Is Landon Constitutional?

BY ROBERT H. JACKSON

THE constitutional issue, which threatened at the beginning of the campaign to be of major importance, was for a time evidently recognized as a hot potato by both sides and was generally ignored In his last few speeches, however, Governor Landon has again, perhaps rashly, brought the issue into the limelight. Particularly in his Detroit speech on October 13 the Republican candidate devoted most of his remarks to criticism of what he called President Roosevelt's usurpation of legislative power, and of his readiness to ignore or to defy the power of the courts.

When on July 23 a voice from Topeka proposed to "restore" our government to a "constitutional basis," we accepted it as a proper statement of the purpose of any law-abiding citizen. The voice also called attention to the Presidential oath "to preserve, protect, and defend the Constitution of the United States" and said that the oath carried the obligation to "so use the executive power that it will fulfil the purposes for which it was delegated." This was still obvious and safe But the candidate continued, "It is with a full understanding of the meaning of this oath that I accept this nomination " This was a clear challenge to an investigation of his understanding of constitutional principles, which was the last thing that he should have started.

In Kansas the executive power as exercised by Governor Landon has been in conflict with the judicial power just as the national executive power has clashed with the judicial, and with the same results. The executive and legislative branches of government in Kansas have been prevented from carrying out major policies by their failure to comply with requirements which the judicial department considered more important than the policy involved. The judges killed the policy to vindicate the constitutional principle that they felt had been violated.

Governor Landon was first elected for a two-year term which began on January 9, 1933. He was reelected in the landslide of November, 1934, which produced the oversized New Deal majority in Congress. That might indicate that he was not out of step with the New Deal sentiment then prevailing. His second term began January 14, 1935, and his tenure of office therefore roughly coincides with President Roosevelt's. The two men have faced similar problems; both have had rough treatment from the legalists.

Topeka did not chide Washington; it attended the New Deal ceremonials with supplications and anthems of praise. At the oil conference called by Secretary Ickes on March 27, 1933, Governor Landon is reported by the New York *Times* to have declared that he wanted to "enlist for the duration of the war in this campaign of President Roosevelt's to get America on its feet"; and he added that "even the iron hand of a dictator is better than paralysis." Of course Mr Roosevelt's better judgment recognized such radical, if well-intended, counsel as the panic of scared men. He tried to follow the traditional American way, relying on the Supreme Court, as he was justified in doing by its earlier decisions, to take a reasonably broad view of emergency power.

Executives must have a policy for the future; judges are occupied only with precedents from the past. The policy of an executive is shaped solely by the result which he wants to accomplish The judges have again and again said that they are concerned not with results but with a law that is above results. Can Mr. Landon escape this conflict between legalism and statesmanship? The answer is that as Governor of Kansas he has not been able to.

It is not my purpose in this study to uphold or to attack any of Governor Landon's laws which the courts have struck down. It is my purpose merely to read the court reports and to assay his claim that he knows how to get along with the courts and how to get his program into constitutional shape. Let us look first at certain emergency legislation which reflects Governor Landon's financial

policy. I would not detract from Mr. Landon's reputation as a frugal Governor, but his frugality appears to have been fortified by an early decision of the Kansas Supreme Court which brought him summarily back to the Kansas constitution, from which he had wandered, and restrained any disposition he might otherwise have developed to become lavish. On November 23, 1933, Governor Landon approved a measure authorizing the Kansas Commission of Forestry, Fish, and Game to borrow $200,000 from the Reconstruction Finance Corporation to make certain public improvements and defray extraordinary expenses. The state Supreme Court held the law unconstitutional. In condemning the Landon borrowing policy the court recited various constitutional provisions and said: "These provisions make it clear that from the foundation of the state the mandate of the constitution has prescribed a fiscal policy of 'pay as you go' so far as current expenses of state government are concerned." The court cited extreme measures taken by the state of Kansas in times past in maintaining a traditional financial conservatism. Governor Landon's financial policy was adjudged to be contrary to this safe and sane policy. Thus the Governor of Kansas was saved from an early disposition to go in debt. The court's decision leaves an impression that his reputation for sound finance may be somewhat synthetic.

That unauthorized power has been delegated to the President has been asserted with much sound and fury. It is argued that in order to take the government out of hands that would accept unauthorized power and to avoid the danger of a dictatorship, the Governor of Kansas should become President of the United States. In his Detroit speech on October 13 Mr. Landon said: " . . . when the independence of the courts is destroyed, the rights and liberties of the people are gone. The people are then at the mercy of the Executive. The Executive is all powerful." It is somewhat startling therefore to find that in a unanimous decision of the Kansas Supreme Court Governor Landon was himself accused of exercising unauthorized legislative power. A law passed and approved by Governor Landon in 1933 authorized the Governor of Kansas to extend for a period not exceeding six months a preexisting moratorium given by the legislature on mortgages if in the Governor's judgment the necessity therefor still existed. The Governor proclaimed an extension, but the Supreme Court on January 6, 1935, said: "We conclude that what the Governor was delegated to do, and did attempt to do, was legislative in character and that such delegation of legislative power was entirely unauthorized under our separately constitutioned functions of government, and was therefore unconstitutional, void, and inoperative "

But the mortgage-foreclosure situation was acute, and the failure of relief because the Governor exceeded his powers did not end the problem. The Governor and legislators tried again. On February 28, 1935, Governor Landon approved a measure which extended the time of redemption from mortgage-foreclosure judgments, applying to judgments already rendered as well as to future judgments. The court rendered a decision on December 7, 1935, setting aside this act as unconstitutional. The majority of the court thought that Governor Landon and the legislature had made an assault upon the court's power; the judicial power was perhaps being "flaunted," to borrow from the vocabulary of the Cleveland platform builders. The dissenting opinion was by Justice Harvey, who seems to play in Kansas the role that Justices Stone, Cardozo, and Brandeis play in Washington. Justice Harvey came to the aid of the mortgage-redemption statute and flayed the majority of his court, saying: "Neither can I give my consent to the view, which appears to dominate the opinion as written, that judicial action is so much superior to legislative action. Just as sometimes happens with persons who occupy other governmental units, those of the court occasionally acquire an exaggerated opinion of their own authority or power."

"Vested rights" is a symbol to which the judiciary has shown almost Oriental devotion. It is rarely held, however, that a public group or body has any vested rights, and it is still more rare for an Executive to invade the vested rights of a public group. However, on March 24, 1933, Governor Landon approved a statute authorizing the county to charge back to various taxing districts their prorated share of taxing-district funds, lost in a bank failure when a depositary had been closed several years before. This statute was challenged and held unconstitutional by the court as being "retrospective in its application, and therefore the vested rights of the defendants are invaded and infringed."

Citizens of Wyandotte County, in which Kansas City is located, had complained to the Attorney General and the Governor that the criminal laws were not being enforced. Legislation approved by the Governor provided for a special grand jury and a special prosecutor. The law also provided that the compensation of the special prosecutor should be paid in whole or in part from costs taxed against persons convicted on indictments found by such grand jury. This provision applied to no other county of the state. The penalty against persons convicted on indictments found by this particular grand jury would therefore be greater than the penalties against the same persons for the same offenses would have been had these persons been indicted by a regular grand jury and prosecuted by the regular county prosecutor. The court held that this provision was "a plain denial to convicted persons in Wyandotte County of the equal protection of the law afforded to all others in their situation within this state and guaranteed by the Fourteenth Amendment." And what was more serious, the majority of the court went on to affirm that "this manifest constitutional infirmity" vitiated the whole statute. Thus the constitutional blunder in the statute signed by Governor Landon cost Wyandotte County its special law-enforcement machinery.

One of the rocks upon which some of the New Deal legislation split was the time-honored judicial doctrine prohibiting delegation of power. An act duly approved by the Governor of Kansas on February 8, 1935, authorizes county commissioners to devise methods to stop soil drifting—specifically to order lands subject to erosion "to be cultivated, plowed, furrowed, sowed, planted, handled, or cared for." If the farmer didn't do as he was told, the commissioners were authorized to name an indi-

vidual to "go upon all such lands for such purpose and to assess reasonable charges for such service against the land in controversy." The law also required the board to prescribe rules which must be complied with by the farmer The court held this to be a "clear delegation of legislative power and of power to legislate on a matter which is not local and which is forbidden by the constitution"; and it prohibited the county commissioners from acting upon the ground that they had been trying to prevent soil erosion without lawful authority. Thus ended another costly lesson in constitutional law. The Kansas farmer found that the courts held his problem to be local when the federal government attempted to solve it, and not local when the state attempted to do so.

In reviewing this record of laws struck down by the Kansas Supreme Court I am not concerned with the motives or the statecraft of Governor Landon. When legislation reaches the courts, neither good motives nor sound policy saves it. The strange parallel in the experiences of these two Executives in attempting to make economic, financial, and general-welfare policies meet the requirements of the courts does pose a serious question as to whether the legalists are not intruding technical and obstructive rules of legal philosophy where they do not belong. Both the Kansas record of Governor Landon and the speeches that he has made during the campaign indicate clearly that he has nothing to contribute to the solution of this problem.