


REVIEWS AND NOTICES

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The President: Office and Powers. By EDWARD S. CORWIN.
New York: New York University Press. 1940. Pp. xii, 476.

Professor Edward S. Corwin has, at a most opportune time, presented to the public a history and analysis of the practice and opinion with reference to the office and powers of the President of the United States. On the title page appears the following excerpt from Secretary of State Seward:

"We elect a king for four years and give him absolute power within certain limits, which after all he can interpret for himself."

This is a somewhat exaggerated statement but when one reads the careful analysis of the executive power of the President made by Professor Corwin the reader is somewhat amazed at the gradual increase in executive power which has come to the President since the time of Washington. The author in a most lucid manner analyzes the gradual development of the President's executive power from the year 1787.

The Framers of the American Constitution had clearly before them what they considered to be the basic principle upon which the individual may be assured of liberty, namely, a separation of the legislative, the executive and the judicial powers. They believed that the chief executive should be given sufficient power to take care of such emergencies as might arise and which require to be dealt with for the good of society.

With reference to the increase in the executive power of the President, Professor Corwin says:

"Taken by and large the history of the Presidency is a history of aggrandisement, but the story is a highly discontinuous one. Of the thirty-three individuals who have filled the office only about one in three has contributed to the development of its powers. Under other incumbents things have either stood still or gone backward. That is to say, what the Presidency is at any particular moment depends in important measure upon who is President."

No person is eligible to the office of President except a natural-born citizen of the United States who has attained the age of thirty-five years. In view of the interest in the recent presidential election Professor Corwin's reference to the third-term tradition is rather interesting; to quote:

"As was pointed out in the preceding chapter, the prevailing sentiment of the Convention of 1787 favoured the indefinite reeligibility of the President, a sentiment which was owing in considerable part to the universal expectation that Washington would be the first person to be chosen President, and that he would live practically forever. The custom which limits any individual's tenure of the presidential office to two terms was initiated by Washington himself, although purely on grounds of personal preference and without seeming thought of creating a precedent; but that did not prevent Jefferson, when making public his own decision in 1807 to withdraw at the end of his second term, from stressing Washington's example. Indefinite reeligibility,

Jefferson argued, would so undermine the elective system that, while the office would remain "nominally elective", it would "in fact be for life" and "degenerate into an inheritance". Considering how universal monarchy was at that date—to say nothing of the common law concept of property in office which had just received countenance from the Supreme Court's decision in *Marbury v. Madison*—the argument possessed contemporaneously a good deal of force, and would have doubtless possessed more if either Washington or Jefferson had had a son".

"Sanctioned by the examples of Washington, Jefferson, Madison, Monroe, and Jackson, the "no-third-term" tradition had become by the Civil War a generally accepted tenet of the American constitutional credo. Indeed, Jackson while President had called repeatedly for a constitutional amendment which would render the President directly elective for a single term of four or six years. Although his crusade failed of its immediate purpose, yet following his retirement no other President was re-elected till 1864—the ban on third terms had become in effect one on second terms as well."

"The "no-third-term" taboo was first definitely challenged in 1876, when a coterie of Republican politicians broached the idea of running President Grant again. The popular reaction was strongly adverse; and when four years later a similar movement was launched, Grant being now in retirement, its sponsors professed the greatest deference to the principle but contended that it applied only to a third consecutive term."

"Within recent years the scope of the tradition has become involved in uncertainty repeatedly, and this circumstance has undoubtedly contributed to loosening its hold on popular regard. The prestige of the tradition was never higher than when the first Roosevelt, following his election in 1904, construed it as covering the term which he was then completing in consequence of McKinley's assassination and death in September 1901. "The wise custom", he said, "which limits the President to two terms regards the substance and not the form". "Under no circumstances will I be a candidate for or accept another nomination." And, when later a strong "third-term" movement developed in his behalf, he declared himself to be still of the same determination. All of which, however, did not hinder his running for President in 1912, and justifying himself for doing so by the argument that if at some time he had declined "a third cup of coffee" nobody would suppose that he had meant never to take another cup. Nor, apparently, would Mr. Wilson have been averse, had health permitted, to seeking a third term in 1920, a course which would have been in harmony with his conception of the Presidency as the American equivalent of the British premiership."

It is interesting to note from the above quotations that in the minds of the Framers of the Constitution there was apparently no thought of any objection being taken to a third or even a fourth term. This was doubtless partly due to the popularity and dominating power of Washington.

The Electoral College is an institution found, as far as I know, in no other constitution. Each State appoints its own Electors in such manner

as the State may determine. This Electoral College in turn elects the President. The author sums up its usefulness as follows:

"It was the belief of the Framers of the Constitution that the Electors would exercise their individual judgments in the choice of a President, a belief which the universal understanding that Washington would be the first President, and probably for an indefinite number of terms, went to sustain. But the requirement that the Electors meet "in their respective states", which reflected the poor condition of travel in those days, destroyed the possibility of a deliberate body from the outset; and with the first avowed appearance of party organizations on a national scale, in consequence of Washington's announcement in 1796 that he would not stand for a third term, the Electors became promptly transmuted into party dummies, a character they have retained ever since."

The chapter on qualification, elections, and tenure of office of the President deals in a most interesting way with the question of presidential disability and the powers of the Vice-President. It would appear that so long as the President lives that the Vice-President has few, if any, duties. An interesting reference is made by the author to a debate in the First Senate; to quote:

"A further word or two should be added regarding the Vice-President. In the first Senate a debate sprang up over how the President should be addressed. "His High Mightiness" was one proposal, "His Excellency" another. Thereupon, the further question arose of how the Vice-President should be addressed, and some one suggested "His Superfluous Excellency". From that date to this the Vice-Presidency has been a theme for disparagement even by its incumbents. "My country", wrote the first Vice-President to his wife, "has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived"; and a century and a quarter later another Vice-President compared his official condition to that of "a man in a cataleptic fit. He is conscious of all that goes on but has no part in it."

The President is the administrative chief. The entire executive power is vested in him, whereas under the English system the executive power is vested in the Prime Minister and his Cabinet. The American Cabinet is entirely extra constitutional. The members of the American cabinet are not members of Congress or of the Senate and only act in a consultative capacity. To quote from Professor Corwin:

"In short, the Constitution knows only one "executive power", that of the President, whose duty to "take care that the laws be faithfully executed" thus becomes the equivalent of the duty and power to execute them himself."

The chapter entitled "Chief Executive" deals in a most lucid manner with the procedure adopted by the President in carrying out the various phases of the machinery of government and is summarized as follows:

"The Framers of the Constitution, in an endeavour to realize the eighteenth-century idea of a balanced Constitution, cast the President for a role that was in some respects self-contradictory. They endowed

him with certain monarchial and more or less autonomous prerogatives but at the same time made him the principal instrument of law enforcement. Until Jackson's period no serious conflict resulted from this assignment of functions; not at first, because the Federalist leaders thoroughly understood its implied obligations of self-restraint; not later, because of the ultra-Whiggism of the Jeffersonian party. Jackson's violent reconstitution of the executive, however, obliterated the theoretical line separating the two aspects of presidential power; or, in other words, as I pointed out in Chapter 1, the President's obligation to the law lost its character of legal obligation and became one of constitutional obligation, of which the presidential oath—impeachment being ordinarily out of the question—is the principal sanction; and Lincoln's course confirmed and amplified this result with a wide-ranging conception of executive prerogative in times of emergency. But long before this Congress itself, veering away from the original conception of the law-enforcing power as narrowly nondiscretionary, had enacted legislation whose enforcement was left to presidential judgment as to the mode and extent of its applicability; and the practice thus begun has in recent years, with the vast expansion of the powers of the National Government, become a dominant feature of national legislation. Today the twentieth-century conception of the state as primarily administrative is more and more exemplified by the trends of government under the Constitution. Legislation emerges out of administrative experience and comes to fruition in enlarged administrative powers."

The following chapter entitled "Commander-in-Chief" gives in detail the increase in executive power which resulted from the emergencies which arose during the Civil War and later on during the Great War.

The exclusive right of the President to be the nation's intermediary in its dealings with foreign nations and the development and growth of the same from 1787 up to the present time is considered in the chapter entitled "Organ of Foreign Relations". The following quotation from this chapter shows the very wide powers now possessed by the President:

"So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President alone has the power to negotiate treaties with foreign governments; that he is free to ignore any advice tendered him by the Senate as to a negotiation; and that he is final judge of what information he shall entrust to the Senate as to our relations with other governments."

The final chapter entitled "Popular Leader and Legislator" is a most interesting analysis of the wide field covered by the President. While the executive power of the President of the United States is extremely wide, nevertheless the liberty of the individual is protected by a separation of the executive, legislative and judicial powers. Although at the present time there appears to be no possibility of any interference with individual liberty, yet Professor Corwin in his concluding paragraph speculates as follows:

"Finally, I return to the point that, as matters stand today, presidential power is dangerously personalized, and this in two senses: first that the leadership which it affords is dependent altogether on the accident of personality, against which our haphazard method of selecting Presidents offers no guarantee; and, secondly, that there is no

governmental body that can be relied upon to give the President independent advice and whom he is nevertheless bound to consult. As a remedy calculated to meet both phases of the problem I have suggested a new type of Cabinet. At least, if a solution is to be sought in institutional terms, it must consist in stabilizing in some way or other the relationship between President and Congress. That, today, with the rapid relegation of judicial review to a secondary role, is the center of gravity of our Constitutional System."

The author after devoting 316 pages to his analysis of the practice and opinion respecting the President, his office and powers, follows it with 130 pages of references giving "chapter and verse" for the opinions which he has expressed.

Professor Corwin has made a most valuable and helpful contribution to the field of constitutional history which should be read not only by every student of the American Constitution but by all those who are interested in knowing how the President of the United States came to possess the very wide powers which now attach to that office. In view of the close relationship which now exists between the United States and Canada and the British Empire, it is increasingly important that Canadians should be familiar with the government and constitution of the United States.

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The Law of Wills: Including Intestacy and Administration of Assets. Second Edition. (Pitman's Equity Series, edited by G. W. KEETON.) By S. J. BAILEY. London and Toronto: Sir Isaac Pitman and Sons. 1940. Pp. xxxi, 267. (\$6.00).

The first edition of the present book appeared only in 1935 and the fact that a new edition has been called for so soon bears out the view of the reviewer that it is probably the most useful of the small books on this subject for student purposes. Having been faced with the problem of teaching the subject of Wills and Trusts for some twelve or thirteen years, the reviewer can speak feelingly about the lack of material suitable for students' needs. The standard large works on the subject, while all of excellent quality, do not easily lend themselves to purposes other than that of reference, and even then the bulk of material in many of the English books, dealing as it does with the complicated questions which arise in English settlements and in involved limitations found in English wills, is not suitable for teaching purposes here.

Mr. Bailey has followed a simple scheme and has chosen in the main modern cases. The present edition is an improvement over the last inasmuch as it contains a separate chapter on intestacy and a new chapter on administration of estates. The present edition has been increased by almost fifty pages. Even so it remains a comparatively small book and the scope it covers is large.

It is perhaps asking too much to have covered in one volume problems which usually arise in connection with wills but which are customarily treated in English books under the separate head of Trusts, such as apportionment between life tenant and remainderman. While the present book is admirably designed to acquaint a student with the various concepts met in the law of wills, it, like most of the books dealing with the same subject, does not seem as much concerned with developing the

technique of using the various devices of property law in carrying out a testator's intention as seems desirable. To the present reviewer what seems to be required in this field is an analysis of our whole system of future interests in property directed towards the aim of constructing a document which will achieve the purposes for which it was conceived at present, most of the books on wills seem to be written from the standpoint of interpreting poorly drawn wills. A book of the kind suggested would involve drawing together our learning on trusts, real property, personal property and the doctrines of equity. Mr. Bailey has, within the confines of this small volume, gathered more of these things together than we can find in other similar books, and it is for this reason that the reviewer unhesitatingly recommends it to students who are struggling to grasp a notion of an extremely difficult subject, as well as to the practitioner who constantly needs to be kept in touch with the manifold developments in this branch of the law.

While the price of the book seems high with reference to its size, one must expect a rise in the price of books published in England in the present troubled times, and the reviewer believes that even at the higher price a student will be well repaid by a careful study of Mr. Bailey's presentation.

C.A.W.

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The War: First Year. By EDGAR MCINNIS. Foreword by Raymond Gram Swing. London and Toronto: Oxford University Press. 1940. Pp. xv, 312. (\$1.50).

During the past year the material which forms the subject matter of the present book was presented periodically in five separate parts known as "The Oxford Periodical History of the War." These parts have now been collected within the confines of two covers and the reader is presented with an analysis and a consecutive pattern of the varied phases of the first year of the present war.

To the public, bludgeoned by screaming headlines and distorted newspaper accounts of the events of the past year, events which, in many cases, were treated in the well known newspaper fashion of pandering to public hysteria or were magnified in an attempt to fill space, the present volume, written by a person with the technique of an accurate historian, cannot fail to provide a guide to clear thinking. We are, naturally, too close to the events here related to expect an interpretation to which time alone may bring the proper perspective. At the same time a contemporary point of view, gathered from presently available sources has a unique advantage of its own, particularly to persons who are living in the midst of the events dealt with.

The errors and blunders of the democratic nations are all too apparent as one reads this account of the first year of the war. Professor McInnis, however, neither blames nor attempts to exculpate. The facts are presented with a detachment which is extraordinary in a time so calculated to engender distortion. Any reading of the events of the last year cannot be cheerful, but it is well to bear in mind the words of Mr. Raymond Gram

Swing in the preface to the effect that: "Anyone reading the history of the war so far will do well to bear in mind that he is not following the dreadful development of an inevitable doom, but is reading the consequences of policies and concepts for which he himself has had a measurable share of responsibility."

We congratulate the author and the publishers for making available so helpful a book at such reasonable cost.

C.A.W.
