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FEDERAL LEGISLATION

RESPONSIBILITY IN RULE-MAKING

"The administration is not autonomous; while the legislature should not make the rules, it speaks, after all, with the voice of the public, and is entitled to final judgment on the interpretation which the administration has placed upon the laws it has passed."¹

ALWAYS vexatious, the problem of imposing responsibility upon administrative action has reached a crucial stage in recent years. Congress now feels it necessary to enact legislation to preserve constitutional government from a subtle but complete subversion. The process of transformation is not purely a wartime phenomenon.² Presented herein is a brief background of the problem, a review of recent counter-active measures, and a suggested remedy.

THE REVERSAL OF CONSTITUTIONAL PROCESS

Schooled in the classic theory of balance of powers, the makers of our constitutional charter contemplated three independent, but cooperating, units of government: the Congress—to establish policy by law and, by implication, to determine whether or not that policy is carried out;³ the Executive—to enforce policies set out in the laws of Congress;⁴ and the Judiciary—to interpret the law and, by implication, determine if and when the executive exceeded the authority vested in the latter by Congress.⁵ Today, in many instances, this *modus operandi* is reversed. The change is most obvious in rule-making by executive agencies.⁶

¹VIEC, INTRODUCTION TO PUBLIC ADMINISTRATION (1935) 58.
²See BURNHAM, MANAGERIAL REVOLUTION (1941) 4, 139-151, 252-272. For more general discussion of governments in transition, see 5 TOWNEE, STUDY OF HISTORY (1939) passim, and SPENGLER, DECLINE OF THE WEST (1928) passim.
⁶Administrative *adjudication*, as well as administrative rule-making, is also undergoing a metamorphosis. In fact, a changing concept of due process seems to be rapidly evolving from the combined administrative activities, a concept whose final form may well result
Though rule-making is legislative in nature, its development in the executive branch of the government had a practical basis. The men who had to enforce a statute knew best how to implement its broad policy by promulgation of regulations thereunder. Force of circumstances caused Congress to rely on such implementation.\(^7\) A regulation in harmony with the intent of Congress, and within the standards and principles expressed in the statute met no opposition in the courts. It was no aberration from constitutional theory, since Congress was the initiating and policy-forming body, and the regulation was a mere executive detail.\(^8\)

Furthermore the fact that the message to Congress from the president was to "... give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; ...",\(^9\) and the development of that message from an informative statement of conditions calling for legislative action to an elaborate program of legislation, did not warp our government from its constitutional frame. Congress is provincial by nature. The executive branch sees the nation as a whole, and is better qualified to offer suggestions for nation-wide betterment. As long as Congress, and Congress alone, finally determines policy in fact, the function of representative government is maintained.\(^10\) But that function is not maintained when the executive branch ignores or usurps the primary legislative powers of Congress. Failure to enforce a statute is,\(^11\) in a negative

\(^7\)Maurer, Cases on Administrative Law (1937) 100-103; Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 11-24; Blachly and Oatman, Administrative Legislation and Adjudication (1934) 43-53.


\(^9\)U. S. Const. Art. II, § 3.

\(^10\)Blachly and Oatman, Federal Regulatory Action and Control (1940) 152; Hart, Ordinance Making Powers of the President of the United States (1925) 279-280: "Now it may be true that the administration is right and public sentiment wrong; but in a popular government it is not proper for the administration in important matters of discretion to ignore the ideas of the public, and those ideas can ordinarily be ascertained with a fair chance of certainty only if the matter is threshed out in the public forum."

Compare: H. R. Rep. No. 862, 78th Cong., 1st Sess. (1943) 1-4; H. R. Rep. No. 898, 78th Cong., 1st Sess. (1943) 1, 2. In general, citations below will treat executive orders as administrative regulations, since they are similar in nature and effect.

sense, an exercise of policy determination by the executive. Far more serious, and more prevalent today, is the positive action of initiation and enforcing of policy by the executive agencies—sometimes in clear opposition to the expressed will of Congress.

The issue is not whether such action by the executive agencies is substantively salutory, or needed. Even if it is exactly what the electorate would want their representatives in Congress to enact, it still vitiates the principle and the procedure of representative government. If Congress does not properly represent the wishes of the electorate, the constitutional remedy is to change the composition of Congress at the polls—not to allow the executive branch to take over the rights and duties of the national legislature in promulgating laws, nor the rights and duties of the people in giving expression to their wishes. Allowing such usurpation by the executive branch destroys the procedural functions of government by the people. There is no purpose in keeping a shell of representative government, and going through the formality of voting, if the will of the elected representatives is thwarted, circumvented, or ignored by the executive. The demands of war call for no such sacrifice, especially a war whose alleged purpose is to prevent such a sacrifice.

Nor


2bLegis. (1943) 31 GEORGETOWN L. J. 435.

The president's "October 1" decree to Congress focussed sharply this issue. "In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act." N. Y. Times, Sept. 8, 1942, p. 14, col. 6. See also BURNHAM, THE MACCIAVELLIANS (1943) 241; Pusey, Danger of Executive Lawmaking, Washington Post, Feb. 11, 1943, p. 9, col. 5.


Atlantic Charter:

"Third, they respect the right of all peoples to choose the form of government
does the fact that this administration has been quite "responsive" to the people's wishes ameliorate the vicious precedents it sets for a later administration which may be far from "responsive" and for which today's precedents may have removed the necessity of being "responsible". History is replete with proof that autocracies rise under authority of specious precedents for their actions.17 The Lord Chief Justice of England, as far back as 1929, ably described the steps by which "the ardent bureaucrat" seeks to "clothe himself with despotic power":

"(a) get legislation passed in skeleton form, (b) fill up the gaps with his own rules, orders, and regulations, (c) make it difficult or impossible for Parliament to check the said rules, orders and regulations, (d) secure for them the force of statute, (e) make his own decision final, (f) arrange that the fact of his decision shall be conclusive proof of its legality, (g) take power to modify the provisions of statutes, and (h) prevent and avoid any sort of appeal to a Court of Law."18

Every one of these eight prototypes exists, in one form or another, in our administrative law today.

The growth of administrative agencies is not, in itself, alarming.19 But, combined with the concomitants just reviewed, it makes the problem of responsibility in rule-making the most vital domestic issue in the history of constitutional development in the United States. If the precedents continue to grow with the size and the number of the executive agencies, then the electorate faces a future devoid of any real control of its government.20 The people will live under a Constitution reversed: the executive, as the primary source of the law, will formulate and initiate policy, and enforce it—and Congress will be merely a ratifying body, if that.

under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them; . . . " United States Dept of State, Executive Agreement Series 236, Publication 1732, Aug. 14, 1941, p. 4.
19Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 7-10; Blachly and Oatman, Administrative Legislation and Adjudication (1934) 1-18; United States President's Committee on Administrative Management, Report (1937) 320, 322; Buck, Our Wonderland of Bureaucracy (1932) 1-86; Comer, Legislative Functions of National Administrative Authorities (1927) 50-112.
Various factors, now considered desirable, aid this reversal. Congress aids it by enacting statutes which vest more and more power in the executive.\textsuperscript{21} By using ever broader standards and less intelligible principles, and by leaving its intent ambiguous, Congress thus becomes less a legislative, and more a reviewing and ratifying body. It further weakens its function by making court review of administrative action (which review, as will be shown, has become less and less effective) purely illusory in many instances.\textsuperscript{22} The executive agencies have not been slow to take advantage of such congressional procedures. They extract every iota of power from the letter of the law and sometimes supplement even this by unauthorized practices.\textsuperscript{23} But much of the fault lies with Congress in its enactment of "loose legislation", and by leaving its intent ambiguous.

The third unit of government, the courts, have established doctrines which are conducive to the extension of such unauthorized practices by the executive agencies. The history of judicial self-limitation makes the way easy for court approval of administrative regulations which have tenuous statutory basis, if any.\textsuperscript{24} Also, it may be said that the principle of statutory construction, that the court will not go behind the plain words of the statute to find the congressional intent, lays the way open for administrative abuse.\textsuperscript{25} Furthermore the courts are hamstrung by limited review allowed them by statutes.\textsuperscript{26}

This reversal of the Constitution has called into play the "checks and balances" which the Constitution provided as safeguards under such circumstances. A decade ago the Supreme Court was holding in check the administrative power.\textsuperscript{27} Either Congress and the executive saw eye


\textsuperscript{22}E.g. 56 STAT. 31, 50 U. S. C. App. § 924 (Supp. 1942). See: Admin. Law (1943) 32 GEORGETOWN L. J. 76; Smith, Totalitarianism and Administrative Absolutism (1939) 5 JOHN MARSHALL L. Q. 202, 221; POUND, ADMINISTRATIVE LAW (1942) 35-36; TUSKA, ADMINISTRATIVE COURTS (1927) 11.

\textsuperscript{23}See note 12 supra.

\textsuperscript{24}BLANCHLEY AND OATMAN, FEDERAL REGULATORY ACTION AND CONTROL (1940) 333-338; Sen. Doc. No. 232, 74th Cong., 2d Sess. (1938) 57-70.

\textsuperscript{25}McPherson v. Blacker, 146 U. S. 1, 27 (1892); United States v. Hartwell, 6 Wall. 385, 396 (U. S. 1868); accord, Caminetti v. United States, 242 U. S. 470, 490 (1917).

\textsuperscript{26}See note 22 supra.

to eye on policies, or else Congress temporarily abdicated its policy-formulating functions. Gradually the "checking powers" of the Supreme Court have fallen into comparative desuetude in a changing political atmosphere. An executive-judicial liaison has taken shape. Hence Congress is now assuming the Court's former place as the balancing unit of government. Today congressional assertion of its constitutional prerogatives is in full flower. Whether or not it remains the primary unit that it should be, in a representative government, depends in large measure on its control over policy formulation.

Responsibility is the crux of representative government. Congress is by nature more immediately responsible to the people, through elections, than executive agencies. Authority is to responsibility as right is to duty. Since the ever expanding executive agencies are relatively devoid of responsibility to the people, their authority must be circumscribed. This is a problem of Federal Legislation. Congress must retake and retain its policy-forming function; it must insist that its intent be enforced, though the words it uses in the statutes (perhaps) may afford some basis for the executive agency's enforcement of a different intent (i.e., that of the executive agency itself). And Congress must insist that the regulations framed by the executive be as well within the letter as within the spirit of the statutes.

The problem raised here is this: How can Congress make sure of its control over the execution of its policies? In recent times three major efforts have been made along this line—the Logan-Walter bill, the Attorney General's Committee and the Smith Committee.

29Legis. (1943) 31 Georgetown L. J. 435, 446.
THE LOGAN-WALTER BILL

Although dealing mainly with reform of adjudicative procedure in administrative law, the Logan-Walter bill, and its relevant reports, had some interesting provisions as to rule-making. The President's Advisory Committee, in 1937, had forecast some of the changes that should, and must, be made in rule-making procedure. These involved such "prenatal" safeguards as: regularization of rule-making, advisory committees, notice and formal hearings, preliminary publication of draft regulations, informal conferences with groups affected, and progression from voluntary to mandatory standards. Unquestionably, these changes would improve, and have improved, rule-making procedure by creating responsibility within the executive branch of government. But such responsibility is merely incidental to the issue involved here—namely, responsibility of the executive branch to the legislative branch. Procedural uniformity is a means to administrative responsibility. The latter is the big issue today.

Some of these changes were incorporated in the Logan-Walter bill. The President's veto message pointed out some defects.

THE ATTORNEY GENERAL'S COMMITTEE

Following the veto, the Attorney General's Committee made its report on administrative procedure. In dealing with rule-making, the majority stressed responsibility within the executive branch, whereas the minority stressed responsibility to Congress. The majority cast aside the theory

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that regulations should be laid before Congress before becoming law,\textsuperscript{38} but did recommend that executive agencies report to Congress the rules they promulgated,\textsuperscript{39} and their suggested bill incorporated several “prenatal” safeguards.\textsuperscript{40} The minority suggested that the report to Congress be more specific,\textsuperscript{41} and laid down “Legislative Standards of Fair Procedure.”\textsuperscript{42} This latter was considered vital by the minority. They pointed out that: “. . . Congress has rarely undertaken to state the principles under which administrative agencies shall operate. . . . Not only has Congress given the agencies themselves little direction, it has given the public and the reviewing courts almost no indication of its desires as to their methods of operation.”\textsuperscript{43} “. . . Under these circumstances, it is natural that the courts should lean backwards to deny themselves powers which Congress has not clearly conferred upon them.”\textsuperscript{44}

The implication is clear that the minority of the Committee considered congressional laxity to be a cause of the current irresponsibility of executive agencies. They regarded the remedy as composed of two elements: (1) clearer mandates from Congress as to intent, policy, etc., and (2) more careful review of the regulations of executive agencies, made possible by detailed reports from the agencies to Congress.\textsuperscript{45}

The proposals discussed in the preceding paragraphs, while helpful in creating uniformity in administrative rule-making, do not adequately rectify the basic problem of responsibility. Congress still remains merely

\textsuperscript{38}Id. at 120.
\textsuperscript{39}Ibid.; id. at 195, § 205.
\textsuperscript{40}Id. at 195, §§ 201-203. This suggested bill later became S. 675, 77th Cong., 1st Sess. (1941). Compare the more numerous “prenatal” safeguards in the minority’s recommendations, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 224, Title II. The latter’s suggestions became S. 674, 77th Cong., 1st Sess. (1941).
\textsuperscript{41}Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 231, § 213. Compare with § 205 of the majority report, id. at 195. The report to Congress by the proposed Office of Federal Administrative Procedure was to be more specific also. Compare § 7 (7), id. at 194, with § 109 c, id. at 222.
\textsuperscript{42}Id. at 213-216. Compare Title II of the minority’s suggested bill, id. at 224.
\textsuperscript{43}Id. at 213.
\textsuperscript{44}Id. at 212.
\textsuperscript{45}The minority also assailed the “substantial evidence” rule by which courts have limited themselves, thus rendering proof of the validity of a regulation that much easier for the agency concerned. The minority suggested that courts investigate the “propriety” and “reasonableness” of such regulations. Id. at 230, § 211, b, 2. This scope of review was later narrowed, Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess. (1941) (Pt. 3) 1410, § 211, 6, b, 2.
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a ratifying body whenever its statutes lay down standards that are too broad or fail to provide for adequate judicial review. Some form of "remedy" before the administrative regulations become law would prevent the harm that follows any abuse of executive authority.

The Smith Committee

Administrative responsibility has been a focal point of action in the Seventy-Eighth Congress. The Smith Committee is the progeny of this new spirit. It is authorized to investigate unauthorized acts of executive agencies. The functions of the Committee were limited to investigation, and recommendations to Congress. Hence the fears of encroachment upon judicial province seem unfounded, since the Committee may not revoke, alter, or issue any rules, nor directly affect rights and liabilities under rules of executive agencies. In fact, some members of Congress regard the functions of such a Committee as a necessary incident to the constitutional duty of Congress.

The Smith Committee investigations deal mainly with the substantive aspects of rule-making. By so directing its activities it can approximate a more desirable control over administrative regulations than would have resulted from the methods proposed by the Logan-Walter bill and similar suggestions previously discussed.

One of the issues left undetermined was the Committee's jurisdiction to investigate executive orders. Abuse of authority by executive agencies was sharply reprimanded by some members of Congress, and juris-

489 Cong. Rec. 880 (1943): "We have reached the point where some of these Executive agencies do not seek legislative authorization for the penalties which they inflict upon the people but exercise the assumed power until prohibited from doing so by Congress."

4Legis. (1943) 31 Georgetown L. J. 435, ff., especially at 447.


489 Cong. Rec. 873-874 (1943) (Mr. Sabbath); id. at 877 (Mr. Voorhis).

4Id. at 874 (Mr. Voorhis), 875 (Mr. Halleck, Mr. Hope), 876 (Mr. Dirksen), 877 (Mr. Voorhis), 882 (Mr. Fish), 882-883 (Mr. Smith, Va.).

4The discussion in Congress mentioned that the passage of the Logan-Walter bill would have made the Smith Committee unnecessary. Id. at 876-877 (Mr. Mundt). It is submitted, however, that the Logan-Walter bill was directed chiefly at securing uniformity in rule-making procedure, whereas the Smith Committee is designed to enforce administrative responsibility to Congress. Furthermore, the Logan-Walter bill was directed to procedural aspects mainly, but the Smith Committee is concerned with substantive aspects for the most part.

4Id. at 875 (Mr. Halleck), 877 (Mr. Graham), 878 (Mr. Boren), 879-880 (Mr. Robsion, Mr. Reed).
dition over the agencies themselves was cleanly defined. But jurisdiction over executive orders proper was not clearly spelled out in the resolution creating the Smith Committee. Furthermore, in the debate in the House of Representatives, Mr. Smith (Va.), the proponent and later Chairman of the Committee, stated that such jurisdiction was not expedient "at this time", but later in the debate he qualified this statement by refusing to answer directly the question whether or not the Committee would investigate executive orders. The fact that the restriction on the Committee was limited to "at this time" may indicate that such immunity may not always be granted to executive orders. It was pointed out in the debate, moreover, that though executive orders would not be investigated, the use of the power thereunder would be. A Senate Resolution, flatly directed to the investigation of executive orders proper, was recently adopted by a unanimous vote.

The hedging by the House of Representatives on the issue of executive orders was unfortunate. The inference is that it is abdicating the impeachment power clearly granted to Congress by the Constitution.

It is not the proper function of the president to do by executive fiat

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53 Id. at 875 (Mr. Halleck), 876 (Mr. Mundt), 879 (Mr. Robsion, Mr. Reed), 880-881 (Mr. Springer, Mr. Gearhart), 882-883 (Mr. Smith, Va.).
54 H. R. Res. No. 102, 78th Cong., 1st Sess. (1943): The Committee was authorized "... to conduct investigations of any action, rule, procedure, regulation, order, or directive taken or promulgated by any department or independent agency of the Federal Government. ..." A resolution has been introduced providing for delayed effectiveness of the regulations of executive agencies. H. J. Res. No. 66, 78th Cong., 1st Sess. (1943).
55 89 Cong. Rec. 875 (Mr. Halleck), 878 (Mr. Voorhis), 881 (Mr. Gearhart), 882 (Mr. Fish).
56 Id. at 882-883 (Mr. Smith, Va.).
57 Id. at 883 (Mr. Mott's interrogation of Mr. Smith, Va.). Incidentally, the Smith Committee has commented on the validity of Executive Order No. 9017 [H. R. Rep. No. 1024, 78th Cong., 2d Sess. (1944) 6, 11-13] and others [H. R. Rep. No. 898, 78th Cong., 1st Sess. (1943) 10-13].
58 89 Cong. Rec. 875 (Mr. Halleck), 883 (Mr. Smith, Va.).
59 Sen. Res. No. 252, 78th Cong., 2d Sess. (1944): "... the Committee on the Judiciary, or any duly authorized subcommittee thereof, is hereby authorized and directed to study and survey any or all Executive orders of the President, and directives, rules and regulations issued by or under authority of any department or independent agency of the executive branch of the Federal Government, with particular regard to the source of constitutional or legislative authority upon which such Executive orders, directives, rules, and regulations are based, their validity and the effect and manner of their enforcement, ..." Adopted 90 Cong. Rec., March 30, 1944, at 3353.
what Congress refused to do by the democratic process of legislation. An executive order, like any other administrative regulation, must have its basis in the Constitution or a parent statute.Absent such a basis and the president is acting in excess of his authority, for which the only constitutional remedy is investigation and impeachment by Congress.

Should Congress enforce the recommendations of the Smith Committee, but continue its grant of immunity to executive orders, it may well be that executive agencies will have all their regulations promulgated by executive order—and thus avoid censure and correction by Congress. Faced by such flouting of its will, Congress would have but three remedies: impeachment, which apparently has been shelved for the time being; refusing appropriations for the enforcement of executive orders; or the repeal of the statutory basis of such executive orders.

It is apparent that Congress, in creating the Smith Committee, had little notion of the potential influence which such a committee might have. Suppose, for example, the Smith Committee recommended specific amendments to legislation instead of general recommendations. Suppose further that Congress passed these amendments without question. An immediate housecleaning would undoubtedly take place in the executive agencies. But such action by Congress, though it would install

References:

Blachly and Oatman, Federal Regulatory Action and Control (1940) 76, and cases therein cited. Of course, some executive orders may be based on powers other than those vested in the Chief Executive by Congress. See Comer, Legislative Functions of National Administrative Authorities (1927) 22-25. But such is not true of his war powers. H. R. Rep. No. 1024, 78th Cong., 2d Sess. (1944) 12, 13; Pusey, Danger of Executive Law-making, Washington Post, Feb. 11, 1943, p. 9, col. 5. Two bills have been introduced in Congress requiring the Attorney General to print, in the Federal Register, his opinions on the validity of executive orders: S. 1486, 78th Cong., 1st Sess. (1943); H. R. 4316, 78th Cong., 2d Sess. (1944).

Ogg and Ray, Essentials of American Government (1943) 215; Comer, Legislative Functions of National Administrative Authorities (1927) 184. The judicial remedy is not in point here since it does not eliminate the source of the abuse, but merely affects the orders resulting from the abuse.

See notes 55 and 56 supra.

This action, if indiscriminately applied to executive orders, would cause more harm than good, since most executive orders are quite proper and necessary.

This action was taken on the salary limitation order, 57 Stat. 63 (1943), 50 U. S. C. App. § 964a (Supp. 1943).

Though the Committee is authorized to “recommend such legislation or amendments to existing legislation as they deem desirable”, as yet its recommendations have been purely general. See note 12 supra. Quite probably the Committee will offer concrete amendments to the Price Control Act before the expiration of OPA authority.
responsibility in executive agencies, would hamper the proper functioning and very purpose of administrative rule-making, and would result in irresponsible legislation which would be worse than the disease it sought to cure.

Limited as it is, however, the Smith Committee is bringing to light inexcusable abuses of authority by executive agencies. Such investigations will be abortive unless Congress acts on the recommendations of its Committee. It may be that Congress will correct the abuses committed by certain executive agencies when they seek legislation giving them a new lease on life. Congressional activity of this nature would appear to be the proper procedure, at present, with regard to this Committee.

However, it should be noted that the problem posed initially is unanswered by this Committee, whose function is to check up on a regulation after it has become law. Congress, in some instances, remains a policy ratifier rather than a policy initiator.

"Prenatal" Alternative

In brief, the remedy here suggested is that the regulations of certain administrative agencies must receive the affirmative approval of a congressional reviewing body before going into effect. This prophylactic panacea is not new. It was considered, and rejected, in the Report of the Attorney General's Committee on Administrative Procedure. A similar proposal was made in the Indiana Legislature in 1941. Somewhat analogous laws have been passed by Congress, and allied suggestions have been considered by leading authorities.

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67See note 12 supra. The findings of the Committee, if accurate, indicate that (for one executive agency, at least) due process is nearly synonymous with confiscation. See H. R. Rep. No. 898, 78th Cong., 1st Sess. (1943) 3.


69Supra p. 270.

70Cf. Dimock, Forms of Control over Administrative Action (1935) 295.


72Legis. (1941) 41 Cot. L. Rev. 946. The bill died in committee after passing the Senate.


74See note 71 supra; O'Connell, The Need for Reform in Administrative Law (1936) 16
Let it be clear now that the remedy suggested here should be severely restricted. It should be imposed only upon those administrative agencies whose activities merit the label of "irresponsible"; it should be removed when those agencies indicate willingness and ability to follow the intent and letter of congressional will.

Nature and functions of the reviewing body:

As stated above, the major problem today is responsibility of the administrative agencies to the representatives of the people, not responsibility within the administration. Hence the proposals made for intra-agency review are not applicable. Instead any reviewing body created should be completely separated from the executive branch, responsible only to Congress, although sufficiently independent to be free from pressure groups. It should be composed of men who are fully acquainted with the rule-making problems of the executive or independent agencies involved.

Whenever the Smith Committee or a comparable committee (such as a standing committee of Congress) finds that an executive or independent agency, or subdivision thereof, is often acting in excess of its

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**Notes and References**


Supra p. 271.

Harris, supra note 72, at 869; Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 103-115, 203-209; H. R. 6324, 76th Cong., 3rd Sess. (1940); Blachly and Oatman, Administrative Legislation and Adjudication (1934) 54-90.

If it were responsible to no branch of government, then (though it would have no authority to initiate, repeal, amend, or annul any regulation) it would truly be the "headless fourth branch of the government, responsible to no one, and impossible of coordination, . . ."

The Judiciary Committees of Congress would be appropriate congressional agents to appoint the reviewing body. Congress could specify the duration of the body's authority, at the end of which Congress could further extend the life of the body if there were still need for control of the selected administrative agency. Tenure of the body's members would be for the duration of the body's authority, subject to be removed for cause by Congress only. Cf. Cushman, Independent Regulatory Commissions (1941) 668-679.

Cf. O'Connell, The Need for Reform in Administrative Law (1936) 40 Ore. L. Rev. 40, 43. A true congressional committee would be inadvisable. First, a group of Congressmen, sufficiently informed on administrative problems of the executive agency involved, would be hard to find. Secondly, Congressmen, representing conflicting interests as they do, would be unwilling (and could not be forced) to approve all the various regulations submitted to them.
authority, Congress could by statute require that the regulations of that agency be submitted for the approval of the reviewing body. A limited period for such control could be set out in the statute, and time limits within which the decisions of the reviewing body must be made could be stated according to the nature of the regulations. The regulations submitted would have no effect until approved. Opportunity could be given to interested parties to present objections if the nature of the regulations was such as to allow for a hearing. The reviewing body would have no power to initiate, repeal, annul, or amend any regulation. Its sole function would be that of disapproval or approval of regulations initiated by the administrative agencies involved. If a regulation were later found to be unwise, Congress itself, or the administrative agency should change it. If a regulation were unconstitutional, the courts are the proper reviewing unit.

The proposed reviewing body would be mainly concerned with the intent, more than the words, of Congress. Of course, it could have no authority to determine finally the constitutionality of the statute, nor of the regulations once approved. But it could be given authority to disapprove any regulation which is not consistent with the intent of Congress, nor reasonably related to the parent statute of the regulation, before the latter becomes law.

Nature of regulations to be submitted:

For the most part only regulations which are policy-making in character need careful review. Regulations of a strictly emergency character should not be delayed; but those which by nature must be drawn up in camera (e.g., rationing and price control regulations) could be so reviewed.

It may be contended that requiring submission of executive orders to such a review as is here suggested might amount to unconstitutional interference with the executive. However, Congress could properly

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80A less desirable alternative would allow the regulations to become effective at the end of a specified period, unless disapproved. Under this alternative a stalemate in the reviewing body would cause endless confusion.
81Cf. Leiserson, Administrative Regulation (1942) 74-93.
82Thus when an executive agency has been denied a certain authority in one statute, and claims to find it in another (see note 12 supra), the reviewing body would disapprove the regulation, in construing the intent of Congress as a whole. This would not apply if the latest statute clearly authorized the regulation involved.
83Most executive agencies, especially those of the "old line" variety, need no such check. Even the newer executive agencies issue proper regulations for the most part.
84Mississippi v. Johnson, 4 Wall. 475, 500 (U. S. 1867) (by implication).
require such a review as a condition precedent to the use of any appropriation for carrying out executive orders, and, it is believed, could also require such a review of any regulations passed under an executive order, where such executive order is necessarily based upon statutory authority.85

Objections—practical and constitutional:

The immediate objection to such a reviewing body is the practical one of good administration.86 The reviewing body would split responsibility; and no executive agency can properly serve two masters. As long as the Chief Executive keeps his agencies within their proper statutory authority, there is no need for such a reviewing body.87 But when he fails to do so, either consciously or unconsciously, the future history of the United States will be healthier if those agencies are compelled to serve two masters (Congress and the Chief Executive) rather than no master.

However, the so-called split of responsibility would not be as drastic as at first appears. Rule-making initiative and execution would remain solely within the administrative body, and responsibility therefor would be divided only with respect to possible prenatal nullification of regulations from a restricted number of agencies. The resulting division of authority is within the theory of separation of powers: the selected agencies would become responsible to Congress, through its reviewing body, on matters of policy, and would remain responsible to the Chief Executive on matters of execution of regulations.

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85Hart, Ordinance Making Powers of the President of the United States (1925) 301-302. Congress already has taken action to curb the abuse of authority by use of executive orders. See the proposed amendment to the Independent Offices Appropriation, 90 Cong. Rec., Feb. 23, 1944, at 1980. If the Chief Executive should try to vitiate the control of the reviewing body (for example, by issuing regulations of the wayward agency in the form of executive orders, or by creating through executive order a new agency to take over the rule-making of the agency which Congress selected as in need of control), Congress might well pass legislation similar to this amendment, and thus insure that its intent is properly executed. Another plan is being considered whereby Congress could correct, by a majority vote on a concurrent resolution, any misconstruction of a statute by the executive branch. See Bryant, Congress Weighs Plan to "Veto" Executive Acts It Doesn't Like, Wall Street Journal, March 11, 1944, p. 1, col. 6.

86United States President's Committee on Administrative Management, Report (1937) 314, 316, 329-334. See Federalist Papers (Dunne's ed. 1901) No. LXX.

87See note 50 supra. Of course, the reviewing body could be given jurisdiction over the regulations of wayward "independent" agencies as well as over agencies under the direct control of the Chief Executive.
The objection that such a reviewing body would not have the time to properly pass on regulations is easily met. Set up as an experimental corrective, its jurisdiction should be limited to one wayward administrative agency at first. If it was efficacious there, and other administrative agencies were in need of such control, then Congress could appoint new reviewing bodies, for those other agencies, made up of men qualified in those other fields. It is unlikely that such would be necessary. Once the administrative agencies realize that abuse of their authority will bring swift control by a congressional reviewing body, there will unquestionably be an immediate and wholesome administrative reform in rule-making. The limited number of agencies involved, and the restricted nature of the regulations reviewed, should not result in a serious burden on the reviewers.

As to possible constitutional objections, the most obvious one is that such a reviewing body would be usurping the function of the courts. Courts have limited their jurisdiction to justiciable issues in controversy.\(^{89}\) If the reviewing bodies, suggested herein, were to pass upon the regulations after they became law, then the encroachment on the court's function thereby would be clearer, since rights might have vested. But where such regulations do not become law until approved by such a body, no justiciable issue can arise, since no rights have vested.\(^{89}\) Furthermore, the fact that the reviewing body may approve a regulation would by no means deprive the courts of the power to declare that regulation unconstitutional.

There would be no encroachment on powers of administrative agencies since the initiation of regulations would remain solely with them (subject only to the nullifying power of the reviewing body), and the execution of the regulations would remain strictly within the administrative agencies.\(^{90}\) Of course, Congress could abolish entirely the rule-making powers it has authorized by statute.

The constitutional functions of Congress would not be impaired since the statutes they pass are not subject to review by the proposed body,

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\(^{89}\)Cf. Hart, Ordinance Making Powers of the President of the United States (1925) 301, 302; Blachly and Oatman, Federal Regulatory Action and Control (1940) 85.

\(^{90}\)Cf. Cushman, Independent Regulatory Commissions (1941) 668-679; McFarland, Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations (1934) 21. One probable result of such a reviewing body, however, would be an approximation of the direct responsibility found in the British parliamentary government.
and the requirement that regulations be subjected to a reviewing body of Congress would be no more an infringement of congressional powers than the initial vesting of rule-making authority in the administrative agencies.

Advantages:

Judicial self-limitation, plus the fact that judicial review usually follows the promulgation of a regulation, make the judicial remedy relatively futile in many instances. The harm is done before adequate relief can be granted.91 This result could be counteracted to a great extent by the reviewing body herein suggested.

There would be at least five probable results from the creation of such a reviewing body:

1. When the administrative agencies realize that their regulations will not become law until approved, they will make sure that their regulations are more carefully drawn, clearer and more adequate.
2. For the same reason, there will be fewer regulations.
3. The regulations will have a more substantial basis in the statutes. Since the reviewing body will place its approval more on the intent than on the words of Congress, the agencies must perform find clearer statutory justification for their regulations than the tenuous reasoning they sometimes use today.92
4. The results will be more definitive than those reached by judicial review. A court decision may simply declare that this regulation, in an instant case, is against due process, without going into the validity of the regulation itself. This may mean delay, expense, and endless perplexity as to rights and liabilities under that regulation in other cases. The reviewing body suggested, however, could eliminate these problems, since regulations (when and if approved) would be more likely to withstand judicial scrutiny.93
5. Last, and most important of all, the principles of administrative

91Supra notes 12 and 22.
93It may well be that the legal profession could take advantage of this situation. By presenting their opinions to the reviewing body, many defects of judicial review might be eliminated, and the definitive nature of the reviewing body's action might obviate the very necessity for judicial review in many instances. Of course, the profession could present their views to the Smith Committee today; but the results would not be as satisfactory, since that Committee's authority is merely to recommend legislation to Congress. As yet, the Committee has not gone so far as to request an executive agency to amend a regulation.
rule-making would be brought into accord with constitutional theory. The laws of Congress would be a bulwark of policy limits beyond which no administrative regulation may go. Those laws would be a guide to congressional intent which no administrative regulation may distort. "Prenatal" control of this nature would make administrative agencies the servants of the people once again—not the autonomous units which today are growing away from the true spirit of representative government.94

CONCLUSION

Under a representative form of government, responsibility to the people must be maintained in all phases of legislation. Hence when rule-making powers are vested in administrative agencies, some limitations must be laid down, or the result is administrative absolutism. These limitations, mainly, are that Congress cannot delegate its essential legislative powers95—that is, its policy-making functions—and that intelligible principles and primary standards must be incorporated in the vesting statute.96 The purpose behind the limitations is that of keeping policy-formulation in the hands of that branch of government which is most responsible to the people—Congress. Ordinarily judicial review is sufficient to keep the administrative regulations within this constitutional framework. But between judicial self-limitation, congressional emasculation of judicial review, and increasingly broader standards, the administrative agencies are in a position to formulate much policy themselves, and to vitiate, circumvent, and ignore the will of Congress. The issue is not whether executive-made policies are good or bad; the issue is: are they to be allowed to by-pass and take the place of those policies laid down by Congress. If they do, then autocracy becomes our form of government—for which the usual remedy is revolution. If they do not, then (if reform is needed), the remedy remains a constitutional one—election of a Congress whose policies will represent the will of the people.

The answer to the problem lies mainly with Congress. They have the authority of the Constitution and the power of their legislation. With these weapons, administrative rule-making can be made responsible,

94SULLIVAN, DEAD HAND OF BUREAUCRACY (1940) 188.
and today's vicious precedents therein can be overruled. But if Congress fails to act immediately and judiciously, then history may well prove that such failure nurtured the seeds of a future autocratic government in the United States.

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NOTES

NEED THE TESTATOR REQUEST THE WITNESSES TO
ATTEST HIS WILL?

IN THE District of Columbia, as elsewhere,1 whether or not a will was properly executed and is entitled to be probated, is determined by questions, such as the following, put to the attestting witness:

Q. What is your name?
A. John Doe.
Q. I show you this instrument and ask you if that is your signature on it? (Register of Wills hands the witness the will.)
A. Yes.
Q. Did you see the decedent sign this paper?
A. Yes.
Q. Did he declare this instrument to be his will?
A. He did.
Q. Was he of sound mind at that time?
A. Yes, sir, he was.
Q. Did you sign as witness at the request of the testator?
A. I did.
Q. And in his presence?
A. Yes.
Q. And in the presence of the other witness?
A. Yes.
Q. And did the other witness likewise sign the will at the testator's request, and in his presence, and in your presence?
A. He did.

Although this is the usual method of proving execution of a will, it is quite obvious that it includes questions which are not at all necessary. The District of Columbia statute,2 which stems from the Statute of Frauds,3 does not require the testator to sign in the presence of the witnesses nor the witnesses to sign in the presence of each other; neither does it require a declaration by the testator that the instrument is his last will and testament.

It is the purpose of this note to determine whether the aforementioned

1Field, Execution of Wills in Michigan (1937) 16 MICH. STATE BAR J. 527.
2D. C. CODE (1940) tit. 19, § 103.
3"All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; . . . ."
429 CAR. II, c. 3, § 5 (1677).
question, "Did you sign as witness at the request of the testator?" is not also superfluous and unnecessary. In other words, need the testator request the witnesses to attest his will? We shall first consider this question as it applies in particular to the District of Columbia and in general to those states whose statutes, like that of the District of Columbia, are based on either the Statute of Frauds or the Statute of Victoria, and do not provide in express terms that the witness shall sign at the request of the testator. In addition, we shall consider the answers given to this question by the courts of the eleven states, namely, Arkansas, California, Colorado, Idaho, Montana, New York, North Dakota, Oklahoma, South Dakota, Utah and Washington, whose statutes provide that each witness must sign the will as a witness at the testator's request.

_Funk & Wagnalls New Standard Dictionary_ (1943) defines "request" as "1. To make a request for; express a desire for; solicit; ask; as, to request a favor of a person; to request a brief delay. 2. To address a desire or request to; ask; as, to request a person to do a favor." For the reasons which will be developed hereinafter, it is submitted that neither in the District of Columbia nor elsewhere within the United States need the testator make a request for, express a desire for, solicit, ask, or address a desire or request to the witnesses to attest his will. In other words, it is not necessary for the testator to request the witnesses to attest his will.

There is an amazing degree of variety in the statements of the textwriters and commentators with reference to this question. For instance, Alexander says this:

"The Statute of Frauds (29 Charles II, ch. 3) and the Statute of Wills (1 Victoria, ch. 26) provide only that the will be attested and subscribed by witnesses, and contain no requirement that the testator must request the witnesses to sign as such. This formality is likewise omitted from the statutes of some of the states in the Union. In others it is required that the witnesses must sign as such at the request of the testator . . . .

"Where the statute requires that the testator request the witnesses to subscribe his will as such, it is not necessary that such request be formally expressed in words. Any act or sign will be sufficient, and it may be made either

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7 WILL. IV & 1 VICT., c. 26, § 9 (1837).
8ARK. DIG. STAT. (POPE, 1937) § 14512; CAL. PROB. CODE (DEERING, 1941) § 50; COLO. STAT. ANN. (MICHIE, 1935) c. 176, § 39; IDAHO CODE ANN. (SUPP. 1940) § 14-303; MONT. REV. CODES ANN. (ANDERSON & WENTZ, SUPP. 1943) § 6980; N. Y. DECEDENT ESTATE LAW § 21; N. D. COMP. LAWS ANN. (1913) § 5649; OKLA. STAT. ANN. (SUPP. 1943) tit. 84, § 55; S. D. CODE (1939) § 56.0210; UTAH CODE ANN. (1943) § 101-1-5; WASH. REV. STAT. ANN. (REMITTNGTON, SUPP. 1943) § 1395.

91 ALEXANDER, COMMENTARIES ON THE LAW OF WILLS (1917) §§ 489-490.
by the testator himself or by some one acting for him in his presence and hearing. The request may likewise be implied from the surrounding facts and circumstances. Where witnesses, in the presence of the testator, are requested to act as such by a third person, it is a sufficient acquiescence on the part of the testator if he is able to object and does not.” (Citations omitted.)

Atkinson states:

“Ten states expressly require that the testator should request that the witnesses attest and subscribe. Even in the absence of such legislation some form of request is necessary for the validity of the execution. . . . The fact that a jurisdiction has an express legislative requirement for this formality has no apparent effect upon the decisions as to what is a sufficient request.

“The courts agree that the request need not be an express oral one. It may be implied from what the testator says or does. A signing by the witness with the testator’s consent, or with his knowledge and approval may be considered an implied request. A request to the witnesses by the attorney who drew the will, or by some other person, acquiesced in by the testator is sufficient. However, if the testator is too weak to understand what is going on, his acquiescence cannot be deemed equivalent to a request.” (Citations omitted.)

The predecessor to Atkinson’s book was that by Gardner,8 who took the contrary slant, stating:

“Although under any statute the witnesses must sign with the knowledge and assent of the testator, in the absence of express legislation to this effect, the witnesses need not be requested by the testator to attest the will. . . . However, when a request of this character is required it must be made; otherwise the will is void.

“Anything which conveys to the witnesses the idea that they are desired to be witnesses is a good request. A request therefore may be made by words . . . or by conduct. . . . So a request may be implied . . . from attestation in his presence by witnesses known by him to have been procured for that purpose by the draftsman of this will. So a request made by anyone in the testator’s presence, of which he is aware, and which is acquiesced in by him, is sufficient, as is also a request by the testator to one of the witnesses to sign, made in the presence of the other, and followed by attestation by both. . . .

“Acquiescence in the act of attestation, in order to amount to a request thereafter, must be a thoroughly conscious acquiescence.” (Citations omitted.)

Professor Page9 has this to say:

“Even though the statute does not provide in express terms that testator must request the witness to sign as witness, it is generally held that the very idea of an attesting witness imports a request of some sort by the testator that the witness act in such capacity. Passive acquiescence is not enough. In

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some states a contrary view has been taken, and it has been said that a request is not necessary under a statute which merely provides that attesting witnesses shall subscribe. This probably means nothing more than that a formal request is not necessary.

"Under other statutes, by their express terms, testator must request witnesses to act in that capacity. Under either form of statute, therefore, a request of some sort is apparently necessary." (Citations omitted.)

Rood, on the other hand, states:

"No request by the testator to the witness to attest and subscribe need ordinarily be proved or made. Knowledge and acquiescence by him are enough. But under any statute it must be done with his knowledge and express or implied assent and sanction, and in Arkansas, California, Idaho, Montana, New York, North Dakota, Oklahoma, South Dakota, and Utah, the statutes expressly require that the witnesses shall sign at the request of the testator. The decisions on these statutes hold them to be satisfied by a request by another for the testator and in his presence, or by any acts by him from which his wish or sanction can be implied." (Citations omitted.)

Rollison is to the same effect, as is Schouler; while Thompson takes

\[\text{\textsuperscript{10}} \text{Rood, A TREATISE ON THE LAW OF WILLS (2d ed. 1926) § 289.} \]

\[\text{\textsuperscript{11}} \text{Rollison, THE LAW OF WILLS (1939) § 111.} \]

\[\text{\textsuperscript{12}} \text{Schouler, LAW OF WILLS EXECUTORS AND ADMINISTRATORS (6th ed. 1923) § 512.} \]

\[\text{\textsuperscript{13}} \]
the view that some form of request is necessary.\textsuperscript{18} \textit{Corpus Juris,}\textsuperscript{14} \textit{Ruling Case Law,}\textsuperscript{15} and \textit{American Law Reports Annotated}\textsuperscript{16} all contain statements to the effect that according to the great weight of authority the subscribing witnesses must be requested by the testator to sign, or attest the will.

to this provision and a formal request is not necessary to the witnesses to sign but either an implied request or an assent to their signing is sufficient and the request may appear by conduct by another in the presence of the testator it may take place through an interpreter, and a request once made may be applied to any will subsequently signed by the testator.

"The request that witnesses should attest and subscribe one's will may be inferred from acts and conduct of the testator as well as his express words; the law regarding substance rather than literal form in such matters. It is not essential, therefore, that the testator should expressly ask the suscribing witness to attest his will. His acts, his gestures, may signify this request; whatever, in fact, implies his knowledge and free assent thereto. Indeed, the active part in procuring the witnesses and requesting them to attest and subscribe is not unfrequently borne by some friend, near relative or professional counsel; and if such third person acts truly for the testator in his conscious presence and with his apparent consent, the legal effect is the same as though the testator himself had spoken and directed the business. But under such circumstances the tacit or open conduct of the testator himself, as expressive of his knowledge and free assent or the reverse, demands the strictest scrutiny; for nothing done by others officiating on his behalf in a clandestine, fraudulent or overpowering way, can stand as the testator's own act though done in his presence." (Citations omitted.)

\textsuperscript{18}THOMPSON, \textit{The Law of Wills} (2d ed. 1936) § 126.

"That some form of request on the part of the testator or another with his knowledge and consent, that the witnesses sign and attest the will, is generally held to be necessary. But under statutes which merely provide that attesting witnesses shall subscribe, it has been held that a request is unnecessary. While a request made by another in the presence of the testator and with his assent is sufficient, the safest practice is for the testator to make his request in person. No particular form of words need be used by the testator in making his request, but a request may be inferred from the acts and conduct of the testator which clearly evinces a desire on the part of the testator that the witnesses attest his will. A constructive request is sometimes considered the equivalent of an actual request. Thus a request to sign as witness made in the presence of the testator by the scrivener may be taken as the equivalent of a request of the testator." - (Citations omitted.)

\textsuperscript{19}68 C. J. 686 (1934).

\textsuperscript{20}28 R. C. L. 127 (1929).

"The rule recognized by the weight of authority is that subscribing witnesses must be requested by the testator to sign, or attest the will, . . . ."

\textsuperscript{21}125 A. L. R. 414 (1940).

"According to the great weight of authority it is an essential part of the execution of a will that the witnesses attest or subscribe the will at the request of the testator . . . in a few jurisdictions the opinions cite express statutory provisions requiring such a request, though the view has been taken in other jurisdictions that this requirement may be implied."
It is submitted that the authorities who hold that a request is necessary where the statute does not expressly provide for it are confusing "acknowledgment" with "request". It is clear that, even in jurisdictions not having statutes which by their terms require a request of the witnesses, the testator must at least acknowledge to the witnesses that the instrument (which must be proved to have been then signed by him) is his act, and that the attesting witnesses must sign the instrument, as attesters, in testator's presence. The due execution of a will requires that it be in writing, that it be signed by the testator (or by someone at his express direction and in his presence), and that testator's signature (under the Statute of Victoria) or the will, as testator's act (under the Statute of Frauds) be acknowledged by him to the requisite number of witnesses, who must attest and subscribe that will in testator's presence, and (under the Statute of Victoria) in the presence of each other, or at the same time. But must he request them to sign it? The statute does not in words require such request. The majority of courts say, in effect, what the United States Court of Appeals for the District of Columbia said expressly in the case of Peters v. Peters,17 "If both witnesses signed in the presence of the testator, obviously they acted on the request of the testator to witness his will". But is this a presumption of law, an inference of fact, or are they just begging the question? It is believed that they are just begging the question.

It is agreed by all authorities that no express request by the testator need be proved.18 For instance, in the case of In re Cosgrove's Estate,19 Cosgrove brought a pencilled draft of his will to a stenographer to be typed. When she replied that it could not be done that day, he was satisfied, saying he was going out of town for a few days anyway. As reported by the court, the succeeding facts were as follows: "Miss Young asked, 'Would you like to sign this will in case anything should happen?' Mr. Cosgrove answered, 'Yes, I would, Miss Young, and that is a good suggestion.' Thereupon, he signed the instrument before Miss Young and another woman, and the latter persons subscribed their names as witnesses thereto. In Mr. Cosgrove's presence, Miss Young filled in the date in ink and wrote the attestation clause, whereupon

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18In re Maikka's Estate, 110 Colo. 433, 134 P. (2d) 723 (1943); In re Cox's Will, 139 Me. —, 29 A. (2d) 281 (1942); Look v. French, 346 Mo. 972, 144 S. W. (2d) 128 (1940); In re Jones' Estate, 190 Okl. 123, 121 P. (2d) 574 (1942); In re Davis' Will, — Or. —, 142 P. (2d) 143 (1943); 125 A. L. R. 423-427 (1940) and cases cited therein.
Mr. Cosgrove left the office." Objection was made on the ground that the testator had not requested the witnesses to act as such, that the proposed will should fail because the witnesses subscribed voluntarily rather than at the request of the testator. This will was held to have been duly executed. The language of the court, however, possibly justifies the divergence of opinion among text-writers. The court said:

"It will be noted that our statute does not expressly require the testator to request the witnesses to subscribe the will. In the case of In re Cummings' Estate, 92 Mont. 185 (11 Pac. [2d] 968), it was held that acts and conduct may be shown to indicate that an instrument was intended as the testator's will, and a request that witnesses sign may come from another if there is intelligent acquiescence by the testator. Other cases holding an express request by the testator unnecessary are: In Matter of Estate of Johnson, 100 Cal. App. 676 (280 Pac. 987); Farmer v. Farmer, 213 Ky. 147 (280 S. W. 947); In re Lagershausen's Estate, 224 Wis. 479 (272 N. W. 469).

"Even in those states that require a request to the witnesses, a very liberal interpretation is given to the statutory provisions and a formal request is not necessary to the witnesses to sign, but either an implied request or an assent to their signing is sufficient."

While Professor Page states that "Passive acquiescence is not enough", it is not believed that this statement is accurate. In the only case cited in support of said statement, the decedent's doctor met the witnesses outside the sick-room and told them they were to be witnesses to his patient's will. Then he alone went inside. Later he called them into the room, exhibited to them the will, upon which was the patient's signature, which was known to the proposed witnesses. He talked with them of other matters, but did not mention the will, and then directed them to sign it, which they did, in the presence of the patient. Of course the will was held to be not validly executed. There was no acknowledgment of it by the decedent. Nothing was said about it, by her, or in her presence, excepting the doctor's direction to the witnesses to sign it.

On the other hand, there are numerous cases in which the will has

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"No will made within this state . . . shall be effectual . . . unless it be in writing and signed by the testator or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two (2) or more competent witnesses."


23Ritchie v. Jones, 210 Ala. 204, 97 So. 736 (1923); Slade v. Slade, 155 Ga. 851, 118 S. E. 645 (1923); Craig v. Trotter, 252 Ill. 228, 96 N. E. 1003 (1911); Dyer v. Dyer,
been held to have been properly executed where there was only acquiescence on the part of the testator. For instance, in the case of McMechen v. McMechen\textsuperscript{24} the rule was stated as follows:

"It is not necessary, that the testator shall actually assent to the attestation, but when the attestation is made, he must be in a mental and physical condition, which will enable him to dissent from the attestation, if he so desires; and if his condition is such, that he could give such dissent or disapproval, if he chose to do so, but does not, his assent will be implied."

An interesting case in this connection is In re Demaris' Estate\textsuperscript{25} Here, one George Demaris asked his doctor, a Dr. Gillis, to prepare his will; and Demaris thereafter, with the assistance of the doctor and in the presence of the doctor's wife, signed the will which had been prepared by the doctor. No request of any kind was made that the doctor or anyone else should attest the will. Twenty to thirty minutes later, Dr. Gillis signed the will as a witness and Mrs. Gillis, at her husband's request, also signed the will as a witness. Demaris was conscious of the attestation when it took place. The will was held to have been duly executed. While the court stated, at p. 74, "... the request for the preparation of a will ... carried with it an implied request for an attestation", its decision seems to be founded on the fact that testator was conscious of the attestation when it took place, acquiesced therein, and several days later expressed his approval thereof.

Since all courts are agreed that no express request is needed, and since it appears that conscious, silent acquiescence is enough, at least where the statute does not expressly provide for a request, it does not appear that the testator need make a request for, express a desire for, solicit, ask, or address a desire or request to the witnesses to attest his will. He must acknowledge to the witnesses his signature (under the Statute of Victoria) or the will, as his act (under the Statute of Frauds), but he need not request the witnesses to attest his will. He need only be conscious of their signing and be able, if he so desires, to object thereto. For a court to find that there was an "implied request" and to hold a will properly executed on that ground (in a case where the statute does not provide for a request, and the will has been properly

\textsuperscript{87} Ind. 13 (1882); Higgins v. Carlton, 28 Md. 115, 141 (1868); Allen's Will, 25 Minn. 39 (1878); Look v. French, 346 Mo. 972, 144 S. W. (2d) 128 (1940); Ayers v. Ayers, 43 N. J. Eq. 565, 12 Atl. 621 (1887); In re Ames' Will, 40 Or. 495, 67 Pac. 737 (1902); In re Lagershausen's Estate, 224 Wis. 479, 272 N. W. 469 (1937).
\textsuperscript{24} 17 W. Va. 683, 713 (1881).
\textsuperscript{25} 166 Or. 36, 110 P. (2d) 571 (1941).
acknowledged by the testator, subscribed by the requisite number of witnesses in his conscious presence, though no request to sign has in fact been made), does violence to the meaning of the word "request" and is quite unnecessary. Proper acknowledgment and conscious acquiescence in the witnesses' signing are all that is required.

In states where the statutes expressly provide that the witnesses shall subscribe at the request of the testator, the courts have disregarded the clear terms of said statutes, and require no express request. Even though there is in fact no request, so long as the will has been properly acknowledged and has been signed by the requisite number of witnesses in the conscious presence of the testator, the courts hold that there has been an "implied request", and that therefore the statutory requirement for a request has been satisfied. Of course this is utter nonsense, since there has in fact been no request. However, if the statutes were literally applied, many wills (which otherwise should be allowed) would have to be held invalid as improperly executed. Therefore the courts are probably justified in completely disregarding what the word "request" actually means, and liberally interpreting what may be considered a request by the testator.

In summary it may be stated that, where the statute does not expressly provide for a request by the testator to the witnesses, no request by the testator to the witnesses need be proved. As shown, for example, by In re Cosgrove's Estate, the testator's knowledge of and acquiescence in their signing is enough. But of course, if they are to attest and subscribe in his presence (as all statutes require) then obviously they must do so with his knowledge, and express or implied assent and sanction. Furthermore, even in states whose statutes provide in terms for a request, it suffices if the request is made by another for the testator and in his presence, and the statute is satisfied also by any acts by the testator from which his wish or sanction can be implied.

ROBERT W. BALL

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26In re Maikka's Estate, 110 Colo. 433, 134 P. (2d) 723 (1943); In re Jones' Estate, 190 Okl. 123, 121 P. (2d) 574 (1942); 125 A. L. R. 423-427 (1940) and cases cited therein.
27In re Jones' Estate, 190 Okl. 123, 121 P. (2d) 574 (1942); 125 A. L. R. 429-448 (1940) and cases cited therein.
CONGRESSIONAL CONSIDERATION OF THE SUPREME COURT QUORUM

The population of the original thirteen states surrendered certain freedoms, and the individual states relinquished portions of their sovereignty to enable the founding fathers to deliver an addition to the family of nations. These were surrendered, not sacrificed, by the donors. They were offered conditionally, to be safeguarded by such limitations as would preclude the new nation from assuming the character of a tyrant. Since the early days of the United States, the judiciary, personified by the Supreme Court, has been regarded as the stalwart safeguard against the obliteration of both the population’s freedom and the residual sovereignty of the states. The method of safeguarding was to be through the Court’s interpretation of the Constitution.¹

Should the judiciary incapacitate itself, refuse to exercise its responsibility, lose its independence and become subservient to any of the other departments, there could be no doubt that this protective bulwark of the democracy would no longer exist. There are some who see signs of this on the horizon, offering the Supreme Court’s inability to try the cases of United States v. Aluminum Company of America,² and North American Company v. Securities and Exchange Commission³ as evidence. The Court’s inactivity has caused much concern in Congress,⁴ as it is predicated upon a failure to obtain a quorum (six)⁵ in each case.⁶

To correct this situation congressional action might be of a dual nature (1) the enactment of such legislation as will remedy the existing appellate deficiencies in present antitrust litigation; and (2) the refraining from enactment of any legislation which would prevent the Court from adhering to precedent in extricating itself from the embarrassing position in which it finds itself. As the problem is really de mini-

¹Marbury v. Madison, 1 Cranch 137 (U.S. 1803).
³318 U.S. 750 (1943).
⁶The disqualified Justices have never been revealed; see Hearings before Committee on Judiciary on H.R. 2808, 78th Cong., 1st Sess. (June 11, 1943) 3 and 4. (All page references to the Hearings before Committee on Judiciary on H.R. 2808, of June 11 and 24, 1943, are to the typewritten transcript of the proceedings.)
mis in its nature, Congress should not belittle itself by enacting panacea legislation affecting the Court's quorum.

A study of the individual bills committed to the Judiciary Committee of the House of Representatives during the First Session of the 78th Congress will reveal some of the intricate and delicate situations involved in a legislative remedy for abating this judicial incapacity.8

H.R. 774.9

This bill provides that (1) five members of the Court shall constitute a quorum when one or more member or members disqualify themselves; and (2) in the event that the remaining members number less than five, the Chief Justice shall call in any judge or judges of a United States circuit court, or any retired Justice or Justices of the Supreme Court, or any judge or judges of the Court of Appeals for the District of Columbia, for service in any particular case.

The provision allowing the Chief Justice of the Court to call circuit judges to fill vacancies10 on the Supreme Court bench merits special

8S. 1135 and H.R. 2808, 78th Cong., 1st Sess. (1943), are identical measures, therefore the ensuing discussion will be confined to the bills introduced in the House of Representatives, 78th Cong., 1st Sess. (1943).
9U. S. CONSI. Art. III, § 1 provides for the creation of a supreme court and such inferior courts as the Congress may from time to time ordain and establish. However, as the Constitution is silent as to the number of justices or what a quorum of the court shall be, the inference is that this is left to the Congress as an exercise of legislative authority. The Judiciary Act of 1789, 1 STAT. 73 (1789), was the first exercise of this authority.
"Sec. 215. (1) The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, any six of whom shall constitute a quorum: Provided, That in the event a member or members shall disqualify himself or themselves from sitting, then, in that event, any five shall constitute a quorum.
(2) In such case, the Chief Justice, in the event the remaining members number less than five, shall call in for service in the Court in any particular case a judge or judges of any circuit court of appeals of the United States or any retired Justice or Justices of the Supreme Court of the United States or any judge or judges of the Court of Appeals for the District of Columbia."
consideration since this exercise of congressional authority involves certain problems of constitutionality.

The Constitution established the judiciary department, but the creation of the necessary "inferior courts" was left to Congress. For more than a century the judicial system of the Federal Government did not include the independent circuit courts of appeal we know today. The personnel of the original circuit courts were district judges and Justices of the Supreme Court assigned to the specific circuits which were created by Congress. This pattern was followed by subsequent Congresses. Intermittent legislation extended federal appellate jurisdiction to newly admitted states or reorganized existing circuits. In 1891, due to the growth of the country and the inability of the Supreme Court to keep up with its docket, Congress by exercising its prerogative, created permanent circuit courts staffed by justices especially appointed to these new tribunals.

The purpose of the act of 1891 was to distribute the appellate jurisdiction of the Supreme Court. Has subsequent judicial interpretation of this legislation placed the newly created courts of appeal on the same level as the Supreme Court? Such a contention is indefensible. The Supreme Court may only be eliminated by an amendment to the Constitution; the circuit courts could be abolished overnight by Congress. Here, alone, is a line of demarcation setting the tribunals apart. However, is this differentiation present in the judicial office, or is it broad enough to include the justices as individuals? The possibility of a circuit judge ascending to the Supreme Court by the operation of law would also afford district judges the same privilege. It is inconceivable that a tribunal created by the Constitution could relinquish its exclusive jurisdiction and position by a theoretical separation of the

11See note 8 supra.
12Judiciary Act of 1789, 1 Stat. 73 (1789).
"That there is hereby created in each circuit a circuit court of appeals, which will consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established."
17In the case of Peters v. Hanger, 136 Fed. 181 (1905), it was possible for a district court judge to hear and decide a case in a circuit court when neither a Justice of the Supreme Court nor a circuit judge was available.
individual Justices’ persons from their official positions. The independence of the Court is as much dependent upon a stable membership as upon a lack of servility to any of the other departments. The exclusiveness of the Court attaches as much to its members, as individuals, as it does to all the other vested authority of the Court. A plan to interchange circuit judges for Supreme Court Justices is nothing more than circumvention of the constitutional intent to maintain the Court’s unique position. The Court is the accumulative voice of the men nominated and confirmed to sit as its members. To tamper with this voice is to artfully defeat the intentions of the founding fathers. That others have attained “inferior” court judgeships under identical appointment procedures is immaterial.

This proposal would, no doubt, allow capable men to sit upon the Court. But nevertheless, it would allow men lacking an indoctrinated Supreme Court sense of responsibility to sit also. The question, should these circuit court selectees apply to themselves the disqualification rules as set forth by law, or could they be allowed to exercise their

Since Chisholm v. Georgia, 2 Dall. 419, 432 (U.S. 1793), the portion of the Supreme Court’s jurisdiction derived from the Constitution of which Congress cannot deprive it has been recognized. Accord, United States v. Hudson, 7 Cranch 32, 33 (U.S. 1812). This doctrine was reaffirmed by the Supreme Court in Cary v. Curtis, 3 How. 236, 245 (U.S. 1845), the Court saying: “... the judicial power of the United States, although it has its origin in the Constitution is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.”

The exclusiveness of this constitutional jurisdiction is summarized by Sen. Doc. No. 232, 74th Cong., 2d Sess. (1938) 429, in this manner: “Jurisdiction prescribed by the Constitution cannot be extended by Congress. Thus, a statute authorizing the Supreme Court to issue writs of mandamus, where under the circumstances, that constituted an original proceeding; or giving it jurisdiction of a prize cause transferred from a lower court, where no action had been taken upon the cause in such court; or giving it jurisdiction to the circuit court in all suits in which an alien is a party is invalid. A section of the Expediting Act of 1903 (32 Stat. 833) which, upon division of opinion in circuit court, authorized certification of cases to Supreme Court for review ‘in like manner as if taken there by appeal’ was held to invoke the exercise of original jurisdiction, contrary to the settled rule.” (Cases omitted.)

No disqualification procedure is established for a Supreme Court Justice. However the rules governing the disqualification of circuit court judges have been enacted into law and are enumerated in 36 Stat. 1132 (1911), 28 U. S. C. § 216 (1940).
discretion as brethren of the Court, would lead to the Court’s hearing an incidental disqualification issue and deciding it, before it could ready itself for actual case litigation. For the best administration of justice, all members of the same tribunal hearing the same cause must of necessity be maintained on the same footing and level. In this respect H.R. 774 fails, since it tends towards the establishment of a double standard of conduct.

Neither this Congress, nor any previous one, has ever thought it necessary to question the integrity of the present members of the Court or any of their predecessors. Once an appointee has satisfied the character qualifications and the Senate confirmed the appointment, a public trust vested which never was belittled by the adoption of disqualification rules affecting the Justices. The Court itself has never adopted any procedure to determine the ineligibility of a Justice. This has always been a personal and voluntary determination on the part of the individual Justices themselves. Their knowledge, their honor and their realization of the dignity of the office are but a few of the prerogatives considered in this discretionary self-disqualification procedure exercised by the Court’s Justices. However, this is not the prevailing situation in the “inferior” federal tribunals. The judges of the district courts and the circuit courts of appeal are governed by disqualification rules prescribed by law. Here is the final mark of differentiation, not only one of office but also one of personalities.

Finally, such a proposal in actual operation might make the Court susceptible to unwarranted criticism emanating from members of the bar adversely affected by a decision rendered by the Court composed of Justices and circuit judges. The thought that a selectee was “hand-picked”, and therefore that the Chief Justice by his selection had packed the Court, would be ever-present should the Court be composed of these two groups. The presence of these suspicions would cheapen the tradition which the Court has maintained by being above the pettiness of politics. These criticisms would affect the thought of every American citizen in his regard and esteem for this, his final recourse against prejudice and maladministration of justice.

Hearings before Committee on Judiciary on H.R. 2808, 78th Cong., 1st Sess. (June 24, 1943) 3.

H.R. 2808.\textsuperscript{22}

This measure provides for the reduction of the present Supreme Court quorum of six to a quorum of five.\textsuperscript{23} Consideration of this proposed legislation must center about the features of parliamentary procedure not only in the United States, but in other Anglo-Saxon jurisdictions as well. Under the common law, a majority of the authorized membership of a representative body consisting of a definite number of members constituted a quorum for the purpose of transacting any pending business.\textsuperscript{24} An important modification of this has been recognized by the courts of the State of Kentucky.\textsuperscript{25} The general rule was expressed by the Supreme Court of the State of Colorado in \textit{Mountain States Telephone and Telegraph Co. v. People}\textsuperscript{26} the court saying in that instance:

"This statute clearly determines that which is necessarily implied in the constitutional provision, (Article 6 §§ 5 and 8 of the Colorado Constitution) that a quorum of the justices may transact business and decide cases. The statute does not define a quorum. The word, therefore, must be held to be used in its ordinary meaning, and that meaning is a majority of the entire body."

In this particular instance the court of Colorado was called upon to interpret a state statute fixing the quorum of the Supreme Court of Colorado.\textsuperscript{27}

A cursory review of the legislation affecting the Supreme Court quorum reveals that the present quorum of six, one more than the Court's majority, is sanctimonious and traditional with Congress rather than justified by legal or historical precedent.

\textsuperscript{22}H.R. 2808, 78th Cong., 1st Sess. (1943), introduced by Mr. Sumners of Texas, 90 Cong. Rec., May 27, 1943, at 5016.

\textsuperscript{23}H.R. 2808, 78th Cong., 1st Sess. (1943), provides for an amendment of § 215 of the Judicial Code, 28 U.S.C. § 321 (1940), as follows:

"Sec. 215. The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, a majority of whom shall constitute a quorum."

\textsuperscript{24}1 BL. COMM. (Wendell's ed. 1858) 349-352.

\textsuperscript{25}The Supreme Court of the State recognized the common law doctrine that a majority of an authorized body consisting of a definite number of members may constitute a quorum for the purpose of doing business. By its opinion however, the court modified this doctrine by holding that a quorum may also be determined by the creating agency or by allowing the created body to decide for itself. Seiler v. O'Maley, 190 Ky. 190, 227 S.W. 141, 142 (1921).

\textsuperscript{26}68 Colo. 487, 499, 190 Pac. 513, 517 (1920).

\textsuperscript{27}COLO. REV. STAT. (1908) § 1412: "If there shall not be a quorum of the justices of the supreme court present on the first day of any term, the court shall be and stand adjourned from day to day until a quorum shall attend."
Though the Constitution created the Supreme Court, it left to the discretion of Congress the incidentals pertaining to the Court. Since the early days of the nation Congress has determined what appellate causes shall go to the Court as a matter of right, how many Justices shall constitute a quorum of the Court, and other like matters. The first Judiciary Act set the number of Justices, including the Chief Justice, at six and the quorum at four. This established a two-thirds quorum. However, this two-thirds quorum was co-incidental with the establishment of a bare majority. From 1801 to 1837 the size of the Court varied, but the quorum remained stationary. In 1837, the number of justices, including the Chief Justice, was increased to nine and the quorum established at five, a bare majority. During the next twenty-six years there was no change in the number of justices or in the quorum. However, in 1863, the number of Justices, including the Chief Justice, was raised to ten and the quorum to six. In 1866, Congress amended the Judicial Code by providing for the diminution of the Court to six Associate Justices and one Chief Justice. By prohibiting the Chief Executive from nominating candidates to fill Court vacancies which were occasioned by the death or the retirement of the Justices then on the Court, Congress had hoped that the desired number of seven Justices would be achieved. This level, however, was never reached, but in 1868 the Court was reduced to eight members including the Chief Justice. In 1869, Congress re-established the number of Justices at nine, but maintained a quorum of six. It has re-

\[^{28}\text{See note 8 supra.}\]

\[^{29}\text{Ibid.}\]

\[^{30}\text{Ibid.}\]

\[^{31}\text{See Mr. Charles Warren's statement, \textit{Hearings before Committee on Judiciary on H.R. 2808}, 78th Cong., 1st Sess. (June 11, 1943) 5.}\]

\[^{32}\text{Stat. 89 (1801) provided for five Justices and for the quorum of four which was established in 1 Stat. 73 (1789). 2 Stat. 421 (1807) increased the number of Justices to seven but made no mention of the quorum of four established in 1789. 4 Stat. 332 (1829) made no mention of the number of Justices on the bench but provided for a quorum of four.}\]

\[^{33}\text{Stat. 176 (1837).}\]

\[^{34}\text{12 Stat. 794 (1863).}\]

\[^{35}\text{14 Stat. 209 (1866).}\]

\[^{36}\text{Neither Justice Catron, who died in 1865, nor Justice Wayne, who died in 1867, was ever replaced before the Act of 1866, 14 Stat. 209, was revised.}\]

\[^{37}\text{16 Stat. 44 (1869), Rev. Stat. \$ 673 (1875), 28 U. S. C. \$ 321 (1940).}\]

\[^{38}\text{However the requirement for a two-thirds quorum, 16 Stat. 44 (1869), Rev. Stat. \$ 673 (1875), 28 U. S. C. \$ 321 (1940), did not go by unnoticed; see 89 Cong. Globe, 41st Cong., 1st Sess. (1869) 216 (Mr. Edmunds); 339 (Mr. Woodward); 341 (Mr. Kerr).}\]
mained at this level for the past seventy-five years.39

This attempt to reduce the quorum of the Court to five has been inter-

rupted by some members of Congress as another attempt to pack the Court.40 The theory offered to substantiate this contention is the

supposition that the President may fill the next vacancy on the bench

with the present Attorney General. Thus with the present quorum rule, such an appointment, if forthcoming, would prima facie disqualify

the Supreme Court in any recent matter in which the United States

is a party.41 These fears may be groundless, but they have been given consideration. In passing, it is of interest to note that the administra-
tion is taking a stand contrary to the one it maintained in 1937 during

the historic controversy over the President’s attempt to reorganize the

judicial branch of the Government.42 The planned proposal of 1937,

though primarily intended to increase the number of Justices on the

Supreme Court bench, provided for a two-thirds quorum also.43

A belief is also present that a quorum of five will not allow enough

Justices the opportunity to hear and decide the important constitu-
tional issues present in these litigations, and that therefore the resulting
decisions establishing a portion of the nation’s law are rendered by

a very small number of men. This position is untenable. As early as

1834, Chief Justice Marshall stated a rule in Briscoe v. Commonwealth’s

Bank of Kentucky,44 from which the Court has never departed.45 In

39The number of Justices and the necessary quorum established in 1869 were reaffirmed


40Mr. Fellows termed the plan to reduce the quorum to five, a half-sister to the court-

packing scheme of 1937. Hearings before Committee on Judiciary on H.R. 2808, 78th

Cong., 1st Sess. (June 11, 1943) 59-61.

43Three Justices have recently been affiliated with the Department of Justice, Justices

Murphy and Jackson, former Attorneys General, and Justice Reed a former Solicitor

General. It is interesting to note that during the Hearings, see note 7 supra, Mr. Justice

Douglas’ recent affiliation with the Securities and Exchange Commission was entirely

overlooked.


43That number of judges which is at least two-thirds of the number of which the

Supreme Court of the United States consists, or three-fifths of the number of which the

United States Court of Appeals for the District of Columbia, the Court of Claims, or the

United States Court of Customs and Patent Appeals consists, shall constitute a quorum

of such court.” S. 1392, § 1 (c), 75th Cong., 1st Sess. (1937).

448 Pet. 118, 121 (U.S. 1834). The then Chief Justice said: “The practice of this court

is, not (except in cases of absolute necessity) to deliver any judgment in cases where con-

stitutional questions are involved, unless four judges concur in opinion, thus making

the decision that of a majority of the whole court. In the present cases four judges
that case the Court imposed upon itself the restraint that in cases involving a constitutional issue no judgment could be given unless a majority of the whole Court concur therein.46

An historical justification for lowering the quorum to five is present. Mr. Charles Warren, the eminent constitutional historian, in his testimony before the Judiciary Committee of the House presented the practical as well as the historical phases supporting a reduction of the quorum to five. Mr. Warren believes an odd number of members should constitute a quorum. This would dispense with the necessity of retrying later cases involving the same issues where there had been a prior affirmation of a decision below by an evenly divided Court. In reality these draw decisions do not decide the issues pending before the Court but merely force the Court to avoid an issue which eventually will have to be retried.47 However, an odd numbered quorum is not an assurance that a draw vote will be prevented because an even number of judges may be sitting.48

H.R. 2926.49

This bill provides that the quorum is to remain at six, but should do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present. "Mr. Justice Johnson and Mr. Justice Duvall were absent when these cases were argued. However, when City of New York v. Miln was argued at the next term, the Court was still not full and the Court's previous position was reiterated. 9 Pet. 85 (U.S. 1835).


46See note 45 supra.

47"It is highly desirable that the number fixed for a quorum should always be an odd number, because if you have an even number for a quorum there is always the possibility of the court splitting evenly and being unable to decide a case even if they have got a quorum." Hearings before Committee on Judiciary on H.R. 2808, 78th Cong., 1st Sess. (June 11, 1943) 10.

48What has been said of H.R. 2808, 78th Cong., 1st Sess. (1943), is applicable to those provisions of H.R. 774, 78th Cong., 1st Sess. (1943), which provide for the reduction of the quorum to five. However, the latter bill has additional complicated features previously discussed which involve the calling of circuit judges. The provisions of H.R. 774 concerning the recalling of retired Supreme Court Justices will be discussed along with the provisions of H.R. 2926 and H.R. 3456, 78th Cong., 1st Sess. (1943), which are entirely devoted to solving the problem by recalling retired members of the Court, and differ only as to the method.

disqualifications occur among the Justices, causing the Court to become incapable of action in any litigation, the Chief Justice shall designate such retired Justices of the Supreme Court, in the inverse order of their retirement, as are necessary to enable the Court to obtain a quorum. This divestment of retirement is contingent upon the consent of the designatee. By operation of this bill the Court would therefore be able to hear and determine any cause which the duly appointed tribunal would be forced to shelve. Such a provision would allow the Chief Justice a selection of any one of two retired members, and more probably only one as far as the two cases are concerned.

The provisions of the two bills for the return of retired Supreme Court Justices in order to obtain a quorum will be discussed concurrently.

These provisions seem to be more practical than the remedial proposals of H.R. 774 above discussed. For, in the recalling method there is both federal legislation and judicial precedent forming a basis which will allow Congress to further condition the retirement of these inactive members of the Court. By the provisions of the Retirement Act of 1937 Congress qualified the retirement of Justices by allowing the Chief Justice to offer such judicial assignments in any circuit as the retiree would be willing to undertake. As the salaries of Justices

60 sec. 215 . . . Provided, That whenever a quorum cannot be obtained wholly or partly because the Chief Justice or one or more of the Associate Justices declares himself, or themselves, disqualified for any reason, the Chief Justice shall designate from among the retired justices of the Court, including retired Chief Justices, such number of justices as may be necessary to constitute a quorum. Retired justices shall be designated for such purpose in the reverse order of their retirement, the justice most recently retired being the first designated, but no such retired justice shall be designated without his consent. H.R. 3456, 78th Cong., 1st Sess. (1943) differs from this proposal in that it provides for the simultaneous recall of all of the retired Justices of the Court.

Chief Justice Hughes and Mr. Justice McReynolds.

It is probable that Chief Justice Hughes would disqualify himself in the North American case and in the Aluminum Co. case as his son is representing both companies. Hearings before Committee on Judiciary on H.R. 2808, (June 11, 1943) 59.


The provisions of H.R. 774, 78th Cong., 1st Sess. (1943) relate to the recall of circuit judges and retired Justices of the Supreme Court and allows the Chief Justice to exercise his discretion in making the selection of the appointee.


See note 55 supra.

are not changed upon their retirement, such an extension of the Retirement Act may be deemed a reasonable exercise of the congressional authority to further qualify the inactivity of these retired Justices.

That a retired member of an inferior federal court continues to hold his office has been established in United States v. Moore. In interpreting the provisions of the Retirement Act applying to members of the circuit courts, Mr. Justice Roberts, speaking for the Supreme Court, said:

"It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge. The Act does not, and indeed could not, endue him with a new office, different from, but embracing the duties of the office of judge. He does not surrender his commission, but continues to act under it. He loses his seniority in office, but that fact, in itself, attests that he remains in office. . . . But Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it. . . ."

The adherents of the plans providing for the recall of the retired Justices do not rely upon this decision. However, this trend of judicial interpretation combined with the congressional authority to determine of what the Court shall consist, presents two very strong points supporting the proposals containing these recall provisions. Opposed to such proposals would be the practical issues involved in the administration of an act of this nature. Mr. Chief Justice Stone believes, "... if you made that provision [eligibility of retired justices to be recalled] you would have an initial lawsuit which the Supreme Court would have to decide before you would get to the main question in these lawsuits."

Another aspect is the reaction of the bar to a fluctuating Court. One of the bills would confine the recalling of Justices to the inverse order of their retirement, and would summon the necessary number needed to give the Court a quorum; the other bill would recall all the retired members as a unit, disregarding the number needed to create an oper-

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The latter proposal seems to be unnecessary since future instances may arise where a summoning of all the retired members and their accepting would create a Supreme Court which would be larger than that allowed by law. These problems presented by H.R. 774 affecting circuit judges do not affect H.R. 2926 and H.R. 3456, as the Justices involved in the two latter proposals were originally appointed to the Supreme Court but have retired from the Court.

However, these retired Justices would not be eligible to be active members on the Court. Their very designation "retired" suggests a divestment of some authority. How much of a divestment has never been decided by the courts. A sitting judge is either a de jure or a de facto member of a court. The former is a judge who has assumed his position as a matter of right, and the latter is a usurper, possessing only a color of title. The retired Justice would be neither. As a matter of right he has surrendered his active participation and has been replaced by another Justice who has been duly appointed and sworn as a member of the Court.

In another sense he is not a usurper for in the very meaning of the word, the connotation of an unjust or illegal possession of an unoccupied but bona fide office is present. How is the recalled Justice to be regarded? If he were regarded as a de facto member, there would be the necessity of a quo warranto suit to determine by what method and right he holds the office. Such a proceeding would enable the Court not only to determine the status of the recalled member, but also to investigate such legislation on constitutional grounds.

**Conclusion.**

Congress is to be commended for the interest it has shown in its attempt to provide some solution to this quorum problem. But there may be no such problem in existence. This Court, and past Courts, have found themselves disqualified from sitting and hearing causes on occasion. These past predicaments were avoided without the neces-

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*See note 9 supra.

1Caldwell v. Barrett and Turner, 71 Ark. 310, 74 S.W. 748 (1903).

11"Now, in order to be a de facto judge, there must be a regularly constituted office and a vacancy therein . . . " Id. at 314, 74 S.W. at 750.

*In discussing the Court's inability to decide the United States v. Bethlehem Steel Corp., Mr. Francis Biddle, the Attorney General said: "Now there are a few other cases in which this difficulty has arisen lately. For instance, the Bethlehem Steel case, a very important case, was held up eighteen months on account of a lack of quorum. Then there was a slight change, a quorum was reached." *Hearings before Committee on Judiciary on
sity of forthcoming legislation. Legislative measures should be enacted into law only when a definite need must be met, and this action should have permanent qualities and lasting effects. An understanding of the Court's disqualification record during the past session 1942-1943, and of the Judges' Act of 1925 will enable one to view a few additional aspects of the problem which Congress imagines to be existent.

During the 1942-1943 session the Court, with a Chief Justice and only seven Associate Justices from October 12, 1942, to February 8, 1943, and carrying a new Justice (Rutledge) until the close of the term, had 201 individual disqualifications. The latest appointee to the Court disqualified himself 70 times before taking part in his first decision on April 19, 1943. A breakdown of these 201 disqualifications reveals that on 88 occasions one Justice was involved, on 37 occasions two members of the Court were involved, on four occasions three members of the tribunal did not sit, and on only two occasions did the Court disqualify itself when four members declined to hear the pending cases. These instances are exclusive of the 70 instances prior to Mr. Justice Rutledge's active participation. Thirteen of the suits involved were rehearings. Mr. Justice Frankfurter was the only member of the Court who never disqualified himself, and Mr. Justice Murphy had more disqualifications than any other of the Justices who commenced the term. These disqualifications were present for various reasons other than, and including, past governmental affiliations.

The cases cited at the beginning of this note are not exceptional. It is true that the North American case presents a heretofore unde-
cided constitutional question. It comes to the Court on certiorari. In deciding to hear the case, the Court embarrassed itself because the Chief Justice had not fully realized the extent of the disqualifications among the Associate Justices. However, appellate remedies set forth in the Holding Company Act of 1935 have been met. The Court in granting a hearing will be forced to hold the case under advisement until a change in the Court's makeup is effected. By doing this it would adhere to precedent.

The Aluminum case does not present the same problem. Here the only question involved is the application of the Sherman Act that has been before the courts for more than fifty years. The Government is very much interested in the case; and having had an adverse ruling, it desires an appeal from a one-judge court decision. This case comes to the Court by appeal as a matter of right. However, as the law involved has been applied in such situations numerous times, inferior federal courts have been enabled to proceed with surety in relying upon these earlier decisions.

Though a right of appeal is not a component part of due process, legislation should be forthcoming which does not affect the Supreme Court's quorum but which will extend a right of appeal in antitrust injunctive litigation to the circuit courts rather than to the Supreme Court. By so enlarging the appellate jurisdiction of the circuit courts of appeal, many cases which now come to the Supreme Court will go first to the circuit courts of appeal. The Supreme Court will then have the opportunity to examine in advance the possible disqualifications among Justices in a particular case, before being required to consider

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87 The constitutionality of the Death Act Clause, § 11 (b) (1) of the Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. § 79 [e and k (b) (1)] (1940), was never decided by the Supreme Court.

88 It would either be forced to wait for a change in personnel as it did in the Bethlehem case, see note supra 69, or perhaps take the course that Chief Justice Marshall selected in 1834 by ordering the cases to be retried at the next term, Briscoe v. Commonwealth's Bank of Kentucky, cited supra at note 44.

89 See note 6 supra.


92 Ibid.


the merits of the case, as it must now do on direct appeal from the
district courts.

In closing, however, it may be noted that if the forthcoming legisla-
tion embodies any one of the plans offered by the bills introduced into
the 78th Congress, 1st Session, (1943), it will contain a major defect.
None of the bills introduced has dealt with the problem of terminating
the office of the recalled Justices or the substitute tribunals. This
omission should be corrected before any legislation affecting the quoro-
um of the Court is made law. Before Congress enacts legislation to
remedy this problem, it should investigate the appellate remedies in
antitrust injunction cases in order to determine whether a right of
appeal, in this kind of litigation, to the circuit courts (instead of directly
to the Supreme Court) would lessen the number of the Court’s disquali-
fications. Thus, Congress, in utilizing a broader approach to the prob-
lem, could afford itself the opportunity of eliminating some of the addi-
tional causes which contribute to the embarrassment of a disqualified
Court.

IRVING M. WOLFF

[89] On March 27, 1944, Mr. Kefauver of Tennessee introduced H.R. 4487, 78th Cong.
2d Sess. (1943), 90 Cong. Rec., March 27, 1944, at 3195. This measure embodies, in part,
the provisions of his earlier bill, H.R. 2926, see note 49 supra, by providing for the
recall by the Chief Justice of retired members of the Court in the inverse order of their
retirement when the Court fails to seat a quorum. In addition to this the bill provides
for a substitute tribunal when the Court is incapacitated from hearing and deciding any
monopoly or antitrust litigation pending before it. The bill, if enacted, will allow the
circuit court of appeals for the district wherein a case originally was brought to trial
to exercise the same authority as the Supreme Court in disposing of the case. The measure
contains the same inherent defects found in all of the earlier proposals, since it does not pro-
vide for a method of relieving the recalled members of the Court of their duties, or for the
termination of the jurisdiction of the substitute court. In addition to these, the bill presents
a question concerning the effects of the measure to bestow upon this alternate court the
right of a final review. This acts to discriminate against a group, which through no fault
of its own has been deprived of an appeal as a matter of right to the Supreme Court.
It will allow some to go to the Court while others, less fortunate, must be content with
a substitute court. Another interesting question is whether this substitute court would
have the jurisdiction to overrule the Supreme Court’s past decisions. If so, it is clearly
unconstitutional. Thus the bill reveals another deficiency in that it does not set forth the
limit of the newly created tribunal’s jurisdiction.
RECENT DECISIONS

AGENCY—Master Is Liable for Servant’s Negligence in Colliding with Stranger while Servant Was Running along Sidewalk. Scope of Employment Is Not Dependent on Time, Place, or the Instrumentality of Locomotion Used.

Appellant brought action for damages against appellees, Postal Telegraph Company and Postal Telegraph-Cable Company of Indiana, for personal injuries sustained when appellees’ messenger boy negligently collided with her on a public sidewalk. The sole means of locomotion used by the messenger boy was his own legs, the negligent use of which was admittedly the proximate cause of the accident. Upon demurrer to the complaint, judgment below was entered for appellees, the trial court holding that the use of the messenger boy’s legs and the use of the public sidewalk were both uses in his own right that were not and could not be given or delegated to him by appellees and that to such state of facts the doctrine of respondeat superior had no application. On appeal the judgment was reversed. Held, scope of employment, to determine liability under the doctrine of respondeat superior, is not dependent on time, place, or instrumentality used, but it is determined by the connection of the negligent act with the type of employment. Annis v. Postal Telegraph Co. et al., 52 N. E. (2d) 373 (Ind. App. Ct., Jan. 11, 1944).

In determining liability under the doctrine of respondeat superior, the real test is whether at the time the servant commits the negligent act, resulting in injury to a third person, he is engaged in performing some duty within the scope of his employment. The court was asked to narrow the application of this doctrine by holding that it is only when the servant uses a vehicle or other instrumentality owned, controlled, and directed by his master, as a means of locomotion on a public highway, that the master can be held liable for the negligence of the servant, which negligence is predicated solely upon the manner of such locomotion. The court stated that it could find no precedent in the State of Indiana for such limited application of the doctrine.

The defendant companies relied very strongly upon two Missouri cases in support of their position, Phillips v. Western Union Tel. Co., 270 Mo. 676, 195 S. W. 711 (1917), and Ritchey v. Western Union Tel. Co., 227 Mo. App. 754, 41 S. W. (2d) 628 (1931). The facts of the Phillips case are similar to those of the principal case. Phillips was standing on the curb of a public sidewalk waiting to cross the street with the traffic signal. One of the company’s messenger boys negligently collided with Phillips with such force that she was knocked down and severely injured. The trial court’s judgment for plaintiff was reversed by the Supreme Court of Missouri. A close examination of the facts of that case reveals that the decision might be supported on the ground that the servant was not acting within the scope of his employment.

The Ritchey case presents a very similar set of facts. A messenger boy,
running from his employer's doorway, negligently collided with the plaintiff. Judgment for defendant was affirmed on appeal. The court's decision was based on the theory that since the servant was in the street not by the master's permission but by a public right, the master was not in control and, therefore, not liable. It is interesting to note that in the opinion the court refers to the authority of the Phillips case as follows: "Whether the doctrine of the Phillips case is sound or unsound is not for this court; it is controlling notwithstanding holdings in other jurisdictions to the contrary." Thus, it would seem that even in the jurisdiction of its origin the rule is now accepted not so much because of its soundness as because of its authority as a binding precedent.

In the principal case the court acknowledges that both the appellees and the messenger boy had the right of using the public street, the former in furtherance of their business and the latter as a facility for gaining a livelihood, but points out that the appellees had the further right to require their messenger to use the sidewalk for their purposes. If the careless disregard by one for the rights of others using the same public street results in injury to another without fault, the wrongdoer must respond in damages. The fact that the master exercises that use through his servant does not alter the rule, if the servant at the time is acting within the scope of his employment. There is no valid reason for repudiating the doctrine of respondeat superior merely because the servant was walking or running along the public street at the time instead of riding a bicycle or driving an automobile.

The court stated that, with the exception of Missouri, all jurisdictions where the same question has arisen have held that the doctrine of respondeat superior applies to cases involving facts of similar nature. Among the cases cited to the point were Hobba v. Postal Telegraph-Cable Co., 141 P. (2d) 648 (Wash. Sup. Ct., Sept. 27, 1943); Tighe v. Ad Chong, 44 Cal. App. (2d) 164, 112 P. (2d) 20 (1941); Schediwy v. McDermott, 113 Cal. App. 218, 298 Pac. 107 (1931).

No doubt the ownership and the nature of the instrumentality are important factors to be taken into consideration in determining liability under the doctrine of respondeat superior, but it would be unreasonable to absolve the master for a servant's torts committed within the scope of employment simply because the servant was operating in a manner independently of the master's permission.

GUIDO DE ROSSI D.


Sarah Prince, guardian of Betty M. Simmons, a girl of nine years, appealed from convictions for violating the child labor laws of Massachusetts. Mrs. Prince and Betty both testified they were ordained ministers of the Jehovah's
Witnesses. The appellant contended that the public distribution of Jehovah's Witnesses' publications by Betty with her permission was a rightful exercise of her religious convictions. Held, The state has the power to control the conduct of children in publicly proclaiming religion upon the street and in other similar public places. *Sarah Prince v. Commonwealth of Massachusetts*, 64 Sup. Ct. 438 (1944).

The events leading to the convictions are relatively familiar and hardly need presentation except to give setting to the part played by Betty Simmons. Mrs. Prince was accustomed to go each week on the streets of Brockton, Massachusetts, to distribute "Watch Tower" and "Consolation", publications of the sect, according to the usual plan. Permitting Betty to accompany her on December 18, 1941, Mrs. Prince and the child took positions along the street and exhibited for sale copies of the publications.

Charges were brought against Mrs. Prince under §§ 80 and 81 of the child labor law of Massachusetts, Mass. Gen. Laws (Ter. Ed.) c. 149 (1932), as amended by Acts and Resolves of 1939, c. 461. Section 69 of the law prohibits all children within specified age limits from selling or offering to sell "any newspapers, magazines, periodicals or any other articles of merchandise of any description . . . in any street or public place." Criminal sanctions are imposed by § 80 upon anyone who furnishes merchandise to minors for sale, and by § 81 similar criminal sanctions are imposed on the parents and guardians who compel or permit minors in their control to engage in the prohibited transactions.

The following complaints were made against Mrs. Prince: (1) furnishing Betty with magazines, knowing she was to sell them unlawfully, that is, on the street; and (2) as her custodian, permitting her to work contrary to law. The question squarely before the court was whether §§ 80 and 81, as applied, contravene the Fourteenth Amendment by denying or abridging appellant's freedom of religion and by denying to her the equal protection of the laws.

The Supreme Court readily admitted that an ordinance or statute identical in terms with § 69, applicable to adults or all persons generally, would be invalid, citing *Young v. California*, 308 U. S. 147, 154 (1939); *Nichols v. Massachusetts*, 308 U. S. 147, 156 (1939); *Jamison v. Texas*, 318 U. S. 413 (1943); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); and *Martin v. City of Struthers*, 319 U. S. 141 (1943). Compare the Murdock case with *Jones v. Opelika*, 316 U. S. 584 (1942), judgment vacated on rehearing, 319 U. S. 103 (1943).

However, the state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment, and rights of religious freedom are not beyond limitation. Acting to guard the general interest in youth's well-being, the state as *pares patriae* may require school attendance, *State v. Bailey*, 157 Ind. 324, 61 N. E. 730 (1901); *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *West Virginia State Board of Education v.*

It was contended by appellant, however, that when state action impinges upon a claimed religious freedom or other fundamental liberty, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger. Cf. Schenck v. United States, 249 U. S. 47, 52 (1919), and West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639 (1943). To this the Court answered that in acting in the best interests of the state and society in general the state has the power to guard against evils arising from child employment, especially in public places, and the possible harms arising from other activities subject to the diverse influences of the street. See, e.g., Clopper, Child Labor in City Streets (1912); Children Engaged in Newspaper and Magazine Selling and Delivering, U. S. Dept. of Labor, Children's Bureau Publication No. 227 (1935).

In ruling that with reference to the public proclaiming of religion upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, and that the boundary of its power had not been crossed in this case, the Court also held that the appellant's contention of denial of equal protection of the laws had been disposed of. In support of this contention, appellant argued that the street, for Jehovah's Witnesses and their children, is their church, and to deny them access to it for religious purposes as was done here has the same effect as excluding altar boys, youthful choristers, and other children from the edifices in which they practice their religious beliefs and worship. The Court in answer said, "However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion." Cf. Cox v. New Hampshire, 312 U. S. 569 (1941), and Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).

This statement would seem to conflict directly with the Court's opinion in Murdock v. Pennsylvania, 319 U. S. 105, 109 (1943), wherein, while discussing the various activities of the Jehovah's Witnesses in the conduct of their religion, such as house to house canvassing, etc., it was said, "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of press." The Murdock case, it should be remembered, held that a municipal ordinance which, as construed and applied, requires colporteurs to pay a license tax as a condition to the pursuit of their activities, is invalid under the Federal Constitution as a denial of freedom of speech, press, and religion. Id. at 108-110. The Court further held that the power to impose a license tax on the exercise of fundamental freedoms was as potent as the power of censorship, which the Court has repeatedly struck down. Lovell v. Griffin, 303
U. S. 444 (1938); Schneider v. State, 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940); Largent v. Texas, 318 U. S. 418 (1943); and Jamison v. Texas, 318 U. S. 413 (1943).

In Jones v. Opelika, 316 U. S. 584, 597 (1942), the Court had held that when a religious sect uses “ordinary commercial methods of sales of articles to raise propaganda funds,” it is proper for the state to charge “reasonable fees for the privilege of canvassing.” The Court in the Murdock decision, after referring to the holding in the Opelika case, said (p. 111): “But the mere fact that the religious literature is ‘sold’ by itinerant preachers rather than ‘donated’ does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project.”

It cannot be denied that the Prince decision in part qualifies the Murdock decision. It is one thing for the Court to classify the public activities of house to house canvassing and hand distribution as such a part of the sect’s religious activity as to be immune from any supervision by licensing and freed from any fees in payment thereof. It is another thing to hold that if the acts are performed by minors, they are subject to state regulation. It therefore follows that all such “religious activity” is immune from regulation only when practiced by adults. The effect of the Court’s decision is to make age, rather than the nature of the activity the determinative feature. See Mr. Justice Jackson, dissenting at page 447.

A separate dissenting opinion of Mr. Justice Murphy challenged the reasonableness of the majority opinion. It was his opinion that regulation of such activities should not be the same as those imposed on activities solely commercial in nature, Murdock v. Pennsylvania (p. 111), and that there must be convincing proof that such activities constitute a grave and immediate danger to the state or to the health, morals, or welfare of the child. West Virginia State Board of Education v. Barnette, (p. 639). “The vital freedom of religion, which is ‘of the very essence of a scheme of ordered liberty,’ Palko v. Connecticut, 302 U. S. 319, 325, cannot be erased by slender references to the state’s power to restrict the more secular activities of children.”

It is interesting to note that while the Court affirmed the Massachusetts court’s decision, it did so for different reasons. The Massachusetts court’s opinion was substantially that “freedom of the press and of religion is subject to incidental regulation to the slight degree involved in the prohibition of the selling of religious literature in streets and public places by boys under twelve and girls under eighteen.” 313 Mass. 223, 229, 46 N. E. (2d) 755, 758 (1943). Cf. State v. Richardson, 92 N. H. 178, 27 A. (2d) 94 (1942). This is construed by Mr. Justice Jackson, with whom Mr. Justice Roberts and Mr. Justice Frankfurter joined, to be the better opinion. This opinion also suggests that a better test for the court’s action would be to regard such public activities as carnivals, lawn fetes, Bingo games, and card parties as secular activities and subject to state regulation. The distribution of religious publications by
house to house canvassing would fall into this category. But, as shown by the words of Mr. Justice Jackson, "The court in the Murdock case rejected this principle of separating immune religious activities from secular ones in declaring the disabilities which the Constitution imposed on local authorities. Instead, the Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities."

It is impossible to speculate as to the manner in which this decision will affect future litigation. The course of decisions affecting Jehovah's Witnesses and their activities has been a tortuous one. See (1942) 31 Georgetown L. J. 64, and (1943) 32 Georgetown L. J. 93.

The Court warned against an indiscriminate application of its ruling by stating: "Our ruling does not extend beyond the facts the case presents. We neither lay the foundation 'for any [that is, every] state intervention in the indoctrination and participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious training and activities.' The religious training and indoctrination of children may be accomplished in many ways, some of which . . . have received constitutional protection through decisions of this court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision."

WILLIAM J. HICKEY

FEDERAL COURTS—In Diversity of Citizenship Cases, Questions of State Law, though Unsettled, Must Be Decided by Federal Courts.

Plaintiffs were holders of bonds issued by the City of Winter Haven, Florida, and brought action in the federal court on the basis of diversity of citizenship, seeking a declaratory judgment and an injunction in connection with the city's proposal to call and retire bonds without payment of interest. The question of the legality of the interest provision was in controversy and involved Florida constitutional law and statutory law. The decisions of the Florida courts had left this question in a state of uncertainty, and what their future decisions on the particular question involved might be was unpredictable. Held, that federal courts must decide questions of state law whenever necessary to the rendition of the judgment, even though it is difficult to determine just what the state court may subsequently decide. Meredith, et al. v. City of Winter Haven, 64 Sup. Ct. 7 (1943).

The history of this case in the federal courts shows that they were divided on the question of applying state law in diversity of citizenship cases of this character. The action was brought in the southern district of Florida, where the court granted a motion to dismiss on the grounds that questions of law had been determined adversely to petitioners by the Supreme Court of Florida.
The Circuit Court of Appeals reversed this decision holding that since the State law was not definitely settled on the question, and since no federal question was presented, petitioners should proceed in the state court for a decision as to the applicable state law. 134 F. (2d) 202 (C. C. A. 5th, 1943). A dissenting opinion held that, as the Constitution granted federal courts jurisdiction in cases involving diversity of citizenship, the court must follow the latest decision of the Florida Supreme Court, and could not divest itself of jurisdiction by referring to the state court for adjudication.

The Supreme Court of the United States passed down a 7-2 decision, with two justices adopting the views expressed in the decision of the Circuit Court of Appeals. The majority opinion by Mr. Justice Stone held that it is mandatory for a federal court to decide cases where diversity of citizenship is involved, and that it must decide questions of state law whenever necessary to the rendition of a judgment; otherwise, the "denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

A discussion of *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938), is but a natural guidepost in any controversy over the applicability of state law in a federal court. That case involved an action for negligence and was brought by a person who, while walking along a railroad right of way, had been struck by a passing train. The action was brought in federal court on the grounds of diversity of citizenship. The accident had occurred in Pennsylvania, and the railroad invoked the common law of that state, which held that persons walking along a right of way were trespassers and that railroads were not liable for injuries sustained by them. This contention gave the Supreme Court an opportunity to review the nearly century-old rule of *Swift v. Tyson*, 16 Pet. 1 (U. S. 1842), which permitted a federal court to apply whatever law it desired, regardless of the decisions of the highest court of the state in which the cause of action arose. By the decision in the *Erie case*, the court overruled *Swift v. Tyson*, and held that there is no federal general common law, and that federal courts, in diversity of citizenship cases, must apply the substantive law of the state in which they sit.

That this rule extends to equitable actions as well as legal actions was apparent from the holding in *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202 (1938). In that case, the company sought rescission of a policy of insurance on the ground of misrepresentation, and, as it was argued prior to the *Erie* ruling, counsel for both sides ignored the question of applicability of state law. However, the court applied the *Erie* doctrine, vacating the judgment and providing for an amendment of the pleadings to conform to the state law with respect to the construction of incontestable clauses in insurance policies. Commenting on this doctrine, the court said: "... the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts."
Briefly summarized, the controversial issue in the subject case may be stated as whether the doctrine of *Erie R. R. v. Tompkins* shall prevail to the extent that federal courts may dismiss diversity of citizenship cases merely because the state law on a particular question is unsettled. The Supreme Court's decision holds in the negative; in fact, the opinion states that the *Erie case* "did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state law in all cases within their jurisdiction in which federal law does not govern."

The Supreme Court has vigorously upheld the *Erie* rule and has not been reluctant to remind the lower federal courts that they must not establish an independent rule on questions of state law but must follow the decisions of state courts, even though an intermediate appellate court has been the highest state court to rule on a particular point, and even though the state decisions appear to be bad law. Examples of decisions along this line are found in *New York Life Ins. Co. v. Jackson*, 304 U. S. 261 (1938), in which the state court's interpretation of an insurance policy was binding; in *Rosenthal v. New York Life Ins. Co.*, 304 U. S. 263 (1938), in which the lower court had refused to follow the state court's adjudication with respect to the effective date of an incontestable clause in a lapsed insurance policy; in *Hudson v. Moonier*, 304 U. S. 397 (1938), in which the court had declined to apply the law of the state regarding the liability of a truck operator for injuries sustained when the truck had improper signaling devices; in *West v. American Telephone & Telegraph Co.*, 311 U. S. 223 (1940), in which the highest state tribunal ruling on a question of stock transfer was only an intermediate appellate court; in *Six Companies of California v. Joint Highway District*, 311 U. S. 180 (1940), in which the Circuit Court of Appeals had failed to apply the rule of the state court with respect to liquidated damages because it felt the state rule erroneous; and in *Fidelity Union Trust Co. v. Field*, 311 U. S. 169 (1940), where the appellate court had ruled on the construction of a New Jersey statute dealing with trust deposits independently of the construction accorded by the state to the statute.

In view of the trend of these decisions, the Circuit Court of Appeals in the *Meredith case* seemed to be following the safer course by declining to interpret Florida law about which it could not be certain. Its opinion also pointed out that judicial precedent binds federal courts more strongly than lower state courts, because decisions of the latter may be appealed to the state supreme courts. Nevertheless, the Supreme Court in *Palmer v. Hoffman*, 318 U. S. 109 (1943) stated that "where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error." This opinion was rendered after the appeals decision in the *Meredith case*, but it is doubtful whether the appellate court would have been influenced to any degree by this assurance.

In spite of the decisions cited, it cannot be said that there had ever been elimi-
nated the necessity for a federal court to determine state law. Shortly after the *Erie* ruling, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941) was decided. In that case an action was brought in the federal court in Delaware by a New York corporation against a Delaware corporation for breach of a contract executed and performed in New York. The Circuit Court of Appeals had followed the New York statute in ascertaining the measure of damages for breach of contract, stating that it believed the law of the place of performance should govern. Although each side had contended that, according to Delaware law, the point was in their favor, the decision was reached independently of state law. The Supreme Court reversed the Circuit Court of Appeals, holding that the latter should determine what the state law was, in accordance with the *Erie* doctrine and stated: "... the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

The mere fact that the state law may be difficult to determine does not relieve the federal court of its responsibility. In a discussion of this responsibility, Judge Goodrich pointed out: "If an authoritative local decision is found which governs the case, the (federal) judge may breathe a sigh of relief. Whatever he may think of the local decision, it governs the instant case for him and all he needs to do is apply it. . . . Nevertheless there will be many gaps and very important gaps in the case law of the state which the federal judge is bound to follow." Goodrich, *Mr. Tompkins Restates the Law* (1941) 27 A. B. A. J. 547.

This view seems to adequately summarize the situation in the instant case. The Circuit Court of Appeals might have considered that its view was the more practical approach to the problem. The Supreme Court, however, protected the diversity of citizenship aspect of federal jurisdiction, and made it mandatory for the federal court to decide the case according to state law despite the uncertainty thereof. At the most, the case seems to restrain lower federal courts from divesting themselves of jurisdiction merely because they are uncertain about the state law.

WILLIAM B. ROBERTS

LABOR—Prerequisites to an Employer's Right to Injunctive Relief under the Norris-LaGuardia Act.

In October 1940, petitioners, The Brotherhood of Railroad Trainmen and others, were selected by the employees of respondent, Toledo, Peoria & Western Railroad, to represent them, under the provision of the Railway Labor Act, 48 STAT. 1187 (1934), 45 U. S. C. § 152, Fourth (1940), in negotiations with respondent. Negotiations between the parties failed, as did a long course of mediation with the aid of the National Mediation Board. In November 1941 both parties refused to arbitrate as proposed by the mediator pursuant to another provision of the Railway Labor Act, 48 STAT. 1195 (1934),
45 U. S. C. § 155, First (b) (1940). After the bombing of Pearl Harbor on December 7, the employees, urged by the Mediation Board, agreed to arbitrate, but respondent refused, insisting that an emergency board be appointed. On December 29 the employees struck and acts of violence ensued. Respondent filed a complaint in the District Court for the Southern District of Illinois on January 3, 1943, seeking an order enjoining petitioners from interfering “by violence or threats of violence” with its property and interstate railroad movements. A temporary restraining order issued ex parte that day, and, after a hearing, a preliminary injunction issued. Petitioners appealed from the order granting the injunction, and the Circuit Court of Appeals for the Seventh Circuit affirmed. 132 F. (2d) 265 (1942). On certiorari the unions brought the case to the United States Supreme Court, and that Court reversed. Held, that the respondent had not satisfied the requirements of the Norris-LaGuardia Act, 47 Stat. 72 (1932), 29 U. S. C. § 108 (1940), in that it had not made “every reasonable effort” to settle the dispute and that it was therefore not entitled to injunctive relief. The Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27 v. Toledo, Peoria & Western Railroad, 64 Sup. Ct. 413 (1944).

Section 8 of the Norris-LaGuardia Act provides:

“No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.”

Inperfecting an appeal to the circuit court one of the contentions of the unions was that the employer had failed to comply with one of its statutory duties when it refused to arbitrate as required by the Norris-LaGuardia Act. The circuit court disapproved the unions’ contention, citing Mayo v. Dean, 82 F. (2d) 554 (C. C. A. 5th, 1936), and stating that “The Act specifically says that arbitration is voluntary, not compulsory, and further that the employer must make every reasonable effort to settle a dispute either by negotiation or mediation, or voluntary arbitration before he may obtain injunctive relief. The employer is not compelled to avail himself of all three methods; any one of them will fulfill the requirements.” Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, 132 F. (2d) 265, 271 (C. C. A. 7th, 1942). That court further held, in accordance with a contention of the employer, that “... where violence and threats of violence are committed, Section 108 [of the code, § 8 of the Norris-LaGuardia Act] has no application.” Cater Const. Co. v. Nischwitz, 111 F. (2d) 971 (C. C. A. 7th, 1940); United Electric Coal Companies v. Rice, 80 F. (2d) 1 (C. C. A. 7th, 1935); Newton v. Laclede Steel Co., 80 F. (2d) 636 (C. C. A. 7th, 1935).

In reversing the circuit court the Supreme Court based its decision on only one of the unions’ contentions, namely, that “respondent did not make every
reasonable effort to settle the dispute as required by the Norris-LaGuardia Act." The Court held that an employer must exhaust all three methods specified in § 8 of the Act for the settlement of a labor dispute, that is, negotiation, mediation (when available), and voluntary arbitration, in order to be considered as having made the "every reasonable effort" required as a prerequisite to obtaining injunctive relief.

A familiar rule of statutory construction is followed by the Court in arriving at this conclusion, namely, that no part of a statute shall be so construed as to render that, or any other, part surplusage, if by some other construction redundancy can be avoided. Platt v. Union Pacific R. R., 99 U. S. 48, 58 (1878); Crabb v. Zerbst, 99 F. (2d) 562, 564 (C. C. A. 5th, 1938); Pacific Gas & Electric Co. v. Securities & Exchange Comm., 127 F. (2d) 378, 382 (C. C. A. 9th, 1942); accord, Market Co. v. Hoffman, 101 U. S. 112, 115 (1879); Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 475 (1911). Dividing § 8 of the act into two clauses as follows: (1) "... to comply with any obligation imposed by law ...", and (2) "... to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration", it finds that the second clause would be wholly redundant—a dead letter, in fact—if it could be satisfied by negotiation only, since negotiation is an obligation imposed by law.

The Supreme Court made but brief reference to the case cited by the circuit court as determinative of the issue, Mayo v. Dean, supra, and made no effort to distinguish the facts of that case from those here in issue. It is suggested that these cases can be distinguished on the facts and that the "every reasonable effort" required of an employer will vary according to the fact situation. In Mayo v. Dean, supra, there were three parties to the labor dispute, or, more accurately, harmonious relations between the employer and employees were involved in a labor dispute through actions of another labor organization which desired certain revisions of employee representation, rates of pay, or operating conditions. The importance of this difference is best brought out in Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 99 F. (2d) 309, 317 (C. C. A. 8th, 1938), cert. denied, 305 U. S. 662 (1939). In this case the employees by vote refused to accept defendant "outside" union as their representative, and upon action by the employer to restrain acts of violence, the defendants alleged that the employer had failed to make "every reasonable effort" to settle the labor dispute and should be denied injunctive relief. The Circuit Court of Appeals for the Eighth Circuit in that opinion said, "Accepting as true all of the allegations of the complaints, what effort on the part of the plaintiffs to settle the controversy with the defendant union would have been a reasonable effort, and what reasonable effort did the plaintiffs fail to make? Looking at the matter realistically, it would seem that at no time after the plaintiffs were notified by their employees of their refusal to accept the defendant union as a bargaining agent, was there anything which the plaintiffs could reasonably have offered to the defendants by way
of compromise or settlement of the dispute which had arisen, except, perhaps, an explanation of the situation and a prayer for peace.” The conclusion is inescapable that “every reasonable effort” by the employer requires negotiation and mediation and arbitration only where the labor dispute is directly between employer and employees. Where the labor dispute is merely a jurisdictional dispute between two unions, Cater Const. Co. v. Nischwitz, supra, or an attempt to organize the employees by an outside labor organization, United Electric Coal Companies v. Rice, supra, then to require an employer to negotiate, mediate, and arbitrate may be to require quite an unreasonable or even pointless effort.

Though not basing its reversal upon the point, the Supreme Court saw fit to indicate error in the holding of the circuit court to the effect that § 8 of the Norris-LaGuardia Act does not apply when violence is involved. The Supreme Court made it clear that even though violence is involved, the employer is not on that account relieved from compliance with the statute. At first blush, this may give the impression that striking employees will not be enjoined from using acts of violence as a strike weapon. However, the Court takes care to point out that “The purpose of the section [§ 8] is to head off strikes and the violence which too often accompanies them, by requiring the statutory steps to be taken before the aid of federal courts is sought in equity.” The Act does not sanction acts of violence by striking employees, but takes from federal courts the power to enjoin such acts when the employer refuses to follow the means that it specifies for peaceable settlement of the dispute. As for a case where it might be impossible to move for settlement by negotiation, mediation, or arbitration, and where violence occurs, the court refers to the statement by Representative LaGuardia, who sponsored the legislation in the House. “In seeking a restraining order a party believed to be aggrieved comes into court and under a certain state of facts, which are enumerated in the bill itself, asks for a restraining order. If time has not permitted him or the corporation to avail itself of the existing governmental machinery for the settlement of a labor dispute, he recites that as one of his facts, which is a full compliance, of course, with the provisions of section 8. . . .” 75 Cong. Rec. 5508 (1932). The result, then, is that the employer is denied the injunctive relief against acts of violence only where he is himself unwilling to pursue the course of negotiation, mediation, and arbitration prescribed by statute. He is not even then denied all relief. Other means of protection remain by way of actions for damages and possible criminal prosecution.

The practical result of the decision is to clarify considerably the effect of § 8 of the Norris-LaGuardia Act. It states a definite requirement for negotiation, mediation, and arbitration by an employer engaged in a dispute with an employee-union whenever such means are available and of possible assistance to him, before he will be entitled to injunctive relief. It indicates that an injunction will issue to restrain violence or threats of violence only after all such action has been properly taken, or when failure to take any step has been properly and adequately explained.
The seventeen papers in this volume are those presented at a symposium conducted by the Tax Institute in New York City in late November 1942. The papers are arranged under five general headings: (1) What the War Is Doing to State and Local Costs, (2) What the War Is Doing to State and Local Revenues, (3) Intergovernmental Fiscal Problems As Accentuated by War, (4) Shaping Fiscal Policies to Aid in Postwar Adjustments, and (5) State and Local Fiscal Responsibilities in Winning the War. An appendix to the volume contains reports and summaries of four regional conferences on the same subject and a memorandum on Florida’s economy in wartime. A bibliography and an index complete the volume.

Costs, on the whole, have been raised for state governments, while some city governments likewise have increased costs. The increases have often been due to rises in the price of material, and the demand of employees for increased wages to meet the higher costs of living. Some cities have had to cope with a great influx of war workers, and resulting demands for police and fire protection, health and education, water, etc. However, some expenditures are generally reduced, simply because supplies cannot be had and public works and capital expenditures have had to be postponed. Some cities too have suffered a loss of population, and this may mean a loss of revenue without a corresponding decline in municipal costs.

Tax receipts have risen in some cases and declined in others. Individual and corporate income taxes have risen, and so have property taxes. The gasoline tax has been the outstanding war casualty. Other sales taxes, with striking exceptions, will decline. The miscellaneous revenues of local units have, in the main, been affected adversely. There is general feeling that states and local units will later be faced with serious revenue declines.

Intergovernmental tax relations have been affected during the war chiefly because of: (1) the large accessions of land by the federal government for camps, etc. (and consequent removal from tax rolls), (2) attempts to immunize war contracts from state and local sales and use taxes, and (3) efforts to abolish federal tax immunity of interest on state and local bonds. For the property tax exemption problem, one
participant suggests payments in lieu of taxes as the best solution, although opinion is far from unanimous that payments in the past under this system have been adequate. On points (2) and (3) above, it is felt by one writer that fundamental issues of state sovereignty are involved, and that consideration of solutions should be postponed until peacetime, and then only as part of a comprehensive reexamination of the administrative and tax relationships of federal, state, and local governments. Sharp issue is raised to this proposal at least so far as exemption of interest from state and local government bonds is concerned. It is pointed out that states and local units are receiving a subsidy because of this exemption amounting to about $76 million, but that this subsidy is costing the federal government about $275 million in lost taxes. Now is the time to act, it is urged, because the real benefit of this exemption accrues to the owners of wealth at a time when the federal government needs the money badly; this undermines the integrity of the tax system.

Postwar capital improvements are deemed to be needed. One visions not only a stop-gap program of public works designed to relieve unemployment and meet the accumulated deficiencies in public improvements, but also a beyond that the need of providing every family with a decent house in decent surroundings. Plans are needed now, because it will be too late to plan when unemployment is upon us. No matter what degree of federal aid is provided, there will be considerable balance of cost to be met by the localities, and it is important for states and local governments to act towards creating reserves of credit, cash, and land for postwar use. Another speaker sees the need of counter-business-cycle budgeting and a tax structure which places greater reliance upon taxes which respond to an upturn in business. The retirement of debt at this time, as in all periods of prosperity, offers several important advantages.

The fiscal responsibilities of the states and local government in the winning of the war are not clear-cut. Opinion differs as to whether state and local tax systems should be geared to aid in combatting inflation, building up reserves, and accumulating funds to finance postwar capital improvements. There seems to be agreement though that this is the time for them to put their houses in order, getting rid of existing deficits, paying off debts, etc. It is also observed that the most glaring need for reorganization lies in the 127,000 school districts.

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This is the worthy successor to a little book which enjoyed high favor during the closing months of the last war. Professor Glenn's original edition, completed during the summer of 1918, was conceived as a new kind of work. It was not offered as a book on Military Justice or even Military Law in a somewhat wider sense; it was rather an essay upon the legal relations running between the Army and the common law. Translating this in terms of the persons affected, the book dealt with the soldier only in so far as his activities proved to be, in point of law, of interest to non-military persons.

Professor Glenn realized, even before the outbreak of the present war, the need for a revision of his work. There had been important shifts of emphases which made a revision imperative. The opportunity of preparing a second edition of his book, Professor Glenn offered to Professor A. Arthur Schiller. The choice was a happy one. Professor Schiller had previously demonstrated a thorough knowledge of the most important developments subsequent to World War I.  

The new edition has a most valuable chapter on "The Constitution of the Army", the most interesting and useful portion of which is that part which explores, somewhat interestingly the jurisprudential bases of conscription. Technical books on the organization and procedure of courts martial abound. Most of them are entirely unnecessary and with the exception of perhaps two, are not worth the materials and effort that went into their manufacture. But the chapter on Military Law and Military Courts in Professor Glenn's little book is a satisfactory thumbnail sketch for laymen of the mission of military law and military courts. It is not intended as an exposition of the rules of procedure before military tribunals. Jurisprudentially, the chapter entitled "The Army's Right of Self Regulation" is a good performance. With all of the interest currently being manifested in AMGOT, the two chapters dealing with military occupation serve as an outline of the pattern of legal problems which will be encountered and which must be solved. The broad bases for their solution are indicated. In Professor Glenn's first edition, there was a chapter entitled "Martial Law at Home". This chapter has been omitted from the revision. By way of justifica-

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Schiller, Military Law and Defense Legislation (1941).
It is stated that (1) such a chapter would be of historical interest only at this particular time, and (2) that several authoritative works fully deal with the subject. It seems to me that the book would have benefited had a revision of Professor Glenn's old chapter been made and included in the present volume.

The revised edition of this little book ought to be read by every citizen—whether in or outside the military service.

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*Four books are mentioned: Fairman, The Law of Martial Rule (1930)—another edition (1943) is now available; Rankin, When Civil Law Fails; Martial Law and Its Legal Basis in the United States (1939); Wiener, A Practical Manual of Martial Law (1940); Rich, The Presidents and Civil Disorder (1941).

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