

RESTRICTED

65

THE FEDERAL GOVERNMENT

4 September 1951

CONTENTS

	<u>Page</u>
INTRODUCTION--Colonel E. E. Barnes, USA, Chief, Mobilization Branch, ICAF.....	1
SPEAKER--Dr. Hugh Elsbree, Senior Specialist in American Government and Public Administration, Legislative Reference Service, Library of Congress.....	1
GENERAL DISCUSSION.....	13

Publication No. L52-6

INDUSTRIAL COLLEGE OF THE ARMED FORCES.

Washington, D. C.

RESTRICTED

RESTRICTED

Dr. Hugh L. Elsbree, Senior Specialist in American Government and Public Administration, Legislative Reference Service, Library of Congress, was born in Preston Hollow, New York, 24 February 1904. He was graduated from Harvard (A.B. 1925, M.A. 1927, Ph.D. 1930) and was Sheldon Travelling Fellow, Paris and Geneva (1927-1928). He has been an instructor in Government at Harvard University (1928-1933); research specialist, Federal Power Commission (1934); assistant professor of Political Science, Dartmouth College (1933-1937); professor of Political Science (1937-1943); chairman, Department of Political Science (1937-1941); principal business economist, Office of Price Administration (1943-1945); administrative analyst, Bureau of the Budget (January 1945 to November 1945); research counsel, Legislative Reference Service (November 1945 to July 1946); and Senior Specialist in American Government and Public Administration, Legislative Reference Service, the Library of Congress (July 1946 to present). He has also been a lecturer and adjunct professor in American Constitutional Development and Constitutional Law, American University (1945-1949). He is affiliated with the American Political Science Association, Phi Beta Kappa, and with the American Society for Public Administration. He is the author of "Interstate Transmission of Electric Power," Harvard University Press, 1931.

RESTRICTED

RESTRICTED

67

THE FEDERAL GOVERNMENT

4 September 1951

COLONEL BARNES: By this time you have undoubtedly discovered that the job of managing the national economy during wartime by the Federal Government is a job of tremendous magnitude. You have also seen that it is a job that is handled not only by many of the old-line departments and agencies in part, but also by a number of emergency agencies that are created especially for that purpose. We feel that a start toward an understanding of how this job is handled is best approached by an examination of the Federal Government as a whole.

Our speaker this morning, Dr. Hugh Elsbree, is particularly well qualified to discuss the subject with you. He is the Senior Specialist in American Government and Public Administration in the Library of Congress.

Dr. Elsbree, this is the third straight year that you have honored us by coming over here to discuss this subject with us. I know that the class is in for a stimulating talk. It is a great pleasure to welcome you back and to introduce you to this class. Dr. Elsbree.

DR. ELSBREE: Colonel Barnes, members of the faculty, and gentlemen: To those who have to listen to me for the third straight time, I apologize. To those of you who are listening to me for the first time, I apologize. I confess I do not understand all the ramifications of the Federal Government. I am afraid that there are very few of them that I understand well enough to describe.

The aspect of our National Government which I will emphasize this morning is the interrelationship among its various branches--the legislative, executive, and judicial departments. I shall not touch at all on the federal nature of our governmental system, that is, the division of powers between the Federal Government and the States; and I shall deal only incidentally with the internal organization and workings of the legislative, executive, and judicial branches.

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 had concluded, every man who attains power is prone to abuse it. Madison, in the fifty-first

RESTRICTED

RESTRICTED

Federalist Paper, stated the fundamental problem of constitution-making 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 most significant "auxiliary precautions" for the control of government under the proposed Constitution was the method of distributing powers among the three departments--the legislative, the executive, and the judiciary. The dominating idea was not to provide a rigid separation of 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 would be achieved, if at all, only, to quote again from Federalist Paper No. 51, "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." 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 is better described as a system of checks and balances than as a system of separation of powers.

RESTRICTED

The idea of mixed government, or of separation of powers, most commonly associated with Montesquieu, is an ancient one and 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 chiefly concerned with devising 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 Convention. Legislative supremacy had become associated with paper money, repudiation of debts, and other "democratic excesses." Many of the framers would have subscribed to Jefferson's comment, to the effect that "One hundred and seventy-three despots would surely be as oppressive as one." Moreover, 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 most of the framers 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. In keeping with the first principle, 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

RESTRICTED

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. The President, of course, was given no part in the selection or removal of members of the Congress.

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.

In conformity with the principle of giving each branch some part in the exercise of the powers of the others, the President is 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 in 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.

The judiciary is not specifically given any share in the power 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

RESTRICTED

RESTRICTED

71

the bicameral system to provide, among other things, a check against the legislative tendency to subordinate the other departments.

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, either because there was a tie or because there was an absence of a majority. 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 vs Madison*. It was a verbal assertion, however, and, regardless of its later significance as a precedent, it did not at the time mark a triumph of the judiciary over the other branches. 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. In his famous book, significantly called "Congressional Government," appearing in 1884, Woodrow Wilson stated flatly that ours was a system of congressional 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 World Wars I and II, 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.

RESTRICTED

RESTRICTED

Congress has created, however, a number of so-called "executive departments" and a much large 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 distinct from the Presidency and 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 is not very important. What is important, however, is the fact that the "executive branch" in the broadest sense is not the same sort of institution as the judiciary and the Congress. If Congress, in passing laws, simply left them to be executed by the President in whatever manner he saw fit, the executive branch of the Office of Chief Executive would be 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.

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 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 President 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, or the past one, should disabuse anyone of the idea that the legislative branch has become a "rubber stamp." The independence of Congress is all the more impressive in that both houses are controlled by the President's party, and we are engaged in "hostilities," though not with the nations with whom we are technically in a "state of war."

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

RESTRICTED

the laws are faithfully executed, the Congress has, from the beginning, felt free to determine the manner in which the laws should be administered. In a recent veto message President Truman expressed concern over what he termed a gradual trend toward more and more congressional participation in the actual execution and administration of the laws. "Under our system of government," the President asserted, "it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch..."

What the framers contemplated may be subject to dispute. In terms of practice, however, the extent of congressional control over administration has been no less remarkable than the extent of executive influence on legislation. Note how varied and far-reaching this control is.

1. With the exception of certain powers that derive directly from the President's constitutional position as Chief Executive and Commander-in-Chief, the powers of the executive branch are granted by the Congress and may be amended or abolished by it. Moreover, the growing practice of establishing a fixed termination date for delegated authority enables Congress to sidestep the President's veto power. Note also that the scope of administrative discretion is determined by the standards prescribed by law. Standards can be so general as to leave the job of legislating, for all practical purposes, to the agencies; or they can be so detailed and specific that virtually no discretion is left.

2. A number of devices have been developed to give the Congress some degree of formal participation in the exercise of administrative discretion. (Of course the Constitution itself provides for participation by the Senate in the case of treaties and appointments.) In certain instances, for example, Presidential reorganization plans and reciprocal trade agreements, provision has been made for the exercise of congressional veto. In other instances, as in the case of the military real estate bill recently vetoed by the President, approval of congressional committees has been required for specified administrative actions.

3. Congress can largely control the form of organization through which the laws shall be administered. First of all it decides what agency or agencies shall administer a law. It may vest administration in the President, in agencies within the Executive Office, in departments or department heads, in bureau heads or other subordinate officers or units of departments, in nondepartmental executive agencies or boards, or in so-called independent boards or commissions. Second, it can determine, in whatever detail it chooses, the internal organization

RESTRICTED

of executive departments and agencies. It may leave the internal organization of a department largely to the department or agency head, or to the President, but it has at all times the power to prescribe it by statute.

4. Congress has an important part in determining who shall administer the laws. Some Presidential appointments must be confirmed by the Senate. With respect to inferior officers, Congress may vest the appointment in the President alone, in the courts of law, or in the heads of departments. Through the civil service laws, however, it continues to exercise a considerable influence even where senatorial confirmation is not required. Where confirmation by the Senate is required, the practice of senatorial courtesy (courtesy of the Senate as a whole to the senator or senators from a state in which an office is to be filled) has led to a situation in which, to a very considerable extent, many appointments are virtually made by members of the Senate, and sometimes even by members of the House.

The Congress has a more limited influence on removals from office. Negatively, on the basis of *Myers vs. the United States* and *Rathbun vs. the United States*, it can limit the President's power to remove those officers whose duties are primarily quasi-legislative or quasi-judicial. It can, however, through investigations and other means, bring strong pressure to bear to secure the removal of any officer.

5. Agencies must, for the most part, secure their funds from annual appropriations by the Congress. I need not elaborate on the vast reservoir of controls and influences, formal and informal, direct and indirect, which go with the control of the purse. Statutory authority without funds is useless, and the amount of appropriations made, the degree to which they are itemized, and the conditions attached to them affect vitally every phase of administration.

6. Procedures through which administrative agencies administer their programs can be controlled by law in such detail as Congress deems desirable.

7. Virtually all internal management operations, or housekeeping functions, can be as rigidly controlled by law as Congress desires. This applies to personnel policy, fiscal procedures, property management, contracting, etc.

8. Through its investigative authority Congress possesses another powerful weapon over virtually all aspects of administration. Investigations of administrative agencies may be conducted by the substantive standing committees, the committees on expenditures in the executive departments, and by special or select committees. In

RESTRICTED

RESTRICTED

75

several instances--for example, atomic energy, foreign economic cooperation, labor legislation, and defense production--joint "watchdog" committees have been established by statute to supervise administration of the laws.

9. In addition to the above, an untold amount of control and influence over administration is exerted through personal intervention of members of the Congress, in one form or another.

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 has been reduced to a minimum of congressional usage, sanctioned, with few exceptions, by the courts.

Incidentally, one of the most surprising features of congressional control over administration is the extent to which political scientists and students of public administration have neglected systematic study and analysis of it. For instance, in textbook after textbook on American national government one finds scattered brief remarks on various specific methods or forms of control, but never anything approximating an adequate general picture.

But in spite of its 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 this in a derogatory sense. It is just beyond human ability to do the job. The task is overwhelming, given the range and complexity of government operations, the number of employees, and the expenditures involved. 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."

It is, however, not only the Congress which 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, however, in certain respects, the uncertain scope of the "executive power" in terms of direction and control

RESTRICTED

RESTRICTED

of administrative policy, and the great prestige of his position as Commander-in-Chief, 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 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 emphasized the weakness of the Presidential office with respect to the control and direction of administration.

It follows that legislative-executive relations in the field of administration cannot be described in terms of the relations 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. And now and then, I think it is safe to say, the departments and agencies are to be found 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. This is one of the leading characteristics of the American system of 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 is continually protesting "encroachments" on its authority by the other branches. Generally, the balance is probably tipped in favor of the "bureaucrats" if only for the reason that their operations are on such a colossal scale that only a relatively small proportion can be checked; but if they are the despots they are sometimes said to be, they have a right to think that despots lead a precarious existence.

Turning for a moment to the judicial department, it has acquired unexpected prestige. Though subject to the other departments with respect to appointments, and in many important 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--note, for example, 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

RESTRICTED

RESTRICTED

veto, cannot be overcome simply 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 amount of discretion. According to one former justice, the court's task is simply to put the Constitution down, then take the statute and lay it on the Constitution, and see if they fit. This may be good judicial argument, but it is woefully weak as description. Judges, in fact, 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 commerce clause, the due-process clauses of the Fifth and Fourteenth Amendments, the contract clause, and the whole question of appropriation authority, are extremely indefinite and judges generally have a wide discretion in deciding whether or not a given Federal or State statute conforms 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 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. Notable illustrations involve the early interpretation of two very important acts--the Interstate Commerce Commission Act of 1887 and the Federal Trade Commission Act. The court, time and again, reversed the interpretations of those laws by the Interstate Commerce Commission and the Federal Trade Commission, respectively; and for a long period of time there was a question in the minds of some whether those agencies were doing anything at all other than serving as primary courts which the regular Federal courts very frequently reversed on appeal.

The judicial 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 interpreted by the courts, this constitutional safeguard has meant much more than a fair procedure. Courts have looked also to the fairness of the result and have reversed the decisions of administrative agencies

RESTRICTED

RESTRICTED

as being "confiscatory" or "unreasonable" 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 which 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 the relations of the so-called "independent regulatory agencies" to the President, they are not independent of the judiciary. Their interpretations and rulings 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 before. 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 of the parts 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, in each of which 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, but it has 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 the present system or the various types of reform proposals. The indications are, however, that only minor changes will be made for some time to come. This is due in part to the difficulty of making drastic changes. But it is due primarily, I believe, to the fact that the idea of checks and balances

RESTRICTED

RESTRICTED

79

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 nation prizes more highly than we do 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.

DR. REICHLEY: Can you describe to us what the powers of the President are in relation to the reorganization of the executive department and its relationship with Congress?

DR. ELSBREE: That is a difficult question to answer, and I cannot answer it in just one way. There are certain powers of organization and reorganization which he may undoubtedly exercise through his direct constitutional powers. That is, that part of the executive power which is given to him by the Constitution he can organize as he sees fit. But that is a small proportion.

Now, other than that, his power of organization or reorganization is highly dependent on the authority granted him by Congress, or on the amount of discretion left him by Congress. If the Congress is passing a law, for example, says that the President is given the authority to do such-and-such and says no more, then the President can have that power exercised by the President's Office, the Executive Office, or by any other agency. Let us suppose that he creates an agency in the Executive Office. He can then transfer that power later to the Department of State, to the Defense Establishment, or anyone that he sees fit.

If, however, the authority is delegated directly by Congress in a statute to the Department of State, then the President cannot redelegate that authority to any other department. Or if the Congress prescribes the organization of the Commerce Department, then the President cannot reorganize it, nor can the Secretary of Commerce.

Of course, Congress has from time to time passed general statutes delegating a rather broad reorganization authority to the President; I assume that this is what you refer to particularly. There is no permanent legislation giving the President power to reorganize. But from time to time, in fact, five times in the last twenty years, Congress has passed a statute with a time limit, usually two years, delegating authority to the President within certain specified limitations to submit reorganization plans to the Congress. Those

RESTRICTED

RESTRICTED

statutes have varied. Under the present one a reorganization plan doesn't become effective if either house of Congress votes it within sixty days. There is always some limitation.

That is not a very clear answer to your question, but it is complicated by the form in which Congress makes the original delegation. Congress can divest the President of almost all reorganization authority if it wants to, or it may grant it to him in the broadest terms.

QUESTION: What is being done on the reorganization of the Government along the lines laid down by the Hoover Commission?

DR. ELSBREE: Congress, the President and department and agency heads, partly through action that could be taken by the president and agency heads without statutory authorization partly through his delegated authority, whereby the President can submit reorganization plans, partly through direct legislation by Congress--in these ways Congress and the executive branch together have put into effect a very considerable number of the three hundred or more recommendations of the Hoover Commission.

There have been various estimates made as to what the percentage is. It is probably more than half. I don't think that number means too much. But there have been many reorganizations made which are intended to carry out the recommendations of the Hoover Commission, sometimes in a modified form.

With respect to a number of the important areas no action of any consequence has been taken; and there has been less action in this session of Congress than in the two preceding sessions, mainly, of course, because of the press of the national military program.

It would be difficult to go into the statistics as to what has been and what has not been accomplished by the several hundred changes that have been made. Some are very minor, and some involve detailed procedures, like the internal organization and operation of agencies. Others involve rather substantial transfers of authority.

I don't know whether that satisfies you or not. I could go into more detail in any specific area that you want me to.

QUESTION: Notwithstanding the fact that the laws that are legislated are designated as being administered by various agencies as they exist, in the final analysis isn't it true that the judiciary interprets the law and sees that it is carried out in the manner prescribed?

RESTRICTED

RESTRICTED

81

DR. ELSBREE: Generally speaking, I think the answer would be yes; that the judiciary almost invariably has the authority at least to rule on the correct construction of a law. However, in administrative practice the rulings of the administrative agencies on minor points of operation are not disturbed by the courts. But there is no final authority in the hands of the administrative agencies to define the limits of the powers which have been delegated to them. That is the function of the judiciary.

QUESTION: How was it that the National Recovery Administration was allowed to operate for a period of approximately five years, after which time it was declared unconstitutional?

DR. ELSBREE: Well, I think it actually operated two years. But the point is that the Supreme Court will not take the initiative in passing upon the constitutionality of a law. It will not even pass upon the constitutionality of a law if an opinion is requested, let us say, by Congress or by the President. It will pass on the constitutionality of a law only when it finds it necessary to do so in deciding a case or controversy properly brought before it. So in almost all cases it is quite a long time, because the case will come to the Supreme Court only as the last court of appeal.

In this case there were protests made against some of the rulings of the NRA fairly early, but a two-year period transpired before those cases got up to the Supreme Court. It then held that the law had never been constitutional and could not be enforced.

QUESTION: In such a case does the constitutionality of a law have to wait for the final decision of the first case that is brought before the Supreme Court?

DR. ELSBREE: Absolutely. There is no guarantee that because a law may eventually be declared unconstitutional, you don't have to obey it.

QUESTION: In furtherance of a previous question, is there any action that has been taken or is contemplated reducing the cost or expediting the movement of judicial action? By that I mean, similar to the Small Claims Court in New York State, whereby these quasi-judicial actions of the agencies could be immediately taken into court, particularly in those cases where very patently they are unconstitutional or contrary to previous court decisions. Has any action been taken in that regard?

DR. ELSBREE: Well, of course, special courts have been set up to deal with certain questions. But when constitutionality is involved, then under our judicial system the Supreme Court must have

RESTRICTED

RESTRICTED

82

the opportunity of passing on it if an appeal is made. Under our constitutional system you can't take constitutional questions out of their regular course.

QUESTION: If I may go further: I wasn't talking about constitutionality decisions as such, but of a small claims court where that action on the constitutionality of a rule by an administrative agency which affects an individual who cannot afford an appeal may be decided.

DR. ELSBREE: I frankly don't know how much thought has been given to that. There have been all sorts of proposals made about reforming the system. Of course, more and more the emphasis has been to give more finality to the decisions of the district courts in these minor cases; or, where an appeal is taken to the Supreme Court, to refuse to take it on certiorari. But whether much thought has been given to reorganizing the Federal system on questions of constitutionality entirely and setting up a new system, frankly, I don't know.

COLONEL BARNES: I would like to ask a question along that general line. I have seen Supreme Court decisions on constitutionality where the phraseology of the decision said: "It was not the original intent of Congress to do such-and-such" in order to explain their decision. How does the Supreme Court go about finding out what the intent of Congress was several years ago? Do they call the congressmen and ask them what they were thinking?

DR. ELSBREE: That is a very good question and one of the most baffling ones in constitutional law. There is no one answer.

The Supreme Court usually follows the rule that it will not go into the question of intent if the statute is relatively free from ambiguity. That is, if the words seem reasonably to mean A, then, regardless of what somebody says to the contrary about Congress having meant B, the Court will not consider B. In other words, then it is A; that is, if Congress intended something different, it didn't say so. So that the problem is narrowed down to those points on which there is substantial ambiguity. That is quite a substantial number of cases, of course.

Now, in trying to arrive at Congress's intent, there are many guide posts. There are the factual circumstances and conditions which led to the legislation. Sometimes the hearings will be looked into, the discussions. There are the committee reports and the debates. All such evidence is examined. The whole legislative history of the statute will be gone into to see if the intent can be derived from it. Of course, it is a very difficult question, because in reality there is no such thing as "Congress" in determining intent--there are only congressmen.

RESTRICTED

COLONEL BARNES: They don't bring the congressmen in and ask them what they had in mind?

DR. ELSBREE: No they don't. But the situation that confronted Congress when it initiated that legislation and the debates that were held will often decide it.

QUESTION: This question deals with only one small facet of this particular program, but I think you are particularly well qualified to answer it. Over the last twenty years or so various government agencies have picked up new duties and new missions. Can you give us a little description of the position of the Library of Congress in the governmental structure? I am thinking particularly about its organization and missions.

DR. ELSBREE: That is a little embarrassing for me to answer, because, as a matter of fact, I know very little about the mission of the Library of Congress generally. I am in the Legislative Reference Services, which is a department of the Library of Congress, of course; but we have not too much to do with the normal operations of the Library.

As the Legislative Reference Service we are designed and authorized--it used to be by appropriation language, but now it is by the Reorganization Act of 1946--to provide various types of information and reference assistance, staff assistance, and so on to Congress. We have no formal functions with respect to the rest of the government departments. Of course, we do provide some assistance, now to this executive agency and now to that, but as a courtesy only. Our statutory function is to serve Congress.

We are only one department of the Library. There has been a considerable question over a period of time as to precisely what are the functions of the Library of Congress, because they are nowhere gathered together in a single statute. They have grown up partly through appropriation language. Some of the Library's collections were primarily designed for the use of Congress. Then it has over a period of time, by accretion, become the National Library of the United States, in a sense, to serve the public, as it now does to an enormous extent. It also, of course, performs an immense amount of service for other departments.

It has under it the Copyright Office. That is a more or less separate branch of the Library. The Library has performed other special services for many years, which often, as I say, have been developed through appropriation language. There is no general statute prescribing exactly what its functions shall be. The Librarian has for many years been trying to get some clarification of what they are. They are derived from scattered statutes and appropriation

RESTRICTED

language; so it is most difficult to determine the balance between being the National Library of the United States and the Library of Congress.

The Legislative Reference Service itself unquestionably has as its number one function to serve directly as a reference agency for Congress, not of Congress, because we are not employees of Congress. But the whole point of it is to have an impartial fact-finding reference agency which would not attempt to influence policy. We are under a statutory obligation not to attempt to influence legislative policy. We are a fact-finding reference agency only.

I could go on and give you a lot of odds and ends about the functions of the Library of Congress, but I am afraid that Dr. Evans might think I have neglected a lot of important things. I don't mean to neglect anything. Legislative Reference is only one of the several important units of the Library.

COLONEL BARNES: Suppose that a congressman was going to make a speech. Could he call up the Legislative Reference Service and say: "I want a lot of meat dug up for me on this point and that point?" Do you do such legislative reference work as that for congressmen?

DR. ELSBREE: Yes. By saying that we are the legislative reference agency for Congress, not of Congress, I mean that we are not employees of Congress. But our work is supposed to be all for them--either for the committees of Congress or for the individual members.

QUESTION: In reading various speeches I got the impression that some treaties are made by the State Department and some made by Congress. Does the actual authority exist in Congress to make treaties?

DR. ELSBREE: Well, technically, no. Technically a treaty can only be arrived at in one way. It has to be negotiated by the President or in the name of the President by the Secretary of State or some special commission or what not. Then, in order to become the law of the land, it must be ratified by two-thirds of the Senate.

Now, the dualism that you speak of, whereby a great many international agreements are arrived at without the intervention of the Senate or Congress directly, is due to the use of the device called the executive agreement. There is no clear-cut definition of what can be done by the formal treaty process and what can be done by the President or the State Department without getting the approval of the Senate. As time has gone on, more and more of these executive agreements have been made. There are thousands of them. Many are made each year.

RESTRICTED

The Supreme Court has had the issue tossed up to it several times. Sometimes the contention is made by some party adversely affected by the enforcement of the American governmental authority under an international agreement that the regulation cannot be enforced, because the Senate did not ratify it and therefore it is not a constitutionally adopted treaty. But the courts so far have refused to hold unconstitutional any one of these agreements.

So the whole constitutional issue appears to have been tossed into the lap of the political authorities. The courts appear to regard it as a political question. Since Congress cannot engineer enough political strength and pressure to require the Executive to have it go through the treaty form, the courts will observe whatever type of agreement is arrived at.

Of course, historians recognize the system of checks and balances, where the Senate was by the framers of the Constitution given a voice in the treaty-making process. But, as our international relations became more complicated with this tremendous variety of subjects, many of them involving minute detail, and as experience demonstrated the difficulty, frankly, of getting treaties through the Senate, with the two-thirds rule and with all the endless debates in the Senate, obviously the Executive's use of this agreement type of negotiation has become greater and greater.

To further complicate it, when an appropriation is required to make a treaty effective, the House of Representatives also enters into the picture. So actually the voice of Congress in international affairs has in some respects been increased as Congress has taken more seriously its use of its appropriating authority in carrying out a treaty.

It is a tremendously confusing area. As our international operations expand, nobody wants to be out of the picture. It is too important. So everybody tries to get into it. The courts, though, have been very wary of getting in too much. They have pretty much said, "Well, these are political questions." They generally sustain whatever form of action has been taken by the other two branches.

QUESTION: What is the nature of the Supreme Court's refusal to declare any of these agreements unconstitutional? Is it by refusing to review the case?

DR. ELSBREE: Are you referring now to any particular case?

QUESTIONER: You said some of these international agreements have been brought to the attention of the Supreme Court and there was

RESTRICTED

no declaration made as to their unconstitutionality. I just wondered what type of review the Supreme Court gave.

DR. ELSBREE: There have been a great variety of cases. In general the courts have held the position that the conduct of international affairs is peculiarly an executive function. They have held in no case that there was necessity for the agreement to have been submitted to the Senate for ratification. The greatest reliance, I would say, in these cases has been on the peculiar role of the Executive in the conduct of foreign affairs, and on there being no clearly specified constitutional definition of when the treaty form must be used.

QUESTION: But did they review the case, or did they say there was no since in making a decision?

DR. ELSBREE: I think that in most of the cases the construction of the lawyers would be that they have taken jurisdiction, but have in essence ruled that they were political questions, and that therefore they did not in a sense have to decide the question, or have sustained the executive action. But I am not familiar enough with the recent cases to be able to give an authoritative answer.

QUESTION: We have noted the observation made here today that the responsibilities and authorities of the legislative, the executive, and the judicial branches are characterized by gray areas, by intermingling, by lack of clear-cut provisions which can be easily understood. Of course, history in the past is replete with the most bitter debates between members of Congress with reference to these authorities and responsibilities. That is number one. Number two, we have noted the fact that the Supreme Court in the absence of a case brought before it to be decided with respect to constitutionality will take no action. Third, we have noted that the time required by the function of getting the Supreme Court's decision, even when a case is brought before it, is substantial. This would add up to the impression that we are in a poor position to take positive action expeditiously. This would add up to the impression that we might not be in a very healthy state with respect to facing the emergency conditions in this day and age, when time is more than ever critical and of the essence.

However, isn't it true, and can't it be supported, that the very fact that there is this gray area in this system of checks and balances, the very fact that there is this absence of a quick decision with respect to constitutional interpretation, does give to the Executive the right to take expeditious action to accomplish his purpose when the emergency calls for it? Even if he were faced with the absence of emergency legislation and emergency powers,

RESTRICTED

RESTRICTED

87

would not history support that course of action, because otherwise we would be faced with a rather dreary prospect?

DR. ELSBREE: I think so. I mean, my own opinion as a student of government would be that on the whole the framers probably were right. I don't mean right so much as successful. At least, we have worked with what they gave us with relative success.

In spite of what has seemed to many students of government an excessive attention to limiting the powers of those who govern by all these checks and balances, we have found also that we have set up a government that can do things efficiently. Undoubtedly, I believe, it is because the framers did not define too sharply the responsible areas of the three branches. But, either by intention or by action, the paramount power has been captured by the departments of the Government that wanted to establish it and use it and that had the ability to get it and use it.

It may very well be that that kind of--I hate to use this word, because the word nowadays has a bad connotation in the economic sense at least--laissez faire within our Government is what has made it possible for a strong President, confronted with what he thought was an emergency situation, to do what he thought had to be done, within reasonable limits, of course. He is limited.

There are other times when the President has not wanted much to govern, or has not had the ability to capture support, when the power has gone to strong cliques or groups of congressmen.

But it is very difficult to strike that kind of balance. I am not one to say that we will ever strike it perfectly. I don't mean that at all. But certainly I do not mean to create the impression that with all these checks and balances we cannot move.

QUESTION: Is it indicated that a considered effort should be made to perhaps remove or diminish some of the checks and balances that were set up originally by the framers of the Constitution in order to permit the departments of the Government to function more freely and perhaps expeditiously?

DR. ELSBREE: I think I answered the other question a little bit more directly than I ought to have. I said a few moments ago that I am not supposed to advocate any kind of policy. I guess I am supposed to have opinions, but I am supposed to keep them to myself. That was too broad a question.

Of course, anybody could argue that there are certain changes which ought to be made. Probably there isn't much agreement on

RESTRICTED

RESTRICTED

which ones ought to be made. The only thing that I feel very sure of is that we are not very likely, in the foreseeable future to have very drastic or fundamental changes. Whether we ought to or not I will pass on to someone else.

QUESTION: Returning to the question of international agreements again, does the Senate or the Congress have the right to repudiate any agreement, such as the one made by the President at Yalta, for instance?

DR. ELSBREE: They have the right to repudiate them, but I will answer that the effect of that repudiation in international law would not be the same as its effect upon domestic law. Repudiation would not necessarily affect our international obligations. But if Congress should pass a statute saying that no agreement made at Yalta and so on was to be any part of the law of the United States, or shall not in any respect be enforceable through the domestic law, and if the President signed it or if it were passed over his veto, then I think there would be no question but that, as far as the domestic law was concerned, the will of Congress would govern. In our system there is no paramountcy as between a treaty and a statute except as a matter of chronology; the later supersedes the earlier.

QUESTION: In a group such as the one you belong to, which must consist of intelligent, thinking men with opinions of their own, how is it possible to insure that the facts gathered and submitted to congressmen are true and unbiased and present an untinted picture of the situation?

DR. ELSBREE: That is a very nice question. One short answer to it would be to say that we don't, but we think we do pretty well. Do you mean, how do we recruit the people who do it?

QUESTIONER: No. How do you control the procedural features of it?

DR. ELSBREE: Procedurally we have not experienced too much trouble. An effort is made to have someone who has some familiarity with the subject matters covered in a report, go over it in great detail, not so much for the technical content of the report as for the presence of any semblance of political bias or other bias; in other words, to see whether they have made as far as possible an objective and impartial presentation. Then, of course, the administrative officers who clear our reports watch particularly for that type of bias. The present director and assistant director have had many years experience in dealing with the congressional committee and members of Congress and it is pretty hard to put anything over on them.

RESTRICTED

RESTRICTED

89

Many times, too, in presenting the material our people check very carefully for accuracy of information with the executive departments or agencies, who have people who can specialize to a greater degree than we can. Then such weight will be given to their comments as is found right in the case.

Those are some of the techniques that we use. I don't know whether that goes very deeply into it or not.

QUESTION: Would you please repeat what you said regarding the power of the Executive to adjourn sessions of Congress.

DR. ELSBREE: He can, of course, call special sessions; but the other dates are set. He has no power to keep Congress from meeting. He can adjourn them only in the case of disagreement between the two houses.

QUESTION: You said he can adjourn Congress if they disagree. Under what conditions does that take place?

DR. ELSBREE: The only time he would do that is when there is a real possibility, such as there is sometimes, that they might just never be able to agree on the adjournment date.

DR. REICHELLEY: I would just like to point out, in regard to the question in relation to Executive agreements versus treaties, and the other question, as to whether the Government is capable of direct action and quick action in an emergency, that we will have a lecture later on in the year on the war powers of the President, which will go into that in more detail. I think then you will get some more answers on those two subjects.

DR. ELSBREE: And undoubtedly by someone who knows a lot more about it than I do.

COLONEL BARNES: I think you have convinced us that you know everything that you were supposed to know. We enjoyed your talk very much. It is going to help us a lot. Thank you very much.

(24 Oct 1951--650)S./mmg

RESTRICTED

