Current Legal Periodicals

Constitutional Aspects of the Truman Civil Rights Program. By CHAS. WALLACE COLLINS. 44 Illinois Law Review: 1-12.

When on February 2nd, 1948, President Truman asserted federal jurisdiction over the civil rights of individual persons throughout the United States, he precipitated a conflict that involves the fundamental question of the nature and form of the United States system of government. The term "civil rights" does not appear in the Constitution but it has frequently been judicially interpreted, and an analysis of the cases indicates that it embraces those intimate relationships and contacts in the daily life of the individual person in his struggle for existence, in the pursuit of happiness, in sickness and in health, under the protection and restraint of his government.

The civil liberties enjoyed to-day are inherited from the English people, who fought and won them in the Magna Carta, the Petition of Right and the Bill of Rights, and the Declaration of Independence is a complaint against the abuse of these civil rights by the Crown. Each colony, upon becoming an independent state, preserved and protected the civil rights of its citizens under its written constitution. When the States met in the Constitutional Convention of 1787 their chief concern was the preservation of control of their own internal affairs and to delegate to the central government only those powers that were deemed necessary to enable it to perform the functions of a central government, which were beyond the powers of a single State, such as military operations, foreign affairs and public finance. Even after the Constitution had been ratified, many still feared that the Federal Government might invade their internal affairs, and the First Congress drafted and submitted to the States the first ten amendments, collectively known as the Bill of Rights, which were forthwith ratified, and which confirmed to the States the residue of power not delegated to the United States by the Constitution. In 1947 the Supreme Court in *Adamson* v. *California* upheld a long line of decisions to the effect that a State

was free "within the limits of the due process clause" to abridge the privileges and immunities flowing from State citizenship. This was in accord with the Constitutional doctrine of federalism by leaving to the States the responsibility of dealing with the privileges and immunities of their citizens, except those inherent in national citizenship. As far as the Constitution is concerned, the Supreme Court and the legal profession generally consider it settled law that the Bill of Rights is a limitation on the Federal Government only and not upon the States, that the Fourteenth Amendment has not altered this, that Congress has no power or jurisdiction over the violation of the civil rights of an individual person by another individual person in which a State has no part, and that Congress has no power to legislate on these rights but they must be asserted and vindicated in the courts of law by the person aggrieved.

The civil rights programme of legislation can only be attributed to President Truman in the sense that he has caused it to be formalized and has adopted it as his own. Such measures as full employment, non-segregation of negroes and anti-poll tax laws have been advocated by various unions and ethnic organizations for many years. When the President appointed his committee on civil rights he gave three reasons for this action, the necessity

(1) to preserve the civil rights guaranteed by the Constitution;

(2) to prevent individuals from the injury of other individuals; and

(3) to take all possible steps to safeguard civil rights.

As to (1), the constitutional guarantee of civil rights is a matter of State protection. As to (2) the Federal Government has no authority to concern itself with the private conduct of individuals where no action by the State is involved. As to (3) the Federal Government cannot concern itself with the question of safeguarding the civil rights generally of persons within such States. It would appear therefore that the President had no authority to appoint the committee to consider those questions of civil rights that under the Constitution are solely under the jurisdiction of the States.

The report of the committee is in part propaganda and in part a desperate attempt to find a way to overthrow or evade existing decisions of the Supreme Court. The argument runs through the report that although the American Government is dedicated to the democratic way of life where all are equal and should have equality of treatment by government and by individuals, this principle is being violated, particularly in the South,

and that it is time now to reconsider the whole question of civil rights with a view to understanding the causes of prejudices and stamping them out. To this undertaking, it says, only the national government is competent to come forward.

The committee recommended the enactment of thirty-four separate pieces of federal legislation, including an anti-lynching law, an anti-poll tax law, an enlarged FBI, and a permanent Federal Civil Rights Commission.

Throughout the so-called Truman programme there runs the fallacious assumption that certain groups of persons in the United States are not in possession of fundamental civil rights and that these rights should be bestowed as a boon from the Federal Government. The duality of citizenship is ignored. The citizens of a State all have equality in civil rights and these rights are protected by the due process and equal protection clauses of the Constitution. In national citizenship each has the same privileges and immunities.

Within the last few years many people have come to look to the Federal Government for the satisfaction of all their needs and desires, for protection from the cradle to the grave. The "democratic way of life" has become a moral concept denoting a rule of conduct of the individual, as well as a form of government. This movement to change the fundamental nature of the United States government by evasion, subterfuge, indirection and emotionalism bids fair to become one of the chief political issues before the country. It is not a local or regional question. It is a question of the survival of the Constitution. (J. F. FUNNELL)

Alcoholism: Self-Inflicted Injury or Disease Under Disability Provisions of Insurance Policies. By BEATRICE G. LEFCOURT and WARREN FREEDMAN. 23 Temple Law Quarterly: 39-62.

This article is a discussion of American decisions on the effect of disability from alcoholism under an insurance contract.

Disability policies generally provide for waiver of premiums and monthly payments to the beneficiary when the insured has become totally and permanently disabled by reason of bodily injury or disease that prevents the insured from engaging in any occupation for compensation or profit. Many include a clause that they shall not be effective if the disability of the insured results from self-inflicted injury. The question is whether alcoholism falls in the category of self-inflicted injury or in that of disease. The article deals only with the chronic alcoholic, a

person who has developed a bodily or mental disorder as a definite consequence of an extended period of heavy drinking.

In the first case of this nature before it the Supreme Court of the United States (1943) held that, since the insured, a doctor, knew the consequence of his drinking and of drug addiction, his disability caused by overindulgence was self-inflicted. The insured must have realized the probable consequences of his drinking. Such opinions would label alcoholic disability self-inflicted and by relation back penalize the insured for taking his first drink.

The court made no effort to understand scientific categories and characterized the alcoholic as "An immoral creature hell-bent upon self-infliction". A chronic alcoholic intends to drink intoxicants but not to bring about the condition known as chronic alcoholism. It is not inevitable nor even probable that an excessive drinker should become a chronic alcoholic. Unless there is medical and psychiatric thinking on the subject courts are apt to take the hard road, and not necessarily toward justice.

The contract is intended to protect the insured against fortuitous events and the risk should not be subject to the control of the parties nor should the insured be allowed to profit by his own wrong. Chronic alcoholism is not a risk purely within the control of the insured. It often results from childhood influences of dominating parents who take puritanical attitudes and not from any intent to inflict upon oneself mental and physical deterioration that presupposes a depraved mind bordering on insanity.

In *Lynch* v. *Mutual Life Insurance Company of New York* (1946), a successful lawyer developed from a casual drinker to one who drank to excess. He received medical treatment but was obliged to retire from practice. The court supported the contention of the insurer that the disability was self-inflicted, stating that when a man drinks he intends the result of his drinking. He drinks because he desires. The outcome is of his own choosing and since he could forecast the ensuing harm his conduct was wanton and the injury self-inflicted.

In a 1938 case, *Hurst* v. *Mutual Life Insurance Co. of Boston*, the court rejected an insurer's contention that alcoholism was a self-inflicted malady, demonstrating a gratifying familiarity with the medical and psychiatric rationale of alcoholism. The insured drank for several years until he became a dypsomaniac, and there was no possibility of recovery. The court decided that there was no question of fact for the jury and that as a matter of law the disease of chronic alcoholism was not self-inflicted.

The testimony was to the effect that chronic alcoholism was not the conscious design or purpose of the insured, but the contrary, since the insured had vainly exercised his will to restrain and control his desire. The disease caused a weakness of will and of character which caused the insured to yield to the temptation of an overmastering appetite for intoxicating liquors. Although his drinking in the first stages was voluntary, the drinker was then unaware of the latent danger. The drinker, being ignorant of the insidious effects, cannot be said to have voluntarily inflicted upon himself the consequences.

In *New York Life Insurance Company* v. *Riggins* (1936), it was stated that if a man does not intend to create an injury or bring about a disability, but without any intent on his part does so, the injury is not self-inflicted. The drinker intended to drink the liquor but he did not intend to bring about the state of chronic alcoholism that resulted in partial brain destruction.

A recent survey showed the social pressure on young adults that led to their drinking intoxicating beverages. The lack of intent to inflict self-injury is evident. Courts that have emphasized the dangers of excessive drinking have assumed that there is a stage on the road where a person realizes the possible danger ahead and may stop drinking. Medical and psychiatric learning denies the assumption.

If chronic alcoholism is not regarded as self-inflicted, is it a disease within the meaning of the disability clause, "totally and permanently disabled by bodily injury or disease"? Alcoholism has been described by one sociologist as a sickness characterized by emotional and social maladjustment and by compulsive dependence on alcohol, and by others as a psychological illness. Recovery in a 1943 case was denied, the court holding that alcoholism is a disease of the mind that brings about drinking. Alcoholism, thus, is only a symptom of a disease and not a disease within the meaning of the "bodily injury or disease" clause, according to this court.

It is not clear where "symptomatic drinking" leaves off and where "true alcoholic addiction" begins, but no fine distinction is necessary since both types of alcoholism are recognized as diseases in the common speech of men, and it would subvert justice were a court to attribute the disease to maliciousness or general immorality.

There should be a statutory presumption against chronic alcoholism as an intentional act or non-disease, and the burden of proof of self-inflicted injury should lie on the insurer and be

only rebuttable by substantial evidence to the contrary. (ALVIN C. HAMILTON)

A Dissertation on Judicial Opinions. By HON. JOHN J. O'CONNELL. 23 Temple Law Quarterly: 13-19.

The Hon. John J. O'Connell here considers the question whether the number of published judicial opinions should be reduced. The same question was considered at a symposium at a judicial conference of the Third Judicial Circuit and it was recommended that opinions meeting certain requirements be filed in every case but that only selected opinions be published. The author urges study of the committee report for, although there were those who felt that opinions could not be effectively screened, the whole idea merited consideration.

The learned author is not in favour of the present practice. The flow of written material with which the practising attorney is faced is so voluminous that he is capable only of absorbing a fraction of it. This, together with the expense incurred in procuring it, should be ample reason for seeking remedies. But of greater importance is the fact that parties now may quite easily fail to obtain their legal rights because their counsel are unable to find the elusive controlling case in the surrounding sea of reference material.

The report is not revolutionary. Indeed, Sir Francis Bacon, more than three hundred years ago, made a similar proposal to James I. His proposal has been followed in succeeding years by recommendations, proposals and suggestions by committees expressly appointed for that purpose, by bar associations and by contributors to periodicals. Some States of the Union have taken steps to curtail publication whilst others have encouraged the practice.

Selective publications may not be the true solution since judicial opinion, although large, constitutes but one source from which legal material flows from its point of generation to the law library. Thus legislative, executive and quasi-judicial government agencies pour forth their contributions, not to mention the works of text-writers, legal periodicals and unofficial reporting services. The selective system, if employed on judicial opinions, would have little effect on these other sources.

The general reluctance to curtail judicial opinion rests on the doctrine of stare decisis. This doctrine is unknown in countries that have adopted the so-called civil law. There a case may be

cited for emphasis but is not binding as a precedent, and indeed advocates in France place much more faith in the books of learned text writers than in decided cases.

The prevailing vogue in common-law countries is limited in that the lawyer hunts for decisions in support of his case. He searches for leads, many of them false, in cumbersome libraries, until he is finally in a position to argue his case by standing pat on decisions he considers to be applicable. At the same time, he is prepared to distinguish the cases of his opponent as being inapplicable. Judges, too, religiously follow this system.

Assuming that selected opinions only were published, and overlooking the knotty problems that would result, the author nevertheless feels that lawyers, especially those operating in a limited sphere, would not favorably accept the threat to their fund of information and skill.

The problem is not insoluble however. The practical answer may be in the fact that, although arguments are based on the citation of cases, the court will practically never refuse, or tend to treat summarily, the works of eminent text writers. Although full weight is given to judicial opinions, it should be borne in mind that the function of common law is the determination of the rights of individuals upon the basis of the rules that have evolved through the course of time. Judicial opinions are most certainly evidence of these rules, but each rule, based on a specific set of facts, represents only a fraction of the overall picture. When it is appreciated that one decision fits into a general pattern, we can turn to the pattern itself to ascertain the problem to be argued and decided. This pattern, of course, should be and is contained in text-books. The result might be that lawyers would build their libraries around such texts while casebooks would be available in group libraries.

The common law system is maturing. It is being gradually codified in a process of evolution much along the lines of the Justinian codes, which form the basis of law for many civilized countries today. Whether or not complete codification is brought about depends to a great extent on the attitude of the bar in determining a case on the merits of the cause rather than on the size of the library. (J. G. WEBSTER)

The Impact of Recent Supreme Court Cases on the Question of Patentable Invention. By WILLIAM H. Davis. 44 Illinois Law Review: 41-48.

In the last decade the Supreme Court of the United States has

had occasion to pass on the question of patentable invention in fourteen cases. Of these, nine cases came up because of a conflict of decision over the validity of the patent. In all these conflict cases the court held the patent invalid. The remaining five cases were brought up on discretionary grounds because of the importance of the question involved or because of the effect of the patent on the industry involved. In two of these the decision below sustaining the patent was upheld and in the other three it was reversed.

There has been judicial comment to the effect that the decisions of the court on the question of patentable invention have shown an increasing disposition to raise the standard of originality necessary for a patent, requiring "a high standard" of invention, a change characterized as "a pronounced new doctrinal trend".

It may come as a shock that out of fourteen cases the Supreme Court has sustained the patents in only two. However this does not compare unfavourably with its record in the previous two decades when the members of the court had the reputation at least of being more conservative than the present ones. The reason for the heavy mortality of patents in the Supreme Court is not difficult to explain. Strong patents are usually respected. In most instances the stakes involved are so high that infringers or prospective infringers will not run the risk of a judicial contest unless the existence of a patentable invention is sufficiently doubtful to give a fair prospect of a successful defence. From the very nature of things many of the patents litigated present borderline cases where the margin of novelty is small, and the question whether the small change amounts to a patentable invention is a close one. It is not surprising, nor is it any cause for alarm, that the lower courts do invalidate a large proportion of the patents that come before them. If this is true of the "run of the mill" cases in the lower courts, it is all the more true of cases reaching the Supreme Court.

If we are to find "a pronounced new doctrinal trend" we must find it in the nature of the decisions rather than from any statistics as to the number of patents validated or invalidated.

When we turn to the decisions themselves, we find the court reiterating the same tests of patentable invention that have been applied by it for almost a century. All the patent statutes have authorized in substantially similar language the grant of a patent to any person who has invented or discovered any new

and useful art, machine, manufacture or composition of matter. Early writers adopted as their primary test the conditions set forth in the statute, namely, that the matter to be patented must be new and useful. However, in the case of *Hotchkiss* v. *Greenwood*, 52 U.S. 247 (1850), the majority opinion committed the court to a third requirement of patentability, namely, that a thing patented must involve invention in its production. This requirement of invention as an essential element of patentability has become firmly fixed in the law.

The continued mortality of patents in the Supreme Court undoubtedly had a substantial impact on the decisions of the lower courts. Statistics indicate that during the period 1929-1934 the courts of appeal sustained on the average 31% of the patents brought before them, while in the period 1936-1941 only 16% were held valid. This is a sharp drop and the difference must be partly if not largely due to the more critical application of the tests of invention, in other words a "higher standard of invention". However, two recent decisions of the Supreme Court upholding patentability are probably indicative of a change of attitude from hostility in some instances to a more friendly approach on the part of that tribunal, which will be reflected in the attitude of the lower courts.

It must be admitted that the situation so far as patent enforcement in the courts is concerned has reached a dangerous extreme. Patent lawyers all over the country have been giving serious consideration to the desirability of advising their clients to rely on secrecy, where that is possible, rather than on the increasingly uncertain protection afforded by the patent laws as applied by the courts. There are signs, however, that the attitude of the lower courts has begun to change and the pendulum of opinion is swinging back from the extreme to a more normal approach. Since the principal object of the patent law is to encourage disclosure of inventions in return for the grant of a limited monopoly, the adverse trend of lower court decisions, if continued, might seriously have impaired the effectiveness of the patent system and resulted in important sections of the industrial economy becoming enmeshed in veils of secrecy. (J. F. FUNNELL)

The Need for Some Constitutional Changes. By AMRY VANDENBOSCH. 37 Kentucky Law Journal: 343-357.

At the last presidential election the people of the United States narrowly escaped a grave crisis. If 1/160th of the total vote

cast in that election, in three states having an electoral vote of 78, had been shifted to the Republican Party, Dewey would have been elected rather than Truman, although Truman had a popular plurality of 2,000,000 votes.

If Dewey had carried only two of those three states there would not have been a majority in the electoral college and the election would have been thrown into Congress with the possibility of a deadlock in both the House and Senate. Once the election goes to the House each state casts one vote, which is determined by a majority of its delegation, and the deadlock would probably result from the division of political power of the two main parties in the various states. Further, the vote of New York state with a population of about 15,000,000 would be only equal to that of Nevada with a population of approximately 150,000.

Another defect that suggests the desirability of constitutional reform was the recent situation which found a Democrat as President and the Republican Party commanding a majority in both Houses.

The first reform should be made in the offices of the President and Vice-President. The presidential electors, that is, the electoral college, are elected at large with the result that the entire electoral vote goes to the party that receives the majority or plurality of popular votes. For example, Dewey, who only received 46% of the total vote in New York state, received the entire New York electoral vote of 47.

One solution for these defects is to abolish the whole electoral vote system and elect the President by a nation-wide popular vote. The difficulty with this is that it would necessitate an amendment to the Constitution requiring a two-thirds vote by each House and ratification by three-quarters of the states, both of which steps could be obstructed by the least populous states.

The second solution is to abolish the electoral college but retain the electoral vote system. The electoral votes would then be distributed among the candidates in proportion to the popular vote received. This would reduce the danger of a candidate being elected who had not received a plurality of popular votes and, at the same time, circumvent the difficulty of amendment and ratification.

The suggestion would also abolish the justification for the lengthy period between the election of the President and his inauguration. Under the present system the government of the

country is left, in many cases, for a period of two months in the hands of a person in whom the electorate have shown their lack of confidence. The result is a hesitancy on the part of the outgoing President to make any major decisions, and in time of crisis could have serious consequences.

Another defect is the fixed date of the election, particularly when the date is close at hand. The presidential authority may be seriously impaired while the question of his continuing in office is before the electorate.

The time has arrived for drastic reforms of the executive office. The President, under the single executive system, must now make important decisions daily and bears a crushing burden. Should a nation of 150,000,000 people allow one man to make such decisions for them or place such a burden on him?

The objection that the President has a cabinet, which he should consult, does not hold good. There is no provision in the Constitution for a cabinet and the members are only heads of departments responsible to the President. True, there is an unwritten element in the Constitution but in the past, and even now, there has never been anything like a true cabinet advising the President. The situation in the United States is in direct contrast with the system of "cabinet responsibility" in England.

The President and his department heads do not sit in Congress or participate in its debates, and are under no obligation to do so. This affects the quality of the debates, lessens the interest of the public in congressional proceedings and lowers the attractiveness of a seat in Congress to men of high aspiration and great talent. In consequence, those who aspire to the presidency shun Congress. Service there is not the route to the presidency, as many examples illustrate. Not only is there a loss to the men who later become Presidents in not having the experience of a seat in Congress behind them, but Congress itself loses the services of some of the best men. The ex-Presidents should be given ex-officio seats in the Senate, if the office itself is not changed so that presidential candidates will normally be drawn from Congress.

Drastic steps must be taken to change the quality of the President's so-called cabinet, and the character of its membership. The work of the various departments has become so involved that the actual administration should be left to subordinates, most of whom have long experience. The work of the department head should be to advise the President, and to do this he should have national political experience. It is striking that the present

"cabinet" does not include one person with Congressional experience.

The simple expedient of requiring heads of departments to sit in Congress, and to participate in debates, with or without vote, would profoundly affect the relationship of the executive to Congress, and would also require the President to give much more care to the selection of his "cabinet". The President might even make his selection from the appropriate committee chairmen, in which case the seniority rule of selection would have to be dropped. The President then would be driven into the background, but the simple way to meet this would be to have him elected by Congress for a definite tenure, which should be the same as for both houses of Congress.

The office of Vice-President, being "the most insignificant office that ever the invention of man contrived", should be reformed. It is absurd that each state should have two Senators regardless of population, particularly when one considers that the Senate has three important and exclusive powers, namely, approval of appointments to superior offices, consent to ratification of treaties, and trying impeachment charges.

Further, the small states may, through their disproportionate voting power in the Senate, approve grants-in-aid, the cost of which must be largely borne by the larger, more industrial states, though they may receive little benefit from them.

The same anomaly exists in the ratification of treaties. The Senators of one-third plus one, or 17, of the least populous states can block ratification. A further anomaly exists in the case of treaties. Although the President and the Senate can make treaties that are legally binding on the nation, whenever legislation or appropriation is necessary they must go to the House of Representatives. The House has in the past performed its part, but there is no obligation on them to do so. On the other hand, the President, in order to avoid the hazards of a two-thirds vote in the Senate, has resorted to executive agreements instead of treaties. The result is that the provision incorporated in the Constitution to control foreign relations has defeated its own purpose. The Constitution should be amended to require a mere majority vote, but of both Houses, for ratification of treaties. This change would not in itself solve the whole problem of the control of American foreign policy, and in the end the abandonment of the principle of separation of powers may be necessary. (R. A. GALLAGHER)