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Book Reviews

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BOOK REVIEWS

CONGRESS ON TRIAL. By James M. Burns. New York: Harper & Brothers, 1949. Pp. vii, 224. $3.00.

In this book, Professor Burns attacks Congress as being predominantly swayed by local interests and pressure groups which prevent it from being guided either by the national interest or by the pledges of its party platforms and political leaders. The people, he asserts, frequently vote at a presidential election for one set of policies only to find that a parochial minded Congress refuses to carry into effect the mandate which the voters believed they had imposed.

To remedy these defects, Professor Burns proposes in effect that we adopt the British system of strict and centralized party responsibility. He would, therefore, have party funds centralized and given to those who follow the party line and withheld from those who do not. Patronage would be treated in the same way and it is suggested that the central committee of the national party, as in Britain, should have the right to veto the choice of candidates for the House and Senate (p. 201). As if all these were not enough, periodic political "purges" would be carried on to drive out of the party those who did not follow its platform—this platform being revised annually at national conventions and implemented by an executive committee of party leaders.

Now let it be granted that there is much to Professor Burns' indictment. Localities and groups do exert terrific pressure upon Congressmen and Senators for excessive public improvements and for narrowly sectional and class legislation. There are deep cleavages in the Democratic party between the "conservative" wing which is still dominant in the South and the more "liberal" wing which is dominant in the North. This leads to an alliance between conservative Republicans and conservative Democrats which on most controversial domestic issues has been able to control Congress for the last decade. There are also deep splits within the Republican party. All this makes legislation difficult.

But in the judgment of this reviewer the alternatives proposed by Mr. Burns are at once impossible of execution and would create more evils than they would cure.

In the first place, the proposals are highly unrealistic. Mr. Burns seems to forget that virtually all the senatorial and congressional candidates are nominated by the direct primary system and have direct mandates from the voters. The public will not and, in my opinion at least, should not give up this power of selecting candidates to an inner junto which could be swayed to a

much greater degree by personal prejudices and intrigue. There is, moreover, safety in having the members of Congress depend more upon the voters for retention and advancement than upon an inner circle. For the resultant decisions, even though at times overweighted with particularism, are far sounder than if made by an inner and more secret body. Nearly every Congressman when he returns home to the people has the feeling of coming into cleaner air where judgments are saner than in the politically overheated conferences of Washington.

Secondly, Mr. Burns commits the logical error, which is quite prevalent today, of concluding that because a given system may work well in another country, it must necessarily work well in ours. The success of the British system of strict party discipline, as I shall show, may have been purchased at too great a price, but to the degree that there are successes, they are due in large part to the relatively small area of that country and to the relative social homogeneity within each of their parties. England is so small a country that London and the provinces can deal with each other on terms of mutual knowledge and respect. The United States however is so large that Washington loses touch with the more distant regions. Both the Labor and Conservative Parties in England are moreover substantially unified within their respective ranks and party bitterness is checked by common traditions built up out of a thousand years of common history. In this country, most of the sharp differences between the Northern wing of the Democratic party and the majority of its Southern representatives are caused by the much heavier concentration of Negroes in the South. This issue does not arise in England, but if South Africa were to send representatives to Westminster, one suspects that the British Labor Party would develop similar cleavages.

In the third place the requirement that individual members must implicitly follow an annually announced party line upon penalty of expulsion from the party would crush individual consciences and would transform Congress, particularly the Senate, from being deliberative assemblies into mere passive registrants of the party will. Under this very principle, the House of Commons has long since ceased to be a truly deliberative body. The days of Burke, Fox and Pitt, of Gladstone and Disraeli, when debates actually changed both public and parliamentary opinion and when independent members of integrity and ability could exert an influence on legislation, are no more. Members in their political capacity are now more or less party stooges whose only duty is to follow the leader. W. S. Gilbert well expressed the actual situation over half a century ago when he wrote in *Iolanthe:*

> "When in the House, M.P.'s divide,
> If they've a brain and cerebellum too;
> They've got to leave that brain outside,
> And vote just as their leaders tell 'em to."

In this country the establishment of Mr. Burns' proposed system would have driven from public life George Norris, perhaps the greatest Senator of the last half century, and both the older and younger LaFollettes, and it would effectively prevent others from developing in their places. These men and others like them, such as Senator Aiken of Vermont, have, in my judgment, been of inestimable value to the nation. Many of the lonely and apparently lost causes which they defended have since largely triumphed through their efforts. But more important still is the example which those men have created. In a world of pressure groups where coercion of one type of another is brutally exercised and where individuals all too often feel helpless, the spectacle of men who cannot be bought, frightened or flattered but who instead follow the voice of conscience in the political hurly-burly is priceless for its effect upon the character and moral values of the community.

By ruthlessly suppressing dissenters and independents in the name of party discipline Mr. Burns would create monolithic political parties—which is one of the last things which lovers of American liberty should favor.

Furthermore, while Mr. Burns' argument is ostensibly directed toward obtaining disciplined political parties, the ultimate effect of his program would be to transfer still further powers from the legislative to the executive branch. Ostensibly these powers would be largely transferred to the President as party leader. But since the President is overburdened with work, these powers would in practice be exercised by the group of advisors around him and the National Committee. These men, largely anonymous, are not responsible to the voters but Mr. Burns would put in their hands the major lines of policy and make puppets of Senators and Congressmen.

I do not know how conscious Mr. Burns is that this would be the result of his proposals but that he is at least partially aware of this fact is indicated by the sub-title of his book, namely, "The Legislative Process and the Administrative State." It is further shown by the fact that in complaining of the way in which Congress now "assumes the executive function" Mr. Burns cites as his most telling illustrations the fact that first, "Congress enacts, repeals, and amends the law under which the administrative agencies operate" (p. 100); secondly, that Congress carries on "investigations" of executive departments (p. 101). It is certainly an extraordinary misunderstanding of the basic principles of American government for a political scientist to believe that Congress is infringing on the executive when it passes laws or seeks to find out if these laws are being administered in accordance with their original purpose. Mr. Burns, therefore, unfortunately seems to have joined the ranks of those who are so enamored with the administrative state that they want to put the representatives elected by the people under the control of administrative officials.

What he fails to see is that the administrative state is but a short step re-

moved from the police state. It is not an accident that the two countries where the bureaucracy was most powerful, namely Germany and Russia, have been the ones which have developed the police state in its most terrifying form. For, lacking strong and independent legislative bodies, the people of those nations were not trained to exercise choice in a climate of freedom.

Mr. Burns moreover seems to think that legislation is merely a matter of voting "yes" or "no" upon bills privately drafted by anonymous insiders. On the contrary, bills are improved and modified by the process of committee hearings and legislative debate. Reason, persuasion and the dialectic of the intellectual process all operate to produce better legislation than that which is originally introduced. Despite the common belief that speeches never change votes, it is nevertheless true that they frequently do. Off the floor discussions and the impact of facts and arguments developed in committee hearings have an even greater effect. Moreover, group interests may and commonly do modify legislation proposed by the executive departments and while these groups do at times work against the general interest, they nevertheless represent real interests which have a right to be heard as legislation is being framed. In short, the form of legislation is framed by a complex of forces similar to those which prevail in the world of physics and which the mathematicians treat in their discussions of vector analysis.

While acutely conscious of the many defects of legislators, Mr. Burns seems to be rather blind to the faults of the bureaucrats to whom he would entrust so much power. After some intimate experience with both legislators and bureaucrats, I have found the former group to compare more than favorably with the latter, and I would trust them more to maintain our civil liberties. For they are directly responsible to the people and can largely be controlled by them, whereas the administrators are irresponsible. Moreover, the legislators are also out in the open and exposed to an intense public scrutiny of their words and actions. This helps to keep them humble and to restrain their acts. The administrators, on the other hand, are anonymous and largely shielded from public knowledge and restraint. Perhaps because of their much greater participation in the administrative than in the legislative branch many political scientists seem to have forgotten the nature and advantages of representative government and to be unknowingly willing to throw the baby out with the bath.

Of course, we can and should do more to develop party responsibility without crushing the conscience of the legislator. Thus, I would favor the following: (1) Biennial declarations of party principles would make the mid-term elections more significant; in the framing of these platforms, the congressional and senatorial candidates who will have to do the "running" should play a prominent part in doing the formulating. (2) Where a candidate disagrees with the party platform on a given issue, he has a moral obligation to tell the

voters so. (3) Debates between political opponents in which the issues at stake are threshed out should be fostered to the fullest extent. (4) Senators and Congressmen who feel they must oppose the vital features of a party's program should not be allowed to be committee chairmen. For while I believe in the right of the individual to vote as his conscience dictates, and in his right to appeal to the voters, he is not, in my judgment, privileged at the same time to act as the funnel through which the legislation of the party must pass. (5) More frequent party conferences in the Senate and House where both policy and strategy will be discussed and an effort made to obtain greater party unity by voluntary agreement are desirable. By these means we can make legislatures and parties more responsible without creating a Frankenstein which would swallow up our liberties.

PAUL H. DOUGLAS *

LANGUAGE AND THE LAW. By Frederick A. Philbrick. New York: MacMillan Co., 1949. Pp. v, 254. $3.75.

Mr. Philbrick quite adequately demonstrates his competency in the field of semantics. His book is interesting reading for the lawyer in active practice, but it falls within the realm of entertainment rather than that of instruction. The claim of the publisher on the jacket that the book "gives lawyers the thorough understanding of words that is necessary for a command of effective language in the courtroom" is a little too broad.

The first half of the book deals with "Principles," while the latter half is devoted to "Cases." The chapters on Interpretation and Bias are most interesting and lean heavily on the writings and opinions of Mr. Justice Holmes for basic illustrations. These chapters do furnish linguistic working tools for the practicing lawyer, as illustrated by the following quotation from the chapter dealing with Bias, where the author suggests:

> "All good speakers are adepts at putting their thoughts into the words most suitable to the circumstances, but lawyers are in special need of bias words by which things can be represented in a favorable or unfavorable light. If a witness is asked 'Did you fail to write that letter?' counsel has suggested that he ought to have written it. 'Do you admit . . . ?' and 'Have you confessed . . .?' are questions similarly colored by the use of bias words." (P. 78).

The author's discussion under Interpretation brings recollections of the conversation between Alice and Humpty-Dumpty:

> "'When *I* use a word,' Humpty-Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

* United States Senator from Illinois.

"'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

"'The question is', said Humpty-Dumpty, 'which is to be master—that's all.'" [1]

The cases discussed by the author are four in number, two from England and two from the United States (Proceedings against Queen Caroline, 1820; Tilton v. Beecher, 1875; People v. Harris, 1892; Rex v. Greenwood, 1920); cases involving respectively charges of adulterous intrigue, damages for criminal conversation, and two murders—illustrating the common misunderstanding of the layman that all great legal trials worthy of public note are those of a criminal nature, preferably involving sexual relations. Most of the speeches quoted from these cases are of the "let he who is without sin cast the first stone—go and sin no more" type—highlighted by the reference to the wit who parodied Denman's speech in defense of Queen Caroline:

> "Most gracious queen, we thee implore
> To go away and sin no more;
> But, if that effort be too great,
> To go away at any rate." (P. 150).

If the book is purchased, it will be read with sustained interest, but the practicing lawyer will read it more for relaxation than for guidance in the present-day courtroom.

CECIL SIMS *

COMMENTARY ON THE U. S. JUDICIAL CODE. By James William Moore. Albany: Matthew Bender and Company, 1949. Pp. viii, 684. $10.00.

Throughout the history of the United States only three general surveys have been made by Congress of the structure and jurisdiction of the federal court system. The first was the original Judiciary Act of 1789 establishing the fundamental outlines of the national judiciary. The second took place in 1911 when the Judicial Code was enacted. The third is contained in the Judicial Code of 1948 which became effective September 1, 1948.[1]

While the general structure of the federal judicial system is retained, a substantial number of changes have been made by the new revision.

For example, a petition to remove a case from the state trial court to the federal district court is now filed initially in the federal district court, rather than in the state court, as the practice existed before the 1948 Act. Prejudice and local influence and the concept of the "separable controversy" have been eliminated as grounds for removal. Important changes have been made in the

1. LEWIS CARROLL, THROUGH THE LOOKING GLASS, c. 6.

* Member, Bass, Berry & Sims, Nashville, Tennessee.

1. It was amended by the Act of May 24, 1949, to remove minor errors and omissions and to clarify some of the language.

rules on venue of actions in the federal courts. In the case of corporations, section 1391(c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

This subsection broadens considerably the venue provisions regarding corporations as they existed under the prior law.

The assignee clause, which created so much confusion and difficulty in the past, has been eliminated and original and removal jurisdiction broadened thereby.

The doctrine of forum non conveniens has been reduced to statutory form.

These are but a few of the changes made and not necessarily the most important ones.

They should indicate, however, the wisdom of reviewing, in a comprehensive manner, the provisions of the new Code. This is particularly true in the case of any lawyer who practices in the federal courts or who may do so in the future.

For such a comprehensive review I have found Moore's *Commentary* excellent.

The author, Professor James William Moore of the Yale Law School, was Chief Research Assistant to the United States Supreme Court Advisory Committee on the Federal Rules of Civil Procedure and Special Consultant to the Committee on Revisions to the Judicial Code. In the amount of actual time and effort devoted to scholarly work in this particular field of law few men have the background of Professor Moore. He is the author of Moore's *Federal Practice* (1938 with supplements), which is outstanding among the modern treatises on the subject.

All of his work has been noteworthy for its superior quality, accuracy, and thoroughness. The *Commentary on the U. S. Judicial Code* is no exception.

While it has been completed and made available to the legal profession only a few months after the new Code became effective, the book is noteworthy for its broad and complete coverage. It not only explains the changes made in the law by the new Code but also brings the reader up to date on the general field of the jurisdiction of the federal courts. Thus, it is invaluable as a means of reviewing and refreshing one's knowledge of the subject as well as a source for the clarification of the recent changes which have been made.

The *Commentary* is a companion book to Moore's pamphlet on the *Federal Rules and Official Forms, as amended to 1949, with Comments,* and to his *Federal Practice,* which is keyed to the Federal Rules.

The following headings in the table of contents indicate the coverage of the book: