

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School, at
34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 71.

NOVEMBER, 1922.

NUMBER 1.

THE CO-OPERATIVE DUTIES OF THE STATES AND THE FEDERAL GOVERNMENT.*

Ever since the handful of delegates to the First Continental Congress met in the little hall of the Carpenters' Company of Philadelphia, two years before the Declaration of Independence and fifteen years before Washington was inaugurated first President of the United States, our Government has been steadily growing more and more centralized, more and more nationalized.

When the Constitution was adopted we formed simply a union of the States, with a common government as to some matters, but with the great bulk of governmental powers remaining with the States. The Constitution would not have been ratified upon any other terms, for while we had Federalists and Anti-Federalists, the parties differing as to the extent to which the United States should exercise powers which had been exercised only by the States, neither party, nor any considerable body of public opinion, was nationalist in purpose. And yet, in the new government which was then formed, all of the effective forces were centripetal, whether willingly or not.

*An address delivered by the Attorney General before the Illinois State Bar Association at Chicago, on June 2, 1922.

Jefferson had doubted whether the United States had power to purchase foreign territory; and yet under his Presidency the Louisiana Purchase was made and a vast realm came under the control of the central government.

Men earnestly denied that Congress had power to appropriate money for the building of roads or for the improvement of waterways, even though those roads and those streams were used as highways of interstate commerce. Political battles were fought over the question. But Congress continued to make the appropriations; roads were built and streams were dredged at the expense of the Federal Treasury.

With the Civil War—the great struggle of the Union against disunion—the United States became each year less and less a federation of States and more and more distinctively a national government. Then at the close of the war came the Reconstruction Amendments. As we all know, they were adopted primarily in order to limit the power of the recalcitrant States. But the necessary effect of those Amendments and of the other Amendments which have followed them has been to limit the authority of all of the States and to increase the power of the central government.

After the Civil War there were many important economic changes. As a recent writer has well said, "The United States of our time is further away from Lincoln's day than his America was from the America of Washington." And these changes have all tended toward the concentration of all governmental power in one government. The great transportation systems of the country, built largely with Congressional appropriations and with grants of millions of acres of the public domain, the powerful industrial organizations, which have so thoroughly ignored State lines in their operations, the telegraph and the telephone and other means of increasing ease of communication between widely distant parts of the United States—all these forces have tended to weld the country more closely together and to bring about not only a greater unity of spirit among our people but also a greater readiness to rely upon one central government rather

than upon the separate State governments. The business leaders of the nation, calling upon the central government repeatedly for aid and invoking its protection against radical State legislation, have necessarily exalted the government of the United States and made effective all of the restraints upon State action.

The war with Spain united the entire country, North and South, to fight for a common end, and the result of that war gave us larger thoughts of national greatness. We no longer boasted that

"No pent-up Utica contracts our powers,
But the whole boundless continent is ours,"

for we had expanded beyond the continent. We had reached across the Pacific and conquered distant islands. We had seen that the dominion of our country may extend to the ends of the earth. And we thought more and more about the destined greatness of our nation and less and less about the history and the hopes of the individual States.

Any war, especially a hard-fought war that results in victory, naturally increases the spirit of nationalism; and the World War, where the fate of civilization hung in the balance for years, had far more influence than our easy victory over Spain. In the great World War the thoughts of the entire country were turned for years to a common purpose. Indeed the spirit of nationalism became so intense that when the United States Chamber of Commerce organized its war service committees it even organized a committee on baby vehicles and a committee on corsets to cooperate with the War Industries Board in the manufacture of articles needed for the prosecution of the war. Those committees will be found referred to in the report of the War Industries Board.

Speaking seriously, however, during that war billions of dollars were spent by this country for a common purpose; hundreds of thousands of American lives were risked or lost on the battlefields; and the entire activities of many millions of Americans who remained in this country were all devoted for years, not to

local purposes, but to purposes that concerned the entire country. The Government regulated our food, our fuel and our means of communication. Taxes were greatly increased; and because of the war Federal taxation must for years to come mean much more to the American people than ever before. It is only natural, therefore, that local government should now appear to be much less important than it was before the war and that there should be an ever-increasing tendency towards the centralization of governmental power and governmental activities in Washington.

The trend of public opinion is altogether in one direction. There is no longer any danger of disunion. There is no longer any danger that State jealousy will deprive the United States of any power which it should possess. The whole tendency of the past one hundred and fifty years has been towards a more centralized government than would have been tolerated when the First Continental Congress assembled, when the Constitution was adopted, when the Civil War was fought, or even at the beginning of the present century. All of the powers which the advocates of a strong central government could desire for it are now possessed by the United States or are readily obtainable by the now easy process of constitutional amendment.

But the time has come when the country should consider seriously the other side of the question. Now that the authority of the central government in matters of general importance is so well established, we should give serious attention to the fact that there are now being dumped upon the national government many problems which could be handled more effectively by the States, and that this condition is not good for either the United States or the States.

I do not refer merely to the direct raids upon the Federal Treasury. I know that Congress has appropriated large sums to aid the States. In the past six years it has given \$275,000,000 towards road-building within the States, and it is about to give \$65,000,000 more for the same purpose. This year it will probably appropriate some \$8,600,000 for agricultural extension

work and *State* agricultural experiment stations, and over \$8,000,000 for education within the States, apart from the education of ex-soldiers; and there are many other similar appropriations which have been recently enacted or are now pending in Congress. Moreover, the largest of those appropriations are avowedly merely preliminary to still larger appropriations for the same objects in the near future.

But such financial burdens, serious as they are in themselves, are trivial in comparison with other burdens which are being placed upon the Government. Congress is being urged not only to appropriate large sums of money for purposes which are not strictly national in their nature, but to go further and regulate many activities which could be and should be regulated by the States. Congress is constantly enacting legislation to punish offenses which should be punished by State law. For instance, laws punishing the sale of liquor, the larceny of packages from common carriers, the larceny of automobiles traveling from State to State, larceny and embezzlement from State banks belonging to the Federal Reserve System, fraudulent stock selling schemes, the dissemination of obscene literature, the white slave traffic, the sale of narcotics, the violation of food inspection laws and many similar laws have been enacted.

As a result, the courts of the United States are being clogged with a vast number of criminal cases. Over 15,000 cases under the National Prohibition Act are now pending in those courts. Over five hundred cases under the mail fraud statutes are awaiting trial, and the trial of those mail fraud cases alone would require all of the time of all of the United States judges for twelve months. When you add to these instances the vast number of cases arising under other acts of Congress, the load to be borne by the Department of Justice and the Federal courts is little less than appalling.

Moreover, we must remember that the Federal courts are not even able to give their entire time to the disposition of the cases on the criminal docket, for they are also called upon to

consider a large number of civil cases—controversies between individuals who are entitled to ask for the decision of the Federal courts. Our terribly overburdened courts are so swamped with work that great delays in the trial of both civil and criminal cases are inevitable, although, as the Constitution itself points out, a speedy as well as a public trial is necessary if a court is to award complete justice to those who come before it.

And not only is the work of the courts greatly burdened with the disposition of problems which could and should be dealt with by the States, but those matters require so much of the time and thought of the officials of the National Government that it is sometimes difficult for them to give adequate attention to matters which are essentially national in their scope. They are being called upon to do such an amount of work that our governmental machinery, as now constituted, is inadequate to deal with it and delays in transacting the business of the country and of the courts are often destructive of the rights of the Government and of individuals. To make that machinery thoroughly adapted to the task it would be necessary to build up a very elaborate bureaucracy, with all of the objectionable features which are inevitable in such a bureaucracy.

The readiness of the American people to rely upon the National Government so much more largely than they would once have done or is now desirable, is due partly to a misguided spirit of nationalism. Love for our common country has blinded them to the fact that too great a centralization of governmental activity is injurious to the central government as well as to the States. But this thrusting upon the National Government of so many matters which could be regulated far more effectively by the States is also due to the decay of State activity. Every one who has observed present-day conditions must admit that such a decay exists. And every one must also admit that there are two essential causes of the failure of the State governments to measure up to their responsibilities—a spirit of lawlessness among large masses of our people and a lack of moral backbone by many of the men who have sworn to enforce the laws.

Successful popular government requires obedience to the laws. It is absolutely impossible unless the majority plays the game according to the rules and compels the minority to do likewise. It requires us to observe the provisions of the Constitution so long as they are part of the Constitution and to recognize the right of the people to change the Constitution to any extent whatever if the methods ordained for changing the supreme law of the land are observed. It requires the free discussion of campaign issues and fair elections. But it also requires that the losers in a fair political fight should recognize the rights of the winners—that when a law has been enacted or a constitutional amendment adopted it should have the hearty support of those who did not approve of it and whose views did not prevail and that those members of the minority who do not voluntarily comply with the decisions of the majority should be compelled to do so.

The real offense of men like Debs was not that they held views which we consider unsound. They had a perfect right to hold those views and to express them at the proper time. But after Congress had reached a decision, the men who thought that Congress had decided wrongly had no right to obstruct, by speech or otherwise, the carrying out of the national will. So also in the case of any law which is enacted, it is the duty of all men to obey it whether they like it or not. But unfortunately we have throughout the country a widespread spirit of lawlessness, an unwillingness to play the game according to the rules, an unwillingness on the part of the losers in our legislative battles to accept defeat in an honorable manner, in the only manner compatible with successful popular government.

And, on the other hand, while the men whose duty it is to enforce the laws seldom sympathize with the pacifists, they do too often sympathize with bootleggers and their patrons, with profiteers and with other lawbreakers, or else they lack the moral backbone which is needed when the enforcement of a law means the making of some enemies as well as friends. Such men are unfit to hold office. In the case of one whose duty it is to enforce

the criminal laws, an unsympathetic or weak attitude towards the enforcement of the law is a disgrace to himself and an insult to the government which he has sworn to serve. The man who becomes the enemy of a public official who insists upon enforcing the law is an enemy to his country also. As we all know, the English king who dispensed with the execution of the laws was driven from the country by our angry forefathers; and the most prominent feature of the Bill of Rights of 1689 is a denunciation of the pretended power of the executive to suspend or dispense with the laws or their execution. Until that principle, recognized and applied over two centuries ago by our ancestors, is recognized and applied inexorably by our people of today we cannot have good government.

It must not be supposed that when I call attention to the fact of a widespread spirit of lawlessness and of the too frequent failure of State officials to punish acts which violate State as well as National law, I am seeking to minimize in the least the duty of the Department of Justice and of the other branches of the National Government to enforce the laws. Whether we have adequate support or not, the duty remains with us. If we fall short in our work we should be sent to join the ranks of the unemployed, just as some of the men in my Department and some of the men in other Departments of the Government have already been driven from the posts which they had dishonored. The Department of Justice regards its duties seriously and asks to be judged according to its performance.

But I do want to stress as fully as possible the fact that the National Government is overburdened with difficulties in the enforcement of the laws and that those difficulties should be met, not by creating a vast horde of officials to deal with them, but by reducing the necessity for National action in law enforcement in two ways—by creating a more law-abiding spirit among the great masses of the American people, and by securing from the State officials a more vigorous enforcement of their own State laws.

Where the same act violates both State and National laws—and I have given a number of instances of such laws—the larger part of the duty of law enforcement has always rested upon the State officials, and it should now rest upon them. It should be possible for the officers of the National Government to confine their action to cases in which there is serious inconsistency between a National and a State law, or where there is no State law, or to those cases, which should be very exceptional, where there is a law upon the statute-books of a State which is not enforced.

On such a basis of law enforcement, with such an attitude towards law observance as should reasonably be obtainable from the country as a whole, and with such an attitude towards law enforcement as we should expect in States in which the voters who choose the lawmakers also choose the public prosecutors, the task before the National Government would not be unreasonably great and we could expect a large measure of success in enforcing the will of the National Government in those remaining communities in which there has been serious lawlessness.

I do not contend that Congress should repeal any of the laws now on our statute-books. I do not contend that the United States should confine its activities exclusively to the objects which were contemplated by those who adopted our Constitution over one hundred and thirty-three years ago. If, upon any matter whatsoever, the people of the United States think that there should be a uniform rule of law throughout the country, and the Constitution permits it or is amended to permit it, there should be a law accordingly, and the Department of Justice will do its full duty towards the enforcement of that law.

But, whether the scope of Congressional legislation is extended or diminished, whether or not the American people decide that public welfare demands that upon any subject there should be a uniform rule of law throughout the country, we can have a thoroughly successful enforcement of the National will only if our citizenry in general takes the stand that obedience to the law is the only honorable course for any man to pursue and only if a

large part of the duty of enforcing law and order throughout the land is performed by the State officials.

Certainly the great problems of government cannot be solved by simply turning them over in a body to the United States. The men who founded our country and those who preserved it wisely intended that we should have an indissoluble union of indissoluble States, for they rightly saw that only by preserving in full vigor both State and National governments can either government render its best service to the American people.

• *Harry M. Daugherty.*

Washington, D. C.