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EXTRA-CONSTITUTIONAL GOVERNMENT

By Edwin F. Albertsworth

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A silent transformation is occurring in American constitutional institutions. The governmental fabric created by the Constitution of the United States, though popularly regarded as a Rock of Gibraltar, has not escaped the erosive effect of Time. Like the evolution of the laws embodied in the Twelve Tables, like the restatements of the Mosaic Code by Talmudic interpretations, like the credal formulations of Holy Writ by the Church Fathers, present-day practices in government in American federalism have become strata overlying the original textual enactments of the Constitution which, in some instances, have resulted in a Pompeian disappearance of that which was once regarded as fixed and absolute. These developments are illustrative of the truth that the genius and destiny of the American people as exemplified in their governmental practices are not to be confined within four corners of a written instrument as a constitution.¹ Usages, judicial construction of the text of the Constitution, and practical adaptation to unforeseen needs of government so that its processes may smoothly function, have resulted in the creation of so-called “extra-constitutional” government in the United States. They are practices of government which cannot be found either expressly, or implicitly, by analysis from other functions, within the formal Constitution; but, on the other hand, they cannot be said to be expressly or impliedly prohibited by that document. Hence, they may be conveniently, and not without a reasonable degree of accuracy, designated “extra-constitutional” practices flourishing alongside the Constitution; in fact, as it were, beyond the pale of the written Charter. They result in one government “in the books,” and another “in action”; a “visible” government versus an “invisible” one.

The reasons for the development and continual existence of extra-constitutional government may be said to be two-fold. In the first place, until a case or controversy in the justiciable sense

¹ James M. Beck, in his “Foreword” to my “Cases on Constitutional Government” (1930), pp. iii-iv.
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can be presented to the judiciary in the federal scheme of government—in constitutional as distinguished from legislative courts—no challenge can be made of the constitutionality of these extra-constitutional institutions or practices. A person must show himself aggrieved or damned in his right in order to frame an issue cognizable by a proper court having jurisdiction because of an alleged extra-constitutional practice of government; and federal courts generally, and most of the State courts, have no general or abstract veto powers, powers in thesi, over legislation or practice of government where no such issue can be presented. Thus, without the ambit of the written Constitution, a governmental practice or an institutional control can grow and flourish unmolested by judicial inhibitions which alone are effective in overthrowing, or at least questioning, practices and usages alleged to be extra-constitutional. A second reason making for the evolution of these “outlaw” forms of government is to be found in the fact that practical statesmen and politicians, acting under a theory that what was not prohibited in the formal Constitution, was impliedly authorized as means for the execution of granted powers, created in various instances a “super-government” unknown to the written Constitution, even though not prohibited by it. Constitutionally, such a viewpoint is unsound if it include powers not delegated to the Federal Government, for that Government is one of granted, not prohibited, power. On the other hand, it is true that choice of means in carrying on, or executing, the powers delegated, makes for wide latitude of discretion in adopting practices of government, or in execution of policies of administration, that may make for extra-constitutional developments. Theodore Roosevelt, in his “Autobiography,” stated his conception of the powers of the Presidency to be all those not expressly prohibited by the Federal Constitution; for the people had granted to the Chief Executive, in the Constitution itself, all executive powers, and had not limited these, as they had in granting legislative powers to Congress by the qualification “herein granted.” If Mr. Roosevelt meant that within the general scope of Federal Government, within the circle of its


operation, he had all executive powers not expressly prohibited, there is truth in his position. On the other hand, Mr. Taft has
criticized the Rooseveltian position, in his book "Our Chief
Magistrate and his Powers,"\(^4\) by saying that such viewpoint
contradicted the entire constitutional fabric of the Federal Gov-
ernment as a government solely of granted powers, leaving to
the States or their people all those powers not granted. In this
Mr. Taft was constitutionally correct, if Mr. Roosevelt is taken
at his word, without reading into his viewpoint the interpreta-
tion already mentioned. However this may be, the real point is
that numerous governmental practices not prohibited by the
Constitution have grown up unchallenged by judicial review
solely because no justiciable issue could be framed for this
purpose and under varying conceptions of the nature of the
federal fabric of government.

Some publicists are of opinion that American governmental
evolution is describing a downward curve toward "Avernus"; others feel that a newer and better government is in the making.
The crucible of Time alone will afford the answer. However
this may be, these developments outside the pale of constitut-
ionality seem to be inevitable by-products, in the words of
Woodrow Wilson,\(^5\) in the evolution of national life wherever a
written or formal constitution, more or less by its own nature
rigid and unyielding, is the basis of delimitation of govern-
mental power. The kaleidoscope of changing events because
of an incessant flux in practical government due to the com-
plexity of modern industrial civilization and experiments in
government; the myriad factual situations for which there are
no exact or express constitutional provisions, force a gradual
modification of received constitutional doctrines, legal institu-
tions, and theories of government. Changing emphases of one
age, different conceptions of the functions of the State, law and
government, as well as their scope and purpose, cause practices
and institutions to develop outside the canons of constitutional
orthodoxy. Sir Henry Maine, the distinguished Historical
jurist, pointed out this truth so far as the development of legal

\(^4\) Pp. 139-140.  
\(^5\) "Congressional Government," ch. on The Executivb. In part, Mr. Wilson said: "We have resorted, almost unconscious of the political
significance of what we did, to extra-constitutional means of modifying
the Federal system where it has proved to be too refined by balances
of divided authority to suit practical uses."
procedure was concerned, by showing the degree to which legal fictions were employed to create an appearance of reality when, as a matter of fact, the fundamental bases for another rule of law had already occurred.\(^6\) And the great Tarde, in his "Laws of Imitation," has demonstrated that the new masquerades in the form of the old in order to make itself more receptive and overcome the objection of innovation.\(^7\) Moreover, a written instrument of government—such as a constitution—is generally not self-executing; there must be legislation, executive agencies, administrative officials, judicial interpretation, construction, and adaptation, to set the machinery of government in motion and to keep it going; as a result, statutory enactment and constitutional meanings always meet their Waterloo or their Wellington in enforcing officials and courts.\(^8\) Thus, the real Constitution of the United States will be found, not in the formal instrument itself, but rather in some 300 volumes of the decisions of the Supreme Court of the United States, the "voice of the Constitution," the final arbiter of the formal document. In these volumes also will be mirrored many governmental practices unknown to the written Constitution from a mere reading of it, but which originate from analysis, historical interpretation and metaphysical reasoning about the fabric of government created by it. That a "government of men" will be found as a concomitant of these extra-constitutional practices is inevitable in modern government under written constitutions.\(^9\) But law and government cannot exist \textit{in vacuo}, divorced from practical experience and human enforcing agencies or the reactions of human beings for which it is supposed to function.\(^{10}\) It is


\(^{10}\) Earle H. Ketcham, "Law as a Body of Subjective Rules," 23 Illinois Law Review, 360. Mr. Ketcham says: "If law is subjective, as is here contended, then the law binds no one, and no one obeys laws. Instead, one obeys individuals and acts in accordance with laws. * * * Law never provided for the enforcement of contracts nor for the payment of damages in case of torts. All such things are actions of men and not of law. The demand that the government should be one of law and not of men is a demand for the impossible." (P. 365.)
equally true of extra-constitutional government. If the complainant can make out his case or controversy challenging these practices as they affect him in his property or personal rights, he will have his due process of law in the form of a day in court. Hence, he has no cause for hostile or unfavorable criticism of extra-constitutional practices; and if he cannot frame the justiciable issue necessary, he has not been dammified, and hence, again, has not been prejudiced. Thus, a great deal of extra-constitutional development, unchallenged from a constitutional standpoint, continues in existence.

The practices and usages of extra-constitutional government have annexed themselves principally around the executive and legislative functions in the Federal State, largely because these have been the most active and direct forces of government. They are the active element in that they create and execute law in the accepted sense. The judiciary, on the other hand, is the passive factor in government; for, being confined to justiciable issues framed by litigants, this branch of government of necessity has remained aloof from those practical, every-day problems where modern government touches the innumerable situations of life. Moreover, the judiciary could hardly, within the orthodox conception of the judicial function, initiate new relationships between government and its subjects or citizens, or create usages resting on the habits and customs of the people for their sanction. The judges can and do create customary modes of judicial decision, but only in an indirect sense can these decisions be said to create popular customs or usages resulting in governmental practices. Thus, there has not been the same opportunity for that accretion of extra-constitutional development in connection with the judiciary as has been the case with the other departments of government.

Extra-Constitutional Executive Developments.

Probably the best type of government unknown to the written Constitution, is the Presidential Cabinet. By this is meant

11 "When I tell you that less than 50 federal statutes have been declared invalid by that [Supreme] Court in the history of the government and that thousands of laws have been passed by Congress for which no possible warrant can be found in the Constitution, you will appreciate that the Court cannot, or at all events does not, in all instances defend the Constitution." James M. Beck, "The Changed Conception of the Constitution," vol. 69, Proceedings of the Amer. Philos. Socy., p. 111.
the heads of departments in the Federal Government, as distinguished from the so-called "little" cabinet, or the more numerous officials who do not head up federal departments, but who nonetheless are important figures in the execution of federal law and who are often consulted by the Executive, and who likewise seek his advice in execution or formulation of administrative policies. Growing out of that article of the Constitution\(^\text{12}\) empowering the Chief Executive to require the opinion in writing of the "principal officer in each of the executive departments," there has gradually emerged, in the words of the late Chief Justice Taft, "an extra-statutory and extra-constitutional body," existing only as long as the President desires its continuance, because it is the "mere creation of the President's will."\(^\text{13}\) Having himself occupied the position of Chief Executive, Mr. Taft's language is a true description of this institution of extra-constitutional government. As further stated by Professor Burgess, writing of the same political institution: "The Cabinet is, therefore, a purely voluntary, extra-legal association of the heads of the executive departments with the President, which may be dispensed with at any moment by the President, and whose resolutions do not legally bind the President in the slightest degree. They form a privy council, but not a ministry."\(^\text{14}\)

Oddly enough, Congress has usually fixed the character and number of the executive departments from which the President has chosen his cabinet advisers. So far as the formal Constitution itself is concerned, however, the President is not under duty to select his advisers from these departments, and, in fact, may invite anyone he pleases to sit in his cabinet. In Mr. Harding's time, the Vice-President, Mr. Coolidge, was so requested, and did sit for some time, in the cabinet. But custom, usage, political expediency, and party obligations have, on the other hand, been controlling factors in the choice of cabinet members, more or less binding Presidential action. If an occasion should ever present itself permitting formulation of a case or controversy challenging the constitutional existence of this extra-constitutional body—which seems unthinkable—it is probably safe to

\(^\text{12}\) Article II, sec. 2.  
\(^\text{13}\) "Our Chief Magistrate and His Powers," p. 30 (ed. 1916).  
\(^\text{14}\) "Political Science and Constitutional Law" (ed. 1891), vol. 2, p. 263.
predict that no attack would be successful, in the courts. For, under the broad constitutional duty imposed on the Chief Executive to execute the federal laws, wide discretion would be allowed him in the means chosen by him to carry out this duty as well as others required of him by analogous provisions of the written Constitution.

Another extra-constitutional development has been witnessed in the election of the Chief Executive, by voting for presidential electors. Present agitation of a more or less organized fashion, is seeking to make formally written—as well as to provide for assumption of office by the newly-elected incumbent shortly after his election—a usage that has grown up outside the written Constitution. This is the practice of really voting for contestant Presidential nominees directly, in that the Presidential electors no longer exercise any reasoned or discretionary judgment of their own when casting their ballots in the electoral college, but mechanically, cast their vote according to the dictates of their constituents. Thus, the electoral college, of which these electors themselves are the constituents, is an institution that has become obsolete, although the written Constitution knows no other method of choosing a President of the United States. However, by voting for Presidential electors in the several States, it is possible for the will of the majority of the people to be defeated, as a candidate might have a plurality of popular votes, but an insufficient number of electoral votes, and conversely. An interesting, but probably moot, question, and highly speculative, would be whether or not attack would lie by a defeated candidate because of this extra-constitutional practice, enjoining, for example, Presidential electors from casting their ballots according to the vote of the electorate, but instead requiring them to act independently. Difficulties of judicial enforcement of such a procedure, assuming jurisdiction were taken, would seem to answer the question without further argument. Woodrow Wilson, in his work on "Congressional Government," speaking of this practice of indirect election of the Chief Executive, says "Once the functions of a presidential elector were very august. He was to speak for the people; they were to

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accept his judgment as theirs. He was to be as eminent in the qualities which win trust as was the greatest of the Imperial Electors in the power which inspires fear. But now he is merely a registering machine—a sort of bell-punch to the hand of his party convention. It gives the pressure and he rings. It is, therefore, patent to everyone that that portion of the Constitution which prescribes his functions is as though it were not."

It has been wittily said that the electoral college is like the appendix *vermiformis* in the human anatomy,—its only possible function being to obstruct. This may be an exaggerated viewpoint, but nevertheless the popular method which is now followed under constitutional requirement really covers up the fact that quite another political institution has actually occurred, unknown to the formal Constitution, an extra-constitutional phenomenon. Perhaps, in future, when and if a constitutional convention convenes for general study of constitutional amendments—if the people can be persuaded that such a convention can with safety be called—this obsolete institution of the electoral college will be eliminated from the formal instrument of government. But if not, it has in truth already been eliminated by popular usage, acquiesced in by the presidential electors.

In relation to other departments of Government in the Federal system, the Executive power has worked out certain usages unknown to the formal Constitution, even though not prohibited by it. Of these, perhaps, the most striking is the relationship to the Senate. Because of this development, the Senate, as a body, is not a potent force in the initiation of nominations for public office by means of advice to the Chief Executive—although the words of the written Constitution are "by and with the advice and consent of the Senate"—and the same is true of the formulation of policies of treaty negotiation or execution of administrative policies. In the early days of the Republic, when the Senate was a much smaller body so far as members went, the notion was that it should be a consultative body, a ministry or council of State, which probably explains why the Constitution provided for advice from that body to the President. The reason why the Senate was to approve treaties,

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16 *Supra*, note 5.

said Hamilton, was because secrecy was desirable, and a smaller body representing the component States, like the Senate, was preferable to a larger one such as the House. But the expansion of the nation, and the present practice of popular election of Senators, even though they are thought of as representing the State in its corporate capacity, has brought into desuetude any practice of governing in connection with the Chief Executive by means of "advice." Today, except as the President may in advance consult certain individual Senators of influence, in order to secure the approval of the requisite number for subsequent submission of nominations or treaties, all formulation of treaties, initiation of nominations to public office under the United States, as well as formulation of policies in general, are undertaken without obtaining prior advice from the Senate. In an indirect sense, of course, the Senate gives advice, for by refusing to approve when submitted, the President is informed negatively that the Senate's advice through consultation with certain Senators of influence, or party leaders, had better been obtained ab initio. The presidential practice, attacked as unconstitutional by some, of appointing a number of key Senators on commissions to negotiate treaties, is a recognition on the part of the Chief Executive that from practical considerations the Senate may not be ignored even in matters of advice, indirect though it may be. Constitutionally, however, negotiation as an act is solely the function of the President, as the affairs of state have eventually evolved.

To buttress and maintain this strong position of independence on the part of the Executive, there has been created a doctrine of "affairs of State" which may prevent the Senate from obtaining documents or securing information from the various departments that would enable it to pass resolutions or reject nominations or treaties, if the President refuses to grant such information, thus preventing the Senate's giving effectual advice

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19 Dewhurst, "Does the Constitution Make the President Sole Negotiator of Treaties?" 30 Yale Law Journ. 478; Brandeis, J., dissenting, in Myers v. United States (1926, 272 U. S. 52, at pp. 264, 265.
in a positive way on governmental affairs to the President. The recent conflict between Senators and President Hoover over submission of so-called secret understandings between the President or Secretary of State and the Government of Great Britain over the proposed limitation of naval armaments, is only a recurrence of other similar controversies throughout the national history. Quite naturally, the contention of the Senate is that it cannot adequately perform its function of approval of treaties, or nominations to public office, unless it has all the documents pertinent to the issues. On the other hand, the President in his superior position of contact with foreign powers, and his intimate acquaintance—in theory at least—with the qualifications of nominees for public office, may in certain instances feel that the public welfare would be jeopardized should he divulge matters of certain character. Precedent and sound governmental practice and policy support the President in this position. The Senate may exercise its constitutional right, in retaliation, by refusing to approve a treaty, or approve it subject to reservations, or reject a nominee submitted by the President, and this may cause embarrassment to the Chief Executive; but that is the extent of the power of the Senate, to object.

This doctrine of presidential independence has not had judicial recognition in any express precedent, but it would probably receive the judicial blessing were a justiciable issue ever presented so that it could be properly raised; for being so well entrenched in usage, it seems improbable the courts would refuse to recognize it, or would review the President's determination that affairs of State precluded access by the Senate to certain types of information. The well-established doctrine of judicial non-review of so-called "political" questions would argue strongly for protection from attack under the Constitution of this extra-constitutional practice. Nonetheless, an impartial observer without knowledge of this development might carefully search the written Constitution and not become conversant with this practice or that of no longer consulting the Senate as a body.

for advice in government. Written constitutions or statutes do not alone mirror all the political institutions, governmental practices, or laws of a given people at a given period of time in their history. In truth, government and practical politics cannot be cramped within these written constitutions or statutes, just as the latter cannot be enforced if strong habits and customs of the people run counter to them.

Another custom on the part of the President in relation to making nominations to public office has become well established—that is, to consult not only individual Senators of the same political faith with him, but also similar politically minded members of the lower House. Nowhere in the formal Constitution is information given the Chief Executive from what sources he shall nominate officials for public office under the United States; hence, what is not forbidden, under the Rooseveltian theory is impliedly permitted, since there is no new federal power or authority delegated to the Central Government. As matter of fact and practice, however, nominations are often made by other parties than the President, who only formally approves the nominees, or rubber-stamps them, unless of course the suggested nominee is, in the President's opinion, unfit for the proposed office. Mr. Roosevelt took the position that he would insist on a certain standard of qualification, but would in other respects observe the usage already clearly established. This has probably also been the attitude of other incumbents of this high office, though not expressly announced. Especially would, and should, this be the case in appointments to the judiciary or other positions of responsibility and trust, where sound training, ability, and high character should be outstanding elements of qualification. That a President can be mistaken in judging whether or not a nominee measures up to the standard set is not to be wondered at in view of the hundreds of thousands of offices lying within his appointive power. Perhaps party loyalties and pressure from friends and organizations should share the blame with the President, where there has been any, in cases of

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26 Caffey, "Federal Executive Power," supra, note 18, pp. 3 and 5, states, that up to 1921, there were 15,000 Presidential appointees; and more than 568,000 of all types of appointments to office.
appointment of men who either were not qualified or who sub-
sequently became disqualified. The late Henry Cabot Lodge
justified this presidential practice of consulting individual
Senators of the same political party in making nominations, by
arguing that the Senate was by the Constitution made the adviser
of the President. In rebuttal, it has been said that the prac-
tice ought therefore to include Senators of a different political
persuasion, which is seldom the case, and that it should include
the Senate as a body, and not merely a part. The point has
further been argued that the practice is extra-constitutional in
that it includes among its advisers members of the lower
House. If Mr. Lodge was seeking constitutional justification
for the usage, he gave the wrong reason, rather than no reason,
to support it, as will presently appear. However, this may be,
by means of these usages in nomination to public office, entirely
unknown to the written Constitution, a veritable machine in
government, in fact, a super-government, has been created out-
side the pale of the fundamental Charter. There would seem to
be no legal method of attacking this practice, though it may
keep out of office men of strength and ability and put into office
men of mediocre qualifications, because the former are persona
non grata to local Congressmen or Senators, who have power to
place names in nomination to the President. Once the nomina-
tion is made, the normal practice will be approval by the Senate,
because of the party system of politics. It is matter of common
knowledge in American election machinery that the highly
important matter is to secure nomination; thereafter, if the
nominee chances to be with the winning party, he is automati-
cally elected, though the people preferred, in the first instance,
another nominee. On the other hand, the party system of carry-
ning on governmental affairs is itself unknown to the formal
Federal Constitution, the latter contemplating, perhaps, that
this method was an inevitable concomitant of government, and
thus adopting it sub silentio. However this may be, it would
seem that the President in numerous instances could not secure

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27 Kenneth C. Sears, “The Appointment of Federal District Judges,”
28 “A Frontier Town and Other Essays” (ed. 1906), p. 76.
29 H. W. Horwill, “The Usages of the American Constitution” (ed.
1925), pp. 131-132.
30 C. E. Merriam, “The American Party System” (ed. 1922), pp. 345
et seq.
adoption of his administrative program in Congress unless this system of mutual patronage obtained between himself and individual Senators and Representatives of his own party at least, not to mention those of opposite political affiliations. No perfect form of government has yet been devised among men, nor can one be formed that will fit in all its details into a rigid formulation of political doctrine or governmental machinery embodied in a blueprint laying down the fabric of government. Some play, some give within the machinery itself, to allow for friction and to lubricate the mechanism, is an indispensable element.\textsuperscript{81} In fact, stated otherwise, practical necessities of practical government compel development of usages of government unforseen by the drafters of the Constitution. In the words of Mr. Justice Holmes, a Constitution creating a framework of government is made for people of varying views, and does not enact a static government; and as Chief Justice Marshall put it,\textsuperscript{32} a Constitution was adopted for ages to come and must therefore be adapted from time to time to changing circumstances. It does not follow, however, from this viewpoint that as a result we have no longer any Constitution left to us, but only judicial decisions that may emasculate the Constitution, or practices that may ignore it, as some have maintained. On the contrary, the broad formulas of government enunciated in the Constitution are still most effective safeguards to life, liberty, and property when interpreted and applied by a highminded judicial personnel, trained in constitutional law and the habits of judicial reasoning, based on ideas of right and justice, and not on caprice. There is also the protection of a vast body of precedents created by the Supreme Court of the United States during the past century construing and applying the formal Constitution, all of which will ordinarily bind the judges in new problems. But amendments are too cumbrous, too slow a method, to adjust governmental needs and constitutional requirements in numerous situations where no vital, or new, powers of government are being created; and, there being nothing to hinder in the written Constitution, and being necessary by-products of practical gov-

\textsuperscript{81}“Some play must be allowed for the joints of the machine.” Holmes, J., in \textit{Missouri, K. \& T. Ry. Co. v. May} (1904), 194 U. S. 267.

\textsuperscript{32}\textit{McCulloch v. Maryland} (1819), 4 Wheaton, 316.
ernment, these practices of making nominations to office would seem to be sound political expedients.33

Some publicists are of opinion that the President, in certain types of foreign relationships, may create extra-constitutional practices by means of a carefully-chosen nomenclature not offensive to the Constitution itself.34 Thus, Mr. Wilson appointed Mr. Elihu Root his special "agent," but with rank of "ambassador," to represent him and make certain investigations in Russia, not placing his name for confirmation before the Senate. Nothing could be done about it, had there been such intention, in a constitutional sense; for the President, in order to discharge his duty under the Constitution, to inform Congress from time to time of the "state of the Union," as well as to enter preliminary negotiations looking toward a treaty, or toward recognizing a foreign power which may be engaged in creating a de jure government from a de facto one, has wide powers of discretion. Nonetheless, interesting questions might arise in a constitutional sense should Congress be asked for funds to cover expenses, or to provide salaries, for officials holding public office under the United States, without having been appointed under the method designated by the Constitution.35 The so-called contingent fund36 provided for by Congress to take care of expenses of this nature in foreign affairs would probably save the Chief Executive embarrassment in such appointments, so far as his own personal agents were concerned. But if Congress abolished the contingent fund, where would be the duty on Congress to compel its restoration? Conceding a duty, how would it be enforced? Another method of accomplishing extra-constitutional results through a device of nomenclature is to be found in the so-called "executive agreements" entered into by the President, where there was no treaty to be carried out, or no congressional authority conferred. Mr. Roosevelt entered into a number of such agreements with foreign powers, without

34 O. A. Beard, "American Government and Politics" (ed. 1924), pp. 204-205.
36 1 Stat. at Large, 128; and cf. Totten v. United States (1875) 92 U. S. 106.
submitting these understandings to the Senate. Perhaps he could have obtained no approval from the Senate, or he may have felt the Senate's approval would be delayed, and immediate action was necessary. In some cases, these understandings served the bases for negotiations for subsequent treaties. But the point is that he executed them without consulting any other organ of government. Their legal status has been approved in judicial decisions where the President has had congressional authority, or where he entered into them to execute a treaty made prior to their execution. But judicial authority is scant for upholding his actions where he acted entirely without any prior authority of any kind. However, as commander-in-chief, and under other constitutional relationships, strong argument can be made that many of these understandings were by-products of such relationships, even though there was no affirmative or positive authorization so to act found in the written Constitution. But not being "laws of the land" so as to bind or compel action in a domestic sense, these executive agreements would have found difficulty of enforcement in the courts in this country, even though the courts themselves might not have reviewed the action of the President directly. We have decisions, however, holding that if an Executive order has been illegally issued, the official acting under it is not protected in the event an action by a private citizen for damages is brought against him.

Other instances of accomplishing results not known to the Constitution might be given; but they would serve no useful purpose other than to pile up accumulative evidence.

Extra-Constitutional Practices Evolved by Congress.

As has been indicated, no justiciable issue arises for review of alleged unconstitutional practices unless somebody feels aggrieved at some governmental action, and can prove that he is aggrieved. Thus, a wide avenue is opened to many probably unconstitutional enactments which stand on the statute books until in some actual judicial proceeding they are called in question; and, if necessary in disposing of the case, and not otherwise, they will be reviewed by the proper judicial tribunal.

When it is contemplated that less than one hundred federal statutes have been overthrown throughout the life of the Republic, while thousands have been enacted, it will be seen how true the above generalization is.

In the relationships between Congress and the President, it rarely happens that either of these agencies of Government will inter se question the validity of legislation or executive orders; that is, after the legislation has been enacted or the executive order has been issued. Some private litigant may do so, and frequently does, where rights are alleged to be infringed, or duties enlarged; but seldom, if ever, in the event of a disputed issue between Congress and the President over a question of constitutional power, will one or the other of these forces in government raise the question. Two instances come readily to mind.

In 1913, Congress, seeking to control presidential action in foreign affairs, enacted that "hereafter the President shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so." That this was and is a deliberate attempt to control presidential discretion in his conduct in foreign affairs must be admitted by any candid and impartial thinker; for, the President in exercising his duty to negotiate treaties in the first instance, must, without being compelled to obtain the prior consent of Congress, have complete freedom in entering into various conferences as prerequisites to negotiations. Probably, although this is not conclusively settled in our constitutional law, Congress might withhold appropriations for such purposes in the event the President negotiated treaties which that body did not approve, although the Senate, and not Congress, approves treaties, and this withholding of action to enforce the treaty might more probably be the case where Congress was controlled by a political party in opposition to that of the President. But to require as a condition precedent that the President first obtain consent of Congress to initiate the international congress, is an unwarranted trespass upon the duty...

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of the Executive and his discretion in carrying out his duties. While it cannot be said to be unconstitutional because not yet so adjudicated in a proper case or controversy, nonetheless it is extra-constitutional at least; and perhaps would, if the question could be raised, also be declared unconstitutional, as repugnant to the division of powers of government separating the Executive function from that of the Legislative or Judicial in the federal fabric of government. But *quaere*, how could the issue properly be raised or presented? The Federal Supreme Court does not "sit at the gates" of Congress, striking down invalid legislation, nor does it wield the "big stick" to compel co-equal power in government, the Congress to do its duty, or to refrain from breaching it, under the Constitution. So to think of the Court is the great popular delusion about it. Hence, extra-constitutional government obtains between the Congress and the Chief Executive, unless the latter chooses to ignore it and assume the risks and the embarrassment to which he may be experienced.

The other example is equally patent in extra-constitutional-ity. This is the Resolution of the Senate,* of October 18, 1921, made a reservation to the treaties of peace between the Government of the United States and the respective Governments of Germany, Austria, and Hungary, providing that the "United States shall not be represented or participate in any body, agency, or commission, nor shall any person represent the United States as a member of any body, agency, or commission in which the United States is authorized to participate by this Treaty, unless and until an Act of Congress of the United States shall provide for such representation or participation." The practice of the Chief Executive, particularly Mr. Harding, in resorting to "unofficial observers" is well known in our recent political and governmental maneuvers. Whether he felt that he was bound by this Resolution so to do, on advice of his legal and political advisers, or whether he did this out of a spirit of *camaraderie* for his former associates in the Senate, is conjectural and problematical. Nevertheless, this Resolution would appear to be as much an invasion of presidential power as the law of 1913, already mentioned.* For the President, under

the duty to execute the federal laws, of which a treaty is by the Constitution declared "the supreme law of the land," has wide choice of means in securing their enforcement; moreover, in his relations with foreign powers under his constitutional right "to send and receive ambassadors," broad powers not only of recognizing new foreign States or governments, but also carrying on dealings with them, are of necessity and constitutional right permitted the President. In the Resolution of 1921, appears to be a further attempt to "hamstring" the Executive in his own constitutional functions. But in none of the two examples cited has any question, so far as is known, been raised by the Presidents since 1913, challenging either the power of Congress or the jurisdiction of the Senate in these matters. Whatever right the Congress has to refuse legislation appropriating funds to execute treaties where funds are necessary, is besides the issue.\[43\] During discussions relative to the Jay Treaty in the time of Washington, the lower House, through Jeffersonian practice, sought to prevent enactment of such legislation, but the Federalists were able eventually to defeat such proposal. As Mr. Willoughby has pointed out,\[44\] while the Senate in its prerogative of approving treaties has never conceded the power of the lower House to refuse to vote appropriations for executing treaties where such are necessary, nonetheless provisos by the Senate to treaties of that character have usually been inserted. Mr. Taft was of the opinion that under its prerogative to enact money bills, the lower House was under no legal duty to provide such legislation in the enforcement of treaties where money was necessary, although he was of opinion that there was a "moral" duty so to do.\[45\] However, the issue raised by the Resolution of 1921 is not of that character, and, as already pointed out, attempted to thwart presidential action looking toward preliminary conferences and conventions.

In the legal questions presented by the Resolution, no justiciable issue has been presented by any private litigant; thus there has been no judicial declaration of unconstitutionality. A common practice in somewhat delicate problems of this nature, where the conflicting claims of co-equal powers in government

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\[43\] Supra, note 35.
\[44\] Willoughby, op. cit., pp. 555-560.
\[45\] Taft, op. cit., p. 115.
are at issue, is for the judicial tribunal to evade the question, sidestepping it if it is at all possible, by deciding the issue on some other ground. Perhaps a court might find that a private litigant raising the issue had not really been damnified, conceding he could originate a case or controversy attacking these alleged infringements on Executive power. That the President himself would challenge the validity of these measures, while not unthinkable, is hardly probable, so far as making them outright issues is concerned. He might ignore them in practice, and then there would be no remedy available against him other than impeachment, which seems both an unlikely as well as an impracticable procedure. If Andrew Johnson could not be impeached on the charges made against him, all the more on lesser charges would it be improbable. Suffice it to say, these attempts by Congress and the Senate have all the earmarks of extra-constitutionality, enacted probably because of a feeling that their own constitutional prerogatives had been either ignored or imposed upon by certain Presidents in those peaceful conflicts which are almost certain to arise between the President and Congress in the execution of administrative policies, especially where the latter is controlled by a political party opposite to that of the President. After all, the measures discussed are probably political maneuverings, more or less innocuous.

The Senate has attracted further publicity to itself more recently in its practice of excluding from membership Senators elected by constituent States who, in the judgment of the Senate, were not qualified to sit in its House. By Article 1, section 5, the Constitution expressly confers on the Senate, in fact each House, power to judge of the elections, returns, and qualifications of its own members; but the Constitution further provides, in Article 5, that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." No case or controversy in the judicial sense has thus far been decided raising the relative powers of the Senate under the provisions quoted, other than cases of contempt proceedings to compel witnesses to testify or submit evidence where investigations are carried on relative to candidates for the Senate or House.46 However, it is matter of common knowledge that the Senate did exclude from membership William S. Vare, Senator from the State of

46 Barry v. United States (1929), 279 U. S. 597.
Pennsylvania, and Frank L. Smith, from the State of Illinois, because of allegations and proof of unduly large expenditures by interested parties in the primaries. Although in the decision of *Newberry v. United States,*\(^4\) in 1921, the Federal Supreme Court, by a 5 to 4 vote, had held that the primaries were not part of the elections themselves, as to be within the legislative jurisdiction of Congress, nevertheless the Senate under its power to scrutinize and determine the qualifications of its members could inquire into the question how much third parties had financed the nominee in the primaries, which undoubtedly is sound. How far, on the other hand, preliminary investigations could be made of a mere nominee, not yet elected to the Senate, as was done in the case of Ruth Hanna McCormick by the Nye Committee, is not so clear. But a strong case supportive of the right of the Senate even in this investigation could be made on the ground that the Senate has a right to protect itself by getting the evidence early, without waiting until the nominee were elected, if at all. So far as is known, in Mrs. McCormick's case there was no allegation of expenditure of funds other than her own, which likewise puts another viewpoint into the case. However, the real point in excluding a Senator who has been elected, but not yet been seated in the Senate, is whether the Senate is limited in its power by constitutional provisions; in other words, whether the power to exclude is absolute, or is subject to constitutional limitations.\(^4\) By some it has been argued that the correct constitutional procedure should be to seat the Senator, and thereafter, to exclude on a two-thirds vote, for otherwise the selection itself of a Senator is in the hands of the Senate, and not in the people of the State which elected him, despite the defect in his qualifications pointed out by the Senate.\(^4\) It has, however, been further argued, in particular by James M. Beck,\(^5\) that the Senate is by the Constitution restricted in its exclusion powers to those qualifications mentioned expressly, or by inference, within the Constitution itself, namely, age, residence in the State from which he comes, validity of

\(^4\) (1921) 256 U. S. 232.


\(^4\) Thurber, supra, note 47.

\(^5\) James M. Beck, “The Vanishing Rights of the States” (1929), chs. 1-8; ibid., “May It Please The Court,” ch. XII.
credentials, etc., and there is no power whatever to exclude on any other grounds. As Mr. Beck has said: "Thus a coup d'etat is at any time possible. * * * If such a power exists, then the greatest of all States' rights has become little more than a 'scrap of paper'."\textsuperscript{51} Taking this view of the matter, the various provisions of the Constitution regarding equal suffrage of the States in the Senate, with the right of the Senate itself to determine the qualifications of its own members, are harmonized and made consistent. Such a view has much to commend itself to reason and good government.\textsuperscript{52}

It is not possible, under present constitutional practice and theory, for a "case" or "controversy" to be framed before a proper federal judicial tribunal by means of which challenge can be had of this action of the Senate. For, if jurisdiction were taken by a federal court and the merits of the controversy heard, which is doubtful, there would be no effective method of enforcing the judicial decision, because if the Senate refused to abide by it, contempt proceedings could be of no avail, in that the Senators are free from arrest, as well as other judicial processes, while the Senate is in session; and it would, of course, be of no value to the ousted complainant Senator to take steps to obtain relief subsequent to an adjournment of the Senate when process might be served. Moreover, it is extremely doubtful whether the federal court, assuming it took jurisdiction, would enter upon the merits of the issues involved, in that they were questions solely to be settled by that branch of Federal Government in which the Constitution had reposed the power to make the decision in the first place. It would be quite a simple solution of the controversy for the court to invoke the doctrine of "political" questions and dismiss the entire controversy from consideration, as an invasion within or trespass upon an area committed solely to the determination of a co-equal power in government. In such constitutional issues as these it would


\textsuperscript{52} Other publicists have taken the position that the Governor may appoint by ad interim appointment some other individual acceptable to the Federal Senate, and thus the State not be deprived of its representation. The difficulty with this view is said to be that the appointment of the Governor in such case is usually restricted to situations where there is a vacancy, and that the elections have indicated otherwise. But this would not seem a valid objection, in my opinion.
seem desirable to be able to call upon the Supreme Court of the United States for a so-called declaratory judgment by the litigant, or advisory opinion by the Senate itself, construing the Federal Constitution with authority and finality, even though there were no actual means available to enforce the so-called moot judgment. Under present constitutional machinery, of course, such a method is not allowable because of absence of an actual case or controversy wherein some litigant is attempting to prove himself aggrieved in his property or personal rights. Were an amendment to the Constitution drafted and ratified providing for such a procedure, public opinion would be the sanction of enforcement after the judgment had been rendered. On the other hand, under the power of Congress to create so-called "legislative" courts, it is possible that no amendment would be necessary to provide for a tribunal with power to render these declaratory or advisory opinions, for Congress has wide powers in the conferring of judicial power on purely legislative courts, as, for example, it has done in the jurisdiction of the Court of Claims to hear suits against the United States in contracts, express or implied, "not sounding in tort." The large difficulty in such a procedure would be that this tribunal would not have the same degree of prestige in construing the Constitution as the Supreme Court of the United States would and does have, and that Congress, having created the tribunal, could also refuse to follow its decisions. Moreover, no appeal would lie to the Supreme Court itself in that the latter as a constitutional court could not by Congress be empowered to assume such jurisdiction because a case or controversy was lacking. Thus, all in all, the Senate in taking the position it has in excluding certain Senators because in its judgment their qualifications were inadequate, is able to do so without challenge under the Constitution.

"A somewhat similar provision is found in the new German Constitution for settling conflicting jurisdictional disputes between the Government of the Reich and the respective State governments. Cf. Walter Simons, Ex-President of the Supreme Court of the Reich, "Relation of the German Judiciary to the Executive and Legislative Branches of the Government," 54 Reports of the American Bar Association, p. 226, at p. 237. Judge Simons, however, confesses that he prefers the American system of not giving advisory opinions so far as the Federal Supreme Court is concerned.

"And as found also in Ex parte Bakelite Corporation (1929) 279 U. S. 438; and see Katz, "Federal Legislative Courts," 43 Harvard Law Review, 894."
The Senate has been charged with creating extra-constitutional government, if not "unconstitutional" rule, in various practices within that body during the process of legislation, or seeking information on which it alleges legislation is to be enacted. My colleague, Colonel Wigmore, has within recent years written profusely and authoritatively on these subjects; in fact, it may with truth be said that it was he who first threw the searchlight of criticism on this development in constitutional law in this country. The American authority on the law of evidence in the Anglo-Saxon world, quite naturally has reacted in a hostile fashion to the so-called "grand jury" and inquisitorial practices of the Senate in making investigations into the business and other practices of individuals thought to possess information that might expose certain individuals and corporations to unwelcome publicity, if not to prosecution, for violation of federal law. Not being expressly bound in the Constitution by any particular rules of evidence, senatorial committees engaged in investigating numerous problems alleged to be within their jurisdiction may be governed by mixed motives, and probe into matters and ask questions of subpoenaed witnesses entirely irrelevant and unconstitutional if presented in a court and judged by common law rules of evidence. Unfortunately, the judicial decisions on this subject are not as precise or profuse in their discussions of constitutional safeguards, as they might be. Suffice to say, the holdings which do raise problems that are more or less pertinent, appear to require the Senate or a committee to allege at least that the investigation is to concern a proposed legislative enactment, or relates to the qualifications of its members, or is within some other power granted to the Senate by the Constitution, and that the questions asked on these subjects must have pertinency to the subjects being investigated as conditions precedent to punishment of a recalcitrant witness for contempt. But no particular requirement is laid down by the courts as to admitting evidence, or to harassing a witness, except that he may generally refuse to answer questions.

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put him where the answers or evidence furnished would incriminate him if there is no immunity statute protecting him in his answers. The aggrieved individual in these senatorial grand jury inquisitions, as they have been called, will have his day in court if contempt proceedings are instituted against him and he is taken into custody, by petitioning for the writ of habeas corpus to that federal judicial tribunal that may have jurisdiction over the person thus holding him. On the hearing in court, all these matters above discussed will be considered by the court on the rule to show cause why the petitioner should not be discharged. Needless to say, however, the individual questioned by a committee of the Senate or the lower House can, during the process of inquisition, be exposed to public ridicule, contempt, and even hatred, because of the pressure exerted on him at the time, largely at the hands of investigators, who, conceding their motives to be of the highest, know that they are not bound by any particular constitutional rules in the proceedings other than those already mentioned. The restraint of high-mindedness is often flagrantly absent in these extra-constitutional practices of government. But a desire to play a political role or to make the front page of the newspapers must and will be served in some of these investigations by the Senate.

The method by which an individual Senator may prevent not only consideration, but also enactment itself, of important legislation, has likewise been attacked as not only an extra-constitutional, but even an unconstitutional, development of government. Colonel Wigmore has referred to this practice as the "liberum veto," in these words: "Today no legislation can be enacted in the Senate (except on the few issues which directly involve opposite party policies, e.g., the tariff) if a single Senator forbids. This is not in the Constitution. Nor will you find it in the Rules of the Senate. It is a tacit understanding. But it is as solid a fact as the Grand Canon of the Colorado. It is called senatorial courtesy. * * * It is not merely technically unconstitutional; it is actually blocking all legislation." It will be recalled that when Vice-President Dawes first presided over the Senate, a vigorous attack was made by him on this practice. Nothing resulted, however, from this well-meaning speech to

speed up the work of the Senate by abolishing this senatorial courtesy practice. It may have resulted in alienation from Mr. Dawes of certain Senators of influence in his party; that it helped him politically is doubtful. That the rule is still in force is certain. On the other hand, too severe condemnation must not be made of this practice on the part of senators. For government is a practical matter, and bargaining for advantage is one of the incidents of politics. Moreover, it is also true that each senator has the right, as well as the duty, to weigh proposed legislation with care, so that no undue haste will result in unwise and unsound legislation. Every conceivable angle of a proposed bill can thus be considered even before it is introduced formally into the Senate. Critics of the practice, on the other hand, maintain that it results in the creation of a “fifth wheel” to the vehicle of government, which impedes its functions; or, to change the metaphor, it gives as many veto powers over proposed legislation as there are senators, and thus is unconstitutional. Granting all this, what is to be done about it? Is there any way to compel removal of this extra-constitutional practice? Probably not, unless individual senators in future are led to believe that it is destroying their usefulness as legislators, and they then will agree not to practice this so-called “senatorial courtesy.” That they will do so seems unlikely so long as the returns from this powerful source of bargaining power are so valuable for practical political purposes.

Regarding the geographical limitations imposed on congressmen in the Federal Government, there has been another extra-constitutional development, not found within the formal constitution itself. Beyond requiring that a representative when elected must be a resident of the State from which he comes, the Constitution imposes no further geographical restriction.58 The constitutional theory is that the constituency of a congressman is the entire State itself, not some localized area or district; in fact, congressional districts themselves are unknown to the Constitution. There is no argument being now made that these usages which have grown up unknown to constitutional government are unwise or impractical; the sole motive is one of exposi-

tion of these developments outside the pale of the Constitution. Lord Bryce designated the practice of compelling a congressman to be a resident of a certain district within the State from which he comes as "a custom old, universal, and as strong as law itself." But that a statute restricting nominees to certain local residential districts would be constitutional is doubtful, in view of the express provisions found in the Constitution. Hence, the sanction is found outside the Constitution, even though not expressly prohibited by it. Various effects follow from this extra-constitutional practice, of vital consequence to the nation as a whole. It excludes from Congress able men who chance to live in a congressional district where already there is a plethora of political incumbents; nor can these men offer themselves to other constituencies where there is a dearth of politically qualified aspirants—unless, of course, they change their party affiliations, an infrequent practice. After election, the congressman must see that he pleases his own local constituency, or his career is at an end. As has been well said by Mr. Horwill, in "The Usages of the American Constitution:"—"The knowledge of this sword of Damocles hanging over him stimulates many a representative to exert himself inordinately in securing largesse for his constituency from the public purse." Sectionalism and parochialism are thus paramount in motivating conduct of representatives; while this has advantages for government, it also has obvious disadvantages, not pertinent to raise here. The point being made is that one's political career has doubtful continuity; for if he gains too much strength, he runs the risk of having a gerrymander practiced on him through a revision of the number of congressional districts by the State legislature under control of the opposite party; if he does not please his constituents, someone else will be chosen by the local residential party bosses who will "deliver the goods." Professor C. A. Beard has said that men of ability and independence of viewpoint, men who seek a permanent career, do not as a rule fit into this system which has developed outside the Constitution; but that, on the contrary, the system develops "shrewd men with the qualifications of the successful horse trader," rather than statesmen. Perhaps this characterization is too inclusive and untrue because of its broad generalization, for there are, and

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60 Supra, Note 34, p. 29.
have been, numerous able congressmen and senators whose native ability alone has elevated them to official position. Furthermore, holding office gives the incumbent an advantage that the outsider does not possess, so that he undergoes an education that to some extent qualifies him if, at first, he lacks in qualification. But in view of the fact that senators are often recruited from the ranks of the congressmen who have "evolved" through the process described, and inasmuch as there have been numerous senators, in the words of Dr. Glenn Frank,61 "who bring to the politics of a planet the vision of a parish," there is much truth in the statement that the present system of the resident congressman, unknown in England, does not make for the most effective and highest type of government in America.

In the growth of extra-constitutional government as it relates to the legislative branch, it must not be overlooked that there have been instances of nonfeasance on the part of Congress, i. e., cases where Congress has itself refused to obey the plain dictates of the Constitution, and followed a practice of carrying on government unknown to the Constitution. Reference is in part to the refusal of Congress to re-appoint its membership after the census of 1910,62 probably explicable on the ground that the urbanization of the country would upset the equilibrium enjoyed by the rural elements in the House of Representatives. Nevertheless, the duty is plain, and stated in terms of positive requirement, that the House should re-appoint its membership after each census. There being no way in which to compel Congress to discharge its duty, no steps were taken until 1929 to remedy this situation, so that it might truthfully be said that since the census of 1910, the House of Representatives has carried on an extra-constitutional government, in refusing to re-organize and redistrict its members on the increased basis of population. Yet nothing could be done about it under the Constitution. An extra-constitutional practice had grown up alongside the Constitution. The Act of 1929, in at last making provision for re-appointment, recognized the duty on the part of

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Congress, but actual re-apportionment has not been, and will not be, made probably for some time.63

Nor has Congress provided adequate machinery by statute or other enforcement methods of the extradition clause in the Constitution, which provides that fugitives from justice fleeing to another State from that in which the crime was committed shall be delivered up on demand made on the Governor of the asylum State.64 Again, Congress has been charged with failure to enact legislation penalizing State authorities in imposing educational qualifications on colored voters and white alike, but which results in actual exclusion of colored citizens from the franchise, in violation of the Fifteenth Amendment, providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."65 Failure to act in these instances, as well as others which might be mentioned, has perpetuated extra-constitutional practices in government for which Congress has received criticism.

Exposition of the above developments in government naturally raises the query, how remedy these situations? This inquiry is not easily answered; no rough and ready, no precise or exact method of dealing with the problems is available. If one thinks that the Supreme Court is the vigilant sentinel sitting at the gate of Congress,66 ready to strike down invalid acts, or to impose constitutional duties on government, he is indulging in a popular delusion; for that tribunal has no such powers outside a "case" or "controversy" properly raising the questions. And, as already indicated, often no justiciable issues can be framed to effectuate such a desired review by the Court; and likewise, often the Court will evade the issues presented by holding them to be "political" questions, that is, questions better decided by the other departments of government to which, it is said, the Constitution has committed them for solution. In truth,

64 U. S. Rev. Stats. sec. 5278 reiterates substantially only the Federal constitutional provision (Art. IV, sec. 2), stating it "shall be the duty" of the executive authority of the asylum State to surrender the fugitive from justice, providing no other enforcement machinery. Cf. Ex parte Germain (1927), 258 Mass. 289.
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66 And see Guinn v. United States (1915), 258 U. S. 347. I personally doubt whether Congress has really been derelict in its duty here.
there are loopholes in the Constitution which permit these extra-constitutional practices to grow and flourish unchallenged by law. They are evolutions of the national mind and life that are unavoidable, and but illustrate the great and profound truth that that mind and life cannot be confined within four corners of a written instrument like a Constitution. Life is ever flowing, in incessant change, and no Canute of written governmental formulas can stay its progress. Extra-constitutional developments are inevitable by-products.

EDWIN F. ALBERTSWORTH.