CONSTITUTIONAL DOCTRINES OF

WILLIAM HOWARD TAFT

Twenty-seventh President of the United States
Chief Justice of the United States

by

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PREFACE*

William Howard Taft, son of Alphonso and Louisa Maria Taft, was born in Cincinnati on Sept. 15th, 1857.

He attended Woodward High School in Cincinnati, from which he was graduated in 1874. In 1878 he was graduated with honors from Yale, and began the study of law in the Cincinnati Law School. He received the L.L.B. degree from that school in 1880, being admitted to the Ohio bar the same year.

For a short time he was law reporter on the Cincinnati Times, and later on the Cincinnati Commercial. From 1881 to 1883 he was assistant prosecuting attorney of Hamilton County, Ohio, during a part of which period he was also Collector of Federal Internal Revenue. From 1883 to 1887 he practiced law in Cincinnati, being assistant county solicitor of Hamilton County from 1885 to 1887. On June 19, 1886, he married Miss Helen Herron, daughter of John W. Herron of Cincinnati. From 1887 to 1890 he was judge of the superior court of Cincinnati. In 1890 he was appointed by President Harrison as Solicitor General of the United States; two years later he was appointed United States Circuit Judge for the sixth circuit, in which capacity he served for eight years.

In 1900 Mr. Taft was chosen by President McKinley to head a commission for establishing civil government in the Philippines. He served upon this commission until July 4, 1901. Upon the latter date be became the first civil governor of the Philippine Islands, which position he held until Feb.1, 1904. From Feb.1, 1904, to June 30, 1908, he served as Sec-

tary of War in the Roosevelt Cabinet, during which period he was in charge of the construction of the Panama Canal. In 1906 he was sent by President Roosevelt to Cuba to adjust the insurrection there, and for a short time he acted as provisional governor of the island.

In the Republican National Convention of 1908, Mr. Taft was chosen as that party's candidate for the presidency, and on November 3rd of that year he was elected President of the United States. He was renominated in June, 1912, by the Republican National Convention at Chicago, but was defeated in the November election of that year by Woodrow Wilson.

In 1913 Mr. Taft became Kent professor of law at Yale, which position he held until 1921, lecturing on constitutional law in the college and law school. During the World War he served as joint-chairman of the National War Labor Board. From 1906 to 1913 he was president of the American National Red Cross; in 1913 he was president of the League to Enforce Peace.

In 1921 President Harding appointed Mr. Taft as Chief Justice of the United States, his appointment being confirmed by the Senate on June 30, 1921. He took the official oath on July 7, 1921, and was installed on October 3rd.

Mr. Taft is the author of several books, the most important of which are the following: Popular Government, 1913; Ethics in Service, 1915; The Antitrust Act and the Supreme Court, 1914; The Presidency, its Duties, its Powers, its Opportunities, and its Limitations, 1916; World Peace, a written debate with William Jennings Bryan, 1917; Present Day Problems,

1908; Our Chief Magistrate and His Powers, 1916; Political Issues and Outlooks, 1909; Four Aspects of Civic Duty, 1906; and the Taft Papers on the League of Nations, 1920.

CHAPTER I

Introduction

It is seldom that one finds so long and useful a record of public service as that possessed by the present Chief Justice of the United States, William Howard Taft, whose public career extends over forty-eight years. Having entered public life in 1881 at the age of twenty-four, Mr. Taft has, with the exception of two brief periods, been a public servant continuously from that time to the present. The capacities in which he has served have been widely varied; his offices have been both local and national, both elective and appointive. From assistant prosecuting attorney of an Ohio county, his first public office, he has risen to fill the highest elective and appointive offices within the gift of the nation,- the Presidency and the Chief Justiceship. And to him, moreover, belongs the additional distinction of being the first man to hold both of these great offices.

It would be almost impossible for anyone to be so long and intimately connected with the executive and judicial branches of our national government without formulating, consciously or otherwise, certain theories as to the nature of government in general and certain ideas as to what our own national government, in particular, should be and do. This involves, of course, the formulation of a set of attitudes as to the interpretation of our constitution and the powers of the national government therunder,-- in other words, a body of constitutional doctrine.

It is the purpose of this study to ascertain, in so far as is possible from the material available, the attitude of Mr. Taft as to the interpretation and application of several of the more important or controversial provisions of the constitution. To this end, a comprehensive study has been made of the opinions written by Mr. Taft since his accession to the Chief Justiceship of the United States, as well as of considerable earlier material, including his more important published works and certain of his public addresses. An attempt has been made to bring together under the various chapter headings most of the material relevant to the particular constitutional provisions selected for detailed treatment. It is hoped that additional material,- particularly the opinions written by Mr. Taft as circuit judge,- may be used at some future time in the compilation of a more comprehensive paper than the one at hand can possibly be.

In the chapter on the Chief Executive, we have drawn rather heavily upon the views expressed by Mr. Taft in his interesting and illuminating book Our Chief Magistrate and His Powers. The material in the chapter on the Judiciary is taken largely from various addresses made by Mr. Taft during his presidency, from excerpts from his various books, and from his Arizona Veto Message. The chapters on the First Eight Amendments, the Fourteenth Amendment, and the Commerce Clause, are based almost entirely upon Chief Justice Taft's Supreme Court opinions. It is the purpose of the present chapter to consider the ideas of Mr. Taft as to the nature and purpose of government in general, and to observe briefly his attitude upon

some of the constitutional questions which have not been selected for more detailed treatment in subsequent chapters.

Government and Constitutions - Their Nature and Purpose

In his theory as to the nature and purpose of government, Mr. Taft seems to lean toward the ideas of Bentham and the other Utilitarians. In an address during his presidency he defined government as "a human instrumentality to secure the greatest good to the greatest number, and the greatest happiness to the individual".[1] "The object of government", however, "is not only to secure the greatest good to the greatest number, but also to do this as near as may be by securing the rights of each individual in his liberty, property, and pursuit of happiness".[2]

The best government, in the sense of the one best protecting the rights and providing for the needs of all classes, is one in which every class has a voice, but since government by unanimous vote is impossible, the majority of the electorate must rule.[3] Since, therefore, expediency decrees that the majority shall rule in a popular government, it is necessary that the whole people, by the adoption of a constitution, impose certain restraints upon the action of the majority to the end that the fundamental rights of the minority may be properly safeguarded. "Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority, and of the individual in his relation to other individuals, and in his relation to

the whole people in their character as a state or government".[4] Indeed, the value of a written constitution lies in the fact that it consists of a body of limitations "imposed by a highly intelligent people in their calm and deliberative moments upon action which may be taken by themselves under the influence of passion and prejudice".[5]

Importance of the States under our Federal System - Attempts of Congress to Usurp State Powers through its Power to Tax

While Mr. Taft is an exponent of a strong national government, he is certainly not one who would annihilate the political importance of our states by taking from them their present governmental functions. He denounces the proposition that, because the states are not as active as they should be in suppressing evil and accomplishing good, the federal government should assume some of their functions. "This would break up our whole Federal System".[6] "A centralized system of government, in which the President and Congress regulated the doorsteps of the people of this country, would break up the Union in a short time. Those who lightly call for this extension really do not understand the dangerous proposition they are urging".[7]

The unwillingness of Mr. Taft to allow the national government to usurp the powers and functions rightfully belonging to the states is amply illustrated by his opinions in two important cases in which the Supreme Court declared invalid certain acts of Congress passed under guise of the taxing power. The first of these is the Child Labor Tax Case.[8]

The federal Child Labor Tax Law of 1919 (40 Stat.1138,c.18) required that any mine or quarry employing children under sixteen years of age; or any mill, cannery, workship, factory, or manufacturing establishment employing children under fourteen, or children between fourteen and sixteen more than eight hours a day, six days a week, or before six o'clock A.M., or after seven o'clock P.M., should pay to the federal government ten per cent of its net earnings as an excise tax. The "tax", however, was not to apply to anyone employing a child in violation of the law when such employer <u>believed</u> the child to be of proper age.

The Drexel Furniture Company, which was engaged in the manufacture of furniture in North Carolina, received a notice from Bailey, Collector of Internal Revenue, that it had been assessed ten per cent of its profits for 1919, for employing a boy under fourteen years of age. The company paid the tax under protest and sued Bailey in the United States District Court to recover it. The district court gave judgment for the company, and Bailey appealed.

In affirming the judgment of the lower court and holding the act of Congress unconstitutional, Chief Justice Taft declared that it was patent upon the face of the act that it was not a legitimate measure for raising revenue, but an attempt to regulate the employment of children in the states—a function reserved exclusively to the states under the Tenth Amendment. The so-called "tax" was in reality a penalty placed upon employers of child labor. It was only when an employer <u>knowingly</u> employed children within the prohibited

ages and hours that he was required to make the stipulated payment. "Scienter is associated with penalties not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?".[9]

"Out of a proper respect for the acts of a coördinate branch of the Government", said the Chief Justice, "this Court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be

to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States".[10]

The second case is that of Hill v. Wallace,[11] in which the Supreme Court was required to pass upon the validity of the federal Future Trading Act of 1921 (42 Stat.187,c.86). That act imposed a tax of 20¢ a bushel on all contracts for the sale of grain for future delivery, but excepted from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain conditions and requirements set forth in the act. A commission consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General was authorized to suspend or revoke the designation of a board for failure to comply with the requirements.

In holding the act unconstitutional, Chief Justice Taft, speaking for the Court, declared: "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade. As the bill shows the imposition of 20¢ a bushel on the various grains affected by the tax is burdensome....The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collec-

tion of the tax at all....The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20¢ a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power".[12]

In this connection it is interesting to note that in a more recent opinion Chief Justice Taft seems inclined to indulge a stronger presumption in favor of the validity of a purported taxing measure. In Nigro v. United States,[13] in upholding the validity of the federal Anti-Narcotic Act, he said: "In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid".[14]

It is true, as pointed out by the Chief Justice in his opinion, that the Narcotic Act netted the treasury a substantial revenue--- approximately $1,000,000 a year. Nevertheless, he seems to indulge a stronger presumption in favor of the alleged taxing character of the measure in the Nigro case than in either the Child Labor Tax Case or that of Hill v. Wallace. It seems not unlikely that the willingness on the part of the Court to go so far in upholding the validity of the Narcotic Act may have been due, at least in part, to an opinion that greater social evil is inherent in the drug traffic than in

either child labor or future trading.

Separation of Powers

Although he adheres, in general, to the theory of separation-of-powers, Mr. Taft realizes that coöperation of the different branches of government is essential to an efficient operation of the governmental machinery. In Our Chief Magistrate and His Powers he says: "While it is important to mark out the exclusive field of jurisdiction of each branch of the government, Legislative, Executive and Judicial, it should be said that in the proper working of the government there must be coöperation of all branches, and without a willingness of each branch to perform its function, there will follow a hopeless obstruction to the progress of the whole government. Neither branch can compel the other to affirmative action, and each branch can greatly hinder the other in the attainment of the object of its activities and the exercise of its discretion.... The life of the government, therefore, depends on the sense of responsibility of each branch in doing the part assigned to it in the carrying on of the business of the people in the government, and ultimately as the last resource, we must look to public opinion as the moving force to induce affirmative action and proper team work".[15]

That Mr. Taft is not one who blindly worships the separation-of-powers theory is evident from his opinion in the Grossman case,[16] in which he insists that complete independence and separation between the three branches of government are neither attained nor intended. He recognizes that the carrying

of the theory to the extreme of its logical conclusion is neither possible nor desirable. He strongly urges the necessity, while following roughly the theory of separation, of a close working relationship between the different branches,— particularly between the executive and the legislature.[17]

Mr. Taft's "Conservatism" -- and his Tendencies toward "Liberalism"

Mr. Taft is commonly thought of as a conservative,-- and sometimes even as a reactionary,-- statesman and judge. Indeed, his appointment as Chief Justice, while evoking extraordinary popular and editorial approval,[18] was opposed by some because of his alleged ultra-conservative views. The attitude of those who objected to his appointment is exemplified by the following quotation from a contemporary editorial in the Nation:[19] "What the position of Chief Justice called for in these rapidly changing times, fraught with momentous issues, was far less a thick and thin supporter of the existing order than a man with broad vision and open mind; not a man long in political life and definitely committed to given political views, but one who is at least not on record as having closed his mind on certain political developments which may or may not come before him as Chief Justice for adjudication in one form or another....It was not a Taft, but a Brandeis, or a Holmes, that the hour called for".

But a careful study of Mr. Taft's writings and opinions reveals numerous liberal tendencies on his part. He is by no means such an out and out defender of the status quo as he is sometimes portrayed. We may mention briefly a few examples.

He favors, for instance, changing the present system so as to make the term of the President six or seven years and render him ineligible for reëlection. "Such a change", he believes, "would give to the Executive greater courage and independence in the discharge of his duties. The absorbing and diverting interest in the reëlection of the incumbent, taken by those Federal civil servants who regard their own tenure as dependent upon his, would disappear and the efficiency of administration in the last eighteen months of a term would be maintained".[20] Again, he thinks the plan of the President addressing Congress personally, which was followed by Washington and John Adams and revived by Wilson, superior to that of sending written messages,- although he followed the latter plan during his own presidency. "Oral addresses fix the attention of the country on Congress more than written communications, and by fixing the attention of the country on Congress, they fix the attention of Congress on the recommendations of the President".[21]

It is in regard to his attitude toward labor that Mr. Taft has been most bitterly accused of ultra-conservatism. In commenting editorially upon his appointment to the Chief Justiceship the New Republic said:[22] "The greatest significance of the widespread popular approval of Mr. Taft's appointment lies in the fact that it measures the present temporary triumph of reaction. Labor is cowed, liberalism is confused, and the country's thinking generally is done in the storm-cellar". But it does not appear that Mr. Taft's stand as Chief Justice upon controversies in which organized labor has been involved substantiates the contention that his attitude toward labor is

unfriendly. If his opinion in the Truax case[23] reveals a reactionary attitude from the viewpoint of labor, this is surely offset by the liberal attitude displayed more recently in his dissent in the Adkins case.[24] And his decision in the Wolff Packing Case[25] certainly met with the approbation of labor.[26]

Cases other than those involving labor may also be cited in which Chief Justice Taft is found on the so-called "liberal" side of the court. In Panama Railroad Co. v. Rock[27] and in Federal Trade Commission v. Western Meat Co.[28] the Chief Justice joined with Justices Holmes and Brandeis in their dissents in five-four decisions, Justice McKenna also dissenting in the former case and Justice Stone in the latter. Again, in Lambert v. Yellowley,[29] in which case Justices Holmes and Brandeis are on the majority side of a five-four decision, we find the Chief Justice concurring with them.

While, as we have seen, Mr. Taft is not the reactionary statesman and judge that he has sometimes been pictured by his opponents, he is in many respects a true conservative. He is, for example, a staunch defender of the right of private property, which he considers one of the inalienable rights of man.[30] In an article for the Yale Review of October, 1920, in which he discussed the issues of the presidential campaign of that year, Mr. Taft made the following statement in regard to the Supreme Court and the appointments made by President Wilson to that body: "Mr. Wilson is in favor of a latitudinarian construction of the Constitution of the United States to weaken the protection it should afford against socialistic raids upon property

rights, with the direct and inevitable result of paralyzing the initiative and enterprise of capital necessary to the real progress of all. He has made three appointments to the Supreme Court. He is understood to be greatly disappointed in the attitude of the first of these [Justice McReynolds] upon such questions. The other two [Justices Brandeis and Clarke] represent a new school of constitutional construction, which if allowed to prevail will greatly impair our fundamental law. Four of the incumbent Justices are beyond the retiring age of seventy, and the next President will probably be called upon to appoint their successors. There is no greater domestic issue in this election than the maintenance of the Supreme Court as the bulwark to enforce the guaranty that no man shall be deprived of his property without due process of law".[31] This statement is of especial interest in view of the subsequent appointment of Mr. Taft to the Chief Justiceship by President Harding.

But while he would rigidly protect property rights, Mr. Taft recognizes that a certain amount of regulation of such rights may be desirable or even necessary. In an address in Boston in 1912 President Taft said: "That we may restrict the use of private property to prevent its abuse in unfair competition and in injuring equality of opportunity, everyone admits.... Nevertheless, those who have studied closely the operations of the past believe that next to the right of liberty the institution of private property is the greatest uplifter of man that we have had, because it has insured to the laborer the product of his labor, and has furnished a suitable and proportionate reward for the exercise of self-restraint in the saving of part

of that product, and for energy, foresight, industry, and prudence in the application of capital to the reproduction of wealth".[32]

Mr. Taft is also a genuine conservative in that he opposes the sudden adoption of any sweeping changes in governmental institutions. He believes that changes in government must come about by evolution rather than by revolution. "Real progress in government", he says, "must be by slow stages. Radical and revolutionary changes, arbitrarily put into operation, are not likely to be permanent or to accomplish the good which is prophesied of them".[33] We shall treat more fully his attitude toward the sudden adoption of new governmental instrumentalities in the chapter on the Judiciary,[34] in which we shall consider his attitude toward the judicial recall and the recall of judicial decisions.

CHAPTER II

The Chief Executive

Probably the most lucid and practical description of the powers and duties of the President of the United States now in print is that set forth by Mr. Taft in his book Our Chief Magistrate and His Powers. In this little volume, written shortly after his own retirement from the Presidency, Mr. Taft discusses, in both a philosophic and a practical manner, the powers, duties, opportunities, and obligations attaching to that great office. Being not only an ex-president, but also a trained legalist with a wide experience in numerous phases of governmental work, Mr. Taft was pre-eminently qualified for the task of writing upon the Presidency. In the course of his discussion he sets forth not only a description of the more important presidential powers and duties, but also something of his own interpretation of them. He was later to be afforded the opportunity,[1] as Chief Justice, of giving judicial sanction to some of those interpretations.

Although Mr. Taft's book gives a rather complete analysis of the powers and duties attaching to the presidential office, we shall limit our discussion to a consideration of his views on the veto power, the power of appointment, the power of removal, the treaty-making power, and the pardoning power, together with a few observations as to the proper relation between the President and Congress, and the question as to whether the President possesses any "inherent" powers.

The Veto Power

In a consideration of the veto power, which, according to Mr. Taft, is the President's only legislative function,[2] several important problems are presented. One of the most difficult of these is the question: Under what circumstances is the President justified in placing his judgment against that of Congress by vetoing measures passed by that body?

The theory has sometimes been advanced that the President should not exercise the veto power except when he believes that the bill presented to him is unconstitutional, but Mr. Taft is strongly opposed to any such doctrine. "The Constitution", he says, "makes the President's veto turn on the question whether he approves the bill or not. The term 'approve' is much too broad to be given the narrow construction by which it shall only authorize the President to withhold his signature when the reason for his disapproval of the bill is its invalidity. No better word could be found in the language to embrace the idea of passing on the merits of the bill. If anything has been established by actual precedents, it is that a President in signing or withholding signature, must consider the wisdom of the bill as one of those responsible for its character and effect".[3] Mr. Taft insists that, in the exercise of the veto power, it often happens that the President, elected by the entire country and thus freer from the influence of local prejudices, more truly represents the country as a whole than does the majority of the two Houses.[4] He does not hesitate to say that, in passing upon the wisdom of proposed legislation, the discretion of the President is equal to that of the Houses

of Congress.[5]

While, therefore, the President may veto any bill of which he disapproves, regardless of its constitutionality, it is his duty to veto any measure which he believes to be unconstitutional, no matter how much he may favor it as a matter of expediency. "He has taken an oath to the best of his ability 'to preserve, protect and defend the Constitution of the United States', and he cannot escape his obligation to do so when the question before him is whether he shall approve the bill passed by both Houses which violates the Constitution he has given his plighted faith to maintain and enforce. His duty is as high and exacting in this matter as is the duty of the Supreme Court of the United States".[6] But there is this difference between the function of the President and that of the Court: The President must veto the bill if in his judgment it violates the constitution. The Court, on the other hand, must indulge every reasonable presumption in favor of the statute, which has been enacted by a co-ordinate branch of the government. "The Court, before holding otherwise, is bound to find that beyond reasonable doubt the act is not within the limit of the discretion of the legislature....If the Court has any doubt about the validity of a law, it is bound to sustain it, and it has no right to set aside a law merely because of a difference of opinion between it and the legislature as to the legislative powers".[7]

Mr. Taft denounces the prevalent practice according to which acts which are obviously unconstitutional are passed by legislatures and signed by executives — particularly state

governors — merely to please constituencies. The legislative and executive branches of the government thus pass on to the courts the task of declaring the laws invalid, and thus bringing down upon the judiciary the popular displeasure. "This", says Mr. Taft, "is one of the fruitful sources of the unjust attacks upon the courts of the country of which we have had so many in the last ten years".[8]

While Mr. Taft disapproves the practice of attaching "riders" to appropriation bills, he does not think the item veto the proper remedy. Concerning this form of veto he writes: "While for some purposes, it would be useful for the Executive to have the power of partial veto, if we could always be sure of its wise and conscientious exercise, I am not entirely sure that it would be a safe provision. It would greatly enlarge the influence of the President, already large enough from patronage and party loyalty and other causes. I am inclined to think that it is better to trust to the action of the people in condemming the party which becomes responsible for such riders, than to give, in such a powerful instrument like this, a temptation to its sinister use by a President eager for continued political success".[9]

The Power of Appointment

The power of appointment is characterized by Mr. Taft as "one of the functions which in a practical way gives the President more personal influence than any other".[10]

A staunch advocate of the merit system in the executive civil service, Mr. Taft recommends an extension of the appli-

cation of the civil service rules to many offices, such as those of internal revenue collectors and customs collectors, which are now filled by nomination by the President and confirmation by the Senate. This extension, he points out, could be made by executive order, if Congress would first remove the requirement of senatorial confirmation.[11] During Mr. Taft's term as President he not only extended the merit system by executive order but, like Mr. Roosevelt, he attempted to introduce the merit tradition in the diplomatic and consular service.[12]

In regard to the number of offices which should be filled directly by presidential appointment, Mr. Taft says: "In my judgment, the President should not be required to exercise his judgment to make appointments except to fill the most important offices. In the Executive department, he should be limited to the selection of those officers, the discharge of whose duties involves discretion in the carrying out of the political and governmental policy of his administration".[13] The President should, of course, appoint the cabinet officers, and a political under-secretary in each department.[14] He should also appoint federal judges, the general officers of the army, the flag officers of the navy, and the leading Ambassadors and Ministers.[15] "Other appointments, it seems to me, might well be left to a system of promotion, to be carried on under civil service rules as interpreted and enforced by a Commission and the heads of departments. In this way, the attention of the President would be taken up in matters of appointment with those offices in which he would have a full opportunity to learn of the qualifications of proper

candidates, and in the appointment of which, because of the conspicuous importance of the duties to be discharged, he would be held to a proper responsibility by a much more discriminating public scrutiny than can possibly be exercised in respect to the less important and subordinate offices".[16]

The Power of Removal

Closely related to the power of appointment, but offering more difficulty as regards questions of constitutional interpretation, is the power of removal. Since his appointment as Chief Justice, Mr. Taft has had occasion to hand down two important decisions involving the power of the President to remove government officials. The first of these cases, decided soon after Mr. Taft's accession to the Bench, is that of Wallace v. United States.[17]

Certain federal statutes in force in 1918 provided that no army officer should be dismissed from the service except by order of the President or by sentence of a court-martial. When any officer, dismissed by the President, should make application for trial by court-martial, the President was to summon such court-martial. If a court-martial was not convened within six months from the time of application, or if, being convened, such court-martial did not award sentence of dismissal or death, the order of dismissal by the President was to be void.

During the war with Germany, the President issued an order dismissing Wallace, then a colonel in the Quartermaster Corps. The order was made under date of Feb. 13, 1918, and

Wallace was notified of his dismissal on the same day. On March 1st, the President sent to the Senate nominations for promotions in the Quartermaster Corps, which nominations were confirmed by the Senate on March 8th. These promotions filled the complement of 21 officers allowed by law in the grade of colonel in the Quartermaster Corps, a certain Lieutenant Colonel Smith being promoted to the rank of colonel, to take effect Feb. 14th.

Wallace applied for trial by court-martial, which was refused by the Secretary of War. He then sued in the Court of Claims for his salary, alleging that he was still a colonel. The Court of Claims dismissed his petition and he appealed to the Supreme Court.

In affirming the judgment of the Court of Claims and holding the dismissal of Wallace to be valid, Chief Justice Taft said:

> "Before the Civil War there was no restriction upon the President's power to remove an officer of the Army or Navy. The principle that the power of removal was indident to the power of appointment was early determined by the Senate to involve the conclusion that, at least in absence of restrictive legislation, the President, though he could not appoint without the consent of the Senate, could remove without such consent in case of any officer whose tenure was not fixed by the Constitution. The first legislative restriction upon this power was enacted March 3, 1865, by the very provision we are here considering... Thereafter, on July 13, 1866, Congress took away altogether the power of the President to dismiss an officer of the Army or Navy in time of peace, except in pursuance of a court-martial sentence or in commutation thereof. After that, in the controversy between President Johnson and the Senate, the tenure of office act was passed which cut down the power of the President to remove civil officers. The validity of these acts has never been directly passed on by this court in any case. The question has been expressly saved. Parsons v. United States, 167 U.S. 324,339.

> "While, thus, the validity and effect of statutory restrictions upon the power of the President alone to remove officers of the Army and Navy and civil officers have been the subject of doubt and discussion, it is settled that the President with the consent of the Senate may effect the removal of an officer of the Army or Navy by the appointment of another to his place, and that none of the limitations in the statutes affects his power of removal when exercised by and with the consent of the Senate. Indeed the same ruling has been made as to civil officers. Parsons v. United States, 167 U.S. 324."[18]

The Court then held that the Senate, in confirming the promotion of Lieutenant Colonel Smith to the rank of Colonel, had joined with the President in the removal of Wallace. "We can take judicial notice", said the Chief Justice, "of the fact that nominations to office sent to the Senate are usually referred to the appropriate committee for investigation and report. In this case, the nomination would have been sent to the Military Committee which considers each appointment and is, of course, charged with the duty of inquiring into the existence of a vacancy. ...We must presume, therefore, in the absence of any showing to the contrary, that the Senate was advised of the facts in respect to the nomination of Lieutenant Colonel Smith and that it intended to supply the vacancy occasioned by the dismissal of appellant".[19]

The importance of the Wallace case lay, of course, in the fact that the Supreme Court approved the principle that Congress could not, by legislative action, restrict the power of the President, by and with the consent of the Senate, to remove officers appointed by him with senatorial consent. In the next case discussed we shall see how, some four years after

the Wallace case, the Court, again speaking through Chief Justice Taft, went farther and held that Congress could not restrict the power of the President alone to remove such officers. In the Wallace case the Chief Justice observed that there had been considerable doubt as to the effect of legislative restrictions upon the power of the President alone to remove civil and military officers. In Myers v. United States,[20] the second of his opinions involving the removal power of the President, he proceeded to put such doubt to rest.

The Myers Case

Of far greater significance than the Wallace case, the opinion in the Myers case is probably the most momentous opinion that Mr. Taft has yet written in the course of his Chief Justiceship. The Myers decision has been characterized by a prominent authority on constitutional law as "the most conspicuous constitutional decision rendered by the Supreme Court during its 1926 term, or for many a preceding term".[21]

On July 21, 1917, Frank S. Myers was appointed by President Wilson, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oregon, for a term of four years. The Act of Congress of 1876 (19 Stat.80, 81,c.179) under which the appointment was made, provided that "postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law".

On Jan. 20, 1920, Myers' resignation was demanded. He refused to resign and on Feb. 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. Myers protested against his removal and continued to do so until the end of his term. In April, 1921, he brought suit in the Court of Claims for his salary from the date of his removal. The Court of Claims gave judgment against him, from which judgment he appealed to the Supreme Court of the United States.

In August, 1920, the President gave a recess appointment to the Portland postmastership to one Jones, who took office on Sept. 19th. The nomination of a successor to Myers was never submitted to the Senate.

The Supreme Court, in a six-to-three decision (Justices Holmes, McReynolds, and Brandeis dissenting), held that the provision of the act of 1876 restricting the power of the President to remove executive officers appointed by him with senatorial consent was invalid. This decision is supported by the Chief Justice in the majority opinion upon two main grounds. "One of these is historical, i.e., that the long-established practice of the government has been in accord with the Court's decision; the other is constitutional or inferential, i.e., that the removal power is part of the President's broad grant of executive authority which under the doctrine of separation of powers may not be restricted by Congress".[22]

The historical part of the Chief Justice's argument is based largely upon the so-called "legislative decision of 1789". In the First Congress Madison introduced in the House of Repre-

sentatives a bill to establish a Department of Foreign Affairs under a secretary to be appointed by the President by and with the advice and consent of the Senate and removable by the President. After considerable debate, two amendments to the bill were adopted. One of these amendments struck out the words expressly giving to the President the power of removal; the other inserted a clause clearly implying that the power of removal rested with the President, by alluding to vacancies created "whenever the principal officer shall be removed from office by the President of the United States". The discussion in the House shows that the two amendments, striking out the express grant to the President of the power of removal and inserting words implying such power, were adopted because of the fear that, if the removal power were left in the form of an express legislative grant, it might be implied that the power to remove did not exist in the President by virtue of the constitution.

In the Senate, the bill, as amended by the House, was passed by the deciding vote of John Adams, the Vice President. The records show that, in both houses, a majority of those members who had been in the Constitutional Convention voted in favor of recognizing and affirming the restricted power of the President to remove.

After a rather detailed review of the "decision of 1789", which he characterizes as "a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone",[23] Chief Justice Taft proceeds to show that the "decision" was followed and acquiesced

in by all branches of the government for a period of 74 years. And the Tenure of Office Act, passed in 1867 as a result of the political differences between President Johnson and Congress, the Chief Justice regards as invalid in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate. "This Court", says the Chief Justice, "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions".[24]

Having disposed of the historical aspect of the question, the Chief Justice proceeds to consider the problem from the constitutional or practical angle, and to show that the power of removal is necessarily a part of the general executive power delegated to the President by Article II of the constitution. "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. ...As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his

power of removing those for whom he can not continue to be responsible".[25] The requirement of senatorial confirmation of presidential appointees was adopted, not for the purpose of limiting the president's power of removal, but to prevent the President from making too many appointments from the larger states.[26] "Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal".[27]

"Our conclusion on the merits", says the Chief Justice, "sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers --- a conclusion confirmed by his obligation to take care that the laws be faithfully executed".[28]

Each of the three dissenting Juctices in the Myers case filed a separate opinion. That of Justice Holmes occupies only a half-page, but those of Justices McReynolds and Brandeis are nearly as long as the majority opinion of the Chief Justice. The dissenting Justices attack the majority opinion from both the historical and the constitutional angles, and it is the belief of some of the leading authorities on constitutional law that the dissenting opinions are the stronger as regards both history and logic.[29]

In considering the "decision of 1789" the dissenting opinions emphasize the fact that the declaration of the First Congress was with reference to the head of a department, ap-

pointed for an indefinite term, whereas the case at bar concerned an inferior officer, appointed for a definite term. Then, too, the "decision" merely held that the President had the power of removal in the absence of express statutory grant; it was not a declaration that Congress had no power to restrict by legislation the removal power of the President.

As to the constitutional aspect, the dissenting Justices cannot see how an unlimited power of removal can be implied from the broad grant of executive power in Article II. "If the phrase 'executive power' infolds the one now claimed", says Justice McReynolds in the course of his dissent,"many others heretofore totally unsuspected may lie there awaiting future supposed necessity; and no human intelligence can define the field of the President's permissible activities".[30] Then, too, it is difficult to understand why Congress, which body could vest the appointment of all postmasters in the Postmaster General and restrain him in respect to removals, can not restrict the removal power of the President as regards postmasters. It would seem that the power of removal is more logically implied in the power of Congress to create offices and prescribe the tenure of incumbents than in the broad grant of executive power to the President.

But whether or not the opinion of the Chief Justice has the better of the argument, it seems only natural that he should have decided the case as he did. The very doctrine proclaimed in the Myers case had been enunciated by Mr. Taft ten years earlier, when he wrote: "It was settled, as long ago as the first Congress, at the instance of Madison,... and by

the deciding vote of John Adams, then Vice-President, that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President had the absolute power to remove him without consulting the Senate".[31]

Then, too, the Chief Justice had been President, and he undoubtedly realized, from a practical standpoint, that it was necessary for the President to have an untrammeled power of removal in order that he might be able adequately to direct the administration and execute the laws. Upon this point Professor Cushman says: "It is clear that this argument [that the power of removal is to be implied from the general grant of executive power and the injunction to see that the laws are executed] rests upon the conviction which Mr. Taft's presidential experience undoubtedly confirmed and emphasized, that the President cannot effectively and responsibly administer his office unless he can control his subordinates through an unrestricted power of removal".[32] Professor Corwin voices the same sentiment when he says: "Chief Justice Taft was once President himself, and this fact, it may be surmised, accounts in no small measure for the trend of his opinion in the case at bar".[33]

The authorities are not agreed as to the practical results of the Myers decision. Professor Cushman believes that the decision involves the following principles:[34] (1) Congress cannot control the President's power to remove officers appointed with senatorial consent. (2) The reasoning of the Court would seem to imply that the power to remove officers appointed by the President alone cannot be limited. [He notes,

however, that Professor McBain takes the opposite view on this matter .] (3) When Congress vests the appointment of inferior officers in the courts or in the heads of departments, it may restrict the removal of such officers; but if it does not do so the President may remove them in the exercise of his general executive authority.

Professor Fairlie sums up his conclusions as to the results of the decision in the following words: "The result of this decision on governmental practice is likely to be much less important than is indicated by the length of the opinions and the emphasis of dissent. With regard to the great number of inferior presidential offices, the consent of the senate for appointments will probably continue, and will in effect operate to limit any possible tendency to excessive executive removals. For the more important administrative and quasi-judicial commissions, there will be more active opposition to any arbitrary removal; and if this should develop, it may be possible for Congress to constitute these bodies specialized courts with judicial tenure for their members".[35]

But disregarding the question as to whether the majority opinion in the Myers case has the better of the logic, the seemingly general opinion, and the one in which the writer concurs, is that the practical results of the decision will be advantageous rather than otherwise.

The Treaty-Making Power

"The treaty-making power of the United States", according to Mr. Taft, "is the widest power that it has, ...All govern-

mental power exercised by the country in dealing with foreign governments is exercised by the Federal Government alone, and the only limitation upon that power is that in treaty making the President and the Senate shall not violate any prohibition of the Constitution and shall exercise that power within the limits which international practice normally imposes as to the subjects to be included in a treaty".[36]

The most important duty of the President in his conduct of foreign relations, in Mr. Taft's opinion, is that of initiating and drafting treaties with foreign nations and submitting them to the Senate.[37] He emphasizes the fact that the initiation of treaties rests entirely with the President; that neither house of Congress nor both of them can force the chief executive to negotiate a treaty. Moreover, after a treaty has been made and approved by the Senate, it is for the President to decide whether or not he will ratify and proclaim it, and a treaty cannot take effect without executive ratification.[38]

The legal relation between treaties and statutes, which has been the subject of some discussion and litigation, is clearly and briefly explained by Mr. Taft. " According to our Constitution, "he says, "a treaty of the United States, in so far as its provisions are in an appropriate form to operate as such, is a law in the United States, exactly as a statute of Congress is a law in the United States. ...A treaty may repeal a law of Congress if it is inconsistent with it, and... a law of Congress may repeal a treaty. A treaty operates both as a binding contract with a foreign nation and as municipal law. As a contract binding upon both parties, it cannot be made to

lose its obligation by a refusal of either country to perform it. It is thus broken, but the party injured by the breach has in international law a right to damages from the party breaking it. If Congress passes a statute inconsistent with the treaty, while it breaks the treaty it repeals it as municipal law. It does not relieve the nation from its moral and international obligation to make good the breach by damages or otherwise, but it does change the law which binds the officers, citizens and others within the governmental jurisdiction of the United States, to comply not with the treaty, but with the law which abrogated it".[39]

Mr. Taft maintains that the President alone cannot abrogate a treaty unless he is expressly given that authority by the terms of the treaty itself. "The President may not annul or abrogate a treaty without the consent of the Senate unless he is given that specific authority by the terms of the treaty. The ending of a treaty is to be effected by the same power which made the treaty".[40] This doctrine is of particular interest in view of Chief Justice Taft's Myers decision,[41] relative to the power of the President to remove officers appointed with the consent of the Senate. It seems to be Mr. Taft's opinion that, although the Constitution requires senatorial consent to the making of both appointments and treaties, the former may be terminated by the President without such consent, while the latter may not.

A very serious obstacle in the way of the proper carrying out of treaties made by the national government, Mr. Taft explains, arises from the fact that that government, under the

present state of the law, is unable properly to protect the rights guaranteed to resident aliens by treaty provision.[42] The national government may by treaty provide that the nationals of another country may reside within the borders of the United States and receive the same protection to life and property which our own citizens enjoy. But when the rights thus guaranteed to aliens are violated by our citizens, the national government is without authority to intervene; it must rely entirely upon the state governments to punish the guilty persons. Numerous instances have occurred in our history in which aliens have been murdered by mob violence, outstanding among which are the massacre of Chinese at Rock Springs, Wyoming, in 1885, and the lynching of nine Italians in the Mafia riots at New Orleans, in 1891.[43] And in practically every instance the perpetrators of the crime have, because of local sympathy, escaped conviction in the state courts.

This inability on the part of the national government to protect aliens in the exercise of the rights it has promised them, and to punish those persons who unlawfully violate those rights, is due to the failure of Congress, by appropriate legislation, to make offenses against the treaty rights of aliens cognizable in federal courts, and to give to the Executive authority to take proper measures for preventing such violations.

That Congress has the power under the constitution to enact such legislation Mr. Taft has no doubt. The constitution confers the power of making treaties solely upon the national government, and it expressly provides that treaties shall be a part of the supreme law of the land. Moreover, since a treaty

operates as a statute within this country, a resident alien who has been guaranteed protection of life and property by treaty has a right to such protection under the Constitution and laws of the United States. And "under the eighteenth clause of Section VIII of Article I of the Constitution, Congress has power to make all laws which shall be necessary and proper for carrying into execution all powers vested by this Constitution in the government of the United States".[44]

This power of the national government to provide means for protecting aliens in the exercise of their treaty rights is not only reasonably and logically implied in the constitution, Mr. Taft declares, but was definitely recognized by the Supreme Court in the case of Baldwin v. Franks, 120 U.S. 678. In that case, which involved the punishment of a man for driving Chinese from their homes and depriving them of their business contrary to our treaty of 1881 with China, the Court expressly declared that the United States had power to punish those guilty of depriving Chinese subjects of rights guaranteed to them by the treaty, but then proceeded to examine the statutes and decide that the power had not been exercised by Congress.[45]

This requisite legislation, which had previously been recommended by Presidents McKinley and Roosevelt, was urged upon Congress by President Taft in his inaugural address.[46] He was, however, unable to secure its enactment.

The Pardoning Power -- The Grossman Case

"The duty involved in the pardoning power", says Mr. Taft, "is a most difficult one to perform, because it is so completely

within the discretion of the Executive and is lacking so in rules or limitations of its exercise. The only rule he can follow is that he shall not exercise it against the public interest. ...The question which the President has to decide is whether under peculiar circumstances of hardship he can exercise clemency without destroying the useful effect of punishment in deterring others from committing crimes".[47]

The President's power of pardon, Mr. Taft explains, extends to all offenses against the United States, and may be exercised either before indictment, after indictment and before conviction, or after conviction.[48] A pardon may be absolute or conditional, and may extend to individuals or classes.[49] Moreover, Congress may not restrict or regulate the exercise of the pardoning power.[50]

Previous to 1925 some difference of opinion existed as to whether the President's power of pardon extended to the case of one sentenced to imprisonment by a federal court for contempt. In that year the Supreme Court was called upon to settle the question in the case of Ex parte Grossman.[51]

Philip Grossman disobeyed an injunction issued by a United States district court under the National Prohibition Act, whereupon he was arrested, tried, found guilty of contempt by the district court, and sentenced to imprisonment for one year and a fine of $1,000. This decree of the district court was affirmed by the Circuit Court of Appeals. President Coolidge issued a pardon to Grossman, in which he commuted the sentence to the fine. The pardon was accepted, the fine was paid, and Grossman was released. Later the district court recommitted Grossman, notwithstanding the pardon, on the ground that the

President had no power to pardon for contempt. Thereupon Grossman petitioned the Supreme Court for a writ of habeas corpus.

In upholding the power of the President to pardon Grossman and ordering his discharge from custody, the Chief Justice, after a somewhat extended review of authorities, enunciates the doctrine that the pardoning power of the President extends to cases of criminal contempts of federal courts. Such contempts, he asserts,[52] have been pardoned for eighty-five years, during which period the power has been exercised twenty-seven times. The pardoning power does not, however, extend to cases of civil contempt, for in such cases the punishment is remedial and for the benefit of the complainant.[53]

In answer to the objection that to construe the pardon clause to include contempt of court would be to violate the principle or separation of powers, Chief Justice Taft declares: "Complete independence and separation between the three branches... are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate. ...Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. ...Whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it".[54]

It would be unreasonable, the Chief Justice insists, not to allow pardons for contempt, where a person is convicted by a judge without a jury, when they are allowed in cases of jury

trial. "The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial? The pardoning by the President of criminal contempts has been practiced more than three-quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the federal courts of its validity".[55]

Relation Between the President and Congress

The attitude of Mr. Taft toward the separation-of-powers theory in general has already been discussed.[56] Particularly interested in securing a closer working relationship between the executive and legislative branches of the government, he advocates changing our system so as to admit the heads of the executive departments to the floor of each house of Congress to introduce measures, advocate their passage, answer questions, and participate in debate, without, of course, any vote.[57] Such a change, which, he points out, could be effected by Congressional action without changing the constitution, was strongly

urged by President Taft in a special message to Congress near the close of his term.[58]

In the matter of financial legislation, in particular, Mr. Taft believes that a close relationship between the President and Congress is desirable, and he is a strong advocate of a national budget system.[59] He seems to feel that the English practice according to which expenditures may be proposed only by the Executive, the legislative branch reserving the right to strike out or reduce any item in the appropriation bill, has much to recommend it.[60] Writing before the [redacted] adoption of our present budget system, he says: "I think... that our Federal Constitution might be improved in imposing the duty of framing a budget on the Executive and limiting the power of Congress in the voting of appropriations, so that it may give all that the Executive asks to run the government as organized by Congress through general laws, and may not have the specific power to increase the appropriations which the Executive says on his oath and his responsibility are enough to carry on the government duly established by Congress".[61]

Our present budget system, created by the Budget and Accounting Act of 1921, while it does not limit Congress to the striking out or reducing of expenditures proposed by the President, goes a great way toward centralizing control over and responsibility for the financial administration of the national government.

The Question of Inherent Powers

The question as to whether the President possesses certain inherent powers, by virtue of his office, in addition to

those powers expressly or impliedly delegated to him by the constitution or by act of Congress, has long been a controversial one. One of the staunchest proponents of the doctrine of inherent powers was Mr. Roosevelt. He insisted that the executive power was limited only by specific restrictions and prohibitions appearing in the constitution or imposed by Congress under its constitutional powers; that it was not only the President's right, but his duty, to do everything that the needs of the nation demanded unless such action was forbidden by the constitution or by the laws.[62]

Mr. Taft, on the other hand, insists that the President possesses no undefined residuum of powers; that his powers are limited to those expressly granted by the constitution or by acts of Congress passed thereunder and those which may be reasonably implied therefrom. He says: "The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. ...The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist".[63]

CHAPTER III

The Judiciary

The theories of Mr. Taft as to the nature and function of the judicial branch of the government are of particular interest in view of the fact that he now occupies the position at the head of our federal judiciary. Of wide experience not only as a jurist but in numerous other phases of government as well, he is unusually well qualified to analyze the unique position of the judiciary under our federal system. While he displays a disposition to uphold, as a necessary feature of our system, the supremacy of the judicial branch of government, he will not suffer that branch to usurp the power or functions of the executive or legislature. In the Grossman case, for example, Chief Justice Taft upheld the power of the President to pardon a person sentenced by a federal court for contempt, in spite of the argument that to extend the pardon power to such cases would be to encroach upon the prerogative of the courts and violate the principle of separation-of-powers.[1] And in numerous other Supreme Court opinions the Chief Justice has insisted that it is beyond the power of that Court to legislate or to pass upon the <u>wisdom</u>, as distinguished from the <u>validity</u>, of legislative measures. Such "political" functions belong solely to the legislative branch of the government, viz. Congress.[2] The function of the courts, according to Mr. Taft, consists "in maintaining the constitutional guaranties of rights, and in preserving against the usurpation of the majority the rights of the nonvoting

part of the people and of the voting minority and of the individual".[3]

Unique Position of the Judicial Branch of Government

In our national government, as in practically all countries of the world, the judiciary occupies a position quite different from that of the other branches of government. One very important difference, Mr. Taft maintains, is that members of the judiciary, whether appointed or elected, are not representative in character in the same sense that the executive and members of the legislature are representative.[4] The very nature of the judicial function renders it impossible to require that judges, in rendering their decisions, shall give effect to the will of the majority of the electorate. "The moment they assume their duties they must enforce the law as they find it. They must not only interpret and enforce valid enactments of the legislature according to its intention, but when the legislature in its enactments has transgressed the limitations set upon its power in the Constitution the judicial branch of Government must enforce the fundamental and higher law by annulling and declaring invalid the offending legislative enactment. ...It is a complete misunderstanding of our form of government or any kind of government that exalts justice and righteousness to assume that judges are bound to follow the will of the majority of an electorate in respect of the issue for their decision. In many cases before the judges that temporary majority is a real party to the controversy to be decided. It

may be seeking to deprive an individual or a minority of a right secured by the fundamental law. In such a case, if the judges were mere representatives or agents of the majority to carry out its will, they would lose their judicial character entirely, and the so-called administration of justice would be a farce".[5]

The work of judges "is not work in the doing of which they are to follow the will of the majority except as that is embodied in statutes lawfully enacted according to constitutional limitations. They are not popular representatives. On the contrary, to fill their office properly, they must be independent. They must decide every question which comes before them according to law and justice".[6]

Another way in which the judiciary differs from the other branches of government lies in its relative independence. In many of our modern governments, viz. those of the parliamentary type, little or no distinction is made, for all practical purposes, between the executive and legislative branches, the former being in reality a standing committee of the latter. Indeed in presidential governments like our own the present tendency seems to be toward a closer working relationship between the two political branches. In all modern governments, however, whether parliamentary or presidential, the judicial branch occupies a position relatively independent of the other branches, and this independence Mr. Taft, in company with most other students of the problem, believes absolutely essential. "The whole structure of popular government", he once said, "rests upon the independence

of the judiciary".[7] At another time he characterized independence as "that priceless and indispensable quality in the judiciary".[8] One might look far without finding a stronger champion of judicial independence than is the present Chief Justice.

Judicial Review

One of the most important functions of the federal courts under our governmental system is that of inquiring into the constitutionality of acts passed by Congress and the state legislatures, when the validity of such acts is questioned in cases before them, and of refusing to give effect to such of them as are contrary to the federal constitution. This power of judicial review, while practically unknown in Europe, has been exercised by both the state and federal courts of this country almost from the beginning of our history. While neither the federal constitution nor any of the state constitutions expressly confer this power upon the courts, it has been assumed by them as being necessarily inherent in or incidental to the judicial power in general. Even before the adoption of the federal constitution the highest courts of some of the states adopted the practice of reviewing acts of the state legislatures and declaring them void when they contravened the state constitution. The power of the federal courts to pass upon the constitutionality of acts of Congress was clearly established in the famous case of Marbury v. Madison[9] in 1803; and their power to pass upon acts of the state legislatures was definitely settled in the case of Fletcher v. Peck[10] seven years later.

Mr. Taft is a strong proponent of the doctrine of judicial review. "This power [to declare legislative acts unconstitutional] conferred on the judiciary in our form of government", he says, "is unique in the history of governments, and its operation has attracted and deserved the admiration and commendation of the world. It gives to our judiciary a position higher, stronger, and more responsible than that of the judiciary of any other country, and more effectively secures adherence to the fundamental will of the people".[11]

While he does not question the power of the courts to declare legislative acts unconstitutional, Mr. Taft insists that the power must be used with care. Every reasonable presumption must be indulged in favor of the validity of a legislative act, and it should not be set aside unless it is clearly beyond the power of the legislative branch. An act should never be declared unconstitutional because of a mere difference of opinion between the courts and the legislature as to the legislative power. "Courts ought not to set aside a law when there is room for difference of opinion as to its validity. ...In other words, the invalidity of a law solemnly adopted by the legislature given authority to enact laws should not be declared, unless the want of power appears to be beyond reasonable doubt".[12]

But while the courts should indulge all reasonable presumptions in favor of the validity of a legislative act, and should not set it aside unless it clearly and unquestionably violates the constitution, they must not, in their effort to

sustain legislation, place upon it an interpretation clearly differenct from that intended by the law-making body. To do so is to exercise a legislative function and is quite beyond the judicial power. In speaking for the Supreme Court in a recent case Chief Justice Taft said: "We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation".[13]

Recall of Judges and Judicial Decisions

In order properly to perform its function, the judiciary must be independent, not only of the other branches of government, but also of the electorate to the extent that it is not answerable immediately and directly to the voters for its decision in each individual case. The judiciary, as has already been demonstrated, is not representative of the people in the way that the other branches of government are representative; and it is not the function of the courts, in rendering a decision, to give effect to what, at that particular moment, happens to be the popular will. The judges must enforce the law as they find it; it is their duty to give effect to the popular will only when and as that will has been duly expressed in the form of statutes enacted in accordance with constitutional requirements.

During the latter part of Mr. Taft's presidency, and

particularly during the pre-convention campaign of 1912 in which he was seeking re-nomination, the so-called "progressive" wing of the Republican party, under the leadership of ex-President Roosevelt, was advocating the adoption of various new "democratic" devices, among which were the "judicial recall" and the "recall of judicial decisions". Although these devices were advocated primarily as applying to the judges and decisions of state courts, the controversy over them was so heated and the stand taken by President Taft so significant that they deserve brief consideration here.

The purpose of the "judicial recall" is to make the judges of the state courts subject, during their elective or appointive term, to removal by popular vote. That is, if a certain percentage of the electorate believe that a judge should be removed from office because he decides cases wrongly, or is corrupt, or for other reasons, there will be held, upon petition of such persons, an election to determine whether that particular judge shall continue in office or whether he shall be removed and another chosen to take his place. Seven states now provide in their constitutions for the popular recall of judges.[14]

Of a still more radical nature and evoking even more severe criticism is the proposal for the popular recall of judicial decisions. According to this proposal, whenever the highest court of a state declares a state law invalid on the ground that it violates the state constitution, the question as to the constitutionality of the law is to be submitted to the people at a general election and the people are to decide,

by majority vote, whether the decision of the court shall stand or whether it shall be "recalled" and the law considered constitutional in spite of the court decision. It is interesting to note that only one state, viz. Colorado, has adopted popular recall of judicial decisions. The constitution of that state provides that when the state supreme court shall hold a law invalid as a violation of either the state or federal constitution, the decision shall be referred to the people if, within sixty days, five per cent of the voters so petition. This provision, however, has been held unconstitutional by the state supreme court in so far as it applies to decisions in which state laws have been held invalid as violations of the federal constitution.[15]

To both the judicial recall and the recall of judicial decisions Mr. Taft is uncompromisingly opposed. In regard to the judicial recall he says: "It would be hard to devise a more unjust and ineffective method of purifying the judiciary or one less likely to promote courage of honest conviction".[16] He admits that some method of removing incompetent judges is necessary, but insists that popular recall is not the proper procedure. Corrupt judges may now be removed by impeachment, and if the impeachment procedure is too cumbersome it may be amended. "Create a tribunal for removal of judges for cause. Give them an opportunity to be heard, and by an impartial tribunal; but do not create a system by which, in the heat of disappointment over a lost cause, the defeated litigants are to decide without further hearing or knowledge whether the judge who decides against them is to continue in office".[17]

Moreover the judicial recall, if adopted, will result in a deterioration of the judiciary. Deprived by this device of its independence and prestige, judicial office will not be sought or accepted by men of the greatest courage and ability. Under such a system "the character of the judges would deteriorate to that of trimmers and time-servers, and independent judicial action would be a thing of the past".[18]

During his presidency Mr. Taft vetoed the joint resolution to admit the territories of Arizona and New Mexico to statehood because the proposed constitution of Arizona provided for the popular recall of judges. Accordingly that territory eliminated the offensive provision, whereupon the President signed the resolution. Soon after her admission as a state, however, Arizona reinserted the provision for judicial recall in her constitution by amendment.

As to the recall of decisions, Mr. Taft insists that the electorate are not properly qualified to pass upon the constitutionality of a particular law in a particular case. "The approval of general principles in a constitution, on the one hand, and the interpretation of a statute and consideration of its probable operation in a particular case and its possible infringement of a general principle, on the other hand, are very different things".[19] What the court decides when it annuls legislation is that the purported law violates the fundamental law and is therefore beyond the power of the legislature to enact. The voters, on the other hand, will consider, not whether the law conflicts with the constitution, but whether on its merits it is a good law.[20] Moreover, the

electorate are apt to make a decision upon a question in the heat of popular excitement quite different from the decision they would render after taking time to give the matter thought and study. Mr. Taft is perfectly willing to trust the judgment of the people when they have had time to learn the facts and give sufficient thought to the subject;[21] and it is the purpose of the amending procedure to allow the time necessary for such consideration by the people before rendering judgment. "The proper and reasonable method of avoiding the effect of a decision of the Supreme Court construing the Constitution...is...to amend the Constitution according to the provisions of the Constitution itself".[22]

One very serious objection urged by Mr. Taft to the recall of decisions is that it would render consistency in constitutional interpretation practically impossible. "The majority which sustains one law is not the same majority that comes to consider another, and the obligation of consistency of popular decision is one which would sit most lightly on each recurring electorate, and the operation of the system would result in suspension or application of constitutional guaranties according to popular whim. We would then have a system of suspending the Constitution to meet special cases. The greatest of all despotisms is a government of special instances".[23]

Mr. Taft's attitude toward - we may almost say contempt for - the whole proposal for the recall of decisions is summed up admirably in the following statement: "I have examined this proposed method of reversing judicial decisions on constitutional questions with care. I do not hesitate to say that it

lays the ax at the foot of the tree of well-ordered freedom and subjects the guaranties of life, liberty, and property without remedy to the fitful impulse of a temporary majority of an electorate. ...Such a proposal as this is utterly without merit or utility, and, instead of being progressive, is reactionary; instead of being in the interest of all the people and of the stability of popular government is sowing the seeds of confusion and tyranny".[24]

Necessity for Co-operation between State and Federal Courts.

Ponzi v. Fessenden

It seems characteristic of Mr. Taft that he is never willing to sacrifice the practical workings of government in obeisance to political theory. We have already noted[25] his refusal to endorse without qualification the theory of separation-of-powers and his insistence upon the necessity for co-operation between the executive and legislative branches of the government. He does not stop, however, with the advocacy of co-operation between the different branches of the national government, but proceeds to show, at least in the case of the judicial branch, that a certain degree of co-operation is essential between the national government on the one hand and the governments of the individual states on the other. In the case of Ponzi v. Fessenden[26] Chief Justice Taft shows that, in order to secure a proper administration of justice, it is necessary that a willingness exist on the part of both the federal and state courts to render mutual aid and assistance whenever possible.

In September, 1920, a number of indictments were returned against Charles Ponzi in a state court in Massachusetts, charging him with certain larcenies. In October of the same year two indictments were returned against him in the United States District Court for Massachusetts, charging violation of the Federal Penal Code. He pleaded guilty to one of the counts in the latter indictments, and was sentenced to imprisonment for five years and committed.

In April, 1921, the state court issued a writ of habeas corpus directing one Blake, as master of the House of Correction where Ponzi was held in federal custody, to bring the prisoner before the state court for trial on the pending indictments. The Attorney General of the United States directed Blake to comply with the writ, and he produced the prisoner. Ponzi then petitioned the United States District Court for a writ of habeas corpus against the Justice of the state court and against Blake, alleging that he was within the exclusive control of the United States, and that the state court had no jurisdiction to try him while thus in federal custody. His petition was denied and he appealed to the Circuit Court of Appeals, which certified to the Supreme Court the question as to whether a prisoner, while serving a sentence imposed by a United States District Court, may, with the consent of the Attorney General, be taken on a writ of habeas corpus into a state court and put on trial upon indictments there pending against him.

In answering this question in the affirmative and denying Ponzi's petition, Chief Justice Taft said:

"We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

"One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

"One accused of crime...is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense. If that is accorded him, he can not complain. The fact that he may have committed two crimes gives him no immunity from prosecution of either...

"Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offence is to postpone trial on many others, it furnishes the criminal an opportunity to avoid the full expiation of his crimes".[27]

In the course of his opinion the Chief Justice cites numerous cases in which state courts have held that a prisoner may be tried, while in custody, for offences other than the one for which he was committed. Some of these cases, it is true, relate to crimes committed in prison while serving a

sentence, and not to crimes committed before imprisonment but this difference, the Chief Justice insists, "is not one in principle. If incarceration is a reason for not trying a prisoner, it applies whenever and wherever the crime is committed. The unsoundness of the view is merely more apparent when a prisoner murders his warden, than when he is brought before the court for a crime committed before his imprisonment. It is the reductio ad absurdum of the plea. Nor, if that be here important, is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates".[28]

Selection, Tenure, and Retirement of Judges

In formulating a plan for a judicial system, few problems are of more importance, and few present more difficulty, than those concerning the selection and tenure of the judges. In regard to these matters Mr. Taft favors the practices which, while deviated from in some of our American states, are followed as to our federal judges and the judicial officers in most other countries of the world. That is, he favors appointment by the executive rather than popular election as a method of selecting judges, and prefers tenure for life or good behavior to a fixed term.[29]

But while he favors the life term, Mr. Taft has also gone on record as favoring the compulsory retirement of federal judges upon their reaching the age of seventy, to the end that we may not be obliged to retain on the federal bench men who, because of their advanced age, are incapable of per-

forming the judicial function with the greatest degree of efficiency. Under our present law a federal judge may, after ten years of service, retire upon full pay upon reaching the age of seventy.[30] Such retirement is not compulsory, however, and it is probably not within the constitutional power of Congress to make it so. It would seem that a constitutional amendment would be necessary to effect compulsory retirement. In his book "Popular Government", published some eight years prior to his appointment to the Chief Justiceship, Mr. Taft says:

> "Congress has passed a law providing that all Federal Judges may retire after a service of ten years upon attaining the age of seventy. The law is in form not compulsory because I presume it was thought doubtful whether Congress had any power to retire Judges, even though they continue the full salary as a life pension. I think the absence of power in Congress to do this is a defect. There is no doubt that there are judges at seventy who have ripe judgments, active minds, and much physical vigor, and that they are able to perform their judicial duties in a very satisfactory way. Yet in a majority of cases when men come to be seventy, they have lost vigor, their minds are not as active, their senses not as acute, and their willingness to undertake great labor is not so great as in younger men, and as we ought to have in Judges who are to perform the enormous task which falls to the lot of Supreme Court Justices. In the public interest, therefore, it is better that we lose the services of the exceptions who are good Judges after they are seventy and avoid the presence on the Bench of men who are not able to keep up with the work, or to perform it satisfactorily. The duty of a Supreme Judge is more than merely taking in the point at issue between the parties, and deciding it. It frequently involves a heavy task in reading records and writing opinions. It thus is a substantial drain upon one's energy. When most men reach seventy, they are loath thoroughly to investigate cases where such work involves real physical endurance".[31]

This statement by Mr. Taft as to the desirability of retiring judges upon their attaining the age of seventy is

of particular interest now that he himself is a member of the Supreme Bench and has passed the seventy mark. Moreover, he is eligible to retire at full pay at any time he so elects, as Congress by a recent act (45 Stat.1423,c.419) has provided that the ten years of service required for retirement need not be continuous.[32] Since Mr. Taft served eight years as a circuit judge and has now (1929) served the same length of time on the Supreme Bench, he has sixteen years of service to his credit. Whether the Chief Justice will choose to retire in the near future remains to be seen. Rumors have not been lacking to the effect that such is his intention, but up to the present these seem to have been unsubstantiated by any official statement from Mr. Taft himself.

But while a decision on the part of the Chief Justice to retire from the bench might seem to be in conformity to his attitude as outlined above, it is probable that the public at large would regret such a course. A mid-western newspaper recently carried the following editorial comment on current rumors to the effect that Mr. Taft was contemplating retiring:

> "The country generally entertains the hope that the report Chief Justice Taft of the United States supreme court will retire at an early date is incorrect.
>
> "The chief justice has revealed a high order of ability and a vast fund of level headedness and devotion to duty during his time on the bench. Judges of his caliber are not too easily found.
>
> "It is true that he has never been numbered among the court's 'liberals' with Brandeis and Holmes. But few liberals, for all that, would be pleased if he were to step down. The country needs him where he is, and his retirement would be met with almost universal regret notwithstanding the fact that it rejected him for a second term in the presidency".[33]

It is the belief of the writer that this statement is fairly typical of the popular attitude throughout the country.

Chief Justice Taft and Judicial Reform[34]

In his attitude toward judicial reform Chief Justice Taft is a true progressive. While a staunch supporter of all legitimate prerogatives of the courts, he realizes that our judicial system is not perfect and urges that efforts be made to improve it. Unlike some of his predecessors, he does not believe that a judge must limit his activities to the decision of cases which come before him and must take no active interest in the promotion of legal reforms. His views on this matter are clearly and forcefully expressed in the following statement:

> "I know there are some who think that judges should hold themselves in an isolated way on every subject, and only decide the cases that come before them; but I do not agree with that view. I think a judge may take an interest in matters of legal reform and may be active in respect to it, and in the expression of opinion in regard to it, without in any way demeaning himself or lessening the dignity of his office. It certainly does not interfere with the weight of the testimony of a witness that he knows something about the subject of which he is talking, and that he knows it not from the mere theoretical side, but from the actual practice and the daily contact with the operation of the machinery that has been furnished by the legislature for the doing of justice to all members of the community".[35]

When Mr. Taft became Chief Justice the dockets of the federal district courts, due largely to the great number of prosecutions under the Volstead Act, were far in arrears.[36] He strongly urged an increase in the number of district judges and the creation of a judicial council with power to transfer

judges from districts with light dockets to those which were overcrowded, thus making possible a more effective distribution of the judicial force.[37] These recommendations were incorporated by Congress in a law of 1922[38] which gave to a judicial council, composed of the Chief Justice and the senior circuit judge of each judicial circuit, general supervision of the federal courts with power to transfer judges to the districts where their services are most needed.

A second reform advocated by the Chief Justice was a reduction in the obligatory jurisdiction of the Supreme Court and an increase in the field of its discretionary jurisdiction by certiorari, to the end that the jurisdiction of that Court might be confined as nearly as possible to constitutional questions.[39] In an address before the Chicago Bar Association in 1921 he said:

> "A Supreme Court where there are intermediate courts of appeal is not a tribunal constituted to secure, as its ultimate end, justice to the immediate parties. They have had all that they have a right to claim when they have had two courts in which to have adjudicated their controversy. The use of the Supreme Court is merely to maintain uniformity of decision for the various courts of appeal, to pass on constitutional and other important questions for the purpose of making the law clearer for the general public. Litigants, therefore, can not complain where they have had their two chances that there should be reserved to the discretion of the Supreme Court to say whether the issue between them is of sufficient importance to justify a hearing of it in the Supreme Court".[40]

The changes sought by this recommendation were at least partially effected by the enactment, in 1925, of the so-called Judges' Bill,[41] redefining the appellate jurisdiction of the Supreme Court.

Another reform in the administration of civil justice

recommended by Chief Justice Taft is the abolition of separate courts of law and equity, and the administration of both law and equity in one form of civil action.[42] Such a system, he points out, has already been adopted in the courts of many states. He also emphasizes the need for a simplification of procedure in the trial federal courts.[43]

In the administration of criminal justice one part of our machinery in particular needs reforming - viz. the jury system. Chief Justice Taft admits in his opinion in Balzac v. Porto Rico[44] that the jury as an institution is not necessarily suited to the needs of every people, regardless of local conditions and background. The right of trial by jury guaranteed by the Sixth Amendment is not, therefore, a fundamental right which necessarily goes wherever the jurisdiction of the United States extends. And in a recent interview the Chief Justice expresses the opinion that the jury system must be reformed if it is to work satisfactorily in this country. "It is a disgrace to our country", he says, "that so many criminals with large resources at their command have been able to avoid paying the penalty for their misdeeds. At the basis of this situation lies our jury system, which must be improved if we are to obtain effective justice. We must find a means of getting intelligent and conscientious jurors who will not be misled by ingenious attorneys or swayed by maudlin appeals to sympathy".[45]

While, as we have seen, Chief Justice Taft has considered it the prerogative, or even the duty, of his high office to take an active part in promoting reform in the

judicial system, to the end that the law may be efficiently administered, he would seem to think that it is not compatible with judicial office to take a part in discussions as to the merits of existing laws, which it is the duty of the courts to enforce. During the recent presidential campaign certain letters written by Mr. Taft in 1918, in which he opposed the adoption of national prohibition,[46] were construed by some as showing that the stand taken on that question by Mr. Taft in 1918 was the same as that taken by Governor Smith in 1928. In declining to discuss these letters, the Chief Justice said: "I am now on the bench, and cannot properly take any part in political discussions".[47]

CHAPTER IV

The Fourteenth Amendment

The Fourteenth Amendment has probably given rise to more litigation in the federal courts than has any other provision of the federal constitution. The due process and equal protection clauses of that Amendment have opened up avenues whereby the validity of great masses of state legislation may be challenged in the federal courts, and persons adversely affected by such legislation have not hesitated to avail themselves of the opportunity so afforded. As a result, the Supreme Court of the United States is constantly being called upon to determine what constitutes due process of law and equal protection of the laws.[1]

The Due Process Clause

Meaning of Due Process

Consistently refusing to lay down any comprehensive definition of due process of law, the Supreme Court has preferred to determine what constitutes due process by a "gradual process of inclusion and exclusion". Nevertheless, one occasionally finds in the opinions of the Court a statement which indicates, in a general way, the fundamental elements which the Justice who is writing the opinion deems essential to due process. Thus, in speaking for the majority of the Court in a very important recent case, Chief Justice Taft said: "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the gen-

eral law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society".[2]

Liberty to Contract

It is generally conceded that liberty to contract is part of the liberty guaranteed to the individual by the due process clause of the Fourteenth Amendment, and in this view the Chief Justice concurs. In one of his most important opinions involving the Fourteenth Amendment, he declared the Kansas Industrial Court Act invalid so far as it permitted the fixing of wages in packing houses, on the ground that it deprived employers and employees of liberty to contract in violation of the due process clause.[3]

The Court of Industrial Relations Act, passed by the Kansas legislature in 1920 (c.29, Laws 1920, Special Session), declared the manufacture and transportation of food and clothing; the production and transportation of fuel; and public utilities and common carriers to be affected with a public interest. It created an Industrial Court of three judges with power, upon its own initiative or on complaint, to summon the parties and hear any dispute over wages or other terms of employment in any such industry, and if it should find the peace and health of the public imperiled by such controversy, it was required to make findings and fix the wages and other terms for the future conduct of the industry. The employer

was bound to pay the wages fixed and the employees were forbidden to strike against them. The supreme court of the state was authorized to review orders of the Industrial Court and in case of disobedience to an order could be appealed to for enforcement.

The Wolff Packing Company was a Kansas corporation engaged in slaughtering and packing meat for sale and shipment. The Meat Cutters Union filed a complaint with the Industrial Court against the packing company respecting the wages which the company was paying its employees. After a hearing, the court ordered an increase in wages. The company refused to comply with the order, and the Industrial Court instituted mandamus proceedings in the supreme court of Kansas to compel compliance. That court granted the mandamus and the company appealed to the United States Supreme Court.

In reversing the Kansas court and holding the Industrial Court Act invalid as to the plaintiff, the Chief Justice said: "It [the Industrial Court Act] curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affiars. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances".[4]

It is of interest to note that, some two years later, the Supreme Court again had occasion to consider the valid-

ity of the Kansas Industrial Court Act as applied to the Wolff Packing Company.[5] In this later case the Court, speaking through Mr. Justice Van Devanter, declared the Act unconstitutional, not only so far as it permitted the compulsory fixing of wages (as was decided in the earlier case), but also, and for the same reasons, in its provision for the compulsory fixing of hours of labor.

In National Union Fire Insurance Company v. Wanberg,[6] Chief Justice Taft upheld the validity of a North Dakota law which provided that all hail insurance written in that state should take effect 24 hours after the taking of the application by the local agent. This law, said the Chief Justice, did not deprive the insurance company of the liberty of contract guaranteed by the Fourteenth Amendment, since it did not force a contract upon the company, and since the company might refuse to accept an application or might reject it within 24 hours.

Notice and Hearing

The question as to whether notice and hearing are essential to due process is a difficult one, and one upon which it is almost impossible to generalize. The Chief Justice has held that, where a state law prohibits the possession of intoxicating liquor, and liquor has been seized for destruction as being possessed in violation of the law, it is not necessary to due process that the law provide for notice and hearing before the order of destruction is made by the court, when the previous possessor can try the validity of the seizure

by suing to obtain possession of the liquor and to enjoin its destruction.[7]

In Hetrick v. Village of Lindsey,[8] the Chief Justice held that a state law which permits the levying of special assessments without notice and hearing does not violate the due process clause when it is provided by the general laws of the state that action can be brought in the ordinary courts to enjoin the collection of illegal assessments or to recover them back when collected. In such an action, the party affected would have an opportunity to have all the questions of law and fact as to the validity and fairness of the assessment reviewed. Such a judicial procedure constitutes due process and fulfills all requirements for notice and hearing.

On the other hand, a New Jersey law providing that, in case of an accident in which the vehicle of a non-resident is involved, civil process may be served on the non-resident chauffeur, operator, or owner by service on the secretary of state of New Jersey, must, in order to make it valid, contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the non-resident defendant who is sued.[9] It is not enough that notice <u>is actually</u> served on the defendant, if the statute does not require the service; the fact of such notice, since it was not directed by the statute, cannot supply constitutional validity to the statute or to service under it.

It is significant to note that due process does not necessarily require a judicial trial, but that an administrative determination of facts may, in certain cases, be

final and conclusive. In Booth Fisheries Company v. Industrial Commission of Wisconsin[10] the Chief Justice declared that a state workmen's compensation law which provides that findings of fact made by an industrial commission, in settling claims for compensation against employers, are conclusive if there is any evidence to support them, does not deprive an employer of due process by denying him a judicial review of the facts, when the act is elective and does not bind an employer who has not voluntarily accepted its provisions.

Separation of Powers

In Tumey v. Ohio[11] the Chief Justice had occasion to consider the validity of an Ohio law which provided that offences against state prohibition might be tried without a jury before the mayor of any rural village situated in the county in which the offence occurred. The mayor's judgment upon the facts was to be final and conclusive unless so clearly unsupported as to indicate mistake, bias, or wilful disregard of duty. The fines were to be divided between the state and the village, and the mayor was to receive a fee when he convicted, but not otherwise. In holding a conviction by a mayor's court under this law to constitute a denial of due process, the Chief Justice said:" It certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case".[12] "Every procedure which would

offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law".[13]

The Chief Justice then pointed out that, in this case, the mayor was the chief executive of the village and, as such, responsible for the village's finances. For this reason, also, a defendant in a case before him would be denied due process, since half of each fine went to the village treasury and there would naturally be a strong motive on the part of the mayor to help his village by a conviction and fine. "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him".[14]

But the possession of judicial functions by the mayor does not necessarily violate due process of law, and in Dugan v. State[15] the Chief Justice held that the mayor of the city of Xenia, Ohio, was not disqualified to act as judge in a liquor case. The position of the mayor in this case, however, differed markedly from that of the mayor in the Tumey case. The city of Xenia was under the commission form of government, one member of the commission acting as mayor. The mayor had no executive, but only judicial functions, the city manager being the active executive and responsible for the financial administration of the city. The mayor's

salary was fixed, whether he convicted or not, and he received no fees. The Chief Justice maintained that the fact that one-half of all fines was paid into the city treasury did not give the mayor a direct pecuniary interest in reaching a conclusion against a defendant, since the mayor was not directly responsible for administering the finances of the city.

The Police Power and Due Process

When a state law makes illegal the possession of intoxicating liquor for other than medicinal, mechanical, or sacramental purposes, the seizure and destruction, under the act, of liquor legally acquired before the passage of the act, does not deprive the owner of property without due process of law.[16] It is within the police power of a state to make the possession of intoxicating liquor unlawful, and when a person makes or stores liquor he does so knowing that the state, in the interest of the public health and morality, may deny it the character and attributes of property, and that without compensation to the owner.[17]

Again, it is within the state police power to require that insurance policies, issued to indemnify the owner of a motor vehicle against liability to persons injured through negligence in its operation, shall provide that the insolvency or bankruptcy of the insured shall not release the company from payment of damages for an injury sustained during the life of the policy.[18] Such a requirement does not deprive the insurance company of property without due process of law.

It is also within the police power of a state to require that railroad companies shall not discontinue switch service on industrial side tracks without notice and hearing; and an order made by a state public service commission, after a hearing, requiring a railroad to continue such service, does not deprive the railroad of property without due process of law merely because the switching, when considered separately, may involve a monetary loss to the railroad.[19]

Due Process in Taxation

The Chief Justice has written at least two opinions dealing with due process as applied to taxation and one with due process as applied to special assessments. In Rhode Island Hospital Trust Company v. Doughton[20] he held that "a State has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred".[21] The case involved the validity of a North Carolina inheritance tax law which imposed a tax on shares of stock owned by a non-resident in any corporation of another state having 50% or more of its property in North Carolina, the assessment of the shares as compared to their full value being in the same ratio as the value of the corporate property in North Carolina to all the corporate property of the corporation concerned. The Chief Justice held the law invalid as violating due process of law, declaring that "the owner of the shares of stock in a company is not the owner of the corporation's property".[22] Of course the devolution of the shares could be taxed by the state in which their owner resided, since

the status of intangibles, for purposes of taxation, is with the owner. So, too, the state in which the corporation was organized might provide, in creating the corporation, for taxing all shares of its stock in that state, whether owned by residents or non-residents.[23] But the mere fact that one-half or more of the property owned by the corporation is situated in a certain state other than the one in which the corporation is organized, does not give the state jurisdiction, for purposes of taxation, over shares of stock in the corporation when owned by non-residents.

In Blodgett v. Silberman[24] the Chief Justice enunciated the principle that intangible personalty has situs at the owner's domicile for transfer tax purposes, while tangible personalty has situs for such taxation only in the jurisdiction where it is physically located. Thus, when the deceased owner was domiciled in Connecticut, that state could, without violating due process, exact a succession tax on: an interest in a New York limited partnership; United States Bonds and Certificates of Indebtedness deposited in New York; stock in foreign corporations; a life insurance policy in a New York company; and a savings account in a New York bank. But coin and bank notes deposited in a safe-deposit box in New York are tangible property and not subject to the Connecticut tax under the due process clause, being taxable only in the state where deposited.

The case concerning due process in special assessments[25] involved the validity of the Diking Act of the State of Washington, passed in 1923. That act provided for the creation of

special improvement districts for drainage purposes, the costs to be assessed against the lands benefited. It further provided that where part of the land in a special improvement district failed to pay its assessment and was appropriated and sold, any deficit thus arising might be met by additional assessments on the land of the district. In holding that the reassessment provision did not violate due process of law, the Chief Justice said: "When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments".[26]

Due Process in Criminal Actions

The due process clause of the Fourteenth Amendment not only forbids the statesto deprive the individual of his property without due process of law, but also guarantees to the individual that he shall not be deprived of his life or liberty in a criminal action without the safeguards which due process imposes. The elements necessary to constitute due process in a criminal action are many. It is generally conceded that due process requires a public trial in a criminal case. However, the mere announcement by the trial court, during the course of a murder trial, that the general public will be excluded from the courtroom, does not constitute a denial of due process to the defendant, when the record shows that the

announcement was not carried out and that the general public were admitted to the extent of the seating capacity of the courtroom.[27]

A somewhat unusual case is that of Kelley v. Oregon.[28] Kelley was a prisoner in the Oregon State Penitentiary. He, together with two fellow-prisoners, killed one of the guards and escaped. Kelley was recaptured, indicted for first degree murder, tried, convicted, and sentenced to death. He appealed to the supreme court of Oregon, which court affirmed the judgment of the trial court. The case came to the United States Supreme Court on assignment of error, Kelley contending that he was deprived of due process by being kept in custody in and out of the courtroom during the trial. In dismissing the writ of error and holding that Kelley had not been deprived of due process, the Chief Justice declared: "It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely freed from custody. There is no showing that he had not full opportunity to consult with counsel or that he was in any way prevented from securing needed witnesses. The assignment is wholly without merit".[29]

Kelley also claimed that he had a vested right to serve out his penitentiary term before he could be executed for murder, in regard to which contention the Chief Justice said: "A prisoner may certainly be tried, convicted and sentenced for another crime committed either prior to or during his imprisonment, and may suffer capital punishment

and be executed during the term. The penitentiary is no sanctuary, and life in it does not confer immunity from capital punishment provided by law. He has no vested constitutional right to serve out his unexpired sentence".[30]

In considering due process as applied to criminal law and procedure, it is of interest to note the doctrine enunciated by Chief Justice Taft in Cline v. Frink Dairy Company[31] that vagueness and uncertainty render a criminal statute void as a violation of due process. In this case the Supreme Court held invalid the Colorado Anti-Trust Law of 1913 because it was so vague and uncertain in its description of what constituted its criminal violations. The due process clause of the Fourteenth Amendment, said the Chief Justice, "certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required".[32]

The Equal Protection Clause

Distinction Between Due Process and Equal Protection

Truax v. Corrigan

Doubtless the most outstanding opinion of Chief Justice Taft involving the Fourteenth Amendment is that in the case of Truax v. Corrigan.[33] This case, moreover, is of especial importance because it marks the first attempt on the part of any American court to indicate where the distinction between due process and equal protection might lie.[34]

An Arizona law (Ariz. Rev. Stats.,1913, par. 1464) provided that no injunction should be granted by any court of

that state in any case between an employer and employees involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to property rights. The law further provided that no such restraining order or injunction should pronibit any person or persons from terminating any relation of employment, or from ceasing to patronize or employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means to do so.

Truax, the plaintiff in the case, was the proprietor of a restaurant in Bisbee, Arizona.[35] The defendants in the case were cooks and waiters formerly in the employ of Truax, together with the labor union of which they were members. The union had ordered the employees of Truax to strike, because of the refusal of the latter to comply with certain demands of the union regarding terms and conditions of employment. To coerce the plaintiff to comply with their demands, the defendants picketed his place of business, displayed banners, denounced him as unfair to union labor, and by various other methods sought to induce potential customers not to patronize the plaintiff. As a result of this campaign the volume of plaintiff's business was greatly reduced. Alleging that he had no adequate remedy at law, Truax sued for an injunction to restrain defendants from continuing their activities against his business. The defendants relied for immunity upon the provisions of the statute above cited, and entered a demurrer to the complaint. The trial court sustained the demurrer, and this judgment was affirmed by the supreme court of Arizona.

The case came to the United States Supreme Court on writ of error, Truax alleging that the Arizona statute violated the due process and equal protection clauses of the Fourteenth Amendment. By a five-to-four decision the Supreme Court, speaking through Chief Justice Taft, reversed the state courts and held the Arizona statute void.

"Plaintiffs' business", says the Chief Justice, "is a property right and free access for employees, owner and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. ...A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the Fourteenth Amendment. ...If, however, contrary to the construction which we put on the opinion of the Supreme Court of Arizona, it does not withhold from the plaintiffs all remedy for the wrongs they suffered but only the equitable relief of injunction, there still remains the question whether they are thus denied the equal protection of the laws".[36]

The equal protection clause of the Fourteenth Amendment "is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Consti-

tion as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to Congressional legislation".[37] The due process clause, of course, "tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. ...But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied the spirit in a specific guaranty".[38]

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process".[39] It conferred an additional right beyond the requirement of due process. Moreover, it "was intended to secure equality of protection not only for all but against all similarly situated".[40]

"If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction".[41]

"Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be".[42]

Classification "must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual".[43]

The case of Truax v. Corrigan is one of those in which our highest court has declared a state law invalid by the narrow margin of a five-to-four decision. In this case three dissenting opinions were registered: one by Justice Holmes; another by Justice Pitney, concurred in by Justice Clarke; and a third by Justice Brandeis. While these several opinions discuss the various phases of the case at considerable length, the general attitude of the dissenting Justices may be indicated by quoting briefly from the pithy two-page dissent of Justice Holmes. After alluding to the dangers of a delusive

the slow and discouraging course of agitating for the adoption of a Code of Industrial Relations by constitutional amendment; it can bow to the inevitable and be content to eat humble pie; or it can attempt to break the power of the judiciary by direct action. These alternatives are not pleasant to contemplate. If in future years Truax vs. Corrigan comes back to plague us in terms of defiance of the courts, we shall know where to assess the blame."

While sufficient time has not yet elapsed since the Truax decision to determine fully its effect, the past seven years have certainly not justified the dire forebodings contained in the above-mentioned editorial. Whether the majority or the minority of the Court had the better of the logic, it does not seem probable that the decision is fraught with such ominous consequences as some critics of the Court would have us believe.

Classification and Equal Protection

Since his decision in the Truax case, Chief Justice Taft has written several opinions involving the validity of state laws under the equal protection clause. In some of these cases the Court has been called upon to consider the highly complicated question as to how far a state legislature may go in classifying persons or things without denying to some person the equal protection of the laws.

As explained in the Truax case, classification in legislation is inevitable. But classification must be reasonable; it must regard real resemblances and real differences, and be

exactness in the application of the Fourteenth Amendment, Justice Holmes says: "I think ... that the selection of the class of employers and employees for special treatment, dealing with both sides alike, is beyond criticism on principles often asserted by this Court. And especially I think that without legalizing the conduct complained of the extraordinary relief by injunction may be denied to the class. Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases".[44]

Again: "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect".[45]

The Truax decision naturally provoked considerable discussion at the time it was rendered. A large part of the criticism, of course, was not favorable to the majority opinion of the Court. Several of the more "liberal" periodicals, some of which had opposed the appointment of Mr. Taft as Chief Justice,[46] were particularly venomous in their denunciation of the decision. An editorial in the Nation,[47] after characterizing the decision as a "body blow to organized labor", ended with this gloomy prophecy: "What courses are left? They are not many, nor are they promising. Organized labor can adopt

pertinent to the purpose in hand. Whether or not any particular classification is reasonable is, of course, a judicial question for the decision of the courts.

In Gong Lum v. Rice[48] the Chief Justice, speaking for the Court, held that a Chinese citizen resident in this country is not denied equal protection by reason of being classed among colored races, and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black. The decision relative to the separation of races is within the discretion of a state in regulating public schools.

In National Union Fire Insurance Co. v. Wanberg[49] the Chief Justice held that the hail insurance business is so different from other forms of insurance as to justify its being put in a special class for legislative treatment. A North Dakota law of 1913 provided that all hail insurance written in that state should take effect 24 hours after the taking of the application by the local agent.[50] Since this law applied to all companies engaged in the hail insurance business, said the Chief Justice, there was no discrimination or denial of equal protection. "The fact that the time requirements of the statute may bear more heavily on foreign companies whose principal offices may be far removed than upon those whose headquarters are within the State is a circumstance necessarily incident to their conduct of business in another State of which they can not complain".[51]

Again, a reasonable classification of property for taxation does not involve a denial of equal protection. In upholding the validity of a Washington law providing that all

the operating property of street railroads should be assessed and taxed as personal property, the Chief Justice maintained that street railways are so in a class by themselves as to render not arbitrary their being put in a special class for taxation.[52] They differ so widely from steam railways that a separate treatment of the two classes of railroads for purposes of taxation is justifiable.

A somewhat unusual contention in regard to the equal protection and due process clauses was decided in the case of Missouri Pacific Railroad Co. v. Clarendon Boat Oar Co.[53] A Louisiana law required foreign corporations doing business in the state to designate a resident agent upon whom legal process might be served. The Missouri Pacific Railroad Co., a Missouri corporation, sued the Clarendon Boat Oar Co., a New York company doing business in Louisiana, in a Louisiana court for breach of a contract entered into in the state of Arkansas and to be performed in that state. The state courts dismissed the case for want of jurisdiction, on the ground that the provision made by law for suing foreign corporations doing business within the state, while applicable alike to actions by residents and nonresidents, did not extend to transitory actions arising outside the state. The case came to the United States Supreme Court on writ of error, the railroad company contending that failure to provide for service on foreign corporations in such transitory actions as the one here involved, when it was provided for in other cases, con-

stituted a denial of due process and equal protection in violation of the Fourteenth Amendment.

In dismissing the writ of error and holding that there was no denial of due process or equal protection, Chief Justice Taft said: "Under ... the Federal Constitution, the citizens of each State are entitled to all privileges and immunities of citizens in the several States. This secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State; but where the citizens of the latter State are not given a process for reaching foreign corporations, it is not apparent how non-citizens can claim it. Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State."[54]

Equal Protection in the Execution of Laws

Of particular interest is the doctrine enunciated by Chief Justice Taft in Sioux City Bridge Co. v. Dakota County, Nebraska,[55] that denial of equal protection may result from the improper execution of a statute as well as from its express terms. To assess the property of one or a few of a class of taxpayers at 100% of its actual value, while other property of the same class is regularly assessed at a much lower percentage, is a denial of equal protection, according

to the Chief Justice, even though there is a constitutional or statutory requirement that all property be assessed at 100% of its value. Since it is impossible for the aggrieved person by any judicial proceeding to secure an increase in the great mass of under-assessments, his remedy is to have his assessment reduced to the percentage of value at which other taxpayers are assessed. "Where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."[56]

Equal Protection as Applied to Foreign Corporations

It is a well known principle of constitutional construction that a corporation is not a citizen within the meaning of that clause of the constitution which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States".[57] Thus a state may impose higher requirements for the privilege of doing business in the state upon a foreign than upon a domestic corporation. But, once a foreign corporation has been admitted, it is on a par with domestic corporations and is entitled to the same treatment. To discriminate against a foreign corporation after its admission is to deny it the equal protection of the laws.

In Hanover Fire Insurance Co. v. Harding[58] Chief Justice Taft held that, while a state may forbid a foreign corporation to do business within its juriddiction, or may permit it to do business therein subject to certain conditions, a "State may

not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed".[59] This case involved the taxation of foreign insurance companies by the State of Illinois, and in the course of his opinion the Chief Justice said: "In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a quasi citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind".[60] "By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign, within the State; and tax laws made to

apply after it has been so received into the State are to be considered laws enacted for the purpose of raising revenue

for the State and must conform to the equal protection clause of the Fourteenth Amendment".[61]

CHAPTER V

The First Eight Amendments

When the product of the Philadelphia Convention was submitted to the thirteen original states in 1787, one of the most serious objections urged to ratification was that the proposed constitution contained no "bill of rights" - no specific guaranty that the private rights of individual citizens should not be arbitrarily interfered with by the government. There was a general feeling that the original document as drafted by the convention had created a central government with too much power,[1] and even before ratification was completed it became generally understood that a bill of rights in the form of amendments to the constitution would be adopted as soon as the new government went into effect.

Accordingly, the first Congress to assemble under the new constitution proposed a series of amendments, ten of which were soon ratified by the necessary number of states and put into effect.[2] The first eight of these embodied specific guaranties of certain fundamental personal and property rights; the ninth provided that the enumeration in the constitution of certain rights should not be construed "to deny or disparage others retained by the people"; and the tenth made it clear that all powers not delegated to the United States by the constitution, nor prohibited by it to the states, were "reserved to the States, respectively, or to the people".[3]

It was decided by the Supreme Court as long ago as 1833,

in the case of Barron v. Baltimore,[4] that the provisions of the first eight amendments, which are often designated collectively as the Bill of Rights, are restrictions upon the national government only, - not upon the individual states. It is important to remember, therefore, that, while many similar restrictions are placed upon the state legislatures by the Fourteenth Amendment and by provisions of their respective state constitutions, it is impossible for a state law to violate the provisions of the first eight amendments.

Freedom from Unreasonable Search and Seizure.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

It will be noted, as pointed out by Chief Justice Taft in Carroll v. United States,[5] that this amendment does not forbid all searches and seizures, but only such as are unreasonable. The question of reasonableness must, of course, be determined upon the merits of each particular case, and the number of cases in which this question comes before the Supreme Court has been greatly increased by the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act. A search and seizure without warrant may be reasonable under certain circumstances and unreasonable under others.

In determining whether or not a search without a warrant is reasonable, the Supreme Court has made a very interesting and logical distinction between the search of a house or other building, on the one hand, and that of an automobile or other vehicle, which may readily be moved out of the locality, on the other. In the case of buildings it is usually practicable, and therefore necessary, to secure a warrant. Movable vehicles, on the other hand, may be searched without a warrant on probable cause. In the course of his opinion in the above-mentioned case, the Chief Justice said:

> "The guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.
>
> "...If an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure.
>
> "...In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause".[6]

In construing the provisions of the Fourth Amendment that no warrant shall issue but upon probable cause, and that a warrant shall particularly describe the place to be searched and the persons or things to be seized, the Supreme Court has

not been disposed to allow justice to be promiscuously defeated by the contention on the part of a defendant that the warrant was not issued upon probable cause, or that it does not describe in sufficient detail the place to be searched or the property to be seized. Unless there is an obvious violation of the constitutional provisions, the tendency on the part of the Court is to uphold the actions of government officials in matters of search and seizure.

In regard to the question as to what constitutes probable cause, the Chief Justice adheres to the principle, laid down by the Court in earlier cases, that it is sufficient to justify an officer in making affidavit to secure a search warrant "if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed".[7] As to the requirement that the place to be searched be particularly described in the warrant, "it is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended".[8]

One of the most important of Chief Justice Taft's opinions involving an interpretation of the Bill of Rights is that in the recent case of Olmstead v. United States.[9]

Olmstead and others were convicted in a United States District Court in the State of Washington of a conspiracy to violate the National Prohibition Act. The information which led to the discovery of the conspiracy was obtained in large part by the interception of messages on the telephones of the conspirators, the wires being tapped by federal prohibition

officers. The wires were tapped without trespass upon the property of the defendants, the tappings being made in the basement of the office building in which their main office was located, and in the streets near their homes.

The Circuit Court of Appeals affirmed the conviction and the defendants brought certiorari, claiming that the use of evidence secured by wire tapping violated their rights under the Fourth and Fifth Amendments. They contended that the wire-tapping amounted to an unreasonable search and seizure in violation of the Fourth Amendment; also that the use in evidence of the conversations so intercepted was, in effect, compelling the defendants to be witnesses against themselves in a criminal case in violation of the Fifth Amendment.

The Supreme Court, by a five-to-four decision, affirmed the judgment of the Circuit Court of Appeals and upheld the validity of the wire-tapping by the prohibition officers. In speaking for the majority of the Court, Chief Justice Taft said:

> "There is no room in the present case for applying the Fifth Amendment, unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.
>
> "...The [Fourth] amendment itself shows that the search is to be of material things - the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or <u>things</u> to be seized.
>
> "...The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the

houses or offices of the defendants.

"...The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.

"...We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment".[10]

Justices Brandeis, Holmes, Butler, and Stone dissented from the majority opinion in the Olmstead case. "In the application of a Constitution", says Justice Brandeis, "our contemplation cannot be only of what has been, but of what may be".[11] He suggests that, if wire-tapping is permitted, as science advances even more intricate methods may be found of exposing to a jury the most intimate occurrences of the home.[12] The evil incident to invasion of the privacy of the telephone,he points out, is far greater than that involved in tampering with the mails, since the tapping of one man's telephone involves tapping the telephone of every person whom he may call or who may call him.[13] "The makers of our Constitution ... conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth".[14]

Justice Holmes directs his pithy dissent chiefly against the contention by the majority of the Court that

the fact that wire-tapping was a misdemeanor under the law of Washington did not render the evidence obtained in that manner inadmissible. That contention was based, of course, on the common-law principle that evidence is not inadmissible because illegally obtained. Justice Holmes, however, cannot see how the national government can be justified in fostering the violation of state law in the enforcement of its own. "For my part" he says, "I think it a less evil that some criminals should escape than that the government should play an ignoble part".[15]

Double Jeopardy -- The Lanza Case

The Fifth Amendment provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. This means, of course, that a person cannot be tried or punished more than once for the same offense.[16] In the case of United States v. Lanza [17] Chief Justice Taft enunciated the principle that this restriction applies only to two prosecutions or punishments by the national government, and does not bar prosecution and punishment of an offender by both the national and state governments if his offense violates the laws of both.

Lanza and others were indicted in the United States District Court for the Western District of Washington for violating the National Prohibition Act. They were charged in five counts with manufacturing, transporting, and possessing intoxicating liquor, and with possessing a still and materials for use in its manufacture. The defendants set up

as their defense that they already had been convicted in a Washington court and fined for manufacturing, transporting, and possessing the same liquor, under a statute of the state which was in effect before the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act. They insisted that two punishments for the same act, one under the National Prohibition Act and the other under a state law, would constitute double jeopardy within the meaning of the Fifth Amendment. They argued that both the national and the state laws derived their force from the same authority - that clause in the Eighteenth Amendment which gives Congress and the several states concurrent power to enforce prohibition - and that in principle to punish under both would be the same as if the two punishments were in prosecutions by the United States in its courts.

The district court sustained the plea of the defendants and dismissed the indictment, whereupon the case was taken to the United States Supreme Court on writ of error. The Supreme Court, speaking through Chief Justice Taft, reversed the district court and held that punishment by the state under its laws did not preclude punishment by the United States under the National Prohibition Act.

As to the contention that the states, as well as the national government, derive their power to adopt and enforce prohibition from the Eighteenth Amendment, the Chief Justice says: "To regard the amemdment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for

some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded".[18]

Having disposed of this question, the Chief Justice proceeds to deal with the merits of the particular case in hand. "We have here", he explains, "two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

"It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Pro-

hibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy".[19]

The Chief Justice expresses the opinion that, if punishment by a state for violation of its prohibitory law was allowed to give immunity from federal prosecution under the National Prohibition Act, offenders would flock to the courts of those states imposing light penalties to plead guilty and thus escape federal prosecution. Such an arrangement, certainly, would not make for respect for the federal law. Of course, it is within the legislative power of Congress to bar prosecution by the federal courts when punishment for violation of state prohibition has been imposed. But Congress has not seen fit to do so, and, "in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts."[20]

Freedom from Self- Incrimination

One of the guaranties embraced in the Fifth Amendment is that no person shall be compelled in any criminal case to be a witness against himself. This exempts a person accused of a criminal offense, not only from personally appearing in court to testify against himself, but also from being compelled to turn over to the court for use as evidence any books, records,

or documents in his possession and control, if the use of such would tend to incriminate him.

But the situation becomes complicated in the case of bankruptcy proceedings, and Chief Justice Taft has been called upon in two cases[21] to decide whether this clause of the Fifth Amendment exempts a receiver or trustee in bankruptcy from producing before a court, in criminal proceedings, books and records in his possession, because such production would tend to incriminate the bankrupt. In answer to this question, the Chief Justice has held that the bankrupt's immunity from producing his books and records ceases with the transfer of the control and possession of such books and records, by court order, into the hands of the receiver or trustee in bankruptcy. After such transfer, the bankrupt cannot prevent the production in court of the books and records by the official who has possession and control over them, when the latter has been properly subpoenaed. Moreover, a stipulation made by the bankrupt, at the time of delivering possession, that the books and records shall be used only in connection with the civil administration of the bankrupt's estate, is without validity and effect, and will not prevent their being produced as evidence against him in a criminal proceeding.[22]

In Ex parte Fuller the Chief Justice said: "A man who becomes a bankrupt or who is brought into a bankruptcy court has no right to delay the legal transfer of the possession and title of any of his property to the officers appointed by law for its custody or for its disposition, on the ground that the transfer of such property will carry with it incrimi-

nating evidence against him. His property and its possession pass from him by operation and due proceedings of law, and when control and possession have passed from him, he has no constitutional right to prevent its use for any legitimate purpose. His privilege secured to him by the Fourth and Fifth Amendments to the Constitution is that of refusing himself to produce, as incriminating evidence against him, anything which he owns or has in his possession and control, but his privilege in respect to what was his and in his custody ceases on a transfer of the control and possession which takes place by legal proceedings and in pursuance of the rights of others, even though such transfer may bring the property into the ownership or control of one properly subject to subpoena duces tecum".[23]

Again, in Dier v. Banton:[24] "We agree ... that the right of the alleged bankrupt to protest against the use of his books and papers relating to his business as evidence against him ceases as soon as his possession and control over them pass from him by the order directing their delivery into the hands of the Receiver and into the custody of the court. ...While they are, in the due course of the bankruptcy proceedings, taken out of his possession and control, his immunity from producing them, secured him under the Fourth and Fifth Amendments, does not enure to his protection".[25]

"Of course", the Chief Justice explains, "Where such books and papers are in the custody of the Bankruptcy Court, they can not be taken therefrom by supoena of a state court except upon consent of the federal court. In granting or with-

holding that consent the latter exercises a judicial discretion dependent on the circumstances, and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory. All we hold here is that the court below having exercised discretion to allow the use of the books and papers in the custody of its officer upon subpoena by another court, the alleged bankrupt's rights under the Fourth and Fifth Amendments have not been violated".[26]

It is important to note, as pointed out by Chief Justice Taft in Essgee Co. v. United States,[27] that corporations do not enjoy the same immunity that individuals have, under the Fourth and Fifth Amendments, from being compelled to produce their books, papers, and records for examination by the state or federal government. Moreover, an officer of a corporation may not refuse to submit for examination the corporate books and records on the ground that they will tend to incriminate him personally. "An officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity and is not, therefore, protected against their production or against a writ requiring him as agent of the corporation to produce them".[28]

Due Process of Law

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. This provision, as we have seen[29], applies only to the

national government; however, the due process clause of the Fourteenth Amendment places the same restriction upon the states. Since the cases arising under the due process clause of the Fourteenth Amendment are much more numerous than those under the like clause of the Fifth, Chief Justice Taft's conception of due process was studied in considerable detail in the preceding chapter. It will suffice for our present purpose to notice briefly those opinions of the Chief Justice involving the requirement contained in the Fifth Amendment of due process as applied to the national government.

In Cooke v. United States[30] the Supreme Court was called upon to decide whether due process requires that an offender be given notice and an opportunity to be heard before being sentenced by a federal court for contempt. Speaking for the Court, the Chief Justice held that, when a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. "Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law".[31]

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument...

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires

that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed".[32]

In United States v. Balint[33] Chief Justice Taft, in considering an indictment under the federal Narcotic Act, held that the punishment of a person for an act in violation of law when ignorant of the facts making it so does not constitute a denial of due process in violation of the Fifth Amendment.

In Barclay & Co. v. Edwards[34] the Chief Justice declared that the taxing by Congress of income derived by domestic corporations from the sale abroad of goods bought or made by them in this country is not invalid under the due process clause because of the fact that a like tax is not imposed upon the income similarly derived by foreign corporations. Considerations of foreign policy, he points out, might well justify the exemption of foreign corporations from such taxes, even though they were exacted of domestic corporations.[35] In view of the very wide power of Congress in levying taxes, a classification of taxpayers that is reasonable, and not merely arbitrary or capricious, does not violate the requirement of due process.[36]

The most interesting of Chief Justice Taft's opinions involving the due process clause of the Fifth Amendment is his dissent in the case of Adkins v. Children's Hospital.[37]

By an act of 1918 (40 Stat.960,c.174), Congress provided for the fixing of minimum wages for women and children in the District of Columbia. A board of three members, representative of employers, employees, and the public, was created to carry on investigations, hold conferences and hearings, and fix minimum wages in the various employments.

Suits were begun in the supreme court of the District of Columbia by certain employers of women and women employees to restrain the enforcement of orders of the board fixing minimum wages. That court denied the injunctions. These judgments were reversed by the court of appeals of the District of Columbia, and the cases remanded. The trial court then, in pursuance of the mandate, entered decrees granting the injunctions, which decrees were subsequently affirmed by the court of appeals. The cases were then appealed to the Supreme Court of the United States.

The Supreme Court, by a five-to-three decision (Justice Brandeis not participating), affirmed the decrees of the lower court and held the minimum wage law void as interfering with the freedom of contract in contravention of the due process clause of the Fifth Amendment. Two dissenting opinions were filed, - one by Chief Justice Taft, concurred in by Justice Sanford, and another by Justice Holmes.

In the course of his dissent, the Chief Justice maintains that the right of the legislature, under the Fifth and Fourteenth Amendments, to limit the hours of employment in the interest of the health of the employee has been firmly established.[38] He considers the famous Bakeshop Case,[39] in which

the Supreme Court held that restricting those employed in bakeries to ten hours a day was an arbitrary and invalid interference with the liberty of contract secured by the Fourteenth Amendment, as being virtually overruled by the case of Bunting v. Oregon,[40] in which the Court sustained a law limiting the hours of labor of any person employed in any mill, factory, or manufacturing establishment to ten hours a day with a proviso as to additional hours.

If the legislature can fix maximum hours, it seems perfectly clear to the Chief Justice that it can fix minimum wages, since one term of the wage contract is fully as important as the other.[41] Moreover, the Supreme Court has at various times sustained laws which have placed limitations upon the wage term of the contract of employment. As examples of laws so upheld the Chief Justice mentions, among others, a law making it illegal to estimate the graduated pay of miners by weight after screening the coal, and a law forbidding the payment of wages in advance.[42]

"The boundary of the police power", declares the Chief Justice, "beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our Court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can and not to depart from it by suggesting a distinction that is formal rather than real".[43] Furthermore, "it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic

views which the Court believes to be unwise or unsound".[44]

"With deference to the very able opinion of the Court and my brethern who concur in it", says the Chief Justice, "it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolable than its other terms...

"...I do not feel ... that either on the basis of reason, experience or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage".[45]

In the Adkins case we certainly discern a definite trend toward liberalism on the part of Chief Justice Taft. From the standpoint of liberal philosophy, his dissent in this case compares favorably with the dissents of Justices Holmes and Brandeis - those two great disciples of liberalism - in the Truax case. Indeed, in the Adkins case we find Justice Holmes on the same side of the Court as the Chief Justice, as also Justice Brandeis would undoubtedly have been had he participated in the decision. Those critics who so bitterly denounced as reactionary the opinion of the Chief Justice in the Truax case should find considerable solace in his Adkins dissent.

CHAPTER VI

The Commerce Clause

Scope of the Commerce Clause

The opinions of Chief Justice Taft dealing with problems of interstate commerce are numerous and important. Taken en bloc, these opinions disclose a tendency on the part of the Chief Justice to expand the powers of the national government by giving a broad and flexible interpretation to the commerce clause. To him, the power to regulate interstate commerce is by no means a narrow power; nor is it limited to regulation in its negative aspect. To maintain that the power is limited to the fixing of reasonable rates and the prevention of those which are discriminatory is to take too narrow a view of the commerce clause. "To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety".[1]

Interstate Commerce and the State Police Power

One of the most difficult problems arising in connection with the regulation of commerce is that as to how far the states may interfere with interstate commerce in the exercise of their police power. It would seem to be the general rule that state police measures are not invalid merely because their execution involves an incidental interference with interstate commerce, providing that Congress has not itself enacted

legislation covering the particular phase of interstate commerce involved. In Oregon-Washington R.R. & Navigation Co. v. State of Washington[2] it was explained by the Chief Justice that there are two fields in the relation of the states to the regulation of interstate commerce by Congress: In one the states cannot act at all, regardless of whether or not Congress has acted; in the other the states may act, under their police power, until Congress has occupied the field by affirmative regulation. The opinion in this case gives such a clear explanation of the relation between interstate commerce and the state police power that it deserves consideration in some detail.

An act of Congress of 1912 (37 Stat. 315, c.308), as amended in 1917 (39 Stat. 1165, c.179), authorized and directed the Secretary of Agriculture to quarantine any state, territory, or district of the United States, or any portion thereof, when he should determine that such quarantine was necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States.

In 1921, the legislature of the State of Washington passed a law making it the power and duty of the Director of Agriculture, with the approval of the governor, to establish and maintain quarantine when needed to keep out of the state contagious diseases of plants, or injurious insects or other pests. Under this law the director and governor promulgated an order declaring a quarantine against certain areas in Utah, Idaho, Wyoming, Colorado, Oregon, and Nevada, which were infested with alfalfa weevil. The order forbade the importation

into Washington of alfalfa hay and meal from these areas except in sealed containers.

Suit was brought by the State of Washington in a superior court of the state against the Oregon-Washington R.R. & Navigation Company, a common interstate carrier, the state alleging that the railroad company had violated the proclamation by shipping alfalfa hay from the quarantined areas into Washington in common box cars. The state asked for an injunction to restrain the railroad company from making further shipments in violation of the quarantine regulation. The trial court granted the injunction, and its decree was affirmed by the supreme court of Washington. The case came to the United States Supreme Court on writ of error, the railroad company alleging that the quarantine order and the law under which it was made were in contravention of the interstate commerce clause of the federal constitution, and in conflict with the above-mentioned act of Congress.

In reversing the state courts and holding the Washington statute and the order made thereunder to be of no effect, the Chief Justice said: "In the absence of any action taken by Congress on the subject matter, it is well settled that a State in the exercise of its police power may establish quarantines against human beings or animals or plants, the coming in of which may expose the inhabitants or the stock or the trees, plants or growing crops to disease, injury or destruction thereby, and this in spite of the fact that such quarantines necessarily affect interstate commerce." [3] But if Congress decides to assume control its authority is paramount, and the state police regulations must give way to the regulations laid

down by the national government. The Chief Justice points out that the scope of the federal act in question clearly indicates the intention on the part of Congress to give to the federal Department of Agriculture complete direction and supervision of quarantine against importation into the country and as between states. So long, therefore, as the federal law is in force, state action is illegal and unwarranted. Nor may the states act in the absence of any action by the Secretary of Agriculture; that officer is obliged to act whenever quarantine, in his judgment, is necessary, and, when he does not act, it is to be presumed that action is unnecessary.

In another recent case,[4] the Chief Justice held that, in the absence of national legislation specifically covering the subject of interstate commerce, a state may, in the exercise of its police power, prescribe the maximum load that may be hauled over its highways, such regulations being applicable alike to vehicles moving in interestate commerce and those in intrastate.

But while federal regulation of interstate commerce supersedes all state legislation on the subject, an interstate carrier may not escape state police regulations by pleading that such regulations interferewith interstate commerce and constitute a burden thereon. Where, for instance, reasonable safety of the public requires the abolition of grade crossings, a railroad cannot prevent the exercise of the state police power to that end by alleging that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad.[5]

A state may, then, in the valid exercise of its police power, require the abolition of grade crossings. But it may not require carriers to build a new union station and extend their lines thereto on the ground that such extensions are an indispensable element in getting rid of grade crossings.[6] The Transportation Act of 1920 provides that no interstate carrier shall extend its lines of railroad unless and until the Interstate Commerce Commission shall certify that public convenience requires it. It is beyond the power of a state, therefore, to require the extension of such lines until the Interstate Commerce Commission shall have acted favorably upon the project.

Interstate Commerce and the State Taxing Power

Another difficult problem is that of the relationship between interstate commerce and the power of the states to tax. The national government, under the constitution, has the exclusive power to regulate commerce between the states. Any tax upon articles in interstate commerce would constitute an obstruction to and burden on such commerce, and it is therefore beyond the power of the states to impose such a tax. But when is an article in interstate commerce so as to be exempt from state taxation, and when does it cease to be a part of such commerce and come again within the taxing power of the state? These questions are not always easily answered.

In Champlain Realty Co. v. Town of Brattleboro,[7] the Chief Justice, speaking for the Court, held that logs being floated from points in Vermont to a destination in

New Hampshire and held temporarily in a boom at a Vermont town enroute, waiting for high waters to subside so that the journey might be safely resumed, were in interstate commerce and not taxable by the Vermont town. He pointed out that the preparation for the interstate journey was completed at the towns where the logs were put into the stream, and that the journey had actually begun. The boom in question was not a depot for the gathering of logs preparatory for the journey; it was a refuge of safety in the course of the journey. "If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken".[8]

Again, oil transported into a state by rail and destined for shipment abroad is not subject to state taxation while held temporarily in storage tanks awaiting the arrival of a ship or the accumulation of sufficient cargo to load a ship.[9] The storage in such a case is part of the continuous interstate or foreign shipment, and the fact that the exact point of destination abroad was not fixed before the journey began does not prevent the continuity required in a continuous exportation, when no oil is sold at the point of storage except for exportation.

In Hughes Bros. Timber Co. v. Minnesota,[10] the timber company, a partnership in Minnesota, had entered into a contract with the Central Paper Company of Muskegon, Michigan, by which it agreed to deliver certain pulp wood to the paper company, over the side of the paper company's vessels at the mouth of the Pigeon River in Lake Superior. The wood was to be cut in Minnesota, floated down the Swamp and Pigeon Rivers to the

mouth of the latter, and taken from there to Muskegon, Michigan, in the paper company's boats. The drive of the logs down the Swamp River began on April 29, 1922, and the state of Minnesota attempted to tax the logs as personal property owned by the timber company on May 1st. The Supreme Court, again speaking through Chief Justice Taft, held that the logs were in interstate commerce and exempt from state taxation as soon as the journey by floating was begun, and that the change in the method of transportation from floating to carriage on vessels did not affect the continuity of the interstate passage. Of course it must appear that the interstate journey actually has begun and is going on; the mere gathering of the logs preparatory for the journey does not put them in interstate commerce. But "the mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation".[11]

However, grain shipped from western to eastern points through Chicago on through bills of lading, and removed from the car at Chicago for temporary purposes of storing, inspecting, grading, changing ownership, etc., may be taxed in Chicago, although it has not been taken out of interstate commerce in such a way that Congress is deprived of the power to regulate it.[12]

And a tax on the sale of oil brought into Texas from outside the state and sold and delivered in Texas in the original packages is not a burden on interstate commerce when the tax applies to all wholesale dealers in oil engaged in making

sales and delivery in Texas.[13] The immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original package of importation and added to the mass of merchandise of the state, does not extend to articles coming from interstate commerce in original packages. In the case of articles coming from interstate commerce, as soon as they come to a state of rest and become part of a general stock of goods, they may be taxed by the state, whether in the original package or not, providing the same tax is levied on all similar articles, without regard to origin.

Interstate and Intrastate Rates

Just as state police regulations must give way before the superior action of Congress, so in the matter of rate regulation state action must give way to national legislation and orders made thereunder. Not only does the national government have exclusive jurisdiction over interstate rates, but it may also regulate intrastate rates to the extent of preventing discrimination against interstate commerce. Thus the Interstate Commerce Commission may order an increase in intrastate rates above the maximum prescribed by a state statute, if the maximum rates prescribed by the state are so low as to make interstate commerce bear an undue proportion of the cost of maintaining an adequate railway system.[14] The Commission may even order an increase above a maximum rate provided in a charter contract between a state and a railroad.[15]

Difficulties sometimes arise over the question as to

what is interstate commerce, and what intrastate, for the purpose of fixing rates. This is shown in the case of Atlantic Coast Line R. Co. v. Standard Oil Company of Kentucky.[16] The oil company purchased oil products from points in Louisiana and Mexico, which products were shipped in tank steamers owned by the sellers to certain seaboard towns in Florida where the oil company owned large storage facilities. The oil waspumped from the tank steamers into storage tanks and tank cars at these Florida towns, and was subsequently distributed by rail over the Atlantic Coast lines to numerous bulk stations maintained by the oil company throughout the State of Florida. The railroad company attempted to charge interstate rates on shipments from the seaboard towns to the bulk stations in the same state, claiming that these shipments constituted a part of continuous shipments of oil from Louisiana and Mexico to bulk stations in the interior of Florida, and that its interstate character continued throughout the entire passage. The oil company brought suit in the United States District Court to restrain the collection of interstate rates on shipments from the seaboard towns to the bulk stations, claiming that these were intrastate shipments. The district court granted the injunction.

In affirming the decree of the district court, Chief Justice Taft held that the interstate or foreign commerce in the oil ended upon its delivery into the oil company's storage tank cars at the seaboard, and that from there its distribution to bulk stations within the state was intrastate commerce. "The reshipment of an interstate or foreign shipment does not

necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars".[17]

Interstate Commerce and the Anti-Trust Laws

The problem concerning the status of strikes under the federal anti-trust laws is closely bound up with the interpretation of the commerce clause. The Sherman Act declares illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states or with foreign nations. But when does an industrial strike interfere with interstate commerce so as to bring it within the prohibition of the Sherman Act? In United Mine Workers v. Coronado Coal Co.[18] Chief Justice Taft declared that obstruction to coal mining is not directly an obstruction to interstate commerce, although it may incidentally reduce the amount of coal to be carried in interstate commerce. "But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act".[19]

Again, "the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize

the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce".[20]

It seems, then, that intent is an important factor in determining whether or not a strike restrains interstate commerce in violation of the Sherman Act. A strike, though it may be illegal, does not violate that Act merely because, by obstructing the manufacture or production of an article, it incidentally decreases the amount to be carried in interstate commerce. But if it is the intent and purpose of the strikers to interfere with interstate commerce and control the supply of the article entering and moving therein, then there is a direct violation of the Sherman Act.

The National Police Power

The police power has been defined by eminent authority as "the power of promoting the public welfare by restraining and regulating the use of liberty and property".[21] Since our national government is a government of delegated powers, and since no general police power is conferred by the constitution upon that government, when Congress exercises police power it must do so indirectly through the exercise of some power specifically delegated to it. While we usually think of the police power as being reserved to the states by the Tenth Amendment, Congress during recent years has passed many laws which are essentially police regulations, most of them being enacted under the constitutional powers of Congress to tax, to regulate

commerce, and to control the mails. Doubtless more national police regulations have been based upon the power to regulate interstate commerce than upon any other delegated power. Illustrations are such measures as the Mann white-slave act, the Adamson eight-hour-day law, the meat inspection act, the pure food and drugs act, and the employer's liability act.

But while police measures have usually been enacted by Congress and upheld by the courts under the guise of some one of the powers expressly delegated to Congress by the constitution, it is of interest to note that Chief Justice Taft has expressly recognized the existence of a national police power as such. In upholding the validity of the National Motor Vehicle Theft Act of 1919 (41 Stat. 324, c.89), the Chief Justice said: "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce".[22]

Chief Justice Taft propounds the fundamental doctrine that Congress may subject to national regulation practices which, while not really a part of interstate commerce, it deems likely to obstruct, restrain, or burden that commerce.[23] And it is through an application of this doctrine that many national police measures have been enacted.

One of the most important cases involving such a police regulation is that of Stafford v. Wallace.[24] In 1921 Congress

passed the Packers and Stockyards Act (42 Stat.159,c.64), a provision of which required that commission men and live-stock dealers in the larger stockyards of the country should register, and should keep a schedule of their charges open for public inspection. Stafford and others, commission men and dealers in the Union Stockyards of Chicago, filed a petition in the United States District Court for an injunction to restrain the enforcement against them of certain orders of the Secretary of Agriculture made under the authority of the act for the purpose of carrying out its provisions. The plaintiffs alleged that the act was invalid as to them because their business was strictly intrastate. The district court denied the injunction and the plaintiffs appealed. The Supreme Court affirmed the decision of the district court and upheld the validity of the act, pointing out that Congress, in enacting the law in question, had treated the stockyards as national public utilities, conducting a business affected by a public use of a national character, and subject to national regulation. In the course of the opinion, the Chief Justice, speaking for the Court, said:

> "The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and the East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.
>
> "The chief evil feared is the monopoly of the packers. ...Another evil which it [Congress] sought to provide against by the act, was the exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in

> the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce".[25]

It is primarily for Congress to determine whether a practice constitutes an obstruction to or a burden on interstate commerce, and the courts will not substitute their judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.[26]

A very similar case is that of Chicago Board of Trade v. Olsen.[27] The Grain Futures Act of 1922 (42 Stat.998c.369) declares that transactions in grain "futures" on boards of trade are affected with a national public interest; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control; that as a result of such speculation, manipulation, and control, sudden and unreasonable fluctuations in prices occur; and that such fluctuations in prices are an obstruction to and a burden on interstate commerce, and render regulation imperative for the protection of such commerce and the national public interest therein. The act then forbids all persons to use the mails or interstate telephone, telegraph, wireless, or other communication, in offering or accepting sales of grain for future delivery or to disseminate prices or quota-

tions thereof, excepting the man who holds the grain he is offering for sale, and the owner or renter of land on which the grain offered for sale is to be grown; and excepting also members of boards of trade designated as "contract boards" by the Secretary of Agriculture. The act requires boards of trade to meet certain prescribed conditions before they can be designated as "contract boards".

Members of the Chicago Board of Trade brought suit in the United States District Court to enjoin the enforcement of the provisions of the act against them, on the ground that it violated their rights under the federal constitution. The district court dismissed the bill and the plaintiffs appealed. The Supreme Court affirmed the judgment of the district court and upheld the validity of the act.

In delivering the opinion of the Court, the Chief Justice points out that the Chicago Board of Trade is the greatest grain market in the world; and that the greater part of the grain sold thereon is shipped into Chicago from the West and North and, after being sold, is shipped in large part to eastern states and foreign countries. "In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein. It is clear ... that we would be unwarranted in rejecting the finding of Congress as unreasonable".[28] In referr-

ing to the Stafford case, the Chief Justice says: "The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East".[29]

It is important to note that Chief Justice Taft would not permit the regulation effected by the Grain Futures Act to be accomplished under guise of the taxing power. The Future Trading Act of 1921 (42 Stat. 187,c.86) attempted to effect such regulation by imposing a tax of 20¢ a bushel on all transactions in "futures" on boards of trade other than those designated as "contract boards". When the validity of this act was challenged in the case of Hill v. Wallace,[30] it was attempted in support of the measure to distinguish it from the Child Labor Tax Law, which had just been declared unconstitutional, by showing that future trading was a burden on interstate commerce and therefore subject to federal regulation.[31] The Court, however, showed that the Future Trading Act did not purport to be a regulation of interstate commerce, and proceeded to declare the act unconstitutional as not being a valid exercise of the taxing power. Seizing upon the inference in the Hill case that the desired regulation might be sustained under the commerce clause, Congress hastened to pass the Grain Futures Act, which, as we have seen, was upheld as a legitimate regulation of commerce.

Another important field of police regulation effected through the power to regulate commerce is that of quarantine.

Thus Congress may use its power over interstate commerce to prevent the spread by that commerce of human disease, or of diseases of plants and live stock.[32] Federal quarantine to prevent the spread of diseases of plants and live stock is of particular importance, the usual method of control being to forbid the shipment of diseased plants and animals in interstate commerce. While, of course, federal quarantine regulations cannot be made to apply to intrastate shipments, the power of Congress over interstate commerce in such cases is very broad. In a very interesting recent case,[33] the Chief Justice held that the ranging of cattle across the line between states is interstate commerce, and that the spread of disease from one state to another by such cattle is a burden on interstate commerce, which it is within the power of Congress to prevent by quarantine legislation.

NOTES

Explanation: As is inevitable in case material, many of the excerpts quoted in the body of this thesis are interspersed, in the Reports, with citations of statutes, cases, and other authorities. The writer has felt that to include all such citations would unnecessarily encumber the pages with data extrinsic to the purpose of the average reader, and that to indicate their ommission by ellipses might at times be misleading, as suggesting an omission from the substance of the opinion when such was not the case. It has been deemed advisable, therefore, to omit the citations in numerous instances without ellipses, where it seemed that such a course might help to avoid confusion and at the same time not vitiate the substance of the quotation. As exact references are given in the notes for each quotation and statement, the reader may readily refer to the Reports if additional citations of authority are desired.

Preface.

* The data included in the preface is taken from the Congressional Directory, 70th Congress, 2nd Session, January, 1929, and the Encyclopedia Americana.

It should be said that this thesis was in the hands of the typist at the time of Chief Justice Taft's resignation on February 3, 1930. The writer regrets that the study could not be brought down to the end of Mr. Taft's chief justiceship by including the opinions written by him during the present (October, 1929) term of the Court.

Chapter I.

1. "The Judiciary and Progress". Address of President Taft at Toledo, Ohio, Mch.8, 1912. Sen.Doc. 408, Sixty-second Congress, Second Session, p.3.
2. Ibid., p.4.
3. Ibid., p.3.
4. President Taft's Arizona Veto Message, Aug. 15, 1911. House Doc. 106. Sixty-second Congress, First Session, p.4.
5. Our Chief Magistrate and His Powers, p.57.
6. Ibid., p.52.
7. Ibid., p.53.
8. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).
9. Ibid., p.37.

10. Ibid., p.37-38.

11. 259 U.S. 44 (1922).

12. Ibid., p.66-67. The regulation of trading in "futures" attempted in the Future Trading Act was afterwards accomplished by Congress in the Grain Futures Act of 1922 as a regulation of interstate commerce. See infra, Chap.VI.

13. 276 U.S. 332 (1928).

14. Ibid., p.341.

15. Our Chief Magistrate and His Powers, p.138-139.

16. Ex parte Grossman, 267 U.S. 87 (1925). See infra, Chap.II, p.36-37.

17. See infra, Chap.II, p.37-38.

18. See the Literary Digest, LXX, p.13 (July 16, 1921). Also Dickinson, J.M., Chief Justice William Howard Taft, American Bar Association Journal, VII, p.331 (July, 1921).

19. "The Chief Justice - A Mistaken Appointment", The Nation, CXIII, p.32 (July 13, 1921).

20. Our Chief Magistrate and His Powers, p.4.

21. Ibid., p.40.

22. "Mr. Chief Justice Taft", The New Republic, XXVII, p.230,231. (July 27, 1921).

23. Truax v. Corrigan, 257 U.S. 312 (1921). See infra, Chap.IV.

24. Adkins v. Children's Hospital, 261 U.S. 525 (1923), C.J. Taft dissenting, 562. See infra, Chap.V.

25. Wolff Packing Co. v. Kansas Court of Industrial Relations, 262 U.S. 522 (1923).

26. See the New Republic, XXXV, p.112 (June 27, 1923). Also the Independent, CX, p.392 (June 23,1923).

27. 266 U.S. 209 (1924).

28. 272 U.S. 554 (1926).

29. 272 U.S. 581 (1926).

30. "The Judiciary and Progress". op.cit., p.3.

31. "Mr. Wilson and the Campaign", The Yale Review, X (Second Series), p.1, 19-20 (October, 1920).

32. Address of President Taft to the General Court of the Legislature of Mass., Boston, Mch. 18, 1912. Sen. Doc. 451, Sixty-second Congress, Second Session, p.3-4.

33. Our Chief Magistrate and His Powers, p.12-13.

34. Chap. III.

Chapter II.

1. Particularly in the Myers case. See infra, p.23-30.

2. Our Chief Magistrate and His Powers, p.29.

3. Ibid., p.16.

4. Ibid., p.18, See also Myers v. United States, 272 U.S. 52, 123 (1926).

5. President Taft's Arizona Veto Message, Aug. 15, 1911. House Doc. 106, Sixty-second Congress, First session, p.2.

6. Our Chief Magistrate and His Powers, p.19.

7. Ibid., p.19-20.

8. Ibid., p.22.

9. Ibid., p.27.

10. Ibid., p.55.

11. Ibid., p.61.

12. Kimball, Everett, The National Government of the United States, p.228.

13. Our Chief Magistrate and His Powers, p.70-71.

14. Ibid., p.71.

15. Ibid., p.72.

16. Ibid., p.72.

17. 257 U.S. 541 (1922).

18. Ibid., p.544-545.

19. Ibid., p.546.

20. 272 U.S. 52 (1926).

21. Cushman, Robert E., Constitutional Law in 1926-1927, American Political Science Review, XXII, p.70 (Feb., 1928).

22. Ibid., p.71

23. Myers v. United States, 272 U.S. 52, 114 (1926).

24. Ibid., p.175. See also J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

25. Myers v. United States, 272 U.S. 52, 117 (1926).

26. Ibid., p.119-120.

27. Ibid., p.132.

28. Ibid., p.163-164.

29. See Cushman, Robert E., op.cit., p.74. Also Corwin, E.S., Tenure of Office and the Removal Power Under the Constitution, Columbia Law Review, XXVII, p.353 (Apl., 1927).

30. Myers v. United States, 272 U.S. 52 (1926), J. McReynolds dissenting, 178, 183.

31. Our Chief Magistrate and His Powers, p.56.

32. Cushman, Robert E., op.cit., p.74.

33. Corwin, E.S., op.cit., p.387.

34. Cushman, Robert E., op.cit., p.76.

35. Illinois Law Review, XXI, p.736 (March, 1927).

36. The United States and Peace, p.76-77.

37. Our Chief Magistrate and His Powers, p.105.

38. Ibid., p.106.

39. Ibid., p.108-109. See also The United States and Peace, p.79-80.

40. Our Chief Magistrate and His Powers, p.115-116.

41. Discussed supra, p.23-30.

42. For a full discussion of this subject see The United States and Peace, Chap.2.

43. Mr. Taft lists several of the more recent outrages. Ibid., p.59-61.

44. The United States and Peace, p.80-81.

45. Ibid., p.81-83.

46. Ibid., p.64-68.

47. Our Chief Magistrate and His Powers, p.121.

48. Ibid., p.118.

49. Ex parte Grossman, 267 U.S. 87, 120 (1925).

50. Our Chief Magistrate and His Powers, p.119.

51. 267 U.S. 87 (1925).

52. Ibid., p.118.

53. Ibid., p.111.

54. Ibid., p.119-121.

55. Ibid., p.122.

56. Chap. I.

57. Our Chief Magistrate and His Powers, p.31.

58. Congressional Record, Vol.49, part I, p.895-896.

59. Our Chief Magistrate and His Powers, p.4-6.

60. Ibid., p.6-9.

61. Ibid., p.8-9.

62. Ibid., p.143. Mr. Taft quotes from Roosevelt's "Notes for a Possible Autobiography".

63. Our Chief Magistrate and His Powers, p.139-140.

Chapter III.

1. Ex parte Grossman, 267 U.S. 87 (1925). See supra, Chap.II, p.34-37.

2. See particularly: Stafford v. Wallace, 258 U.S. 495 (1922); United States v. Coffee Exchange, 263 U.S. 611 (1924); and Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926).

3. "The Judiciary and Progress". Address of President Taft at Toledo, Ohio, March 8, 1912. Sen.Doc.408, Sixty-second Congress, Second Session, p.5.

4. Ibid., p.5.

5. Ibid., p.5

6. President Taft's Arizona Veto Message, Aug. 15, 1911. House Doc. 106, Sixty-second Congress, First Session. p.4.

7. Address of President Taft at the Banquet of the Swedish-American Republican League, Chicago, March 9, 1912. Sen. Doc. 452. Sixty-second Congress, Second Session. p.13.

8. Address of President Taft to the General Court of the Legislature of Massachusetts, Boston March 18, 1912. Sen. Doc. 451, Sixty-second Congress, Second Session, p.7.

9. 1 Cranch, 137 (1803).

10. 6 Cranch, 87 (1810).

11. Arizona Veto Message, op.cit.,p.5.

12. Popular Government, p.166. See also supra, Chap.II, p.17.

13. Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926). See also Hill v. Wallace, 259 U.S. 44, 70 (1922)

14. Oregon, Arizona, California, Colorado, North Dakota, Kansas, and Nevada. See Ray, P. Orman, An Introduction to Political Parties and Practical Politics, Third Edition, p.410.

15. Salt, E.M., American Parties and Elections. Footnote p.545.

16. "Judiciary and Progress", op.cit.,p.7.

17. Ibid., p.7

18. Arizona Veto Message, op.cit.,p.7.

19. "The Judiciary and Progress", op.cit.,p.8.

20. Ibid., p.7.

21. Address at Banquet of the Swedish-American Republican League, op.cit., p.7-8.

22. Popular Government, p.178-179.

23. "The Judiciary and Progress", op.cit.,p.8.

24. Ibid., p.9-10.

25. Chaps. I & II.

26. 258 U.S. 254 (1921).

27. Ibid., p.259-264.

28. Ibid., p.265.

29. Popular Government, Chap.8.

30. Code of the Laws of the United States (1926), p.908.

31. Popular Government, p.158-160.

32. See New York Times, Sept. 4, 1929, 32:3.

33. Kansas City Kansas, March 13, 1929.

34. A good discussion of recent reforms in the federal judiciary and the part played by Chief Justice Taft in effecting them may be found in Frankfurter and Landis, The Business of the Supreme Court, Chaps. 6 & 7.

35. An address of Chief Justice Taft to the Conference of Bar Association Delegates, 1922 Meeting of the American Bar Association, Journal of the American Judicature Society, VI, p.73,75 (Oct.,1922).

36. See Journal of the American Judicature Society, VI, p.69 (Oct., 1922).

37. "Three Needed Steps of Progress", Address of Chief Justice Taft to the Chicago Bar Association, Dec.27, 1921, American Bar Association Journal, VIII, p.34 (Jan., 1922); "Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts", Address of Chief Justice Taft to the 1922 Meeting of the American Bar Association, Journal of the American Judicature Society, VI, p.36 (Aug.,1922). Both the creation of a council of judges and a curtailment of the obligatory jurisdiction of the Supreme Court were recommended by Mr. Taft several years before his appointment to the Chief Justiceship. See Taft, William H., Attacks on the Courts and Legal Procedure, Kentucky Law Journal, V, No.2,3 (1914).

38. 42 Stat. 837; Code of the Laws of the United States (1926), p.893.

39. See supra note 37.

40. American Bar Association Journal, VIII, p.34,35 (Jan.,1922). This same view was taken by Mr. Taft during his presidency and incorporated in his recommendations to Congress. See Richardson, J.D., Messages and Papers of the Presidents, XVII, p.7903-4.

41. 43 Stat. 936. For discussions of this act see: Blair, Paxton, Federal Appellate Procedure as Affected by the Act of February 13, 1925, Columbia Law Review XXV, p.393 (1925); Taft, William H., The Jurisdiction of the Supreme Court Under the Act of February 13, 1925, Yale Law Journal, XXXV, p.1 (1925); Frankfurter andLandis, The Business of the Supreme Court, Chap.7.

42. Journal of the American Judicature Society, VI, p.36 (Aug., 1922).

43. See supra note 37.

44. 258 U.S. 298 (1922).

45. Kansas City Star, Jan. 9, 1929.

46. See Time, XII, No.16, p.10-11 (Oct. 15, 1928)

47. New York Times, Oct. 4, 1928, 5:2.

Chapter IV.

1. As to the number of opinions handed down under section 1 of the Amendment down to 1911, see Collins, C.W., The Fourteenth Amendment and the States, p.113.

2. Truax v. Corrigan, 257 U.S. 312, 332 (1921).

3. Wolff Packing Co. c. Kansas Court of Industrial Relations, 262 U.S. 522 (1923).

4. Ibid., p.534.

5. Wolff Packing Co. c. Kansas Court of Industrial Relations, 267 U.S. 552 (1925).

6. 260 U.S. 71 (1922).

7. Samuels v. McCurdy, 267 U.S. 188 (1925).

8. 265 U.S. 384 (1924).

9. Wuchter v. Pizzutti, 276 U.S. 13 (1928).

10. 271 U.S. 208 (1926).

11. 273 U.S. 510 (1927).

12. Ibid., p.523.

13. Ibid., p.532.

14. Ibid., p.534.

15. 277 U.S. 61 (1928).

16. Samuels v. McCurdy, 267 U.S. 188 (1925).

17. Ibid., p.198.

18. Merchants Mutual Auto Liability Insurance Co. v. Smart, 267 U.S. 126 (1925).

19. Western & Atlantic R.R. v. Georgia Pub. Ser. Comm., 267 U.S. 493 (1925).

20. 270 U.S. 69 (1926).

21. Ibid., p.80-81.

22. Ibid., p.81.

23. Ibid., p.81.

24. 277 U.S. 1 (1928)

25. Kadow v. Paul, 274 U.S. 175 (1927). For another case on special assessments see supra, p.64.

26. Kadow v. Paul, 274 U.S. 175, 181 (1927).

27. Gaines v. State, 277 U.S. 81 (1928).

28. 273 U.S. 589 (1927).

29. Ibid., p.591.

30. Ibid., p.593.

31. 274 U.S. 445 (1927).

32. Ibid., p.458.

33. 257 U.S. 312 (1921).

34. Mott, R.L., Due Process of Law, p.287.

35. The restaurant was owned by Truax and certain co-partners, who joined in the suit. For the sake of simplicity, Truax will be spoken of in the following discussion as the plaintiff, without reference to the co-partners.

36. Truax v. Corrigan, 257 U.S. 312, 327-330 (1921)

37. Ibid., p.331-332.

38. Ibid., p.332.

39. Ibid., 332-333.

40. Ibid., p.333.

41. Ibid., p.334.

42. Ibid., p.335-336.

43. Ibid., p.338.

44. Truax v. Corrigan, 257 U.S. 312 (1921), J. Holmes dissenting, 342, 343.

45. Ibid., p.344.

46. See Supra, Chap.I, p.10-11.

47. The Nation, CXIV, p.32, 33 (Jan.11, 1922).

48. 275 U.S. 78 (1927).

49. 260 U.S. 71 (1922).

50. See also supra, p.63.

51. National Union Fire Insurance Co. v. Wanberg, 260 U.S. 71, 75 (1922).

52. Puget Sound Power & Light Co. v. County of King, 264 U.S. 22 (1924).

53. 257 U.S. 533 (1922).

54. Ibid., p.535.

55. 260 U.S. 441 (1923).

56. Ibid., p.446.

57. Art. IV, Sec. 2, clause 1.

58. 272 U.S. 494 (1926).

59. Ibid., p.507.

60. Ibid., p.510-511.

61. Ibid., p.515.

Chapter V.

1. See Arneson, B.A., Elements of Constitutional Law, p.163-164.

2. See Warren, Charles, Congress, the Constitution, and the Supreme Court, Chap.3. Also, by the same author, The Making of the Consitution, p.768-9.

3. A very illuminating discussion of the Bill of Rights may be found in McBain, Howard L., The Living Constitution, Chap.3.

4. 7 Peters 243; 8 L. ed. 672.

5. 267 U.S. 132, 147 (1925).

6. Ibid., p.153-156.

7. Steele v. United States No.1, 267 U.S. 498, 504-505 (1925); Carroll v. United States, 267 U.S. 132, 161 (1925). Chief Justice Taft quotes with approval from the opinion of Mr. Justice Hunt in Stacey v. Emery, 97 U.S. 642, 645.

8. Steele v. United States No.1, 267 U.S. 498, 503 (1925).

9. 277 U.S. 438 (1928).

10. Ibid., p.462-466.

11. Olmstead v. United States, 277 U.S. 438 (1928), J. Brandeis dissenting, 471,474.

12. Ibid., p.474.

13. Ibid., p.475-476.

14. Ibid., p.478-479.

15. Olmstead v. United States, 277 U.S. 438 (1928), J. Holmes dissenting, 469, 470.

16. Arneson, B.A., Elements of Constitutional Law, p.173.

17. 260 U.S. 377 (1922).

18. Ibid., p.381.

19. Ibid., p.382.

20. Ibid., p.385.

21. Ex parte Fuller, 262 U.S. 91 (1923); Dier v. Banton, 262 U.S. 147 (1923).

22. Ex parte Fuller, 262 U.S. 91, 94, (1923).

23. Ibid., p.93-94.

24. 262 U.S. 147 (1923).

25. Ibid., p.149-150.

26. Ibid., p.151.

27. 262 U.S. 151, 155 (1923).

28. Ibid., p.158.

29. Supra, p.85-86.

30. 267 U.S. 517 (1925).

31. Ibid., p.534.

32. Ibid., p.536-537.

33. 258 U.S. 250 (1921).

34. 267 U.S. 442 (1925)

35. Ibid., p.451.

36. Ibid., p.450.

37. 261 U.S. 525 (1923).

38. Adkins v. Children's Hospital, 261 U.S. 525 (1923), C.J. Taft dissenting, 562, 563.

39. Lochner v. New York, 198 U.S. 45 (1905).

40. 243 U.S. 426 (1917).

41. Adkins v. Children's Hospital, 261 U.S. 525 (1923), C.J.Taft dissenting, 562, 564.

42. Ibid., p.565.

43. Ibid., p.562.

44. Ibid., p.562. Compare the statement of Justice Holmes in his dissent in the Truax case, supra, Chap. IV, p.77.

45. Adkins v. Children's Hospital, 261 U.S. 525 (1923), C.J. Taft dissenting, 562, 564-566.

Chapter VI.

1. Dayton-Goose Creek Ry. Co. v. United States, 263 U.S. 456, 478 (1924).

2. 270 U.S. 87 (1926).

3. Ibid., p.93.

4. Morris v. Duby, 274 U.S. 135 (1927).

5. Lehigh Valley R. Co. v. Board of Public Utility Com'srs, 278 U.S. 24 (1928)

6. R.R. Comm. of Calif. v. Southern Pac. Co., 264 U.S. 331 (1924).

7. 260 U.S. 366 (1922)

8. Ibid., p.376.

9. Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929).

10. 272 U.S. 469 (1926).

11. Ibid., p.476.

12. Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

13. Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923).

14. Wisconsin R.R. Comm. v. C.,B., & Q. R.R. Co., 257 U.S. 563 (1922).

15. New York v. United States, 257 U.S. 591 (1922).

16. 275 U.S. 257 (1927).

17. Ibid., p.268.

18. 259 U.S. 344, 408 (1922).

19. Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310 (1925).

20. United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457, 471 (1924).

21. Freund, Ernst, The Police Power, p.iii.

22. Brooks v. United States, 267 U.S. 432, 436 (1925). See also Chicago Board of Trade v. Olsen, 262 U.S. 1, 41 (1923).

23. United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 408 (1922).

24. 258 U.S. 495 (1922).

25. Ibid., p. 514-515.

26. Ibid., p.521.

27. 262 U.S. 1 (1923).

28. Ibid., p.37-38.

29. Ibid., p.36.

30. 259 U.S. 44 (1922). See supra, Chap.I, p.7-8.

31. See Harvard Law Review, XXXVII, p.136-140.

32. See Oregon-Washington R.R. & Nav. Co. v. Washington, 270 U.S. 87 (1926), discussed supra, p.104.

33. Thorton v. United States, 271 U.S. 414 (1926).

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