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# The Presidency as an Institution

Wilfred E. Binkley

IN ONE OF those exquisite phrases which he so neatly turns Walton Hamilton characterized the term institution as "a verbal symbol which for want of a better describes a cluster of social usages."<sup>1</sup> That phrase, a "cluster of social usages," serves to flood-light the concept "institution." As to the particular institution about to be considered, we seem never to have neglected the presidency as a product of Constitution, statute and judicial interpretation. But if the mythical Man from Mars were to arrive and, by some miraculous means, were to become cognizant of every clause of the

Constitution, every statutory provision and every judicial judgment pertaining to the President, he would yet be woefully ignorant of the presidency as an institution.

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He would lack that which vitalizes the great office, that is, the "cluster

of social usages" that makes it a dynamic institution. He would know nothing of those extra-legal organizations, the major political parties, which exist on a national scale, above everything else, for the purpose of electing the President and which consequently determine so largely what the presidency has been, is and will be. He would know nothing of the national nominating conventions which emerged without preconceived design and the presidential campaigns that follow. He would lack knowledge of the inauguration and the inaugural parade which are utterly devoid of legal validity but are profoundly significant of the great institution to the nation that views the gigantic spectacle from sidelines or as broadcast over the national hookups. There is the President's leadership of his party and of Congress, his use of patronage and charm, if any, his tours of the country, his public addresses and fireside chats. Here is but a meager sampling of the usages that, in their totality, constitute essentials of the presidency as an institution.

Walton Hamilton further observes that "institution is the singular of which mores or the folkways are the plural."<sup>2</sup> But these mores frequently

<sup>1</sup> 8 ENCYC. SOC. SCI. 84.

<sup>2</sup> *Ibid.*

make the transition into what the late Franklin H. Giddings denominated "stateways," that is, laws with their inevitable sanctions. This transition is what the philosopher Emerson must have meant when he wrote, "The law is only a memorandum." He might as well have said, "Here are the mores which we have reduced to writing in order that they may not be forgotten." The Constitution and statutes pertaining to the presidency are, as we shall see, by and large political mores that have somehow made the transition into stateways.

It was a shrewd observation of President Grover Cleveland that, "Before I can understand a political problem I have got to know how it originated." Now that we are to investigate problems of the presidency let us see how the office came about. We shall discover that it is a peculiarly American institution, that it had its genesis in the first permanent English settlement in America, the Jamestown colony in 1607.

The settlement of Jamestown was undertaken as a get-rich-quick enterprise. Elizabethan and Jacobean England was fascinated with fantastic tales of gold and silver and other resources in Virginia, where the rich hauls of Cortez and Pizarro were, they believed, about to be repeated. The London Company, a joint-stock corporation, sold stock to eager buyers sure of enormous dividends. The charter granted by James I was that of a commercial corporation which, of course, required a business manager, designated by the charter as governor. But since this economic enterprise was to operate in a wilderness utterly devoid of civil government, the manager was, by the terms of the charter, incidentally constituted a magistrate to enforce the laws of England in the Virginia settlement. A similar official functioned also under the later charters of the Plymouth and Massachusetts Bay settlements and indeed in all the charter colonies.<sup>3</sup> The American presidency is a lineal descendant of that old colonial office of Governor, either a grandchild or a great-grandchild of it.

No dividends were ever declared by the London Company, and King James wound up the venture by annulling the charter when the colony was seventeen years old. But the King then appointed a royal governor of Virginia and provided him with a commission conveyed in an elaborate document including, among other things, the civil powers of governor as in the charter. In other colonies the letters patent, conveying the land title to proprietors such as William Penn and Lord Baltimore in Pennsylvania and Maryland, made the proprietors governors with powers similar to those previously mentioned in the charter colonies and the royal provinces.

In due time there were thirteen colonies, with thirteen governors, thirteen governor's councils evolving into upper branches of a legislature, and

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<sup>3</sup> See these charters in MACDONALD, DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 1-90 (1929).

thirteen popular assemblies elected by the colonists. The colonial interests were stubbornly defended by these assemblies against the royal agents, the colonial governors, who were sometimes practically compelled to come, hat in hand, to the door of the colonial legislature pleading for funds for every purpose, even their very salaries. The colonial legislature was absolute master of the purse strings. So miserable did they make the life of the governor that one American scholar has declared that the American Revolution was consummated twenty-five years before Lexington.<sup>4</sup>

At any rate, when independence was achieved and the colonies had become states, the state constitutions they framed promptly reduced the governors to the "mere ciphers" that Madison pronounced them in the *Federalist* papers.<sup>5</sup> So odious indeed had the colonial experience made the very title "Governor" that four revolutionary states, in search of a decent term, designated the chief executives of their states "Presidents,"<sup>6</sup> which title the framers of the Philadelphia Constitution serenely appropriated for the chief executive of the United States.

The intense prejudice generated against the executive in colonial times planted a persistent prejudice against the executive. Repression of the chief executive was practically a dogma of the Webster-Clay Whigs, and the Republican party is by no means free from it today. It is scarcely an exaggeration to say that the grim specter of the old colonial governor to this very day haunts the chambers of our state legislatures and the halls of our Congress. The twenty-second amendment to the constitution, limiting the President to two terms or sometimes a term and a half, and the proposed Bricker Amendment, limiting the President's negotiating power in foreign relations, are only the most recent incantations designed to lay the ghost. There will be others.

Since the Congress, under the Articles of Confederation, had no delegated power to enact statutes, no national executive as such existed in America prior to the Constitution. It was when the framers of the Constitution provided the imposing list of legislative powers for Congress<sup>7</sup> that the creation of a national executive became imperative. This, however, required no stroke of inventive statesmanship but merely the appropriation and adaptation of the evolving native American institution of the Executive then 180 years old. The evidence that this is precisely what the framers did is found in one clause after another of the Philadelphia Constitution. There

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<sup>4</sup> MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 34-37 (1926).

<sup>5</sup> *THE FEDERALIST*, No. 48 (Hamilton).

<sup>6</sup> Johnson, *What the Federal Constitution Owes to the Several States*, NEW PRINCETON REVIEW (1887). Quoted by 2 BRYCE, *AMERICAN COMMONWEALTH* 19 (Commonwealth ed. 1908).

<sup>7</sup> U.S. CONST. Art I § 8.

was no need of inventing a title for the new American chief executive when they could merely reach out and appropriate that already used for the chief executive in Delaware, New Hampshire, Pennsylvania and South Carolina. When the framers made the President Commander-in-Chief they only copied precisely what the framers of twelve of the thirteen state Constitutions had already done with their chief executives. The President was given the power of pardon in imitation of the governors of nine of the states. Almost all of the states prescribed a form of the Executive's oath of office and apparently Gouverneur Morris only rephrased that of the Pennsylvania Constitution in his own incomparable style. "Not creative genius," wrote the late Professor Alexander Johnson, "but wise and discreet selection was the proper work of the Convention."<sup>8</sup> Verily the President of the United States was created in the image of the state governor and he is in fact a glorified state governor.

On one item the framers forgot the art of statesmanship—the method of electing the President. I can scarcely do better than quote Alexander Johnson on this matter: "The presidential electoral system was almost the only feature of the Constitution not suggested by State experience, almost the only feature that was purely artificial, not a natural growth, and democracy has ridden right over it."<sup>9</sup> Curiously enough the framers, early in their deliberations, had decided to have the President elected by Congress just as the Governor was then elected by the legislature in most states. But this might have made the President only a bigger "cipher" than the governors.

In plain truth the electoral college was scarcely expected to elect Presidents after Washington would no longer be available. The Constitution provided that each state was to choose, in any manner that its legislature might prescribe, a number of electors equal to the total number of its Senators and Representatives in Congress. These electors, meeting in their respective state capitols, were to vote for any one they personally thought suitable for President and Vice-President. Since formal nominations or political parties were not anticipated, the framers expected that the electoral votes would be so widely scattered among the many voted for as not to produce the majority required for election oftener than once in twenty times as George Mason calculated<sup>10</sup> or once in fifty times as he later estimated it. So the framers provided that the real election would take place in the House of Representatives, which would ballot on only the five who stood highest in the scattered balloting of the Electoral College, with each state casting one vote.

It was the unanticipated emergence of political parties as early as the third presidential election that upset the calculations of the framers and

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<sup>8</sup> JOHNSON, *op. cit. supra* note 6.

<sup>9</sup> *Ibid.*

converted the presidential electors into the automata or dummies that have transformed the Electoral College into an organ for registering, somewhat inaccurately, the popular majority. Here is the most influential one of the "cluster of social usages" constituting the institution of the presidency. Arthur W. Macmahon epitomizes the matter in his statement that "considered nationally political parties in the United States may be described as loose alliances to win the stakes of power embodied in the presidency."<sup>11</sup> The powers of the presidency are what our major parties seek to capture and control. It is the competition for that very power that determines largely what the presidency as an institution has become and is today. No matter how bravely a President may proclaim his personal convictions he is inevitably the organ of the most influential interest to whom he owes his election. And Franklin Roosevelt, President by the electoral votes of every state but two small ones in 1936, will possess and exercise power impossible to Rutherford B. Hayes, declared elected by the margin of a single furiously disputed electoral vote. It is a fair approximation to say that the presidency is what our political parties have made it. Here again is the handiwork of American folkways and mores with a minimum of stateways.

In our own generation the usages of the Electoral College have come to make the presidency peculiarly sensitive to minority groups concentrated largely in metropolitan centers. One of these usages, that long ago became a stateway, is the election of the presidential electors at large in each state, instead of by districts as they originally sometimes were. Thus in each state the election of electors is, for the political parties, a game of all or none. For example, this makes it possible for the Negro vote in half a dozen big pivotal states to throw a presidential election to either party. The recent striking gains in civil rights are largely due to the balance of voting power wielded by such minority groups in the great cities of pivotal states. One need only read President Truman's veto of the Taft-Hartley Act to see that it was consciously designed to retain the party loyalty of a minority group, labor. The presidential election of 1952 only suspended the decisive functioning of these interest groups as balances of power. It was the stars in their courses that fought for General Eisenhower—the stars on his uniform. He knows he can scarcely depend on astrology for reelection. Judging by his elaborate legislative program he is learning rapidly the art of sewing up the support of these minority groups. At any rate it would now appear that no one need go to jail to obtain social security no matter which party holds the presidency. The ballots of minorities, with their balances of

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<sup>10</sup> DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE AMERICAN UNION, (Tansill ed.), 69th Congress, 1st Sess., House Document, No. 398, 1st Sess. p. 663, H. R. Doc. No. 398, 69th Cong.

<sup>11</sup> 11 ENCYC. SOC. SCI. 596.

power functioning through the usages of the Electoral College, compel presidents and presidential candidates to play the game of out-promising each other in legislative programs. Thus they hope to capture the ballots of the minorities which collectively constitute the majorities required to elect Presidents.

The letters of Washington just before he assumed the duties of the presidency reveal a deep concern as to what the public expected of him and what it would tolerate in his conduct of the new office. He was acutely aware of an utter lack of precedents for an American national chief executive.<sup>12</sup> He knew he would be establishing precedents and he desired that they "may be fixed on true principles." The elaborate inaugural ceremony accompanying his taking the oath of office did not pass unchallenged. Today we generally recognize that while the inauguration itself has no legal force, it nevertheless symbolizes the fact that the President is chief of state as well as chief executive. But to the post-Revolution purists the inauguration was a conspicuous violation of Republican simplicity and an aping of monarchy.

The elective branch of the colonial legislature had clung to the control of finance with the tenacity of a bulldog. In this tradition Congress established the Treasury Department and required that it report directly to Congress, so that half a century later it was still being debated whether the Treasury was an executive department. Washington appointed Hamilton Secretary of the Treasury, and in accordance with the law and the requests of the House of Representatives, Hamilton made his famous reports to Congress on manufacturers and on finance and pushed through the houses his famous measures—the Hamiltonian program. What of Washington's legislative program? There was none. Hamilton, an inveterate Anglophile, immediately upon appointment had assumed that he was prime minister, in the tradition of the Chancellor of the Exchequer. The conduct of the government was rapidly falling into the pattern of a parliamentary system. Washington, without any conscious shirking of responsibility, was dropping into the background with a separateness suggestive of the British monarch.<sup>13</sup> Here is a striking illustration of the extent to which the presidency is a "cluster of social usages." How often has the presidency come to a parting of the ways and taken one instead of another fork of the road? As strong as the trend toward parliamentary usages then was, it promptly encountered adverse social forces so deep-seated in the emerging American culture that the trend was soon reversed.

When Washington in person first delivered to Congress what we today call the "State of the Union" message, critics promptly dubbed it the

<sup>12</sup> HART, *THE AMERICAN PRESIDENCY IN ACTION*, 1789 pp. 7, 8 (1948).

<sup>13</sup> See BINKLEY, *PRESIDENT AND CONGRESS* 37 (1947).

"Speech from the Throne." When the reply to this message was prepared by the two houses and then sent to Washington's residence to be delivered by the Vice President, it was pronounced downright mimicking of British practice. A year earlier Patrick Henry, speaking in the Virginia Convention that ratified the Constitution, had declared that the Constitution "squinted toward monarchy." Before Washington had been President half a dozen weeks he received a letter from a friend in Virginia who wrote that Henry's phrase, "squints toward monarchy," was in every mouth.<sup>14</sup> It was a dozen years later that President Jefferson, a son of the Piedmont frontier and thoroughly habituated to the American folkways, promptly ended the reign of the "monocrats," as he dubbed the Federalists, and "put the Ship of State on its Republican tack," to use his own picturesque phrasing. By then the trend had already set in that, in the milieu of our own political mores, would transform the presidency into what Grover Cleveland was long afterward to characterize as "peculiarly the people's office."

Washington soon needed advice—an advisory council. Every colony had been provided with a Governor's Council, and this organ had been evolving into the upper house of the legislature, but without losing all its executive functions. "Elliott's Debates" on the making and ratifying of the Constitution of the United States contains nearly a dozen scattered references to the United States Senate as a "council to the President," an "advising body to the executive," a "council of appointment," or a body associated with the President "to manage all our concerns with foreign nations."<sup>15</sup> Indubitably the Senate is a legitimate child of the Governor's Council, and it carries to this day vestigial evidence of its parentage. Among these vestiges are the confirmation of presidential appointees and the ratification of treaties. Quite naturally, President Washington turned to the Senate as his councilors. This was not strange at a time when the upper house had only twenty-two Senators, two states not having yet ratified the Constitution. Washington made his first visit to the Senate chamber with a set of propositions concerning a proposed treaty with the Indians. What could be plainer than the Constitution's provision: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur?" Now Washington would get their advice and consent on negotiations. Upon arrival he took the chair of the Senate just as the Governors then did when conferring with their councils. Vice-President Adams read the first proposition for the treaty and turning to the Senators asked "Do you advise and consent, etc.?" The question was greeted

<sup>14</sup> Hart *op. cit. supra* note 12 at 14.

<sup>15</sup> 2 ELLIOTT, DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION: 47, 287, 306. (Washington 1827-46). 3 *id.* at 220, 221, 489, 491, 493.



with stony silence. Here was a momentous instant in the laboriously-emerging institution of the presidency. Senator Maclay of Pennsylvania finally broke the awkward silence by asking for some of the papers pertaining to the matter and a little later urged that the matter of the treaty be referred to a committee. Thereupon, according to Maclay, Washington "started up in a violent fret and said, 'This defeats my every purpose in coming here.'" When Washington left the Senate chamber that day, he is reported to have said that he would be damned if he would ever come back there.<sup>16</sup> Another fork in the road to be taken had been determined. Treaties would simply have to be negotiated by the President or his agent beforehand and the draft submitted to the Senate for their consideration in his absence.

In the first session of Congress the Senate confirmed all Washington's appointees but one. Here was another constitutional power suggesting the intention of the framers to make the Senate a council for the President that was to sit with him while considering an appointee. Washington's one nominee who was not confirmed was to have been collector of customs at the port of Savannah, to which nominee the Georgia Senators had objected. The astonished President sent the Senate a message suggesting that, in such cases, the Senate might ascertain the President's reason for the appointment. This was ignored and the usage, euphemistically denominated "senatorial courtesy," had begun.<sup>17</sup> As a consequence it can be set down that usage has literally reversed the Constitutional provision, so that it is the Senate that nominates and the President that gives consent. It was now clear that, no matter what the framers of the Constitution may have intended, the Senate simply would not serve as a council advising the President. Usage is a sovereign that can reduce a provision of the written Constitution with which it conflicts to sheer dead-letter.

Washington finally got his executive council or advisory group scarcely by design but almost by accident. The Constitution, with apparently no suggestion of a council, authorizes the President to require, in writing, the opinion of the principal officer in each of the Executive departments upon any subject relating to the duties of their respective departments, and Washington was doing this as early as 1790. His first meeting with his department heads as a consultive group occurred in the third year of his presidency in order to consider what to do about the request of Congress for papers relating to St. Clair's disastrous defeat by the Indians in the Northwest Territory. The President here needed advice on a perplexing issue that had arisen, and he resorted to the expedient of calling his executive heads together. It is almost certain that he had no idea whatever of starting a new institution. It is but one more concrete illustration of the shrewd observations of the late James Bryce that "historical development is wiser than the wisest men" and "a succession of small improvements, each made conformably to existing conditions and habits, is more likely to succeed than a large

scheme made all at once in what may be called the spirit of conscious experiment."<sup>18</sup> It is a significant fact, noted by the late George Burton Adams, that the British Cabinet system, every essential feature of which is pure usage, had matured so recently that the framers of our Constitution were not aware of its existence, and in fact the British Cabinet system was half a century old before its nature was sufficiently recognized that clear expositions of it as now understood were published.<sup>19</sup>

There was certainly no prompt recognition that a new usage had been contributed to the cluster constituting the presidency. Gradually, however, the term "cabinet" crept into the vocabulary of the newspapers and letters of the Executive heads.<sup>20</sup> By the end of Washington's eight years the term was understood. It appeared in Congressional debates in 1798. Marshall used it in the Marbury decision in 1803.<sup>21</sup> By the end of Jefferson's presidency in 1809 it was a recognized institution. President Jackson was first to use the term "cabinet" in a presidential message. In 1907 it first appeared rather incidentally in a statute in the phrase, "the heads of the Executive Departments who are members of the President's cabinet."<sup>22</sup>

Jefferson's Secretary of the Treasury, Albert Gallatin, could not persuade his President to hold regular cabinet meetings. When they were held a vote was taken on issues discussed, with Jefferson having a single vote, but he had usually persuaded the cabinet to the point of unanimity.<sup>23</sup> Jackson largely ignored his Executive heads as counsellors and turned instead to the coterie of cronies in his famous "Kitchen Cabinet." Some Presidents have abided by the majority vote of their cabinet, notably Pierce and Buchanan. Lincoln was unquestionably the master of his cabinet. To this day we can say that the cabinet is not yet a stabilized institution but is still evolving. As recently as December 29th, 1953, Stewart Alsop was observing that President Eisenhower "has now made the National Security Council the chief instrument of decision on matters of vital importance, that he has been presiding over it in person, and that it has thus all but replaced the unwieldy cabinet reducing the out-dated cabinet to a shadow." During the first year of the Eisenhower administration the National Security Council is said to have won Presidential approval of 305 major policy decisions.<sup>24</sup>

<sup>18</sup> HART, *op. cit. supra* note 12 at 86-96.

<sup>17</sup> *Id.* at 123.

<sup>18</sup> 1 BRYCE *op. cit. supra* note 6 at 332.

<sup>19</sup> ADAMS, AN OUTLINE SKETCH OF ENGLISH CONSTITUTIONAL HISTORY 167 (1918).

<sup>20</sup> LEARNED, THE PRESIDENT'S CABINET 155 (1912).

<sup>21</sup> Marbury v. Madison, 1 Cranch 137 (U.S. 1803).

<sup>22</sup> 34 Statutes at Large, ch. 1639, p. 993.

<sup>23</sup> WALKER, MAKING OF THE NATION 91 (1895).

<sup>24</sup> The Toledo Blade, Dec. 29, 1953.

Why is the President the Chief of Administration? Practically all the reasons given by text book or court opinion are not much more than ex post facto rationalizations of the *fait accompli*. The Constitution is silent on the matter, apparently because the framers failed to recognize the distinct character of administrative power — that is, the “management of men and materials in accomplishing the purposes of the state” as Leonard D. White so aptly put it.<sup>25</sup> Because of the Constitution’s silence on administration the legislative and executive branches of the federal government throughout our history as a nation have competed for the control of that function. They are still competing today. The present administration has removed key administrators apparently as a consequence of senatorial pressure, and under the same kind of pressure has made appointments to positions where the appointee could embarrass and harass the executive branch. I can think of no President less vigilant and firm than the present one in maintaining the chief executive’s constitutional mastery of administration.

The key to the presidential control of administration lies in the question whether he has the constitutional power to remove executive officers on his own volition. That question was thoroughly debated in the first session of the First Congress. A bill investing the President with this very power of removal, without requiring senatorial consent, was considered then and dropped. This disposal of the issue has been called a “legislative decision,”<sup>26</sup> because it amounted to an interpretation that the Constitution implied the sole power of removal resided necessarily in the Chief Executive; otherwise he could not “take care that the laws be faithfully executed” if the Senate, by sharing the removal power, compelled him to retain subordinates he did not trust. A statute forbidding the Senate to share in removal power might have been repealed. An implication or a gentleman’s understanding seemed safer.

It was Andrew Jackson who first put to test the President’s power of removal as a means of control of administration. He even selected the least likely office in the cabinet on which to make the test. In 1833 he had appointed William J. Duane Secretary of the Treasury and advised him to remove the federal deposits of money from the Bank of the United States, the renewal of whose charter he had just recently vetoed. Now Congress had by statute specifically vested in the Secretary of the Treasury exclusively the discretion to remove deposits from the Bank. Duane, quite legally, refused to make the removal and stood firm despite Jackson’s patient but persistent attempts at persuasion. Then Jackson removed Duane and appointed in his stead Roger B. Taney, who obediently removed the deposits. Jackson justified his removal of Duane by reasoning that “upon him has

<sup>25</sup> WHITE, PUBLIC ADMINISTRATION 2 (1926).

<sup>26</sup> HART, *op. cit. supra* note 12 at 155 ff.

been devolved by the Constitution and the suffrages of the American people the duty of superintending the operation of the Executive Departments of the Government and seeing that the laws are faithfully executed."<sup>27</sup> Half a century later President Hayes, even in spite of a recently enacted Tenure of Office Act by which the Senate shared in removal power, defied the Senate by removing some New York customs officers, among whom was a future President of the United States.<sup>28</sup> And Grover Cleveland likewise removed a district attorney in the face of a furious senatorial protest.<sup>29</sup> It was only after President Wilson had removed a postmaster before the expiration of his term of appointment that the question was finally decided in 1926 in the case of *Myers v. United States*.<sup>30</sup> The President has then the unquestioned constitutional power to remove appointive executive officers and is consequently as much of a chief of administration as he has the competence and resolute will to be. Neither constitutional prescription nor statute has made him such, but rather usage fortified finally by court opinion.

A quarter of a century ago Professor Howard Lee McBain denominated the President "Chief Legislator." "The prime function of the Executive," he wrote, "is not executive at all. It is legislative."<sup>31</sup> "Rightly or wrongly," he added, "the whole country looks to him, praises or blames him, for what Congress does or does not do, except of course, when both houses chance to be in control of the opposite party."<sup>32</sup> Here is a statement of plain fact that would have been incomprehensible in the early days under the Constitution and indeed at almost any time before 1900. Sixty-five years ago Senator John Sherman of Ohio advised President-elect Benjamin Harrison: "The President should have no policy distinct from that of the party and that is better represented in Congress than in the Executive."<sup>33</sup>

It was President Theodore Roosevelt who established the first promising organic connection of the presidency and the Congress by means of White House conferences on pending legislation with the then master of the House of Representatives, Speaker Joseph G. Cannon.<sup>34</sup> The dethronement of the Speaker in 1910 ended all possibility of institutionalizing that kind of liaison. In 1913 Woodrow Wilson initiated what he conceived to be the prime ministry of the presidency, which he believed the Constitution invited

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<sup>27</sup> 3 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 19 (1927).

<sup>28</sup> BINKLEY, POWERS OF THE PRESIDENT 167-171 (1937).

<sup>29</sup> *Id.* at 174-182.

<sup>30</sup> 272 U.S. 52, 47 Sup. Ct. 21 (1926).

<sup>31</sup> MCBAIN, THE LIVING CONSTITUTION 115 (1927).

<sup>32</sup> *Id.* at 131.

<sup>33</sup> 2 SHERMAN, RECOLLECTIONS OF FORTY YEARS IN HOUSE, SENATE AND CABINET 1032 (1895).

<sup>34</sup> BUSBEY, UNCLE JOE CANNON 217, 218 (1927).

in the provisions for the President to give Congress information of the State of the Union, and recommended measures for their consideration.<sup>35</sup> In 1933 Franklin Roosevelt revived what resembled the Wilsonian technique in legislative leadership. In time he developed a rather definite formula. Whenever he had an important legislative project in mind, he would summon to his aid outstanding specialists in the particular field to conduct the required research. The public would be fed information on the proposed legislation in order to encourage it to exert its influence on Congress. When, in due time, the message recommending the legislation went to Congress, President Roosevelt had already held conferences with leaders of his party in Congress in order to see, among other things, that the bill would be referred to hospitable committees. Moreover the message recommending the measure would probably have lying right under it the draft of an appropriate bill with the last "t" crossed and "i" dotted.<sup>36</sup> Congress became accustomed to Presidents' submitting a bill along with a message. In 1947 a Republican leader, Senator Ferguson, in an unguarded moment let slip an unconscious recognition of this established usage. Complaining that President Truman was letting his objection to certain pending legislation leak out of the White House, he said, "If the President wants to tell the people that he stands for a certain thing he ought to come to the House and Senate with a message. And he ought to provide a bill if that is exactly what he wants."<sup>37</sup> When a partisan Republican leader can chide a Democratic President for not formally proposing legislation and accompanying the proposal with a bill, there can no longer be any question about the usage of presidential leadership in legislation.

Of course presidential leadership in legislation runs counter to a strong Republican party tradition. President Lincoln once accompanied a proposal for legislation with the draft of a bill,<sup>38</sup> but the explosion it created in Congress was so loud that Lincoln's act was repeated by no President for two generations. But during the first year of the Eisenhower administration the public grew more and more critical of the President's failure to assume the initiative in legislation. When he did finally assert leadership, opinion polls promptly registered public approval. His prestige as a President depends largely on the percentage of his program he can persuade Congress to enact.

Few usages have contributed more to making the presidency what it is today than the National Nominating Convention. Viewed from the gal-

<sup>35</sup> WILSON, *CONSTITUTIONAL GOVERNMENT* 72, 73 (1907).

<sup>36</sup> "Congress's Reason for Delay in Passing the President's Bills," *UNITED STATES NEWS AND WORLD REPORT* (January, 1946).

<sup>37</sup> *What Your Congress is Doing* UNIVERSITY OF CHICAGO ROUND TABLE No. 483

<sup>38</sup> BINKLEY, *op. cit. supra* note 28 at 135.

leries the convention looks as absurd as a typical sitting of the National House of Representatives. In either case the significant action is invisible from the point of disadvantage in the gallery. Of course the convention looks utterly irrational. Successful institutions, however, are not products of reason and logic but of chance and circumstance. The nominating convention emerged somewhat sheepishly in the 1830's after almost half a century of groping to fill an interstice in the Constitution—that is, a method of reducing the potential multitude of presidential aspirants to a workable number for the voters, preferably two candidates, one for each party. The use of the congressional caucus at first for that purpose had played out by 1824. Then state legislatures began haphazardly nominating presidential candidates, which method turned out to be impractical. Next, national gatherings of party members came together, not in delegate-conventions, but rather in irregular national mass-meetings.<sup>39</sup> For example, the so-called convention that nominated Van Buren at Baltimore in 1835 had 626 names on its roll, half of whom were from a single state, Maryland. Two-thirds were from Maryland, Virginia, New Jersey and Pennsylvania. Later each state was allowed to cast as many votes as it had presidential electors no matter how many delegates appeared. One lone Democrat in one convention cast all fifteen votes of Tennessee. Ultimately the party sent from each state its agreed quota of delegates, as is done today. Here is the perfectly natural evolution of a new institution by the usual trial and error method. The convention emerged practically when nobody was looking, which is precisely what makes it so practical.

The key to an understanding of a national convention is that it is managed by professionals—politicians who are experts in social coordination. These experts have one great objective, namely, manipulating the delegates so as to pick a potential winner and thereby capture control of the prestige, power and patronage embodied in the presidency. In the strategy of picking a winner the managers exercise an acumen and wisdom impossible for the rank and file of a party functioning individually in a national party primary. Substituting a presidential primary for the national convention would alter the very nature of the presidency in an unpredictable manner. Lincoln would not have had a ghost of a chance in a nominating primary. The choice of Governor Stevenson, the best candidate the Democrats could have nominated in 1952, would have been impossible in a nation-wide primary. Even if he could have been dragged kicking into it, his face was unfamiliar to the party voters. The voters were more familiar with other contestants then.

The most recent Republican Convention illustrates the dynamics of picking a potential winner. Senator Taft was undoubtedly the favorite of

<sup>39</sup> McCURE, OUR PRESIDENTS AND HOW WE MAKE THEM 53, 60 (1900).

most of the delegates, but too many of them doubted whether he could be elected. The contest in the convention turned into a furious battle between the Republican congressional forces backing Taft and the twenty-some Republican governors mainly backing Eisenhower. The impasse was broken by patronage, of which the Republican governors had plenty and the Republican Congressmen none. Inevitably the candidate nominated will be debtor to the powerful interests that swung the nomination to him, no matter how much he may protest his freedom from commitments and usually "methinks he doth protest too much." The President who has no powerful party forces behind him rules with a palsied hand. Such is the nature of government in a sinful world. For us the significant thing is that the nominating convention is a faithful expression of the genius of the American people and of its folkways and mores. When we get a better nominating procedure, it will be one that emerges naturally just as the convention did; it will never be the brain-child of a genius.

No interpretation of the presidency would be adequate that omitted the contributions of the great Presidents to the making of the office. If we may borrow a term from the geologist, let us say that the administration of each of the great presidents has contributed its stratum of rich alluvial deposits. Washington's peculiar gift was in consequence of his superb character, which made its contribution even before he was chosen President. We have competent testimony to this fact in a letter written a year after the Philadelphia Convention by Pierce Butler, one of the delegates. "Entre Nous," he wrote, "I do not believe they (the executive powers) would have been so great had not many of the members cast their eyes toward George Washington (President of the Convention), and shaped their ideas of the powers to be given the President by their opinions of his virtue."<sup>40</sup> To a degree the office is what it is because it was made for Washington. In office he gave it a good start.

It was Thomas Jefferson, the third President, despite all his acquired Eastern polish still a Piedmontese frontiersman at heart, whose role it was to reorient the developing office of the presidency away from foreign precedents toward its genuinely American charter. Jefferson's keen eye had appraised Europe as accurately as any American of his day who had sojourned overseas, but he saw little there to be imitated. Here was our first astute American politician-statesman, a happy son of the American political mores, resolutely determined to make the presidency a republican and an American institution.

<sup>40</sup> 3 FARREND, THE RECORDS OF FEDERAL CONVENTION 301 (1911).

<sup>41</sup> See BINKLEY, AMERICAN POLITICAL PARTIES: THEIR NATURAL HISTORY 135 (1945).

<sup>42</sup> GAUSS, DEMOCRACY TODAY: AN INTERPRETATION app. 29 (1919).

A generation later an upsurge of the American masses, "the common man," put Andrew Jackson in the White House. Speaking in the then prevailing classical vogue, his partisans proclaimed him a "tribune of the people."<sup>41</sup> Just as the ancient Roman tribune had shouted his "Veto" into the patrician Senate in defense of his plebian constituents, so President Jackson converted the presidential veto into an instrument for the protection of the interest of the common man. When Old Hickory retired, it was impossible to turn the hands of the clock of history back and ever again make the presidency what it had been before.

Even more than Jackson, Lincoln won the hearts of common folk—Lincoln who casually touched his hat in return to an officer's salute but uncovered his head to the men in the ranks, as Noah Brooks observed.<sup>42</sup> Woodrow Wilson set the modern and apparently enduring pattern of legislative leadership, in which his disciple, Franklin Roosevelt, managed to surpass even the master. President Franklin Roosevelt, as an expert in mobilizing group loyalties with the *quid pro quo* of group-benefits for group-ballots, developed to the highest degree the art of group-diplomacy on which the very existence of American political parties depends. Evidently he set the pattern that President Eisenhower is even now learning, imitating and practicing, as his current program of legislation indubitably reveals. President Eisenhower is indeed the fortunate beneficiary of an incomparable heritage bequeathed to him by a long line of dynamic predecessors. His place in history depends on what he does with that heritage.