

CHAPTER II

THE SOURCES OF PUBLIC HEALTH LAW

THE government of the United States is said, rightly, to be one of laws and not of men. This is no mere platitude, but is a fundamental concept of a free democracy. It means that under a republican form of government such as ours, the people shall be governed not by the whims of a dictator or absolute monarch, but by themselves. They are governed, furthermore, in accordance with established laws and recognized legal principles that are enacted, enforced, and interpreted by their own chosen representatives. Despite a few inevitable defects, there is no better system of government, and none that offers greater opportunities for personal liberty.

An important feature of our form of government is its dependence upon written constitutions, both federal and state, which have been created and promulgated by the people and can be altered only by them. In England there is no formal written constitution, the law-making power being entirely in the hands of Parliament. England is, however, a democracy which has a definite, if unwritten, constitution, to be found chiefly in the common law but also in the statutes, in political usage, and in established legal customs and traditions of that commonwealth.

Sources of Law in the United States

The sources of the written or statutory law of the United States are, in the order of their relative importance, as follows:

1. The Federal Constitution
2. Acts of Congress and treaties
3. State constitutions
4. State legislation
5. Municipal charters granted by states
6. Municipal legislation

Rules, regulations, orders, and decisions of departments, bureaus, and commissions of the Federal Government and of the state governments are not actually a part of the statutory law. When adopted and issued under the authority of legislation for the purpose of carrying out the intent or principles of legislation, such administrative regulations will, however, be recognized as having the force and effect of law. In recent years there has been a tremendous growth in

the scope and variety of administrative regulations, particularly in the Federal Government. These regulations are first issued in the *Federal Register*, and compiled in the Code of Federal Regulations of the United States of America, which in 1946 contained 43 volumes, and is constantly being augmented.

Extensive as is our written or statutory law, it is less extensive than the unwritten or common law, that body of legal principles inherited from the common law of England and expressed and sanctioned in the decisions of our federal and state courts of final appeal. When constitutions and statutes are silent on a particular subject, as is frequently the case, the principles of the common law must be applied to the situation. The common law may, however, be altered or modified by statutes expressing the will of the people.

The American Plan of Government

Another distinctive feature of our system of government is what is known as the separation of powers. The greatest statesmen and the leading authorities on political science have always believed that a true democracy can be achieved only if laws are made by one group of individuals, enforced by another, and adjudicated by a third. When the power of making, enforcing, and interpreting legislation is vested in a single individual or group, tyranny and oppression may be the result.

The framers of the Constitution of the United States provided, therefore, for a tripartite system of government, consisting of an executive department, a legislative department, and a judiciary.¹ Each of these three coordinate branches of the government has separate and distinct powers, each is of equal importance with the others, and each may exert, to a certain extent, a desirable check upon the others. The separation of powers in our existing government is not, however, a complete one, since the makers of the Constitution felt that it was expedient to provide for a certain amount of overlapping. Thus, the executive is given the veto power over legislation, the legislature is given the power to approve or disapprove certain executive appointments and treaties, the composition and scope of the judiciary is subject to legislative determination, and in practice the constitutionality and validity of legislation and executive activity are both subject to judicial determination.

1. F. A. Ogg and P. O. Ray, *Introduction to American Government*, 2d ed., New York, Century, 1925.

A similar separation of powers has been set up in all the States under their own constitutions. Although the federal and state constitutions each provides, among other matters, for the form of government, there is a fundamental political difference between the Federal Constitution and the constitutions of the several States. The former is a grant of power by the people of the States to the national government, while the latter are, in general, documents limiting the powers of the government of the State at the behest of the people. State constitutions originally were concise and simple, but in recent years most state constitutions, as amended and revised by the people represented in constitutional conventions, have become lengthy and complex, with a more or less detailed set of regulations for the operation of government and the conduct of the citizenry.

All health officials should be familiar with the Federal Constitution and with the constitution of their own State. A copy of the latter may usually be procured from the Secretary of State.

The Functions of the Legislature

It is the duty of the legislative branch of government to ascertain the need for laws and to pass all necessary legislation. In order to determine the need for legislation, suitable investigations may be made and appropriate hearings conducted. After a law is passed, the legislature is no longer directly concerned with it, except to authorize necessary appropriations to carry out the law, or to amend or repeal it if such action seems desirable. After a law has been adopted, it is turned over to the executive branch of government for enforcement.

In the Federal Government and in all the States except Nebraska, the legislature consists of two parts, an upper and smaller chamber known as the Senate, and a lower and larger chamber known as the House of Representatives, the Assembly, or some other appropriate designation. The members of the legislature are elected by the people for stated terms. The Congress of the United States, consisting of a Senate and a House of Representatives, is the national legislature and also, under the Federal Constitution, the legislature for the District of Columbia. The Senate, comprising two senators from each State regardless of population, theoretically represents the States, while the House of Representatives, consisting of 435 members representing congressional districts apportioned by population, theoretically represents the people. The powers of Congress are set forth in detail in the Federal Constitution.

The Functions of the Executive

The principal duty of the executive branch of government is to administer and enforce all laws. The executive power of the Federal Government is vested in the President of the United States, while in the States the executive power is vested in the governor.

The Federal Constitution mentions other executive departments, but does not enumerate them. In the Federal Government there have been created by statute ten departments, in this order: State (1789), Treasury (1789), War (1789), Navy (1789), Justice (Attorney General 1789, Department 1870), Interior (1849), Agriculture (1862), Commerce (1903), Labor (1913). Each is under the direction of a Secretary or other officer, such as the Attorney General and the Postmaster General, the ten heads of these departments comprising the President's Cabinet. Within each department are numerous bureaus which have been created from time to time by law.

In addition to the ten departments of cabinet rank there are in the Federal Government numerous independent establishments and commissions, such as the Interstate Commerce Commission (1887), the Federal Trade Commission (1914), the Veterans Administration (1930), the Federal Works Agency (1939), and the Federal Security Agency (1939), the heads of which report directly to the President. Under the provisions of the Reorganization Act of 1939 (53 Stat. 561, 5 U.S.C. 133) the President transferred and regrouped various federal bureaus, setting up, among others, the Federal Security Agency.²

There is no national department of health, the public health activities of the Federal Government being undertaken by a number of different bureaus in the various executive departments and by several of the independent commissions. In 1879 Congress created a National Board of Health, but its duties were restricted in 1882, it received no appropriations after 1886, and it officially ceased to exist in 1893.³ Numerous proposals for a Department of Health in the Federal Government have been made, but Congress had not acted favorably upon any of them up to the beginning of 1947.

Among the executive departments of the state governments, some or all of which are usually enumerated in state constitutions, is the board or department of health, under the direction of an executive

2. See *United States Government Manual*.

3. J. A. Tobey, *The National Government and Public Health*, Baltimore, Johns Hopkins Press, 1926. *Dunwoody v. U. S.* (1891), 22 Ct. Cl. 269; affirm. in 143 U.S. 578, 12 S. Ct. 465, 36 L. Ed. 269, 27 Ct. Cl. 562.

officer, known as the Secretary, State Health Officer, or State Commissioner of Health. Other departments of the State governments may also be, and frequently are, concerned with various aspects of the public health.

The Functions of the Judiciary

The function of the courts is to interpret the laws, determine their constitutionality and the validity of their enforcement by the executive, and to apply the laws in the interests of justice in all cases brought before them. The courts cannot, as a rule, adjudicate a law except in the course of actual litigation, although the constitutions of some States provide that the justices of the highest court shall render an opinion on matters of special legal significance and on solemn occasions when officially requested to do so by the governor. In 1935, for example, the governor of Colorado asked the Supreme Court of that State for an opinion as to the constitutionality of a law requiring the licensing of places where food is prepared for human consumption. The decision of the Supreme Court was that the law was constitutional. The law was subsequently (1936) upheld by a United States District Court in a decision which was affirmed by the United States Supreme Court.⁴

The only court expressly provided for in the Federal Constitution is the United States Supreme Court, although Congress is given the power to establish inferior courts. Under the Judiciary Act of 1789 the Supreme Court was organized, and District Courts were provided for. More than 90 districts, including the District of Columbia, are now in existence, each having at least one judge. In addition there are ten judicial circuits and the District of Columbia, each having a Circuit Court of Appeals, with at least three judges, one of whom is a Supreme Court Justice. The United States District Courts and the Circuit Courts of Appeals are constitutional courts.

Since it has been held by the United States Supreme Court that courts other than these constitutional courts may be created by Congress for special purposes, such legislative courts have been set up. Included are the United States Court of Claims, the United States Court of Customs and Patent Appeals, the United States Customs Court, the Tax Court of the United States, certain courts of the District of Columbia, and the consular courts.

4. *In re Interrogatories of the Governor* (1935), 97 Colo. 587, 52 P. (2d) 663. *Kress & Co. v. Johnson* (1936), 16 F. Supp. 5; affirm. (1937) in 299 U.S. 511, 57 S. Ct. 49, 81 L. Ed. 378 (memo).

The state courts of record usually include courts of general jurisdiction, such as county, district, or superior courts, and courts of appellate jurisdiction, with one supreme court or court of appeals.

Judges of the federal courts are appointed by the President, with the advice and consent of the Senate. In the States, judges are sometimes appointed by the governor with the consent of the state senate, but in recent years the tendency has been toward the election of judges by the people.

The right of the United States Supreme Court to pass upon the constitutionality of Acts of Congress, and the right of the state courts of appeals to rule upon the constitutionality of state legislation, has been an established legal doctrine in this country for many years. Under our form of government, where constitutions represent the supreme law, some agency must of necessity have the power to say the final word as to the validity of a statute that has been assailed as unconstitutional.

In exercising this power of interpretation, the courts must, however, recognize the power of the legislature as a fact-finding and law-making body, and must not attempt to amend a law under the guise of interpretation, or substitute the factual ideas of the court for those of the legislature. A court can only apply to the law established legal principles as written or implied in the constitution, or established in the common law. If the law as written is unsatisfactory, it may be changed by the people and not by the courts, although the courts in their rulings may take proper cognizance of changing social conditions, as modified by the progress of science. In the past courts have occasionally, but only occasionally, overruled their former decisions. In recent years, however, there has been a tendency on the part of the United States Supreme Court, as now constituted, to overrule some of its previous decisions, apparently in an endeavor to keep pace with the changing social order.

"Logic, and history, and customs, and utility, and the accepted standards of right conduct," wrote the late Mr. Justice Cardozo, "are the forces which singly or in combination shape the progress of the law."⁵

The Federal Constitution

"This Constitution," says Article VI of the Constitution of the United States of America, "and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which

5. B. N. Cardozo, *The Nature of the Judicial Process*, New Haven, Yale University Press, 1921.

shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The Federal Constitution, which superseded the Articles of Confederation, was finally adopted in March, 1789, more than a decade after the colonies had declared and won their independence. Ten amendments were proposed in September, 1789, and were ratified by ten States by the end of 1791. All these amendments restrict the powers of the Federal Government and guarantee certain rights of individuals, although some are also concerned with the powers of the States. In addition to the first ten, other amendments to the Constitution, totaling twenty-one in all, have been adopted from time to time. An amendment giving Congress the power to control child labor was proposed in 1925, but was not approved by a sufficient number of the States. In order to become a part of the Constitution, an amendment must be ratified by three-fourths of the States, usually within seven years.

Nowhere in the Federal Constitution is there any mention of the public health. The Preamble alludes to the promotion of the general welfare as one of the reasons for the Constitution, but the Preamble is merely a statement of the purposes of the instrument and has no legal effect.⁶ The "general welfare" is also mentioned in Article I, Section 8 on the taxing power. Public health was not referred to in the Federal Constitution because the protection of the public health was the responsibility of the States when the Constitution was adopted, and this duty was not one of those granted to the national government. The States retained their responsibility for the care of the public health as a part of their police powers.⁷ In the Tenth Amendment to the Constitution, it was stated, furthermore, that the powers not delegated to the United States by the Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people.

Although there is no specific or direct mention of public health in the Federal Constitution, many of its provisions are of significance to public health law in this country. Not only does the Federal Government have certain public health powers of its own under the terms of the Constitution, but numerous clauses in the document af-

6. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 8 Ann. Cas. 765.

7. See Chapter III, on The Police Power and the Public Health.

fect the manner in which the police power can be exercised by the States.

The powers of the Federal Government over certain aspects of the public health are derived from those portions of the Federal Constitution which 1) empower Congress to regulate interstate and foreign commerce; 2) empower Congress to lay and collect uniform taxes; 3) empower Congress to establish post offices; 4) empower Congress to legislate for the District of Columbia and the territories; and 5) empower the President, with the advice and consent of the Senate, to make treaties.

Regulation of Interstate and Foreign Commerce

Since commerce includes both persons and commodities, the Federal Government has the power to exclude from entry into the United States persons who are diseased or likely to become diseased, and articles or animals that are or may be dangerous to health.

Medical inspections of aliens have been undertaken by the Federal Government since 1890, under the provisions of an Act of Congress of 1882 (20 Stat. 214). The general supervision of the admission of aliens under present laws is administered by the Immigration and Naturalization Service of the Department of Justice, but medical inspections are made by officers of the United States Public Health Service of the Federal Security Agency. Officers of this Service are also in charge of foreign quarantine, including inspections of ships and passengers in foreign ports and upon arrival at ports in this country. Quarantine laws were adopted by Congress as early as 1796, although the first measures of this nature merely extended federal aid to the enforcement of local regulations. A national quarantine act was first passed by Congress in 1878 (20 Stat. 37).

Federal laws regulating the entry and transportation of diseased animals are administered by the Secretary of Agriculture through appropriate bureaus, such as the Bureau of Animal Industry, while the Food and Drug Administration of the Federal Security Agency administers laws pertaining to the importation of foods and drugs.

Under the federal power over interstate commerce, Congress has enacted a number of important laws of direct or indirect interest to the public health. Among them are an act of 1902 for the supervision and control of viruses, serums, toxins, antitoxins, and other biological products (U.S.C. title 42, secs. 141-148); the Food and Drugs Act of 1906, which was revised and extended in 1938;⁸ the Meat Inspec-

8. See Chapter XII, on Foods, Drugs, and Cosmetics.

tion Act of 1907; a number of other laws relating to foods; the so-called Mann Act or "White Slave" Act of 1910, prohibiting the transportation of women and girls for immoral purposes (U.S.C. title 18, secs. 397-404);⁹ and various laws regulating safety and health on interstate railroads.

Neither the word "commerce" nor the word "regulate" is defined in the Federal Constitution, but the legal application of these words in respect to interstate commerce has been expressed in the statutes passed by Congress on the subject and in the rulings of the United States Supreme Court, which is the final arbiter as to the constitutionality, meaning, and intent of all acts of Congress.

Commerce is understood to include transportation by land, water, or air, and the instrumentalities of such transportation, whether persons or things or both. Commerce embraces also the transactions, such as purchases and sales, which enter into trade, but interstate commerce has been held not to include sale of goods after they have reached their destination and have been commingled with other goods sold within a State. If sold in the original, unbroken package, however, goods are considered to be still in interstate commerce.

In recent years the scope of interstate commerce has been extended by federal statutes and by rulings of the Supreme Court to include the production of goods intended for shipment in interstate commerce, or which affect interstate commerce. Thus, the Federal Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201) includes provisions with regard to the wages and hours of persons engaged in the production of goods which are to be shipped in interstate commerce. It also prohibits child labor in connection with such production.

This law was sustained by the United States Supreme Court in a leading decision in 1941.¹⁰ This decision specifically overruled an earlier case, the so-called *Child Labor Case*, in which it had been held that Congress did not have the power to forbid the transportation in interstate commerce of articles made in factories in the States where children under fourteen years of age were employed.¹¹ The *Child Labor Case* of 1918 was decided by a bare majority of the Court, with

9. Sustained in *Hoke v. U.S.* (1913), 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523, Ann. Cas. 1913 E 905, 43 L.R.A. (N.S.) 906, and other cases.

10. *U.S. v. Darby* (1941), 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430. *Opp Cotton Mills v. Administrator of Wage and Hour Division* (1940), 312 U.S. 126, 61 S. Ct. 524, 85 L. Ed. 624.

11. *Hammer v. Dagenhart* (1918), 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918 E 724, 3 A.L.R. 649.

a brilliant dissenting opinion by Mr. Justice Oliver Wendell Holmes, which was characterized by Chief Justice Stone in the 1941 decision as a "powerful and now classic dissent."

Inspections of food establishments producing commodities which are intended for shipment in interstate commerce have long been undertaken by officers and employees of the Federal Government as a proper part of their duties, and in accordance with federal laws which have been upheld as valid and constitutional. In sustaining laws regulating the control of milk prices, it has been decided by the Supreme Court that the federal power over interstate commerce now extends to those activities which are purely intrastate in character, but which so affect interstate commerce as to make regulation of such activities an appropriate means to attain the legitimate end, the effective execution of the granted power of the Federal Government to regulate interstate commerce.¹²

While the power of Congress over interstate commerce is said to be plenary, this power is still subject to certain limitations when it conflicts with the police powers of the States. The legal problems involved in such conflicts are discussed in Chapter III, on The Police Power and the Public Health.

The Taxing Power of Congress

Under Article I, Section 8, of the Federal Constitution, the Congress is given the 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 must be uniform throughout the United States. There can be no tax on articles exported from one State to another.

Although the taxing power was conferred primarily for the purpose of raising revenue and not for the purpose of regulation, the regulatory aspect of revenue measures may often be significant. Thus, the Federal Narcotic Act (U.S.C. title 26, secs. 1040-1064), known as the Harrison Law (of 1914), not only imposes taxes on all persons dealing in narcotics, but regulates the use of these dangerous products. The constitutionality of this law, both as a revenue measure and as a regulatory one, has been upheld by the United States Supreme Court.

A federal law of 1886 imposing a tax upon oleomargarine when colored to resemble butter has been sustained as constitutional by the

12. *U.S. v. Wrightwood Dairy Co.* (1942), 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726.

United States Supreme Court.¹³ Although the purpose of this law may have been to discourage sales of oleomargarine in competition with and (at that time) as an inferior substitute for butter, the law is valid as a revenue measure. Oleomargarine is, however, a legitimate object of interstate commerce, according to another decision of the United States Supreme Court,¹⁴ but the methods of sale of this product in intrastate commerce may be regulated in a reasonable manner by the States.¹⁵

The power to tax was said by Chief Justice Marshall to involve the power to destroy. As the result of a prohibitive tax placed by Congress upon matches made with white phosphorus, a dangerous poison, the manufacture of these matches ceased when this law (37 Stat. 81) went into effect in 1912; it has produced no revenue, nor has it ever been contested in the courts. A similar tax on filled cheese (U.S.C. title 26, sec. 10) is in effect, and has not been challenged in court.

A prohibitive tax placed upon goods or persons may, however, be unconstitutional, as was shown in the second child labor case decided by the United States Supreme Court. Having failed in 1916 to control child labor under the federal power over interstate commerce, Congress passed a law in 1919 imposing a tax of 10 per cent on the net profits of any person, firm, or corporation employing child labor (40 Stat. 1138), but this law was declared unconstitutional by the United States Supreme Court on the grounds that under the guise of taxation Congress was attempting to interfere with a state right.¹⁶

Control of child labor is included in the Federal Fair Labor Standards Act of 1938, the so-called Wage and Hour Law (52 Stat. 1060, 29 U.S.C. 201-219). In addition to setting the minimum wages for persons engaged in producing goods for interstate commerce, this law prohibits the employment of children under sixteen years of age in such establishments, or under eighteen in dangerous trades. The child labor provisions of this act are administered by the Child Labor Division and the wage and hour provisions by the Wage and Hour and Public Contracts Division of the Department of Labor.

Under the power to tax and the power to appropriate monies, Con-

13. *McCray v. U.S.* (1904), 195 U.S. 60, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

14. *Schollenberger v. Pennsylvania* (1897), 171 U.S. 1, 18 S. Ct. 757, 43 L. Ed. 49.

15. *Powell v. Pennsylvania* (1888), 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253. *Plumley v. Massachusetts* (1894), 155 U.S. 461, 15 S. Ct. 154, 39 L. Ed. 223.

16. *Bailey v. Drexel Furniture Co.* (1922), 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1492.

gress has created and supported numerous bureaus in the executive departments which are concerned directly or indirectly with public health activities. In making appropriations, Congress sometimes has allotted funds to the States for public health purposes, such as the promotion of the hygiene of maternity and infancy or the control of venereal diseases, but only on condition that these allotments be matched by appropriations of the States themselves. Such an appropriation under the terms of the so-called Sheppard-Towner Law for the promotion of maternity and infancy (42 Stat. 224) was contested by the Commonwealth of Massachusetts and by a citizen of that State. The Supreme Court of the United States held, however, that neither the State nor the taxpayer had a status in court entitling them to bring such a cause of action, and dismissed the cases without actually passing upon the constitutionality of this law, although it was hinted in the decision that the law was not invalid.¹⁷

In 1937, however, the United States Supreme Court was called upon to decide the validity of the Social Security Act of 1935, which provided for various types of taxes, including federal taxes on employers, and the making of grants by the Federal Government to the States for the purpose of coping with unemployment under the terms of state laws approved by the Social Security Board. In sustaining this law as constitutional and valid, the Supreme Court stated that Congress had the power to spend money for the "general welfare,"¹⁸ the term "general welfare" having been discussed at some length in a decision of the previous year upholding the Agricultural Adjustment Act.¹⁹

Postal Laws and the Public Health

In accordance with the constitutional authority to establish post offices and post roads, Congress has passed laws prohibiting the use of the mails for the transmission of poisons, explosives, disease germs, and other dangerous articles, except under such rules and regulations as may be prescribed by the Postmaster General (35 Stat. 1131). The postal laws also prohibit the mailing of obscene matter, contraceptives and contraceptive information, and articles used for procuring

17. *Massachusetts v. Mellon* (1923), 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078.

18. *Steward Machinery Co. v. Davis* (1937), 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A.L.R. 1293. *Helvering v. Davis* (1937), 301 U.S. 619, 57 S. Ct. 904, 81 L. Ed. 1307, 109 A.L.R. 1319.

19. *U.S. v. Butler* (1936), 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914.

abortions. Fraudulent and spurious articles cannot be mailed nor can the advertising of fraudulent goods be sent through the mails. Included in these prohibited categories are false cures for cancer, diabetes, drug addiction, tuberculosis, venereal diseases, etc. Misbranded foods and drugs which are sent through the mails or advertised and promoted through the mails may be dealt with under the postal laws as well as under the Federal Food, Drug, and Cosmetic Act and the Federal Trade Commission Act.²⁰

When evidence is collected by a postal inspector showing that a person, firm, or corporation is using the mails to defraud, to promote improper medical schemes, or to injure the public health in any way, the Postmaster General may cite the offender to appear for a hearing and may, if the evidence warrants, issue a fraud order denying the use of the mails to the perpetrator of the fraud, or may hand him over to the Department of Justice for prosecution under penal laws. A fraud order is not always issued in cases of wrongdoing, as an opportunity is often given for the immediate discontinuance of the reprehensible practice. Persons or concerns affected by a fraud order of the Post Office Department may be enjoined from receiving mail, and all of their postal communications will be marked "fraudulent" and returned to the sender.²¹

The postal laws in their application to public health matters have been held to be valid,²² although the United States Supreme Court has ruled that the postal laws do not debar use of the mails to treatises on mental healing, where the efficacy of such a system is a matter of opinion and not necessarily a fraud.²³

A health officer or other person who believes that a fraud against public health is being perpetrated through the mails should submit a report on the matter to the Chief Inspector, Post Office Department, Washington, D. C. Reports on certain mail order frauds, based on official reports, are frequently published in the weekly issues of the *Journal of the American Medical Association*.

20. See Chapter XII, on Foods, Drugs, and Cosmetics, page 201.

21. See *United States Official Postal Guide* (issued frequently, with supplementary bulletins).

22. *Leach v. Carlisle* (1922), 258 U.S. 138, 42 S. Ct. 227, 66 L. Ed. 511. In *Baker v. U.S.* (1940), 115 F. (2d) 533, conviction of a cancer quack for using the mails to defraud was sustained, and the methods employed were characterized as a hoax. The U. S. Supreme Court refused to review the case (1941), 312 U.S. 692, 715; 615 Ct. 711, 731; 85 L. Ed. —.

23. *American School of Magnetic Healing v. McAnulty* (1902), 187 U.S. 94, 23 S. Ct. 33, 47 L. Ed. 90.

State health officials are permitted to use penalty envelopes of the Federal Government for free transmission of mail to the United States Public Health Service on matters of official business.

The Treaty-Making Power

Under the Constitution, the President of the United States may make treaties with foreign states, which are, however, subject to ratification by the Senate. Many treaties have been made, including a number that are directly concerned with the public health, such as adherence to the International Sanitary Convention and to the Pan American Sanitary Bureau. Where supplementary legislation is needed to carry out the terms of a treaty, Congress may pass the requisite laws, even though the subject might not be within the scope of Congress if it were not for the existence of the treaty.

The Government of Federal Territories

Section 8 of Article I of the Federal Constitution gives to Congress complete jurisdiction over the government of the District of Columbia, the territories of the United States, and the reservations ceded to the Federal Government by the States. The power over the health of the residents of these areas is, therefore, complete and subject only to the constitutional rights of individuals. Congress may also provide for the health of the non-citizen Indians, Eskimos, and other wards of the government, and for the health and medical care of members of the national military establishments and other government services.

In 1923 the Supreme Court of the United States decided that an act of Congress fixing a minimum wage for employed women in the District of Columbia was unconstitutional as an infringement of the Fifth Amendment to the Constitution, which states that no person shall be deprived of life, liberty, or property without due process of law.²⁴ This restriction in the Fifth Amendment to the Constitution applies to the Federal Government, whereas a similar restriction in the Fourteenth Amendment applies to the States. The purpose of the law in question was declared to be for the protection of the health and welfare of women and minors of the District of Columbia, but the Supreme Court as then constituted felt that freedom of contract and of liberty was a more important right than the exercise of the police power in this type of social legislation. There were

24. *Adkins v. Children's Hospital* (1923), 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A.L.R. 1238.

strong dissenting opinions in this case by Chief Justice Taft and Mr. Justice Holmes.

In 1937 this decision was overruled by the United States Supreme Court in a case in which a state law providing for a minimum wage for women and minors in the interests of their health and welfare was upheld as constitutional.²⁵ As before, the court was divided, three justices dissenting.

"What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?" said Chief Justice Hughes for the court in this case. "And if the protection of women is a legitimate end of the exercise of state power," he continued, "how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"

Federal Health Organization

Numerous bureaus in the various departments of the Federal Government are concerned with different aspects of the public health.²⁶ Most important of these agencies is the Public Health Service, a bureau of the Federal Security Agency. This bureau has evolved from the Marine Hospital Service, which was originally charged with the administration of medical relief to American seamen under federal laws dating from 1798. Until 1939 the Public Health Service was a bureau of the Treasury Department, but in that year it was transferred by the President's Reorganization Plan I, dated April 25, 1939, to the newly created Federal Security Agency. In 1944 the laws relating to the Public Health Service were consolidated and revised, the new law being known and cited as the "Public Health Service Act" (58 Stat. 714, 42 U.S.C. 201-286).

By the terms of this act the Public Health Service in the Federal Security Agency is administered by the Surgeon General under the supervision and direction of the Administrator. The Service consists of 1) the Office of the Surgeon General, 2) the National Institute of Health, 3) the Bureau of Medical Services, and 4) the Bureau of State Services. In the Service is a commissioned Regular Corps,

25. *West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330.

26. J. A. Tobey, *The National Government and Public Health*, Baltimore, Johns Hopkins Press, 1926. R. D. Leigh, *Federal Health Administration in the United States*, New York, Harper, 1927. White House Conference on Child Health and Protection, 1930, *Public Health Organization*, New York, Century, 1932. H. S. Mustard, *Government in Public Health*, New York, Commonwealth Fund, 1945.

and in time of national emergency, a Reserve Corps. Officers or employees of the Service may be detailed, upon request, to other federal executive departments, to state health authorities, or to nonprofit institutions engaged in health activities for special studies of scientific problems and the dissemination of information relating to the public health.

The powers and duties of the Public Health Service, as enumerated by law, include: 1) the conduct and promotion of scientific research relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man; 2) cooperation with and assistance to the States in the enforcement of quarantine and the prevention and suppression of communicable diseases, the control of venereal diseases, the control of tuberculosis, and the maintenance of adequate public health services; 3) health education; 4) the furnishing of medical and hospital care, and medical examinations to legal beneficiaries, such as merchant seamen, federal prisoners, federal employees, aliens, lepers, narcotics addicts, and others; 5) the regulation of biological products; 6) foreign quarantine and interstate quarantine; and 7) cancer research. For the purpose of carrying out these duties the Surgeon General is authorized to promulgate necessary regulations.

The responsibilities of the Public Health Service with respect to mental health were increased by the National Mental Health Act of 1946 (P. L. 410, 79th Cong.) which provides, among other matters, for the granting of subsidies to the States for psychiatric services, and for the establishment of a National Institute of Mental Health. In 1946 Congress also passed a bill providing for a program of hospital construction with federal aid, which is administered by the Public Health Service.

In addition to the Public Health Service, a number of other federal bureaus having important public health functions are now grouped in the Federal Security Agency. In 1940 the Food and Drug Administration was transferred to this agency from the Department of Agriculture, in which it had been created in 1928. In accordance with the President's Reorganization Plan No. 2 of 1946, the Children's Bureau (with the exception of its child labor functions) was transferred from the Department of Labor, where it had been since 1913; and the Division of Vital Statistics became a part of the Public Health Service. Since 1902 this Division had been a part of the Bureau of the Census, in the Department of Commerce (Commerce and Labor until 1913).

The Children's Bureau of the Social Security Administration of

the Federal Security Agency administers maternal and child health services, services for crippled children, and child welfare services under the Social Security Act. The bureau also investigates and reports on various aspects of child health and welfare.

The Division of Vital Statistics of the Public Health Service promotes the adoption of improved and uniform standards for registering births and deaths in the States, and compiles data so collected.

The Food and Drug Administration of the Federal Security Agency enforces the Federal Food, Drug, and Cosmetic Act, the Tea Act, the Import Milk Act, the Caustic Poison Act, and the Filled Milk Act.

Among other bureaus in the Federal Government having important public health functions and duties are:

The Bureau of Animal Industry of the Agricultural Research Administration of the Department of Agriculture, established in 1884, which administers the Meat Inspection Act, the Animal Quarantine Acts, the Diseased Animal Transportation Acts, and the Virus-Serum-Toxin Act. The bureau also conducts scientific investigations on animal diseases, many of which are transmissible to man.

The Bureau of Human Nutrition and Home Economics of the Department of Agriculture conducts research and disseminates information on foods and nutrition and other subjects.

The Bureau of Dairy Industry of the Department of Agriculture is concerned, among other things, with milk sanitation.

The Production and Marketing Administration of the Department of Agriculture, through its Food Distribution Programs Branch, is responsible for the administration of the National School Lunch Act of 1946, and for direct food distribution programs and industrial feeding programs. In this administration there is also a Foreign Food Programs Branch.

The Bureau of Narcotics of the Treasury Department, which administers the Harrison Narcotic Act, the Marihuana Tax Act, the Narcotic Drugs Import and Export Act, and various related statutes. In cooperation with the Public Health Service, this bureau determines the quantities of crude opium and coca leaves that may be imported into the United States for medical and other legitimate purposes.

The Bureau of Mines of the Department of the Interior administers the Coal Mine Inspection Act, and is concerned with the health and safety of miners.

The Office of Indian Affairs of the Department of the Interior supervises the health of the Indians and Eskimos, and operates hospitals for them.

The Federal Trade Commission, an independent establishment

of the government, enforces the Wheeler-Lea Act pertaining to deceptive advertising and unfair trade practices concerning foods, drugs, and cosmetics, and also administers numerous other laws.

The Veterans Administration, another independent establishment, through its Medical and Hospital Service, provides medical care, treatment, hospitalization, physical examination, and outpatient relief to legal beneficiaries of the various laws pertaining to veterans.

Other federal bureaus having less extensive and more indirect public health functions include: the Bureau of Labor Statistics of the Department of Labor, which studies and reports on industrial hygiene; the Women's Bureau of the Department of Labor, which studies and reports on the health of women in industry; the Office of Education of the Federal Security Agency, which among other things is interested in school hygiene; the Bureau of Entomology and Plant Quarantine of the Department of Agriculture, which deals among other matters with insects dangerous to health; and the Federal Works Agency, which administers the Lanham Act, including construction of public health, sanitation, and hospital facilities, with the Public Health Service acting as approving agency for this particular type of construction.

At the time of the transfer of the Children's Bureau and the Division of Vital Statistics to the Federal Security Agency, in 1946, President Truman stated that the size and scope of this agency and the importance of its functions clearly call for departmental status, and that he would soon recommend to the Congress that legislation be enacted to that end, making the Federal Security Agency an executive department with Cabinet status.

During the course of World War II a number of other federal bureaus, such as the Office of Defense Health and Welfare, were concerned with public health matters. Many of these were discontinued after the cessation of hostilities, but a few have been continued. Thus, the Office of Inter-American Affairs has a Health and Sanitation Division; the United Nations Relief and Rehabilitation Administration (UNRRA) was engaged in health and nutrition activities until the end of 1946, when its activities were to be liquidated. In 1946 a World Health Organization was formed, with the objective of the attainment by all peoples of the highest possible level of health, through direction and coordination of international health work.²⁷

Quasi-governmental agencies which do health work include the Pan American Sanitary Bureau, the American National Red Cross,

27. See World health organization charter, *J.A.M.A.*, 131:1431, August 24, 1946

and the National Academy of Sciences through the Food and Nutrition Board of the National Research Council.

The Social Security Act

In 1935 Congress passed a law known as the Federal Social Security Act (53 Stat. 1360, 49 Stat. 620, 42 U.S.C. 301), which provides for grants to the States for old-age assistance; for federal old-age benefits; for grants to the States for unemployment compensation administration, for aid to dependent children, for maternal and child welfare, for public health work, and for aid to the blind; and provides also for federal taxation to support certain of these activities, and for the administrative machinery to carry them out. The act was amended in 1939 (53 Stat. 1360).

Title V of this law, pertaining to maternal and child welfare, authorized an annual federal appropriation of \$5,820,000 to be apportioned to the States for the operation of plans for maternal and child health services under the direction of state health departments. The state plans must be approved by the Chief of the Children's Bureau, which administers this section of the law. Other portions of this total annual appropriation are for state services for crippled children; child welfare, especially in rural areas; and vocational rehabilitation of the physically disabled.²⁸

For the purpose of assisting States, counties, health districts, and other political subdivisions of the States in establishing and maintaining adequate public health services and in training personnel, Title VI of this act authorized annual federal appropriations of \$8,000,000. Allotments from this appropriation are made to the States by the Surgeon General of the United States Public Health Service, with the approval of the Federal Security Administrator, the amounts being determined by 1) the population, 2) the special health problems, and 3) the financial needs of the respective States. Plans for expenditures of the funds must be submitted by state health authorities to the Surgeon General and approved by him.²⁹ This title became part of the Public Health Service Act in 1944.

In addition to the sums granted to the States, this act authorized an annual appropriation of \$2,000,000 for investigations of disease and

28. *Facts About Child Health*, Bureau Publication 294, U.S. Children's Bureau, 1946.

29. See *The Public Health Program under Title VI of the Social Security Act*, Supplement No. 126 to *Pub. Health Rep.*, U.S. Public Health Service, 1937. J. W. Mountin and E. K. Hankla, Training Public Health Workers, *Pub. Health Rep.* 61:725, May 24, 1946.

problems of sanitation by the United States Public Health Service. The law provides, however, that no personnel of the Public Health Service shall be detailed to cooperate with the health authorities of any State except at the request of the proper authorities of the State.

Since the passage of this act, several thousand persons, including medical officers, engineers, nurses, sanitation officers, and laboratory workers, have received postgraduate training in public health work. A gratifying increase in the employment of full-time health officials and employees is also reported. Through grants-in-aid to the States, numerous specialized health activities likewise have been developed, including divisions of venereal disease control, industrial hygiene, and various other branches of public health endeavor.

Radio Control

Supervision of radio activities is a function of the national government under the Federal Communications Act of 1934 as amended (48 Stat. 1064, 15 U.S.C. 21, 47 U.S.C. 35, 151), which is administered by the Federal Communications Commission, an independent establishment of the government. The Commission has broad powers to license and regulate broadcasting stations, and it also has jurisdiction over telephone and telegraph operations in interstate commerce. The Commission conducts research, makes investigations and inspections, holds hearings, issues and refuses licenses, and exercises general control over radio activities, including allocation of broadcasting stations and supervision of subject matter.

Under the Federal Trade Commission Act of 1938, the Federal Trade Commission also has jurisdiction over false advertising of foods, drugs, devices, and cosmetics over the radio.³⁰

Since broadcasting facilities are often used for medical and health talks, and for the promotion of wares and commodities and other matters that may affect the public health, radio control is frequently a matter of public health significance.

In 1931 the Federal Radio Commission, which was superseded by the Federal Communications Commission in 1934, refused to renew the license of an individual who was using the radio to broadcast an alleged cancer cure, to oppose vaccination, and to criticize physicians and scientific medicine. When the owner of this station moved it to Mexico near the international boundary and continued to broadcast, using electrical transcriptions prepared in Texas, he was indicted and tried in the United States District Court, where he was convicted for

30. See Chapter XII, on Foods, Drugs, and Cosmetics.

violation of the Federal Communications Act.³¹ On appeal, however, the Circuit Court of Appeals reversed this conviction on the grounds that the act as written did not prohibit the recording of sound waves in the United States and the sending of them to a foreign country to be reproduced and broadcast,³² a decision which the United States Supreme Court refused to review.

Refusal by the Federal Radio Commission to issue a license in 1930 to a physician who was prescribing proprietary medicines of his own over the radio, on the grounds that such action was inimical to the public health and safety, was upheld by the Court of Appeals of the District of Columbia in 1931.³³ The revocation of this physician's license to practice medicine by the state board of medical examiners of Kansas was likewise upheld by the United States Circuit Court of Appeals,³⁴ the court pointing out that diagnosis and prescription by radio was not in the public interest, and that the revocation of the license was justified.

Patents

Under Section 8 of Article I of the Federal Constitution, Congress is given the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and inventions. In accordance with this power, Congress has passed copyright³⁵ and patent laws, the former being administered by the Register of Copyrights of the Library of Congress, and the latter by the Patent Office of the United States Department of Commerce.

Under the Federal Patent Laws, any drug, medicine, therapeutic device, or remedy may be registered and patented if it is an original invention. The patent is then in force for seventeen years and may not be infringed by others. Numerous drugs and medicines have been patented in the past, some of them being clearly in the class of

31. *U.S. v. Baker* (1936), 18 F. Supp. 48.

32. *Baker v. U.S.* (1937), 93 F. (2d) 332, cert. den. 303 U.S. 642, 58 S. Ct. 332, 82 L. Ed. 1102. *Baker v. Arkansas* (1940), 199 Ark. 1005, 187 S.W. (2) 938, cert. den. 311 U.S. 666, 61 S. Ct. 25, 85 L. Ed. —.

33. *KFKB Broadcasting Ass'n v. Federal Radio Commission* (1931), 60 App. D.C. 79, 47 F. (2d) 670. In *Norman v. Radio Station KRMD* (La. 1939), 187 So. 831, the right of the station to breach a contract with an unlicensed chiropractor was upheld.

34. *Brinkley v. Hassig* (1936), 83 F. (2d) 351. *Brinkley v. Hassig* (1930), 130 Kan. 874, 289 P. 64; affirm. (1930) in 282 U.S. 800, 51 S. Ct. 39, 75 L. Ed. 720.

35. See page 320.

nostrums. There has been no scientific determination of the value or efficacy of these so-called "patent medicines," the sole criterion for the issuance of a patent having been that the formula shall not have been previously patented within the statutory limit. Trade marks are also issued by the Patent Office.

Many ethical products of importance to the public health, including insulin for use in the treatment of diabetes, methods of imparting vitamin D to milk, liver preparations for use in treating anemia, copper-iron preparations for similar use, and a serum for the prevention of scarlet fever, have been patented in this country.

Whether medical inventions should be patented or not is a question that has aroused much discussion,³⁶ some authorities holding that contributions to scientific medicine should be freely available to all physicians, while others have pointed out that patenting permits of reasonable control of the invention in the interests of the public welfare and prevents its misuse by incompetent and unauthorized persons.

It has been held that an employee of the Federal Government cannot patent a discovery or invention made while in the employ of the government and as a direct result of the employment.³⁷ In this case an employee of the Public Health Service invented or perfected a safe gas to be used as a fumigant, but his invention was held to belong to the government.

State Constitutions

A state constitution is a grant of power by the people of the State to their government, setting forth legal limitations upon the government and those which may be imposed upon the people. It is the supreme law of the State, subject to the provisions of the Federal Constitution, acts of Congress, and treaties made by the President with the consent of the Senate. A state court of appeals cannot declare any part of a state constitution to be invalid, but such a court may interpret and apply its terms. The United States Supreme Court may, however, rule that parts of a state constitution are invalid as inconsistent with or opposed to the Federal Constitution.

Provisions regarding the public health are seldom written into state constitutions and actually are unnecessary, since the care of the public

36. A. G. Connolly, Should medical inventions be patented? *Science*, 86:383, October 29, 1937. M. Fishbein, Medical patents, *J.A.M.A.*, 109:1539, November 6, 1937.

37. *Houghton v. U.S.* (1930), 23 F. (2d) 386.

health is universally recognized as a lawful responsibility and duty of the State, a duty which need not be declared in its constitution, or supreme law. In a number of States, however, constitutions require the legislature to provide by law for the establishment, maintenance, and efficiency of a state board of health, and sometimes for county and other local boards of health.⁸⁸ These boards are sometimes declared in state constitutions to have supervision of all matters relating to public health, with such powers, duties, and responsibilities as may be prescribed by law.

The constitutionality, validity, scope, and legal significance of these powers and duties are discussed in the following chapters.

Health Activities in Canada

Canada became a federal union in the British Empire by the terms of the British North America Act, adopted by the Imperial Parliament in 1867. This Act assigned to the Dominion Government jurisdiction over "quarantine and the establishment and maintenance of marine hospitals." The provinces were also authorized to establish and maintain hospitals, asylums, and charitable institutions, other than marine hospitals, in and for the provinces. The provinces were, furthermore, given jurisdiction over "property and civil rights in the province," and generally over all matters of a merely local or private nature.

In Canada the legal power over the public health is, therefore, accepted as being vested primarily in the provinces, just as in the United States this power belongs primarily to the individual States. In each of the nine Canadian provinces departments of public health have been organized, the first provincial board of health having been created in Ontario in 1882.

From the time of Confederation until 1872, Dominion health activities were under the control of the Department of Agriculture. Later, these activities were divided among a number of the federal departments. In 1919 a Federal Department of Health was established by Act of Parliament, and in 1928 another act merged it with the Department of Soldiers' Civil Re-establishment to become the Department of Pensions and National Health.

By Chapter 22 of the Act of 8 George VI, adopted in 1944, this department was superseded by a new Department of National Health and Welfare, presided over by a Minister with two Deputy Ministers.

The duties, powers, and functions of the Minister, as set forth in

88. J. A. Tobey, Public health in state constitutions, *Pub. Health Rep.*, 41:2065. September 24, 1926.

this law, include all matters relating to the promotion and preservation of the health, social security, and social welfare of the people of Canada over which the Parliament has jurisdiction, and particularly:

- a) Administration of acts of Parliament and orders or regulations of the Government relating to health;
- b) Investigation and research into public health and welfare;
- c) Inspection and medical care of immigrants and seamen, administration of marine hospitals, and such other hospitals as the Government may direct;
- d) Supervision, as regards the public health, of railways, boats, ships, and all other methods of transportation;
- e) Promotion and conservation of the health of the civil servants and other Government employees;
- f) Administration of the Food and Drugs Act, the Opium and Narcotic Drug Act, the Quarantine Act, the Public Works Health Act, the Leprosy Act, the Proprietary or Patent Medicine Act, and the National Physical Fitness Act, and all orders or regulations passed or made under any of these acts;
- g) Subject to the provisions of the Statistics Act, the collection, publication, and distribution of information relating to the public health, improved sanitation and social and industrial conditions affecting the health and lives of the people;
- h) Cooperation with provincial authorities with a view to the co-ordination of efforts made or proposed for preserving and improving the public health and providing for the social security and welfare of the people.

The law provides for a Dominion Council of Health, consisting of the Deputy Minister as chairman, the chief executive officer of the Provincial Board of Health of each province, and such other persons, not to exceed five in number, as may be appointed by the Governor in Council, whose terms shall be for three years.

It is stated that nothing in the Act or in any regulations made under it shall authorize the Minister or any other officer of the Department to exercise any jurisdiction or control over any provincial or municipal board of health or other health authority operating under the laws of any province.

Regulations to carry out the objects of the Act, including penalties, are authorized, but must have the approval of the Governor in Council and be published and laid before the Parliament.

As in the United States, other Canadian federal departments are also concerned with various aspects of public health. Thus, the De-

partment of Agriculture has certain jurisdiction over food and domestic animals; the Department of Mines and Resources controls sanitation in the national parks and supervises the health of Indians and Eskimos; the Bureau of Statistics compiles, tabulates, and publishes vital and public health statistics.

Five of the provinces, Prince Edward Island, Nova Scotia, Ontario, Saskatchewan, and Alberta, have separate Departments of Health. In New Brunswick there is a Department of Health and Social Service, in Quebec a Department of Health and Social Welfare, in Manitoba a Department of Health and Public Welfare, and in British Columbia the work comes under the Provincial Secretary.

Public health acts in the provinces generally require the appointment of local boards of health, a medical officer of health, and such number of sanitary inspectors as are required to enforce the public health laws and regulations.³⁹

Although geographically part of Canada, Newfoundland is a separate governmental entity, and has its own system of public health organization.

39. *Health, Welfare and Labour, Reference Book for Dominion-Provincial Conference on Reconstruction, 1945. Re Provincial Board of Health, 46 Ont. L. 587, 51 Dom. L.R. 444.*