CHAPTER V

THE PRESIDENT

EVERY one who undertakes to describe the American system of government is obliged to follow the American division of it into the three departments — Executive, Legislative, Judicial. I begin with the executive, as the simplest of the three.

The President is the creation of the Constitution of 1789. Under the Confederation there was only a presiding officer of Congress, but no head of the nation.

Why was it thought necessary to have a President at all? The fear of monarchy, of a strong government, of a centralized government, prevailed widely in 1787. George III. was an object of hatred: he remained a bogey to succeeding generations of American children. The Convention found it extremely hard to devise a satisfactory method of choosing the President, nor has the method they adopted proved satisfactory. That a single head is not necessary to a republic might have been suggested to the Americans by those ancient examples to which they loved to recur. The experience of modern Switzerland has made it still more obvious to us now. Yet it was settled very early in the debates of 1787 that the central executive authority must be vested in one person; and the opponents of the draft Constitution, while quarrelling with his powers, did not accuse his existence.

The explanation is to be found not so much in a wish to reproduce the British Constitution as in the familiarity of the Americans, as citizens of the several States, with the office of State governor (in some States then called President) and in their disgust with the feebleness which Congress had shown under the Confederation in its conduct of the war, and, after peace was concluded, of the general business of the country. Opinion called for a man, because an assembly had been found

to lack promptitude and vigour. And it may be conjectured that the alarms felt as to the danger from one man's predominance were largely allayed by the presence of George Washington. Even while the debates were proceeding, every one must have thought of him as the proper person to preside over the Union as he was then presiding over the Convention. The creation of the office would seem justified by the existence of a person exactly fitted to fill it, one whose established influence and ripe judgment would repair the faults then supposed to be characteristic of democracy, its impulsiveness, its want of respect for authority, its incapacity for pursuing a consistent line of action.

Hamilton felt so strongly the need for having a vigorous executive who could maintain a continuous policy, as to suggest that the head of the state should be appointed for good behaviour, *i.e.* for life, subject to removal by impeachment. The idea was disapproved, though it received the support of persons so democratically-minded as Madison and Edmund Randolph; but nearly all sensible men, including many who thought better of democracy than Hamilton himself did, admitted that the risks of foreign war, risks infinitely more serious in the infancy of the Republic than they have subsequently proved, required the concentration of executive powers into a single hand. And the fact that in every one of their commonwealths there existed an officer in whom the State constitution vested executive authority, balancing him against the State legislature, made the establishment of a Federal chief magistrate seem the obvious course.

Assuming that there was to be such a magistrate, the statesmen of the Convention, like the solid practical men they were, did not try to construct him out of their own brains, but looked to some existing models. They therefore made an enlarged copy of the State Governor, or to put the same thing differently, a reduced and improved copy of the English king. He is George III. shorn of a part of his prerogative by the intervention of the Senate in treaties and appointments, of another part by the restriction of his action to Federal affairs, while his dignity as well as his influence are diminished by his holding office for four years instead of for life.[1] His salary is too small to permit him

[1] When the Romans got rid of their king, they did not really extinguish the office, but set up in their consul a sort of annual king, limited not only by the

either to maintain a Court or to corrupt the legislature; nor can he seduce the virtue of the citizens by the gift of titles of nobility, for such titles are altogether forbidden. Subject to these precautions, he was meant by the constitution-framers to resemble the State governor and the British king, not only in being the head of the executive, but in standing apart from and above political parties. He was to represent the nation as a whole, as the governor represented the State commonwealth. The independence of his position, with nothing either to gain or to fear from Congress, would, it was hoped, set him free to think only of the welfare of the people.

This idea appears in the method provided for the election of a President. To have left the choice of the chief magistrate to a direct popular vote over the whole country would have raised a dangerous excitement, and would have given too much encouragement to candidates of merely popular gifts. To have entrusted it to Congress would have not only subjected the executive to the legislature in violation of the principle which requires these departments to be kept distinct, but have tended to make him the creature of one particular faction instead of the choice of the nation. Hence the device of a double election was adopted, perhaps with a faint reminiscence of the methods by which the Doge was then still chosen at Venice and the Roman Emperor in Germany. The Constitution directs each State to choose a number of presidential electors equal to the number of its representatives in both Houses of Congress. Some weeks later, these electors meet in each State on a day fixed by law, and give their votes in writing for the President and Vice-President.[1] The votes are transmitted, sealed up, to the capital and there opened by the president of

short duration of his power, but also by the existence of another consul with equal powers. So the Americans hoped to restrain their President not merely by the shortness of his term, but also by diminishing the power which they left to him; and this they did by setting up another authority to which they entrusted certain executive functions, making its consent necessary to the validity of certain classes of the President's executive acts. This is the Senate, whereof more anon.

[1] Originally the person who received most votes was deemed to have been chosen President, and the person who stood second, Vice-President. This led to confusion, and was accordingly altered by the twelfth constitutional amendment, adopted in 1804, which provides that the President and Vice-President shall be voted for separately.

the Senate in the presence of both Houses and counted. To preserve the electors from the influence of faction, it is provided that they shall not be members of Congress, nor holders of any Federal office. This plan was expected to secure the choice by the best citizens of each State, in a tranquil and deliberate way, of the man whom they in their unfettered discretion should deem fittest to be chief magistrate of the Union. Being themselves chosen electors on account of their personal merits, they would be better qualified than the masses to select an able and honourable man for President. Moreover, as the votes are counted promiscuously, and not by States, each elector's voice would have its weight. He might be in a minority in his own State, but his vote would nevertheless tell because it would be added to those given by electors in other States for the same candidate.

No part of their scheme seems to have been regarded by the constitution-makers of 1787 with more complacency than this,[1] although no part had caused them so much perplexity. No part has so utterly belied their expectations. The presidential electors have become a mere cog-wheel in the machine; a mere contrivance for giving effect to the decision of the people. Their personal qualifications are a matter of indifference. They have no discretion, but are chosen under a pledge — a pledge of honour merely, but a pledge which has never (since 1796) been violated — to vote for a particular candidate. In choosing them the people virtually choose the President, and thus the very thing which the men of 1787 sought to prevent has happened, — the President is chosen by a popular vote. Let us see how this has come to pass.

In the first two presidential elections (in 1789 and 1792) the independence of the electors did not come into question, because everybody was for Washington, and parties had not yet been fully developed. Yet in the election of 1792 it was generally understood that electors of one way of thinking were to vote for Clinton as their second candidate (*i.e.* for Vice-President) and those of the other side for John Adams. In the third

[1] "The mode of appointment of the chief magistrate of the United States is almost the only part of the system which has escaped without some censure, or which has received the slightest mark of approbation from its opponents." —*Federalist*, No. lxvii., cf. No. l. and see the observations of Mr. Wilson in the Convention of Pennsylvania; Elliot's *Debates*, vol. ii.

election (1796) no pledges were exacted from electors, but the election contest in which they were chosen was conducted on party lines, and although, when the voting by the electors arrived, some few votes were scattered among other persons, there were practically only two presidential candidates before the country, John Adams and Thomas Jefferson, for the former of whom the electors of the Federalist party, for the latter those of the Republican (Democratic)[1] party were expected to vote. The fourth election was a regular party struggle, carried on in obedience to party arrangements. Both Federalists and Republicans put the names of their candidates for President and Vice-President before the country, and round these names the battle raged. The notion of leaving any freedom or discretion to the electors had vanished, for it was felt that an issue so great must and could be decided by the nation alone. From that day till now there has never been any question of reviving the true and original intent of the plan of double election. Even in 1876 the suggestion that the disputed election might be settled by leaving the electors free to choose, found no favor. Hence nothing has ever turned on the personality of the electors. They are now so little significant that to enable the voter to know for which set of electors his party desires him to vote, it is often thought well to put the name of the presidential candidate whose interest they represent at the top of the voting ticket on which their own names are printed. Nor need this extinction of the discretion of the electors be regretted, because what has happened in somewhat similar cases makes it certain that the electors would have so completely fallen under the control of the party organizations as to vote simply at the bidding of the party managers. Popular election is therefore, whatever may be its defects, a healthier method, for it enables the people to reject candidates whom the low morality of party managers would approve.

The completeness and permanence of this change has been assured by the method which now prevails of choosing the electors. The Constitution leaves the method to each State, and in the earlier days many States entrusted the choice to

[1] The party then called Republican has for the last sixty years or so been called Democratic. The party now called Republican did not arise till 1854.

their legislatures. But as democratic principles became developed, the practice of choosing the electors by direct popular vote, originally adopted by Virginia, Pennsylvania, and Maryland, spread by degrees through the other States, till by 1832 South Carolina was the only State which retained the method of appointment by the legislature. She dropped it in 1868, and popular election now rules everywhere, though any State may go back to the old plan if it pleases.[1] In some States the electors were for a time chosen by districts, like members of the House of Representatives. But the plan of choice by a single popular vote over the whole of the State found increasing favour, seeing that it was in the interest of the party for the time being dominant in the State. In 1828 Maryland was the only State which clung to district voting. She, too, adopted the "general ticket" system in 1832, since which year it was universal until 1891, when Michigan reverted to the district system, the then dominant party in her legislature conceiving that they would thereby secure some districts, and therefore some electors of their own colour, although they could not carry the State as a whole.[2] (This in fact happened in 1892.) Thus the issue comes directly before the people. The parties nominate their respective candidates, as hereafter described (Chapters LXIX. and LXX.), a tremendous "campaign" of stump speaking, newspaper writing, street parades, and torchlight processions sets in and rages for about four months: the polling for electors takes place early in November, on the same day over the whole Union, and when the result is known the contest is over, because the subsequent meeting and voting of the electors in their several States is mere matter of form.

So far the method of choice by electors may seem to be merely a roundabout way of getting the judgment of the people. It is more than this. It has several singular consequences, unforeseen by the framers of the Constitution. It has made the election virtually an election by States, for the system of choosing electors by "general ticket" over the whole State usually causes the whole weight of a State to be thrown into the

[1] Colorado, not having time, after her admission to the Union in 1876, to provide by law for a popular choice of electors to vote in the election of a President in the November of that year, left the choice to the legislature, but now elects its presidential electors by popular vote like the other States.

[2] Michigan repealed this law in 1893, and now elects by "general ticket."

scale of one candidate, that candidate whose list of electors is carried in the given State.[1] In the election of 1884, New York State had thirty-six electoral votes. Each party ran its list or "ticket" of thirty-six presidential electors for the State, who were bound to vote for the party's candidate, Mr. Blaine or Mr. Cleveland. The Democratic list (*i.e.* that which included the thirty-six Cleveland electors) was carried by a majority of 1100 out of a total poll exceeding 1,100,000. Thus, all the thirty-six electoral votes of New York were secured for Mr. Cleveland, and these thirty-six determined the issue of the struggle over the whole Union, in which nearly 10,000,000 popular votes were cast. The hundreds of thousands of votes given in New York for the Blaine or Republican list did not go to swell the support which Mr. Blaine obtained in other States, but were utterly lost. Hence in a presidential election, the struggle concentrates itself in the doubtful States, where the great parties are pretty equally divided, and is languid in States where a distinct majority either way may be anticipated, because, since it makes no difference whether a minority be large or small, it is not worth while to struggle hard to increase a minority which cannot be turned into a majority. And hence also a man may be, and has been,[2] elected President by a minority of popular votes.

When such has been the fate of the plan of 1787, it need hardly be said that the ideal President, the great and good man above and outside party, whom the judicious and impartial electors were to choose, has not been secured. The ideal was realized once and once only in the person of George Washington. His successor in the chair (John Adams) was a leader

[1] A list is usually carried entire if carried at all, because it would be foolish for the partisans of a candidate to vote for some only and not for all of the electors whose only function is to vote for him. However, the electors on a ticket seldom receive exactly the same number of popular votes; and thus it sometimes happens that when the election is close, one or two electors of the beaten party find their way in. In California in 1880 one out of the six electors in the Democratic ticket, being personally unpopular, failed to be carried, though the other five were. Similarly in California, Ohio and Oregon in 1892 one elector belonging to the defeated list was chosen, and in North Dakota was presented the surprising spectacle of the Republican, Democratic and "Populist" parties each winning one elector.

[2] This happened in 1876, when Mr. Hayes received, on the showing of his own partisans, 252,000 popular votes less than those given for Mr. Tilden; and in 1888, when Mr. Harrison was 95,534 popular votes behind Mr. Cleveland.

It is an odd result of the system that the bestowal of the suffrage on the negroes has operated against the Republican party which bestowed it. The Southern States received in respect of this increase in their voting population 37 additional presidential votes, and these have in the four latest elections (1880, 1884, 1888, 1892), been all thrown for the Democratic candidate.

of one of the two great parties then formed, the other of which has, with some changes, lasted down to our own time. Jefferson, who came next, was the chief of that other party, and his election marked its triumph. Nearly every subsequent President has been elected as a party leader by a party vote, and has felt bound to carry out the policy of the men who put him in power.[1] Thus instead of getting an Olympian President raised above faction, America has, despite herself, reproduced the English system of executive government by a party majority, reproduced it in a more extreme form, because in England the titular head of the State, in whose name administrative acts are done, stands in isolated dignity outside party politics. The disadvantages of the American plan are patent; but in practice they are less serious than might be expected, for the responsibility of a great office and the feeling that he represents the whole nation tend to sober and control the President. Except as regards patronage, he has seldom acted as a mere tool of faction, or sought to abuse his administrative powers to the injury of his political adversaries.

The Constitution prescribes no limit for the re-eligibility of the President. He may go on being chosen for one four year period after another for the term of his natural life. But tradition has supplied the place of law. Elected in 1789, Washington submitted to be re-elected in 1792. But when he had served this second term he absolutely refused to serve a third, urging the risk to republican institutions of suffering the same man to continue constantly in office. Jefferson, Madison, Monroe, and Jackson obeyed the precedent, and did not seek, nor their friends for them, re-election after two terms. After them no President was re-elected, except Lincoln, down to General Grant. Grant was President from 1869 to 1873, and again from 1873 to 1877, then came Mr. Hayes; and in 1880 an attempt was made to break the unwritten rule in Grant's favour. Each party, as will be more fully explained hereafter, nominates its candidates in a gigantic party assembly called the National Convention. In the Republican party Conven-

[1] James Monroe was chosen President in 1820 with practical unanimity; but this was because one of the two parties had for the time been crushed out and started no candidate. So also J. Q. Adams, Monroe's successor, can hardly be called a party leader. After him the party-chosen Presidents go on without interruption.

tion of 1880 a powerful group of the delegates put forward Grant for nomination as the party candidate, alleging his special services as a ground for giving him the honour of a third term. Had there not been among the Republicans themselves a section personally hostile to Grant, or rather to those who surrounded him, the attempt might have succeeded, though it would probably have involved defeat at the polls. But this hostile section found the prepossession of the people against a third term so strong that, by appealing to the established tradition, they defeated the Grant men in the Convention, and obtained the nomination of Mr. Garfield, who was victorious at the ensuing election. This precedent has been taken as practically decisive for the future, because General Grant, though his administration had been marked by grave faults, was an exceptionally popular figure. A principle affirmed against him is not likely to be departed from in favour of any aspirant for many elections to come.

The Constitution (Amendment xii., which in this point repeats the original Art. xi. § 1) requires for the choice of a President "a majority of the whole number of electors appointed." If no such majority is obtained by any candidate, *i.e.* if the votes of the electors are so scattered among different candidates, that out of the total number (which in 1888 was 401, and is now under the Apportionment Act of 1891, 444) no one receives an absolute majority (*i.e.* at least 223 votes), the choice goes over to the House of Representatives, who are empowered to choose a President from among the three candidates who have received the largest number of electoral votes. In the House the vote is taken by States, a majority of all the States (*i.e.* at present of twenty-three States out of forty-four) being necessary for a choice. As all the members of the House from a State have but one collective vote, it follows that if they are equally divided among themselves, the vote of that State is lost. Supposing this to be the case in half the total number of States, or supposing the States so to scatter their votes that no candidate receives an absolute majority, then no President is chosen, and the Vice-President becomes President.

Only twice has the election gone to the House. In 1800, when the rule still prevailed that the candidate with the

largest number of votes became President, and the candidate who came second Vice-President, Jefferson and Aaron Burr received the same number. The Jeffersonian electors meant to make him President, but as they had also all voted for Burr, there was a tie. After a long struggle the House chose Jefferson. Feeling ran high, and had Jefferson been kept out by the votes of the Federalist party, who hated him more than Burr, his partisans might possibly have taken up arms.[1] In 1824 Andrew Jackson had 99 electoral votes, and his three competitors (J. Q. Adams, Crawford, and Clay) 162 votes between them. The House chose J. Q. Adams by a vote of thirteen States against seven for Jackson and four for Crawford.[2] In this mode of choice, the popular will may be still less recognized than it is by the method of voting through presidential electors, for if the twenty-three smaller States were through their representatives in the House to vote for candidate A, and the twenty-one larger States for candidate B, A would be seated, though the population of the former set of States is, of course, very much below that of the latter.

The Constitution seems, though its language is not explicit, to have intended to leave the counting of the votes to the president of the Senate (the Vice-President of the United States); and in early days this officer superintended the count, and decided questions as to the admissibility of doubtful votes. However, Congress has in virtue of its right to be present at the counting assumed the further right of determining all questions which arise regarding the validity of electoral votes, and has, it need hardly be said, determined them on each occasion from party motives. This would be all very well were a decision by Congress always certain of attainment. But it often happens that one party has a majority in the Senate, another party in the House, and then, as the two Houses vote separately and each differently from the

[1] The votes of two States were for a long time divided; but Hamilton's influence at last induced the Federalist members to abstain from voting against Jefferson, whom he thought less dangerous than Burr. His action — highly patriotic, for Jefferson was his bitter enemy — cost him his life at Burr's hands.

[2] Clay, unlucky throughout in his ambitions for the presidency, had stood fourth in the electoral vote, and so could not be chosen by the House. Jackson had received the largest popular vote in those States where electors were chosen by the people.

other, a deadlock results. I must pass by the minute and often tedious controversies which have arisen on these matters. But one case deserves special mention, for it illustrates an ingrained and formidable weakness of the present electoral system.

In 1876, Mr. Hayes was the Republican candidate for the presidency, Mr. Tilden the Democratic. The former carried his list of electors in seventeen States, whose aggregate electors numbered 163, and the latter carried his list also in seventeen States, whose aggregate electors numbered 184. (As the total number of electors was then 369, 184 was within one of being a half of that number.) Four States remained out of the total thirty-eight, and in each of these four two sets of persons had been chosen by popular vote, each set claiming, on grounds too complicated to be here explained, to be the duly chosen electors from those States respectively.[1] The electoral votes of these four States amounted to twenty-two, so that if in any one of them the Democratic set of electors had been found to have been duly chosen, the Democrats would have secured a majority of electoral votes, whereas even if in all of them Republican electors had been chosen, the Republican electors would have had a majority of one only. In such circumstances the only course for the Republican leaders, as good party men, was to claim all these doubtful States. This they promptly did, — party loyalty is the last virtue that deserts politicians, — and the Democrats did the like.

Meanwhile the electors met and voted in their respective States. In the four disputed States the two sets of electors met, voted, and sent up to Washington, from each of these four, double returns of the electoral votes. The result of the election evidently depended on the question which set of returns should be admitted as being the true and legal returns from the four States respectively. The excitement over the whole Union was intense, and the prospect of a peaceful settlement remote, for the Constitution appeared to provide no means of determining the legal questions involved. Congress,

[1] In Oregon the question was whether one of the chosen electors was disqualified because he was a post master. In Florida there were complaints of fraud, in South Carolina of intimidation, in Louisiana two rival State governments existed, each claiming the right to certify electoral returns. There had doubtless been a good deal of fraud and some violence in several of the Southern States.

as remarked above, had in some previous instances assumed jurisdiction, but seeing that the Republicans had a majority in the Senate, and the Democrats in the House of Representatives, it was clear that the majority in one House would vote for admitting the Republican returns, the majority in the other for admitting the Democratic. Negotiations between the leaders at last arranged a method of escape. A statute was passed creating an electoral commission of five Senators, five members of the House of Representatives, and five Justices of the Supreme Court, who were to determine all questions as to the admissibility of electoral votes from States sending up double returns.[1] Everything now turned on the composition of the electoral Commission, a body such as had never before been created. The Senate appointed three Republicans and two Democrats. The House of Representatives appointed three Democrats and two Republicans. So far there was an exact balance. The statute had indicated four of the Justices who were to sit, two Republicans and two Democrats, and had left these four to choose a fifth. This fifth was the odd man whose casting vote would turn the scale. The four Justices chose a Republican Justice, and this choice practically settled the result, for every vote given by the members of the Commission was a strict party vote.[2] They were nearly all lawyers, and had all taken an oath of impartiality. The legal questions were so difficult, and for the most part so novel, that it was possible for a sound lawyer and honest man to take in each case either the view for which the Republicans or that for which the Democrats contended. Still it is interesting to observe that the legal judgment of every commissioner happened to coincide with his party proclivities.[3] All the points in dispute were settled by a vote of eight to seven in favour

[1] Power was reserved to Congress to set aside by a vote of both Houses the decisions of the Commission, but as the two Houses differed in every case, the Democrats of the House always voting against each determination of the Commission, and the Republicans of the Senate supporting it, this provision made no difference.

[2] The Commission decided unanimously that the Democratic set of electors from South Carolina were not duly chosen, but they divided eight to seven as usual on the question of recognizing the Republican electors of that State.

[3] The same phenomenon has been observed in committees of the English House of Commons appointed to deal with purely legal questions, or to sit in a virtually judicial capacity.