

**PUBLIC OFFICIALS:
ELECTED
AND
APPOINTED**

by **HUGH V. BERNARD**

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PREFACE

This little book is directed to the interested reader who desires information about the law governing public officers and the governmental process. It may prove useful as enrichment or supplemental reading for college classes in political science, for more advanced social studies classes in high schools, and in adult education classes. Lawyers, perhaps, may find it helpful in refreshing their memories of the law concerning public office in its relation to the administrative process. If it helps to make citizens more informed about this area of the law, it will have served its purpose.

The author expresses his gratitude to the authors of the materials listed in the bibliography. These sources have proved most helpful to him. He assumes full responsibility for any errors, however, and asks that readers call his attention to any they notice. This will prove helpful in preparing later revisions of this book.

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Chapter 1

FROM TORCHLIGHT TO TELEVISION

Public Office in America

A few postage stamps at the rural or neighborhood post office.

A few packets of seeds from the Congressman.

Within the memory of many persons now living the above two items virtually comprised the average citizen's total contact with his Federal government. Unless he served in the armed forces, traveled abroad and needed a passport, imported goods and paid the tariff duty or ran for public office at the national level, he had almost no other direct contact with Federal authority. True, a businessman who was forced to go through bankruptcy, an inventor or author who desired patent or copyright protection, persons homesteading land on the public domain in the West and those concerned with navigable waters and certain forms of interstate commerce might have dealings with Federal officialdom. These were very much in the minority, however. The citizen paid no direct tax to his Uncle Sam. Except for brief periods during the Civil War and during the early 1890's there was no Federal income tax until 1913, and for the average wage earner it was not until the eve of World War II that he had to file a return and pay any actual income tax.

In those now vanished times, Mr. Average American lived out his life having only spasmodic dealings with officialdom at any level. Government simply played a minor role in his life and that of his family. Business and agriculture were only slightly regulated, and no arm of government intruded upon his decisions and planning concerning his retirement, savings, banking, investing, conditions of work, industrial or occupational safety, and care for himself or his loved ones in sickness or old age (except to the limited and humiliating

degree comprehended by the county alms house or poor farm). Common carriers (meaning almost solely the railroads) were regulated to a degree; a few rudimentary health regulations existed (mainly of the quarantine or pesthouse variety); a few licenses (marriage, dog, hunting and fishing) might be required at appropriate times; some form of public schooling was provided (although in the rural areas, and particularly in the Deep South, public schooling above the basic elementary level was almost nonexistent until well into the Twentieth Century). In cities and large towns, there was police and fire protection; streets were provided and maintained; the more progressive places had public libraries; there were parks in most larger communities; and following 1900 it came to be expected that the citizen should accept and be willing to pay for a larger group of public services of many kinds. The local tax collector was not far away, of course, and exacted his limited demands at regular intervals, although in many communities a citizen could discharge almost his total tax obligation by putting in a few days of work on the roads. Male citizens voted and served occasionally on juries. The county sheriff's aid was invoked in the service of process in some private lawsuit or in the levying of execution after judgment, and he was of course available for duty as a peace officer should the situation require it. The foregoing contacts just about sum up the total experience with government in its working aspects that the average rural or small town citizen was to know until little more than a half century ago. City dwellers knew but little more of government involvement in their lives.

Nevertheless, the citizen did feel deeply concerning his government. Elections and campaigns livened up an otherwise dreary round of toil, relieved in the rural and small town areas only by the coming of the circus or some traveling theatrical troupe. The citizen of that day found in the excitement of the torchlight parades, barbecues, clambakes, debates and oratorical contests, and other blatant manifestations of political activity the flattering sense that he was regarded as important, his vote counted for something, and

that he was a person of consequence after all. In the cities of the East, where the immigrant tide poured in from Europe, political machines grew up and, although denounced as corrupt (which no doubt they were by turn-of-the-century or modern standards), they served a valuable social and economic purpose. In an age when direct and formal welfare services were not provided at any governmental level, it does not seem today so monstrous that a machine politician should have traded a load of coal or an order for groceries to a poor family in exchange for the votes of its male members on Election Day. In many places, no public relief program existed otherwise; and private charity, particularly during the recurring financial and business "panics" of the times, could not carry the load.

As population swelled, as people moved from farm and hamlet to city, as cities burgeoned to megalopolitan proportions, as agriculture and ranching gave way to industry and industry in turn to the service-oriented occupations, as self-reliance and self-sufficiency gave way to interdependence, and as life in short became too complicated and involved for any person to meet his own needs entirely by his own efforts, the relationship of the citizen to his governments (local, state and national) inevitably and inexorably changed. The social and economic history of the United States during the present century, and that of its states, counties and local entities, to a great extent records the steady demands placed by the citizenry upon government, and government's efforts to meet those demands. Beginning with the passage of acts regulating the civil service and interstate commerce in the 1880's, and an anti-trust measure in the early nineties, Congress began to regulate more areas of hitherto private or local concern. These laws were followed, after 1900, by a wave of statutes in the fields of conservation and reclamation, food and drug regulation, banking and financial control, farm and forest and natural resource management, labor regulation and protection, workmen's compensation, vocational education, health and sanitation, labor organization and collective bargaining, social security, and a wide range

of welfare and relief measures—with these and many other devices, government entered the life of the average citizen.

For better or worse, we live in a government-involved nation. Government, of course, is people, and many of these people are public officials. Since they perform some of the acts of sovereignty that inhere in government, they are themselves governed by law and by legal principles. To give some indication to the average citizen of his legal relationship to the sovereign, as that sovereign is represented by the human agents who carry out its services and exercise its powers, is the aim of this little book. The citizen should know something of how public office, both of the elected and appointed variety, is obtained and held (and lost), how the law governs the acts of public officials, the nature of the powers they exercise and the limitations on those powers, and the influences (both legal and extra-legal) that bear on the setting of and changing of policy. He should know the ways by which the citizen may bring his influence to bear on public officialdom, so that government may be and seem less like a bloated and impersonal Frankenstein's monster and more like what it should be—the means by which the people's collective civic demands are channelled and controlled to provide such services for the citizen as can best be provided collectively rather than individually. The wheels of power are not without brakes, reduction gears and governors. An informed citizenry, fully aware of its relation to the government and to the human instrumentalities of that government, is the best assurance that governmental power will be kept in bounds and directed toward wholesome, popularly approved goals.

What Public Office Is and Is Not

In the broadest sense, of course, every person who draws his compensation from the public treasury at any level for performing any duty for the sovereign or subordinate public power that employs him is a "public official." Thus, a postal clerk at the registry desk, teacher, policeman on the beat, member of the President's Cabinet, Internal Revenue agent,

statistician in the Agriculture Department, librarian, judge, army officer, city councilman, deputy sheriff or forest ranger—each may at some time and for some purpose be considered a “public official.” However, in legal thinking, “public office” may be said to vest only when certain requisite elements coalesce in a single position at a single time. These elements are well summed up in a Federal court decision which expresses clearly the requirements: “Giving the word ‘office’ the sovereignty of the state attaches for its technical qualities, five elements would seem indispensable in order to make a public office of a civil nature. (1) It must be created by the Constitution or the Legislature or by a municipality or other body with authority conferred by the Legislature. (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public. (3) The powers conferred and the duties to be discharged must be defined either directly or indirectly by the Legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The office must have some permanency and continuity and the officer must take an official oath.” **Pope v. Commissioner**, 138 F.2d 1006 (1943).

In order to define what is meant by “a portion of the sovereign powers of government,” the Missouri Supreme Court has used the following terminology:

If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the State, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.” **State ex rel. Pickett v. Truman**, 333 Mo. 1018, 64 S.W.2d 105 (1943).

Repeatedly, in the decided cases involving questions turning on whether a given position is or was a "public office" or whether a given incumbent was a "public officer," the courts have stressed the necessity that the occupant of the position, to qualify as such, must have performed or been empowered to perform some part or portion of the sovereign power of the jurisdiction that put him in office. At certain times and for certain purposes, the same person in the same office may be considered a "public official" and at other times and in other contexts he may not. In general, it may be safely said that occupants of seats in legislative bodies, even at the local municipal level, are public officials; judges and judicial officers are public officials in almost every instance (about the only exceptions might be at the lowest level, where a committing magistrate, for example, might in certain cases have actually no judicial discretion to exercise. In other cases the same magistrate might exercise true judicial, and therefore, sovereign powers.) A local justice of the peace and ex-officio notary public would be a public official when presiding over his justice court, but would not be when notarizing a document. The degree and presence of supervision by other officials or employees is important. A judge, even though subject to judicial review by higher courts should his decisions be appealed, is nonetheless a public official. His decisions are arrived at through construing the law, as he is given to understand it through the constitutional and statutory principles, rules and the decided cases touching on the question before him; not by taking counsel of the appellate bench which may some day pass upon the accuracy of his interpretation. Likewise, there is precedent for holding that a tax assessor or higher tax administrative official is a public official; the executive officer (mayor, city manager, etc.) of a city is such an official; the higher municipal, state and county officers, Federal officials in the Cabinet and sub-Cabinet levels, the occupants of regulatory and quasi-judicial bodies, and usually all those whose appointments are subject to Senate confirmation are considered public officials. For the purpose of this book, however, the term "public official" will be limited to civilian positions

at any level of government, above the lower and middle levels of the career civil service, and excluding military officers, diplomatic and consular officials, the career foreign service, and quasi-military bodies such as the commissioned officers of the Public Health Service and similar persons. This is done to keep the work in bounds and because the average citizen has little or no formal contact with those categories of officials.

Chapter 2

HOW PUBLIC OFFICE IS ACQUIRED— ELECTION

Voting and Election Laws

Constitutional and statutory controls govern the method of registering voters and determining their eligibility, conducting campaigns, holding elections and primaries, counting the ballots and recording and announcing the results of voting. Provisions exist for settling disputes, holding recounts or canvasses of the ballot, certifying candidates as winners and otherwise regulating the electoral process. These provisions of law, local, state and national, are treated in detail in another unit of the Legal Almanac series (No. 24, **Voting and Election Laws**, by C. E. Smith) and for that reason are not dealt with in any detail here. However, peripheral to the principal laws concerning elections and voting are many other legal matters that must concern the aspirant to public office and the interested citizen as he ponders the political scene.

The Political Party, Its Role

Although not mentioned at all in the United States Constitution, and mentioned in but few of the state constitutions, the political party nonetheless plays a vital and usually decisive part in the process by which public office is obtained and held in the United States at all levels. Even in the now-dwindling "one-party" jurisdictions, political party machinery is brought into play by means of conventions, petitions and primaries to nominate candidates for office. In such jurisdictions, "personal politics" and intra-party factional contests dominate the political process, since the nominee of the dominant party is virtually assured election, in what is often a cut-and-dried "general election." The political party evolu-

ed because all but the smallest areas and communities require a means by which the voters of similar interests and philosophical or economic approaches to government may make their collective wishes and concerns felt. Even where social and economic or other differences barely exist at all, the party continues in its necessary role in the political process because certain vested interests come to grow up in and around it—organizational machinery, patronage, personal loyalties, tradition and the need for a nexus that is difficult to define—a mystique perhaps, centering in persons and history and visceral feelings more than in concrete issues and principles. Suffice it to say that parties are inherently a part of the American political picture, and a grasp of the legal principles governing them is necessary for the aspirant to office and for anyone concerned about the office-obtaining process.

Obtaining this information is difficult, since it is usually not gleaned from a study of statute or constitution, nor in many cases from the decided court cases. News media tell part, but often not all, that is needed. The person must contact the party officials in his community, county or state. Dates for holding primaries or conventions, qualification rules by which one becomes a candidate for nomination, time deadlines required for announcing or declaring candidacy, fees to be paid (and when and to whom to pay them), petitions if any to be filed, how many signatures are required for them if needed (and the qualifications for signers), how one advertises or announces his entry into the primary campaign—these and many more matters are largely governed by the parties themselves through an apparatus of committees at several levels, chairmen and other officials. One aspiring to run under a party banner or symbol ignores the requirements to his peril, since if disqualified as a party candidate he would have to abandon his effort, or run in the general election as an independent, and possibly as a write-in candidate, with the handicaps that such status imposes.

One thing to be borne in mind is that, although the parties in the different states, counties and local entities have the same general names (Democratic, Republican, Liberal, Farmer-Labor and the like), they are actually autonomous,