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75

THE FEDERAL GOVERNMENT

5 September 1950

## CONTENTS

|   | <u>Page</u> |
|---|-------------|
| INTRODUCTION--Dr. Marlin S. Reichley, Director of<br>Instruction, ICAF.....   | 1           |
| SPEAKER--Dr. Hugh L. Elsbree, Senior Specialist in American<br>Government and Public Administration, Legislative<br>Reference Service, Library of Congress..... | 1           |
| GENERAL DISCUSSION.....   | 12          |

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77

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DR. REICHLLEY: Gentlemen, this is the first lecture in a series on organization and management.

I feel certain, although you have been studying the course in economic mobilization for only one week, that you have been impressed with the tremendous burden that a wartime economy imposes on the Federal Government. However, all too often we think of a wartime government only in terms of the many regular and wartime agencies that naturally have the main administrative load to bear. But the activities of these wartime agencies can be understood properly only when seen against the background of the Federal Government as a whole--its constitutional basis; its political character; the legislative, the judicial, and the executive branches.

Dr. Elsbree, our speaker this morning, is well qualified to give us this over-all view of the Federal Government and to supply this understanding. He is an outstanding political scientist and a professional civil servant. His present position with the Legislative Reference Service of the Library of Congress gives him an enviable position from which to view the operation of the Federal Government in toto.

It gives me great pleasure again to welcome back to the Industrial College, Dr. Elsbree.

DR. ELSBREE: Dr. Reichley, members of the faculty, gentlemen: This is a somewhat academic subject, following as it does a discussion of the atomic bomb. And I fear, also, that I stated it in somewhat too historical and perhaps too academic terms for the present moment, when the emergency powers of the Executive begin to loom much larger than they did six months ago. However, I do think that the background of the interrelations among the various departments of our Government is rather essential even in the understanding of emergency situations.

I would state in advance that I am not going to touch at all on the federal nature of our governmental system, or on the internal operations of the three great departments of the Government. Even within those limitations, I did not have any great difficulty in finding material for a short lecture.

The foundation of our constitutional system of separation of powers was the conviction of most of the members of the Constitutional Convention that, as Montesquieu said, "Every man who attains power is prone to abuse it." Madison, in the famous Federalist Paper No. 51, states the problem of all constitution makers in these terms:

"In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

One of the fundamental "auxiliary precautions" for the control of government under the proposed constitution was the distribution of powers among the three departments--the legislative, the executive, and the judicial. The dominating idea was not to provide a rigid separation of legislative, executive, and judicial powers. As Madison pointed out in Federalist Paper No. 37:

"Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces--the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."

The framers knew as well then as we do now that the powers of government cannot be partitioned in watertight compartments. Their aim was the more practical one of preventing any one department, directly or indirectly, from absorbing all or most of the powers of one or both of the others. They were fully aware, in the light of the experience of the state governments, that this result could not be achieved simply by defining the powers of each of the three departments. They recognized that it could be achieved, if at all, only "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." These are Madison's words again. Far from attempting a rigid separation of powers, the framers deliberately intermingled the powers of the three departments to the extent necessary, in their judgment, to enable each to defend itself against the others. The result, then, is better described as a system of checks and balances than as a system of separation of powers.

The idea of mixed government, or of separation of powers, is an ancient one and one that was well known to virtually all the framers. In devising the American system of checks and balances, however, the framers were probably much less influenced by the writings of Montesquieu or other political theorists than by the experience of the American governments with which they were familiar. It is important to remember

that most of the framers were concerned chiefly with developing restraints on the legislative department. Historically, of course, the provincial legislature had been the hero; the royal governor, the villain. But by the time of the Revolution, the legislatures were supreme, and in most of the revolutionary state governments, the executive was almost completely subordinate to the legislature. The central government had never even had a separate executive. Experience with legislative supremacy had greatly altered the views of the more conservative classes especially, and these were well represented in the Constitutional Assembly. Legislative supremacy had become associated with paper money, repudiation of debts, and other "democratic excesses." It is to be noted that even Jefferson, in his "Notes on the State of Virginia," pointed out that "one hundred and seventy-three despots would surely be as oppressive as one." Then, too, those who had participated in or observed the operations of the central government during and after the Revolution came to have a high appreciation of the value of a strong executive authority in the conduct of war and foreign affairs.

In short, the framers, or most of them, were anxious to establish a reasonably strong executive department and were aware of the difficulty of preventing the legislative department from making the executive dependent on it. At the same time, deep-seated popular distrust of the executive made caution necessary in providing for that department.

It is unnecessary to describe in detail the checks and balances which the framers finally adopted. In general, the attempt was made, first, to provide an independent basis for each department, and, second to give each some part in the exercise of the powers of the others. Thus, the President was to be elected by an electoral college, to which no Member of the Congress could be elected. Only in case of a tie or absence of a majority was the Congress to participate in the selection of the President. The President was given a fixed term of office, and it was provided that his compensation could not be diminished, or increased, during his term of office. The independence of each department was further guarded by the provision that no person holding any office under the United States shall be a Member of either House of the Congress during his continuance in office, and the provision that no Senator or Representative shall be appointed to any civil office which shall have been created, or the compensation for which shall have been increased, during the time for which he was elected.

In the case of the Judiciary, the independent position was less carefully safeguarded. The selection of judges is left to the President and the Senate. It was believed, however, that the provision that the judges shall hold office during good behavior, being removable only by impeachment, combined with the provision that their compensation shall

not be diminished during their terms of office, would guarantee their independence of the influence of the other departments.

The President was given a part in the legislative power through his veto and through the power to make recommendations. He may call special sessions of the Congress, and adjourn the Congress in case of disagreement of the two Houses. He and the Senate share the treaty-making power. He is given the pardoning power, except in cases of impeachment. He and the Senate share in the appointment of judges.

The Congress, for its part, can override the President's veto by a two-thirds vote of both Houses. The Senate shares in the appointing power, as well as in the treaty-making power. The President, the judges, and all civil officers may be impeached on charges preferred by the House and sustained by two-thirds of the senate. The Constitution also leaves with the legislative branch important functions with respect to the organization and jurisdiction of the Federal Courts.

Again, the Judiciary is not specifically given any share in the powers of the other departments, other than that the Chief Justice of the Supreme Court shall preside over the Senate when that body is trying the President on impeachment charges. The power of judicial review was later exercised, however, as an integral part of the judicial power.

In the case of the legislative department, an internal check-and-balance device was provided by adoption of the bicameral system. Fully aware of the strength of the traditional American preference for the legislative branch, the advantage of popular representation, and the great power of the purse, the framers undoubtedly looked to the bicameral system to provide, among other things, a check against the legislative tendency to subordinate the other departments.

In the light of the present tendency to be preoccupied with the executive power, it is interesting to note that the experience of the first quarter of the nineteenth century bore out the fear of some of the framers that the legislative department was the one most likely to make the others dependent on it. From Jefferson through John Quincy Adams, the President was selected by the Congress, either directly or through the congressional caucus. After Jefferson, no President until Jackson exercised any appreciable influence with Congress, and even the control of administration was largely in the hands of the Legislature. Nor was the Judiciary a real threat to legislative supremacy during this period. To be sure, Marshall asserted vigorously the independence of that department in the famous case of Marbury v. Madison. It was a verbal assertion, however, and regardless of its later significance as a precedent, it did not mark a triumph of the Judiciary over the other branches.

The courts accepted the Republican Judiciary Repeal Act, avoided a direct conflict with either the President or the Congress, and proceeded to concentrate on developing a strong spirit of nationalism in the interpretation of the Constitution. It was in the field of federal-state relations that Marshall and his Court made most of their great contributions to our constitutional development.

The Executive power was not even firmly established by the Jackson and Lincoln precedents. Even towards the end of the nineteenth century, Woodrow Wilson characterized the Government of the United States as "congressional government" and pointed to the relative feebleness of the executive branch. In his famous book, "Congressional Government," appearing in 1884, he stated flatly that ours was a system of legislative supremacy in which the Congress thoroughly dominated both the Executive and the Judiciary; and he had, at the time he was writing, very strong evidence to support his view.

It is, then, a great error to see in our constitutional history a steady growth of the Executive at the expense of the Legislature. I think it is a conservative estimate that the balance has been tipped in favor of the legislative department fully as often as it has in favor of the Executive. If we exclude the War Between the States and the two World Wars, that is indeed a conservative estimate.

It would take too long to trace the evolution of the checks and balances which the framers devised and those which sprang from usage. Where does the system stand today? Has any one department subordinated one or both of the others to it so as to impair, in a fundamental manner, its or their independence of action?

But, first, what do we mean today by the three departments of government? Specifically, what do we include in the executive department? The Constitution vests the executive power in the President. Congress has created, however, a number of so-called "executive departments" and a much larger number of "administrative agencies" of varying types, several of them vested with functions essentially legislative or judicial in character. These are generally considered part of the "executive branch," but they are not all subject in the same manner and degree to the control of the President. This whole mass of administrative agencies is sometimes referred to as the "fourth branch" of the Government, to be distinguished from the "Executive," properly speaking. Nomenclature, by itself, certainly is not very important. What is important, however, is to realize that the "executive branch" in the broadest sense is not the same sort of institution as the Federal Judiciary and the Congress. If Congress, in passing laws, simply left them to be executed by the

President in whatever manner and by whatever agencies he saw fit, the executive branch and the Office of Chief Executive would be, legally at any rate, synonymous. But this is not the case, and we have, therefore, a "national administration," of which the President is supposedly the head, but over much of which he possesses a very shadowy legal authority. The problem of control, it should be noted, is not merely one of size. It is a problem, also, of the constitutional and legal basis of the control.

With this complication in mind, let us look briefly at the present system of checks and balances. The Presidency is more secure than originally; thanks to the nominating convention and what amounts to popular selection. Furthermore, the President's influence on legislation is far greater than can be accounted for by the veto power and the submission of recommendations. It is due primarily to his position as party and popular leader (an extraconstitutional function) and, in a lesser degree, to the use of his appointing authority. Also, he possesses, by virtue of his constitutional authority and by delegation from the Congress, a rule-making power that is essentially legislative in character and that sometimes is confined only within the broadest limits.

Yet, powerful as the Presidency has become, particularly in time of war or great emergency, it can hardly be said that the Congress has abdicated. A comparison of President Truman's program with the legislation enacted so far during the present Congress should disabuse anyone of the idea that the legislative branch has become a "rubber stamp." Note, too, that this is a Congress in which both Houses are controlled by the President's party.

The legislative branch has done much more than maintain its independent status in matters of legislative policy. In spite of the constitutional provisions vesting the executive power in the President and charging the President with the duty of seeing that the laws are faithfully executed, the Congress has, from the beginning, felt free to determine the manner in which the laws should be administered. Its capacity to influence administration is no less remarkable than the President's capacity to influence legislation. Consider for a moment the extent and variety of its controls (these are in addition, of course, to the important control that Congress has by way of amending the basic policies that any administrative agency enforces):

1. Congress can create and terminate departments and agencies. As a matter of fact, it not only can but does. Virtually all agencies are congressional, or statutory, agencies, and not agencies merely set up by the President.

2. Congress can provide for the internal organization of departments and agencies. Again, it not only can do that but very frequently does. There are, of course, great differences among the agencies in that respect. In the case of the Department of State, the internal organization is left largely up to the head of the Department. But in such agencies as the Department of the Interior and the Department of Commerce, the basic structure is largely determined by statute, and Congress can go into any detail it wants in prescribing how any agency shall be organized to carry out the functions with which it is vested by law. In other words, what I am pointing out here is that even though, as is very frequently pointed out, here and there is an agency in which the head of the agency or the President is left almost completely free to organize it as he wants--that is, by sufferance and not by irrevocable provision. Congress can at any time, if it does not like the way an agency operates, step in and change the internal organization, which change must be observed.

3. Congress can vest the administration of laws in whatever officials it chooses. Here, again, is a tremendously important power. The administration of given laws very frequently is vested not in the head of a department but in a subordinate official of that department, which creates a highly anomalous situation. In other words, there is sometimes complete disregard for the hierarchical type of organization, with the official in whom authority is vested subject sometimes to an uncertain "general supervision" by the head of the agency.

A number of organization plans which went into effect this year concentrated authority in the heads of departments. It should be noted, however, that the plan first submitted for the reorganization of the Treasury Department was rejected. The new plan submitted and adopted excluded the Comptroller of the Currency from its operation.

Note, too, that at any time the Congress can redistribute responsibility for the execution of laws, as it pleases.

4. Congress can influence appointments to office through senatorial confirmation and through the civil-service laws. With reference to senatorial confirmation, the framers, of course, had in mind that the President would make appointments and that the Senate would simply reject those it found unsatisfactory. Of course, as all of you know, it has not worked in that way. The practice has developed that the President simply has to appoint to many offices persons who are selected by a Senator of his own party from that state, or by a Member of the House from that district. The House, theoretically, has no part in this, but, actually, there is a division of patronage between Members of the Senate and Members of the House. Thus, the influence that

the Congress exerts in administration, through its share in the appointing authority, is far more direct and significant than the framers ever contemplated it would be.

5. Congress can establish the basis for Federal personnel policy in such detail as it chooses. For example, I believe right now a congressional committee is giving detailed consideration to an efficiency rating bill. It is not purely a matter for the Executive, the agency, or the Civil Service Commission to determine. Congress itself is considering the detailed provisions of a rating system which is to be established.

6. Congress possesses the appropriation power, through which it can and, as you all know, does exert a powerful influence on administration.

7. With its agent, the General Accounting Office, Congress exercises supervision and control over the expenditure of funds. This control is not limited to auditing. It includes accounting and disallowance, considered by many to be executive functions.

8. Congress can regulate administrative practice and procedures in as much detail as it believes desirable. This applies not only to procedures with respect to carrying out legislative policies--an example of that would be the Administrative Procedures Act--but also to procedures involved in housekeeping operations, such as the purchasing of supplies, and many other details. As a matter of fact, some of the most detailed laws on our statute books are laws which regulate the conduct of purely administrative operations.

9. In addition to the continuing supervision exercised by the appropriations committees, the Congress can conduct special investigations of administrative agencies. These are sometimes conducted through the committees on expenditures in the two Houses and sometimes through other standing committees which, by the Legislative Reorganization Act, were given a direct mandate to supervise the administration of policies of agencies in their field of operation. Less frequently, since the Legislative Reorganization Act, investigations are conducted by special investigating committees.

10. Informally, much influence on administration may be exercised through the direct intercession of individual Members of the Congress.

This enumeration is by no means exhaustive. In fact, the potential influence of the Congress on administration may best be viewed by noting that it is almost unlimited. Just as the assumed exclusive prerogative of the Congress to legislate has been largely ignored by the delegation to the President and other administrative officials of powers essentially

legislative in character, so the exclusive character of the executive power--I don't mean the executive power but the theory that the executive power is exclusively vested in the Executive--has been reduced to a minimum by congressional usage, sanctioned, with few exceptions, by the courts. One of the few express constitutional limitations, as interpreted by the courts, is the removal power, but even there the President is not absolutely and fully guaranteed the right to remove officers. Under the terms of the decision in the case of Humphrey's Executor (Rathbun) v. the U. S., reference 295 U. S. 602 (1935), a few years ago, it was decided that the Congress could restrict the right of the President to remove officers having what the Court calls "quasi-judicial" or "quasi-legislative" functions. Only in the case of officers found to have duties that are purely executive does the President have unrestricted removal power.

In spite of this formidable array of powers, it is no secret that the legislative branch feels at times almost completely frustrated in its efforts to control administration. The reason, of course, is that the capacity of the Congress for the job is far from being equal to its legal authority. I do not mean the word "capacity" here in a derogatory sense. It is simply beyond human ability to do the job. Considering the range and complexity of government operations, the number of employees, and the expenditures involved, the job is overwhelming. As long ago as 1884, when the national administration was but a small fraction of its present size, Woodrow Wilson remarked of the efforts of Congress at supervising the administrative branch: "It can violently disturb, but it cannot fathom, the waters of the sea in which the bigger fish of the civil service swim and feed."

However, it is not merely the Congress that has trouble fathoming these waters. The President is equally troubled. Oddly enough, he lacks many of the weapons of control which the Congress possesses. This is not to say that he does not possess powerful weapons. The power to revise the budgetary estimates, the appointing and removal authority qualified in certain respects, the uncertain scope of the "executive power" in terms of direction and control of administrative policy, and the great prestige of his position as Chief Executive are all highly significant and do give the President a potent influence. Nevertheless, the magnitude of the national administration, the relatively small staff services at the President's disposal, and, above all, the fact that he shares with the Congress the responsibility for control and supervision all go to make his role in the administration of the laws a far less significant one than his title as Chief Executive would indicate. It is noteworthy that both the President's Committee on Administrative Management in 1937 and the Hoover Commission recently emphasized the weakness of the Presidential office with respect to the control and direction of administration. In the case of the Hoover Commission, the leading report, the Commission's

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first major report, and probably, in the eyes of political scientists at any rate, by all odds the strongest, most effective, and decisive report of the Commission, emphasized the lack of Presidential control and of control by the heads of the departments over the administration of the Government.

It follows that legislative-executive relations in the field of administration cannot be described in terms of the relation between the President and the Congress. Much of the time the Congress is dealing directly with the departments and agencies, almost without regard for the President as Chief Executive. I could turn that around and say that much of the time the departments and agencies are dealing directly with the Congress, almost without regard for the President as Chief Executive. With respect to any particular area of administration, the President, the Congress, and the agency or agencies involved are likely, all three, to feel that real power rests with the other two. That is one of the leading characteristics of the American Government. Officials are forever contending that they cannot do anything because somebody else has the real authority. Each branch of the Government by sad experience has learned the limits of its own strength and the "encroachments" of the others. Generally, the balance is probably tipped in favor of the "bureaucrats"; but if they are the despots they are sometimes said to be, they have a right to think that despots lead a precarious existence.

The judicial department has acquired unexpected prestige. Though subject to the other departments with respect to appointments, and in many matters of organization and jurisdiction, the life tenure of its members has prevented executive or legislative domination. Not notably successful in some of its earlier encounters with the other branches--I have reference, among other things, to the Dred Scott decision--it has been a powerful checking influence since the latter part of the nineteenth century.

The most spectacular weapon of the Judiciary, and the one to which it probably owes its great prestige, is its power to refuse to enforce acts of Congress which it finds contrary to the Constitution. This judicial veto power, which, unlike the Presidential veto, cannot be overcome by a two-thirds vote of both Houses of the Congress, gives the courts a potent (though negative) role in the legislative process. I should note, perhaps, that very frequently it is alleged that this power, great as it may be, is not a power which gives the judges any great discretion. In other words, their job, as one Justice once described it, is simply to put the Constitution down, then take the statute, lay the statute on it, and see if they fit. Obviously, that is an entirely erroneous statement as a statement of fact. It is a good judicial argument but it is not a fact. Judges have enormous discretion in passing upon the constitutionality of legislation. In fact, there are almost no instances in which the Court has reversed an act of Congress in which that act was not highly debatable, from a constitutional point of view. Such clauses as the

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commerce clause, the due process clauses of the Fifth and Fourteenth Amendments, the contract clause, the whole question of appropriation authority, are extremely indefinite and judges generally have a wide discretion in deciding whether or not a given statute does conform to the Constitution.

But the role of the Judiciary in legislation is not simply a negative one. The function of interpreting the laws is not so spectacular as the function of judicial review, but its influence on legislative policy is probably greater. Where legislation is general in character, as in the case of the Sherman Antitrust Act, for example, those who interpret the law in effect make the law. Even where the rule-making authority is delegated to the executive branch, as it frequently is, it rests finally with the Judiciary to decide whether the interpretations, rules, and regulations promulgated by the administrative agencies constitute a proper construction of the law. In its role as interpreter, therefore, the Judiciary is also acting, in most instances, as a check on the executive branch.

The check on the Executive is not confined to seeing that executive interpretations, rules, and regulations are authorized by law. Administrative officials must observe "due process of law" in the application of their rules and regulations. As construed by the courts, this constitutional safeguard has meant much more than a fair procedure. The courts have looked also to the fairness of the result and have reversed the decisions of administrative agencies as being "confiscatory," "unreasonable," or "unfair" and, therefore, lacking in due process in the substantive sense. The very use of the terms "confiscatory" and "unreasonable" illustrates, again, the enormous amount of discretion the judges have.

These checks on administrative action have countered, to a considerable extent, the gravitation of many functions essentially judicial in character to the executive branch. Whatever are the relations of the so-called "independent regulatory agencies" to the President, they are not independent of the Judiciary. Their interpretations and rulings, like those of other administrative agencies, must not be ultra vires, their procedures must not be unfair, and their decisions must not be arbitrary or unreasonable. Further, it must be kept in mind that the scope of judicial review over their actions is, in the last analysis, set by the courts themselves.

Today, then, the system of checks and balances is in flourishing condition. Each department has maintained its independent status, and the powers of the Federal Government are more intermingled than ever. From time to time, observers and participants have noted the decline of

the Judiciary, the Executive, or the Legislature, or of all three of them, at the expense of the bureaucracy. At the moment, however, all seem very much alive, and if any one of them is dominating the others, it does not appear to realize it.

Whether or not the device of checks and balances has been overdeveloped is another question. Have we, by too much intermingling of powers, made it too difficult for the Government to govern, while at the same time failing to oblige it to control itself? Our system is clearly lacking in unified responsibility, not only for the conduct of government as a whole, but for the conduct of any one branch of the Government. Buck passing is easy in a government in which responsibility for both the formulation and the execution of public policy is partitioned in bewildering fashion among the Congress, with its two Houses and many committees, many of them with overlapping jurisdictions, and in each House authority is widely dispersed; the President; a maze of administrative agencies; and the Federal courts. The party system, of course, has done something to bring about cohesion--and I probably ought to have emphasized the party system more as the binding force--but party system or no party system, we have by no means obliterated the difficulties of operating a government with such a wide partitioning of powers. Advocates of reform warn that we must "streamline" our governmental system if it is to deal effectively and efficiently with the complex problems confronting it.

I shall not attempt to evaluate our present system or the various types of reform proposals. I say merely that, by all indications, only minor changes will be made for some time to come. This is partly due to the difficulty of making drastic changes, but basically I think it is due to the fact that the idea of checks and balances remains one of our fundamental political beliefs. It cannot be said that, as a people, we have a passion for orderliness and efficiency in the conduct of government. We do not regard the business of government as just business. We are still skeptical of the wisdom of entrusting to any one branch of the Government too much responsibility for governing. No other nation prizes more highly the value of a "dependence on the people" as a method of controlling the Government, but there remains with us more than a sneaking suspicion that Madison was correct when he said that "experience has taught mankind the necessity of auxiliary precautions."

COLONEL BARNES: Dr. Elsbree is ready for your questions.

QUESTION: Doctor, I think you made the statement earlier in your lecture that the President can adjourn Congress if there is a disagreement between the two Houses. Was that your statement? And, if so, would you clarify it?

DR. ELSBREE: All it means is that if they cannot agree on a date of adjournment--if one wants to adjourn, the other does not, and they cannot reach an agreement--he can step in and, acting as an umpire, settle the dispute. He cannot adjourn them against their will.

QUESTION: Had the Hoover Commission recommendations been adopted, would they have, in your opinion, altered or realigned materially the balance of powers as we know it today?

DR. ELSBREE: If the spirit of the Hoover Commission recommendations, as well as the formal steps to be taken, should go into effect, I would say yes, to a considerable extent. I put it that way because the carrying out of the recommendations in a purely literal sense--the establishing of a real hierarchical system in the administration of the laws--would not have, in itself, as great an influence as one might think. The Government is still so big that the President just could not do everything he had the power to do. On the other hand, the Hoover Commission emphasized the building up of a Presidential staff and of departmental staffs. If the President had a sufficient staff of his own and if the department heads had sufficient staffs of their own to counteract "departmentalitis" or "bureaucratitis"--call it what you will--within agencies, from the functional viewpoint, then I think that the total impact would be greatly to strengthen the hand of the President. How much, it is hard to say. I don't believe it would bring about the revolution that some of the opponents of those proposals have claimed would take place, because Congress would still be, in a sense, in the driver's seat; it would still have its appropriation authority, its investigation authority, and so on. There would not be a major revolution, but the full enactment of those recommendations which bear on increasing the authority of the heads of the departments and the President over administration and the implementation of those recommendations by Congress itself granting sufficient funds to build up really strong functioning staffs would have made--or "would make," if you think of them as still possible--a great deal of difference.

QUESTION: What, in your opinion, would be the effect on this relationship of forces in government if we put into effect a program of widespread geographical dispersion of government agencies?

DR. ELSBREE: That is anybody's guess. Of course, many agencies have already dispersed their forces pretty much throughout the United States. In other words, a great many of our agencies have, by all odds, a greater part of their personnel and a great deal of their authority out in the field, and that has had some influence. If you add to that a dispersal of agencies--I suppose by that you mean actually having some of the departments in different areas--presumably it would, to a certain extent, weaken the authority of the President. But I find it very difficult to figure out what the tangible results of that might be.

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Modern methods of communication being what they are, the result probably would not be so astounding as one might think. Just as in the case of the dispersal of agencies, I am sure it was thought some years ago that as great a decentralization of some Federal agencies as took place would cause a revolution in those departments. It has not, because the telephone, teletype, and other modern methods of communication enable one man sitting here still to keep his finger on what is going on just about as much as he could have when the authority was here. A lot of the operations were taken out in the field, in any case.

QUESTIONER: If I may just elaborate on that a little, I think of the proposal some years ago of moving the entire Department of Agriculture to Kansas City, let us say, and the opposition of the bureaucrats in the various bureaus in the Department of Agriculture against such a movement, not for functional reasons, but primarily because they thought their influence on Congress would be weakened if they were in Kansas City.

DR. ELSBREE: It could work in different ways. It depends on what relationship you are thinking of. They might become somewhat more subject to certain local pressures than they now are. But as time goes on and the communications system becomes more highly developed, I think that the influence of any such movement would tend to decline somewhat and probably not be so great as opponents might immediately fear.

I think there would be a considerable amount of confusion and inconvenience, frankly, because of the problems of interagency relationships. Already, as you know, one of the biggest administrative problems in the present administration of the Government is the establishing of a satisfactory type of interagency relations in the field. That is true even within the Department of Agriculture. They have local offices scattered all over. When we start scattering the national departments and agencies around the country, then it becomes more difficult. But, again, with lots of travel money and many telephone calls, I suppose things would move along more or less in the pattern they do now.

QUESTION: If I remember correctly, one of the reports of the Hoover Commission stated there were 65 different agencies that were required to report to the President. The report pointed out that it was impossible for the President to spend sufficient time with each one of them and recommended that some of them be eliminated entirely and that others be combined with, shall we say, another agency or other agencies having jurisdiction in the general area. Has there been anything done toward reducing the great number of agencies that were required to report directly to the President?

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DR. ELSBREE: I frankly have not kept count on just what the results have been up to now. There has been some reduction. If all the recommendations of the Commission were followed out, there would be a very substantial reduction--to below 30, I believe.

But, frankly, in my opinion, that was to a great extent a very highly artificial point that the Commission made, because it primarily involved organizations like the Smithsonian Institution, and so on. How much time of the President does the Smithsonian Institution take? A great many of the cases were somewhat like that. So I think some of the consolidations that were to be effected under the Hoover Commission proposals would have been highly artificial ones, involving agencies that would still probably have functioned autonomously and that never took any, or took very little, of the President's time.

On the other hand, in terms of some 10 or 12 really significant independent agencies--the Federal Power Commission, the Interstate Commerce Commission, and so on--agencies that are independent of the President and which, it can be said, do not have to report to him, agencies with very substantial powers and which, to a very considerable extent, compete with other important departments and agencies, the Commission did not recommend that they be abolished, although it did recommend some redistribution of authority. It recommended that certain purely executive-administrative functions of some of these agencies be given to some of the Executive departments.

I don't believe that the Commission's claims as to the amount of the President's time that would be saved, and so on, were substantiated by its actual recommendations. I don't think very many real changes have been made by the changes that have gone into effect.

QUESTION: The President committed our troops in the Korean situation. That has been done before--in the Mexican border incident, I believe in Tripoli, and in Nicaragua. What is the fine dividing line between a state of war and the committing of American troops by the President? When does Congress step in and declare a state of war, and when does the President say, "We will send troops over"?

DR. ELSBREE: If you are interested in political science, you might want to read "The Relativity of War and Peace," written by an international lawyer, Dr. Fritz Grob. From reading a review of it, I gather that the whole book deals with collecting and discussing definitions of war.

Someone might say that the only thing that is war is the war that Congress declares. As you very well know, however, we can get what everybody else would call a war without a declaration of war by

Congress. In the whole field of the conduct of foreign affairs, the President is in a position, almost without question, to commit the United States to what is in reality a state of war, by actions which he can take independently of any declaration of war by Congress, and Congress eventually would have to call it such, or the United Nations or somebody else would have to call it such.

That is a question that has bothered a great many Members of Congress and a great many other groups of American citizens for a long time. It seems to me we can never answer it in terms of any constitutional provision, legal definition, or anything else. But the President, in his position as Commander in Chief of the Armed Forces and as head of the Government, conducting personally, or through his representative, the foreign relations of the United States, unquestionably has a tremendous authority in terms of foreign affairs.

I don't mean to say that the Congress is uninfluential even there. One of the things that the President, unless he is completely bereft of political and every other kind of intelligence, must know is what the influential members or the influential committees of Congress think on some of these moves before he makes them; otherwise, he might create a most intolerable situation. But even with that limitation, there is, strictly speaking, no boundary line, and unquestionably a President, by his actions, can put us into what really is a state of war that Congress has no alternative but to declare.

QUESTION: Suppose that Congress is not in session, and the President receives information that some country is about to make an attack against this country. Could he not order an atomic offensive without calling Congress into session?

DR. ELSBREE: I don't know who could countermand him. The Supreme Court might afterwards, as in the Civil War, say it was illegal; but Lincoln did not worry very much about that.

QUESTIONER: If we get into a really tight spot, it would not be required that Congress be called together and vote, "Yes; we are going into it."

DR. ELSBREE: That is right. There are many forms of hostility that are what might be termed nonbelligerent, I suppose. There are many such terms. Two I recall are "nonbelligerent hostility" and "nonhostile belligerency." But the President does not have to worry about definitions. All he would have to do is use his power as Commander in Chief of the Armed Forces, and there would not be any question about the legal status of it.

COLONEL BARNES: Isn't it reasonable to assume, in a situation like that, though, Dr. Elsbree, that the President would undoubtedly call in his leading congressional leaders before he made the decision?

DR. ELSBREE: Yes; unless he had to make a decision at once. Unless he were bereft of all political intelligence, the first thing he would do would be to inform Members of Congress what he proposed to do, and they would immediately have Congress take the necessary ratifying action--unless it happened to be a situation in which the country was terrifically divided. I can use the Mexican War as an illustration of a close case in which there was a very strong sentiment against it.

DR. HUNTER: Could I throw in a related question there? Our constitutional system, I suppose, has been devised primarily to meet the needs and conditions of peacetime. Then we find that once we get into an outright war, public opinion supports giving rather strong powers to the President, Congress makes those legal, and the President sometimes goes beyond them and acts according to the requirements of the emergency situation. It seems to me we are coming into a different kind of situation, as we have found in these postwar years, where it isn't quite war and it isn't quite peace, and there is quite a possibility that we shall continue, shall we say, on a semipermanent basis, or for some time into the indefinite future, that which is neither a state of war nor a state of peace. Now, is there any possibility of making an adjustment in our system of government so that we can cope with semiemergency conditions of a continuing nature?

DR. ELSBREE: It seems to me, looking at it historically, that one of the most astonishing features about the Constitution is that it has been capable of being adapted to, as John Marshall said, "the varying crises of human affairs." One reason, I think, why even very learned and historically minded people have, from time to time, been wholly misled about the direction our system of government is taking is that they have failed to realize how quickly we in this country can go from what is termed "executive dictatorship," or almost that, to a period of what looks like almost complete "legislative supremacy." It is a system in which, if there is popular sentiment behind him in a crisis or emergency, the President can get away with almost anything, in a sense, just because of his direct constitutional powers. If he has political backing, the Congress will vote him almost anything in an emergency and delegate wide powers to him. The combination of the things he can do under the war powers delegated by Congress and of the things he can do directly through his powers as President and Commander in Chief of the Armed Forces enables him to move very fast and to take very drastic action. And people looking at that will say, "Our constitutional system is gone! The separation of powers is gone!" Then suddenly comes the

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fall of 1945, and, although it was not the end of the emergency, as you say--we have never been out of the war legally--the about-face that our Government made in terms of its operation was really considerable. Yet it was the same Constitution, the same system of government.

It is tremendously flexible, and that is probably the only reason it survives. I think that if we were to try, as the Germans did in the Weimar Constitution, to set up some kind of emergency provisions, we would probably flub it much worse than we flubbed it just by having it work out as luckily as it did; that is, the constitutional distribution and intermingling of powers. The check-and-balance system our framers set up is not the rigid and arbitrary thing that many critics have called it. If it had been, I believe it would not have lasted 10 years. It certainly would not have lasted anything like the period it has. It is viable in the sense that we can have a very strong Executive, or we can have what is virtually legislative supremacy, or we can have almost a bureaucracy, but the channels are always open for a slapdown on one or the other if a public opinion arises that makes it seem desirable.

QUESTION: We have heard some talk recently about a preventive war. Before I came to this school I felt reasonably safe in believing that we could not have a preventive war because Congress would have to declare war, the people would have to know about it, and we would lose the advantage of surprise. But as I see it now, the President, the Chiefs of Staff, and the Defense Establishment could get together and say, "We are going to declare war on such-and-such day and such-and-such hour." No one would know about it outside those I mentioned, and the bombs would be dropped. True, Congress could say, "We do not agree with you," but the ox would be in the ditch and we would be in war. Is that possible?

DR. ELSBREE: Instead of answering your question immediately, I will say something that may seem quite irrelevant. The Supreme Court of the United States could declare null and void every law that Congress passes, and the whole government of this country would stop. The President could veto every law. Congress could refuse to appropriate any money at all for national defense purposes. Now I am getting a little more relevant. Congress could start today refusing to appropriate any money for defense purposes, and it could order all the atomic bombs destroyed. Then where could the President get anyone to drop the bombs?

I think the trouble with your question is that it is unrealistic. The whole temper of our governmental system is such that each of the agencies knows by long experience in dealing with the others and with public opinion that each has to be careful not to go too far ahead of what the others will do or stand for; otherwise, the President would simply be going down to fanatical suicide, just as, perhaps, the Japanese

RESTRICTED

Army did. The Japanese could do it there. In America the political temper of this country being what it is, and our whole system resting on the delicate balance of authority that it does, it is almost inconceivable that it could happen in the stark way in which you put it. Presidents just don't do things like that, and it is part of the American governmental system that they don't.

QUESTION: Doctor, you spoke about the bicameral system of the Federal Legislature. In the states, we have a miniature Federal system set up, although in one or two states--I think particularly of Nebraska--there is a unicameral system. Would it be possible in this country to have a unicameral Federal system by a joint resolution of both Houses of Congress, or would the Constitution have to be amended?

DR. ELSBREE: It would require a constitutional amendment. Two-thirds of each House of Congress would have to vote for the amendment, and it would have to be ratified by three-fourths of the states.

COLONEL BARNES: This is in connection with the judicial branch declaring unconstitutional laws that Congress has passed. I may be incorrect, but it is my recollection that the Supreme Court has at times stated, in support of such a decision, that such-and-such was not the intent of Congress, and, therefore, the law is unconstitutional. The Congress that voted for it says it was its intent; the Court says it was not. Who is to decide?

DR. ELSBREE: I cannot offhand think of a case like that. It may be that in the AAA case there was a suggestion that Congress could not really have meant to create a revolution in the distribution of powers between the Federal Government and the states.

Of course, usually where the constitutionality of a statute is questioned the talk is about the intent of the framers; the intent of Congress usually comes up when the Court is trying to construe a statute. The issue arises: How do you decide what was the intent of the framers or what was the intent of Congress?

Here are all these Members of Congress. You can look at the hearings, you can study the debates, and you can go all over the record with a fine-tooth comb. How can you say what was the intent of Congress other than by giving words a reasonable construction. The Supreme Court has disagreed on how much attention should be paid to intent in trying to do that. If the words are unambiguous, the Court usually says, "This is what they said. We are not going to go back of it." But where they are not free from ambiguity, or where, perhaps, the members of the Court are not free from wants and wishes about what Congress meant, then that can be tossed in as an argument, sometimes backed up fairly

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convincingly, but usually it is a tricky subject. I think it is usually a form of argument; it is a rationalization of a decision made on other grounds.

COLONEL BARNES: Doctor Elsbree, on behalf of the students and faculty, I thank you for a very instructive and entertaining talk.

DR. ELSBREE: Thank you.

(7 Nov 1950--350)S.

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