THE NEW ROLE OF THE GOVERNOR.

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About twenty years ago, Mr. Bryce, with microscopic vision, observed that the state governor was "not yet a nonentity."[1] On the other hand the state legislature was "so much the strongest force in the several states that we may almost call it the Government and ignore all other authorities."[2] The strangeness of sound with which these statements strike our ears at the present day is indicative of the length of the road which we have since traveled and of the change which has taken place within recent years in the relative positions of the governor and the legislature in our state governments. The unmistakable tendency which now prevails in many quarters towards an enlargement of the power of the governor directs attention anew to the administrative and political position which that officer occupies and to the manner in which his influence and prestige have been, and may be still further, increased.

The administrative position of the governor has been unsatisfactory since the original organization of the state governments. The first state constitutions were largely adaptations of the colonial charters to new conditions and were framed in the light of colonial experience. The conflicts that had taken place between the colonial governors, appointed by the crown, and the colonial legislatures, composed of representatives of the people, had embittered the colonists against the exercise of executive authority. Hence, in the new state constitutions, the predominant legal position was assigned to the legislature, which was made the controlling and regulating force in the state governments, while the executive was rendered weak and inefficient both in organization and function. As Madison

[1] *American Commonwealth*, 3rd ed., vol. I, p. 532. [2] *Ibid.*, p. 534.

succinctly expressed it in the Convention of 1787, "The executives of the states are in general little more than ciphers; the legislatures omnipotent."[3] In no state was the governor given an independent power of appointing the administrative officers of the commonwealth, but this power was largely vested in the legislature, and in the majority of states, even the governor himself was appointed by the legislature.

The reaction towards democracy which swept over the country during the early part of the last century served to curtail the power of appointment both of the legislature and of the governor and to lodge it nominally in the people but really in the party managers, where it has since remained. In the constitutions adopted by the new states admitted during this period and in the revisions effected by the old ones, the chief administrative officers of the state are, in nearly all cases, made elective by the people and thus independent of each other and of the governor. Even in those cases in which the governor retained a limited power of appointment, no power of removal was allowed him sufficient to create any practical control over administration. In the leading case of Field *v.* People,[4] decided in 1840, the Supreme Court of Illinois declared unwarranted the attempt of the governor to remove his secretary of state from office, on the ground that the general grant of executive power by the Constitution to the governor did not include the power of removal, and that he could exercise no power not expressly granted to him in the Constitution or laws. In 1873 a further illustration of the impotence of the governor in respect to removal was afforded in New Jersey. The police commissioners of Jersey City, who were state officers and charged by the state with the enforcement of the law in that city, were tried and convicted in the county court upon indictment for conspiracy to defraud the city of public funds. The governor, with the laudable intent of ridding the state administration of officers whose unfitness had thus been unequivocally demonstrated, undertook to remove them from office. The supreme court of the state, however, held that the right to remove a state officer,

[3] Elliot's Debates, vol. V, p. 327. [4] 3 Ill., 79.

even for proved malfeasance in office did not belong to the executive, that the act of removal was judicial in character and belonged only to the court of impeachment.[5] The result was that, until the cumbrous machinery of impeachment could be brought into operation, the people of the state had to endure the unedifying spectacle of the enforcement of the law entrusted to men who not only ought to have been, but were, convicts.

The governor's lack of the power of removal is apt also to produce a serious disharmony in administration when, as not infrequently happens, important administrative officers serve for longer terms than does the governor himself, and may also belong to the opposite political party. A recently elected governor was much embarrassed to find, upon his election, that his attorney-general, whom he could not remove, would hold office for a longer term than his own, and had presided over the party convention which had nominated his leading opponent in the gubernatorial campaign.

The manifest incongruities which this diffusion of executive power produces have caused a slight reaction towards allowing the governor a larger control over the administrative officers of the state. This has been effected in some states by granting him, either constitutionally or by statute, a greater power of appointment and removal, and also the power to require information from executive officers as to the working of their departments. For example, by the Illinois Constitution of 1870, the governor was given the power "to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office."[6] A number of states have adopted a similar rule, either by constitution or statute, and substantially the same provision is copied into the constitution of New Mexico. By the constitutions of thirty-two states, including those recently adopted in Alabama, Oklahoma, Michigan, and Arizona, the governor is empowered to require information in

[5] State *v.* Pritchard, 7 Vroom (N. J. L.), 101.

[6] Thorpe, *Charters and Constitutions*, vol. II, p. 1025.

writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

The slight reform which has thus been wrought in the direction of centralizing the control of state administration in the hands of the governor has not, however, assumed sufficient dimensions to produce any great change in his administrative position nor to place in his hands any very effective control over the law-enforcing officers of the state. The result has been and is that the will of the majority of the people of the state presumably expressed in the law is frequently thwarted and set at naught. The prevalent non-enforcement of state law is largely due to the fact that the diffusion of executive power deprives state-wide public opinion of any adequate facilities for the control of public policy. Adverse local sentiment and the malign influence of "political experts" cause petty executive officers to interpret the state will to suit their own purposes, and in many instances the latter actually control the determination of public policy within the range of their official activity or possible non-activity. State excise and other laws remain unenforced because upon the officers charged with their enforcement there rests no continuous pressure of responsibility to the general public, capable of being applied by the governor. State election laws will doubtless continue to be violated and wholesale election frauds to be connived at under a system in which a community of interest exists between the political managers and their appointees, the sheriffs, and in which the latter officers in turn practically control the selection of the grand juries.

Of many startling examples of the disregard of law due at least in part to the disintegration of the state administrative system, the so-called "tobacco war" in Kentucky may be cited as an example.

"In December, 1905, in Todd County, in the circuit court room, packed by excited men, a lawyer declared that if they (the night riders) did violate the law they ought not to be punished, and would not be prosecuted while he was Commonwealth's attorney, and the very next night one tobacco factory was burned and another set on fire, and the following Monday

night a large band of armed and masked men held up a railroad train and searched it for tobacco and dynamited a snuff factory, and although the circuit court was in session, with a grand jury empaneled, no one was indicted or punished."[7]

Local officers and even judges were in sympathy with the night riders, and it is significant that the judges and state's attorneys were elected by the people and not subject to removal or correction by the governor. Those who bewail the prevalent disregard of law and attribute all lawlessness to the pusillanimity of sheriffs, state's attorneys and grand juries may well consider whether this condition of affairs is not due rather to the system of nominal popular election of local executive officers, who are thus actually placed under the control of sinister unofficial influences, and to the consequent lack of general popular control over them which might otherwise be exercised through the effective administrative supervision of the governor.

From this sketch of the administrative position of the governor it appears evident that the increase in the power and prestige of that officer, noted at the beginning of this paper, arises not at all, or only slightly, from an increased control over administration. We therefore turn to inquire what influence the governor exerts over legislation.

In the first state constitutions, as has been pointed out, the legislature was given a position completely overshadowing the other departments of government. Since then, however, a popular distrust of the legislature has arisen and steadily grown until it has become one of the most striking political phenomena of the present day. A history of state legislatures would be largely concerned with the successive development of various methods of curtailing the almost absolute power which those bodies originally possessed. Leaving for the moment out of account the usurpation of legislative power by the so-called "third house," we may say that this general movement has manifested itself in the transfer of legislative power from the

[7] Message of Governor Willson of Kentucky to the legislature of that state, January, 1908, quoted in Reports of American Bar Association, vol. XXXIV, p. 416.

legislatures (a) to the courts, (b) to the people, and (c) to the governor.

The transfer of legislative power to the courts arose, of course, through the early development of the power of the judiciary to annul unconstitutional legislation. The more recent tendency to incorporate ordinary legislation in state constitutions, to prescribe narrowly in those instruments the powers of the legislatures and the manner in which they may be exercised, and to define minutely the organization and functions of various branches of the government, has served greatly to increase the power of the judicary over legislation.

The prevalent distrust of the legislature further manifests itself in the adoption of the popular initiative and referendum as applied, not to matters of constitutional revision or of merely local interest, but to ordinary legislation of state-wide concern. These "newer institutional forms of democracy" appear to give a greater popular control over legislation, but their legitimate application is confined to those matters upon which the people are capable of passing, viz., simple and broad questions of public policy. It may be noted, in passing, that provisions for the introduction of the initiative and referendum incidentally place a check upon the legislative power of the governor by forbidding him to exercise his veto in regard to measures referred to the people.[8] It would seem probable, however, that in so far as this is a real check upon the power of the governor, it will not prove to be permanent. On the whole, the initiative and referendum appear to be passing phenomena, useful perhaps in an emergency, but not fitted to serve as a steady regimen. True reform towards real democratic state government lies not in the direction of these popular nostrums, but in the direction of the increasing control of the governor over the state's legislative product. "The true initiative of the people is not a legal initiative, but the originating and stimulating force of articulate public opinion operating through the effective instrumentality of the responsible executive head of the state gov-

[8] See, for example, the Constitution of Oklahoma, Thorpe, *op. cit.*, vol. VII, p. 4278, and the Constitution of Arizona, art. iv, sect. 1.

ernment."[9] The increasing influence of the governor over legislation is the comparatively new rôle which he is now beginning to play, and which, in its relation to popular control of government, bids fair to become one of the most important developments in the history of the state governments.

Legally speaking, the governor has exercised from the beginning a certain amount of control over legislation by means of his veto. Conferred but grudgingly at first, and not at all except in two states, it has been gradually extended until now only one state still withholds it.[10] At the same time the size of the majority required to overcome the veto has steadily increased until now in most states it approximates two thirds. Furthermore the efficiency of the veto has been increased through the power now granted the governor in more than thirty states to veto separate items of appropriation bills, and in three states this privilege has even been made to apply to any bill.[11] In all these cases, of course, the governor's veto is a qualified one only, but it may become absolute with regard to legislation passed shortly before the adjournment of the session. Mention may also be made in this connection of the lengthening of the governor's term of office, and of the partial abandonment of the provision which renders him ineligible to succeed himself. It thus appears that the tendency of constitutional development has been towards increasing the legal power of the governor over the course of legislation. But this tendency has not yet advanced far enough to give the governor any very real and effective control over the shaping of legislative policy. The veto power is evidence in the law of the general recognition of the desirability of granting to the governor some share in the formulation of the will of the state as embodied in legislation. But in spite of the legal sanction of this principle, the veto power is illogical and insufficient in that it carries only one side of that principle into practical effect. The plain fact is that the

[9] *The New Stateism*, by the present writer, in the *North American Review* for June, 1911.

[10] Dealey, *Our State Constitutions*, p. 31.

[11] *Ibid*, p. 32.

governor is held responsible for controlling the course of legislation, but is not given the legal power commensurate with that responsibility. He can sometimes block vicious legislation, "jokers," "riders," and "jobs," but he has legally no correlative power of initiating and pushing through legislation which is demanded by intelligent public opinion. Unless the governor is given both these powers he ought not rightfully to be held responsible for the course that legislation takes. But whether rightfully or not the people are holding him responsible because he alone stands out conspicuously among state officers. In the hydra-headed legislative body no strikingly prominent figure can be found, upon whom responsibility can be saddled. The course of legislative procedure is so confused, and desirable legislation may be emasculated, smothered, and killed in so many different ways in the scuffle and scramble of legislation that the people find it impossible to fix the blame within the legislature. As has been so often observed, the actual process of legislation has deserted the legislative chambers, and now takes place behind the closed doors of committee rooms. And even if the progress of the public business within the committee rooms were entirely open to the public view, the people would doubtless still be confused by the multiplicity of committees, each responsible for only a comparatively small part of the whole field of legislation. Since no one looms up in the legislature that can be held responsible, the governor, who stands off exasperatingly powerless, is made the scapegoat. The deplorable morass into which the state business thus falls has led some publicists to advocate the entire abolition of the legislature.[12] Others, such as Mr. U'Ren,[13] Mr. Croly,[14] and Mr. White,[15] disgusted by the results of the present great diffusion or responsibility both in administration and in legis-

[12] Cf. Dealey, *op. cit.*, p. 9.

[13] Bill for a Law and Suggested Amendments to the Constitution of Oregon, pamphlet, Portland, Oregon, August 14, 1909.

[14] *The Promise of American Life*, chap. XI.

[15] Political Science Quarterly, vol. XVIII, p. 655.

lation, advocate a thoroughgoing reorganization of the state governments upon entirely new lines.[16]

Meanwhile, however, a development is taking place and being gradually wrought out before our eyes which may render any radical reconstruction of the state governments along legal lines not only unnecessary but undesirable. "The whole country," says Governor Wilson of New Jersey, "since it cannot decipher the methods of its legislation, is clamoring for leadership, and a new rôle, which to many persons seems little less than unconstitutional, is thrust upon our executives. The people are impatient of a President who will not formulate policy and insist upon its adoption. They are impatient of a governor who will not exercise energetic leadership, who will not make his appeals directly to public opinion and insist that the dictates of public opinion be carried out in definite legal reforms of his own suggestion."[17] Some of the subtle, extra-legal, and largely unforeseen influences which have raised the President to the predominant position which he occupies in the National Government are now, in spite of the greater legal difficulties in the way, beginning similarly to affect the position of the governor. By the gradual accretion of precedent, and by the growth of custom, the governor is forging the instrument of control over both the initiation and the passage of legislation. This extra-legal instrument is the personal influence of the governor, supported by the full force of "pitiless publicity" and public discussion. This is a much broader power than that which is usually associated with the right of sending messages to the legislature. It is true, as has been recently pointed out,[18] the message power has not been used by governors to the extent which the language of the state constitutions would warrant. They "give him the right to recommend measures and do not limit him in respect to the form in which he shall

[16] These plans are summarized in Beard, *American Government and Politics*, pp. 504–6.

[17] Address before the Commercial Club of Portland, Oregon, May 18, 1911.

[18] Address of Governor Woodrow Wilson of New Jersey before the House of Governors, Frankfort, Kentucky, November 29, 1910.

make his recommendations. He can make them in the form of bills if he pleases."[19] But, as Mr. Henry L. Stimson has remarked, "the executive ought not to be forced to resort to innovating constructions. The course of co-operation between governor and legislature ought to be made easy and natural, instead of forced and difficult."[20] To obviate this difficulty a method of procedure has already been devised through the introduction in state legislatures of so-called "administration bills," which are nominally fathered by some member of the legislature but which really emanate from the governor. But in securing the passage of such bills after their introduction the personal influence of the governor comes into play. Already in some states we find the governor appearing before informal meetings of legislative committees, discussing with them questions of public policy, and advocating the measures that public opinion demands. The personal influence of the governor is not the influence of coercion or the selling of appointments for favorable votes on administration bills. Such tactics sooner or later undermine the influence of the executive. But the real influence of the governor over the legislature, as Governor Wilson has pointed out, consists in his power to represent, to persuade, and to lead the people.[21] If by his qualities of leadership and the force of his arguments, he can persuade the people during the campaign, the same qualities will give him such a personal ascendancy over the legislature after his election that he will be able to lead that body also.[22] The

[19] *Ibid.*

[20] Address delivered at the McKinley Day Banquet of the Tippecanoe Club of Cleveland, Ohio, January 28, 1911, pamphlet, p. 13.

[21] In the Frankfort address.

[22] A step has been taken in New Jersey towards granting the governor or candidate for governor in each party a greater influence over the formulation of the public policy which, as governor, he may have to carry into effect. By a recent enactment of that state it is provided that a state convention of each party shall be held annually for the purpose of adopting and promulgating a party platform, which convention shall be composed of the party candidates who have been nominated at the party primaries for the office of member of the Assembly or State Senator, together with hold-over Senators, members of the State Committee, and "the candidate of the party for Governor nominated at the said primaries in the year in which a Governor

legislature must be led by some person or persons. It cannot pass upon all measures that come before it without guidance from some source. Legislative policies do not, as a rule, originate in the legislature itself. They usually emanate from outside sources, sometimes legitimate but too often illegitimate. The bosses have too frequently dictated the passage or the sidetracking of measures. "In his new rôle the governor becomes the virtual boss and shapes the course of legislation for the general benefit, instead of for private and special interests. There is little danger in such bossism, for the governor can be held accountable by the people, while the unofficial boss cannot. This does not imply that the governor is in continual conflict with the legislature and wields the big stick of his personal influence over them. On the contrary, he works, as far as possible, in entire harmony and co-operation with them. Co-ordination, not separation, is the proper relation between the executive and legislative departments which the governor endeavors to foster. But, in the case of a recalcitrant legislature, the governor's power of appealing directly to the people always remains in reserve, though its existence would usually render its exercise unnecessary. . . . For, no matter how jealous a legislature may be of its own prerogatives, no matter how incapable it may be of being bulldozed, wheedled, or cajoled by threats or intimidation on the part of the governor, it cannot withstand the force of pitiless publicity wielded by a vigorous, independent, and courageous governor, supported by the pressure of intelligent and aroused public opinion. And it is the function of the governor to keep it aroused by a continuous and relentless application of repeated doses of publicity throughout the whole course of legislation."[23]

The open leadership of an able, responsible, and fearless governor is thus becoming an effective instrumentality for the

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is elected, and in each year in which no Governor is elected, the Governor of the State shall be a member of the convention of the political party to which he belongs." New Jersey Session Laws of 1911, Chap. 183, p. 276.

[23] This passage is quoted from an article by the present writer on *The New Stateism* in the *North American Review*, June, 1911.

control of public policy by public opinion. Only men of unusual ability are capable of playing this new rôle of the governor, but the opportunity which thus presents itself for the display of statesmanlike qualities will induce a much abler type of man to become a candidate for the office than has hitherto been the case. A "House of Governors," if composed of a number of such able and independent leaders, will, though entirely extra-legal in character, become one of the most influential bodies in the country in shaping the course of general state legislation.

The significance of the increasing influence of the governor lies in the fact that through him the people have found a means of controlling the formulation of public policy. The concentration of large power in the hands of a single responsible officer no longer excites fear of tyranny, but is seen to be a step towards true democracy. Government becomes, if not by the people, at least for the people.

The natural desire of the people for leadership has hitherto found its manifestation largely in boss-rule. The power of the boss has been due to the fact that he has performed two functions which must of necessity be assumed by some one. These are the dictation of legislation, and the appointment of nominally elective officers. In other words, he has controlled both legislation and administration. Since the bodies empowered by law to perform these functions are not fitted to do so, the functions must of necessity be either usurped by some organization outside the governmental system, such as the political machine, or else transferred to some other body within the government better qualified for their proper discharge. Hitherto the former alternative has been very largely followed, but more recently, as has been shown, perceptible progress has been made towards transferring the control of legislation from the unofficial boss to the governor. Even, however, should the boss be completely ousted from the control of legislation, he can still take refuge behind the breastworks of the long ballot. Hence, in order that the power of the governor may be fully commensurate with his responsibility, it will be necessary that the number of elective state officers be reduced and greater

power of appointment and removal vested in the governor. In bringing about this much-needed reform, the newly acquired influence of the governor over legislation is likely to be a potent factor. The greater co-ordination which the governor in his new rôle effects between himself and the legislature tends to establish those governmental and political conditions which will be conducive to the adoption of the short ballot. As soon as the people become fully aware of the far-reaching evils arising from the present disintegrated administrative system in the states, they will be assisted in finding a remedy by the possibility of greater control over the state business which the new position of the governor places in their hands.

NOTES ON CURRENT LEGISLATION

EDITED BY HORACE E. FLACK

The British National Insurance Act. The year 1911 will stand out in English history in the same manner as do those of 1689 and 1832, as witnessing a constitutional revolution of the first magnitude. The year will be remembered for the passage of the Parliament Act which has certainly completely overshadowed and dwarfed all other accomplishments of Parliament for many sessions. Yet, had the Parliament Act never been conceived, the year 1911 would be memorable in the political and social history of England from the enactment of the National Insurance Law, which the Prime-minister perhaps not unjustly declared to be "the greatest scheme for the social benefit of the people that has ever yet been conceived." Whether we agree or not with this eulogium, there is no question that the measure marks the highest point to which paternalistic government has ever yet dared venture. It constitutes the fitting and logical capstone to that great system of legislation for the amelioration of the condition of the working classes with which Parliament in recent years has busied itself. The Unemployed Workmen Act of 1905, the Workmen's Compensation Act of 1906, the Old Age Pensions Act of 1908, the Labor Exchanges Act of 1909 may be viewed as merely paving the way for this last great stride toward the régime of state interference. It is estimated that about 14,000,000 persons will come within the scope of the act, almost equaling the number who benefit from state insurance in Germany, where of course the total population is much larger and the system has been in operation for twenty years.

The bill was introduced by Mr. Lloyd-George, the Chancellor of the Exchequer, and was read a first time on May 4; its second reading occurred on May 29. It was at first intended to force the measure through at the regular session, but this being found impossible, it became the chief matter of business for the special autumn session. Even with this additional allotment of time, it was necessary to apply most drasticly the procedure which has come to be variously called "closure by compartments," "the guillotine," or "the kangaroo clos-