

CHAPTER VI

THE LEGISLATURE AND THE BUDGET

PERHAPS the greatest immediate need of the whole discussion of the budgetary process is a clear definition of the function of the legislature in it. Abundant discussion there is of the executive's part in it, but rarely a word about the legislature's part. The budgetary functions and responsibilities of the legislature are an uncharted field. It is the purpose of this and the succeeding chapters to make soundings and to chart these functions and responsibilities somewhat comprehensively even if they serve only as a basis for later and better work.

I. THE RELATION OF LEGISLATURE AND EXECUTIVE

There was a time in British history when law was merely the declaration of existing practice, when it was merely an explicit statement of something that was implicit in custom — that is, it was the common law. This was a very convenient cloak behind which to hide the absolutism of monarchy. In those days the legislature was merely a "sampling" of the people. Its ideas, prejudices, and emotions were the ideas, prejudices and emotions of the nation. What they would accept the nation would accept. Hence it was a great convenience for the executive to have such a convenient organization "to try it on." This legislative situation is well defined by Bagehot in these words:

“ The Parliament of to-day is a ruling body ; the mediæval Parliament was, if I may so say, an expressive body. Its function was to tell the executive—the King—what the nation wished he should do ; to some extent, to guide him by new facts. These facts were their own feelings, which were the feelings of the people, because they were part and parcel of the people. From thence the king learned, or had the means to learn, what the nation would endure, and what it would not endure ;— what he might do, and what he might not do. If he much mistook this, there was a rebellion.” (Bagehot, “ The English Constitution,” p. 345.)

The so-called executive budget would restore that situation as near as may be under modern conditions. It is very well expressed in the word “ merely ” in the following quotation : “ Generally speaking, the executive authority (apart from the United States) has been conceived of as possessing powers of initiation and leadership while the legislative authority is regarded as possessing *merely* powers of final determination and control.” (Report of the Commission on Economy and Efficiency, 1912.)

But it was most bluntly expressed in the provisions of the recent proposal for a revision of the New York State constitution. The governor proposed, but the legislature could accept or reject or reduce these proposals. As the attitude of the legislature developed, the governor could withdraw or amend or send in entirely new proposals at any time before final action by the legislature. The legislature would become largely an expressive body. In other words, the legislature would be merely a convenient agency for the executive to try out his various schemes and plans. Priority of bills as determined by the governor must

be respected by the legislature. Hence the word "merely." It is true the legislature was given some "scope" subject to executive veto after the executive had his program out of the way, but what avails it? The most that could be done would be patch-work, and that is the very thing which the so-called executive budget is designed to remedy.

It is the experience of the world and particularly of the Anglo-Saxon part of it that the budgetary power cannot be safely intrusted to an individual. And under American conditions with our inelastic set forms of government — with definite terms, even though they be short — the giving of such power to an individual or to different individuals in rapid succession will result in a wide variety of abuses without effective corrective while they are contemplated or being carried out. The safety here is in the free action of numbers of representatives in the legislature.

The legislature is still a "sampling" of the nation. It presumably represents the varied interests of the nation. It has knowledge of the national needs. It may be an aggregation of local interests instead of a coalescence of these into a truly national organization, but that is a fault to be remedied, and one which has been minimized, for example, in the English Parliament and may be here. *In the counsel of these interests, in the free play of the one against the other, in the mutual give and take of healthy associations, lies the destinies of a democracy.* For a time, it is true, a benevolent despotism may be more efficient, may make the people happier, may even reduce taxes, if we view these things alone, but one wonders: After

Marcus Aurelius — what? This vicarious service in the name of the nation if prolonged would be enervating and would be a more fertile field for a Commodus to do his evil works.

The executive budget is partly at least an expression of impatience with the legislature, with its stupidity, its apparent lack of knowledge, its selfishness, or, as it is most frequently worded, its inefficiency. And yet it is to such a body that we have committed our destinies. And some of the wisest or shrewdest of the sons of men have acknowledged the wisdom of the procedure. It is in this application that Lincoln's words are pertinent that "You can fool all the people some of the time, some of the people all the time, but you cannot fool all the people all the time." It is this faith in the common sense of the "People" that lies at the basis of the power granted the legislature in our government. It was pointed out by Talleyrand when he told Napoleon that there was somebody wiser than he and wiser than all his ministers. "Who?" asked Napoleon. "Everybody!" was the reply.

It is well to review here this basis for the legislative function in government. That this great power exists in the legislature, particularly with reference to budget-making, is evident from the power granted to the legislature. Take the case of the United States Congress by way of illustration. To it is granted these powers:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

“ To borrow money on the credit of the United States ;

“ No money shall be drawn from the treasury, but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.”

Obviously while such powers are granted Congress, budgetary matters will be under its thumb. And as similar powers are granted the state legislatures, the control over budgetary matters is equally effective.

Viewed, then, from this standpoint, the function of the administration and the executive in budget-making is preliminary, preparatory. It is to place before the legislature in the fullest and most intelligible form the results of the administrative experience during the past fiscal periods and in the light of last year's experience and next year's probable needs to prepare estimates of financial needs in terms of a social program. The legislative power over these estimates must be absolute. In England where the executive is merely the organization of the leadership of the majority of the legislature, the legislature may delegate its power to a part of itself, which is always under its immediate control through a vote of lack of confidence.

The budget is the intelligent basis for the declaration of public policy. It is, therefore, peculiarly the legislature's "business."

In this chapter we shall consider the general question of the legislative function in budget-making, particularly as contrasted with the executive. The succeeding chapters will deal in detail with the specific phases of the budgetary process during the legislative period. How the organization, rules and character

of the legislature, both national and state, and the general legislative conditions affect budget-making is the subject of the next chapter. In other words, our subject is the budgetary procedure in the legislature — a subject very rarely treated in connection with budget-making. The whole contemporary discussion is preoccupied almost entirely with the executive preparation of the budget and the subject of accounting control.

What happens to the budget proposals when they are presented to the legislature? How is adequate consideration secured? What function does the minority serve? Does the administration play any part in the legislative budgetary procedure? Should it? How shall the legislature formulate its decisions? These and other similar questions are the subject matter of chapter seven.

But there is a special problem of the budget which deserves separate treatment. It has ramifications through all our national law-making and administration. It is the most potent influence in determining the substance of the budget act. What is it? It is the local character of the legislature. It finds its expression in the "pork-barrel," and that is the subject of chapter number eight.

II. THE BRITISH ANALOGY

British example and British experience are frequently used to clinch the case for an "executive budget" for the United States.

But is this British analogy fair?

Is it illuminating?

Is it apropos?

When we speak about an executive budget in England we must refer to a budget prepared by the cabinet or the prime minister. When we speak about an executive budget in America we must refer to a budget prepared by the President or by a governor. That being so, would authority vested in the President of the United States be looked at by Congress in the same way as Parliament looks upon similar power conferred upon the Prime Minister? The obvious answer to this question is "No!"

The reason for this, and the reason for the lack of application of British conditions to America, are found in the relation of Congress to the President as contrasted with British conditions.

The theory upon which the American government is framed is the theory of the separation of powers. Practically there is a hiatus between the executive and the legislature, and there is suspicion and distrust that would prevent any such delegated legislative power as the British practice and the American imitation propose.

The theory of the separation of powers was evolved, supposedly, from British experience. Unfortunately for the theory, British experience did not conform to the theory. "The efficient secret of the English Constitution," says Bagehot, "may be described as the close union, the nearly complete fusion of the executive and legislative powers." (Eng. Const. p. 78.) He says elsewhere, "A cabinet is the combining committee — a hyphen which joins, a buckle which fastens the legislative part of the state to the executive part

of the state. In its origin it belongs to the one, in its functions it belongs to the other." (Eng. Const. p. 82.) It is this intimate relationship of the executive and the legislature in England as contrasted with our own "separation" that makes the British analogy futile.

The executive of England is the creature of the legislature. To its own executive committee, a legislature may very properly delegate power that it would not dream of delegating to an outside agency. Moreover, it may delegate such power to such a committee when such a committee is under its immediate and continuing control through the simple device of the interpellation and the possible vote of lack of confidence. And then, too, public opinion does not have to wait two years or four years to express itself formally. Depending on the intensity of public opinion and its volume, it may be asked at any time to decide the issue of the day. In America no matter how great the crisis or how great the need for a formal expression of public opinion, the inelastic provisions of the law require that such expression shall come on a certain day one, two or three years away.

The weakness of the British analogy is very clearly perceived by Frederick A. Cleveland, the leading expositor of the executive budget, in these words:

"This thought may be left in closing,—namely, that until some such provision for making the 'electorate' and the 'representative body' effective instruments of control over the executive, the people will not sanction an increase in executive power sufficient to make him a responsible leader. They would prefer to continue to suffer from the results of

inefficiency, log rolling, pork barrel and all, rather than tie themselves up to an executive for a fixed term who could not be called sharply to account. The recent experience in New York may be pointed to as confirming this view. But if this be thought to be a too recent or too narrow experience, it is confirmed by a thousand years of Anglo-Saxon experience." ("Budget-Making and the Increased Cost of Government," paper read by Frederick A. Cleveland before the American Economic Association, December 28, 1915.)

It would seem therefore that on the general question of the relations of the executive to the legislature in budget-making, British experience is without value so far for direct imitation or adaptation because of the dissimilar relations of the executive and the legislature, because of the control exercised over the executive by the legislature in England, and because of the opportunity to permit public opinion to decide issues at any time instead of the arbitrary times for similar decisions in America.¹

III. THE EXECUTIVE BUDGET IN THE LEGISLATURE

There can hardly be any difference of opinion on the proposition that the legislature, before it passes

¹Compare: "Such efforts to accomplish reform in public expenditure are doomed at the very outset. Our theory of Government and our institutions do not permit the adoption of what many really seek—the British method of preparing a budget. It is a curious anomaly that while many publicists in the United States are so lavish in their praise and so determined in their advocacy of the British budget system, that in England it is now, and for some years has been, the subject of severe condemnation. In 'British War Finance,' 1914-15, Mr. W. R. Lawson, a writer of considerable note on financial matters, discusses extensively and condemns severely in the chapter entitled 'The doom of the one-man budget,' the system prevalent in Great Britain." (Speech of Mr. Fitzgerald, Congressional Record, Sept. 8, 1916, p. 16564.)

on the budget, should have every iota of information possible about social conditions, about administrative experience, and about financial conditions. It should go almost without saying that the administration should formulate its own experience to be presented to the legislature. The administration should know how effectively the governmental machine is meeting its duties and its opportunities. It was on the basis of this intimate day-to-day experience that elsewhere in this book it was recommended that the executive, the commissions and the courts should formulate the budget proposals. It may be assumed that when American public opinion really understands what the budget program is, it will require either as a matter of custom, if not of law, that the budget proposals shall be formulated by those close to the administrative problems. In other words, there is practically no difference of opinion on the *preparation* of the budget proposals by the administrative authorities.

THE QUESTION OF THE EXECUTIVE BUDGET

Nor is that the fundamental problem raised by the "executive budget." The real question relates not to the preparation of the budget proposals, but to the *status of these proposals* before the legislature.

The contention of those in favor of the so-called "executive budget" is that the budget proposals are presumptively *the budget* unless the legislature rejects them in whole or in part. For example, the concrete proposition made at the New York Constitutional Convention was that the "executive budget" must be passed before any legislatively initiated financial

propositions should be considered. These, it may be noted, require a larger majority to pass than any of the governor's propositions.

The budget proposals are formulated by the executive and are final as to what items are included and maximum in amount unless special action is taken by the legislature subsequently to the passage of the budget — and this action would be subject to executive veto. The net result of this is that an executive with a minority of one more than one-third of the members of one house could defeat any proposed financial legislation subsequently to the passage of the budget.

In other words, if an executive failed to include in the budget proposals, the civil service commission or the labor department or any of its bureaus, the legislature could do nothing except it was sure of a two-thirds vote of all members elected to the legislature or of those present,¹ or the number necessary to override a veto — in the last days of the session this would mean a practically unanimous vote of those in attendance.

If the legislature wants a different formulation of the budget, or the insertion of new items or of increased amounts, it can practically compel it by rejecting the budget a sufficient number of times, though it cannot legally insert such changes. The executive may at any time recall the budget proposals for any amendments he wishes. And so long as the budget proposals are before the legislature it cannot formulate changes. Should the debate in the legislature reveal

¹ Depending on local requirements.

the need for changes, they cannot be made by the legislature at this stage. The only thing that can be done is for the executive to recall the bill for such changes if he wishes them made.

Even under such restrictions there is a way that the legislature may assert itself if it really wants to. A motion would be in order to pass the budget except all material after item 1. Upon the passage of such a motion the budget would consist of this single item, and the whole process of budget-making would be before the legislature. With the further provision in the New York Constitution of the "lapsing" of appropriations at the end of the fiscal year, such a situation would be critical.

The whip hand is given to the executive and a minority of either house of the legislature. It is the contention of this book that in a democracy such a provision, particularly with a practically irremovable executive for a fixed term, is anomalous. The main reliance of popular government must be on the "many" in the legislature rather than on the executive for the declaration and control of public policy.

It is pointed out by those who believe in the executive budget that all that a legislature can do is to be a ratifying agency in matters of finance. This is simply a modern way of saying that the legislature is *merely* an expressive agency. The legislature is dethroned and the executive enthroned. A detailed statement of this view is given in a note at the end of this section.

PROPOSED SOLUTION OF THE CONFLICT

The crucial test in budget-making, according to the advocates of the executive budget plan, is the settlement of difference between the executive and the legislature on important appropriations. In the executive budget the whole process of budget-making is directed to a subordination of legislative difference of opinion and the supremacy of the executive. The budget-making proposals of this book are directed to the freest interplay and exchange of views between the executive and his representatives on the floor of the legislature and the legislature itself, with the final say remaining as at present in the legislature itself.

One remedy of this conflict of the legislature and the executive proposed in the discussion of the budget in connection with the revision of the New York State Constitution was thus phrased: "In case the legislature is unable to agree on an administration appropriation bill submitted by the governor, or as amended by him, before the beginning of the next fiscal year, the several established departments, bureaus, offices and commissions under the jurisdiction of the governor shall be authorized *by executive order* to expend public moneys at the same rate, in the same amount, and under the same conditions as were authorized for the concluding fiscal year." (Budget Systems, p. 253.) This is strictly in the spirit of the executive budget. It is another evidence of the spirit of turning to the executive for everything. The expedient used in the Congress of the United States is the passing of a concurrent resolution. This leaves the control of funds

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where in the interest of democratic control, it belongs: in the legislature. A better device for avoiding the administrative cataclysm and securing continuity of governmental activity is the continuing appropriation.

None of these means, however, solve the fundamental problem. But the proposition as it went to the New York Constitutional Convention recognized the necessity of ultimate popular control, though those who advocated it did not protest against its elimination in the constitution as adopted by the Convention.

The only excuse for giving the executive the extraordinary powers which were proposed was the presence of means to make effective popular control. That was its safeguard. This was gently dropped and left an executive that is almost an autocrat.

The constitutional amendment providing for an executive budget for the state of Maryland — formulated under the same influences as the New York constitution — also omits this fundamental provision in its plan for the executive budget. As already pointed out, even Dr. Frederick A. Cleveland sees and emphasizes the need for this ultimate popular control: "Until some such provision for making the 'electorate' and the representative body effective instruments of control over the executive, the people will not sanction an increase in executive power sufficient to make him a responsible leader."

Dr. Cleveland in the same article puts very well the need for this ultimate popular control. He lists among the essential provisions for an effective budget system the following, which will bear repetition be-

cause its advocates seem so completely to forget it as soon as a practical proposal is made:

“Provision whereby any important issue may be settled either between the executive and a majority of the representatives of the people, or, in case this is not possible, by having the issues referred directly to the people at an election to determine which of the partisans to the controversy will be retained in the public service, the essential purpose of such action being to make the government responsive to the will of a majority, and to put the administration into the hands of persons who are in sympathy with the policy adopted.” (“Budget Making and the Increased Cost of Government,” Address delivered by Frederick A. Cleveland before the American Economic Association, p. 68, Dec., 1915.)

We regard the reference of such issues to the citizenship for decision in a time of political crisis as a beneficent change in our governmental scheme, because of its great formative results on public opinion and because of its great dynamic power in educating the public. But no such revolutionary change — and it is revolutionary though it is tied on to an autocratic scheme — is possible in this generation. If it comes sooner, well and good! But there is a more immediate problem, the conflict of the legislature and the executive. The executive budget system is so arranged that differences are practically decided in favor of the executive because the number of votes needed to reverse executive proposals would be in practice exceedingly difficult to secure toward the end of the session. Under the plan proposed in this book the executive power of giving the legislature information and of making recommendations is utilized in the

initial step of budget-making. The budget proposals are placed before the legislature by the executive. But they are given no artificial support. They stand or fall on their worth. In a conflict between the legislature and the executive through the system of continuing appropriations existing appropriations stand and continue until the law-making agencies agree on a change.

SUMMARY: THE LEGISLATIVE FUNCTION IN
BUDGET-MAKING

Definite responsibility for the final form and amount of the budget is on the legislature. This is merely another way of saying that control of the purse-strings is, where a thousand years of Anglo-Saxon history says it should be, in the legislature. The executive's part in budget-making is merely preparatory, the legislature's part is final. The responsibility placed upon the executive is for full accurate information the responsibility upon the legislature is for decision upon appropriations in the light of all the facts, both those submitted by the executive and by others.

Budget-making must therefore in the final analysis be a legislative function, and American democracy will not, if it realizes what it is doing, tie the hands of the legislature in any way in the budget-making process.

The variety of community interests represented in the legislature must have the freest play in the formulation of the social program as embodied most effectively in the budget. To that end, therefore, the budget proposals will come to the legislature for whatever

actions it sees fit to take in the light of the social needs.

NOTE

The point of view of this section was made the basis, by Professor Fairlie of the University of Illinois, of a criticism of Frederick A. Cleveland's exposition of the "executive budget idea" at the 1915 meeting of the American Economic Association (printed in the *American Economic Review*, March, 1916, pp. 81-82). It will be well to give Dr. Cleveland's complete reply on this point to Professor Fairlie and to add in a parallel column a few questions and comments.

Professor Fairlie's comment on the second possibility is this: "If decision is to be made on referendum or recall of the governor and the governor's budget is approved, the legislature will soon be reduced to an agency for ratifying the governor's proposals." Again may we say, what of it? Is it better to ratify the individual proposals of from two to six hundred members of a legislative body representing local constituencies than it is to ratify the proposals of an executive who has been elected by the whole people and who spends his whole time (1) thinking about the business in hand? Is it better to ratify one or another of the proposals of men who have no responsibility (2) whatever for administration and who have little or no contact with the current management of affairs? (3) Which has produced better results in the past, the ratification of log-rolling proposals of individual members or the ratification of the well-considered (4) plans of responsible executive leaders? Or is Professor Fairlie disturbed because the legis-

(1) Where are the executives who spend their whole time thinking about the business in hand? Is Dr. Cleveland over-emphasizing the contrast?

(2) Have not legislators final responsibility for administration? Are not administrators legislative agents?

(3) Has an executive just elected any contact with the current management of affairs? Have executives any current contacts with actual administration? Are governmental executives business managers?

(4) Are not "well considered" and "responsible" begging the question? Where in the United States have there been *well considered* plans by *responsible* executives, as Dr. Cleveland must be using the words?

lature on financial measures will be reduced to a ratifying agency? What else can a legislature do on matters of finance? Assuming that finance measures are initiated in a standing committee, is not the legislative body still a ratifying agency? (5) But furthermore, when they ratify the proposals of their standing committee they do so in a very different procedure than when they ratify the proposals of the executive. When the executive lays before them a measure for approval or disapproval they put themselves in a critical attitude, and members are given opportunity to ask questions openly of the executive and to have them answered publicly. (6) Furthermore, the "committee-of-the-whole" procedure becomes an important factor and the floor of the legislature becomes an opportunity for the Opposition.

Where executive officers are required to lay before legislatures their proposals, publicity is the key-note of legislative procedure; where a legislative committee (7) in the hands of a legislative majority leader that cannot be held responsible to the state or nation initiates the measure to be ratified, the procedure is one of "gag-rule," the purpose being to forestall criticism and to protect those who stand with this irresponsible leader. These are differences that are fundamental in their importance. There is nothing to be feared from the legislature being "Reduced to an agency for ratifying executive proposals." The review, ratification, or rejection of executive proposals is what in last analysis the legislative branch has

(5) Is it necessarily? May it not overthrow completely the recommendations of its standing committees? The writer has seen the Wisconsin legislature reject a university appropriation from the joint committee of finance and work out in the Committee of the Whole its own appropriations for the university. What I object to is that under Dr. Cleveland's executive budget plan, the legislature is necessarily merely a ratifying agency. When budget estimates are intelligently prepared and supported by information convincing to the legislature, then the legislature may safely be a ratifying agency, but it should be such only when the budget proposals "stand on their own feet," and acquire no presumptive legal right by the source of their preparation.

(6) With these very proper and highly desirable safeguards why should it be necessary to bolster up by legal buttresses the executive recommendations on the presumption that they are carefully prepared (which they may or may not be) instead of on their intrinsic worth?

(7) This is *not* the alternative. The alternatives are: (a) a budget prepared by the executive which is in effect the imposition of the executive will on the legis-

been created for so far as relates to matters of finance. ("Budget Making and the Increased Cost of Government.")

lature in the exercise of the fundamental legislative power, the control of the purse strings, and (b) a budget prepared by the executive which is submitted to the legislature without artificial supports and whose value depends upon intrinsic values.