lay the groundwork both for the responsibility of the Ministry or Cabinet to the House of Commons and for party government.[3] He seems to have subsequently discovered these tendencies himself. He abandoned the policy in the later years of his reign. The policy, however, was one demanded by the spirit and

[1] Dicey, The Privy Council, p. 65.

[2] Hallam, Constitutional History of England, vol. iii, p. 185 ff.

[3] Todd, Parliamentary Government in England, vol. i, p. 111 ff.

conditions of the age. It reappeared under the Hanoverians;[1] and since 1832 it has been the unquestioned custom of the constitution.

2. The Cabinet is, therefore, now composed of the heads of the executive departments, selected from among the members of Parliament and belonging to the party in the House of Commons dominant for the time being.[2] The Crown selects the Prime Minister,[3] and the Prime Minister selects the other members.[4] It is possible, but not usual, to introduce a few persons into the Cabinet without portfolios. All persons, upon becoming cabinet ministers, become thereby privy councilors,[5] if they are not already such, even though the position in the Cabinet should have been held for but a single instant, and they hold their membership in the Privy Council, like all other councilors, for the life of the King or Queen appointing them, and for six months after the decease of the said royal person, unless their tenure be terminated earlier by their own decease or by royal dismissal.[6]

3. The most important standpoint, however, from which to view the Cabinet, the standpoint from which the best comprehension of its essential character may be attained, is that of its powers over, and relations to, both the Crown and the houses of Parliament. I will first state what these powers and relations are, and then seek the principle upon which they rest.

The Cabinet may demand of the King or Queen regnant the whole power of the Crown in every direction, and the royal person must confer it.[7] The Cabinet may require the Crown to pack the House of Lords to its liking, and to dissolve the House of Commons, and the Crown must give ear

[1] Todd, Parliamentary Government in England, vol. i, p. 112.
[2] Gneist, Das englische Verwaltungsrecht, S. 660 ff.
[3] Todd, Parliamentary Government in England, vol. i, p. 327.
[4] *Ibid.* vol. i, p. 324. [5] *Ibid.* vol. i, p. 323.
[6] Bowyer, Constitutional Law of England, p. 125 ff.
[7] Bagehot, The English Constitution, p. 80.

thereto, and can now hardly be said to have the power to refuse.[1]

The Cabinet may be dismissed by the Crown; but if it be sustained by the House of Commons, it must be reinstated by the Crown. The only possible escape of the Crown from this immediate result is to effect dissolution of the Commons through another Cabinet, formed out of persons supported by the minority party in the House of Commons; but if the newly elected house sustain the policy of the old Cabinet, it must then be reinstated, in principle, if not in personnel.

Finally, the Cabinet is responsible to the House of Commons for the use which it makes of the royal powers;[2] but it may escape its responsibility to the immediate House of Commons by requiring the Crown to dissolve that house. Appeal is then made to the electors to choose a new house upon the issue between the Cabinet and the old house. It is to the new house alone that the Cabinet owes unconditioned obedience.

Now what must be the essential character of an organ possessing such powers? It cannot be representative of the Crown merely, although its members are formally appointed by the Crown; for it can exercise compulsion over the Crown. It cannot be representative of the House of Commons, merely, or of both houses of the Parliament; for it can exercise compulsion over both houses of the Parliament. Bagehot says that the Cabinet is chosen by the legislature,[3] and proceeds to argue from this that it is the creature of the legislature. It seems to me that both the proposition and the inference are erroneous. There certainly is no formal election of the Cabinet or the Prime Minister by the legislature or by the House of Commons. The only election which takes place is in and by the constituencies of the House of Com-

[1] Bagehot, The English Constitution, pp. 83, 297.
[2] Todd, Parliamentary Government in England, vol. i, p. 495.
[3] Bagehot, The English Constitution, p. 81.

mons. The members of the Cabinet, if elected at all, are elected by the original holders of the suffrage. The holders of the suffrage simply designate the party which shall govern; and the Crown formally calls the generally acknowledged chiefs of that party, whether they be elected or hereditary legislators, to conduct the administration. Now the suffrage-holders, when electing a House of Commons upon the issue of a new governmental policy, are in the British system the state. Why, then, do we not say that the state, rather than the legislature, chooses the Cabinet, and that the Cabinet represents the state rather than the Parliament or the House of Commons viewed simply as legislature? This view of the Cabinet, as immediate representative of the state, and this view only, explains satisfactorily its dominant position over both the Crown and the Parliament, and its greater need to maintain "rapport" with the suffrage-holders than with the majority in the House of Commons.

This view will also explain several other things which commonly perplex the student of the English constitution. It explains how Parliament has been able to preserve its integrity under a rule which permits less than one-tenth of the members in the House of Commons, and less than one-hundredth of the members in the House of Lords, to be deemed regular quorums and to do the business of legislation. The Cabinet represents the majority quorum; and it is the control of all legislation by the Cabinet which prevents all dangers from the minority quorums in the houses; but in the English system, the majority quorum, chosen upon a cabinet issue, is the state.

I am aware that this theory of the Cabinet is novel, and I fear that, like most new things, it may be crude. But the current theories are admittedly unsatisfactory; and if the view here presented be accepted as containing a greater share of truth, I shall gladly leave to others its better formulation.

CHAPTER III.

THE CONSTRUCTION OF THE EXECUTIVE IN THE GOVERNMENT OF THE UNITED STATES.

I. *The Election of the President and Vice-President.*

This process is separated into two parts by the constitution. The first part relates to the election of the electors; the second, to the election of the President and Vice-President by the electors.

1. The constitution commands that "each State" (commonwealth) "shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State" (commonwealth) "may be entitled in the Congress."[1]

The appointment of the electors from each commonwealth is thus made wholly and exclusively subject to the direction and control of the legislature of the commonwealth, unless limited by some other clause of the constitution. So far as this clause is concerned, the legislature of the commonwealth might order the election of the electors by universal suffrage or by a restricted suffrage, directly or indirectly, by district ticket or general ticket, by single or cumulative vote; or it might authorize the executive of the commonwealth to appoint them; or it might choose them itself; or cause them to be selected by any person and in any manner which it might deem suitable. It may, and it alone can, direct how a disputed election of the electors or of any one of them shall be determined. It may, and it alone can, determine the

[1] United States Constitution, Art. II, sec. 1, § 2.

qualifications of the electors, outside of the one qualification prescribed by the constitution, *viz;* that they shall hold no office of trust or profit under the United States.[1] Up to the point of the completion of the election of the electors the legislature of the commonwealth has plenary and exclusive power conferred upon it by this provision of the constitution. Let us examine now if any subsequent clause of the constitution puts limitation upon the fulness of this power, or impairs its exclusiveness.

First. The third paragraph, of the first section, of Article II, confers upon the Congress the power to fix the day of choosing the electors; and Congress has fixed it on the Tuesday following the first Monday in November in every fourth year succeeding every election of the President and Vice-President.[2] This day must by the constitution be one and the same for the whole United States.

Second. The principle of the fifteenth Amendment certainly applies to every election which may be held within the United States. If, therefore, the legislature of the commonwealth orders the presidential electors appointed by the commonwealth to be chosen by popular election, it cannot disqualify any citizen of the United States resident within the commonwealth from voting for them on account of his race, his color, or his previous status in respect to freedom or servitude.

Third. Article XIV of the Amendments also contains a certain restriction upon the commonwealth legislatures in respect to this subject. It declares: "When the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State" (commonwealth), "or the members of the legislature thereof, is denied to any of the male inhabitants of such State" (commonwealth) "or

[1] United States Constitution, Art. II, sec. 1, § 2.
[2] United States Revised Statutes, sec. 131.

in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State" (commonwealth).[1]

This clause has led some students of the constitution to claim that the presidential electors must be chosen by popular election; *i.e.* that the legislature of the commonwealth has no power to order their selection in any other manner. The declaration in the original provision that each "*State*" (commonwealth) shall appoint the electors appears also to support this view. It is argued that the "State" (commonwealth) is the people, not the legislature. But I think this is fallacious. No one, I think, would claim that this clause of the fourteenth Amendment orders the judges of a commonwealth to be elected by the voters, and yet it certainly does if it requires the presidential electors to be so chosen. I take it that this clause simply means that, when the legislature of the commonwealth commands the appointment of presidential electors by popular election, then it must follow the rule of suffrage indicated in this clause or suffer the reduction of the number of electors from the commonwealth, in proportion as the rule of suffrage which it ordains narrows the suffrage indicated in this clause. Thus far, and thus far only, is the full power of the legislature of the commonwealth over the election of the presidential electors modified by this provision.

As to the argument that the commonwealth must appoint the electors and that the commonwealth is the people, I will only say that the people can be the commonwealth only when politically organized. It will hardly be claimed that the people as organized in the voting precincts are the commonwealth. At the time of the formation of the constitution, the people of a commonwealth were regarded as

[1] United States Constitution, Amendments, Art. XIV, sec. 2.

organized, if at all, in the legislature of the commonwealth. The organization of the people of the commonwealths in general conventions was commanded by the constitution for the purpose of ratifying the constitution and subsequent amendments to it. The people of the commonwealths organized in general conventions had also framed the governments of the commonwealths. We might call these conventions the extraordinary organizations of the people. The legislature was certainly regarded as the ordinary organization of the people of a commonwealth. What was meant by the phrase: "Each State" (commonwealth) "shall appoint," was that *in* each "State" (commonwealth) shall be appointed. The original resolution upon this subject proposed to charge the legislatures of the commonwealths, expressly, with the duty of choosing the presidential electors themselves.[1] The change of language was undoubtedly caused by the states-rights sensitiveness about too exact directions being issued to the commonwealth legislatures. There was certainly no intention of making the appointment of the presidential electors subject to popular election. I think it is evident that the framers were anxious to avoid this. The well-known fact that in several of the commonwealths the legislatures chose the presidential electors at the first election and for a considerable period afterwards, is certainly good evidence of the general opinion of the meaning of the phrase, "Each State" (commonwealth) "shall appoint." It appears to me manifest, therefore, that the original intention of the constitution was to invest the legislatures of the commonwealths with plenary power over the appointment of the presidential electors, except as to the time of their appointment, and to exclude not only any interference of the general government in this sphere, but also any interference, not permitted by the legislature, on the part of any other organ of the commonwealth. If, however, the general convention

[1] Elliot's Debates, vol. i, p. 217.

of a commonwealth should undertake to make provision in the organic law of the commonwealth for the election of the presidential electors in opposition to the will of the legislature, and if the proposition of the convention should be ratified in the manner provided in the organic law of the commonwealth for making such propositions valid parts of its organic law, it is somewhat difficult to see how the legislature of the commonwealth could defeat the same, except by failing to provide the means and measures for carrying out the elections by the persons and in the manner ordained by the organic law. It is true that the organic law might itself provide the means and measures in sufficient detail and address its commands for the execution of the same to the executive power of the commonwealth. If so, the only independent means possessed by the legislature to defend the power conferred upon it by the constitution of the United States would fail. Whether then, as a last resort, the legislature of the commonwealth could appeal to the general government to protect it in the possession of this power against any other organ of the commonwealth calling itself the "State" is a new question. The legislature might, by choosing a set of electors itself, or ordering them chosen in some other way than that ordered by the organic law of the commonwealth, cause two sets of returns to be sent to the Congress and thus raise the question. The Congress would then be in position to determine which were the true electors; *i.e.* it would be in position to determine whether there is any organization of a commonwealth, outside of the legislature thereof, which is empowered by the constitution of the United States to appoint presidential electors, unless authorized thereto by the legislature of the commonwealth. Such a determination by the Congress, however, would not be a law. It would be only a decision in a particular case. It would not, therefore, be binding upon a succeeding Congress or even upon the same Congress in another case.

I do not think it can be successfully gainsaid that the legislative department of the general government has the power to define the word "State" in this connection and in every other connection in which it occurs in the constitution of the United States. The constitution itself does not define the word. Any word used in the constitution and not defined thereby, may be defined, primarily, by the legislative department, and this definition will be ultimate as well as primary, unless the judicial department should revise it. It would also be the law of the land *until* the judicial department should revise it. It is most likely, however, that the judicial department would refuse to interfere with the legislative definition on the ground that the question is one purely of politics. It would thus seem that in this question the legislature of the general government is the arbiter. It is not a controversy which is at all likely to arise, but should it do so, it will go to the very foundation of our whole political system.

2. From the completion of the "appointment" of the electors forward, the process is no longer subject to regulation and control by the commonwealths or the legislatures thereof. What the constitution of the United States does not, thereafter, itself regulate in detail, must be regulated by the organs of the general government.

The constitution commands the electors to meet in their respective commonwealths upon a day which the Congress may determine (and which Congress has fixed upon the second Monday in January succeeding their appointment), and to vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same commonwealth with themselves.[1] The constitution further commands "that the electors shall name in their ballots the persons voted for as President, and in distinct ballots the persons voted for as Vice-President; and that they shall make

[1] United States Constitution, Amendments, Art. XII, 1; *Ibid.* Art. II, sec. 1, § 3; United States Statutes at Large, vol. 24, p. 373.

distinct lists of all persons voted for as President and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate."[1] This language seems exact enough and comprehensive of every detail; but it has not been found in practice to be entirely sufficient. The Congress has felt it necessary to elaborate this part of the procedure still more minutely.

Congress requires the governor of each commonwealth to furnish to the persons duly chosen electors three copies of the certificate of their election, and orders the electors to make out three lists of all the votes given by them for President and Vice-President, and to attach to each of these lists one copy of this certificate of their election, and to seal them and certify upon them that they contain all of the votes of the commonwealth for President and Vice-President, and to transmit one set of these papers, forthwith after the second Monday in January upon which they shall give their votes, to the President of the Senate, by a messenger appointed by writing under their hands or the hands of a majority of them, and to transmit another set, at the same time, to the President of the Senate, by mail, and to deposit the third set with the judge of the district in which the electors shall assemble; and orders the Secretary of State of the United States to send a special messenger to the said judge to obtain this list, in case neither of the other two shall have been received at the seat of government on or before the fourth Monday of the month of January in which the electors shall have held their meeting.[2]

The Congress furthermore commands the governor of each commonwealth to transmit, so soon as practicable after the

[1] United States Constitution, Amendments, Art. XII, § 1.

[2] United States Revised Statutes, secs. 137, 138, 139, 140; United States Statutes at Large, vol. 24, p. 373; *Ibid.* vol. 25, pp. 613, 614.

conclusion of the appointment of electors in the said commonwealth, under the seal of the commonwealth, to the Secretary of State of the United States, a certificate containing the names of the persons chosen electors and the canvass of the votes cast for each person voted for. Furthermore, in case there shall have been a disputed election of the presidential electors or in regard to any one of them in any commonwealth, and the said dispute shall have been determined six days before the meeting of the electors of said commonwealth, by organs and according to a procedure prescribed by the laws of the said commonwealth existing upon the day of the determination of the dispute, the governor of the said commonwealth is commanded by the Congress to transmit, so soon as practicable, to the Secretary of State of the United States, under the seal of the said commonwealth, a true and full account of the whole procedure.

Finally, the Congress has ordered the Secretary of State of the United States to publish these several certificates in full, upon receipt of the same, in such public newspaper as he shall designate, and to transmit copies of them in full to the Congress at the first meeting of the same after he shall have received them.[1]

The constitution then ordains that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."[2]

It is curious that at this most critical stage of the whole procedure the language of the constitution should be so scant and vague. The framers, certainly, did not foresee the point upon which the strain would come, and if they had foreseen it, it is not certain that they would have been able to have made successful disposition of the difficulties which it presents. Their descendants have been groping for the solu-

[1] United States Statutes at Large, vol. 24, p. 373.

[2] United States Constitution, Amendments, Art. XII, § 1.

tion of the problem during nearly a century and have hardly yet found it.

The fourth section of the statute of February 3, 1887,[1] the first three sections of which I have cited above, professes to regulate in detail this most important part of the process.

(*a*) It fixes the time of the meeting of the Congress for the count at one o'clock P.M. on the second Wednesday in February succeeding the meeting of the electors. (*b*) It designates the place as the hall of the House of Representatives. (*c*) It ordains that the bureau of organization shall consist of the President of the Senate as the presiding officer and four tellers, two appointed by each of the Houses previous to their joint meeting. (*d*) It orders that the President of the Senate shall open all certificates and papers purporting to be certificates in the alphabetical order of the commonwealths beginning with the letter A, and shall hand them to the tellers; (*e*) that the tellers shall read the same in the presence and hearing of the two Houses; and (*f*) that upon the reading of any such paper the President of the Senate shall call for objections, if any. (*g*) It provides that all objections shall be made in writing, shall state clearly and concisely and without argument the ground thereof, and, in order to be received, must be signed by at least one member from each House. (*h*) It commands that, after all objections so made to any vote or paper from a commonwealth shall have been received and read, the Senate shall thereupon withdraw from the hall of the House of Representatives and, in separate meeting, consider and decide upon the received objections; and that the House of Representatives shall likewise, in separate meeting, consider and decide upon the received objections. (*i*) It orders that, when the two Houses have voted upon the question or questions contained in the received objections, they shall

[1] United States Statutes at Large, vol. 24, p. 373 ff.

immediately meet, and the presiding officer shall then announce the decision of the questions submitted. (*j*) It prescribes that no electoral vote or votes from any commonwealth from which *but one* return has been received shall be rejected, provided the same shall have been given by electors whose appointment has been certified to in the manner above explained, and provided the votes given by such electors shall have been *regularly* given; but that in case both Houses of the Congress shall have decided, by separate vote, that the electors making the return have not received the lawful certification above described, or have not given their vote or votes for President and Vice-President *regularly*, then such vote or votes may be rejected by the concurrent resolution of the two Houses. (*k*) It prescribes that, in case *more than one* return or paper purporting to be a return shall have been received from a commonwealth by the President of the Senate, and a determination as to who are the true electors of the commonwealth shall have been reached by an authority or tribunal within the commonwealth six days before the meeting of the electors of the commonwealth, and in accordance with the laws of the commonwealth in force upon the day when the said determination was made, then that return shall be received and the votes contained therein counted which have been given by those electors, or their lawful substitutes or successors, whom such determination shows to have been appointed; provided the votes of these electors for President and Vice-President shall have been *regularly* given. It is not expressly stated in this period of the section that, if the two Houses in separate assembly decide that such electors have not given their votes regularly, they may by concurrent action reject those votes, though it is to be presumed that such is the meaning of the law. The language of this paragraph is very confused, almost unintelligible; and since we have as yet had no actual precedents

of interpretation, there are several points concerning which our predications cannot claim the attribute of certainty. (*l*) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a commonwealth by the President of the Senate, and conflicting determinations as to who are the true electors of the commonwealth shall have been made by different authorities or tribunals within the commonwealth, each claiming to be the true authority or tribunal for the making of such determination, then the two Houses of Congress, acting in separate assembly, may by concurrent agreement determine which are the true and legal electors of the commonwealth; but if they disagree as to this, then the vote of the commonwealth shall not be counted. Here again it is not expressly stated that, if they agree upon the persons to be regarded as the lawful electors of the commonwealth and also agree that they have not given their votes regularly, they may by concurrent resolution refuse to count the vote of the commonwealth, though this is again to be inferred. (*m*) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a commonwealth by the President of the Senate, and no determination as to who are the electors of the commonwealth shall have been made in the commonwealth as provided in this act, but one set of the electors making a return of the electoral votes of the commonwealth shall have the certificate of the executive of the commonwealth, under the seal thereof, to their appointment, then the votes given by such electors shall be counted, unless the two Houses in separate assembly decide by concurrent resolution that such electors are not the lawful electors of the commonwealth or have not given their votes regularly or lawfully for President and Vice-President. In this case the two Houses may, furthermore, by concurrent resolution declare the electors not furnished with the certificate of the executive

of the commonwealth to their appointment, to be the true and lawful electors of the commonwealth, and the votes of such electors must be counted unless the two Houses concurrently resolve that these electors have not given their votes *regularly* for President and Vice-President and concurrently decide to reject them. (*n*) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a commonwealth by the President of the Senate, and no determination as to who are the electors of the commonwealth shall have been made in the commonwealth as provided in this act, and neither set of the electors making returns shall be furnished with the certificate of the executive of the commonwealth to their appointment, then the two Houses may, acting separately, by concurrent resolution determine who are the lawful electors of the commonwealth, and the votes of such electors shall be counted unless the two Houses by concurrent resolution decide that such electors have not given their votes regularly or lawfully for President and Vice-President and resolve to reject the same. If, in this case, the two Houses cannot agree as to who are the lawful electors of the commonwealth, no vote or votes from the commonwealth can be counted. (*o*) Lastly, it commands that the tellers shall make lists of the votes as they shall appear from the certificates as opened by the President of the Senate, when no objections have been made, and as they shall appear from the decisions of the two Houses made according to this law and announced by the presiding officer upon reunion of the two Houses, when objections have been duly raised; and that the votes, having been ascertained and counted in the manner and according to the rules provided in this act, shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President, and together with

a list of the votes shall be entered on the journals of the two Houses.

The first thing which strikes the uninitiated reader of this section as strange and peculiar is the apparently changeable organization of the Congress when counting the electoral vote, and when hearing it counted. Apparently, when listening to the count, Congress is a joint national assembly, consisting of the members of the two Houses. One person is made the presiding officer. He is called sometimes the President of the Senate, but sometimes also simply the presiding officer. He is vested with the power to keep order in the united assembly, and he reads the decisions (upon objections to votes) which both the House of Representatives and the Senate make in separate assembly. On the other hand, so soon as the passive state is laid aside and the active assumed, this apparently simple body becomes two bodies with independent and possibly conflicting wills and organs. This strange organization is the product of two conflicting principles of constitutional law. The one is the proposition that the constitution itself provides for the counting of the electoral vote; and the other is that the constitution vests in Congress the power to provide by legislation for the count of the vote. The first proposition, although Senator Sherman[1] gave the great weight of his opinion against it, was supported by the Senate as its defence against the tendency of the House to organize, by legislation, a single body for counting the electoral vote, consisting of the members of the two Houses, in which the senators would be overwhelmed by the far more numerous representatives. The second proposition was held by a large party in the House, large enough to carry through the House, in the forty-eighth Congress, a bill to constitute the two Houses a joint convention to count the electoral vote;[2] although

[1] Congressional Record, vol. 17, p. 817.

[2] *Ibid.* vol. 15, pp. 5076 & 5557.

during the course of the debate upon the bill both Mr. Eaton and Mr. Pryor abandoned their own constitutional ground, and undertook to turn the argument of the Senate against itself by occupying the Senate's position. Mr. Eaton declared that in his opinion the constitution vests in the House of Representatives the power to count the electoral vote in case of dispute,[1] and Mr. Pryor asserted that the constitution creates a joint convention of the two Houses for this purpose.[2] The only wonder is that we did not get, as a compromise between these various theories, an organization more complicated and illogical than that above described.

It seems to me that the constitutional principle upon which the House bill rested is the true one, *viz;* that the constitution does not itself expressly provide for deciding disputes in regard to the counting of the electoral votes, but vests in Congress the power to provide for the case by legislation. Article I, section 8, paragraph 18, reads: "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." This was the view taken by Senator Sherman. Senator Garland also declared that in his opinion the constitution does not specifically and expressly provide for determining disputes in regard to the count of the electoral votes;[3] but his extreme states-rights political science would not permit him to accept the doctrine that the constitution generally and impliedly vests in the Congress the power of making provision for their determination. His view was that what is not to be found specifically and expressly in the constitution must be put there by constitutional amendment. This has an honest ring, but with our present method of amending the constitution it simply means stagnation. It

[1] Congressional Record, vol. 15, p. 5548.
[2] *Ibid.* vol. 15, p. 5102.
[3] *Ibid.* vol. 13, p. 2648.

simply means that our public law shall never keep pace with the developments and requirements of our political science. It means the accumulation of error until nothing short of revolution can correct it. It means the congestion of the body politic until nothing but blood-letting can relieve it. It is therefore the *petite morale* over against the *grande morale.* His brethren in the House certainly manifested greater statesmanship than he upon this subject. His first proposition is, however, undoubtedly true, *viz;* that the constitution does not specifically and expressly provide for determining the conflicts over the electoral returns. It was certainly impossible for the framers of the constitution to provide expressly and specifically for the determination of disputes whose causes they could not foresee, and to attribute such prescience to them is nothing but chauvinistic piety. We all know that, while the form of the electoral system which they created remains, the substance of it has become completely changed, and that it is from this change that these disputes and controversies arise. The framers of the constitution undoubtedly meant that the President of the Senate should count the electoral votes, but in making the count they did not think of anything more than mere enumeration. They did not think of his ever being placed under the necessity of ascertaining what should be counted. They were, however, wise enough to know that they could not foresee all things, and therefore they wrote in the constitution that Congress should have power to make all laws necessary and proper to carry into execution all powers vested by the constitution in the government of the United States or in any department or officer thereof. A sound interpretation of this clause cannot fail to accord to the Congress the power to make laws for carrying into execution this general and undefined power of the President of the Senate to count the electoral votes. Congress may therefore, by a law, create any tribunal it will for the determination of controversies

and conflicts in the counting of the electoral votes and make such determinations binding upon the President of the Senate in the enumeration of the votes.[1] Whether that tribunal shall be the two Houses of Congress acting independently, or a convention composed of the members of the two Houses of Congress, or an equal number of representatives from the two Houses, or a court already in existence or created for the purpose, or any other body, — Congress may, nay must, determine by an act of legislation. It is only a question of practical politics, and not at all of constitutional powers.

The failure of the Senate to comprehend, or its determination to ignore, this view is what has produced the mixed and confused methods and procedures provided in this fourth section of the law under our consideration.

When we come to examine these provisions in detail, we find several measures of very questionable wisdom and several points still left unsettled.

First. The rule that the determinations made by a commonwealth tribunal or authority in regard to controversies and contests concerning the appointment of electors cannot be reversed by the concurrent act of the two Houses appears to me to be unwise. No determination proceeding from a commonwealth should be made *conclusive* against the judgment of both Houses of the Congress in the counting of the electoral vote. In matters like this, the concurrent judgment of the two Houses of the Congress is the surest interpretation of justice and right which our political system affords; and the claim that they have no constitutional right to determine the legal genuineness of any electoral vote sent to them under any form of certification by any commonwealth, on the ground that the constitution vests the appointment of the electors wholly in the commonwealth, confounds the process of the appointment or election with that of the count,

[1] Kent's Commentaries (12 edition), vol. 1, p. 295.

and seeks to rob the power of counting of its most important element, *viz;* the power of ascertaining what is to be counted. The constitution either vests in Congress the power to count the electoral vote or the power to provide by legislation for counting it. If the former proposition is true, then Congress cannot by legislation divest itself of the power of ascertaining and determining what is to be regarded as the true electoral vote of a state. If the latter proposition is true, then Congress may indeed by legislation designate a commonwealth tribunal or authority and vest the same with the power to determine, in first and last instance, all controversies and contests in regard to the appointment of electors; but it would be most unwise to do so. Such a rule must be based upon the supposition that only the commonwealth in which the controversy or contest occurs has any important interest in its determination. It is the same sort of folly that was contained in the compromise measures of 1850, when it was imagined that the slavery question could be put to rest by putting its discussion out of the Congress.

Second. The rule that no electoral vote or votes from any commonwealth from which but one lawful return has been received shall be rejected, seems to me to surrender too far the control of Congress over the counting of the vote. It is altogether conceivable that a commonwealth may make but one return, and yet that, in the election of the electors who sign the same, notorious fraud and terrorism may have carried the day. This rule cannot be justified except upon the assumption that the purity of presidential elections is matter solely or at least chiefly of commonwealth concern, and that the local consciousness of right and wrong in reference to this subject is rather to be trusted than the national. It seems to me that such assumptions need only be stated to be rejected. The constitution expressly provides a grave penalty for any such procedures within a commonwealth, and imposes upon Congress the duty of securing its enforce-

ment.[1] When the bill went from the Senate to the House it contained the proper modification of this rule. It provided that the concurrent act of the two Houses should prevail against a single return,[2] but the House struck out the modification and insisted upon the amendment as one of the indispensable conditions of its agreement to the bill.[3] It will be remarked, however, in connection with this provision, as with the previous one, that the law authorizes the two Houses by concurrent resolution to reject the votes of the electors for President and Vice-President if they agree that these have not been *regularly* given; *i.e.*, the two Houses cannot reject the return on account of fraud or defect in the election of the electors or in the determination of a controversy concerning the election of the electors, but they may do so on account of irregular action on the part of the electors themselves in giving their votes for President and Vice-President. By implication it leaves in the two Houses the power by concurrent resolution to determine wherein irregularity shall consist. This distinction is certainly a valuable one. It would be an unendurable surrender of the powers of Congress to so bind the two Houses that they could not by concurrent act prevent, for example, the electors from choosing a person for the presidency who should not have the qualifications for the office prescribed in the constitution.

Third. The rule that, in case of conflicting returns and no determination made by the commonwealth according to the provisions of the act, the certificate of the executive of the commonwealth shall be held conclusive as to who are the true electors of the commonwealth, unless the two Houses shall by concurrent act resolve the contrary, is liable to abuse. It gives too much power over the presidential election into the hands of the executive of the commonwealth.

[1] Art. XIV, sec. 2. [2] Congressional Record, vol. 18, p. 29.
[3] Congressional Record, vol. 18, p. 77.

He could easily procure the transmission of conflicting returns and then, in case of a difference of view in the two Houses, he could practically determine which of the returns should be received. The executives of the commonwealth have not shown themselves sufficiently immaculate to be intrusted with powers so easy of manipulation. This provision did not exist in the bill as it went from the Senate to the House, but was introduced as an amendment by the House and made another *conditio sine qua non* of its acceptance of the bill.[1]

Fourth. The rule that, in case of two or more returns sent in by two or more sets of electors, each authorized by a determination of the commonwealth made professedly in accordance with the provisions of the act, either House of the Congress may reject the vote of the commonwealth, is one of doubtful wisdom. When the bill was in the Senate, Mr. Evarts pointed out the fact that this provision would inure to the undue advantage of the House whenever the loss of the vote of the commonwealth affected the election, since the House could, by throwing out the vote of the commonwealth, bring the election into its own hands.[2] This condition of things could easily be manufactured, of course; and a House so disposed could easily defeat an election by the electors and substitute its own choice therefor. Mr. Hoar suggested that this could not happen, since, if the votes from a commonwealth should be thrown out, they must be deducted from the whole number of electoral votes in calculating the majority necessary to a choice. The result of this might be the election of the other candidate by the electors, but it could not be to bring the election into the House of Representatives.[3] But the assertion of Mr. Hoar that, when the votes of a commonwealth are thrown out, they are to be deducted from the whole number of the electoral votes in

[1] Congressional Record, vol. 18, pp. 30, 49, 77.
[2] *Ibid.* vol. 17, p. 820. [3] *Ibid.* vol. 17, p. 821.

calculating the majority necessary for a choice, was not at the moment, and is not now, the fixed and certain law of the land. It was only his conjecture, while Mr. Evarts, an equally weighty authority in the interpretation of constitutional law, held, as we have seen, the contrary view. Mr. Morgan suggested that the House might be deterred from such an act by the fact that the members from one more than one-third of the commonwealths can, under the constitution, prevent a quorum for the election of the President from assembling; which would result in a failure of the House to elect, and would make the person chosen by the Senate as Vice-President, the President.[1] But this again is crude reasoning. The constitution provides that a quorum of the House of Representatives to elect a President shall consist of members *or a member* from two-thirds of the commonwealths.[2] Practically no Congress would be so constituted as to party affiliations that all the members from one more than one-third of the commonwealths would be opposed to a majority of the members from each of one less than two-thirds of the commonwealths.

The criticism upon this rule will apply equally to the rule permitting either House to prevent the counting of the vote of a commonwealth from which several returns have been presented, when no determination has been made in the commonwealth according to the provisions of this act, and neither set of the electors making returns is furnished with the certificate of the executive of the commonwealth concerned.

Fifth. The law fails to cover at least two points. It does not provide for the case where two persons, each claiming to be the true executive of the same commonwealth, issue certificates to different sets of electors, and no determination, according to section second of the act, shall have been made

[1] Congressional Record, vol. 17, p. 867. [2] Art. XII.

in the commonwealth. The analogies of the cases provided for would lead us to infer that the vote of the commonwealth should be rejected, unless the two Houses acting separately could agree as to which return should be counted; but this is only conjecture. Furthermore, no provision is made in the law as to whether, when the vote of a commonwealth is rejected, it is to be deducted from the whole number of electoral votes to which all the commonwealths are entitled, in determining the majority necessary to choose the President. The constitution declares that the majority necessary to elect shall be that of the whole number of electors appointed.[1] If, when the vote of a commonwealth is rejected, it is to be assumed that the commonwealth has not appointed any electors, then it would seem that such a commonwealth should not be regarded in computing the majority necessary to a choice; but this again is conjecture. When two such able lawyers as Senators Evarts and Hoar disagree, as I have pointed out above, in regard to this matter, it certainly is to be concluded that there is necessity for greater clearness and exactness upon this point.

The last three sections of the law, the fifth, sixth and seventh, prescribe rules of procedure in the joint meeting, and in the separate meetings, of the two Houses. The purpose of these is to prevent the protraction of the count beyond the day for the inauguration of the new President, *i.e.* to prevent interregnum. They ordain that, in the joint meeting, the President of the Senate shall have power to preserve order, and that no debate shall be allowed, and no question shall be put by the presiding officer except to either House on a motion to withdraw; that such joint meeting shall not be dissolved until the count of the electoral votes shall be completed and the results declared; that when the two Houses separate to decide upon an objection that may have been made to

[1] Art. XII.

the counting of any electoral vote or votes from any commonwealth, or other question arising in the matter, either House may direct a recess until ten o'clock A.M. of the next calendar day, Sunday not counted, but that if the counting of the electoral vote and the declaration of the result shall not have been completed before the fifth calendar day next after the first meeting of the two Houses, no further or other recess shall be taken by either House; that, in the separate meetings of the two Houses, each senator and each representative may speak to the objection or question not more than once and for not longer than five minutes, and that such debate shall not be permitted for a longer time than two hours, upon the expiration of which time it shall be the duty of the presiding officer of each House to put the main question without further debate. There is also provision for the seating of the two Houses and their officers which need not be recited for our purpose.

These regulations are apparently exhaustive. So far as human wit can divine, they will probably prevent any failure of the Congress to reach its decision in regard to the counting of the electoral votes before the expiration of the existing presidential term; *i.e.* they will remove this possibility of interregnum which, in one case at least, seriously threatened to occur.

There is no doubt that the law disposes, in a complex and clumsy way indeed, of some of the difficulties in the counting of the electoral votes; but it cannot be regarded as a solution in principle of this great question. It is a makeshift, at best a compromise. Senator Hoar himself, who, with Senator Edmunds, may be regarded as the originator of this law, conceded that a perfect regulation of this subject would require a common arbiter between the two Houses of the Congress, and agreed that the constitution confers upon the Congress the power to establish such an one by law; but he cited the failure of all attempts as yet made upon that line

and concluded that practically it is impossible to secure any such provision.[1]

If, from the announcement of the state of the vote as made by the President of the Senate, it should appear that no person has received the votes of a majority of the whole number of electors appointed, as required by the constitution for the election of the President,[2] the constitution then provides that the House of Representatives of the Congress shall immediately elect the President by ballot, from among the three persons having the highest number of electoral votes for that office; that for this purpose, a quorum shall consist of a member or members from two thirds of the commonwealths; that the voting shall be by commonwealths, and that a majority of all the commonwealths shall be necessary to elect.[3] Naturally the declaration of the result will be made by the Speaker of the House, though the constitution makes no provision upon this point.

If, from the announcement made by the President of the Senate, it should also appear that no one has been chosen by the electors Vice-President, the constitution ordains that the Senate shall immediately elect the Vice-President from the two persons having the highest number of electoral votes for that office; that for this purpose a quorum shall consist of two thirds of the whole number of senators, and that a majority of the whole number shall be necessary to elect.[4] Naturally the announcement of the result will be made by the President of the Senate, though the constitution makes no provision upon this point.

The procedure in each House is regulated by each House for itself, under its power to establish its own rules of discipline and procedure.

II. *The Law of Succession to the Presidency* — in case of

[1] Congressional Record, vol. 17, p. 1020.
[2] United States Constitution, Amendments, Art. XII, § 1.
[3] *Ibid.* [4] *Ibid.*

the failure to elect a President, or in case of his death, resignation, removal, or inability to discharge the powers and duties of the office.

If there should be no election of a President, either by the electors or by the House of Representatives, before the expiration of the current presidential term, *i.e.* before the fourth day of March next following the meeting of the Congress for the purpose of counting the votes of the electors, and if there should be an election of a Vice-President, either by the electors or by the Senate before that time, the constitution provides that the person elected Vice-President should then after the fourth of March act as President.[1] If there should be no election either of a President or of a Vice-President before the said fourth of March, the constitution does not indicate who shall act as President; nor does it vest in any body the power to determine this question. There would, therefore, be interregnum, unless the existing President and Vice-President should resign before the expiration of their terms. Then, by a statute of Congress, the Secretary of State would become President, and would hold until a President should be elected.[2] This cannot be considered as any adequate regulation of this very important point. The constitution should provide that the existing President shall hold until a President shall be elected.

If the President should die, resign, be removed, or become unable to discharge the duties of his office, the constitution then devolves the office upon the Vice-President.[3]

If both the President and Vice-President should die, resign, be removed, or become unable to discharge the duties of the presidency, the constitution empowers the Congress to make by law provision for the succession. Congress has covered this point by the statute of January 19th, 1886, naming the Secre-

[1] United States Constitution, Amendments, Art. XII, § 1.
[2] United States Statutes at Large, vol. 24, p. 1.
[3] United States Constitution, Art. II, sec. 1, § 6.

taries of State, of the Treasury, of War, the Attorney-General, the Postmaster-General, the Secretaries of the Navy, and of the Interior as the persons who, in such case shall succeed, in this order, to the duties and powers of the presidency,[1] and hold until the disability be removed or a President be elected.[2] The reasonable interpretation of this statute would be that if the disability should be removed from the Vice-President, but not from the President, the former would dispossess the Cabinet officer who should be acting as President; and that if afterwards the disability should be removed from the President before the end of the term for which he was elected, the President would dispossess the Vice-President acting as President. This would be also the reasonable interpretation of the constitution upon this point. We have, however, no precedents to guide us upon this subject; and it is certainly a question whether, when the Vice-President once becomes President or acting President, he can be dispossessed by the person originally elected President. As I have just said, I incline to the view that he can; but many publicists (perhaps I should say politicians) take the opposite view.

The constitution has left one very important point in connection with this subject unprovided for, and has not authorized any body to make provision covering the case, *viz;* who shall determine when disability occurs or ceases. The decision of these questions certainly should not be left solely to the parties concerned in the succession. Either the Supreme Court or the Congress should decide them. They are primarily judicial questions, and have no rightful connection with policy. Still, the determination of them may involve grave political consequences. If it should be left to the two houses of Congress, by concurrent resolution, to declare when disability happens and when it ceases, I think the solution of the question which best comports with the spirit of our institutions will have been reached.

[1] United States Statutes at Large, vol. 24, p. 1. [2] *Ibid.*

III. *The Presidential Term.*

This is fixed by the constitution at four years.[1] The date from which the term should be calculated is not expressly provided in the constitution. This date was fixed originally by an act of the Confederate Congress, passed September 13th, 1788, appointing the first Wednesday of the following March as the day upon which government under the new constitution should begin. The first Wednesday in March of that year was the fourth day of March; and, although as a fact the President was not inaugurated until the 30th of April, the 4th of March, 1789, was considered to be the legal beginning of the first presidential term, and therefore the 4th of March of every fourth year succeeding the year 1789 is impliedly made by the constitution the beginning of every new term, even though during the course of the term the office should devolve upon a new person. Such person would hold only during the remainder of the term.

There are now no provisions for the election of a President at any other time than the regular quadrennial period. Statutory provisions for this purpose existed from March 1st, 1792, to January 16th, 1886. They were abolished by the statute of the latter date. Whether during the period of the existence of these provisions, a new election at some other time than the regular quadrennial period would have changed the date of the beginning of subsequent terms, is a question. I think it would have done so. I think the newly elected President would have been entitled by the constitution, to a full term of four years, from the 4th of March following his election, and would not have been limited to the completion of the term in which the vacancy occurred. The day and month of the year would have remained the same, but the year would have been changed. The Congress evidently holds this view.[2]

[1] United States Constitution, Art. II, sec. 1, § 1.

[2] United States Revised Statutes, sec. 152.

I do not think that Congress now has the power to change either the day, month or year of the beginning of a presidential term, except by providing for a new election when vacancy occurs, during a term, in both the presidential and vice-presidential offices. The date of the beginning of the first term once fixed, the constitution requires that every new term should begin in four years from that date, unless a new election should take place at an irregular time on account of vacancy; and a new date once fixed in this way, the succeeding dates would be again controlled by the constitution until another election at an irregular time, on account of vacancy, should again change the same. The wisdom of abolishing these provisions for irregular election can hardly be questioned, and it is to be hoped that they will not be re-enacted.

IV. *The Qualifications for the Presidency.*

The constitution requires citizenship by birth within the country, *i.e.* birth within the country, of parents who are not extra-territorial persons.[1] Whether a natural born citizen who should become, by naturalization, a citizen of a foreign state, and who should subsequently regain citizenship of the United States, would then be eligible to the Presidency, is at least a question. A technical argument might be constructed to support the proposition that he would; but I think the broader principles of public law and political science would incline to the negative. The President is the representative of the interests of the country against foreign countries. His entire interests should be with his own country. Citizenship in a foreign state would be very likely to create ties which might divide his interests and his sympathies.

The constitution furthermore requires residence for fourteen years within the country.[2] There is no requirement that this time of residence shall be immediately previous to the election or that it shall be one single period.

[1] United States Constitution, Art. II, sec. 1, § 5. [2] *Ibid.*

The constitution also requires that the President shall be thirty-five years of age.[1] Whether the thirty-five years shall be measured to the date of the election of the electors, or to the date of the election by the electors or by the House of Representatives, or to the date of the assumption of the powers and duties of the office, is not fixed, either by the constitution, by statute or by custom. Natural reason would decide that the date of the election of the President by the electors as declared in the count, or by the House of Representatives, in case of the failure of the electors to elect, would be the proper point of time to which the age of the person should be reckoned. It is for the Congress, in counting the electoral vote, or for the House of Representatives, in electing, to enforce these qualifications; and therefore the time of the performance of these acts appears naturally to be the time to which the age of the candidates should be reckoned.

The constitution requires, lastly, that before entering upon the execution of the office of President, the elected person shall either swear or affirm that he will faithfully execute the office of President of the United States, and will to the best of his ability preserve, protect and defend the constitution of the United States.[2] Whether this is to be regarded as a qualification necessary to entering upon the privileges, powers and duties of the office is a question. The language of the constitution seems to imply that it is. If this be true, then any President-elect, who should undertake to exercise the executive powers before taking this oath or affirmation, should be regarded and treated as a usurper. This would be a radical and, I think, an excessive penalty, but I do not see how its infliction could be legally avoided. It seems to me that oath-taking as an induction to office ought to be regarded as a ceremony like coronation, desirable under certain circumstances, but not an antecedent necessity to the validity of official acts.

[1] United States Constitution, Art. II, sec. 1, § 5. [2] *Ibid.* § 8.

The constitution creates two disqualifications, *viz;* the holding of membership in either house of Congress at the same time with the holding of the office,[1] and engaging in rebellion or insurrection against the United States or giving aid and comfort to the enemies thereof after having taken an oath, as a member of the legislature of the United States or of any commonwealth or as an officer of the United States or of any commonwealth, to support the constitution of the United States.[2] The latter disqualification may be removed by "a vote of two-thirds of each house" of Congress.[3] Whether a subsequent act of Congress repealing the act removing the disqualification would revive the disqualification is a question; and if this be answered in the affirmative, a second question arises — whether the repealing act must be passed by a two-thirds majority. I do not think it was the intention of the framers of this provision that the Congress, after once removing this disability in any case or class of cases, should have any further power over the subject. It is very difficult however to dispose of the question in this manner. The dilemma illustrates the impolicy of vesting the legislature with the power to abolish, change or modify constitutional provisions. Such power should exist nowhere but in the general amending power; *i.e.* in the sovereignty as organized within the constitution. If it be placed elsewhere, it will be sure to create uncertainty and confusion.

V. *The Rights and Privileges of the President.*

The President has the right to a compensation for his services, which the Congress fixes by statute, but which the Congress may not alter during the period for which he shall have been elected. He cannot within this period receive any other emolument from the United States or from any commonwealth.[4] The present compensation, as fixed by

[1] United States Constitution, Art. I, sec. 6, § 2.
[2] *Ibid.* Amendments, Art. XIV, sec. 3.
[3] *Ibid.*
[4] *Ibid.* Art. II, sec. 1, § 7.

statute, is $50,000 per annum, together with the use, as a residence, of the executive mansion, and of the furniture and effects kept therein.[1]

He is privileged from the jurisdiction of any court, magistrate or body over his person. He cannot be arrested or restrained of his personal liberty by any body for anything, not even for the commission of murder. He is responsible to one body only, *viz;* the Senate of the United States, organized as a court of impeachment under the presidency of the Chief Justice of the United States. In the course of his trial before that body, which can be only upon the motion of the House of Representatives, he cannot be arrested or in any manner restrained, nor forced to appear in person before the tribunal, nor to give testimony, nor be deprived of any of his powers as President. These privileges exist up to the moment when judgment is pronounced against him. The judgment can condemn him only to removal from office and to disqualification from holding office in the future. After this judgment shall have been duly rendered, however, the President is stripped of all his official privileges and may be arrested, imprisoned, tried and condemned, as a common citizen, for any crime or misdemeanor committed while President. This is also true in case his descent from office should have been effected by resignation or the expiration of his term. In all cases the criminal statute of limitations ought not to begin to run in his favor until the moment of his descent from office.

The principles of the presidential privilege, as I have thus stated them, are not expressly prescribed by the constitution, nor provided by statute, nor are they contained in any decision of the Court upon the case in point. They are simply the postulates of political science, which the constitution implies, which the Court apparently approves in the case of Mississippi *v.* Johnson,[2] and some of which were followed in the only case

[1] United States Revised Statutes, sec. 153. [2] U. S. Reports, 4 Wallace, 475.

of presidential impeachment which we have experienced. These postulates rest both upon natural reason and necessity. Democratic doctrinaires have tried to make it appear that such privileges can only spring from the monarchic principle that the "King can do no wrong"; but their argumentation is a tissue of sophistry. All states have found it necessary to recognize the complete personal independence of the executive head of the government, and some of them have founded it upon the doctrine that the "King can do no wrong." But there is another and deeper principle than that of the immaculate character of the king, upon which both the monarchic doctrine and the republican doctrine of the executive independence rest, *viz;* the necessary order of authority in every political organization. It is impossible to make the supreme executive head of the government subject to process without ultimately destroying all power to execute process, *i.e.* without disorganizing the government. It is impossible to make the executive head of the government of the United States subject to process without destroying the unity of the executive power, without placing a part of the power to execute the laws under the control of some other person than the President; and this the constitution forbids, in that it vests the whole executive power in the President. It is impossible to execute any process upon the President of the United States should he resist it, for the constitution makes the whole machinery of execution subject ultimately to his command. Moreover, the constitution vests in the President the unlimited power of pardon, except for impeachment. He could therefore, if made subject to ordinary process of law, free himself by pardoning himself. From whatever standpoint we regard the question, we are forced to the conclusion that the President is personally inviolable, and that it is the presumption of law that he has done no wrong until the Senate, by a two-thirds vote, upon a prosecution instituted by a majority of the House of Representatives, expels him from the presidency.

There is no danger to the people in this principle. There would be great and constant danger in the opposite theory. Under the opposite theory, any magistrate might, at the instigation of any individual, cause interregnum or a devolution of the presidential office, thus defeating the will of the whole people in the choice of the President, and exposing the whole people to the danger of anarchy. Moreover, as I have said, the principle only *suspends* the powers of the courts to subject the President to process. Upon his descent from office he becomes immediately liable to prosecution for every crime and misdemeanor committed while in office. There is but one process which he can escape by descent from office, *viz;* impeachment. Whether he can escape impeachment by resigning his office in the face of an impeachment, is a question. Upon technical grounds, it would appear that he can. The constitution, certainly, recognizes the power of the President to resign at his own discretion;[1] and the statute of March 1st, 1792, provides that the "only evidence of a refusal to accept, or of a resignation of the office of President or Vice-President, shall be an instrument in writing, declaring the same, subscribed by the person refusing to accept, or resigning, as the case may be, and delivered into the office of the Secretary of State."[2] The President may therefore resign at any moment; and there is no body vested with the power to refuse the resignation. From the moment that he deposits his resignation in the office of the Secretary of State, he ceases to be an officer; and when he ceases to be an officer he is no longer subject to the process of impeachment.[3] He may thus avoid part of the penalty which the Senate might inflict in a condemnation on impeachment, *viz;* disqualification from holding office in the future.

[1] United States Constitution, Art. II, sec. 1, § 5.
[2] United States Revised Statutes, sec. 151.
[3] United States Constitution, Art. II, sec. 4.

CHAPTER IV.

THE POWERS OF THE PRESIDENT.

I. *The Diplomatic Powers.*

1. The constitution vests the President with the power to negotiate treaties, conventions and agreements with foreign states.[1] The exact language of the constitution is: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." In the power to make a treaty must be included the power to make conventions and agreements, upon the principle that the greater includes the less. In the making of a treaty two distinct processes must be recognized. The first is the fixing of the points of the agreement, the negotiation; and the second is the ratification. From the nature of the case, the President must conduct the first. It requires secrecy, concentration of responsibility, and promptness of decision. The Senate, according to this principle, will be confined, in its activity, to the process of ratification. This is not only the dictum of a sound political science, but it is also the practice of our government.

The constitution, furthermore, makes the power of the President to negotiate treaties and agreements with foreign states practically exclusive as against the powers of the commonwealths. It forbids a commonwealth absolutely from entering into any treaty, alliance or confederation with a foreign state;[2] and it forbids a commonwealth, without the consent of Congress, from entering into any agreement or compact with a

[1] United States Constitution, Art. II, sec. 2, § 2. [2] *Ibid.* Art. I, sec. 10, § 1.

foreign state.[1] The constitution apparently makes a distinction between treaties and agreements, forbidding the commonwealths absolutely from making the former, but allowing them, by consent of the Congress, to make the latter. If Congress should give its consent, then, naturally, the governor of the commonwealth concerned would be enabled, so far as the constitution of the United States is concerned, to negotiate the agreement with the foreign state. He would exercise a diplomatic power. This is a relic of confederatism. It does not trouble us in practice, but in theory it is an excrescence.

2. The constitution vests in the President the power of nominating the diplomatic and consular agents of the United States to foreign states, and of commissioning them. The exact language of the constitution is: "He shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls . . . and shall commission all the officers of the United States."[2] The power to nominate and commission these officials is thus vested wholly in the President. The power to "appoint" appears to be attributed to him and to the Senate jointly; but the exclusive power to nominate and to commission leaves nothing to the Senate but the power of approval; and that was meant to be the function of the Senate alone. The language of the constitution is a little unfortunate and obscure. It has given rise to claims on the part of the Senate, or rather of the senators, to participate in the nominations, even to dictate the nominations, — claims which have caused the President, at times, great embarrassment. This is unwarranted by the constitution. The advice and consent of the Senate can be given only by way of a vote of approval or disapproval of the President's nomination. The advice and consent of individual senators have no constitutional force or value. The President alone may appoint these officials during a recess of the Senate, and com-

[1] United States Constitution, Art. I, sec. 10, § 3.

[2] *Ibid.* Art. II, sec. 3.

mission them for a term which may extend to the expiration of the next session of the Senate.[1] This power is expressly conferred by the constitution. It is of course implied that he shall make nominations to the Senate, at its next following session, for permanent appointments to such posts, but this is not expressly required by the constitution or by statute.

It is also implied, from the principle of the sole responsibility of the President in supervising the execution of the laws, that the President is authorized to dismiss or suspend any person from any diplomatic or consular office. During a period of twenty years, from 1867 to 1887, the Congress took a different view of the powers of the executive in this matter. In the tenure of office acts, of 1867 and 1869, the Congress went upon the theory that, inasmuch as the constitution makes no express provision for the dismissal and suspension of such officers or of officers generally, the Congress has the power to regulate the subject by law. The abolition of these acts, in the year 1887, may mean that Congress now regards these powers as conferred upon the executive by the constitution, and it may mean that Congress itself, now and for the time being, simply permits the President a discretionary exercise of these powers. There is a very wide difference in the two views. If the former be the correct interpretation, the Congress is debarred from any re-enactment of such measures. If the latter, then the Congress may again regulate this subject by statute. The Court has never had opportunity to pronounce upon the constitutionality of the acts of 1867 and 1869. There is no doubt that one of the great parties in our politics regarded them, at the time of their enactment, as encroachments upon the executive prerogatives. I think there is little doubt, also, that the friends of these measures were anxious to prevent any case involving their constitutionality from coming before

[1] United States Constitution, Art. II, sec. 2, § 3.

the courts.[1] This uncertainty as to the respective powers of the President and the Senate can hardly be removed until the subject of dismissal from office is regulated by an amendment to the constitution.

3. The constitution vests the President with the duty of receiving ambassadors and other public ministers.[2] This duty contains very important powers. In discharging it, the President may refuse to receive an ambassador or public minister from a particular state, or from a particular organization claiming to be an independent state; or he may refuse to receive a particular person as ambassador from a state whose independence has been already universally recognized; or he may dismiss or demand the recall of any ambassador or public minister. Furthermore, in discharge of this duty, the President may recognize, in first instance, the independence of a foreign state.

A part of this duty is, therefore, merely ceremonial; another part contains powers which, though discretionary, are not dangerous; while a third part contains powers which may be so exercised as to produce most momentous results. For example, the dismissal of an ambassador or public minister upon grounds personal to himself will not estrange states; but his dismissal for political reasons is a hostile act; and the recognition of the independence of a political organization, which is in rebellion against a legitimate government,

[1] This is the testimony, at any rate, of Judge Luke P. Poland, of Vermont, who drew the complaint against General Lorenzo Thomas for threatening to dispossess Secretary Stanton of the War Office without the consent of the Senate to President Johnson's dismissal of Stanton; which was the principle provided against in these acts. According to Judge Poland's story, General Thomas's counsel resolved not to procure bail for their client, hoping that the judge before whom he was brought, Judge Cartter of the District Court, would commit him to prison. Had the judge done so, this would have furnished the opportunity for testing the constitutionality of these acts before the courts. Judge Cartter, however, a friend of the acts, understood the plan and foiled the same by declining to make an order for bail. The prosecution was dropped, and the case failed to reach the court. Letter of Judge Luke P. Poland to the Omaha Republican, under date of March 26th, 1887. [2] United States Constitution, Art. II, sec. 3.

is a far different thing from recognizing a new state not formed through the process of rebellion and revolution.

The Senate has a certain check upon some of these powers of the President, in that the Senate may refuse to make treaties with, or send diplomatic agents to, states whose independence it does not recognize. And the Congress may refuse to create diplomatic posts in such states or vote salaries for their endowment.

As against the commonwealths, however, these powers of the President are exclusive. The commonwealths cannot send diplomatic agents to states, nor receive such agents from foreign states; at least they cannot do so without the consent of the Congress, given by way of a regular statute.

II. *The Powers of the President in Legislation.*

1. The constitution vests in the President the power to call together the Congress, or either house thereof, in extraordinary session. It also vests in him the power to adjourn them to such time as he shall think proper, in case they themselves cannot agree upon a time of adjournment.

2. It imposes upon him the duty of giving to Congress information of the state of the Union and of recommending to Congress such measures as he shall judge necessary and expedient.

3. It vests in him the power to veto every bill, order, resolution or vote, to which the concurrence of the two legislative chambers shall be necessary, except a vote to adjourn.

The constitution does not manifest any timidity about allowing the President to call one house without the other to extraordinary session. The prime object of this provision is, of course, to allow the President to summon the Senate as an executive council, to aid him in treating with foreign powers and in appointing officials. He may, however, call the House without the Senate, and either body, when so called, may undertake legislative business, in the absence of the other, so far as any constitutional limitations are concerned.

Once assembled in extraordinary session, however, the President cannot adjourn one without the other. He could accomplish this result, however, by adjourning both and then immediately recalling one of them.

The only apparent opportunity for an abuse of this power is in the forming of treaties with foreign powers. This opportunity, however, is not created by the absence of the House, but by the fact that the House, though present, cannot participate in this function. So far as the constitution is concerned, the President and Senate, through a treaty with a foreign state, can bind the House, whether it be absent or present at the time of the formation of the treaty, to anything which by international custom falls within the domain of treaty. Not only is the House bound in a general sense, in that the treaty is the law of the land, but it is also bound to agree to the enactment of the measures necessary to carry out the treaty. The presence of the members of the House at the seat of government might possibly result in the exercise of some influence over the President or the senators when these are engaged in the making of a treaty; but influence is not participation in the exercise of governmental power.

It is manifest from these considerations that there is very little opportunity for the President to abuse the power of assembling one house of the general legislature without the other. It is not easy to see how he could do so without committing a plain and palpable infraction of the constitution. He cannot do it by any mere manipulation of his constitutional powers. If he should succeed, however, in persuading either house to join him in an illegal course, it is difficult to see in what manner he could be brought to account, except at the polls, in case he should be a candidate for re-election; for the only process to which he is subject while in office is impeachment, and it requires the consent of both houses to perfect the inauguration of that procedure. The individual citizen or subject would, however, be protected by the courts

in his personal and property rights against any measures to which the force of law was sought to be irregularly given.

The constitution apparently vests in the President the power to initiate legislation, in the provision requiring him to give information to the Congress of the "state of the Union" and to recommend such measures as he shall judge necessary and expedient. It does not appear to me that any further constitutional warrant is necessary to authorize the President to construct and present regular bills and projects of law to the Congress. The constitution does not prescribe the form in which the President shall present the measures which he may recommend; nor does it vest the Congress with the power to do it, either by any express provision or by any reasonable implication. It leaves the determination of the form, therefore, to the President himself. We must look elsewhere for the explanation of the fact that the President does not present his recommendations to Congress in the form of regular bills or projects. It is to be found in the lack of any executive organs for presenting, explaining, defending and, in general, managing such goverment bills in the Congress. It cannot be predicated with certainty that the existence of such organs would strengthen the power of the executive in legislation. It might lessen his real influence. The result would depend wholly upon the character of these organs, and their relation to the Congress, on the one side, and to the executive, on the other. So much, however, can safely be asserted, *viz;* that the form which the presidential recommendations are, under existing circumstances, compelled to take, is not such as permits the President to exercise any real initiation in legislation. Without such an initiation the veto power does not give to the President an equal part in the legislative power; certainly not when the veto power is limited, as distinguished from the absolute veto possessed by each chamber. The limited veto power of the President is only a negative power, a power to hinder legislation. It may

be a conservative power; it is sure to be a conservative power in the narrow sense; but it may not be a conservative power in the large and true sense, in the sense which views conservatism, not as stagnation, but as steady and natural development.

I have called the veto power of the President a limited power. It is, as I have indicated, the *effect* of the veto that is limited. Its *extent* is not limited. So far as the express provision of the constitution is concerned, the President may veto any act or resolution of the two chambers in regard to any subject. It rests with the President alone to determine whether the veto shall be used freely or sparingly; whether it shall be used generally, or shall be confined to any particular class of subjects. From the executive point of view, there is a natural line of division between possible subjects of legislation. The most important purpose of the veto is to prevent encroachment by the legislative chambers upon the constitutional prerogatives of the executive. Its next most important purpose is to prevent unwise legislative changes in the existing means and measures of administration, and unwise legislation in the creation of new means and measures of administration. The executive must be presumed to know best what are his own prerogatives and what are the most advantageous measures of administration. The peculiar province of the veto is the defense of these domains. On the other hand, projects of legislation which do not touch the executive prerogative or the measures of administration do not naturally call for a vigorous exercise of the veto. Upon such subjects, a wise executive will incline to yield somewhat in opinion to the views of the legislative chambers. He will thereby store up power for more important occasions. It would be very difficult, however, to trace in the constitution this line of natural cleavage. It would be necessary, moreover, if such a solution of the problem were attempted, to construct an

organ for determining differences of opinion between the legislature and executive touching the nature and tendency of any given project of law. It is at least a simpler solution to make the veto power general; to trust to the wisdom and temperance of the executive not to use it too freely upon subjects not involving executive prerogative and administrative measures, and to trust to the chambers not to override the veto where the project of law does trench upon the sphere of executive independence.

4. The constitution makes no provision at all concerning the promulgation of the laws. This is naturally an executive function. The Congress has by statute imposed this duty upon the Secretary of State.[1] This statute requires that the Secretary of State shall receive the law immediately from the President, if approved by him, or if not disapproved within the time prescribed by the constitution; and if disapproved by him but passed over his veto, from the presiding officer of that chamber in which it has been last considered and voted; and that the Secretary shall, so soon as convenient, cause the same to be published in certain newspapers, etc. Publication and promulgation are thus treated as the same thing, and are regarded as merely ministerial functions, conferring no discretionary power upon any body.

It is true that the exact time within which the Secretary of State shall publish the law is not fixed. The phrase, "so soon as convenient," gives him some latitude; but this is a matter of no great importance, since the law takes effect from the date of its approval by the President,[2] or the date of its passage over the President's veto by the last chamber which votes thereon, or the tenth day after it shall have been placed before the President for his signature, in case he neither approves nor disapproves it. It is the President's duty, of course, to hold the Secretary to the proper discharge of this

[1] United States Revised Statutes, sec. 204.

[2] Gardner *v.* The Collector, U. S. Reports, 6 Wallace, 504.

function. There is no difficulty about that part of the process. But it is hardly within the power of the legislature to command the executive to transmit a law to the Secretary of State or to any other officer or person. The legislature may confer a power upon the President, but it cannot command him. The constitution alone can do that. It is an omission in our constitutional law that no provision is made therein for the promulgation of the laws.

III. *The Powers of the President in Civil Administration.*

The chief power of the President in civil administration is a duty as well as a power, *viz;* to procure the execution of the laws. This is the chief end for which powers are conferred upon the President. If no express provision of the constitution had vested any body with the power of appointing the necessary officials for the execution of the laws, it might have been inferred that the power belongs to the President as incident to his duty to procure the execution of the laws; and the imposition of this duty certainly means that the President has the power to put the primary interpretation upon the laws, and to use the means placed within his hands for procuring their execution in such order and manner and to such degree as the constitution and the laws of the United States permit.

The constitution, however, regulates the manner of the appointment of the officials. I have already stated the law upon this subject as respects the appointment of the officials of the diplomatic service. It is the same for all other civil officials, except those inferior officers whose appointment is vested by statute law in the President alone, or in the heads of departments, or in the courts.[1] The Congress must, of course, determine which are these inferior offices. The way is here open for the legislative department to deprive the executive of his participation in the appointment of a large number of officers, by vesting the power of appoint-

[1] United States Constitution, Art. II, sec. 2, § 2.

ing the same in the heads of departments, or in the courts. This is, however, not much more than a theoretical consideration. The fact that the executive nominates and may dismiss the heads of the departments prevents any practical encroachment upon his prerogative through this avenue of approach.

The law of dismissal, as explained in connection with the tenure of the diplomatic officials, also holds in reference to all other civil officials nominated or appointed by the President.

The primary interpretation placed upon the statute law by the executive in the course of its execution is subject to revision both by the legislative power, in explanatory and modifying enactments, and by the judiciary, when the latter chooses to assume jurisdiction. The Jacksonian doctrine that each department interprets ultimately as well as primarily has not stood the test of our experience. It is an anarchic theory and cannot advance much beyond statement with so politically practical a people as those of Teutonic blood and character. The executive interpretation is, however, the law of the land until it shall have been regularly revised by new legislative acts or judicial decision. The question is not so simple, however, when we come to the interpretation of the constitution. There are parts of the constitution which may be executed by the President without the aid of Congressional enactments ; for example, the powers of military commandership. The President may thus interpret the constitution as well as the statutes in the process of executing the laws. If a proper case can be framed, the judiciary may revise the executive interpretation in this respect. If not, and if the two houses of the Congress cannot override the veto which the President may put in the way of their revising his interpretation by a statute, then the President's interpretation becomes, in fact, ultimate. This method of regulating this most important matter is, indeed, subject to the criticism of being complex and shifting, but

it contains no legal contradictions. Ultimate interpretation in all cases by the same body would be more simple. It would be likely, however, to be also much more arbitrary.

As to the order in which the President may use the means of power confided to him by the constitution and the statutes of Congress for the execution of the laws, there is no question that the ordinary uninterrupted civil administration must be through the civil officials, that the resistance to the same by individuals or small combinations of individuals should be dealt with through prosecution in the courts, and that where such resistance amounts to insurrection or rebellion, the executive is authorized by the constitution to use the military power. The President must determine when such resistance becomes rebellion; and, in the use of the military power, he is left to his own discretion in selecting the particular arm of the military, subject to his command, which he will employ.

IV. This last consideration leads us to the question of the military powers of the President.

The constitution vests in him the commandership-in-chief of the army and navy of the United States, and of the militia of the several commonwealths when called into the service of the United States.[1] The constitution does not construct either the army or the navy, and does not provide immediately for the bringing of the militia of the commonwealths under the President's command. As we have already seen, the constitution confers these powers upon the Congress. The Congress has created a standing army and navy upon the volunteer enlistment principle,[2] a militia upon the principle of the universal military duty of all able-bodied male citizens between the ages of eighteen and forty-five years,[3] and has authorized the President himself to call any part of the militia under his command, whenever, in his judg-

[1] United States Constitution, Art. II, sec. 2, § 1.
[2] United States Revised Statutes, p. 202 ff.; *Ibid.* p. 244 ff.
[3] *Ibid.* p. 285.

ment, danger from invasion or rebellion requires it, by issuing his orders to such officers of the militia as he may think proper;[1] and the court has decided that the President alone is the judge as to when the exigency shall have arisen requiring the calling of the militia or any part thereof under his command, and that disobedience to his orders in regard to this matter will subject the person disobeying to the jurisdiction of the court martial.[2]

The legislature might abolish these statutes and leave the President without any army or navy to command; but so long as they exist, it cannot legally encroach upon his constitutional prerogative of commandership-in-chief. The various powers included in this prerogative are not stated in detail in the constitution. In determining their character and scope, we must therefore resort to implication. Here we can gain little aid from judicial decision. The questions here involved are, for the most part, those of high public policy. The general principles of political science and governmental custom must be our guide.

From this standpoint, we should say, in the first place, that the disposition of the forces, both in time of war and of peace, is a constitutional power of the President. The Congress has no power, in creating the forces, to designate the localities to which they shall be assigned and in which they shall remain. The Congress cannot foresee when and where the forces will be needed in repelling invasion, quelling rebellion, and executing the laws. These questions can be answered only according to the exigencies of the moment, and their answer requires individual discretion and prompt decision. It is a function of commandership-in-chief. The same reasoning would attribute to the commander-in-chief the power of making distribution of the materials of war.

In the second place, the supervision of the execution of

[1] United States Revised Statutes, sec. 1642.

[2] Martin *v.* Mott, U. S. Reports, 12 Wheaton, 19.

military law in the government of the land and naval forces is, of course, the constitutional power of the President. He is commanded by the constitution to procure the execution of all law without exception.[1]

In the third place, the power to wage war is a constitutional function of the President. He cannot, as we have seen, declare offensive war. Offensive war can begin legally only through a legislative act. But the President can enter upon defensive war and the suppression of rebellion without waiting for any legislative movement; and he should do so, if, in his opinion, the safety of the country requires it. Whether, however, the war be legally begun or not, the President wages the war and must have the powers necessary to the performance of that most responsible duty. His will must be law not only for the soldiery subject to his command, but for the inhabitants of the territory which is the theatre of the conflict. Within this district he may suspend all liberty and govern at his own discrétion. Of course, the line which separates such districts from those in which war cannot be said, at a particular moment, to prevail is very uncertain, and the constitution does not expressly designate any organ which may draw this line. The Court has endeavored to assert jurisdiction over this question, as we have seen, and to set up, as the criterion of peace for any district, the undisturbed procedure of the courts.[2] This solution of the question did not and cannot stand the test of practice. A sound political science must confide this power to the President. It is a despotic power, but the President must have despotic power when he wages war. The safety, the life perhaps, of the state requires it.

In the fourth place, the appointment and dismissal of the officers of the army and navy would undoubtedly fall under the prerogative of commandership-in-chief, did not the consti-

[1] United States Constitution, Art. II, sec. 3.

[2] *Ex parte* Milligan, U. S. Reports, 4 Wallace, 2.

tution make other provision in regard to this subject. It makes appointment to the military offices, in both army and navy, follow the same course as appointment to the civil offices,[1] with the one exception that the appointment of the officers of the militia is reserved to the respective commonwealths.[2] The constitution undoubtedly recognizes the power of dismissal in time of war as a necessary incident of the President's prerogative. In time of peace, however, this necessity is not so apparent; and the Congress has by statute determined that, during such time, no officer, either of the army or the navy, shall be dismissed save by sentence of a court martial, or by way of commutation of a sentence of a court martial.[3] The President alone has the power to commute such a sentence.

V. *The Judicial Powers of the President.*

The constitution vests the President with an unlimited power of reprieve and pardon for offences against the United States, except in cases of impeachment.[4]

Reprieve and pardon may be granted, therefore, before or after conviction, to a single person or a number of persons or a class of persons, conditionally or absolutely, in whatsoever form the President may judge proper, and from whatever time he may fix.[5] The power to pardon includes also the power to commute, *i.e.* to substitute a less grievous penalty, but not one simply of a different character.[6]

VI. *The President's Advisers.*

In the exercise of his powers the President may ask the advice, if he will, of the heads of the executive departments, but he is not required to do so by the constitution.

[1] United States Constitution, Art. II, sec. 2, § 2.

[2] *Ibid.* Art. I, sec. 8, § 16.

[3] United States Revised Statutes, sec. 1229.

[4] United States Constitution, Art. II, sec. 2, § 1.

[5] *Ex parte* Garland, U. S. Reports, 4 Wallace, 333; United States *v.* Wilson, U. S. Reports, 7 Peters, 150.

[6] *Ex parte* Wells, U. S. Reports, 18 Howard, 307.

The words of the constitution are that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." These officers are not specifically mentioned in any other part of the constitution. They certainly have no *collegiate* existence under the constitution. The President may, if he chooses, consult them as a body, unless they themselves object. Should they object, he could not point to any specific clause in the constitution which requires such an organization, or which authorizes him to require opinions in such a form. He might, of course, dismiss an officer who should refuse to take part in the collegiate deliberations. The constitution makes the President the only bond between the executive departments. The Congress has no power to create any other bond. What we call the Cabinet is, therefore, a purely voluntary, extra-legal association of the heads of the executive departments with the President, which may be dispensed with at any moment by the President, and whose resolutions do not legally bind the President in the slightest degree. They form a privy council, but not a ministry.

CHAPTER V.

CONSTRUCTION OF THE EXECUTIVE IN THE GERMAN IMPERIAL CONSTITUTION.

I. *The Tenure of the Emperor.*

I take, as my point of departure, the proposition that the German *imperium* is not a sovereignty, but an office. The sovereignty, according to the most authoritative commentators upon the constitution, is in the Federal Council (*Bundesrath*), not in the Emperor.[1] The Imperial office was created by a conscious and deliberate agreement between the German princes (*i.e.* the governmental heads of the twenty-two princely commonwealths), the representatives of the three free cities, and the representatives of the people. It owes its legal existence to a clause in the Imperial constitution, which reads: The presidency of the Union belongs to the King of Prussia, who, in this capacity, shall be entitled German Emperor.[2] An amendment to the constitution, in the manner prescribed therein for such a case, may therefore deprive the King of Prussia of this office. Article 78. of the constitution ordains that amendments to the constitution may be made by agreement of the Federal Council and the Imperial Diet (*Reichstag*), provided less than fourteen of the fifty-eight voices in the Federal Council object to the propositions. In the case of a right expressly reserved by the constitution to a commonwealth, the consent of that commonwealth is also necessary to an amendment affecting such right.[3] Now the King of Prussia is represented in the Council, casting seven-

[1] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 197.
[2] Reichsverfassung, Art. 11. [3] *Ibid.* Art. 78.

teen of the fifty-eight votes in that body. He cannot, therefore, as a fact, be amended out of the Imperial office, without his own consent, by the sovereign power as organized in the constitution. Over against that power, then, he is not merely officer; he holds as against it by his own right. We must go back of the constitution, to the sovereignty which originally formed it, to find the organization of the German state over against which the Emperor is but officer. That (constituent) organization, however, has now no legal existence; and the King of Prussia may always prevent its reorganization by legal means. If it should reappear, it must, therefore, be by his consent or by revolution. The Emperor thus holds his office from the state back of the constitution, but by the tenure of his own right within the constitution. This status and relation result from the indissoluble connection of the Imperial office with the Prussian crown, and the possession by the Prussian King of a sufficient number of votes in the Federal Council to prevent any amendment to the Imperial constitution.

The inalienable right to the Imperial office — inalienable, that is, as against every existing legal organization of the German state — is thus seen to be in the Prussian crown, and the succession to the Imperial office must necessarily follow the law of succession to the Prussian crown. The Imperial constitution recognizes this principle by making no provision for the succession to the Imperial office further than what is included in the simple declaration that "the presidency of the Union belongs to the King of Prussia."

II. *The Law of Succession to the Imperial Office.*

In order, then, to learn the law of succession to the Imperial office, we must have recourse to those provisions of the Prussian constitution which regulate the succession to the Prussian crown. Article 53. of the Prussian constitution provides that the crown is, according to the royal house-laws, hereditary in the male branch of the royal house, by right of primogeniture

and agnatic lineal succession.[1] The royal house-laws, here referred to and adopted as constitutional law, provide that the heir to the crown must be a descendant of the first wearer of the crown; must be the son of a father capable himself of wearing the crown according to the same laws; must be born in regular wedlock of a mother of equal rank with the father and from a marriage approved by the reigning head of the house.[2] Frederick I of Hohenzollern was the first King of Prussia, and the year 1701 is the date of his assumption of the crown.[3] So long, then, as male descendants from him exist, possessing the above-mentioned qualifications, Prussia has a constitutional heir to the throne, and consequently the German Empire has a constitutional successor to the Imperial office. If, however, these should fail, the Prussian constitution makes no further provision for the succession.

There exists a *pactum confraternitatis* between the princely houses of Brandenburg, Saxony and Hesse, dating from the year 1457, and confirmed, for the last time, in the year 1614, which provides that in case of the extinction of the male line of any of these houses the other two shall succeed to its land and subjects. If this fate should befall Hesse, two-thirds shall go to the princes of Saxony and one-third to the Brandenburg house. If it should befall Saxony, two-thirds shall go to the Hessian house and one-third to the Brandenburg house. If it should befall Brandenburg, one-half shall go to each of the others.[4] It will be seen that the last ratification of this agreement antedates by nearly a century the establishment of the Prussian kingdom by the Brandenburg house, and by nearly two and a half centuries the establishment of the present constitution of Prussia (1850.) It will be found, also, that it

[1] Verfassungsurkunde für den preussischen Staat, Art. 53.

[2] Schulze, Lehrbuch des deutschen Staatsrechts, Erstes Buch, S. 213 ff.

[3] Droysen, Preussische Politik, Bd. IV, Ab. 1, S. 153; von Rönne, Preussisches Staatsrecht, Bd. I, Ab. 1, S. 149.

[4] Von Rönne, Preussisches Staatsrecht, Bd. I, Ab. 1, S. 153, Anmerkung.

conflicts with Articles 1, 2, and 55, of that constitution, which consolidate all of the territories subject to the Brandenburg-Prussian house into the state of Prussia, declare that the boundaries of the state so constituted can be changed only by a law and that, without the consent of both chambers of the legislature, the King of Prussia cannot be, at the same time, ruler of another state.[1] This *pactum confraternitatis* would, therefore, require for its validity, now at least, ratification by both branches of the Prussian legislature. Should this come to pass and Prussia be divided between Saxony and Hesse, the Empire would be obliged to make a new disposition of the Imperial office.

There is no probability that the Prussian legislature would ratify this old agreement. The more natural and probable course would be so to amend the Prussian constitution as to allow the male descendants of the female line of the present house to succeed, or the descendants of the male line from an ancestor back of Frederick I, or to place a new house upon the throne. In all of these eventualities the new King would be, *ipso jure*, German Emperor. Whether, if the Prussian constitution should be so amended as to make the female line capable of succeeding to the crown or to make the Prussian kingship an elective office, with or without a change of title, the queen or elected king or president would be, *ipso jure*, German Empress or Emperor, is a question which has not, so far as I know, been seriously considered by the German publicists, and I do not venture to suggest any solution of my own.

By and upon the death of the reigning King, the crown passes, *ipso jure*, to the legal successor without any form or ceremony of accession, possibly even without the knowledge, at the moment, of the new King. "Der Todte erbet den Lebendigen," "Der Konig stirbt nicht," are the general principles of the public law of Prussia and of all the princely

[1] Verfassungsurkunde für den preussischen Staat, Art. 1.

states of Germany upon this point.[1] In fact, there have never been but two coronations in Prussia. The first was that of Frederick I, in 1701, and the second that of William I, in 1861.[2] The 54th Article of the Prussian constitution requires of the King that he take his oath, in the presence of the two legislative chambers, to govern in accordance with the constitution and the laws. Von Rönne undertakes to support the proposition that should the King refuse to do this, his government would not be legal, his acts would be without binding force, and he might be dealt with by the chambers as a violator of the constitution.[3] Laband, on the other hand, considers this interpretation as extravagant and contradictory to the general principles of the royal system of government. He declares that von Rönne's doctrine would result in the assertion of a right on the part of the chambers to dethrone the King.[4] There is no doubt that Laband's view is correct. The failure of the King to take his oath would raise a serious constitutional question, but in no event could the punishment therefor be so grave as his dethronement or the rendering of his government illegal.

The transfer of the Imperial office follows these same principles. The death of the King of Prussia makes his legal successor German Emperor without any act, form or ceremony executed by or upon the latter.

The King may abdicate, provided he be capable of making such a disposition; but his abdication can only be in behalf of his legal successor, and it must be entire, not partial.[5] His abdication of the Prussian throne would work, at the same instant, his abdication of the Imperial office. He cannot hold the latter without the former. The plain words of the

[1] Von Rönne, Preussisches Straatsrecht, Bd. I, Ab. 1, S. 159.

[2] *Ibid.* Bd. I, Ab. 1, S. 161. [3] *Ibid.* Bd. I, Ab. 2, S. 588 ff.

[4] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 205. Von Rönne holds, in another connection, that the King cannot be dethroned; Bd. I, Ab. 1, S. 165.

[5] Von Rönne, Preussisches Staatsrecht, Bd. I, Ab. 1, S. 164 ff.

Imperial constitution are, that the presidency of the Union belongs to the *King* of Prussia, *i.e.* to the existing bearer of the royal power.

III. *The Regency.*

The last and most difficult question in regard to the succession to the Imperial office is presented by the case of a regency in the kingdom of Prussia. Articles 56 to 58 (inclusive) of the Prussian constitution make thorough provision for such an event in the Prussian state, as follows: "When the King is a minor, or is otherwise permanently prevented from ruling, the adult agnate standing nearest to the crown shall assume the regency. He shall immediately call the legislative chambers together, and they, in joint assembly, shall determine the question of the necessity of a regency. If there should be no adult agnate and if no law shall have been made to meet the case, the Ministry shall call the chambers together, and the chambers, in joint assembly, shall elect a Regent" — if, that is, they decide regency to be necessary. "Until the Regent so chosen shall assume the government, the existing Ministry shall govern. The Regent shall exercise the royal powers in the King's name. He shall, after the establishment of the regency, take oath, in the presence of the united chambers, to hold the constitution inviolable and govern in accordance with the constitution and the laws. Until the taking of the oath by the Regent, the existing Ministry remains responsible for all governmental acts.[1]"

The King attains majority at the age of eighteen; the princes of the royal house on the other hand at the age of twenty-four. Neither the constitution nor the laws of the land nor those of the royal house prescribe the age which the prince must attain in order to be eligible to the regency. Neither have we any direct precedent to guide us. Von Rönne holds that the completion of the eighteenth year qualifies, in this respect, for the assumption of the regency,

[1] Verfassungsurkunde für den preussischen Staats Artkl. 56, 57, 58.

on the ground that no higher qualification can be required in the Regent than in the King.[1]

The establishment of the regency in the case of minority is not a matter of special difficulty. The constitution undoubtedly authorizes the Prince, whom it designates for the regency, to take the initiative, assume the government and call the chambers together, for the purpose of determining the question as to whether the regency is necessary; but the Prince must do this in the manner prescribed by the constitution, in Article 44, for all the royal acts, *viz;* through the existing Ministry.[2] Whether the chambers may constitutionally decide, despite the fact that the King is a minor, that no necessity exists for a regency, *i.e.* that the minor King may rule, is a question of some difficulty. It would certainly be a useless trouble to establish a regency if the King lacked only a few days or weeks of attaining his majority. Von Rönne inclines to the view that the chambers have this power.[3]

The other case mentioned in the constitution as authorizing the regency is one of more difficulty, *viz;* when the King is permanently prevented from governing. A variety of exigencies of this character may arise. The King may be a prisoner of war or long absent for some other reason. He may become insane or physically impotent. He may become subject to influences which rob him of all independence of thought and act. The delicate question of public law is: How shall it be determined when these exigencies require a regency? It would be impossible to provide in detail, by constitutional law or by statute, how insane or how long sick or absent a King must be in order to make a regency necessary. The Prussian constitution has hit upon the true solution of the problem, by designating an organ, or rather organs, for determining, with full discretion,

[1] Von Rönne, Preussisches Staatsrecht, Bd. I, Ab. 1, S. 490, Anmerkung.
[2] *Ibid.* [3] *Ibid.*

each case as it may arise. It authorizes the adult Prince standing next to the crown in regular order of succession to seize the initiative (in understanding, of course, with the existing Ministry), assume the government, call the chambers, submit to them the question of the necessity for the regency and, if they in joint assembly approve, exercise the royal powers until the regency is legally terminated. This is one of the most important provisions of the Prussian constitution. It furnishes a legal way out of many difficulties heretofore considered insurmountable in states having kingly government. It may be applied in directions probably unsuspected by its originators. Let us suppose, for example, that the persons who had most direct access to King Frederick III had persistently taken advantage of his weak and helpless physical condition to constrain him into acts and agreements highly perilous to the welfare and even existence of the state, contrary to his own best judgment. I do not see why, in such a case, this constitutional provision would not have furnished the means of escape from such danger. If the conviction should have become universal that the danger was extreme, and if the desire to avoid it should have become equally universal and intense, what constitutional or legal reason would have prevented the then Crown Prince, in agreement with the Ministry, from assuming the regency, calling the chambers, submitting the question to them, and, with their approval, removing the royal powers from the King to himself? The constitution confides everything, in regard to this matter, to the unlimited discretion of these three organs; and if they should at any time agree to interpret the state of things above assumed as permanently hindering the existing King from governing, who could legally gainsay them?

Von Rönne calls attention to two other eventualities which would require a regency, but which are not expressly provided for in the constitution, *viz;* when the King dies

without existing male descendants, but leaving a pregnant widow; or when the legal successor to the King dies without male descendants, but leaving a pregnant widow, and the King then dies before the birth of the child.[1] It is the presumption of the German law that the child will be a male, and therefore heir to the crown. In place of the crown passing on, then, immediately upon the death of the King to the next qualified person in existence, a regency must be established and the Regent must govern, at least until birth determines the sex of the child. If it should be a male, the regency would continue to his majority; if a female, the Regent would become King.

Of course, the King, the Prince entitled by the constitution to the regency and the chambers of the legislature may come to an agreement concerning the regency before the death of the King or in view of the King's inability to govern; but the King can do nothing *ex parte* impairing the constitutional rights of the Prince entitled to the regency.[2] The King may also authorize any one to transact certain business for him, *e.g.* to sign certain royal decrees; but this must not go so far as to become a regency, and the arrangement is only valid during the lifetime of the King who makes it, and it gives no rights to the agent against the King.

The 57th Article of the constitution, which provides for the case of failure of an adult agnate without legal provision having been made for the regency, is one of great importance, and stamps the Prussian system with a thoroughly legal character. It authorizes the existing Ministry to seize the initiative and summon the chambers. The chambers then, in joint assembly, are vested with discretionary power in determining the necessity for a regency. In case they decide this question affirmatively, they are directed by the constitution to elect the Regent, without being limited to any family, race

[1] Von Rönne, Preussisches Staatsrecht, Bd. I, Ab. 1, S. 489.
[2] *Ibid.* Bd. I, Ab. 1, S. 491.

or class.[1] The only limitation is that they shall elect a single person Regent, not a board, or directory; and this limitation is not expressed in the constitution, but is implied from the general principles of the system and from the language of the 57th Article.[2]

The Regent must in all cases take his oath to govern in accordance with the constitution and the laws. If he should refuse or neglect to do so, I hardly think his government should be considered illegal,[3] but he could not exercise any power over the constitution of his Ministry. The existing Ministry, appointed by his predecessor, is, by the constitution, continued in power and made responsible for all governmental acts until he shall have taken the prescribed oath. Whether, in case the chambers called by the qualified agnate should decide against the necessity of a regency, the governmental acts committed by this person before the decision had been reached would be regarded as illegal, I have not been able to learn either from the constitution, laws, precedents or opinions of commentators.

The regency terminates naturally through the cessation of its occasion. If it should be doubtful whether the occasion has ceased, or if the Regent should undertake to hold on to the government beyond the legal period, neither the constitution nor the laws prescribe the mode of procedure to be employed in meeting the case, nor are there any precedents. The analogies of the constitution would indicate, however, that the King himself, in agreement with the Ministry, might call the chambers in joint assembly and submit the question to their decision. Of course, the Regent himself may submit the question, if he will, to the chambers, and when the regency terminates by the Regent himself be-

[1] Schulze, Das Staatsrecht des Königreichs Preussen, S. 48 ff.

[2] *Ibid.*; von Rönne, Preussisches Staatsrecht, Bd. I, Ab. 1, S. 492.

[3] Von Rönne says this would amount to a relinquishment of the regency. Preussisches Staatsrecht, Bd. I, Ab. 1, S. 493.

coming King, no difficulties in regard to this matter would be felt.[1]

The Regent exercises all of the political and governmental powers of the King, but does not bear the title or possess the personal majesty of the King.[2] He is, however, inviolable and irresponsible while Regent, and cannot be held responsible for his acts during the regency after the termination of the same.[3]

The question pertinent to our subject, to which this somewhat extended explanation is preparatory, is whether the Regent of Prussia is also Regent of the Empire. The way in which the provision is worded, in the Imperial constitution, does not absolutely compel this interpretation; and von Rönne is of the opinion that, in case of a regency in Prussia, the Imperial question must be determined by an Imperial law. Von Rönne maintains that the acts of the Prussian legislature in deciding the necessity of a regency or electing the Regent, or those of the Prussian Ministry in convoking the legislature and exercising the royal powers until the Regent is elected, cannot be taken as having any validity for the Empire.[4] On the other hand, Laband holds that the right to the Imperial office is a prerogative of the Prussian crown, inseparable from the other prerogatives of the crown, save by the process of amending the Imperial constitution; that the question who shall exercise the prerogatives is a question purely internal to the Prussian state; and therefore that the person, who by the constitution and laws of the Prussian state is vested with the exercise of these prerogatives, permanently or temporarily, exercises, *ipso jure*, the powers of the Imperial office.[5] This is undoubtedly the sound view. Any other would not only violate sound juristic reasoning, but would lead into a maze of practical difficulties. For example: if, in

[1] Von Rönne, Preussisches Staatsrecht, Bd. I, Ab. 1, S. 494.
[2] *Ibid.* Bd. I, Ab. 1, S. 493 ff. & Anmerkung.
[3] Schulze, Staatsrecht des Königreichs Preussen, S. 50.
[4] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. I, S. 225 ff.
[5] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 203 ff.

case of a Prussian regency, the Regent did not hold the Imperial powers, then no one would until the Imperial constitution should have been so amended as to meet the case; but the Regent of Prussia would certainly instruct the seventeen voices of Prussia in the Federal Council to resist any project for an amendment which would exclude him from the Imperial office, and these seventeen votes would prevent any such amendment. That is, the Regent could legally produce a permanent *interregnum* in the Empire should his government therein be denied. This would be true also in reference to the administration of the Empire by the Prussian Ministry, in case no adult agnate should be at hand and the Ministry should be thus compelled to administer the government of the Prussian state until the Regent should be chosen by the chambers and take his constitutional oath.

Whether the Emperor-King could cause himself to be temporarily represented by one person, in the government of Prussia, and by another, in the government of the Empire, is a question which I do not find anywhere treated. I should think not, however, since this would impair the fundamental principles of monarchic institutions. The constitution and the laws of the Empire and those of the Prussian state are equally silent upon this subject; and the only precedent we have, *viz;* that of June 4th to December 5th, 1878, is one in which the representation in both spheres was conferred upon the same person — and upon the person who was entitled, by law, to the regency, in case of necessity for the same in the lifetime of the Emperor-King, and to the throne of Prussia and the office of Emperor after his death.

IV. *The Privileges of the Emperor.*

The Imperial constitution is entirely silent as to the privileges of the Emperor. As King of Prussia, he is, by Article 43 of the Prussian constitution, declared to be personally inviolable, and the same character must attach to him as Emperor.

CHAPTER VI.

THE POWERS OF THE EMPEROR.

I. *Diplomatic Powers.*

The Emperor is vested, by Article 11 of the Imperial constitution, with the power to represent the Empire internationally, and for this purpose to send and receive ambassadors, to make agreements, treaties and alliances with foreign powers, and to declare war and make peace. But if the treaties touch any subject already regulated by an Imperial law, constitutional or statutory, then the consent of the Federal Council is necessary to their conclusion and of the Diet also to their validity; and to every declaration of offensive war the consent of the Federal Council is necessary.[1] These are most important and thoroughgoing limitations upon the treaty-making and the war powers of the Emperor. They provide, in the first place, against any conflict which might arise between the treaties and the constitution and laws, by requiring the consent of the amending power to such treaties as may touch upon a provision of the constitution, and of the legislative power to such as may touch upon a provision of the statute law.[2] A treaty cannot change a law in the Imperial system, without the consent of the law-making power, but a law may change a treaty without the consent of the Emperor. There is, thus, no chance for arbitrary action on the part of the Emperor in the exercise of this power.

The Emperor is likewise most heavily handicapped in the exercise of the power of declaring offensive war. He can

[1] Reichsverfassung, Art. 11.

[2] Schultze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 328.

act only in agreement with the majority of the Federal Council. As King of Prussia he controls, as we have seen, seventeen voices in the Federal Council, and he may cast these votes in favor of the declaration (or against it, of course), but the constitution requires thirty votes, *i.e.* thirteen more than Prussia possesses, to legalize the act. Only one other state possesses as many as six votes in the Federal Council, *viz;* Bavaria. Most of them possess but one. An agreement between the princely heads of at least three commonwealths besides Prussia, and probably of many more, would thus be necessary to a declaration of offensive war. Now these German princes are, for the most part, very conservative men, hostile to centralization of power in the Imperial government, and they know that war tends toward that end; many of them are old men; many of them are connected by intermarriage with the dynastic interests of almost all the reigning houses of Europe; and many of them act, in the instruction of their delegates to the Federal Council, through ministries subject to legislative control in their respective states; while the interests of the three free cities represented in the Federal Council, being commercial, would as a rule be upon the side of peace. If here are not sufficient safeguards against arbitrary, ill-considered or unnecessary declarations of war, I must confess that I do not know how they could be devised.

The independent prerogative of the Emperor, as international representative of the Empire, consists, thus, only of the powers to appoint and receive ambassadors, other public ministers and consuls,[1] to negotiate all treaties, to conclude treaties of peace and such other treaties as do not conflict with the constitution and the laws, and to wage defensive war. The president of a republic should not be intrusted with powers less than these.

[1] The Emperor can appoint the consuls only upon hearing the committee of the Federal Council for commerce and intercourse; Reichsverfassung, Art. 56.

II. *The Powers of the Emperor in Legislation.*

The constitution confers upon the Emperor the power to call, open, adjourn and prorogue both the Federal Council and the Diet, and to dissolve the Diet. It imposes, however, the following limitations upon the exercise of these powers: the Emperor must call the two bodies annually; he cannot call the Diet without the Federal Council, but may call the latter without the former; he must call the Federal Council when this is demanded by one-third of the voices in that body; he can adjourn the Diet only once during the same session, and for no longer than thirty days, except it consent to another or a longer adjournment; he can dissolve the Diet only by consent of the Federal Council, and in case of dissolution, he must order new elections within sixty days, and reassemble the Diet within ninety days. Moreover, the annual voting of the budget requires the yearly assembly of the legislature.[1]

The Emperor appoints the chairman of the Federal Council. He appoints, also, the members of the standing committee for naval affairs, and, with the exception of one voice, the members of the standing committee for the army and fortifications, with the limitation, however, that four states besides Prussia must be represented in each. On the other hand, he is bound to submit the propositions of each member of the Union to deliberation in the Federal Council, and to lay before the Diet the resolutions of the Federal Council in the exact form and wording given to them by the Council.[2]

This is the sum and substance of the powers and duties of the Emperor in legislation. It will be seen from this that he has no immediate power to initiate legislation either in the Federal Council or in the Diet, nor to veto the acts of either of these bodies. His powers in legislation would be altogether too weak to sustain his own prerogatives, except

[1] Reichsverfassung, Artkl. 12, 13, 14, 24, 25, 26, 69, 71. [2] *Ibid.* Artkl. 15, 8, 7, 16.

for the fact that, as King of Prussia, he is represented in the Federal Council. As King of Prussia he may, like any other German prince, initiate legislation in the Federal Council, through his delegates in that body, but not in the Diet. His delegates, like those of any other member of the Union, may appear in the Diet and explain to this body the views of the government sending them. As King of Prussia, his seventeen votes in the Federal Council enable him to veto any amendment to the constitution; and, like any other member of the Union, he can prevent the change of any of the guaranteed rights of his own commonwealth. As King of Prussia, he has the casting vote in case of a tie in the Federal Council. Finally, as King of Prussia, he can veto, in the Federal Council, all projects of law which propose a change in the existing military, naval, customs or excise systems and arrangements, or in the existing administrative ordinances for the execution of the customs and excise laws.[1] The meaning of all this is simply that the King of Prussia can prevent the existing instruments of power, confided by the constitution and laws of the Empire to the Emperor, from being withdrawn from the latter. These are very wise provisions, under existing conditions. I do not see how the Emperor would be able to discharge his great duties to the nation without them.

In the promulgation of the laws, the constitution confers upon the Emperor the powers of furnishing the bills passed by the Federal Council and the Diet with the formula of command and of proclaiming the same as law.[2] At first view these would appear to be only ministerial functions. From a consideration of the provision, alone and apart from the remainder of the instrument, one would naïvely conclude that the Emperor *must* furnish with the form of law, and proclaim as law, all bills whose passage through the Federal Council and Diet had been regularly attested by the proper officers

[1] Reichsverfassung, Artkl. 7, 9, 78, 5, 37, 35. [2] *Ibid.* Artkl. 17.

of these bodies. But if this interpretation of the provision be the true one, then the simple majority in the Federal Council and the Diet could render nugatory the veto power of the King of Prussia in the Federal Council against attempted changes in the constitution and in the laws regulating the military, naval, customs and excise systems of the Empire, by simply calling the measures effecting these changes ordinary legislation. On the other hand, if the prerogative of the Emperor to formulate the bills as law contains the power to determine, from their content, whether they are ordinary or extraordinary legislation, and to leave them unpromulgated when and in so far as, in his opinion, they have not received the majority in the Federal Council prescribed by the constitution for the class of projects to which he may decide they belong, then we concede to the Emperor the means of blocking any bit of ordinary legislation which may be distasteful to him, by simply declaring it to be a constitutional amendment, which he, as King of Prussia, may always prevent. The commentators do not yet agree as regards the interpretation of this provision. Von Rönne, for example, holds that the question whether a project belongs to the class of ordinary or to that of extraordinary legislation is itself a preliminary question of constitutional interpretation and, as such, is to be determined by the Federal Council and Diet by the course of ordinary legislation; *i.e.* by simple majority, with no power of veto against it, either in the Emperor or the King of Prussia, except in case of a tie vote, when the voice of Prussia would be decisive.[1] On the other hand, Laband and Schulze teach that the guardianship of the constitution lies ultimately with the Emperor, and that the prerogative of furnishing the bills of the Council and Diet with the form of law contains the power and the duty to determine whether or no the bills have been constitutionally passed by these bodies, and to ignore them if, in his opinion, they

[1] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Ab. 1, S. 35.

have not.[1] This conflict of ideas has not progressed beyond the academic stage. We await with much interest a practical issue involving the point. It appears to me that the framers of the constitution did not have this question consciously in mind and did not consciously make any provision in regard to it; but I agree with Laband and Schulze, that Prussia would not have at all her proper power and position in the Imperial system if the Emperor could not exercise, in this respect, the power which they ascribe to him.

The power of proclaiming the laws is limited by a provision of the constitution, which prescribes that they must be published in an Imperial governmental gazette, and come into force fourteen days from the day of their publication, unless otherwise provided in the particular law. The Emperor has no power to delay the publication.[2]

III. *The Powers of the Emperor in Civil Administration.*

The general principle upon this subject is contained in Article 17. of the constitution, which provides that the *supervision* of the execution of the Imperial laws shall be the right and duty of the Emperor.[3] The immediate administration of the laws, generally and in first instance, is not conferred upon the Emperor by this provision. As far as this provision goes, the Imperial laws must be primarily and immediately administered by the different commonwealth governments, under the superintendence of the Emperor. In the execution of this general power, the Emperor cannot issue his commands to the subordinate officials of the commonwealth governments. He must address himself wholly to the executive heads of these respective governments, and, if these refuse or resist or ignore the Imperial commands, he has only the remedy provided in Article 19. of the constitution, which ordains that, when members of the Union fail to fulfil their constitutional duties to

[1] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 549 ff.; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 119.

[2] Reichsverfassung, Art. 2. [3] *Ibid.* Art. 17.

the Union, they may be coerced thereto. Coercion must, however, be voted by the Federal Council before the Emperor can proceed to execute it.[1] Any immediate powers of administration possessed, in first instance, by the Emperor, are exceptions to the general rule and must be found in special provisions of the constitution or in the laws of the Imperial legislature made in accordance with the constitution.[2] These extraordinary powers in the domain of the civil administration comprehend:

1. The supervision of the collection of the Imperial taxes. The constitution provides, upon this subject, that the collection of the Imperial taxes by the commonwealth officials shall be supervised by the Emperor through Imperial officials, whom he may co-ordinate with the commonwealth officials. That is, the Emperor is not confined to transactions between himself and the heads of the respective commonwealth governments in the collection of the taxes, but may, through his own agents, inspect the operations of the commonwealth officials and make report thereof to the Federal Council, in order that this body, in case it should become necessary to coerce a commonwealth to the proper discharge of its duties to the Union, may be placed in possession of the necessary information from Imperial sources.[3] This provision does not apply to the collection of the excise duties upon distilled liquors and beer in Bavaria, Württemberg and Baden. In these commonwealths, the Emperor can supervise the administration, in this respect, only according to the general rule as above stated, if at all.[4]

2. The direction of the postal and telegraphic administration of the Empire. The constitution provides that the Emperor shall have the "superior direction" of the postal and telegraphic administration of the Empire; that he shall

[1] Reichsverfassung, Art. 19. *Cf.* Laband, Das Staatsrecht des deutschen Reiches, in Marquardsen's Handbuch, S. 102 ff.

[2] Laband, Das Staatsrecht des deutschen Reiches, in Marquardsen's Handbuch, S. 102 ff. [3] Reichsverfassung, Art. 36. [4] *Ibid.* Art. 35.

have the power to make the rules and regulations for the same; that he shall appoint all the officers necessary to administer this superior direction; and that all the officers employed in the service are bound to obey the Imperial orders. On the other hand, the constitution reserves to the commonwealths the appointment of all other officers of the postal and telegraphic service not included under the class of superior directive officers.[1] Again, Bavaria and Württemberg, except in time of war, are exempted from these administrative powers of the Emperor.[2]

3. The Emperor may fix the railroad tariffs upon certain articles of food, in time of famine and distress. The constitution provides, in this respect, that in times of distress, especially when food becomes extraordinarily dear, the railroads shall transport grain, flour, potatoes and other vegetables at special low rates, fixed by the Emperor upon recommendation of that committee of the Federal Council in whose sphere the subject falls. The rates cannot, however, be placed lower than the lowest charge made by the particular road for raw products.[3] Bavaria, again, is exempted from this power of the Emperor.[4]

The constitution empowers the Imperial legislature to authorize the construction of Imperial railways for defence and general intercourse. Such railways would naturally be administered immediately by the Emperor, but an act of the legislature would be necessary to confer upon him this power.[5]

4. The extraordinary powers of the Emperor in civil administration comprehend, lastly, the immediate local government of Alsace-Lorraine. This power of the Emperor does not rest upon a provision of the constitution, but upon a law passed by the Imperial legislature on the 9th of June, 1871, which provides that the Emperor shall exercise the

[1] Reichsverfassung, Art. 50. [2] *Ibid.* Art. 52. [3] *Ibid.* Art. 46.
[4] *Ibid.* Art. 46. [5] *Ibid.* Art. 41.

powers of government in Alsace-Lorraine.[1] By virtue of this Imperial law, the Emperor controls the special legislation for Alsace-Lorraine, in so far as it is not exercised by the Imperial legislature itself, and directs immediately the local administration therein.[2]

The Emperor appoints and dismisses all the officials employed in his ordinary or extraordinary administration;[3] but all of his orders to them or acts in regard to them must be issued in the name of the Empire and require for their validity the signature of the Chancellor — a rule which preserves the irresponsibility of the Emperor.[4] The exception to this general principle is the case of the judicial officers of the Empire. These are appointed by the Emperor, but upon nominations made by the Federal Council; and they hold, as against the Emperor, for life.[5] The Emperor's power to appoint the judges rests upon a law made by the Imperial legislature, not upon the constitution. The same is true of his power to pardon. The constitutional provision in reference to these subjects simply empowers the Imperial legislature to establish the judicial system of the Empire.[6]

IV. *The Military Powers of the Emperor.*

In the sphere of military administration, the constitution is more generous to the Emperor. This is both natural and necessary. In the military organization of the state, federalism is out of place. Here the strictest centralization is the true principle of a rational and practical polity. Nevertheless this principle has not yet been fully realized in the German system.

[1] Reichsgestzblatt, 1871, No. 25, S. 212: "Die Staatsgewalt in Elsass und Lothringen übt der Kaiser aus."

[2] Leoni, Staatsrecht der Reichslande Elsass-Lothringen, in Marquardsen's Handbuch des öffentlichen Rechts, S. 230 ff.; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 377 ff. [3] Reichsverfassung, Art. 18. [4] *Ibid.* Art. 17.

[5] Gerichtsverfassungsgesetz, § 127: "Der Präsident, die Senatspräsidenten und die Räthe werden auf Vorschlag des Bundesrathes von dem Kaiser ernannt." *Ibid.* § 6: "Die Ernennung der Richter erfolgt auf Lebenszeit."

[6] Reichsverfassung, Art. 4, § 13.

1. The constitution vests in the Emperor the command of the army of the whole Empire in time both of war and peace.[1] It binds the entire soldiery to render unconditional obedience to the commands of the Emperor.[2] It empowers the Emperor to organize the army;[3] to appoint all the officers commanding a contingent, or more than one contingent, or a fortification; and makes the appointment of the generals within the contingents by the governments of the respective commonwealths dependent upon the Emperor's approval.[4] Officers lower than generals are appointed by the commonwealth governments independently. These are the general rules, but there are exceptions to them in the cases both of Bavaria and of Württemberg.

The Bavarian troops form one consolidated component part of the German Army. The Bavarian King appoints all the officers thereof, independent of Imperial ratification. The Bavarian troops are under the exclusive command of the Bavarian King in time of peace, but from the beginning of mobilization for war they come under the superior command of the Emperor and are bound to render absolute obedience to the Emperor from such moment until the re-establishment of peace.[5] Mobilization proceeds upon order from the Emperor, but the order must be addressed to the Bavarian King, and issued by him directly to the Bavarian troops.[6] If the Bavarian King should refuse or fail to transmit the Imperial order, the only remedy in the hands of the Emperor is that provided in Article 19. of the constitution, to which I have already referred, *viz;* coercion voted by the Federal Council and executed by the Emperor. The Emperor has the power and the duty to inspect the Bavarian troops at any time.[7]

[1] Reichsverfassung, Art. 63. [2] *Ibid.* Art. 64.
[3] *Ibid.* Art. 63. [4] *Ibid.* Art. 64.
[5] Bündniss-Vertrag mit Bayern von 23 Nov. 1870, III.
[6] *Ibid.* [7] *Ibid.*

The Württemberg troops form one consolidated army corps under the immediate command of the King of Württemberg, but under the superior command of the Emperor in time both of war and peace. The King of Württemberg appoints all the officers of this corps, except the commanders of fortifications, but his appointments of the highest officers of the corps must be ratified by the Emperor. The Württemberg troops owe unqualified obedience to the commands of the Emperor; but, in time of peace, the Emperor has no power to order the Württemberg troops out of Württemberg or other troops into Württemberg, without the consent of the King of Württemberg, except for the purpose of garrisoning South-German or West-German fortifications. The Emperor has the power and duty to inspect the Württemberg troops at any time.[1]

2. The constitution vests in the Emperor the superior command of the navy. It empowers him with the authority to organize the navy, to appoint all of its officers, and to require from all the officers and men the oath of obedience.[2]

3. The constitution confers upon the Emperor the power to establish fortifications within the territory of the Empire,[3] except in Bavaria.[4]

4. The constitution empowers the Emperor, in case of insurrection or rebellion in any part of the Empire, to declare that part in a stage of siege; *i.e.* to govern therein, for the time being, as commander-in-chief of the army and through the officers of the army.[5] Bavaria is exempted from the operation of this power.[6]

V. *The Imperial Chancellor.*

The Imperial constitution requires that all the official acts of the Emperor, except those of military commandership, shall

[1] Militair-Konvention mit Württemberg, von 21 und 25 Nov. 1870, dem Art. 68 der Reichsverfassung zugesetzt.

[2] Reichsverfassung, Art. 53. [3] *Ibid.* Art. 65.

[4] Bündniss-Vertrag mit Bayern von 23 Nov. 1870.

[5] Reichsverfassung, Art. 68.

[6] Bündniss-Vertrag mit Bayern von 23 Nov. 1870.

be countersigned by the Chancellor, who thereby assumes the responsibility.[1] The Emperor is thus irresponsible and, as I have already stated, from his character as King of Prussia is personally inviolable.

To whom the Chancellor is responsible is not declared in the constitution, and no way is provided in the constitution whereby the legislative bodies can enforce any responsibility. They are not vested with the power of impeachment, and no one thinks of the resignation of the Chancellor as the necessary result of a vote of distrust.

It is provided by the law of the 17th March, 1878,[2] that the Emperor may, upon the proposition of the Chancellor, appoint a substitute or representative for the Chancellor, who may countersign the Emperor's acts when the Chancellor is unable to do so. The substitute may be a single person or a number of persons, each taking, in the latter case, the responsibility in a certain branch of the administration. If the substitute be a number of persons, they must be taken from the chiefs of the administrative departments. The Chancellor is, however, empowered by the law to resume his powers at any moment, in whole or part, as he may see fit. This law must be regarded as a constitutional law, since it modifies the constitution. Here may be the beginning of a collegiate organization of the heads of the administrative departments. This law, however, does not necessarily involve any such result. The Chancellor may always prevent it as well as the Emperor. It would require the assent of both.

It is evident that parliamentary government and ministerial responsibility no more exist in the German system than in that of the United States. The Chancellor or his substitute, be they one person or several persons, are the servants of the Emperor and practically responsible only to him.

[1] Reichsverfassung, Art. 17; Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 93.

[2] Reichsgesetzblatt, 1878, S. 7.

CHAPTER VII.

THE CONSTRUCTION OF THE EXECUTIVE DEPARTMENT OF THE FRENCH GOVERNMENT.

I. *The Election of the President.*

The constitution provides that the President shall be chosen by an electoral body composed of the members of the two legislative houses.[1] It requires that this body shall be convoked for this purpose at least one month before the legal expiration of any presidential term.[2] It does not expressly declare by whom it is to be convoked, but the plain inference is that the President of the Senate in understanding with the President of the Deputy Chamber shall issue the call. In case, however, he should neglect to do so, the constitution provides that the body may form itself, of full right and in full power, for the purpose of the new election, on the fifteenth day before the legal expiration of the current presidential term.[3] In case of the death or resignation of the President, the constitution commands the immediate union of the two legislative bodies in the electoral college.[4] If, at the moment when the vacancy occurs, the Chamber of Deputies should be dissolved, the constitution commands the immediate holding of the new elections and the immediate assembly of the Senate.[5]

The constitution prescribes that, when the two legislative bodies meet in the electoral college, the President of the

[1] Loi constitutionnelle du 25 février, 1875, Art. 2, § 1.
[2] Loi constitutionnelle du 16 juillet, 1875, Art. 3, § 1.
[3] *Ibid.* Art. 3, § 2. [4] *Ibid.* Art. 3, § 3. [5] *Ibid.* Art. 3, § 4.

Senate shall preside and the Vice-President and Secretaries of the Senate shall act as the officers of the electoral college.[1]

Lastly, the constitution prescribes that the election shall take place by a union upon the same person of the votes of an absolute majority of the college; *i.e.* a majority of the whole legal number of members of the college.[2]

The constitution makes no further provision as to the procedure within the electoral college. All further questions are therefore left to be determined by the college itself. The precedents established by the practice of the college are: No debate, and the immediate transmission of the result of the election to the newly elected President by the Council of Ministers of the preceding President.[3] The legislature has by statute fixed the seat of the electoral college at Versailles.[4]

II. *The Qualifications for the Presidency.*

The constitution prescribes no qualifications as necessary to the holding of the office. It declares, on the other hand, one disqualification, *viz;* membership in any of the families that have reigned over France.[5] The commentators, however, lay down the principle that, since the presidency is a political office, the President must have been, at the time of his election, in possession of the full civil and political rights of a French citizen.[6] Within these two limitations the electoral body is free to exercise its own discretion.

III. *The Presidential Term.*

The constitution prescribes that the full term shall be seven years.[7] If the presidency of a particular person should be brought to a close before the expiration of this term, the

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 11, § 2.

[2] Loi constitutionnelle du 25 février, 1875, Art. 2, § 1.

[3] Lois constitutionnelles et organiques de la Republique française, M. Eugene Pierre, p. 25, note.

[4] Loi du 22 juillet, 1879, Art. 3, § 2.

[5] Loi constitutionnelle des 13–14 août, 1884, Art. 2, § 2.

[6] Lebon, Das Staatsrecht der französischen Republik; Marquardsen, Handbuch, S. 443; St. Girons, Manuel de Droit constitutionnel, p. 347.

[7] Loi constitutionnelle du 25 février, 1875, Art. 2, § 2.

newly elected President would therefore begin a new term and would not be limited to the completion of the interrupted term. The constitution also declares the President re-eligible.

IV. *The Succession to the Presidency.*

The presidency being an elective office, the law of succession will only attach in case the term should be brought to a close in an extraordinary way before its legal expiration. On account of the fact that the national electoral college may generally be constituted at a moment's notice, the French constitution has made no provision for a vice-presidency. It simply vests the executive powers, temporarily, in the Council of Ministers of the outgoing President. The words of the constitution are: "In case of a vacancy in the presidential office, by death or through any other cause, the Council of Ministers is invested with the executive power."[1] This language covers a vacancy created by the failure to elect a new President before the legal expiration of the term of the old President, and one created by conviction of the President for high treason by the Senate, as well as one caused by the death or resignation of the President. The language of the provision will cover every case of vacancy which can arise. Nothing, however, is expressly said in the constitution concerning a temporary disability of the President to discharge his duties; for example, on account of long sickness, or absence from the country, or capture in war by a foreign state; and nothing is said in regard to his office and powers during a process for high treason against him. These are grave omissions. Their gravity, however, is somewhat lessened by the fact that the electoral body can generally be organized immediately and can meet any emergency in a double capacity either as the electoral body or as the sovereign body.

V. *Privileges of the President.*

The constitution provides that the President is irresponsible except in case of the commission of high treason;[2] and

[1] Loi constitutionnelle du 25 février, 1875, Art. 7, § 2. [2] *Ibid.* Art. 6, § 2.

that the President can be arraigned only by the Chamber of Deputies and tried only by the Senate.[1] Of course, from the nature of the case, the President cannot while in office (and so long as he is President he is in office) be made subject to any process by any tribunal which would restrain in the slightest degree his personal freedom, no matter what offence he may have committed. He must be deprived of his official powers before he can be made answerable personally for anything, by any body, before any tribunal; *i.e.* he is inviolable. The constitution evidently takes all this for granted. The points regulated by the constitution are the occasion upon which, and the means through which, his removal from office may be accomplished. There is but the one occasion, *viz;* conviction of the commission of an act of high treason, and but one lawful accuser, *viz;* the Chamber of Deputies, and but one lawful court, *viz;* the Senate. It will be seen, however, that the constitution does not define high treason, nor limit to removal from office the penalty which may be inflicted upon the President for the commission of an act of treason against the state, nor require that a judgment of removal shall precede the infliction of any other penalty by the Senate. So far as the language of the constitution is concerned, the Senate must define the crime, and may inflict the death penalty upon the President upon conviction of high treason, without having first removed him from office; but I cannot see how the penalty could be legally executed upon the President, without his own consent, while he remained in office. The provisions of the constitution of the United States upon this subject are far more scientifically complete. As we have seen, they vest the Senate, the political court, only with the power of removal, and then, after the President shall have been deprived of his official inviolability, they leave him to prosecution before the ordinary tribunals under the ordinary law, like any other subject of the state.

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 1.

The French system has never yet had a practical test. When it does, I predict that it will be found necessary to remove the President first in order to get a new executive head by whom any further penalties voted by the Senate may be executed. The French system protects the President at more points than that of the United States. It leaves him unprotected at but a single point, while that of the United States permits his removal for any high crime or misdemeanor. On the other hand, the system of the United States protects the President, *in all cases*, against the infliction of any penalties touching his life, liberty or property by the political court, which the French system does not do.

The French constitution jealously guards the presidency against claiming any responsibility to the people. The French statesmen have experienced the dangers which may arise from any such relationship.[1] President MacMahon once dared to speak of his responsibility to France. This utterance evoked from the Chamber of Deputies the indignant and just reproof that the only France to which the President is responsible, is France organized in the legislative bodies, and then only upon the single occasion of the commission of an act of high treason. The French constitution meant to create a substantially irresponsible executive, so that it might secure a change of Ministry to correspond with a change of legislative majority without requiring a change in the Presidency; *i.e.* so as to secure an unpolitical President.[2]

By force of custom and by statute the President is grand-master of the Legion of Honor, and is protected against the insults and libels of the press by graver penalties than those which may be inflicted in behalf of private persons.[3] His salary is also fixed by the annual budget.[4]

[1] St. Girons, Manuel du Droit constitutionnel, p. 344.
[2] Lebon, Das Staatsrecht der französischen Republik, S. 45.
[3] *Ibid.* S. 44 ff. [4] *Ibid.* S. 44.

CHAPTER VIII.

POWERS AND DUTIES OF THE FRENCH PRESIDENT.

I. *Diplomatic Powers.*

1. The constitution, in my opinion, confers upon the President the power to make defensive war. The constitution does not make this provision expressly. It expressly forbids the President to declare war without the previous assent of the two chambers,[1] and it expressly confers upon the President the power to make disposition of the forces of the state.[2] When the former provision was before the National Assembly for adoption, M. Laboulaye defined its meaning thus: "Without doubt the President, by virtue of his power to dispose of the forces of the state, has the power and the duty to take all the measures demanded by the circumstances to defend France against invasion."[3] The meaning of the limitation is therefore, I think, that the President shall not enter upon an *offensive* war without the consent, previously given, of both legislative chambers. The form of the consent is not prescribed by the constitution, and the practice has not required the form of a statute. In the expedition of 1881, against Tunis, and in that of 1884, against Tonkin, no declaration of war was made in the form of a statute. The members of the legislative chambers who opposed these expeditions declared that the President had violated the constitution in the making of these wars, but the

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 9, § 1.

[2] Loi constitutionnelle du 25 février, 1875, Art. 3, § 3.

[3] Lois constitutionnelles et organiques de la République française, M. Eugéne Pierre, p. 60, note 1.

majority sustained the views of the Ministry in both cases, *viz;* that the vote of confidence in the administration, and the appropriation of money for the arming and transportation of the troops, by the legislature were constitutional forms of consent to the making of offensive war.[1] I think we must regard another point as settled by these precedents, *viz;* that subsequent consent by the chambers will indemnify the President's acts. Of course, a President who makes war without the authorization of the chambers takes a serious risk; but exigencies may arise under which he would be obliged to take this responsibility or see the welfare of the state irredeemably sacrificed.

I think this clause of the constitution makes the President commander-in-chief of the army and navy. It seems to be a necessary implication.

2. The constitution confers upon the President the power to appoint and send ambassadors, envoys and consuls to foreign states,[2] and to receive ambassadors, envoys and consuls from foreign states.[3] He has thus the power in first instance to recognize, so far as France is concerned, the independence of a foreign state and its right to be regarded as a member of the international sisterhood. As regards the sending of French representatives to a given state, the legislature may control him by refusing to establish the posts and to vote the required salaries; but, in the reception of representatives from a foreign state, he is left by the constitution uncontrolled. The constitution seems to treat this prerogative as purely ceremonial. It connects it in the text with the power to preside at state ceremonies.

3. The constitution empowers the President to negotiate and to conclude all treaties and agreements with foreign states.[4] If, however, the proposed treaty should be one of

[1] Lebon, Das Staatsrecht der französischen Republik, S. 46 ff.
[2] Loi constitutionnelle du 25 février, 1875, Art. 3, § 4. [3] *Ibid.* Art. 3, § 5.
[4] Loi constitutionnelle du 16 juillet, 1875, Art. 8, § 1.

peace or commerce, or should involve the finances or the territory of the state, or should relate to the personal or property rights of Frenchmen in foreign states, it must be voted by the two chambers before the President can constitutionally ratify it;[1] and if the foreign state should conclude with the President any agreement touching any of these subjects without the ratification of the legislature duly given thereto, France would not be bound by any principle of international law to fulfil the same. The foreign state, in dealing with the French President, is bound to know the extent of his powers as provided in the constitution. Almost every treaty which can be imagined would involve one or more of these points; a fact which makes it advisable when dealing with the French government, to demand the consent of the legislative bodies to all agreements entered into with the executive. In all cases, the President is constitutionally required to inform the chambers of his acts and agreements so soon as the security and welfare of the state will permit.[2]

II. *The Powers of the President in Legislation.*

1. The constitution confers upon the President the power to call the legislature together in extraordinary session, and imposes upon him the duty of so doing, when both chambers demand it by absolute majority vote in each.[3] It confers upon him the power to adjourn the chambers twice during the same session. But the single adjournment must not be for a longer period than one month,[4] and the legislature must sit for at least five months of each year, excluding the periods of adjournment by the President.[5]

2. It confers upon him the power to prorogue the legislature, *i.e.* to close its sessions. If the legislature be in

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 8, § 2.
[2] *Ibid.* Art. 8, § 1. [3] *Ibid.* Art. 2, § 1. [4] *Ibid.* Art. 2, § 2.
[5] *Ibid.* Art. 1, § 2; Lebon, Das Staatsrecht der französischen Republik, S. 48.

regular session, the President cannot constitutionally prorogue it until it shall have sat for at least five months.[1]

3. It confers upon him the power, with the consent of the Senate, to dissolve the Chamber of Deputies at such time, and as often as, he may deem it proper and for the welfare of the state.[2] During the period of dissolution, the Senate cannot, of course, sit as a legislative body. The dissolution of the Deputies works the prorogation of the Senate.[3] The purpose of the dissolution is to give the electors the opportunity to express their opinion upon a given question. Accordingly, the constitution orders the new elections to be held within two months from the date of the dissolution, and orders the newly elected chamber to assemble within ten days from the completion of the elections.[4] It is the duty of the President to see that these commands are fulfilled.

4. The constitution confers upon the President the power to propose to the legislative chambers that they go into national assembly for the purpose of revising the constitution.[5] If, however, they should refuse to do this, the constitution provides no means by which the President can enforce his suggestion. If the Deputy Chamber alone should refuse while the Senate acceded, it would be possible for the President, in agreement with the Senate, to bring a pressure upon the Deputies by the threat of dissolution. He might even, in agreement with the Senate, decree dissolution in order to let the electors speak upon the subject.

5. The constitution confers upon the President the power to initiate legislation.[6] He must send his projects to the

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 1, § 2; Lebon, Das Staatsrecht der französischen Republik, S. 48.

[2] Loi constitutionnelle du 25 février, 1875, Art. 5, § 1.

[3] Lebon, Das Staatsrecht der französischen Republik, S. 48 ff.; Loi constitutionnelle du 16 juillet, 1875, Art. 1, § 2.

[4] Loi constitutionnelle du 25 février, 1875, Art. 5, § 2, modifie par la loi constitutionnelle des 13–14 août, 1884, Art. 1.

[5] Loi constitutionnelle du 25 février, 1875, Art. 8, § 1. [6] *Ibid.* Art. 3, § 1.

chambers by a minister.[1] He may send them to either chamber first, at his discretion, unless they contain items of financial legislation, in which case he must send them first to the Chamber of Deputies.[2] He may cause his projects to be explained and defended before the chambers, not only by his ministers, but by commissioners specially appointed by him for the purpose.[3]

6. It confers upon him the power to require the chambers to reconsider any law passed by them.[4] This requirement must be made within the period allowed by the constitution before promulgation of the law, and it must be made through a message giving reasons. Reconsideration cannot be constitutionally refused by the chambers; but a re-passage of the law by the ordinary majority will overcome the presidential interposition.

7. The constitution vests in the President the power to promulgate the laws.[5] It leaves him to his own discretion in regard to the manner of promulgation; but requires that he shall not delay promulgation beyond one month from the date when the law shall have been transmitted to him as finally adopted by the legislature, or beyond three days when both chambers shall have voted that promulgation is urgent.[6] I suppose the vote of urgence may be taken at any time in regard to laws already in the hands of the President and not declared urgent by the chambers at the time of the transmission, and that its requirement must always be obeyed by the President. The commentator Lebon, who, at the time he wrote, was chief secretary of the President of the Senate, makes a distinction between promulgation and publication of the laws. He defines promul-

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 6, § 1.
[2] Loi constitutionnelle du 24 février, 1875, Art. 8.
[3] Loi constitutionnelle du 16 juillet, 1875, Art. 6, § 2.
[4] *Ibid.* Art. 7, § 2.
[5] Loi constitutionnelle du 25 février, 1875, Art. 3, § 1.
[6] Loi constitutionnelle du 16 juillet, 1875, Art. 7, § 1.

gation in the French system to be the decree whereby the President certifies that the law has been regularly passed, and commands its execution;[1] while publication is the printing of the law in the governmental gazette.[2] I do not find this distinction in the constitution itself. The constitution appears to me to treat publication as a part of promulgation. The governmental practice appears to me to sustain this view. The governmental decree regulating this matter is styled "Décret du 5 novembre, 1870, relatif à la promulgation des lois et décrets," and directs that the promulgation of the laws and decrees shall be effected by their insertion in the *Journal Officiel*, etc. I think the distinction made by Lebon is German, not French. The tendency of such a distinction, and of such a definition of promulgation, is towards according the executive a larger discretion in promulgation than the principles of the French system warrant.

III. *Civil Administrative Powers.*

1. The constitution confers upon the President the power to supervise and effect the execution of the laws.[3] This is his most important duty.

2. In order to enable him to fulfil this duty, the constitution expressly empowers him to appoint all the officials,[4] and impliedly empowers him to dismiss them all, unless otherwise ordered by an act of the legislature.[5] The legislature has protected the military officials, the university professors, and the judges against this discretionary power of dismissal, and has passed some fragmentary legislation upon the subject of qualifications for appointment. (The latter subject is for the most part regulated by executive decrees.) It is clear that the legislature does not regard itself as trenching upon the President's constitutional power of appointment in undertaking such legislation.

3. The President is also empowered to make disposi-

[1] Lebon, Das Staatsrecht der französischen Republik, S. 49. [2] *Ibid.*
[3] Loi constitutionnelle du 25 février, 1875, Art. 3, § 1. [4] *Ibid.* Art. 3, § 4.
[5] Lebon, Das Staatsrecht der französischen Repulik, S. 50.

tion of the army and navy,[1] for the purpose, among others, of securing the execution of the laws. The occasions upon which the President may use the forces are not expressly enumerated in the constitution. He is therefore left to determine, in first instance, when the security and welfare of the state demand the use of such means.

4. The constitution impliedly empowers the President to make the ordinances needed for the execution of the laws, in so far as the legislature shall not have made them. The constitutional provision which declares him the administrative head of the Republic, and authorizes and requires him to execute the laws, of course empowers him to issue instructions and orders to the officials. By the constitutional power to make executive ordinances, however, I mean quite another thing. I mean the power so to supplement the acts of the legislature as to render them capable of execution. This involves the power to bind the common subject by executive orders for which no specific authority can be found in the legislative act.[2] Of course, the President must not make use of this power to frustrate the purposes of the legislature in the enactment of the law, and his ordinance must not violate any other law.[3] Within this limitation, however, he is free to act under his constitutional prerogative.

In making this statement concerning the power of the French President, I have deferred to the teachings of the commentators in reference to the practice of the administration. My own opinion is that the written constitution of the French Republic does not confer any such power upon the President. I cannot find it expressed anywhere in the text, and I deny that it is a necessary implication from the duty to execute the laws. If, when the legislature enacts a

[1] Loi constitutionnelle du 25 février, 1875, Art. 3, § 3.

[2] St. Girons, Manuel de droit constitutionnel, p. 379; Lebon, Das Staatsrecht der französischen Republik, S. 50.

[3] *Ibid.* S. 50.

law, it neither makes the provisions necessary for the execution of the law nor empowers the President to make them, the President can leave the law unexecuted until the necessary measures receive the approval of the legislature. We, in America, not only know this to be practicable, but we generally believe that any other procedure would be dangerous to liberty and constitutional government.

This power of the President is sanctioned by Article 471, § 15, of the Code pénal, which inflicts a fine of from one to five francs for disobedience to the ordinances of the administration. It is not sanctioned anywhere else or in any other way. Now the Code pénal is not a part of the constitution. It is a statute. It seems to me, therefore, that this general power of the President to make ordinances in execution of laws rests upon a general statute empowering him thereto, and not upon the constitution.

But even if it be admitted that this sphere of power is granted by the constitution to the President, yet if the legislature be empowered to oust the President from this sphere at will, the power of the President is tantamount only to a power conferred by a general permissive statute. Now, nobody doubts that the French legislature has the power to make every ordinance for the execution of the laws, if it will. It is, therefore, only by its implied permission that the President can act in this sphere at all.

It seems to me that the commentators are laboring under the influence of the royal and imperial traditions when they interpret the present constitution as vesting in the President the power to make ordinances for the execution of the laws.

IV. *Powers of the President in Judicial Administration.*

1. The constitution confers upon the President the power to constitute the Senate as a court of justice for the purpose of trying any person accused of an *attentat* against the security of the state.[1] It follows from this language, that

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 3.

the court so constituted can sit in judgment upon the highest officials of the government, the President included.

2. The constitution confers upon the President the power to pardon any person sentenced by any criminal or police court in France. He may, therefore, pardon the ministers themselves against the judgments of the Senate, as a court of justice. His power to pardon, *i.e.* to remit penalties, includes, of course, the power to commute penalties into milder punishments, and the power to reprieve, *i.e.* to suspend the execution of the sentence. He is not, however, empowered by the constitution to issue an amnesty, *i.e.* a relief against all the civil and political results of the conviction. This, according to the constitution, only the legislature can do.[1] The legislature, however, may make a pardon granted by the President equal to an amnesty, by a vote to that effect.

V. *The Ministers of the President.*

All the powers of the President must be exercised through the Ministry or a minister. He must appoint and dismiss the members of the Council of State in the Council of Ministers;[2] he must declare his resolution to call the Senate as a court of justice in the Ministerial Council;[3] and his every act must be countersigned by a minister.[4] It is thus that the executive and administrative power is made responsible at every point to the legislature, and yet the President himself made irresponsible, except only in case of commission of high treason. The constitution pronounces this principle in the following language: "The ministers are collectively responsible to the chambers for the general policy of the administration, and individually responsible for their own personal acts."[5]

[1] Loi constitutionnelle du 25 février, 1875, Art. 3, § 2.
[2] *Ibid.* Art. 4, §§ 1 & 2.
[3] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 3.
[4] Loi constitutionnelle du 25 février, 1875, Art. 3, § 6.
[5] *Ibid.* Art. 6, § 1.

Nominally, the ministers are appointed and dismissed by the President, and, so far as the constitution is concerned, at his pleasure. The constitution does not even fix a qualification or a disqualification for the holding of these high offices. It is implied, of course, that the ministers shall be French citizens in full enjoyment of civil and political rights; and it is the practice to take them from the ranks of the majority party in the Chamber of Deputies. They have seats and voices in the Council of State. This latter body is the privy council of the President, and its members are appointed and dismissed by him at pleasure, under the single constitutional requirement that these acts shall be done in the Council of the Ministers. The ministers may be members of the legislature; generally they are. Whether they are or not, they have free access to the chambers, and must be heard whenever they demand it. They are the heads of the various administrative departments, and the President can issue no command except through one of them.

Their responsibility is twofold, *viz;* political and criminal. Their political responsibility is also twofold, *viz;* joint and single, *i.e.* the responsibility of the Ministry and the responsibility of each minister. The first attaches in all cases of general policy, the latter in all cases of individual activity. Their political responsibility is enforced in both cases by their dismissal from office. The constitution does not expressly command the President to dismiss the Ministry or a minister upon a vote of distrust, general or particular, or upon the refusal of the legislature to adopt projects of law laid before them by the Ministry or a minister, and declared to be vital to the administration; much less does it require this when the vote of distrust or the refusal to adopt ministerial projects is confined to the Chamber of Deputies; but the constitution puts the Chamber of Deputies in possession of the means to bring about this result. The power of this chamber over the budget enables it to block the entire activ-

ity of the government in case the latter should undertake to act out of accord with the majority in the Chamber. The mere resignation or even dismissal of the ministers is not connected with any other penalty, not even with the political penalty of disqualification to hold office again.

The criminal responsibility of the ministers, on the other hand, must be individual in every case, and is enforced by such penalties as the Senate may see fit to inflict in each case. The provision of the constitution in reference to this subject reads: "The ministers may be placed in accusation by the Chamber of Deputies for crimes committed in the exercise of their functions. In this case they are tried by the Senate."[1]

It is clear from the language of the constitution that the ministers cannot be arraigned and tried in this manner for any crime which they may commit as private persons. As private persons they are subject to the jurisdiction of the ordinary courts, and to this jurisdiction only. It is only for crimes committed in the exercise of their ministerial functions that they can be made subject to this extraordinary jurisdiction by bill of attainder.[2]

As to what shall constitute crime committed by a minister in the exercise of his functions, the constitution is silent. The definition of crime contained in the Code pénal, or rather the catalogue of crimes enumerated in the Code pénal is evidently too narrow for the meaning of the word as here employed. The commentator Lebon adopts Brisson's definition of the term crime in this connection, *viz;* the violation of any law.[3] This seems to me to present the true view, although I think it is left by the constitution to the Senate to determine in each case whether what has been done amounts to a crime or not.

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 2.

[2] Lebon, Das Staatsrecht der französischen Republik, S. 55.

[3] *Ibid.* S. 57.

The constitution imposes no limitations upon the legislature in reference to the arraignment, trial and judgment of a minister. It directs, however, that these matters shall be regulated by law;[1] *i.e.* by rules passed by both bodies for the direction of each body. In other words, the constitution orders the legislature to limit the powers of each house in the accomplishment of the part assigned to it. The question then arises whether, in the absence of any such law, these extraordinary prosecutions can be undertaken at all. English and American jurisprudence would be very likely to answer this question in the negative. Lebon, however, holds that the precedents of French constitutional and parliamentary history authorize each chamber, in the absence of a law, to act freely in that part of the procedure assigned to it by the constitution.[2] He says the only limitation which, in the existing status of French law, rests upon the absolute freedom of each legislative chamber in regard to the prosecution, trial and sentence of the ministers, is in respect to the choice of the penalty to be inflicted. Since in most cases the crime would be political, political penalties only must be inflicted, such as deportation, imprisonment, exile, loss of citizenship.[3] Where he finds this limitation is to me unintelligible. It is not contained in the constitution, unless it be found in the constitutional requirement that the whole matter shall be regulated by law. But this the learned commentator declares to be no antecedent necessity to the action of the two chambers. If the limitation be not in the constitution nor in a law, I do not see how it can bind the chambers. I think Lebon's principle necessarily leaves the Senate entirely free to select the penalty and to order its execution. This would certainly give the Senate a most despotic political jurisdiction over the ministers. Uneasy must be the hand which carries a *portefeuille* with such responsibility.

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 5.

[2] Lebon, Das Staatsrecht der französischen Republik, S. 57. [3] *Ibid.*

If the act committed by the minister be a crime according to the code pénal, he is also subject to the ordinary criminal jurisdiction.

Lastly, the constitution empowers the President to preside upon great occasions of state.[1]

The French presidency is quite a unique creation of modern political science. It seeks to unite the elective tenure with the position and relations of a constitutional King. There is no contradiction in principle or practice between the elective tenure and the exercise of executive powers of the strongest nature, executive powers equal to those exercised by a constitutional King; but there does seem to be incongruity between the elective tenure and the position of political impartiality and indifference required of the constitutional King. How can a man elected by a party and supported by a party look with impartiality and indifference upon the triumph of the opposite party, whose success may mean his own downfall? It is too much to expect that a legislature, whose members form the electoral body of the executive, will refrain from forcing a President out of office when a clear majority of the body is of a different party from that to which the President adheres, or adhered at the time of his election; and it is too much to expect that a President, knowing this, will be an impartial and an indifferent spectator of changes in the legislature which might bring about such a result. A far greater self-control than either French legislatures or French Presidents are thought to possess would be necessary to prevent this natural outcome. Elective government is naturally party government, and it is quite impossible to make anything else out of it. The warmest friend of what we call in the United States civil service reform does not dream of making the head of the administration and the highest class of the officials sub-

[1] Loi constitutionnelle du 25 février, 1875, Art. 3, § 5.

ject to its rules. The elective executive can never be the head of the state in the sense in which an hereditary King is its head, and no constitutional convention can make him so.

The practical working of this new institution will be watched with much interest. Should it really succeed, its success will furnish the best possible evidence that the French state has arrived at its maturity and is fully capable of intelligent and conservative self-government.

CHAPTER IX.

COMPARATIVE STUDY OF THE EXECUTIVE.

A COMPARISON of the four typical constitutions, upon the subject of the executive, gives for its first result the fact that the modern states of the world are apparently in less harmony upon this subject than upon that of the legislature. A closer comparison reveals the further fact that the disharmony lies more in the tenure of the executive and his relation to the legislature than in his powers.

I. Two of these systems present hereditary executives and two of them elective executives. In the first pair, the law of descent is not the same; and in the second, the electoral bodies and the electoral procedure differ widely. Two of these systems present executives personally irresponsible. One of them presents an executive personally irresponsible, except in case of high treason; and one of them an executive personally responsible to the legislature for criminal acts in general. Two of them present executives politically responsible to the legislature through ministries; and two of them executives irresponsible politically to the legislature. And of the first pair, the political responsibility of the ministry in one, is only collective; while in the other, it is both collective and individual. These are essential differences; and we shall do well to linger a little upon the conditions producing and sustaining them.

1. It is generally taught that the change from the hereditary to the elective tenure is the product of the revolutions of the eighteenth century. Of the four systems we are considering, the two which present the elective tenure are the

two whose constitutions rest without doubt upon revolutionary bases. But I think I have shown that the constitutions of the other two, the two still retaining the hereditary tenure, rest also upon revolutionary bases. While, therefore, it may be granted that the elective principle, as to the executive tenure, has been introduced by the revolutions which have established the democratic state, it does not appear that such a result is inevitable; and if, after the lapse of a sufficient period for the realization of the spirit of these revolutions, no such result has attached, we have here some evidence, at least, that it need not. Looking at the subject from a purely scientific standpoint, it seems to me that a democratic state may, without violence to its own principle, construct for itself a government in which the executive power will hold by hereditary right. If the democratic state will only preserve its own organization separate from and supreme over its government, it may consistently use any form of government which it may deem adapted to the exigencies of the age.

The hereditary tenure, however, is certainly not the most natural tenure for the executive of a democratic state. It implies the existence of unusual conditions and the observance of difficult requirements. It implies the existence of a royal house whose foundation reaches far back of the revolution which changed the state from its monarchic, or aristocratic, to its democratic form. It implies that that house has accommodated itself to the spirit of the revolution, has, in fact, placed itself at the head of the revolution and brought it to its consummation; has retained its hold upon the people; has kept and still keeps attached to itself the most capable personalities of the state, the natural leaders of the people; is content to surrender sovereignty and retain a limited governmental power only, and, in the exercise of this power, follows always a liberal and popular policy. This is a strait and narrow way for an hereditary ruler to walk in;

but certain rulers have found it practicable. The Guelphs of England, the Hohenzollerns of Germany, owe their present positions as hereditary executives of democratic states to their wisdom in these respects, their substantial fulfilment of these requirements. It is probable that when the democratic state reaches a higher stage of perfection in England and in Germany, the hereditary tenure of the executive will be swept away. It certainly will be swept away if those who hold by it forget the conditions of their existence. Until this period shall arrive, however, there are advantages, manifest even to one surrounded by the prejudices of the new world, in the retention of the hereditary executive in both of these great states, and in all other states in which corresponding conditions exist. Among these advantages I would mention, first of all, a respect for government and a readiness to obey the law, which can in no other way be attained until the political society shall have reached a degree of perfection far beyond anything which, at present, exists anywhere in the world. As Bagehot somewhere says, the mass of men at the present time have not much reverence for a thing which they assist every half-dozen years to create. Another very important advantage is the ease with which the hereditary executive maintains a stable and an efficient civil service.

I will not pursue this reflection any further. My object at this point is to call attention to the fact that, while the elective executive is the more natural form in the democratic state, the hereditary executive, in its present constitution in England and Germany, is not inconsistent with the existence of the democratic state either in fact or in principle; that, in the four systems which I am comparing, the hereditary and elective principles are only two methods of determining the tenure of the executive office and do not constitute a distinction as to the forms of state; and that these differences are, therefore, less fundamental than is usually supposed. The hereditary executive of a democratic state with a constitu-

tional government is a very different institution from the hereditary sovereign in a monarchic state. It is only a presidency with an unlimited term.

2. The difference between the English and German law of succession, on the other hand, is more significant than appears at first glance. It is not merely a question of the admission of women to the succession, or of their exclusion from it. The English law may result in frequent changes of the royal house. Furthermore, since it does not require princely marriage for the princesses, it may result in the infiltration of much unroyal blood. Both of these possibilities, if realized, will have a strong tendency to weaken the mystical influence of royalty over the minds of the masses. But this is not all; the Queen regnant is far more likely to yield to advisers than the King. She will be far more likely to introduce the reign of favorites, if her ministry be of her own independent choice, or to yield to the encroachments of the legislature upon the royal prerogative, in case her ministry should be imposed upon her by the legislature. I doubt very much if the English system would present exactly its present relations if, instead of the good Queen, a strong man had worn the crown during the last fifty years. The German law is undoubtedly the better law, if the wearer of the crown is to be anything more than a figure-head. The modern executive, whether hereditary or elective, must be something more than a figure-head, else this utilitarian age will sooner or later sweep it aside.

3. In the two systems which present an elective executive, the differences in the character of the electoral body, and in the law of election, produce important results. Here again the differences are more significant than they appear at first view.

The election in both cases is indirect; but while in the one case it proceeds from a number of bodies each independent of the others, and all independent of the legislature with which the executive is connected, in the other it proceeds from a

single body, identical in personnel with the membership of the legislature with which the executive is connected. As results, we have, in the one case, a permanently independent executive; in the other, an executive tending to become completely subordinate to the legislature. The reason why the framers of the present French constitution vested the election of the President in the legislature was, of course, their fear of a President proceeding from the people and responsible to the people. They had had experience with such a President in the constitution of 1848. They feared that such a President might again rout the legislature by the help of the popular favor and upon the principle of a direct responsibility to the people. They have certainly guarded well against this danger, but they have certainly created a very weak executive. There is little danger that the executive will overthrow the legislature, but there is a good deal of danger that a factious legislature without a strong executive may make the state a prey to some ambitious adventurer outside of the government. An elected figure-head is a far more useless organ than an hereditary figure-head, for it lacks that influence which royalty exercises over the masses and which royalty lends to its ministers. It seems to me that the time has come for an amendment of the French constitution in this respect. I do not see why the formation of electoral colleges in the *départements* and the election of the President by such colleges under a general law of election would not sufficiently avoid the dangers of a direct election by the people, and at the same time give the President a more natural position over against the legislature, especially against the rapacious Chamber of Deputies. It would at least make it impossible for the legislature to force the resignation of one President for the sake of electing another.

II. The four systems are in much closer accord than is generally supposed as regards the personal responsibility, or rather irresponsibility, of the executive.

It is the common idea that the quality of personal irresponsibility attaches only to the royal executive. From the analysis, in the preceding chapters, of the powers of the executive in the United States and in France, I think it is manifest that entire personal irresponsibility, while in office, is the necessary character of the elective executive also. The only important difference is this: The elective executive may, upon certain charges defined in the constitution, be removed from office by the legislative chambers, while the hereditary executive cannot. We have seen, however, that the Prussian King, and therefore the German Emperor, may be removed by agreement between the Crown Prince, the Prussian Ministry and the Prussian legislature. This fact still further lessens the actual difference between the royal and elective executives in regard to personal responsibility. Of the four executives under comparison, only the wearer of the English crown is entirely exempt from removal by the legislative branch of the government. An act of the state would be necessary for the removal of the English King against his own will.

What appears to me the most important conclusion is this: that the personal irresponsibility of the executive head is not a unique quality of the hereditary executive, but a necessary principle under all forms of government; that all attempts to make the executive head in any system of government personally responsible, while in office, will be abortive; and that any process provided by a constitution, for the removal of the elective executive from office by some other branch of the government, is far more likely to result in failure or in abuse than in any profit to the state. A law of succession providing for the devolution of the executive office, in case of the permanent physical or mental incapacity of the temporary incumbent, is always a most valuable part of a constitution; but we shall deliver ourselves from much delusion and avoid many dangers if we frankly attribute to the elective executive

head, in the supreme governmental system of the state, personal irresponsibility during the term for which he shall have been chosen, unless physical or mental incapacity shall have caused the transfer of the office before the regular expiration of the term. As I have said, this will be the inevitable result in practice, and it is better political science and better public law to generalize theory from necessary practice than to cling to a fiction derived from a confused prejudice.

Of course, the reasons for making the executive head irresponsible do not hold in the case of the ministerial chiefs of the executive departments. There is no reason why they should be inviolable. If they commit crime or misdemeanor, they are and should be responsible both to the legislature and to the courts. There is no difficulty in executing a process against them, and no interregnum would result from their arrest and confinement. The ministers of the hereditary executive need not have and, in the systems we are studying, do not, as a fact, have any more sacred character than the ministers of the elective executive.

On the other hand, the *political* responsibility of the ministers to the legislature is not required by any general principle of right or of political science; nor, on the other hand, is their irresponsibility a scientific necessity. What the relation shall be, is a question of high policy, dependent for its proper solution upon the general character of the particular legislature and of the electors of that legislature. Responsibility or irresponsibility of the ministry to the legislature leads to very essential differences, however, in the working of government. Ministerial responsibility will inevitably bring party government and the subordination of the executive to the popular branch of the legislature. Party government may occur when the ministers are irresponsible; but it is not, as in the other case, inevitable; and where the ministers are not responsible to the legislature, the independence of the executive may be far more easily preserved. There

is no doubt that there are periods in the life of a state when it is most advantageous that the legislature and executive should agree in political views and policies. The active, creative epochs require, we might almost say, this relation. There are, however, periods in the life of the state when such agreement would not be advantageous. After an active, creative period, a season of comparative rest is natural, in order that new institutions, laws and policies may make their cycle and prove their qualities. In such periods, a more deliberate movement of government is advantageous. During such periods, difference of political view between the legislature and executive is more likely to prove beneficial than sameness of view. In systems where both the legislature and executive are elective, we may fairly expect that the same party will possess both branches of the government in active and critical periods of development; while in the ordinary periods of rest, there is some likelihood, at least, that this will not be the case. In systems where the executive is hereditary and the legislature or the popular branch thereof is elective, the same results may occur. It is probable that they will occur. The hereditary executive has certainly as great an interest in keeping himself in sympathy with the people at large as the elective executive. That he shall do so is, in most cases, the prime condition of his continued existence; and the hereditary executive is usually as awake to his own interest as the elective executive. On the other hand, if he is not in accord with the people, and if he persists in antagonizing the legislature upon subjects in regard to which the legislature represents the popular view, he may not be so easily overcome as the elective executive. His term may not expire so soon. It may, on the other hand, expire sooner; and history certainly shows that the successor by inheritance may differ as widely as the successor by election from the political views of his predecessor.

Again, even though the executive should be of the same

political party with the legislative majority, the political independence of his administration over against the legislature will, at least during the normal and tranquil periods in the growth of the state, be more advantageous than its subjection to the legislative majority. It may also be more advantageous during the active periods of that growth. No legislature possesses infinitude of wisdom. A politically friendly executive may arrest many an unwise project of law, provided he have the independent power to do so.

If, finally, the executive should be of no political party, as is possible in the case of the hereditary executive, the political independence of his ministry may be of the highest value to the state, not only in imparting greater wisdom to legislation, but in protecting the rights of the minority against the possible tyranny of the legislative majority.

I cannot, therefore, conclude that the system of the hereditary executive requires, in the modern state, the political responsibility of the ministry to the legislature, any more than that the system of the elective executive requires it. In fact, of the two states under consideration in which the ministry is responsible, one (France) presents us with the elective executive; while of the two systems having an irresponsible ministry, one (Germany) presents the hereditary executive. It must be said, however, that the influence of the hereditary executive over the legislature is likely to be greater than that of the elective executive, although the powers possessed may be the same in both cases. This, in all probability, makes parliamentary government under the hereditary executive more conservative than under the elective executive; *i.e.* makes it, in general, safer and more practicable.

What, then, are the conditions which require the political responsibility of the ministry to the legislature, or the popular branch thereof, or which make this relation advantageous?

We have now two distinct questions which require distinct

answers. I can conceive of nothing *requiring* this relation except the permanent incapacity of the executive head, or irrational persistence on his part in an unpopular policy, or such evidence of a treacherous disposition as to make it impossible that he shall be trusted. On the other hand, ministerial responsibility to the legislature will be *advantageous* when the electorate and the legislature are of so high character intellectually and morally as to be practically incapable of forming an erroneous opinion or of doing an unjust thing. The checks and balances of double or treble deliberation by independent bodies will then be no longer necessary, will be rather hurtful than necessary. The natural age of compromise will have been passed. Until something like this condition shall arrive, however, the responsibility of the ministry to the legislature for governmental policy tends to the production of crude measures, and, in general, makes government radical. I do not think that parliamentary government stands in such high favor with political scientists as it did a decade or more ago. Based upon the narrow English electorate of twenty-five years ago, its working seemed to vindicate most thoroughly its principle, but the recent great extension of that electorate has revealed dangers hardly suspected before, and has shaken the faith (once orthodox) in its perfection and in its adaptability to every condition of political society. I have no hesitation in saying that to me England, as well as France, now appears to need a greater independence of the executive power over against the legislature.

I have pointed out one distinction between the principle of ministerial responsibility contained in the English system, and that contained in the French, *viz;* that while the former is collective only, the latter is both individual and collective. The latter seems more complete upon paper, but it works very badly in practice. It divides responsibility where it should be concentrated. It promotes dissension and discord

in the ministry. It permits the more crafty members of the ministry to make scapegoats of their weaker (and sometimes of their more honest) colleagues.

III. As I said at the beginning of this comparison, the difference in the four systems is not so marked in regard to the executive powers as in regard to the executive tenure and the relation of the executive to the legislature. In all four, the chief executive powers, *viz;* diplomatic representation, commandership-in-chief of the armed forces, superintendence of the execution of the laws, and appointment of the officials are very nearly identical. The powers of the executive over legislation in the different systems, though differing in character, appear roughly equivalent in degree. Where a general veto power is lacking, some compensation seems to be afforded by the power to initiate legislation and to dissolve the legislature. These latter powers, however, are not worth much unless the executive (or the ministry through which he acts) is independent of the legislature in tenure. Where the ministry is but a committee of one house of the legislature and entirely responsible thereto, this appearance of executive control is more or less delusive; and where the executive must also have the consent of one of the houses for the dissolution of the legislature, the control is reduced practically to nothing.

There is, however, one very important point of difference in these four systems as regards the executive powers. It is this: that while in the constitutional system of the United States the residuary powers of government, *i.e.* those powers not forbidden to the government by the state and not disposed of specifically by the state, are left in the commonwealth legislatures, and in that of Germany in the commonwealth executives, and in that of France in the legislature, in that of England they remain in the Crown. The causes which have produced and which still sustain this difference are, undoubtedly, the centralization of government in England,

and the preservation of the Crown as government, after it has ceased to be sovereign. But for the Federal system of government in the United States and in Germany, the residuary powers of government would undoubtedly be in the general legislatures of these states; and but for the overthrow of the Crown, in the revolutions out of which the present systems of the United States, Germany, and France have proceeded, these powers would undoubtedly still be found in the Crown.

This is certainly the most essential difference which we have found in the four executive systems subject to our examination. It gives the English Crown a much stronger position than it would otherwise have. It gives it a general constitutional ordinance power upon all subjects not regulated by statute or common law, which none of the other three executives has. The ordinance powers of the President of the United States, of the German Emperor, and of the President of France, are almost wholly statutory and specific. These powers are given, in these cases, by the respective legislatures, and may be withdrawn by statute. Now the ordinance power does its most valuable service to the state when employed to meet unforeseen exigencies which require immediate action. A sound political science would therefore approve the principle of a general residuary governmental power in the executive. Such a power should be constitutional in its source, but it need not be guaranteed by the constitution against legislative encroachment, *i.e.* it need not be made exclusive to the executive. The reason for its existence does not require this. When the legislature *can* act in this general residuary sphere, it should be permitted by the constitution to do so; but when it cannot, many advantages will accrue to the state should the constitution allow the executive to act.

It is manifest from the preceding comparison of these four executive systems, that, while there is not so wide a divergence in their construction and powers as appears upon first

view, there is more divergence than in the legislative systems of these typical states. This has an historical reason. The legislatures are more purely the products of the modern state, while the executive is in greater degree an institution transmitted from antecedent eras. Its adjustment to modern conditions is still in progress, and the political science of the future must give to this department the larger share of its attention.

DIVISION IV. — THE CONSTITUTION OF THE JUDICIARY.

I MUST remind my readers again that I am writing a book upon constitutional law, and not upon public law; *i.e.* I am treating that part of public law which is ordained in the constitutions. There is no doubt of the fact that some parts of the public law now existing only in the form of statutes or customs ought to be in the constitutions, and there is, on the other hand, no doubt that some things contained in the constitutions are more properly subjects of statutory regulation. In the preceding pages I have indicated where, in my opinion, such mistakes have been made, and in the discussion of the present topic I shall do the same. But I shall not treat of this topic further than the constitutions deal with it, both for the reason above given and for the additional reason that this work is to be followed by treatises upon administrative law and comparative jurisprudence, in which the statutory and customary organization of the courts will be considered as well as their constitutional organization.

CHAPTER I.

THE ORGANIZATION AND POWERS OF THE JUDICIARY IN THE CONSTITUTION OF THE UNITED STATES.

I. *The Basis of the Judicial Department.*

The constitution declares that the "judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[1]

[1] United States Constitution, Art. III, sec. 1.

Apparently the Supreme Court is here created by the constitution, while the inferior courts depend for their existence upon the will of the legislature. When we come to consider the subject more closely, however, we find that the existence of the Supreme Court itself virtually depends upon the will of the legislature. The legislature, in the absence of constitutional provisions, must determine the number of judgeships which the Supreme Court shall contain, create the same, and fix the salaries of the judges. It might be thought that, these things once done, the Court would then have a constitutional anchor against the legislature, since the constitution provides the term of good behavior for the judges and forbids the diminution of the salary of any judge during his continuance in office.[1] But it must be again remembered that at the end of any term, concluded by the death, resignation, or impeachment of any judge, the legislature may modify or abolish that particular judgeship for the future. It is thus possible for the legislature virtually to disestablish the Supreme Court at the conclusion of the terms of the judges who may be holding at the time the legislature may adopt this destructive policy. A sound view of the constitution would, I think, interpret the constitutional provision in reference to the creation of the judicial department as a command to the legislature to organize the Supreme Court in such force, and inferior courts in such number and force, as to provide for the transaction of the judicial business of the central government; but the legislature alone is the authoritative interpreter of the constitution upon this subject, and the legislature is here subject to control by the state only. The constituencies may influence the legislators, but the sovereignty alone can command the legislature. It will thus be seen that the judicial department, even in the constitution of the United States, does not really have an equally independent existence with the legislative and executive departments. In order to accomplish this, the con-

[1] United States Constitution, Art. III, sec. 1.

stitution must establish all the courts and all the judgeships thereof, and create means for the selection of the judges without action by the other departments. This consideration appears to me to be the most important argument for the election of the judges. I admit, however, that the argument is more academic than practical. The legislature has hardly made adequate provision for the central judiciary, as the most cursory examination of the docket of the Supreme Court will reveal; but it has not claimed the right, under the discretionary power vested in it by the constitution, to provide no organization at all for the judicial department.

With this general understanding of the constitutional basis of the judicial department, we may now examine the details of its organization and powers, so far as these are regulated by the constitution.

II. *The Judicial Tenure and Term.*

All the judges of the courts of the central government are nominated by the President,[1] confirmed by the Senate,[2] and commissioned by the President.[3] These are the three elements of appointment. The character of the first two of these elements differs, however, from that of the last. In the nomination of the judges the President is left by the constitution entirely to his own discretion. The constitution does not even prescribe a qualification for holding judicial office. Likewise, in the confirmation or rejection of the President's nominees, the Senate is left by the constitution entirely to its own discretion. The commissioning of the appointed judge is, however, a ministerial power. The President is ordered by the constitution to execute the commission.[4] If, however, he should fail to do so, there is no way in which he could be compelled to do so. The President may in this manner defeat the appointment if he will. If, however, he shall have signed the commission and shall have

[1] United States Constitution, Art. II, sec. 2, § 2.
[2] *Ibid.* [3] *Ibid.* sec. 3. [4] *Ibid.*

transmitted it to the Secretary of State, as directed by statute, the appointee has then a vested right which he can pursue in a proper court against any attempt on the part of the Secretary of State to withhold the commission; and if the Secretary shall have sealed and recorded the commission, as he is commanded by statute to do, the attempt of the President himself to withdraw it will not deprive the judge of his office, not even if the Secretary should return the commission to the President.[1]

Once appointed, the term of the judge is during good behavior.[2] In other words, the term is for life, unless the judge shall resign or be convicted upon impeachment and expelled from office by judgment upon impeachment.

Good behavior, accordingly, is determined by the legislature through the process of an impeachment trial. The important question — important as regards the independence of the judicial tenure — is whether the legislature is left by the constitution in possession of complete freedom in the interpretation of the phrase "good behavior," or is limited by the constitution in this respect. The constitution provides that removals from office through the process of impeachment shall be upon conviction of treason, bribery, or other high crimes and misdemeanors,[3] *i.e.* upon conviction of the commission of an indictable offence. What these offences are is tolerably well defined in our system of criminal law. For two reasons, then, I hold that the legislature is limited in its power to interpret the phrase "good behavior," *viz.*; that an unlimited power in this respect would enable the legislature to destroy the independence of the judiciary, and that the specification in the constitution of the classes of offences for which the judges may be impeached and removed by the legislature excludes all other classes. The constitution,

[1] Marbury *v.* Madison, U. S. Reports, 1 Cranch, 137; United States *v.* Le Baron, U. S. Reports, 19 Howard, 73.

[2] United States Constitution, Art. III, sec. 1.

[3] *Ibid.* Art. II, sec. 4.

however, provides no method of enforcing this limitation upon the legislature. If the legislature proceeds upon a wider interpretation of its powers than the view above taken warrants, no power in our system short of the sovereign can revoke its act. The legislature seems, at an early period, to have taken this wider view of its power of impeachment.[1] More recently, however, it has manifested the wiser tendency to follow the narrower view.[2]

The final element in the principle of judicial independence is the sufficiency and stability of the salary. The constitution permits the legislature to determine the amount of the salary, but prohibits it from reducing the same during the continuance of the particular incumbent in office.[3] As a matter of fact, the legislature has once violated this constitutional limitation and has always pursued a niggardly policy as to the compensation of the judges. From the standpoint of practical politics, however, I do not see how this subject could be regulated otherwise than it is. The judges could not, upon any sound principle of political science, be permitted to fix their own salaries. Neither could the executive be intrusted with any such power over the judiciary. The alternative lies between the constitution and the legislature. The state might, of course, prescribe the salary in the constitution, and such an arrangement would greatly increase the judicial independence, but it would be a clumsy solution of the question. The judicial salary ought to be increased as the cost of living increases, unless it should at the outset be fixed at so high a sum as to discount such increase of expenses. It would be a clumsy procedure to initiate a constitutional amendment every time that this necessity became manifest; and, after all, it is not certain that the state would be any

[1] Annals of the 8th Congress, 1st Session, case of Judge Pickering, 794 ff.

[2] Annals of the 8th Congress, 2d Session, case of Judge Chase, 81 ff.; Congressional Debates, vol. vii, case of Judge Peck, 9 ff.

[3] United States Constitution, Art. III, sec. 1.

more generous than the legislature in this respect. The greater enlightenment of the legislature is about the only practicable way of curing this defect common to democratic states.

III. *The Judicial Powers.*

The jurisdiction of the United States courts is of a double nature. Upon the one side, it is determined by the character of the matter in controversy; upon the other, by the character of the parties to the suit.

1. It extends, in the first sphere, to all cases in law or equity arising under the constitution, the statutes, and the treaties of the United States, and to all cases of admiralty and maritime jurisdiction.[1]

2. It extends, in the second sphere, to all cases affecting ambassadors, other public ministers, and consuls; to controversies to which the United States shall be a party; to controversies between two or more commonwealths, between a commonwealth and citizens of another commonwealth, between citizens of different commonwealths, between citizens of the same commonwealth claiming lands under the grants of different commonwealths, and between a commonwealth or the citizens thereof and foreign states or the citizens or subjects of foreign states.[2]

The Supreme Court has defined the phrase, "case in law or equity," to mean the submission of a subject to the judicial department by a party who asserts his rights in the form prescribed by law,[3] *i.e.* a "suit instituted according to the regular course of judicial proceedings," [4] and has distinguished cases from controversies by the limitation of the latter term to civil suits.[5] According to this distinction, the constitution

[1] United States Constitution, Art. III, sec. 2. [2] *Ibid.*

[3] Osborn *v.* United States Bank, U. S. Reports, 9 Wheaton, 738.

[4] Story, Commentaries on the Constitution of the United States, vol. ii, p. 436 ff.

[5] Chisholm *v.* Georgia, U. S. Reports, 2 Dallas, 419.

has conferred no criminal jurisdiction upon the United States courts wherever it denominates the suit a controversy. If they have any jurisdiction in such suits, it must rest upon an act of the legislature of the United States. Such jurisdiction does not, however, come under consideration in a work limited strictly to constitutional law.

I will not go with any fulness into the reasons for conferring judicial power upon the courts of the central government in these cases. Briefly, they are: The preservation of the supremacy and uniformity of United States law; the defense of the international responsibility of the United States; the vindication of the sovereign dignity of the United States; the prevention of self-help between the commonwealths; and the attainment of impartial decisions. These are all commanding reasons; and one or the other of these will be found to support the jurisdiction of the United States courts, as conferred by the constitution.

The two questions of greatest importance to political science and comparative constitutional law, in reference to this part of this subject, are: Whether the constitution has conferred upon the judiciary a power to stand between the constitution and the legislature and impose its interpretations of the constitution upon the legislature; and whether the constitution, or rather the state through the constitution, has conferred upon the United States courts the power of independent interpretation in all the branches of their jurisdiction.

The Supreme Court of the United States has itself answered these questions. It has asserted the power of the United States judiciary to stand between the constitution and the legislature, and to pronounce an act of the legislature null and void whenever it comes into conflict with such private rights or private property as, according to the interpretation placed upon the constitution by the judiciary, are guaranteed in that instrument.[1] The Court, on the other

[1] Civil Rights Cases, 109 U. S. Reports, 3.

hand, declines to claim any such transcendent power where the legislative act does not come into conflict with private rights or private property.[1] Of course, the Court asserts the same power over against executive interference with private rights or private property. *A fortiori*, it claims the same power over against the acts of the commonwealths.[2] The Court must itself determine when the case is one primarily affecting private rights or private property, and when, on the contrary, it is primarily a political question. The Court bases this position, in principle, upon the provision of the constitution which vests in the judiciary jurisdiction over all cases arising under the constitution.

The judicial interpretation of the constitution is therefore the ultimate interpretation; but it must be given through the form of a case, and can therefore be given only upon such questions as form a proper subject for a case. Now, a case is a suit, and a suit can be brought only when some private relation is directly involved.

The conclusion of political science from this view, held by the Court itself, must be that the decision of the Court really affects only the particular case and that the executive power may, without violating the constitution, go on enforcing the nullified law in all instances where it is not successfully resisted through the courts. The general respect for judicial decision in the United States has, however, given to any particular judgment of the Supreme Court of the United States the force of a general rule, and has made it a part of our constitutional custom that the executive shall cease to undertake the further enforcement of a statute pronounced unconstitutional in any case.

[1] Luther *v.* Borden, U. S. Reports, 7 Howard, 1; The Cherokee Nation *v.* Georgia, U. S. Reports, 5 Peters, 1; Mississippi *v.* Johnson, U. S. Reports, 4 Wallace, 475; Georgia *v.* Stanton, U. S. Reports, 6 Wallace, 50.

[2] Cohens *v.* Virginia, U. S. Reports, 6 Wheaton, 264; Virginia Coupon Cases, 114 U. S. Reports, 269.

As to the question whether, in the exercise of its jurisdiction, the United States judiciary possesses the right of independent interpretation of the law, the Supreme Court of the United States has given the following answer. It has asserted this right in all cases in which jurisdiction is established by the character of the subject-matter of the suit; but when jurisdiction is based solely upon the character of the parties to the suit, it has enunciated the principle that the United States courts, in interpreting the local law which governs the case, must follow the interpretation placed upon the law by the commonwealth court of highest instance. This doctrine rests upon the assumption that all purely commonwealth law is finally interpreted by the commonwealth courts, and that the common law is purely commonwealth law;[1] *i.e.* that the United States has no common law. The Court has not itself been able to hold to this doctrine in its practice. In many cases where the jurisdiction of the United States courts rested wholly upon the character of the parties to the suit,[2] it has rendered decisions contradicting the decisions of the highest courts of the commonwealths concerned. Such action can be rationally explained only upon the theory that the United States has a common law; that the United States courts are quite as independent in their interpretation of this common law as in their interpretation of the constitution, statutes and treaties of the United States; and that, in many cases where the jurisdiction of the United States courts rests apparently only upon the character of the parties to the suit, the question involved is one of United States common law.

IV. *The Distribution of the Judicial Powers.*

1. The constitution confers original jurisdiction upon the

[1] Wheaton *v.* Peters, U. S. Reports, 8 Peters, 591.

[2] Munroe Smith, State Statute and Common Law, Political Science Quarterly, vol. iii, no. 1; Meigs, Federal Doctrine of General Principles of Jurisprudence, Central Law Journal, vol. 29, no. 24.

Supreme Court only in cases affecting ambassadors, other public ministers and consuls, and in those cases in which a "State" shall be a party.[1] The Court has, I think, indicated that the phrase "affecting ambassadors," etc., includes all cases where the ambassador, etc., is either party to the suit or is directly affected and bound by the judgment.[2] The word "State" in this connection undoubtedly means one of the commonwealths of the Union. The constitution does not, therefore, confer original jurisdiction upon the Supreme Court when a foreign state or a foreigner simply is a party. The Court has adopted the principle that its original jurisdiction cannot be extended by a statute of the Congress.[3]

The constitution does not confer exclusive original jurisdiction upon the Supreme Court in any of these cases. It is therefore a question for the Congress to determine whether any other court or courts shall exercise concurrent original jurisdiction in these cases, and, if so, under what forms and limitations.[4]

2. In all cases falling under the jurisdiction of the United States Courts, in which the Supreme Court has not original jurisdiction, the constitution confers upon it appellate jurisdiction.[5] The appellate jurisdiction extends also to such cases as might have been brought originally in the Supreme Court, but which in fact shall have originated in some other court.[6] The appellate jurisdiction conferred upon the Supreme Court by the constitution extends both to law and fact.[7]

[1] United States Constitution, Art. III, sec. 2, § 2.

[2] United States *v.* Ortega, U. S. Reports, 11 Wheaton, 467; Story, Commentaries on the Constitution of the United States, vol. ii, p. 448.

[3] Marbury *v.* Madison, U. S. Reports, 1 Cranch, 137; *Ex parte* Yerger, U. S. Reports, 8 Wallace, 85.

[4] Börs *v.* Preston, 111 U. S. Reports, 252; Ames *v.* Kansas, 111 U. S. Reports, 449.

[5] United States Constitution, Art. III, sec. 2, § 2.

[6] Cooley, Principles of Constitutional Law, p. 113.

[7] United States Constitution, Art. III, sec. 2, § 2.

V. *The Constitutional Limitations upon Judicial Procedure.*

1. I have already treated of most of these limitations under the title of the immunities of the individual against the powers of the general government. The constitution, as we have seen, requires that the courts shall issue only special warrants, shall prosecute for infamous crime only by means of indictment, shall grant habeas corpus unless the same be legally suspended, shall try for crime only by jury process, shall try in open court, shall not force the accused to give testimony against himself, shall give the accused compulsory process to obtain witnesses in his favor, shall not subject the accused to jeopardy of life or limb more than once for the same offence, shall inform the accused of the nature and cause of the accusation, shall secure him counsel for his defence, shall not impose excessive bail nor excessive fines nor inflict cruel and unusual punishments, shall preserve jury process on appeal of a case tried by jury, etc. As regards these matters, I have only to refer the reader to the title cited, remarking that what is immunity for the individual is limitation upon the government.

2. There are, however, two limitations upon the judicial procedure of the United States courts which were not discussed under the subject of individual immunities and which must, therefore, be explained at this point.

The first is the special limitation contained in the eleventh amendment, preventing the United States courts from entertaining any suit commenced or prosecuted against a commonwealth by a citizen of another commonwealth or by citizens or subjects of foreign states.

It is a general principle of political science that a sovereign cannot be sued by a subject except by consent of the former. This is the ground upon which the non-suability of the United States rests. This principle would not defend the commonwealths against suit at the instance of an individual, since the commonwealths are not sovereign. The sovereign was

therefore, obliged to impose this limitation upon the judicial power, through the constitution, if the limitation was to exist at all.

The phrasing of the limitation in the constitution indicates, however, that the provision is to be regarded as an explanation rather than an original limitation. It seems to indicate that upon general principle the commonwealths could not be sued; *i.e.* it seems to indicate the view that the commonwealths are sovereign. The policy of the limitation can, indeed, be defended only on that ground; *i.e.* it cannot, in my opinion, be defended at all. The Supreme Court has itself evidently felt the error of the limitation, and has rendered it nugatory wherever it has been possible to place the individual in the position of defendant instead of plaintiff in a suit in which the other party is a commonwealth,[1] and whenever it has been possible to make an officer of the commonwealth, in his personal character, defendant, in place of the commonwealth itself.[2]

The second limitation is the general one contained in Article III, section 2, paragraph 2, which vests in the legislature the power to regulate, and make exceptions to, the appellate jurisdiction of the Supreme Court.

This power of the legislature over the judiciary is a most serious one. It places the appellate power of the Court very nearly at the mercy of the legislature. The legislature has made use of this power in the passage of the several judiciary acts, and I do not know that it can be said to have abused it. It seems to me, however, an unnecessary surrender of the independence of the courts to require that things which can be better accomplished by the rules of court shall wait upon the pleasure or, possibly, caprice of the legislature.

In concluding the discussion of this branch of the subject (*viz;* the judicial organization and judicial powers of the

[1] Cohen *v.* Virginia, U. S. Reports, 6 Wheaton, 264.

[2] Poindexter *v.* Greenhow, 114 U. S. Reports, 270.

central government in those parts of the United States in which federal government prevails), it only remains to be said that, while the United States courts cannot interfere with the rightful jurisdiction of the courts of the commonwealths, yet they can protect their own rightful jurisdiction when a cause has been removed according to the forms established by the legislature of the United States, by enjoining any further procedure in any commonwealth court.[1]

VI. *The Territorial Courts.*

The provisions of the constitution in reference to the judiciary have no application in those parts of the United States not subject to the system of federal government. For these parts the legislature of the United States is vested with full powers of legislation concerning the organization and powers of the courts.[2] The territorial courts, therefore, are purely statutory creations. They have no direct relation to the constitution, except that those constitutional immunities of the individual against the powers of the United States government, which do not depend upon residence in a commonwealth, are to be regarded as limitations upon the procedure of these courts also.

VII. *The Senate as a Court of Impeachment.*

The constitution creates the Senate of the United States a high court of impeachment.[3]

1. As to the organization of this court, the constitution provides that when the Senate sits as a court of impeachment, the Senators shall be on oath or affirmation.[4] The Senate has construed this to mean a special oath or affirmation, and has determined that the constitutional requirement is not satisfied by the general oath taken by each senator upon being sworn in as senator.[5] The constitution provides further,

[1] French, Trustee, *v.* Hay, U. S. Reports, 22 Wallace, 250.
[2] Clinton *v.* Engelbrecht, U. S. Reports, 13 Wallace, 434.
[3] United States Constitution, Art. I, sec. 3, § 6. [4] *Ibid.*
[5] Congressional Record, vol. 4, part 7, p. 3.

in regard to organization, that when the President of the United States is tried, the Chief Justice of the Supreme Court of the United States shall preside.[1] It is to be presumed that this court can do no business unless the usual quorum prescribed for the Senate, as a legislative body, be present, though the constitution does not expressly declare this.[2] Everything further pertaining to organization is left either to statutory regulation or regulation by orders of the court itself.

It may be questioned whether the Senate *must* organize itself as a court of impeachment upon the demand of the House of Representatives that it should issue order for the appearance of the party whom that house shall have resolved to impeach. I should say that there is only a moral obligation resting upon the Senate to do so. If it should refuse, there is certainly no way provided in the constitution whereby the House can enforce its demand.

2. As to the jurisdiction of this court, the constitution provides that it shall extend over the President, the Vice-President, and all the civil officers of the United States, accused before its bar by the House of Representatives of treason, bribery or other high crimes and misdemeanors.[2]

The officers of the army and navy are excepted from this jurisdiction, since they are subject to the jurisdiction of courts martial. The members of the two legislative houses are likewise excepted,[3] since they are not officers at all, and are subject to the jurisdiction of their respective houses. Of course the officers deriving tenure from the commonwealths are not subject to this jurisdiction. The constitution speaks only of officers of the United States, and by the phrase United States is here meant the central government as distinguished from the commonwealths. There is an opinion of an attorney-general that a territorial judge is not subject

[1] United States Constitution, Art. I, sec. 3, § 6.
[2] United States Constitution, Art. II, sec. 4.
[3] Annals of Congress, 5th Congress, vol. 2, p. 2319.

to this jurisdiction,[1] and I should conclude that, if a territorial judge is not, no territorial officer is subject thereto. I doubt, however, the correctness of this opinion. The reason alleged is, that a territorial judge is not a constitutional, but a statutory officer. Most of the officers of the United States are statutory, in the sense that their offices have been created by act of the Congress. Very few officers of the United States would be subject to this jurisdiction if this criterion should be applied.

Until the trial of Belknap, it was a question whether any but actual incumbents of office at the time of and during the process of impeachment could be impeached.[2] Belknap resigned his office, and the resignation was accepted before the process commenced, but the court, nevertheless, took jurisdiction of his case.[3] It set the precedent, therefore, that a person not at the time of the process an officer may be impeached for treason, bribery, high crime or misdemeanor committed by him while in office.

Of the offences for which an officer (or a person having been an officer at the time of their alleged commission) may be tried before this court, treason is defined by the constitution. I have discussed this definition in another part of this work. I suppose that the definition is binding upon this court as well as upon the ordinary courts.

The other offences are not defined in the constitution, and therefore the court may define them upon the basis of either statute or common law. This gives the court a very large power, since no appeal lies from its decision to the ordinary judiciary. An inspection of the cases of impeachment will show that the court has, except perhaps in a single instance, been justly conservative in the meaning which it has attributed to these terms. It has not been willing to pronounce

[1] 3 Opinions of the Attorney-General, p. 409.
[2] Congressional Globe, 40th Congress, 2d Session, part 2, p. 1559.
[3] Congressional Record, vol. 4, part 7, p. 76.

judgment against an official simply because he has not discharged his official duties or exercised his official powers in the manner which the court would approve, unless his act or failure to act can be made to appear a crime or misdemeanor as described by the ordinary law of the land. This court has seen that the independence of the governmental departments required by the constitution could not be preserved, should the legislature assume an unlimited power of interpretation over these terms, and treat acts of officials as impeachable offences, whenever there exists a difference of opinion between the legislative bodies and the executive and judicial departments as to the powers and duties of the officials.

3. As to the procedure followed in the trial, the constitution makes the House of Representatives the only lawful accuser.[1] The course of the procedure in the House is not prescribed in the constitution. It is, therefore, subject to regulation by statute or by the rules of the House. In the absence of statute, it must be regulated by the House itself. I suppose that the limitations of the constitution upon the procedure of the ordinary judiciary in criminal trials should be regarded as binding upon this court. Such, for example, as the provisions requiring the testimony of two witnesses or confession in open court to convict for treason; speedy and public trial; information to the accused of the nature and cause of his arraignment; compulsory process in behalf of the accused for obtaining witnesses; counsel for defense, etc.[2]

The constitution requires expressly that judgment of conviction shall be passed only with concurrence of two-thirds of the members present.[3] Those present but not voting must, therefore, be counted in favor of acquittal.

Everything further in reference to procedure is left either to statutory regulation or to regulation by orders of the Senate

[1] United States Constitution, Art. I, sec. 2, § 5.

[2] Congressional Globe, 40th Congress, 2d Session, part 2, p. 1559.

[3] United States Constitution, Art. I, sec. 3, § 6.

as legislative body or as court. In the absence of statute, then, the Senate must occupy the ground. There is a question, however — and in the case of the President it would be a very serious question — as to whether this court has the power to arrest and confine the accused during the trial, and consequently to suspend him for the time being from office. It did order the arrest of Blount [1] This was the first case of impeachment, and the accused was not an officer, but a member of the Senate itself. For two reasons, then, this case cannot be accepted as a precedent, *viz;* because the arrested person was not an officer, and may be said to have been taken into custody by virtue of the Senate's power over its own members, rather than by virtue of its power as a court of impeachment; and because, at that time, the English practice was followed with too little discrimination, too little appreciation of the difference of the purpose and result of the process in the two systems. In the system of the United States, the only penalties allowed by the constitution may be inflicted as well in the absence as in the presence of the accused. There is no necessity in any event for his arrest. In the English system, as we shall see further on, such is not the case. I do not think that a sound interpretation of the constitution would recognize to the court the power to arrest the accused and suspend him from office during the process of impeachment. I certainly do not think that there is any such power when the President is the accused person.

4. As to the penalties which this court may inflict, the constitution is express and exact. It provides that its judgments "shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit," *i.e.* any office whatever, "under the United States." [2] It provides further that the judgment of removal shall follow upon conviction.[3] The only discretion

[1] Annals of Congress, 5th Congress, vol. 1, p. 40.

[2] United States Constitution, Art. I, sec. 3, § 7. [3] *Ibid.* Art. II, sec. 4.

left to the court in regard to judgment upon conviction is, therefore, in respect to disqualifying the convicted person to hold United States office in the future. It may or may not do this; but it must remove him from the office held at the time of the conviction.

The constitution furthermore provides that the judgment rendered by this court shall not excuse the condemned person from trial for the same offence by the ordinary courts, in the ordinary manner, and with the ordinary results.[1] The accused is not put in jeopardy of life or limb by an impeachment trial and the provision of the constitution which forbids the second trial of a person for the same offence, when, in the first trial, judgment was reached upon a good indictment, has therefore no application to impeachment trials.

5. The constitution forbids the exercise of the presidential power of pardon or reprieve in behalf of a person suffering condemnation from this court.[2] Whether the court can reverse its own judgment of condemnation, if the House of Representatives should move for a new trial, and whether the Congress can by statute of amnesty remove the disability to hold future office, are questions not answered by any express provisions of the constitution. It seems to me, however, that, from the reasons of judicial analogy and of political science, both of these questions should be answered in the affirmative. An impeachment trial, above all others, is one in which party prejudice will assert an influence, possibly a controlling influence. Some means of relief from manifest injustice should certainly be recognized in the constitutional system of every state. To some men, to the very men who ought to hold office, honor is more than life; and the reasons which are convincing against the President's power to pardon the condemned person do not hold at all against the court itself or the Congress.

[1] United States Constitution, Art. I, sec. 3, § 7.

[2] *Ibid.* Art. II, sec. 2, § 1.

CHAPTER II.

THE CONSTITUTIONAL JUDICIARY IN THE ENGLISH GOVERNMENT.

In the English system there are but two bodies that can be termed constitutional courts, *viz;* the House of Lords and the judicial committee of the Privy Council. All the rest are statutory and, therefore, are not subjects of consideration in a work which, so far as it is devoted to law at all, is devoted wholly to constitutional law.

The test by which, in my opinion, we may distinguish a constitutional from a statutory court, is the ability of the court to protect itself against abolition by ordinary statute. According to such a test the House of Lords, so far as it is a court at all, is a constitutional court. No mere statute can be passed affecting its judicial power without its own consent freely given. The House of Commons can drive the Lords to an unfree consent only when it acts as the state.

It is not so clear, however, that the judicial committee of the Privy Council has the power of self-protection against the legislature. Unless we regard this body as the Crown's own court, and accord to the Crown the freedom of the absolute veto in defense of its own prerogatives, we shall have to deny to this body a constitutional character, and pronounce it a statutory court, whose organization and powers may be changed or destroyed by a mere legislative act. It seems to me, however, that it ought to be regarded as the Crown's own court—and this in spite of the facts that a large part of its jurisdiction has been conferred by statute;[1] that its procedure,

[1] Statutes, 25 Henry VIII, c. 19; *Ibid.* 8 Elizabeth, c. 5; *Ibid.* 7 and 8 Victoria, c. 69.

at least in part, is regulated by statute;[1] and that its powers have been transferred to it by statute from the whole Privy Council.[2] In essence, the powers of this court are simply what is left of the original general judicial power of the Crown. The modifications imposed upon it by statutes, having the free approval of the Crown, ought hardly to be considered as destroying entirely its constitutional character. It must be conceded, however, that, in its present status, it lies upon the border line between constitutional and statutory institutions. I shall treat it briefly, however, as a constitutional court.

I. *The Judicial Committee of the Privy Council.*

1. The members of this court, as privy councilors, are appointed by the Crown. They are subject to dismissal by the Crown, and may also, of course, be impeached by the Parliament. Except in case of their death, resignation, dismissal, or impeachment, at an earlier date, they hold for the life of the royal person appointing them, and for six months subsequent to his or her decease.[3]

The statutes 3 & 4 William IV, c. 41, and 34 & 35 Victoria, c. 91, require that the committee shall be composed of those privy councilors, who are, for the time being, Lord President of the Council and Lord Chancellor, those who fill or have filled high judicial offices, and of two other councilors specially designated by the Crown; also that from those councilors who have filled high judicial offices in India or the Colonies, two shall have seats in the committee. These last four receive compensation. These are certainly quite important statutory limitations upon the pleasure of the Crown in the appointment of the members of this court. The purpose and result of them are, as we shall see, the identification of this committee, as regards its personnel, with

[1] Statutes, 3 & 4 William IV, c. 41; *Ibid.* 6 & 7 Victoria, c. 38; *Ibid.* 7 & 8 Victoria, c. 69. [2] *Ibid.* 3 & 4 William IV, c. 42.

[3] Bowyer, Constitutional Law of England, p. 125 ff.; Statutes, 6 Anne, c. 7.

those members of the House of Lords who exercise the appellate judicial powers of the House of Lords.

It should be added that, under certain circumstances, the composition of the committee is modified by other statutes. When the proceedings before the court are under the Church Discipline act, the bishops and archbishops, who are privy councilors, are made members of this court,[1] and when the proceedings are under the Public Worship act, these persons attend as assessors.[2]

2. The jurisdiction of this court is chiefly appellate. Appeals are taken to it from the Court of Arches at Canterbury, from vice-admiralty courts abroad, from the Isle of Man, the Channel Islands, India, and the colonies generally. This appellate jurisdiction is almost wholly regulated by statute, and the proceedings are in the form of a petition to the Crown in Council.[3]

In a few cases, however, this court has original jurisdiction. Applications for the extension of patents, controversies between two provinces concerning the extent of their charters, claims of a feudal grant to a province or an island from the Crown, are subject to the original jurisdiction of this court.[4]

Finally, it must be concluded, from the general principles of the English political system, that all questions of a judicial nature, for the consideration of which by the courts of independent jurisdiction or by the House of Lords no provision is made, either by custom or statute, are subject to the original jurisdiction of the judicial committee of the Privy Council. This is the residuary governmental power of the Crown in the domain of the administration of justice.

II. *The House of Lords as a Judicial Body.*

1. The jurisdiction of the House of Lords as a court separates itself into three general branches, *viz;* as high

[1] Statutes, 3 & 4 Victoria, c. 86. [2] *Ibid.* 39 & 40 Victoria, c. 59.
[3] Bowyer, Constitutional Law of England, p. 126 ff.
[4] *Ibid.* p. 127.

criminal court for the trial of peers, as general court of impeachment, and as highest appellate court in the United Kingdom.

As criminal court for the trial of peers the body is composed of all the Lords of Parliament.[1] As court of impeachment it is likewise composed of all the Lords of Parliament.[2] As highest appellate court, however, while the body is still composed of all the Lords of Parliament, it is requisite that not less than three persons of the following description shall be present at the hearing and determination of any appeal, *viz;* the Lord Chancellor of Great Britain for the time being, the Lords of Appeal in Ordinary, and such Lords of Parliament as hold or have held high judicial offices.[3] The persons of this description are termed the Lords of Appeal. The Lords of Appeal in Ordinary are two, eventually four, persons appointed by the Crown to hold during good behavior, without regard to the demise of the Crown. They must be taken by the Crown from among persons who shall have held, for at least two years, high judicial office or shall have been, for fifteen years, practising barristers in England or Ireland, or practising advocates in Scotland. If they are not already Lords of Parliament, which they may be, they become such by virtue of this appointment. Their dignity and office thus created do not descend to their heirs. They are paid salaries of 6000 pounds sterling per annum.[4] They are the statutory exceptions to that custom of the constitution which makes all peerages created by the Crown hereditary, and to that custom also which denies compensation out of the royal treasury to Lords of Parliament. The purpose of this statutory creation is to strengthen the judicial capacity of the House of Lords; and, as a matter of fact, the appellate judicial power of the House of Lords is now exercised by the

[1] Bowyer, Constitutional Law of England, p. 323.
[2] Anson, Law and Custom of the Constitution, Part I, p. 306.
[3] Statutes, 39 & 40 Victoria, c. 59. [4] *Ibid.*

Lord Chancellor, the Lords of Appeal in Ordinary, and such other Lords of Parliament as hold or have held high judicial office. Moreover, these Lords of Appeal in Ordinary, if they be members of the Privy Council, as they are almost sure to be, are constituted members of the judicial committee of the Privy Council.[1] This same statute furthermore provides that, whenever two of the four paid judges in the judicial committee of the Privy Council shall have died or resigned, the Crown may appoint a third Lord of Appeal in Ordinary; and that, when the other two shall have died or resigned, the Crown may appoint a fourth Lord of Appeal in Ordinary; and that these two new Lords shall have the same tenures, salaries, pensions, and positions as the other two first created.[2]

By referring now to the composition of the judicial committee of the Privy Council it will be seen that, when the four Lords of Appeal are all in office, that committee will be composed substantially of those members of the House of Lords who exercise the appellate jurisdiction of that body. Upon both benches we shall find the Lord Chancellor, the judges of the High Courts, and the Lords of Appeal in Ordinary. The complete unification of the highest appellate instance for the whole Empire will then have been accomplished.

2. When the House of Lords sits as high criminal court for the trial of peers, it is not the Lord Chancellor who presides over it, but a Lord High Steward, appointed *pro hac vice*. The respective functions of this official and of the Lords are not those of judge and jury: the Lord High Steward is merely a *pro tempore* chairman, and the Lords are the judges both of the law and the fact. The judges of the high courts attend the trial, and assist the Lords with their counsel upon points of law. The Lord High Steward also advises the Lords upon points of law, and sums up the evidence. When the vote is taken upon the question of guilty

[1] Statutes, 39 & 40 Victoria, c. 59. [2] *Ibid.* c. 59, § 14.

or not guilty, the spiritual Lords must withdraw. The temporal Lords alone may vote upon this question. (The spiritual Lords are Lords of Parliament, but not peers. They cannot be tried before this court, and they do not participate in the rendering of its judgments.) The Lords answer, separately, upon their honor, the question of guilty or not guilty, put to them by the Lord High Steward. To convict, the vote must be that of a majority, and must be concurred in by at least twelve Lords.[1]

The jurisdiction of this court extends only to the high crimes of treason, felony, and misprision of treason and of felony committed by peers and peeresses. Its jurisdiction over these crimes is not exclusive. When the Parliament is not in session, peers and peeresses charged with any of these crimes may be tried before the court of the Lord High Steward.[2] In this court the Lord High Steward is judge, and decides the questions of law.[3] The jury, however, must be composed of Lords of Parliament, and when the accusation is of treason or misprision of treason, the entire House, excepting only the spiritual Lords, forms the jury.[4] In such a case the court of the Lord High Steward is virtually the House of Lords.

The prosecution of peers and peeresses before this court proceeds upon an indictment, found by a grand jury of freeholders in the Queen's Bench or at the Assizes before the justices of Oyer and Terminer, and removed to the House of Lords by a writ of *certiorari* issued by this house.[5]

3. When the House of Lords acts as a court of impeachment, it is presided over by the Lord High Steward, in case the person tried be a peer or peeress, and by the Lord Chancellor or Speaker of the House of Lords, in case the

[1] Blackstone, Commentaries upon the Laws of England, Bk. IV, p. 261 ff. Sharswood's Edition; Bowyer, Constitutional Law of England, p. 323 ff.

[2] *Ibid.* [3] *Ibid.* [4] Statutes, 7 William III, c. 3.

[5] Bowyer, Constitutional Law of England, p. 321, note 3.

person tried be a commoner. Neither of them, however, occupies the position of judge over against the Lords as jury. The Lords determine the questions both of law and fact. When the question of guilty or not guilty is put to the Lords, the spiritual Lords must withdraw, if the case be a capital one. The spiritual Lords, however, as all other persons, may be impeached before the House of Lords for any offence. Whether, therefore, they must withdraw when one of their own number is impeached, and why they must withdraw in any case, the commentators do not definitely state.

In all cases, impeachment is instituted by a vote of the House of Commons. After the motion has been passed, a committee of the House, appointed for the purpose, draws up and delivers to the House of Lords and to the accused person copies of the accusation. The usual forms of criminal procedure are followed before the House of Lords. The Lords vote separately, upon honor, to the question of guilty or not guilty, propounded to them by the Lord High Steward or the Lord Chancellor or Speaker, as the case may be, and a simple majority of the Lords will convict. I do not find it anywhere distinctly stated, however, whether the majority shall be that of the whole number of Lords entitled to seats in the house, or of the regular quorum only. Upon conviction by vote of the Lords, the accused is brought to the bar of the House of Lords, and if the Speaker of the Commons then demands judgment, it is pronounced by the Lord who presided over the House of Lords at the trial.[1]

The last impeachment trial was that of Lord Melville in the year 1805–6. The failure of the attempt to impeach Lord Palmerston in the year 1848 shows that the procedure has become nearly obsolete in the English system.

4. When the House of Lords sits as highest Court of Appeal for the United Kingdom, it is regularly presided over by the Lord Chancellor. The Lord Chancellor does not,

[1] Anson, Law and Custom of the Constitution, Part I, p. 303 ff.

however, sit as judge over against the other Lords as jury. All the Lords sit as judges, and the decision is by majority vote. Although all the Lords may sit in this court, yet in fact, as I have already pointed out, only certain members of the House do sit. Nevertheless the sitting of these members is always regarded in law as the sitting of the House.[1]

This court may sit during a prorogation of Parliament, if so ordered by the House of Lords during the session of Parliament next preceding the prorogation.[2] Also during a dissolution of Parliament, the Lords of Appeal may, under authority from the Crown, exercise the jurisdiction of the House of Lords as highest Court of Appeals. They may sit in the House of Lords for that purpose, and their sittings are regarded in law as continuations of the sittings of the House of Lords.[3]

Appeals may be taken to this court from any order or judgment of Her Majesty's Court of Appeal in England and from any order or judgment of any court in Scotland or Ireland from which, by custom or statute existing on the 31st day of October, 1876, error ran or appeal lay to the House of Lords.[4] "Every appeal" must "be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty, the Queen, in her Court of Parliament, in order that the said court may determine what of right, and according to the law and custom of" the "realm, ought to be done in the subject-matter of such appeal."[5]

The statute empowers the court to fix the amount in controversy necessary to an appeal, to determine the security for costs and the time within which appeal shall be brought, and to provide for the rules of practice and procedure.[6]

The appellate jurisdiction of the House of Lords, as it now

[1] Anson, Law and Custom of the Constitution, Part I, p. 308.
[2] Statutes, 39 & 40 Victoria, c. 59, § 8. [3] *Ibid.* § 9.
[4] *Ibid.* [5] *Ibid.* [6] *Ibid.* § 11.

exists, appears to be purely statutory. Moreover, the statute which confers its jurisdiction was not passed by a House of Commons elected upon the issue of the judicatory acts. It would seem, therefore, that the law upon which this court rests is not constitutional but ordinary law. But the test of distinction between these two kinds of law is not simply their source. It is rather the character of the power required to alter or abolish them. No power of the House of Lords, however acquired, can be altered or abolished against the will of that House, except by an act of the state. The custom of the constitution requires the House of Lords to yield against its own will only to a House of Commons elected upon the direct issue. When no such appeal has been made to the electorate, the absolute veto of the House of Lords may be freely employed against the projects of the House of Commons or of the Crown. Viewed from this standpoint, the only standpoint which gives us firm footing in considering this subject, we must class the judicial power of the House of Lords, as highest appellate court of the United Kingdom, among the constitutional functions of that House.

CHAPTER III.

THE ORGANIZATION AND POWERS OF THE JUDICIARY IN THE GERMAN IMPERIAL CONSTITUTION.

THERE is but one court in the German Empire which can be termed constitutional in distinction from statutory, *viz;* the *Bundesrath*, the Federal Council. The constitution neither establishes an independent judicial department nor provides for the judicial tenure. It simply vests in the legislature the power to create and regulate the whole judicial organization of the Empire.[1] But if the legislature creates and regulates without further constitutional limitations, it can modify and destroy. The regular courts are thus purely statutory, and as such have no place in a treatise devoted exclusively to constitutional law.

Upon the Federal Council, however, the constitution confers certain judicial powers. These are:

1. The power to settle conflicts of a political nature between the commonwealths of the Empire upon application from either party to the conflict.[2]

According to this provision, the Federal Council can assume jurisdiction only upon application from one of the parties to the conflict. It has, therefore, no constitutional power to proceed upon its own initiative.[3] Should its aid be invoked by one of the parties, the constitution permits it to accord the same only when the controversy is of a political character.[4]

[1] Reichsverfassung, Art. 4, § 13. [2] *Ibid.* Art. 76, § 1.

[3] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 59 ff. Laband, Das Staatsrecht des deutschen Reichs, Band I, S. 248 ff.

[4] Reichsverfassung, Art. 76, § 1.

The German jurisprudence distinguishes the Empire and the commonwealths, as political organizations, from these same bodies, as private corporations. For example, all the fiscal rights of the Empire and the commonwealths are rights of these bodies as private corporations, and all controversies in respect to the same are pursued before the ordinary courts. The very article of the constitution, which vests jurisdiction in the Federal Council over the political conflicts between commonwealths, refers to the jurisdiction of the ordinary courts over private controversies between these same bodies.

Lastly, the constitution does not confer upon the Federal Council simply the power to hear and decide these controversies, — the term employed in the constitution is of a more general nature. The German word here used is not *entscheiden* but *erledigen*. *Erledigen* means to dispose of, to settle. Now the settlement of a controversy does not necessarily involve a judicial decision. The Federal Council may be able to settle the question either by mediation or by reference to arbitration, and, in case these methods should fail, the Council might still refer the decision to some regular court, since the constitution does not specifically require the decision to be rendered by the Council itself.[1] One of the earliest commentators upon the Imperial constitution holds that it was not intended that the Council should ever render the decision itself.[2] Certainly no body could be less fitted for the rendering of judicial decisions than the Federal Council. Its members are not required to have any judicial qualifications; they must vote according to instructions from their respective principals; and the parties to the controversy may take part in the rendering of the decision.[3] Nevertheless I think the Federal Council has the constitutional power to

[1] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 59 ff.; Laband, Das Staatsrecht des deutschen Reichs, Bd. I, S. 248 ff.

[2] Von Rönne, Das Staatsrecht des deutschen Reichs, Bd. I, S. 218, 219.

[3] Schulze, Lehrbuch des deutschen Staatsrecht, Zweites Buch, S. 60.

render the decision if it will. The term settlement certainly includes decision. How the settlement shall be accomplished is, therefore, a question for the Federal Council itself to determine. It is also a question for the Council alone to determine whether the controversy to be settled be of a political or a private nature.

2. The constitution confers upon the Federal Council the power to adjust, by friendly intermediation, constitutional conflicts within the commonwealths, when called upon by either party to the conflict, in case the constitution of the commonwealth concerned does not provide any organ for the decision of such questions; and if the Council should be unable to effect a settlement in this manner, the constitution confers upon it the further power to bring the conflict to conclusion by way of Imperial legislation.[1]

The constitutional conflicts within a commonwealth here referred to are conflicts between the legislature and executive only, in regard to their respective powers and relations under its organic law.[2] In the case of the three city commonwealths such conflicts can arise, in the sense here intended, only between the Senates and the Common Councils. A dispute within a princely commonwealth, concerning the succession to the princely power therein, is not included under this title. The Federal Council is, indeed, the organ provided by the Imperial constitution to decide such a conflict; but this power is not conferred by the provision which we are here considering. The Federal Council must pass upon the credentials of its own members, and in doing so it must decide whether the person claiming membership from and for a particular commonwealth shall have been appointed by the rightful prince, or, in case of the city commonwealths, by the rightful Senate.[3] I do not class this

[1] Reichsverfassung, Art. 76, § 2.

[2] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 61.

[3] *Ibid.* S. 62.

function, however, under judicial powers, as the phrase judicial powers is employed in this title.

It will be observed here again that the Federal Council can act only when appealed to by one of the parties. It cannot of its own motion assume jurisdiction.

It will be further remarked that, in the case of constitutional conflicts within the commonwealths, the Federal Council is, in no event, vested with the power of decision. It can, in first instance, only mediate an agreement between the parties; and if its mediation should fail to bring about the settlement of the question or questions, it can then, in last resort, only refer the matter to the Imperial legislature, which latter organ is to decide the conflict by a statute. This procedure certainly makes the Imperial legislature a court of last instance in the settlement of constitutional conflicts within those commonwealths whose organic law provides no organs therefor.[1] The fact that the decision may be pronounced in the form of a statute should not be regarded as changing its character; *i.e.* the legislature should determine the question according to law and justice, and should not be influenced by party affiliations.

Viewed from the standpoint of this requirement, I am inclined to pronounce the Imperial legislature a very badly composed court for the settlement of such questions. The Federal Council in all such cases would be likely to sympathize with the executive of the commonwealth and the Diet with the legislature; and the Imperial legislature would thus be unable to reach any decision. The result of this state of things would probably be chronic strife within the commonwealth concerned.

3. The constitution confers upon the Federal Council the power to intercede with the government of a commonwealth in which justice shall have been denied or unreasonably delayed to any person, and, if necessary, to compel that

[1] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 62 ff.

commonwealth to give the judicial relief proper to the case.[1] In determining whether there has been a denial or delay of justice, however, the Federal Council must be governed by the laws of the commonwealth affected.[2] The Imperial constitution also limits the Federal Council to the consideration of cases in which relief can not be obtained in the regular legal way.[3]

From these provisions, we conclude that the Federal Council is authorized to exercise a general supervision over the administration of justice within the several commonwealths; and that, where complaint of failure of justice is made by the party aggrieved, the Council has the power, after friendly intercession with the commonwealth government, to apply force to the commonwealth for the purpose of obtaining for the complainant such relief as the Council may, under the laws of the particular commonwealth, judge to be proper to the case.[4]

4. The constitution confers upon the Federal Council the power to determine when a commonwealth fails to discharge its constitutional duties to the Empire.[5] Among these duties must, of course, be included the duty to obey the requirements of the Federal Council in the cases above mentioned. The Council may assume jurisdiction in this question of its own motion and, in the event that it finds the commonwealth recusant, may vote that compulsion be applied. The constitution then requires of the Emperor the execution of the compulsion.[6]

[1] Reichsverfassung, Art. 77. [2] *Ibid.* [3] *Ibid.*

[4] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 64.

[5] Reichsverfassung, Art. 19.

[6] *Ibid.;* Laband, Das Staatsrecht des deutschen Reichs, Bd. I, S. 247 ff.

CHAPTER IV.

THE ORGANIZATION AND POWERS OF THE JUDICIARY IN THE FRENCH CONSTITUTION.

An examination of the French constitution will reveal the fact that it makes no provision for the judicial department of the government. The French judiciary is therefore a purely statutory body. As such, it has no place in this treatise, the purpose of which is to expose rather than conceal the defects in the constitutional law of the several states.

There is, however, a single exception to this general statement. The constitution creates the Senate a court for certain specified purposes. The exact language of the constitution is as follows: "The Senate may be constituted as a court of justice to pass judgment upon the President of the Republic and the ministers, and to take cognizance of attacks upon the security of the state."[1] The phrasing of this provision immediately gives rise to the questions: Upon whose motion the Senate may be organized as a judicial body; who are the lawful accusers of the persons who may be brought before its bar; and whether it is unlimited in the jurisdiction assigned to it.

The questions are answered in some degree by other articles of the constitution.

1. It is provided in another clause that the Senate may be organized as a court of justice for trying any person accused of an attack upon the security of the state, by a decree of the President, rendered in the Council of Ministers.[2] The

[1] Loi constitutionnelle du 24 février, 1875, Art. 9.

[2] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 3.

clause does not declare, however, that the organization of the Senate as a court shall be effected in this manner only. If such were the fact, great embarrassment would certainly arise in case the President himself, or a minister, should be the accused person. He, or his cabinet, would only find it necessary to remain passive, and the constitutional power of the Senate to try him or a minister would be defeated.

M. Eugène Pierre, the chief secretary of the presidency of the Chamber of Deputies, speaks, in a note to Article 9. of the constitutional law of February 24, 1875, of the Senate *constituting itself* as a court.[1] I think that the sound interpretation of the constitution would accord to the Senate this power of self-organization, at least when the President or a minister is accused. The constitution should, however, have made this plainer. Its failure to make explicit provision upon this most important point renders it possible for the President to claim, as his constitutional prerogative, the power to disperse the Senate by force, if necessary, whenever it shall organize itself as court of justice, without his decree authorizing the same.

2. The constitution provides that the President can be placed in accusation before this court by the Chamber of Deputies, and by that body only, and that the ministers may be placed in accusation by the Chamber of Deputies.[2]

I conclude from this language that any other person may be placed in accusation either by the Chamber of Deputies or by the "Chambre des mises en accusation" of the regular "Cour d'appel," and that the ministers themselves may be accused by this latter body. Another clause of this same article is confirmatory of this interpretation. It declares, that if the prosecution should be begun by the ordinary judicial process, the decree convoking the Senate may be issued at any time before the "Chambre des mises en ac-

[1] Lois constitutionnelles et organiques de la République française, p. 45.

[2] Loi constitutionnelle du 16 juillet, 1875, Art. 12, §§ 1 & 2.

cusation" refers the case to the "Cour d'assises."[1] The commentators do not speak positively upon this point, and I regard my own conclusion as conjectural.

3. The constitution limits the jurisdiction of this court, in the case of the President, to the trial of charges of the commission of high treason;[2] in the case of the ministers, to that of charges of the commission of any crime in the exercise of their public functions;[3] and in the case of all persons, except the President, to that of charges of the commission of any attack upon the security of the state.[4]

Crime in general, and treason in particular, are tolerably fixed concepts in French law, though they are not defined in the constitution. The Senate would probably be constrained to adopt the ordinary legal significance of these terms; but in the interpretation of the phrase "attentats commis contre la sûreté de l'état," it has an open field with no fixed boundaries. It may consider peaceable agitation to secure by constitutional amendment a change of the form of government such an "attentat." It probably would do so. It may even be claimed that it has done so. It is a court badly constituted for the trial of such a question. Its judgments are more likely to be dominated by politics than by law and justice.

The constitution furthermore declares that the rules of procedure in the court of senators shall be determined by a law, *i.e.* by an act of the legislature.[5] As to the sentence and penalty which it may impose, however, this court is unlimited. It may condemn to exile or death as well as to dismissal from office. The power to fix the city or town, and the locality therein, where the court shall sit is also accorded by law to the Senate.[6]

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 4.
[2] Loi constitutionelle du 25 février, 1875, Art. 6, § 2.
[3] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 2.
[4] *Ibid.* Art. 12, § 3. [5] *Ibid.* Art. 12, § 5.
[6] Loi du 22 juillet, 1879, Art. 3, § 3.

4. Lastly, the constitution makes the jurisdiction of this court exclusive only for the trial of the President for the commission of high treason.[1] We should conclude, therefore, that its jurisdiction is merely concurrent with that of the ordinary courts in all other cases concerning which it may act, unless otherwise provided by an act of the legislature.

[1] Loi constitutionnelle du 16 juillet, 1875, Art. 12, § 1.

CHAPTER V.

COMPARATIVE STUDY OF THE JUDICIARY.

The two great questions of public jurisprudence upon which we seek enlightenment by the comparison of these four judicial systems are, the judicial power of the upper houses of the respective legislatures, and the position of the ordinary judiciary over against the other departments of the government.

I. The constitutions do not agree, apparently, in their solutions of the first question. In all of them, indeed, a power to hear and settle cases between parties is acknowledged to the upper houses of the respective legislatures; but the extent of the jurisdiction, both as to parties and subjects, and the character of the penalties which may be imposed, vary widely.

It is difficult to find any scientific reason for vesting judicial powers in either branch of the legislature, except so far as is necessary to preserve the rules of discipline and procedure in the respective houses. The reasons why such powers are vested in the upper houses are historical; and an examination of these reasons will show, I think, that under modern conditions there is no longer the same necessity, as formerly, for the maintenance of these powers.

It is easy to understand how the gradual development of all the parts of the English governmental system out of the Crown and the Magnum Concilium resulted, at first, in a partition of the judicial powers between the two; how, in earlier times, the inability of the Crown's judicial agents to deal with great offenders made it needful that the Parliament

should retain a criminal jurisdiction over them; how the upper house, consisting of permanent members for the most part, many of whom were deeply learned in the law, should have come to exercise these judicial powers in the place of the whole Parliament; and how the Parliament, in its inability to make the independent Crown responsible, should have sought to hold the ministers through the fear of an impeachment.

At present, the conditions requiring these relations have largely passed away. The judicial department has received a careful and full development. The ordinary courts have sufficient power and prestige to deal with any offender, excepting only the person who wears the crown. The Ministry holds at the will of the House of Commons, or, ultimately, at the will of the electorate. In consequence of these changed conditions we see that no impeachment trials now occur; that the trial of a peer for the commission of felony is exceedingly rare; and that the highest court of appeals, while nominally still the House of Lords, consists really of the Lord Chancellor, who may be a commoner, and of two, eventually four, Lords of Appeal in Ordinary, who are appointed by the Crown from among the men most learned in the law, for the purpose of discharging judicial service, and who hold their membership in the House of Lords as the accident, so to speak, of their judicial positions, that membership terminating, *ipso facto*, when they cease to discharge their judicial functions.

It is comprehensible, also, from the historical point of view, that the framers of the constitution of the United States, with the English precedents so distinctly before them, should have imitated the English practice, in some respects, at least, upon this question of the judicial power of the upper house of the legislature. The wonder is that they did not follow English precedents more completely. They certainly manifested a very discriminating sense of the difference of condi-

tions existing in the two countries. They could not think, indeed, of making the Senate a criminal court for the trial of any noble class, since no such class existed in the United States; but would it have been a far-fetched idea to have made the Senate the highest Court of Appeals in law? It was to be expected that the best legal talent of the country would be found in the Senate, and the Senate represented, according to the prevalent view, the commonwealths in what was then termed their sovereign capacities. In the adjustment of disputes between commonwealths, between the United States and commonwealths, and between the different branches of the United States government itself, what more august body could be devised than the Senate?

It is remarkable, all things considered, that the framers did not think seriously of following the English example upon this point. They were undoubtedly preserved from it by the doctrine of the French philosophy regarding the separation of the departments. It seems to me that their solution of the question of the judicial power of the Senate is a most happy one. The limitation of this power to the trial of officers of the government for the commission of offences indictable under statutes of the United States or under the common law; the restriction of the penalty to be imposed by this tribunal to dismissal from office and disqualification to hold United States office in the future; the relegation to the ordinary courts of all further proceedings against the person sentenced by the Senate and thus deprived of any defence by virtue of official character — all this is most natural and necessary. Wisely applied, the judicial power of the Senate secures the responsibility of the executive and judicial organs without impairing their independence, and without trenching upon the sphere of the ordinary judiciary. It can be used, of course, in such a manner as to destroy the co-ordinate independence of the executive and judicial departments. In the earliest trials the Senate seemed to take a

view of its powers in this respect which, if followed, would have threatened the constitutional existence of the other two departments. Madison is reported to have said that he would regard the removal of a worthy officer by the President as a cause of impeachment of the President. It was here that the influence of the English example was most likely to be felt. Happily, this tendency has been overcome; and the Senate, in the later trials, has taken the sounder and more limited view of its own powers.

There is one point of detail, however, in which the constitutional limitations in reference to procedure and judgment in impeachment trials might be improved. The constitution should require the same majority in the decision of the preliminary question of the assumption of jurisdiction of the case as upon the rendering of the judgment. It is possible that, during the hearing, some senator who voted against trying the case, may be convinced that his opinion in regard to jurisdiction was erroneous and vote for conviction, but it is not at all probable. As the rule, those who vote against jurisdiction will vote against conviction, for the reason that they believe they have no right to try the case. As a fact, they have done so. It is practically a uselessly expensive, not to say scandalous, procedure to pursue an impeachment trial unless a number sufficient to convict shall have voted to assume jurisdiction. I do not think, however, that conviction should be made any easier. Such a change would be likely to make impeachment a purely partisan procedure. It would be far better to have no such power vested in a legislative body than to run such risk of its abuse.

There is no such power conferred upon the Federal Council or the Diet by the German Imperial constitution, and no one can assume that any need for it has become manifest. The judicial power of the Federal Council, as we have seen, belongs wholly to the domain of the higher politics. The Council is vested with authority to restrain the common-

wealths from disturbance of the peace and from violation of justice. These are powers which are distributed by the constitution of the United States between the whole legislature and the judiciary. Much can be said in favor of the German plan. It is certainly a simple and summary solution of the question; but, unless we regard the Council (as some commentators do) as the sovereign organization of the German state, and its action as the immediate interposition of the sovereign power, the solution is too simple. In a federal system of government, immediate interference in the internal affairs of a commonwealth, by a single body composed of partisans, at the call simply of either party to the controversy, is as likely to prove prejudicial as beneficial. It seems to me that the wisdom of the whole legislature upon such subjects is better than that of either house; and that, when the two houses cannot agree, this is to be taken as an evidence that delay is better, for the time being, than immediate action.

Viewed in the light of modern conditions, the provisions of the French constitution regarding the judicial power of the Senate appear most unnatural and most threatening to political liberty. It is very difficult to comprehend what possible necessity can now exist for holding to the process of an impeachment, either of the President or of the ministers, when the President is robbed of all executive independence and the Ministry is wholly responsible, as a matter of law, to the legislature and, as a matter of fact, to the Chamber of Deputies. The legislature can cause the resignation of the ministers, and also that of the President, at any moment; and the ordinary courts are strong enough to deal with any offender, when deprived of the support of his official character. Certainly there is no need of according to the Senate the power of ordering the infliction of any penalty beyond dismissal from office and disqualification to hold office in the future. The unlimited power of punishment conferred upon the Senate is repugnant to political liberty and to even-handed jus-

tice. The violation of liberty and justice in the impeachment of officials, however, appears quite trivial in comparison with the sweeping jurisdiction accorded to the Senate over every person in France accused before it of committing an attack upon the security of the state, with the power to order the infliction of any penalty it may choose. There is no justification for conferring such power upon a legislative body, except the existence of a state of society in which the ordinary courts are unable to deal with great offenders. If there is any state in the modern civilized world that has succeeded in getting rid of its great and powerful personalities, it is France. If the French democracy were a true democracy, it would not endure for a moment this constitutional travesty of true political liberty. The clause, it is true, was placed in the constitution by the Constituent Assembly, which contained a majority opposed to the republican form of government; and it was probably their intention that this power of the Senate should be used for the purpose of suppressing the growth of republicanism. But the French democracy is now triumphant in all branches of the government and in the constituencies, and the democracy has kept this clause standing in the constitution. The fact that the French democracy has not thought of the expulsion of this clause from the constitution, manifests its tendency towards the principles of Cæsarism.

II. The question as to the constitutional position of the ordinary judiciary over against the legislature and the executive is one of still greater importance. Apparently, the ordinary judiciary has a constitutional status only in the system of the United States. A little careful examination, however, will reveal the fact that this department, although nominally created by the constitution and vested by the constitution with the power of interpreting constitutional law as well as ordinary law, does not in reality occupy a greatly different position over against the legislative and executive departments

of our government from that which the judiciary might assert in the other systems under comparison.

Let us suppose that the legislature of the United States should desire to destroy the judicial department. It may legally abolish each United States judgeship at the expiration of the term — by death, resignation, or removal — of the existing incumbent. In a few years no judicial department would, in fact, remain. In fact, the legislature of the United States has abolished United States judgeships without regard even to the terms of the existing incumbents. Again, the United States Supreme Court has itself pronounced the doctrine, that the courts cannot assume jurisdiction over political questions; that their jurisdiction is limited to cases in which private rights and private property are primarily concerned. Lastly, the legislature of the United States may impeach and remove the judges; and although the constitution limits this procedure to cases in which accusation of treason, bribery, or other high crimes and misdemeanors, is sustained, yet the Senate has the power to interpret these words. If the House of Representatives should vote to impeach a judge for declaring an act of Congress unconstitutional, and the Senate should interpret the judicial decision as a misdemeanor on the part of the judge making the same, what could save the judge from dismissal and disqualification?

Now let us suppose that a German Imperial judge should refuse to apply an act of the Imperial legislature to a given case, on the ground that it had not been constitutionally passed. What would, or could, happen? He could not be impeached by the Imperial legislature, for the constitution vests no such power in the Imperial legislature. He could not be impeached by a commonwealth legislature, since he is an Imperial officer. An Imperial statute, also, prevents the trial and removal of the judges by any body, except the regular courts. The Imperial legislature could indeed abolish all the existing courts, by virtue of its power to organize and

reorganize at will the entire judicial system; *i.e.* it could do all at once what the Congress of the United States could do piecemeal. The Emperor could do no more with the judges for taking the stand above indicated than could the President of the United States in a similar case. Both of them could refuse to lend executive aid to the execution of the judgment of the Court.

Let us suppose, again, that the Lords of Appeal should refuse to apply an act of Parliament to a particular case, on the ground of its unconstitutionality. What could happen? They could be impeached, and removed from office; but would the House of Lords pass judgment of impeachment upon itself? They could be deprived of their offices by a statute; but would the House of Lords agree to the passage of an act which would deprive it of its own judicial powers, except at the demand of a House of Commons elected upon that issue, *i.e.* at the demand of the state? The Crown could do no more with the Lords of Appeal for taking the stand above indicated than the President of the United States could do with the Supreme Court of the United States. Is not, then, the position of the highest court in the English system even more impregnable than in the system of the United States?

Lastly, let us suppose that the French Court of Cassation should refuse to apply an act of the legislature to a given case. What could happen? The legislature could impeach the judges and remove them upon the charge of committing "attentat" upon the security of the state. The legislature could abolish all the judicial offices, since these are not created by the constitution and are not protected by the constitution against the legislature. As we have seen, the Congress of the United States can also do these things, gradually if not immediately. The French President has no more constitutional power over the judiciary than the President of the United States.

From a purely constitutional standpoint, we may sum up

the advantages possessed by the United States judiciary over the judiciaries of Germany and of France, as consisting in these facts: The destruction of the judicial department by legislative action can be accomplished only gradually in the system of the United States, while it can be done immediately in those of Germany and France; and the judicial tenure is originally fixed by the constitution in the system of the United States, while in the other two it is fixed by statute. In these respects, however, the Court of the Lords of Appeal in the English system seems to be quite as well off as the Supreme Court of the United States.

These are indeed substantial and important advantages. They secure the judiciary of the United States against any hasty action of the Congress at any given moment. Do they, however, sufficiently explain the peculiar authority accorded to judicial decision by the custom of our constitution? Do they explain the fact that, when the Supreme Court of the United States refuses to apply an act of the Congress to a given case on account of its alleged unconstitutionality, the Congress and the President immediately accept the decision as having, *ipso facto*, abolished the congressional act for all cases, or, at least, suspended its operation until the Court shall itself reverse the decision? In England, France, and Germany, as we know, such an effect is scarcely thought of. We have seen, however, that the Supreme Courts of England, France, and Germany might deal with a particular case just as the Supreme Court of the United States deals with it, and that the legislatures of these respective states have only about the same powers of coercion over these courts that the Congress of the United States possesses. Moreover there is no provision in the constitution of the United States, any more than in the constitutions of these other states, which clothes the judiciary with power to declare an act of the legislature generally null and void on account of its conceived repugnance to the constitution, or on any other account. What,

then, is it which causes this all-important generalization to be made, immediately and unconditionally, from a special decision of the Supreme Court of the United States, when such a generalization is scarcely dreamed of anywhere else?

We must go back of statutes and constitutions for the explanation. Back of these, however, there lies nothing in the domain of political science but public opinion. It is then the consciousness of the American people that law must rest upon justice and reason, that the constitution is a more ultimate formulation of the fundamental principles of justice and reason than mere legislative acts, and that the judiciary is a better interpreter of those fundamental principles than the legislature, — it is this consciousness which has given such authority to the interpretation of the constitution by the Supreme Court. This consciousness has been awakened and developed by the fact that the political education of the people has been directed by the jurists rather than by the warriors or the priests; and it is the reflex influence of this education that upholds and sustains, in the United States, the aristocracy of the robe. I do not hesitate to call the governmental system of the United States the aristocracy of the robe; and I do not hesitate to pronounce this the truest aristocracy for the purposes of government which the world has yet produced. I believe that the secret of the peculiarities and the excellencies of the political system of the United States, when compared with those systems founded and developed by priests, warriors, and landlords, is the predominant influence therein of the jurists and the lawyers. I find in it, in particular, the explanation of the problem which I have been discussing — the explanation of the authority accorded, in our practice, to the decisions of our Supreme Court.

But government by lawyers has its weak points and its dangers. If the lawyers separate law from history and jurisprudence, and jurisprudence from ethics, they will inevitably and speedily loose that spiritual influence over the conscious-

ness of the people, which is the sole basis of their power. Let this once happen, and the courts will be unable to stand between the constitution and the legislature. The legislature will become almighty. That branch of the government in which, especially under universal suffrage, party blindness and passion are most sure to prevail, and in which the least sense of personal responsibility exists, will have at its mercy those individual rights which we term civil liberty. The student of political history knows only too well that the despotism of the legislature is more to be dreaded than that of the executive, and that the escape from the former is generally accomplished only by the creation of the latter.

I think there is reason to fear that the legal profession of to-day in the United States does not appreciate its position, and is not sufficiently impressed with its duty to preserve the ideal source of its power. There is reason to fear that law is coming to be regarded by the mass of lawyers too much as an industry; and if this be true of them, it will surely follow that it will be so regarded by the mass of the people. It rests with the lawyers and the teachers of law to determine for themselves whether they will divest themselves of their great spiritual power over the consciousness of the people; whether they will give up the commanding influence which their predecessors have held in the making of this great republic, and which those predecessors exercised with such beneficent results to the welfare of the whole people.

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In this index, the symbols (E.), (F.), (G.), (P.), and (U. S.) indicate that the topics thus designated appertain to the constitutional history or law of Great Britain, France, Germany, Prussia, and the United States of America, respectively.

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