and the Agricultural department, serve as branches of the administration, one, the Judicial Committee, is a law court, and one, the Cabinet, is the virtual executive of the nation. The framers of the American Constitution saw its unsuitability to their conditions. It was nominated, while with them a council must have been elective. Its only effect would have been to control the President, but for domestic administration control is scarcely needed, because the President has only to execute the laws, while in foreign affairs and appointments the Senate controls him already. A third body, over and above the two Houses of Congress, was in fact superfluous. The Senate may appear in some points to resemble the English Privy Council of the seventeenth century, because it advises the executive; but there is all the difference in the world between being advised by those whom you have yourself chosen and those whom election by others forces upon you. So it happens that the relations of the Senate and the President are seldom cordial, much less confidential, even when he and the majority of the Senate belong to the same party, because the Senate and the President are rival powers jealous of one another.

CHAPTER X

THE SENATE

THE National Legislature of the United States, called Congress, consists of two bodies, sufficiently dissimilar in composition, powers, and character to require a separate description.

The Senate consists of two persons from each State, who must be inhabitants of that State, and at least thirty years of age. They are elected by the legislature of their State for six years, and are re-eligible. One-third retire every two years, so that the whole body is renewed in a period of six years, the old members being thus at any given moment twice as numerous as the new members elected within the last two years. As there are now forty-four States, the number of senators, originally twenty-six, is now eighty-eight. This great and unforeseen augmentation must be borne in mind when considering the purposes for which the Senate was created, for some of which a small body is fitter than a large one. As there remain only four Territories[1] which can be formed into States, the number of senators will not (unless, indeed, existing States are divided, or more than one State created out of some of the Territories) rise beyond ninety-six. This is of course much below the present nominal strength of the English House of Lords[2] (about 550), and below that of the French Senate (300), and the Prussian Herrenhaus (432). No senator can hold any office under the United States. The Vice-President of the Union is *ex officio* president of the Senate, but has no vote, except a casting vote when the numbers are equally

[1] I reckon in neither the Indian territory, which lies west of Arkansas, nor Alaska, because the former is not likely within the near future, nor the latter for a long time to come, to contain a civilized population such as would entitle either of them to be formed into States.

[2] At the accession of George III. the House of Lords numbered only 174 members.

divided. Failing him (if, for instance, he dies, or falls sick, or succeeds to the presidency), the Senate chooses one of its number to be president *pro tempore*. His authority in questions of order is very limited, the decision of such questions being held to belong to the Senate itself.[1]

The functions of the Senate fall into three classes — legislative, executive, and judicial.[2] Its legislative function is to pass, along with the House of Representatives, bills which become Acts of Congress on the assent of the President, or even without his consent if passed a second time by a two-thirds majority of each House, after he has returned them for reconsideration. Its executive functions are: — (*a*) To approve or disapprove the President's nominations of Federal officers, including judges, ministers of state, and ambassadors. (*b*) To approve, by a majority of two-thirds of those present, of treaties made by the President — *i.e.* if less than two-thirds approve, the treaty falls to the ground. Its judicial function is to sit as a court for the trial of impeachments preferred by the House of Representatives.

The most conspicuous, and what was at one time deemed the most important feature of the Senate, is that it represents the several States of the Union as separate commonwealths, and is thus an essential part of the Federal scheme. Every State, be it as great as New York or as small as Delaware, sends two senators, no more and no less.[3] This arrangement was long

[1] The powers of the Lord Chancellor as Speaker of the English House of Lords are much narrower than those of the Speaker in the House of Commons. It is worth notice that as the Vice-President is not chosen by the Senate, but by the people, and is not strictly speaking a member of the Senate, so the Lord Chancellor is not chosen to preside by the House of Lords, but by the sovereign, and is not necessarily a peer. This, however, is merely a coincidence, and not the result of a wish to imitate England.

[2] To avoid prolixity, I do not set forth all the details of the constitutional powers and duties of the Houses of Congress: these will be found in the text of the Constitution printed in the Appendix.

[3] New York is twice as large as Scotland, and more populous than Scotland, Northumberland, and Durham taken together. Delaware is a little smaller than Norfolk, with about the population of Bedfordshire. It is therefore as if Bedfordshire had in one House of a British legislature as much weight as all Scotland together with Northumberland and Durham, a state of things not very conformable to democratic theory. Nevada has now a population about equal to that of Caithness (45,761), but is as powerful in the Senate as New York. This State, which consists of burnt-out mining camps, is really a sort of rotten borough for, and is controlled by, the great "silver men."

resisted by the delegates of the larger States in the Convention of 1787, and ultimately adopted because nothing less would reassure the smaller States, who feared to be overborne by the larger. It is now the provision of the Constitution most difficult to change, for "no State can be deprived of its equal suffrage in the Senate without its consent," a consent most unlikely to be given. There has never, in point of fact, been any division of interests or consequent contests between the great States and the small ones.[1] But the provision for the equal representation of all States had the important result of making the slave-holding party, during the thirty years which preceded the Civil War, eager to extend the area of slavery in order that by creating new Slave States they might maintain at least an equality in the Senate, and thereby prevent any legislation hostile to slavery.

The plan of giving representatives to the States as commonwealths has had several useful results. It has provided a basis for the Senate unlike that on which the other House of Congress is chosen. Every nation which has formed a legislature with two houses has experienced the difficulty of devising methods of choice sufficiently different to give a distinct character to each house. Italy has a Senate composed of persons nominated by the Crown. The Prussian House of Lords is partly nominated, partly hereditary, partly elective. The Spanish senators are partly hereditary, partly official, partly elective. In the Germanic Empire, the Federal Council consists of delegates of the several kingdoms and principalities. France appoints her senators by indirect election. In England the non-spiritual members of the House of Lords now sit by hereditary right; and those who propose to reconstruct that ancient body are at their wits' end to discover some plan by which it may be strengthened, and made practically useful, without such a direct election as that by which members are chosen to the House of Commons.[2] The American plan, which

[1] Hamilton perceived that this would be so; see his remarks in the Constitutional Convention of New York in 1788. — Elliot's *Debates*, p. 213.

[2] Under a statute of 1876, two persons may be appointed by the Crown to sit as Lords of Appeal, with the dignity of baron for life. The Scotch and Irish peers enjoy hereditary peerages, but only a certain number are elected by their fellow peers to sit in the House of Lords, the latter for life, the former for each parliament.

is older than any of those in use on the European continent, is also better, because it is not only simple, but natural, *i.e.* grounded on and consonant with the political conditions of America. It produces a body which is both strong in itself and different in its collective character from the more popular House.

It also constitutes, as Hamilton anticipated, a link between the State Governments and the National Government. It is a part of the latter, but its members derive their title to sit in it from their choice by State legislatures. In one respect this connection is no unmixed benefit, for it has helped to make the national parties powerful, and their strife intense, in these last-named bodies. Every vote in the Senate is so important to the great parties that they are forced to struggle for ascendency in each of the State legislatures by whom the senators are elected. The method of choice in these bodies was formerly left to be fixed by the laws of each State, but as this gave rise to much uncertainty and intrigue, a Federal statute was passed in 1866 providing that each House of a State legislature shall first vote separately for the election of a Federal senator, and that if the choice of both Houses shall not fall on the same person, both Houses in joint meeting shall proceed to a joint vote, a majority of all the members elected to both Houses being present and voting. Even under this arrangement, a senatorial election often leads to long and bitter struggles; the minority endeavouring to prevent a choice, and so keep the seat vacant.[1]

The method of choosing the Senate by indirect election has excited the admiration of foreign critics, who have found in it a sole and sufficient cause of the excellence of the Senate as a legislative and executive authority. I shall presently inquire whether the critics are right. Meantime it is worth observing that the election of senators has in substance almost ceased to be indirect. They are still nominally chosen, as under the letter of the Constitution they must be chosen, by the State legislatures. The State legislature means, of course, the party for the time dominant, which holds a party meeting (caucus) and decides on the candidate, who is thereupon elected, the party going solid for whomsoever the majority has approved. Now the determination of the caucus has very often been

[1] See as to this statute and the evils of the present system a thoughtful article in the *Atlantic Monthly* for August, 1891, by Mr. W. P. Garrison.

arranged beforehand by the party managers. Sometimes when a vacancy in a senatorship approaches, the aspirants for it put themselves before the people of the State. Their names are discussed at the State party convention held for the nomination of party candidates for State offices, and a vote in that convention decides who shall be the party nominee for the senatorship. This vote binds the party within and without the State legislature, and at the election of members for the State legislature, which immediately precedes the occurrence of the senatorial vacancy, candidates for seats in that legislature are frequently expected to declare for which aspirant to the senatorship they will, if elected, give their votes.[1] Sometimes the aspirant, who is of course a leading State politician, goes on the stump in the interest of those candidates for the legislature who are prepared to support him, and urges his own claims while urging theirs.[2] I do not say that things have, in most States, gone so far as to make the choice by the legislature of some particular person as senator a foregone conclusion when the legislature has been elected. Circumstances may change; compromises may be necessary; still, it is now generally true that a reduced freedom of choice remains with the legislature. The people, or rather those wire-pullers who manage the people and act in their name, have usually settled the matter at the election of the State legislature. So hard is it to make any scheme of indirect election work according to its original design; so hard is it to keep even a written and rigid constitution from bending and warping under the actual forces of politics.[3]

[1] The Constitution of the State of Nebraska (1875) allows the electors in voting for members of the State legislature to "express by ballot their preference for some person for the office of U.S. senator. The votes cast for such candidates shall be canvassed and returned in the same manner as for State officers." This is an attempt to evade and by a side wind defeat the provision of the Federal Constitution which vests the choice in the legislature.

[2] The famous struggle of Mr. Douglas and Mr. Lincoln for the Illinois senatorship in 1858 was conducted in a stump campaign.

[3] A proposal frequently made of late years (and lately carried in the House of Representatives) to amend the Federal Constitution by taking the election of senators away from the legislature in order to vest it in the people of each State is approved by some judicious publicists, who think that bad candidates will have less chance with the party at large and the people than they now have in bodies apt to be controlled by a knot of party managers. A nominating convention is no doubt as bad a body as a State legislature, but nominations

Members of the Senate vote as individuals, that is to say, the vote a senator gives is his own and not that of his State. It was otherwise in the Congress of the old Confederation before 1789; it is otherwise in the present Federal Council of the German Empire, in which each State votes as a whole, though the number of her votes is proportioned to her population. Accordingly, in the American Senate, the two senators from a State may belong to opposite parties; and this often happens in the case of senators from States in which the two great parties are pretty equally balanced, and the majority oscillates between them.[1] As the State legislatures sit for short terms (the larger of the two houses usually for two years only), a senator has during the greater part of his six years' term to look for re-election not to the present but to a future State legislature,[2] and this circumstance tends to give him somewhat more independence.

The length of the senatorial term was one of the provisions of the Constitution which were most warmly attacked and defended in 1788. A six years' tenure, it was urged, would turn the senators into dangerous aristocrats, forgetful of the legislature which had appointed them; and some went so far as to demand that the legislature of a State should have the right to recall its senators.[3] Experience has shown that the term is by no means too long; and its length is one among the causes which have made it easier for senators than for members of the House to procure re-election, a result which, though it offends the doctrinaires of democracy, has worked well for the country. Senators from the smaller States are more frequently

made for popular elections will at least be made publicly, whereas now candidates for election by a legislature may be nominated secretly; and though there may be as much demagogism as at present, there will probably be less corruption.

[1] It was arranged from the beginning of the Federal Government that the two senatorships from the same State should never be vacant at the same time.

[2] If a vacancy occurs in a senatorship at a time when the State legislature is not sitting, the executive of the State is empowered to fill it up until the next meeting of the State legislature. This power is specially important if the vacancy occurs at a time when parties are equally divided in the Senate.

[3] This was recommended by a Pennsylvanian Convention, which met after the adoption of the Constitution to suggest amendments. See Elliot's *Debates*, ii. p. 545. A State legislature sometimes passes resolutions instructing its senators to vote in a particular way, but the senators are of course in no way bound to regard such instructions.

re-elected than those from the larger, because in the small States the competition of ambitious men is less keen, politics less changeful, the people perhaps more steadily attached to a man whom they have once honoured with their confidence. The senator from such a State generally finds it more easy to maintain his influence over his own legislature; not to add that if the State should be amenable to the power of wealth, his wealth will tell far more than it could in a large State. Yet no small State was ever more controlled by one man than the great State of Pennsylvania has been by its "bosses" during the last thirty years. The average age of the Senate is less than might be expected. Three-fourths of its members are under sixty. The importance of the State he represents makes no great difference to the influence which a senator enjoys; this depends on his talents, experience, and character; and as the small State senators have often the advantage of long service and a safe seat, they are often among the most influential.

The Senate resembles the Upper Houses of Europe, and differs from those of the British colonies, and of most of the States of the Union, in being a permanent body. It is an undying body, with an existence continuous since its first creation; and though it changes, it does not change all at once, as do assemblies created by a single popular election, but undergoes an unceasing process of gradual renewal, like a lake into which streams bring fresh water to replace that which the issuing river carries out. As Harrington said of the Venetian Senate, "being always changing, it is forever the same." This provision was designed to give the Senate that permanency of composition which might qualify it to conduct or control the foreign policy of the nation. An incidental and more valuable result has been the creation of a set of traditions and a corporate spirit which have tended to form habits of dignity and self-respect. The new senators, being comparatively few, are readily assimilated; and though the balance of power shifts from one party to another according to the predominance in the State legislatures of one or other party, it shifts more slowly than in bodies directly chosen all at once, and a policy is therefore less apt to be suddenly reversed.

The legislative powers of the Senate being, except in one point, the same as those of the House of Representatives, will

be described later. That one point is a restriction as regards money bills. On the ground that it is only by the direct representatives of the people that taxes ought to be levied, and in obvious imitation of the venerable English doctrine, which had already found a place in several State constitutions, the Constitution (Art. i. § 7) provides that "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills." In practice, while the House strictly guards its right of origination, the Senate largely exerts its power of amendment, and wrangles with the House over taxes, and still more keenly over appropriations. Almost every session ends with a dispute, a conference, a compromise. Among the rules (a few extracts from which, touching some noteworthy points, will be found in the Appendix) there is none providing for a closure of debate (although an attempt to introduce such a rule was made by Henry Clay, and renewed in 1890), nor any limiting the length either of a debate or of a speech. The Senate is proud of having conducted its business without the aid of such regulations, and this has been due, not merely to the small size of the assembly, but to the sense of its dignity which has usually pervaded its members, and to the power which the opinion of the whole body has exercised on each. Where every man knows his colleagues intimately, each, if he has a character to lose, stands in awe of the others, and has so strong a sense of his own interest in maintaining the moral authority of the Chamber, that he is slow to resort to methods which might lower it in public estimation. Till recently, systematic obstruction, or, as it is called in America, "filibustering," familiar to the House, was almost unknown in the calmer air of the Senate. When it was applied some years ago by the Democratic senators to stop a bill to which they strongly objected, their conduct was not disapproved by the country, because the whole party, a minority very little smaller than the Republican majority, supported it, and people believed that nothing but some strong reason would have induced the whole party so to act. Accordingly the majority yielded.

The absence of a closure rule is a fact of great political moment. In 1890 it prevented the passage of a bill, already accepted by the House, for placing Federal elections under the

control of Federal authorities, a measure which would have powerfully affected the Southern States, and might possibly have raised civil commotions.

Divisions are taken, not by separating the senators into lobbies and counting them, as in the British Parliament, but by calling the names of senators alphabetically. The Constitution provides that one-fifth of those present may demand that the Yeas and Nays be entered in the journal. Every senator answers to his name with Aye or No. He may, however, ask the leave of the Senate to abstain from voting; and if he is paired, he states, when his name is called, that he has paired with such and such another senator, and is thereupon excused.

When the Senate goes into executive session, the galleries are cleared and the doors closed; and the obligation of secrecy is supposed to be enforced by the penalty of expulsion to which a senator, disclosing confidential proceedings, makes himself liable. Practically, however, newspaper men find little difficulty in ascertaining what passes in secret session.[1] The threatened punishment has never been inflicted, and occasions often arise when senators feel it to be desirable that the public should know what their colleagues have been doing. There has been for some time past a movement within the Senate against maintaining secrecy, particularly with regard to the confirming of nominations to office; and there is also a belief in the country that publicity would make for purity. But while some of the black sheep of the Senate love darkness because their works are evil, other members of undoubted respectability defend the present system because they think it supports the power and dignity of their body.

[1] Secrecy is said to be better observed in the case of discussions on treaties than where appointments are in question. Some years ago a Western newspaper published an account of what took place in a secret session. A committee appointed to inquire into the matter questioned every senator. Each swore that he had not divulged the proceedings, and the newspaper people also swore that their information did not come from any senator. Nothing could be ascertained, and nobody was punished.