

Elements of
Democratic Government

CORRY AND ABRAHAM

ELEMENTS OF DEMOCRATIC GOVERNMENT

Elements of Democratic Government

FOURTH EDITION,
REVISED AND ENLARGED

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Preface to the Fourth Edition

The revision presented in this fourth edition follows the general scheme of the third. In addition to necessary updating, approximately 20–25 per cent of the materials of the preceding edition have been thoroughly rewritten. This rewriting for the most part has been occasioned by the advent of the Fifth French Republic; to a lesser extent there have been significant changes in the other Western democracies and in the Soviet Union. Thus several chapters, notably V, VIII, IX, X, XII, XIII, XIV, XV, XVII, and XIX have been extensively revised; two of these have been retitled; several charts and tables have been added. Wherever we thought it appropriate, we adopted pertinent illustrations taken from states other than the ones of main concern in the book—for example, West Germany in connection with federalism and legislatures. But we have not been current at the expense of depth. Acting upon several suggestions, we have appended the constitutions of the United States, France, and the Soviet Union. In addition to the basic bibliography at the end of the book, lists of suggested references for further reading now follow each chapter.

Once again we wish to express our appreciation to the many colleagues whose helpful suggestions have done so much to make this a better book. In particular, we wish to thank Professor Benjamin E. Lippincott of the University of Minnesota, Professor Charles A. McCoy of Temple University, Professors Philip E. Jacob, Jewell Cass Phillips, and Alvin Z. Rubinstein of the University of Pennsylvania, Professor Garold W. Thumm of Bates College, and Professor Clifton E. Wilson of the University of Arizona. Mrs. Helen S. White typed the manuscript with her usual patience and compe-

tence, and our research assistants, Peter B. Harkins, Rocco D'Amico, and Andrea Pilch were always cheerfully helpful. The authors, of course, assume full responsibility for all deficiencies.

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Preface to the Third Edition

This book expresses the views of two teachers on the way to begin the study of government with students who are—or should be—seriously concerned about liberal democracy. At the beginning, the basic political ideals of liberal democracy and of the modern dictatorships are sketched and contrasted. Thereafter, the bulk of the book is taken up with an elementary description and comparison of the structure and working of government in the United States and Great Britain. Wherever reference to the government and politics of France seems likely to sharpen appreciation of American and British political institutions or to throw light on the fundamental problems of liberal democracy, the relevant features of French government and politics are introduced.

As the institutions and practices of these three leading democracies are described chapter by chapter, their relation to the essential activating ideals is discussed and some analysis of the problem of harmonizing ideals and action is offered. In every chapter where effective contrast seems possible, the relevant institutions of the Soviet Union are sketched and their relation to basic Communist theory is noted. In this way, an effort is made to contrast liberal democratic theory and practice with the theory and practice of Communist dictatorship as represented by the Soviet Union. The book thus has a concern for political theory and analysis on which descriptive works on government often lay little or no stress, and it also has a concreteness of reference that is often lacking in introductory textbooks on political science.

It is designed to direct the student's attention to the questions being asked everywhere about democratic institutions and practices, and to provide suf-

ficient description of the structure and operation of three leading democratic governments to enable him to see the significance of the questions and some of the considerations to be taken into account in looking for answers to them. Thus the great issue of the relation of democratic institutions and practices to democratic ideals occupies the forefront if not the bulk of the discussion. Within this frame of reference, the great expansion of the activities of democratic governments is sketched and analyzed. The significance of this expansion as a response to democratic ideals is considered, and the impact of the greatly expanded functions of government on democratic institutions and practices is kept constantly within the focus of attention.

The great expansion of governmental activities has made the structure of all governments, including the democratic, much more complex. If the introductory course in government is concentrated on the detail of a single government, the trees are always getting in the way of the student's view of the forest. While study of the full detail cannot be shirked if a sure understanding is finally to be reached, it is open to question how far this can be achieved in an introductory course. There is something to be said for trying to concentrate on fundamentals. If there are some fundamentals of democratic government, they are more likely to emerge into clear view from a study of the basic institutions of three governments than from the study of one.

Also, the challenge of the dictatorships and the rapidly changing scope of government in the democracies have led to a reconsideration of democratic creed and practice. In the last thirty years or so, a large literature devoted to such reconsideration has appeared, scattered through many books and journals. The questioning that produced the literature also exists in the student mind, and suggests a course that might serve as an elementary introduction to the literature.

This book has been prepared for a course that would try to emphasize fundamentals and, at the same time, make constant reference to practice. For the student who takes only one course in government, such a course provides an introduction to the great continuing debate about democracy, enabling him, if he is so minded, to follow the debate intelligently on his own account. For the student who intends to take further courses in government, it also furnishes some criteria, of a tentative nature at least, for sorting and judging the detail met in close study of particular governments. The advantages of this method entail some skimping of detailed description of the governments in question and some sketchiness in the analysis of the underlying problems. It has seemed preferable, however, to present a unify-

ing theme and a framework of analysis in the text, and to leave the supplementing of detail, and the critical examination and further development of the analysis, to lectures in the classroom. The steps in analysis and the connectedness of things are presented to the student more precisely and in more durable form than his notes or memory of lectures are likely to supply.

The attempt to define the connection between democratic ideals and democratic institutions, and to give an analysis of the impact of greatly expanded governmental functions on liberal democratic government, has led to numerous generalizations. With many of these, there will be fairly general agreement. Others are conclusions on matters that are widely debated, and will meet with some dissent. Rather than suspend judgment on numerous disputed points in an introductory survey, we have frequently ventured conclusions. We have tried, however, not to be dogmatic, and to give reasons for our conclusions. The conclusions, of course, are no better than the reasons given in their support.

This book was originally written at the end of World War II and was published in 1946 under the title, *Democratic Government and Politics*. In 1947, a revised and enlarged edition was published by the Oxford University Press under the present title. It was prepared at a time when everyone was disposed to hope that the democracies would be able to give their main attention to their own internal problems under conditions of international peace assured by the United Nations. Because this was a fit and decent hope not yet proved illusory, it was thought appropriate to concentrate on democracy as a form of government and to elucidate the subject by an elementary comparison of the governments of the leading democracies, with only incidental reference to the Soviet Union and other modern dictatorships.

By 1950, when the second American edition was prepared, the hopes for a world of settled peace seemed to have little foundation, and only the sanguine will be sure they have a better basis in 1958. The gulf between East and West yawns with thermonuclear menace. The gulf itself, we recognize, is, in large measure, caused by sharply differing conceptions of what the purposes of government and the state are.

In these circumstances, some shift in emphasis in the instruction of the beginning students is needed. Domestic politics cannot now claim to monopolize his attention. The tension between East and West must have some share of it.

Accordingly in the second, and again in the present third, edition significant adjustments of focus have been made. These adjustments have been

noted above, with one exception: the insertion of a final chapter on the relations of sovereign states in order to help the student to get some grasp of the tragic dilemma of international politics. This latter topic is not easy to integrate with the other material in the book, but an effort has been made to draw revealing contrasts between *domestic politics* within the cohering frame of an ordered government and an abiding law, and *international politics* in a state system where both government and law exist only in embryo, if at all.

The revision presented in this edition follows closely the general scheme of the last preceding one. Within this scheme, two main modifications have been made. First, systematic comparisons between the government of France and the governments of the United States and Britain have been introduced, thus making explicit the significance of a multiple-party system and of markedly different constitutional tradition on the workings of democracy. Second, some rearrangements of material within chapters, and considerable changes in the sequences of chapters, have been made. In the arrangement of chapters, the book has been moved much closer to what may perhaps be called the standard sequence. The chapters on Federalism and Local Government have been moved from the end of the book to its early part. The chapters dealing with the formation of opinion, the organization of the electorate, and fundamental civil rights now all precede the chapters which discuss the executive, the legislature, and the judiciary. To give coherence to this rearrangement, some shifting of material from one chapter to another, and some rewriting, have been undertaken.

Whether re-arranged or not, all chapters of the book have been brought up to date by recording relevant changes in the government and politics of the countries dealt with, and by including, wherever possible, additional illustrations drawn from recent events. In particular, all sections on American government have been strengthened by more detailed discussion and added illustrations. For greater ease of reference, many new headings and sub-headings have been introduced throughout the text.

The main burden of preparing this edition has been carried by Professor Henry J. Abraham, who heads the basic courses in Political Science at the University of Pennsylvania, and who signs this preface as co-author. It is hoped that the results of our collaboration will recommend themselves to those whose interest in earlier editions encouraged us to undertake this revision.

At the request of the publisher, the following persons submitted critical analyses of the second American edition: Mr. Warner Moss, Professor of

Government at William and Mary College, Mr. Marbury B. Ogle, Jr., Professor of Government at Purdue University, and Mr. Benjamin E. Lippincott, Professor of Political Science at the University of Minnesota. The manuscript of this revision has been read, either in its entirety or in part by Mr. Guy H. Dodge, Professor of Political Science at Brown University, Mr. John W. Chapman, Assistant Professor of Government at Smith College, and Mr. Charles Gilbert, Assistant Professor of Political Science at Swarthmore College. In their many comments and suggestions, obscurities and defects of analysis came to light, which we have endeavored to repair. We wish to thank them for the help they have given us. We also wish to express our appreciation to Professors G. Edward Janosik and Garold W. Thumm of the Department of Political Science at the University of Pennsylvania, whose constant critical vigilance aided us greatly in the preparation of material for this revision, and to Miss Yolanda C. Legnini, Registrar of the Graduate Division of the Wharton School of Finance and Commerce, for typing the entire manuscript. Such errors and defects as remain after all this help are, of course, our own.

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ELEMENTS OF DEMOCRATIC GOVERNMENT

I

The Study of Government

If each of us were solitary and self-sufficient, each could rule himself, and would have no need to control the actions of others, or to be controlled for the sake of others. There would be no need of *government*, which in its simplest and most superficial appearance is the ruling of some aspects of our conduct by others for the sake of others. Nor would we have to concern ourselves with *politics*, which is a term for a particular set of processes by which we try to bring the actions of others under the control of government, or try to divert or modify the application of government to ourselves.

SOCIETY, STATE, AND GOVERNMENT

SOCIETY AND GOVERNMENT

However, we are neither solitary nor self-sufficient. Man is a social creature. To flourish or even to survive in isolation from his fellows, he would have to be an utterly different creature from what he is. All history testifies to his need for *society*. We cannot alter this verdict, nor would we want to do so. The child could not survive to become the man without the family. The man could not flourish without easing the burden of securing food, clothing, and shelter through co-operation with others. If each of us had to produce unaided with our hands all our material needs, we should lead a barren and precarious existence. In economic co-operation with others, we produce wealth and not merely subsistence.

The Need for Society. Without society, there would never be the rich heritage of art and literature and practical knowledge needed to improve man's estate. It is only by living in society that a cultural heritage can be transmitted from one generation to another. If each had to learn for himself the hard way about everything, we should never know or enjoy very much. Then, beyond all the selfish calculations about what a good bargain society is for the individual, there is the need for fellowship. Where one man seeks his own company in solitude, thousands of men want to be with their fellows for purposes that run all the way from religious communion to idle gossip.

WHAT IS SOCIETY? Society, as the term is used here, is not a name for an agglomeration of people like a public meeting or the residents of the United States. Nor is it a name for particular groups of persons organized for some purpose, such as the Society of Friends or the Society To Maintain Public Decency. Such groups are called associations, or simply groups. Society is a term for designating the entire network of social relationships between individuals, whether within or without groups, between groups, or between individuals and groups. Thus the total of social relationships in the United States constitutes American society. The word *community* will be used here from time to time in a similar sense to mean the totality of any group, whether it be the people of the United States, or of a particular state, county, or city. The context will always have to be kept in mind to make clear whether it is the national community or some lesser community that is being discussed.

ORDER AND REGULARITY. We enter into varied and innumerable relationships with our fellows expecting advantages and satisfactions of various kinds. If these expectations are not always to be frustrated, there must be some order and regularity in the behavior of those participating. It is true that much of the attraction of a game is suspense about the result, an unpredictable element depending on chance or skill. But the game loses all point if there are no rules, or if everybody plays according to different rules. Even a game of chance is spoiled if somebody cheats. The social relationships that constitute society depend on some minimum of order and regularity.

Economic co-operation in the factory will not satisfy expectations unless the workers come and go at fixed hours, work co-operatively, and accept such direction as is needed for the common task. The same is true of the family, the church, the club, the school. Relationships must be based on some kind of order, must exhibit a pattern that can be relied upon. While no one wants social relationships to have the faultless regularity of a machine, each must

know, within limits, what to expect of others, and these expectations must not be too often disappointed. Men must live in society in order to live at all.

The Need for Government. This conclusion is indisputable, but it does not of itself prove the need for government and politics. A multitude of social relationships follow an orderly pattern which has been established and maintained without any obvious control being exercised by anybody over anybody, or at least without any control being exercised by governments. Many of our social relationships are established by custom and maintained by habit. The elementary courtesy of waiting our turn, exemplified at a high level of perfection by the English queue, rests on custom and habit. So do most relationships of family life. Other social relationships are based on conscious and deliberate agreement. Clubs and associations are formed and the terms of association are agreed on by the members. Of course, there is control and direction exercised by the parents in the one instance and by the officers of the club in the other. But the control is voluntarily accepted for the most part; the co-operation is spontaneous. Much of our life in society is ordered in these ways. It is even conceivable that all social relationships might be ordered on the bases of custom, habit, and agreement, that we might learn to do voluntarily all that is needed to ensure the satisfactions of social life and thus make government and politics unnecessary.

While this is conceivable, it seems most unlikely. The history of human societies is a history of conflict as well as of voluntary co-operation. Unruly elements seem deeply rooted in human nature. Children quarrel over the terms of their play and fight for the possession of toys. These dispositions, however moderated and disciplined by social life, continue in grown-ups. The established social relationships are always frustrating to many people, and frustration leads to aggressive and unpredictable behavior. Modern psychology pictures us all as potential aggressors because life can never give any of us all we are capable of demanding.

MAINTENANCE OF PUBLIC ORDER. Even if most of us are pacific and co-operative, the violent and unpredictable behavior of a few is capable of disappointing most of the expectations of social life. Voluntary co-operation rests on confidence, and fear dissolves confidence. A few thugs and burglars operating without restraint can disrupt social relationships and paralyze the social life of a community. So there must be an organization to maintain order and suppress violence through the possession, and use where necessary, of coercive restraining power. This organization, in its concrete tangible form, is government. The primary and indispensable function of government is to ensure a

firm framework of *public order* within which men can order their social life on the bases of habit, custom, and agreement. Ordinarily, it does this by making laws forbidding acts that imperil public order and restraining those who break the law, by force if necessary.

It is not enough for the effective maintenance of public order merely to support custom and habit and the established ways of society. A community that sets itself against all change is static, asserting that the old ways cannot be improved upon. The communities with whose governments this book is primarily concerned are dynamic, bent on progress and improvement. That means acceptance of the principle of change in social relationships, but not necessarily any agreement on what, when, or how. The process of social change is infinitely complex, but its main features are a matter of everyday observation. We have already noted that many people feel frustrated in their established social relationships. There are always individuals and groups bent on particular changes while other individuals and groups resist. This leads to friction and conflict, which if not moderated by some external authority may disrupt public order just as seriously as the activities of thugs and burglars.

GOVERNMENT AND SOCIAL CHANGE. Much of the adjustment of this kind of conflict can be—and is—carried through by voluntary agreement of the individuals and groups affected. However, where society consists of the relationships of tens of millions of people spread over a great territory like the United States, it is too complex for adequate adjustment to be made by voluntary agreement. An example may be taken from the economic field. If Pennsylvania coal miners are granted a change which gives them higher wages and shorter hours of work, such a change does not merely affect them and their employers. It affects all householders and all industries that use their coal, and ultimately it affects all the consumers of goods produced by those industries. It affects everyone in the United States, and people in other countries as well. If the attempt to get higher wages and shorter hours involves a prolonged strike in the coal-mining industry, again everyone is affected. It is not possible, even with the best will in the world, for all the groups and individuals affected to adjust such a conflict by general voluntary agreement. At every turn, one will find that changes in the relationships of particular persons and groups have repercussions on many other persons and groups as well. These latter need some agency that speaks for them and protects their interest in the outcome of the conflict.

Here is another great function of government: presiding over the struggle for social change of whatever kind. Its main purpose here is to ensure that

the struggle does not imperil public order. Higher prices for coal are embarrassing and annoying to many but are not likely to endanger public order, unless the rise in price is astronomical. On the other hand, prolonged strikes in the coal industry will paralyze industry and transportation and threaten public order, and government will be required to intervene to protect it. It is through the government that society, threatened by failure of a supply of coal or by any other conflict between individuals and groups, can bring pressure for a solution of the conflict and dictate and enforce its terms if necessary. The very fact of the reserve power of government always overhanging the scene disposes the parties to the conflict to find a solution.

GOVERNMENT AND POLITICS. If we are to live in society with some assurance that it will not be disrupted by individual and group aggressions, government is necessary. Its essential function determines its character. It is an organization for controlling human action, mainly through the enforcing of rules, by sheer physical force if necessary. Present-day governments carry on many activities which seem to have little or no connection with making and enforcing rules of conduct, just as a drugstore handles many lines besides drugs. But to understand the essential character of government and the prevailing attitude of individuals and groups toward it, it is necessary to keep its essential function always in mind. Politics is a term for describing the varied methods by which individuals and groups try to move government to stop conduct that is disturbing public order, to compel the settlement of some conflict that is threatening public order, to enforce some social change they want, or to refrain from enforcing some social change they dislike.

Besides the danger of disruption from within, a society is exposed to attack from without, and this will continue until war has been eliminated from human affairs. Society has to take steps to protect itself from external enemies. The example of the countries that have been overrun by war in the last fifty years vividly illustrates this need. Government is a necessary agent for meeting this need through the maintenance of military and naval establishments. It is the organization to which the control and application of naked force is given whether in relation to internal or external matters.

STATE AND GOVERNMENT

When rules enforced by government restrain us from doing things we want to do, we tend to regard it as an alien force imposed on us from the outside. We actually see some few men who form the government, for the

time being, apply its power to control the conduct of other men. However, government is not alien and external to society. It is an essential instrument of men in society for ensuring an adequate measure of stability in society. There must be order, dictated by government decree if need be. In times past, men have supported absolute governments over which they themselves had no control because these governments ensured order. They have even regarded absolute monarchs as gifts from God for this indispensable service.

But government does not undertake to define all social relationships by law; it does not try to dictate terms of all social co-operation by government decree. That would scarcely be possible. In any event, it is not necessary, because men always want to be together in society and they exert themselves to find ways to make it possible, such as custom, habit, and voluntary agreement. Because these alone do not suffice, they support government as well to act at critical points and at critical times. All have an interest in seeing that government does its essential job. When it is doing that, it acts for us all in furtherance of common interests and common purposes.

The State as a Mutual Insurance Association. In effect, what we do, at least in democratic countries like the United States, Britain, and France, is to become members of a compulsory mutual insurance association to insure one another against external enemies who would ravage us by war, against private aggression within society, and against disruption of social relationships by individual and group conflict. The taxes we pay are the premiums paid for protection by this kind of insurance. This association is called the *state*.

It is an association for limited, specific purposes and works by methods appropriate to those purposes. If we want to associate for other purposes, such as religious worship, business, or recreation, we join quite different kinds of associations which work by quite different methods. Every association consisting of large numbers of persons must have a constitution prescribing how it is to act and who is to act for it in protecting the common interests and carrying out the common purposes of its members. The association that is the state has a constitution prescribing the organs of the state and the methods for selecting persons through whom these organs find expression. These organs and persons constitute the government about which we have been talking.

The state is the expression of one aspect of society. The government as a whole is the organ of the state and thus an instrument of society. The government at any moment has concrete and tangible form; we can hear its

voice, and we can see members of Congress, judges, and government officials. The state is always an abstraction, a sign, or a shorthand term for bringing into the focus of attention the discussion of the preceding pages. It denotes the *order* aspect of society. It points to unseen but important realities behind the concrete manifestations of government, helping to clarify our understanding of the place of government in society.

DEFINITION OF STATE. Many definitions of the state, varying in their emphasis, have been attempted—some 145 are available today. But the one which best provides the emphasis wanted here may be quoted and given some comment:

The state is an association, which, acting through law as promulgated by a government endowed to this end with coercive power, maintains within a community territorially demarcated the universal external conditions of social order.¹

The state is concerned with order in a given territory. Its rule is universal in that territory. Everyone there must obey the law of the state, and only the government or its delegates are entitled to apply physical coercion. The monopoly of coercive power wielded by the state is called *sovereignty*. Membership of the state depends on the constitution and is at least as extensive as the right to vote. One cannot escape from the laws of the state and the control of the government merely by resigning one's membership. Indeed, the only effective way to resign is to take up membership in another state. Even then, unless one moves physically from the territory of the state in question, one remains subject to its control. The state does not create all social order by its coercive apparatus. Much of the order found in society is spontaneous. The primary concern of the state is with the outward conditions needed to nourish the inward impulses for orderly social relationships.

The State as a Promoter of Common Interests. All persons have a common interest in social order. In this matter, the state can act for all its members with their approval. In fact, wherever its members discover a common interest or a common purpose, the state can appropriately act to protect that common interest and promote that common purpose. So the state can be defined, rather more widely than in the foregoing definition, as an association for promoting the common interests and common purposes of its members. We should always remember, however, that it is the guardianship of social order that gives the state its special and unique characteristics, and

¹ R. M. MacIver, *The Modern State* (Oxford: Clarendon Press, 1926), p. 22.

that most common interests are related, in one way or another, to the maintenance of social order.

The world is divided territorially among a number of states. The definition of the state quoted here is not valid in all its terms for all the states of the present day, nor for many of the states that have existed in the past. We shall see later why this is so. It is, however, correct for those states which have democratic governments, and the primary concern of this book is with democratic states and governments.

Strictly speaking, then, the definition is a description of a particular kind of state as it now exists. It does not purport to explain the essential character of all states that have ever existed. Nor does it purport to explain the historical origin of the state. Historically, the state always arises in response to a need for order. But its first manifestations rarely take the form of an association. It has generally begun as an organization of naked power controlled by a small imperious clique imposing order on its people as *subjects*—i.e. as being under its authority, dominion, and control, exploiting them harshly at the same time, and refusing them their role in the state as *citizens*—i.e. as members of the political community. The definition is valid only for states that have been tamed and made directly responsible to the people on whose behalf order is being provided.

SOCIETY, STATE, AND GOVERNMENT: SUMMATION

To sum up this preliminary discussion, society is the total of social relationships within the given area of the earth's surface on which attention is focused. The state is one particular constellation of social relationships, men associating together to provide the indispensable conditions of public order. The state is therefore *less* than society; it is an instrument of society for its purposes. The government is the concrete embodiment of the state, consisting of organs and persons who carry out the purposes of the state. For democratic countries at any rate, the government at any particular moment is less than the state. It is the agent of the association that directs and controls it.

It is necessary here, however, to anticipate a possible confusion about the use of the term *government*. The word is widely used, and will be used here, in two different senses. *First*, it is used in a narrow sense, as when we speak of the government of the day. It is common to speak of Prime Minister Macmillan's Government in Britain. In this sense, one could speak of President

Kennedy's Government, meaning President Kennedy's Administration. The narrow meaning designates the executive branch of government, which will be described in Chapters XIII and XIV. *Second*, the word is used in a general inclusive sense to denote the whole set of institutions through which some command and others obey. It is in this wide sense that the word is employed in the title of this book, or when we speak of the study of government, ideals of government, forms of government, and so on. In a particular sense in this book, it may not be immediately obvious in which sense the word is used. The context as a whole, however, will make it clear and the reader must attend to the context to avoid confusion.

WHY STUDY GOVERNMENT?

Government affects almost every aspect of our lives. We have already seen that it ensures for us the advantages and satisfactions of life in society. Properly designed and used, it can nourish the highest level of civilization. Clumsily and ignorantly managed, it can lead—and often has led—men to think it is intolerable because of the burdens it puts upon them. It always takes from us in taxes money for which we have infinite uses of our own. It can block our most cherished designs and suppress us ruthlessly if we pursue them in the face of its interdict. It can require us to sacrifice our lives in war. Normally, we can only escape it by submitting to another government somewhere else in the world, which may deal with us still more harshly and summarily. If we want to know anything about our world, if we want to know what we can plan for or expect in the future, we must try to understand government.

The Challenge of Citizenship. In democratic countries, we enjoy the privileges of citizenship. Through voting in elections and through other methods to be discussed later, the citizens who are members of the state collectively decide in broad outline what government will do and how it will behave. The actions of citizens are decisive, as much by their ignorance and inattention as by their understanding and sustained interest. The man who fails to vote is also helping to decide. It is broadly true in a democracy that we get the government we deserve. If it is bad, the first step for each of us is to deserve better by earnest effort to understand and to influence what government does.

CITIZENSHIP A RESPONSIBILITY. Citizenship is more than an opportunity: it

is also a responsibility. There have always been critics of democracy, government under the control of the many, who were sure it could not endure permanently because the mass of citizens would not live up to the high responsibilities it entails. It is not necessary, or even possible, for every citizen to understand the nature and problems of government. But democracy will certainly be a failure unless there comes forward voluntarily in each generation a large number of citizens prepared to give the time and thought necessary to the understanding of government, and then to participate actively in political life. By the attitude we take toward this responsibility we decide the fate of democracy.

Hitherto there has not been nearly enough well-informed participation by the citizens of democratic countries. Too many have assumed that they could have the advantages of 'government of the people, for the people, and by the people' without themselves taking up the responsibilities it involves. The men who struggled from the eighteenth century onward to secure the right of participation for all would have found this most difficult to understand. They and their forebears had had a long experience as subjects of states whose governments they could not control, or even persuade to listen to them. The frustrations and humiliations of this condition led them to think that full citizenship, the right of participation in the state, was the greatest gift that could be made to man, and that men who had it would cherish it and exercise it fully.

Democratic Government on Trial. They, who knew the unpleasantness of the alternatives, would have deemed it incredible that the privileges and responsibilities of citizenship should be taken lightly. We of the West, who have enjoyed for a long time the right of participation in the state, have let the unpleasantness of the alternatives fade from our minds and have taken the responsibilities of citizenship lightly. In large measure, we have done this because of the enormous success of democracy in the latter part of the nineteenth century and in the early years of the twentieth. For a time, democracy seemed almost certain to sweep the world and to become the prevailing, if not the universal, form of government. In these circumstances, it was easy to take it for granted and forget the unpleasantness of the alternatives.

However, ever since the end of World War I, the grisly episodes of dictatorship in Nazi Germany and Fascist Italy and the established Communist dictatorships in Russia and Eastern Europe have warned us that the alternatives are very real and very unpleasant. We cannot take democracy for granted. If democratic government is to maintain itself as a genuine alterna-

tive to dictatorship, it must be able to draw deeply on the informed understanding and vigorous participation of a large number of its citizens. This gives a special urgency to the study of democratic government.

Democratic government has not fulfilled all the high hopes of those who first established it in the modern world. It is even probable that some of these hopes were naïve and not capable of full realization. Some of the indifference of citizens toward their privileges and responsibilities may be due to disillusionment. The purpose of this book is to reveal the essential characteristics of democratic government, as experience seems to show them to be, by describing and comparing in broad outline the governments of the United States and Britain, and, to a much lesser extent, France, and providing a sharp contrast by sketching some of the main features of government in a modern dictatorship, the Soviet Union. Note will be taken of the defects and limitations democratic government has so far exhibited, especially in the two great countries that have practiced it most successfully and continuously. An effort will be made to show what it does achieve despite its defects and limitations, and to suggest what we can fairly expect it to accomplish.

WAYS OF STUDYING GOVERNMENT

It will help to make clear the scope and limitations of this book if we look briefly at the different ways in which state and government, or particular aspects of them, can be studied. Enough has been said already to show that state and government are very complex, as complex as the total sum of social relationships with which they are in one way or another concerned. Even if one wants to understand state and government completely, one cannot study all aspects of them at once. It is necessary to isolate particular aspects or branches of the study, and focus intensively on each one separately, hoping later to combine these separate pieces of learning in a fuller understanding. Also, particular persons may be interested in one aspect of government and not in another. There have come to be a number of different branches, or foci of interest, in the study of government. Yet the first and most fundamental thing to note is the distinction between a study of what government actually is and does in any one or several countries, and a study of what government ought to be and ought to do. The difference is one between fact and theory. The focus of interest of each is different, and the method of study appropriate to each is different.

Government as It Is. For instance, one can study the government of the

United States as it actually is, read its Constitution and its laws, learn how the legislature is composed and how it makes laws, fix in one's mind how the executive, the courts, and the civil service are organized. This is a study of existing structure and machinery, and is not very revealing in itself. The next necessary step to understanding the government of the United States is to observe how men act in relation to their government, whether as private citizens or as part of the government. Here one studies the behavior of men in political parties, in elections, in pressure groups, in their dealings with various branches of the government, in trying to get the government to do this, or not to do that. This is the study of political behavior, the dynamics of government, which has received increasing emphasis in recent years, particularly from political scientists.

The examination of structure and dynamics together constitutes the study of the government of the United States, or American Government. But interest is not exhausted and understanding is incomplete with the mere collection of facts. As particular facts are turned up and recorded, the student will ask how this came to be. The Constitution of the United States makes no mention of or provision for political parties. Yet political parties are facts of undeniably first-rate importance in the government of the United States. Why did political parties develop? Why are there two, and not three or more? For that matter, why did Congress pass one particular law and not another? The questions that can be asked are almost endless. Asking them assumes that the facts in question have causes that can be identified. If these causes can be identified, understanding is deepened.

So the study of a particular government to be meaningful must go beyond the collection of facts to inquire into the meaning or significance of facts. This involves analysis, an attempt to discover the relation, if any, between one fact, or set of facts, and another. However, both the description of the facts and their analysis are concerned with seeing and understanding what government actually is in the United States.

This focus of interest and this method can be applied to one government after another, or to two or more in combination. There is a special advantage in comparing side by side two or more governments which have at the same time both marked similarities and striking differences. For example, Britain and the United States have had two-party systems that are similar in a general way, and yet show very striking differences in their detailed structure and working. What accounts for the similarities and for the differences? Some comment will be offered on this question later. We may note now that

such comparison tends to sharpen the analysis of cause and effect, and thus improves the understanding of the essentials of both governments. Study conducted on these lines is known as Comparative Government.

Government as It Ought To Be. Then there is the study of government as it ought to be, the search for standards for judging the rightness or wrongness of particular governments as they actually exist and work. Presumably life has a purpose or purposes, and government, if it makes any sense at all, must be an instrument of these purposes. What are the ideals or goals at which we should aim? Is government necessary to help toward these goals? If so, in what way can government help or hinder; what should it do? When should it bring its sovereignty to bear on individuals, and when should it refrain? Who should be allowed to participate in government? How best can government be organized to achieve the purposes we have decided it should pursue?

These and similar questions have been asked again and again since the beginnings of government. Academic philosophers have asked them as academic questions, and tried to find answers for them. Both philosophers and ordinary men have asked them as agonizingly practical questions when they were trying to decide whether it was their duty to obey their government, or to resist it when they themselves thought what it was doing was wrong. There is an immense literature recording what men in the Western world have thought on these questions in the last 2,500 or more years. The study of this record, and original thought on these questions, with a view to finding answers to the problems of our own times is called Political Philosophy or Political Theory. The conclusions drawn from such a study may lead one to deny the rightness of one's own government and to demand that it be changed.

In every stable society there are widely held beliefs or ideals of what government should be; these exercise a pervasive and powerful influence on the structure and working of government in that society. There is a democratic political theory that seeks to justify democratic government and also to determine the uses to which a democratic government will be put. A study of the governments of the United States and Britain that ignored the ideals that have largely determined the present structure and press constantly on the daily working of these two governments would be incomplete. Accordingly, the next chapter attempts to outline democratic political ideals. By way of contrast it will, in turn, be followed by one dealing with the beliefs that have motivated some modern dictatorships. Succeeding chapters will try to

show in what ways the structure and working of the governments of the United States and Britain are responses to the democratic ideals. France, which possesses a related but rather different type of governmental structure—and evidently a less predictably stable one—will be treated wherever appropriate, as will certain other governments from time to time.

Cause and Effect Relationships in Government. There is a third approach to the study of government and politics which is concerned not only with understanding what is but also with predicting what will be. It does not focus on the issue of what men should do in government and politics, but on what their fundamental human nature will lead them to do in specific sets of circumstances. We are all given to predictions of this kind in every field of human activity. We say that certain things cannot be done because they are against human nature, or that particular kinds of behavior are inevitable, given human nature. Such forecasts are based on the assumption that human nature, or at least certain elements in it, is constant, and does not change from person to person and from time to time. Public opinion polls take a sample composed of the opinions of a few thousand people and on this basis predict how millions will vote. The predictions are not inevitably right, but they are always based on an assumption of constancy in human nature and human behavior.

Predicting. The interest in prediction is always present in the study of government, as distinct from the study of political philosophy. Whenever we say that political facts A and B in combination cause political event C, we are asserting cause and effect relationships which are the basis of all prediction. It will be suggested later that the fact of political parties, and of at least some of the behavior of men in parties, is the inevitable outcome of human nature in a certain kind of political and social circumstance. To say, as is sometimes said, that the President of the United States should have the power to dissolve Congress and call a new congressional election at any time instead of having fixed election dates, as at present, assumes that political behavior reacting to these changed circumstances would bring predictable beneficial results.

Despite a spate of new methods and techniques, our power of prediction in politics is markedly defective, partly because of the complexity of both human nature and of the circumstances and conditions to which human nature reacts. Also, we have not been able to determine how far men are conditioned by their nature and by circumstances, and how far each is free to direct his actions by conscious and deliberate aim. Presumably they are in some meas-

ure conditioned, or there would be no sense in talking about cause and effect or in trying to make any predictions, in human affairs. Presumably they are in some measure free to choose, or there would be no point at all in the thousands of years of talk about what government ought to do or ought not to do. To talk in this way assumes that men are free, to some degree at least, to decide how their government shall be organized and what it shall do. But we do not know where the line between determinism and free will really lies.

DATA FOR PREDICTION IN POLITICS. The science of psychology is trying to discover how far human behavior can be predicted. Psychologists amass great bodies of data from which they draw generalizations about how men can be expected to act in certain defined sets of circumstances. This method can be, and is being increasingly applied to the study of political behavior in elections, in the relations between political leaders and followers, and so on. There may some day be a reliable science of political behavior, but at present it is still in its early, although distinctly promising, stages.

Materials for attempting predictions in the field of government and politics can be drawn from history as well as from psychology. History gives us a long record of the vicissitudes of states and governments. In the course of history, there have been many states and governments, and we know a good deal about how they arose, how they developed and flourished, how they were torn by civil war or revolution, how they fell, or how they have endured for varying lengths of time. By a study of this record, we may be able to discern constantly recurring patterns in history according to which states rise, thrive, and fall.² To take specific examples, it has been urged, on the basis of historical record, that men have always been ruled by an elite, a small governing class, which always makes its will prevail whatever the forms of government, and further, that they always will be so ruled.³ A fascinating study of a number of political revolutions in the past shows them all going through several remarkably similar stages,⁴ tempting one to predict that future revolutions will also go through these same stages. Communism claims the warrant of history for its predictions about the outcome of our times, although not resting its case by any means on history alone.⁵

Political Science as Prediction. A study that finds laws by which to predict

² Arnold J. Toynbee, *A Study of History*, abridgment of vols. 1-vi by D. C. Somervell (New York: Oxford University Press, 1946).

³ James Burnham, *The Machiavellians* (New York: The John Day Co., 1943).

⁴ Crane Brinton, *The Anatomy of Revolution* (London: Allen and Unwin, 1939).

⁵ See Chapter III, *infra*.

what will happen in politics in carefully defined sets of circumstances differs markedly from both the study of Government and the study of Political Theory, and is appropriately called Political Science. *Science* is here used in the sense of a body of knowledge that enables us to make accurate predictions on the analogy of the natural sciences, notably physics and chemistry. The identifying mark of these two sciences is the power of prediction.

To talk of Political Science in this sense is somewhat pretentious, because in the present state of knowledge our ability to predict the course of political events is very limited indeed. One has only to ask how much reliable forecast there is in one decade of the major political events of the next decade. We think that careful analysis has given us some insight into causal relationships in government and politics, and the patient intensive study of political behavior will no doubt give us further and deeper insights. At present, however, political science in this strict sense has not advanced very far. It represents an aspiration to a deeper knowledge of political forces rather than any substantial body of reliable generalizations. Yet there is little doubt that political scientists would like to find laws of political activity as certain as the law of gravity.

Political Science as Systematic Study of Government. The term Political Science is more often used in a wider and looser sense to cover the entire study of government and politics in whatever aspect and by any of the methods outlined above. Very often, a college course in Political Science will cover a general description of forms of government, of constitutions and different organs of government, an analysis of the state as an aspect of society, and a consideration of theoretical views on what governments ought to be and ought to do. In this wider sense, the identifying mark of *science* is in the methods of study used: painstaking accuracy in observation and in collection of facts and systematic analysis by close logical reasoning. Defined in this way, any comprehensive, verifiable, and systematic body of knowledge about a specified area of inquiry may be called a science.

In this sense there is a *political science*, and this book at least attempts to be scientific. When, as often happens, universities and colleges put the label Political Science on one or more of their courses in government and politics, they are generally using *science* in this sense. Much of the argument and difference of opinion on whether the study of government is, or can be, a science turns on sharply different definitions of what is a science. It is only when the narrow definition is accepted that a serious issue arises. There is nothing to be gained by pursuing that particular issue further here.

If anyone is to satisfy his own mind as to whether the study of government is, or can be, a science, he must first of all master the existing body of knowledge about government and politics—the science and the art. This book is at most an introduction to a part of that body of knowledge. Then he would need to learn what history and psychology and several other branches of systematic knowledge tell us about human behavior in the past and in the present. With that knowledge, he will be fully aware of the difficulties of deciding. Without it, he cannot make any useful judgment on the issue. As in everything else, one must begin at the beginning.

The purpose here is to make a beginning with one particular kind of government, democratic government, trying to make clear in an elementary way what its essential features are, how it works, and how it is related to the ideals it is supposed to be furthering. Before going ahead, however, a brief survey of forms of government may help to set the stage.

FORMS OF GOVERNMENT

Even in the most primitive societies, government exists in some rudimentary form. There are always leaders who exercise authority, patriarchs or priests if not kings, politicians, or dictators. Government in every society has distinctive characteristics, and as a society develops and changes, government usually passes through several transformations. History is a rich storehouse of forms and types of government, which political thinkers ever since the time of the Greeks have been trying to classify.

Aristotle's Classification. There are many different classifications of government, none of which has been generally accepted as satisfactory. In these circumstances, it would merely be confusing to the beginning student to enumerate and discuss them. It will be worthwhile, however, to discuss briefly one famous classification, an adaptation of that made by Aristotle in his study of the Greek city-states. It is still perhaps more widely accepted than any other, and it illustrates sufficiently the difficulty of classifying different kinds of governments.

The criterion used by this classification for distinguishing types of governments is the number of persons who rule or share the ruling power. Where one person governs, the government is a *monarchy*. Where rule is shared by a relatively small section of the population, the government is an *aristocracy*. Where control of government is vested in the citizens generally, the govern-

ment is a *democracy*. Accordingly, every government is either a monarchy, an aristocracy, or a democracy.

It should be pointed out that this is both an adaptation and a simplification of Aristotle's classification. It is an adaptation because some of the terms used had not the same meaning for him as for later classifiers. Democracy, for example, meant to him something approaching mob rule and was a perversion of a good form of government, which he called *polity*. His term *polity* meant something pretty close to what we would call democracy. It is a simplification because Aristotle's classification identified at least six forms of government, some of which were true forms, or models, while others were recurring perversions of these models, i.e., *tyranny*, *oligarchy*, and *ochlocracy*. He also noted the occurrence of a variety of mixed forms. There have been, of course, many variations on Aristotle's classification, but most of them treat monarchy, aristocracy, and democracy as the basic forms.

DIFFICULTY IN APPLICATION. The difficulty about this threefold classification lies in its application. In one sense, British government is a monarchy. In strict constitutional law, the monarch is the ruler. The ministers who exercise the powers of government derive their formal authority from the monarch and cannot act without it. Relying on this aspect of the British constitution, some have concluded that the British government is a monarchy—a limited monarchy, it is true, but still a monarchy.

However, as we shall see, a large part of the British constitution is made up of *customary rules* which settle the way in which the formal legal powers of the king are to be exercised. These customary rules have been closely adhered to for over a century and they give the monarch only a negligible influence over the appointment of his ministers and the powers they exercise. Briefly, they provide that the monarch must choose ministers who have—and can hold—the confidence of Parliament, and that he must accept their advice. The House of Commons, the effective part of Parliament, is made up of the elected representatives of the electorate, which, in turn, comprises the whole body of adult citizens. On these grounds, many classify British government as a democracy.

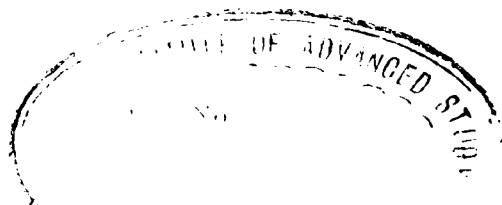
If substance rather than shadowy forms is to be the criterion, the British form of government is a democracy, and a highly effective one as matters go in an imperfect world. When we brush aside forms to follow substance, we often encounter serious difficulties in applying a certain classification. To return to the concept of monarchy, for example, when as has often happened,

the monarch shares his rule with his mistresses, is the government still a monarchy? More important, no monarchy has ever been able to maintain its rule without the support of at least a small group or class in the community. These do not give their support without sharing in, or imposing limitations on, the powers of the monarch. There are *republics*—e.g., modern Egypt and Ghana—where the forms clearly point to democracy but the practice points equivocally to rule by one or a few, and not to rule by the many. The Communist case against the democracies of the present day is that they are masked oligarchies in which the relatively small owning capitalist class is the effective ruler. An attempt to classify according to the inward practice rather than the outward forms often raises difficult questions and interminable debate on what the realities are.

COMBINED FORMS. The governments of all but the most primitive societies are complex institutions and they cannot be sorted neatly into simple categories. Almost all of them reveal some combination or two or more of the three forms. Some governments combine monarchic and aristocratic elements; others combine aristocratic and democratic, and so on. Attempts at classification are important for the scientific study of government in general, but discussion of these attempts cannot usefully precede careful, detailed study of particular governments.

Those who tried to classify governments as either monarchies, aristocracies, or democracies then proceeded to discuss the merits and demerits of each. By the end of the nineteenth century this discussion had become largely academic. Democracy, defined as rule by the many and marked by wide extensions of the franchise, had triumphed in the Western world. Whether it was the best form of government or not, there was no prospect of a return to aristocratic or monarchical rule.

Dictatorships. If this conclusion needed any confirmation, it was provided by events between the two World Wars. A new form of government—or a very old form of government in a new dress—appeared in Europe. As a result of revolutions in Russia in 1917, in Italy in 1922, and in Germany in 1933, the three most notorious modern dictatorships were established. Somewhat similar forms of rule were set up in Turkey, Poland, Spain, and other countries, such as those of Latin America. Since World War II, dictatorships more or less on the Russian model have been set up in Europe in Rumania, Bulgaria, Hungary, Yugoslavia, Albania, Poland, and Czechoslovakia. Most of these regimes have reviled the existing democracies but have paid them



the compliment of regarding them as a serious rival form of government. Monarchy and aristocracy, as the world had hitherto understood these terms, they have dismissed with a shrug of contempt.

Although the three leading modern dictatorships mentioned above are worlds apart in many respects, they have certain striking similarities, particularly in their methods of gaining and maintaining power. These methods were so successful that aspiring revolutionaries are bound to continue to copy them in the future. Where democracy proves to be an inadequate form of government, it seems almost certain to be succeeded by the modern type of dictatorship.

A Significant Distinction. World War II was quite accurately represented as a titanic struggle between two forms of government, democracy and Fascist dictatorship. Although the democracies and the Communist dictatorship in Russia were allies in the war, they fell into distrust and bitter rivalry as soon as their common enemy had been overcome. Their fundamental beliefs about government and politics are sharply opposed. They now confront each other 'in a posture of war' in every part of the world. *The only classification of forms of government which seems at all closely related to current realities is that which distinguishes between democracy and dictatorship.* (However, one distinguished observer has inclined to the view that the essential difference is really between non-aggressive and aggressive states.⁶)

Dictatorship has been spreading through the world in the past generation, replacing some democratic governments and threatening others. Superficially, it appears as a new form of government in the Western world, threatening the older established democratic forms. But in the perspective of history, democracy, as we know it today, is a newer and rarer form than monarchy, aristocracy, or dictatorship. The human race has had a much wider and longer experience of government imposed by one or a few than it has had of democratic self-government.

EARLY FORMS OF GOVERNMENT

Pre-Christian. Before the Christian era the prevailing form of government over an extensive territory was the despotic empire. For several thousand years, the Middle East, or large parts of it, was ruled successively by the Assyrian, Egyptian, Babylonian, and Persian empires, headed by kings who

⁶ William Ebenstein, *Today's Isms*, 3rd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1961), pp. 80-88.

were believed to be gods or demigods as well as kings. They maintained a precarious kind of order throughout their dominions, and demanded crushing taxes and tributes in return. Apart from the dubious public order they provided, they did little for their people, who lived in fear of the tax-gatherer. Their polyglot subjects had no participation in or control over the government. The short-lived empire of Alexander the Great was of this kind.

City-States. In the millennium before Christ many small city-states grew up in the Mediterranean basin, the most famous of which were Athens and Rome. Initially at any rate, their territories were always small, limited to a few square miles. In the course of their histories, they ran the gamut of the forms of government, from monarchy to aristocracy to democracy to dictatorship. The democratic phases were very short in contrast to the duration of the other phases. During their brief appearance, however, the Greek and Roman democracies gave to the world the idea of free and equal citizenship.

Rome. At the dawn of the Christian era the Roman Republic was transformed into the Roman Empire, the greatest and longest-lived empire the Western world has known. It extended citizenship to all subject people of the Empire, and it ruled the known world for four hundred years. However, there were no effective institutional devices by which the citizens could participate in government and control the Empire. The power of the emperor became absolute, and the very office of Emperor became the plaything of the praetorian guard in Rome, who set up and tore down the emperors at will. There was nothing democratic about the forms of government under the Roman Empire.

Dark Ages. The Empire disintegrated in Western Europe in the fifth century of the Christian era. Civilization collapsed and government itself almost disappeared for about 500 years in the Dark Ages that followed. What government there was certainly was not democratic. In the Middle Ages (roughly A.D. 900 to A.D. 1500) Western Europe revived under the feudal system. In its political aspects, *feudalism* was an extremely decentralized form of government. Europe was broken up into thousands of little principalities, many of which would not make a large farm by modern standards. The feudal lord both owned the principality, or farm, and provided the government for his tenants and serfs. There were some elements of popular participation in feudal government, but it was everywhere predominantly monarchical or aristocratic in essential form.

Middle Ages. Throughout the Middle Ages, individual feudal lords and their descendants steadily expanded their holdings by a variety of methods,

and the more successful of them finally set themselves up as kings. In this way, a number of large territories were each brought under the sway of a single central government. The process of consolidation first brought the kingdoms of England, France, Spain, Austria, and so on, into existence, and then continued until all the modern states of Europe as we have known them were established. But the final consolidation of Germany and Italy was not completed until after the middle of the nineteenth century.

Modernity. By the end of the fifteenth century feudalism had lost its vigor, and rule by a monarch was becoming the typical form of government in Europe. The Middle Ages came to an end and the modern era began. From the sixteenth to the nineteenth centuries most of Europe was ruled by absolute monarchs who treated their people as subjects rather than as citizens. Indeed, the Czar of Russia, the German Kaiser, and the Austrian Emperor continued to claim almost absolute power until they were all overwhelmed in World War I.

There democracy had triumphed. It seemed to reign supreme. Let us look at it now through a basic and forthright examination of its varied *modis operandi* in theory and practice—its ideals and ideas, its proved accomplishments and those that still remain expectations.

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II

Basic Assumptions of Democracy

INTRODUCTORY

What Is It? Looked at from the point of view of popular understanding, the word democracy provides a fascinating paradox. Few terms are so widely and favorably used by the people of the free world and at the same time mean so many different things to them. Lip-service to democracy is almost universal, even while it is being misunderstood and often betrayed in practice. Even Communist and other dictatorships use it widely and boastfully as a 'sop' to the people—e.g. the 'People's Democracies' of Russia's Eastern European satellites; Egypt's President Nasser's 'Presidential Democracy'; Ghana's President Kwame Nkrumah's 'Guided Democracy.' Yet the people of the United States, France, Britain, the Lowlands, and Scandinavia, among others, are devoted to its dimly perceived principles, and would fight for them again—as they have fought in the past—even without being clear as to what they were fighting for in specific terms.

DOUBTS. 'Make the world safe for democracy' was a famous slogan of the war effort of the Woodrow Wilson Administration. It was a noble rallying-cry, yet many who were willing to push that effort through to a finish were puzzled about exactly what democracy meant, especially since one of the Allies, Czarist Russia, was evidently fighting to preserve autocracy! During the Second World War, a war that was also fought for democracy, the government of the United States, for one, organized an extensive educational

service to answer the oft-voiced query, 'What are we fighting for?' With very few exceptions, the questioners did not ask in a defeatist way; after all, more than anything else, they wanted to lick the 'Krauts' and the 'Japs'; and they would praise democracy in their interminable discussions or 'gripe-sessions.' Because they had been raised in a democratic climate and, for the most part, had not experienced the evils of dictatorship, they were neither articulate about democracy nor fully conscious of its meaning. They were inarticulate because they had absorbed a lot of understanding through the pores of the skin, as it were, but had never been forced to think about it. To many, *democracy* simply—and touchingly—meant a return to family and friends; to others, a chance-to-get-even-with those so-and-so officers and non-commissioned officers in civilian life; to still others, plainly no more than release from the bondage of military service. Probably for all of them, the now famous definition of democracy, written by E. B. White, an editor of *The New Yorker*, in response to a war-time query by the Writers' War Board, best expressed their innermost feelings:

Surely the Board knows what democracy is. It is the line that forms on the right. It is the don't shove. It is the hole in the stuffed shirt through which the sawdust slowly trickles; it is the dent in the high hat. Democracy is the recurrent suspicion that more than half the people are right more than half the time. It is the feeling of privacy in the voting booths, the feeling of communion in the libraries, the feeling of vitality everywhere. Democracy is a letter to the editor. Democracy is the score at the beginning of the ninth. It is an idea which hasn't been disproved yet, a song the words of which have not gone bad. It's the mustard on the hot dog and the cream in the rationed coffee. Democracy is a request from a War Board, in the middle of a morning in the middle of a war, wanting to know what democracy is.¹

Difficult Frame of Reference. In part, at least, the aforementioned uncertainties about meaning may be traced to the fact that the term *democracy* is so often used in almost the same breath to describe an *ideal* as well as a form of *government*. It is both—and it is neither: *It is pre-eminently a manner of governing and of being governed.* The basic authority is vested in the people; indeed, this is the literal meaning of the Greek *demos* (people) and *kratos* (authority) from which the term is derived.

FUNDAMENTALS. With that in mind it is, however, possible to discern certain *ideals*, i.e. fundamental aims for which we have fought, on which there is

¹ 'Notes and Comments' from 'The Talk of the Town,' *The New Yorker*, February 3, 1943.

a large measure of agreement, and which constitute the deeper meaning of democracy. Without raising questions of order of importance, these are:

Respect for Individual Personality	Justice
Individual Freedom	Rule by Law
Belief in Rationality	Constitutionalism
Equality	

We shall now examine each of these basic beliefs on which the practice of democracy rests. In reading and thinking about them, the student of government should always remember some essential points: First, no one can run his life in any orderly or meaningful way without a set of values, a system of ends, or ideals, to guide him in deciding what to do next. Second, if people are to live peacefully together in society and not always at cross purposes, there must be some agreement on the values, the ends, and ideals that our life in society is supposed to serve. Third, most of us cling to a set of values by sheer habit, habit inculcated by the family, the school, and the church in our formative years. That is why soldiers and others often find they cannot give any articulate account of the principles by which they live. Fourth, the ideals we share in common set standards for governments. If we are going to be governed with our own consent and approval, there must be some congruence between what the government is doing and what seems good to the governed. Fifth, these ideals of government, as they are called, are often vague and general. We cannot get everyone to acknowledge that they are true in any absolute sense, and it is often hard to decide how to apply them in particular sets of circumstances.

Democratic Ideals and Sources. Our concern here is with the deeply imbedded beliefs that support and justify present-day democratic government, and with the rejection of those beliefs that have brought modern dictatorships to the fore. Understandably, there are significant differences in emphasis in the ideals actually honored in the different democratic states, and the modern dictators vary in the raucousness of their repudiation of Western thought. Yet there is a common core of values that supports all functioning Western democracies; and there is a basic similarity in the negations of the dictatorships.

This common core has been shaped through a long period of history. The beginnings of the Western tradition from which Britain and the United States derive their ideals of government can be traced to Greek political thought five centuries before the Christian era. Significant features of it come

from Hebrew thought introduced into the West by Christianity. The Western tradition began to take distinctive shape with the mingling of Graeco-Roman and Hebraic-Christian elements in the later days of the Roman Empire. The fusing of these elements went on in Western Europe for a thousand years before the beginning of the modern age, and produced a remarkable synthesis in the political thought of the Middle Ages.

The modern age ushered in by the Renaissance and Reformation rejected the medieval synthesis and went back again to the classical age of Greece and Rome and to earlier Christianity for inspiration. Another four hundred years of thought and reflection went into the formulation of the democratic ideal as we know it in the West today. While the formulation is different and distinctive, it was not made out of whole cloth. In large measure, it is another synthesis achieved by reworking ideas long current in Western thought. Because of the great emphasis it puts on individual liberty, it is most accurately described as the *liberal democratic ideal*.

FUNDAMENTALS OF DEMOCRATIC BELIEF

A brief sketch cannot do justice to a synthesis that rests on two thousand years of thought and reflection. It can only attempt to state the essentials, ignoring many of the qualifications and refinements of statement needed for precision. Unfortunately, a bald statement of essentials lumps together a number of beliefs that seem on superficial appearance and in everyday unreflective experience to be mutually contradictory. Democrats believe in individual freedom and in social order, in individual freedom and social equality. Yet it often appears that the demands of one can only be met at the expense of the other.

(1) *Respect for Individual Personality*. It is not possible here to phrase a reconciliation of these beliefs. Actually, that reconciliation is one of the perennial and never-ending tasks of democratic politics. But it is necessary to see how a reconciliation is possible. The possibility exists because not all the various ends, purposes, values, and objectives cherished by democratic society are regarded as having equal rank or worth. Some are held because they are thought to contribute to the achieving of still other higher ends. Thus we believe in freedom and social equality not for themselves alone but rather because they are both needed in varying proportion to create the best environment for the development of individual personality.

A wide range of individual freedom enables some to get rich while others remain poor, thus producing sharp social inequalities. Intervening in this situation for the purpose of enforcing some measure of equality would limit individual freedom. The clash between the claims of individual freedom and social equality can be resolved by asking what combination of freedom and equality is needed to promote the purpose that is higher than either of them, namely, the full and rich development of individual personality.

If all other values are subordinate to the claims of individual personality, then it is the superior value, the highest of the democratic ideals. But why should it be the ultimate? Should not our highest aim be to do the will of God, or to serve Truth and Goodness? The ideals of democratic government, that is, government controlled by the people for their purposes, must be widely accepted and believed by the people or those ideals cannot, by definition, be democratic. Respect for individual personality is the maximum on which it has been possible to get widespread agreement. If we say our highest ideal is to do the will of God, that raises the question of what God's will is. If we say our highest ideal is to serve Truth and make it prevail, that raises the question of what Truth is. Answers to these questions will turn on religious or philosophical views about the nature of the universe and man's place in it. And when we ask what is the final scheme of things and man's place in it, we meet divergent answers and hot dispute. We are in the midst of the controversies of the ages and beyond the area in which general agreement is possible in our present state of knowledge.

DISAGREEMENT ON COSMIC ULTIMATES. We cannot frame or hold a common ideal at all if we must first agree about questions on which there is no present prospect of agreement. It is not an accident that all the functioning democracies are committed to religious toleration. Also, it is of the highest significance that modern democracy did not begin to develop and flourish until the commitment on religious toleration was made. For it is in the sphere of religious belief that views on first and last things find passionate and diverse expression. In taking religion out of politics, three assumptions vital to modern democracy were made.

First, by virtue of their common humanity, men have enough common interests and can find a sufficient basis of common beliefs to found a system of order without having to be committed to dogmatic answers to all the ultimates. Second, the profoundest need of all men is for self-expression (in selfless as well as self-regarding forms); all the various interests they struggle to defend and promote are means to that end. Third, they can agree to con-

cede to others the claim to personality that they make for themselves on the ground that, given mutual trust and confidence, this is the best way to protect their own most cherished claims and promote their own deepest needs, including their need for fellowship with others of their fellow-men.

From the point of view of democracy, the highest value, *the ultimate for politics*, is the liberation of and respect for individual personality. In the cosmic sense, there are other values to which men may make personal commitments. For example, the Communist thinks himself to be in possession of a cosmic truth, a final purpose toward which all creation moves, and which he wants to see vindicated through political action at whatever cost to individual men and women right here and now. But from the point of view of democracy, government is a mundane affair, primarily concerned with a framework of order which will serve the concrete needs and interests of an earth-bound humanity. If men will make the adjustments necessary to secure firmly for one another these needs and interests, they are freed in their persons for the pursuit of the various forms of excellence that seem good to them. If one's vision is solitary, he can hitch his wagon to the star of his choice. If he finds others of like mind, they can go forward in voluntary and satisfying fellowship. If the vision fades for some, they need go no further. But when government is harnessed to a cosmic purpose, all are required to go in the same wagon to the same star, willy-nilly.

THE PURSUIT OF HIGHER VALUES. Making individual personality the ultimate value for politics does not deny the existence of other higher values for individual or group activity. On the contrary, it frees men to pursue them. If the highest value is to glorify God, God is best glorified by willing servants who submit freely to His demands as they see them. If the highest value is Truth, it must be discovered by individual minds free of constraint, building on the insights of other free minds. Truth, it is said, will set us free, but we must be free to search for it in the first place. And if Truth is to prevail throughout the world, it must suffuse individual personalities with a sense of its imperative. Belief cannot be coerced; it must be freely given.

Nor does individual personality as an ultimate value for politics deny that, in the final analysis, belief in the value of individual personality must rest on some view of cosmic ultimates, framed in religious or philosophical terms. It merely reiterates that we are far from any agreement on ultimate truth. For example, Christians affirm that belief in the importance of individual personality and in the related values of individual freedom, responsibility, and equality depends on acceptance of the Christian view of man and the

universe; positivists deny it, and skeptics beg leave to doubt. All that is affirmed here is that democracy has been made a going concern in Britain and the United States with individual personality as the ultimate for politics, and has managed, over a long period, to get a common loyalty both from those who profess ignorance or doubt about cosmic ultimates and from those who claim to know the final answers but differ about what they are.

What we apprehend of these values, whether it be Goodness, Truth, or Beauty, is crystallized for us by the religious, intellectual, and artistic expression of individual personalities. It is true that individuals give diverse, and often conflicting, interpretations of these values. If it is recognized that each has a right to his own view as long as he respects the equal right of others to their views, competitive expression in these matters enriches our lives. To put it another way, art, literature, and science are debased, and the artist and scientist are defiled, when they conform slavishly to the dictates of a government which claims to be the final authority on first and last things. So the fundamental goal of democratic politics is the securing of the conditions needed for the realization of individual potentialities. Since it makes stupendous demands on human nature, perhaps this goal can never be fully achieved. Yet it is the pursuit of this goal that gives meaning to political life in the democracies.

STOIC AND CHRISTIAN EMPHASIS ON PERSONALITY. In committing itself to the value of individual personality, democracy is carrying forward one of the most persistent themes of the Western tradition. Before the Christian era, the Stoic philosophers in Greece asserted the brotherhood of men, the claims of a common humanity that makes us all members of one another. They urged the duty of the individual to realize Truth and Goodness in his own life, to enlighten the understanding of his fellows by precept and example, and to attest his faith in human dignity by succoring the unfortunate. It is difficult to overestimate the contributions of the Stoics, who broke away from antiquity, and whose works attained their culmination in the writings of Cicero and Seneca.

The central features of the Christian message are the infinite worth of the individual soul, the denial of all distinctions of rank or place, and the redemption of mankind through pity and love. Christianity asserted too the awful responsibility of the individual to God, and the necessity of rendering an account of his stewardship at the Last Judgment. In the final balance of the soul, duty to an earthly king would not be an excuse for failing in the service of God. While Christianity admits that Caesar is entitled to his due,

it is not Caesar who sits at the Last Judgment. Religious duty has a higher claim than any earthly authority.

Translated into secular terms, the Christian emphasis on the unique value of the individual soul expresses itself as a profound concern for human personality. The imperative of love for one's neighbor and the denial of social distinctions issue in a demand for the creation of the conditions of self-realization for all, for rough equality of opportunity. The overriding duty to supernatural authority expresses itself in a demand for the limitation of the power of governments so as to ensure to the individual a sphere of private judgment in which his conscience is his guide. Conscience speaks peremptorily but with a different voice to different people. This accounts for much of the bewildering differences of opinion in democratic politics.

Thus the ideal of democracy, although stated in secular terms, has a powerful religious sanction for its main tenets. There is much of the passion that religious feeling evokes in the support ardent democrats give to the claims of personality. There is much of Christian compassion in the demand for a large measure of social equality. Christian belief in the responsibility of the individual to God gives strong support to the claim for individual freedom.

(2) *Individual Freedom.* At later points in this book we shall be concerned with the political significance of the claim for individual freedom and private judgment and the consequent proliferation of diverse opinions. At present we are concerned with the ideals on which there is a large measure of agreement, verging on a religious dogma. In so far as there is a persistent enduring ideal, it is respect for personality. Liberty and equality are also democratic ideals but they are honored when they sub-serve the claims of personality, and limited and qualified in so far as they do not contribute to this purpose. The claims of personality provide the criterion for testing the validity of all other ideals in the political sphere.

INDIVIDUAL PERSONALITY AND FREEDOM. Individual freedom or liberty is the necessary condition for the realization of the potentialities of personality. The sheltered, protected person, like the slave whose choices are made for him by others, is likely to be a colorless, starved, and even weak personality. It is the making of moral choices in which we assess the alternatives and then have to abide the consequences of the decision that develops character and makes life rich and meaningful. The long struggle for individual freedom arose from the claims of ever larger numbers of men seeking to secure for themselves this means to the enrichment of their lives.

It must be added at once that the ideal of respect for personality does not support and justify *every* claim for freedom. *It justifies only that freedom which is exercised responsibly, which respects the equal claims of other personalities to the conditions of self-realization.* The criminal laws express a thousand limitations on the freedoms of those who are disposed to disregard the claims of others. As we have already pointed out, some basic order and physical security from violence is at once seen to be necessary if we are to live in society and enjoy the enrichment of our lives that society makes possible. More controversially, if the freedom of the businessman or the laborer or the farmer to do as he likes with his own property or service can be shown, in present-day conditions, to blight and frustrate the lives of many people, there is a case for its limitation. The ideal of freedom is therefore not an absolute, not an end in itself, but rather a means to the liberation of personality and justified only to the degree that it serves that purpose. This, of course, is the key to the reconciliation of the rival claims of freedom and order.

INDIVIDUAL FREEDOM AND COMPETITIVE STRIVING. Where there are millions of individuals, each bent on securing and defending his claims to self-realization, there is bound to be continual competitive striving and collision. The peaceful harmonizing of freedom and order may seem an impossible task. It is impossible if each thinks only of himself without regard to the claims of others, and blindly refuses to consider the mutual benefits of participation in a society inspired by mutual respect. But the democratic ideal postulates a decent respect for others, an admission that each must exercise his freedom responsibly, and a willingness at least to discuss the validity of his claims and to refer them to some tribunal for settlement. It permits each to argue his case tenaciously, yet counsels him to concede something to the reasonable claims of others reasonably put forward. If this attitude were not widely held, the widespread discussion that goes on in newspapers and legislatures and on election platforms would never take place. Men who are not prepared at some point to contemplate concessions will not be willing to debate. The very fact of debate implies a willingness to 'listen to reason,' and a recognition by the participants that they will have to moderate their demands if these are shown in discussion to be inconsistent with some generally accepted principle.

(3) *Belief in Rationality.* The democratic ideal assumes, in other words, that man is a *rational being*, capable of finding principles of action and sub-

ordinating private desires to those principles. This assumption is of basic importance. If men will not 'listen to reason,' democracy cannot be an enduring form of government. The conflicting aims and interests of numerous individuals cannot be arbitrated and harmonized by discussion and debate unless there are generally accepted rules to decide who wins the debate. The simplest and most obvious of these rules is that the majority carries the day. But the bare principle of majority rule is just as irrational as the proposition that might is right. We choose ballots—and the process of discussion involved therein—rather than bullets because the former make room for rational procedures. For example, in discussion of rival claims, it is common to ask each claimant what he would expect to get if he were in the other's shoes. This is an appeal to a principle, the principle of equality of treatment for all who stand in the same position.

In a society where there is mutual respect for individual personality, men have some confidence that when the majority is making up its mind the appeal to principles will not go entirely unheeded. To be more specific, there is some confidence that when a case is shown to rest on erroneous statements of fact, it will be discredited; that when it is shown to conflict with some widely accepted principle, it will be held to be a bad case. On the other hand, there is some confidence that when a case rests on proved facts and accepted principle, it will be given favorable consideration.

Of course, none of us shows full respect for facts and logic all the time. Some men are always immune to reason; and there are times when emotional appeals seem almost to drive reason from the field. Men are also creatures of feeling and not mere logical machines. But the peaceful interplay of free personalities requires a substantial measure of rationality. The democratic ideal therefore has to assume that, through effort, men can move from the plane of feeling to the plane of reason, there to talk out their differences and settle them on some basis of principle.

(4) *Equality*. Another vital democratic ideal is equality. Just as in the case of individual freedom, there is the widest possible divergence of interpretation on what this ideal requires. Some democrats interpret it narrowly, saying it requires only equality before the law and equal political rights in voting. At the other extreme, it is held by some to require social and economic equality, putting everyone on the same level of income and obliterating all social distinctions. Much of the struggle in contemporary democratic politics is concerned with this issue.

Every attempt to define the ideal of equality with precision raises the problem of harmonizing it with the ideal of liberty. It is obvious that men are not equal in natural endowment, whether it be health or stature or intelligence. As George Orwell obliquely stated, 'all men are born equal, but some are born more equal than others!' So, if they are left free to make of themselves what their inborn capacities make possible, they will turn out to be unequal in artistic perception, intellectual accomplishment, economic status, and what not. Accordingly, an attempt to enforce a dead level of economic and social status would involve the sharpest of restrictions on individual freedom. Even if the emphasis is on pulling the weaker up, a uniform level can only be reached by holding the stronger down. On the other hand, the lifting of all restrictions on individual liberty would mean, in practical effect, the abandoning of the ideal of equality. How are liberty and equality to be reconciled?

LIBERTY AND EQUALITY. They are to be reconciled by remembering that both liberty and equality are subordinate means to the end of releasing the potentialities of individual personality on the widest possible scale. The development of a rich variety of personalities requires a large measure of liberty and forbids all attempts to impose a dead level of social and economic equality. On the other hand, if men are to live together with mutual respect and harmonize their differences by peaceful discussion, they must be able to meet on some plane of equality. For the purposes of discussion, they must treat one another as if they were equal. Even in the midst of differences in natural endowment and in social and economic position, the assumption of equality for the purpose of discussion need not be a fiction. The Christian and Stoic doctrines of the brotherhood of man, if strongly held, dwarf all differences between men. Differences of natural endowment and of social position can become almost irrelevant if men have a sufficiently keen appreciation of what they have in common.

However, we know that, for most of us, the consciousness of brotherhood needs to be buttressed by the sharing of common experience. The antagonism that exists between classes even in democratic countries clearly illustrates this point. So also does the fact that there is more give and take within nations than between nations. Where there are wide distinctions of economic status and social position, the feelings of superiority and inferiority that emerge make discussion between the two extremes almost impossible. It is highly unlikely that the depressed poor will be able to debate on anything like equal

terms with the very rich. Even with good will, the experience of life of the two groups is so different that they can scarcely understand each other. They belong to different worlds and cannot find enough common ground for discussion.

EQUALITY OF OPPORTUNITY. The convention of equality, vitally necessary for the purposes of discussion, can scarcely be maintained where social and economic inequalities are so great as to be a standing refutation of it. Discussion moves most easily in a society where these inequalities are kept within bounds. Under the impulsion of the ideal of equality, democratic societies have been moving steadily to reduce existing social and economic inequalities. In this movement, the aim has not been to reach a flat level of economic equality but rather to create a rough equality of opportunity so that each individual, no matter how circumscribed his origins, may by his efforts bring his innate capacities to fruition. Phrased in this way, the ideals of liberty and equality can be reconciled in the service of personality. The actual reconciliation at a particular time and place has to be worked out through discussion in the political process.

LEGAL AND POLITICAL EQUALITY. To sum up, the ideal of equality has insisted that men are politically equal, that all citizens are equally entitled to take part in political life, to exercise the franchise, to run for and hold office. It has insisted that individuals shall be equal before the law, that when the general law confers rights or imposes duties, these rights and duties shall extend to all; or conversely, that the law shall not confer special privileges on particular individuals or groups—such as exempting all-American football stars from the law of assault and battery. For the rest, the emphasis has not been on an enforced flat level of actual equality but on a liberating equality of opportunity.

(5) *Justice.* No account of the ideals of government would be even superficially adequate without some discussion of the ideal of justice. Those who struggled to establish democratic government in the world and those who have struggled to improve it have been inspired by a quest for justice. Indeed, Western political thought for more than two thousand years can be represented as a ceaseless effort to define justice so that governments and other social arrangements could be directed toward achieving it. Every form of government we have known has been defended on the ground that its rule was just, and has also been attacked because it maintained intolerable injustice. There has always been a universal human yearning for justice.

JUSTICE AS VAGUE IDEAL. Yet despite the protracted debate about justice, no general and lasting agreement on a definition of justice has been reached. To take only the question of the distribution of economic rewards: some have tried to show that justice requires payment according to merit, while others have insisted that the standard must be payment according to need, leaving, be it noted, both merit and need still to be defined. Still others have urged standards of justice as diverse as equality of incomes, on the one hand, and what the market will bear, on the other. Equally divergent and clashing views are held on what justice requires in social relationships outside the economic field. One can almost say that each has his own private dream of a just society, and that dream defines justice for him. Just as men disagree about Truth, Beauty, and Goodness, so they disagree about Justice. Yet a common ideal requires agreement rather than disagreement.

JUSTICE AND FREEDOM. However, it is not possible to dismiss the discussion of justice in this way. From the time of Aristotle there has been a persistent tendency to define justice as some kind of a proportion between merits on the one hand, and rewards and recognition on the other. For example, Justinian in his codification of Roman Law in A.D. 525 defined justice for the legal system *as the giving to every man his due*. Even this, of course, remains vague, for it presupposes a recognizable standard for weighing merit and assessing rewards.

Men are not satisfied to get merely what some authority external to themselves thinks they deserve. Hence the establishing of merit in a way that will be accepted as just requires men to be free to try to prove their own valuation of themselves as correct. Equally, since one man's meat is another man's poison, they must be free to say what they regard as fitting reward or recognition. If what wage-workers really want is a share in the control of their working conditions, the demand cannot be met conclusively by merely raising their wages. In other words, *justice as a democratic ideal is in part included under the ideal of freedom*.

JUSTICE AND EQUALITY. The notion of justice as a proportion also implies equality in the sense that persons of equal merit should get equal reward and recognition. Phrased in this general and comprehensive way, the ideal of justice almost comes to a nice refining of the ideal of equality. If governments were asked to enforce justice in this comprehensive sense, some authority would have to be set up that would decide exactly what each was worth and what each should get. But where the dominating political ideal is the liberation of personality, men will not agree to this, and the ideal of

justice so phrased would be a profoundly disrupting force rather than a unifying ideal.

As was suggested earlier, the political ideal of democracy is not the vindication of cosmic truth. Neither is it the vindication of some conception of exquisite and exact justice, to be enforced though the heavens fall. Its primary concern is rather the establishment of order and security adequate for the free development of personality. It expresses a faith that once men are secure in their persons they will learn to treat one another with respect and even become friends. Friends do not need to demand justice of one another because that—and more—is freely given without the asking.

JUSTICE AS IMPARTIAL LAW IMPARTIALLY ADMINISTERED. But none of this can come to pass without a solid framework of order and security. Moreover, in this vital sphere, all should be treated equally. We all need the protection that order affords, and therefore we must all be made to observe its requirements. These can only be met by measuring every action against standards laid down in advance by law. The law should be general, playing no favorites and laying down reciprocal rights and duties for all. If it exempts some from the duties it imposes on others, it creates privilege. If the judge, in applying a general law, excuses some but not others from the obligations it imposes, he creates favoritism.

When Justinian said justice aimed to give every man his due, he was declaring against legal privilege and against favoritism in applying the law. It is highly significant that when we think today about an impartial law being impartially applied, we talk about the administration of justice. The most specific meaning given to justice in the Western tradition is justice according to law, which in the main means *equality before the law*. Here the elusive notion of justice as a proportion between merits and deserts is brought down to earth. All merit equal treatment in the vital sphere of order and security protected by law. Also, as we have seen, it is now widely believed that all merit some rough equality of opportunity.

(6) *Rule by Law*. The ideal of an impartial law impartially administered is, of course, conceived as a buttress to individual personality. No one can have any security for his claims as a person, no one can plan his life or take the risk of the responsibility for his own actions, unless he knows what he has a right to try to do and what demands others can effectively make on him. But if he is forearmed with this knowledge he has a chart for his voyage. He can anchor his personality firmly with the cords of the law. Yet no one can expect to have charts and anchorage supplied solely for his

convenience. Each must submit to law for the benefit of others embarked on the adventure of life. Realizing the potentialities of personality requires freedom, but always freedom under law.

To have to submit to capricious and forcible interference is an indignity as well as a frustration. In submitting to the law, however, one submits to a principle which makes equal demands on all. In this there is no indignity, and only such frustration of individual desires as is equally suffered by others for the sake of an ordered society.

LAW AS CURB ON RULERS. The individual needs to know the limits of his rights and duties in relation to his fellow citizens and in relation to his government. There is little point in being free from the caprice of private persons if one remains subject to unlimited and unpredictable demands by the government. There is no essential difference between being bullied by a bully and being bullied by a policeman, a customs official, or an income tax inspector. Capricious action by a government can be far more oppressive than capricious action by private persons, because governments have far more power, a longer reach, and much greater resources for persecution.

In view of this, the good life is not to be secured by finding a wise ruler and then blindly obeying whatever orders he thinks good for his subjects. Rather, it is to be secured through obedience to a law that defines clearly what the government as well as private persons can and cannot do. Five centuries before the Christian era, Aristotle explained why it was better for the citizens to be ruled by a fixed law than by the imponderable wisdom of even a wise and just ruler. Ever since then Western political thought has been developing and strengthening this conviction. The ideal of rule by law, of 'a government of laws and not of men,' has been one of the strongest beliefs in the democratic creed. It is an absolutely essential one.

(7) *Constitutionalism.* Closely related to the ideal of rule by law is the ideal of constitutionalism—of which much more will be said later. Starting from the conviction that governmental action should be in accordance with law carefully laid down beforehand, it holds that the best way to accomplish this is to establish a fundamental law, a constitution, that defines the organs of government, prescribes how they shall function, and outlines the basic relationships between government and the private citizen. Government is then denied the power to change this fundamental law, except by carefully circumscribed method, and is required to observe its terms. Actually, of course, constitutionalism is a means for achieving the ideal of rule by law. But in the democratic world, the constitution—be it written, unwritten, or

mixed—has become a symbol around which men who are in disagreement on other points can be rallied. A special sanctity attaches to the constitution, and a special revulsion to unconstitutional actions or proposals.

It is worthwhile to note how deep the roots of constitutionalism are in Western culture. Greek political thought was profoundly concerned with the notion of a constitution which would regularize the actions of government, but it did not put especial emphasis on the rights of individuals against governments. Strong emphasis on this point was supplied by Stoic and Christian thought. The Stoic philosophers worked out a conception of a law of nature unconditionally binding on all men at all times in all places, because it expressed the permanent demands of their innermost nature. That is to say, it was thought of as a fundamental law binding on rulers and ruled alike. Christian thought asserts that God rules the world and that the commandments He gives His creatures form the Divine law. Rulers should obey this fundamental law as part of their duty to God. Moreover, individuals cannot render to God that which is God's if Caesar is allowed to use his power to prevent them from doing so. Government therefore must be limited by a law higher than any commands it makes. Secular and religious elements in the Western tradition combine to support rule by law and constitutionalism. To trace the Bill of Rights and other constitutional guarantees of the Constitution of the United States, for example, to their sources in human thought, would take us back to Stoic philosophy and basic Christian doctrine. It may be well to do so from time to time!

DISAGREEMENTS DESPITE COMMON IDEALS

It has been said that these seven fundamentals of democratic belief represent the motivating political ideals of democracy. It cannot be said, however, that they are engraved on the heart of every citizen of a democracy! There are always substantial numbers who are little moved by ideals of any kind. Even those who acknowledge these ideals do not always give automatic and undivided loyalty to them, just as professing Christians do not always live up to the high professions of their faith. Moreover, since the ideals all celebrate the importance of individual personality, they quite naturally invite individual self-expression. Individuals earnestly bent on developing and expressing their inherent capacities will often find it difficult to draw the fine line between legitimate expression of themselves and unwarranted interfer-

ence with the claims of others for opportunities to realize their capacities. Indeed, the line is so difficult to draw that some serious thinkers in every age have deemed it impossible and have urged the necessity of authoritarian government to keep everyone in his place.

What Should Government Do To Realize the Ideals? Most important of all, these ideals are vague and do not lay down specific rules for harmonizing the infinity of conflicting claims that may easily arise. What should the government do in specific terms to encourage the widest possible realization of individual capacities? At what point does individual freedom become disruptive of order and thus require limitation? How far can the government go in trying to redress grave social inequalities without shackling initiative and destroying incentive? Rules of thumb cannot be laid down for these or for a thousand other issues because almost everything depends on the social and economic circumstances of the time when and the place where the question arises. The ideals provide us only with a goal. They tell us little about the means of reaching or approaching it.

To be still more specific, does the industrial factory and wage system where the many spend their working day under the direction of a few frustrate the personalities of the many? And if it does, what alternative organization of the complex division of labor will be at once less frustrating and also compatible with the maintenance of the conditions of freedom? If a partial answer to this question is the compulsory recognition of trade unions and compulsory collective bargaining, at what point, if at all, does the power of the trade union to withhold labor in a strategic industry imperil social order and deny the reasonable expectations of consumers and workers in other sectors of industry? A comprehensive system of social security helps to redress social and economic inequalities, promotes equality of opportunity, and ensures basic necessities to exposed groups in the community. At what point, if at all, does the security thus provided reduce incentives in the recipients? At what point does the high taxation necessary to finance such measures seriously reduce initiative and enterprise in the taxpayer?

These and many others are questions on which honest men differ. They differ although all may well be equally agreed on the political ideals of democracy and all equally anxious to direct the actions of government to these ideals. Such questions cannot be answered with the convincing assurance that supports the solution of a problem in mathematics. The answers will turn partly on questions of fact, on which it is always very hard to get

adequate evidence, and partly on estimates of how human beings will behave in given circumstances. In many matters that vex our present politics, it is impossible to say with certainty and to get general agreement on what to do.

The Clash of Interests and Convictions. Here then are the reasons why, despite broad general agreement on goals, there is so much diversity of opinion, confusion of counsel, and cross-purposes in action in democratic life. The ideals postulate freedom and therefore diversity: they welcome self-expression. Yet we must co-operate to satisfy our need for society, and to preserve and improve the conditions for a further approach to the ideals. Co-operation in politics, in deciding what shall be undertaken and enforced in the name of all, runs into a considerable measure of indifference, a good deal of individual selfishness, honest ignorance of the effects of our actions on the legitimate claims of others, and *honest disagreement about what can or should be done.*

This last presents peculiar difficulties. Men of high purpose who hold strongly to ideals generally also have strong opinions on how to achieve them. Conscience is thus brought into play and sharpens the clash when disagreement is discovered. For example, Christians who feel a profound responsibility for making the will of God manifest in history find a special urgency in many political issues. It leads some to press passionately for the extension of governmental action, and others to press passionately against encroachment by government on the sphere of private judgment.

Agreed Procedures for Dealing with Disagreements. What prevents this diversity of immediate aims and confusion of counsel from disrupting democratic society and degenerating into violence? The widespread acceptance of common ideals helps to dispose men to study together the reasons why they differ on means. It is here that the agreement on certain procedures for handling differences is of vital importance to democracy.

First, there is the agreement that when the state acts, it must act through law (or, as in Britain, universally accepted custom) laid down beforehand in accordance with procedures established in the constitution. Individuals and groups who object to a proposed law should always have a chance to protest and state their objections before coercive state action is taken.

Second, there is the agreement, resting on mutual respect, that differences must be submitted to discussion and debate. Indeed, the process of law-making always involves debate in the legislature; and it often involves long preliminary discussion in innumerable groups, in the press and on the radio,

within political party organizations, and between parties on election platforms.

Third, there is the assumption that one's fellows are, within limits, rational beings and will submit their differences to the tests of fact and of logic. There are always two sides to a story. Discussion undertaken in a reasonable and accommodating spirit is likely to be fruitful, revealing some common middle ground on which, admittedly, no one gets his own way entirely but every one gets some concession in reward for cogent facts and argument and for his reasonable attitude.

Fourth, there is the agreement to conclude the debate at some stage by taking a vote, and then to abide by the decision of the majority. The good loser is an essential phenomenon of democracy as well as of sports. Minorities agree to accept majority decision because they have reason to hope that majority decision, reached after a fair hearing in a reasonable spirit, will incorporate some concessions to their points of view, and because they know they can always raise the issue again when circumstances seem favorable. The case of the minorities is not finally defeated by an adverse vote, but rather adjourned for further hearing.

Fundamentally, the democratic political process is one of discussion, accommodation, and compromise. Many persons of imperious, inflexible temperament dislike it and resist it. But as long as the great majority insist on submission to the procedures just outlined, the democratic political process is reasonably secure against disintegration from within.

THE PLACE OF THE STATE IN DEMOCRATIC IDEALS

Given these ideals of government, it can be seen why the state is thought of as an association for securing the common interests and promoting the common purposes of the individuals who are its members. Since the principal point of general agreement and common purpose among the members is liberation of individual personality through individual freedom, the genuinely shared interests and purposes cover only a small part of the interests and purposes entertained and pursued by the members. The greater, and the more cherished, part of human activity must go on outside the state in the area of freedom it is designed to secure. Moreover, the only way to find out what is genuinely shared is through discussion and vote of the members. Even then, the inherent diversity of views noted above compels *continuous*

compromise in deciding on the scope of action for the state. Two conclusions follow.

Government: Means not End. FIRST, the state is an instrument of its members. The government, meaning the men who direct the activities of the state at a given time, cannot assert that it has exalted purposes beyond the criticism and understanding of its members. The state cannot be set up as an end in itself. Even when it calls on individuals to sacrifice their lives in a war, the sacrifice is justified only on the ground that it is necessary to protect the society without which individuals cannot realize any of their purposes. That is to say, the supreme demand that the state can make is for the securing of a common interest in maintenance of the society, and it rests on the tragic fact noted by Mr. Justice Holmes—that societies are founded on the death of men.

SECOND, because of its restriction to common purposes, it cannot be an instrument through which particular individuals and groups realize *all* their purposes. Each has to share the state with others. Because the state has to do something for everybody, it cannot be all things to anybody. No one can expect to bend it to the comprehensive service of his particular purposes.

At the same time, men will give their best only to purposes which they, for whatever reason, find good. This is the essential significance of free personality. It follows that men cannot hope to realize their loftiest aims through the state. While the state is necessary for social life, and therefore an aid to the realization of our fondest dreams, we have to find the principal meaning of our lives outside of it.

So the state is not an exalted communion in which men lose themselves gladly and spend themselves prodigally. That calls for spontaneity, and there is little spontaneous enthusiasm left after the processes of discussion and compromise necessary for defining the sphere of state action have been carried through. Discussion consumes time and delays decision. The compromises reached seem, to many, to be tainted with mediocrity. Decisions reached by compromises are rarely executed with single-minded devotion.

The state therefore does not inspire reverence and unthinking obedience. It may evoke respect, and even affection, but it is the affection a man has for a tool that serves his purpose. When a tool begins to turn in his hand or does him injury rather than service, he does not submit to its imperfections but turns critically to remedy its defects and dangers. So shall we consider the state as long as we are moved by the ideals of government sketched above.

Remoteness of the Modern State. The state is also too remote from the

lives of most men for them to find in it the principal meaning of existence. Modern states number their citizens in tens of millions dispersed over a great area. This is true even in Britain and France, small as they are by present-day standards. The only active and direct participation of most citizens is in periodic elections. Even with the present wide range of state activities, most citizens have little active contact with the state. Most of them never see Congress or Parliament in action, never see even the outside of the buildings in Washington, London, or Paris, where the great decisions are taken and administration is carried on.

There is, of course, wider and more sustained participation in state and municipal government, but even there only a tiny fraction of the citizen body gives much of its effort to the work of government. If all had to find the deepest significance of life in the association that is the state, they would lead intolerably barren existences.

Contrast with the Ancient City-State. If the state is small in numbers and area, fellowship in it may have a larger meaning for the citizen. In the city-state of ancient Athens, where the citizens were few, lived cheek by jowl in relative freedom from economic pressure through the use of slave labor, and participated directly and frequently in political life, citizenship came closer to being a full-time job. In those conditions, more things were shared in common and the state was the active supervisor of the common life. The city had an official religion. To put it in our terms, church and state were one. The combined political and religious regulations and ceremonies pervaded almost every aspect of the citizen's life. In this respect, the city-state of Athens resembled the early New England town meeting, which undertook not only the political functions of order and general security but also the supervision of morals and religious observances. Thus the reflective minds of Athens were led to say, in effect, that the purpose of the state was to teach men how to live the good life.

Just as a school which opens the windows of the world for the growing mind can absorb almost the whole life of the adolescent, so the Athenian might be expected to find his life and work as a citizen almost completely absorbing. There was an intimacy in the Greek city-state which made it more like a close-knit family than like the United States of America. Just as a family bound together by loyalty and affection and sharing a common household can often provide the greatest satisfaction for its members, so it could be claimed that fellowship in the city-state was the transfiguring experience for individuals.

Of course, whatever the values of this close fellowship, it had its costs as well. The citizen was so busy participating in politics, submitting to the routine of custom and the regimen of religious observance, that he had little time to be himself. A powerful, almost fierce, communal spirit demanded a high degree of conformity from individuals. Even Socrates, the symbol of liberated intelligence, paid his respects to the gods of the city.

Whether or not this fellowship was worth the price, the choice is not open to the citizen of the modern state. The modern state is too remote from him. While it is well adapted to caring for interests that are common to all, it is not able to meet the particular diverse needs to which the family, for example, can minister. The state can build vast armies for the common defense and equip the soldier adequately for that purpose. But it has the greatest difficulty in catering to the diverse needs of soldiers as individual human beings.

The Importance of Voluntary Association. Yet men need fellowship almost as much as they need their individuality. They cannot realize their individuality except through society. If association in the state cannot supply fellowship, it must be found in other ways. Where the ideals supporting democratic government have been accepted, it has been found through voluntary association. The interests of personality cannot be served at all without allowing like-minded individuals to club together for common purposes. As we shall see in detail later, freedom of association is one of the principal freedoms derived from the democratic ideals of government and supported by constitutional guarantees.

Historically, the critical step was taken when religious toleration was accepted. Its acceptance meant that each was entitled to his own views on religious questions, and to join with others of similar views to establish a communion of their own. In other words, the church became a voluntary association providing both freedom and fellowship. Once freedom of association was conceded in the field of religion, there was no reason for withholding it in any other field of legitimate human activity. An ever-growing number of voluntary groups came into existence, each to further purposes shared in common by its members.

Because each association is devoted to some end that seems good to its members, it helps to give meaning to the lives of the members and in return gets some of their loyalty and allegiance. Particular groups can spend themselves on objectives that seem trivial or even reprehensible to outsiders as long as their activities do not imperil the common interest in public order and general security. They can move faster to their objectives because there

is relatively little diversity of views among the members to be discussed and compromised. The dissenters can always resign from the voluntary association whereas they cannot resign from association in the state except by leaving the country. Freedom and fellowship are reconciled through the voluntary association.

THE RISE OF DEMOCRACY

A Glance into History. In the preceding chapter we looked briefly at the origin and the rise of the state as we know it today. We must now examine briefly the development of democracy.

Democracy in the city-states of the ancient world was a short interlude in the long record of government by one or a few. Modern democracy, as we shall see, is sharply different from ancient democracy, particularly in its ambitious application to an enormous territory and to tens of millions of population. This kind of democracy is entirely new in the world. Its effective establishment dates from about the middle of the nineteenth century. We have had little more than a century of experience with it, while other forms of government, in various manifestations, have lasted thousands of years.

Absolute monarchy had never really established itself in Britain. The attempts of the Stuart kings so to assert themselves were defeated in the seventeenth century. From then until the Great Reform Act of 1832, which extended the franchise to the propertied middle classes, Britain was ruled by a landed aristocracy. Universal-manhood franchise was not reached in Britain until 1884. The American Revolution in the late eighteenth century was a popular revolution, but manhood franchise was not fully realized in the United States until about 1840. Similarly, the aspirations for democracy expressed in the French Revolution at the end of the eighteenth century were not actually attained until after the middle of the nineteenth century.

Once established, however, modern democracy spread very quickly. Monarchic and aristocratic governments were everywhere giving way before it in the years preceding World War I. President Wilson represented World War I as a struggle 'to make the world safe for democracy' against monarchical and aristocratic reaction. Victory in this struggle was interpreted as the final victory of democracy over the older forms of government. All new governments established in Europe after that war (excepting always the Soviet Union) were set up under thoroughly democratic constitutions. Yet no sooner

did its victory seem assured and complete than a pronounced reaction set in against democracy. This reaction has given us the modern dictatorships.

Reaction against Democracy. So far, the actual replacing of democratic government by dictatorship in our day has been in countries where democracy was entirely new, as in Weimar Germany, in Guinea, or Ghana; or insecurely based, as in Italy or undermined by agents of the Soviet Union, as in Czechoslovakia. Democracy has never been voluntarily abandoned by countries in which it had been *efficiently* established. The desperate eagerness of the leaders of the Soviet Union and of the eastern European countries now under Communist dictatorship to prove that their governments are genuinely 'democratic' shows that the popular aspiration for democracy is still very strong.

But in actual fact democracy has failed to work in many of the countries in which it has been tried. Even in the countries where it has been longest established and works best, the events of the last fifty years have made many wonder if it will be as transitory in the modern world as it was in the ancient world. Why have its prospects declined so rapidly? Why does it work in some countries and not in others? Under what conditions can it be expected to work, and under what conditions it is likely to fail?

The first step in trying to find answers for these questions is to examine the structure and operation of democratic government in countries where it has worked best. Of the larger countries in the world, the United States and Britain have had the longest and most successful experience in democratic government. It was in these countries that religious toleration was first and most firmly established. Together with France, the Lowlands, Switzerland, and the Scandinavian lands, they have the strongest hold on democratic ideals, and they certainly have given the widest application to, and found the most effective guarantees for, individual freedom. Study of the governments of the three largest among these countries should throw light on the essential elements of democratic government and indicate at least some of the conditions in which it can be expected to work successfully.

Contrasts in Ancient and Modern Democracy. Even if an exact definition of democracy as a form of government is difficult to frame, certain common features of the democracies of Britain and the United States, for example, are readily perceived. They have little in common with the democracies Aristotle studied. He was concerned with the Greek city-states, societies within the area of a county and with the population of a smallish city, of which only a minority were citizens entitled to take part in government. The modern

democracies have an enormous territory and millions in population. Substantially all who live in the territory are citizens and almost all adult citizens enjoy full political rights.

The ancient democracies were *direct democracies*. Each citizen participated directly in making laws, and could expect to come to public office from time to time by lot or rotation. The democracies to be discussed here are called *representative democracies*, because the common form of participation of the citizen in the control of government is in voting for representatives who govern on his behalf. Other significant ways of influencing the government are open to the citizens generally and are exercised by some, but the periodic election of representatives is the principal and decisive method the many have for enforcing their rule.

There are a host of other differences between the characters of the ancient and modern democracies. Also, of course, the environment, economic, social, and cultural, is entirely different. However much the liberal democratic ideals owe to the political theory of the Greek city-state, they are a modern formulation profoundly influenced by Stoic and Christian thought, which did not make its impact on the world until after the decline of the Greek city-state. Thus little would be gained in trying to compare governments which are not at all comparable. It is true that the closer we approach the fundamental problems of modern democracy the more relevant become the reflections on democracy of the ancient political thinkers. Some patterns of political behavior appear to be repeated throughout the ages. Still, we cannot approach these fundamental problems until some appreciation of the concrete institutions and actual working of modern democracy has been gained.

THE CONSTITUTIONAL TRADITION OF MODERN DEMOCRACY

Basic Influences. The structure of democratic governments has been given a special bias by certain beliefs that came into the Western world with the Renaissance. Briefly, these beliefs, which are an important part of the democratic ideals we have been discussing, exalt the individual and depreciate—sometimes excessively—the collective restraints which society puts upon him through custom, law, and government. They are deeply influenced by the Christian insistence that there is a higher law than the law of the state, whether it be the dictates of an organized church or the promptings of

private conscience. The claims of a church can sometimes be so imperious as to threaten public order, and private conscience sometimes leads us to an outrageous disregard of others. These beliefs do not reject all restraints. They recognize the necessity of some minimum of government. We all have impulses which must be restrained, and we are never sure when our own inhibitions, our limited understanding of the claims of others to an equal freedom, and our desire to be thought well of by our fellows will need to be supplemented by the threat, or by the actual use, of the organized force of the community. So there must be government and it must have the ultimate power to apply direct coercion to individuals.

Power. This power to apply force must be a monopoly, because to allow two or more independent centers of coercive power in a community is to create the conditions for civil war. But according to these beliefs, such a monopoly has grave dangers. The obverse of a belief in the importance of the individual is a fear of government which unless controlled can crush him—and more often than not has done so. Government, though necessary, is potentially one of the greatest evils. Like fire, it is a good servant and a bad master. And it is always potentially master because of its monopoly of naked force. What prevents the government of the day from using the army and the police to enforce on us its conception of our own good is the knowledge that its power is contingent and may be taken away at the next election, and the further knowledge that if it pursues its own whims in these matters it will soon find itself violating the law which binds the government as well as the citizens.

Leaders. It will be quickly and properly objected that the Hoovers and the Trumans, the Edens and the Attlees, the Mendès-Frances, and the Spaaks, are not the clay from which dictators can be swiftly moulded. This is equally true of the Roosevelts and the Churchills, although, of course, the leaders the democracies call up in a crisis are likely to have some of the qualities of resolute leadership which undoubtedly mark the crisis-born dictators. Here it is necessary to remember that a system of government attracts and chooses as its leaders the type of men temperamentally suited to work within its limitations. It is extremely unlikely that any of these men would ever have come to power in a dictatorship—not even de Gaulle, who may with reason be viewed as an autocrat, but not as a dictator. On the other hand, the Nazi bosses in Germany were drawn to politics and encouraged to pursue power by violent means because of the prizes, congenial to their taste, which control of the government offered. Four years before Hitler came to power in Ger-

many, the devices for assuring that government should remain servant and not master had ceased to work, and the country was governed by executive decree. That is to say, the riches of the earth lay open to those who could somehow get control of the government. Whenever this happens, the power-hungry, the ruthless, the doctrinaire zealots, who want to impose their conception of the good life on everybody, are all attracted to politics as the bees to the flowers. But where the people are determined that government shall be servant and not master and the machinery of government is constructed to that end, the imperious are little attracted to politics and do not get far even when they try.

Government as Servant. So in approaching the study of democratic governments, the centuries-long tradition of government as servant must be kept to the fore and the machinery of government understood as a means to that end. This draws attention at once to the constitution, which provides for the structure and the control of government. The democratic constitution, be it written, unwritten, or mixed, is a body of fundamental rules which the government of the day cannot change of its own free will, and which is, at the same time, a censor of governmental actions. The constitution gives sanctity to the law, which cannot be changed without the consent of the legislature, and also provides that the government and its agents must obey the law or expose themselves to punishment through the courts.

Constitutionalism. It follows that the democratic constitution is not merely a set of rules by which the people are governed; it is also a device by which the people govern their rulers, by which they ensure that the state remains an instrument for furthering genuine common interests. It is true, of course, that many details of the constitution are neutral on this point. Whether or not women have the vote, whether the life of the legislature is five years or two, whether judges hold office for life or must retire at the age of seventy, are questions that matter little from this point of view. But the main features of the democratic constitution are designed to ensure that those who exercise the powers of government shall act with a sense of responsibility. *The phenomenon of a government conforming to the dictates of a settled constitution is known as constitutionalism.* The democracies to be considered here are called constitutional democracies. Their governments are constitutional governments.

The dictatorships have no constitutions in the sense of meaningful bodies of rules that limit and control what the government can do. What passes for a

constitution is either no more than a set of rules for the division of the work of the government or mere window-dressing. Every large organization must have rules for internal management, even if there are no rules for imposing external control upon it. Otherwise, civil servants would not know what to do in their day's work and would be falling over one another all the time. But these rules for internal housekeeping are in no way a restraint upon the dictatorial rulers. They can change them all by decree just as a business corporation can change the rules by which it manages its own affairs or as the owner of a slave plantation could reshuffle the tasks of his slaves. As far as governmental forms are concerned, power is utterly concentrated. The one abiding rule is authority from the top downward, obedience from the bottom upward. Constitutionalism does not exist in the dictatorships. This is true of the Soviet Union as well as the others, past or present. An elaborate Constitution was adopted in the Soviet Union in 1936. Despite claims that it guarantees to its citizens a greater range of rights than any other constitution, it has never been an effective restriction on the power of the small group, the oligarchy, that runs the Soviet Union. The governments of the dictatorships are not constitutional governments.

Democratic countries also must divide the work of government for the sake of efficiency. There is a geographical distribution which delegates certain powers to municipalities while the residue of powers is kept in the hands of the central government. Sometimes this distribution is made more complex by introducing a third and intermediate level of government, as in the federal systems where state governments have exclusive control of a wide range of matters. At each level of government there is always a functional division, generally identified as legislative, executive, and judicial, with still more elaborate division or departmentalization within the executive branch. Such divisions of work, whether geographic or functional, invite disagreement and cross-purposes, and therefore every constitution must define the relations between the different levels and functions so as to limit friction and provide an assured means of breaking deadlocks.

However, these divisions, though necessary for efficiency, are not solely directed to that purpose. In the democracies, they are designed for, and contribute in considerable measure to, preventing the concentration of power in the hands of a few. The legislature is a check on the executive; the judges are independent and commonly are sharp critics of the executive. They cannot be said even to be always sympathetic to the legislature. In a federal system,

the state governments are a check on the federal government. The existence of municipal governments sets limits to the ambitions of state governments.

In the dictatorships, such division of authority as exists does not serve this purpose at all. The concentration of power at the apex is utter and complete. In Germany, for example, the Nazis destroyed the federal system, eliminating the separate states. They destroyed the autonomy of the municipalities, giving them over to the charge of Nazi party bosses. The legislature was a complete farce without power, and the judges were the tools of the leaders. We shall see later that the divisions of authority in the government of the Soviet Union come to the same thing. In the light of this contrast, the squabbling that goes on within and between governments in a democratic country ceases to look entirely deplorable.

LIBERALISM AND DEMOCRACY

It might be concluded from the emphasis of this contrast that the democratic peoples are so much in fear of government as such that they would deny it any significant range of power, holding that the best government is the one that governs least. The men who framed the American Constitution and those who laid down the main lines of the modern British constitution after the expulsion of the Stuart kings in 1688 were much of this mind. However, they were not democrats. They believed in constitutional government and a wide range of individual liberty but not in the control of government by the many. They believed rather that the franchise should be restricted to the upper and middle ranks of the population. They feared that extension of the franchise to the ignorant masses would result in the destruction of all liberty.

British government in the eighteenth century was an aristocracy, and the relatively few who controlled it often confused their own narrow interests with the public interest. But they did banish arbitrary government from Britain, and a by-product of their success was a large measure of civil liberty for individuals. Continental European admirers of Britain in the eighteenth century constantly spoke of it as a land where men were secure in their persons and property from arbitrary governmental action and could think and express themselves freely. It is true that men could still be impressed into the service of the navy against their will, and that Roman Catholics and dis-

senters from the doctrines of the Church of England were subject to disabilities on the ground of religion. These and other restrictions were deviations from the liberal ideal. Yet, in comparison with earlier times and other countries, the British constitution of the eighteenth century provided a striking vindication of individual liberty. British government, which operated within the strict confines of the constitution, could be fairly described as liberal government.

One of the grounds of complaint that lay behind the American Revolution was that British subjects in America were denied liberties which British subjects were accorded at home. Accordingly, steps were taken in the American Constitution, and in the first ten amendments thereto in 1791, to secure the content of these and other liberties for American citizens. Without attempting a complete catalogue, we should note that the Constitution contains guarantees against arbitrary interference with person or property and specifically assures freedom of religion, freedom of speech, freedom of the press, and freedom of peaceable assembly. The framers put themselves on record as unqualified believers in liberal government. Yet few of them believed in democracy when defined as adult male suffrage.

Adult male suffrage, subject to certain minor qualifications which need not concern us here, was adopted in Britain and the United States in the course of the nineteenth century. It was won by convinced democrats, relying on the freedom to discuss and agitate afforded by liberal constitutional government. These convinced democrats were also convinced liberals and individualists, who asked little of government except that it should protect individuals in the widest possible freedom of action. They wanted manhood suffrage because they thought this was the only way to ensure permanently that government would not restrict freedom in the interests of a narrow class. Thus democracy in Britain and North America inherited beliefs in individual liberty and constitutional government, and made them a central part of its own creed. In the beginning, it feared government as such, and thought of manhood suffrage as an additional device for keeping it under control. The principle of *laissez faire*, the belief that government should be confined to a very narrow sphere of action, was a dogma of first importance through the greater part of the nineteenth century.

Therefore, the governments of Britain and the United States are appropriately described as *liberal democratic governments*. Those who have lived under them and have had no experience of other regimes think, if common speech is any index to belief, that they are sufficiently described as democratic

governments, assuming that liberty and democracy inevitably go arm in arm. However, we have just seen that it is possible to conceive of, and to maintain for a time at least, governments which are liberal without being fully democratic. In the strict meaning of words, democracy means merely rule by the many. And it is always possible to have a democracy in which there is little respect for individual liberty. Some of the ancient democracies degenerated into mob rule. Mobs are composed of large numbers who do not behave liberally or constitutionally. There is always some danger of intolerant majorities denying liberty to individuals and minority groups that have aroused their hostility. The record of democracy in the United States and Britain is by no means free of blemishes of this kind.

It can be said with assurance that the principal check on intolerant majorities is the widespread mutual respect engendered in men, despite their differences, by the liberal democratic ideal. The modern dictatorships have not been lacking in certain democratic elements because the dictators have gone to great pains to secure, by one means or another, mass support for their rule. These masses often behaved like mobs, and Mussolini and Hitler encouraged them so to behave. Yet there is no denying that these dictators had extensive popular support, however secured.

Whatever the democratic element in the dictatorships, they have not been liberal any more than they have been constitutional. On every hand the individual is subordinated to some overriding purpose, relentlessly pushed, if not entirely conceived, by the leaders. We know what Mussolini and Hitler thought about freedom for individuals. The Communist dictatorship in the Soviet Union scorns bourgeois liberty as found in the liberal democracies on the ground that it is merely the liberty of the few to exploit the many. It holds forth the promise of a larger liberty—which liberals must acknowledge as a noble ideal—but thus far it has not delivered any significant installments on account.

DEMOCRACY AND THE POPULAR WILL

Whether liberal or not, a government is not democratic unless it responds to the will of the people. With the broadening of the franchise, government in Britain and the United States did so respond, making laws in accordance with the aspirations of the newly enfranchised groups. After manhood franchise had been achieved and people had got some confidence that government

was an instrument they could use for their purposes, some of the earlier fear of government as a necessary but regrettable evil began to disappear. At the same time, a variety of circumstances, which will be considered later, suggested a good many purposes that governments could be used to further. The belief in *laissez faire* began rapidly to decline and democratic electorates loaded the government—their servant—with new tasks, new powers, and new obligations until ancient despots might well envy democratic governments their range of authority.

The steadily accelerating tendency to call on government for solutions to any and every social problem, as described earlier, is perhaps the most remarkable social phenomenon of our time. The rapid growth of government action was well under way by 1900. It was accelerated by World War I, it slackened in the 'twenties, gathered speed again in the long depression of the 'thirties, and came, during World War II, almost to match the scope of governmental functions in the dictatorships. While government activities have fallen away from this peak in the United States, and to a lesser extent in Britain and France, there is no likelihood of a return to the 1939 level. (Indeed, the exigencies of defense will require a considerable expansion of governmental action over an indefinite period.) The vast majority of the people no longer show any great fear of government, and there is widespread confidence in the power of the electorate to control and direct its operations.

This raises another important distinction between democracy and dictatorship. In a dictatorship, the leader and a small clique around him decide what government shall do. They are able to act with great rapidity and often with a high degree of consistency, because there are only a few minds to be made up. In a democracy, the ultimate decision about what the government is to do rests with the millions composing the widely scattered electorate. Cumber-some machinery that consumes a great deal of time and effort is necessary for consulting the wishes of the sovereign electorate. More important still, it is exceedingly difficult for millions of people to come to a common mind or a majority decision about anything. When one considers how long a small committee can debate before coming to any agreement about the simplest matters, it is astonishing that the electorate ever manages to agree on instructions to its government. When it is realized how many things democratic governments do nowadays, it is understandable why the will of the people is not always manifest in what is done. What needs explaining is how the electorate is able to transmit coherent instructions to the government at all.

Democracy inherited its devices for restraining governments from the pre-

sumptuous abuse of power. It did not, however, inherit its mechanisms for eliciting and transmitting to the government the positive measures it wants to see carried out. It had to create them, feeling its way by trial and error. The chief of these mechanisms is the organized system of political parties. Its workings are far from giving general satisfaction—but a great deal of the dissatisfaction with political parties and with democracy arises from a failure to understand the difficulty of what is being attempted.

Two Principal Themes. The main body of this book has two principal themes. *First*, the need for restraints on government as such, and the instruments by which democratic peoples have maintained these restraints. *Second*, the problem of deciding, in a democracy, what the government is to do in the name of all, and the instruments through which the authentic voice of the electorate is to be heard and translated into action. The two themes cannot always be discussed separately, because the same instrument is often used for both purposes. For example, the legislature is both a check and a spur to government. And, as we shall see, when the electorate wishes to spur the government on to a more positive program of action, it must often be willing to slacken the reins by which government is checked.

In fact, democratic constitutions have been considerably modified in the last sixty or seventy years to allow government to carry out the widening activities it is expected to perform. The adaptation has gone so far that some will challenge the accuracy of the description of democratic constitutions given here. They will say that democratic constitutions are no longer to be understood as devices for restraining governments but rather as instruments for carrying out the will of the people, for ensuring that government does what electoral majorities want it to do. Furthermore, they will contend that any portion of the constitution which does not promote this purpose is outmoded and should be changed forthwith. In other words, where the liberal democrat once sought freedom *from* government, his recent quest has been to seek freedom *through* government! Who, then, is or was the true liberal, Herbert Hoover or Franklin D. Roosevelt? For the past forty or so years, a great debate has been raging in democratic countries over this question.²

² In this connection, the battle of terminologies involving the concepts of 'liberal' and 'conservative' has hardly been either helpful or enlightening. The terms connote different things to different people and depending upon the times in which one lives, it would appear to be more fashionable (and politically profitable!) to be one rather than the other. Thus, during the heyday of the New Deal in America it was *de rigueur* to be a 'liberal'; in the late 'fifties and early 'sixties, however, to be a 'conservative' was far more 'respectable.' It is clear that much depends upon interpretation and—to use Al Smith's happy phrase—whose ox is gored. Is a 'liberal' one who defends and upholds the Bill of Rights against society's encroachment or is

assumptions of dictatorship.

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he a 'conservative'? Is it the conservative who still believes in *laissez faire*, or is he a 'liberal'? Or perhaps he is a 'reactionary.' The supporters of the two statesmen named above would give rather different responses! Senator Joseph R. McCarthy of Wisconsin was called a 'conservative' by many, 'radical' by many others. (No one seriously called him 'liberal.') One aspect is certain: man's views change with and generally adapt themselves to the unfolding of events. Labels confuse the issue—unless they are accompanied by meaningful data and objective reflection.

III

Basic Assumptions of Dictatorship

GENERAL BACKGROUND

The Modern Dictatorships. Dictatorship is not a new concept in the language of government and politics. At times of crisis in the ancient Roman Republic, immense—although not quite absolute—power was often put in the hands of a single man, a dictator. But his rule was limited to a very short period of time and was subject to some other limits and restraints as well. The powers of the dictator came automatically to an end and the normal agencies of republican rule were restored. Modern dictatorships, on the other hand, are forms of absolute rule and are not subject to any predetermined limits of time or subject matter.

TYRANNY. While the modern dictatorships are quite unlike the old Roman institution from which the name is derived, they are not entirely new phenomena. One of the ancient forms of government was known as tyranny. At many times and places in the world of the Greek city-states, the government fell into the hands of tyrants. Originally, the word *tyrant* meant merely ruler, and there were good and bad tyrants just as there have been good and bad kings. However, the word gradually came to be a term of abuse used to describe a despotic ruler who seized power by fraud or force, often with the support of the submerged masses of the population. Thus Plato described tyranny as the worst form of government and as the most probable outcome of democracy, which he was disposed to regard as an unworkable form of

government. Aristotle regarded tyranny as a perversion of monarchy, the tyrant as a ruler who ruled by demagogic tricks rather than by the kingly virtues of wisdom and forbearance. It is the latter form of government which modern dictatorship most resembles.

Modern dictators are usually persons of obscure origin whose first political successes were in the leadership of crowds. They seize power by unconstitutional means, exercise it in despotic fashion, and, at the same time, go to extraordinary lengths to persuade the masses to support them. To read Aristotle's account of how tyrants maintain their power, one would think he had been studying at first hand the actual methods of Mussolini and Hitler.¹ The way in which these two men and their associates exploited the weaknesses of the faltering democracies of Italy and Germany gives a somber significance to Plato's account of how democracy can degenerate into tyranny.²

We have already noted that the three great modern dictatorships are markedly different in many ways. The description just given above is not a wholly accurate statement of the origins of the Communist dictatorship in Russia. It overthrew a degenerate monarchy rather than a degenerate democracy, and the most striking native quality of Lenin and Stalin was not the leadership of crowds. But the methods of exercising and maintaining power are substantially the same for all three.

Therefore, for the purpose of making broad contrasts with democracy, all modern dictatorships can be grouped together. Whether imposed by a single tyrant or by a small group of imperious leaders, dictatorship is necessarily fiercely anti-democratic. Of course, there are sharp practical as well as theoretical differences between communism on the one hand and fascism on the other. There are important distinctions to be made between a Hitler, a Mussolini, a Stalin—and for that matter, between him and Khrushchev—a Peron, a Franco, and a Nasser. But when all is said and done, dictatorship is essentially a negation of liberal democratic ideals. It rejects, in varying degree, the democratic cornerstones of respect for individual personality, personal freedoms, belief in rationality, equality, justice, rule by law, and constitutionalism.

A BASIC POINT. One very important distinction between democracy and dictatorship, if not the basic one, has been best phrased by a wit with no

¹ Aristotle, *Politics*, bk. v, ch. viii.

² *The Republic of Plato*, tr. by Francis Cornford (New York: Oxford University Press, 1945), pp. 287-96.

pretense to learned scholarship. *In the democracies, he said, what is not forbidden is permitted, while in the dictatorships, what is not forbidden is compulsory.* That is to say, the democracies have been regimes of freedom. In the main, government in democracies has been concerned to forbid and punish various forms of serious anti-social conduct and not to command a precise pattern of behavior on all matters. Murder and wife beating are forbidden. On the other hand, no one is ordered by the government to love his neighbor as himself or to produce ten children for the glory of the state. Even where the government commands people to do precise and specific things, such as sending their children to school or submitting to compulsory vaccination, the professed object is to enlarge the freedom of the individual.

Government in the dictatorships not only has forbidden a wide range of actions, but has also limited severely individual free choice by ordering many of the details of life from the cradle to the grave. While these minute regulations are explained to the individual as being for the welfare of society and for his own good, they enforce on him the dictator's conception of that good, and prevent him very largely from following his own. In effect, the regimentation is for the glory of the small ruling group, or, at any rate, for something other than the enlargement of the life of individual citizens.

The War of Ideas Between Democracy and Dictatorship. For almost fifty years the world has been convulsed by the antagonism between democracy and dictatorship. The first phase culminated in World War II when Fascist Italy and Nazi Germany went down before a coalition of democratic powers and the Soviet Union. In the second phase, now still very much in progress, Communist Russia—with Communist China ominously in the wings—is ranged against the Western democracies in the 'cold war.' The antagonism between democracies and dictatorships is deep-rooted.

This antagonism has always rested partly on a conflict of material interest, but it is also a conflict of ideas. The cold war at present involves a good deal of maneuvering for strategic advantage but it is essentially a war of ideas, a battle for men's minds. The Soviet Union tries to win converts in the democracies. The democracies have often despaired of making contact with minds behind the Iron Curtain, yet they are deeply aware of the need to try, and they have done so.

There was also, of course, a bitter antagonism between Fascist Italy and Nazi Germany on the one hand, and Communist Russia on the other.

Even today, the most abusive epithet in the great arsenal of Communist invective is 'Fascist.' But again we must note that all three have been remarkably alike in the means they employ and substantially at one in their negations of Western democratic political ideals.

FASCISM AND NAZISM

Philosophic Negations. The Fascist and Nazi philosophies, in so far as ideals of government are concerned, consisted almost entirely of negations. Devoted Fascists and Nazis would, of course, deny that statement or consider its emphasis on ideals quite irrelevant. Italy's Fascists would probably point to such 'positive' accomplishments as Mussolini's brave conquest of the powerful Ethiopians and to the fact that *Il Duce* made the trains run on time! The Nazis would obviously speak in nostalgic terms of the resurrection of *das Reich* and its subsequent aggressive spread over most of Central Europe, and of such internal achievements as Hitler's handsome *Autobahnen*—so helpful to the victory-bent Allies in 1944-45. Why bother with 'ideals' when the material results achieved were so attractive!

SPECIFICS. Nevertheless, a glance into historical evidence clearly shows that widespread resentment, frustration, and despair in both Italy and Germany, arising out of the national humiliation of World War I and its consequences, coupled with severe economic depression and the weakness of existing political institutions, led to disillusionment with democracy and rejection of the Western tradition, without bringing any alternative constructive system of ideas. Moreover, the Fascist and Nazi dictatorships have run their course, and such positive ideas as they embodied are most unlikely to be resurrected in the same form again. Of course, Fascist and Nazi attitudes can still be found, but they no longer seem to dominate many minds. For present purposes, then, our attention will be focused on the philosophic negations. These may be grouped into five general categories:

- (1) Contempt for Individual Personality.
- (2) Denial of Rationality of Man.
- (3) Society and State over the Individual.
- (4) The Rule of the Elite.
- (5) Denial of Freedom and Equality.

(1) *Contempt for Individual Personality.* The fundamental negation of the Fascists and Nazis is the denial of individual personality as the ultimate for politics. Indeed, these creeds went to the point of denying that the individual, as such, has any significance at all except as means to ends beyond and above him. In part, this view rests on a low estimate of human nature. The great mass of individuals are engrossed in their private lives and are utterly lacking in any conception of the public interest. They live on an emotional level, in continual conflict over squalid selfish aims. If one waits for people of this quality to conceive and carry through great projects, no grand, heroic achievement is possible. The Fascist and Nazi movements had their substantial share of impatient visionaries with vague designs for human betterment who could not wait for a slow, fumbling humanity to realize the vision. It is not difficult, but fatally easy, to despise and even hate people who cannot live up to the plans you have made for them.

Mussolini, the Fascist dictator of Italy, scoffed at public opinion, and one of his favorite epithets for the people was 'mud.' In *Mein Kampf*, the Nazi Bible, Hitler stated bluntly his estimate of human beings. Individually they were ignoramuses and incompetents, collectively a rabble, marked by indolence, stupidity, and cowardice. Individuals are therefore to be regarded as means and not as ends in themselves.

(2) *Denial of Rationality of Man.* This comes out most clearly in the attitude of Hitler and Mussolini toward persuasion in the political process. The democratic ideal assumes the rationality of man. On this assumption, the individual has a claim to be persuaded by reasonable arguments before he gives his consent and support. However many democratic politicians fall short of this in practice by appealing to the passions of their listeners, they all pay lip-service to logic and truth. Hitler and Mussolini paid no such tribute. On the contrary, they paid tribute to falsehood, holding that the more audacious the lie the more likely that it would be believed. For example, in *Mein Kampf*, Hitler blatantly called for resort to the big lie, contending that the greater and more persistent the falsehood the more its likelihood of success! This theory was widely accepted by his countrymen during his regime, despite the fact that the crudity of this and other types of propaganda was an insult to the intelligence of listeners.

Hitler and Mussolini's appeals to the people were not fireside chats; they were mass spectacles in which music, color, ritual, symbols, the atmosphere of church and theater, combined with hypnotic suggestion to overwhelm the minds of the listeners. The heckler, who pricked pretentious

bubbles with a question or ribald comment, was brutally silenced. Questioning provoked violence rather than discussion. Indeed, it was unsafe not to applaud. It was best to turn off the mind.

This shows better than anything else the Fascist and Nazi contempt for individual personality. It shows too their unqualified denial of the rationality of man. The success of their methods suggests that there is much truth in their estimate of the susceptibility of men to emotional appeal. There is, in fact, independent evidence from the science of psychology to show that the democratic ideal has underestimated the irrational factors in human nature. This may be acknowledged while pointing to a still further lesson to be learned from the Fascist and Nazi episodes.

The dignity of the individual cannot survive this unqualified denial of his rationality. If he cannot be appealed to on the basis of facts and reasoning, he has to be appealed to on the vague grounds of sentiment and feeling, where obscurantists and liars have an overwhelming advantage. If these will not suffice, he has to be bludgeoned by force. The democratic ideal is compelled to hold to the faith that the individual can be persuaded—and further educated—to take thought about how to settle the terms of his common life with others in society.

(3) *Society and State over the Individual.* If the Fascists and the Nazis denied the value of individual personality, what goal did they ask men to strive for? They asserted the unqualified pre-eminence of society over the individual. The Italian Fascists put it bluntly: 'Society is the end, individuals the means, and its whole life consists in using individuals as instruments for its social ends.' Equally categorical statements abound in Nazi literature. The individual was to realize himself by submerging himself in loyal unquestioning service and boundless sacrifice for society.

Society, for them, was identical with the state. Their one unvarying appeal was to a strident jingoistic nationalism. Mussolini was always promising to revive the glories of the Roman Empire. Hitler's supreme aim was to rouse the German nation to a sense of its so-called racial superiority, and of its world mission consequent on that superiority. Literally, the two dictators demanded that every Italian and German submit himself to severe military discipline for the achievement of these ends. Their watchwords were authority and obedience. No more than any other military commander did they propose to let the private soldiers discuss and decide the plan of campaign.

Three highly important consequences follow from what has been said so far. *First*, grandiose schemes of this kind require concerted effort on a

grand scale. The state was the only agency that could undertake the comprehensive co-ordination needed. Hence the state became the name of society. Mussolini gave the formula: 'Everything for the state, nothing against the state, nothing outside the state.' He insisted that the state was only an instrument in the service of the Folk. But in practice, the Nazi state was infinitely more than the Fascist state.

This brings us to the *second consequence*. Vague goals of society or a world mission do not define any specific action. It is still necessary for someone to decide step by step what is to do. If individuals here and now do not matter, the world has nothing to do with them. If they are lazy, stupid, and incapable of entertaining a heroic design—let alone of thinking systematically about the means of promoting it. So the Nazis rejected majority rule by elected representatives in favour of a few. The effect of this was to relieve the state from all responsibilities. It followed inevitably that the decisions leading to action were made by the state without reference to what the body of citizens thought or common interests or common purposes. The state decided at its discretion what were the desirable social ends, what was to be done, and how to set about them.

But who or what, it may be asked, is the state here? It is no longer what adherence to democratic ideals makes it, an agency for the people in a given territory for furthering the interest they have in it. Here we reach the *third consequence*. The state becomes a small group of persons who control its power and operate it. The State, government, and movement become one and the same.

(4) *The Rule of the Elite*. Political power is concentrated in the hands of a small elite, an oligarchy—and those they gather around them, this, as all Fascist and Nazi literature insists, is as it has always been. 'History is made by minorities.' They alone have the vision, the relentless will to struggle against the inertia of the masses, and to lead them with their vision and example, and to drive them where they would be led. In their eyes the elite alone have the right to rule!

Only one comment on these arrogant claims is needed. The leaders have elevated themselves so far above their fellows, beyond the reach of criticism, the leaders can pursue their visions. But having no need to listen to anyone or to win consent through rational discussion,

no way of knowing whether their visions are anything but bad dreams.

VI. . . . but their own powers of self-criticism—a scarce commodity among so many prophets and crusaders—to keep them from letting their private prejudices, hatreds, and ambitions with the great social ends, always vague and undefined, by which they justify their irresponsible power. The sordid realities of the Fascist and Nazi regimes are not at all surprising. They merely confirm the ancient wisdom that *no man is good enough to be trusted with absolute power*.

(5) *Denial of Freedom and Equality*. The remaining negations of democratic ideals by the Fascists and Nazis can now be stated quickly. Having denied the worth of individual personality, they could find no value in individual freedom. Mussolini sneered at the 'putrescent corpse of the Goddess of Liberty.' Hitler talked much about freedom, but it was freedom for the German nation at the expense of freedom for individual Germans. Individual freedom could not be claimed against the state. It existed only in so far as the state allowed it to exist.

The contempt of the Fascists and Nazis for individuals in general and their glorification of the elite were, in substance, a denial of human equality. The dictators saw clearly the facts of inequality but lacked the deeper sense of the brotherhood of man which is needed to reduce the significance of the more obvious natural and social inequalities. Denying the need for discussion and debate, they had no reason to treat men as if they were equal.

On the contrary, they glorified inequality. 'Fascism,' said Mussolini, 'asserts the irremediable and fertile and beneficial inequality of men.' The Nazi creed of inherent Nordic³ racial superiority denied the right of Jews to be citizens. Cross-breeding between Germans and Jews produced 'bastards,' an inferior group that had to be eliminated. Furthermore, the aristocratic principle which identifies superior and inferior races also distinguishes between superior and inferior persons within the master race, 'putting the heads above the masses and subjecting the masses to the heads.' In Nazi and Fascist practice, the consequences of these views were fully worked out in the abolition of equality in political and civil rights.

The Totalitarian State. In conclusion, the Fascist and Nazi negation of democratic ideals was categorical and complete. As a result, the individual becomes defenseless before the state. In the place of a state with limited functions, which he as a citizen helps to define, he is faced with a state that

³ The true 'Nordic' was characterized as tall, blond, blue-eyed, athletic, and handsome. Yet Hitler, the Nordic *Führer*, was short, dark, brown-eyed, unathletic, and unattractive.

undertakes to organize every aspect of his existence when and how it likes. He no longer has a realm of freedom in which he can realize his potentialities outside the state. He has to find the meaning of life in abject surrender and unquestioning obedience. The state is all, the totality, and hence the Fascist and Nazi states were called totalitarian. In place of the ideals of Liberty, Equality, and Fraternity that inspired the French Revolution and the succeeding democratic age, they put Responsibility, Discipline, and Hierarchy.

Fascism and Nazism Contrasted. Fascism and Nazism are commonly classified as one and the same. Broadly speaking, this is logically permissible, especially when employed as a basis of comparison with communism. Fundamentally, both these 'isms' come under the general heading of *fascism*, a term derived from the Italian *fascio*, i.e., a political group or club that served as the early instrumentality for Mussolini's gathering of support and power.⁴ *Fascism*, if a definition still be needed after the aforesaid description, may be viewed as the *totalitarian organization of government and society by a single-party dictatorship, intensely nationalist, racist, militarist, and imperialist*. Mussolini and his onetime student and admirer, Hitler—who later grew to despise and ridicule his teacher—merely differed in the degree of application of fascist doctrines. This was partly due to the different types of people with whom each dictator dealt and to the different soils in which fascism found its roots. For a variety of reasons the German soil proved to be considerably more fertile!

Enough has been said in the preceding sections of this chapter to indicate clearly the many similarities between the two types of fascism. A few of the differences are worth noting; however, born of circumstantial expediency, they were not so much differences of principle as of degree.

(1) RELIGION. Whereas the Nazis soon commenced to battle with the Church, and openly denied the need for religious adherence according to traditional beliefs, one of the early steps taken by Mussolini's regime was to enter into a *concordat* with the Vatican. In essence this agreement—known as the Lateran Pact of 1929—meant 'you leave me alone and I shall leave you alone.' Both parties to the *concordat* adhered to it faithfully, although it frequently proved to be an uneasy truce, especially in the realm of the education of Italy's youth.⁵

⁴ Literally *fascio* means a 'bundle'—commonly a bundle of sticks or wood bound together, thus symbolizing unity of purpose.

⁵ For a pertinent discussion, see Richard A. Webster, *Fascism in Italy. The Cross and the Fasces: Christian Democracy and Fascism in Italy* (Stanford: Stanford University Press, 1960).

Hitler, on the other hand, did everything in his power to undermine the authority and influence of both the Protestant and Catholic Church in Germany, even to the extent of establishing a National Church (*Reichskirche*). He, too, had entered a *concordat* with the Vatican in 1933, but he failed to respect it, and Pope Pius XI renounced it in 1937. Although Hitler intimidated many officials and members of the traditional churches, he did not succeed in raising his National Church to a position of omnipotence. Moreover, some of his most effective opposition, however limited, came from such religious leaders as the Bavarian Cardinal Faulhaber and the Prussian Pastor Niemöller—not so much because they necessarily disagreed with Hitler's over-all policies for the German state, but because he interfered with their authority. Cardinal Faulhaber proved to be especially courageous in his opposition, aided indirectly by Rome. Pastor Niemöller, although a dedicated militaristic and nationalistic German, was ultimately sent to a concentration camp.

(2) ANTI-SEMITISM. Undoubtedly the most sordid aspect of the Nazi regime was its racist philosophy, which ultimately culminated in the systematic liquidation of the Jews. Italy's fascist regime made life uneasy and frequently unpleasant for its Jewish citizens, but it did not actively molest them in any extreme sense. Indeed, anti-Semitism was originally no part of Italian fascism; it was 'borrowed' from the Nazis, who finally compelled its adoption.

Viewing the German Jews as 'aliens,' as 'foreigners,' and above all as *non-Aryan*, the Nazis, on the other hand, determined upon their ultimate eradication. This despite the fact that the German Jews had been completely assimilated into the stream of German life and culture, had lived there for centuries prior to the existence of the German state and participated in its creation and development, and numbered but 600,000—scarcely 1 per cent of the population! However, as a defenseless and generally well-to-do minority, they provided an ideal scapegoat—a basic requirement in dictatorships. The Nazis began their anti-Semitic campaign modestly enough in 1933, but by 1939 they had resolved upon *die entgültige Lösung*: annihilation of all Jews. Any German Jew who had not managed to escape by 1941 was doomed to extermination in one of the dread concentration and extermination camps. Six million European Jews had been thus murdered when Nazi Germany collapsed in 1945.

(3) BRUTALITY. While Mussolini's fascism enforced its own reign of fear through a total suppression of civil liberties by the devices of concentration

camps, a secret police, and spies, it could not match the extreme brutality practiced by the Nazis. The barbarism of such concentration camps as Buchenwald, Dachau, Bergen-Belsen, and Auschwitz represent bestiality on a scale hitherto unknown. Nor could the Italian secret police compete in infamy with the dreaded *Gestapo*, the Secret State Police—a term that has become synonymous with ruthlessness, lawlessness, and terror. Nothing the Italian Fascists did equaled the orgies of murder and torture conducted by their Nazi allies.

(4) ADULATION OF THE LEADER. *Il Duce* had his faithful retinue, his cohorts, and organizations that were blindly loyal to him. He could command the attention of crowds and regale them with the splendor of his regime. Yet the adulation paid to Mussolini was more or less superficial: Italians feared and accepted him as their leader—for indeed he personified Italy's fascism—but their homage was a far cry from the rousing, fanatical allegiance tendered Germany's *Führer* by his masses. Hitler was accorded a devotion that was as blind and unquestioning as it was frightening. 'Heil Hitler' was akin to a charismatic message, one that the *Führer* was able to manipulate as he pleased. He had a profound effect on the German masses.

(5) IDEOLOGY. Mussolini's fascism was devoid of any clear-cut, positive philosophy. It had a highly opportunistic flavor about it. The ideological cement holding the party members was negligible; it simply served as a means to the end of subordination of the individual to the state. The people were compelled to serve the state, and they did—but unlike their fascist German cousins they hardly knew why. As one observer well put it, 'The totalitarianism of the Italian Fascists was shallow and specious. It did not penetrate the life or the thought of the people.'⁶ It was simply a fact that took place.

The Nazi brand of fascism, however, was characterized by an extreme form of dogmatism. Dictator and state were identified with the notion of the *Volksgeist*—the spirit of the people. This *Volksgeist* was effectively represented as a personification of German purity and triumph, a triumph over the impurities of the enemies of the Nazi *Reich*, enemies that included such 'devils' as Jews, foreigners, international bankers, socialists, Communists, free-masons, democrats, humanitarians, individualists. The *Volksgeist*, inherent in the purity and greatness of the Aryan race, and incarnated in the German state, became Nazidom's successful gospel. At once incomprehen-

⁶ R. M. MacIver, *The Web of Government* (New York: The Macmillan Company, 1947), p. 247.

sible and attractive, it provided a watchful Jehovah for the chosen people of the *Fatherland*.

COMMUNISM

COMMUNIST IDEALS OF GOVERNMENT

The ideals professed by the Soviet Union must be discussed more fully. They are now competing with the democratic ideals for men's allegiance all over the world. The Communist ideals were not hastily thrown together to justify power-hungry men in doing what they had already done or determined to do anyway. The Communist Bible is the writings of Karl Marx. He died in 1883, and his theories were anxiously worked over for almost fifty years after his death by a large body of disciples before attempts to put them into practice began in Russia in 1917. Furthermore, for Karl Marx and many of his followers, Communist theory was not a negation of the basic ideals of the Western tradition but rather, in their view, the necessary means to their full realization. Any examination of Communist ideas must begin with Marx.

DEMOCRATIC IDEAL AND ECONOMIC REALITY. Marx was a German philosopher deeply influenced by the Western political tradition. In his youth, he shared with most of the young intellectuals of his time an enthusiasm for the ideals of the French Revolution. But he quite early became acutely conscious of the immense gap between these ideals and the political and social realities of the time. In the Europe of his day, the masses of peasants and urban workers were sunk in degrading poverty, entirely dependent, so it seemed, on the whims of the large landowners and of the capitalists, the owners of commercial and industrial establishments. Formal slavery did not exist but the practical condition of the masses was little improvement on serfdom.

The struggle for a bare existence was so exhausting that the great bulk of the lower ranks of the people had no opportunity to realize whatever possibilities they may have had as individuals. Even in Britain, where individual liberty had been formally acknowledged for over a century, countless thousands of lives were being blighted by the horrors of the early factory system. Theories about the essential dignity of the human person seemed a travesty in the light of these facts. Fired by a genuine passion for human

dignity and freedom. Marx set out to discover why things were as they were and how they could be changed.

He concluded that the cause of the plight of the masses was economic. Living on the verge of destitution, one cannot be a person, one cannot have the freedom to do anything or be anything. But the means of production on which the masses had to rely for any improvement in their condition were private property in the hands of landowners and capitalists who did not give them enough in the form of wages or other return to make meaningful freedom possible. More than that, the owning classes took advantage of their superior position in the social structure to exploit their workers.

THE DESTINY OF MAN. Evidence to support these conclusions was easily found in Europe in the middle of the nineteenth century, as it can still be found in parts of Europe and elsewhere. But it would take a considerable knowledge of early-nineteenth-century German philosophy to explain the larger and more general conclusions Marx reached after he saw the importance of economic factors in social life. He concluded, in effect, that this economic exploitation had always been inevitable and also that it was fated to pass entirely away. Mankind, having lived thus far in the 'realm of necessity,' plagued by the economic struggle, would move in the near future into the 'realm of freedom,' where the exploitation of man by man would cease.

Starting from certain highly abstract formulations in German philosophy, he developed an all-embracing philosophy of history to show how all creation moves in a predestined direction. He worked out a theory of social development comparable in certain ways to Darwin's theory of biological development. But while Darwin limited himself to explaining the course of evolution in the past, Marx undertook to show the course of evolution of human society in the future. It was as if Darwin, after showing how the apes came down out of the trees and became men, had gone on to demonstrate that men would now, at the next stage, sprout wings and become angels. The vitally important part about Marx was his prediction of the future.

COMMUNISM IN THEORY

(1) *The Theory of Economic Determinism.* Attempts to sketch briefly a philosophy of history generally end in misrepresentation. Having noted that danger, we may look at Marx's destiny of mankind under three headings.

First, there is the theory of economic determinism. The known ways and means of meeting material needs such as food, clothing, and shelter at any given time determine all significant aspects of social and political organization. If these 'forces of production,' as they are called, are to be fully employed, certain relationships between the different members of society must be established. Those with the know-how must direct the productive effort, and all others must be subordinated to them.

ECONOMIC CAUSES OF CLASS DIVISIONS. The drive to satisfy material needs is so strong that it forces the division of men into economic classes. The significant classes are the directing class, whose dominance has generally been enforced by its taking over the means of production and distribution as its private property, and the servile classes, who are controlled by the directing class. The directing class always comes, sooner or later, to systematic exploitation of the servile classes. The most important fact about any society is the economic class structure.

With the discovery of new resources and new techniques of production, there always comes, sooner or later, a radical change in the mode of production which forces a change in economic organization and a new alignment of economic classes. The *feudal aristocracy* formed the dominant exploiting class in the days of self-sufficient agriculture in the Middle Ages. With improvements in the means of transportation and arts of navigation, and with the discovery of the New World and its new resources, the feudal lords had to give way to the merchants, traders, and adventurers, who alone could organize an economy based primarily on specialization of labor and widespread exchange of goods. At first, they formed a new class, the *middle class*, midway between lords and serfs. With the coming of the Industrial Revolution and the developing factory system, the middle class was enlarged and consolidated in the *capitalist class*, also known as the *bourgeoisie*. With the drawing of the peasantry from the countryside into the factories in rapidly growing urban centers, an entirely new dependent and exploited class, the urban industrial wage-worker, came into existence. Marx identified the capitalists (*bourgeoisie*) and the *urban proletariat* (the industrial working class) as the two significant classes for our time.

THE STATE. But economic organization determines all other aspects of social and political organization. To ensure the dominant and directing class their control of the forces of production and to prevent revolts by the exploited classes, a *policing organization* is necessary. This is the state, and this is its indispensable function. The state, according to Marx and Engels is

not an association for furthering the common interest of the citizens as a whole: 'It is an executive committee for managing the affairs of the bourgeoisie as a whole.' The laws enforced by the state and all significant aspects of political life are direct consequences of the form of economic organization.

IDEALS A REFLECTION OF ECONOMIC INTERESTS. This is only a small part of the story. The ideals of government that hold sway at a particular time arise also from economic sources. The dominant theory about what government should and should not do is always the one that protects the interests of the exploiting class. On this analysis, Marx would say that the decisive feature of the democratic values discussed earlier was the emphasis on freedom. He would say that the significant thing about this ideal of freedom was that it upheld the freedom of the capitalist to do as he liked with his property, i.e. *to continue the exploitation of the working class*. And he would go on to say that this discussion completely misrepresents the relationship of ideals to action when it treats the ideals or values as determining what the state shall and shall not do.

The state always does whatever is necessary to protect the position of the dominant economic class. In their main aspects, democratic ideals are a sort of reflex of the economic system, a set of elaborate afterthoughts that justifies the rule of the capitalist class. The stress on human equality and on the essential worth and dignity of individual personality is merely hocus-pocus for hoodwinking the exploited masses and persuading them to accept their subordinate role. When it was pointed out that many democratic values are rooted in religious beliefs, Marx made his famous retort that 'religion is the opiate of the people.' It too is cunningly adapted to keeping the people quiet. The dominant religion at any time is also a reflex of the economic structure.

To put it briefly, Marx banished God from the scheme of things and put 'the forces of production' in His place as the final cause. The Calvinist interpretation of Christianity pictured an all-wise and all-powerful God who governed the universe in every detail. He left men no freedom of action but determined even before their birth whether they were to be saved or damned. This was the doctrine of predestination. Marx also believed in a predestination in which everything is preordained by the forces of production. Men are the pawns of these forces which determine not only what men shall do but also what they shall believe. This is the theory of economic determinism.

(2) *The Theory of Class Conflict.* Second, there is the theory of class conflict. The forces of production divide society into dominant and subordinate classes, into exploiters and exploited, between which there is unceasing and irreconcilable antagonism. There are no common interests uniting all men in society. *There are only conflicting class interests.* The significant classes for our era are the capitalist owners of the means of production and distribution, and the urban industrial proletariat which must sell its labor and work for a wage in order to live. Their antagonism is illustrated by the need of the capitalist to buy labor as cheaply as possible, and the need of the proletariat to sell labor as dearly as possible.

Each class develops a set of beliefs and values which justifies its place in the economic structure—or its aspirations to a better place. Marx thought he was expressing the theory appropriate to the aspirations of the proletariat. The capitalist class justifies itself by reference to democratic ideals which, of course, were formulated and won widespread adherence in the period of its dominance. These are the ideas which the forces of production predestined the capitalist class to believe.

Generally speaking, the members of this class and its adherents sincerely believe in democratic values, and also believe that private property in the means of production and distribution is the best way to a further realization of these values. For these and other reasons, the capitalist class refuses to give up its privileged position, and it will fight the aspirations of the proletariat to the bitter end. *If the proletariat is to realize its aspirations, it must be prepared to overthrow the capitalist class by violence.* This is the theory of class conflict, which denies that there are, or can be, any common interests or common values, any common ground on which men can meet to compose their differences, as long as they are divided into economic classes. The division and the conflict can be ended only by bringing into existence a classless society.

(3) *The Theory of Dialectical Materialism.* If the rule of the capitalists has been predestined by the forces of production, what hope of ousting them can be entertained? This brings us to the *third* heading for discussion, the theory of dialectical materialism. Dialectical materialism is the core of Marx's philosophy of history. The materialism involved in substituting 'the forces of production' for God is obvious enough. *The dialectic can be described for present purposes as an inner mechanism of the material world which ensures the full working out of economic and social change.* Through the ceaseless contention of rival economic classes, it brings new economic and social

arrangements into existence in somewhat the same way as logical argument, or dialectical dispute, between opposing sides in a dialectic process opens up new truth. In a cunning way, it even makes the capitalist class create the conditions which will ultimately destroy it.

Freedom of individual economic enterprise brought the Industrial Revolution. To reap the full benefits of the Industrial Revolution, the capitalist class had to create the factory system and ultimately the mass production system. For this purpose, they drew the peasants to the towns and created the urban proletariat. Production on the assembly line in the great factory is an intensely co-operative kind of work, and the capitalist system trained the workers to co-operative action. Incidentally, the workers learned also to co-operate in resisting the efforts of the capitalists to exploit them.

In response to their economic needs, the industrial workers created the great trade-union movement which is almost entirely a development of the period of capitalist dominance. The trade unions are one of the principal means by which the workers are disciplined in co-operative action. Over many years the capitalists fought the trade-union movement bitterly but they were unable to crush it. Thus, even against their own will and efforts they are led to provide the conditions for their own downfall.

THE NEMESIS OF THE PROFIT MOTIVE. The only effective motive the capitalist class can bring to the processes of production is the desire for private profit and gain. This drives the capitalists to suppress competition among themselves and to combine in monopolies. But the effect of monopoly in their hands is restrictive; it thwarts the potentialities of the great productive equipment they themselves brought into existence. To realize these potentialities, it is necessary to abolish private property and the profit motive, and to give unrestricted scope to co-operative impulses and techniques. The only class which has been trained to exploit co-operative production to the full is the industrial proletariat. God, that is to say, 'the forces of production,' will not be mocked. The very forces which once gave mastery to the capitalistic class must now confer it on the proletariat. The industrial working class is destined to become the vanguard of progress. This is the outcome thought to be guaranteed by the theory of dialectical materialism.

FREEDOM AND EQUALITY IN THE CLASSLESS SOCIETY

The Dictatorship of the Proletariat. As his own theories show, Marx did not expect the capitalist class to recognize that it was headed for the dustbin.

He anticipated rather that the capitalists would use every means, including the repressive power of the state, to maintain their position. There was no reason to expect they could be ousted by measures short of revolution. The proletariat could not count on being able to take up its historic role without the use of violence. To protect itself against counter-revolution by the capitalists and to construct the new socialist society, *the proletariat would find it necessary to set up and maintain during a transitional period a dictatorship of the proletariat*. In reality, this would be a new kind of state for protecting the interests of the proletariat and for liquidating capitalist remnants. One might have expected, again on Marx's own theories, that it would continue indefinitely as the 'executive committee' of the new governing class.

The Classless Society. But Marx expected the capitalist system in its last days to drive almost everyone except a few great capitalists and their hangers-on into the exploited proletariat. Thus he envisaged something new in history once the threat of capitalist counter-revolution had been removed by liquidating the capitalists. He predicted *the emergence at long last of a classless society*. Since there would no longer be a submerged class or classes to exploit, there could not be an exploiting class. With the disappearance of economic classes, there would no longer be anything to divide men in bitterness and conflict. In place of irreconcilable class interests, there would be at last a genuine and all-absorbing common interest in raising co-operative production to the highest possible level for the benefit of all. Like many other creators of Utopias, he looked to see men live together like one happy family.

The State 'Withers Away.' If the sole cause of contention among men is economic and that cause is removed, the problem of maintaining public order and security is solved. The state and government no longer have any reason for existence. As Engels, Marx's collaborator, said, *the state withers away*, and 'the government of persons is replaced by the administration of things and the direction of the process of production.' Also, the study of government and politics fades from the college curriculum. It becomes as dead as a dead language. In Lenin's own words: 'From the moment all members of society, or even only the vast majority, have learned to administer the state *themselves* . . . the necessity of observing the simple, fundamental rules of human intercourse will very soon become a *habit*.'⁷

The Age of Communism. The long, sad record of the exploitation of man by man will then be closed and the violation of human dignity through poverty, oppression, and violence will cease. That is to say, freedom will at

⁷ *State and Revolution* (Moscow: Foreign Languages Publishing House, 1948), pp. 160-62.

last become meaningful because there will no longer be a dominant class whose freedom rests by necessity on the exploitation of subordinate classes, and no longer subordinate classes whose freedom is thwarted by the necessities of the economic system. Mankind moves from the 'realm of necessity' into the 'realm of freedom.' Marx's ideal of freedom and equality is realized in the age of communism, where, as he phrased it, *every one contributes to society according to his capacities and receives according to his needs.*

In chart form, the movement to communism would thus traverse the following path:

- Stage 1. Exploitation of All by the Feudal Aristocracy.
- Stage 2. Overthrow of the Feudal Aristocracy by the Middle Class, i.e. the Capitalists, the Bourgeoisie.
- Stage 3. Exploitation of the Urban Proletariat by the Capitalists.
- Stage 4. Overthrow of the Capitalists by the Proletariat.
- Stage 5. Temporary Dictatorship of the Proletariat.
- Stage 6. Emergence of the Classless Society.
- Stage 7. The State Withers Away.

COMMUNISM IN PRACTICE

The above represents the merest outline of Marx's philosophy, popularly known now as communism. Main emphasis here has been put on the economic and political implications. It should be noted, however, that Marx thought he had found the key for explaining every significant aspect of human society. Not only economics and politics but art, literature, science, philosophy, religion, all are to be explained and understood in terms of economic classes and the dialectic. A body of doctrine which uses one key to unlock all mysteries is a religion. In that sense, communism has become a religion to Marx's followers. This goes far to explain their untiring zeal, their sacrificial devotion, their dogmatism and intolerance.

Revolution. As already noted, Marx's doctrines were systematically developed by his followers, especially by Lenin, into what is known as Marxism-Leninism, or communism. Just as interpreters of the Bible claim always to be faithful to the sacred text, so Marx's followers have claimed never to have added to or diminished a word of what Marx has said. Just as in the interpretation of the Scriptures, there has been endless dispute about what Marx really meant. In particular, his followers have disagreed on whether Marx believed

that revolution would be necessary to oust the capitalists and bring the proletariat into its own. There are passages in Marx's writings which suggest that he had not ruled out the possibility of a peaceful transition. However, the main trend of his arguments and most of his explicit statements support the interpretation that revolution will be necessary—one that has also been supported by the successful practitioners of today's Marxism-Leninism, the masters of the Soviet Union, the Communist party in the Soviet Union and in the other countries that now have Communist governments. It is they who make Communist ideas a power in the world, and they who determine what communism means today.

However, soon after he had attained complete power Nikita Khrushchev began to talk repeatedly about the possibility of a peaceful transition from capitalism to communism, confidently expressing the belief that 'we will bury you.' Indeed, the text of the Party Draft Program of July 30, 1961, delivered by Khrushchev himself at the 22nd Party Congress, contains this passage: 'Peaceful co-existence of the Socialist and capitalist countries is an objective necessity for the development of human society.' This pronouncement, which thus became Communist party dogma in the Soviet Union and for its allies, soon engendered a battle of words with the Chinese Communists, with the leader of the latter, Mao Tse-tung, and his followers accusing the Soviet Union of having betrayed orthodox Marxism-Leninism. Of course, it is not at all clear whether this change in the Bible is more than soothing double talk to help in the efforts of the Soviet Union to relax somewhat the tensions of the cold war.

The revolutionary wing of the Russian followers of Marx, led by Lenin and Trotsky, seized power in Russia in 1917 and proclaimed the dictatorship of the proletariat. The social and economic system they set up cannot be discussed here. For the moment, it is sufficient to say that although the capitalists in Russia were always few and were fully liquidated forty years ago, *the state has not withered away and the 'government of persons' is still an active enterprise.* Something will be said later about the continuing dictatorship in the Soviet Union as a form of government. Here the focus of interest is in the ideas behind government.

Negations. It was said earlier that Communist thought in practice rejects the Western political tradition in the same way as did Fascist and Nazi doctrine. These negations are nowhere bluntly stated in Communist doctrine; indeed, it affirms the same fundamental values as the Western tradition and promises the full realization of them in the future. The negations arise from

certain consequences and tendencies in the Communist creed which must now be stated.

'Democratic Ideals an Illusion in a Class-Divided Society.' First, in so far as Communists are loyal to their doctrine, they cannot give any allegiance to democratic values as these are understood in the Western world until the exploiting capitalist class is overthrown and the proletariat has come to power. Before the revolution, before the emergence of the classless society, freedom, equality, and justice are meaningless terms. To labor for the realization of these values within the framework of a society made up of conflicting economic classes is to pursue a phantom.

Bernard Shaw, who understood Communist *theory* sympathetically, once said that democracy was a big balloon put aloft to attract the gaping attention of the populace while the exploiting class picked their pockets. That is to say, working for these ideals is merely playing the capitalist game of keeping the masses quiet and submissive. It distracts attention from the vital task of undermining the old system and making way for the new. For this purpose, class antagonisms must be heightened, not lessened. Improving the lot of the masses within the capitalist society tends to lessen antagonisms. For the sake of the future, it is necessary to forget about the values of human personality here and now.

If Communists are loyal to their creed, the important unit is not the individual, but the economic class which is the instrument of destiny. The worth of individuals and the treatment to be accorded them is determined by their class affiliation. Those with capitalist mentality are obstacles stubbornly blocking the new world that awaits its birth. They are in the way and must be removed like any other rubbish that gets in the way.

The proletariat is the vanguard of the new society, the expendable soldiers important now as means and not as ends in themselves. In fact, of course, many members of the proletariat are deaf and inert to the call of destiny. How long must the 'realm of freedom' wait for them to respond? After all, at this stage of history, they are merely means; the class structure prevents them from realizing themselves as persons. In the outcome, the temptation to drive the masses when they will not be led is almost as strong for Communists as it was for Nazis and Fascists.

'NO UNIFYING COMMON INTEREST IN A CLASS-DIVIDED SOCIETY.' Second, if the real interests are always class interests in a class-divided society, and if these interests are irreconcilable, it follows that all discussion aimed at composing these diverse interests is useless. Any agreement that might be reached is

certain to violate the interests of one or other of both classes and will have to be broken if economic classes are to perform their inevitable role in history. Actually, on Communist theory, genuine agreement is impossible. It is impossible to convince the capitalist that his part on the stage of history is finished, because his economic interest, his membership in his class, determines his beliefs. Blinded by class interests, he cannot see the truth.

Equally, no Communist can agree with propositions put forward by persons of capitalist mentality because he knows in advance that, however plausible they appear on the surface, they must be fallacious and perverse. Discussion and debate will never reveal a common interest which men can agree to pursue together because no such common interest exists. In a class-divided society, there are only capitalist interests and capitalist truth, proletarian interests and proletarian truth, and never the twain shall meet!

Whatever the view about the rationality of man in the classless society of the future, Communist theory denies the possibility of rational discussion in a society divided into economic classes. Men do not think freely and make up their minds on the basis of logic and evidence. Their thinking is just a reflex induced in them by their role in the economic system. This too leads to the denial of the worth of human personality. Individuals cannot treat one another with mutual respect unless there is some common ground of experience and values on which to meet to discuss and compose differences.

RELIGIOUS INTOLERANCE OF COMMUNISM. *Third*, the Communist thinks he has grasped the inner meaning of the world, the final truth about man and society. Communism is thus a kind of 'religion.' Its adherents are so utterly certain of their truth and so intoxicated with the beatific vision of the kingdom of heaven that they become an easy prey to religious intolerance. Their first loyalty is to the truth that will ultimately bring all men to salvation and freedom. Their first duty is to make that truth prevail. The sacred word of Marx says the inevitable way is through intolerance, conflict, and violence. Their impatience with the willful obstructors, the lazy who do not care, and the blind who cannot or will not see, becomes almost unendurable. Consequently, there is a strong tendency to ruthlessness, a disposition to regard the great end as justifying any means. This will not surprise anyone who recalls how the rack and the stake were used in the name of Christian love and charity until the lesson of religious toleration was learned. The democratic ideals are inextricably bound up with religious toleration. Religious intolerance of whatever kind is an utter negation of them.

Procedures Opposed to Theory. The result of these consequences and tend-

encies in Communist theory is to subordinate individuals to the claims of society, the classless society of the future, just as Fascist and Nazi theory subordinated individuals to the existing Italian and German society. Because all three theories lack respect for individual dignity here and now, the rejection of democratic ideals goes point for point the same. *In Communist theory, individual freedom is not for the present but for the future.* Thus far, wherever Communists have come to power, inequalities that rest on distinctions of economic class have usually been abolished, although the U.S.S.R. has lately introduced a number of obvious modifications of this practice. Thus special privileges have been given to such groups as farmers, plant and farm managers, military and party leaders, intellectuals, scientists, and artists. Professor William Ebenstein sees four distinguishable social classes, with a steadily widening income gap between them: (1) Top government officials, party leaders, military officers, industrial executives, scientists, artists, and writers—totaling *circa* one million families. (2) Intermediary ranks of civilian and military officials, collective farm managers, and some skilled industrial workers and technicians—about two to three million families. (3) The bulk of the population, the workers, and peasants—approximately forty million families. (4) Slave laborers and other disadvantaged persons.⁸

At any rate, a multitude of regulations has been made either to enforce social equality or to recognize the merits of particular groups, without regard for the claims of individual freedom. *The essential feature of this equality is an equal subjection to an all-powerful government.* The one kind of equality that is fundamental in the democratic ideals, equality before the law, is rejected more or less. However, as will be explained more fully in the chapters on civil rights and the judiciary, since Stalin's death and particularly since 1955 under Khrushchev there has been a good deal of talk in government circles about 'Soviet legality.' The 1957-58 law on the judiciary and a liberalized criminal code adopted soon thereafter stress that concept repeatedly. How much all this really means remains to be seen—although it would be a mistake not to recognize some distinct differences between the days of Khrushchev and those of Stalin. An informed and realistic glance at the Soviet Union more than a decade after the latter's death does reveal some of significance.

Changes. The old dictator's legacy still lies heavily on Russia, and the cold war is turned on and off more or less at pleasure. But Khrushchev has given

⁸ William Ebenstein, *Today's Isms*, 3rd ed. (Englewood Cliffs, N. J.: Prentice-Hall, 1961), p. 53.

evidence that, up to a point, he is sensitive to world opinion; he has made himself more available to the world; he has roundly and repeatedly condemned the excesses of Stalin's era; much of the erstwhile police terror has disappeared from the lives of millions of Russians; he has given some evidence that deviation from the party line does not necessarily invite liquidation (although it may well result in banishment from public life and oblivion); he has opened his country to tourists (but still denies travel abroad to all but a carefully selected handful of his own countrymen); cultural exchanges have been promoted; and sundry material concessions—even Western jazz!—have been made to the now also comfort-craving Soviet citizenry. But, of course, notwithstanding these very real changes and much talk of co-existence, Khrushchev continues a confirmed enemy of the liberal democracies and their capitalist or quasi-capitalist systems.

ELITISM. Thus it remains true that under Communist rule a small elite, those who have the vision and the hard determination, seizes control of the machinery of government and exercises unlimited power over individuals. This involves the rejection of majority rule in any meaningful sense, the rejection of constitutionalism, of rule by law, of the procedures that ensure meaningful discussion and peaceful accommodation of conflicting interests in the democracies. These ideals and procedures are denied for the sake of getting into power and establishing the dictatorship of the proletariat. Once in power, the elite resists all attempts to limit its power, and the dictatorship of the proletariat becomes dictatorship *over* the proletariat. As Milovan Djilas, once a fervent Communist, and a comrade of Stalin and Tito, demonstrated so well in his *The New Class*,⁹ a book smuggled out of Yugoslavia in two parts in 1957, Communist rule is essentially a despotism in which a relatively small group that has monopolized all levers of power feeds parasitically on the fruits of the labor of the great mass of the citizenry.

ENDURING DICTATORSHIP. This seems to be the conclusion to be drawn from the course of events in the Soviet Union. Almost five decades after the Revolution, the Soviet Union has not yet realized the realm of freedom. As we shall see in detail later, and despite official assurances of impending future events, the state has not withered away, but has grown to monstrous proportions. The state in the Soviet Union under communism is as totalitarian as the Fascist or Nazi states, although there are highly significant differences between it and the now defunct German and Italian variety—including differences in origin, philosophy, appeal, dogma, application, and execution.

⁹ Milovan Djilas, *The New Class* (New York: Frederick A. Praeger, 1957).

Marx and some of his disciples may well have been moved by a generous passion for humanity. But they adopted a theory and a set of procedures which inevitably frustrate the high ideal.

This underlines an important lesson which could be illustrated in many ways. Ideals may come to nothing unless the means appropriate to their realization are chosen and carefully observed. Procedures are almost as important as the ideals themselves. The means used to reach an end cannot be divorced from the end desired. Much of the discussion in this book will be focused on the procedures by which the democracies of the United States, Britain, and France have been trying, however inadequately, to realize the democratic ideals.

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IV

Constitutions and the Separation of Powers

CONSTITUTIONS

The governments of the United States, Britain, and France are constitutional governments and, as was shown in Chapter II, they are thus marked by constitutionalism—the essential attribute of a government conforming to the dictates of a settled constitution. It is necessary first to look at the constitutions within which these countries work. But we cannot accept a view, which was quite general not so long ago, that a description of the constitution is about all an intelligent person needs to know about a government. We now realize that a constitution is merely the skeleton or essential frame of orderly government—although it is clearly based upon the fundamental concept of *restraints* upon government. The constitution provides for the establishment of and defines the chief organs of government. It outlines the relation between these organs and the citizen, between the state and the individual. Being concerned mainly with the pedigree of governmental organs and the relationship between them, it does not create the government or make it work. By itself, it is inert and lifeless. Only when clothed with flesh and blood—human passions and active agents—does it begin to win friends and enemies and influence people.

We learn very little about a government merely by examining its skeletal structure. We have to study the complex functional system installed in it, and

also the hopes, fears, aims, and prejudices, the fundamental drives and conflicts of the individuals and groups whose actions influence the government of the day and in turn provoke governmental action. We must go beyond anatomy to physiology and psychology—vastly more difficult subjects.

Frame or Chassis. The figure may be varied. The constitution is the frame or chassis in which the working engine of government is set. Within a certain tolerance, the type and structure of the engine can be modified without changing the frame. A constitution generally will accommodate a considerable adaptation of the working mechanisms of government. The engine itself will not run without fuel. Human needs and dreams are the fuel on which governments run, and what governments do depends to a large degree on the tangled motives of politicians and on the foibles and cross-purposes, as well as the agreements, of the individuals and groups making up society.

While much always depends on the intelligence and skill of the operators, the structure of the engine nevertheless determines what can be used as fuel. Liberal democratic government will not run on the aspirations of a multitude of would-be dictators. It requires, among other things, a tolerant mentality of its people.

On the other hand, the frame within which the working engine of government is set determines the ways in which the power generated can be transmitted, and the kind of operations to which it can be effectively harnessed. A liberal democratic constitution is not a very good frame for transmitting power for twentieth-century wars. Nor, for that matter, was it for nineteenth-century wars, as Abraham Lincoln showed by ignoring the Constitution in a number of ways—although the United States Supreme Court under Mr. Chief Justice Roger B. Taney took a dim view of at least two of these aberrations.¹ So much improvising for the purpose of war organization is necessary that one can almost say the constitution is temporarily set aside. Most motor vehicles do not lend themselves to amphibious operations, and a constitution of the liberal-democratic type is not designed for traveling at high speed to the new Utopia.

In the study of a particular government, therefore, we have to examine the frame or constitution, to see the essential design. We must also study the working mechanism of government within the constitution. We have to take account of the character of the people and the beliefs and wants on which the government feeds, which calls for an understanding of human nature in

¹ See *Ex parte Merryman*, Fed. Cases, No. 9, 487 (1861) and *Ex parte Milligan*, 4 Wall. 2 (1866).

general and also of the unique qualities of the particular society in question. The government of a people, like the history of that people, is the study of a lifetime. Whatever introductory simplifications may be resorted to, the inherent complexity of the subject must be emphasized.

Contradictions. This suggests why all sorts of contradictory statements can be validly made about government. For example, many close observers of liberal democratic governments have described them and their operations as enforcing the will of the people. On the other hand, many searching critics have described them as tools of an economic oligarchy—instruments for maintaining the rule of the capitalist class. Exponents of both these views are competent and honest and they can both marshal impressive evidence to support them. The truth is that so great a variety of forces and motives enter into government in the twentieth century, and the response of government to these is so complex, that a plausible case for a great many propositions can be made out. No one key will unlock the mysteries of government and we must always beware of thinking we know more than we really do. Alexis de Tocqueville wisely admonished us in 1831 that there is 'nothing absolute in the theoretical value of political institutions,' and that their 'efficiency depends almost always on the original circumstances and the social conditions of the people to whom they are applied.'

If, in his initial approach to government, the student tries to comprehend it in all its complexity, he will be completely baffled. A play-by-play description of what goes on in the national capital on a single day would convince him that he should stick to a tidy subject like mathematics. Difficult subjects can be handled only by taking one at a time the elements involved. One can begin with the anatomy of government—the framework to be found in the constitution. That will occupy the attention of the present chapter and much of the succeeding chapters. At the next level of difficulty, one can isolate the organs and agencies of government and see how they function within the framework. Finally, one can consider how far this functioning is a response to the environment in which government operates, to what extent government action reflects the interplay of the social forces of the community. In the later chapters, some consideration, inevitably incomplete, will be given to the physiology of government and to the reaction of the organs to the environment.²

² The use of the biological analogy must not be taken to suggest that biological laws are in any way applicable to the state. As the analogy becomes more forced in later pages, this will probably become sufficiently obvious.

WHERE TO LOOK FOR THE CONSTITUTION

In the United States. The American Revolution was a fairly clean break with the past and the Americans obtained a written constitution from it. But they did not write on an entirely clean slate. Both in what they accepted and in what they rejected they were decisively influenced by their heritage. British and French political thought played a considerable role. The remarkably short constitution—a document of only five thousand words whose reading time would not alarm the devotee of the popular magazine—is not, however, by any means the whole of the United States Constitution of today. In order to make the paper constitution work in practice and to adapt it to the American scene, much improvising has had to be effected.

HOW THE UNITED STATES CONSTITUTION HAS GROWN. (1) Twenty-four *formal amendments* have been adopted, the last one in 1964. (2) With the passage of time, many *customs and usages*, for which there is no warrant in the written text and which it would take a substantial volume to describe, have acquired an importance and sanctity scarcely less than that of the Constitution itself. The President's cabinet, his power of dismissal of most, but not all, officials who serve under him, and the highly significant role of political parties are just three illustrations of that aspect of constitutional growth.

Then (3), the very terseness of the Constitution left a number of fundamental gaps that have been filled by *Acts of Congress*. Into that category fall, for example, the basic structure of the federal courts—only the Supreme Court is mentioned in the Constitution—and the creation of the ten great executive departments. (4) *Executive action* has played another vital role in constitutional development, particularly, but certainly not exclusively, in foreign affairs. The broad interpretation of the war powers by such assertive Presidents as Lincoln, Theodore Roosevelt, Wilson, and Franklin Roosevelt come to mind at once.

Finally (5), and perhaps most significantly, the *Supreme Court of the United States*, which in a very real sense has the last word on the Constitution, has added a wealth of meaning to many of the clipped phrases of the written document. For example, in *McCulloch v. Maryland*,³ a case presumably known to every high school student, the Court held in 1819 that some matters not expressly mentioned in the Constitution are necessarily implied. As a result, no conceivable effort of imagination would suffice to gather

³ 4 Wheaton 316.

from the written text what all these years of interpretation have made it mean. It takes hundreds of pages to describe even summarily the contribution of the Supreme Court! Thus there is at least some warrant for the frequent jibe that 'the Constitution is what the Supreme Court says it is'—a crass oversimplification of a complex matter, but one that was publicly used even by the then ex-Associate Justice and future Chief Justice of the U.S. Supreme Court, Mr. Charles Evans Hughes.

In Britain. The British constitution is always said to be unwritten. This is not to say that it has nowhere found expression in the printed word, but rather that the principles and detailed rules of the constitution have never been collected together in a formal document solemnly adopted at a specific date. The British people have never made a sharp revolutionary break with their past. Freedom—and everything else political in nature—has slowly broadened down from precedent to precedent. The present day constitution which has been worked out over centuries by trial and error, comprises five major elements: (1) great basic documents; (2) statutes; (3) common law; (4) judicial decisions; and (5) custom. What endures is what has been found workable. Magna Carta of A.D. 1215, although overrated in popular oratory, is the earliest, and still a significant, *great basic document* of the constitution. The Petition of Right of 1628, the Bill of Rights of 1689, the Act of Settlement of 1701, the great Reform Act of 1832, are others of prime importance. In terms of bulk, the greater part of the constitution is to be found in the form of *statutes* enacted by Parliament. Almost all the momentous changes of the past century have been thus brought about, e.g. the extension of the franchise, the method of elections, and the defining of rights and duties of public officials.

Many basic principles, however, rest on the *common law*, that vast body of English law based on custom and reshaped to new needs by succeeding generations of judges. The principles that rest on the common law have to be evolved, laboriously, out of the *decisions of the courts* in particular disputes. Finally, a considerable and important portion of the constitution has no other basis than comparatively recent *custom*. The conventions of the constitution, as these are called, concern mainly the relation of the cabinet to Parliament, ensuring that the government is always carried on conformably to the will of the majority in Parliament. Thus a first-hand exploration of the British constitution would take one through ancient charters, scores of statutes, hundreds of judicial decisions, and finally into the biographies and correspondence of statesmen, which often provide the only written evidence

for the conventions of the constitution. Its elusiveness is excused by saying it is unwritten. Hence the literal-minded who want everything in precise black-and-white throw up their hands and say, 'The British constitution! There's no such thing!'

In France. After a series of simple, flexible constitutions, including the piecemeal resort to the three 'constitutional laws' of 1875, the framers of the Constitution of the Fifth French Republic—appropriately known as the 'de Gaulle Constitution'—produced a comprehensive document in 1958 that is tantamount to a written constitution. However, unlike the written Constitution of the United States, that of France would seem to depend for its successful functioning more or less on the degree of sympathy accorded to its provisions by the Chief Executive. If this appears to be a glib oversimplification, it must be remembered that—to all intents and purposes—the Constitution of the Fifth Republic has been what de Gaulle has said it is, although there does exist a formal amendment procedure and the Constitutional Council as well as the *conseil d'état* are, at least theoretically, empowered to interpret it within prescribed limits. On the other hand, the current French Constitution represents far more of a legal *document* than does the constitution of its neighbor across the English Channel.

This sketch indicates the sources and some of the range and variety of constitutional provisions in three democratic states. It also suggests that if a search for the essential elements of a constitution is not to lose itself in a welter of confusing materials, some categories to help in classification and analysis will have to be adopted. Just as the amateur botanist, lacking a principle of classification, wanders among the flowers and gets only the impression that nature is wonderful, so the student of government without categories for sorting out his material decides that the subject is incomprehensible.

THE SEPARATION OF POWERS

Threefold. The distinctive feature of government is the exercise of power by some men over other men, and a classification of the kinds of power thus exercised, though artificial to a degree, aids understanding. At the simplest level of discussion, a familiar classification, as old as Aristotle, is available for use. There are, it is said, three distinct kinds of governmental power: legislative, executive, and judicial. *Legislative power* consists in making laws, general rules of conduct supplementing or replacing some of the older rules based

on custom or unwritten law. *Executive power* consists in the executing or carrying out of laws and the carrying on of the manifold public activities and services, the daily drudgery which exhausts the civil servant. *Judicial power* consists in interpreting laws or, more concretely, deciding in the event of dispute what specific acts are permitted or required or forbidden in execution of the law.

Montesquieu. While it is impossible thus to classify all the varied powers exercised by modern governments, these categories will serve for immediate purposes. The Baron de Montesquieu, a French jurist and philosopher of the mid-eighteenth century, adopted this classification and made himself famous by arguing that the secret of civil liberty lay in the separation of these powers, in the reserving of each type of power to different persons or bodies of persons. One man or group of men should exercise substantially all legislative power and at the same time have no extensive share in or control over executive or judicial power. Men will always push what power they have to the limit; and if those who make the laws also enforce them, they can tyrannize over their fellows. The result will be the same if either executive and judicial, or legislative and judicial, power is joined in the hands of the same persons. No one body of men, according to this argument, can be trusted with the monopoly of force possessed by government.

According to Montesquieu, assurance that government shall be servant and not master depends on the separation of powers. This, he argued, is the essence of an effective constitution. He thought he discerned a proof of his argument in the British constitution of the eighteenth century. Britain enjoyed individual liberty, while on the Continent, where absolute monarchs had gathered all power into their hands, no one had any sure tenure of freedom. He saw the independent status of the judges in Britain, ensured by the Act of Settlement of 1701. He saw in Parliament a legislative authority independent of the executive, and he thought he saw in the monarch, his advisers, and servants an independent executive authority. He was in substantial error on this last point, but the British constitution did conform to the classification and there was *then* some measure of separation of powers.

The Americans could not find the civil and political liberty they wanted under the British constitution in the days of George III. Yet they were deeply impressed with Montesquieu's analysis, if not with the particular proof he offered. They were the more impressed because John Locke, the philosopher of constitutionalism, had pointed to a similar conclusion. Moreover, the conservative-minded fathers of the American Constitution feared excesses of

popularly elected legislatures as much as they feared a powerful executive. Accordingly, they set out to fashion a new government composed of three powers, each of which would be separate and, at the same time, a check on the others. So whatever of enduring wisdom there is in the separation of powers, it is a principle closely associated with the rise and spread of modern constitutional government. The constitutions of the modern world which have tried to hold governments strictly to account have relied heavily on the British and American models. This is reason enough for using Montesquieu's doctrine for preliminary analysis. Its value can be more justly assessed at a later stage.

THE CONSTITUTION OF THE UNITED STATES

Although only a part of the Constitution of the United States is now to be found in the written document and in its twenty-four formal amendments, it is still the most basic part, and attention will, for the present, be directed primarily to the written document. In looking at it, one must always remember that it is an instrument establishing a new national government and it takes the constitutions of the separate states of the Union almost completely for granted. For the most part, too, it takes for granted the main principles of the common law that the colonists imported from Britain and adapted to their use, and from which some significant features of the American constitutional system are derived. With the Revolution, the thirteen states modified or repudiated their charters as British colonies. Before 1789 most of them had adopted republican written constitutions. These constitutions, as since revised and added to by the admission of thirty-seven new states, form an important part of the American constitutional system. But their bulk forbids discussion here and, in any event, on the more fundamental questions they are faithfully paralleled by the Constitution of 1789.

Federalism. The more important principles of the Constitution may now be sketched. The first is its *federal character* arising from the preservation of the integrity and substantial independence of the separate states. The thirteen states that had made the Revolution had need of unity if they were to protect their nascent republicanism in a world of powerful monarchies. Yet they were not prepared at all to submerge themselves in a new state giving all authority to a single central government. The result was a compromise federal system in which a new national government was to have certain specific powers in aid of the broad general objectives stated in the preamble, viz. 'establish jus-

tice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty.' The separate states, on the other hand, as Amendment X adopted in 1791 makes clear, were to continue to exercise such authority as was not specifically granted to the national government (viz. declare war), expressly prohibited to the states (viz. coin money), or withdrawn from the reach of all governments (viz. *ex post facto* laws). Most of the written Constitution is taken up with defining the new national authority and distributing powers between it and the states.

Limited Government. The second principle is that of *limited government*. Whereas the supreme legislative power under the British constitution can regulate every aspect of social life, the American Constitution tried to put certain claims of individuals that were thought to be sacred human rights beyond the reach of Congress. It limited the area of human affairs over which the federal government, and in some cases the states, could exercise power. This sprang, in part, from the eighteenth-century doctrines about the natural rights of man, so prominent in the French Revolution and in the revolutionary constitutions in France. In part, it sprang from the more earthy concern of the conservative framers of the Constitution who feared the radical ferment stirred up by the American Revolution.

CONSTITUTION AND BILL OF RIGHTS. These general limitations on government are to be found principally in the original Constitution of 1789 and in the first ten amendments, adopted in 1791 and generally known as the Bill of Rights. Some of them take the form of abstract *natural rights*. For example, Congress is forbidden to interfere with freedom of religion, of speech, of the press, of petition and of peaceable assembly.⁴ Other provisions strike at particular abuses, the usual weapons of arbitrary governments, such as general search warrants, bills of attainder, and *ex post facto* (retroactive penal) laws.⁵ Still others sought to preserve against encroaching governments particular institutional procedures that had been useful in the English and American struggles for liberty, such as habeas corpus⁶ and trial by jury.⁷

Most of these and numerous other limitations are expressly applicable only to the federal government and do not bind the state governments. Of those mentioned above, only the prohibitions against bills of attainder and *ex post*

⁴ Constitution of the United States, Amendment I.

⁵ Ibid. Art. I, sect. 9, and Amendment iv.

⁶ Ibid. Art. I, sect. 9.

⁷ Ibid. Amendments v, vi, and vii.

facto laws thus apply to *both* levels of government.⁸ However, since most of the state constitutions, in their own bills of rights, go as far as or farther than the federal Constitution in imposing limitations, it is substantially correct to think of all these restrictions as being generally applicable. By gradual judicial interpretation of the due process and equal protection of the laws clauses in the Fourteenth Amendment, which applies to the states, many, but not all, of the limitations in the Bill of Rights have become also effective against the fifty states.⁹ Notable exceptions are the guarantees of indictment by grand jury and trial by jury.

'DUE PROCESS.' The most famous of all these restrictive provisions is one imposed by the federal Constitution on state and federal governments alike. The *Fifth* Amendment forbids the *federal* government, and the *Fourteenth* Amendment forbids the *states*, to 'deprive any person of life, liberty, or property, without due process of law.' The phrase 'due process of law' can be traced back into the early history of English law and is reminiscent of the tone of Magna Carta, which stipulated that free men should not be proceeded against except in accordance with the law of the land. The Petition of Right, in which the English Parliament in 1628 petitioned Charles I to respect the rights of his subjects, used the two phrases, 'the law of the land,' and 'due process of law,' interchangeably. The Declaration of Independence pronounced 'life, liberty, and the pursuit of happiness' to be inalienable rights. The exact phrase used in the Constitution, however, comes from John Locke, the philosopher of constitutionalism, who declared 'life, liberty, and property' to be fundamental natural rights of man. But the past fame of these phrases pales before the notoriety they have gained in the American Constitution. The Supreme Court of the United States has been deeply divided over their meaning and this in turn has aroused sharp political debate throughout the country. These deceptively simple phrases have been storm centers of controversy over the last hundred years.

STATE GOVERNMENTS. Some restrictions were laid upon the *state governments only*. In the turbulent period during and after the Revolutionary War, the legislatures of many of the states had been enacting laws that impaired the rights of creditors under existing contracts and/or made the almost worthless paper currency legal tender for payment of debts. It is said that harassed creditors often took to the woods to evade their vindictive and relentless

⁸ Ibid. Art. 1, sect. 10.

⁹ See Mr. Justice Cardozo's opinion for the Supreme Court in *Palko v. Connecticut*, 302 U.S. 319 (1937).

debtors who sought to pay them off in inflated currency. Accordingly, the framers of the Constitution, among whom the creditor interest was well represented, inserted clauses providing that no state should pass any 'law impairing the obligation of contracts,' and forbidding states to coin money, emit bills of credit, or make anything but gold or silver legal tender.¹⁰

These are some of the more important of the clauses illustrating the principle of limited government. In Britain, by contrast, Parliament could lawfully enact each and all of these measures forbidden in the United States. It has not done so. Britain has been no less free of legislative tyranny than the United States. The effective guarantee is not found in a written constitution but in the settled constitutional habit of the British people, of which Parliament is itself an expression. Thus far it has been reasonably adequate. There has not been any significant agitation for written constitutional guarantees against the power of Parliament.

Separation of Powers. The third fundamental principle is the *separation of powers*. The Constitution of 1789 takes Montesquieu's classification for granted. Without defining the nature of the three powers in any way, the first three articles of the document assign legislative, executive, and judicial power to three separate organs. Article I provides that all legislative powers granted therein shall be vested in Congress; Article II that the executive power shall be vested in the President; Article III that the judicial power shall be vested in one Supreme Court and in such inferior courts as Congress may establish. It is also stipulated that no member of Congress shall, during his term in Congress, be appointed to any civil office, and that no person holding any such office shall be a member of Congress. Thus no one can share in the exercise of more than one of the three powers at the same time. Neither the President, nor his cabinet, nor any executive officer can be a member of Congress. The executive power of the United States is exercised not by a committee of the legislature responsible to the legislature, as in Britain, but by an independently elected President aided by such advisers outside Congress as he sees fit to consult. The President is required to keep Congress informed of the state of the Union, to advise it about the administration of national affairs, and to recommend such legislation as he thinks necessary. He has power, in certain circumstances, to convene Congress and to fix a date for its adjournment, but beyond this he is not expected to shape or participate in its deliberations.

The judiciary is appointed by the President with the advice and consent of

¹⁰ Ibid. Art. I, sect. 10.

the Senate. But once appointed, they hold office during 'good behavior,' which really means for life. Congress cannot intimidate them by reducing their salaries during their continuance in office. Congress alone can remove them, but only through impeachment (by the House) for and conviction (by the Senate) of a serious offense. It would appear that the powers of government are parceled out among the three organs and kept separate by the unscalable walls of the Constitution. In the United States, Montesquieu's principle received its fullest expression.

CHECKS AND BALANCES. Each of the three organs was to have a will of its own and as little ability as possible to influence the choice of the personnel who exercise the other two powers. Still, the framers feared the popularly elected legislatures which had run riot in the Revolutionary period, and they still feared a strong executive who might get it in his head to be a king. It was thought that dividing Congress into two houses, each to be elected by a different method and for different periods, would tend to divide and moderate the legislative will. By providing for indirect election of the President, that office would be shielded from demagogues who notoriously abuse even the widest mandate.

It was thought advisable to have still further checks on power, and this abundance of caution led the framers to introduce some qualifications on the clear-cut separation of powers. Bills and certain resolutions passed by a majority of the two houses of Congress require the approval of the President in order to become law and can only be made law over his veto by a two-thirds vote of both branches. The President was given some share in legislative power. The President, Vice-President, and other executive officers can be removed from office by impeachment in the House and conviction in the Senate, thus giving the Senate some judicial power. The declaration of war, an executive act, can only be made by Congress. The Senate shares with the President the powers of treaty-making and the appointment of high officials, also executive acts. While the President and Senate appoint the federal judges, the Senate can remove them by conviction on impeachment—which has occurred in four cases. The constitution of all courts inferior to the Supreme Court is confided to Congress. These *checks and balances*, as they are called, were not set up to knit the three powers together for concerted action but rather to ensure, in the words of *The Federalist*, No. 51, that the 'several constituent parts [of the government] may by their mutual relations, be the means of keeping each other in their proper place.'

To those who do not know the history of the disorder of the Revolutionary

period, the predominantly conservative temper of the framers, and the emphasis put by the prevailing political philosophy of the time on the natural rights of individuals and on the natural propensity of government to tyranny, much of this will seem not merely abundance but excess of caution. Indeed, there is no doubt that the separation of powers and checks and balances have had unfortunate effects on American government; on the other hand, there is doubt whether this complex scheme would have worked at all but for the rise of mediating institutions not contemplated by the authors of the Constitution. Yet the various effects of the scheme on the operation of government, and the important modifications that custom has brought about, largely through the rise of political parties to all-pervasive influence, must be left for succeeding chapters. Meanwhile these words of Mr. Justice Brandeis may be noted: 'The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments to save the people from autocracy.'¹¹

Judicial Review. The last of the important features of the American Constitution to be sketched here is *judicial review*, the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon it, and any illegal action by a public official that it deems—upon careful, normally painstaking reflection and in line with the taught traditions of the law as well as judicial self-restraint—to be in conflict with the Constitution. In other words, in invoking the power of judicial review to be discussed more fully in Chapter XV—a court applies the *superior* of two laws: in the United States, the Constitution.

Of course, the courts cannot range across the statute book on their own motion, slaying legislation at will. But when, in a dispute between parties properly brought before them, the decision is found to turn on the terms of some act of a legislature, the judges—state and inferior federal as well as Supreme Court—may inquire whether the legislation is contrary to state or federal constitutions, and if so, the party relying on its terms will fail through the ensuing declaration of unconstitutionality. An act of a state legislature may be struck down on the ground that it could only be enacted by Congress, or vice versa, and is thus a violation of the federal principle. A statute may be attacked before the courts on the ground that it violates one or the other of the two 'due process of law' clauses, or some other fundamental guarantee,

¹¹ *Myers v. U.S.*, 272 U.S. 52 (1926).

and thus infringes the principle of limited government. An act of Congress may be challenged on the ground that it violates the principle of the separation of powers. Indeed, any legislative act that in their judgment is prohibited by the Constitution may be held invalid by the courts.

This is in the sharpest contrast with the treatment of legislation in the British courts. They may *interpret* an act of Parliament, but they can never question the power of Parliament to do anything that Parliament has manifestly done. The Rule of Law in Britain means no more than the enforcement as law of what Parliament has said: The Rule of Law in the United States means also the enforcement of the 'higher law' of the Constitution against both the legislature and the executive.

Nor do the French courts possess the power of judicial review of legislation *per se*. However, since its creation by the de Gaulle Constitution of 1958, the *Constitutional Council* (*conseil constitutionnel*), consisting of all ex-Presidents of France plus nine distinguished personages, of whom three each are selected by the President of the Republic and the heads of the two houses of Parliament, has been clothed with *limited* authority to safeguard the Constitution. It has the power to declare unconstitutional all *organic* laws and standing orders of Parliament, all of which must be submitted to it prior to their promulgation. It may also strike down *ordinary* laws, treaties, and protocols, but only if these have been *voluntarily* referred to it by the President or Parliament. Furthermore, it possesses certain supervisory powers over national elections and referenda. But it is not really a *court*; it lies outside of both the ordinary and administrative judicial systems of the government (similar, but not the same, extra-judicial bodies exist, among other places, in Austria, Italy, and West Germany); it cannot itself initiate action in constitutional cases; and neither private individuals nor groups are able to challenge the constitutionality of a law although, as will be fully explained in Chapter XVII, the citizens of France may turn to the administrative courts, headed by the Council of State (*conseil d'état*) for the redress of grievances involving members of the executive branch of the government.

AN IMPLIED POWER

Strangely enough, this power of the United States courts is not explicitly stated in the Constitution. But there is persuasive evidence that between twenty-five and thirty-two of the forty delegates to the Constitutional Convention, Anti-Federalists as well as Federalists, favored it—although for quite

different reasons—who, with less than a handful of dissenters, in effect concurred in the pronouncement by Gouverneur Morris of Pennsylvania that the courts should decline to give the weight of law to 'a direct violation of the Constitution.' So prominent a framer as Alexander Hamilton, in No. 78 of *The Federalist* papers, clearly envisaged it and called for its acceptance as an essential element of the Constitution.¹² Moreover, it is noteworthy as a matter of historical fact that the British Privy Council had *established* judicial review over acts passed by the colonial legislatures, and that between 1789 and 1803 the courts in ten of the states had *exercised* that power. Thus, it is one of the powers that the Supreme Court has ever since Mr. Chief Justice Marshall's historic decision in *Marbury v. Madison* in 1803¹³ held to be necessarily implied from that provision of Article VI of the Constitution known as the 'supremacy clause,' (a) that the Constitution and the laws of Congress made in pursuance thereof and all treaties made under the authority of the United States shall be the supreme law of the land, and (b) that 'the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding.' The necessity of the implication has continued to be challenged but, in any event, custom has made judicial review as much a part of the Constitution as if it were explicit in the document. Hundreds of laws, state and federal, chiefly the former, have been held unconstitutional by the judiciary. In this censorship of legislation, of course, the Supreme Court, being the highest court of appeal, has the last word. But it does not resort to the weapon of judicial review lightly: As of the end of its 1962–63 term, it had held unconstitutional 91 provisions of 85 federal laws and 700 state laws.¹⁴

Congress acting alone has no power to amend the Constitution. The framers made formal amendment extremely difficult. Noting the difficulty and rarity of amendments, many have said that it is the Constitution that is supreme in the United States. Others, noting the relative ease with which the Supreme Court has from time to time found unsuspected meanings in the clauses of the Constitution, have said that it is its nine justices who are supreme. Still others, seeing the numerous cases in which the ruling interpretation given by

¹² 'Limitations [to the legislative authority] can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'

¹³ 1 Cranch 13.

¹⁴ For a complete table of the former as well as an extensive discussion of the problem, see Henry J. Abraham, *The Judicial Process* (New York: Oxford University Press, 1962), chs. vii and viii.

the Supreme Court rests on the narrow majority of five judges for and four against, make still more disturbing comments. Such remarks are significant, but no simple statement will uncover the locus of supreme power in the United States. As a matter of form, supreme power rests with the bodies that Article V of the Constitution authorizes to make amendments. But, as we have seen, thus far relatively little of the amending and developing of the Constitution has been carried out in this way.

LEADING PRINCIPLES OF THE BRITISH CONSTITUTION

Very early in British constitutional history, the powers of government exercised by the Norman and Angevin monarchs began to be differentiated along lines resembling the threefold classification, and distinct organs for their exercise emerged. The Great Council, composed of the great feudal lords and meeting three times a year, 'advised' the monarch largely by trying to set limits to royal action, as in Magna Carta. With the addition of representatives from the counties and boroughs, the Great Council developed into Parliament. The redress of grievances and the imposition of limitations on the monarch took the form of laws enacted with the consent of the king.

Apart from the Great Council, the monarch was advised by an inner council composed of his trusted lieutenants, the heads of an embryonic civil service only slowly differentiated from the monarch's personal household. This inner council, generally called the Curia Regis, carried on all the executive work of government, doing the will of the monarch everywhere except where blocked by the Great Council. As government business increased, several groups of these officials specialized in settling disputes and interpreting the law applicable to them. At first, they were merely committees of the Curia Regis but after developing an organization and procedure of their own, they became distinct and separate courts of law, although until 1701 the judges still held office at the monarch's pleasure. Within the Curia Regis itself, increasing size brought the need for a small executive committee—hence the Privy Council, close to the monarch. The Privy Council became the real executive council, and even today the *formal* authority of the cabinet derives from their being sworn 'of the Privy Council.'

Thus distinct legislative, executive, and judicial organs took shape. It would, however, be misleading to suggest that the judges never made laws and that the legislature and executive always refrained from judging, and wrong to think that each organ had a well-marked sphere of authority in

which it was separate and independent. In part at any rate, the struggle between Parliament and the Stuarts arose out of the indefiniteness of the relationship between these organs, which was only cleared up by the constitutional settlement after the Revolution of 1688. The judges once appointed were made independent of the executive. It was settled that only Parliament could change the law or make a new law such as the levying of a tax—which, in effect, made Parliament supreme. The power of governing the country subject to the limitations thus imposed by law, the administration of the colonies, and the conduct of foreign relations remained with the monarch and his advisers appointed by him. It took most of the eighteenth century to establish beyond question the rule that the monarch must choose ministers who enjoy the confidence of Parliament. Montesquieu can be excused for thinking in 1748 that the executive was separate and independent.

The Supremacy of Parliament. But there has been no excuse in the last hundred years for anyone's thinking that the British constitution exhibits a sharp separation of powers. Its basic principle is the supremacy of Parliament. The British courts do not possess the power of judicial review. Any and every law passed by Parliament is constitutional. It has been said that Parliament can do anything except make a man a woman. This is an understatement! If Parliament were to declare that henceforth women were to be treated in all respects as if they were men, the executive and the courts would be obliged so to treat them, even in the face of nature. Women would then have to be called up under the military service law hitherto applicable only to men. Obviously, this means that Parliament can turn absurdities into laws and can work its will on the other two organs of government. It could pass a law dismissing all servants of the Crown and taking into its own hands the entire executive power. It could abolish the judiciary. So it can enlarge or diminish at pleasure the sphere of the executive and judiciary. It can—as it has increasingly done in the last eighty years—delegate law-making powers from itself to the executive. There is no ban on law-making by the executive if only Parliament will authorize it. It can—and does with great frequency—take the power of interpreting particular laws away from the judiciary and give it to the executive.

Of course, as long as the House of Commons, which is the effective part of Parliament, represents the electorate and depends on it for re-election, there are many things it will not dream of doing. There is, in practice, a considerable separation of powers, although there are no formal constitutional provi-

sions ensuring its close observance. If we look at the strict legal forms of the constitution alone, Parliament can change any law by majority vote, and it can change the constitution in the same way. But the British constitution is largely made up of custom and convention which often seem to nullify the legal forms. Constitutionalism and the constitutional practices on which it rests are preserved in Britain by custom and the deeply conservative habit of the British people. They resist rapid and drastic change. They believe in limits on governmental power and those who represent them in Parliament have not been allowed to forget it. As we shall see later, drastic constitutional change is not ordinarily undertaken by Parliament until the proposed change has been made a direct issue in a general election.

Fusion of Powers. The electorate, however, has not insisted on a sharp separation of legislature and executive. It has rather approved an intimate connection and interdependence between them. The executive is directly responsible to Parliament. The ministry, composed of some sixty ministers, heads the various departments of government and directs all the energies and activities of the civil service. A varying number of the more important ministers, generally about twenty, composes the cabinet. Since the cabinet—and the other ministers also—must have seats in Parliament, it is, in reality, a committee of Parliament for the executive management of the nation's affairs. When this committee loses the confidence of the House of Commons, it must either abandon the direction of affairs of state and resign, or seek a dissolution of Parliament in the hope that a newly elected House of Commons will give it renewed confidence. In formal constitutional theory, at any rate, the executive is dependent on Parliament. The cabinet is, in Bagehot's words, a buckle, a hyphen, a combining committee, for ensuring harmony between the detailed execution of the laws by the civil service and the will of the majority in Parliament. The executive and legislative powers are not separated but almost completely fused.

The judges are appointed by the monarch on the advice of his ministers; the appointment is for life and during good behavior. With the exception of county court and magistrate court judges, who are removable for cause by the Lord Chancellor, they can be removed only by an address of both Houses of Parliament. Because of a high standard of judicial rectitude and impartiality, this power has almost never been used and the judicial power has enjoyed a high degree of independence. It must be remembered, however, that Parliament has the power to declare that any and every interpretation of

law made by the judges is wrong and, by an amendment, to substitute its own authoritative interpretation. Also, Parliament may take from the courts the power of interpreting particular laws.

Although there is no formal separation of powers, it would be incorrect to think that these organs do not act as some check on one another. The heads of the civil service sometimes find obstacles to doing what Parliament wants to do. The courts not infrequently interpret the laws to mean something different from what Parliament intended and the executive hoped. Even the majority in Parliament that supports the cabinet is sometimes reluctant to support particular ministers. The significant fact is that if Parliament really makes up its mind, nothing can stand in its way.

The Rule of Law. There is another fundamental principle of the British constitution called the Rule of Law. Although its exact significance is a matter of much debate, it is clearly of critical importance. The Rule of Law means, at least, that all actions of government must conform to the law and an individual cannot be prejudiced in person or property by the government or anyone else except in accordance with existing law. It has commonly been thought that, in addition, officials had to justify their actions by the law generally applicable to all citizens before the established judiciary, which is free of all suggestion of executive influence.

A century ago there was much more warrant for this last proposition than there is today. For a long time now, Parliament has been granting to officials special powers to take action not justified under the ordinary law, and it has been limiting the right of the citizen to have the actions of officials scrutinized by the judicial power. Yet there has been no general removal of officials from judicial surveillance, and it remains true in most cases that anyone who asserts that he has been wronged by the action of a government official can bring that official before the courts of law to answer for his conduct. The official may justify himself by pointing to an Act of Parliament that gives him a special privilege to do what he has done. But he cannot turn aside the complaint merely by asserting an exalted official status and an inscrutable executive expediency in what he has done. The state can throw away the conscript's life but it cannot conscript him in the first instance on the plea of high policy or public expedience, except as supported by a law sanctioned by Parliament. The Rule of Law, although qualified today by the grant of special powers to officials, remains an indispensable instrument for ensuring that government remains servant.

Parliament, being supreme, could abolish the Rule of Law tomorrow. As

long as Parliament is concerned to keep the executive under control, it is unlikely to do so. Yet the fact that the Rule of Law does not now mean what it meant a hundred years ago indicates that *the really fundamental principle of the British constitution is the supremacy of Parliament*. Or, as has been stated elsewhere, it is not entirely a caricature to describe the British constitution as no more than the current notion of politicians about proper conduct.¹⁵

THE CONSTITUTION OF FRANCE

The constitutions of France's Third Republic and Fourth Republic resembled Britain's in their emphasis upon legislative supremacy and the fusion of powers. But it was not until that of the so-called October Constitution of 1946 of the Fourth Republic that the French resorted to a formal, written document roughly along the lines of the Constitution of the United States, complete with titles (chapters), articles, and a preamble that enumerated a group of civil rights. The Third Republic had adopted a constitution in 1875 that consisted of just *three* briefly stated constitutional laws, around which that most enduring of all of France's late republics functioned for sixty-five years.¹⁶ However, the Constitution of the Fifth Republic, commonly known as the *de Gaulle Constitution of 1958*, although retaining the disciplined written form of its immediate predecessor, has departed from French republican tradition by prescribing a system of government based upon the concept of a strong executive and a weak legislature, coupled with the doctrine of the separation of powers. Like the Constitution of the United States, the de Gaulle Constitution is relatively brief, concise, and elastic—and, as will be pointed out in greater detail in later chapters, has been made even more elastic by the assertiveness and personality of the powerful first President of the French Fifth Republic, General Charles de Gaulle.

Executive Supremacy. Drafted primarily by one of de Gaulle's most intimate advisers, Michel Debré, who became its first Premier from 1958 to 1962—and, incidentally, established the all-time record for republican premiers of three years and three months in office—the 1958 Constitution lodges predominant authority in the executive branch. In theory the executive power is divided between the President and the Premier, who is chosen by the Presi-

¹⁵ David E. Butler, *The Study of Political Behaviour* (London: Hutchinson & Co., 1958), p. 17.

¹⁶ First, a 'Law on the Organization of the Senate'; second, a 'Law on the Organization of the Public Powers'; and third, a 'Law on the Relation of the Public Powers.'

dent and then becomes responsible to Parliament. But it is far less of a meaningful responsibility than that of the earlier republics, especially since the Constitution divides the law- and/or rule-making power between Parliament and the Premier and his cabinet. This division *a fortiori* works to the advantage of the executive since the Constitution spells out limitations upon this power solely for the legislature!

Yet under the new system it is clearly the President who has the upper hand because of an enormous reserve of power, which reaches its zenith when exercised under Article 16. This fountainhead of extraordinary power authorizes the President to assume virtually dictatorial powers 'when the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities is interrupted.' Under these circumstances, having informed the nation of the impending steps, and upon consultation with the Premier, the Constitutional Council, and the heads of the two branches of Parliament—which may not be dissolved during the application of Article 16—the President 'shall take the measures commanded by these circumstances.' Thus, de Gaulle invoked Article 16 after the attempted military insurrection in Algeria in April 1961.

Separation of Powers. Under the earlier French republics, fusion rather than separation of powers existed between the executive and the legislative branches of government in the native land of Montesquieu. Then the members of the ministry were members of Parliament—although this was not so absolute a requirement as it was and still is across the Channel. In the same sense as in Britain, the French cabinet or ministry was a committee of Parliament for the execution of laws and the supervision of administration, and the titular chief of state who then existed—though also called President of the Republic—possessed only slightly more power than the British monarch. Parliament was all-powerful; in contrast to Britain's House of Commons it could be dissolved only with the greatest of difficulty; it toppled one government after another almost in the manner of a game of bowling.

All this has been changed. Stripped of most of its law-making powers; its effective authority to overthrow cabinets drastically reduced; ridiculed and despised by the President of the Republic, whose power of dissolution is now a real one, the French Parliament, once the undoubted center of gravity of power in France and probably the strongest legislature in the free world of the twentieth century, has been reduced to little more than at worst a

debating society and at best a second-rate, frustrated power. Furthermore, a strict separation rather than fusion of powers now governs the relationship between executive and legislature, with no member of one being permitted to hold office under the other (although civil servants may take a 'leave of absence' from their job to serve in Parliament). As has already been indicated in some detail earlier in this chapter, no *bona fide* power of judicial review exists in France, other than the severely circumscribed review function inherent in the duties and powers of the Constitutional Council. But access to that body is limited and depends upon the President or Parliament for voluntary referral of constitutional questions except in the restricted area of organic laws and standing orders of Parliament. Indeed, although of some significance, the Constitutional Council—despite an occasional 'no' to the President—has developed less as an independent judicial organ than as an arm of the chief executive.

Codified Law. A unique feature of the French Constitution is that law is still based chiefly upon the Napoleonic codes. Unlike the largely judge-made law of Britain and the United States, French law is primarily statutory; it is written law, and the judges consider themselves bound thereby. There is far less resort to precedent than in the English-speaking lands. The professional French judges are appointed by the High Council of the Judiciary and the Minister of Justice (theoretically by the President of the Republic), chiefly as a result of special competitive examinations and of four years' attendance at the new (1959) *Center of Judicial Studies* (to be described later). They are removable 'for misconduct in office'—in a sense they are a branch of the civil service, although the de Gaulle Constitution in effect asserts that they are 'irremovable.' They apply and interpret the codified law of the land under a Constitution that has placed a premium upon domination by the President of *la patrie*.

AMENDMENT OF CONSTITUTIONS

So far we have considered constitutions as if they were frozen and static, imposing a rigid frame within which the powers of government are exercised. Obviously a high degree of stability in a constitution is necessary, because order and security depend, in part, on the predictability of what governments can do or can be required to do. On the other hand, only a static, caste-ridden society could tolerate an unchanging constitution. As long as social change, or progress, continues, it is vital that a constitution should respond to decisive

social transformations. A too rigid constitution may stifle or distort the direction of change. At the other extreme, the forces dammed back by it may gather enough power to break it by revolutionary means. As an alternative to violence there is stealth. A constitution may be evaded by pretending it does not apply to a particular situation or even by pretending it is not there. If the pretense is accepted for a considerable time without effective protest, it amounts to an unacknowledged change in the constitution. It is important, therefore, to see both what formal methods of amendment, if any, constitutions specifically provide for, and what types of informal amendments, changes by stealth, have been employed.

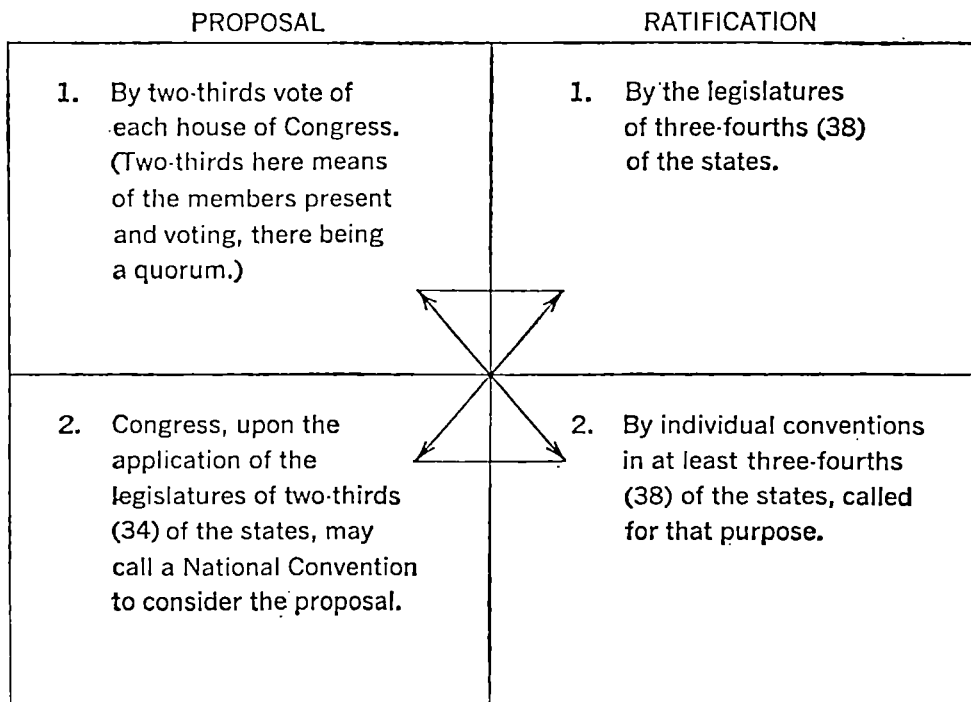
Formal Amendment. As the British Parliament is utterly supreme, it follows that it can change the constitution as it sees fit. An ordinary law passed by a simple majority suffices to make the profoundest constitutional change. However, the recently developed doctrine of the electoral *mandate*, to be considered later, is an important modification imposed by *custom* on this sweeping power of Parliament.

FRANCE. Title XIV of the Constitution of the Fifth Republic prescribes a fairly simple mode of amendment, with the initiative in the hands of either the President of the Republic, upon the suggestion of the Premier, or of the members of Parliament. To become part of the basic document, an amendment must then be adopted in identical language by both chambers of Parliament *and* ratified by a popular referendum, or—if the President of the Republic so determines—by a three-fifths majority of the two chambers meeting in joint session. No amendments may be proposed ‘when the integrity of the territory is in danger,’ and the Constitution is emphatic on the point that the ‘republican form of government shall not be subjected to amendment.’

As was pre-eminently true of its predecessor, the Fifth Republic has not seen many attempted amendments of its Constitution. And as long as the present trend toward the centripetal presidency continues, it is not likely that legislative action in this sphere will either be attempted or successful. Indeed, in October 1962, over the objections of both the Constitutional Council and the Council of State, President de Gaulle ignored Title XIV, deliberately and (with obvious glee) publicly by-passed a frustrated and angry legislature, and, in violation of the Constitution, submitted directly to the people in a referendum the question of whether future presidents should be chosen by direct popular vote. Parliament revolted, bringing down Premier Pompidou’s government by a vote of censure, but President de Gaulle—

though obliged to dissolve the National Assembly and to call a new election—proceeded with his plan for the referendum. The voters subsequently approved the desired change by a *oui* vote of 61 per cent of the responses, the smallest favorable margin of any referendum during Charles de Gaulle's regime. To the charge that he had violated the Constitution, the President countered with the query "How can I violate the Constitution in going to the very fountainhead of its authority, the people of France?" Nonetheless, he had, of course, infringed its terms.

THE UNITED STATES. Article V of the United States Constitution defines the amending procedure—one fairly simple on paper, yet difficult to use effectively. There are two ways of proposing and two of ratifying a constitutional amendment. These methods may be used interchangeably, as the following diagram demonstrates:



Thus far twenty-nine amendments have been proposed by Congress, none by the states. Of these twenty-nine proposals, twenty four have been ratified and four were rejected. One, the no-longer-needed child labor amendment, has been before the states for ratification since 1924, Congress having failed

to specify a time limit. All except the Twenty-first Amendment were ratified by the state legislature method. That one, which repealed the 'Prohibition' Amendment (the Eighteenth), was ratified by conventions in three-fourths of the states in eight-and-a-half months. The haste was almost indecent!

The difficulty of formal amendment is thus fairly obvious. If one can judge from experience since the Civil War, it takes about a quarter-century of agitation to get an amendment launched with any hope of success, and the issue must be one that can be dramatized so as to arouse widespread popular interest and feeling. Forbiddingly technical matters, whatever their importance, will scarcely ever muster the necessary support. There were some who thought it would be impossible to repeal the Eighteenth Amendment, even though every man, woman, and child carried his own flask. However, the issue turned out to be one of broad popular appeal and the amendment went through quickly. The Constitution is generally regarded as much too rigid and most changes have been worked by informal methods. Sixteen of the thinly populated states with less than 10 per cent of the population can block an amendment. Although thousands of resolutions for amendments have been introduced in Congress, Congress has given the necessary two-thirds majority only to the twenty-nine, as indicated. Amendment procedures for the fifty state constitutions vary greatly, but in a majority of them amendments are required to be prepared by the state legislatures by majority vote and ratified by popular referendum.

Informal Amendment. A constitution that provides for one particular method of amendment by implication forbids all other methods. Informal amendment is, therefore, a paradox. It is a development of the constitution by unconstitutional means. This raises the large question of the nature of political processes that often rely on devious pretense rather than on straightforward rational attack. Yet wherever there is life, this informal development of the constitution goes on ceaselessly. In the working of a constitution, new problems are always being met. The instinct for a quiet life predisposes the men who are working it to modify its application to the circumstances, or to read into it particular answers to questions on which it has no answer at all, rather than to cry out that the constitution is unworkable unless amended. But the process of patching, stretching, and twisting goes on until it finally becomes clear to everyone that a change has come about and has been generally accepted. The individual men who begin and carry along piecemeal adjustments often do not appreciate their creative role or perceive the general

direction of their labors. Like the polyps on the coral reef, they work silently below the surface, building atolls and islands and archipelagoes of which they never dreamed.

AMENDMENT BY CUSTOM. Informal amendment comes about chiefly through custom or judicial decision, although, as already noted, both legislative and executive interpretation also play significant roles. Custom is much more widespread in its operation because it works more silently over longer periods. Notable examples are the conventions or customs of the British constitution that enforce the responsibility of the cabinet to the House of Commons. For centuries the monarch chose whom he would as his advisers and ministers. But it has been clear for over a hundred years that ministers who lose the confidence of the House of Commons must either resign or secure a dissolution of Parliament, hoping to find renewed support in a newly elected House of Commons. In effect, the monarch must now choose as his ministers person who can carry the House of Commons. The various conventions that ensure the workability of cabinet government have been worked out slowly over many years.

We have already stated that the power of Parliament to amend the British constitution has been qualified by the convention that requires Parliament to have a 'mandate' from the electorate for making any fundamental constitutional change. This convention is a very recent one, resting almost entirely on the practice of the last sixty years. But it gets its real authority from an inner logic. If Parliament were to use its undoubted power to make any law whatsoever to force through unpopular and drastic changes in the constitution, it would be soundly punished by the electorate at the first opportunity. Thus it is the part of wisdom for Parliament to refer all proposals for drastic change to the electorate at a general election. Like all constitutional changes resting on custom, its limits are hard to define. How does one identify changes so fundamental as to require a 'mandate'? In 1937 the Public Order Act in Britain put some very substantial restrictions on freedom of assembly. One might have thought this was a fundamental constitutional question, yet no mandate from the electorate was sought.

It is also difficult to know when a decisive change has been effected by custom. Up until 1940 no President of the United States had ever been even nominated for a full third term of office, although some observers of the American scene would designate Grover Cleveland and/or Theodore Roosevelt as 'third-termers.' It was generally said that custom had made a third term unconstitutional. Yet President Franklin D. Roosevelt sought and

obtained a third term in 1940 and a fourth term in 1944. Did this mean there was no rule against a third term or was it merely an application of the maxim, *inter arma leges silent*? Of course, this particular issue is now settled by the Twenty-second Amendment which forbids *election* of the same person for more than two terms, although a person succeeding to the presidency with less than two years of the unexpired term remaining may serve a total of ten years.

The method of election of the President of the United States is a striking instance of a decisive change brought about by crystallization of usage. The Constitution provides for indirect election of the President through a body of electors. Through the operation of the political party system, these electors are now chosen by popular means and are pledged to cast their votes for the presidential candidates put forward by their respective parties. Indeed, the political parties themselves in the three countries, although their activities are now in some instances regulated by formal legal rules, are extra-constitutional growths depending on custom.

AMENDMENT BY JUDICIAL DECISION. The other method of informal change is judicial decision. In Britain and the United States the judges are required to interpret the constitution when it is in issue in disputes coming before them. He who interprets authoritatively sets the measure of the law, be it constitutional or otherwise. In both these countries part of the constitution is found in the common law, which is derived entirely from judicial decision and which is subtly modified thereby. The judges also interpret statutes, many of which may be said to be part of the constitution; but they do not interpret those conventions of the constitution that depend on modern custom.

In the United States, as has already been demonstrated earlier in this chapter, for over a hundred and sixty years the Supreme Court has had to be continuously deciding what the brief and often vague phrases of the written document mean in relation to the development of a continental domain by a restless and almost inexhaustibly resourceful people. A little reflection on the movement and variety of American life and especially the transformations of the last century will show that the judges could not possibly find all the answers in the short written document. It now takes volumes to do justice to the meanings that the Supreme Court has read into it.

Two illustrations, in brief and inadequate form, must suffice here. Article I, section 8, clause 3, of the Constitution gives Congress power 'to regulate

commerce with foreign nations and among the several states . . . Commerce that is not interstate, but *intra-state*, was to be regulated, if at all, by the state legislatures. The river-boat, pack-horse, and wagon-freight days of 1789 have given way to the age of steamships, railways, motorized road transports, and airliners; local industries serving a local market have been replaced by prodigious enterprises making products shipped to every state in the Union. How much of this activity is interstate commerce? Who would know from an examination of the words alone that an insurance company that insures clients who live in other states is *not* engaging in interstate commerce,¹⁷ whereas the transportation of lottery tickets across state lines *is* interstate commerce¹⁸ and therefore subject to regulation by Congress?

The Constitution does not say expressly that Congress has power to regulate trusts and combines as affecting interstate commerce, but the Supreme Court has held that Congress may do so.¹⁹ On the other hand, in 1918, the Supreme Court decided that Congress could not forbid or regulate child labor as used in making goods that go into interstate commerce.²⁰ In 1941 it overruled this decision²¹ and Congress can now regulate child labor in such circumstances. This is why it can be said, and with some show of reason, that the Constitution means what the Supreme Court says it means. It now takes a sizable book to explain fully what the interstate commerce clause means.

Adopted in 1868, the Fourteenth Amendment forbade the states to 'deprive any person of life, liberty or property without due process of law.' The primary purpose of the amendment was to protect the newly enfranchised Negroes in the Southern states in the exercise of their newly acquired political and civil rights. The amendment was not vigorously used for this purpose, but for forty years the Supreme Court interpreted it as forbidding a variety of efforts by state legislatures to regulate various aspects of economic life on the ground that legislation interfering with economic freedom, except when obviously a police or health measure, was a deprivation of liberty or property, or both, without due process of law. For example, statutes fixing maximum hours of work and minimum wages for employed persons were, for a

¹⁷ The Supreme Court so decided in 1869 in *Paul v. Virginia*, 8 Wall. 168. But in 1944, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, it held that such an insurance company *is* engaging in interstate commerce. The 1944 decision stands today as a clear illustration of how the Supreme Court modifies the Constitution.

¹⁸ *Champion v. Ames*, 188 U.S. 321 (1903).

¹⁹ *United States vs. Northern Securities Co.*, 193 U.S. 197 (1904).

²⁰ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

²¹ *United States v. Darby*, 312 U.S. 100 (1941).

time, held to be unconstitutional deprivations of liberty.²² The *due process* clause was bent to the service of *laissez faire*, the doctrine that government should leave business alone. In recent years, however, with a considerable change in the personnel of the Supreme Court, there has been a marked retreat from this position²³ and a restoration of emphasis on the protection of minorities from attacks on their political and civil rights. The fifty years—roughly from 1885 until 1936—the Supreme Court spent in protecting the freedom of economic enterprise from the more controversial forms of state interference may turn out to have been no more than an episode in constitutional development. In any event, it is a striking illustration of amendment by judicial interpretation.

This discussion does not pretend to be an outline of the constitutions under review or even a comparison of all their salient points. It gives no clue at all in regard to how governments actually operate within these constitutions. It merely marks a number of points of departure and tries to cut a few exploratory paths through the jungle that modern government presents to the student. All classifications and categories are tentative, to be tested with increasing knowledge as that comes from further elaboration of detail. It is hoped that it reveals the inadequacy of engineering and biological analogies. The constitution is a framework constructed for a conscious purpose, but it is one that is constantly being revised and modified by a process that bears an analogy to growth. It is the bony structure or anatomy of government, but it is modified at times by deliberate purposeful intelligence, and here the tempting analogy is mechanics and not biology. The application of other possible analogies would show that a constitution is *sui generis*.

FASCIST AND NAZI SUBVERSION OF CONSTITUTIONS

Both Italy, before the coming of the Fascist dictatorship under Mussolini in 1922, and Germany, before the coming of the Nazi dictatorship under Hitler in 1933, had theoretically democratic forms of government under

²² In 1905, in *Lochner v. New York*, 198 U.S. 45, the Supreme Court held—over one of Mr. Justice Holmes' most famous dissents ('The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics* . . .')—a New York statute fixing maximum hours of work in bakeries to be unconstitutional on this ground. For a similar decision on the constitutionality of minimum-wage legislation, see *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

²³ For example, the Supreme Court overruled its earlier decisions on minimum-wage laws in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

written constitutions. Without expressly repealing these constitutions, the dictatorships, in both countries, overrode the constitutions and ignored their terms almost completely. This was accomplished by enlarging the powers of the executive until it was the only effective organ of government and giving it power to make any law it wished by executive decree. In each case, the dictator and the chosen few he gathered round him constituted the executive. The judges continued to be appointed by the executive, but they lost their security of tenure. They held office at the pleasure of, and could be dismissed by, the executive at any time if their decisions did not conform to that body's wishes.

Both the Nazi and Fascist dictatorships recognized a distinction between legislative, executive, and judicial power and maintained, as a matter of form, distinct organs for the exercise of each kind of power. The principle of the separation of powers, however, was denied and therefore exercised no restricting influence on governmental organization. As we shall see later, supreme power was concentrated in the executive. Under the dictatorships, neither Italy nor Germany had any constitution in the sense of a body of rules that restricted and confined the power of the government in any way.

THE SOVIET CONSTITUTION

Unlike the United States, Britain, and France, the Soviet Union has had a very limited experience with constitutions. The first Constitution of Czarist Russia was not introduced until the early years of the twentieth century, and it was overwhelmed by revolution in 1917 without ever having worked effectively. From the Communist revolution of 1917 to 1936 the Soviet Union had two constitutions, but during this period the Communist party was still consolidating its control over the country, and the government was frankly a dictatorship. The present Constitution, widely proclaimed by Communists as 'the most democratic constitution in the world,' was adopted in 1936. As constitutions go, it is brand-new, and there is as yet no special sanctity of age attached to its terms. Its provisions are by-passed with an abandon and amended with a frequency and casualness that is surprising to the Western observer to whom a constitution is something fixed and permanent.

Economic Relationships Defined. The most characteristic feature distinguishing the Soviet Constitution from its Western counterparts is its attempt to define economic relationships within the Soviet Union, which is described

as 'a socialist state of workers and peasants.' The constitutions of Britain, France, and the United States leave economic relationships to be defined by ordinary law or, more often, by voluntary arrangements between the parties concerned. Communist theory holds, however, that the economic relationships within a particular society determine all its important human relationships. Consequently the essentials of the economic system must be set out in the Constitution.

The Constitution recites the overthrow of the power of the landlords and capitalists, and proclaims the elimination of the exploitation of man by man. It declares the abolition of private ownership of the means of production and the establishment of socialist ownership of them. It then provides that the economic life of the Soviet Union shall be determined and directed by a national economic plan under the control of the state. It declares the principle for distribution of incomes: 'From each according to his ability, to each according to his work.'²⁴ However, if we leave aside the clauses relating to economic matters, the Soviet Constitution reads much like the liberal democratic constitutions we have just been outlining.

A Federal State. Like the United States, and unlike unitary Britain and France, the Soviet Union is a federal state. The Constitution provides for fifteen Soviet Socialist Republics, generally known as Union Republics, whose position is somewhat like that of the states of the United States. These constituent units make up the Union of Soviet Socialist Republics (U.S.S.R.) and are in turn divided into smaller areas of descending importance and size: autonomous republics, autonomous regions, and national areas. The peoples of the Soviet Union belong to numerous nations, or ethnic groups, and speak numerous languages. The Soviet Constitution thus purports to assure each national group a high degree of cultural autonomy in the administration of local affairs, and the preservation of the national tongue through its use in the schools, government offices, and courts of law of the Union Republics and their subdivisions. Soviet federalism and its illusory nature are more fully discussed in Chapter VI. Be it noted here that on paper the Soviet Union is a federal state with enumerated powers vested in a central government and residual powers—the remaining powers not specifically granted the government of the U.S.S.R.—left in the hands of the authorities of the republics, regions, and areas.²⁵

The Legislature Formally Supreme. After declaring that all power belongs

²⁴ See, generally, Constitution of the U.S.S.R., ch. 1.

²⁵ Ibid. ch. 11.

to the working people as represented by their *soviets*,²⁶ or councils,²⁷ the Constitution states that 'the legislative power of the U.S.S.R. is exercised exclusively by the Supreme Soviet of the U.S.S.R.'²⁸ This body, the Soviet legislature, is composed of two chambers—the Soviet of the Union (lower) and the Soviet of the Nationalities (upper)—chosen on the basis of universal, equal, and direct suffrage by secret ballot, and is theoretically comparable to Congress or the British Parliament. The Supreme Soviet, and it alone, has the power to amend the Constitution by a two-thirds majority in both chambers.²⁹ The highest executive authority in the Soviet Union is the Council of Ministers. It is both appointed by and responsible to the Supreme Soviet.³⁰ The highest judicial authority is the Supreme Court of the U.S.S.R. The judges who compose it are elected by the Supreme Soviet for five years.³¹ Thus the legislature is formally supreme as in Britain. The American principle of a rigid separation of powers finds no place in the Soviet Constitution.

Bill of Rights. On the other hand, like the Constitution of the United States and of that of the Fourth and Fifth French Republics, but unlike that of Britain, the Soviet Constitution contains a bill of rights.³² Among other things, it guarantees to the citizen freedom of the person, speech, press, religion, and assembly. However, these rights are stated generally as belonging to the citizen and are not explicitly phrased as limitations on the power of the government. In practice this has turned out to be highly significant: the rights have turned out to be hollow; practice has made them a mockery. The Constitution does not establish effectively the principle of limited government. In effect, the government of the Soviet Union is an unlimited government, a fact quite openly admitted by Khrushchev in his famous speech regarding the post-1934 *Stalin* 'era of the cult of the individual.'

Supremacy of the Communist Party in Practice. The provisions of the Soviet Constitution will be discussed in greater detail later. Here, however, it is necessary to explain why the Soviet Union is governed by an all-powerful, autocratic government, when the Constitution contains most of the guarantees and provides for all the essential machinery of democratic government. It has already been suggested that there may be a wide difference between

²⁶ Ibid. Art. 3.

²⁷ *Soviet* is the Russian word for *council*.

²⁸ Constitution of the U.S.S.R., Art. 32.

²⁹ Ibid. Art. 146.

³⁰ Ibid. Arts. 64–70.

³¹ Ibid. Arts. 102–5.

³² See generally, *ibid.* ch. x.

the forms and the actual working of constitutions; that a constitution is only a frame for government; and that how a government operates in its frame, or indeed, whether it operates within the frame at all, depends on the beliefs that are held about the purpose and functions of government, on the capacity of the people for the art of government, and on the whole economic and social environment. The forms may provide an ideal framework for the operation of a certain type of government, but the substance, the actual working performance of government, may be entirely different from what the forms would lead one to expect.

No better example of this can be found, in modern times, than the Soviet Constitution. It is like a blueprint for a magnificent building of a particular functional design, which was never built because of the lack of the materials and the skilled workers needed for that particular kind of construction. Whether the architects of the Soviet Constitution ever intended to build a government conforming faithfully to their blueprint is, of course, a different matter, which cannot be known with any certainty.

In Chapter III, it was shown that the Communists consider the state to be a tool in the hands of the dominant social class. The Soviet state, therefore, was set up in the first place as a state of workers and peasants and presumably embodied the interests of the rural and urban proletariat, although it was actually headed by an elite from the intellectual class. In recent years, Soviet leaders claim, the enemies of the working class have been eliminated and consequently the state now embodies the interests of all the people in the U.S.S.R. But the Communists in the Soviet Union believe that the vigorous leadership needed to further these interests can best be provided by a relatively small group of workers and peasants—the Communist party—which is the vanguard and the leader of the proletariat. We must therefore look to the Communist party in order to understand the practice of Soviet government.

Linking of Party and Government. The Communist party, the only political association tolerated in the Soviet Union, is a tightly controlled, highly centralized 'state' within the Soviet state. Its organization parallels the organization of the Soviet government; each legislative and executive organ of the government is complemented by a party organ whose area of concern coincides with that of the corresponding government organ. Thus, the local soviets (or councils), the organs of government at what we would call the municipal level, are paralleled by the local organizations of the Communist party. So it goes at each level until, at the very top, the Council of Ministers

of the U.S.S.R. is paralleled by the Central Committee of the party, and particularly by its two most powerful subcommittees, the *Presidium* of the Central Committee—formerly known as the Political Bureau (*Politbureau*)—and the *Secretariat*. All important decisions on public policy are first decided by one or another of the important subcommittees of the Central Committee of the party, and then transmitted to the appropriate organs of government for action. The transmitting is relatively easy because the key members of the government are almost always leading members of the party hierarchy. From 1941 until his death in 1953, Stalin, for instance, was both the Secretary-General of the Central Committee of the Communist party and the Chairman of the Council of Ministers or cabinet (until 1946 known as the Council of People's Commissars). Frequently decrees issued by the Supreme Soviet and decisions and ordinances of the Council of Ministers are signed by high party officials as well as by the appropriate officers of the government. In practice, most decisions of the highest party organs have the force of law even before they are ratified by the Supreme Soviet.

THE OMNIPOTENCE OF THE COMMUNIST PARTY. The Communist party not only controls the machinery of the state, it dominates all other associations and organizations. That has led some to characterize the Communist party as an *interlocking directorate* which supervises and centralizes all organized activities in the Soviet Union,³³ and as the 'key to the functioning of the Soviet system.'³⁴ An understanding of the Soviet Constitution and of Soviet government and politics, therefore, requires above all an appreciation of the place of the Communist party in the Soviet Union.

The Constitution is misleading because, while it defines the organs of government and their functions, it does not specify in detail the role of the Communist party in the government. All the Constitution says about the Communist party is that it is 'the vanguard of the working people in their struggle to build communist society and is the leading core of all organizations of the working people, both public and state.'³⁵ Soviet government gets its essential character not from the formal terms of the Constitution but from the fact that *it is controlled and directed at every point by a small group, the leaders of the Communist party*. It thus earns the label of dictatorship in spite of the Constitution.

³³ Samuel N. Harper and Ronald Thompson, *The Government of the Soviet Union*, 2nd ed. (New York: D. Van Nostrand Co., 1949), p. 56.

³⁴ John N. Hazard, *The Soviet System of Government*, 2nd ed. (Chicago: The University of Chicago Press, 1960), p. 12.

³⁵ Constitution of the U.S.S.R., Art. 126. See also Art. 141.

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V

The Scope of Modern Government

The main lines of the British and American constitutions were laid down in the eighteenth century (those of the French in the nineteenth). Prominent among the factors determining those lines was the view taken about what it was either possible or desirable for government to do. The role government can play in human affairs is physically limited by the means of transport and communication and by the productiveness of the economic system. And the role government ought to play within the limits of the physically possible is determined by the views of the politically powerful of the time and place.

In the eighteenth century modern developments in transport and communication had hardly begun, and the modern industrial economy that has so increased productivity was still in embryo. There were many serious physical limits to governmental action from which we have now been freed. Also, the dominant Anglo-American political thought of the eighteenth century favored individual liberty of action with corresponding restrictions on governmental action. Thus these constitutions did not envisage government's taking on a wide range of functions.

In the first half of the nineteenth century the means of transport and communications were greatly improved and extended, and there was an enormous increase in economic productivity. The inescapable limitations on the range of governmental action were greatly diminished, and governments did take on some new functions. But the political theory of *laissez faire*—literally 'let do' or 'let make'—the theory that government ought to be restricted to a

very narrow sphere of operation, steadily gained strength and reached its zenith about 1860. The amazing material progress of the time was generally attributed to the abandonment of government regulation in economic and social matters.

LAISSER FAIRE AND ITS DECLINE

The Negative State. Generally speaking, the *laissez faire* philosophy held that government should restrict itself to protection of the community from external enemies, maintenance of internal order, and a few great essential public works. Maintenance of order may involve much or little. *Laissez faire* interpreted it narrowly, calling it the police function and invoking only the technique of the criminal law. By general laws, the legislature was to forbid those forms of conduct that are disruptive of order and then rely on the policeman and the courts to punish law-breakers. Faced with the certainty of detection and punishment, all but a few would be deterred from anti-social behavior. There would be enough jails—an example of essential public works—to look after the incorrigibles. Within the limits thus imposed, individuals were to be free to direct their energies as they saw fit. Of course, contracts freely entered upon must be kept. The judiciary was to award damages for the breach thereof, and also for a variety of minor transgressions, known as *torts*, not serious enough from a public point of view to merit the proscriptions of the criminal law.

Therefore, public works and military establishment apart, government was to be mainly occupied in making general laws applicable to everybody and enforcing the judgments of the courts on transgressions as they appeared. The state, as thus envisaged, has been aptly described as *the negative state*, imposing restraints at the margins of socially permissible conduct. The believers in *laissez faire*, including even Adam Smith, never were able to restrict the operations of government to the narrow sphere prescribed by their beliefs. But they had a profound influence on the scope of government action throughout the greater part of the nineteenth century. The negative state was not merely an academic theory; it was largely realized in the scope and character of nineteenth-century governments.

Government Intervention in the Economy. After the middle of the nineteenth century, however, a combination of forces steadily undermined the *laissez faire* tradition. Except in Britain, where free trade ruled until 1931,

important sections of the business community wanted—and got—government intervention in the form of *tariffs* to aid industrial development. In continental Europe, agriculture as well got tariffs to protect it against the competition of cheap wheat from America. The shift of population from rural isolation to rapidly growing industrial cities brought many new social problems. Elementary education became a necessity; public health measures had to be improved. Later it was seen, for example, that a system of employment exchanges was necessary to give necessary mobility to labor. These are only a few examples of the services necessary to an industrial society that the government has been asked to provide or to supervise.

With increasing economic specialization and further minute division of labor, the social structure became more complex and individuals became less able to control the factors affecting their destiny and more dependent on the actions of others that they could not control. The self-sufficient farmer of earlier times, who produced his own food and most of the other necessities of life, was mainly dependent on the weather, and it did not occur to him that the government could do much about it. The highly specialized farmer of today is dependent on distant markets for his income, and on other specialized producers for many of the necessities of life. The industrial wage earner is dependent on markets too, and also on a multitude of decisions made by his employer and others.

The farmers and workers as individuals cannot control these factors any more than they can control the weather; but it is at least plausible for them to think that the government, which has the longest reach of any agency in the community, can do something to control them. Accordingly, they, and many other groups as well, are disposed to appeal to government. On the whole these appeals have met with considerable success. Economic and social interdependence gives an impetus to government intervention.

Rise of the Social Conscience. Moreover, it was gradually realized that unrestricted individual enterprise did not necessarily bring about the degree of social justice it had been expected to. While wealth and productivity increased at an astonishing pace, a large section of the population was still condemned to grinding poverty and/or acute insecurity. At the same time, competition proved an inadequate regulator in various branches of industry. Large-scale organization produced monopolistic features in industry where entrenched interests levied toll on the public.

Interest in trust-busting and social reform grew up in an atmosphere of the new and experimental trial-and-error approach toward social and polit-

ical problems, often called *pragmatism*, which prompted two types of governmental measures. First, regulations of various kinds, ranging from factory legislation requiring safety devices in factories to fixing of rates and standards of service for railway companies, were imposed by governments on industry. Government was to regulate industry so as to ensure operation in the public interest. Second, an attempt was made to reduce the glaring inequalities of income and improve the security of the less fortunate members of society through social services or social security measures such as health insurance, unemployment insurance, and old-age pensions. These measures, differing in scope and application, are administered and financially supported by the various governments. Through taxation, income is taken from the taxpayer and transferred to the recipients of these services. The movement toward social security and regulation of business was greatly accelerated by the extension of the franchise to the adult male population in the nineteenth century, and to adult women in the twentieth. The mass of the people had no firm conviction that *laissez faire* was an advantage to them; yet they did see the advantages to be had from social services. Politicians quickly learned the connection between votes and the services desired by large groups in the population.

Special Privileges for All. Once significant breaches were made in the principle of *laissez faire*, its inhibiting power was greatly diminished, and finally it almost disappeared as an influence on public policy. Government had proved amenable to popular control through a democratically elected legislature. Government provided valuable services and there seemed to be no reason why it should not be used to correct all kinds of maladjustments. Britain and the United States had been the great strongholds of *laissez faire*, but by 1939, even in them, almost every significant social group was getting some service or privilege from the government.

In 1840 it had been agreed that the job of government was through general laws to maintain equal rights for all before the law and special privileges for none. Before 1930 the cynics had coined a new slogan, 'special privileges for all and equal rights for none.' For many years socialists have urged that governments must go still further and plan and manage the economic system as a whole, rather than merely intervene at particular points as they were doing prior to the outbreak of war in 1939. During World War II we saw this done, although not with the measure of public ownership socialists desire. What the future scope of government functions will be is impossible to say, but they are quite unlikely to decline to the 1939 level. For present

purposes it will be sufficiently revealing to indicate something of how matters stood at that date and to take general note of post-war developments.

The war period also revealed too, in a striking way, how the sheer physical limitations on government action have declined. Transport and communications are now so highly developed that central governments can overcome the handicaps of time and space sufficiently to direct the energies of half a continent. And productivity is now so great that government can absorb for its purposes, including war, well over half the national income and still leave the civilian population a tolerable standard of living. Big spending by government, even to the point of deficit spending, has now become the rule rather than the exception. The following table indicates relative expenditures for the social welfare and national defense sectors in 1962:

COMPARATIVE NATIONAL EXPENDITURES FOR SOCIAL WELFARE
AND NATIONAL DEFENSE IN 1962*

COUNTRY	SOCIAL WELFARE	NATIONAL DEFENSE
Denmark	D.KR. 5,645,000,000	D.KR. 1,300,000,000
France	N.F. 12,378,000,000	N.F. 19,187,000,000
Germany	D.MK. 15,800,000,000 (1960)	D.MK. 9,400,000,000
Great Britain	£ 3,679,000,000	£ 1,675,000,000
Norway	N.KR. 838,937,300	N.KR. 1,285,850,000
Sweden	S.KR. 4,478,621,000 (1960-61)	S.KR. 2,737,744,000 (1960-61)
Switzerland	\$87,200,000 (1960)	\$214,800,000 (1960)
United States	\$10,280,000,000†	\$51,212,000,000

* Unless otherwise indicated figures are for fiscal 1962.

† Includes outlays for Veterans Administration and Department of Health, Education and Welfare.

The Positive State. The negative state is now only a memory and we are faced with what is called, by contrast, the *positive state*, also variously called the *social state* and the *welfare state*. The government is not merely imposing restraints; it is acting positively to accomplish a wide range of purposes. In peacetime it is charged with attaining a minimum standard of education, with ensuring public health, with guaranteeing individuals security against a wide range of misfortunes, and with regulating the major facets of economic life in the public interest. In war it must direct all the activities of the population; it must keep the common goal in sight and improvise methods of reaching it. It must do for the nation what the plantation owner did for his estate. This task requires vast resources of energy, foresight, and initiative, which, in the negative state, were largely supplied by individuals operating on their own account. But even before World War II, government was carrying on a great many activities of vital importance to the community.

It has been difficult to adapt constitutions framed on the assumptions of the negative state to the demands of the positive state. In fact, the fighting of two World Wars required the temporary suspension of these constitutions at

least in part. The purpose of the separation of powers, for example, was to secure effective restraints on government at the expense of efficiency. When efficiency becomes the prime consideration, the separation of powers is an embarrassment. The tripartite separation of powers, while it may have been an adequate instrument of analysis a hundred years ago, is defective for an understanding of the complex operations of government today. It is widely contended that these *laissez-faire* constitutions are outmoded and will have to be very substantially revised. And it is also urged in many quarters that simple analyses, such as those outlined in Chapter IV, do not get us at all close to the realities of present-day government. This argument will be assessed in later chapters. Here we must sketch in outline the tasks that governments are now called on to perform.

THE NEWER FUNCTIONS OF GOVERNMENT

The broad patterns of government functions in Britain and the United States are strikingly similar. Britain, with a more mature industrial system, has moved faster and further in the provision of social security, but the United States has been catching up rapidly in recent years. On the other hand, government in North America has been called on to assist in opening up the resources of a new continent—an activity for which there has been no scope in Britain. It has not merely been a matter of building canals, roads, and railways. Governments have assisted and encouraged agriculture, mining, and lumbering in a great variety of ways. The trend now, of course, is toward conservation and more efficient use of natural resources, and there is more similarity of pattern in this respect than formerly. In Britain there is a distribution of tasks between central and municipal governments. In the United States, federalism requires a three-way distribution among federal, state, and municipal. Attention here is focused on the activities of central governments, including state but not municipal. No attempt will be made at this stage to distinguish state and federal functions.

In view of the similarity of pattern it will be adequate to sketch the newer activities of central governments in a general way without attempting a separate catalogue for each country. While some of the specific functions pointed to may not be carried on in both Britain and the United States, other functions comparable to them are almost certain to exist and the general impression will be reasonably accurate for both. Space does not permit treat-

ment of this intriguing problem in, for example, France or the Scandinavian countries, which are so experienced in the field. In a general way, however, they fit the pattern of the expanding role of government in America and Britain, with France's policies more closely identifiable with the former and those of the Scandinavian lands with the latter.

REGULATION OF BUSINESS

Regulation of business is either of a broad pervasive character affecting business generally or of a more specific kind affecting directly only particular kinds of trade or business. *General* regulation of business is accomplished by tariffs, anti-monopoly laws, and control of currency and credit.

Tariffs. Tariffs are now much more than the fixing of import duties and the policing of borders to ensure their collection. The government is charged with delicate and frequent adjustment of tariff schedules to the end that native industries shall not be driven out of business by the dumping of cheap foreign goods on the domestic market. Government must be continually collecting and revising statistics on the cost of production of domestic industries, because this knowledge is necessary for intelligent adjustment of the tariff to the end desired. In this way the government substantially protects investment in established industry and gives the employed worker in these industries at least the illusion that his livelihood is also being protected. The tariff has a powerful influence in determining what industries, and what enterprises within an industry, shall be established or maintained.

THE COMMON MARKET. But tariff regulation today has to be considered in an entirely new set of economic conditions. The world has rapidly organized itself into five major trading areas—the Common Market, the United States, the Communist bloc, the Commonwealth, and Latin America. Newest of these is the Common Market of Europe, which at this writing (Autumn 1963) included the original six, geographically joined, member nations of France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg, plus some 'associate members.' In accordance with the Treaty of Rome of 1958, the Common Market—a popular term for the European Economic Community (EEC)—determined to merge the economies of the six member nations into one; establish free trade among all; and set up a common tariff wall around them. Thus trade in the Common Market area would be as easy as trade among any six states of the United States. It has

proved so successful that the initial time schedule, adopted to bring about these goals gradually by 1970, had been advanced by several years and fruition in the foreseeable future seems possible, with the possible exception of the vexatious agricultural problem.

The United States met the trade issue by a complete change of tariff policy. With the passing of the New Frontier's 1962 Tariff Bill, the President now possessed power to reduce tariffs on world imports as much as 50 per cent over a five-year period and to eliminate tariffs entirely on certain manufactured goods. Many believe this 'new and bold instrument of American trade policy' to be President Kennedy's greatest legislative achievement, since the bill would put America on equal bargaining grounds with the Common Market and other world economic blocs, and also mark the end of the United States's historical protectionist policy. To counter the effect on industries and labor, the legislation provided for federal aid to adversely affected segments. This new trade policy was designed not only to raise United States industrial production and employment but also to achieve more permanent ties with the nations of the world, particularly the underprivileged.

Britain, on the other hand, found herself confronted with infinitely greater difficulties because of her obligations toward the Commonwealth of Nations, her traditional policies of aloofness and independence from the Continent, and her own characteristic agricultural and industrial complex. But by 1962, if not earlier, Britain realized her salvation lay with the Common Market and thus applied for membership—a move heartily seconded by the United States and by Britain's trading partners in the rather loosely organized European Free Trade Association (E.F.T.A.), consisting of Denmark, Norway, Sweden, Switzerland, Portugal, and Austria. However, Britain's membership application was flatly rejected in 1963 by President de Gaulle of France, after many long months of negotiations—over the objections of most, if not all, of the other five member-nations of the E.E.C., who desired full and immediate membership for Britain. Although Britain had demanded certain concessions on behalf of the Commonwealth and particularly the agricultural interests, the main—some would say the sole—reason for France's veto was evidently de Gaulle's fear that Britain would dominate the Common Market and, moreover, expose it to increasing American influence.

Monetary. Expansion or contraction of business is determined by a great variety of factors. One of the most powerful is the interest rate, the cost

of borrowing money to carry on business. This is primarily fixed by the banks as the main lending institutions. The banks are subject to close supervision and inspection by government. Thus, central banks—the Federal Reserve System in the United States and the once-private Bank of England in Britain—control the banking and credit business. The central bank has powers that enable it to exert a crucial influence on the lending policy of the banks. And whether or not the central bank is directly a department of government, the government in the long run sets its general policies. Moreover, the government, either directly or through the central bank, determines the rate at which the domestic currency shall be exchanged for foreign currency. In this way, apart altogether from tariffs, the trend of imports—and exports—can be modified and the outflow of gold regulated. This in turn has profound effects on the economy as a whole. To maintain sound business conditions the central bank, and departments of government associated with its work, must constantly be gathering statistics on domestic and international trade and conducting research continually into their significance in order to know how to use their powers intelligently.

Anti-Trust. A third general kind of regulation of business, as exemplified in the United States by the Sherman and Clayton Anti-Trust Acts of 1890 and 1914, respectively, and their offshoots, is aimed at trade combinations, trusts, and monopolies in the production and distribution of goods and services. It seeks to dissolve those combinations whose activities are clearly detrimental to the public interest,¹ and to prevent particular unfair trade practices by trade associations that otherwise are thought to serve legitimate purposes. For example, price-fixing in violation of the Robinson-Patman Act came under sharp attack in the 1960 indictment of twenty-nine of the largest American electrical firms, leading to a total of \$2,000,000 in fines and jail terms of thirty days for seven company executives. Increasingly the government has also eyed mergers² and divisions of markets violative of the Sherman Act. In order to keep track of trade agreements and monopolistic

¹ In 1957 one of the most interesting of recent U.S. Supreme Court decisions was handed down in the case of *U.S. v. du Pont*, 353 U.S. 586. In a 4:2 opinion, the Court ruled that E. I. duPont de Nemours & Co. was in violation of the anti-trust laws by holding 23 per cent of the stock of General Motors Corporation. The ruling was based on a finding that this stock ownership gave du Pont a preference with General Motors in the market for automotive finishes and fabrics.

² See *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962), in which the Supreme Court denied Brown the right to merge with the G. R. Kinney Co., a large retail shoe outlet, holding that in Section 7 of the Clayton Act—aimed at corporate mergers—Congress had intended to curb 'in their incipience [any] tendencies toward concentration in industry.'

practices in various industries and estimate their effect as well as to secure the evidence necessary for prosecuting offending combinations, government must maintain a staff of economists and accountants continuously engaged in investigation and research. In the United States, the administration and enforcement of the anti-trust laws are in the hands of the Federal Trade Commission, an independent regulatory commission created by Congress in 1914, and the U. S. Department of Justice.³

Utilities. Various trades and types of business have been singled out for more specific regulation. The most important group are public utilities, those industries producing an essential service for the public but which, for one reason or another, have a tendency to monopoly with its attendant evils. All transport and communication enterprises are in this class: railroads, tramways, motor transport, air transport, shipping, telegraph, telephone, television and radio. The gas, water, and electric power industries also fall into this class. A great variety of regulations that cannot be detailed here are imposed on them by government.

In the United States those public-utility enterprises whose business has the character of interstate commerce are regulated by the federal government. Thus the road, rail, and water-transport utilities fall to the Interstate Commerce Commission, the oldest independent regulatory commission, created in 1887; the telegraph, telephone, television, and radio industries to the Federal Communications Commission (1934); air transport to the Civil Aeronautics Authority (1938); and the electric power utilities to the Federal Power Commission (1920). The public utilities that operate entirely in one state are usually regulated by public utility commissions set up by the several state governments under their *police power*.

Generally speaking, no one can enter any one of these businesses, which are legally viewed as 'affected with a public interest,' without getting a license or a certificate—the 'certificate of public convenience and necessity'—acknowledging that additional facilities in the industry are needed for the public convenience. Rates to be charged and extent and quality of the service to be rendered are subject to governmental control. These rates cannot be fixed without taking into account the rates of return that particular enterprises are to be allowed to earn for their owners. Just what constitutes a proper rate of return has proved to be a difficult problem, indeed, to the

³ The Sherman Act is administered by the Anti-Trust Division of the Justice Department, headed by an Assistant Attorney General, and the Clayton Act, by the same body and the F.T.C.

American courts; but recent cases seem to indicate that—beyond certain basic standards of 'fair value'—they are disposed to leave the matter to the regulatory authorities.⁴ In the transportation businesses a great many regulations are concerned with safety: licensing of pilots and airfields, the load line on ships and licensing of masters and pilots, inspection of brakes, speed limits, size and weight of loads, level crossings, and the like. It will not do for a government to make haphazard decisions on these matters. It obviously must have at its command a great array of economic, accounting, and engineering talent in order to decide on rates of return, rates to be charged to the public, standards of service, and safety measures. And the job cannot be done once and for all. As costs fluctuate, adjustments must be made in the rates to be charged. Technical advances will call for repeated revision of the standards of service and safety.

Financial Enterprises. The financial enterprises of insurance, trust, and loan companies are subject to close government supervision designed to ensure fair dealing and safeguard their financial position. They must secure an annual license and often are required to make deposits with the government covering a portion of their obligations to their clients. They must make annual returns describing their operations and undergo annual inspection by government officials. If their financial practices have been reckless or their financial status becomes seriously impaired, their licenses may be modified or cancelled.

Charters and Securities. Before a corporation can be formed to conduct any enterprise, the promoters must secure a *charter*, or grant of incorporation, from government.⁵ All corporations which, on incorporation or during reorganization, wish to sell an issue of securities to the public, are required to make a fair disclosure of the facts relevant to the enterprise. Through refusal to authorize particular issues of securities, and through regulation of brokers and stock exchanges, governments try to prevent reckless and fraudulent misrepresentation in the issue and sale of corporate securities. In several states of the United States *blue-sky* laws, largely ineffective, establish some such structure of regulation. The most effective regulation of

⁴ See the decisions of the United States Supreme Court in *Smyth v. Ames*, 169 U.S. 466 (1898); *Driscoll v. Edison Light and Power Co.*, 307 U.S. 104 (1939); *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); and *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954).

⁵ In the United States, private corporations are normally chartered by state governments. An interesting exception is the now wholly privately-owned National Space Communication Corporation, chartered by the federal government in 1962.

incorporations and flotations of securities is imposed through the laws passed by Congress and administered by the Securities and Exchange Commission, created in 1934.

Scores of other kinds of businesses are subjected to license and inspection, generally for police, health, safety, or 'welfare' purposes. The regulations involved need not be described, for by and large they do not profoundly affect the economic life of the community, and do not require the accumulation of records, the marshaling and interpreting of statistics, or the intricate economic and engineering knowledge needed for the working of the more far-reaching controls already described.

Regulation of Employer-Employee Relations. The bringing of large numbers of workers into factories or shops to work under contract for an employer or manager has raised many acute social and economic problems with which governments have tried to deal. Government officials frame—and enforce through periodic inspection—factory, shop, and mine regulations designed to ensure safe and sanitary working conditions and to regulate hours of work and working conditions, especially, but not exclusively, for women and children. Government administers an insurance scheme—left to the states in America—whereby employers are compelled to provide compensation and rehabilitation for their injured workers whatever the cause of the injury may have been. The burden of industrial accidents and industrial diseases, which used to fall mainly on the worker and his family, has been turned through government action into a cost of production that falls on the purchasers of the products of industry.

Minimum wages and maximum hours are fixed by government in considerable detail for most industries in Britain and in the United States. In the latter such regulations were limited, in the main, to the employment of women and children until the passage of the Fair Labor Standards Act of 1938. Prior thereto all federal and many state wage laws for adult males were held to be unconstitutional deprivations of liberty without due process of law. In both countries, government enforces an immigration policy that limits the entrance of foreign workers to compete for jobs with the native-born. There are governmental measures in support of the unionization of labor and collective bargaining. In the United States the National Labor Relations Board, established by Congress in the Wagner Act of 1935, as amended by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959, actively promotes collective bargaining. Government also provides a conciliation service for mediating in industrial disputes and, in some vital

industries, e.g. railroads, it insists on a public investigation and strenuous effort at settlement before a strike or lockout can be called. In this connection too, subsequent statutes, especially the Taft-Hartley Act, effected several changes in the Wagner Act, despite heavy labor opposition.

Government is thus involved in a continuous study of wages, costs of living, standards of living, the trade cycle, industrial diseases, and safety devices. If it is to perform adequately the functions it has undertaken, it must be steadily revising its regulations in the light of accumulating knowledge and changing conditions, and it must put drive and energy into its inspection to detect, punish, and prevent evasions.

Government Economic Enterprises. In some industries, government tries to get a simple solution of the complex problems of business and labor regulation by direct government ownership and operation. Where not so long ago there was only the post office, there are now a number of comparable enterprises owned and managed by the government. Apart altogether from the ownership of waterworks, gasworks, transit systems, electric power plants by municipalities, and liquor distribution systems, central governments in one or both countries own and operate air lines, railways, canals, coal mines, telegraph, telephone, television, and radio transmission systems, and hydro-electric power systems. While governments have undertaken a much wider range of economic enterprises in Britain than in the United States, the Tennessee Valley Authority in the latter is the most diversified government enterprise to be found in either country.⁶

In such undertakings, government sets out to make itself a model employer as well as a model producer and distributor of goods and services. To do this, it has to wrestle with the same problems—except for the payment of heavy taxes—that plague private enterprise and that call for sympathy and imagination. It has to find the energy and resourcefulness, which alone make any enterprise efficient, and it has to find them without the incentives of profit and the spur of competition that have done much to maintain healthy vigor in private enterprise. When government goes into business, business methods have to be carried over into government. These methods are not the methods of the policeman and the judge. Here perhaps more than anywhere else the requirements of the positive state are made clear.

Agriculture. Particularly in the United States, government now takes

⁶ For a brief description of the T.V.A. and a comparative discussion of government ownership, see Henry J. Abraham, *Government as Entrepreneur and Social Servant* (Washington: Public Affairs Press, 1956).

the lead in promoting the application of science to agriculture. Most of the measures take the form of free services to farmers, relatively few of them are police regulations. The most important of the latter type are regulations for control of animal diseases and plant pests, giving the government powers of inspection, quarantine, and wholesale destruction of plants and animals to check the spread of such threats to agriculture. The effort spreads out as far as the control of commercial poisons offered to combat pests⁷ and to the supervision of nurseries that distribute stock. Alongside these powers goes continuous research into the origins and causes of, and the means of controlling, plant pests and animal diseases. For example, decades of research have been put into the development of strains of wheat that will resist rust and the sawfly.

SERVICES. This however, is only a small fraction of governmental research into agricultural matters. Attempts are made to improve every breed of agricultural product, whether plant or animal. The search for champion hens and champion cows, longer bacon pigs, longer ears of corn, and smaller *petits pois*, never ends. Experimental farms and stations—such as the huge farm at Beltsville, Maryland—carry this work into field and laboratory and explore the methods of culture best suited to particular environments. Soil surveys discover soil deficiencies and aid in other extensive governmental efforts to deal with drought, erosion, water conservation, and new methods of irrigation.

Improved methods are of little value unless widely adopted, and education of the farmer is pushed in various ways by illustration stations, extension services, agricultural fairs, county agents, and a barrage of bulletins. Increased production needs wider and better markets. Government tries to find new markets at home and abroad and provides a marketing and intelligence service that analyzes market trends and possibilities. Reliable grades and honest packaging are important aids to marketing. Government now requires that most agricultural products going outside a local market should be sold according to specified grades and in standard packages, and it devises the specifications and employs an inspectorate to see that the regulations are obeyed. Continuous research must go into the establishment and improvement of grades if they are to have their maximum usefulness.

SUPPORTS. The middleman who markets farm produce has always drawn

⁷ For an intriguingly controversial treatment of pest control in America see the prize-winning book by Rachel Carson, *Silent Spring* (Boston: Houghton Mifflin Co., 1962).

the wrath of the farmer. Government now intervenes at many points in the marketing process on his behalf. It imposes regulations on stockyards, and on commodity exchanges such as the grain exchange. It puts its influence and authority behind schemes for co-operative marketing and purchasing, and for stabilization of prices and production of a number of agricultural products. For example, in the United States, the Agricultural Adjustment Act of 1938, as amended, attempted, by an intricate and controversial set of measures covering the six principal agricultural products—wheat, cotton, corn, tobacco, rice, and peanuts (facetiously called the 'Holy Six')—to limit acreage, fix marketing quotas, and facilitate the storage of surpluses. The purpose was both to maintain prices and, by an intricate *parity* system, to ensure growers something like an annual average decent purchasing power in good years and bad. It supports, if it does not enforce, efforts to limit acreage and thus to maintain prices, but the surplus problem remains an enormous—and, as some contend, scandalous—burden on the national budget. In both the United States and Britain the law of supply and demand is challenged by the laws of the government in fixing the price and regulating the distribution of fluid milk in urban areas.

The range and variety of government activity in relation to agriculture defy summary description. Enough has been said to afford further illustration that government provides many valuable services and privileges to different groups in the community, and that effective provision of these services makes demands on governmental organization and personnel that were never dreamed of in the days of the negative state.

Public Health. Public health has long been a charge of government, but measures to promote it remained rudimentary until the scientific discoveries of the last century revealed the causes of a great variety of diseases and the necessary means to control them. They remained relatively unimportant until urban concentration and rapid means of transport changed entirely the problem of public health. Since that time, health services of a range and variety comparable to the activities noted in the last section have been developed. The bulk of these are still carried out by the municipal governments, but central governments exercise close control and supervision over the municipal health agencies. Sanitation measures must meet government standards and every municipality must maintain a public health organization that meets certain minimum specifications. These standards are enforced by frequent inspection. Furthermore, governments enforce many precautions

against the spread of infectious diseases, and the outbreak of an epidemic brings extraordinary powers of the central government into action.

SERVICES. Government makes available a great many health services for local governments and for individuals. Diagnostic clinics and laboratories aid in the discovery, analysis, and identification of disease. Vaccines and serums, such as the Salk anti-poliomyelitis vaccine, are sponsored and distributed in mass vaccination programs. Research is carried on in the fields of sanitary engineering, preventive medicine and air pollution. The United States Public Health Service maintains seven National Institutes of Health in Bethesda, Maryland, which conduct research on major diseases, including heart, cancer, and mental illness. Statistics are collected and studied, and a program of public education in health matters is advanced by demonstrations, exhibits, bulletins, lectures, and motion pictures.

Besides making grants to aid in the building and maintenance of general hospitals, government provides special clinics and hospitals for those suffering from particular diseases such as tuberculosis, and for the mentally ill and mentally defective. Special health services are given to school children and special attention to maternal and child welfare. Then, of course, there is the matter of compulsory national health insurance like that adopted by Britain in 1948. Its National Health Service entitles every inhabitant to full medical care, the cost of which is met predominantly from public funds. Congress, however, has been very reluctant to legislate health insurance in the United States, largely due to the militant lobbying of the American Medical Association and those opposed to the increase in social security taxes that would accompany such a measure. The Kerr-Mills Act of 1960 does provide medical care for the needy aged, if the state concerned participates in the program, but attempts by the Kennedy Administration to enact the so-called Medicare plan for all elderly citizens under social security had met with repeated defeat as of this writing (Autumn 1963).

OTHERS. Pure-food and drug laws establish standards of quality designed to prevent dangerous adulteration and misrepresentation of food and drugs. Samples offered for sale are collected and analyzed; frequent inspections of food-processing and manufacturing plants are made; and standard programs of testing and reporting are required before a new drug can be put on the market. Government inspectors are permanently installed in the canning and meat-packing plants. The sale of patent medicines and narcotic drugs is subject to regulation. Thus, in 1962, the U. S. Pure Food and Drug Administration was able to prevent the sale of thalidomide, a drug which

was strongly and correctly suspected of causing deformed babies. Numerous other interventions in the field of public health could be cited.

Social Security. Governmental research into the incidence and causes of disease proved the close connection between poverty and ill-health and was thus one of the prime causes of the demand that government should supplement charitable relief of poverty. In Britain the relief of the chronically poor has recently become a responsibility of the central government. But in the United States the poor remain, as they have been for centuries, chiefly the responsibility of municipal governments and philanthropy—with increasing exceptions, such as President Kennedy's food stamp program. Central governments have, however, undertaken to insure individuals against misfortune arising from many other causes. Sometimes the technique is that of compulsory insurance, requiring employers—and in two states, Alabama and New Jersey, the employees—to contribute to a fund that the government supplements, as in the case of insurance against unemployment. Sometimes it takes the form of outright grants from the public treasury, as in the case of allowances to unwed, deserted, or widowed mothers, assistance for needy and neglected children, and relief to unemployed workers not covered by unemployment insurance. France, as well as some other countries, goes as far as to give a governmental family allowance to each family unit according to the number of children!

But whether through compulsory insurance or through outright assistance, government comes to the aid of the aged, the blind, and other classes of needy persons, as well as the ones mentioned above. With its later amendments, the United States Social Security Act of 1935 is a comprehensive measure designed to provide a measure of security against the more serious kinds of distress partly through the direct action of the federal government, partly through encouragement of and financial assistance to the state governments, and partly through compulsory contributions by individuals concerned. Government also maintains employment services that assist workers in search of jobs.

Public Housing. Government has heavily subsidized public housing and slum clearance in Britain, France, and the Scandinavian lands for a long time. In the United States it used to be chiefly a matter for local redevelopment authorities. But since the New Deal days, because the vast problems involved have become financially and politically almost impossible for the lower levels of government, the federal government has found it increasingly necessary to grant larger amounts of money for housing development. The

federally subsidized projects normally consist of slum clearance, neighborhood renovation, conservation of existing housing, minority group housing, and low-interest, government-insured loan funds.

Education. Although elementary and secondary education is primarily a function of state and local governments, its vital importance in a democracy has led central governments in most countries to pay increasing attention to it. Grants in aid of elementary, secondary, and vocational education by the central government in Britain and by the state governments in the United States have increased steadily. Along with the increase in grants, these governments have extended greatly their control over the local education authorities. To exercise their control intelligently, they must give sustained attention to the varied problems of the educational system, which, viewed as a whole, is a huge undertaking. In the United States the federal government has shown a serious interest in education, and major direct federal grants in aid thereof loomed as a distinct possibility, although not a probability, in 1963. These would be in addition to the well-established loans as well as grants to colleges and universities—sometimes operated as state institutions—and their students, such as those under the National Defense Education Act of 1958. The federal Office of Education in the Department of Health, Education and Welfare not only provides certain specific grants, largely for vocational education, but also makes surveys of existing educational facilities, conducts research in certain educational problems, and offers advice to the local and state authorities concerned with education. Two major barriers to major outright federal aid to secondary and elementary schools have been the question whether such aid should also be extended to parochial schools, and what governmental controls, if any, should be imposed.

Highways. Most central governments in Europe are responsible for the highway systems of their countries. Responsibility for highways in the United States, however, was chiefly left to the states. But of late Congress has appropriated huge amounts of money for a 41,000-mile major inter-state highway system to be completed in 1972. Money for this project is provided in part by taxes on the tire and truck industries and by federal fuel taxes, in addition to general funding. Appropriations are then made to the state from a highway trust fund. Under this recent arrangement, the states contribute but 10 per cent to the costs of the roads within their boundaries and do the actual construction contracting and maintenance. The national government is interested in highways for several reasons. First, America's highways are vastly overcrowded. The time is fast approaching when every

family will have one car and possibly two. Second, new roads stimulate the economy of the nation by the work provided in building them and from the fact that they will connect every major industrial center in the United States, thus boosting the trucking as well as the tourist industry. Third, these highways provide a major link in national defense mobilization plans for evacuation routes as well as faster routes for moving equipment and men. With the increased number of vehicles everywhere, government must prevent its highways from becoming obsolete or face internal strangulation.

Conservation of Natural Resources. Public health and social security measures are aimed at conservation of human resources. In recent years in the United States there has been a steadily growing substantial effort by the government to conserve dwindling natural resources. Much of the work of the Departments of Agriculture and the Interior is devoted to stemming the loss of America's natural resources. Restrictions on the taking of fish and game have been tightened and steps toward enforcing a more careful timber-cutting policy have been taken. Fish and game are also ravaged by disease, while fire and insects are the heaviest users of the forest. Forest protection services have been established by government and, at the same time, reforestation projects are being launched, pollution of rivers and streams is being curbed. Fish hatcheries, wild-life sanctuaries, and national forests are government enterprises. Strenuous government action is being taken to restore the lands ravaged by drought and erosion.

Such measures are not likely to bring significant results unless action is guided by scientific knowledge. So intensification of research goes hand in hand with preventive and restorative action. Even then, the co-operation of the public must be enlisted as government takes up the role of educator and propagandist for conservation. Conservation is no longer a matter of sprinkling the country with a few fish and game wardens. It requires a dozen different kinds of scientists and research laboratories, a large field service staffed by men with highly specialized training for their jobs, a diverse apparatus for fighting fires and insects, for reforestation, and assisting nature to multiply. In another direction, it develops into a large project of public education.

Efforts at conservation in Britain have generally met with considerable success. When conservation bills protecting wildlife and forests are put before Parliament they receive almost no opposition and are quickly passed. The British are proud and protective of their natural realm. Almost every British town has its bird sanctuary or wildlife preserve, and hunting is well

regulated to provide some of the best sporting grounds in the world. Most natural resources have come under nationalization plans; thus, the government takes a direct and expedient interest in its coal mines and other resources.

The United States has the largest national park system in the world, and new units are gradually added from time to time. However, federal appropriation of lands for restricted use is often vehemently opposed by private interests, such as cattle, lumber, and mining concerns. Other natural resources, especially minerals, receive varying degrees of government attention, ranging from complete control over uranium and allied fissionable materials to polite attention to the gaping holes of strip-mining operations.

Other Functions and the Post-war Trend. This is a comprehensive but by no means an exhaustive enumeration. The public works that governments maintain or subsidize go far beyond those contemplated by the *laissez faire* tradition. The taxes now levied by governments are not limited to the amounts required by them to finance their direct expenditures. The central government levies taxes and makes grants to the states, or whatever the subdivisions may be called, to assist the latter in carrying out their extensive functions. State governments, in turn, levy taxes in order to make equalizing grants to municipalities of disparate financial capacity, so that all municipalities can maintain a certain minimum level of services. In this way, as well as by direct social security measures, governments are engaged in an extensive compulsory redistribution of the national income.

Each of the functions of government enumerated here is a matter of common knowledge, although few perhaps realize the grand sweep of the operations as a whole. In the main, these are the activities that governments in the United States and Britain and their allies carried on at the outbreak of World War II, and almost none of them was carried on a century earlier. For the purpose of prosecuting the war all these governments went very much further with a great range of activities designed to meet the emergency. Since the end of the war in 1945 a common pattern in new government functions is hard to find. The United States liquidated most of its wartime emergency activities very quickly in an effort to return to the pre-war situation. Britain, much more badly shaken by the war, maintained many of the wartime functions of government, and may continue some of them indefinitely. Moreover, a Labour government came to power in 1945, with a socialist program most of which could only be carried out by large extensions of government action. When the Conservatives returned to power:

in 1951, they halted but, with the exception of the 'denationalization' of the steel industry, did not reverse that program—although they did sell back to private persons all the road transport for which they could obtain reasonable bids. The Korean crisis of 1950 and the dark shadow of the cold war compelled both countries, however, to reintroduce a number of wartime controls.

In both Britain and the United States, as we have seen, there has thus been an extension of activity in the provision of public housing, health, social security, and in regulation of agricultural prices, with Britain going much further than the United States in housing, health, and social security. Both countries have necessarily undertaken public ownership and development of atomic energy. Both governments are committed, as far as solemn statements of high policy can commit them, to the maintenance of a high level of employment and purchasing power.

Planning for Prosperity. This last is the most important development common to both countries. Governmental planning for war purposes after 1938-39 quickly ended the depression conditions of the early and mid-'thirties and brought an unprecedented level of employment and production. Public opinion came easily, perhaps too easily, to the conclusion that if governments could make and carry out effective economic planning for war, they could do it for peace as well. This conception, if it is to be carried out with vigor and effect, requires a new strategy to be adopted by governments in relation to all their activities. The piecemeal and sporadic intervention of the last sixty years designed to deal with particular maladjustments in a limited way will no longer be enough. Government will have to undertake a large measure of continuous, co-ordinated over-all planning of all its activities with a view to maintaining the economic life of the nation at a high level.

UNITED STATES. The federal Employment Act of 1946 which defines this policy for the United States set up a Council of Economic Advisers to make continuous surveys of the whole economy and to report thereon to the President. The President, in turn, makes an annual report to Congress on the 'economic state of the nation,' along with recommendations for legislative action designed to maintain a high level of employment and purchasing power. It is too early to say how well the government of the United States will be able to discharge this responsibility, and how much governmental activity of a new kind it will involve. That there has been an increase in the latter is clear. However, both in the United States and in Britain the dislocations caused by World War II and the present requirements for

national defense, accentuated by the seemingly permanent tension between the Western world and the Soviet Union, obscure the situation.

BRITAIN. The socialist government of Britain took this particular responsibility seriously. It was not alarmed by the prospects of comprehensive economic planning by governments, a policy which socialists have been advocating for at least a generation. It regarded economic planning as an essential part of the program of socialization it pressed between 1945 and 1951. During that period, the nationalization of the electric power industry, which had been in progress for many years, was completed. Rail, motor, and air transport, gas enterprises, and the iron and steel industry were all taken into public ownership. The coal mines and the central bank, the Bank of England, were nationalized in the same way. As has already been noted, when the Conservatives returned to power in 1951 they halted but, with the exception of the 'denationalization' of the steel industry and parts of road transport, did not reverse the socialist trend in Britain.

It was said at the outset, and specific examples have emphasized the point, that in the United States some of these activities are carried on by the federal government and some by the state governments. Always to have specified throughout which are federal and which are state activities would have required a digression to examine the federal distribution of powers in the Constitution. The two chapters following will discuss this subject and describe the impact on the federal system of the great growth in the functions of both federal and state governments.

No judgment is expressed here on the wisdom or unwisdom of any of these governmental activities, and little has been said about the causes that underlie their introduction. Obviously, however, almost all of them are responses to problems that needed to be met somehow. Whether they should have been met in these particular ways, or indeed by governmental action at all, is deliberately left an open question. Some conclusions may suggest themselves later, but for the moment these activities are facts that shape the structure and profoundly influence the operations of government and therefore must be accepted and kept in mind at every turn.⁸

⁸ For some examples of 'planning' and the 'positive state' in several modern democracies see Wilfrid Fleisher, *Sweden: The Welfare State* (New York: The John Day Co., 1956); Arnold A. Rogow, *The Labor Government and British Industry, 1945-1951* (Ithaca: Cornell University Press, 1956); M. Einaudi, M. Bye, and E. Possi, *Nationalization in France and Italy* (Ithaca: Cornell University Press, 1956); and Marshall E. Dimock, *The New American Political Economy* (New York: Harper and Row, 1963).

INDIVIDUALISTS AND SOCIALISTS

There has been no lack of judgments about the wisdom or unwisdom of the growth of government activities. All the while there have been wide discussion and controversy about the appropriate range of government action, in the course of which almost every conceivable judgment one way or the other has been made. The focus of the controversy is on the relationship of government and business, or economic life, although wider issues are always involved.

The Range of Opinions. On the question of the relations of government and business there are generally four distinct bodies of opinion. The division is not entirely clear-cut because within each group there are often widely divergent views, and the classifications should be viewed in that light.

EXTREME INDIVIDUALISTS. First, there are the *extreme individualists* who are almost anarchists in believing that government is inherently evil. They hold to *laissez faire*. Economic enterprise should be almost entirely free of government control. But *laissez faire* is dead, if we can judge from the record of the preceding pages, and its supporters are voices crying in the wilderness.

MODERATE INDIVIDUALISTS. Second, there are the *moderate individualists*, most of whom approve, reluctantly or otherwise, of almost all the activities of government undertaken in Britain, the United States, and elsewhere in the West up until World War II. They are the group whose policy has been reflected in the action of these governments in the first sixty years of the century. They are least moved by doctrinaire theories, and counsel a tentative, experimental attitude toward the question of the appropriate functions of the state.

EVOLUTIONARY SOCIALISTS. Third, there are the *evolutionary socialists* who advocate a gradual transition from capitalism to socialism through the piecemeal transfer of the major industries from private ownership to public ownership, where they would be, directly or indirectly, under the control of the government. They are somewhat doctrinaire in thinking that political democracy, government of the people by the people, must somehow bring in its train economic democracy, the operation of the economic system not only for the benefit of the people but by the people, or at any rate by their

chosen agents rather than by private owners, or capitalists. But they do point to the stubborn tendency of private industry to combine in ever larger units in fewer and fewer hands. They argue that these concentrations of power in private hands are just as destructive of democracy in the long run as is the monopoly of governmental power in the hands of kings and aristocrats. Because of their undoubted loyalty to democracy they are also called *democratic socialists*.

Democratic socialists accept Marx's prediction of the trend to monopoly and agree with him in expecting it to have dire consequences. But they do not follow him in the further contention that the grip of monopoly capitalism will almost certainly have to be broken by violence. On the contrary, they believe that the capitalists can be compelled to submit to the will of the people through the peaceful processes of democratic politics. Consequently, they see no need to wipe out every vestige of private ownership in the means of production. They are prepared to leave substantial sectors of relatively small industry in private hands.

The vital need, as they see it, is to transfer the great public utilities in the transport and communication field, the massive financial and commercial institutions, and the heavy industries like coal and iron and steel, from private hands to public ownership. It is in this sector that private monopoly is so pervasive and menacing because of the enormous power it puts in a few hands. In fact, this body of opinion has tended in recent years to trim its demands for socialization because it has been realized, first, that many of the vexing problems of the economic system are not solved by nationalization, and second, that there are grave dangers in the state's running everything. Nevertheless, this body of opinion wants government action to go far beyond the scope outlined above. It is not satisfied with government regulation of the economic system. It wants a large measure of public ownership and operation.

The Labour party in Britain, which formed the British Government from 1945 until 1951, is largely, but not entirely, composed of people of this mind. As we have just seen, the Labour party carried through a piecemeal socialization of key industries in Britain until it gave way to the Conservatives in 1951. Thus far the democratic socialists seem to have been right in rejecting Marx's program of violent overthrow of the capitalist system. There is little evidence in Britain that the big capitalists felt able, or seriously disposed to try, to resist socialization by violent non-democratic means. The really critical problems continue to be how to run these industries

efficiently now that they have been socialized, how to restore the incentives for production that moved both owners and workers under private ownership.

It should be noted here that not only the British socialists but their colleagues throughout most of Western Europe have begun to advocate a slowing, if not outright abandonment, of nationalization or socialization of *additional* key industries. This is especially true of the Scandinavian countries, where almost the entire emphasis by the social-democratic governments in this sphere has been to provide social security and welfare services for the people. And the 1959 manifesto of the West German Social Democratic party went so far as to repudiate officially the basic tenet of state ownership of the means of production.

COMMUNISTS. Fourth, there are the *Communists*, the revolutionary socialists in the Marxist tradition. As we have seen in Chapter III, they believe that all capitalists must be destroyed, root and branch, and the means of production fully socialized. They think this is necessary in order to free society from the festering bitterness and conflict of class struggle, and to release the full potentialities of the productive system. Their literature has always suggested in vague terms that the management of industry in the classless society would be carried on by the voluntary co-operation of all workers whether by hand or brain. Their practice thus far in the Soviet Union is quite the contrary. The state, which is in the hands of a relatively few, plans and directs the entire productive system. No private person can hire the labor of others in production. They have even socialized agriculture. The state has become the sole employer and substantially all economic life is directed by the government. As far as realities, as distinct from forms, go, it would not be misleading to describe the system as state capitalism. Whether or not the productive system is run for the benefit of the people, it is certainly not run primarily by the people in voluntary co-operation. This is not 'the realm of freedom,' whatever else it may be.

MODERATE INDIVIDUALISTS v. MODERATE SOCIALISTS

Setting communist theory and practice aside, it is important to see that the disagreements among the other three groups are about means rather than ends. The individualists, whether moderate or extreme, and the democratic socialists are mostly agreed in wanting to prepare the social ground in which human personality can grow to its fullest flowering. They are even

agreed that a wide range of individual freedom is necessary for that purpose. They differ on the questions of how much freedom is necessary, how far economic freedom is necessary to the maintenance of other freedoms such as freedom of expression and occupation, how far we can go in enlarging the power of the state without making it our master.

Democratic Socialist Views. The democratic socialists think that economic freedom as it now exists, say in the United States, sours the social soil and dwarfs the lives of countless people. On the one hand, the economic freedom which is largely concentrated in the hands of the owners of the means of production is much greater than is needed for the purposes of individual self-realization. It is, in fact, the power to control a large part of the lives of those who work for them for wages. It is more power than they are able to use wisely with due respect for the claims of others for self realization.

On the other hand, the economic freedom formally conceded to everybody to dispose of his time and labor as he sees fit is illusory and unreal for large sections of the population. The freedom of the working man to choose his occupation has little meaning if over an extended period he cannot get a job at all. Even when he has a job, he is a hired tool, generally employed in routine operations which he had no share in planning and has no power to modify. He lacks a sense of creative and free participation. He is, they insist, almost a slave of the complex process in which he is enmeshed.

In place of these two unsatisfactory kinds of economic freedom, the democratic socialists want gradually to introduce a large measure of ordered planning in economic matters. The planning of economic life will end many of the frustrations of unemployment, strikes, lockouts. It will greatly increase productivity and provide more goods, amenities, and leisure with which to draw out a rich variety of personal achievement in cultural and other fields. By diminishing economic freedom, more freedom of better quality can be assured in other aspects of social life. Moreover, the worker in a publicly owned industry is a part of the public, and therefore a part owner. He will have a sense of sharing in the work and purpose of the industry that is now denied him. He will participate much more than he does now in controlling the conditions under which he works.

Democratic socialists think that social and economic inequality is a major cause of frustration of human possibilities. They are prepared to limit individual freedom in various fields for the sake of greater equality. Thus the socialization of industry is aimed at the elimination of profits and the raising of wages. Furthermore, they demand heavy taxation to maintain

comprehensive social security measures, thus leveling income. In Britain today, for example, it is extremely rare for anyone to have a net income the equivalent after taxation of more than \$15,000 a year.

Democratic socialists doubt the capacity of democratic government to regulate private monopolies successfully in the public interest, but are confident that it can devise successful means of running public monopolies. As ardent democrats, they believe that the will of the people can control and direct the state even in the massive task of running the key industries of the country. Thus they see no reason to fear the state. They do not believe that economic freedom, the dispersion of ownership in many hands—and it is in many hands despite the features of monopoly—has any significant relation to the other freedoms that they think are more important.

The individualists, on the other hand, think freedom is the main buttress of human personality. The extreme individualists think that those who cannot thrive on freedom are dead losses anyway, and that there is no sense in sending good money after bad. They recognize, of course, that all freedom depends on a framework of order and security and they approve the criminal law which restricts the 'freedom' of the criminally-minded and by that very fact enlarges the freedom of everybody else. But it is hard to convince them that the need for order and security goes much beyond the protection afforded by the criminal law.

Moderate Individualist Views. The moderate individualists are less sure that freedom always serves the interests of personality. For example, whatever the effect of unemployment insurance, maximum hours and minimum wage laws, and factory legislation may be on individual freedom, they see these measures as justifiable, or even necessary, protection to the human claims of industrial workers. But when it comes to widespread public ownership of economic enterprise, they pause. They suspect strongly that there is some close connection between economic freedom and individual freedom in other fields. They remember that absolute monarchy in Europe between the sixteenth and nineteenth centuries went hand in hand with detailed control and direction of economic life by the state. They remember that the triumph of liberal democracy in the nineteenth century was achieved in a period when there was very wide freedom of economic enterprise, and that its triumph was greatest in those countries where the state had least to do with economic life. They cannot forget that the Fascist, Nazi, and Communist dictatorships, which denied all forms of individual freedom in our own day, also took over decisive direction of economic matters.

Independently of this kind of evidence, moderate individualists still fear the state because they think all great concentrations of power tend to override the claims of individuals to live their own lives. For that matter, they fear the concentration of economic power in private hands. They approve the increase of governmental power mainly as a counterpoise to big business, for the purpose of regulating and limiting monopolistic tendencies. They hope to achieve a balance in some kind of mixed economy composed of some private ownership, some public ownership, some governmental economic planning, and considerable governmental regulation of private enterprise. They think extensive socialization of industry would tip the scales too far.

The moderate individualists have difficulty in seeing how the electorate can control the operation of great publicly owned industries through the ballot box. They are not sure that the people could ever reach a united will on matters as complex as the operation of an industry. They are not convinced that the average industrial worker will find much more creative satisfaction in working for a mammoth public enterprise than for General Motors. It would appear, for example, that public ownership of the railways and the coal mines in Britain has not worked any great transformation in labor-management relations in these industries.

Moderate individualists agree with democratic socialists on the dangers of gross social and economic inequality. They support substantial social security measures as a means of narrowing inequalities and providing rough equality of opportunity. But their recipe for enriching human personality has more freedom and less equality than that of the democratic socialist.

Means and Ends. The controversy between the individualists and the democratic socialists is largely one of *means*. One in fundamental purposes, they differ in their judgments on human psychology, the lessons of history, the possibilities of directing the economic system through the political process, and a hundred other complex questions that cannot be discussed here. These questions are debated, and will continue to be debated, on the assumption that the discovery of more facts, a better knowledge of psychology and of political processes, will bring some measure of agreement. The continuing experiment in Britain with socialism is bound to produce persuasive evidence one way or the other on many points. The important point to notice here is that adherence to liberal democratic ideals and democratic procedures compels this kind of discussion about the appropriate range of state action.

The actual merits of the many issues debated between individualists and

socialists cannot be discussed here. Many of the considerations involved are too complex for satisfactory discussion in the early stages of the study of government. The present purpose is to describe and analyze the machinery and processes of liberal democratic government. Whatever action government undertakes, it has to be carried out by this machinery and these processes. Is the machine suitably designed, or can it be adapted, for the purpose of running a socialist economy under democratic control?

One further significant comment should be made. While the extension of government activities of the last sixty or so years has been somewhat influenced by the highly technical and theoretical arguments of individualists and socialists on the subject, it does not appear to have been primarily determined by them. It has followed rather a tentative experimental course. Social and economic maladjustments occur and persist. After a time, government is moved to take action about them. The action taken does not proceed so much from theoretical convictions as from the pressure of various elements in the electorate that, for one reason or another, want something done about the maladjustment. The action taken is always tentative. It is later modified, or even abandoned, in the light of the results it seems to have obtained.

THE NEW FUNCTIONS AND THE WILL OF THE PEOPLE

One argument sometimes made in support of the new range of activities should be given attention. All these projects were launched by governments that were supported by a legislative majority, and almost all of them have survived changes of government and reversals of party fortunes. So, it is often argued, they have the support of a majority of the people and from them there is no appeal in a democracy. If plebiscites were taken on particular measures separately one by one, however, it is doubtful how many of them would find majority support. Generally speaking, the truth is that many of these activities directly benefit particular individuals and groups and, in an immediate material sense at any rate, place a burden on other individuals and groups.

Social security measures benefit the recipients and are a burden to the taxpayers. A new customs duty benefits some industries and some groups of workers at the expense of the rest of the community. When price supports and other services are provided for agriculture, they must be paid for by the

taxpayer. A workmen's compensation scheme benefits industrial workers, and the cost of it is passed on to the purchasers of the goods and services they produce. It may be that, in each case, there are general benefits to the community as a whole that are shared even by those on whom the burden immediately falls. But these benefits are indirect and difficult to trace and establish. Outside those who think they will be directly prejudiced or advantaged by a particular measure, very few members of the public pay attention to it and, of those, only a fraction attempts the intricate calculations necessary to trace out the effects of the measure.

The Push and Pull of Interests. Thus, in relation to almost any proposed new activity of government, there is an active interested minority pushing for it, supported less strongly by a larger group that thinks social justice or economic efficiency will be served by it. There is an active interested minority opposed to it, passively supported by a larger group that vaguely objects. In most cases, unless the measure is very widespread in its obvious effects or has been effectively dramatized by supporters or opponents, the great mass of the electorate is sufficiently neutral not to take a stand either way. Minorities are often able to get measures in their favor, not because of active support of a majority of the electorate, but because the majority in the legislature think it is a good thing and that, on balance, it will mean more gain than loss in electoral support.

This analysis does not apply to every new function of government, and even where it is applicable it does not begin to do justice to the complexity of the forces behind legislative action. More will be said about it later. At present, we are concerned only with its general significance, namely, that modern legislation is greatly influenced, and often determined, by the push and pull of interest groups. Economic specialization has created almost innumerable groups, each with a special economic interest. Ease of transport and communication has enabled the like-minded across the country to seek one another out and form associations on the basis of their special interest. A thousand religious, philanthropic, cultural, economic, and recreational associations flourish, and they all have purposes that can be promoted by one kind of government action and impeded by another.

The twentieth-century phenomenon of governments undertaking activities for the benefit of special groups is partly due to the ubiquity of special interests and partly the cause of further strengthening of these group interests. They thrive on the benefits they can get from the government for their members and on the defense they can put up against legislation prejudicial to

their interests. The voluntary association catering to the diverse needs of individuals is an indispensable feature of liberal democratic society. Once the principle of *laissez faire* was abandoned, it was inevitable that a great variety of voluntary associations should try to advance the interests of their members by bringing pressure on the government.

Normally, most individuals identify themselves more closely with their own special interests—they may belong to any number of different interest groups—than with the general common interest of the community. The immediate loyalties are continuous and intense, the wider loyalties and interests are tenuous and only spasmodically cross the threshold of attention. What the genuine common interest is at any one time has to be clarified by discussion. The industrial worker, the manufacturer, the farmer see much more clearly the advantages of a rise in their money income as producers than they do their corresponding disadvantages as consumers.

There should be no need to illustrate this point. During the war, when the most obvious and vital of general community interests were at stake, we saw producer groups of every kind demanding legislation that would maintain or raise their income despite the patent fact that, to win the war, the general standard of living had to be lowered. This is not due to a callous indifference to the general interest but to the greater immediacy and clarity of our special interest and to the difficulty of comprehending that our narrow advantage may be at variance with the general interest. So, much of the extension of government activity in the twentieth century comes not from a widespread general conviction that the public interest will be served thereby, but from the demands that interest groups, in combination or competition, press upon the government and the legislature.

AGGRANDIZEMENT OF THE EXECUTIVE

One other general result of great significance involved in the burgeoning of government activities must be attended to here. The positive state and the nature of the tasks it undertakes have aggrandized the executive branch of government. Two cases in point may be cited here.

Illustrations. For example, seventy years ago the law, as given content by judicial application of common law principles or as enacted by the legislature, defined in general terms the circumstances under which an employee could recover damages from his employer for injury suffered in the course of

his employment. If he suffered injury and the employer denied responsibility, the employee had to bring an action in the courts, where a judge decided the issue and awarded the damages, if any. Whatever damages he got, he then spent either in paying his doctor or by having a day at the races as he saw fit. The executive had no part in the process at all unless the employer refused to pay the damages the court had awarded.

WORKMEN'S COMPENSATION TODAY. The result is entirely different with the present-day workmen's compensation laws, already briefly described. The legislature has outlined in a general way a scheme of compulsory insurance against industrial accident and disease, requiring a fund to be built up by contributions from employers. The carrying out and enforcing of this law is given to an executive agency, a Workmen's Compensation Board or Industrial Accidents Commission. Injured employees make claims to the board, which has substantial discretion as to liability and amount. The courts have no longer any extensive functions in this field. The executive agency is instructed to devote the amount awarded to the rehabilitation of the worker. It is expended on maintenance of his family, medical expenses, and retraining for a new job as the board sees fit.

The agency also has important preventive powers. It can order the use of safety devices in a factory and it can increase the premium payable by employers with a bad record of accidents. This involves not only a field force of inspectors going from place to place but also the compilation of statistics, an engineering branch, and a staff for research into the causes and incidence of industrial accident and disease. The agency soon knows more about industrial accidents than anyone else and therefore can contribute more ideas for the amendment and improvement of the workmen's compensation laws than the legislature.

Moreover, its statistics and its researches show that the health conditions of the worker outside the factory, his education and training, even his biological inheritance, are important factors in the incidence of industrial accident and disease. That is to say, an executive agency that wants to do a really effective job will be pressing constantly for an extension of its powers, and if it were not checked by the legislature it might soon bring public health, education, and eugenics within its purview. As it is, the administration of the workmen's compensation fund brings a significant enlargement of the executive, including an inspectorate, a claims division, medical advisers, a social welfare service, and a research bureau as well as many routine and clerical workers. This agency speaks with great authority on its operations, and its

voice is likely to be heard in favor of rather than against an enlargement of its powers.

REGULATION OF PUBLIC UTILITIES. This matter is so important that, even at the risk of boredom, another illustration must be given. Not so long ago the regulation of public utilities, those essential industries enjoying for one reason or another monopoly advantages, was left to the legislature and the judiciary. The law provided merely that railway, telegraph, telephone, and electric power companies must provide reasonable services to the public and must not charge unreasonable rates. Anyone who was aggrieved by the rates or service had to bring an action in the courts asking for a decision that the rate charged him was too high or the service given him inadequate. Now the legislature makes provision for an executive agency, a transport commission, or a public utilities commission.

Aggrieved persons apply to this agency and not to the courts. It determines rates in great detail. To do this, it has to decide what is a *reasonable return* on the investment of the public utility company. It is thus necessary to decide what the investment shall be taken to be, the nominal capital, the actual value of the assets committed to the adventure—i.e. ruling out *watered stock*—their replacement value, or the amount that prudent men would have invested in this particular enterprise. Allowances for depreciation and obsolescence have to be calculated. The commission lays down precise regulations about standards of service. A railway may be required to run more trains, or more cars per train, or forbidden to discontinue particular trains. An electric utility may be required to step up its voltage or extend its lines. This involves finding a very nice balance between public needs in the way of service and the ability of the company to furnish them. New capital seeking entrance to the industry must satisfy the commission that it is in the public interest that the industry should expand, a judgment that calls for a great range of knowledge. This executive agency must go deeply into the economics of the industry, the financial history of particular companies, and relate these to what it is thought the public needs, i.e. the public interest. Expert staffs of economists and accountants are needed.

Moreover, safety is an element in reasonable service, particularly in the transport utilities. The agency must develop regulations regarding the safety measures to be taken. The devising and improving of these regulations and the enforcement of them require an inspectorate and an engineering staff always at work surveying existing facilities in the industry, investigating accidents, and testing new safety devices.

Here again, a large staff is built up; its activities give it unique knowledge about the public utility industry and reveal new ways in which it can improve its regulation by extending the scope of its control. Its experience is always suggesting changes in the laws for the regulation of public utilities and thus it has great, and often decisive, influence when the legislature comes to amend the law.

A Consequence of the Positive State. In almost all the functions of government outlined in this chapter, similar enlargements of the executive have taken place. The New Deal alone in the United States swelled the civil service by some 350,000 persons. The large staffs that carry out the intricate detail of these tasks of government are generally referred to as the administrative, and some have described this as a fourth power alongside the legislature, executive, and judiciary. In fact, it is a part of the executive although it has swollen that power out of all recognition and radically changed its character. Where the executive formerly was something of an automaton carrying out the dictates of legislatures and courts, it now does a great deal of detailed legislating on its own in the course of administration; it is a powerful influence in the determining of legislative policy; and it has everywhere encroached on the judiciary. Its size and the scope of its operations have created a new problem of internal management. How is the President of the United States to co-ordinate and direct the energies of almost three million civil servants in the employ of the federal government? No matter what problem of present-day government is under consideration, it will be found to have been intensified, if not entirely created, by the remarkable developments we have been considering.

This great service and regulatory apparatus called the administrative is also known, in terms of alarm or contempt, as the *bureaucracy*. It is not always understood that it is the necessary concomitant of the positive state. Most people approve of some or other of these new functions of government and almost all castigate bureaucracy, associating it with those activities of government of which they disapprove. But the general effect of the great extension of state action on government, and particularly on democratic government, has never been adequately explored. Later chapters will indicate trends and suggest probabilities.

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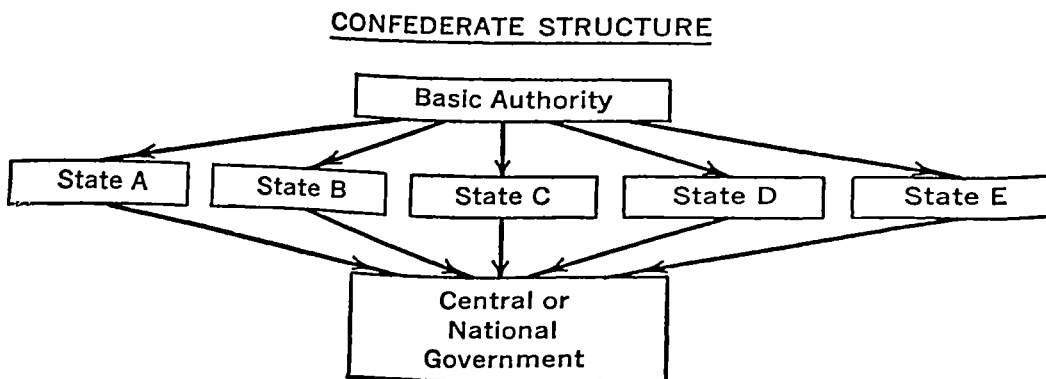
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VI

Federalism

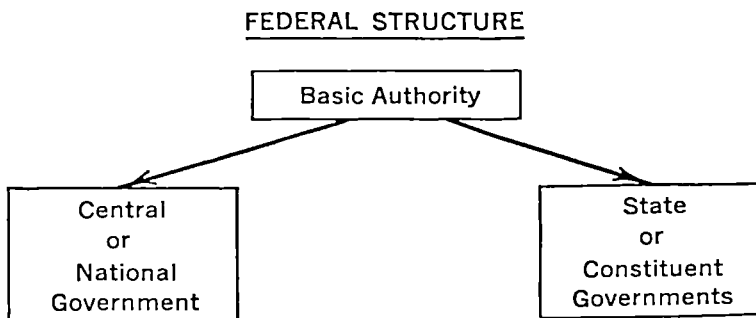
BASIC ARRANGEMENTS AND CONSIDERATIONS

1. *Confederate*. There are many ways in which separate political communities can come together for common purposes. When several states confer together and agree on a common course of action in certain specified circumstances, such as resistance to a common enemy, they are bound together by *treaty or alliance*. When they go one step further and set up a more or less permanent body of delegates or ambassadors to make detailed recommendations for carrying out the treaty or implementing the alliance, their association together is called a *confederation*. Such was the Congress finally set up by the American colonies in 1781 under the Articles of Confederation of 1777 to fight the war against Britain. In a confederation, the common central body



is merely a committee for deliberating and advising the separate members. It has no meaningful power over the separate states in the association or over the citizens of these states. A confederation is little more than a 'firm league of friendship,' from which the member states have a right to withdraw. In a way, today's United Nations resembles a form of 'confederation.'

2. *Federal*. The next further step is to give irrevocably to the common central body some portion of the authority hitherto exercised by each of the member states on its own account. When this is done, the central body becomes a government with power to act independently of its own volition and not merely a council of ambassadors. A new state comes into existence to which the citizens of the member states owe an allegiance and a duty of obedience. Such are the United States of America brought into existence by the Constitution of 1789 and the Dominion of Canada created in 1867. Other current examples of important federal governments are the Republic of Switzerland, the Commonwealth of Australia, and the Federal Republic of West Germany, as established by their constitutions of 1848, 1900, and 1949, respectively. Such unions are *federal unions or federations*. The member states or provinces are joined together not by treaty but by a written *constitution* from which they have no right to withdraw. It is a marriage and not merely a casual alliance.

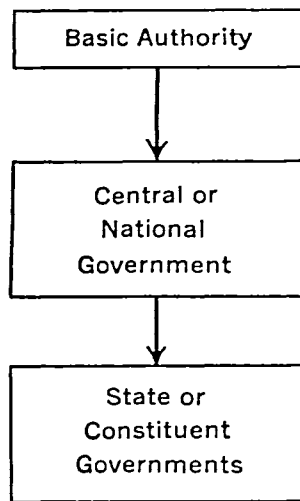


Yet, at the beginning at least, a federal union is merely a marriage of convenience—a practical businesslike arrangement with no sentimental nonsense. The parties insist on retaining their distinct identities and personalities; they do not become one flesh. Of course, with the passing of time and the running of a common household, the marriage of convenience may be transformed into the kind of marriage that is made in heaven, where the identities of the several states are merged in an indissolubly united nation.

3. *Unitary*. If and when this happens, the desire for a genuinely inde-

pendent status in the several participating states will probably disappear. If so, conditions will be ripe for the last step in political unification, the disappearance of autonomous units and the reposing of all final governmental authority in a single central government. This is called the *unitary state*, of which Great Britain, incorporating the once independent communities of England, Wales, and Scotland, and France, incorporating Normandy, Brittany, Provence, and so forth, are leading examples.

UNITARY STRUCTURE



There are still far more unitary states in the world today than any other, although the federal idea has become increasingly popular.

FEDERALISM

Why? Why do separate political communities when uniting together sometimes prefer a federal to a unitary form of government? A federal system is always a compromise between two distinct, and sometimes conflicting, sets of political forces. *First*, there are the pressing common interests and purposes shared by the several states. The American colonies on the Atlantic seaboard had just won their independence from Britain and wanted to secure themselves against the assaults of any European imperialism. The British colonies in North America in 1867 feared the aggrandizement of the United

States, which had emerged from the Civil War as a great military power. Such interests and purposes, among others, can only be protected by presenting a united front.

Second, there is the desire of each of the uniting communities to maintain its identity and a large measure of independence. In part, this desire springs from the same mysterious sources as national pride and national exclusiveness. Robert E. Lee, offered the command of the Northern Army at the outbreak of the Civil War, refused it, saying he could not draw sword against his native state, Virginia. His first allegiance was to Virginia and not to the United States. In part, the desire springs from very practical considerations. The conditions of life and the character of the people as moulded by history and the physical environment vary greatly in the states contemplating union. Just because the unitary form works well in Britain does certainly not mean that it would work well in the United States.

No government that fails to take account of these differences will ever be regarded as satisfactory. A government that is locally controlled is far more sensitive to the factors of uniqueness than is a central national government, which is far away and preoccupied with more general issues. The desire to limit the reach of a distant government is the main reason for a federal system. Without the urgent common interests, there would, of course, be no union at all. But with no insistence on a guaranteed sphere of independence for each of the uniting communities, there would be no reason for a partial union—no case at all for a federal form of government.

Defined. Federalism, therefore, is a dual form of government, based on a territorial and functional division of powers, calculated to reconcile unity with diversity. It provides for a common government for common purposes, generally called the federal, or national, government. In the beginning, the common purposes mostly relate to external matters. The aim is to have a common policy vis-à-vis the rest of the world. The federal scheme also provides for the continuance of the governments of the several states, provinces, or *Laender* in the federation, preserving for them, against the world and against the common government they have set up, control of most matters of internal policy. *The most important aspect of a federal system, then, is the distribution of powers and authority between the common government on the one hand, and the state governments on the other.* To set at rest all later questioning of what this distribution really is, it is written into the Constitution or Basic Law. This distribution of powers firmly established in a written constitution is the distinctive feature of federalism and makes many aspects

of politics and government in the United States markedly different from those of Britain and France, both unitary states. Therefore, in discussing federalism, Britain and France cannot be used for purposes of contrast.

There are a number of other federal systems with which comparisons might be made. Limiting the choice to those genuinely within the liberal democratic tradition, there are only Australia, Canada, and Switzerland, plus a very recent entry, West Germany. Australia and Switzerland are both remote, and are products of distinctive environments which would require much explanation. West Germany has had but brief opportunity to see its system in action, nor has Germany had much experience with the liberal tradition! Canada, however, is close at hand and subject to a continental North American environment similar to that of the United States. Consequently, our chief interest here lies with federalism as it exists in Canada and the United States, with sporadic references to the interesting German system.

SCOPE OF COMPARISON. The Dominion of Canada was set up in 1867 by federating the British colonies that remained, or grew up, in North America after the American Revolution. Its Constitution was laid down by a statute of the British Parliament, the British North America Act. Within this framework, only rarely amended, a distinctive federal system has developed. It has managed to hold together in peace, if not in complete harmony, the English-speaking Protestants and the French-speaking Roman Catholics, the two great groups of which the Canadian people are composed. In recent years Canada has undergone rapid industrialization and there has been a great increase in the activities of government, the same factors that have complicated the working of federalism in the United States. The principal features of these two federations will be compared, with occasional allusions to other federal countries. In a concluding section, something will be said briefly about a quite different kind of 'federalism,' that found in the Soviet Union.

Significant Difference. But prior to embarking upon the comparison it is of the utmost importance to point out that, in a very real sense, federalism is a point on a continuum reaching from complete isolation to complete absorption, neither of which is ever found in the actual life of actual states. As Aristotle might have said, there is no such thing as federalism; there are only federal states—states reflecting the federal principle. Hence, the federal idea—defined again recently by Governor Rockefeller of New York as 'a concept of government by which a sovereign people, for their greater protection and Progress, yield a portion of their sovereignty to a political system that has

more than one center of sovereign power, energy and creativity'¹—features dramatic differences. West German federalism is hardly of the same stripe as the Canadian or American, and its pre-Hitler predecessor was always dominated by one of its constituent parts—usually Prussia, sometimes Bavaria. Again, the cantons of Switzerland enjoy significantly more independent power than do the constituent governments of most other federal states. For example, in the areas of 'public economy' and 'police regulation' they are constitutionally permitted to make agreements or compacts with foreign powers—although these must be brought to the attention of the national authorities. Yet an authority on that stable federal state speaks of a tremendous increase in the central government's power, even more than in the United States!² The federal arrangements of India and Brazil are again utterly different—all underscoring the essential point that when we speak of federal states it is contrast rather than comparison that dominates.

THE FEDERAL DISTRIBUTION OF POWERS

In the United States. In considering the federal systems of the United States and Canada, the distribution of powers set out in the respective constitutions must be looked at first. It has already been noted in Chapter IV that the Constitution of the United States *limits* the powers of all governments and puts certain matters beyond the reach of either the state or federal government. These matters are said to be *reserved to the people*. We shall leave these aside in order that some of the more important features of the distribution may be pointed out. Certain specified powers are *expressly granted to the national government*. Moreover, it is authorized, in what is known as the 'elastic' or *implied powers* clause,³ to make such laws 'as are necessary and proper for carrying into effect' the powers expressly granted—a power of far-reaching significance. Some powers are, of course, *expressly forbidden* to the national government.⁴ While the Constitution *expressly prohibits the exercise of certain powers by the states*,⁵ it nowhere *enumerates*

¹ Nelson A. Rockefeller, 'The Future of Federalism,' The Godkin Lectures, Harvard University, February 1962.

² George A. Coddington, Jr., *The Federal Government of Switzerland* (Boston: Houghton Mifflin, 1961), ch. III, *passim*.

³ Art. I, sect. 8, par. 18.

⁴ See Art. I, sect. 9, and the several Amendments.

⁵ These prohibitions are found in Art. I, sect. 10, and in Amendments XIII, XIV, XV, XIX, and XXIV.

the powers of the states. As Amendment X makes clear, they hold the residue of powers remaining *after* the grants to the national governments, the express prohibitions to the states, and the reservations to the people are accounted for.

Article I, section 8, enumerates the principal powers granted to the United States.⁶ Many of these powers relate, directly or indirectly, to external matters: the raising and supporting of armies and navies, the declaring and prosecuting of wars, the regulation of commerce with foreign nations. In internal matters, the powers of the United States were mostly restricted to the promotion of internal trade and interstate commerce. It was necessary to guard against the states' erecting tariff barriers against one another. Accordingly, in addition to an express prohibition of the levying of duties on imports by the states,⁷ the federal government was given power to regulate commerce among the several states. The *interstate commerce clause*, as it is called, has been the basis of much of the great extension of federal power through judicial interpretation. To a somewhat lesser extent this is also true of the *taxing* power.

Because a common currency and a common standard of weights and measures were needed to promote internal trade and commerce, the federal government was authorized to coin money and to fix its value, and to fix the standards of weights and measures. The powers to establish post offices and post roads, and to grant patents and copyrights, were, in part, aimed at the same purpose of facilitating commerce. The only clause that *might be* thought to have wide general application in internal matters is the one authorizing the federal government 'to provide . . . for the general welfare of the United States.' But the context in which it appears in Article I, section 8, makes it doubtful whether any extensive power was intended to be granted thereby, and the Supreme Court has refused to recognize the existence of any such sweeping power.⁸ It appears not as an independent grant of power but as one of the purposes for which the federal government may levy taxes and spend the funds thus raised.

A few powers, known as concurrent powers, are *shared by both state and federal governments*: the levying of taxes, the borrowing of money, and the establishment of courts. Because the powers of the states are in the form of an unspecified residue, no enumeration would be likely to state them ex-

⁶ Others of significance vis-à-vis the states are granted in Art. iv, sect. 1, 3, and 4, and in Amendments, XIII, XIV, XV, and XIX.

⁷ See Art. I, sect. 10.

⁸ For a well-known example, see the interesting and controversial opinions in *U.S. v. Butler*, 297 U.S. 1 (1936).

haustively. The making and altering of the criminal law and the laws of marriage and divorce are merely well-known instances of the power of the states to make diverse laws as they see fit. In fact, as far as the *written* Constitution goes, the states appear to be the important authorities on most aspects of property, intra-state trade and commerce, and personal relationships. At least so one would infer from a reading of section 8 of Article I and Amendment X—but in the light of present-day realities such a conclusion would be an oversimplification at best. The reader must also keep in mind the significance of the Supremacy Clause of the Constitution—Article VI—as explained in Chapter IV, above.

In Canada. When the terms of union of the British colonies in North America were under discussion in the 1860's, seventy-five years of experience under the federal Constitution of the United States were available for guidance. This experience had just culminated in a civil war that threatened to destroy the Union. The immediate, if not the underlying, cause of the Civil War had been the claim by the southern states of the right to withdraw from the Union. Because the powers of the federal government were specific powers that could be interpreted as having been delegated to it by the states, the seceding states claimed the right to withdraw the delegation.

The framers of the Canadian federation wanted to make it clear from the beginning that such a claim had no semblance of right in the Canadian federation. Indeed, some of them did not want a federal system at all but a unitary state with all authority in one national central government. So the British North America Act of 1867, the statute of the British Parliament that established the Canadian federal system, tried to limit and qualify the independence of the provinces more sharply than the American Constitution had limited the states. It was provided that the Lieutenant-Governors, the formal heads of the provincial governments, should be appointed by the federal government and that they should have the power to 'reserve' provincial legislation for the pleasure of the federal cabinet.⁹ Also, the federal cabinet was given power to 'disallow' within one year any laws enacted by the provincial legislatures.¹⁰ Most important, the opening paragraph of section 91 of the Act, which authorizes the Dominion Parliament 'to make laws for the peace, order and good government of Canada' on all matters not ex-

⁹ British North America Act, sect. 58-60, and sect. 57 as extended by sect. 90.

¹⁰ *Ibid.*, sect. 56 as extended by sect. 90. This power is distinct from, and not to be confused with, the much narrower power of the courts to declare null and void acts of the provincial legislatures that purport to deal with matters reserved to the Dominion Parliament under sect. 91.

clusively reserved to the provincial legislatures, was intended to make it clear that the *residuary powers*, the powers not expressly conferred on either Dominion or province, *rested with the Dominion*, and that the provinces were to have certain specified powers (set out in section 62) and no more. All these provisions were calculated to show that the Dominion did not derive its powers from delegation by the provinces. No room was left for the provinces to argue that their independent status included the right to withdraw from the union.

Powers that the Dominion was to exercise exclusively were set out in section 91. The twenty-nine headings in this section, which purport to be illustrative only and not a definitive statement of the scope of Dominion power, covered a wider range of matters than the corresponding list of federal powers in the Constitution of the United States. They covered such aspects of external relations as a British dependency could expect to control on its own account. They went further than the Constitution of the United States in conferring authority over commercial matters on the federal government. In addition to currency and coinage, they included the power to regulate banking, bills of exchange, interest, and legal tender. Furthermore, in authorizing the Dominion to make laws for 'the regulation of trade and commerce,' they seemed to confer a wide power of regulating business and commerce. By an exception to section 92.10, the Dominion was given wide control over the transportation and communications industries. By section 121, the provincial legislatures were forbidden to interfere with freedom of trade between the different provinces. Reflection on these and other powers enumerated in section 91 indicates that the Dominion was intended to have a wider authority in relation to economic life than the federal government in the United States.

Experience in the United States had shown that it was extremely unsatisfactory for the separate states to have exclusive control over the criminal law (except for federal crimes) and over marriage and divorce. Accordingly, these matters, excluding the forms of the marriage ceremony, which were left for provincial determination, were put in the sole control of the Dominion. On the other hand, whether for sufficient reasons or not, the framers wished to avoid duplication of judicial institutions found in the United States, and accordingly the power to constitute courts for the enforcement of both Dominion and provincial law was given to the provinces.¹¹

Concurrent powers to levy taxes and borrow money were conferred on

¹¹ Ibid. sect. 92.14.

both the provinces and the Dominion. In addition, concurrent powers over agriculture and immigration were provided for in section 95.

This contrast is by no means an exhaustive discussion of the distribution of powers between the Dominion and the provinces. It is designed mainly to show that the framers intended, in the light of American experience, to strengthen the Dominion vis-à-vis the provinces. But, in social and economic matters, what men plan and what ensues are often quite different things. Both these constitutions have been interpreted by the courts on almost innumerable occasions since their adoption and it would be difficult for anyone, looking only at the text of the constitutions, to realize that they mean what the courts have declared them to mean.

JUDICIAL INTERPRETATION OF THE DISTRIBUTION OF POWERS

United States. Except for one significant reversal of the general trend in the years immediately before the Civil War—in the famous *Dred Scott* case¹²—the Supreme Court of the United States has steadily enlarged the powers of the federal government by interpretations given in disputes coming before it, although it did balk for several years on some of the more ambitious New Deal measures of the mid-'thirties. By 1963, federal authority had been stretched to the point where it could employ more than two and one-half million civil servants on its legitimate concerns. The Supreme Court, aided by the arbitrament of arms in the Civil War, has confirmed the indissolubility of the Union and enormously strengthened the position of the federal government vis-à-vis the states. Largely, but not entirely, through a liberal interpretation of the federal taxing power, the *elastic clause*, and the interstate commerce clause, Congress has been given an extremely wide power to regulate trade and commerce and economic life.

The President's Commission on Intergovernmental Relations, which in 1955 completed an exhaustive study of the current operation of federalism in the United States—the first official undertaking of this kind since the Constitutional Convention of 1787—took note of this trend in judicial interpretation as follows: '... under present judicial interpretations of the Constitution, especially of the spending power and the commerce clause, the boundaries of possible national action are more and more subject to determination by legislative action. In brief, the policy-making authorities of the National Government are for most purposes the arbiters of the federal

¹² 19 How. 393 (1857).

system.’¹³ In other words, the Supreme Court would no longer seem to be a major factor in preserving the *federal system*. This, of course, makes the scope of state power depend in large measure on the self-restraint of the national government.

Canada. Judicial interpretation of the distribution of powers in the Canadian Constitution has gone in the *opposite* direction. Until 1949, when the Supreme Court of Canada in Ottawa became the final court of appeal, for constitutional and other cases, the final authority for judicial interpretation of the Canadian Constitution had been the Privy Council in London. The decisions of the Privy Council over a period of fifty years almost denuded of meaning the general, or residuary, clause contained in the opening paragraph of section 91, except for periods of great national emergency. It is by reliance on this clause in time of war that the Dominion substantially supersedes the provincial governments. In times of peace, however, the Dominion has been denied any substantial power under it. Thus the peacetime powers of the Dominion are almost wholly restricted to the matters specifically enumerated in section 91. Even here, the most general clause, ‘regulation of trade and commerce,’ has been very narrowly interpreted. Most laws for regulating economic life, such as the manner in which particular trades and industries conduct their business, have been held to be beyond the power of the Dominion and to be solely reserved to the provinces under section 92.13, ‘property and civil rights in the province.’ Legislation providing for social services and social insurance has also been held to be a matter for the provinces under property and civil rights.

Indeed, section 92.13 has been so widely interpreted, and the general clause of section 91 so narrowly construed, that it can now be said, without any great exaggeration, that *the residuary power rests with the provinces and not with the Dominion*. The Privy Council and its successor have magnified the provinces, while the Supreme Court of the United States has magnified the federal government. Although the Privy Council and the Canadian Supreme Court have confirmed the provinces in a wide range of powers, they have never said anything to support the right of the provinces to withdraw from the Confederation. Nor has any province ever seriously claimed it. The high-water mark of provincialism is the claim frequently made in some quarters that the Confederation is a compact between the provinces and cannot be modified without the consent of all the provinces.

¹³ *The Commission on Intergovernmental Relations: A Report to the President for Transmittal to the Congress* (Washington, D.C.: U.S. Government Printing Office, 1955), p. 59.

It must not be thought, however, that the activities of the Dominion government today are less numerous and important than they were in, say, 1875. On the contrary, they are vastly greater, having grown steadily since the beginning of the twentieth century. The Dominion did not attempt, in the early years of the federation, to exercise all the powers that section 91 conferred on it. It was only when it began, from about 1900 on, to expand its activities that it ran into restrictive interpretations by the Privy Council. The decisions of the highest courts have not prevented the Dominion from enlarging its activities but they have been progressively hampering as the demands for Dominion action have grown. The Dominion could not have carried out during the depression of the 1930's measures comparable to the New Deal in the United States because the British North America Act, as interpreted by the Privy Council, reserved most of such powers to the provinces. The activities of the Dominion government have grown, but not to the extent to those of the federal government in the United States.¹⁴

A Note on West Germany. A summary word about the post-World War II experience of West Germany with federalism may be in order here. The compromises that resulted in the Basic Law of 1948 (*Grundgesetz*) reflect the Weimar pattern to some extent, but a genuine effort was made to limit the central government more in certain areas, including financial matters, and to increase the power of the *Laender* by making 'their' national house of Parliament, the upper house (*Bundesrat*), more influential. The latter consists of ministers from the *Laender*. Most novel—and perhaps most significant of all, although such a verdict must await the passage of time—was the adoption of the Constitutional Court (*Bundesverfassungsgericht*), patterned somewhat upon the United States Supreme Court. Endowed with the role of arbiter of the Constitution, this novel German tribunal not only can decide the constitutionality of legislative and executive-administrative acts, but also basic questions of constitutional interpretation that might arise (and indeed have done so) between the *Laender* and the central government as well as between the branches of the latter. To the surprise of a number of qualified observers, it has been an assertive as well as busy court, indeed, one that did not hesitate in one important instance—concerning Chancellor Adenauer's efforts to break the *Laender's* control over radio and television—to uphold the Democratic Socialist-led *Laender* and declared the stern Chancellor's ac-

¹⁴ See *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa: King's Printer, 1940), vol. 1, pp. 247–59. This volume consists largely of a history of Canadian federalism.

tion of instituting a nation-wide federal T.V. network unconstitutional.¹⁵ Significantly, it based its decision on Article 30 of the Constitution, which states that functions not assigned to the federal government remain under the jurisdiction of the *Laender*.

Further to the realm of division of powers, the 1948 Constitution gives to the upper house of Parliament an absolute veto in matters 'affecting the balance of the federal system' and a suspensive one in all other federal legislation. It has proved to be an able and effective defender of the interest of the *Laender* in the legislative process. The central government has *exclusive* legislative powers in eleven fields, including defense, foreign affairs, and railroads; and it has concurrent powers with the *Laender* in twenty-three, among others, comprising, civil and criminal law, anti-trust, labor, and agricultural regulation. As already indicated, all powers not specified in the Constitution are referred to the *Laender*—among these being education, religious and other cultural affairs, plus police and local government administration.

Although this brief sketch of West German federalism¹⁶ may have given an impression of an arrangement of a prerogative-studded well-entrenched 'Laender-rights' system, such an impression would fail to take cognizance of the not surprising fact of federal life that applies to West Germany as well as to Canada, the United States, Switzerland, and all other federal states: An unmistakable, and in all probability irreversible, trend toward centralization of powers in the hands of the national government.

FEDERALISM AND THE UNIFIED NATIONAL ECONOMY

The essential feature of a federal system is the co-existence of two governments with authority over the same territory and the same persons. Each of these governments is independent of the other. Each has a sphere in which it alone can rule and cannot be overruled by the other. At the launching of the two main federal systems under discussion, it was thought that the sphere of the federal government, on the one hand, and the sphere of the state and provincial governments, on the other, could easily be kept separate, that each of the governments would operate in an almost watertight compartment. The matters committed to the federal government were few and appeared not to

¹⁵ *Entscheidungen des Bundesverfassungsgericht*, xii (February 28, 1961).

¹⁶ See Gerard Braunthal, 'Federalism in Germany: The Broadcasting Controversy,' 24 *The Journal of Politics* 545-61 (1962).

bear very directly on life in the different states and provinces.¹⁷ The latter would control their own destinies without serious clash with one another or with the federal authority.

But this expectation, too, has been falsified by events. The Civil War in the United States revealed how the states could become dissatisfied with the policies of one another's governments, and how one group of states could become so incensed with the policies of the federal government as to secede from the Union. No subsequent issue in either country has threatened a civil war, but it has become more difficult, with each succeeding decade, for each government in the federation to carry on in isolation. There is an ever growing number of interstate and federal-state co-operative arrangements. These arrangements, or the lack of them, are often attended by bickering and quarreling between the different governments. To overcome the squabbling, the states are counseled either to have more and better co-operation, or to hand over further powers to the federal government so that one government will have control of the whole matter at issue. If present-day federalism is to be understood, it is necessary to see how this has come about.

Revolution in Transport and Communications. The American federation was founded when the Industrial Revolution was just beginning, and the Canadian Dominion was established before the full consequences of the Industrial Revolution had become apparent. To take only one aspect of it, the revolution in transportation and communications was still to come in 1789, and it was still in its early stages in 1867. In these circumstances, the states were of necessity very largely insulated compartments. People lived, not by buying and selling in distant markets beyond the boundaries of their own state, but by producing practically all their needs either on the family farm or in the local community close to home.

Agriculture was still the basic industry and principally concerned with local markets. The manufacturing industries were still small and mainly occupied in supplying a local demand. Strict accuracy would compel many important qualifications on the description just given. Intercolonial and foreign trade was important on the Atlantic seaboard in 1789 and in the remaining British colonies in North America in 1867, but it had not yet changed the general pattern of economic and social life. At the time the American federations were being launched, most of the states were relatively self-contained.

¹⁷ Henceforth, in this chapter, the word *state* is to be understood to include *province*, unless the context indicates otherwise.

When there was security from foreign aggression, events in the sister states and in other parts of the world had but a limited impact on each state. Federal union aimed at providing security from foreign intervention and did so successfully. With the principal conditions of life determined within their own boundaries, the states could have a genuine independence. There followed in each case a golden age of states' rights and provincial autonomy.

All the while, however, the onrushing economic transformation of the modern world was preparing the decline of this golden age. Free trade within the federation, improved transportation facilities, and rapid industrial and commercial expansion led to economic integration within the federation. In the place of the largely self-contained economies of the separate units in the federation, there grew a single unified national economy. *Independence gave way to interdependence.* Today, if farmers in the agricultural states cannot sell their produce profitably, workmen in the predominantly manufacturing states suffer unemployment, companies fail to pay their expected annual dividends, mortgage payments due to persons in still other states go into arrears. The order of dependence of such events on one another will vary, but it is at least clear that events that take place in one part of the federation have an impact in every other part. In fact, each of the states has become part of a larger whole with no direct power over what happens to the whole.¹⁸

Effects of Growing Government Activities. This momentous development does not of itself alone bring the several governments in the federation into closer contact, co-operation, or conflict. It was not the mere fact of the development of a world economy in the nineteenth century that brought national governments into conflict and war in the twentieth century. It was rather the fact of the people demanding, whether for adequate reasons or not, that their national governments should intervene in economic and social matters that turned economic rivalries into political conflicts.

So, within the federation, if governmental functions had remained limited to those of the mid-nineteenth century, the several governments would not always be coming across one another's paths as they are today. But they have not been so limited, as will be seen in detail in later chapters. It is the *immense increase in governmental activities* that produces intergovernmental disputes, demands for better co-operation between them, and arguments for

¹⁸ For a superb, analytical enumeration of the changes that took place in the United States between 1789 and 1942, see William Anderson, 'Federalism—Then and Now,' *State Government* xvi (May 1943), 107–12.

enlarging the powers of the federal government, the government whose arm has the longest reach.

Each government working within the sphere assigned to it by the constitution takes action that has repercussions in the spheres of the others. The federal government through its control of tariffs and currency and credit can affect economic conditions in each of the member states. There is scarcely any action it can take on these matters nowadays that does not affect some states favorably and others adversely. This was always true to some extent, but it is more marked now than ever before. On the other hand, the actions taken, or neglected to be taken, by one or all of the states may affect profoundly the matters with which the federal government has to deal. Thus the inability and/or unwillingness of the states to finance a road-building program commensurate with traffic volume compelled the United States Congress in 1956 to pass a mammoth multi-billion, fifteen-year, 41,000-mile road network project known as the National Interstate Highway System. The states were required to pay merely 10 per cent of the cost.

Equally, action taken by one state government may affect some or all of the sister states. Government regulations covering the grading and marketing of produce in the state almost inevitably affect the trade of other states. Laws passed by one state to relieve debt-ridden farmers in that state affect creditor interests in other states. Moreover, there are many matters on which the government of one state cannot hope to take effective action because some of the factors are beyond its control. If one state makes a levy on the industries within its boundaries for the maintenance of a particular health insurance fund, for instance, it takes the risk that industries will shun it in favor of other states which do not follow suit, and where, therefore, the costs of production are lower. If the federal government is restricting credit, state governments cannot hope to take successful measures for expanding production and employment.

Conflict and Co-operation within the Federal System. An excellent illustration of the need for interstate and state-federal co-operation is afforded by the predicament in which the oil-producing industry and the oil-producing states of the United States found themselves in the early 1930's. The great bulk of the oil production of the country comes from the wells in some half a dozen states,¹⁰ whence most of it flows in interstate commerce to the markets

¹⁰ Texas, Louisiana, California, Oklahoma, Wyoming, New Mexico, and Kansas. Smaller quantities are produced in Illinois, Mississippi, Colorado, Montana, Utah, Arkansas, North Dakota, and Nebraska.

in the other states. Between 1926 and 1931 immensely rich new oil fields were opened and production increased at a fantastic rate. With the onset of the depression at the turn of the decade, the demand for oil failed signally to keep pace with production, and the oil-producing industry suffered a catastrophic decline in prices and consequent cut-throat competition. Each state was faced with the additional problem of conserving an irreplaceable natural resource, which was being wasted by overproduction.

Under the Constitution, the regulation of the production of oil—but not its interstate shipment—is a question for the state governments. A state legislature could pass—and several of the legislatures in the major oil-producing states had passed prior to 1930—laws limiting and pro-rating production. But two serious difficulties faced states acting singly and alone. First, oil wells were tapped illegally and the product boot-legged into interstate commerce where control over it could only be exercised by the federal government. Second, it was futile for any one state to impose effective restrictions if the other major oil-producing states failed to act effectively in the same way. The producers in that state would be faced with disastrously low prices in their markets in other states as well as limited in the quantities they could produce and ship.

Complex co-operative arrangements were devised which brought a measure of stability into the oil-producing industry, even if they did not solve the larger problem of wise and effective conservation. Six of the major producing states entered into an interstate compact to restrict the production and marketing of oil. They relied largely on a federal government agency, the Bureau of Mines, to estimate demand and to suggest production quotas for the major oil fields. With these as a basis for discussion, the co-operating states reached agreements on quotas and implemented them by state laws. Congress then enacted a federal law forbidding the transportation in interstate commerce of oil produced and shipped in contravention of state laws.²⁰ The oil-producing industry is, in many respects, unique, and the severity of the crisis it underwent was due to a fortuitous combination of circumstances. Yet, other illustrations can be given to show that federations are pushed to expedients of this kind under the conditions of a complex interdependent economy.

Interstate Trade Barriers. Another instance of the difficulties that beset the unified national economy in the federation is the rise of trade barriers be-

²⁰ Cf. Joseph E. Kallenbach, *Federal Coöperation with the States under the Commerce Clause* (Ann Arbor: University of Michigan Press, 1942), pp. 325-31.

tween the states. These trade barriers are facilitated, although not entirely caused by, the extending regulation of economic life by state governments. They run counter to one of the basic purposes of federal union. As already noted, one of the primary aims of the federal unions of the United States and Canada was to create a great free-trade area, and both constitutions contain provisions forbidding the states to erect barriers against the trade of other states.

In recent years, particularly in the depression decade 1930-39, state governments in both countries resorted to a variety of devices designed to protect home producers against competition from producers in other states. In considerable measure it was a phenomenon of the depression. To the extent that the national economy failed to work satisfactorily, the states were tempted to try to find viable state economies within their own boundaries. The movement assumed much more significant proportions in the United States than in Canada. Much of the Canadian population is found in clusters in relatively small areas, and many of the clusters are separated by great distances and geographical barriers, which limit interprovincial trade. Furthermore, Canada has concentrated a large part of its economic efforts on production of a few products for the international market. Interprovincial trade in Canada is not nearly as significant as interstate trade in the United States, and there is correspondingly less temptation to seek palliatives for economic distress by interstate trade barriers. Illustration is therefore drawn from the experience of the United States.

RESTRICTIONS. The hampering restrictions employed by the states take a multitude of forms. The frank levying of imports or duties on goods coming from other states is forbidden by the Constitution, and therefore barriers to trade have to be masked under the guise of laws that the states have power to enact. One of the most common has been the use of the state taxing power to levy higher rates of taxes on imported products than on native products, or to apply special taxes on non-resident persons or corporations doing business in the state. For example, some states with an important dairy industry have tried in this way to limit the sale of oleomargarine manufactured in other states. Many states impose a discriminatory tax on imported liquors. Some states impose special taxes on chain stores and higher license fees on dealers who handle imported products.

All states maintain a variety of laws generally acknowledged to be necessary for the protection of 'public health and safety.' Many states have framed and/or administered these regulations in such a way as to dis-

criminate against imports from other states. Laws requiring the inspection of milk and dairy herds have been applied so as to exclude milk produced in other states. Laws providing for inspection of and, if necessary, quarantine on plants, fruit, nursery stock, and livestock to prevent the spread of pests and disease have also been applied at times so as to exclude imports from other states. Economic protection masquerades as biological protection. State laws requiring the grading and labeling of products to protect purchasers against fraud or inferior quality have been framed or applied in such a manner as to prejudice imports from other states.

Sometimes the discrimination thought to be involved in the administration of such laws is largely imaginary or unavoidable. In any event, many of the trade barriers erected in the states have originated as retaliatory measures against discriminations, real or imagined. There has been much mutual re-crimination between states over laws of this kind, something that tends to spread into other aspects of their relationships.

Those discussed above are but a few of the many kinds of trade restrictions that have been employed by some or other of the states from time to time. Some of the devices employed are no doubt unconstitutional and can be—and have been—attacked in the courts, with varying degrees of success.²¹ Others can be curbed by Congress acting under the interstate commerce clause of the Constitution—in the realm of labor regulation, for one. But states acting singly cannot deal with the situation. It was regarded as sufficiently serious to bring representatives of most of the states together in the National Conference on Interstate Trade Barriers in 1939. Following the Conference, the states made a co-operative attack on the abuse and succeeded in halting the movement toward still more irritating trade barriers and in securing the repeal of some of those already existing.²² The experience with trade barriers provides another illustration of the way in which the states in a federal system fall foul of one another nowadays, and of the need for vigilant co-operative action.

There are many matters in which all governments should act in concert and unison. Failure to do so causes friction and inefficiency. To take a Canadian example, the Dominion government and its agencies control rail-

²¹ For example, see *Mintz v. Baldwin*, 289 U.S. 346 (1933)—upheld; but *Minnesota v. Barber*, 136 U.S. 313 (1890)—struck down.

²² On the general subject of trade barriers, see F. Eugene Melder, 'Trade Barriers between States,' *Annals of the American Academy of Political and Social Science*, cccvii (1940), 54-61. This volume of the *Annals* contains a number of articles bearing on the subject matter of the present chapter.

way rates and also meet the deficit on the operations of the publicly owned Canadian National Railways. The Canadian National Railways carry about half the total Canadian railway traffic, and in normal times the deficits on its operations are substantial. The provinces build the highways and determine, through motor licenses and gasoline tax, the conditions on which motor carriers can use them. For the past three decades or more the provinces have, in effect, been subsidizing motor carriers by failing to tax them heavily enough to cover their proportionate share of the cost of construction and upkeep of highways. Motor carriers take advantage of the low costs of operation to take business away from the railways and thus to increase the deficits on, and the necessary Dominion government subsidies to, the Canadian National Railways. Such a situation argues for a single coordinated policy of regulating all transportation by rail or road. This can be had only in one of two ways. Either all governments must co-operate closely in the matter, or all authority over the regulations of these forms of transport must be transferred to the federal government.

METHODS OF CONSULTATION AND CO-OPERATION

Methods and organs of consultation and co-operation have been developing over a period of years in both the United States and Canada. In Canada they are still in rudimentary form, going little beyond informal consultation between governments and government officials and occasional Dominion-provincial conferences on critical issues. The conferences often come to little because the governments have not established secretariats to accumulate and analyze data and to prepare for the work of the conferences. Delegates who come to conferences inadequately briefed on the matters to be settled hesitate to agree on anything because they are not in a position to estimate the consequences of any agreement they might make. The United States has gone further in developing methods and organs of consultation; but even here a crying need exists for more knowledge about the facts concerning the number and nature of intergovernmental relationships and the sources and extent of the frictions that appear.

The Interstate Compact. One method for co-operation between the states in the United States is the interstate compact. Article I, section 10, by implication authorizes the states, with the consent of Congress, to make compacts with and among each other. For half a century now, the compact has been used with reasonable success in dealing with matters that can be

settled once for all, or for long periods of time, and do not require frequent reconsideration in the light of changing circumstances. By far the greater number of the approximately seventy interstate compacts, entered into since the end of World War II, have dealt with boundary disputes, the regulation of boundary waters, interstate rivers, harbors, and bridges and highways speeding violations. The giant Port of New York Authority, created by action of the legislatures of New York and New Jersey in 1921, and now staffed by 4500 employees, is one of the most successful examples of such an interstate compact.²³ One out of every four of the 13,500,000 residents of the port district of New York City, Northern New Jersey, and environs is supported, directly or indirectly, by the waterborne commerce handled in the huge port area, and about 14,000,000 overseas and domestic air travelers use the Authority's three airports. In 1963 the Authority operated a total of 24 bridges, tunnels, piers, air, truck, train, and other terminals. At the end of the preceding fiscal year its investment in these was circa \$1250 million, with an equity in these facilities of approximately \$600 million.

Uniform State Laws. There are numerous bodies in the United States devoting some or all of their efforts to securing uniformity in state laws on particular topics. Of these, the National Conference of Commissioners on Uniform State Laws has perhaps the longest record of sustained activity. The members of the Conference are, in a sense, representatives of state governments, and they have agreed upon and drafted many uniform laws on various subjects, which they then recommend to state legislatures. Many states have adopted one or more of these laws, but few such laws have been adopted in all states. The greatest success has been achieved with laws that are interpreted and enforced by the judiciary, laws relating to such matters as negotiable instruments, warehouse receipts, sale of goods, and court procedure. There has been much less success in getting uniformity in laws that require extensive use of the administrative process in their enforcement, i.e. in their interpretation and application by the executive branch.

In any event, where use of the administrative process is involved, it is not sufficient to get state legislatures to adopt uniform laws. Where officials have

²³ Others among the better-known interstate agencies, established by interstate compacts, are: the Pecos River Commission; the Atlantic States Fisheries Commission; the Ohio River Valley Water Sanitary Commission; the Interstate Oil Compact Commission; the Delaware River Basin Commission; and the Southern Regional Educational Board. See Richard H. Leach and Redding H. Sugg, Jr., *The Administration of Interstate Compacts* (Baton Rouge: Louisiana State University Press, 1959).

a discretionary power to make rules and decisions and are relied on generally for enforcement, administration sets the measure of the law. Neither uniformity nor effective co-operation can be had without frequent consultation between state executives, or at least between those state officials concerned with particular subjects such as the regulation of insurance companies. Numerous associations of state officials such as the National Association of Supervisors of State Banking, The National Convention of Insurance Commissioners, and The American Association of Motor Vehicle Administrators have been formed to discuss the common or related problems of their members. These associations have made some progress in interstate co-operation at the administrative level, subject always to the limits imposed by political considerations.

Council of State Governments. Because both administrative and political considerations are always involved and must be considered together, the most hopeful development in interstate co-operation is the Council of State Governments organized in 1935. A General Assembly of the Council composed of delegates representing both state legislatures and executives meets every second year to discuss both legislative and administrative questions. The Council has established a secretariat which is continuously engaged in research and in the publication of bulletins on the problems of state governments. The Council has also been successful in persuading most of the states to establish permanent commissions on interstate co-operation. From time to time the Council calls conferences on particular problems. The National Conference on Interstate Trade Barriers referred to above was so called. The Conference, and the influence of the commissions on interstate co-operation, were effective in checking the alarming growth of trade barriers.

The movement has gone on to promote the establishment of interstate commissions on particular subjects of common concern. These commissions are composed of representatives of the states that have agreed to co-operate in searching for a solution. While such interstate commissions are still few in number, they have made considerable progress in dealing with the matters they have attacked. Outstanding examples are the Interstate Commission on Conflicting Taxation, which has eliminated some of the confusion in state tax laws and procedures, and the Interstate Commission on Crime, which has tried to secure interstate co-operation in the enforcement of the criminal law of the several states.

These are some of the methods being used to get uniform or co-operative

action by the states.²⁴ The vigor and success of the work of the Council of State Governments show that there is still a determination to make federalism work and still resourcefulness in finding ways and means. By bringing the states together to find solutions for common problems without abdicating to the federal government, the Council has established a counterpoise to the strong centralizing tendencies of the day.

Federal-State Co-operation. Illustrations have already been given to show that, in some matters, interstate co-operation is not enough. Federal-state co-operation is also needed. It is often found that power to regulate some particular aspect of economic life is divided by the Constitution between the federal and the state governments. Unless the governments concerned agree on legislation and administration, there is likely to be confusion and conflict in the regulation. To give precise illustrations would require exposition of the complexities of the distribution of powers under the Constitution as interpreted by the courts. It will suffice here to indicate some of the methods of federal-state co-operation in use in the United States,²⁵ many of which have been used to a lesser degree in Canada. It must be remembered that in neither country has the co-operation achieved been adequate to the growing need.

Federal statutes sometimes adopt the relevant provisions of state law as the federal law to be applied in that state. The so-called *fair trade laws* represent an example, resulting in the Miller-Tydings and McGuire Acts of 1937 and 1952, respectively. State laws often adopt the relevant provisions of federal laws or regulations in the same way. In the New Deal era, and later in World War II, many state laws were enacted to facilitate federal laws and policies for promoting economic recovery and the war effort, respectively. Federal and state administrative agencies and officials have co-operated in such fields as railway regulation, vehicular traffic, and enforcement of food and drug legislation. Sometimes attempts are made to fuse the administration of federal and state laws on a particular matter by making state officials federal agents for administering the federal part of the activity, and vice versa.

CO-OPERATIVE FEDERALISM. The full range of the devices of interstate and federal-state co-operation, of which examples have been given here, is some-

²⁴ For more extended treatments of interstate co-operation, see, among others, W. Brooke Graves, *American State Government*, 4th ed. (Boston: D. C. Heath Co., 1953), ch. xxiv.

²⁵ For detailed discussion, see Kallenbach, *op. cit.*; Graves, *loc. cit.* ch. xxv; and the *Report of the Commission on Intergovernmental Relations*, *op. cit.*

times described as the new co-operative federalism in contrast to the older federalism, in which state and federal governments went their own separate ways on most matters. The meshing of governmental action so far secured in this way is admitted to be inadequate, but its further development and improvement are put forward as the only alternative to massive centralization under the federal government. There is little doubt that this is true. The great increase in the activities of governments is the main cause of the need for intensive intergovernmental co-operation, and there is certainly no reason to expect a decline in the functions of government. So, if co-operative action does not prove to be adequate in particular fields, the alternative is to confer full authority in such fields on the federal government. Because the Canadian provinces could not get together for concerted action in establishing provincial unemployment insurance schemes, they finally accepted an amendment to the British North America Act transferring full constitutional authority over this subject to the Dominion. Some are disposed to think that co-operative federalism is subject to so many frictions and paralyzing delays as to put very severe limits on its development.

It is plausible to think that if a single government is put in control of a particular subject, it will be able to work out a unified, coherent policy. Reasons will be suggested later for thinking that this is too optimistic a view if wholesale centralization were resorted to, and that therefore the utmost effort should be put into making co-operative devices effective. It must be stated, however, that steady co-operation of all or most of the governments in the federation over an extended period is very difficult to maintain. Ultimately, all co-operative enterprises of governments are political matters and cannot be shielded from the impact of politics. Each government, whether state or federal, necessarily responds to the view of the public interest held by the ruling political party or by the combinations of interests that for the time being have the preponderant influence in the councils of governments. Different parties and different combinations of interests may hold power in the different governments at the same time. Diverging conceptions of the public interest are likely to pull some of the meshing gears apart from time to time.

THE TREND TOWARD CENTRALIZATION

Because the fields in which the various governments in the federation come across one another are now so numerous, and because difficulties,

delays, and uncertainties always beset co-operative action, some have concluded that federalism is almost obsolete. Because the separate states no longer have an independent economic life of their own, conditions beyond their control may at any time make their independence a sham. When this happens, they become dependent on the federal government. Whether or not this is correct, it is at least clear that the unified national economy in the conditions of widespread governmental activity and regulation tends toward political centralization.

Acting by themselves, the states could do little to overcome the serious depression of the 1930's. In the depths of the economic crisis, almost everyone, both in the United States and Canada, looked to the federal governments, echoing Will Rogers' admonition to the President to do *something*—'even if it is only to burn the White House!' ²⁰ The New Deal brought a tremendous upsurge of federal government action in the United States. The national government thus undertook large new activities or greatly expanded its former activities in relation to such matters as transport, public utilities, banking and credit, stock and commodity exchanges, labor-capital relations, agricultural production, drought relief, housing, social security, and conservation. Some of the functions undertaken were later abandoned, but the balance have every appearance of being permanent additions to the work of the federal government—regardless of which of the two major parties happens to be in power at any given time.

Government Regulation. The persistent centralizing movement could be halted if we could reverse the trend toward ever-greater governmental functions. But the present-day conviction is that business and social life generally must be extensively regulated by governments. When business is organized on a nation-wide scale with many concerns operating in every state, and when labor unions are national, if not international, in scope, the argument for nation-wide regulation of business and labor-capital relations is very strong. Such facts as these reveal the significance of the enlarged interpretation of federal powers by the Supreme Court of the United States—and by Congress, for that matter. It is a response to a need that is felt in Canada as well.

Centralizing Tendencies in Public Finance. Another urge to centralization is found in public finance. Here again the reasons are the same: the unification of the economy and the multiplying of governmental functions. In both

²⁰ Quoted by Ernest S. Griffith, *The Impasse of Democracy* (New York: Harrison-Hilton, 1939), p. 13.

Canada and the United States many of the most expensive of the new functions of government were allotted to the states by the distribution of powers in the constitutions. For example, highways, education, and the bulk of the social services were conceived to be their responsibilities. But at the same time it was thought to be contrary to the interests of the country as a whole that there should be wide disparities in the number and quality of these services in the several states.

Inequalities between States. Unfortunately, the capacities of the different states to raise the revenues needed to maintain these services at a uniform level vary greatly. Some can maintain a high level of services at moderate rates of taxation while others cannot do so even at very high rates of taxation. That is because some states have prospered while others remain chronically poor relations. In most cases the plight of the latter is largely due to the poverty or lack of variety of their natural resources. Their condition is aggravated, however, by centralizing tendencies in the economic system.

Within the free trade area that the federation maintains, industry and commerce tend to locate in the areas richest in wealth and resources. In 1962, for example, the four states of the Middle Atlantic Region of the United States—New York, New Jersey, Pennsylvania, and Delaware—earned 24 per cent of the nation's income. Manufacturing gravitates to the areas with the best resources of raw materials, industrial skill, and power in form of coal or electricity. Yet the manufacturing industries distribute their products to, and draw their profits from, all parts of the country. The number of products that are nationally advertised is an index of the scope of this business. A similar centralization occurs in the distribution of products. Chain stores and mail-order houses with head offices in a particular state do a nation-wide business, drawing to one point profits that formerly were made and kept by local merchants all over the country. Also, the financial institutions—banks, insurance firms, and trust and loan companies—located in particular areas do business in all areas.

The net result is the pooling of wealth in the states already blessed by nature with rich resources or strategic position, enabling the governments of these states to tap the pools by corporation tax, income tax, and inheritance and estate taxes, while the other state governments are denied comparable access to them. Thus the difficulties of the poorer states in finding tax revenues to support all the activities expected of them are intensified.

Federal Grants-in-Aid. There is one government, however, that has ready

access by taxation to all pools of wealth in the country, wherever found. That, of course, is the federal, or national, government. The poorer states, which find it difficult to finance their activities, and other interests that want a high level of government services, are tempted to argue that they have an inherent right to be 'taken care of' by the national government. When that government has collected large funds, so goes the argument of the poorer states, it should either *make grants to the several states*, enabling each of them to maintain the desired level of government services, *or it should itself take over from the states* the more costly functions of government and administer them.

CONSEQUENCES. When either course is adopted, it enhances the importance of the federal government and diminishes the autonomy and independence of the state governments. It is almost inevitable that some federal control will accompany the grants, as well as assistance and co-operation. If the sums are large in amount, as they usually must be to accomplish their purpose, the authority that takes the odium of collecting them is unlikely to give a completely free hand to other authorities in spending them. Control is usually secured by earmarking the grants for specific purposes such as highways, airport and hospital construction, public health services, old-age pensions, child benefit, or unemployment relief. To earn the grant the state governments must comply with the specifications laid down by the federal government covering the particular activity that is being aided.²⁷ Techniques for federal supervision include periodic reports, audits, and inspections, in addition to the basic specifications.

In the United States and Canada such *grants-in-aid*, as they are called, have been in use for many years, aiding various activities carried on by the state and provincial governments.²⁸ At the end of 1961 federal grants in the United States made up about 18.5 per cent of the total revenues of the state governments! These ranged all the way from 7.2 per cent in New Jersey to 39.8 per cent in Alaska! From a total of \$5.5 million in 1915, federal grants-in-aid to the states had risen to \$6.5 billion in 1962. There were times in Canada in the 1930's when the federal grants-in-aid comprised approximately one-third of the provincial revenues. In some measure then, depending on their amount, these grants require the state governments to dance to the tune of

²⁷ See the *Report of the Commission on Intergovernmental Relations*, op. cit. ch. v, and *Federal Grants-in-Aid*: Report of the Committee on Federal Grants-in-Aid (Chicago: Council of State Governments, 1949).

²⁸ In Canada these grants-in-aid are not to be confused with the unconditional Dominion subsidies to the provinces provided for by the British North America Act, sect. 118.

the federal government, which selects the pieces to be played and prescribes the tempo and manner of execution.

ALLOCATION OF GRANTS-IN-AID. This is not a serious interference with state independence as long as the aided activities are only a few of those in which the state governments are engaged. However, grants-in-aid have not thus far been signally successful in reducing the disparities between the financial positions of the various state governments. Generally speaking, the principles on which the amounts of grants allocated to the several states are calculated do not provide sufficiently for discrimination in favor of the poorer states. Common forms are the *proportionate* grants under which the more a state can afford to spend of its own on the particular service, the more federal assistance it will secure. The poorer states can rarely resist the offer of a proportionate grant and they divert some of their revenues from unaided to aided services in order to earn the federal grant. State budgets thus are often distorted. However, the 1956 highway construction bill provided for a 90 per cent federal grant, with the states' contributions limited to a mere 10 per cent.

A strong body of opinion exists which presses for the other alternative—that of transferring some of the costly functions now performed by state governments to the federal government to be administered as well as financed by it. Such a course eases the financial difficulties of the governments of the poorer states, and puts them in a better position to carry the functions that remain to them. In the past thirty years it has been followed in the allocation of sole responsibility for several of the new social security measures to the federal government. In so far as it is followed, it adds to the power and prestige of the federal government. But when in 1958 President Eisenhower proposed to abandon some federal government programs, notably in the financing of vocational education, in return for a 60 per cent cut of the federal tax 'take' on telephone charges, the vast majority of the states objected vehemently.

THE TAX CREDIT DEVICE. The fiscal powers of the federal government are not entirely centralizing in tendency. The difficulties in the way of any one state's undertaking to provide unemployment compensation have already been noted. By the use of a device known as the *tax credit*, the federal government in the United States was able to remove this difficulty. Under the Unemployment Compensation sector of the Social Security Act of 1935, Congress levied a tax on the payrolls of all employers in certain specified industries across the country. It also provided that by far the greater part

of this tax would be rebated to employers in those states which established an unemployment compensation scheme complying with certain federal requirements.

In effect, a state that refused to set up such a scheme would be heavily penalized for its refusal, and all states quickly adopted unemployment compensation laws. While this is almost dictation by the federal government to states that did not want to provide unemployment compensation, it is, at the same time, an enabling provision for those that wanted to do so but were restrained by the lack of assurance that other states would do likewise. The capacity of some states to meet what they consider to be serious problems can be enlarged by use of the fiscal powers of the federal government.

Some of the conditions attached to federal grants-in-aid may have a similar long-run influence. When a federal grant to assist a particular state activity is made on the condition—as it is under the Social Security Act of 1935—that the state officials who administer the activity have certain qualifications and be appointed by merit, improvements in state administration are likely to result. Federal guidance and leadership such as has developed in the social security program in the United States, of which more will be said in a subsequent chapter, may help state governments to help themselves.

Centralization by Constitutional Amendment? Yet the net result of the tendencies in public finance, as in economic and social regulation, is to aggrandize the federal governments at the expense of the states. If these tendencies continue, and if they accelerate as they have in the past fifty years, the maintenance of a genuine federal system with its separate and exclusive spheres of governmental power may become impossible. In fact, there are numerous reasons for caution in supporting or acquiescing in these tendencies, which will be considered later. For the moment, it is important to remember that this centralization cannot take place merely because an electoral majority, and Congress or Parliament, happen to be in favor of it. In many cases the written constitution stands in the way, ensuring to the separate states the sphere of power that they presently possess. Certain proposals for enlarging the power and responsibilities of the federal government require amendments to the constitution, and such amendments are not easily carried through. There are always elements in the community that resist, even if they are no more than the state and provincial politicians who do not want to see the range of matters under their direct control narrowed. The slogans *states' rights* and *provincial autonomy* continue to have a strong ring—even if they are of doubtful substance.

IS FEDERALISM OBSOLETE?

Need for Concerted Action. It has been suggested already that in some quarters federalism is regarded as obsolete. In many of the problems with which governments are expected to deal, no one government in the federation can act effectively alone. The attempt to act in concert involves so much discussion and delay that many problems are not met at all. What each government does affects the conditions facing the others. They often work at cross-purposes and this adds to the friction. Politicians are not above using the distribution of powers to evade responsibility. To get elected to one of the legislatures in the federation they promise to do things that the Constitution reserves to other legislatures, and then try to excuse themselves by blaming the Constitution or the other governments in the federation. Therefore it is urged that no re-allocation of powers will sufficiently moderate the friction, the frustration, and the evasion of responsibility. Those who hold to this view want the states to be abolished.

Claims of Expensive Duplication. Associated with this conclusion are others who hold that there is a great deal of overlapping and duplication among the several governments, adding unjustifiably to the ever-mounting cost of government. They point to the fact that federal departments of labor, agriculture, health, and so on are duplicated by state and provincial departments of the same name. They say that a country that has to support eleven or fifty-one governments is ridiculously overgoverned and that an immense reduction of government expenditures could be had by abandoning federalism altogether.

Whatever may be the case for abandoning federalism in favor of a unitary state, it cannot be rested on this latter ground. The numerous departments of labor, agriculture, and health are not mainly engaged in duplicating one another's efforts. Some duplication there is, but its cost is negligible relative to the total expenditures of all governments in the federation. At any rate, this was the considered conclusion of the Sirois Commission in Canada, which made a careful investigation of the charges of duplication and overlapping in the several governments in Canada.²⁹ The Commission on Intergovernmental Relations came to a similar conclusion in the United States in 1955.³⁰

²⁹ *Report of the Royal Commission on Dominion-Provincial Relations*, 1940, vol. II, p. 183.

³⁰ *The Report of the Commission on Intergovernmental Relations*, op. cit. Introduction and Part I.

Furthermore, the sums that would be saved by abolishing state and provincial governments are such a small fraction of total expenditures of governments in the federation that it would not be worth the upheaval involved. The reason for this is that the cost of upkeep of legislatures, of the internal housekeeping of government departments, and of the salaries of civil servants is but a small part of the current expenditures of governments nowadays. The great outlays of state governments are in regulating community life and in providing expensive services demanded by the public. The only really effective way to lower the cost of government is to abolish some of its numerous activities. As long as these activities are to be maintained, the abolition of ten or fifty legislatures and governmental establishments would not give any very substantial relief to the taxpayer.

The Lessons of War. The question of whether the sprawling, poorly co-ordinated federal system is now obsolete, a mastodon blundering about in a streamlined age, is not so easily answered. The first consideration to be kept constantly in mind is that the prime cause of the present confusion in federal systems is the greatly augmented scope of governmental action. If governmental management of the life of the people in peacetime had stayed at the level reached in World War II, there is little doubt that federalism would be obsolete. The federal governments ran the war and decided almost everything connected with it.

The state governments remained in a condition of suspended animation with no substantial sphere of independent initiative. They continued to perform most of the functions they had performed at the outbreak of war and cooperated in the war effort, but decisions at Washington and Ottawa left them little independent choice concerning what they would do. Peacetime governmental operations of wartime magnitude would equally have to be directed by a single central government. State and provincial governments might remain as agents for carrying out the decisions of the federal governments, but they would cease to be principles operating on their own account.

The Continuing Diversity of a Continental Country. However, if governmental activities can be stabilized at somewhere around their immediate prewar scope, there is still a great deal to be said for a federal system. The United States and Canada each cover half a continent. Few of the successful unitary states have covered an area greater than that covered by one of the larger states or provinces. Britain's 94,000 square miles, for example, correspond to the area of Oregon; France's 212,000 to Manitoba. It is ex-

tremely difficult for a single government to carry out a wide range of activities over half a continent and carry them on effectively.

The difficulty does not arise merely from the size of the territory; in fact, modern means of transport and communication are overcoming the physical limitations of time and distance. It arises rather out of the *diversity of conditions* that mark the different parts of a continental country. It was pointed out early in the chapter that the conditions of life and the character of the people vary in the different states at the time of union. These differences are lessened as a common life is shared within the union over a considerable period of time, but they still remain highly significant.

REGIONALISM. The significant differences have become, in most instances, *regional* rather than state or provincial in character. It would not be contended that present-day differences between the conditions of life in New Hampshire and Vermont, Georgia and Alabama, New Brunswick and Nova Scotia, Alberta and Saskatchewan are very marked. But there are distinctive differences between the New England region and the deep south, between the maritime region and the prairie region in Canada. The United States and Canada are made up of a number of distinct regions. The people in each of these regions have common problems and a common outlook on many matters, and their problems and outlook differ markedly from those which form the identifying characteristics of other regions. This is the point made by those who argue in the United States for the amalgamation of groups of states under a smaller number of regional governments. They are not arguing against federalism *per se*, but for a drastic revision of its territorial pattern.³¹

It may be that some such revision will prove to be necessary if federalism is to be rescued from its present difficulties. However, there is no large support for it at present and no agreement at all on what states, or parts of states, should be combined in the new regions. Only one thing is obvious: provinces like Quebec, which, as they stand, are distinct cultural entities, would have to remain as they are. Whatever the outcome of suggestions of this kind, the important point for present purposes is the continuing diversity of conditions in a continental country.

Federalism: Ideals and Facts. Attempting to please all factions interested in the maintenance and preservation of the federal structure in the United

³¹ For example, see William Yandell Elliott, *The Need for Constitutional Reform* (New York: McGraw-Hill, 1935), pp. 191-8.

States, the Commission on Intergovernmental Relations viewed the problems of federalism in the light of these ideals in 1955:

Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize co-operative intergovernmental arrangements where appropriate to attain economical performance and popular approval; reserve national action for residual participation where State and local governments are not fully adequate, and for the continuing responsibilities that only the National Government can undertake.³²

But the naked facts are that it has been the national government that has had to deliver the 'goods,' time and time again. No matter how well-intentioned the several component parts may have been, they have frequently been incapable of performance.

This is by no means astonishing. In No. 17 of *The Federalist* papers, one of his many shrewdly analytical pieces of political practice and theory, Alexander Hamilton went to the heart of the matter some 175 years ago:

Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards their government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter.

Broadly speaking, in a very real sense the Commission on Intergovernmental Relations was primarily confronted with the twentieth-century facts of life adverted to in Hamilton's last sentence.

DECENTRALIZATION THROUGH FEDERALISM

If a continental country like the United States or Canada were ruled by a single central government, that government would not be able to adjust all the laws it would have to make and administer to the varying conditions of the different regions. Laws—and even rules and regulations made under them—have to be framed in general terms. When we discuss the civil service we shall see that, under democratic government at least, there is a general

³² *The Report of the Commission on Intergovernmental Relations*, op. cit. p. 6.

insistence that laws should be administered uniformly with very little discretionary adaptation to special circumstances. There are deep underlying reasons for this characteristic of administration.

In fact, uniformity of law and uniform enforcement of it are highly desirable as long as the laws are aimed merely at generally acknowledged anti-social conduct. The definition of murder and its prescribed punishment should be the same everywhere and should be enforced impartially. But when government is regulating everyday life in great detail, diversity of rule and application to meet special circumstances is necessary. This is the reason for the development of the administrative process, which, as will be demonstrated later, imposes a considerable strain on the constitutional safeguards of liberal democracy.

Traffic codes, old-age pensions, the content of the public-school curriculum should vary according to the general standard of living and the cultural and economic conditions of different areas. If general laws on these and a multitude of other matters were enacted and enforced uniformly across the country, there would be deep dissatisfaction over them almost everywhere. Uniformity in these circumstances is sterile, or disrupting, or both.

The reason for adopting federalism in the first place was to arrest the reach of a distant government that is not trusted to take account of unique circumstances in different areas. As long as the federation with its autonomous states continues to exist, the legislatures of these states adapt the laws, partially at least, to the special circumstances of particular areas. Consequently there is less need to rely on the administrative process and less strain on the constitutional safeguards than there would be if one central legislature made all the laws for the country.

Half a continent cannot be governed by a highly centralized machine in Ottawa or Washington. It would be necessary to try to decentralize administration by establishing regional offices under the direction of officials with discretion to adjust the laws to regional conditions. If any proof of this is required, it is to be found in the growing recognition in Britain, a unitary country, of the need for regional authorities that will stand midway between the municipal governments and the central government. Cautious experiments in this direction were begun during World War II.

If such expedients are desirable in a tight little island like Britain with a homogeneous population and no great diversity of conditions, they would be inevitable under the continental conditions of government in North America. If the decentralization of government which federalism provides

were abandoned, it would become immediately necessary to try to restore it in another form by setting up regional branches of the national government.

Excessive Rigidity a Weakness of Centralization. The difficulty is, that as long as governments are kept under control by the governed, there must be fairly narrow limits to discretionary adaptation of laws to special circumstances. The regional branches to which the central government would delegate some discretionary power could not be given enough discretion to make adequate adjustment. They could not begin to respond to the unique aspects of life in a particular region as fully as do the present state governments, each of which must follow the temper of its own particular electorate and does not need to concern itself with what is being done in other parts of the country except in a limited range of matters.

The inability of the regional offices of the national government to adjust uniform nation-wide laws to varying regional conditions is not the only difficulty. Many problems with which governments are expected to deal are peculiar to a particular region and do not require action on a national scale. The national government would either deal with these inadequately or ignore them entirely.

There are even now some matters over which federal governments have sole authority but which are of prime importance in only one or two states. For example, the Dominion Parliament in Canada has exclusive authority over seacoast fisheries. This is necessary because seacoast fisheries involve international negotiation and treaties that the national government alone can undertake. However, the only provinces with a vital interest in seacoast fisheries, in the sense that they are a basis of livelihood of a substantial part of the population, are Newfoundland, Nova Scotia, and British Columbia. The latter two have complained sharply that the Dominion government neglects the fisheries and misunderstands the problems of the industry.

In the past, at any rate, there has been much substance in the complaint. If one compares the range of services provided for agriculture and the amount of scientific knowledge brought to bear on agricultural problems by the Dominion with what the Dominion has done to assist the development of the fishing industry, the disparity is so marked as to require explanation. There are a number of explanations, but most of them turn on one central consideration: Agriculture is an important industry in every province and can claim at every stage a livelier interest and a larger sympathy at Ottawa than fisheries. What is a vital concern in all provinces will always have a prior claim to that which is of serious interest to one or two provinces only.

Farmers will always have more votes in Dominion elections than fishermen.

Such a priority is not, in general, a just ground for criticism. But the fact that it exists, and is likely to continue to exist, does suggest that there should be, in a country of great diversities, state—or regional—governments. Wherever possible these governments should have control over matters of unique concern to their own areas and should have a substantial sphere of independent action. Where this is so, the electorates to which the governments are responsible will see to it that vital regional interests are not neglected. Energies will be harnessed to the tasks in hand and not exhausted in futile efforts to get distant governments to do what needs to be done.

So while there are some spheres in which federalism is inefficient, there are more in which decentralized autonomous governments are necessary to efficiency. On these grounds alone it might be concluded that federalism is not obsolete, although particular federal systems may badly need revision. The principal consideration in favor of federalism, however, has not yet been stated.

FEDERALISM AND DEMOCRACY

In Canada and the United States, with their marked sectional differences, it is extremely doubtful whether democratic government could be maintained at all except through the device of federalism. Democracy has been defined as government by consent. Probably the greatest problem in a democracy is to construct electoral majorities that can agree on what the government should do—a problem that has plagued the unitary governments of continental Europe more or less incessantly. The problem grows more acute as the number of decisions to be made in the political arenas increases. If all these decisions had to be made in the national arena, so many diverging sectional interests would be brought face to face on so many issues that it would be impossible to get a majority in the electorate or in the legislature that would agree on how all these issues were to be dealt with. Federal, or national, politics in the United States and Canada have been immensely simplified by the fact of a number of lesser political arenas, the states and provinces, in which a great many issues are settled without ever rising to the level of national politics at all.

Reconciling Unity and Diversity. It is not merely, or even mainly, that political squabbles are decentralized in the 'insulated chambers' of the states.

A lot of little fights may be as serious as one big one. The great triumph of federalism is that many matters that would cause the sharpest conflict if they were thrown into national politics cause little dissension when dealt with separately in each state. Federalism enables many regional interests and idiosyncrasies to have their own way in their own areas without ever facing the necessity of reconciliation with other regional interests. Individuals identify themselves with particular regional interests and find in them a satisfying expression of many facets of their personalities. *Federalism is a device for combining unity and diversity in accordance with the requirements of liberal democratic ideals.* (But, of course, there are liberal democracies that have a *unitary* form—e.g., Britain and France—and dictatorships that, at least in theory, have a *federal* form—e.g., the Soviet Union.)

Even as things stand at present in America the clash of sectional interests in Congress is very marked. It helps greatly to explain why Congress often cannot reach a majority decision on what should be done in the national interest without *logrolling*—i.e. the famous practice of 'you vote for me and I'll vote for you.' If everything that is done by government in the United States had to be determined by Congress, Congress would exhibit far less unity of purpose than it does now—and that is little enough at times!

In Canada, the Dominion Parliament and government have been much blamed in the recent past for their failure to deal vigorously with serious matters such as the great depression of the 1930's. Their vacillation was not due merely to the constitutional limitations on the Dominion. It arose in part from the fact that deep cleavages among the Canadian people prevented them from producing electoral majorities that would support vigorous measures of a specific nature.

The clearest concrete illustration appears in the course of events in Canada in time of war. Twentieth-century wars are national enterprises which require the national government to regulate the most intimate details of life. Under the pressure of war, Canada, for the time being, almost becomes a unitary state. But even the fear of a common enemy is not enough to overcome the basic cultural diversity in the country. Most English-speaking Canadians rise almost spontaneously to support full participation in a war in which Britain is imperiled. French-speaking Quebec, on the other hand, is more deeply isolationist in basic feeling than the Middle West in the United States has ever been. Quebec and the rest of the country cannot go along together in prosecuting a total war without disagreements that threaten to create irreconcilable factions. Separatist movements spring from the fact

that, in time of war, the common government asks everybody to agree about everything.

Abolition of the federal system would make what has been an expedient of war an everyday necessity. This would be disruptive in the extreme. While the war lasts, a number of divergencies of sectional interests are kept in check only by a recognition of the overwhelming necessity of presenting a common front to the enemy. Once the war is over, the check ceases to operate. If it were not for the federal system in Canada these divergencies would clash in the national political arena and convulse the country as does the conscription issue in time of war.

POLITICAL PARTIES. As we shall presently have occasion to point out, in the United States the national political parties are actually federations of state parties. National political parties in Canada are in a remarkably similar way federations of provincial parties. Each national party appeals to and gets support from persons and groups of diverse interests and attitudes across the country. Each manages to hold its heterogeneous following together because, up until now, national politics have been concerned principally with matters of general interest throughout the country and do not go to the heart of matters on which regional interests and attitudes diverge sharply. These latter matters are mostly within the purview of state and provincial politics. If, however, it were necessary within each national party to come to agreement on these divisive matters, the national parties would scarcely hold together. There is thus some ground for suggesting that the two-party system in national politics in the United States and Canada has been made possible by federalism and that if federalism goes, it will go too. If, as may properly be contended, democracy and the two-party system are closely related, it would follow that democracy and federalism also have intimate connections in countries of continental extent.

These are some of the reasons for suggesting a close connection between federalism and democracy. However, they fall short of conclusive proof. In any political situation, the factors involved are so numerous and so hard to estimate that all arguments and conclusions must be taken with a grain of salt. On the other hand, there does not appear to be any adequate ground for thinking that federalism is obsolete. It seems advisable to continue patching up the federal system. Any satisfactory patching, however, is likely to involve an increase in the powers of the federal government. There are a number of pressing problems of nation-wide scope that can only be dealt with adequately by action on a national scale.

Political Unification of Continental Areas. Also, when we say that people have come to think of themselves as Americans or Canadians as well as citizens of particular states or provinces, we mean that they have become conscious of sharing a wider range of common interests with all their fellow citizens throughout the country. It is natural that they should look to the national government to protect and further these interests.

As nationalism grows in strength, the particularism that marks the early stages of a federal system diminishes. But this point also must not be pressed too far. There is no agreement on how far nationalism has overcome particularism in the United States and Canada. In so far as history affords any guide, it suggests that the creation of genuinely united nations out of heterogeneous populations is a long, slow process.

CONTRASTS. Those who look at the record of the federal systems of the United States and Canada floundering in the difficulties over the past fifty years are often impatient with the long, slow process. Whether they are watching the exasperating disagreements of Dominion-Provincial conferences in Canada, or the confusion and seeming purposelessness of the United States Congress, they often make a comparison with the tidy system of government in Britain. They are inclined to forget, however, that *Britain is a small homogeneous country with a national unity matured over many hundreds of years*, and therefore not at all comparable with the continental diversity of the United States and Canada. The perspective would be corrected if a contrast were made with the continent of Europe as a whole, which has frequently dealt with continental political problems by the wasteful and inefficient processes of war. Alongside Europe, the federations of the United States and Canada seem not only tidy but also triumphs of civilized efficiency. Such untidiness as they exhibit is due to the fact that each is struggling with the political unification of a continental area.

The existence of numerous state and provincial governments in the United States and Canada gives to government, as a whole, a different character from that of Britain, and raises a number of special types of political problems from which British politics is free.

Another revealing contrast is that with the so-called federal system of the Soviet Union. The Soviet Union also governs a vast continental area. But Soviet federalism is a mask behind which lurks a centralized despotism—the time-honored method of ruling great imperial domains. The domain of the United States of America is of imperial magnitude. No one would claim that it has done full justice to the aspirations of all its areas and

minorities. Indeed, a good case could be made for Professor Franz L. Neumann's contention that—by leaving the individual to the diverse and sometimes tender mercies of fifty different police systems, applying a variety of procedural and substantive standards except in those areas of freedom that have been 'nationalized' by the Supreme Court—. . . the federal system may have speeded up inroads into the civil liberties rather than protecting them.³³ The system has, however, done something unique in history for a state of this size. Save for one breakdown in the Civil War, it has made internal peace and order in its domain compatible with an extraordinary freedom for individuals and voluntary associations. As Mr. Justice Cardozo of the U. S. Supreme Court once put the matter, 'the Constitution was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.'³⁴ Canada has done the same on a smaller scale for a shorter time but under the added handicap of having to hold together English-speaking Protestants and French-speaking Roman Catholics, two large groups with widely divergent outlooks and aspirations.³⁵ Only peoples firmly attached to liberal democratic values could have done this. They could not have done it without the procedural device of federalism. The Soviet Union has maintained internal peace and order in its domain, but has done it at the expense of individual and group freedom.

SOVIET FEDERALISM

The Soviet Union is declared in the Constitution to be a voluntary federal union of a number of separate socialist republics, known as the Union of Soviet Socialist Republics. The government of the Union, which will be sketched briefly in succeeding chapters, is thus designed to be a common, or federal, government for common purposes, and these purposes are set out in the Constitution. There are fifteen union republics, hereafter called states, each of which has a separate government authorized to deal with all matters not specifically conferred on the federal government.³⁶

³³ 'Federalism and Freedom: A Critique,' in Arthur W. Macmahon (Ed.), *Federalism Mature and Emergent* (Garden City, N. Y.: Doubleday & Co., 1955), p. 48.

³⁴ *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935).

³⁵ To cite a petty case in point: in June 1962 the Roman Catholic school board of Trois Rivières, Quebec, returned a bill submitted in English by a Toronto electrical appliance firm. The board said that it was its policy to buy only from companies that submitted their accounts in French! (*The New York Times*, June 11, 1962.)

³⁶ Constitution of the U.S.S.R., Art. 13.

The Distribution of Powers. The powers expressly conferred on the federal government are very wide. They include the power to organize military defense against foreign enemies, decide the issues of war and peace, and determine the substance of foreign policy. Closely related to these functions is the power of 'safeguarding the security of the state'³⁷ against internal enemies. In a Communist system, the government with the longest reach must control the economy. The federal government accordingly has the power to administer the banks, control currency and credit, operate the transport and communications system and all other economic enterprises of national importance—whatever these may be. It has power to lay down the basic principles in education, public health, labor legislation, and the use of natural resources. It alone is empowered to allocate the taxes and revenues that are to be used to operate the state and local governments.³⁸ The budget for the entire country is thus drawn up by the central government!

These are the more important federal powers. Obviously they are much wider than the powers granted the federal government in the constitutions of the other major federalist countries we have discussed or mentioned, the United States, Canada, Australia, Switzerland, and West Germany.

The states in the Soviet Union have the residue of powers not specifically conferred on the federal government, and the Constitution declares that these powers shall be exercised independently by each state.³⁹ On paper, each state has the right to enter into diplomatic relations with foreign states and to establish its own military organization. Moreover, each is expressly given the right to secede from the U.S.S.R.⁴⁰

Neither the American states or the Canadian provinces, nor any of the other subdivisions of the federal governments we have mentioned, have the power to enter into diplomatic relations with foreign nations or to secede. On the surface, therefore, the states of the Soviet Union appear to have a large degree of autonomy. And it is true that in *cultural* matters, such as the use of the native language and other native customs, there has been a very substantial autonomy. But aside from these cultural matters, the autonomy of the several states has been largely illusory, and Soviet federalism has little resemblance to the federalism of the United States and Canada and that of

³⁷ Ibid. Art. 14(i).

³⁸ See *ibid.* Art. 14, for the enumerated powers of the federal government.

³⁹ Ibid. Art. 15.

⁴⁰ Ibid. Art. 17.

the other major federal powers. Some of the reasons for this judgment may be briefly stated.

Illusory Nature of Soviet Federalism. First, the powers of the federal government of the U.S.S.R. are very wide, and many of them extremely vague, thus affording possibilities of expansion by interpretation. The distribution of powers is not interpreted by an impartial court, as—in varying degree—in the United States and Canada, Australia, and West Germany, *but by the federal government itself, and by those who, in practice, control the federal government, the leaders of the Communist party.* Moreover, the party dominates the governments of the fifteen states and ensures their subordination within the system—in the way it subordinates all other organization. The participation of the states in foreign policy and military activity is regulated by the directing principles laid down by the federal government.

Second, the formal right of secession given by the Constitution is denied in practice. Separatist agitation within the several states has been interpreted by the Soviet courts as a dangerous form of counter-revolutionary activity threatening the security of the Soviet state which the federal government is specifically authorized to safeguard. Also, as already noted, the federal government has the function of allocating the revenues on which the state governments depend for their operations. The power of the purse can be used, where it is so desired, to control the activities of the state.

Third, the federal government determines the economic plan and supervises its execution. Since the economic plan involves regulation and adjustment of almost every aspect of life, and the carrying out of the plan is the first imperative of Soviet life, the area in which the several states can have any assurance of being able to pursue independent policies of their own without regard to the dictates of the federal government is very small.

It should be added, however, that to make such extensive government action effective in a country of the size of the Soviet Union, there must be a high degree of administrative decentralization. So the governments of the several states—and other lesser governmental bodies as well—exercise wide authority in a great variety of matters and have a good deal of discretion in executing this authority—as long as their policies and decisions are in harmony with the general policy of the federal government and the top leaders of the party. The state governments, however, are essentially instruments for carrying out that general policy. Soviet federalism is not, in any significant sense, a mitigation of the overwhelming concentration of power at the top.

Changes. In 1957, Nikita S. Khrushchev, the Communist party boss, an-

nounced an over-all gradual revision of the Soviet system of industrial management. The plan, as adopted, divided the Russian Republic (R.S.F.S.R.), largest in the Soviet Union, into seventy economic units. The Ukraine was made up of eleven regions; Uzbekistan of four; Kazakhstan of nine; and the eleven other union republics each constituted a separate economic region. Economic councils were established in each of the 105 new industrial management regions—later reduced at first to 101 and, late in 1962, still further to forty—to direct industrial production and construction. The governments of the fifteen union republics have been given broader control over industrial planning and financing than ever before, aided by 'workers' advisory committees.' Some of the industrial and arms ministries at the national level were abolished and replaced by 'state technological committees'; others were 'drastically reorganized,' evidently a continuing process.

However, Khrushchev made quite clear that the central Soviet government was not relinquishing its key controls over the industrial system. The changes represented as much a 're' as a 'de' centralization. Central control is thus exercised by the *State Planning Commission*, which lays out annual and seven-year 'programs of economic development.' Ultimate financial power has been retained in Moscow. It is the central government that channels surpluses from rich areas into underdeveloped ones. Heavy and defense industries are being kept under centralized control—and these account for more than half of Soviet industrial output. In other words, while significant decentralization has been under way ever since 1957, overriding control still rests at the top, although evidently in altered form.

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VII

Local Government

Up to this point we have been considering central governments that rule a wide territory operating from a single center or capital. Even the state governments in a federal system are central governments in this sense. It will be convenient here to refer to all central governments of whatever kind as *senior governments*, thus distinguishing them from a very numerous group of subordinate, or junior, governments, each of which has a limited authority in a very narrow locality.

Central governments have never been able to carry on all the activities wanted of government. They have been compelled to rely on a network of *local governments* which in the aggregate can scarcely be said to be of lesser importance than the senior governments. *Municipal* government, as it is generally called in the United States, touches the lives of more people at more points than do the senior governments. The character of local government and its relation to the senior governments are important factors affecting the working of government as a whole in any country.

STATUS

ANGLO-AMERICAN LOCAL GOVERNMENT

Subordinate Government. The place of local government in the constitutional framework must be considered first. Local government is subordinate

government. The city or the county, unlike the states in a federation, has no assured sphere of autonomy that the constitution protects.¹ At any time a law passed by the appropriate legislature may abolish local government, or modify or take away some of the powers exercised by it. The whole structure of local government in Britain has been created by statute, and so has most of local government in the United States. Many state constitutions in the latter, however, contain provisions relating to the structure of local government, and it has been urged that to be useful, municipal 'home rule,' for one should be based upon self-executing constitutional provisions rather than statutes. Without such statutory and/or constitutional provisions, the government of the city, town, county, or township could not exist legally. It would have no power to require citizens to pay taxes or shovel snow off their sidewalks, and no duty to maintain and repair roads and lighting and sewage systems. These statutes prescribe in abundant detail how local governments are to be set up, how they are to operate, and what powers and duties they are to have.

Thus, as far as the constitution is concerned, the local governments remain subject to the control of the legislature of the appropriate senior governments. They have a sphere of operation in which they can do as they like only because a discretion has been conferred on them by statute. The ordinances made by the municipal council are merely delegated or subordinate legislation and subject to controls and limitations by the senior government. For example, if the statutorily created city council makes a by-law requiring the banks to lend money to the needy at 3 per cent interest, no bank need obey the by-law and the courts would, upon challenge, declare it to be invalid. The matters on which the city council has power to make laws are set out in detail in statutes of the legislature, and thus far regulation of banks and rates of interest has never been among them.

In Britain, the local governments derive their authority from, and the limits of their powers are marked out by, Parliament. In the United States, the Constitution assigns local government exclusively to the states. Clauses that assign powers to the federal authority are silent on this subject, and therefore the power to create local governments and to exercise control over

¹ This statement is subject to some qualification in the United States, where about one-third of the states have amended their constitutions to provide a defined sphere of 'home rule' for the municipalities in the state. In these states the legislature cannot intervene in this sphere without first getting the 'home rule' amendment of the constitution repealed—a difficult but not impossible task.

them is reserved to the states. The federal government has no *direct* power over the municipalities. They are the creatures of the state.²

The Tradition of Local Autonomy. The dependent and subordinate position assigned to local government by the constitution tends to obscure one fundamentally important fact. Local government in the Anglo-American world is *self-government*. There is a long tradition that local governments are not to be district offices of the senior government but institutions through which local affairs are run by local people. For centuries in Britain local government was run by a self-perpetuating local oligarchy. The country squires as justices of the peace governed the county.

This system was introduced in the American colonies, but it never became rooted there. Local government was rapidly democratized in America; and in the course of the nineteenth century in Britain the justices of the peace were replaced by elected councils chosen by a local electorate and responsible to it. Local democracy is now so firmly established in popular estimation that no legislature would think of using its constitutional powers to abridge it seriously. Local government has a wide sphere of autonomy guaranteed by political considerations and not by the constitution.

So the statutes that prescribe the areas and kinds of local government, and the extent of their power, invariably provide for the election of a local governing body or council by residents of the area. The councils are responsible to their electorate and, generally speaking, to no other political authority. Of course, if corruption has been practiced in municipal elections, an action can be brought in the courts to unseat the councilors involved. If the council exceeds its powers or fails to carry out duties imposed on it by law, redress can be sought through judicial proceedings.

It is only in very unusual circumstances, such as a default in payment on municipal bonds, that the senior government can remove the local council or dictate to it what it shall do. It is true also that there are a number of specific matters, to be discussed later, in which the senior government has some power of supervision over local governments. Although these powers are steadily increasing they are still relatively few and, generally speaking, the autonomy of local governments can only be interfered with by the appropriate legislature's amending statutes that define the constitutions of the local governments.

² In this chapter, *senior government*, in the singular, refers to the state governments in the United States or to the central government in Britain.

CONTRASTS BETWEEN CONTINENTAL EUROPEAN AND ANGLO-AMERICAN
LOCAL GOVERNMENT

The practical autonomy of local government within the sphere marked out for it is regarded in Britain and the United States as part of the natural order and therefore as scarcely requiring comment. It is by no means inevitable, however, as the very difficult status of local government in continental Europe shows. Generally speaking—there are significant exceptions—the countries of continental Europe have no tradition of autonomy in local government. The absolute monarchies established strong central authority over local government. In the late nineteenth and early twentieth centuries there was a trend toward municipal self-government in Europe. The coming of dictatorships reversed the trend in many countries and made local government more than ever an instrument of the central authority. The relationship of central and local government in France affords a fair illustration of the general situation in Europe before the rise of dictatorships.

Centralization in France. A department of the central government, the Ministry of the Interior, has as its special care the governing of the interior, the local areas of France. In some matters such as education, administration is entirely in the hands of the Minister of the Interior. The teachers are employees of the central government and the school is as much under its direction as is the local post office. In other matters, such as police, locally elected authorities participate to some extent, but the powers of central direction are so strong as to leave only a shadow of local autonomy. Local police chiefs are appointed by the central government and may receive binding instructions from that source at any time. In still other matters, locally elected authorities have what appears on the surface to be a wide power to govern. Even here, however, the agents of the central government exercise continuous supervision and, on all major questions, bend local government to the desires of the Ministry of the Interior.

UNITS OF LOCAL GOVERNMENT. The four main divisions of local government in France are the *department* (*département*), roughly comparable to the county in Anglo-American countries; the *arrondissement*, a subdivision of the department; the *canton*, a subdivision of the *arrondissement*; and the *commune*, which may be a rural area, a village, a town, or a city. In 1963, there were 90 departments, 281 *arrondissements*, 3,028 cantons, and 38,014

communes. But the only really important units, those which have standing as 'legal persons,' are the department and the commune.

THE DEPARTMENT. The legislative authority of the department is a *council* elected by manhood suffrage. However, the council is far from having unrestricted powers of law-making for its locality. The power of the purse is the best test of a legislature's authority; yet while the department's council must pass the budget of expenditures, the central government in Paris has wide powers to say what it shall and shall not contain.

Nor has the council the pre-eminence over the executive that we might expect a legislature to possess. Although he is not formally the chief executive officer of the department, the *prefect*, its titular head, is the key figure in French local government and administration. He is usually an experienced administrator, but his appointment is regarded as political, complete loyalty to the Minister of the Interior being essential. As the *agent* of the national government, the prefect is a sort of resident administrative supervisor of the department. This includes supervision of the work of the elected council in any area of national concern—a power known as *tutelle administrative* (administrative guardianship), which compromises the right to dissolve 'illegal' council meetings. If stubborn disputes arise between the prefect and the council of the department, they are resolved by the Minister of the Interior, who may remove the prefect or even, in certain circumstances, dissolve the council and call a new election. There does exist a *formal* executive head of the department, the *president*. He is elected by the members of the council from its own numbers for a three-year term of office—but the prefect obviously sits at the center of power.

Laws passed by the French Parliament confine the council of the department to a very narrow sphere, and it is the prefect who is expected to see that it does not act outside this sphere. So when local aspirations as expressed by the council conflict with the policy of the central government, the prefect has to remember that *his masters are in Paris and not in the locality*. Clearly, then, the department is an administrative area of the central government rather than a unit of effective self-government.

THE COMMUNE. Within each department there is a varying number of communes, large and small. Each commune has a locally elected municipal council with power to make laws relating to local matters. The council chooses one of its members as *mayor* and he is the chief executive of the commune. Once chosen, however, the mayor—who enjoys considerably more power and prestige than the departmental president—becomes sub-

stantially independent of the council. It cannot dismiss him or directly control him in the work of administration. In an important sense, the mayor, too, is an agent of the central government. In matters relating to finance, police, and public health, for example, his main function is to enforce decrees of the central government. Under the doctrine of *tutelle administrative*, he is in many other matters subject to close supervision by the prefect, who can suspend or remove him if he fails to carry out instructions from above.

The council of the commune has a wider sphere of local independence than the council of the department. In the last sixty years its power to make ordinances, or laws, has been gradually extended. But the range of its independent action is in no way comparable to that enjoyed by municipal councils in Anglo-American countries. In all genuinely important fields of local government its decisions are subject to modification by the prefect under certain circumstances. In particular, its freedom in matters of finance is very sharply limited. When recalcitrant councils resist that tutelage, the prefect can suspend them or recommend their dissolution.

Although the French system of local government provides for participation of locally elected councils, centralization is its most striking feature. Its character is not seriously misrepresented by charting it in the familiar hierarchical form. At the apex stands the Minister of Interior, a member of the cabinet in the national government, from whom orders go to the prefects at the departmental level. The prefect, in turn, passes on edicts and instructions to the mayors who govern the communes at the base of the pyramid. (As already indicated, there are two other intermediate units of French local government, but they have no genuine significance and need not be considered here.) Local government in most European countries before the era of dictatorships closely resembled the French system. One of the few notable exceptions is Switzerland, where local government has consistently employed a remarkable degree of autonomy.

Anglo-American Decentralization. Local government in Britain and in the United States presents the sharpest contrast to these centralized systems. It is *decentralized*. Within the wide sphere of operations guaranteed to them by law, the locally elected councils govern according to their interpretation of the desires of the often apathetic local electorate. The next election presumably determines whether they have interpreted local opinion on local demands and needs correctly or not.

Not only do municipal councils make what laws they think fit; they also

appoint and control the officers who enforce these laws and carry on the work of daily administration—although there are significant departures from this principle in the United States, to be explained later. While there is a steadily growing number of matters in which the senior government prescribes minimum standards that local governments must observe, local governments are not obliged to placate officials of the senior government at every turn. It is true, however, that in some states the governor or a state department head has been given power to remove certain kinds of local officials in certain specified circumstances. No matter how dark a view the senior government takes of the behavior of particular locally elected councils, it cannot suspend or dissolve them. If the council has exceeded its powers or violated the law, the remedy, in almost all cases, is an action in the courts. The only other course generally open to the senior government is to ask the legislature to amend the general law relating to local government. But it hesitates to sponsor such a measure because that will bring it into collision with a general public inclination toward autonomous local self-government.

GEOGRAPHICAL AREAS AND AUTHORITIES IN ANGLO-AMERICAN LOCAL GOVERNMENT

Areas. Local government requires the division of the country into areas each with a separate authority or government. The number, type, and configuration of these areas vary in each country. What these areas are depends partly on past history and partly on the needs and purposes of the present. The *county* has been a unit of government in Britain since early times, and it was transplanted to North America in colonial times. The county or its equivalent, called 'parish' in Louisiana and 'borough' in Alaska, is found almost everywhere³ because of the pervasiveness of rural conditions in our past. There may also be smaller rural subdivisions of the county: the *township* in the United States, and the *rural district* in Britain. These are now too small, either in area or in population, for many purposes, and their importance is declining.

There have always been units of urban government as well. The ancient English *boroughs* have a long history of local autonomy. The *cities* and *towns* of more recent origin in both countries have been more or less com-

³ Rhode Island and Connecticut *abandoned* the county as a unit of government, the latter in 1959; but the other forty-eight states in the United States are holding the line, Alaska having entered the Union in 1959 without counties.

pletely separated from the counties or townships in which they lie and have been given charters of self-government. A few great metropolitan centers in each country are special areas with distinctive forms of government, such as Greater London, and the 'Metro' of Dade County, Florida (Miami) which extends to more than twenty-six municipalities and unincorporated areas, comprising 2,054 square miles with a population of one million! In the United States, the configuration of the rural units and the names given them vary from state to state. Nothing would be gained by attempting detailed description and comparison.

Conditions and needs of rural government differ sharply from those of urban government, and every metropolitan area is in some measure unique. Accordingly, the governmental institutions are more or less adjusted to the differences and there is very little of a common pattern of local government even within a single country. The one great common characteristic has already been discussed: These units are all local democracies practicing a wide measure of self-government in a specified list of matters.

Authorities. In Britain there are very few exceptions to the general authority of the county or city council in local matters. In the United States, however, there are numerous special areas for special purposes, with separately elected governing bodies. These areas may or may not coincide with the boundaries of the town, city, or county. The most typical example is the *school district* for the purpose of education, with its board of trustees or board of education. In addition, in the cities and town in many states, particular matters are often withdrawn from the jurisdiction of the general council and placed under the authority of special bodies like boards of health, police commissions, and public-utilities commissions.

The questions whether there shall be special authorities for particular purposes, and if so, how they shall be chosen, are not left to local choice. They depend on the state legislation that establishes the structure of local government and defines its functions. *Local government, it must be remembered, is subordinate government and cannot frame or alter its own constitution.*⁴

⁴ In some states of the United States the state legislatures authorize alternative forms of structure and organization among which localities are free to choose. Four identifiable charters exist: (1) those provided by *special* acts of the state legislature; (2) those provided by *general* laws of the state; (3) optional or '*à la carte*' charters for municipalities; and (4) home rule. Cf. Jewell Cass Phillips, *Municipal Government and Administration in America* (New York: The Macmillan Co., 1960), p. 75 *et seq.* Also, even where state legislation does not offer alternatives, a particular city or county may take the initiative in *proposing* modifications in its charter for the approval of the state legislature, and of its own citizens in a popular referendum.

ELECTED COUNCILS. Something will be said later about the significance of these special local authorities. At present, it is necessary to look at the characteristics of the general government of local areas. The legislative authority of the city, town, or county is always an *elected council* chosen by substantially adult suffrage. Although there are some matters in which the local electorate may, or must, participate in the law-making process by a popular referendum, all laws relating to local affairs require an ordinance by the council. The council also has some control over the executive and administration.

STRUCTURE

LOCAL GOVERNMENT IN BRITAIN

Council in Control. In Britain, this aforementioned control is complete. The council, which is elected for a three-year period, is the executive as well as the legislature, the cabinet as well as the parliament. While the central legislature relies on one small executive committee for all purposes (the cabinet), the local legislatures set up separate executive committees for finance, public works, parks, public welfare, and so on. Each member of the council has a share in the control of one or more branches of administration. Each committee of the council occupies a position comparable to that of the minister in charge of a department of the central government. Indeed, if the chairman of a committee is vigorous and skillful, he may run the committee and thus be the equivalent of a minister.

Each committee has a general oversight of administration but does not itself do the work of daily administration. It relies on a body of appointed civic officials and employees, which is very numerous in great cities and almost nonexistent in rural districts. In a large city the committees of council, like the ministers of large departments of the central government, must rely very heavily on their senior civic employees, restricting themselves to the larger questions of policy. In the smaller units of local governments where the affairs to be managed are few and relatively simple, the committees can—and often do—direct the activity of civic employees in some detail.

The point to be stressed here is that the municipal civil service, be it large or small, is responsible to a committee of the council, and through it

to the council itself. The council not only makes the laws, either directly or indirectly through senior officials under its control, but it also enforces by-laws, hires and fires, purchases supplies, lets contracts, and generally conducts civic housekeeping.

Co-ordination. In the senior government of Britain the cabinet co-ordinates the work of the several executive departments, ensuring a degree of harmony in administration as a whole. In local governments, where each branch of administration is under the supervision of a distinct committee or council, there is need for co-ordination to prevent confusion and cross-purposes. The problem is not a serious one until the urban form of government is reached. In cities it is met more or less effectively in a number of ways.

COMMITTEES. The fact of interlocking membership in the various committees helps each committee keep track of what the others are doing. Frequently the finance committee is made up of chairmen of other committees just as in the senior governments administration is integrated through financial control. Furthermore, the committees have no power to make decisions on questions of policy, which must always be settled finally by the council as a whole. That is to say, the council itself performs many of the co-ordinating functions of the cabinet in the senior governments. Finally, in the larger cities, administration is too burdensome and complex for the committees to interfere much in its detail. This is the opportunity of appointed city officials to exercise a good deal of guidance and authority in administration. In many instances the city clerk assumes functions approaching those of a general manager.

The Mayor. This description makes no reference to the office of mayor, which is found in all British cities. The mayor is the first citizen or chief magistrate of his city, but these are formal titles and do not confer on him any specific governmental functions. Like the monarch, he has the influence of an exalted position but no significant power. He is not popularly elected but is chosen annually by the council, generally from among themselves. Apart from being chairman of the council, he is largely a figurehead gracing ceremonial occasions. The real authority both in legislation and administration is the *council*.

LOCAL GOVERNMENT IN THE UNITED STATES

In the United States up to the middle of the nineteenth century, the formal organization of municipal government closely resembled the British

pattern just described. Legislative and executive authority were concentrated in the council. The mayors of the cities were mostly figureheads, although they were popularly elected and not appointed officers. Two strong sets of influences of the mid-nineteenth century led the state legislatures to introduce the separation of powers into local government and put the executive and legislative powers in different hands.

Influence of Ultra-Democratic Ideas. First, 'government of the people, by the people, and for the people' was interpreted in the United States as requiring that, wherever possible, those who exercised powers of government should be directly *elected*. Accordingly, provision was made for direct election of mayors as well as of many of the chief officials of the counties and cities. Clerks, treasurers, auditors, assessors, and others, who in Britain are appointed by the municipal council, came to be directly elected by the voters in American municipalities. These officers who control a large part of local administration got a direct mandate from the local electorate and became directly responsible to it.

DIFFUSION OF CONTROL. The control of administration was thus largely taken away from the council, and responsibility for administration was diffused among a number of elected officials. The same impulses led to the establishment and direct election of numerous distinct local boards, comparable in nature to the school boards already mentioned. Power in local affairs was widely diffused instead of being concentrated in a single elected council. While the trend in this direction has been largely reversed in the twentieth century, direct election of many administrative officers and boards is still the rule in most counties and in many of the smaller cities in the United States.

FREQUENCY OF ELECTIONS. Furthermore, ultra-democratic ideas also suggested that the more often elected representatives had to go to the people, the closer the control the people would be able to exercise over their government. So annual election of councilmen and other officials came to be the rule in the late nineteenth and early twentieth centuries. However, there has been a strong reaction against this practice in recent years. One-year terms of office are much less common than formerly. In most cities, mayors are now elected for either two or four years. Some councils are still elected annually, but a majority of them are now chosen for periods running from two to four years.

Influence of Separation of Powers. The second set of influences was derived from the examples set by the federal and state constitutions. In these

constitutions the separation of powers set the executive apart from the legislature, and made it necessary to have the chief executive independently elected. It was plausible to think that a principle that is sound for the nation and the several states must also be valid for the municipality. That is to say, if presidents and governors are directly elected and given wide powers to exercise independently of the legislature, so should mayors. Mayors ceased to be largely figureheads and became elected chief executives with independent powers. They were given a suspensive or even full veto on ordinances passed by the council, the power to hire and fire civic employees, and so on. The extent to which mayors have to get confirmation of their executive decisions by the council varies from state to state.

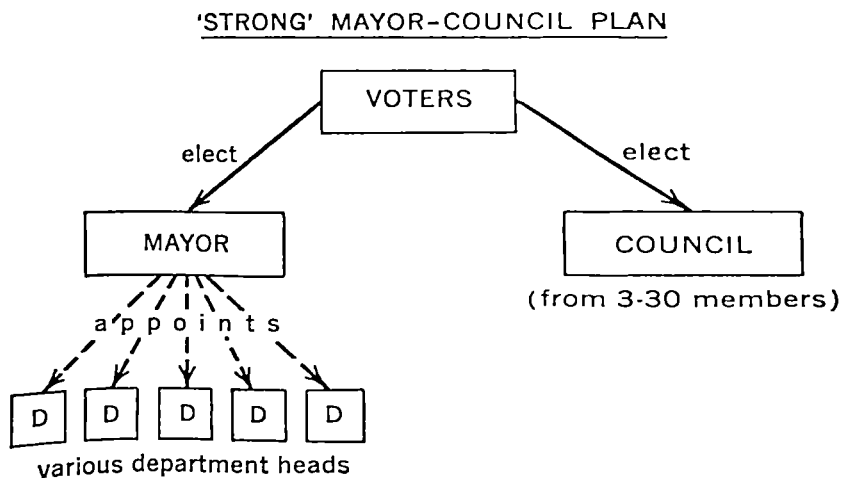
We have already seen how the separation of powers weakens authority and divides responsibility in the federal government of the United States. It has had similar, even more unsatisfactory, results in local government, and about the beginning of the twentieth century a pronounced reaction against it developed.

Reactions against Separation of Powers. For a variety of reasons associated with the rapid growth and heterogeneous population of American cities, local government in the second half of the nineteenth century in the United States was marked by many evils and abuses. One contributing factor was the division of legislative and executive authority and the diffusion of responsibility among many elected officials. In the last quarter of the century there was a rising insistence on drastic reform, and a number of advances toward better local government. Shortly after 1900 the attention of reformers was turned toward the structure of local government itself.

NEW PLANS. Since then, two principal revisions of the general organization of local government known as the *commission* plan and the *council-manager*, or *city-manager*, plan have been adopted by many municipalities. Reorganization of local government in accordance with these plans has made almost no, or at best very little, progress in the rural counties or in cities of more than half a million population. The counties still adhere mainly to the system of many elected officials and widely diffused authority, and most large cities are still governed by some variant of the mayor-council plan. But many of the medium-sized and smaller cities in the United States have gone over to either the commission or council-manager scheme of local government.

1. *The 'Strong' Mayor-Council Plan.* Before speaking more particularly about the commission and the council- or city-manager schemes, it should

be said that the mayor-council form of government—sometimes called the burgess-council—is being rapidly transformed in one city after another, largely by *strengthening the position of the mayor*. This is done by raising the mayor from a mere figurehead—as he is under the ‘Weak’ Mayor-Council plan—to a chief executive with control over most, if not all, of the administrative departments of the city government, i.e. a ‘Strong’ Mayor. Under the latter system, the heads of most, if not all, of the departments cease to be elected and are appointed and removed by the mayor. They work under his control and supervision, and he is often given a predominant influence in finance. Moreover, he is frequently armed with a veto over legislation passed by the council. It is being widely recognized that efficiency and responsibility in administration cannot be secured adequately under the older practice of diffusion of authority. In 1963, of the twenty-one largest cities in the United States (all over 500,000 inhabitants), all except Dallas, San Antonio, San Diego, Cincinnati, and Washington, D. C., had the ‘Strong’ Mayor-Council type of government.



2. *The Commission Plan.* Under the commission plan—which originated in Galveston, Texas, as a direct result of the catastrophic tidal wave and flood of 1900, with which its mayor-council government was unable to deal effectively—a small commission, or council, of from three to seven members is elected for a term of two or four years. With the exception of the still retained school board, as a rule no other officials or boards are normally elected by the voters. One of the commissioners is chosen, either by the

commissioners themselves or by popular vote, to act as chairman or mayor, but he is rarely given any significant independent powers. The commissioners give full time to their work and are paid relatively substantial salaries. All authority and power, both legislative and executive, is concentrated in the commission.

FUSION OF POWER. The separation of powers and the diffusion of authority are eliminated. As a legislative body, the commission enacts by-laws, levies taxes, and appropriates money to the items of expenditure. The day-to-day work of administering the affairs of the city is divided among a number of departments, such as finance, works, health, and safety. There are usually an equal number of commissioners and departments so that each commissioner, in addition to being a legislator, is the executive head of a department, directing all its operations.

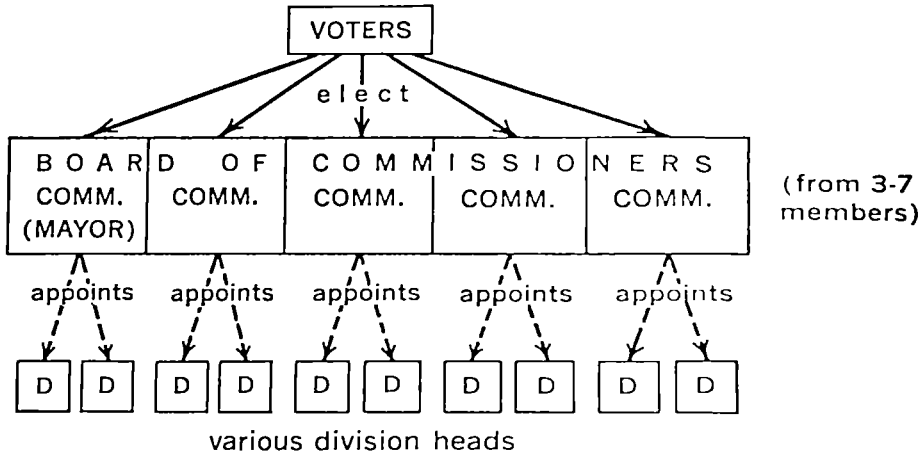
This structure might be expected to produce the substance of cabinet government: a small executive linking together the legislature and the administration, and concerting among themselves a unified policy both for the legislature and for the separate departments of administration. In practice, however, it has not worked that way. Collective responsibility, which is a vital feature of cabinet government, is lacking.

DIFFUSION OF RESPONSIBILITY. Each commissioner regards himself as having a distinct mandate from the people for two or four years, and he tends to concentrate his attention on his own department. The commissioners also tend to give too much attention to the detail of their departments instead of leaving it to expert permanent officials, and too little attention to co-operative co-ordination of the varied business of the city as a whole. When, as too often happens, each commissioner fights for his own department, the executive does not work as a team, and administrative rivalries weaken the deliberations of the legislature. Lacking a strong, vigilant opposition in the legislature, there is nothing to compel the commissioners to hang together or hang separately.

DECLINE. While commission government was an advance on the forms of organization it superseded, the defects noted, among others, have brought a considerable decline in recent years. In 1917, a total of 36 per cent of all local governments used it; but by 1963 scarcely 9 per cent (over 5,000) did. Memphis was among the few prominent cities still adhering to it. Some cities that abandoned it—e.g. Jersey City—adopted or returned to the separation of powers between council and mayor, often giving the mayor a stronger position than before. Others have adopted the council-manager, or

city-manager, plan, which is the currently favored plan for reorganizing city government.

COMMISSION PLAN

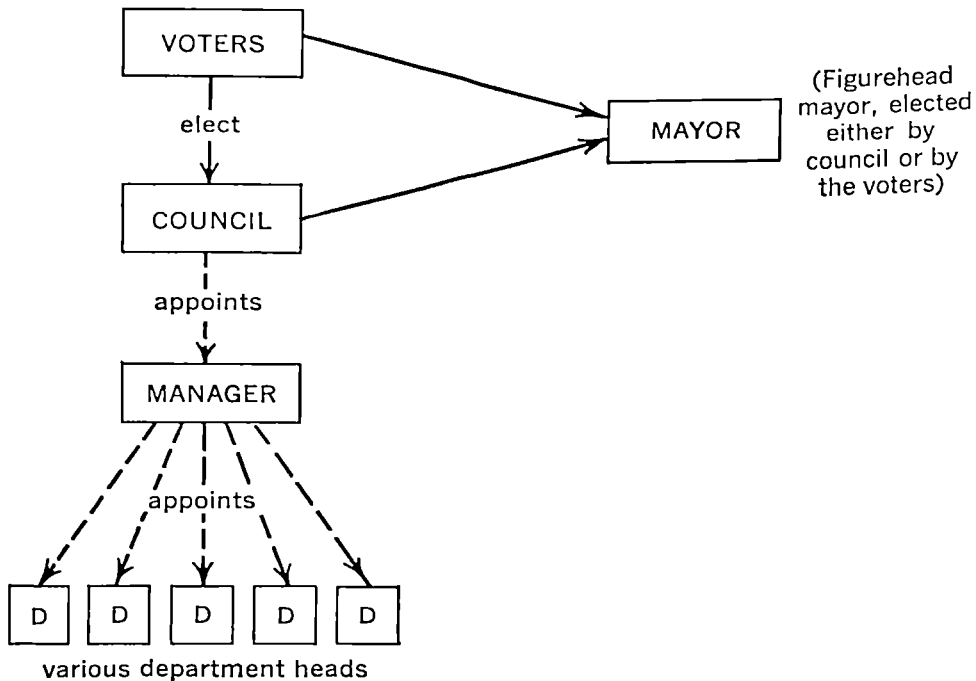


3. *The Council- or City-Manager Plan.* The council- or city-manager plan corresponds closely to the commission plan up to the point where responsibility for the day-to-day direction and control of administration is reached. All governing power and responsibility, both legislative and executive, are vested in a small elected council, but the members of the council do not become the active heads of the administrative departments. Instead, *the council appoints a city manager who is directly responsible to the council for executing the laws and managing all the affairs of the city.* The council, or the electorate, elects a mayor, who is the presiding officer of the council and represents the city on ceremonial occasions. The closest parallel is the business corporation. The electorate are the shareholders in the city corporation; the council is the elected board of directors; and the latter appoints a general manager—commonly on a contractual basis—who is operating head of the administration.

THE MANAGER. The line that is drawn is not between legislative and executive, but between the making of policy and the carrying out of policy in detail, or administration. The council makes the ordinances, votes the budget, and has general surveillance over administration. The manager puts the council's decisions into effect. He is a professionally trained governmental expert, usually hired from *outside* of the local area he is to serve, and presumed to be divorced from all political ties and motivations. He advises the council on all matters of detail, such as drafting a proposed budget, ap-

points and removes all heads of departments and, subject in most cases to civil service regulations, hires and fires the municipal employees. Where the council gets a good manager and can restrain itself from interfering with him in matters of detail, this scheme helps cities to build up a competent expert civil service and to get effective co-ordination of administration. Although these conditions are not always satisfied, the council-manager plan has had a large measure of success. In 1963 some 38 per cent of the cities used it, including, San Diego, San Antonio, Cincinnati, Kansas City, and Dallas. It is generally on the increase in America, especially in small and medium-sized cities, but also in counties and townships.

COUNCIL-OR CITY-MANAGER PLAN



Independent 'ad hoc' Boards. About two-thirds of American cities still maintain a more or less marked separation of powers between mayor and council. In these cities, however, the mayor and council are not always the sole authorities in matters of local government. We have noted that the autonomous school district is found in most areas of local government. Schools are controlled by independently elected school boards and not by the council elected for general purposes of local government. Also, in many

cities—and in many counties as well—there are other special *ad hoc* authorities, frequently elected but sometimes appointed by the governor or other state officials.

SPECIAL DISTRICTS. Sometimes the physical boundaries of the authority of these bodies coincide with the boundary of the city or county, and sometimes they combine several areas of local government for a particular purpose. For example, there are often *special districts* combining two or more municipalities for the purpose of roads, parks, health, fire protection, and water supply as well as for schools. Wherever a special district is created for the exercise of a particular function of local government, an authority independent of mayor or council, or both, is generally created also.

BOARDS. In addition, there are numerous instances where distinct agencies for exercising particular functions within a city or county are set up. The most common are boards of financial control and police commissions. The former usually consist of the mayor and a small board elected by the voters at large. The latter are often appointed by the state government without reference to the wishes of the local council or local electors.

Such *ad hoc* authorities, where they exist, cause still more diffusion of authority and responsibility in local government. Except where their object is to combine two or more counties and/or cities so as to give a larger unit of administration for such services as roads, water supply, or public health, all the criticisms of the separation of powers between the mayor and the council are valid against them also.

The most important of the original impulses for establishing *ad hoc* independent boards was disgust with the elected municipal council. In the last half of the nineteenth century, American local government suffered greatly from corruption and boss rule. Political machines often controlled municipal elections and used local government for their own purposes rather than for the good government of the municipality. The establishment of independently elected boards for the exercise of particular functions was intended to take those functions out of politics. However, there is little hope of curbing machine politics merely by multiplying elections. If the function in question is an important one, the machine politicians will turn their hand to controlling the elections to the board. The *ad hoc* boards have been extremely unsatisfactory, and the present tendency is toward their elimination.

In addition, the withdrawal of important functions from the control of the council lowers the power and prestige of the council. This, in turn,

lowers the caliber of men who seek election to the council, thus providing a fallacious reason for taking still more powers away from the council. Able, public-spirited men are not likely to be willing to give their time and effort to local government unless they see the possibility of solid accomplishment. The surest way to attract them is to concentrate the powers of local government in the general council. This is what has been done in Britain, and British local government, where there is less diffusion of authority, is markedly more efficient than American local government.

PRACTICE AND THEORY

FUNCTIONS OF LOCAL GOVERNMENT

Although the institution of local self-government is common to Britain and the United States, it is evident that there are marked differences in structure and organization. In this same way, a broad similarity exists in the kind of functions performed by local government in both countries, and there are very considerable variations in the detailed scope of the functions undertaken. Even within the same country or state, the scope of the functions of rural and urban government differs greatly. The functions of rural governments are very few while, generally speaking, the larger the city, the more things its government undertakes. It would be burdensome and confusing to list the numerous functions and note the differences. However, if we are to grasp the pressing problems of local government today, it is necessary to see the general character of the functions performed.

Aim. The principal purpose of local government is to provide through collective action a number of services that the citizen, standing alone, cannot secure for himself as well or at all. But local governments have never been left free to undertake anything and everything that a majority of the citizens approve. Local governments can only do the things they have been authorized or required to do by the legislature of the appropriate senior government. The statutes enumerate the functions of local government and limit the action of each municipality to its own area.

THREE CLASSES. The functions fall into three broad classes. First, there are the *protective services* of police, public safety as in fire protection, public health, and sanitation. Second, there are certain *physical services or facilities*, of which roads, streets, and bridges are the best examples. The public utilities such as light, gas, water, power, and transport, which are increasingly

owned and operated by municipalities, fall in the same group.⁵ Third, there are what may be broadly described as the *welfare services*, such as education, libraries, parks and other recreation facilities, hospitals, and the care of those for whom some public provision has to be made because of poverty, advanced age, or other defect.

Increasing Cost of Functions. Just as in the case of the senior governments, functions are always changing in scope and emphasis. In local government, too, the trend of activity has been sharply upward, particularly in urban areas. The coming of the automobile compelled much greater outlays on roads, streets, and highways. The demand for better education, and education on a wider scale, has imposed steadily rising costs. Greater emphasis on preventive medicine and sanitation measures has raised expenditures on public health. Disturbed economic conditions, with consequent poverty and unemployment combined with an insistence that such distress be relieved at public expense, have multiplied several times the cost of welfare services since the turn of the century. Other expenditures also have tended to rise.

TAXES. The steady, persistent rise in per capita expenditures of local governments over the last century has created a serious problem in municipal finance. Expenditures are always more easily boosted than revenues. But local governments are in a peculiarly difficult position because much the greater part of the revenues they themselves raise comes from a single source, a tax on land values. Municipalities try to increase their revenues by other kinds of taxes, and by imposing licenses and collecting fees of various kinds. In the United States, state governments often share with the local governments the proceeds of taxes on, for example, income, gasoline, and sales. These shared taxes, as they are called, are levied and collected by the state governments, and part of the proceeds are distributed to the local governments, generally without strings attached. Lately, several municipalities in the United States have been granted power by the states to tax income and/or sales directly. Thus New York City now has a city sales tax, Philadelphia a city income tax, and local sales taxes are widely prevalent in California. While local governments are relying increasingly on these other sources of revenue, their combined yield is almost everywhere considerably less than the proceeds of the tax on land values.

⁵ In 1960, municipalities in Pennsylvania, for example, owned 440 waterworks, 228 operated directly by municipal governments and 212 controlled by authorities; 39 ran electrical systems; a few had gasworks; many provided sewage, garbage, and refuse disposal services. (*Horizons*, 9, May 1962.)

As local expenditures rise, the tax on land values must also rise. This brings an unfortunate tendency into operation. Other factors such as the general level of economic activity remaining constant, sharply rising taxes on real property will depreciate land values, so that local governments are often trying to get more and more revenue from a source that shrinks from and with their every advance.

Furthermore, land values are very sensitive to economic conditions, following the downward swing of depressions and showing the most marked depreciation in the areas hardest hit by economic decline. Unfortunately for local government, the costs of welfare services in particular mount in periods of depression, rising most sharply in the most depressed areas. Thus revenues are hardest to come by when and where they are most needed. Plenty of statistical proof of this predicament could be given, but it is sufficient to recall that many municipalities were bankrupted by the long depression of the 1930's. And even in the best of times there is a marked disparity in the financial capacity of different municipalities to maintain a standard level of services.

THE 'EXPLODING METROPOLIS'

A word must be said here about an ever-increasing problem of mid-twentieth century local government—the 'exploding metropolis' or 'megalopolis.' The increasing size of metropolitan centers of population, including suburban areas as well as cities, has not only compounded the economic and political problems of these urban regions but, in some instances, the situation has reached the crisis stage. More and more cities proper are becoming 'service centers' for outlying areas, with the more prosperous elements of the population moving outside the city's borders, leaving the latter area in large measure to a heavy concentration of the less well-to-do, the underprivileged, and the migrant. The exodus from the cities has not, however, solved the population squeeze, for, increasingly, less open spaces remain and, no matter what their inhabitants may call the outlying areas, they are in fact becoming extensions of the cities. Without too much exaggeration we may speak, for instance, of one huge 'megalopolis' extending from Portland, Maine, to Richmond, Virginia—or certainly from Boston, Massachusetts, to Washington, D. C.

These facts of metropolitan local government have brought with them a frightening number of governmental problems in a host of fields. To

mention but a few: ever increasing demand for services; enormous transit traffic and parking difficulties; air pollution; slum clearance; staggering housing problems; recreational needs; insufficient water supply; population mobility; and a crying need for effective planning. Moreover, these and other problems are accompanied by such difficulties as fragmented and proliferated units of local government; harassment by the state government; tax inequalities; mal-representation in the state legislature; population shifts and 'ghettos.' It would require a chapter, if not a book, to do justice to these problems that face the 'exploding metropolis.' Suffice it to note them here and to point to the desperate need for solutions—for no matter how strong the traditional sentimental attachment to rural areas may be, today urban centers represent the heart of healthy and effective local government. Already they are compelled to turn more and more to the national government for aid. If the several states of the United States are to keep their historic relationship to local government, they must recognize the plight of the metropolitan areas where two-thirds of the entire population of the nation now reside.

RELATIONSHIPS BETWEEN LOCAL AND SENIOR GOVERNMENTS

Shifts of Functions. One way of easing the difficulties of the local governments is for the senior governments, which have access to more diversified sources of revenue and can expand their revenues more easily, to take over some of the more onerous functions of the local governments. A number of functions have been thus transferred in recent years. In Britain, distress arising from unemployment, poverty, ill-health, and old age is now solely relieved by the central government. In the United States, a number of welfare problems, which formerly imposed, in one way or another, heavy charges on the funds of local governments, have been taken over by the national or state governments. Thus senior governments now provide unemployment insurance and aid to the aged, the blind, needy mothers, and dependent children, hence giving local governments appreciable relief from the burden of welfare services that would otherwise have fallen on them.

Compulsory Services and Standards. Alongside this movement and in some respects antedating it is another more complex development. The legislatures of senior governments have enacted laws that impose substantial, uncontrollable expenditures on local governments, limiting their ability to retrench in the face of declining revenues. Local governments are

required to provide certain services and to keep them at a level of quality determined on by the senior government. Elementary education is free to the child, but it is compulsory on the local government. Local governments are required by law to maintain a wide variety of sanitary facilities and public-health precautions. In a host of other matters, some important and some trivial, central governments require local governments to perform specified duties, to employ officials of recognized qualifications, and so on. In Britain, where this development has gone furthest, there are relatively few functions of local government in which the senior government does not impose some minimum standards of obligatory services.

The reasons for the intervention of the central government, whether convincing or not in particular instances, are clear enough. There is thought to be a national interest in maintaining a minimum level of such services as education and public health all across the country. Areas of illiterary and unchecked disease are menaces to the whole society. Yet for various and excellent reasons, these services are not likely to be as well managed and administered by the senior governments as by the local governments. On the other hand, many, if not all, local governments are hard pressed financially to maintain the standard insisted on by the senior government.

Grants-in-Aid. Accordingly, the imposition of standards has been accompanied by grants of money from the senior governments to the local authorities. For example, compulsory free education is almost everywhere assisted by grants, which have risen in amount as the required standards have risen. In Britain, where the senior government imposes many standards, about one-third of the annual current expenditures of all local governments were being met by grants from the Treasury at the outbreak of World War II. During World War II the proportion increased to one-half. Since 1945 the costs of poor relief, maintenance of hospitals, and medical care have been lifted from the local governments by Parliament, and some new obligations imposed. In 1948 the whole system of grants-in-aid was revised in an effort to come closer to equalizing the disparate financial resources of different local governments. The proportion is now slightly more than one-half.

As we have already noted in connection with federalism, such grants ease the financial position of local governments, but they also limit their independence. The senior government defines in detailed regulations the standard of achievement it expects in particular services, and it usually employs inspectors to check on performance. Serious failure to comply with

the regulations may involve a cut in the grant. The central department of education establishes curricula and tests the product of the schools by periodic examination. The recurring visits of its inspectors are a feature of school life. Similar techniques are used in other municipal services whose standards the senior governments want to raise.

Expert Guidance and Services. There is a great deal more to the intervention of the senior government than the drafting of regulations and the prying of inspectors. The departments of the senior government give the local authorities needed encouragement and valuable expert advice. The department of education tries to keep abreast of new movements and new needs in education, and to interpret these to the local school authorities. The senior government provides a number of services for the local authorities that no one of them could provide for itself. Vaccines and serums, diagnostic clinics, and laboratory analysis are provided free of charge. Research in preventive medicine and sanitary engineering is carried on, and the results are available to all local governments. A great work of education in public health is carried on by bulletins, demonstrations, and exhibits. In Britain, this development has gone so far in so many fields that the complex relationships of the central and local governments can best be described as a *partnership* in providing and improving the services supplied by local government.

UNITED STATES. Nothing comparable to this partnership has yet emerged in the relationships of senior and local governments in the United States. North America did not have to face the complexities of crowded urban industrial conditions as early as did Britain, and is only now slowly adjusting itself to them. The United States has not developed the art of local government to the point it has reached in Britain. Municipal civil services, generally speaking, are not nearly as good in quality. Many units of local government are too small, either in area or population, to be effective units of administration for the present-day services required of local government. Little has been accomplished in the way of enlarging these areas. As a consequence of these factors and the financial difficulties of local governments, there has been a tendency in the United States to take particular services entirely away from local governments and make them solely a responsibility of state or national governments. The tendency has been most marked in public-welfare services and in the construction and maintenance of highways.

Whether this is a desirable trend or not, it is the existence of federalism with its intermediate level of government that makes it possible. It would

be fantastic for the central government in Britain to think of taking over and administering any significant number of the services that local governments supply. It is not so fantastic in the United States, where the administration of these services can be distributed among fifty governments. Federalism can be employed not only for decentralization but also for a modified centralization.

The Trend Toward Centralization. Here we come again upon a persistent trend of present-day politics, the drive toward centralization. In discussing federalism, it was noted that a rising demand for the states to undertake more expensive functions had created a tendency to centralize more powers in the hands of the federal government. We now see that the pressure for more governmental services at the municipal level has had similar results. The parallel is remarkably close. In each case, general financial weakness of the governments at the lower level and their widely disparate capacity for maintaining the desired services lead to outright centralization of particular services, and to grants-in-aid and extensive control over other services by the government at the higher level. At this writing (Autumn 1963), it seems but a question of time until a federal Department of Urban Affairs is established by the United States.

Decline of Local Autonomy. Through the convergence of a number of different influences, Anglo-American local self-government has substantially less formal autonomy and independence than it had one hundred years ago, or even at the turn of the century. There are some who think that the trend we have been examining threatens to take the 'self' out of local self-government. It is difficult to estimate the seriousness of this threat, but no doubt a good deal depends on the vigor and intelligence shown by local democracy. If local governments are determined to understand the complexities of their present-day functions and to improve their civil services sufficiently to meet their problems, central control and supervision and central-local collaboration may help rather than hinder them in surviving. Certainly local governments need the knowledge, advice, and suggestion which senior governments can supply, and which many local governments cannot easily secure by their unaided efforts.

The probable effect of the growing central control of local government is an important question because it seems likely that vigorous local self-government is necessary to the maintenance of democracy in national politics and government. In a general way, the history of democratic experiments in the last hundred years tends to confirm this conjecture. Democracy has had

the greatest stability and the highest measure of success in the countries with strong systems of local self-government. On the other hand, in continental Europe, the countries with centralized systems of local government or relatively weaker institutions of local self-government have most easily fallen prey to dictatorships. Of course, these may be accidental coincidences not in any significant way linked as cause and effect. There are, however, some very plausible reasons for thinking there is a great deal more to it than mere coincidence.

LOCAL GOVERNMENT AND DEMOCRACY

In the Anglo-American tradition local self-government has long been credited with contributing greatly to the working of democracy. Two of the commonest arguments may be looked at first. It is often said that experience on a municipal council is valuable elementary training for budding statesmen and politicians. By being faithful in small things, the municipal councilor learns to handle great affairs when he is called by the electorate to service in national or state politics. Second, the mass of citizens get an indispensable political education through discussion of lively local issues and participation in frequent local elections. Such experience helps them to grasp national issues and to exercise their franchise wisely in national politics.

Essential Links. These two contentions are valid as far as they go, but they are far from revealing the essential links between local self-government and democracy. Indeed, they tend to obscure these links because they tacitly assume that it is national and state politics alone which really matter in a democracy, and that local government is merely a training center, and not even a junior league, in the game of politics.

We miss the essence of democracy if we think of it mainly as something practiced by statesmen in a distant capital and forget that it consists of an attitude of mind toward, and a method of dealing with, all the stresses and strains of living together in a society. If local quarrels were always settled by discussion at the local level, and if local communities put their best efforts into making adjustments that are tolerable to all members of the community, there would be less need to tremble at the mention of dictators.

Unfortunately, we have a weakness for big things. The newspapers, which generally give us the kind of news we want, give us exciting front-page

accounts of the dramatic events of national and international politics, while the tiresome wrangles of local politicians are often decently buried under the small headings on an inside page. We do not want to listen to John Smith in a radio discussion on some issue of local government. Rather we want to listen to President Kennedy or Prime Minister Macmillan, to hear what the big men are doing about big things. We give too large a share of our attention to these distant exciting events which we cannot adequately understand and on which, therefore, we often cannot make useful judgments. On the other hand we tend to be fascinated—and revolted—by local scandals!

Need for Participation. The ideal of political democracy demands intelligent, responsible participation by the people in the choice of those who govern and in the approval of the policies by which they are to govern. Intelligent participation requires that the citizen be able to judge the character and qualifications of those who ask for his vote, and to understand the platforms he is asked to support or reject. Responsible participation requires that the citizen, as he votes, should realize that his vote affects the public welfare, that the public welfare will suffer the consequences of his errors in judgment and that he must, therefore, watch his elected representatives and the working out of programs in practice so as to rectify errors at the earliest possible moment. In the subsequent discussion of national government and politics in these pages, numerous reasons will be given for thinking that at present we cannot come at all close to this ideal in the national or state political arena. *The ideal can, however, be much more closely approached in local government and politics, and that is why democracy, like charity, begins at home.*

Some approach to the ideal of intelligent, responsible participation is made in all municipalities where self-government has not degenerated into boss rule. The definite decline of 'boss rule' in a majority of the large American cities augurs well for the future. The citizen sees with his own eyes how the men he has elected behave. He can see whether the policies being followed by his local government work well or ill. It is possible for people, even as they go about their own work, to keep track of their local government.

Remoteness of National and State Politics. It is much more difficult to keep track of national or state politics. More often than not, voters do not know the candidates between whom they must choose. Moreover, many of the issues in state and national politics are hopelessly abstract to the average citizen; they do not arise out of things that have come concretely to his attention and about which he has knowledge. He does not understand

the jugglery by which the budget is balanced, he does not understand the cases for and against the manipulation of currency and credit. Most people are wearied by the parade of statistics marshaled for and against particular governmental policies, and bewildered by the seemingly convincing, yet inconsistent, arguments put up on particular points by the opposing candidates and parties.

It must be acknowledged, of course, that the same difficulties arise in the local politics of large cities. There are numerous cities in the United States whose affairs equal or surpass in complexity those of the smaller states. But the difficulties are not as all-pervasive in local as in national or state politics. Even in the great cities, most of the work and the problems of local government come within the range of the average citizen's knowledge and understanding. He may not, in fact, attend closely to them. All that is urged here is that if he did attend closely, he would, on the whole, be better able to make a useful judgment in local than in state or national politics. Public apathy may well be *the* central issue of the problems of local government.

The behavior of political parties provides some support for the general contention made here. In national and state politics, to a greater extent than in local politics, they try not to burden the voter too much with reams of facts and statistics. They try to help him to make up his mind easily by finding simple issues which will appeal to his feelings and which do not require sustained attention. Hence, national and state elections tend, rather more than municipal elections, to emphasize emotional appeals, and so to fall seriously short of the ideal of intelligent responsible participation.

It is not suggested that such elections are solely what has been called registrations of emotions. There are generally some tests of a rational character, applicable to some, at least, of the claims of a political party for support, which the voter can apply fairly easily. Not uncommonly too, some moral issue is at stake, and on it the average man's judgment is likely to be as good as anyone's. Yet no one can have failed to note the frequency of cries about fearsome bogies such as a *creeping bureaucracy*, the *strangling octopus* of socialism, or the *insidious poison* of fascism. And there can be little doubt that the greater the powers exercised by senior governments, the more various and complex election issues become, the less the voter is able to understand, and the more he is thrown back on his emotions.

When a senior government is conducting operations of great magnitude and complexity, how is the voter to know whether it deserves support in the next election—whether it is doing well or ill? For the most part, its

record cannot be fairly judged merely by the effects of its policies on the life of any particular voter or his neighborhood. If a rational judgment is to be made on its record, it must be judged by the way its policies have worked all across the country—statistics again. For these statistics the voter is at the mercy of the politicians, the writers in the newspapers, the speakers on the radio, about whose integrity and capacity the voter generally knows little or nothing.

NEED FOR EDUCATION. This is not a criticism of the average citizen nor is it a criticism of the political parties. Until the electorate is much more highly educated and possessed of a great deal of leisure that they can devote to the understanding of political issues, it is hard to see how it could be otherwise. It is a criticism of the assumption that local self-government is just a training ground for democracy that is to be practiced elsewhere. It suggests that, for a long time to come, intelligent, responsible citizenship should find its best and most effective expression in local self-government. At the same time, it is not part of the present argument that local governments are always better run and better controlled than are senior governments. Often they are not. All that is said is that the obstacles in the way are less formidable.

The fact that intelligent, responsible citizenship is hard to achieve in national and state politics must not be allowed to obscure its importance or to lessen efforts to achieve it in those fields. There are a great many matters that cannot be dealt with at all by local governments and so must be entrusted to the senior governments. The recent experience with dictatorship in Europe shows clearly that if democracy fails at the national level of government, it automatically disappears at the local level. The conclusion to be drawn from the fact that democracy can be most effectively practiced at the local level is that as many matters as possible should be reserved for the decision of local governments. Every increase of centralization, even when it is unavoidable, puts heavier burdens on the citizens' capacity to understand what is going on and to control it.

Decentralization and Political Unity. This brings us to an important reason for linking democracy with local self-government, which has already been discussed in the chapter on federalism. It was urged there that the decentralization afforded by a federal system reduces the number of disputed matters that have to be settled in the national political arena, thus making it much easier to get majorities that can agree on what the national government should be doing.

The same argument applies point for point to the still greater decentralization provided by local self-government, and it need not be restated at length here. It is sufficient to say that the more closely the senior governments can be restricted to the general common interests that unite the citizens, the greater will be national unity and the less will be the danger that the two-party system will be splintered into a multiple-party system. One of the best ways of so restricting the senior government is to arrange for local demands and local needs that vary widely to be met by a response to these demands and needs by local governments.

EXPERIENCE OF FRANCE. The experience of the French Republics with their highly centralized local government tends to support the position just stated. It has already been explained how almost all important decisions in the sphere of local government are decided either by the Ministry of the Interior in Paris or by one of its agents in the field. When local matters cannot be decided at home, the main job of each member of the legislature is to represent his constituency at the point where the decisions are made. A great part of the time of the French member of the legislature is taken up with lobbying at the Ministry of the Interior in the interests of his locality.

A frequent combination of professions in French life is that of mayor and member of Parliament. To be a successful mayor, one needs to have close connections with, and some influence over, the Ministry of the Interior. The most effective connection is membership in Parliament. A leading example was the revered Edouard Herriot, perennial Mayor of Lyons, and a prominent officer and member of Parliament for forty years. At each election in the years before the debacle of 1940 at any rate, from fifty to eighty mayors were elected to the lower house—then the Chamber of Deputies—where they formed a powerful mayors' bloc primarily concerned with putting pressure on the Department of the Interior. The Fourth Republic's upper house—the Council of the Republic—contained 107 mayors in 1958. The Senate of the Fifth Republic has seen a continuation of the practice. Every member of Parliament, whether a mayor or not, has a great many chores to do at the Ministry of the Interior. According to the constitutional forms, the central government controls and directs local affairs. In actual practice, local affairs and interests invade the central government, hoping to control its decisions.

French localities must think of their own interests, and they must send to the legislature men who will be determined champions of local needs and interests. If the local water supply is not adequate and more up-to-date facilities cannot be purchased without the consent of the Department of

the Interior, it is inevitable that a high proportion of parish pump politicians will go to the legislature. A Parliament with its gaze thus introverted has not enough interest in, time for, or understanding of, broad questions of the national interest.

Politicians biased in favor of local interests find it extremely difficult to find common ground on which to have national political parties united in a common view of the national interest—which was one of the chief reasons for de Gaulle's downgrading of the legislature under the Constitution of 1958. This, it may be suggested, was one of the roots of the multiple-party system in France, although by no means the only one. Localism has always played too important a part in French national politics. Countries with vigorous systems of local self-government are freed of such distractions.

Centralization and the Coup d'état. One other and rather different aspect of the significance of local self-government may be selected for attention. In most countries of continental Europe, such as France, Germany, and Italy, for example, a central department of the interior has had a large measure of control over local government. Usually this includes pretty complete control of the local police forces. Unlike the local police in the Anglo-American system, the *gendarmerie* are virtually agents of the central governments in the localities, taking orders from the center. Thus control of the department of the interior was one of the great prizes for which Nazi and Fascist parties contended when they were fighting their way to power.

NAZI GERMANY. For example, the first government in which Hitler participated in Germany was a coalition of his Nazi party with the Nationalist party, each party getting half the posts in the cabinet. But in that cabinet, Hitler's lieutenants, Göring and Frick, got control of both the Prussian and Reich ministries of the interior, which gave them leverage on the local governments and control of the police across the country. They were thus enabled to fasten their grip on the country in an incredibly short time. This helps somewhat to explain how the Nazis, who never got 40 per cent of the total vote in a *free* election, were able to carry through a revolution without firing a shot—except, of course, the shots of the local police acting under their orders.

A highly centralized system of local government eases the task of a would-be dictator, while local self-government helps to assure its people against the sudden *coup d'état*. Even where there is no immediate need to guard against such eventualities, an effective system of local self-government acts as a counterpoise to the senior government or governments. All forms

of human organization tend to expand and aggrandize themselves unless and until checked by stronger forces. It is therefore extremely important, at a time when the powers of central governments are expanding very rapidly, to have active, energetic local centers of political life that are determined to retain a sphere of independence for themselves.

On occasion, indeed, they may resist the central government too strongly, clinging doggedly to powers they can no longer exercise effectively. We must always reckon with the bad which the good often carries with it. The point to be remembered is that the senior governments, which are in ultimate control of the weapons of coercion in the society, are checked not only by legislatures, electorates, and courts but also by independent local governments in which many men of modest ambition find an outlet for their energies and their desire to render public service. These men can be counted on to resist centralizing pretensions and to compel those who urge more centralization to prove its necessity to the hilt.

Evaluation. These are some of the reasons for thinking there is a close connection between local self-government and liberal democratic senior governments. Still others could be given. The fact that dictators always destroy the autonomy of local government also suggests a connection. It does not follow, however, that local self-government will continue to bolster liberal democracy in the twentieth century unless it is substantially modified and improved.

Financial weakness and the necessity for governments to possess technical scientific knowledge are not the only factors in the movement to shift the responsibility for certain services from the local to the senior governments. Many units of local government, particularly rural ones, are too small to carry some of the newer functions of government. The civil services of most American municipalities are not of a sufficiently high quality to perform many municipal functions efficiently. As the things that local governments are expected to do become more numerous and complex, a considerable overhauling of municipal organization is imperative.

LOCAL GOVERNMENT UNDER DICTATORSHIP

If dictators were to exercise close control over all other features of government and social organization and leave local governments a larger sphere of autonomy, all the accumulated dissatisfactions with their repressive rule would express themselves in the sphere of local government. Centers of

resistance to the dictatorship would soon be built up at the local level all across the country. So the dictators cannot afford to ignore local government. Once serious shackling of free expression in politics is undertaken, it has to be extended to cover every point where significant clusters of resistance might gather. Furthermore, comprehensive regulation of the lives of people, such as modern dictatorship tries to enforce, has to be carried out in large part through the agency of local governments which touch the lives of more people at more points than does any senior government. Genuine local autonomy would be intolerable.

In Germany and Italy. The Nazi and Fascist dictatorships co-ordinated local government as they co-ordinated everything else. Popular election of local councils was abolished and local governments were committed to party bosses who were responsible to the central government and the party leadership and not to the people of the local community. As in France, local government in Germany and Italy had always been subject to a large degree of direction and supervision by a department of the central government, the ministry of the interior. Under the dictators, it was completely subjected to the central government, which might intervene at any time in any way.

In the Soviet Union. Local government in the Soviet Union is not referred to as 'local government' but as 'local agents of state power,' thus suggesting that there is no truly autonomous area in which it can operate. It is made to respond to the federal government and the top party leaders by somewhat different methods in the Soviet Union, which is divided into territorial administrative units. Government policy is carried out in these administrative units under the supervision of the hierarchy of *soviets*, the governing bodies consisting of representatives of workers, soldiers, and peasants, which will be described in a later chapter. Strictly speaking, it is only the soviets of cities and villages which correspond to Anglo-American local governments, but in a sense the whole area of government *below* the supreme soviets of the union republics can be considered as falling within the category of local government.⁶ It should be remembered, of course, that some of these administrative units are larger than many American states.

The tight Communist party control over the nomination of candidates, to be described subsequently, settles the election of local soviets. They are elected for two-year terms by universal suffrage. They 'direct the work of the organs of administration subordinate to them, ensure the maintenance of public order, the observance of the laws and the protection of the rights

⁶ See Constitution of the U.S.S.R., ch. XII, for the main provisions relating to local government.

of the citizens, direct local economic and cultural affairs and draw up the local budgets.'⁷ These tasks can be carried out by the local soviets only 'within the limits of the powers vested in them by the laws of the U.S.S.R. and of the Union Republic'⁸—and one of these limits is the lack of the power to tax!

CHIEF CONTRASTS. Two main characteristics distinguish Soviet from Anglo-American local government. *First*, the scope of its jurisdiction is considerably wider. Local soviets are not only charged with the administration of local services such as public health, education, and highways, but also must supervise all other locally situated enterprises of the Soviet state, such as factories and retail stores. *Second*, Soviet local government lacks, in practice, the autonomy which gives Anglo-American local government so important a place in democratic politics. Like everything else in the Soviet Union, activities of 'the local organs of state power' are controlled very tightly by the Communist party. The system of local government is yet another means of permitting the party leaders to dominate every aspect of life in the Soviet Union. The maintenance of autonomous local government is essential to the forces of liberal democracy in its continuing struggle against totalitarian government.

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VIII

Civil Rights and Liberties

It will be recalled from the discussion in Chapter II that liberal democratic ideas affirm the essential worth and dignity of every human being. The ultimate aim of democratic politics is to provide the necessary conditions for the fullest and widest realization of human personality. The principal conditions are two: *First*, there is the indispensable framework of order and general security which government exists to provide for society. Government provides it by the making and enforcing of laws to which all must equally submit. To be secure in his own person, each must be prepared to help to maintain the same security for others through equal laws equally enforced. The *second* condition is individual freedom, within the limits imposed by the need for order, to make of ourselves what we can out of our abilities and our own unique experience of life. These two conditions can be summed up as *freedom under law*.

When the law marks out a defined area of freedom for individuals and provides a means by which individuals can protect themselves in the exercise of freedom in that area, it can be said to create rights. Each individual then has a right to that area of freedom. However, if the constant aim is to foster and protect human personality, certain kinds of freedom are more important than others, so important in fact that they are basic to the whole enterprise. The principal of these are freedom of religion, freedom of expression, freedom of the person, and freedom of public meeting.¹ In the Anglo-

¹ On this point, see Mr. Justice Cardozo's majority opinion in the celebrated case of *Palko v. Connecticut*, 302 U.S. 319 (1937).

American world, a number of these basic freedoms have long been accorded a special emphasis and a special protection which will be discussed in this chapter. They have been variously called fundamental freedoms, civil liberties, or civil rights.

FREEDOM UNDER LAW

Freedom under law is an ideal, a goal to be strived for. To make it effective in our political and social life, both freedom and law have to be defined with some precision and reconciled in the interests of personality. The process of adjustment of the two goes on endlessly, and the precise terms of reconciliation vary from time to time. The changing scope of government activities has made continuous adjustment of the boundary between them in the last seventy years. Where to draw the line between the two has been one of the most vexatious problems of our times. To define this boundary with precision in the United States or Britain, and thus to learn in full detail the scope of individual rights of all kinds, one would have to make an extensive study of the whole legal system.

For Individuals. Liberal democracy approaches the mutual adjustment of freedom and law with a leaning toward freedom. As we have already seen it is broadly correct to say that in a liberal democracy *conduct which is not forbidden by law is permitted*. The common law, which is unwritten or customary law, chiefly made by judges, and which is still a large part of the law in the United States and Britain, has a bias toward individual freedom. But it also circumscribes freedom; witness the criminal law—defining offenses committed against the safety and order of the state—which in Britain is still largely common law, increasingly less so in the United States. Statutory law—written and codified law, made by the legislature—is a rapidly growing part of the law, and it also often puts limits on what individuals are free to do. Between them, common law and statutory law define the entire area of individual freedom, largely by the negative process of saying what one may *not* do.

AGAINST OTHER INDIVIDUALS. If individuals break these laws and thereby infringe on the rights and freedoms of other individuals, they are exposed to actions in the courts. If X makes a slanderous statement about Y, he infringes on Y's right to his good name, and may be sued in court by Y for

damages by way of compensation. If X puts his statement about Y in writing, the latter can sue for libel.² If he obstructs a public highway so as to prevent others from its lawful usage, he interferes with a lawful freedom of those persons, and the courts will, on proper presentation of a charge, impose a penalty for creating a public nuisance. Where mutual respect and the fear of damages or penalty are not enough to make particular individuals respect the lawful claims of others, the courts are open to give redress. In this way, the law protects individuals against wrongful interference by other individuals. It should not be assumed, however, that this protection is foolproof. Indeed, a good case may be made for the position that more civil rights and liberties are violated by private persons against their peers than by free government against its citizenry.

AGAINST GOVERNMENT. But individuals need to be protected against the government as well as against their fellows as private persons. A legislature with power to make the laws and an executive with overwhelming force at its command have effective and alarming power to restrict individual freedom. The men who laid the main lines of the modern British and United States constitutions had had bitter experience with arbitrary governments. One of their most anxious concerns was to limit the power that governments could exercise over individuals.

Accordingly, they selected for special emphasis a number of freedoms thought to be vital to the interests of personality. In Britain, this emphasis led immediately to the Bill of Rights of 1689, a solemn Act of Parliament that curbed sharply the powers of the executive branch of government, and to a genuinely independent judiciary free of executive pressure. Also, it led immediately to a strong affirmation of the Rule of Law, which subjected public officials of all kinds to the same rules of law and to the same courts as private individuals. Then, over the years, it led to an extraordinarily powerful public opinion in favor of these vital freedoms, and opposed to Parliament's restricting them by legislation. In the United States, this emphasis led to the Bill of Rights and other clauses in the Constitution, and to the various bills of rights in the state constitutions, thus protecting individuals in their exercise of certain rights and freedoms from interference by governments.

² In a much-publicized comment in 1962, Mr. Justice Black expressed the opinion that the First Amendment to the U. S. Constitution in effect forbids all damage suits for libel and slander, since it provides: 'Congress shall make no law . . . abridging freedom of speech or of the press.' His is, however, obviously a minority point of view, based on his absolutist position vis-à-vis the First Amendment.

RIGHTS AND LIBERTIES. The rights and freedoms so protected by constitutional provisions in the United States are generally described as *civil rights*. Substantially the same rights and freedoms are also protected in Britain—there simply called *civil liberties*—by common law or statute against executive interference, and by a strong public opinion against legislative interference. Civil liberties or civil rights are to be distinguished from all the other rights and freedoms that individuals may enjoy under law because they are specially buttressed in one way or another *against violation by governments*.

Civil and Political Rights Distinguished. Civil rights,³ as they will be normally called here, are to be distinguished from political rights. *Political rights* are those which give the adult citizen the right to the franchise, qualify him to hold public office, and entitle him to direct participation in political life. They are now restricted to persons who are citizens,⁴ and full recognition of political rights has lagged behind the recognition of civil rights, both in Britain and the United States. *Civil rights*, on the other hand, are rights which protect the individual against political interference in the private sphere of life. Of course, political rights cannot be exercised effectively without at least some of the civil rights: freedom of speech, freedom of the press, and freedom of peaceable assembly. But the civil rights were never thought to be dependent on political rights or on political democracy for their validity. They are not restricted to citizens⁵—the United States Constitution contains many references to 'persons' and 'people'—but are conceded, generally speaking, as rights to which a man is entitled because of his human person-

³ *Civil rights* has acquired a very special meaning in Canada through the use of it to describe a particular area of provincial legislative power in Sec. 92.13 of the British North America Act. As used there, the term civil rights is primarily concerned with *private law*, the legal relationships between person and person in private life. The rights and liberties treated herein are exclusively in the field of *public law*, which defines the relationships between the government and private persons. Cf. Ch. XV, *infra* and, particularly, J. A. Corry and J. E. Hodgetts, *Democratic Government and Politics*, 3rd ed. rev. (Toronto: University of Toronto Press, 1959).

⁴ Aliens were permitted to vote in the State of Arkansas as late as 1926.

⁵ Space does not permit a discussion of citizenship and its fascinating problems. Suffice it to note here that, broadly speaking, citizenship may be acquired either by birth or naturalization, and that it is determined throughout the world on the basis of two different legal principles. *jus sanguinis* and *jus soli*, i.e. based upon 'blood' or 'soil,' respectively. Most continental European countries adhere to the former, whereas most English-speaking lands follow the latter. Thus, in the United Kingdom all persons born there and subject to its jurisdiction are British citizens. In the United States the Fourteenth Amendment to the Constitution states that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' There are various exceptions to these rules, but the basic concepts govern.

ality. Indeed, for a long time they were thought to be inherent in man by virtue of his nature—inalienable endowments from his Creator, as Thomas Jefferson said in the Declaration of Independence—and to rest upon the universal laws of nature as first expounded by the Stoic philosophers.

Civil Rights: Substantive and Procedural. The fundamental civil rights as already suggested, are freedom of religion, freedom of the person, freedom of speech and of the press, and freedom of peaceable assembly. They are all expressly conferred by the Constitution of the United States, and the scope of the limitations they place on government will be discussed later. They are all generally recognized and asserted in Britain. They are *substantive rights*. But solemn declarations and lip-service do not alone guarantee their effectiveness in practice. The Constituent Assembly of the first French Republic issued its resounding Declaration of the Rights of Man, but this did not prevent the Reign of Terror three years later, an episode in which the fundamental freedoms were trampled underfoot. Ways and means of assuring their effectiveness are also needed.

The most important of these ways and means is *fair trial without undue delay*. Declarations of basic liberties will be of little avail if the government can make arrests on trumped-up charges, and holds its victims without trial or get them convicted in an unfair trial. The first requirement for a fair trial is a judiciary independent of direct control by the government. Other basic requirements are trial by jury, the rights of the accused to know the specific charge against himself, to confront his accusers in open court, not to be compelled to incriminate himself and to have the assistance of a lawyer for his defense. To prevent undue delay in his being brought to trial, there must be a procedure to compel either early trial or speedy release of the accused, such as is provided by habeas corpus. All these *procedural rights* are conferred by the Constitution of the United States—although not always repeated on every point and with equal strength in the constitutions of all of the several states—and are equally guaranteed by common law or statute in Britain.

There are besides a number of weapons that governments bent on persecuting individuals commonly use. They make *ex post facto* laws—retroactive *penal* legislation—which turn into crimes acts committed before the law was passed. They make arrests or search persons and places just in the hope of turning something up, acting on the authority of a general warrant. They require excessive bail from those they have taken into custody. The Bill of Rights in Britain outlaws excessive bail, the common law forbids

general warrants, and *ex post facto* legislation would outrage public opinion. The Constitution of the United States outlaws all three abuses. Thus, the protection of individual civil rights or liberties against encroachment by governments is further strengthened.

TWO KINDS OF CIVIL RIGHTS. So there are really two kinds of civil rights. First, there are the essential freedoms that men want for their own sake; these are the *substantive* civil rights. Second, there are the means that the Anglo-American genius for practical political devices has established for making them effective; these are the *procedural* civil rights. Everyone hopes he will never need them. No doubt there is less need for some of them now that political democracy has established a large measure of mutual confidence between government and people. But there is no complete assurance that democratic majorities will always refrain from oppressing minorities, either in the public or the private sphere, and every criminal trial that arouses public passions reminds us that the struggle for fairness of trial is never over.

More will be said later about the scope and significance of some of these civil rights. Immediately, it is important to see how they are guaranteed to the individual in the two leading democracies. The method of guarantee is far more complex in the United States than in Britain; hence we shall look at the simpler British situation first.

CIVIL RIGHTS IN BRITAIN

Parliament is supreme in Britain. There is no authority that stands above it and no provision of the constitution it cannot change by majority vote. The only limitation on its power is the customary one of requiring a 'mandate'—in a sense, instructions—from the people in an election before carrying through a serious constitutional change. The strongest formal guarantee available for civil rights is an act of Parliament—which Parliament could change tomorrow. The English *Bill of Rights of 1689*, from which all American bills of rights borrow, takes the form of an act of Parliament subject to change or repeal by a majority vote of Parliament. Equally, of course, any rights that depend on the common law can be altered by Parliament. No declaration of rights, however solemn, lies beyond its reach.

No Formal Statement. Perhaps for this reason the British people have never made a comprehensive formal statement of their civil rights. The Bill of Rights itself is mostly concerned with the detail of grievances against

the Stuart kings in their high-handed conduct of the executive branch of government, and does not purport to give a general guarantee of the important civil rights of today. Nothing is said in it in any direct way about freedom of religion, freedom of the press, or freedom of assembly. It does provide a guarantee of freedom of speech, but only for debates in Parliament. There is no other comparable document in which guarantees of civil rights in Britain can be found. In the main, they have to be spelled out of the common law, which permits what it does not forbid. In the seventeenth-century struggle against the Stuarts, Englishmen appealed to the common law as the basis of their liberties. It still remains the principal source of British civil rights.

Freedom of Speech. The exact nature of British civil rights can be made clear by considering more closely the right of freedom of speech. It is nowhere expressly stated as it is in the First Amendment to the Constitution of the United States. It rests rather on the general proposition that what is not forbidden by the common law or by statute is permitted—and protected. To define it, it is necessary to see what kinds of speech or writing entail adverse legal consequences for the utterer.

LEGAL LIMITATIONS. In the first place, the common law, as modified by statute, sets itself against *libel* and *slander*. Any speech or writing which makes false statements injurious to the reputation of any person is a wrong against that person—slander when spoken, libel when written—and gives him a right to sue for damages. Second, *blasphemy* is a criminal offense, and so is the writing and publishing of indecent or obscene literature. The exact definitions of these offenses do not matter here. It is enough to notice that they place some limits on freedom of expression in the interests of religious sensibilities and sexual morality.

Third, and most important for present purposes, *sedition* is a criminal offense against the criminal law. Seditious libel is broadly defined as 'the use of words tending to arouse hatred or contempt for any of the institutions of government, advocating changes in Church or State other than by lawful means, or raising discontent or ill-will among the populace.'⁶ It would be very difficult to carry on vigorous political discussion without committing a technical offense under this law. Not only Communists arguing for revolution, but democratic socialists persuading the poor that existing society is unfair to them, and members of Her Majesty's Loyal Opposition, doing their best to show that the government of the day is stupid and inept, could be

⁶ Hiram M. Stout, *British Government* (New York: Oxford University Press, 1953), p. 40.

charged almost daily under this law; and its literal meaning is broad enough to justify conviction. In fact, however, trials for sedition are extremely rare and occur only when there is incitement to immediate violence and revolt.

There are various other limitations on freedom of speech and expression. There are special statutory penalties for trying to arouse disaffection among the police and the armed forces. Dramatic productions, motion pictures, and radio scripts are subject to a relatively mild censorship. This list is not exhaustive, but it covers the main restrictions on freedom of expression.

WHAT IS LEFT? Freedom of speech is what is left after these restrictions and limitations on expression. To be more precise, *the individual has a right to say whatever the courts will allow him to say with impunity*. For it is only in the courts that action can be taken against him for what he has said. The Rule of Law requires the government to act according to law. Officials cannot detain a person or inflict a penalty on him for what he has said on some vague ground that it is unwise, not in the public interest, or unfair to the government. They can only lay a charge against him in the courts alleging violation of a specific law.

Other Basic Freedoms. Freedom of the person is secured in the same way. The common law, supplemented by statute, defines the offenses for which a man may be convicted and imprisoned. The law also authorizes the detention of the mentally unbalanced in institutions. But the sane man who keeps clear of the criminal law has a right to personal freedom. Anyone, of course, may find himself arrested on suspicion of a crime. But here again the law defines carefully the lawful power of police or others to arrest, and the right of the suspect to be released on bail pending trial. On very serious charges like that of treason—an overt act aimed at the overthrow of government, betrayal to the enemy—bail is not allowed. However, if the person arrested is not formally charged and tried for some specific offense, he can secure his release on *habeas corpus*, a proceeding in which the court, often within a period of from forty-eight to seventy-two hours, will order his jailer to release him at once unless the jailer shows that he is lawfully detained under a specific law. The Rule of Law comes into play here also. Police, jailers, and other officials who exceed their lawful powers of arrest and detention are personally liable to actions for damages for assault, false arrest, and false imprisonment. Independent courts and procedures ensuring fair trial are also necessary to make the right of personal freedom effective.

Of the freedoms of religion, press, and assembly, it is enough to say here that freedom of the press has substantially the same protection as freedom

of speech and expression; that a wide right of public meeting for all lawful purposes is recognized; and that everyone is free to hold such religious convictions and practice such religious observances as he will. It is true that the Church of England is an established state church, but the right of dissent is fully recognized and there are no longer any civil or political disabilities attached to dissent. The same formula applies to all the basic freedoms. The government cannot penalize anyone for his conduct or hamper him in his actions unless he violates a specific law.

HOW CIVIL RIGHTS ARE GUARANTEED

It must be said again that all civil rights are at the mercy of Parliament—which does, on occasion, limit them. For example, in 1936 Parliament passed the Public Order Act, which limited somewhat the right of public procession and meeting. The occasion was the recurring street-fights between Fascists and Communists, as they tried to break up one another's meetings, thus threatening the most basic of all conditions: order and general security. Also, in time of war, Parliament authorizes a degree of censorship of expression, and of detention without trial of persons suspected of enemy association. But in time of peace, the majority in Parliament always shows a tender and alert regard for basic civil rights. Moreover, as we have just seen, the law against sedition is not enforced nearly as drastically as its terms would justify. That is to say, the executive, the government of the day, which decides whether or not to launch criminal prosecutions against alleged offenders, lets slip almost all its opportunities for pressing charges of sedition. It limits itself almost entirely to prosecuting incitements to immediate violence and to attempts to undermine the loyalty of the armed forces and the police.

Best Record. What is the reason for this forbearance of the executive and majority in Parliament? Why has Britain had, without formal constitutional guarantees, the best record in the world for protecting civil rights? Why is there much more freedom of expressing opinions than a literal interpretation of the existing law allows? The answers to all these questions are the same: *The British people as a whole have an intense attachment to individual freedom.* If the majority party in Parliament were to push through laws sharply restricting civil rights, it would have to expect defeat at the next election. Equally, if the government undertook widespread prosecutions to enforce the letter of the sedition laws, it would arouse formidable

protest. Action of either kind might so undermine confidence in the government of the day as to force an immediate election. Moreover, trials for sedition must take place before a jury. Juries are much more concerned with public opinion than with the strict letter of the law, and any attempt by the government to use the sedition laws against its political opponents would be likely to be frustrated by acquittals.

The British concern for civil liberties expresses itself in the crisis of war as well as in time of peace. When war broke out in 1939, Parliament gave wide emergency powers to the executive. Section 18B of the Defence Regulations of 1939, enacted under these powers, authorized the detention without trial of persons suspected of enemy or hostile associations. Several persons, including a member of Parliament, were thus held in prison. When France fell in 1940 before the Nazi tidal wave, there were in Britain some thousands of German refugees who had fled from Nazi Germany before 1939. There was little doubt that most of these were anti-Nazi and therefore trustworthy, but there was equally no certainty that a considerable number of them were not carefully planted Nazi agents. There was no quick, sure way to tell one from the other. Faced with imminent invasion when treachery from within would have been fatal, the government detained most of these German refugees. As they were not known to have committed any offense, they could not be brought to trial; so they were interned without trial.

Importance of Public Opinion. Even in this desperate situation, when Britain stood alone with the world crumbling about her, British passion for fair play and individual liberty would not be stilled. In Parliament and out, the government was subjected to mounting criticism (unlike the situation involving the 1942 evacuation of 111,000 Japanese-Americans from the West Coast of the United States—70,000 of whom had been born in the United States—which evoked but little criticism until after the war). The government finally agreed to establish independent advisory committees to screen the persons detained and to advise on their continued detention or release. Over a period of time, these advisory committees investigated the authenticity of the German refugees who had been detained, and recommended the release of the great majority of them. In most instances, the government followed the recommendation of the advisory committees. The attachment to civil liberties is both sincere and profound, and it finds an eloquent champion in the legislative branch—which is not where the average American would look for defense of his civil liberties: he would first turn to the independent judiciary and its power of judicial review.

RESPECT FOR PRECEDENT. The main reason for this unfailing public opinion in support of civil rights is fairly clear. The British people have lived so long together that they have a deep trust in one another. They feel assured that their fellows will not be roused to precipitate action by the glitter of new ideas. Further, their respect for precedent is enormous. The British are ruled, to an irritating degree, by *custom*. It has even been suggested that the British are able to enjoy such wide civil rights because in much of their lives they submit voluntarily to the dictatorship of custom. However that may be, the customs by which they live are permeated with conceptions of fair play and mutual respect.

Notions of fair play and mutual respect rest upon belief in the supreme importance of human personality. So the final basis for civil rights in Britain is the liberal democratic ideals. As long as these ideals are widely held and ensure the unity of a people, they afford a better guarantee than the express guarantees of a written constitution. For a written constitution, in the long run, is no stronger than the fundamental beliefs of the people who live under it.

CIVIL RIGHTS IN THE UNITED STATES

In the United States, there are two lines of legal defense of civil rights against governments. The first line is substantially the same as in Britain. What is not forbidden by law is permitted. The main differences are in the details of what is forbidden, and in the fact that *state as well as federal laws* have to be taken into account in discovering what is forbidden. Also, the Rule of Law or the supremacy of law, as it is more often called, is a vital principle in the United States. Except where expressly authorized by law to the contrary, government officials must answer according to the ordinary law in the ordinary courts. Independent courts are available to test the question whether an official has infringed the rights of individuals as these are defined either by common law or by the statute law of a legislature. This line of defense is a protection of considerable importance.

In the Written Constitution. But there is a second and more formidable line of defense in the federal and state constitutions. As we have already seen, certain specific civil rights, both substantive and procedural, are written into these constitutions, and thus put beyond the reach of legislatures and executives. Some of the civil rights guaranteed in the federal Constitution

are asserted against the federal government only—such as the contents of the first eight amendments; some against state governments only—such as the guarantee of the equal protection of the law; and some against both federal and state—such as *ex post facto* laws and bills of attainder. The state constitutions also contain bills of rights, which usually repeat, and often go beyond, the provisions of the federal Constitution guaranteeing civil rights—but in practice frequently fail to provide the same degree of effective protection as the federal sphere.

The principle of limited government in this context means that laws enacted in violation of these guarantees to the prejudice of civil rights are unconstitutional, and the courts will, upon proper challenge, so declare them. Official action infringing civil rights in pursuance of an unconstitutional statute is itself unconstitutional and the courts will so hold. Before valid legislation cutting away these civil rights could be passed, it would be necessary to amend the Constitution, or constitutions as the case may be, so as to take away the protection they afford. Unlike the situation in Britain, a mere legislative majority cannot cut down the *letter* of guaranteed civil rights—although it can attack their spirit.

PROTECTION AGAINST GOVERNMENT ONLY. The various bills of rights in the American constitutions extend to all persons and not merely to citizens. *But they protect civil rights only against governments and not against private persons or organizations.* If hoodlums break up religious services in a church, the remedy is not an appeal to the First Amendment of the United States Constitution, but to the ordinary law relating to assault, trespass, and public nuisance. American history presents persuasive evidence that on the scale of regard for civil rights, the federal government ranks first, the state governments second, and individuals last.

GENERAL TERMS. Many of the civil rights guaranteed in the federal and state constitutions are stated in general terms without any express qualification. They are not, however, to be regarded as absolute. The substantive rights of freedom of religion, speech, press, petition, and assembly set out in the First Amendment, for example, cannot be pressed to the point where they disrupt the indispensable public order and general security that government must provide if it is to be at all useful. It would be almost correct to say that the Supreme Court has inserted the word 'reasonable' as a qualification on these rights in its interpretation of them. But, in recent years the Supreme Court has put a very high value on the importance of these five freedoms for a liberal democratic society, and may well be expected to strike

down statutes that purport to qualify them, unless it is convinced that the qualification is clearly necessary for the preservation of public order. The Court—albeit sometimes by the narrowest of margins—has generally accorded the First Amendment somewhat of a 'preferred' status in the scale of constitutional values.

More will be said on the limits of these rights later. At the moment the important function of the courts, particularly the Supreme Court of the United States, in defining and safeguarding civil rights must be stressed. There are limitations on these rights, and the Supreme Court, subject to reversal by Congress or constitutional amendment, or by its own change-of-mind, has the final word on what they are. Some of them are obvious and occasion no disagreement. As Mr. Justice Holmes once pointed out in what has become a classic statement of the problem, no one has the right falsely to shout 'fire' in a crowded theater.⁷ Others are much harder to define, and may even vary from time to time. Much will always depend on the personal outlook of the judges, how strongly they are dedicated to the liberal democratic values, and how much faith they have in the reasonableness of their fellow men.

Nonetheless, in this at once fascinating and vexatious area many judges are quite consistent and predictable. For example, Justices Hugo Black and William O. Douglas, since their appointment to the highest bench in 1937 and 1939, respectively, could almost *always* be found on the side of the individual *versus* the state. Mr. Justice Felix Frankfurter, on the other hand, while embracing similar values personally, became an outspoken advocate of judicial self-restraint during his long tenure from 1938 to 1962, and drew the line more often than not on behalf of *the state*, believing that, on balance, judicial restraint was by far the better part of wisdom and, indeed, required by the role and position of the Court. It is precisely the 'drawing of the line' which is so fundamental and so difficult in the relationship between the rights of the individual and those of society. The first of the guarantees mentioned in Article I of the Bill of Rights affords a poignant illustration.

FREEDOM OF RELIGION IN THE UNITED STATES

To turn now to that most important of the guarantees, the First Amendment of the Constitution begins with the provision that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exer-

⁷ *Schenck v. U.S.*, 249 U.S. 47 (1919), at 52.

cise thereof.' Judicial interpretations of the clause of the Fourteenth Amendment, which forbids the states to deprive any person of 'life, liberty or property without due process of law,' have held that the 'liberty' thus protected against the states includes the five freedoms of the First Amendment.⁸ So neither Congress nor state legislatures can set up a state church or interfere with the freedom of the individual to worship God in his own way.

The deepest feelings and the strongest convictions of individuals are expressed in their religion. It sums up their judgment of the inner meaning of their lives, and of their relationship to the cosmic scheme of things. The religious system to which each adheres, even when it takes the form of saying there is no God, is the citadel of his personality.

No State Religion. As long as it was believed that unity of religion was the indispensable foundation of political order, the state prescribed an official religion and required everyone to conform. Dissenters, who always appear when there is any freedom to think at all, were required to assert beliefs they did not hold and were persecuted for holding unorthodox beliefs. The final indignity to the individual is to deny him the right to hold and express his innermost convictions. The only escape for the dissenters from this humiliation was to seize the government and turn the tables on their persecutors. So persecution on the one side was matched by seditious conspiracy on the other. In this kind of atmosphere, government by consent and peaceful adjustment of differences is impossible. This is why liberal democracy could not come into existence until religious toleration had been accepted. It was necessary first to see that men have enough in common to support a common system of public order without having to agree on all items of religious faith. This discovery was first made by left-wing Puritans in England and America, such as John Locke and Roger Williams. Freedom of religion is a fundamental necessity for liberal democracy.

Caesar and God. It should not be thought, however, that it is easy to reconcile the imperative claims of public order and freedom of religion. Deep religious convictions demand more than verbal expression and ceremonial practice: they urge the believer to act on them. A faith that does not inspire action is scarcely a faith at all. Moreover, religious leaders have a tendency to imperialism; they want truth to prevail. But there is a definite limit to the freedom of individuals that can be allowed in the interest of

⁸ See, among others, *Fiske v. Kansas*, 274 U.S. 380 (1927)—speech; *Near v. Minnesota*, 283 U.S. 697 (1931)—press; *DeJonge v. Oregon*, 299 U.S. 353 (1937)—assembly and petition; *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934)—religion.

public order. The difficulty is, as Mr. Justice Roberts put it well, that freedom of religion embraces two concepts—freedom to believe and freedom to act. 'The first is absolute but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'⁹ The defining of what belongs to Caesar and what to God is a difficult and seemingly endless process. It accounts for much of the diversity of opinions and actions in a liberal democracy.

Two Aspects of the Clause. For the sake of constitutional interpretation, we should distinguish between the first and second parts of the opening clause of the First Amendment. Although the Supreme Court has been inclined to lean over backwards in defense of religious liberty, its role in the area of separation of Church and State—the first part of the clause—has lent itself to considerably more controversy than in the second.

(1) 'CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION.' What does this phrase mean? What does it forbid? References to history seem to intensify rather than solve the riddle! In general, the Court has held it to forbid governmental favoritism for any *particular* religion, and—probably, but not certainly—any considerable amount of direct *general* aid to *all* religions. Yet it has not viewed as a violation of the principle of separation of Church and State the general-tax-exemption granted to church-owned property or property simply used for religious functions. Nor has it rejected the long-standing practice of *federal grants* for free lunches for parochial and private schools as well as public schools; nor those to war veterans to attend any institution of higher learning of their choice; nor the use of general *public* funds for the use of chaplains in legislatures and in the armed services. But the Supreme Court has gone beyond the rather broad exemptions just cited, and has upheld certain federal, state, and local governmental practices in the face of allegations that they constitute breaches in what Jefferson termed the 'wall of separation between Church and State' including the expenditure of public funds to furnish non-sectarian textbooks to Louisiana parochial and private schools as well as public schools—on the grounds that such 'public purpose' gifts of texts benefit the *child* rather than religion.¹⁰ Yet in 1962 the Court *refused* to review an Oregon Supreme Court decision *banning* state loans of textbooks to pupils of parochial schools as a violation of the Oregon Constitution.* In its most striking decision in

⁹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁰ *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930). See also *Bradfield v. Roberts*, 175 U.S. 291 (1899) and *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

* *Dickman v. School District, Oregon City*, 371 U.S. 823.

this particular field. Mr. Justice Black, speaking for a Court which split 5:4 on the issue, upheld the right of authorities of Ewing Township, New Jersey, to provide free bus transportation to children attending parochial as well as public schools.¹¹ Here again the 'child benefit' theory was the key factor in the Court's decision.

A related, thorny problem has been the constitutionality of *released time*, an arrangement whereby children attending public schools are 'released' from them at stated times in order to attend religious classes. In the most famous released-time case on record, the issue was a practice of the Board of Education in Champaign, Illinois, whereby privately selected religious instructors were permitted to teach religion *during the school day, on the public school premises*, to students whose parents had signed 'request cards,' with the school authorities keeping attendance records in the same manner as for any other class. In an 8:1 decision, rendered by Mr. Justice Black—and received with considerable hostility by the public at large—the Court held the practice to be unconstitutional on the grounds that:

. . . here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.¹²

However, the Court rendered a contrary decision in a New York City released time case four years later. Although the program was essentially like that in Champaign, religious instruction was given *outside* the public school buildings in facilities provided by the various religious groups. While expressly refusing to overrule the Champaign decision, Mr. Justice Douglas contended for the majority that the difference inherent in the administration of New York City's law sufficed to save the program, and added that there is 'no constitutional requirement which makes it necessary for government to be hostile to religion. . . .' But the author of Champaign and Ewing Township majority decisions, Mr. Justice Black, here dissented sharply—as did Justices Frankfurter and Jackson—on the grounds that 'ex-

¹¹ *Everson v. Board of Education*, 330 U.S. 1 (1947). Fifteen years later, Mr. Justice Douglas, who was among the majority here, announced from the bench that he thought *Everson* had been wrongly decided. State courts have handed down decisions in favor of both sides.

¹² *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), at 212. See Vashti C. McCollum, *One Woman's Fight* (Boston: Beacon Press, 1961).

cept for the use of the school buildings in Illinois, there is no difference between the systems that I even consider worthy of mention.'¹³

Yet no decision in this delicate realm of conscience fanned the flames of public passion as much as did the Supreme Court's 1962 verdict in the famous 'New York Prayer Case.' With only Mr. Justice Potter Stewart in dissent, the Court there struck down as a violation of the principle of separation of Church and State an official 22-word non-denominational prayer, drafted by the New York State Board of Regents and recommended for reading aloud by the state's teachers and by the children in each classroom at the start of every day in the public schools. Writing for the decisive majority, Mr. Justice Black put into focus the manifold and perhaps non-solvable problems of personal commitments and majority-minority line-drawing that continue to bedevil the religious-constitutional controversy:

It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.¹⁴

(2) '... OR PROHIBITING THE FREE EXERCISE THEREOF.' The phrase means what it says: Congress—and by interpretation the states—may not interfere with the sacred right to act in accordance with one's religious belief. But this right is not absolute. For example, the Court upheld a congressional statute proscribing the practice or advocacy of polygamy against the challenge by Mormons that it infringed upon their religious freedom;¹⁵ it denied the claim that it includes the right to exhibit poisonous snakes in church;¹⁶ and it saw no violation of religious freedom in state 'blue laws.'¹⁷ On the other hand, parents are not obliged to send their children to public schools, if they prefer a parochial institution;¹⁸ a state may not require a declaration of belief in God as a qualification for public office;¹⁹ and in

¹³ *Zorach v. Clauson*, 343 U.S. 306 (1952), 314-15.

¹⁴ *Engel v. Vitale*, 370 U.S. 421. The Court's 8:1 decision, just one year later, that no State or locality may require recitation of the Lord's Prayer or Bible verses in public schools was almost anticlimactic (*Abington Township v. Schempp* and *Murray v. Curlett*, 374 U.S. 203, 1963).

¹⁵ *Reynolds v. U.S.*, 98 U.S. 145 (1878).

¹⁶ *Lawson v. Commonwealth*, 291 Ky. 437; 164 S.W. 2d 972 (1942).

¹⁷ See *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc.*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); and *Gallagher v. Crown Kasher Market*, 366 U.S. 617 (1961).

¹⁸ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁹ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

1946 the Court reversed two decisions of long standing and admitted to citizenship a Canadian Seventh Day Adventist whose religious beliefs prevented him from bearing arms, but who declared his readiness to serve in the armed forces as a non-combatant.²⁰

A long series of cases involving the Jehovah's Witnesses, a militantly evangelical minority religion, serves to emphasize the post-1937 Court's addiction to liberal interpretations of freedom of religion. In the twenty-five years from 1938 to 1963, of sixty-five cases before the Court the Witnesses won fifty-seven.²¹ In the most celebrated of these cases—after initially holding that public school pupils could be forced to salute the flag of the United States, despite their claim that to do so would be to 'behold a graven image' in violation of religious beliefs²²—the Court *reversed* itself less than three years later and struck down a West Virginia compulsory flag salute statute. Speaking for a new majority of six, Mr. Justice Jackson here made an observation that has been frequently quoted:

. . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.²³

FREEDOM OF SPEECH AND PRESS

The First Amendment to the Constitution of the United States forbids Congress—and now by judicial interpretation the several states—to make any law 'abridging the freedom of speech or of the press.' This guarantee covers both speech and writing in every form and would be more accurately described as *freedom of expression*. Again, the right it protects is not absolute. Common and statutory law impose much the same limitations as in Britain.

Legislative Restrictions. Legislatures in the United States have ample

²⁰ *Girouard v. U.S.*, 328 U.S. 61 (1946). Cf. *U.S. v. Schwimmer*, 279 U.S. 644 (1929) and *U.S. v. MacIntosh*, 283 U.S. 605 (1931). In deference to religious objections to military service, Congress now permits bona fide conscientious objectors to serve a period of time equivalent to that required by the draft in work contributing to the 'national health, safety, or interest,' in lieu of induction.

²¹ Cf. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946); and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

²² *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

²³ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). On the same day the Court also invalidated a Mississippi statute that made it unlawful to urge people, on religious grounds, not to salute the flag. (*Taylor v. Mississippi*, 319 U.S. 583.)

power to make laws curbing seditious utterances or providing against subversion generally. Congress and the various state legislatures, especially during periods of national emergency, have enacted such laws increasingly since the end of World War II—chiefly as a reaction to and fear of the tactics employed by Communist Russia and its agents.

THE COURT'S ATTITUDE. The Supreme Court has not always applied a uniform test in deciding the validity of such legislation. It has acknowledged that restrictions on speech which would not be justified in time of peace may be justified when the nation is at war.²⁴ For a long time the prevailing view of the Court was that utterances which had a 'bad tendency' to undermine the belief of Americans in the rightness of their form of government and their established way of life were not entitled to the protection of the First Amendment. But in recent years—with lapses—the Court has shown much more anxious concern for freedom of expression. Its prevailing view in these recent years has been that the only utterances that can lawfully be curbed are those which threaten paramount public interests, 'not doubtfully and remotely but by clear and present danger.'²⁵ Yet what constitutes a 'clear and present danger'?

The Clear and Present Danger Doctrine. As it was first conceived and spelled out by Justices Holmes and Brandeis in the *Schenck* case in 1919,²⁶ the 'clear and present danger' doctrine was intended by its authors to draw the all-important line between freedom of expression and the right of the state to guard itself against subversion. Mr. Justice Holmes, in holding for a unanimous Court that the defendant could *not* with impunity agitate for disobedience of the Draft Act of 1917, in the face of a prohibition to the contrary contained in the Espionage Act of 1917, attempted to find and define that line as follows:

. . . We admit that in many places and in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights. But the character of every act *depends upon the circumstances* in which it was done . . . The most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effects of force . . . The ques-

²⁴ *Schenck vs. U.S.*, 47 (1919).

²⁵ *Thomas v. Collins*, 323 U.S. 516 (1944).

²⁶ Loc. cit. Some students of the doctrine would credit Judge Learned Hand with an important assist, if not the initial idea, in the creation of the doctrine. See Robert S. Lancaster, 'Judge Hand's Free Speech Problem,' *Vanderbilt Law Review* 10 (February 1957), 301.

tion in every case is whether the *words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent*. It is a question of proximity and degree.²⁷

Yet the enigmatic nature of this 'clear and present danger' test is illustrated when only six years later a majority of seven held one Benjamin Gitlow's speeches and publications against the New York State Criminal Anarchy Act to be in violation of that law, despite his reliance on the guarantees of freedom of expression under the First and Fourteenth Amendments.²⁸ Although the Court did not apply the 'clear and present danger' doctrine *per se*—for obviously no such danger was created by Gitlow's action—it spoke of a 'bad tendency' to bring about such results. There were two dissenters: Justices Holmes and Brandeis—who had already had occasion to disagree with their brethren on this issue a mere six months after *Schenck*²⁹—distinguished this case from *Schenck* chiefly because of the absence of war. Brandeis seized on an early opportunity to refine and expand their doctrine, with Holmes's support, when he wrote in a concurring opinion that 'No danger flowing from speech can be deemed clear and present, *unless* the incidence of the evil apprehended is so *imminent* that it may fall before there is full opportunity for discussion.'³⁰

PROBLEMS OF INTERPRETATION. Ever since the 'clear and present danger' doctrine was devised its interpretation has thus troubled the Court. On the one hand, it has modified the doctrine by its collateral adoption of the 'bad tendency' test; on the other, it has seen the need to be mindful of the right of freedom of expression, especially in the face of the congressional and public tendency to be restrictive, even intolerant, of unpopular views in troubled times.

As a result, either or both tests have been employed in various cases, and the court has frequently been split—sometimes 5:4—in their application. Usually, the 'clear and present danger' plus 'imminence' test has been invoked by those justices who feel obligated, under the Constitution, to express a preference for free speech, while the 'bad tendency' test has been invoked by those who are more strongly inclined to look with favor upon the discretion of legislatures in the face of threats to national security.

To cite only a few examples of this great problem of drawing the line,

²⁷ *Schenck v. U.S.*, op. cit. 52. (Italics supplied.)

²⁸ *Gitlow v. New York*, 268 U.S. 252 (1925).

²⁹ *Abrams v. U.S.*, 250 U.S. 216 (1919).

³⁰ *Whitney v. California*, 274 U.S. 357 (1927). (Italics supplied.)

the Court, by a 5:4 vote, *voided* as an abridgment of freedom of speech a Lockport, New York, ordinance which forbade the use of sound trucks in public except with the advance permission of the chief of police,³¹ but *upheld*, also by a 5:4 vote, a Trenton, New Jersey, ordinance prohibiting the use on its city streets of sound trucks emitting 'loud and raucous noises.' The 'switch-vote' by Mr. Chief Justice Vinson was apparently based upon the different wording of the two statutes, which raises the interesting question how sound trucks can be anything but 'loud and raucous.'³² In another seemingly contradictory set of decisions, the Court *voided* 8:1 the disorderly conduct conviction of a sidewalk speaker under a New York City ordinance deemed to constitute unlawful prior censorship,³³ but—on the same day—it *upheld* 6:3 Syracuse, New York, police in arresting a sidewalk speaker espousing unpopular causes for 'disorderly conduct'—faced with unrest and threatening movements in a crowd that had gathered about him.³⁴ Lack of space does not permit additional illustrations; suffice it to reiterate the significance and difficulty of the problem of how to reconcile the freedom of individual expression with the safety of the state—once more we see the problem of the 'line.' But something more must be said about the particularly involved and topical problem of the constitutionality of present-day legislative attempts to guard against subversive Communist talk and activity, especially on the national level.

Anti-Communist Legislation. While many states have enacted legislation in this area attention here is directed toward the three major federal statutes:

(1) THE SMITH ACT OF 1940 makes it a crime knowingly to advocate the overthrow of the government by force or violence; or to help organize a society that engages in such advocacy; or knowingly to become a member of it; or to conspire with others to commit any of the first three offenses.

The most important case involving the Communist conspiracy problem was based on the Smith Act. In 1951 the Supreme Court, in a 6:2 decision, upheld its constitutionality in the famous Dennis case.³⁵ Eleven top leaders of the Communist Party, U.S.A., had been indicted and found guilty of a conspiracy to teach and advocate the overthrow of the government by force and violence, and of conspiring to organize the Communist party to teach

³¹ *Saia v. New York*, 334 U.S. 558 (1948).

³² *Kovacs v. Cooper*, 336 U.S. 77 (1949).

³³ *Kunz v. New York*, 340 U.S. 290 (1951).

³⁴ *Feiner v. New York*, 340 U.S. 315 (1951). See also *Beauharnais v. Illinois*, 343 U.S. 250 (1952) and *Burstyn v. Wilson*, 343 U.S. 495 (1952).

³⁵ *Dennis v. U.S.*, 341 U.S. 494 (1951).

and advocate the same. Their appeal to the Supreme Court raised the free speech issue.

In sustaining the Smith Act, Mr. Chief Justice Vinson's majority opinion invoked the 'clear and present danger' doctrine in relation to the *conspiratorial nature* of the defendants' activities. But in so doing he disregarded the imminence test and replaced it with the test of 'probability,' adapting the following excerpt from Chief Justice Learned Hand's decision in the United States Court of Appeals—the court immediately below the United States Supreme Court:

. . . (courts) in each case . . . must ask whether the gravity of the evil, *discounted by its improbability*, justifies such invasion of free speech as is necessary to avoid the danger.³⁶

Chief Justice Vinson contended:

. . . The formation by [the convicted persons] of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries and the touch-and-go nature of our relations with countries with whom [the convicted persons] were in the very least ideologically attuned, convince us that their convictions were justified on this score.³⁷

But—in addition to two separate concurring opinions by Justices Frankfurter and Jackson—there were two passionate dissents by Justices Black and Douglas who *denied* the existence of a danger either 'clear or present' enough to justify this limitation of freedom of expression and argued for 'full and free discussion even of ideas we hate.' Mr. Justice Black closed his opinion with the observation that:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.³⁸

There is little doubt that the 'bad tendency' test had been reintroduced—some would find a new test, that of 'grave and probable.' In the eyes of the Court majority—applauded by the country at large—the gravity of the evil obviated, or at least decreased, the necessity for 'clarity and imminence.'

³⁶ Ibid. citing 183F. 2d, at 212. (Italics supplied.)

³⁷ Ibid. at 510-511 ff.

³⁸ Ibid. at 590.

By June 17, 1957, the federal government had obtained 145 indictments and 89 convictions under the Smith Act. But on that date the Supreme Court, with only Mr. Justice Clark dissenting, gave an amended interpretation to the Smith Act and limited its application in the *Yates* case.³⁹ Writing for the majority, Mr. Justice Harlan narrowed the meaning of the term 'to organize' and drew a clear distinction between the statement of a *philosophical belief* and the *advocacy of an illegal action*. The Smith Act stood, but the federal government would no longer be able to punish members of the Communist party for *expressing a mere belief* in the violent overthrow of the government. It would have to *prove* that individuals on trial for violating the Smith Act actually intended to overthrow the government by force and violence now or in the future, or to persuade others to attempt to do so, and the language employed must be 'calculated to incite to action'—thus reintroducing the clarity, if not the imminence, requirement.

Almost as if to rectify the adverse public reaction to the *Yates* decision, a 5:4 decision by the Court four years later upheld the so-called membership clause of the Smith Act, holding that a person who was a 'knowing, active' member of a subversive group, and who personally had a 'specific intent to bring about violent overthrow,' was convictable.⁴⁰ But in a companion case, with Mr. Justice Harlan switching, the Court ruled that the government had not met the above requirements for conviction and must thus release the petitioner.⁴¹ Again, we see the vexatious balancing problem!

(2) THE INTERNAL SECURITY (MCCARRAN) ACT OF 1950, passed over President Truman's veto, requires all 'Communist-action' and 'Communist-front' groups to register with the government, to provide lists of their membership and financial records, and to label all mail as 'Communist.' Members of such groups are among other things, barred from receiving passports and from working for the government or in defense industry. The Act established a Subversive Activities Control Board to determine what organizations are subject to the registration requirements. It also provided for presidential authority to intern any 'suspected persons' upon a declaration of war. In the first significant ruling involving the Act, the Supreme Court held 5:4 in 1961 that the registration requirement did not violate the First Amendment by forced disclosure of members' names.⁴² In thus upholding the S.A.C.B.'s order to the Communist Party, U.S.A., to register, the Court did not reach

³⁹ *Yates et al. v. United States*, 354 U.S. 298 (1957).

⁴⁰ *Scales v. United States*, 367 U.S. 203 (1961).

⁴¹ *Noto v. United States*, 367 U.S. 290 (1961).

⁴² *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1.

any of the other constitutional questions involved, such as the matter of self-incrimination under the Fifth Amendment.

(3) THE COMMUNIST CONTROL ACT OF 1954, passed in the last days of the 83rd Congress, seems to outlaw the Communist party, but whether it actually does so is uncertain. The law specifically provides that the Communist party shall not be 'entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any subdivision thereof.' And any person who 'knowingly and wilfully becomes or remains a member' of the Communist party is specifically made subject to the Internal Security Act of 1950. No case challenging the constitutionality of the Act had reached the Supreme Court at this writing. (Autumn 1963)

The Position of the Communist Party Today. The language of the majority in the *Dennis* case makes it clear that the decisive facts were *the conspiring and advocating*, as a part of a tightly organized plan for revolutionary action, controlled by the convicted persons themselves, and held at the service of the Soviet Union. The Court expressly said the conviction could not have been upheld if the convicted persons had done 'no more than pursue peaceful studies and discussions or teaching and advocacy *in the realm of ideas*.' Thus, the upholding of the Smith Act in the *Dennis* case appears to be on the ground that it struck at a course of systematic preparation for the realm of action and not at discussion in the realm of ideas; and the *Yates* case, decided six years later, seems to determine that mere advocacy, *without calculated incitement* to action, is not a crime under the Smith Act.

The current legal position of a Communist party member might be described in sum as follows: If the party refuses to register under the Internal Security Act, and the member does not register himself, he is subject to prosecution. If he does register, his mere membership may be legal, but his privileges as a citizen are sharply restricted, and he may be in constant danger of prosecution as 'a knowing, active member' of or a conspirator in a party advocating violent overthrow of the government.

DRAWING THE LINE: CIVIL RIGHTS AND LIBERTIES IN DANGEROUS TIMES

The basis of civil rights or liberties is a tolerant acceptance of diversity and individual differences. Their natural habitat is in those countries where liberal democratic ideas have inculcated a deep mutual respect among men,

despite their differences. As we have seen, there is no place for civil liberties in dictatorial regimes. In the free lands of the West, zealous partisans of the Communist, Nazi, and Fascist regimes have made full use of civil rights to denounce liberal democratic ideals and to try to undermine liberal democratic institutions, in preparation for dosing them with their own nostrums. Of course, if these anti-democratic adherents were once able to get control of the government, whether through peaceful or violent means, they would immediately destroy all civil rights. At any rate, this has been the case in all countries where they have secured control. The creeds and the practice of modern dictatorship and the threat they make to liberal democratic societies have led to strong demands for reconsidering the whole philosophy of civil rights. Its heart is freedom of expression, whether the spoken word or the written word.

Should Freedom of Speech Be Restricted? Many who are seriously concerned in defending civil rights balk at defending them for those who will not admit a reciprocal obligation to defend them for others. Tolerance, they say, must not be extended to the intolerant; freedom must not be allowed to be used to destroy freedom. On what ground can freedom of expression be claimed now by those who will destroy it when they have the power? What principle of fair play is it that requires the acceptance of players who will not play according to the rules?

Further to this issue, it is pointed out that the theory and practice of civil rights were developed mainly in the Anglo-American communities. During the latter part of the nineteenth century these communities established themselves so firmly in the world that the possibility of serious civil disaffection or menacing foreign aggression almost disappeared from the consciousness of their people. They came to regard public order as almost impregnable, something that could be taken for granted. It was easy and even desirable in those circumstances to urge civil rights in almost unqualified terms. It was easy to insist that everyone should be allowed to talk though the heavens fall, when nobody believed there was any serious risk that they would fall.

JEFFERSON. This serene confidence is perhaps best illustrated by Thomas Jefferson in his first inaugural address as President of the United States in 1801 when he said: 'If there be any among us who wish to dissolve this union, or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.' Anyone making such a statement today

might run the risk of being called before a legislative committee investigating subversive activities.

Assumptions in the Defense of Free Speech. The most important point about Jefferson's statement is its assumptions, what it takes for granted. First, it assumes that most men are rational, that they will support what reason shows to be right and true. Second, it assumes the rightness of the union of the American states on a republican basis. It therefore concludes that public order and political unity are impregnable as long as there is freedom of speech. Likewise, John Milton, one of Jefferson's spiritual ancestors in seventeenth-century England, urged in his *Areopagitica* that truth and falsehood be allowed to grapple, for 'who ever knew Truth put to the worse, in a free and open encounter?'

Something must be said about these assumptions. It is clear that freedom of expression and discussion will accomplish little unless most of the participants in it are deeply concerned with truth and are prepared to follow the argument wherever it goes, and to modify their convictions as the amassing of evidence and the unfolding of logic make their positions untenable. They must be genuine seekers with a sense of curiosity and wonder that is continually refreshed by the flow of discussion. They must be listeners as well as talkers, respectful of what the other side has to say. If, on the other hand, both sides in debate have dogmatic beliefs that will not yield to any demonstration, if they are seeking to convince but unwilling to be convinced, if they are ready to falsify the evidence to gain their point, freedom of speech will drive them further apart instead of bringing them closer together. If the mass of men were as irrational as the Fascists and Nazis said they are, the faith in reason and in freedom of expression would be entirely misplaced. Actually, of course, the experience of the British and American liberal democracies in particular shows that there are conditions in which the faith is justified. The basic problem is to identify these conditions.

Before the members of a society can make fruitful use of freedom of speech, they must be conscious of some underlying unity that transcends difference of opinion. They must believe in one another's reasonableness and have a common loyalty to the pursuit of truth. They must have some measure of agreement on what amounts to proof of the truth of an assertion. If they differ seriously on this point, discussion will not bring them closer together. To be specific, if economic classes can see only their own class

interests, there will be one proof which convinces a capitalist and another proof which convinces a proletarian, but no common standard of proof to umpire discussion. A game without generally accepted rules soon ceases to be a game.

BASIS FOR CONFIDENCE. If men are as deeply divided in a society made up of economic classes as the prevailing interpretation of Marxist theory says they are, there is no basis for Jefferson's confidence that public order and political unity will stand the shocks that freedom of speech involves. The real basis of Jefferson's confidence, as applied to the United States of his day, was the belief that Americans were united in support of the ideals he had stated in the Declaration of Independence, and that they would always uphold a union dedicated to the pursuit of these ideals. There can be no other basis for confidence today. Widespread and firm belief in the liberal democratic ideals is the condition on which freedom of expression is constructive rather than disruptive.

Dangers of Division on Fundamentals. It is possible to see now why some sincere defenders of freedom of speech want to deny it to Communists and the holders of other authoritarian creeds that deny the liberal democratic ideals and reject, either expressly or by implication, the rationality of man. They cannot enter into the fellowship of free men because they use freedom of speech destructively rather than constructively.

MILTON AND LOCKE. The argument for denial can be made even clearer by looking briefly at John Milton and John Locke, the two great champions of religious toleration in seventeenth-century England. Milton, arguing for the right to print and publish without license from the government, limited his claim for toleration to those of the Protestant faith, to those who accepted the Scriptures as the final standard of proof and of revealed truth. He expressly excluded Roman Catholics because they recognized in the institutionalized authority of their Church another standard of proof and of truth. In its acceptance of the Scriptures, the Protestant group was united on fundamentals and thus able to discuss constructively. John Locke also excluded Roman Catholics because they denied any obligation to keep faith with heretics. That is to say, they were not comprehended within a unity that transcended differences of opinion. He excluded atheists because they cannot be bound by an oath, and hence cannot be contained by any obligation to society. He excluded also those 'who give themselves up to the protection and service of another prince,' giving as an example Mohammedans—although he was actually referring to Roman Catholics.

J. S. MILL. Milton and Locke, living in the commotion and strife of seventeenth-century England, restricted freedom of expression to those they thought could be trusted to use it constructively. Ardent believers in freedom of thought and speech, they did not think public order was sufficiently secure to allow freedom of speech to those who would try to undermine it. When we come to John Stuart Mill, who lived in the security and peace of mid-nineteenth-century England, we find him arguing for freedom of expression in almost absolute terms. He brushed aside the suggestion that society needs to be protected against subversive and disloyal speech, insisting instead that *it is the individual who needs to be protected against society*. He did not propose discrimination against Roman Catholics because, in his day, their loyalty to their church no longer was in active conflict with their loyalty to Britain. The limitations he proposed on freedom of expression would cover libel, slander, and inflammatory incitements to immediate violence, but little else. 'All mankind has no right to silence a single dissenter,' he urged in his celebrated *On Liberty*, and 'all silencing of discussion is an assumption of infallibility.'

TODAY. Returning to the present situation, we find the whole world convulsed with the clash of rival systems of ideas that threaten war and imperil the security of nation states. Within Britain, the United States, and other western democracies today there are active groups—particularly Communists—that reject the existing basis of public order and are determined to undermine and overthrow it by force if necessary. In these circumstances it is not surprising that many find more affinity with Milton and Locke than with Jefferson and Mill. We have lost some of the serene confidence that Jefferson and Mill had in the impregnability of tolerant liberal societies. In Germany and Italy, we saw freedom of expression destroyed by electorates voting repressive regimes into power. We are alarmed by the danger of a division on fundamentals such as existed between the Protestants and Catholics in seventeenth-century England. In those Communists who take orders from Moscow, we face again the problem of those 'who give themselves up to the protection and service of another prince.' What is to be said concerning the argument that freedom of expression should be denied to those who cannot be counted on to observe the rules of the game?

The Justification of Freedom of Speech. In the first place, as we have seen at some length, the right to free speech is not absolute. The maintenance of public order and security comes first. That is the justification of laws forbidding speech which is a 'clear and present' or 'grave and probable'

danger to public order. In the second place, what constitutes such a danger will vary according to circumstances—peace, war, or 'cold war.' It has already been suggested that this is substantially the ground of the decision of the Supreme Court upholding the constitutionality of the Smith Act. The critical case for discussion is whether to forbid disloyal and subversive talk that aims *at present* only to undermine belief in the rightness of the liberal democratic order as a preparation for its overthrow by force *at some future time*.

THE TEST. The test a liberal democracy should apply to this issue is clear enough. *Will the forbidding of such talk further or hamper the realization of liberal democratic ideals?* No doubt subversive propaganda wins some converts. Every such convert is a loss. No society can look with complacency on the weakening of belief in its unifying ideals. It is still pertinent, however, to ask why its members are converted.

Most of them are converted to a belief in violent solutions because of some rankling sense of injustice, a conviction of the deep inadequacy of existing society. This sense of injustice may be justified or not in particular instances, but it is at least clear that the liberal democratic societies under discussion here have still not succeeded in ensuring adequate opportunity for self-realization of all their people. As long as this remains true there will be the discontented, prepared to contemplate rebellion. The only effective way to cope with them is to moderate or remove the discontent by education, remedial laws, or other community action.

It is easy to make laws that impose punishment for subversive propaganda. But in the circumstances just outlined, this will not stop it. It will continue underground. Moreover, repression sharpens the sense of injustice and provides an added argument for desperate measures. There is no doubt at all that the loyalty of the mass of men to liberal democracy has been greatly strengthened by the right to freedom of expression. They have felt that they have a stake in a society that allows them to express the passion they feel about their deepest grievances. Thus repressive laws are likely to fail in their immediate purpose of maintaining loyalty.

The Dangers in Repression. The gravest danger in repression is that it excuses the liberal democrat from arguing the case for his ideals and for the highly developed procedures for pursuing them. Because he is not openly confronted by the arguments against them, he is not constantly reminding himself and his fellows of the case in favor of them. The surest way to keep beliefs fresh and strong is to exercise them in debate against the strongest

criticism of them that can be made. We then know at any moment why we believe what we believe.

FALSE SENSE OF SECURITY. Repression would give us, for a time, a false sense of security. We would not be outraged daily by hearing ideas we hate. Because social discontent did not break out in violent expression, we would tell ourselves that there were no serious social maladjustments to be met. We would develop a superficial sense of well-being and fail to brace ourselves, in either knowledge or morale, for the kind of problems we have to meet. This is a sort of 'aspirin therapy.' We take two or three tablets five or six times a day and have no way of knowing whether or not we have any aches and pains to which we should be attending.

Freedom for rebellious and revolutionary utterance is a safety valve that gives warning of the existence of dangerous pressures in society. The only effective way to fight the contagion of disloyalty is to get at its causes. A society that descends to repressive measures is losing faith in its ability to win and keep loyalty. This is bound to be fatal. Authoritarian regimes can continue indefinitely even if they are out of touch with the problems and thoughts of their people. Liberal democracy lives only in the hearts of its citizens. If it cannot be kept alive there by free discussion, it certainly cannot be kept alive by repression. Judge Learned Hand stated it aptly in his 'I-Am-An-American-Day' speech in Central Park in New York in 1944: 'Liberty lies in the hearts of men and women; when it dies there no constitution, or law, no court can save it; no constitution, no law nor court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.'

It would be hard to defend freedom of speech as a sacred personal right of those who will deny it to others if they get a chance. But the merit or lack of merit of the particular claimant is not the issue. The issue is what to do in order to maintain and further the unifying ideals. The answer suggested here is that little or nothing will be accomplished and much will be lost by banning the subversive *speech* of even professed revolutionaries.

This theoretical discussion deals only with the question of what a person should be allowed to say if he can find listeners. It is not concerned with the question of what forum, if any, should be made available for opinions we agree to tolerate. It has nothing to do with the question of dismissal from government employment for radical opinions. These are distinct problems that cannot be discussed here⁴³ except to say that a government not only is

⁴³ Cf. Chapter xvi, *infra*, for such a discussion, especially pp. 626 ff.

entitled to be sure of the loyalty of its civil servants, but also has a duty to its people to do so. The big question is how to make sure without unfairly prejudicing the position and prospects of the persons whose loyalty, while not disproved, is doubtful.

FREEDOM OF THE PERSON AND OF MEETING

In the United States, as in Britain, a person has the right to be free of physical restraint in going about any activity he pleases, as long as it is not forbidden by law. In addition, this freedom of the person is further protected by a number of guarantees in federal and state constitutions. To describe the exact scope of them all would require an essay on constitutional law. The most important of them are as follows:

Freedom of the Person. The Thirteenth Amendment of the United States Constitution forbids slavery and involuntary servitude, 'except as a punishment of crime whereof the party shall have been duly convicted.' It was adopted expressly for the purpose of outlawing Negro slavery, but it is equally a protection for all. No legislature can enact laws subjecting persons to servitude, and private persons cannot exact forced labor of anyone. The Fifth Amendment forbids Congress, and the Fourteenth Amendment forbids the states, among other things, to 'deprive any person of life, liberty, or property, without due process of law.' More will be said about these due process clauses later—they are important buttresses of freedom of the person.

The Fourth Amendment and similar clauses in the state constitutions affirm 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . .'

General warrants are outlawed and, subject to certain exceptions carefully limited by judicial interpretation, no person can be arrested and no person or place searched except upon a warrant sworn out before a judicial officer '*particularly* describing the place to be searched, and the persons or things to be seized.' The main purpose served by 'unreasonable searches and seizures' is to compel the person, in effect, to give self-incriminating evidence. The chief purpose of the Amendment then is to prevent self-incrimination *before* trial. Among several others, the Fifth Amendment contains a provision that no person shall be 'compelled in any criminal case to be a witness against himself.' This 'self-incrimination' clause, frequently invoked by persons holding unpopular beliefs as well as by transgressors of the laws, has prompted enactments of so-called immunity bath statutes. The Immunity

Act of 1954, for one, which permits the federal government to *compel* testimony of witnesses in 'national security' cases in return for a grant of immunity from prosecution, was upheld by a divided Supreme Court against right of silence claims in 1956.⁴⁴

Anyone who has been arrested must either be charged with a criminal offense and given a fair and speedy trial, or be released. The procedural safeguards of this right contained in common law and statute are much the same in their terms as those found in Britain and will be more fully described later. The arrested person has also, however, the second line of defense in the Constitution. Among other things, the Constitution of the United States—in Article I and in Amendments V to VIII inclusive—forbids excessive bail; guarantees: *habeas corpus*; public jury trial in *all criminal* cases and in civil cases in which the value in controversy exceeds twenty dollars; the right of the accused to know the charges against him, to have counsel, and to confront the witnesses against him in open court. On the last point, serious problems have arisen in connection with the government's use of Federal Bureau of Investigation files in criminal prosecutions. Since the data contained in F.B.I. files are considered confidential, defense attorneys, unlike government attorneys, were unable to peruse them until the middle of 1957, when the Supreme Court ruled 7:1 that the government could have its choice of producing F.B.I. reports forming the basis of testimony of witnesses in criminal trials, or of dismissing the case.⁴⁵ Congress subsequently passed legislation to protect the F.B.I.'s files from indiscriminate 'rummaging' by defendants; but the bill preserves the right of the defense to examine statements of government witnesses that the trial judge rules to be relevant to a pending case.

Broadly speaking, legislatures have no power to take away the procedural rights enumerated above, which are designed to ensure that no one will linger in prison without trial and that no will be convicted without a fair trial. But it must be noticed again here that the presence of many of these guarantees are *not automatically* incumbent upon the states, unless they are among those 'carried over' to the due process clause of the Fourteenth Amendment by judicial decision, or unless they are contained in the state's bill of rights—which they usually, but not always, are.

Freedoms of Meeting and Petition. The First Amendment forbids Congress, and the Fourteenth, as interpreted, forbids the states, to abridge 'the

⁴⁴ *Ullman v. U.S.*, 350 U.S. 422.

⁴⁵ *U.S. v. Jencks*, 353 U.S. 657.

rights of the people peaceably to assemble, and to petition the government for redress of grievances.' The right of petition is not so important now as in 1791, because a Congress widely representative of the people is steadily engaged in making laws for the redress of grievances. However, organized pressure groups are continually petitioning the government as well as lobbying Congress, and they have a constitutional right to do so. The right of peaceable assembly is of vital importance for the working of the democratic political processes of discussion. It is also essential to the life of voluntary groups, which are necessary features of liberal democracy. Without the right to meet freely and spontaneously to discuss concerted action, voluntary associations could scarcely exist, and political parties could not perform their functions of promoting discussion and organizing the electorate.

This constitutional right is subject to two principal limitations. First, the assembly must be peaceable. Unruly and turbulent meetings that threaten a breach of the peace do not enjoy its protection. Second, those who want to meet must find a lawful place to meet. They cannot assemble on private property without the consent of the owner or tenant, and they have no right to obstruct traffic or passage in public places. Municipal governments through their ordinances, and local police acting under authority of those ordinances, have considerable, but ill-defined, power to regulate the place and conduct of meetings of any size in the interests of local convenience and order. In actual practice, many such ordinances and much local police action put unconstitutional obstacles in the way of meetings of unpopular groups. As Mr. Justice Frankfurter once put it well: 'The safeguards of liberty have frequently been forged in cases involving not very nice people.' Of course, the Court can deal only with cases or controversies that properly come before it—of which more will be said in Chapter XV.

CIVIL RIGHTS AND DUE PROCESS OF LAW

Procedural and Substantive Protection. As already noted, the Fifth Amendment forbids Congress, and the Fourteenth Amendment forbids the state legislatures, to 'deprive any person of life, liberty, or property, without due process of law.' Even a detailed analysis of the decisions of the Supreme Court on these clauses would not reveal a clear, precise meaning for them. Therefore, what can be said about them in a short space must be put very generally.

PROCEDURAL. First, 'due process of law' affords a *procedural* protection. It

guarantees fairness of trial, not only in criminal trials but also in any and every judicial or semi-judicial proceeding in which the rights of persons are *officially* determined. It does not, however, require in civil proceedings all the elaborate constitutional apparatus for criminal trials already discussed. *The standard is the general one of fairness.* As a minimum, any legal body that officially determines private rights must be duly constituted to deal with the case in hand, must give adequate notice in advance to the parties affected, and must give a fair hearing to those whose rights are at stake. The due process clauses deny to governments the power to filch away private rights by hole-and-corner methods. Coerced confessions and deliberately 'stacked' juries are in this category.

SUBSTANTIVE. Second, the due process clauses limit the *substance* of the laws enacted by legislatures as well as the procedures for enforcing them. Because what has not hitherto been forbidden by law is permitted, almost all laws that are made regulate some aspect of a private claim to liberty or property. Legislatures exist, in part, to make laws regulating human relationships, but the Supreme Court has insisted that a legislature in so regulating must not impose 'unreasonable, arbitrary, or capricious' restrictions. For example, a compulsory sterilization statute applicable to inmates of State of Virginia-supported institutions who have been found to be afflicted with 'an *hereditary* form of insanity, idiocy, imbecility, feeble-mindedness, or epilepsy' was sustained 8:1—'three generations of imbeciles are enough,' ruled Mr. Justice Holmes, ' . . . the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . ' ⁴⁶ But a similar Oklahoma sterilization law made applicable to convicted triple criminal offenders, whose crimes amounted to felonies involving 'moral turpitude,' was voided as a violation of the equal protection of the laws clause of the Fourteenth Amendment on the grounds that the classification of 'criminal' was 'too loose for so serious a business,' ⁴⁷ especially since it *included* larceny by fraud—Skinner had stolen three chickens—but *excluded* embezzlement. There is a limit on the kind of laws regulating liberty and property that a legislature can make.

Scope of Due Process of Law. Third, judicial opinion on what is 'un-

⁴⁶ *Buck v. Bell*, 274 U.S. 200 (1927). Carrie Buck was a 17-year-old feeble-minded inmate of a state institution—whose mother was also a feeble-minded inmate there—who had given birth to an allegedly mentally deficient child just before her admission to the institution. (One of the Buck arguments in court was that the statute applied only to the mentally deficient persons confined to state institutions and not 'to the multitude outside.')

⁴⁷ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

reasonable, arbitrary, or capricious' varies from judge to judge, from time to time, and from place to place. Mr. Justice Frankfurter, for one, viewed 'due process of law' as a concept 'compounded by history, reason, the past course of decisions, and stout confidence in the democratic faith which we profess.'⁴⁸ Broadly speaking, without going at length into the detail of decisions made by the courts, there are two schools of thought. Some judges are prepared to impose their view of what is reasonable on the legislature, while others assume that the legislature has its fair share of reasonable men and therefore give the legislature the benefit of any lingering doubt in their own minds about the reasonableness of a particular law.

One very important illustration of the changing views on the substantive requirements of due process may be given. Until the second quarter of this century, and even into the 'thirties, the Supreme Court was strongly disposed to hold unreasonable, and therefore unconstitutional as a violation of substantive due process, any legislation that restricted freedom of contract or the use men were to be allowed to make of their private property. In their decisions they came close to saying that the Constitution guaranteed the freedom of capitalist enterprise and the maintenance of large elements of *laissez faire* in economic life. The best-known cases were those already discussed in Chapters IV and V holding minimum wage and hour laws an unconstitutional violation of personal liberty,⁴⁹ but there were many others of similar tenor.

With a change in the personnel of the Supreme Court, the earlier decisions on minimum wage and hour laws were reversed in 1937 and 1941.⁵⁰ Since then, laws regulating economic life, restricting freedom of contract, and putting various kinds of shackles on freedom of enterprise have generally been upheld. It is almost true now to say that economic interests must make their reckoning with the legislatures without protection from the Fifth and Fourteenth Amendments. The emphasis of the Supreme Court now is not on economic freedom, but on the more intimate personal freedoms guaranteed by the Bill of Rights, and particularly the First Amendment.

⁴⁸ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

⁴⁹ Cf. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Lochner v. New York*, 198 U.S. 45 (1905); and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

⁵⁰ Cf. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

EFFECTIVENESS OF CONSTITUTIONAL GUARANTEES

There are still other clauses of the United States Constitution affording protection for civil rights, but the principal ones have been discussed sufficiently to show the scope and character of the guarantees of individual freedom against encroachment by the government. How useful these guarantees are to individuals depends, of course, on how well they are observed and enforced. They may be flouted by legislatures and government officials, and if they are redress can only be had by bringing allegations of infringement before the courts, and securing loyal enforcement of them by the latter. Even then, the courts cannot enforce the Constitution in every corner of the United States single-handed. As has been wisely said with particular reference to the maintenance of freedom of speech, 'Nine men in Washington cannot hold a nation to ideals which it is determined to betray.'⁵¹

Actually, there has been substantial, but by no means wholesale, infringement of some guaranteed civil rights. Congress and many state legislatures have from time to time made, and executives have enforced, laws infringing the constitutional guarantee of freedom of speech, for one. We have alluded to some of these above. It has often been impossible to secure fair trial for Negroes on criminal charges, and it has not always been possible to secure fair trial for widely detested accused persons. Unpopular groups have repeatedly found they could not exercise their right of peaceable assembly because local police or mayors put obstacles in their way. Officials charged with enforcing the criminal law have frequently violated the provisions of the Fourth Amendment outlawing unreasonable searches and seizures. Even when arrests have been lawfully made, the police in many jurisdictions often use 'third degree' methods to extract incriminating evidence from the persons in custody.⁵² Other instances could be readily given.⁵³ In recent years, however, the Supreme Court has given increasingly close scrutiny to alleged

⁵¹ T. R. Powell, quoted in Z. Chafee, *Free Speech in the United States*, rev. ed. (Cambridge: Harvard University Press, 1954), p. x.

⁵² Evidence so secured cannot be used directly in a criminal prosecution of the person from whom it is extracted, but the police can use it as a *clue* leading to other evidence that connects the accused with the crime; e.g. they find the loot in the place where the suspected burglar says he put it.

⁵³ Cf. the annual *Report of the United States Commission on Civil Rights* (Washington, D.C.: U.S. Government Printing Office), 1959 ff. See also David Fellman, *The Defendant's Rights* (New York: Holt, Rinehart, & Winston, Inc., 1958).

violations of due process in criminal proceedings, and the states have thus frequently seen their convictions reversed on appeal.

Consequences of the Melting Pot. Generally speaking, despite constitutional guarantees, civil rights have *not* been as well protected in the United States as in Britain. The fundamental explanation is a simple one. The United States is a young country still creating a national tradition and only slowly absorbing into itself an extraordinarily heterogeneous population. There is still much suspicion and hostility between groups of diverse origins and customary ways of life. Much of the worry about disloyalty is due to a feeling of insecurity about persons of foreign origin who—or so goes the argument—may not yet have been wholly won over to the American way of life. To put it in the terms of the earlier discussion about Britain, the American people have not lived together long enough for mutual trust and mutual respect to permeate the entire society. In so far as these are lacking, the difficulty of ensuring respect for the civil rights of all is correspondingly greater.

IMPORTANCE OF CONSTITUTIONAL GUARANTEES. This explanation underlines the immense importance of the constitutional guarantees in the United States. Where moral censure of every infringement of civil rights is not swift and sure, the second line of defense provided by the Constitution is vital. In the first place, persons belonging to hard-pressed minorities can usually get their civil rights vindicated and proclaimed *if* they are able to fight the issue through the courts. Second, the Constitution is a never-ceasing educator in tolerance and fair play. Third, it is a promise and a pledge for the future, counseling patience. As long as the Constitution stands and Americans continue to affirm their loyalty to it, those whose civil rights are ill-protected now still have reason to hope. The limited appeal that communism has had for the Negro is probably due in part to a belief that Americans will not perpetually be able to reconcile the generally inferior condition in which the Negro still finds himself with loyalty to the constitutional guarantees of civil rights and to liberal democratic ideals. Indeed, important changes in his position have been taking place progressively since the end of World War II.

Continuing Concern for Civil Rights. In fact, the Constitution is the American conscience. It does not always prevent intolerant and arbitrary action by legislatures and officials. But its promptings never cease, and so far the American people have always ultimately repented of unconstitutional excesses, repudiated the leaders associated with these lapses, and repealed most

of the offending legislation. Every generation has produced large numbers of staunch defenders of civil rights whose devotion renews the pledges of the Constitution. When viewed in this larger perspective and remembering the heterogeneous turmoil of the United States, the achievement has been remarkable, giving still larger promise for the future.

This promise is illustrated by the widespread concern in recent years over ways and means of improving the protection of civil rights. There are several reasons for this concern. First, the constitutional guarantees discussed above are *guarantees against governments only*. Intimidation and violence in one form or another by private persons and groups of persons are much greater threats to civil rights than actual violations by governments. Second, the question of how far there is any legal remedy for infringements by private persons depends on existing federal and state law. It depends on whether the existing laws make it a criminal offense or authorize a civil suit for damages when private persons infringe the civil rights guaranteed in the Constitution. Where violence or intimidation is used, existing law does provide a remedy, but there are subtler means of violation where no such remedy exists. Third, whether the violation is by a government or a private person, punishment or redress has to be sought in the courts. For this, a person needs financial resources, good legal advice, and the co-operation of the law-enforcement officials. Many lack the knowledge or the means to enforce their rights, and co-operation of the law-enforcement officials is not always easily secured.

Enforcement of Civil Rights as a Government Activity. Considerations of this kind led to the establishment of a Civil Rights Section under President Roosevelt's Attorney General, later Supreme Court Justice, Frank Murphy, in the federal Department of Justice in 1939. Its function was to give 'aggressive protection to the fundamental rights inherent in a free people.' To this end, it was to direct, supervise, and conduct prosecutions of violations of the provisions of the Constitution and Acts of Congress guaranteeing civil rights. The Constitution provides a shield for protection of civil rights *against* the government. The Civil Rights Section was to provide a sword for protection of civil rights *by* the government *against private persons*. Despite handicaps of a very small staff and the vagueness of the laws at its command for enforcement, the Civil Rights Section did much to clarify the law, improve techniques of enforcement, push prosecution, and draw wider public attention to the problem.

'TO SECURE THESE RIGHTS.' In 1946 President Truman appointed a Com-

mittee on Civil Rights to investigate the need for additional legislation and for other more effective procedures for protecting civil rights. While asserting that civil rights were being better enforced than ever before, the Committee found an alarming amount of violation in 1947. In its Report, *To Secure These Rights*, it made many recommendations designed chiefly to ascertain that every violation of a civil right by private persons would be a criminal offense. The enforcement of civil rights was to become a new and vigorous government activity on an extended scale. Like all proposals for extending government activity, this one had a political background and became focused in a political issue. President Truman committed himself to the implementing of the Report as far as federal action could do so. Because a number of proposals were aimed at improving the status of the Negro, there came the 'Dixiecrat' revolt in the Democratic party. Although President Truman made the matter an issue in the 1948 presidential elections and won resoundingly, he was subsequently unable to get Congress to enact these proposals for the protection of civil rights. President Eisenhower's initial bills suffered a similar fate.

CIVIL RIGHTS ACTS OF 1957, 1960, AND 1964. The last day of its 1957 session, however, Congress finally did pass a civil rights bill—the first major enactment of such legislation since the Reconstruction era following the Civil War. The much watered-down compromise measure created a Federal Civil Rights Commission with *subpoena* powers; established a special Civil Rights Division within the Department of Justice; and empowered federal prosecution to obtain federal injunctions—with or without the consent of the victim—against actual or threatened interference with the right to vote. The 1957 Act proved to be generally weak and ineffective, but that of 1960 provided a considerable improvement. Although not as far-reaching as many wanted, it has given promise of being a significant piece of legislation chiefly because in an elaborate provision for appointment of federal 'voting referees,' it reaches toward the heart of full citizenship for all—the right to vote free from discrimination. The bill authorizes federal district courts, through appointment of these 'referees,' to enroll qualified voters for *all* state as well as federal elections in areas where local officials have systematically denied them the right to register or to vote. And it enables the federal Department of Justice to file suit to bring this result about. Negro leaders have regarded this machinery as too slow, costly, and cumbersome, but it has been a workable and not ineffective device.⁵⁴ The much more far-reaching 1964 Civil

⁵⁴ Some four dozen such suits had been brought by the Autumn of 1963.

Rights Act was being heavily debated by Congress as this book went to press in the early fall of 1963.⁵⁵

ENFORCEMENT. The hesitant attitude of Congress underlines the basic inherent difficulty. Despite the Constitution, racial and religious prejudices are still potent forces in many parts of the United States, and Congress reflects local and sectional feeling. Even if civil rights were fully 'nationalized' and federal laws and federal agencies amply provided for enforcing them, enforcement would run into many of the difficulties experienced in trying to enforce the prohibition laws, as has been amply demonstrated since 1954 by the resistance the Supreme Court's decisions in the various segregation cases have encountered.

The difficulty is to get law-enforcement officers to prosecute and juries to convict. State action in a democracy cannot get very far in advance of the sentiments and prejudices of large sections of the people. If it does, it outrages those sections and threatens political unity which is the basis of all hope for the future. For full enforcement of the civil rights of all, there must be all-embracing mutual trust and mutual respect. Government, of course, can do many things to promote trust and respect, yet it cannot be a substitute for the slow, hard process of education. Mutual respect cannot be legislated into existence; it must come by leavening. But leadership by responsible public officials is crucial at all stages.

RACIAL DISCRIMINATION

The same reflections apply for the most part to the common practice of racial discrimination generally. The most striking illustrations are still found in segregation laws and practices resulting in separate accommodations for Negroes and whites, although these are receding increasingly, chiefly as a result of federal pressure.

Racial Segregation Problems. The abolition of slavery and the adoption of the Fourteenth Amendment helped to bring about major interracial problems between the Negroes and the whites. Because of the Negroes' predominant concentration in Southern and Border states,⁵⁵ particularly in the former, where in certain areas Negroes outnumber whites, the core of the attendant difficulties of relationship has been concentrated there. In

⁵⁵ After a 75-day Southern filibuster in the Senate, which was finally terminated by a 79:21 closure vote, the Act became law on July 2, 1964, the Senate having approved it by a vote of 73:27, the House 289:126.

1900 almost 90 per cent of American Negroes lived in the Southern states; by 1963 the figure had declined to 57 per cent. Discrimination against Negroes was prevalent both on a private and a public level. Thus, public authorities—state and municipal legislative bodies—enacted measures either permitting or requiring segregation on busses, streetcars, taxi-cabs, railroads, in waiting rooms, comfort stations, at drinking fountains, in public schools, state colleges and universities, at sporting events, on beaches, in bath houses, swimming pools, parks, on golf courses, in court-house cafeterias, theaters, hotels, restaurants, and other similar *public* or quasi-public facilities. *Private* groups and individuals acted to deny Negroes access to social clubs, fraternities and sororities, private schools, colleges and universities, churches, hospitals, hotels, restaurants, theaters, movies, bowling alleys, swimming pools, drinking fountains, bath houses, sporting events, comfort stations, and employment, among others.

'SEPARATE BUT EQUAL.' While there was little the Negroes could do to combat *private* discrimination, they soon began to battle *public* discrimination in the courts. They chiefly relied upon the Fourteenth Amendment's 'due process' and 'equal protection of the laws' clauses—their ultimate success coming with a firm reliance upon the latter, especially in recent years. But, initially, their efforts seemed doomed to failure, for in 1896 the Supreme Court handed down its famous 'separate but equal' doctrine in the celebrated case of *Plessy v. Ferguson*.⁵⁶ At issue was a Louisiana statute requiring segregation of all *intra*-state railway carriers, but at the same time requiring these to provide 'equal but separate accommodations for the white and colored races.' Its 7:1 decision, written for the Court by Mr. Justice Henry B. Brown, a Yale graduate from Michigan, upheld the statute as a reasonable exercise of the state's police power against the challenge that it violated the 'equal protection of the laws' clause of the Fourteenth Amendment. Mr. Justice John Marshall Harlan's—a former slaveholder from Kentucky—often-quoted lone dissent, at once angry and eloquent, did not become majority opinion until almost sixty years later: '*The Constitution is color-blind, and neither knows nor tolerates classes among citizens.*'⁵⁷

The 'separate but equal' doctrine, arising out of the *Plessy* case, remained the law of the land until 1954. Segregation continued to be practiced in the areas and facilities listed above in more than one-third of the American states and in the District of Columbia. But, as the years went by, the 'separate but

⁵⁶ 163 U.S. 537.

⁵⁷ *Ibid.* at 559 (*Italics supplied.*)

equal' doctrine came increasingly under legal attack. Time and again the Supreme Court struck down certain practices by the states as not being 'equal' in facilities, without however going so far as to hold the doctrine itself unconstitutional.

CHIPPING AT THE DOCTRINE. Commencing at the graduate level of *higher education*, the Court began to order particular state universities to admit individual qualified Negroes, or else arrange for truly 'equal' facilities. The state law schools in Missouri and Oklahoma⁵⁸ were the first to be so ordered. But in 1950, in a similar case arising in Texas, the Court found the so-called 'equal' law school for Negroes to be inferior, hence constituting a denial of the equal protection of the laws of that state to Negroes.⁵⁹ By 1957 the Supreme Court had made it quite clear that there was no longer any right to limit admissions to state-operated colleges on the basis of color or race. While there is still considerable resistance, especially in those states with large numbers of Negroes in their population, more and more Negroes—although they still constitute a small number—are now attending desegregated graduate and professional schools in every state of the South. To achieve that, however, it required the federal troop-enforced bloodshed-accompanied admission of James Meredith to the University of Mississippi in the fall of 1962; the similarly-enforced but peaceful entry of three Negroes to the University of Alabama in 1963; and the admission of Harvey Gantt to Clemson University in South Carolina, also in 1963.

During this time the executive branch of the federal government and the Supreme Court had become involved in segregation battles in other areas. The chipping away at the 'separate but equal' doctrine continued. Thus, President Truman, in 1948, issued a tersely worded order outlawing segregation in the *armed forces*; by 1955 the 'color line' had been abolished in all branches of the military services. President Eisenhower established the Commission on Fair Employment Opportunities. In the realm of *restrictive housing covenants*, the Court held these to be legal but *unenforceable* in either federal or state courts.⁶⁰ In 1962, President Kennedy issued an order

⁵⁸ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) and *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948). (Actually, the first court-enforced admission of a Negro came in 1936, when the Maryland Court of Appeals ordered Donald Murray admitted to the University of Maryland Law School.) See also the important decision in *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637. (Oklahoma had admitted McLaurin but compelled him to sit away from the students; at a separate table in the cafeteria; and to study at a special desk in the library.)

⁵⁹ *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁶⁰ *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); and *Barrows v. Jackson*, 346 U.S. 249 (1953).

banning discrimination in federally constructed or supported housing. Regarding *recreational facilities*, the Court, in a series of cases following close on the heels of the public school cases, affirmed lower federal court decisions that struck down state statutes permitting legal segregation in court house cafeterias, in restaurants, in city-owned parking garages, in *public* parks, on *public* bathing beaches or in *public* swimming pools, at sporting events, on *public* golf links, and similar facilities.⁶¹ *Private* facilities were not affected, of course, in the absence of local anti-discrimination (F.E.P.C.) laws, but the courts rejected as an unconstitutional dodge attempts to make public facilities 'private' by leasing them to private operators.⁶²

Transportation facilities also felt the new policies of government and Supreme Court. A Virginia segregation law, applied to interstate busses, fell in 1946.⁶³ In 1950, segregation on interstate trains was outlawed, first by a Supreme Court decision⁶⁴—then by the Interstate Commerce Commission, which particularly referred to sleeping cars and dining cars. Late in 1955 the I.C.C. went all the way by ordering the cessation of all racial segregation on interstate busses and trains and their public waiting rooms in stations and terminals. That particular cycle was completed when, late in 1956 and early in 1957, federal district court judges in Alabama, Florida, and Louisiana held state segregation laws on *public intra-state* busses to be violations of the 'equal protection of the laws' clause of the Fourteenth Amendment. In a series of decisions since then, the Supreme Court went further by striking down segregation statutorily permitted or mandated in railroad and bus terminals, airports, and their waiting rooms and restaurants, no matter whether these service facilities were publicly or privately operated.⁶⁵ The "equal access" sections of the Civil Rights Bill of 1963 endeavored to strike a fatal blow at discrimination in services and facilities of most establishments engaged in interstate commerce.

THE PUBLIC SCHOOL SEGREGATION CASES. Many, if not all, of the sweeping orders and decisions outlined briefly above came about as a direct, or indirect,

⁶¹ For examples, see *Dawson v. Mayor and City Council of Baltimore City*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *City of Petersburg et al. v. Alsuf et al.*, 353 U.S. 922 (1957); *Casey v. Plummer*, 353 U.S. 924 (1957); *State Athletic Commission v. Dorsey*, 359 U.S. 533 (1959); *Burton v. Wilmington Parking Authority*, 365 U.S. 175 (1961); *Watson v. Memphis*, 373 U.S. 526 (1963).

⁶² Cf. *Derrington v. Plummer*, 240 F. 2d 922 (1957).

⁶³ *Morgan v. Virginia*, 328 U.S. 373 (1946).

⁶⁴ *Henderson v. U.S.*, 333 U.S. 816 (1950).

⁶⁵ Cf. *Boynton v. Virginia*, 364 U.S. 454 (1960); *Turner v. Memphis*, 369 U.S. 350 (1962); and *Bailey v. Patterson*, 369 U.S. 31 (1962).

result of the most significant decision in the realm of segregation handed down by the Court since *Plessy v. Ferguson* in 1896: On May 17, 1954, a unanimous Supreme Court, after deliberating almost two years, struck down the 'separate but equal' doctrine in an historic decision.⁶⁶ Speaking for his Court, Mr. Chief Justice Warren held segregation in the public schools to be a violation of the 'equal protection of the laws' clause of the Fourteenth Amendment per se, concluding:

. . . in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. . . .

Fully aware of the bombshell-like effect this decision would have upon the South, and of the many real problems involved in compliance, the Court delayed issuing an enforcement order for one year. But on May 31, 1955, it ordered the end of compulsory segregation, charging local authorities with responsibility for compliance under the scrutiny of the nearest federal District Court in the affected area. It directed these courts to order 'a prompt and reasonable start,' but clearly left the door open for consideration of peculiar local problems. However, there was no mistaking its requirement of full and relatively prompt compliance 'with all deliberate speed' in each state.⁶⁷

COMPLIANCE. While the District of Columbia, under direct federal control, integrated its public schools immediately in the fall of 1954, the response in the affected states—in this as well as many of the other fields we have been discussing here—ran the gamut from bowing to the inevitable in more or less good faith, through reasonably delayed action, to absolute refusal to obey—even reaching the stage of outright defiance, at one time or another, accompanied by flurries of violence, in Arkansas, Virginia, South Carolina, Georgia, Florida, Louisiana, Alabama, and Mississippi.⁶⁸ Many subterfuges were

⁶⁶ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁶⁷ *Brown v. Board of Education of Topeka et al.*, 349 U.S. 294 (1955).

⁶⁸ In the fall of 1957 Governor Faubus of Arkansas called out the National Guard in order to prevent scheduled public school integration in Little Rock. When enjoined by a federal district court from continued interference, he removed the Guard. Riots and disorders ensued, compelling President Eisenhower to federalize the Arkansas Guard and to dispatch federal troops to re-establish law and order, thus allowing integration to proceed. In the fall of 1962, it took 25,000 federal troops to overcome the opposition of Mississippi, led by its Governor, Ross Barnett, to enforce the court-ordered admission of Negro James Meredith to that State University; two lives were lost; scores were wounded; an all-night pitched battle was fought. And troops were needed to overcome Alabama Governor George Wallace's opposition to desegregation of his State University.

adopted by these and others, including the closing of all public schools, such as in Prince Edward County, Virginia. Some 170 state segregation laws were enacted since May 1954. Public feeling thus continued to run high indeed over what the whites in the affected states regard as a threat to their way of life and to the right of the states to govern themselves. Not for many a year had the Supreme Court been under such heavy attack by so large and so vocal a segment of the population. But a start, certainly, has been made toward desegregation and eradication of some of the discriminatory public school practices in the South and the Border, especially in the larger and more cosmopolitan cities. Roughly 15.6 per cent of the school districts in the seventeen Southern and Border states had been desegregated by the beginning of the 1963 Autumn term, with 7.8 per cent of the total Negro school population attending 'mixed' classes. Especially the six Border states have traveled far on the road toward compliance; a beginning however limited, has been made in Tennessee, Arkansas, Florida, Texas, and North Carolina; and an even more limited one in Georgia and Louisiana. But faced with the hostility by what at present still seems to be a sizable majority of their citizens, and a disposition by local officials to flout the Court, most of the states of the 'Old South' are still a long way from more than token submission to the hated edict. Many legal battles undoubtedly lie ahead. Customs that have stood for generations are not altered easily. Yet when the schools and colleges opened in September 1963, only one 'hard core' state remained completely untouched by public school integration: Mississippi, and it had at least one instance at the college level.

Moreover, the Supreme Court made quite clear in 1963 that its *Brown* decision 'never contemplated that the concept of "deliberate speed" would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems or comparable conditions . . . The basic guarantees of our Constitution,' wrote Mr. Justice Goldberg for the unanimous Court, 'are warrants for the here and now.'⁶⁹

General Problems of Discrimination. The various segregation problems just discussed are the most obvious examples of discrimination. But throughout the country there is frequent discrimination in employment practices and in access to private housing and places of public accommodation. A few of these practices violate the constitutional guarantees of civil rights as presently interpreted, but most of them are not contrary to existing laws, being

⁶⁹ *Watson v. Memphis*, 373 U.S. 526.

in the area of economic and other freedoms granted to individuals to keep clear of associations they do not like.

'STATE ACTION' AND 'SIT-INS'. Here, too, it becomes a matter of 'balancing,' of drawing lines—lines between liberty and equality, between what is and what is not '*state action*' which becomes violative of constitutional rights if applied in a discriminatory manner. A pertinent illustration is the vexatious problem caused by the increasingly militant so-called 'sit-in,' 'stand-in,' or 'wade-in' demonstrations by Negroes in private establishments in the South, whose owners have refused to serve them. Here, then, the line becomes not merely one between the right of peaceable assembly and that of serving those whom one wishes to serve but, more pointedly, it raises the issue of whether the policeman, called by the proprietor of the establishment to eject the 'sit-ins,' represents the kind of 'state action' forbidden by the Fourteenth Amendment. Understandably not eager to meet this extremely difficult and delicate issue, the Supreme Court, initially refused to meet the constitutional issue; instead, addressing itself to the specific circumstances of each occurrence, it held in several cases that no 'breach of the peace' or 'trespass' on the part of the 'sit-ins' had taken place. Thus in effect the Court reversed their convictions without reaching the 'state action' issue at all.⁷⁰ But in the Spring of 1963 it did come to grips with the basic problem. Throwing out the conviction of lunch-counter demonstrators in four Southern states, it declared it to be clearly unconstitutional for a state or any of its officials *to require segregation either by statute or official policy*.⁷¹ Yet it reserved for later judgment the important issue of *private* segregation—which raises the intriguing question of private propertarian rights!

F.E.P.C. LAWS. President Truman's Committee on Civil Rights had recommended legislative and executive action by state and federal governments against discriminatory practices generally. Led by New York, thirty-four states and many major cities by the autumn of 1963 had enacted so-called fair employment practices laws, commonly known by the letters F.E.P.C.—with Kentucky and Maryland joining the ranks in 1963 as the first of the Border and Southern states to adopt either a F.E.P.C. or 'equal accommodations' statute. These commonly prohibit discriminatory practices by employers, labor unions, and employment agencies against any employed or employment-seeking person because of race, color, creed, religion, or national origin. Equal accommodation statutes, such as Maryland's, prohibit refusal of

⁷⁰ Cf. *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 369 U.S. 350 (1962).

⁷¹ *Peterson v. Greenville*, 373 U.S. 244.

service in places of public accommodation, e.g. restaurants and hotels. But, generally speaking, there still are very wide differences of opinion on what can be done by legislation in these fields. Laws of this kind obviously create immense problems of enforcement. Governments have found it hard enough to enforce minimum-wage and maximum-hours laws. How are they to supervise effectively the hiring and firing practices of a multitude of employers and the patronage practices of storekeepers, restaurateurs, and innkeepers? Some strong supporters of civil rights are opposed to such laws on the ground that prejudice and discrimination cannot be prevented by law. The whole question of how to deal with religious and racial discrimination is a disputed matter of public policy and no fair statement of the arguments *pro* and *con* can be made in a short space.

Conclusion. One thing, however, can be said. Discriminatory practices, particularly in employment and in access to public health services and public education facilities, are a *pro tanto* denial of the liberal democratic ideal of rough equality of opportunity. Despite widespread discrimination, the strength of that ideal is manifest in most of the varied government activities described in Chapter V, particularly in the large social security programs designed to promote equality. Indeed, the whole development of the positive state is an assertion that the negative approach to civil rights is not enough. Civil rights as discussed in this chapter are negative, aimed at securing freedom from outside restraint. But without positive aids and supports, the freedom of the individual in a complex society may be largely illusory. This is commonly expressed by saying that what is needed is freedom *for*, and not merely freedom *from*, something. Freedom for the realization of the possibilities of human personality requires health, education, and fair opportunities of employment—and many of these are being obtained *through* government.

The strength of this conviction in the world today is further illustrated by the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948. Significantly, it recites the same liberal democratic ideals that have been stressed here, and it proclaims as universal human rights the substance of the civil rights guaranteed by the Constitution of the United States. However, it then goes on to declare that everyone has a right to social security, education, just and favorable conditions of work, and 'a standard of living adequate for the health and well-being of himself and his family. . . .' These are aspirations easier to phrase than to realize in the life of a society, but they show the strength of current demands for equality of opportunity. Further, the Declaration imposes some kind of moral obliga-

tion on the members of the United Nations to live up to it. However this is to be accomplished, by positive government action, by changing the hearts of men, or by both, pressure for what is called positive freedom seems likely to continue. It is in this context that racial and religious discrimination must be considered.

DICTATORSHIPS AND CIVIL RIGHTS

FASCIST AND NAZI DESTRUCTION OF CIVIL RIGHTS

It is not necessary to say much about the status of civil rights of individuals under Fascist and Nazi rule in Italy and Germany. We have already seen that Fascist and Nazi theory glorified the nation, exalted the claims of society as interpreted by the state, and had no respect for the claims of individual personality. Individuals had their significance in being means to the great social ends pursued by the government. Obstruction by individuals asserting their rights against the government was not to be tolerated.

Fascist. Before Mussolini came to power in 1922, Italy had a constitution modeled on that of Britain, recognizing the sovereignty of the legislature. The Fascist party, in control of Parliament, secured the passage of laws giving the executive power to make laws by decree. By use of that decree power, the executive destroyed freedom of speech, subjected the press and radio to close government control, and made the right of public meeting, and of association subject to license by the government. Decrees were passed creating a number of political crimes which, in effect, forbade every criticism of the government.

For example, under these decrees, a person committed a crime if he came to be regarded by 'public opinion' as a person 'dangerous to the national order of the State.' A secret police was set up to ferret out persons suspected of political crimes. On arrest, such suspects were tried by a special tribunal composed of army officers—who were sworn to obey the government—under a procedure that lacked almost all the safeguards afforded accused persons in the United States and Britain.

Nazi. The Nazis came to power in Germany in 1933 in an election under the Weimar Constitution, a thoroughly liberal democratic constitution, which contained a bill of rights designed to guarantee the principal civil rights. It also contained a clause authorizing the executive to rule by decree in an emergency. By the use of this emergency power, the Nazis quickly overrode

the Constitution. One of their earliest executive decrees abolished the civil rights of freedom of the person, speech, press, assembly, and association. They made any breach of 'healthy public sentiment' a crime. They established a rigid censorship and destroyed the independence of the judiciary. They set up a secret police system, the *Gestapo*, and the infamous concentration camps, already discussed in Chapter III.

Although the Nazis had made the courts subservient to them, they rarely troubled to use the judicial process on those who were thought to be politically dangerous. Thousands of Germans were bundled off to concentration camps to be tortured, killed, or to languish indefinitely, without having had a trial at all. No one had any rights he could hope to maintain against the government.

By these methods an apparatus of terror was established in both countries which ensured the docility of the great bulk of the population. The few, and they were truly very few in number, who had the courage to think of resisting the government could not agitate openly. They were compelled to go into underground subversive movements. Civil rights were entirely destroyed.

CIVIL RIGHTS IN THE SOVIET UNION

Civil Rights According to the Constitution. Many of the civil rights guaranteed to individuals in Britain and the United States are contained in Chapter X of the Soviet Constitution. Here are set down the rights usually associated with liberal democratic states and generally thought to be repudiated in the dictatorships: freedom of speech, of the press, of assembly, of street processions and demonstrations, and of religious worship. The Constitution also guarantees the inviolability of the person and of the homes of citizens, and the privacy of correspondence.⁷² Like the civil rights in the liberal democracies, these rights are negative. They are designed to protect the individual *from* interference by the state or by other individuals.

The Soviet Constitution, however, goes beyond the liberal democratic constitutions in declaring some positive rights designed to give the citizen freedom *for* realizing his potentialities. It was noted earlier that the Universal Declaration of Human Rights emphasizes certain positive economic and social rights. The clauses containing these positive rights were, in fact, included in the United Nations' Declaration partly because of the insistence of the delegates of the Soviet Union and other Communist countries on the

⁷² Constitution of the U.S.S.R., Arts. 124, 125, 127-8.

commission that drafted the Declaration. In demanding that the positive freedoms be included, the Communist delegates were urging the example of the Soviet Constitution, which *expressly promises* to every Soviet citizen the right to employment, rest and leisure, maintenance in old age and in sickness and disability, and the right to education.

For his part, the Soviet citizen must abide by the Constitution, observe the laws, 'maintain labor discipline,' honestly perform public duties, and 'respect the rules of socialist intercourse.'⁷³ He must also 'safeguard and fortify public, socialist property.'⁷⁴ His duties are not limited, as are the duties of individuals in the United States, France, and Britain, to the obligation to respect the precisely defined rights of other individuals. They extend far beyond that to include vague, general duties to society which the ruling authorities interpret for him as they see fit.

Denial of Civil Rights in Practice. It has been seen earlier that the facts of Soviet government frequently fail to correspond to the blueprint of the Soviet Constitution. This chapter has suggested that constitutional provisions alone do not guarantee civil rights or liberties. To be effective, these provisions must be enforced by an independent judiciary. The Soviet Union does not meet this requirement. First, the judiciary, like all other institutions of the Soviet government, is dominated by the Communist party. All judges in the Soviet Union are either members of the party, or non-members whose sympathies with the party are strong enough to warrant their appointment or election as judges approved by the party. Consequently the Soviet judiciary is not an effective check *on the government* in its dealings with individuals.

Second, Soviet practice indicates that the Soviet leaders do not think primarily about the essential worth and dignity of every human being. They think primarily about the interests of society as they understand those interests, and they assume that the interests of the individual are identical with their conception of the interests of society. The Soviet state embodies its conception of the interests of society, and consequently no Soviet citizen can assert his individuality when such assertion clashes with government policy as defined by the leaders. *Regardless of what is proclaimed in the Constitution, the Soviet leaders will not suffer the civil rights of the citizens to operate as a restriction on the actions of the government.* The Soviet citizen has no assurance that the interpretation of the law and the Constitution will remain constant and protect him against an overly zealous government.

⁷³ Ibid. Art. 130.

⁷⁴ Ibid. Art. 131.

The Apparatus of Tyranny. In Chapter XV, which describes the Soviet judiciary in some detail, the office of the Procurator-General—a type of supervising prosecutor—will be shown to be, in effect, a check on the Soviet judiciary. The Procurator-General, who, in practice, is responsible only to the Communist party, is empowered to supervise the activities of the Soviet judges, officials, and private citizens. He has yet another power, however—one which helps to explain why the civil rights guaranteed in the Constitution do not ensure the Soviet citizen anything like the degree of freedom enjoyed by individuals in the United States and Britain. Article 127 of the Soviet Constitution states that ‘citizens of the U.S.S.R. are guaranteed inviolability of the person; no person may be placed under arrest except by decision of a court *or with the sanction of a procurator.*’⁷⁵ This enables the procurator to by-pass the courts.

Since Stalin’s death, however, a series of new codes of criminal procedure have been adopted which supposedly ‘liberalize’ the judicial safeguards of the citizen by placing the burden of proof on the prosecution instead of the defendant. Among the much-heralded reforms of the 1958 Code, for example, is the right to counsel and a prohibition against unlawful arrest and detention and coerced confessions. But there is, of course, still no writ of *habeas corpus* procedure, and during the procurator’s investigation of the case detention may be continued. Moreover, ‘political’ or ‘counter-revolutionary’ crimes fall, in effect, into a separate category.

POLITICAL CRIMES. In practice, the procurator’s powers to abrogate the rights of freedom of the person guaranteed by the Constitution are invoked in cases involving *political crimes*, especially if the accused is deemed ‘socially dangerous.’ It is impossible to state precisely what constitutes a political crime in the Soviet Union. It is very nearly correct to say that any action of the Soviet citizen which is considered by the Communist party to be contrary to the public interest can be considered as a political crime by the procurator. Thus the manager of a factory who does not meet the production quota set for him by the state planning organization can be accused of sabotage. As a result of this wide interpretation of ‘political crime,’ a large area of human relationships is potentially taken out of the control of the courts of law.

THE K.G.B. The procurator’s orders are carried out by the political police, the K.G.B., or Committee of State Security—an organization with no counterpart in Britain, France, and the United States—which is subordinated to

⁷⁵ Authors’ italics.

the Council of Ministers. In practice, its authority covers the whole area of political crimes, i.e. any action which is held to be dangerous to the welfare of the Soviet Union, but its powers are a far cry from those of its predecessors, the M.V.D., O.G.P.U., and N.K.V.D., which reached their apogee of dread police-state power under Stalin.

It need not be stressed that the leaders of the Communist party control the K.G.B., and that they do not hesitate to use its machinery against anyone whose conduct they dislike or whose activities might challenge their leadership. Despite much recent talk about 'Soviet legality' since Stalin's demise and Khrushchev's assumption of power, the guarantees of civil rights in the Soviet Constitution are relatively meaningless because the essential procedures—a clearly defined and precisely limited criminal law, confinement of official action by the Rule of Law, *habeas corpus*, impartial courts, and assurance of fair trial—are lacking. Such is the cloth from which dictatorship is cut.

Having made that essential point, we should not, however, ignore the fact that there developed a very real difference between the world of the Stalin of 1953 and that of the Khrushchev of a decade later. To the citizens of the Soviet Union of the latter era, the police state practices of the days of Stalin and Beria had been replaced by less stringent, much less terrifying methods. Terror had not been forsaken, of course—as indeed it cannot be in a dictatorship—but it had become both less crude and less widespread. How long this diminution of extreme oppression would last no one could safely foretell; yet many informed persons do not expect early resumption of the terror that blanketed the Soviet Union under the reign of Stalin.

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IX

Political Parties

The growing democratization of government in the nineteenth century was everywhere accompanied by the rapid development and intensive organization of nation-wide political parties. Put in its simplest terms, a political party is a voluntary association aiming to get control of the government by filling elective offices in the government with its members. Individuals are drawn into the association because they have similar views on the general lines of policy they would have government pursue. Because of the diversity of views on most subjects in a democracy, two or more political parties have always developed wherever democracy has flourished. Invariably, the first step of dictators in destroying democratic government has been to forbid all political parties but one—their own. There is ample reason for suspecting that political parties are somehow essential to the working of democratic government.

It is, however, far too important a matter to be left in the realm of reasonable conjecture. This is particularly true because many people of genuinely democratic instinct are deeply hostile to the party system and are convinced that most of the troubles of democratic countries are due to the spirit of faction which competing parties foster and promote. Thus they still agree with the fears voiced by Madison in *The Federalist* No. 10, almost two centuries ago. An attempt must be made to lay bare the connection between liberal democratic governments and political parties.

Two Types of Democratic Party-Systems. However they may vary between specific countries, two basic patterns exist in the operation of political parties

in modern democracies, the *two-party* and the *multi-party* system. From the time of division of sentiment in Britain—between those in favor of and those opposed to the monarch—political parties in English-speaking lands have, in the main, adhered to the two-party system. This tradition is imbedded in the United States, Canada, Australia, New Zealand, and of course Britain.

Conversely, political parties on the European continent have generally followed a multi-party pattern. France, Italy, the Lowlands, and West Germany are leading examples. Constitutional government and political parties did not really appear in these states until the nineteenth century, when the economic and social forces created by the Industrial Revolution aided the splintering of European politics.

POLITICAL PARTIES IN A DEMOCRACY

FUNCTIONS

Whether in two-party or multi-party systems, political parties in modern democracies have assumed certain functions in pursuit of their aim of getting control of the government. Even though each party is moved primarily by partisan objectives, the party system within which it works performs indispensable services in making democracy a workable form of government. To see what these services are requires some attention to the facts of political life, particularly to the prevailing condition of the electorate.

Adult Suffrage. The fundamental fact is *adult suffrage*—although there still exist certain restrictions on the privilege to vote, and women were not fully enfranchised in the United States, Britain, and France until 1920, 1928, and 1946, respectively. In the United States, where the minimum qualifications are fixed by state laws, restrictions vary from state to state. In some, a significant number of adults is excluded from voting by a variety of devices, ranging from the obvious—residence, registration, and literacy requirements—to the more subtle—‘understanding’ clauses and ‘interpretation’ tests. Legal tests in the courts have resulted in the banning of the more blatantly unconstitutional devices, e.g. the ‘white primary’¹ and the ‘grandfather clause.’²

But generally speaking, almost every adult³ who is so inclined, and is

¹ *Smith v. Allwright*, 321 U.S. 649 (1944).

² *Guinn v. U.S.*, 238 U.S. 347 (1915).

³ Citizens of the states of Georgia, Kentucky, Alaska, and Hawaii are eligible to vote at 18, 18, 19, and 20 years of age, respectively.

willing to comply with minimum requirements, has a vote at his disposal to add to the total from which the will of the people for some common action or program has to emerge. Unfortunately, the people are far from finding spontaneous agreement, or even spontaneous majorities, on what ought to be done. The important basic assumption made here about the prevailing condition of the electorate is that, given the freedom of thought, expression, and association which has marked the liberal democracies, individuals and groups produce a great variety of opinions on political as well as other matters. If ten men are asked what should be done to save the country, there will be several opinions: soften the banks, abolish trade unions, forbid the sale of goods on credit, teach religion in the schools. Even when patterns of partial agreement are found, such as the socializing of certain means of production and distribution, a little further inquiry reveals a multitude of counsel about the pace of advance toward, and the means for reaching, the desired end. Socialists have quarreled bitterly for two generations and broken into a dozen camps over the question of means. The electorate, even after years of education by political parties, is still a mass of various opinions looking for salvation in different directions.

Selecting Candidates for Office. Left to themselves, how would the voters in a constituency pick a representative to the legislature and instruct him on what should be done there to further the common interest? How would candidates be selected to run for office in the first place? At worst each voter would vote for himself and his own panacea. At best there would be numerous candidates, and one of them supported by a small faction that had agreed momentarily to back him would get more votes than any other candidate. Only in the rarest circumstances would any candidate get a majority of all votes or any majority opinion emerge on what should be done to further the public interest. The members of the legislature, thus chosen by haphazard and temporary combinations in each constituency across the country, would themselves be of various opinions, and their accomplishments in the legislature less constructive and more disillusioning than at present.

Providing Alternatives. The two-party system does to this incoherent electorate what the magnet does to the iron filings—it organizes the voters around two poles, orients them in relation to specific alternative programs of political action. Under it the parties select programs, more or less clearly outlined, and choose candidates; and if one party has a majority in the legislature it proceeds with its program. Without the parties, there would be no stable majority in a legislature, and without the support of an enduring ma-

jority it would be impossible to maintain steady drive behind a program for even a month, let alone three or four years. When government performs so many important functions, such a situation would be serious indeed.

Self-Maintenance. Hence an important obligation placed upon political parties is self-maintenance. No legal compulsion for their operation exists in the United States—where the widespread mistrust of parties voiced in the Constitutional Convention prevented any mention of them in the Constitution—, Britain, or France. It is circumscribed almost entirely by custom and does not depend upon compliance with constitutional or statutory law. Only the will of thousands of citizens wishing to make a career or an avocation of politics, or considering political activity the most effective means of securing or protecting certain standards, enables political parties to perpetuate themselves from generation to generation.

It is commonly believed that party motivation is predominantly personal and selfish, but the evidence indicates that a considerable share of political activity stems from idealistic motivations. Skeptics to the contrary, the faithful, dogged support of minority parties in regions perpetually dominated by a strong majority party indicates that many people labor for a party simply because they hold it worth supporting—and their support remains constant despite the unlikelihood of material reward.

Each major political party, even in a multi-party system, primarily sets itself to the task of constructing a majority in the legislature. Party politicians—except those who are members of minor, doctrinaire parties, such as the persistent Prohibition party in the United States—are not, and cannot be, crusaders, men of single-minded passionate purpose who drive straight to the realization of their ideals. They are not even generally the inventors of the ideas they expound. In the aptest phrase yet applied to them, they are brokers of ideas.⁴

Brokers of Ideas. They are that because they are middlemen who select from all the ideas pressing for recognition as public policy those they think can be shaped to have the widest appeal and, through their party organization, they try to sell a carefully sifted and edited selection of these ideas—their program—to enough members of the electorate to produce a majority in the legislature.

It puts the activities of the politician at their lowest to say that he seeks to gain power and a livelihood through traffic in the beliefs and ideas of others.

⁴ A. Lawrence Lowell, *Public Opinion and Popular Government*, rev. ed. (New York: Longmans, Green, 1914), ch. v.

It is well to see things at their starkest. In fact, most politicians have their own conception of the common interest that they would like to see carried out. That is impossible without power, and power has been dispersed among a numerous electorate. It can only be concentrated in a democratic way by massing votes behind leaders and a program. The party politician, unlike some others, has learned about the facts of life; he knows, as another happy phrase has put it, that votes are not delivered by the stork. Voters have to be attracted and organized. Only when this has been done by nation-wide effort and co-operation of many politicians can any one of them hope to make some of his view of the common good come true. And then he can never hope to realize more than a fraction of it politically. For to get the co-operation of other politicians whose view of the common good differs somewhat from his, each has to give hostages. Each has to give up some portion of the good he sees to make room for some of the good that others see.

When the politicians united in a party come to appeal for the votes of a vast electorate, the program has to set aside much that the politicians personally think desirable in order to accommodate something of the diverse goods held dear by the members of the electorate, and by the organized interest groups within the electorate. In so far as the initial assumption of a radical diversity of opinion in the electorate stands, it is clear that the wider the appeal, the lower will be the highest common factor on which united action can take place.

THE NEED FOR ACCOMMODATION. Perhaps the simplest illustration of the necessity for such accommodation is to be found in Canadian politics. The people of the Province of Quebec are overwhelmingly French-speaking and Roman Catholic, French in social structure and culture; they constitute about one-quarter of the population of Canada. Therefore, it is only rarely that a political party can win power without getting substantial support in Quebec. But Quebec opinion on what the Dominion Parliament should be instructed to do for the common good shows marked divergences from the lines of policy for which majorities can be found in the rest of Canada. Accordingly, political parties must modify their programs to find a compromise that will produce a nation-wide majority. This compromise will be something that neither Quebec nor the rest of the country would fight for if each were going its own way.

It is not the fact of Quebec alone that makes this process necessary, although the French-English diversity provides its most striking illustration. The process is at work in every election district in Canada, Britain, and the

United States. The use of this technique of accommodation is, in varying degree, a skill required of democratic politicians everywhere. Britain, with greater social homogeneity than Canada or the United States, gets on with less watering down of programs of political action, but is far from avoiding it entirely.

In the United States, both the Republican party and the Democratic party have drawn traditional support from different regions and diverse interest groups, and both have framed their electoral appeals to attract votes from almost all sections and interest groups. Thus, in Clinton Rossiter's phrase, they become the 'peacemakers of the American community.' The Democratic party has first to compromise within itself to hold together the conservative-minded agricultural and business interests of its Southern wing and the more radically inclined elements of its traditional support among labor and liberal elements in the urban industrial North. Then, to win a majority, it has to woo the predominantly agricultural West, whose interests differ markedly from those of both Southern and Northern Democrats. The Republican party has won its greatest successes as an alliance of Northern and Northeastern business interests, professionals generally, and Western farmers.

The political combinations involved are much more complex than this statement indicates, and their patterns have changed sporadically. The main point, however, is that *both parties appeal to almost all sections and classes*. A notable exception was the Republican party as it first took shape in the 1850's. It was entirely a combination of Northern interests. Its first victory in 1860 did not take account of Southern interests and demands. Its failure to find a nation-wide basis of compromise was one of the chief factors that led to the Civil War.

Party politicians, therefore, are brokers in another sense. They are always arranging deals between different sections of opinion, finding compromises that 'split the difference,' and thus concentrating votes behind the program of their political party. As long as the sovereign electorate is of numerous diverse opinions, this is the only way majorities can be constructed and power gained to push through any political program in a democracy.

Creating Majorities. It may be objected that the argument proves too much. If opinion were naturally so diverse, the parties could never herd the bulk of the electorate into one or other of two camps. In fact, this is precisely what the democratic politicians of many states of continental Europe—such as pre-Fifth Republic France—were always unable to do, and parties there have tended to become more instead of less numerous. In Britain and the United

States a two-party system was established while the electorate was still small in numbers and politics was, much more than now, a game between the 'ins' and the 'outs.' Large sections of the electorate become habituated to allegiance to one or other of the two parties and become deeply attached to its leaders and traditions.

WEAKNESS OF THIRD PARTIES IN THE UNITED STATES AND BRITAIN. Once the two-party system was firmly established, a number of factors discouraged the setting up of additional parties. Everyone has had cause to remark the plausibility of the politicians. Their programs are devised with generally recognized problems in mind. Their arguments seem convincing to an electorate that knows little about the nature of those problems and has given little attention to the ways of meeting them. Most people find that after earning their daily bread and keeping track of the adventures of their favorite motion-picture stars, they have little time for the serious study of politics. Their interest and conviction are not strong enough to make them launch new parties unless there is a pronounced failure of the established parties to meet obvious and urgent problems.

The voter who has not time to study politics has not time to start an organization to promote his views. If his vote is to count at all, he must attach himself to one of the vote-gathering organizations already in the field with some prospect of winning. He is the more disposed to do this because everyone likes to put his money on the winning team. Third, or minor, parties are launched from time to time, but unless they rapidly come within striking distance of a majority, their support soon falls away. To create new parties is costly and often runs into technical difficulties, such as the need of obtaining a sufficient number of petitions from specified areas of the country. The older parties are deeply entrenched in the community. Their organizations are alert to thwart or undermine the competition of any new political party that emerges. Not infrequently this is done by adopting an attractive aspect of the new party's program. Other factors that have supported the two-party system in the past will be considered in different connections.

The first essential function of the party system then is to organize voters into majorities behind platforms and leaders. The voters get alternatives from which to choose, and the electorate can reward the party that appears to be deserving and be sure that both parties will strive to merit reward. This is the only way in which a numerous electorate can exercise effectively the power that democratic theory assigns to it. Also, as earlier discussion shows, the parties by their activity in the legislature contribute to the political education

of the electorate. They turn talk into legislation, and legislation into concrete regulation and services through administration.

Opposing Majorities. Another function of political parties is apparent in the legislative body, where the party out of power, the out-party—or *coalition* of out-parties in multiple-party systems—acts as an agent of restraint on the party or parties in office. The minority may adopt tactics of criticism and/or obstruction of actions taken by the majority. A more positive policy might involve co-operation with the majority on some issues but opposition on others, so that differences might be exploited at the next election. The most formal and most responsible example of opposition is found in Britain. There the minority party is referred to as 'Her Majesty's Loyal Opposition,' and has official standing as such. Through debates in the House of Commons and the daily question period, in which members of the House of Commons ask searching questions of the government, the British Opposition compels the majority to justify, and occasionally even to modify, its actions.

The Opposition, or out-party, in the United States has not customarily shown the same degree of responsibility as has its British counterpart. One reason is that the differences between the two major American parties here are far more blurred. Another reason is, as Hugh Gaitskell, when Leader of the Opposition in Britain, once remarked, that under the American system of separation of powers the *real* opposition is not so much the out-party as it is the *Congress* itself, as an institution of government—a checkmate, however negative or non-constructive it may be.

Concentrating Responsibility. By concentrating votes for themselves, the political parties concentrate responsibility on themselves. It would be difficult to exaggerate the importance of this. A majority party has power to implement its promises, to meet problems as they arise, and to administer laws wisely and fairly. In so far as it is judged in the sequel to have failed, there is no doubt who is responsible and who is to be punished. The people can bring home responsibility to a determinate group of individuals.

If there were no parties and a crisis arose that was not appropriately met, everybody would be equally responsible; i.e. nobody would be responsible. If there were only one party, the responsibility would be clear but it could not be brought home because there would be no alternative government. And the chief defect of the multiple-party system, to be discussed presently, is that in the shifting coalitions it involves, responsibility is blurred and the electorate can scarcely determine where it lies. The two-party system does

not enable the sovereign electorate to govern the country, but it does enable it to *choose* and rule its masters and to make government responsible. Those who know the history of government among men will not be disposed to belittle this achievement.

CONSTRUCTING MAJORITIES IN A MASS ELECTORATE

Yet the everyday spectacle of party politics rouses widespread disgust and distaste. To many—and not only to Charles de Gaulle—politicians are the lowest form of life, and all appreciate Artemus Ward's recommendation of himself, saying, 'I am not a politician and all my other habits are good.' In part, this disgust is due to a failure to understand why the democratic politician does not summarily enforce the opinions of the critic and have done with it. In great measure, however, it is a reaction to certain unsavory aspects of political life. The indictment against parties must be heard and a verdict considered and given.

The unsavory features arise mainly from the fact of widespread suffrage, although it must not be inferred from this that politics had a better smell when the franchise was limited to the well-born. It had a different odor, but by no means a better one. In politics, men are always trying to get their hands on the instruments of legalized coercion and on the sweets of office. It is therefore the most ill-disguised struggle for power short of open war, and is likely to be unmannerly and sometimes unscrupulous. Politics is also the arena where passionately held views clash and men are tempted to make the end justify the means. It is rash to think that the political process can ever be turned wholly to sweetness and light.

Burke's Definition. In eighteenth-century England, when the franchise was narrow and gentlemen were born to politics, there was little evidence of the existence of parties outside the legislature. In Parliament itself, the members of the parties made their deals in secret caucus and the only outward evidence of these were the principles the members expounded. It was in these circumstances that Edmund Burke framed his famous definition of a political party as 'a body of men united, for promoting by their joint endeavours the national interest, on some particular principle on which they are all agreed.'⁵ Of course, the parties tried to extend their membership and influence to the constituencies in the hope of altering or maintaining the complexion of

⁵ *The Works of the Right Honourable Edmund Burke* (Boston: Wells and Lilly, 1826), p. 426.

Parliament at the next election. But the candidate often knew all the voters personally, and in any event could canvass them all himself. Elaborate party organization was unnecessary under these circumstances.

All this has been changed by universal suffrage. Where the voters in a constituency numbered dozens or hundreds, they now number tens of thousands and hundreds of thousands. The candidates cannot personally canvass more than a few of them. Yet their votes are necessary for victory. The party must come to the aid of its candidate with money and scores of tireless workers. For there is much to be done as an election approaches. The voters must be harangued and canvassed. Wavering voters must have the issues at stake specially explained to them. Campaign literature must be prepared and widely distributed. Space in the newspapers and time on the radio must be arranged and paid for. Transportation must be provided to carry the eager and the not-so-eager voters to the polls.

The Need for Organization. An organization that does all this efficiently cannot be thrown together on the eve of an election. It becomes necessary to maintain permanent party committees in each constituency. Nor is this enough. The parties carry on nation-wide campaigns on a national platform and the greatest possible number of seats must be won. A central organization for over-all direction is necessary for maximum results. Local party organizations are sometimes slack and need coaching and encouragement. Doubtful constituencies are the sectors where the front breaks, and the central organization must mobilize strategic reserves. Research is undertaken in problems of public policy, and party speakers across the country are supplied with facts, arguments, and statistics.

The most important work of the central organization, however, is not in fighting this election but in planning the next one. Therefore, it should be a permanent organization with a substantial permanent staff. The platform of the party—no matter how flagrantly it may be disregarded after the election ('We will take it out and read it from time to time,'⁶ a remark by House Minority Leader Charles Halleck in 1961, is symptomatic)—must have the widest possible appeal, and it must not be settled on until the contours of opinion in the constituencies have been plotted. The central organization collects much of the data that the leaders must take into account in drafting the program. It gives attention to alternative plans of campaign and to the strategy and tactics appropriate to each. It keeps in touch with constituency

⁶ Quoted by James MacGregor Burns, *The Deadlock of Democracy: Four-Party Politics in America* (Englewood Cliffs, N.J.: Prentice-Hall, 1963), p. 255.

organizations, bolstering their morale, explaining the government's policy if the party happens to be in power, and the government's lack of policy if the party is in opposition. Analogies are always misleading, but it comes close to being the directing brain of the party.

The vigor of the central party organizations is much stronger in Britain, where they attend to all the matters described and others as well. In the United States, the national central party organizations are but pale reflections of the picture drawn here. That is because the strongest and most effective party organizations are the state or local organizations. In many of the states central party organizations perform more or less effectively most of the functions described above. It must be clearly understood as a primary lesson of American politics that the locus of power within each party lies at the state or local, *not* at the national, level.

The Need for Funds. In any case, permanent central and constituency organizations are necessities if the parties are to make the most of the possibilities. The maintaining of these organizations and the fighting of periodic elections are a heavy expense to the parties. One of the heaviest items of expense in an election is the provision of thousands of workers to help garner in the vote, and for this reason parties have found it necessary to rely heavily on unpaid volunteer workers who help for the sake of the party. Money is the root of much evil in political parties, as elsewhere. The parties find it too cramping, if not impossible, to finance their operations through the small contributions of a large number of party supporters and much easier to get large contributions from relatively few people.

This philanthropy is not always pure, and there are lively expectations, if not tacit understandings, of favors to come when the party gets into power. Wealth alone is certainly not decisive in nominations or elections, but there is little doubt that it helps in handling the rigorous demands that politics in the United States, especially, imposes on candidates. Also, it is found that volunteer workers are more numerous and zealous if the party can give concrete recognition of their services. The loyal workers who do the party drudgery are often aspirants for favors that will be in the gift of the party when it is victorious. The party cannot be successful without a vigorous organization, and organization depends on benefactors and loyal workers.

Fighting To Win. Party organization has other disillusioning features. All organization has a tendency to fall under the control of a few. The organization tends to become autonomous, to exist for its own sake and for the satisfactions it provides for its active personnel, even at the expense of its prin-

ciples and original purpose. Most of the supporters of the party have little interest in humdrum matters of organization, and their attention to party affairs subsides between elections. Party organization in the constituency falls normally into the hands of an interested few who try to control it. The national party leaders naturally have a commanding influence in the national organization.

These local and central leaders, along with the permanently employed officials of the party, come to regard the organization as important for its own sake. Since the organization flourishes on victory and languishes in defeat, principles tend to become subordinated to success at the polls. The benefactors and the party workers often make a similar judgment. The former often show how much they care about the principles of the party by making contributions to *both* parties, sometimes the same amount. The party workers and those benefactors who bet on the nose of their horse cannot be rewarded without victory. Furthermore, the sheer delight of battle stirs everyone connected with the parties to put victory first. There have been times when these influences made the party system primarily a struggle between the ins and the outs. The only safeguard against this degeneration at any time is some minimum of intelligence and interest on the part of the electorate.

There is clear support of this estimate in the search of the parties for issues that will capture the vote. Since neither party can escape the necessity of encouraging one section of opinion to expect some things that, if stressed too much, will repel other sections of opinion, each party looks for red herrings to draw across the trail, specious issues that divert the public and force the other party to a less favorable battleground. Such maneuvers can only be prevented by a public that knows too much to let itself be deceived.

DISHONESTY? Two of the counts in the indictment against the party system used to be fraud in the buying of votes and the stuffing of ballot boxes. Election laws have been tightened up, voting machines have replaced the paper ballot in many instances, and party managers have lost a good deal of their interest in such piecemeal methods. Improvements in the art and media of propaganda make it easier to attempt wholesale stampedes of voters, and bribery now tends generally to take the form of promising large sections of the population benefits from the public treasury.

REWARDS. After the election has been won by such methods, those who have deserved well of the party are rewarded. The benefactors who have earned a reward may be given profitable government contracts, improved social

security legislation, and other advantages. Some of the party workers get government jobs, often through the dismissal of employees of the government who were just learning how to do their work reasonably well. The patronage or spoils system has many unfortunate effects, which are too well known to need discussion. It must be acknowledged, however, that the worst excesses of the spoils system have now been curbed by reasonably effective reforms—with some glaring exceptions. Moreover, like it or not, patronage is the oil that keeps the party machine running.

A Serious Charge. Thus it is claimed that the parties are run by small cliques of politicians who take pains to exclude men of better will than themselves from influence in party councils or in framing the party platform. They, so continues the charge, deceive the public and frustrate the will of the people for better government. They saddle the public with incompetent servants and use their control of the government to enrich themselves, their friends, and their supporters.

A VERDICT ON PARTIES

If a verdict has to be given on the charges summed up in the last paragraph, it will be neither 'guilty' nor 'not guilty,' but 'greatly exaggerated.' Occasional politicians enrich themselves at the public expense, but most of them live and die poor. Corrupt bargains with benefactors are fewer than is generally supposed. Many men give large sums to their party without expectation of a concrete return, although it would not be correct to say that party policy has been unmindful of the source of contributions to party funds. Loyal workers are rewarded with jobs wherever possible, but the critics of this practice have rarely taken adequate account of the difficulty of finding alternative sources of energy for running the party organizations.

Facts of Political Life. The hard fact is that the parties need funds and workers for their indispensable function of organizing the electorate. Job-seekers are the bane of the politicians' existence, and there is nothing more welcome than utterly voluntary service to the party. It is equally certain that they would prefer to get party funds that entailed no obligation. These have not come forward in sufficient volume from the rank and file of the supporters of the parties, and they have received but little supplement from those who rebuke the politicians for making what shift they can.

It cannot be emphasized too much that the party organizations in a democracy are flexible and necessarily responsible to currents of opinion. Those who

are sure that party practices outrage common decency can dedicate themselves to reform of those practices. The obstacles they face are nothing compared to those that vital social movements have overcome in the past.

It is true that a small group of leaders tries to control the party, but that is a general feature of all human organization, certainly not limited to political parties. Men of good will are not excluded from party councils, but they often exclude themselves because they are too inflexible to make the compromises essential to the gathering of votes. The parties do not frustrate the will of the people, because it is only rarely that even a transient majority of the people is genuinely of one mind about a specific political problem. The parties deceive the public, but so do propagandists of every kind. The deception does not often arise from cynicism but rather from zest for the game itself, a general human trait. It may be said generally in conclusion that *the evils in the party system are not peculiar to it but are the outcome of general human frailties*. Indeed, it is hard to see how the parties that must woo the electorate with success can do other than reflect its virtues and its vices. Perhaps it is people as much as institutions that need to be reformed.

These charges and this verdict have been general and make no allowance for the considerable differences in the party system in different countries. Nor do they take account of differences between the parties in the same country. In the last ninety years, at any rate, the spoils system and unsavory bargains with party benefactors have been much more common in the United States than in Britain or France. Moreover, many of the charges leveled at the party system are much less applicable to the newer third and fourth parties—the parties of protest.

These latter parties are maintained by a generous idealism that finances the party and supplies the workers for the sake of the cause. The supporters of these parties, doctrinaire and otherwise, assure us that it is because they appeal to the best rather than to the worst in people. This is not the whole reason. As long as these third parties are a long way from power, it is easy for them to be pure. No one tempts them with donations in return for favors and concessions at public expense. The party workers work hard because until they approach the threshold of power it is possible for each to believe that the party will bring his ideals to fruition. It is only when it becomes necessary to please everyone in order to catch and retain votes that the sickening compromises begin and the disillusionment that saps enthusiasm among the supporters of the older parties sets in.

PARTIES AND PEACEFUL CHANGE OF GOVERNMENT

As long as we adhere to the rule that ultimate power rests with a diffused electorate, political parties are necessary to frame issues and bring public opinion to a focus. However, political parties, two or more in number, perform other even more fundamental functions for democracy. They make peaceful change of government possible and thus eliminate the necessity for the armed *coup d'état* as a means of changing government, and the counter-necessity of ruling by force and terror to prevent such a *coup d'état*. A glance at two striking episodes in the Nazi and Soviet dictatorships will help to make this clear.

It has already been noted that the Soviet Union permits only one party, the Communist party. Some description of this one-party system will be given later in this chapter. Likewise, in Germany under the Nazis, the Nazi party was the only party allowed to exist and participate in the processes of government.

Purges in the One-Party State. In June 1934, the Nazi party in Germany purged itself of scores of prominent members of the party by shooting them down under the pretense that they were resisting arrest. Between 1936 and 1938 there were repeated purges in the Communist party in Russia. Several dozens of the old distinguished members of the party who suffered imprisonment and exile for the sake of the revolution against the Czarist regime were tried for treason and either executed or imprisoned. In each case these actions were the result of a serious split in the party.

NAZI GERMANY. The Nazi party had in it many genuine socialists who wanted to make the party the instrument of out-and-out socialism. In order to win power, however, Hitler had made infamous bargains with anti-socialist elements that he had found expedient to honor for a considerable time after gaining power. The socialist wing, including a minority of important leaders, regarded this as a betrayal of their hopes and of the promises that had been made them. Although the exact circumstances and sequence of events are not clear, it seems that this group was threatening to contest Hitler's leadership of the party when Hitler struck first.

SOVIET RUSSIA. There is also confusion as to what happened in Russia. The accused were charged with and convicted of conspiring with Germany and Japan to overthrow the Russian government. If they did so conspire, it is clear that the conspiracy was the consequence of a conviction that Stalin had

betrayed the revolution. For years there had been a widening rift in the party between those who held with Stalin that a strong socialist state must first be established in Russia before trying to convert the rest of the world, and those who sympathized with Trotsky's view that Stalin's policy was bound to fail and that it was necessary to get on with world-wide revolution without a day's delay. In other words, they disagreed profoundly over the means by which the desired end, world-wide socialism, could be reached.

There are strong reasons for thinking that such purges are a periodic necessity in the one-party system, as is demonstrated by the events of the 1950s in Russia, for one. Whether or not they will require bloodshed depends on how deeply and passionately the leaders are divided and how determined both factions are to make their will prevail. But purges of some sort are necessary where free elections are not used to settle disputes over government policy. For to set up a one-party system is to say that there is only one right way to govern the country and that the way is clear and unmistakable. If there were any reasonable doubt, the sensible thing to do would be to allow two or more parties and let them experiment in turn with their solutions to the country's problems. The one party monopolizes all political activity and it can entertain only one policy. Any man with political ambitions or with strong views on what the government ought to be doing must get into the party and try to work his way to influence and authority.

Nazis and Communists, like other people, are of diverse opinions. There is disagreement over policy within the party. When neither group can convince the other and neither will give in, the single party has, in fact, split into two parties. The peaceful way out is to allow the dissenting minority to secede openly and set up party organs of its own, and then to agree to let the people arbitrate this and any subsequent conflict between them, awarding control of the government to the group that wins the confidence of the electorate for the time being. The alternating governments of the democracies are made possible only by the unflinching and unhesitating acceptance of the convention that the party in power always accepts the verdict of the polls.

One-Party State Solution. The frank adoption of this solution is barred in the one-party state because the zealots who set it up are agreed on one thing at least: *they know* what government policy should be and there is nothing for the public to arbitrate. How could it be otherwise with men who think they have perceived the only valid goals of human life and society? It is a betrayal of their vision to allow the perverse and the stupid to organize against them. Nothing will be gained and everything may be lost by reason-

ing and discussing with the obstructors, who, if they had any reason or good will in them, would have seen the light long ago. For such as these, the zealots have only a burning impatience and contempt. So they destroy without a qualm all organization that might talk or act against their views.

Men who are willing to obliterate all other parties but their own generally will not shrink from obliterating opposition elements within the party. It becomes a question of which faction will shoot first. There is no ground for thinking that Hitler enjoyed shooting old friends who had shared his struggle, or that Stalin found any satisfaction in the judicial liquidation of comrades with whom he had fought and suffered for an ideal. The logic of the one-party system compels such a course of action from time to time.

The Democratic Alternative to Purges. So, when it is asked whether the country can afford to have half its able leaders always obstructing in opposition, the real issue is whether they are more useful there than in the cemetery. The shooting of old friends would not necessarily be bad for the body politic if there were any assurance that those quick on the draw somehow have also the better political opinions. There is no evidence that this is an index to statesmanship.

TESTING OF POLICIES. The prime advantage of the two-or-more-party system is that it applies the only rational test of statesmanship, the testing of policies through their practical application. The public will support one party for a while and then another. Each party experiments with its ideas while in power, and if the results are satisfactory the opposing party acknowledges it by continuing the measure after they come to power. In the past, at any rate, relatively little legislation has been repealed on a change of government. This fact is of great importance. It suggests strongly that the liberal democratic processes of discussion are effective means of enlarging the area of agreement among men and confirming their sense of unity, if they have the patience to thresh out their differences on terms of mutual respect.

TRIAL AND ERROR. Those who come to politics with white-hot convictions will always be impatient with government by trial and error. Before they reject it, they might well examine the alternative and ask whether they wish to put their faith to the test of violence. For violence not only degrades the personalities of those on whom it is practiced. It also destroys the basis of mutual trust and respect on which the pursuit of liberal democratic ideals depends. Those who admit that there may be reasonable differences of opinion on how best to further these ideals will find merit in the open, flexible system. Those who lay store by constitutionalism will cling to the party system

because alternating governments are the effective device for keeping power contingent. The people can govern their rulers and hold them responsible only as long as they can dismiss them and find at once a workable alternative government.

TYPES OF DEMOCRATIC PARTY SYSTEMS

At the beginning of this chapter it was explained that two basic main types of democratic party systems exist: two-party and multi-party. The former, in turn, may again be divided into those with and those without tight party discipline—Britain and the United States, respectively. We shall now examine these several systems.

BRITISH TWO-PARTY GOVERNMENT

The evolution of political parties in Britain has produced a system of strongly disciplined national parties, in which the individual political leader, regardless of his eminence, must forgo a certain amount of individuality. The two-party tradition and a unitary form of government have combined to place the location of political power on the *national* rather than on local or state level—the precise reverse of the situation in the United States.

Organization of Control. Despite one victory and several respectable 'also-ran' showings in bi-elections in the early 1960s, it seems probable now that the Liberal party in Britain is doomed to minor party status—although there are some who predict a three-party system. But in the last general elections in 1959, Liberals polled only 5.9 per cent of the popular vote and obtained but six seats in Commons, since then augmented by the one mentioned. In any case, Liberal and Conservative organizations are so similar in pattern that a description of one will serve for the other. Also, the organization of the Labour party steadily grows more like that of the others.⁷ It will be sufficient to note a few salient divergences. The basic unit in all three parties is the local constituency organization, composed of all those who formally join the party and maintain their membership. The active and effective part of the local association is the small executive committee, which, in turn, is very

⁷ On this point and others to follow see the excellent study of Britain's parties by Robert T. McKenzie, *British Political Parties* (New York: St. Martin's Press, 1955), *passim*.

powerfully influenced by its secretary and a paid party agent, whose job it is to win the constituency in the election.

CENTRAL OFFICE. The local associations are in each case united in a national union, which maintains a central party office and holds an annual conference made up of delegates from the constituency organizations. The conference elects a national executive committee, which directs the work of the central office. The central office is an over-all directing and co-ordinating agency, devoted to the planning and winning of elections. In theory, the conference is a representative party legislature for establishing the policy of the party. But it has come under the powerful influence of its executive committee and the permanent staff of the central office. The central office works in the closest relation with the party's leader in Parliament, by whom the party program is drafted with the help of the chairman of the executive committee and the chief official of the central office. Headquarters rarely fails to get this draft approved by the annual conference of the party.

LEADER OF PARTY. Nor does the conference choose the leader of the party. He is chosen by those members of the party who are in Parliament. As he is their leader in the critical party struggles in Parliament, it is most desirable that he should be their choice. Equally, those who lead the party in Parliament, and who have, or will have, the responsibility of making and enforcing government policy, are sternly set against having the annual conference saddle them with a policy that is impracticable or impossible of application. This helps to explain the centralized party machine. The natural tendency toward oligarchy in human organization and the inherent logic of responsible cabinet government both contribute to it.

LABOUR PARTY AND TRADE UNIONS. The main divergences of the Labour party from this pattern of organization arise from the *connection of the party with the trade unions*. Trade unions and local trades councils, as well as individuals, are members of the party and thus entitled to distinct representation in local and national organization. The local party agent is often a trade union official. Because the trade unions are powerful principalities within the party, the central organization cannot dominate the party so fully. The annual Labour party conference discusses party policy more fruitfully. Yet the conference cannot force a policy on the parliamentary group of the party. After all the debate is over, the latter must approve the policy before it becomes official, and they are simply not bound by statements of policy laid down by the conference. The parliamentary group also chooses the person who is to lead them in Parliament. His position is somewhat less secure than

that of the leader of the Conservative party, because unlike the latter he must be re-elected each session when the party is out of power, and he has thus no automatic right to be Prime Minister when the party comes to power.

APPROVAL OF CANDIDATES. As part of their duties in planning and executing election campaigns, the central organizations insist that every candidate who represents the party be approved by them, and they make judgments on his orthodoxy in cases where doubt arises. Central party officials often want seats in Parliament, and these—and others—are recommended to the local associations. It is very rarely, however, that the central office will try to force a candidate on a local committee determined to pick its own, although the central office may refuse its imprimatur to a particular choice. Ancillary to its principal duties, the central office carries on research in the problems of government, grinds out party literature, manages the party funds, and nurses the party press. It is active continuously and not merely at election time.

CAMPAIGN FUNDS. Much less is known in detail about the sources of campaign funds in Britain than in America—in part because in Britain their expenditure is governmentally regulated so much more successfully. The two older parties rely mainly on substantial contributions from men of substance. Explicit bargains for a *quid pro quo* are not common, partly because of a high standard of political morality, partly because unlike governments in North America, British governments have not had vast natural resources to give away and have not been subsidizing desirable private economic enterprises such as railways. However, titles of honor have been a significant substitute for railway concessions, timber limits, and tariff increases. The parties exploit social snobbery instead of the natural resources of the country. The Labour party, for obvious reasons, has had little part in such traffic. It has drawn its funds in small amounts from a vast body of supporters, particularly through the trade unions.

REWARDS. The merit system of appointment to the civil service covers most government jobs and it is loyally and honestly applied. There is therefore very little room for operation of the spoils system. The patronage appointments do not begin to provide rewards for doing the drudgery of the party. In so far as voluntary workers do not come forward in sufficient numbers, they must be paid a wage. Here the Labour party has an advantage because it has the largest reserve of crusading enthusiasm. On the other hand, it is at a disadvantage on election day because fewer of its supporters can supply automobiles to take the voters to the polls.

British Party Discipline. As has already been pointed out, candidates are

normally chosen by the local party associations. But since localism is not strong in national politics in Britain, and the candidate need not be a resident in the constituency he hopes to represent in the House of Commons, the central party organization strongly influences the choice and often actually provides the candidate.

CHOOSING CANDIDATES. In choosing a candidate, each party in Britain is careful to pick, among other things, a sound party man, one who is loyal to the leadership and principles of the party. In recommending its candidate to the constituency, each party always justifies him by reference to the statesmanlike leadership and sound platform of the party. The candidate himself modestly subordinates to this praise of his party his own claim to merit and preferment. He dwells on its past record, its present promises, the integrity of its leaders, and the wisdom of their policies. He might well repeat the self-depreciation of the hymn, 'Nothing in my hand I bring.' It is assumed throughout that the voting is not merely, or even mainly, to choose a person to represent the constituency but to get the verdict of the voters on the party, its leaders, and its platform.

STRONG PARTY DISCIPLINE IN PARLIAMENT. There have been normally only two significant political parties and one or the other of them gets its members elected to a majority of the seats in the House of Commons. The executive, the cabinet, is chosen from the leaders of the majority party. The rank and file of this majority party respond to its leaders and present a united front on almost all issues. The making of laws and other important decisions in the House of Commons are decisions of the majority party under persuasion and pressure by the cabinet. Often, particular members of Parliament belonging to the majority party are personally opposed, more or less strongly, to the line their party proposes to take. Yet they almost invariably vote for the party line.

All this is common knowledge, but its far-reaching significance is not always grasped. Members of Parliament are often chided for meekly following their party when public opinion in their constituencies is strongly opposed to the line the majority party is following. It is forgotten that the member never held himself to be individually responsible as a mouthpiece for his constituents but rather professed always to be the loyal member of a party. The party takes the responsibility for the man and for the platform, and the constituency is invited to make its reckoning with the party—which, of course, it can effectively do by rejecting the candidate of this particular party at the next election. The political parties have planted themselves between the electorate and the legislature. Moreover, the bulk of the electorate

shows its approval of this by voting for a party, for a party leader, and for a party platform rather than for an individual candidate.

SOME CASE STUDIES. It would be both foolish and futile for a political party to invite responsibility in this way unless there was a prospect of power to make good its promises. Actually, if a well-disciplined party wins a majority of the seats in a legislature where decisions are taken by majority vote, it has the power to carry out its promises. To make that power good, it must keep its members in line—as the Government or as the Opposition. In the role of the latter, for example, the Labour party expelled five ‘left wing’ members from its parliamentary party in March 1961 for having forced a vote against the Government on appropriations for the armed forces, despite Labour’s expressly adopted policy to the contrary. As a result, the five M.P.s remained in the Labour party, but were no longer considered members of its official representation in the House of Commons, and henceforth sat as Independent Labourites.

The imposition of party discipline even on the ‘back bencher’—the member with little effective power in the party—is complete and enforceable. Members of the majority party are expected to support the cabinet, no matter what their personal reservations concerning the proposal at issue. In 1944, when a Government education bill was reported to the floor by the committee in charge, Thelma Cazalet Keir, a Conservative member of Parliament, proposed an amendment providing equal pay for men and women teachers. The President of the Board of Education, who represented the cabinet, opposed the amendment. But Mrs. Keir was able to rally feminist support to the amendment, and it passed by a vote of 117 to 116, with many of the then 625 members of the House of Commons choosing to vote neither against the Government nor against women. On the following day, however, Prime Minister Churchill declared the issue one of confidence in the Government, whereupon support for the amendment dwindled, the number of persons participating in the vote doubled—and Mrs. Keir’s proposal fell victim to party discipline. Among those who ‘toed the line’—Mrs. Keir!

A more recent illustration is the Opposition move in December 1956 to censure the Eden Conservative Government over the Suez invasion debacle of six weeks earlier. Although under heavy attack by members of its own party—albeit in part for quite different reasons—the Government prevailed by a vote of 327 to 260. Its subsequent own motion expressing approval of its conduct passed 312 to 260, with fifteen ‘right wing’ Conservatives abstain-

ing. And, again, in 1963 the Macmillan Conservative Government scored a decisive 333 to 227 victory on the touchy European Common Market issue.

THE PARTY WHIPS. In Britain, each party in the House of Commons has a number of party whips, members of the party whose function it is to maintain close liaison between the leaders of the party and its rank and file. The party whips move constantly among the party members in the House of Commons, sounding opinion among them, informing them of the matters which must be decided, and mobilizing them for a vote when a decision is about to be taken in the House. The jobs of the whips is to ensure the united front of the party and to bring to the attention of the party leadership not only breaches of party loyalty but also any serious murmurs of the rank and file against the policies of the leaders.

The whips try to placate and persuade disgruntled members. If, despite this, members vote against their party on serious issues, they will almost certainly not be nominated as candidates for their party at the next election. These methods of ensuring support generally suffice. Almost all bills introduced in the House of Commons are part of a unified program of the majority party, which gets disciplined support from the members of that party. Moreover, the majority party compels the House of Commons to work to an exacting time-table and to accept an order of priority of business that the party deems essential to the fulfillment of the responsibility it has accepted. It thus controls all significant action in the House of Commons. There are, however, some rare occasions when 'free votes' are authorized and the whips are 'taken off.'

PARTY POLICY AND THE VOTER. Of course, the member of Parliament, of whatever party, keeps in close touch with his constituents and always furthers their interests where he can do so consistently with the party line. The really vital communication is not between the member and his constituents as individuals. It is between him, the local association of his party, and the central organization of his party, and takes the form of a steady flow of information, advice, explanation, and expostulation. If the intelligence thus coming in from all parts of the country indicates that the current party line should be modified, it is not revised through open desertion of it by members of the party in debate in the House of Commons. The revision is made unobtrusively in secret conclave of the parliamentary leaders of the party, where the sensitive antennae of the party organization that reach into all parts of the country register the shifts of opinion that must be heeded.

The British voter accepts this concept of party discipline, and thus eases the task of the party leaders who expect conformity from their parliamentary delegations. The virtual absence of members without party affiliation in the House of Commons is testimony that, in a very real sense, the voters as well as the party expect and impose discipline. In four recent general elections only six independent candidates gained seats in the House of Commons—none in 1950, three in 1951, two in 1955, and one in 1959. With very few exceptions it has proved necessary to run under a party label in order to obtain decisive popular support. The British elector, though he casts his ballot for a representative from a single-member district, in effect votes for *party* rather than *person*—which is the reverse of the custom of American voters. He votes for a national program, rather than for any candidate's personal version thereof, and he therefore expects his representative in Parliament to co-operate with his party's leaders.

BEHIND THE SCENES. In fact, the central organizations of the parties in Britain are so effective in registering the state of opinion in the constituencies that it is rarely necessary for them to hold a caucus, or conference, of the members of the party in the House of Commons to debate an adjustment of party policy. Normally, informal consultation between the party whips and the rank and file of party members in the House suffices to work out the party line. It is in these informal consultations, and occasionally in secret caucus, that the substance of party policy is hammered out in Britain. Quietly behind the scenes and not in open debate in the legislature, members of Parliament show what independence and courage they have. In party caucus or in discussion with party whips, facts ably argued and convictions powerfully expressed may change opinion and alter the party line. Any such alteration is to ensure that virtually all members will support their party in the voting in the House of Commons. In this way, party discipline is made effective, the majority party controls the House of Commons, and hence carries out the bulk of the promises it has made to the electorate.

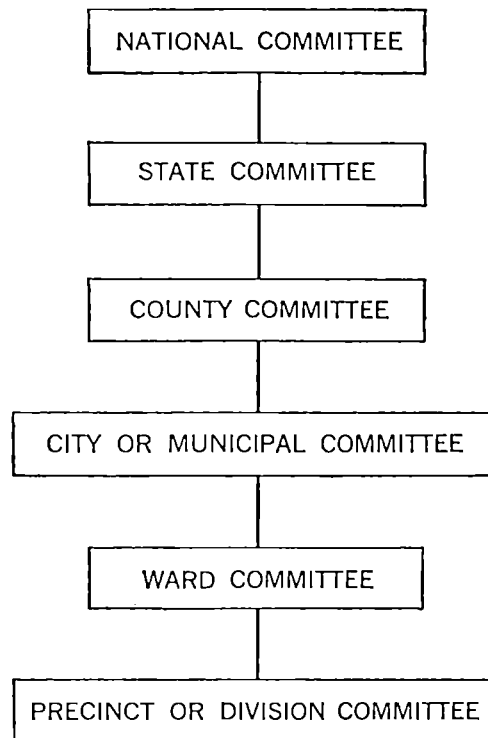
UNITED STATES TWO-PARTY GOVERNMENT

Location of Control. It is impossible to give a simple description of party organization in the United States. Parties perform their functions in each of the fifty states as well as in national politics, and the necessity for linking state and federal party activity fosters complexity. Although the Republican and Democratic parties are national parties, the state is, for each of them, the

vital unit of organization, and the structure of each party varies from state to state.

FREQUENT ELECTIONS. Furthermore, there are more elections in the United States than in any other country. In the national field, there is a presidential election every four years and congressional elections every two years at fixed

FORMAL STRUCTURE OF THE TWO MAJOR
POLITICAL PARTIES IN THE UNITED STATES*



*Although this basic pattern exists throughout the country for both parties, its nomenclature varies at times at the lower levels, and the city or municipal committee is often omitted.

dates. At state elections, generally held at the same time as the national elections, the voters must choose a governor and a state legislature. In addition, many state and municipal executive and administrative posts, which in Britain are filled by appointment, are elective offices in the United States. Also, in almost all states the law now requires each party to hold at least some

direct primaries—preliminary elections within the party—for the purpose of choosing party committees, party candidates, and even delegates to conventions that will choose candidates. There is almost always an election in the offing for which preparation must be made.

PARTY MACHINES. The numerous elections and the state-national division account in large part for the hyper-organized condition of political parties and for the large numbers of professional politicians in the United States. Here, more than in any other democratic country, there is justification for calling party organization a *machine*, because of its intricate articulation and smooth efficiency. The professional politician handles the machine with a sure and delicate touch, and the necessity for making the machine work well and almost continuously encourages apprenticeship in the profession of politics.

Yet this organization stops short of full perfection. Despite the fact that the principal popular excitement is over national issues and national elections, party organization at the national level is temporary, haphazard, and almost entirely lacking in the discipline revealed at the state level. Party organization and activity are much regulated by law, but these laws are almost all state laws. For example, state laws determine how party candidates to Congress and party delegates to national as well as state nominating conventions shall be chosen.

ORGANIZATIONS. This emphasizes the fact that *it is the state and local organizations of the parties which are significant*. Although we are mainly concerned with national and not with local or state government, it is necessary to give close attention to the state organization of the political parties. Fortunately, there is a general pattern to which both parties conform in most states. The pattern will only be sketched and even the little that will be said about it must be prefaced with the warning that the description will not be fully accurate for all, nor perhaps for any one state or party.

Local Organization. The lowest general unit of organization of the party is the local committee of the city, town, or township, formally chosen by the interested supporters of the party in a party caucus or primary. The members of these committees are all active party workers, many of whom hold municipal office or jobs in the state government when their party is in power. In the larger cities, organization goes further down into the *wards* and the polling subdivisions, usually called *precincts*. The ward and precinct committees are often dominated by ward leaders and precinct captains, and the more important of these figures find their way into the city organization of the party.

In the larger cities, city organization is generally, but not inevitably, linked directly with state organization of the party. In the smaller centers of population, the local committee is subordinate to the county committee, which is formally chosen by a county convention or primary. Still higher stands the state central committee, chosen through a primary election or by a convention to which delegates from the constituencies go. One can count on finding the more important of the local committeemen on the state committee.

BOSSES OLD AND NEW. It would be hazardous to say how far this formal organization, much regulated by law, represents reality. The situation varies from state to state and often differs as between the two parties in the same state. In some of the larger cities, the party that is in the ascendant is controlled by a city boss who may hold no office in the party at all. Largely because of ever-increasing governmental social welfare services, more and more city bosses are steadily losing their power—the Skeffingtons⁸ have had to give away to government as provider of relief—but they are still a factor in American politics. In the past, they had found the best soil for their growth in those cities with a large non-English speaking, foreign-born population. These masses were generally poor and always in need of the elementary necessities of life. They were ignorant of American institutions and ways of life and thus frequent violators of laws and regulations. They were utterly bewildered by the complexities of the political system in which they were asked to participate.

In these circumstances, the city bosses were those who proved to be the best friends of the harassed immigrant and his family, who reasoned that those who could spice concrete assistance in time of need with human sympathy and consideration were to be trusted to give sound advice in political as well as social matters. Unfortunately, such assistance must be financed somehow. A man who can swing numerous votes has political power and can use it to tap the public treasury through various kinds of graft and corruption. The more votes he controls, the greater his leverage on the treasury; and the greater his financial resources, the more voters who appreciate his qualities and his advice on politics. There are many sordid aspects of the power of bosses; these are well enough known without enumeration, while the mitigating, if not redeeming, facts are not so widely appreciated. In any event, the present concern is with the key to the power of the bosses.

The boss who gets together a large following in this way becomes a king-

⁸ Skeffington is the Boston political boss, patterned on James Curley, in Edwin O'Connor's *The Last Hurrah* (Boston: Little, Brown, 1956).

maker, if not a king. Without necessarily holding any official party position, he can often determine the make-up of local party committees through his control of the deciding votes in party caucuses and primaries, and he is a power to be reckoned with in the state party machine.

Control by bosses was never, and is not now, limited to cities with large populations of foreign origin. Indeed, the foreign-born no longer constitute an especially numerous group; the days of large-scale immigration terminated with World War I. But every community still has its indigents who, for one reason or another, are ineligible for public assistance. Also there are many who are perplexed by the intricacies of American politics. Organization is always affected by a tendency to oligarchy, and the special features of American politics already noted feed the tendency. Another contributing factor is the extensive patronage system, the number of jobs that politicians in office can give away. United States Senators, who control the federated patronage for their states, have now and then used this and other levers to become the state bosses of their party. Thus Senator Harry F. Byrd of Virginia has dominated that state's politics completely since 1925. While state bosses have been rare, county bosses have not been uncommon.

Even where power in the party is not gathered into a single hand, the most prominent and skillful of the local party leaders generally have a large enough following to get themselves chosen for the state central committee, and that following often enables them to decide who shall be elected to the local and county committees. Thus, power does not always go with the titles to authority and, even where it does, it is often secured by manipulation rather than by the chaste methods prescribed by the democratic ideal. It must suffice to say that the realities are often very different from what the forms would indicate.

A SIGNIFICANT CHANGE. The foregoing discussion on bosses could prove to be easily misleading, however. The days of the legendary city and/or state bosses, of Tweed, Crocker, Murphy, Penrose, Vare, Hague, Prendergast, and Crump, are gone—never to return. Some reasonable facsimiles may well, as indicated, still linger, and some of the old-style machines still persist in a few—predominantly small—cities. But even there it is at least questionable whether they will outlive their present operators. A new style of 'boss' has arisen—a Dewey or a LaGuardia, a West or a Hartsfield, who are very much their own 'bosses,' and whom the electorate can both respect and support.

Moreover, in many areas of the land the 'political club,' the 'do-it-yourself' movement for voters, the new 'amateur politician' has replaced the old boss.

To a considerable extent, the 'coffee-stained' room is supplanting the 'smoke-filled' room. The passing of the immigrant, the expansion of the middle class, the exodus to the suburbs, the rise in the general educational level, the increasing urbanization of the countryside—all these have combined to bring about a new style of politics which, in the words of a National Chairman of the Democratic party, in a sense has begun to make of an increasing number of citizens their own precinct workers.⁹

Perhaps it is still a bit unrealistic and premature to say so, but Leo Egan may yet turn out to be prophet as well as analyst with his contention that 'in modern society, the political boss of old is being replaced by the expert in public relations, by the people who can create illusions and translate the intricacies of government into simple, understandable general principles, by those who know how to manipulate symbols.'¹⁰

State Organization. The state central committee, or the person or persons who control it, exercises functions and imposes discipline much as the central office and the parliamentary leaders of the party do in Britain. The party platform for the state is ordinarily made by a party convention composed of delegates from the localities. The central committee influences the choice of delegates and guides them in their deliberations. Candidates are chosen by conventions or in party primaries over which the central committees have a varying influence. The central committee plans the campaign, raises the necessary funds, and supervises the work of the local committees in striving for victory.

It is also active in national, as distinct from state, politics. It must see to it that party delegates to the presidential nominating convention are chosen by convention or direct primary as the law requires. It must conduct direct primaries for choosing the party candidates for Congress. And in the presidential and congressional elections, much of the work of carrying on the campaign, although not so much of its planning, falls to the state central committees. In a good many, although certainly not in all states, party organization is thus highly centralized, generally strongly disciplined, and extremely efficient in converting a heterogeneous electorate into party majorities.

National Organization. After the complexities of the state organization of the parties, their national organization is simple. It can almost be said that there is no permanent national organization but only a succession of tempo-

⁹ Stephen A. Mitchell, *Elm St. Politics* (New York: Oceana Publications, 1959).

¹⁰ 'The Political Boss: Going, Going—,' *The New York Times Magazine*, January 8, 1961, p. 22.

rary committees for fighting presidential elections every four years. It is true that, for the biennial congressional elections, the party caucuses in the House of Representatives and the Senate pick campaign committees, but these committees do not run the congressional elections. Their activities mainly consist in co-operating with the state party committees.

NATIONAL COMMITTEE. Thus the chief national organization is the national committee, nominally picked by the national convention that every four years chooses a party candidate for the presidency. This national committee consists of one man and one woman from each state, territory, possession, and the District of Columbia.¹¹ The national convention ratifies the nominations made by the state party organizations. The national committee plans the presidential election, collects a huge campaign fund, and—to a greater or lesser degree—co-ordinates the nation-wide party effort to elect a President. Once the debris of the presidential election is cleared away, the national committee lapses into quietude and customarily rallies only once—when it issues a call for another presidential nominating convention some three years later. In recent years, however, both parties have maintained permanent headquarters and staffs in Washington. Although these staffs are greatly reduced in size after an election, they do carry on some research to aid members of the parties in Congress, beat the propaganda drums, and help in various ways with the continuing problem of party organization.

NATIONAL CHAIRMAN. The chairman of the national committee is the personal choice of the presidential candidate of the party, because he is chiefly responsible for managing the candidate's campaign. The national committee under his direction plans the larger strategy, deciding which are the doubtful states into which money, speakers, and propaganda must be poured. However, the national chairman is scarcely a commander in chief who passes orders to the field commanders, the state party leaders. These latter are remarkably independent, like the leaders of well-organized guerrilla bands, and the authority the chairman can exercise over them depends much more on his personality and his infectious energy and enthusiasm than on his position. One of the most successful of these was James A. Farley, President Franklin D. Roosevelt's shrewd, personable, and ambitious Democratic national chairman from 1932 to 1940. If the party wins the presidency the

¹¹ This is so of the Democrats, but not of the Republicans. A few years ago the latter provided for additional 'bonus members,' in the persons of the *state chairman*, for all those states that had voted for the Republican presidential nominee in the past election, or elected a Republican governor of a state, or chosen a majority of Republicans for the state's seats in the Congress.

incumbent national chairman is often appointed Postmaster General of the United States. His replacement, also selected by the President, is likely to remain active as the national party instrument for distributing patronage and implementing pre-election arrangements.

The effective authority of the national committee is limited to the presidential campaign. The committee pays little attention to the concurrent congressional elections beyond making available a portion of its campaign funds for use in them. It does not frame the national platform of the party nor share directly in the choice of the party candidate for President. These functions are performed by the presidential nominating convention, composed of delegates chosen by the state party organizations, either in primaries or conventions or both, in accordance with state law. The national organizations of the American parties do not carry on planning and research between elections on the same scale as do the central organizations of the British parties.

The Lack of Discipline. It is common to represent any elaborate organization as a pyramid rising from its base on the local organization to the apex of national authority. Such a figure for the American party system would show the chairman of the national committee at the apex and the ward and precinct committees at the base. However, if the pyramid is to represent the realities of authority, the apex must be cut off at the state level. *Below* this level, party discipline is generally sharp and effective. *But there is little discipline imposed, or imposable, on the state organizations from above.* The party that wins the presidency finds that it cannot escape some responsibility for the policy of the national government and thus must accord leadership to the President. The President, armed with this authority and the control of patronage, is a power to be reckoned with in his party, but when he has tried to use his power to purge the party of rebellious elements he has almost always failed. Even so popular and powerful a President as Franklin D. Roosevelt failed in his attempt to 'purge' certain congressional candidates, chiefly from the South, in 1938.¹²

At most, the primacy of the President is a temporary situation in the party. On his retirement or defeat, the state leaders will be again without superiors. Generally, authority flows from the state leaders upward as well as down-

¹² These 'purges' comprised three representatives and nine senators. All were re-elected except eight-term Representative John O'Connor of New York. The leading spokesman in Washington for Tammany Hall, O'Connor had opposed and blocked many New Deal measures in his capacity as Chairman of the House Committee on Rules. F.D.R. succeeded in having him defeated for the Democratic nomination; O'Connor then obtained the Republican nomination but lost the election.

ward. The presidential candidate and the national platform of the party are the results of bargains between them.

The national party conventions in the United States—referred to as ‘America’s Zoo’ by some British observers—are, it is universally agreed, like nothing else on earth. They normally end with impressive demonstrations of party unity and solidarity. However, the way to that happy conclusion is marked by sharp struggles over the platform, subtle maneuvers by state delegations over the nomination, and much secret horse-trading. If these features are studied, it will be seen that the national convention also resembles an international conference in which separate nations haggle over a treaty of friendship or alliance.

CONSEQUENCE OF FEDERALISM. The fact is that the federal system, which leaves the states a large measure of autonomy, has provided even more autonomy for state party organization. The great sections of the country have varying interests that it is the business of each political party to try to reconcile. The national committee of the party is somewhat like a gathering of sovereigns, a congress of ambassadors. Thus the national party platforms and the presidential candidates of both parties are compromises dictated by this necessity. *The national party is a loose confederation of the state parties.* This is one reason why national party organization is a temporary coalition of the state parties for winning the presidency and the spoils of office that go with it. The American national party is essentially a coalition—not a hierarchy.

SEPARATION OF POWERS. Another reason is the separation of powers enforced by the Constitution. This division of authority works against the emergence of well-disciplined, permanently organized, national parties. As we have seen, the President is the national leader of his party for the time being. If he is a strong personality and an astute mediator between factions in his party, he exerts a unifying influence on it. But the separation of powers limits his effectiveness. If the executive were closely linked to the legislature as in Britain and the President had the power to dissolve the legislature, the members of his party in Congress would be much more disposed to work with him in trying to ensure discipline in their party, and the opposition party would have to meet this attempt at concentration of power with a comparable attempt. However, when they are so disposed, the parties do *at times* serve as an effective ‘bridge’ to the separation of powers.

WEAK DISCIPLINE IN CONGRESS. As matters stand, in sharp contrast to Britain, party discipline in the United States Congress is weak, indeed. Well-estab-

lished custom has made it an inflexible requirement that candidates for election to Congress must reside in the election district they seek to represent. The candidates are almost all chosen in direct party primaries, preliminary elections within each political party to decide who shall be the party candidate. This device was adopted in most of the states between 1900 and 1910 to reduce the influence of party organization, as distinct from that of the rank and file of the party, in the choice of candidates. Whatever the influence of local and state party organizations in the primaries may be, the central organizations of the national parties have never controlled nominations to Congress and have rarely had any significant influence on the choice of candidates. Localism has always been extremely strong in this matter.

As a result, the personalities of those seeking nomination, and their personal attitudes on questions of keen local and sectional concern, rather than their firm stand on the generalities of the platform of their national party, are always highly important and generally decisive. The member of Congress, once elected, is as much a representative of a locality as he is of a national political party, and is, of course, strongly aware of his sectional interest. Lacking any effective counteracting pressure, the members of Congress are the unruly levies of sectionalism rather than the disciplined troops of national parties standing for national policies. So the members of the parties in Congress resist party discipline at the national level for most purposes except the distribution of patronage. As a well-known party independent, Democratic Senator Byrd of Virginia put the matter, 'I recognize no control over my votes by any influence [outside Virginia], including the National Democratic Convention and a caucus of my Democratic colleagues in the Senate.'¹³

It follows that the national parties in the United States do not and cannot take the heavy responsibilities for candidates and for the enforcement of party platforms that British parties accept. The central organization of the national parties in America do not maintain direct and continuous contact with the election districts. Liaison between the parties in the legislature and the districts is primarily furnished by the individual members of Congress, each of whom tries to gauge the drift of opinion in his district.

Factional Parties Within and Without the Major Parties. But something else must be set forth at this juncture, something which has been both indicated and implied by the discussion of the federal nature of the two

¹³ *The New York Times*, December 6, 1960.

major American parties and the resultant weak party discipline in Congress. First of all, there is frequently more difference in political philosophy and attitude on public issues among various members of one party than between them and members of the opposite party. Civil rights legislation and fiscal policy are cases in point. Second, except on matters of organization of Congress, each party is composed in effect of several identifiable 'segments' or 'multiple sub-divisions'—at least on certain issues. Thus, one may well contend that there are at least three Democratic legislative parties, classifiable as follows in the 87th Congress: (1) those who came from Southern and Border one-party states; (2) those who represented districts dominated by Northern urban political machines; (3) those who were elected from the so-called 'swing districts' of the North and West. Similarly, again using the 87th Congress, there are at least three Republican parties: (1) those from the economically conservative suburban regions of the large industrial centers; (2) those from the traditionally 'rock-ribbed' Republican centers of strength in agricultural and small-town sectors in New England and the Midwest; (3) and those from the 'swing districts' of the North and West. These groups are not, of course, always constant in their allegiance and policy, nor do they form necessarily predictable 'blocs' on all issues. But they are broadly identifiable, and they readily serve as an exclamation mark to the obvious absence of party discipline and to the so significant over-all heterogeneity of the United States.

Third, and going beyond intra-congressional party problems, a good case can be made for the contention advanced by Professor James MacGregor Burns that, to all intents and purposes, the machinery of the American political process, as seen through the political parties, is essentially a four-party pattern. According to this conception, the Democratic and Republican parties are each divided into *congressional* and *presidential* structures, 'with all the elements that comprise the American type of party.' Burns sees these institutionally and ideologically diverse four parties as: the Roosevelt-Truman-Stevenson-Kennedy presidential Democrats; (2) the Willkie-Dewey-Eisenhower-Rockefeller presidential Republicans; (3) the John Garner-Howard Smith-Harry Byrd-John McClellan congressional Democrats; and (4) the Allen Treadway-Robert Taft-Charles Halleck congressional Republicans. Burns views the two 'presidential' parties as generally internationalist, as favoring activist government, and as being concerned with 'broad way-of-life' issues; whereas he sees the two 'congressional' parties as essentially dedicated to 'bread-and-butter' economic issues and, through their joint control

of legislative machinery, devoted to blocking the presidential parties.¹⁴ Although the analysis is perhaps somewhat oversimplified, it contains considerable merit and comes close to the facts of life of the two major American political parties.

Party Machinery in Congress. Each party has its own organization within Congress for getting within its own ranks what agreement and discipline it can. The members of each party in Congress meet in caucus, or party conference, from time to time. In recent years, the caucus has not often been used for deciding the party line on issues of proposed legislation because even though its decisions are theoretically binding, if adopted by two-thirds of the members, in practice they can be easily evaded by individual members on grounds of 'conscience' and 'promises to constituents.' Its principal importance now is in dealing with matters of the internal organization of Congress and issues of party tactics in the political maneuvering within Congress. The nominee of the majority party caucus is assured of election to the post of Speaker of the House of Representatives. The caucus of the majority party also appoints a steering and/or policy committee for each chamber, which is usually headed by the floor leader who commands the party forces on the floor of the chamber. Subject to the rules of legislative procedure, which will be discussed later, the steering or policy committee takes the responsibility for pushing through legislation, determining the priority of measures, and limiting debate. It has, however, much less control over the actual terms of the laws it pushes through than has the leadership of the majority party in Britain.

The minority party also appoints a strategy committee and a floor leader for its party in each chamber. Each party has party whips whose functions are similar to those in Britain. But they are less effective than whips in Britain in securing party regularity in voting because on many matters there are no generally agreed party lines. On many bills in Congress, discussion and voting do not follow party lines at all. On other bills, one or both parties seek a united front for or against, but it often cannot be secured or maintained.

Breaches of party discipline cannot be punished by preventing the selection of the culprit as candidate of the party at the next election because the national parties have no control over selection of candidates. As we have seen, so many excuses have been recognized as justifying a member in flouting the majority decisions of his party caucus that the caucus has virtually

¹⁴ *The Deadlock of Democracy*, op. cit., ch. 10, especially pp. 257-64.

ceased to be a means of securing party regularity on controversial issues. Of course, the leaders of the parties in Congress have a number of means of persuasion they can employ, and according as these are effective, the strength of party discipline in Congress varies from party to party and from time to time. But even at its highest, it falls *far, far short* of that enforced in the British House of Commons.

Platform Implementation. Another reason for the lack of consistency in the policies of the national parties in the United States is the fact that the framing of the party platform and the implementing of it rests in each party with different groups of men. The party platform is determined by the delegates to the presidential nominating convention. The implementing of the platform depends on the action of the men who are elected to Congress on the party ticket. In these circumstances, consistency in the framing and executing of party policy is extremely difficult to achieve and maintain. 'I'll tell you something about the Democratic campaign platform,' once commented the beloved, long-time Speaker of the House of Representatives, Sam Rayburn of Texas: 'Congress determines the platform!'¹⁵ What he meant to convey was that promises are fine for campaigns, but that Congress ultimately decides which planks to throw away and which to endeavor to write into law—with the President as a powerful factor in the program.

It is true that sectionalism is nurtured by the state party leaders who can often make and unmake members of Congress. The power wielded by these leaders would largely disappear if party leadership were centralized at the national level as in Britain. On these grounds, it is sometimes argued that the elimination of local and state party bosses would open the way to disciplined national parties. However, sectionalism is something more than a racket organized and maintained by party bosses at the state level. It is inherent in the variety of life in a country of continental sweep. Even if state party leadership were always secured in a fully democratic way, it would still give expression to sectional interests, although probably not as strongly as at present.

Patronage and Campaign Funds. A great deal could be said about campaign funds and patronage in the American party system, but the abuses are sufficiently notorious to need little description. The most important thing that can be said is that the abuses are by no means the universal practice. The patronage appointment of public officials, or the spoils

¹⁵ *The Philadelphia Evening Bulletin*, January 17, 1961.

system, is more widespread than in any other democratic country. However, it is being steadily diminished by extension of the merit system, and there have always been volunteer workers who do not ask or expect reward.

FUNDS. The campaign funds of the parties are not mainly raised by contributions from the rank and file of their supporters although both major parties have redoubled their efforts toward that end. Exception must be made, however, for the practice of openly or covertly assessing the party supporters who have received government jobs through the good offices of the party. The main reliance is still on substantial contributions from business interests, legitimate or otherwise, and from men of means who often, but by no means always, expect something in return. The fact that governments in the United States have always been promoting the economic development and management of a great country in sundry ways has ensured extremely close relations between business and government. It has not been unknown for campaign managers frankly to solicit contributions from businessmen on the ground that these were policies of insurance on their businesses, and many businessmen take out insurance with both parties. Of course, labor and agriculture, as well as other interests, are being increasingly solicited for contributions with an eye toward mutual benefits.

ATTEMPTED REGULATION. State legislatures, and to some extent Congress, have tried to regulate campaign funds by law. The most frequent provisions are aimed at securing publicity concerning the source and use of party revenues, forbidding contributions by corporations, banks, and labor unions and compulsory assessment of office-holders, forbidding certain kinds of expenditures, and limiting the amounts to be spent by candidates. Most of the provisions of these largely unrealistic and visionary laws are easily and consistently evaded, and there is no adequate inspection or other machinery for enforcement. The chief value of these laws is to interest the public in the questions of where the money comes from and where it goes. But there remains a crying need for the adoption of workable, realistic, enforceable legislation on all levels of government.¹⁶

If the rank and file of the supporters of a political party could, of their own resources, precipitate a majority opinion on men and measures, the party bosses and wire-pullers would get short shrift. But it is only rarely that they can. Yet a candidate must be chosen and a platform adopted. This is what gives the wire-pullers their opportunity. It also reveals their function.

¹⁶ See, for example, Report of the President's Commission on Campaign Costs, *Financing Presidential Campaigns* (Washington, D. C.: U. S. Government Printing Office, 1962).

They act as catalysts, always ready to precipitate, by seeming legerdemain, a majority opinion on particular issues facing the party. Under present conditions, to a greater or lesser extent this will continue until such a time, if ever, a politically educated, enlightened, and articulate electorate takes over the reins.

Some Consequences of the Present System. In a somber essay on the role of the political process in free society, Professor Stephen K. Bailey cited five chief, and very disturbing, consequences of the present amorphous and decentralized conditions of the two major parties in the United States: (1) a government by 'fits and starts,' featuring a lack of co-ordination between the executive and the legislature; (2) an inordinate amount of power in the hands of 'parochial groups' in Congress; (3) a tendency for congressional compromise to favor minority rather than majority interests; (4) as a result of the latter, an 'increasing danger of public cynicism and apathy toward the Congress'; and (5) discouragement and dissipation of sorely needed public criticism of foreign as well as domestic policy.¹⁷ Considerably more will be said regarding the implications of these charges on governmental machinery in subsequent chapters, but there is no doubt that Bailey's indictment is both potent and realistic. Few will gainsay the pressing need for and wisdom of improvements. Yet the sobering fact remains that, notwithstanding its evils and weaknesses, the so often exasperating American party system has served the country well in its prosperous and steadfast growth toward maturity and leadership among the free nations of the world.

FRENCH MULTI-PARTY GOVERNMENT

So far only two-party systems have been discussed. But *multiple* parties have been common throughout the Western democracies on the European continent, from France to the Lowlands, to Scandinavia, to West Germany, and Italy. Most of the social, political, and economic factors rooted in history, which account for multiple parties all over Europe, are found in France, along with some that are peculiarly her own. The France of the pre-Gaulle Republic days still provides the best illustration of the system of multi-party government in action. But it must be noted that highly significant changes have taken place in the impact of the French party system upon government since 1958, although it is unquestionably still a multi-party system.

¹⁷ *The Condition of Our Political Parties* (New York: The Fund for the Republic, 1959), pp. 4 ff.

Cleavages. Few states could experience a cataclysm on the scale of the French Revolution without disrupting consequences on its political future. The historic battle against the Catholic Church, and the prolonged struggle for political freedom against the absolute monarchy, are examples of issues that still stir up division in France, even as they did long ago; only their accent and degree differ. The relatively small working class, the socially conservative and politically radical peasantry, the small businessman who feels forever wronged, all militate against the homogeneity necessary for constructive compromise and the two-party system. Reforms for the worker were ever countered by the peasant and the *petit-bourgeois*, who did not want government at all—and therefore refused to pay for it. The *Poujadists*, who won 11.5 per cent of the popular vote in the 1956 parliamentary elections and obtained 51 seats in the National Assembly—the lower branch of the legislature, formerly known as the Chamber of Deputies—were composed almost entirely of petty-bourgeois tax rebels. The Poujadist platform had but one truly important plank: a refusal to pay taxes! It took a de Gaulle and a new Constitution to knock political heads together—but it is a brave man, indeed, who would safely predict events *après* de Gaulle!

Little Party Discipline. The economic, social, and religious cleavages of the past have been perpetuated in one way or another. The parties themselves have been split within themselves on many issues, and the 'centrist' parties, in particular, have been unable to enforce discipline. To find such discipline in parties, the observer had to look to the extreme wings of the political scale, such as the *Poujadists* on the extreme right, and the monolithic *Communists* on the extreme left. The birth of the powerful new de Gaullist *U.N.R.* (*L'Union pour la Nouvelle République*) in 1958 added a new dimension of discipline. Together with its ally, the *Independents*, it has succeeded in establishing a coalition that had failed but once as of 1963—when the *U.N.R.*, lacking a majority, stood alone with de Gaulle in the presidential referendum controversy of the fall of 1962 and did not have sufficient votes to stave off the Government defeat and fall on a motion of censure. But the new parliamentary elections brought the *U.N.R.* more seats than any one party had ever gained in French parliamentary history: 229 of 465, within easy reach of the desired majority, which was readily obtained by virtue of a coalition with the much-shrunken *Independents*. But the balance of the French political parties can rarely count on solid support from their nominal followers. For example, members of the *Radical Socialist* party, with solid support in their own districts, would desert their

party in the National Assembly, either to form a new wing of their own or to join another parliamentary *bloc* or *groupement* of parties.

Yet the voter, far from being disturbed over this lack of discipline, seemed actually to expect it. He looked upon his representative more or less as a personal delegate, who would, however, speak and cast his vote in Parliament in accordance with his own conscience, in an entirely independent fashion, flouting, if not entirely repudiating, orders from every political party or group. The chief reasons for this attitude are to be found in the historic cleavages, to which we referred above.

THE REVOLUTION. The revolutionary tradition itself, still something more than a memory, breeds both the liberal and the reactionary. For the hundred years following 1789, a fundamental division in French politics was that between the monarchists and the republicans. While this schism has subsided, of course, there remain a good many Frenchmen who cannot quite bring themselves to accept either the Republic or its symbols. If they do not yearn for the Bourbons, they have a nostalgia for Bonaparte and the Empire. Although de Gaulle, filled with disdain for political parties, regarded his U.N.R. as a non-partisan *mouvement*, designed to appeal to all sections of the population, it quickly evolved into a party of conservatism, with much appeal to those who advocate 'strong government' and glorify nationalism and the state. These characteristics, plus its leader's constant attacks upon pressure groups and sectional interests, have caused some observers of the post-World War II French political scene to see in the U.N.R. elements of a neo-monarchist movement. But any conclusions must await de Gaulle's departure from the scene.

RELIGION. Religion, as a political issue, antedates the French Revolution. Inevitably, the Catholic Church, with its emphasis on custom, tradition, and caution in political matters, became allied with the monarchy. The resultant alliance created a deep-rooted and often violent anti-clericalism among the supporters of the republics. When at the end of the nineteenth century the hierarchy of the Catholic Church became allied with the anti-Dreyfus forces, popular feeling eventually pushed through some extreme legislation to reduce Church influence throughout French society. Still fundamental in today's French politics, the religious issue is one of the primary differences, for example, between the clerical *M.R.P.* (the Catholic Popular Republicans) and the anti-clerical *S.F.I.O.* (the Socialists), although these two parties hold similar economic views. Indeed, there is evidence that the Socialists are more anti-clerical than pro-socialist!

FEAR OF A STRONG EXECUTIVE. The experience of absolute monarchy and two Bonapartist Empires created an almost pathological fear of a strong executive. This fear hovered over all attempts to make the executive branch of the government a more effective instrument—until the country, frightened and frustrated by the Algerian crisis, resolved to entrust de Gaulle with the necessary power. One of the reasons for the still large size of the *Communist* party in France today was its early attack upon the strong-executive creed of the de Gaullist movement. The Communists, together with the Socialists, clamored loudly for reposing absolute authority in the legislature. Although they failed to persuade the people to ratify the first proposed post-war constitution, which provided for a very weak executive and a very strong legislature, they did succeed in re-establishing the obsession against a strong head of government, which was embodied in the Constitution of the Fourth Republic.

ECONOMICS. The popularization of socialism in France took place around the turn of the present century, and created additional differences between capitalists who support a free economy—with a minimum of taxes—and socialists who in varying degree believe in a managed economy—also with a minimum of taxes. In contemporary France this issue remains current, although it is obscured by the fact that many Frenchmen support leftist parties for reasons other than a desire for economic revision—such as tradition and anti-clericalism. A similar anomaly is seen, for instance, in the French political party that bears the fierce label *Radical Socialist*, but which actually represents those citizens who seek an economy relatively free of government control. Therefore it is not socialist at all in the sense of the word as it is used today, and it is radical only in the sense in which the British Liberal party and the American Republican party of the nineteenth century were radical.

Parties in the Legislature. The multiplicity of French parties is easily illustrated by referring to the results of the last parliamentary elections of the late Fourth Republic, which took place in January 1956. The National Assembly then elected contained members from nineteen different political parties! Only the *Communist* party and its allies attained as much as one-quarter of the popular vote, 25.6 per cent, to be exact, which netted them 145 of the 627 seats in the National Assembly. The *Socialist* party was next with 15 per cent of the total vote and 88 seats. Only two other parties received 10 per cent or more of the popular vote, the *Poujadists*, with 11.4, and the *M.R.P.*, with exactly 10.

The balance of the seats were distributed among fifteen other parties, several of which usually—but not always—combined for purposes of passing legislation or helping to form governments. Thus, the *Rally of the Republican Left*, the *Radical Socialists* and their allies, gathered 13.6 per cent of the popular vote and 71 seats, and the combined *Independent Republican, Peasant, and dissident de Gaullist* splinter parties won 14.1 per cent of the vote and 94 seats in the Assembly.

To complicate matters some twenty-five deputies had no discernible party association, except when they chose to affiliate themselves *ad hoc* with various parties; and twenty deputies held views so distinctive that even temporary affiliation was almost impossible.

DIFFICULTY OF FORMING GOVERNMENTS. With almost two dozen parties dividing the available seats in the National Assembly, and with only the extremist parties on either wing of the multiple political spectrum providing any semblance of party discipline, it is hardly surprising that it proved to be extremely difficult to form a government and even more difficult to maintain one in office. Fourth (and Third) Republic French governments were usually based on coalitions of center parties and groups. The area of the Chamber of the National Assembly occupied by the center parties was popularly known as the 'swamp.' The term described well the spectacle of deputies floating from the fringe of one party to an adjoining—or even a non-adjoining—group, unhampered by party allegiance or party loyalty in constant disagreement on the need for and aim of legislation. This is no foundation for an enduring government. It is thus not astonishing that between the liberation in 1945 and the death of the Fourth Republic in 1958 France had twenty-five different cabinets averaging a life-span of less than six months in office. This contrasted with an average of almost four years for the British cabinets.

WEAK EXECUTIVE. The problem of forming and maintaining a government was enhanced by the French obsession, however justified, against a strong executive branch. With Louis XIV, Napoleon Bonaparte, and Louis Napoleon in mind, the framers of the Fourth French Republic's Constitution placed severe strictures upon the authority of the chief executive, with the result that the French President enjoyed hardly more power than the British Queen.

STRONG LEGISLATURE. Not even trusting in these safeguards against a 'strong man,' the uneasy French constitutional framers of 1946 thus made their Prime Minister and cabinet subservient to the National Assembly.

The legislative branch alone possessed supreme authority, was a law unto itself, exposed to few, if any, of the limitations imposed either upon the Congress of the United States or the British House of Commons. A provision in the Constitution of the Fourth French Republic permitted the President to dissolve the Assembly—under severely limited circumstances. These circumstances arose only once in the history of the Fourth Republic, so the National Assembly was not effectively confined. Furthermore, the extreme parties of the left and the right made it more or less of a habit to vote *against* the coalition ministry in power. They could afford to do so, for they realized that they would not very likely be called upon to form a new government. Ministries thus came and went, but the Assembly customarily lived out its allotted five-year term. Only two governments of the twelve-year life of the Fourth Republic, those headed by MM. Queuille and Mollet, lasted more than twelve months, the former almost thirteen, the latter sixteen.

Coalition Government. The essential function of compromise in democratic government occurs under the two-party system at political conventions and conferences as well as in the legislative chamber. However, in the Third and Fourth Republics in France compromise existed solely in the legislature. The matched distribution of strength among the more important of the multiple French parties necessitated coalition governments, in which no group actually renounced, or even substantially modified, its objectives. It follows, then, that compromise, not having taken place in the selection of candidates or in the construction of a party platform, had to be accomplished in the National Assembly. The accommodations, made by several parties or party groupings in the formation of a ministry, became strained by issues unforeseen when the ministry was formed, and by the personal animosities of the leaders within the coalition. An illustration of the latter was the much-publicized personality clash between three leaders of the Radical Socialists, MM. Faure, Mayer, and Mendès-France, which raged at the very time when that party was an important component of the coalition governments of 1952–55. With the forcing of a cabinet crisis, by dropping some ministers, and adding others, a temporary adjustment was made. The adjustment lasted only as long as coalition leaders and individual members were disposed to suffer it.

The Role of Parties in the Third and Fourth Republics of France. The French parties then, too, performed a semblance of the functions required of political organizations in democratic government, but the results were

strikingly unlike those of the two-party system. The French voter was faced with a choice of candidates and policies so broad as to be sometimes meaningless—not necessarily to him, but to the political process. It must be granted that the parties did act as restraints upon each other. The moderate, centrist parties formed the ministries and furnished the Premiers, while the extremist parties waited in a state of continual hopefulness, to unite with dissidents from the moderate groups and overthrow the reigning coalition, often referred to as the Third Force. This, briefly, was the history of the multi-party system in France until de Gaulle's Fifth Republic was established.

Under the Fifth Republic. As has been amply indicated, France, even under its new Fifth Republic, still has a multi-party system. But it is a blunted system, indeed—some have even suggested that an obituary is in order, President de Gaulle having smashed it in the name of unity and efficacy!¹⁸ This would appear to be an oversimplification, and an obituary may well be somewhat premature. Any prospective orator ought at least to await the events of a few post-de Gaulle years. The old cleavages are not done away with so readily; they may have been merely submerged or suppressed in the face of de Gaulle's personal rule.

On the other hand, de Gaulle, who never entered upon the slightest effort to disguise his disdain for *les partis politiques*, made quite clear what they could expect from him. When Parliament had toppled the Pompidou Government as a result of de Gaulle's presidential referendum move, he unleashed a withering attack upon the parties late in 1962. Four times in that speech he characterized them as 'the parties of former times.' The voters, he said, clearly disavowed the parties when they voted, in the face of nearly universal party—and, he might have added, legal—opposition, for his proposal for popular election of future presidents of France. His tone indicated clearly that he had no intention of using conciliatory tactics with the parties if the impending legislative elections would produce an anti-Gaullist or non-Gaullist National Assembly—making quite clear that he was not only prepared, but eager, for a head-on clash with the party regime. The President did, however, acknowledge both that political parties contained individuals of merit in their ranks and that they had the capacity for 'espousing and serving still divers currents of opinion, private interests, local wishes.'¹⁹

¹⁸ See, for example, Philip M. Williams and Martin Harrison, *De Gaulle's Republic* (New York: Longmans, Green & Co., 1960).

¹⁹ *The New York Times*, November 8, 1962.

The Elections of 1962 and the Future. As we know, the elections, far from bringing an anti- or non-Gaullist National Assembly, gave de Gaulle a smashing victory. The 229 orthodox Gaullists elected under the U.N.R. label fell just four votes short of an absolute majority of the 465 seats! At no time in modern French history had any single political party obtained more than 25 per cent of the total vote—the U.N.R. received 32 per cent. Never before had any single party come so close to commanding an absolute majority. Thus, for the first time in the history of French Republican institutions a single parliamentary party—the combined U.N.R. and individual deputies committed to it—would now hold such a majority—in fact one totaling 261. To the opposition parties this was a severe jolt, indeed. Nonetheless, they were certainly not extinguished. The Socialists garnered 71 seats; the Radicals and allied center groups 38; the moderate Catholic Popular Republicans (*M.R.P.*) 27; the Communists 41 (although still 22 per cent of the popular vote); and the non-Gaullist Independents 30.

The results appeared to give promise of the following developments: *First*, the formation of a true majority party on the wreckage of the unstable coalitions of old that had governed France for almost a century—a denouement that held at least some promise of a presidential system of government. *Second*, if the above-mentioned vanquished centrist, moderate, and non-Communist left among the surviving parties were to have any meaningful hope for the retention of a political future, they would now have to give some serious thoughts to a united political party grouping in order to contest the forthcoming presidential elections in December 1965. Some have already suggested the formation of a 'unified, non-doctrinaire *labor* party' to combat both the U.N.R. and the Communists.

In any event, barring totally unexpected developments, President de Gaulle and his cabinet, headed by Premier Georges Pompidou, would now be able to look forward to the luxury of at least three years of presumably uninterrupted power during which the new governmental system of the Fifth Republic could be consolidated.

MULTIPLE PARTIES IN OTHER WESTERN DEMOCRACIES

Space does not permit a discussion of the operation of the multi-party system in other countries. It suffices to note here that it was at its worst in the Third and Fourth Republics of France. It has shown relatively more stability in Belgium and Holland, and even more in West Germany, but

there, too, and particularly in the two Lowlands, governments have been compelled to function as coalitions more often than not. Especially since the death of its post-war leader, Alcide de Gasperi, in 1954, Italy has been severely troubled by its multiple parties, approaching the chaos of pre-de Gaulle France, for the Italians have never succeeded in developing two *major* democratic parties as, for example, have England and—perhaps—West Germany. Multi-party democracy rarely works unless one party is in itself strong enough to govern.

Scandinavia. On the other hand, it has provided stable government in the three Scandinavian countries of Denmark, Norway, and Sweden. There, however, the numerically strongest party—almost always the Social Democrats since the end of World War II—has customarily, as a matter of tradition and accommodation, encountered little, if any, difficulty, in obtaining agreement with one or two of the smaller parties to form a government together, thus emerging as a two-party coalition in a multi-party system. In politically stable Denmark, for example, the Social Democrats (*socialdemokrater*) have polled between 32.8 per cent and 42.1 per cent of the votes in every election since 1945, constituting in each instance a clear plurality but not a majority. Thus coalition government was in order which, after the parliamentary election of 1957, for example, resulted in a three-party coalition, consisting of the Social Democrats (39.4 per cent of the vote and 70 seats in Parliament), the Radicals (7.8 per cent and 14), and the Single Taxers (5.3 per cent and 9). In 1960, the Social Democrats obtained 42.1 per cent of the popular vote and 77 seats and, with the aid of two 'non-political' members of Parliament from Greenland, plus again the Radicals (5.8 per cent and 11) readily succeeded in controlling a majority of the votes in the *folketing*, thereby achieving their basic purpose in parliamentary government—the construction of majorities.²⁰

CONCLUSION ON DEMOCRATIC POLITICAL PARTIES

In conclusion, the scope of the foregoing treatment of political parties should be restated. Attention has been concentrated almost entirely on the functions of political parties in a democracy, and on the organization that parties have worked out for fulfilling these functions. It has been urged that the only practicable method so far discovered for eliciting the will of

²⁰ For a good discussion of Danish politics, see Poul Meyer, *Politik* (Copenhagen: Nyt Nordisk Forlag Arnold Busck, 1959), chs. 3–17.

the people as a whole is to have political parties compete for the support of the electorate. This is the essential function of political parties. They cannot perform the function without extensive and intricate organization.

It is difficult to energize a football team by pointing out the broad social functions of sport and recreation. The team needs a more immediate concrete objective, the winning of the next game. Party organization also needs an immediate objective, the winning of the next election. Many of those who are active in party organization regard it as primarily, if not solely, an instrument for gaining power. The immediate objective necessarily looms large in party calculations, a fact that can best be appreciated by looking at the scale and character of party organization.

Much of the criticism of political parties, and of democratic government, arises from the belief that both parties and government are the playthings of small cliques of rival politicians. In any assessment of democratic government and politics, it is necessary to attend to criticisms of this kind. A complete investigation of such charges would take us far afield, but the first step is to describe party organization with a view to seeing who exercises power in it, who makes the effective decisions, and under what limitations and controls. These questions are not easy to answer, but at least it has been seen that whatever power small groups may exercise in political parties from time to time, their power is always contingent, can be undermined, and therefore must be used with both eyes on the electorate.

As already pointed out, concentration on the functions and organization of political parties in the United States, France, and Britain leaves aside much that is necessary to an understanding of the political parties in the three countries. From the point of view of the politics of a particular country, the policies for which the parties stand are of primary significance. But these policies cannot be understood without reviewing political history and the vicissitudes of party fortunes, explaining the social and economic structure, and outlining the current politics of the country in question. While some reference to these matters was absolutely essential to an understanding of the multi-party system in France, a similar treatment could not be undertaken for Britain and the United States.

The Two Indispensable Services of Parties. This discussion can be summed up by saying that at least until human nature is greatly changed and education and knowledge are greatly improved and extended, the party system will perform two indispensable functions for a democracy. *First*, it enables the sovereign electorate to participate in the operation of government.

Second, it makes constitutionalism and ultimate control of government by the electorate possible by enabling the people to change their masters when they see fit to do so.

THE ONE-PARTY SYSTEM IN THE DICTATORSHIPS

The essential function of political parties in the liberal democracies is the creation of majorities through competition for support of the electorate. The parties offer a choice between platforms, or at least between sets of politicians, one or a grouping of which is to be entrusted with the task of governing until the next election. As we have seen, democratic government rests on a foundation of party politics. Party politics has to be justified on the ground that the public interest, over the long run, can best be determined by competition between parties rather than by the dictates of one set of permanently established rulers whose decisions cannot be questioned in any way.

The modern dictatorships deny that the public interest can best be determined by the competition of parties for the votes of the electorate. Fascist and Nazi theory denied that the mass of individuals composing the electorate had any adequate conception of the public interest. To them, the bulk of the people were ignorant, short-sighted, and engrossed in private concerns; they lacked the vision, energy, and courage needed for participation in government. The Fascists and Nazis accordingly scorned the notion of allowing electoral majorities or coalitions to determine the public interest. Communist theory reached the same conclusion by a different line of reasoning which will be examined later. As already pointed out, this conclusion is inevitable for men who are convinced that they know exactly what government should do, and how to do it. In their view, what is wanted of the masses is not decision but discipline.

Repudiation of Competition. So all three dictatorships repudiated the system of competitive political parties. In its place they put the *one-party system*, making it impossible for opposition to the government to combine in an opposing political party and compete for the favor of the electorate. The Fascist party became the sole party in Italy, the Nazi party in Germany, and the Communist party in the Soviet Union. Attempts to organize opposing political parties became serious criminal offenses.

Discipline, not Decision. The essential function of this one party is not

to elicit decisions from the mass electorate on the big issues of politics, but to ensure discipline and obedience among the people. In its organization and its methods, it is more like an army than a political party. In fact, the Fascist party originally called itself 'a militia in the service of the nation.' To perform its function, it needs a large membership drawn from every city, town, and hamlet in the country. The Italian Fascist party, with the lowest membership of the three, had, at the peak, around two million members. Yet membership was not open to all by any means. It was restricted to those who, it was thought, could be counted on to give loyal and unquestioning devotion to the leaders and their ideas. On the other hand, the Nazi party under Hitler was very large. So confident were the Nazis of their ability to cow and control the Germans that few 'Aryans' were able to remain outside the party or one of its many affiliates. There was, however, a relatively small party-elite, composed of the most trusted and most fanatical Nazis—the dreaded, black-shirted S.S.

Essential Functions. The essential function of the one party is carried out in various ways. First, the party controls all elections to ensure that only reliable people come into positions of prominence. Second, it carries the message and doctrines of the leaders to every person and group that can be reached. It interprets the policy and actions of the government so that everyone sees them in the most favorable light. Third, it maintains an espionage and censorship service for the government on every street corner, if not in every house, reporting the rebellious, silencing the disgruntled, and reproaching the unenthusiastic. Fourth, it busies itself at every point in helping to enforce the endless regulations of the government.

Nazi and Fascist Organization. Both the Fascist and the Nazi parties used the Communist party—to be outlined presently—as a model in their organization, eliminating its elective features and substituting more pronounced elements of military discipline. Both of them have been wiped out, and it is enough to say of them here that, in each instance, the local, district, and regional leaders of the party were not elected from below but appointed from above and that the national organizations, dominated by the Duce and the Fuehrer and their associates, commanded the party somewhat in the way army headquarters commands an army. The Fascist and Nazi rulers militarized the life of Italy and Germany, turning men into obedient soldiers rather than consulting them as responsible citizens. It may be suggested that this is the inevitable outcome of a denial of the value of individual personality.

A Note on Other One-Party Systems. Before proceeding to the discussion of the Communist party, it should be noted, however, that the phenomenon of the one-party system is neither confined to the three dictatorships here at issue nor necessarily even to dictatorships. Regarding its presence in other dictatorships or pre- or non-democratic states of various hue and stripe, if we merely confined ourselves to the Africa of 1962, all of the following states, which became independent since World War II, had either a single or a thoroughly dominant political party at the end of that year, which provided a modicum of cohesion for the states involved: Algeria, Ghana, Guinea, the Ivory Coast, Liberia, Senegal, Tanganyika, Togo, and Tunisia.²¹

Moreover, as is obvious to every student of the political party system of the democratic United States of America, a one-party system has existed, or exists now, in various parts of that free country. Although there are increasingly healthy signs of perceptible, however slow, movements away from traditional one-party control, such control is as apparent as it has been traditional for Democrats in the rural Deep South and for Republicans in portions of rural and small-town upper New England and segments of the rural Midwest, to give but a few pertinent illustrations. However, of course no equation of these one-party systems with those present dictatorships is intended—for the differences are crucial, indeed.²²

THE COMMUNIST PARTY IN THE SOVIET UNION

The Communist party is, in effect, the only party allowed in the Soviet Union. It has a monopoly on all political activity. Article 126 of the Constitution of the U.S.S.R. states that

the most active and politically conscious citizens in the ranks of the working class, working peasants, and working intelligentsia, voluntarily unite in the Communist Party of the Soviet Union, which is the vanguard of the working people in their struggle to build communist society, and is the leading core of all organizations of the working people, both public and state.

The Communist party therefore differs very markedly from the political parties of the United States, Britain, and France. It is the aim of the

²¹ See Gwendolyn M. Carter (Ed.), *African One-Party States* (Ithaca: Cornell University Press, 1962).

²² For an illuminating discussion of one- and two-party control in the several states, see V. O. Key, *Politics, Parties, and Pressure Groups*, 4th ed. (New York: Thomas Y. Crowell Co., 1958), ch. 11.

Western democratic parties to build up as large a membership as possible, for political power in a liberal democratic state depends on the numerical strength of a party's following, and a large membership tends to bring a large following at the polls. The Communist party in the Soviet Union, on the other hand, has limited its membership to a relatively small number of citizens, roughly nine million in 1962, who have been compelled to undergo a lengthy period of apprenticeship, and have passed through various stages of party discipline. The Young Communist League (*Komsomol*), which provides a source for future members, had about twenty million. (In 1905, a dozen years before it seized power, the party had but 8500 members; still only 23,000 in 1917.)

The Communist party dominates virtually all organizations in the Soviet Union. Its power is not derived from its numerical strength but from the key position that its members hold in the legislative and executive organs of the state, in the trade unions, and in all other authorized associations, and from the zeal with which they work as the chosen instruments of destiny. According to its present rules, the Communist party is defined as 'a voluntary militant union of Communists, holding the same views, formed of the people of the working class, the working peasantry and the working intelligentsia.'

Party Organization. The party is highly organized throughout the Soviet Union. Party cells everywhere keep a watchful eye on all agencies of the state, on all economic enterprises and all public institutions. At the lowest level of the party organization are the 'primary party organs'—also known as 'cells'—which exist in workshops, factories, offices, farms, and army units, or parts thereof. These cells are formed wherever there are three or more party members. Aside from carrying out the general work of the party, the party rules state that these organs, which meet monthly, 'have the right to exercise control over the activities of the management of their particular enterprise.'

The *primary organization* elects an executive committee, and a secretary who is, in effect, the head of the local party organization. They also appoint delegates to the higher party organ, which is the *city or district conference*. That conference meets only once a year, and elects a city or district committee, which holds monthly meetings and in turn elects an executive bureau and a secretariat. The party pyramid corresponds throughout to the *territorial units* into which the Soviet Union is divided. Above the city or district conferences and other intermediate territorial units are *republican*

congresses,²³ corresponding roughly to state party organizations in the United States. The republican congresses of the party are composed of delegates from the party organizations at the lower levels. These congresses meet every eighteen months to elect small executive committees and also to choose delegates to the *All-Union Communist Party Congress*, which is, in form at least, the highest policy-making body in the party.

Until 1925, the All-Union Communist Party Congress met annually, but it is now convened at longer intervals, normally every three or four years. Usually several thousand delegates and alternates participate in the Congress—4400 at the Twenty-Second in October 1961—making effective discussion impossible. The most important task of the All-Union Party Congress is to elect the *Central Committee* of the party. This is a body of about 175 members and 155 alternates (non-voting) who form the executive committee of the Congress and who meet three or four times a year. Even so, this executive committee obviously does not meet often enough to be a serious factor in the shaping of party policy. It is largely a forum for prominent functionaries, although under Khrushchev it was drawn into some important policy debates, e.g. the clash involving the so-called 'anti-party' group in 1957²⁴ and policy toward Yugoslavia two years earlier.

The Locus of Power. It is the Central Committee, however, which elects the three most important party bureaus, or committees that, in fact, run party affairs. In accordance with the new party rules of 1952 and 1953, as amended in 1956, 1959, and 1961, the Central Committee establishes the *Presidium of the Central Committee* for political work; the *Secretariat of the Central Committee*, headed by the Party Secretary, for current work of an organizational-executive nature; and the *Party Control Committee*, for the carrying out, and ensuring obedience to, party decisions. These three bureaus form the summit of the party pyramid, and their members are its all-powerful leaders. By virtue of the party's strategic position in the Soviet Union, they are also the leaders of the Soviet state, the trade unions, the army, and

²³ A republican congress is the highest party organ in the particular republics, or states, of which the Soviet federal union is composed. There are, of course, intermediate levels of party organization between the city and district conferences and the republican congress, which need not be outlined in a bare sketch of party organization, but which may be seen on the chart, *infra*.

²⁴ It was here that Khrushchev scored his dramatic victory over Malenkov, Molotov, and Kaganovich, despite an initial 7:4 adverse vote in the Presidium. Aided by Marshal Zhukov, who used his planes to rush important members of the Central Committee to Moscow, Khrushchev successfully appealed to the Central Committee which reversed the Presidium vote. Later, Khrushchev nonetheless banished Zhukov!

all other important organizations. Of these three party bodies, the Presidium and the Secretariat are the more influential.

THE PARTY'S SECRETARY-GENERAL (FIRST SECRETARY). During Stalin's regime, the Secretary-General of the Central Committee—now known as the First Secretary—who is, in effect, the Secretary-General of the Communist party, was the most powerful individual in the party, and consequently in the state. It is revealing that Stalin (and Khrushchev) achieved his position of undisputed leadership in the Soviet Union by occupying the position of Secretary-General of the Communist party, and not by winning the office of Prime Minister. Stalin did not assume the latter position until 1941, long after he had established his position as the Soviet dictator.

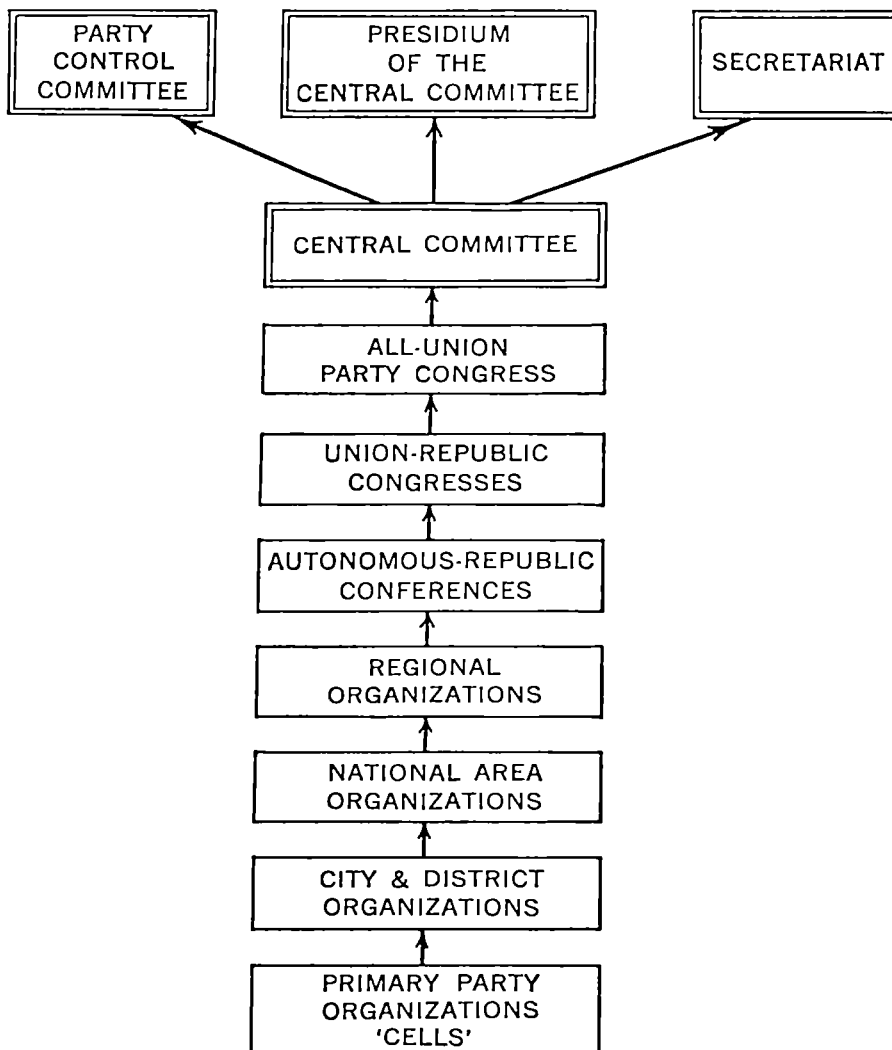
The Communist leader's power in the government, then, is derived from his position in the party; but it does not automatically follow that, as happened to be true of Stalin, the First Secretary of the Communist Party is also its most powerful individual. Whereas Mussolini and Hitler were demagogues and rose to power from the streets and the rostrum, Stalin and Khrushchev rose to power through the party. The Soviet concept of leadership is one of collective leadership. The leading party organs discussed here are committees making collective decisions. Despite the way Stalin was built up in the public imagination as the living symbol of the party and the spiritual heir of the Communist prophets, Marx and Lenin, we do not know whether his work was always law in these committees. He had immense influence, and perhaps overwhelming influence in most matters, but serious students of Soviet politics doubt whether the other members of the Secretariat and Presidium—which was known as the *Politbureau* during his day—were merely yes-men. Some observers thought that they shared Stalin's power as well as his confidence.²⁵ On the other hand, Khrushchev's revelations at the Twentieth Party Congress in 1956, and subsequent Congresses, make Stalin look a formidable tyrant, indeed.

All that can be said with assurance is that decisive power is concentrated in the above-mentioned committees of the Communist party. Although it is true that none of the Communist leaders since Stalin's death has been able to wield as much personal power as he did, and that they have been part of a ruling oligarchy—a *Kollektivnost*, as the Russians call it—Khrushchev had certainly emerged as the top man in that oligarchy by 1958. He became both the dominant single individual in the Soviet Union and the leading

²⁵ See, for example, Julian Towster, *Political Power in the U.S.S.R., 1917-1947* (New York: Oxford University Press, 1948), p. 392.

theoretician of the Marxist world. The passing of Stalin, a powerful personality, changed the power structure. But since his death there has been no change in the disciplinary requirements of the Communist party.

STRUCTURE OF THE COMMUNIST PARTY, U.S.S.R. (1963)



Inner Control. The Presidium, the party's senior brain-trust and policy maker, holds several meetings weekly. The Secretariat, the party's nerve center to determine upon directives to the many subordinate units through-

out the organization, meets daily. It is divided into an unknown number of 'sections,' e.g. culture, foreign affairs, education, 'agitation and propaganda.'²⁶ In 1963, the Presidium consisted of twelve full and six alternate or candidate members; the Secretariat had nine members, four of whom²⁷ were also in the Presidium. Here at last we come to the bodies that are small enough and meet often enough for full discussion, rapid decision, and vigorous action.

These few men who form the Secretariat and the Presidium control the party and the government. Whatever there is of free discussion of political principles and public policy in the Soviet Union goes on among them; for their decisions are accepted without question and without debate, not only by the Central Committee, the All-Union Party Congress, and the lower organs of the Communist party, but also by the various organs of the government—the Council of Ministers, the Supreme Soviet, its Presidium, and the whole pyramid of soviets.

Monopolistic and Monolithic Nature of the Party. The tremendous power of the handful of top Communist leaders is derived from two facts. First, the Communist party is *monopolistic*. It does not have to moderate its policy and its actions because of a fear that a rival party will win the majority of the electorate in the next election. Second, it is *monolithic* in its internal structure; it is made of one piece, and any serious division of opinion, any splintering or fragmentation within the party, is immediately suppressed. We have already noted the purges in the Soviet Union by which splinters are ejected from the body of the Communist party. The leaders of the party are all-powerful because their party is the 'one and only' party in the state. There is no alternative party that the electorate can put in power. At the same time it is the 'one and united' party because it suppresses ruthlessly all internal dissension within it.

The system of 'democratic centralism,' already mentioned in the discussion of local government, applies as much to the party as it does to the soviets. In a limited way, the lower organs of the party take part in the process of party deliberation and in the process of government. They can send information upward to the higher levels of the party pyramid, and they receive orders and directives from the top, which they must try to implement. The lower levels of the party pyramid provide a vast network of supervision of

²⁶ See the excellent article by Max Frankel, 'The Communist Party's "Elite" and How They Run the Soviet,' *The New York Times Magazine*, May 29, 1960.

²⁷ Khrushchev, Koslov, Kuusinen, and Suslov.

the activities of the state agencies, whether they be government offices or industrial enterprises.

Limitations on Party Discussion. The most important decisions, setting the major objectives and goals of government action, and thus molding every aspect of Soviet life, are made in the highest party councils, the Secretariat and the Presidium of the Central Committee. *They are absolutely binding on all members of the party.* The key position of the members of the party in the Soviet state enables them to explain these decisions to the soviets, the trade unions and other associations, and to spur these bodies on to achieve the objectives set by the decisions. Open opposition to party decisions thus reached is unthinkable in the Soviet Union. Discussion is allowed only on the means of reaching major objectives and never on the rightness of the objectives themselves. Moreover, discussion is allowed only until the party leadership comes to a decision on the means to be used in reaching the settled objectives. As soon as a party decision is made on any matter, all further criticism is branded as 'factionalism' or 'deviationalism,' the two cardinal sins in the Communist creed.

The reasons for this blind acceptance of the dictates of a small group of party leaders must be sought in Communist theory. It will be recalled that Marx believed in a sort of economic predestination. He held that his method of dialectical materialism would reveal, through the analysis of economic forces, the cause and effect relationship of all phenomena, and the course and direction which future events would take. His method, which is sometimes referred to as 'scientific socialism,' was taken over by the Communist party in the Soviet Union, where it is being used, with modifications introduced by Lenin and Stalin, in the process of reaching the major decisions on public policy. It is thought that this science, properly applied by those who understand it, shows clearly what a Communist government should do, and how to do it.

The leaders of the party, as the most competent and able members of the vanguard of the proletariat, are best suited to subject the problems of the day to Marxist analysis. Once they have reached their 'scientific' conclusions, discussion is superfluous, for their findings are accurate, like the verified solution of a mathematical problem. To go on discussing a question after the incontestably right answer to it has been found is a waste of time and consequently is unproductive labor. Unproductive labor is anti-social and, therefore, inimical to the best interests of the proletariat and of the Soviet Union. With this attitude on the futility of discussion of public policy once an issue has been

decided by the leaders, it is not surprising that party government in the Soviet Union is something totally different from party government in a liberal democratic state. In Britain and the United States public policy is formulated by the interplay of various interests through the medium of two principal political parties, in other Western lands usually through coalitions of parties. In the Soviet Union it is defined at the top of the party hierarchy, and the main purpose of the widespread party organization is to make sure that the orders of the leaders are carried out by every citizen.²⁸

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²⁸ See pp. 435-8, *infra*, for a discussion of nominations, elections, and representation in the Soviet Union.

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X

Interest Groups and Public Opinion

A number of considerations touched on in earlier chapters must now be drawn together. In particular, it is necessary to recall what we said in Chapter II about some of the consequences of accepting the liberal democratic ideals of government. Man, as Aristotle said, is a social animal. Men need fellowship with one another almost as much as they need their individuality. In the great modern nations they cannot find this fellowship in the state because it is too remote and impersonal. At any rate, they cannot find it in the liberal democratic state, because it is mainly limited to the purposes that all share in common. They must seek it in *voluntary associations* which cater to the diverse interests of free personality. Those who share a particular skill, experience, or outlook on life will always respond to one another if they are given the chance. Thus *interest groups* are born.

A Definition. Modern democracy has provided very wide freedom of association, and the ease of transport and communication makes it possible for persons with common or similar interests, experience, and outlook to organize on a national and even international scale; thus, for example, we have the American Cancer Society and the National Education Association, and the International Political Science Association and the Rotary International. The result has been a spontaneous group life without parallel in history. Great hotels in the center of networks of transportation are rarely free from the raucous fraternity of conventions. These interest groups are of a great variety and are not limited, as discussion sometimes seems to suggest,

to those that share a common interest based on the intense economic specialization of the modern world—witness the heterogeneous war veterans' groups, for example. There are many types of interest groups, but, as used in this text, *'interest group'* means any organized group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in society.¹

Organized Group Activity. Although economic interest groups are of special, and perhaps even fateful, significance when government reaches out to regulate many aspects of economic life, they are not necessarily the most active and powerful among organized groups—the type of groups with which we deal here. Activity depends more on intensity of conviction, and this is often strongest in crusading fraternities with no economic axe to grind, such as the Anti-Saloon League. The power of any group, in democratic politics at any rate, depends on the degree of vigor and single-mindedness it exhibits, and on numbers. Other things being equal, the bodies with the largest membership are likely to be the most effective because they can muster the most votes. Thus war veterans' organizations, in so far as they can agree on what they want—usually bigger and better bonuses and pensions and hospital care—are extremely powerful, although not organized around a common economic interest or function. On the other hand, such numerically small, but wealthy, well-organized, and homogeneous interest groups as the American Medical Association and the American Petroleum Institute, for instance, have been extremely effective.

Of the economic interest groups, one might hazard that agricultural associations, trade unions, and business associations will exert the strongest push and pull on public policy in the future. An organization of consumers that naturally includes everyone would overtop all other economic interest groups. But for reasons already suggested, the consumer interest is extremely difficult to harness into an effective organization. The most successful form of consumers' organization has been the consumers' co-operatives. The importance of this movement, in giving concrete expression to common interests shared, but not adequately realized, by producer groups of diverse and often conflicting special interests, is frequently overlooked.

¹ In essence, this is the definition coined by Professor David B. Truman in his expert work on the subject, *The Governmental Process* (New York: Alfred A. Knopf, 1951), pp. 33-7.

INFLUENCE AND PRESSURE

LOBBYING: PRO AND CON

Moreover, the widening range of governmental action affects most of the organized interests in ways that they think favorable or adverse. Every time the government intervenes in economic or social matters, it sets going a chain of consequences which affects the welfare of a number of groups. Organized interests think that their aims and purposes can be advanced or retarded by legislation. Because they actively press their claims upon institutions of government, they are often known as *political* interest groups. Thus, at every session of the legislature, legislation is proposed which some groups want to support and others want to defeat or modify.

It must also be remembered that most laws do not become settled issues merely because a majority in the legislature approves them. Most modern legislation requires continuous administration to accomplish its purposes. Unlike the law of gravity, it is not self-enforcing. To fit the law to the almost infinite variety of situations, the government is given substantial discretionary power by the legislature. The complexity of the conditions that government undertakes to regulate are such as to make it impossible for the government to know fully what it is about, unless it can draw on the knowledge and experience of the interests affected. Day-to-day administration is of even more vital concern to the interest groups than the enactment of the legislation itself.

Lobbying. These are the circumstances underlying the demand for representation of interests in some way that will connect the affected interests directly with the process of government, and not limit their communication to what can be expressed in voting for a candidate in a territorial constituency once in two or three or four years. Unable to take a hand directly in the making of laws and their administration, they have consequently resorted to influence and pressure, familiarly known as *lobbying*. The term itself has a long history, with the word appearing first in the English language about the middle of the sixteenth century. It was derived from the Latin *lobium*, a monastic walk or cloister. Lobbying is the most notorious, but not the only, method by which group interests of various kinds communicate with the government. These methods will be discussed here and in a later chapter dealing with the administrative process. First, however, some cognizance

must be taken of the widespread view that lobbying and kindred practices are inevitably sinister.

CON. Lobbying of the executive and the legislative branches of the government by interest groups arouses much indignation and alarm, some of which is clearly justified because lobbying interests have sometimes stooped to bribery and corruption. Also, the clandestine character of much lobbying and the means employed by some interests arouse natural suspicion. Backstairs influence always smells of intrigue and is objectionable in method if not in content. The average citizen, who has no one to lobby for him, is angered by the ease with which organized interests maintain close and intimate connection with government, and he comes to the common-sense conclusion that the practice would not be continued unless it paid dividends. Undoubtedly, organized interests get results from their contact with government, often at the expense of unorganized interests. For example, the price controls established by the United States government during the war were quickly liquidated at the end of the war because of heavy pressure from manufacturing and other business interests, although there is strong ground for thinking that a majority of the American people favored continuance of price control for a further period. Another illustration in the United States has been the continued success of oil and gas interests in obtaining and maintaining favorable action by governmental bodies in the face of almost constant consumer protests—causing one student of the field to conclude that the petroleum industry constitutes a private government which seeks to utilize public government to promote its goals of greater economic power and larger profits.² However this may be, the largely unorganized consumer interests always pay for the services that government provides for producer groups.

PRO. These and other points form the case against lobbying. But the real question is whether the practice should be suppressed or encouraged to become more respectable. As long as it is thought to be wholly evil, consultation between government and the interests will rely greatly on backstairs methods. If consultation is recognized as legitimate and even necessary, and required to be carried on openly, it will very likely become as respectable as general community opinion demands. Moreover, the answer to the pressure of selfish interests may be counter-pressure of other interests with diverse aims. One of the pillars of the democratic way of life is freedom of association, and the answer to organization of special interests is counter-organiza-

² Robert Engler, *The Politics of Oil* (New York: The Macmillan Co., 1961).

tion. The only thing preventing any significant social interest, economic or otherwise, from enjoying consultation with the government is lack of energy and initiative to organize for that purpose. Everyone who has leverage on a bloc of votes can get himself heard by democratic governments.

Lobbying and the Popular Will. Objections to lobbying, however, go beyond these immediate considerations. The truth is that the practice is a denial of certain widely held beliefs about democracy. These beliefs are that the people, free of oppression by arbitrary governments and privileged classes, all want the same things of government. They want government to act for the good of all and not for any narrow, selfish purpose. That is to say, the sovereign people are essentially devoted to the public good, and the will of the people, if not corrupted or deflected, unerringly concentrates in a general will, a unified will for the good of all. Somehow—it was never very clear how—the people in electing representatives to the legislature informed them of the content of the general will and infused them with a sense of its imperative. It was believed that a legislature so chosen and insulated from all outside influence, except the mandate of the voters at the polls, would produce in its legislation the highest possible expression of the common good. Therefore, it was wrong for any individual or group to rush to the capital and try to explain the bearing of things to the government. Either they had the presumption to think they had some private revelation of the common good, or they were trying to nourish a special interest at the expense of the public interest. Such beliefs are not always clearly articulated, but unqualified objections by democrats to consultation between government and the interests of which society is composed must rest on the assumption that the will of the people makes it sufficiently clear what should be done for the common good.

Earlier discussion has indicated that this picture of a people wholly absorbed in the public good as distinct from the private good, and of a general will, an agreed conception of the common good arising from that absorption, is untrue to the facts. If it were true, there would be no more room for political parties than for lobbying. People are not absorbed in public questions, and it is difficult to see how the mass of citizens in a modern democracy could ever give more than a minor fraction of their time to them. The citizens of the Greek city-state had leisure based on slavery, for this absorption. Moreover, if the diverse interests of free personality cannot find their principal expression in the sprawling modern territorial state, the citizen must largely be absorbed in concerns that lie outside the specific sphere of government.

WHAT IS THE PUBLIC INTEREST? The true public interest does not spring, fully formed, from the hearts of the people. It may be that a supreme being standing above the struggles of life, or that men who are able to eliminate all passion from their deliberations, could perceive *the* public interest purged of all contamination from narrow special interests. But men who can achieve such detachment are rare, and divine revelations of the common good vouchsafed to men appear to be various, and are far from bringing them to a consensus. It is true that most of the members of the community, or nation, will whatever is necessary to preserve the community and to realize the shared ideals, but that will often lacks specific content. While it enables us to agree to resist a foreign aggressor, it does not tell us how to do it or at whose expense. No more does it tell us what laws to make on a given day in peacetime.

FINDING A FORMULA. Therefore, as a practical matter of deciding what government is to do in the common or public interest, the choice is between meek submission to some dictated formula, and a formulation, always partial and incomplete, that emerges from the competition, clash, and compromise of a great variety of individual and group interests. A democracy must choose the latter because it has its origin and main justification in this diversity. The question that then faces us is: How can a government insulated from all contact with the varied interests of men, except what the members of the legislature bring to it, relate the common good to the particular 'goods' that men pursue? Does the common good consist of a partly informed guess of the government at the general will of the people, or in arbitration between interests in the light of all the data that can be discovered from whatever source? If the latter is even partly correct, government must make contact with all interests that are strong enough to make their voices heard.

DIVERSE GROUP INTERESTS AND DEMOCRACY

This analysis is far from doing justice to all the factors involved. It needs to be modified by recalling what was said in Chapter II about the unifying influence of liberal democratic ideals. There is a large measure of agreement about the higher goals of political action. Much of the competitive striving between groups is concerned with exploring means of giving fuller expression to the claims of personality. Also, this analysis leaves aside what we said in the preceding chapter about the important role of political leadership

in finding the compromises that reconcile unity and diversity amid the clash of interests, and thus attract the support of majorities. It perhaps suggests by its emphasis that *all* organized interests are narrowly selfish interests, which of course is not true.

Many organized groups find their binding common interest in being their weaker brothers' keepers. Britain, France, and the United States have active associations for penal reform, birth control, child welfare, seaman's welfare, world peace, and prevention of cruelty to animals. Thus, Britain has its Council for Preservation of Rural England, its League for Endowment of Motherhood, and so on. Comparable examples in the United States are the Women's Christian Temperance Union, the American Eugenics Society, and the Society To Maintain Public Decency. France has its equivalent of the Women's Christian Temperance Union and the Society for the Prevention of Cruelty to Animals.

A Check on Extremism. The analysis certainly suggests that interest groups are more single-minded than they really are. Few people find full expression of themselves in one interest, and thus most of those who share a particular interest are reluctant to push it to the limit because that would jeopardize other interests they cherish. The organized farmers—except those mainly or solely engaged in dairying and stock-raising—are interested in a high price for grain. If this were their only interest, they would push for unlimited manufacture and sale of liquor so as to assure a greater demand for their grain. In fact, however, most of them feel they have a stake in a temperate, or even an abstemious society, and this moderates the agricultural lobby. A study of the membership of any interest group would show that almost every member has other—indeed, clashing and competing—interests that moderate his support of this particular interest. Sometimes they even *contradict* it, such as the American Legionnaire clamoring for a federal bonus, who, at the same time, is a member of the Pruning Knife League and clamoring for reduced taxes. The multiplying of interests not only enriches life but also provides an automatic check on extremism. A peaceful society becomes possible—although not guaranteed—through a delicate equilibrium of interests without demanding the agreement of everybody on everything.

It should be clear from these considerations that we have only scratched the surface of the question of the place of interest groups in a democracy. It might be argued, at least for the sake of argument, that what has been called democracy in the last hundred years could never have flourished if there had been on every issue the manifest general will which many yearn for. A

society in agreement in detail as to what was right would have muzzled the cranks, throttled discussion, and trampled on minorities, exhibiting all the earmarks of a totalitarian regime and impoverishing life for the sake of a few hard and fast conceptions of what was good.

A Balance of Power. Government by discussion and peaceful adjustment of differences finds its significance in the fact of numerous diverse interests. Each interest is convinced of its own worth and therefore determined to survive and thrive. Being unable—and also unwilling—to ensure its position through a domination of all other interests, it is compelled to seek accommodations with some of these interests and, as James Madison foresaw in *The Federalist*, No. 10, through a series of shifting combinations try to prevent any one interest from dominating all the others. As has already been pointed out, most members of the diverse interest groups want to preserve the community. They thus recognize the necessity of eventual accommodation between diverse groups.

This digression is a luxury of which we can afford only a taste. It does tend to confirm the suggestion that the existence and lively activity of interest groups are closely connected with democracy. At any rate, democratic government has always been involved in maintaining an equilibrium between groups. This has never been an easy task, and it requires the continuous services of a number of highly skilled politicians searching for accommodations that will attract majority support. Thus democracy is not something that can be won today and guaranteed for posterity. It is always on trial. The trial becomes increasingly severe as government activities expand and affect more and more deeply the welfare of an ever larger number of interest groups.

The previous chapter has indicated, and so will others to follow, that the job of appeasing interests by giving them privileges that are immediately, if not ultimately, at the expense of others, has a divisive rather than a unifying tendency, and it becomes harder to mobilize majorities that will accept all these activities as contributions to the common good or the public interest. One of the big problems with interest groups is that what they *really* want is influence in a few important places of public policy—they seek power without responsibility. Yet whether government activity declines or continues to expand, democratic governments must mediate between interests. The mediating will be most successful if done in the light of all the available information, including that tendered by the interests themselves.

FACTORS AFFECTING LOBBYING

In the United States. Much more is generally known about the activities of interest groups, or—as they are often and appropriately called—*pressure groups*, in the United States than elsewhere. There are many reasons for the great quantity of data available on the United States. It is a country where extensive advantage has been taken of freedom of association. No other government has to take account of so wide a range of diversity of interests, most of them organized. In no other country do pressure groups so openly approach the government. Lawmaking is a free-for-all. Indeed, the legislative process in America today is primarily an arena for combat among private organizations. The majority party does not monopolize the defining of public policy, and the executive does not monopolize the drafting of an authoritative legislative program. Laws are made by Congress and its numerous committees, which are always open to suggestion and afford hearings to interested parties. Accordingly, an organized interest can hope to influence legislation by lobbying individual congressmen and by putting its case before the appropriate congressional committees. ‘Lobbying,’ as long-time Congressman Celler (D.-N.Y.) once wrote, ‘is the sum of all communicated influences—both direct and indirect—on legislators concerning legislation. It is indispensable to effective lawmaking which, in a democracy, is always the product of compromise.’³ But, of course, a pressure group also can, and does, approach members of the executive branch, members of the so-called independent regulatory commissions and agencies—of late a particularly fruitful point of contact.

In Britain. In Britain, where the cabinet formulates policy and party discipline ensures its adoption in substantially the form proposed, interest groups cannot hope to get far by lobbying individual members of Parliament or by urging their case on parliamentary committees. These avenues of influence are not entirely neglected, but the most important representations must be made directly or indirectly to the cabinet. Little is publicly known of what goes on when the cabinet receives delegations or written representations, and still less can be said certainly of their influence on the cabinet’s final decision. Equally little is known of what takes place in secret party caucus where the

³ Emanuel Celler, ‘Pressure Groups in Congress,’ *The Annals of the American Academy of Political and Social Science*, 319 (September 1958), 1.

cabinet has to clear serious modifications and adjustments of policy with its supporters. Thus interest groups work more unobtrusively and with less publicity than in the United States. Where the party and the cabinet insist on making policy and have to take full responsibility for it, there is less candor in acknowledging the pressure and influence of interest groups. Also, sporadic congressional investigations of lobbying in the United States have brought a good deal of information to light and encouraged further private investigation and research.

So we know that pressure groups are at work in Britain and that they do influence legislation, but the influence is hard to measure. In the United States it is often possible to describe provisions of a particular law in terms of a compromise between numerous groups that lobbied openly on both sides. In Britain, on the surface at any rate, the law represents the agreed policy of majority party and cabinet.

In France. The position of interest groups in France is again different. Given the multi-party system under the Third and Fourth Republics, there was a natural tendency for political parties and interest groups to coalesce organizationally. Many of the numerous French political parties resembled interest groups; for while they were able to bring a certain amount of influence to bear upon governmental action, they never possessed the kind of effective power of decision which lodges in the majority party, or indirectly even in the opposition party, in a two-party system—regardless of whether the latter be of the disciplined or the undisciplined variety. On the other hand, the French multi-party organization provided direct representation in the legislature to the various interests through the elective process. Very often, the leaders of the French interest groups were themselves elected to public office as leaders of the political parties and thus directly represented a particular interest for which these parties might stand—or, indeed, of which they were often frankly composed, e.g. the aforementioned *Poujadist* party, whose sole aim was to perpetuate non-payment of taxes, or at least to make the tax-collector's life miserable.

However, it would be quite erroneous to assume that all attempts to bring pressure in France were exerted upon the parties directly. Throughout the country, influential business, labor, artisan, and agrarian interest groups operated, chiefly on the local level, and attempted to influence not only the representatives of the party to which they belonged but any member of the National Assembly and the executive who might be within reach. The nineteen specialized committees of the former provided ideal bridgeheads for

interest group activities. Moreover, there existed the—still surviving—National Economic Council, which was supposed to advise the National Assembly on 'economic' matters—except on the all-important budget! Bereft of actual power, and regarded with suspicion by both interest groups and legislators, it consisted of representatives of segments of the French economy, e.g. workers, farmers, industrial groups, co-operatives, civil servants, and so forth.

UNDER THE FIFTH REPUBLIC. The revolution wrought by the assumption of power by de Gaulle under the 1958 Constitution did not, of course, pass over the French interest groups. The shift of the center of gravity of governmental power from the legislature to the executive, led by a President who regarded all pressure groups as egotistical as well as unrepresentative, drastically diminished their importance in the governmental process. Committed to what he viewed as a fight against 'all intermediate forces which cut the people of the nation off from the public authorities,' de Gaulle thus determined to ignore them, more or less. Gone are the days when the group interests could readily force ministers to come to them to gain approval of legislative plans. Now the ministers are in the driver's seat, backed by a powerful chief executive and supported by a government with majority party support in Parliament. Gone, too, are the convenient National Assembly Committee beachheads—now that they are transformed into six generalized committees against the backdrop of a legislature seriously curtailed in its powers. The National Economic Council, now a 229-member body, composed of some twenty-five or thirty 'economic and social interest groups,' still exists in revised form—as will be pointed out more fully in Chapters XI and XVII—and de Gaulle has, in fact, promised to raise it to a prominent position, but at this writing (Autumn 1963) it is still little more than an advisory body.

The French pressure groups still have important links and connections with the legislature, but they are weakened ones, indeed. Hence they have sought their salvation in combined action, always a tenuous tool in the interest group game. On two occasions in 1961, and one in 1963, however, sensing widespread popular support, they resorted to a seldom-employed but dramatically effective tool: the general strike—that of the teachers, farmers, and coal miners. In these instances, the government ultimately acquiesced to the demands, realizing the popularity of the issues and the power of the groups concerned. Short of such drastic measures there is no question that the immediate influence of individual interest groups suffered a keen blow with the onset of the de Gaulle regime.

INTEREST GROUPS IN ACTION

IN THE UNITED STATES

It is impossible to say precisely how many organized group interests are in active contact with the national government at Washington. Not all register with the government, as they are supposed to do. Certainly the number runs into thousands. Hundreds of different groups maintain offices in Washington. However, many of these organizations are not really effective, neither recognized by congressmen as being genuinely representative of the interests concerned, nor possessed of sufficient voting strength and propaganda power to compel anxious consideration. While all the groups with offices in Washington maintain a representative to look after their interests, only the larger and stronger groups are equipped with all the modern means of research and propaganda. They also employ professional *lobbyists*, or legislative agents as they prefer to be called, and pay them highly for their services. In 1963 alone, some four hundred national organizations maintained a thousand such lobbyists in the capital, well versed in the intricacies of legislative procedure, at home in the labyrinths of administration, and reeking with plausibility. They are generally journalists, ex-civil servants, lawyers, ex-members of Congress—the latter being deemed especially desirable because they have access to the floor of Congress.

The Range of Organized Interests. The groups that exert pressure in Washington are organized to promote a bewildering variety of purposes. It would be difficult to classify them in a limited number of categories. Without attempting to do so, it may be said that the more powerful groups are trade associations (representing industrial and commercial interests), organized labor, agrarian interests, professional associations, the bureaucracy, foreign policy associations, national women's organizations, various reform leagues, and a number of veterans, patriotic, ethnic, and religious organizations.

BUSINESS AND AGRICULTURE. Perhaps the most broadly inclusive and effective of the commercial and industrial organizations are the United States Chamber of Commerce and the National Association of Manufacturers, which in 1906 formed the National Industrial Council to supply expert lobbying against labor legislation, and later participated in setting up the Department of Commerce and other agencies in the federal government. Agricultural interests have found powerful and effective expression in many groups, notably the influential American Farm Bureau Federation, which has held

the 'farm bloc' together in Congress; the National Grange; and the National Farmers' Union, the smallest, but the most militant in recent years in its fight for large-scale legislative action in aid of agriculture.

LABOR. The three principal groups representing organized labor are: the recently created 15 million-member A.F.L.-C.I.O., a merger of the American Federation of Labor (which played an active and influential role in the formulation and enactment of legislation concerning employers' liability and workmen's compensation) and the Congress of Industrial Organizations; the four Railroad Brotherhoods which, among other things, secured the passage of the Adamson Act of 1916 providing for an eight-hour day for railway workers; and third, the United Mine Workers, long under the colorful leadership of John L. Lewis.

PROFESSIONAL. The professional organizations are generally not as powerful as the above-mentioned economic interests, because they often lack the financial resources of the business groups and the numbers of the labor and agricultural associations. But they do possess an asset of prime importance in public affairs, namely, technical knowledge, and the prestige related thereto. This knowledge enables them to exert considerable influence upon legislators and administrators and the public. For example, the very active American Medical Association, with a membership of some 200,000, was especially influential in securing the adoption of the pure food and drug laws. It has exerted pressure *for* the reorganization of the health activities of the national government and *against* social insurance laws, particularly those providing for health insurance. In 1949 alone, with a per capita assessment of twenty-five dollars, it collected two million dollars from its members to fight—with success—President Truman's proposal for compulsory national health insurance. Another professional organization, the huge National Education Association, has long pushed plans for a separate federal Department of Education, and has favored such reforms as a law prohibiting profits on the manufacture and sale of munitions, a law providing for unemployment insurance, a federal child-labor law, and laws for the protection of freedom of speech for teachers in the classroom. The 100,000-member American Bar Association plays an important role in judicial staffing and legislation—indeed, its lawyers are active and evident throughout the government.

WOMEN. The women's organizations, particularly the General Federation of Women's Clubs and the League of Women Voters, have brought a large and influential opinion to bear in favor of measures for the censorship of books, magazines, and movies, and have campaigned for better homes, con-

servation, civil service reform, equality for women, prohibition enforcement, education, social legislation, Americanization, and international co-operation for peace. In many of these agitations, they have co-operated with other reformist groups found in the United States. Of these, perhaps the most outstanding in the whole history of pressure groups was the Anti-Saloon League of the organized churches, which was largely responsible for the enactment of temperance legislation from 1893 on, and often drafted such legislation.

ETHNIC. The associations for promoting the interests of different ethnic groups in the United States are not usually as well organized as the economic and professional groups, but they do exert considerable political pressure from time to time. There are approximately one hundred and eighty of these ethnic organizations. On domestic issues, they press for simplification of electoral procedures and for increased immigration from the countries of their origin. In the field of foreign policy, they strive for good relations between the United States and their countries of origin. After World War I, the pressure of American Poles, Czechs, and Yugoslavs on President Wilson's administration influenced the creation of new states in Central Europe. The German-American *Bund* and a number of Irish organizations tried to prevent the entry of the United States into World War II.

RACIAL. The interests of the Negroes are championed primarily by the National Association for the Advancement of Colored People, the Urban League, and the Congress of Racial Equality (CORE). With increasing success, they have opposed racial discrimination in all walks of life, and have pressed for integration generally, for fair treatment of Negroes in the courts and at the polls, for their appointment to more public offices.

RELIGIOUS. Some of the principal religious organizations of national scope are the National Council of Churches in Christ (U.S.A.), which speaks for several, but not all, influential Protestant groups; the National Catholic Welfare Conference and the Legion of Decency, examples of the unified and well-disciplined Roman Catholic groups; and several Jewish interest groups which, like the Protestant groups, are considerably less united and disciplined—even on the question of Israel—than are their Catholic counterparts. The various religious groups are actively interested, often on different sides, in public policy relating to education, marriage and divorce laws, birth control, literary and motion picture censorship, prohibition, diplomatic representation at the Vatican, and so on.

OTHERS. The above represent only a sample of the manifold interest groups that are active. Every segment of American society has its group or groups—

and we cannot leave this discussion without at least mentioning the influential veterans' organizations, such as the American Legion and the Veterans of Foreign Wars. They are constantly in the public eye, either in behalf of legislation beneficial to the millions of veterans and their dependents or in the role of watchdogs of Americanism.

Looking at the extraordinary range of interests represented by organizations in Washington and noting their frank, persistent, and widespread legislative activity, observers have often described them as a third House of Congress, operating outside the Constitution, but not lacking effectiveness on that account. They do not limit their activities to national government and politics but work in a similar way in state and local government and politics. It is important to remember that pressure groups do not neglect any government that has power to affect their interests.

Techniques of Pressure. These interest groups conduct their campaigns on several fronts. They try to influence congressional nominations and elections. They maintain direct contact with, and apply pressure on, members of Congress and also on members of the executive—sometimes even the judiciary. They pour out propaganda in the hope of influencing public opinion. But it must be remembered that American pressure groups operate *outside* the political party structure as such, although some of their leaders may be individually active as party officials. A vital distinction between a political party and a pressure group is that the former is primarily interested in obtaining office, whereas the latter's chief concern is to influence the personnel *in* office—regardless of party labels.

INFLUENCING ELECTIONS. Pressure groups often act on the theory that simpler and more effective control over legislation is to be had by securing the nomination and election of friendly legislators than by attempting to influence them after they are elected. It does not matter whether candidates or prospective candidates are Democrats or Republicans; they are supported or opposed according to their stand on the questions in which the particular lobby is interested. Those who aspire to Congress are questioned on their views and, if willing to give pre-election promises, are given support in the campaign in various ways, including money contributions to the candidates' campaign funds. Both the 'wets' and the 'drys' in the struggle over prohibition supported candidates financially. Big business, which is often long on money and short in numerical voting strength, commonly contributes to the campaign funds of particular candidates and sometimes even to *opposing* candidates in order to 'promote' good will.

It should be noted that this traffic is encouraged by the lack of clear, precise party programs and the weakness of party discipline. If the parties had clear, firm policies, the promise of a candidate to support the special claims of a pressure group would not be worth buying. If the central party organization had, as in Britain, a virtual veto on the candidacy of particular aspirants, the tools of special interests would have great difficulty in getting a nomination. The weakness of the national parties is the opportunity of diverse interests of every kind.

If an interest group has a large, relatively unified, membership, its delivery of effective support in an election campaign is simpler. If it is well organized and able to persuade its members how to vote, it can bring heavy pressure to bear in any constituency where it has significant voting strength. The A.F.L.-C.I.O., like its unhyphenated predecessors, because of the size and compactness of its membership has been very successful, especially since the 1930's, in ensuring the election of particular candidates friendly to labor and in defeating hostile candidates. Labor's Committee on Political Education (C.O.P.E.), which grew out of the old C.I.O.'s Political Action Committee, endeavors to mobilize the labor vote behind candidates who adhere to labor's objectives. The American Farm Bureau Federation has also had signal success in influencing elections. The Bureau keeps a close check on the legislative record of congressmen from agricultural constituencies and brings that record to the attention of voters at the next election.

Alone or in combination with other groups, interests in America can ensure the election of a number of favorably disposed congressmen who will form a bloc in Congress, supporting what the interests want with little regard for party lines or party platforms. If these legislators do not live up to their promises, they are marked for defeat at the next election. However, this is not enough. Countless pressures from all directions play on all congressmen, and it is necessary to supply sympathizers with data and to counteract other pressures. The lobbies maintain offices in Washington because they want to be close to Congress to express their views directly on all measures that interest them, and to maintain contact with such members of Congress as they hope to impress.

LOBBYING CONGRESS. The oldest form of direct pressure on legislators is the social lobby, which still persists, although its results are generally thought to be meager. Members of Congress are often wined and dined by legislative agents just for the sake of getting acquainted. New members particularly are singled out, and the lobbies—among which members of administrative

agencies and foreign interests must also be mentioned—do much to make them feel at home in Washington. But members of Congress cannot be bought for the price of a meal or a cocktail or two, and there is no attempt to do so. The purpose is to establish friendly relations as a prelude to feeding the legislator with information and persuasive arguments.

It has already been pointed out that legislators today are inadequately informed on most of the subjects with which they have to deal. Devices for supplying them with accurate data are lacking, or inadequate, and busy lawmakers cannot do more than a fraction of their own research. But lobbyists on both sides of almost every question are well supplied with information and eager to impart it. They are the chief source of information pro and con on many issues, although by no means all, that come before Congress. The members of Congress whose minds are already made up can draw supporting data and arguments from the source. Those who are in doubt and conscious of their ignorance can be fairly sure that they will get much of the relevant data and arguments by listening to all sides of the story from the interest groups concerned. Naturally, the information is biased, but some of the truth always emerges from the clash of opposites.

The real work of legislation, as will be seen, is done in congressional standing committees and their sub-committees, and therefore lobbyists take special pains to 'educate' members of the committees whose field of work affects them. The committees hold hearings at which they invite evidence from all the interests concerned in a particular bill. These hearings often have a good deal of resemblance to the proceedings of a court, with lobbyists appearing as counsel and witnesses on both sides and members of the committee acting as judge and jury. Of course, the committees are expected to gather information from all possible sources, and officials from the government departments make an appearance to put governmental data and points of view at the disposal of the committee. The evidence of officials may not be wholly impartial either, but it will correct many of the exaggerations and partial truths of the pressure groups.

The well-organized groups go to great pains to convince congressmen that their constituents are solidly behind the group demands. They persuade their own members and prominent citizens who are sympathetic to their point of view to shower congressmen with letters, telegrams, memorials, and resolutions urging the legislators to vote for or against particular measures. Even though the opinions expressed in the 'form letters' often used are clearly inspired by interest groups, most congressmen cannot afford to ignore them

completely, because the senders may have espoused the opinion expressed in them. Such organizations as the Chamber of Commerce, the Farm Bureau Federation, and the A.F.L.-C.I.O., with their huge memberships, can pour an avalanche of letters and resolutions on legislative bodies.

Professional associations can also make an impressive showing. When the highly unified, wealthy, and ably marshaled American Medical Association—supported by some 200,000 doctors, organized locally into about 2000 county units—asks its members to write, and to persuade their friends and patients to write, to their representatives in Washington—who also have doctors—a heavy mail can be anticipated. In 1949–50, the A.M.A. engaged the well-known public relations firm of Whitaker & Baxter at a fee of \$100,000 for its successful campaign against the Truman compulsory health insurance bill. Other similar victories came in subsequent years. The U.S. Savings and Loan League, rated one of the country's most resourceful and influential lobbies, was largely responsible for inspiring a massive letter-writing campaign in 1962 against the Kennedy Administration's measure for the withholding of taxes on interest and dividends. The victorious campaign generated hundreds of thousands of letters to senators after the House had passed the bill—in part insinuating that the advocated withholding constituted a new tax, which was simply untrue. The Senate subsequently deleted the provision and the House failed to fight for it in the joint conference committee that ultimately met to iron out differences in the parent measure dealing with other tax provisions.

LOBBYING OFFICIALS. Pressure groups not only inspire and support the legislation they favor but often draft it and present it to congressional committees. They also maintain direct contact with the administration which, through its discretionary powers, can do much to help or harm the interests of the various groups. How to work your way through the bureaucratic maze at Washington to the official who can and will deal with your problem, instead of referring you to someone else, is a distinct branch of learning, and all the important pressure groups employ experts who have made this province of knowledge their own. They negotiate with officials, investigate administrative practices, especially those of the independent regulatory commissions—an often ideal contact for interest groups⁴—and inform officials

⁴ The Ethical Practices Sub-Committee of the Senate Committee on Labor and Public Welfare of the 82d Congress, 1st Session (1951), charged that '... [these commissions] tend to become the servants rather than the governors of the industries which they regulate ...' (at p. 60).

of the point of view of their groups on such practices. This is an extremely important part of the work of pressure groups, and it will be considered in more detail when the administrative process is discussed in Chapter XVII.

Even the presumably neutral judiciary is not free from being lobbied, although such efforts are of more subtle nature. Judges are variously praised, condemned, and their opinions 'analyzed' by interested groups. The latter often ask for permission to file a brief *amicus curiae* ('friend of the court'), to present their point of view on behalf of their favored litigant. Also, interests frequently take a hand in confirmation battles of 'controversial' judicial nominees. Thus various conservative business and nationalist groups heatedly opposed, though ultimately unsuccessfully, President Wilson's nomination of Louis Brandeis as an Associate Justice of the United States Supreme Court and attempted to block his confirmation by the Senate. Negro and labor groups did succeed in preventing the confirmation of John J. Parker of North Carolina, who had been nominated to the bench by President Hoover.⁵

MOULDING PUBLIC OPINION. Finally, pressure groups try to mould public opinion. The surest guarantee of success is to convince a large section of the electorate of the justice of their group's claims. Almost every channel of communication is used to proclaim the gospel of the group to the public. Speeches are prepared for sympathetic members of Congress. Books and pamphlets pour out in a steady stream. High-powered advertising and public relations firms are increasingly hired. Special articles and news releases are supplied to the press. Radio and television are used, and motion pictures are not neglected. Speakers are supplied to churches, schools, luncheon clubs, and public forums. When the public utility industry was trying to discredit public ownership of public utilities, it not only used all these common methods of trying to influence public opinion, but also tried to mould the educational system to its purposes. It made extensive efforts to eliminate public school textbooks that spoke favorably of public ownership, and supplied the schools with hundreds of thousands of specially prepared booklets. It endowed public utility research bureaus in universities, which were expected to find facts supporting its views. The grand scope of its activities is indicated by the fact that in one year it sponsored more than 10,000 addresses, which were heard by an estimated 1,500,000 people.

Many other illustrations of these grandiose activities could readily be cited.

⁵ On these matters generally, see Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, Britain, and France* (New York: Oxford University Press, 1962).

For example, the National Association of Manufacturers spends more than two million dollars annually for advertising and publishes four periodicals. The American Petroleum Institute has in recent years spent fifty million dollars per year for general public relations! In connection with its above-mentioned battle against compulsory national health insurance, the American Medical Association, within one year, distributed some 65,000,000 pieces of campaign literature, presenting its views of the proposed legislation. Further, its public relations firm arranged for the printing and distribution of roughly 75,000 appealing picture posters of *The Doctor*, with the caption 'Keep Politics Out of This Picture.' These are just some illustrations of the type of techniques used widely by many interest groups today.

Most pressure groups, of course, work on a much smaller educational program, and few of them think it worth while to try to work through schools and universities, because they want quick results on current issues. But they are all anxious within the limits of their resources to influence public opinion.⁶

Regulation of Lobbying. It has been argued at length here that as long as government is expected to carry on its present wide range of functions affecting the welfare of interest groups, close contact between the interests and government is legitimate and even necessary. That does not mean that all the methods used by pressure groups should be approved or even tolerated. Bribery and corruption have long been offenses against the criminal law. The problem of dealing with such methods is one of detection and punishment. Sinister influences in elections are already outlawed in most states but, as has already been noted, these laws are not effectively enforced. Often they are very difficult to enforce.

In regard to non-criminal methods of persuasion and propaganda brought to bear on Congress, public officials, and public opinion by interest groups, believers in democracy—which is, at bottom, government by persuasion—will find it difficult to distinguish between forms of persuasion that are legitimate and those that are not. The important issue at stake arises out of other distinctions, the distinction between interests that are effectively organized for pressure and those that are not, and perhaps the distinction between those interests with lavish funds and those without. This last is doubtful because

⁶ As reported, according to law, the ten biggest-spending lobbies in the nation's capital in 1961 were, in order: American Medical Association; American Farm Bureau; American Legion; U.S. Savings and Loan League; National Committee for Insurance Taxation; National Farmers Union; National Housing Conference; American Trucking Associations, Inc.; International Brotherhood of Teamsters. (*The New York Times Magazine*, August 19, 1962.)

small financial resources can often be compensated for by organization and numerical voting strength. The problem is how to protect the unorganized interests, and specifically in the economic field, how to organize the *general consumer interest* to counterbalance the whole range of producer interests. Aside from the difficulty of defining what is evil in the genuinely persuasive practices of pressure groups, the really forbidding difficulty is that of enforcing any law that might be made.

REGULATION OF LOBBYING ACT OF 1946. These considerations help to explain why, despite many years of agitation for the regulation of lobbying by law, and the frequent introduction of bills and resolutions in Congress for that purpose, no law on the subject was enacted by Congress until 1946. As part of the 1946 legislation for the reorganization of Congress, provision was made for the quarterly registration of lobbyists with Congress; the disclosure of the source of their employment; the amount of their compensation; the nature and amount of their expenditure; and the specific aim of their lobbying. The terms of the law are restricted to 'professional lobbyists' who try 'directly' to influence Congress or its committees, or whose 'principal purpose' is to do so. Therefore the law does not cover persons who limit their pressure to the executive or judicial branch of the federal government, or any organized association whose officers do its lobbying 'incidentally' to carrying on the general purposes of the association. The vagueness and difficulties of interpretation are obvious—and there is no enforcement agency! While almost 7000 persons have registered under the law, this registration is not, because of the law's vagueness, a reliable index to the number of persons who, at one time or other, bring the pressure of organized groups to bear on the government of the United States.

The purpose of the law is to identify the source of pressures and to make it a matter of public knowledge who is paid for doing what, and how much. The reliance is on *publicity*, a weapon not to be underestimated in a democracy. Significantly, there is no attempt to distinguish between the methods used by lobbyists, forbidding some and regulating others. It is a matter of the greatest difficulty to get sufficient agreement on what should be forbidden and what should be permitted.⁷

⁷ To cite some examples of state legislation on this point: in Texas and Louisiana a person is guilty of wrongful lobbying if he privately or secretly attempts to influence a legislator 'except by appealing to his reason.' In Oklahoma a paid lobbyist is guilty if he 'privately attempts to influence the act or vote of any member of the legislature on measures before the latter.' In Georgia and Tennessee lobbying is defined as 'any personal solicitation of any member of the General Assembly . . . not addressed solely to the judgment.'

QUESTIONS OF CONSTITUTIONALITY. Yet even the vague, loosely drawn, and generally deemed ineffective, Regulation of Lobbying Act of 1946 has been repeatedly attacked as an unconstitutional abridgment of the freedoms of speech and petition of the First Amendment and a violation of the due process of law clause of the Fifth Amendment. Lower federal courts have held some sections of the Act constitutional and some, such as the vital registration section, unconstitutional. The first Supreme Court test came in 1953, in which the Court upheld the Act but, at the same time, dealt it a blow by holding that the term 'lobbying activities' meant only *direct* representation before Congress, its members, or its committees, *not indirect* attempts to exert influence through the community.⁸ One year later, the Court, five to three, upheld the Act in a second major challenge, but reiterated that it covered only '*direct communication* with members of Congress on pending or proposed federal legislation.' And the Court further narrowed the scope of the Act by distinguishing between 'solicitation, spending, or receiving' and 'merely spending'—the latter not compelling disclosure.⁹ Delivering the majority opinion, Mr. Chief Justice Warren rejected, however, the sweeping contentions of violations of due process of law, freedom of speech, press, and petition, and pointed out that Congress had every right to know 'who is being hired, who is putting up the money, and how much.'¹⁰ The dissenters viewed the Act as unconstitutional on its face because of vagueness and indefiniteness.

Alarm about Lobbying. In the eyes of the public, lobbying has become much more respectable. Less is heard nowadays about outright corruption and backstairs intrigue. The relation between lobbying and the complex functions of government is better understood, and the operations of most of the more effective pressure groups are increasingly conducted in the open. Yet, even if some of the moral stigma has been removed, genuine alarm about the total effect of the activities of pressure groups on the national government has perhaps increased rather than diminished.

Largely as a result of the increased governmental activities of the New Deal and World War II, the number of interest groups operating in Washington has increased at a very rapid rate. Their pressure on government has become more pervasive and continuous. There is much fear that their push and pull will rob Congress of any sense of national purpose, and make it

⁸ *United States v. Rumely*, 345 U.S. 41 (1953).

⁹ *United States v. Harriss*, 347 U.S. 612 (1954). (Italics supplied.)

¹⁰ *Ibid.*

mainly an instrument for registering the resultant of all the dispersive influences brought to bear on it. For example, the tactics used by the natural gas lobby in 1956, in behalf of a bill to exempt producers of natural gas from direct federal regulation, caused such a national outcry that President Eisenhower vetoed the measure, although he had initially supported it. His disapproval came in the wake of disclosure by Senator Francis Case, Republican of South Dakota, that an oil company had attempted to contribute \$2500 to his re-election campaign in the hope of influencing his vote on the bill.

The indicated popular fear is by no means groundless. As we shall see later in this text, Congress has generally found it difficult to reach and maintain a coherent, consistent view of national policy. The persistent lobbying of many powerful groups with divergent demands increases the difficulty. As it was demonstrated in Chapter IX, the chief cause of the difficulty under the federal system in America is the failure of the national parties to develop clear-cut specific programs and firm party discipline. The majority is potentially in a position to control Congress and to resist the demands of interest groups, but it generally lacks a firm comprehensive program which it can agree to enforce in the national interest. If this is correct, enactment of repressive laws against lobbying is not likely to accomplish much. What is needed are party lines that do not falter or break before the thrusts of interest groups. Such party lines do exist in Britain, and although the phenomenon of organized interest groups is comparable to that found in the United States, the activities of these groups do not cause nearly so much alarm.

INTEREST GROUPS IN BRITAIN

In Britain, there are hundreds of organized interests taking the form of business, labor, professional, agricultural, reform, philanthropic, and other associations. In the range of interests thus served, if not in total numbers of organizations, the British phenomenon is comparable to that of the United States. On the economic side alone, there are hundreds of associations representing commercial, manufacturing, transport, shipping, agricultural, mining, and financial interests. Most of these are in turn linked together in a few great national federations like the Federation of British Industries, the Association of British Chambers of Commerce, the National Union of Manufacturers, and the National Farmers' Union. The numerous labor unions—which in 1960 totaled 183, containing almost 10 million of the 20 million labor force—have a common organ in the General Council of

the Trades Union Congress (T.U.C.), to which all but one million of the trade unionists belong.

No one of these large federations speaks with a single voice except on a few matters of broad general concern. On many if not most specific issues, the associations in a particular federation will speak discordantly. Professional and philanthropic interests are highly organized, often with national headquarters established close to the governing departments in Whitehall and to Parliament at Westminster. Important among them, for instance, are the British Medical Association and the National Union of Teachers, both of which speak for close to 90 per cent of their respective practitioners. Their purpose in every case is to advance the interests of their members and this generally involves the securing of legislative favors. As we saw in Chapter VII, the numerous associations of municipal governments and municipal government officials, headed by the 185,000-member National and Local Government Officers Association, are among the most effective pressure groups in Britain. And, of course, there are the usual civic, recreational, cultural, and educational organizations as well as some of the typically British 'special social sectional associations,' such as the two million-member Automobile Association and Royal Automobile Club, the Pedestrians' Association, and the Cyclists' Union.

The Techniques of Pressure. For reasons to be more fully discussed later, the working of party government with the cabinet in the driver's seat defeats attempts by interest groups to influence policy through winning over individual members of Parliament. The interests do on occasion try to influence the choice of candidates in particular constituencies, and to exact pledges from candidates by promising support or threatening opposition. Generally speaking, they cannot influence the choice of candidates because the local party associations know they must choose good party men. And the candidate, once in the field, must resist all pressure groups which would bind him to action contrary to the party line. So he refuses to give pledges. In Parliament, members almost always vote with their party. The interests cannot break its grip nor are they allowed to appear before parliamentary committees to press their views. Another important consideration here is that these committees, as will be seen in later chapters, are generalized, as in France, rather than specialized, as in the United States, and thus do not represent a fertile point of 'contact.'

WITHIN AND THROUGH THE POLITICAL PARTIES. The interests therefore must work within and through the parties instead of outside and against them.

While many groups remain outwardly non-partisan, some associate themselves directly with one or other party. The trade unions led the van in forming the Labour party and still constitute its main strength. The bulk of the election expenses of Labour candidates is provided by the trade unions associated in the Trades Union Congress. A Labour government is therefore particularly sensitive to the claims of organized labor. In 1960, eighty trade unions were officially associated with the Labour party.

Although no interest groups are similarly 'affiliated' with the Conservative party, the great organizations of employers, industry, trade, commerce, and farming must be regarded as aligned with the Conservatives.¹¹ For example, the National Farmers' Union gives a measure of support to the Conservative party. Not only was its president himself chosen and elected as a Conservative candidate in 1935, but he was also a member of a standing committee which later examined and reported favorably on a bill to assist the livestock industry. Without committing themselves fully, the aforementioned groups are thus generally sympathetic to the Conservative, or occasionally the Liberal, rather than to the Labour party, and they often endorse candidates. On the other hand, among the professional associations, the National Union of Teachers and the British Medical Association, for example, pledge support of one or more candidates sympathetic to them, but they are strictly non-partisan.

The mere fact that an interest group manages to smuggle a number of its sympathizers into Parliament under the cloak of one or other of the parties does not, of course, ensure it any great influence. Private members, standing alone, are quite insignificant, as the time afforded and the treatment given to private members' bills clearly shows. Most of the legislation sought by interests involves the expenditure of money, and private members cannot introduce such measures at all. If a private member's bill is unopposed in the House, as bills sponsored by the Royal Society for Prevention of Cruelty to Animals generally are, it may go through easily. But most private members' bills meet opposition, which means they must be debated. The time allotted for such debates is very short and only a few private members' bills ever reach the discussion stage. Finally, the cabinet has to be persuaded; the civil servants on whom the cabinet relies have to be convinced. Consequently, it is something of an occasion when a private member's bill actually becomes law.

¹¹ On this point, as well as on British pressure groups generally, see the excellent works by S. E. Finer, *Anonymous Empire* (London: Pall Mall, 1959) and J. D. Stewart, *British Pressure Groups* (Oxford: Clarendon Press, 1959).

CONCENTRATION ON THE CABINET. The interests seek to introduce bills through private members mainly for the purpose of getting publicity and building up an agitation that will persuade the government to act. *The interests know they must persuade the cabinet.* They also know that the cabinet is extremely susceptible to the temper of public opinion and of opinion in the House. So they supply members of the House with their literature, and encourage their sympathizers in the House to proselytize and initiate questions and debates bearing on the claims of the group.

This indirect pressure on the cabinet is not the most important activity of interest groups. All the great organized interests are also in close and almost continuous contact with particular ministers and with the cabinet, presenting their facts and urging their point of view. They often appoint a committee to make direct representations to the cabinet or to a particular department of the government. They watch all legislative proposals, and before a bill adverse to their interests goes to Parliament they make strong representations against it to the cabinet.

Interests Consulted. The cabinet, to ensure itself as much as possible against opposition in the House, generally consults all the organized interests concerned while the bill is being drafted. For example, when the bills for nationalizing the coal mines, air lines, and railways were being drafted, the Labour Government consulted both management and trade unions in these industries. Representations are heard on both sides, the criticisms made are subjected to examination by experts, and adjustments and concessions are made by the cabinet as far as it finds it possible to do so. After the legislation is enacted, the interests are generally represented on an advisory committee which is associated with the government department administering the legislation. The committee makes suggestions and criticisms, which often lead to substantial amendment of the legislation at a later date. The cabinet is continually mediating between a great range of interests, each of which claims to be representative of the public interest. It tries to find accommodations that are acceptable or tolerable to the interests concerned but that still enable it to carry out the pledges of the party.

When extremely contentious issues arise, on which the government wants fuller knowledge of facts before committing itself, a royal commission of inquiry, such as the Royal Commission on the Press in the 1940's and 1950's, to which a number of persons who know and can speak for the major affected interests are appointed, is often set up. These bodies perform a function somewhat similar to that of congressional committees in the United

States when they afford public hearings for the various interests on some legislative proposal. If the commission can produce a unanimous report, the government has some ground for hoping that the interest groups will accept its proposals.

A CASE STUDY. In any case, the interests are again consulted by the government before the government frames its bill on the recommendations of the commission. For example, the Minister of Transport submitted the Report of the Royal Commission on Transport of 1931 for comment and criticism to five local government associations, fifteen transport associations, four motor-ing associations, four trade unions, the Association of British Chambers of Commerce, the Federation of British Industries, and the Mansion House Association on Transport, and the National Federation of Iron and Steel Manufacturers. These interests could not agree. The railway companies and the road transport associations were far apart, as might be expected. The Minister was not yet prepared to state a policy of his own for action by the cabinet and Parliament. He called a conference of representatives of the interests in conflict, which did agree on a proposal, although the road transport associations still refused to accept it. In the end, the Road and Rail Traffic Bill produced by the government diverged somewhat from the recommendations of the Commission and also from the proposal of the conference. This illustrates the kind of negotiation that generally precedes the introduction of complex and controversial legislation into the House of Commons.

Important though organized interests are in the initiation of legislative proposals, their importance as critics of such proposals is even greater. As soon as a bill is published, the cabinet and appropriate government departments get representations from all interests that conceive themselves to be affected. It is often impossible to consult all interests before a bill is drafted. Those that were not consulted, and those that were but are still dissatisfied, urge their views as strongly as they can. If representations to the government are not effective, the interests then circularize the members of Parliament and get sympathetic members to urge their friends to protest. If the issue is one on which a general public opinion might be raised, that too is tried. A combination of these tactics is sometimes effective. To take only a few instances, the Incitement to Disaffection Bill of 1934 and the Population Bill of 1937 were very substantially altered by the government, and the operation of the Teachers' Superannuation Bill of 1956 and the Rent Bill of 1957 were postponed because of widespread dissatisfaction with them in the House of Commons. Organized interests had a considerable part in fostering this dis-

satisfaction. The objective of interest groups in Britain is always to convince the cabinet or the department concerned that proposed legislation should be passed, amended, or rejected.¹² They have a large share in shaping legislation, although it is not as important a share as in the United States and is achieved by different means.

INTEREST GROUPS IN FRANCE

According to Article 3 of the now superseded French Constitution of 1946, 'national sovereignty belongs to the French people. No section of the people nor any individual may assume its exercise.' This provision had been intended to preserve the fiction of a *direct* relationship between citizens and state in France and, at least on paper, perpetuated the general hostility of French constitutional and political theory to the existence of pressure groups. Charles de Gaulle, under his Constitution of 1958—and outside of it—has brought a real measure of actuality to the fiction as well as to the theory! Interest groups do still exist in France, of course, but as has already been demonstrated at some length earlier in this chapter, the dramatic shift in the core of governmental power from the legislature to the executive has brought about a major diminution in the influence of the French pressure groups. Nonetheless, they remain a factor to be reckoned with, and something more must be said about them here.

The Range of Organized Interests. Pressure groups as such have always been and are now less numerous in France than in Britain and the United States, but—when they are identifiable as organized interests at all—they fall into several major categories:¹³

BUSINESS. Large business concerns, primarily France's most powerful corporations, are organized in the *Confédération Nationale du Patronat Français* (C.N.P.F.), which is dominated by big steel, textile, and chemical firms. It resembles the National Association of Manufacturers in the United States in influence if not in structural organization. Small business, shopkeepers, the

¹² Sir W. Ivor Jennings, *Parliament*, 2nd ed. (Cambridge: Cambridge University Press, 1957), ch. vii. The sketch above of pressure groups in Britain is largely drawn from this volume. For more detailed data regarding the 'consultation' procedure between ministries and interests, see J. D. Stewart, *op. cit.*

¹³ For two good treatments of this subject, upon which this discussion has chiefly relied, see Bernard E. Brown, 'Pressure Politics in France,' *The Journal of Politics*, xviii (1956), 702-19, and George E. Lavan, 'Political Pressures by Interest Groups in France,' in Henry W. Ehrmann (Ed.), *Interest Groups on Four Continents* (Pittsburgh: University of Pittsburgh Press, 1958), pp. 60-95.

professions, and artisans are organized in the *Confédération Générale des Petites et Moyennes Entreprises* (P.M.E.), theoretically a branch of the C.N.P.F., yet actually not only autonomous but quite distrustful of its 'big brother.' It claims a membership of some 2.5 million and, as the spokesman of 'family enterprise' in France, has much popular backing. Pierre Poujade's now defunct right-wing political party grew out of one segment of the P.M.E.'s membership.

AGRICULTURE. The six million French farmers are organized in seven major interest groups, headed by the *Fédération Nationale des Syndicats d'Exploitants Agricoles* (F.N.S.E.A.) with about two million members. Their obvious goal is approximately the same as that of farm pressure groups everywhere: higher prices, subsidies, lower taxes, and other special farm legislation. A highly influential segment of the population, the French farmers' organizations suffer from a typically French malady—disunity and division among themselves. However, some of their efforts have met with signal success. Probably the outstanding example is the sugar-beet subsidy program, which has been a steady drain on the French treasury, with little, if any, relief in sight. The beet growers have been able to maintain their preferred treatment by 'log-rolling' with the grapegrowers, the distillers, and the many retailers of alcoholic products. Their newspaper, *Le Betteravier Français*, boasts of representing a 'huge organization, whose aim is to defend the beet-growers' interests day in and day out, to the best of its ability, *vis-à-vis* industry as well as *vis-à-vis* the public authority.'¹⁴

LABOR. Labor unions, though badly split in France, also carry on the customary lobbying activities, headed by the well-known 1,700,000-member Communist-led *Confédération Générale du Travail* (C.G.T.). Other important unions are the Catholic *Confédération Française des Travailleurs Chrétiens* (C.F.T.C.) with about 750,000 members, and the Socialist-led 400,000-member *Confédération Générale du Travail-Force Ouvrière* (C.G.T.-F.O.). Each union acts as an intermediary between its members and government departments in social security matters, for example. Labor's pressure is applied to the parties, deputies, and administrators alike. In general, however, the French labor unions have been considerably less successful in their lobbying activities than their American and British counterparts.

OTHERS. A few others among the French interest groups should be men-

¹⁴ *Le Betteravier Français*, February 1956. For a particularly pertinent discussion on this industry, see B. E. Brown, 'Alcohol and Politics in France,' *American Political Science Review* 51 (December 1957), 976-94.

tioned. There are family associations that lobby for social welfare legislation; clerical groups whose chief interest is state aid to parochial and private schools; veterans' associations *en masse*—there were fifty-four in 1963—headed by the influential three-million-member *Union Française des Associations de Combattants et de Victimes de la Guerre* (U.F.A.C.). Of the democratic states here discussed, France, having suffered most from wars, has by far the largest proportionate number of war victims and veterans. It is only natural that these 8,500,000 should attempt to obtain favorable treatment.

The Techniques of Pressure. As already stated, the main weapon of the French interest groups, which was the once so effective liaison with political parties, sometimes even outright transformation into a party, suffered a stunning blow with the advent of the Fifth Republic. There is still a natural tendency for farmers, for example, to ally themselves with the Independents and other parties of the Center and Right; for business to look toward the Center and the Right; for labor to exert pressure upon the parties on the political left. Furthermore, all major interest groups still have some liaison with individual deputies, who sometimes are officers of the interest groups themselves. For example, several Communist, Socialist, and Popular Republican deputies are leaders of the French labor unions and many influential businessmen have been elected to Parliament as Gaullists, Independents, and Radicals. On the other hand, it is obvious that certain pressure groups, the home distillers, for one, continue to make almost a fetish of repeatedly claiming 'complete independence of political parties'¹⁵—a notion so dear to de Gaulle. All of the interests, however, now must and do look to the Gaullist majority for their bounty—and, as has been repeatedly stated, that bounty is no longer the legislature's to give but must come from the fountain-head of all meaningful power in the Fifth Republic, the executive. The latter cannot, of course, ignore the interests—a lesson brought home with the two successful general strikes of 1961—but the executive is now his own boss and decision-maker: no longer must he worry about and mollify the legislature as the interests' 'representatives' except in a very marginal and perhaps psychological sense.

Summation. In the United States, Britain, and France, the interests seek to be heard, not only on what laws should be made, but also on how the laws should be administered and enforced. In fact, as will be shown in detail later, they are as closely connected with the process of administration as with law-making. The various interests that make up modern society have found

¹⁵ Cf. A. Lyantey, in *Le Bouilleur de France*, April-May 1956.

means of access to government which ensure that their knowledge, experience, and point of view will not be overlooked. The arguments for proportional and occupational representation, to be discussed in the next chapter, have been met in Britain and the United States by arrangements that, although by no means free of abuses, are less dangerous to democratic institutions. It should also be clear that the present-day phenomenon of assertive pressure groups arises largely from the wide range of governmental functions, and that it is only in this context that the significance of lobbying and kindred practices can be appreciated.

In a democracy, the political parties must seek, at least ostensibly, to represent all groups and classes in order to obtain the necessary majorities. This is the ideal of democratic government—the representation of all—but behind it group adjustment goes on. Rather than abolish political interest groups, they can be accepted as natural in a political democracy. Of course, they have a significant influence on the actions of both executive and legislature. They supplement the activities of political parties in moulding the exercise of both legislative and executive power. Neither of these two branches of government operates in a vacuum.

When all is said and done, we may safely return to the sage statement by Arthur F. Bentley, over half a century ago, in his classic, *The Process of Government*, that ' . . . governments are but the interest groupings wrestling with one another.' ¹⁰

THE DICTATORSHIPS AND VOLUNTARY ASSOCIATIONS

Liberal democracy has been marked by a wide freedom of association. Because the state could not be all things to all men, the human need for fellowship and for extensive social co-operation has been met by voluntary association outside the state and free of interference by government, as long as the association restricts itself to lawful purposes. Many of these associations turn into pressure groups trying to influence government. A striking feature common to the phases of totalitarian dictatorship in Germany and Italy, and to Communist rule in the Soviet Union, is the destruction of the independent organization of group interests and associations. Dictatorship exalts the state, insists that men must find their meaning in the service of the state, and forbids them to have any loyalties outside the state. Dictators do not want the

¹⁰ *The Process of Government: A Study of Social Pressures* (Chicago: University of Chicago Press, 1908), p. 307.

government to be diverted or distracted in its sublime mission by narrow selfish interests. Pressure groups, as such, are abolished.

With the elimination of capitalism in the Soviet Union, most of the diverse economic interests associated with it also disappeared. According to socialist theory, the abolition of profit and private property automatically dissolved the diversity of economic interests and replaced it with one common interest, the maximum productivity of the economy as a whole. Consequently, the leaders of the Soviet Union believe that there can be no clash of economic interests in the Soviet Union because all capitalists have been eliminated, and the methods of obtaining maximum productivity have been determined by scientific socialism. In the absence of private competition, the government is free from the obnoxious pressure of groups whose aim is to derive private gain from government policies.

The trade unions, being workers' organizations whose strengthening had been one of the slogans of the Revolution, were continued. However, as we shall see presently, they came entirely under the control of the Communist party and lost their freedom meaningfully to agitate and exert independent pressure on the government. Similarly all other associations that are allowed to exist in the Soviet Union are strictly controlled or specifically tolerated by the party and the government.

Nazi and Fascist Control of Associations. In totalitarian Germany and Italy, the dictators did not tear down the existing social and economic structure with its wide diversity of organized group interests. Rather they reconstructed the jumble of divergent group interests by sternly co-ordinating each of them with the aims of party and government. By pressure and compulsion, associations representing group interests were persuaded to elect as their officers party members or party sympathizers. The associations ceased to be independent organizations lobbying the government; they became instruments by which the government enforced its drastic policies on the groups of which the nation was composed. Under party leadership and control, many groups of the type discussed in this chapter became more highly organized than ever before, and the government delegated to them wide powers of self-government. However, it was not genuine self-government. The associations lost their autonomy and vitality and became merely administrative departments of the government for executing its policy. A good example was the abolition of the independent German trade unions and their state-compelled 'fusion' into the state-supervised *Arbeitsfront*, to which all workers, and most employers in trade and industry, were forced to belong.

The workers were completely regimented, with the Nazi government determining wages (low), hours (12 daily), and even the place and type of occupation.

Modern totalitarian dictatorships cannot tolerate independent group life. It has already been pointed out that political parties in the democracies are, in large measure, combinations of group interests. If the dictators allowed groups their independence, many of them would combine to oppose the government. That is to say, opposing political parties would, in fact, be formed despite the ban on them. Therefore, the organized groups had either to be liquidated, or co-ordinated and knit into the governmental structure. Groups that had objectives the dictators did not like were liquidated. All others were turned into instruments of the totalitarian purposes of the dictators.

GROUP INTERESTS IN THE SOVIET UNION

The Trade Unions. The trade unions in the Soviet Union have been made to serve the totalitarian purposes of the government. They are completely dominated by the Communist party. Most of the trade union leaders are high party officials, and the unions are mainly used to enforce the policies of party and government. For many years, the Soviet trade union chief was Lazar Kaganovich, until his expulsion by Khrushchev in 1957 one of the most powerful members of the party 'elite.' Trade unions are no longer independent bodies seeking primarily to improve the lot of their members; they are rather mass organizations whose main function is to discipline the labor force and press it into enthusiastic service of the state. If the trade unions are to be used effectively for this purpose, it is necessary to have most of the industrial working force inside the unions. While membership in a union is theoretically voluntary, a worker suffers serious disadvantages in remaining outside, and about 90 per cent of the workers are now members.

In 1933, to popularize their then announced new role of 'assisting management in increasing production,' the trade unions took over some essentially governmental functions, administering social insurance funds, arranging holidays and cultural programs, and supervising certain activities in the factories such as control over safety devices. In this way, they became, in effect, executive agencies of the government. Obviously, they cannot act as private pressure groups seeking to further the special interests of their members.

Today Soviet trade unions promote extensive social and cultural activities among the workers and engage in collective bargaining on a nation-wide scale. However, collective bargaining in the Soviet Union is not at all what it is in Britain, France, or the United States. Because the capitalists, the enemies of the workers, have been eliminated, the traditional function of the trade union, the protection of the workers from the capitalist exploiters, no longer exists. So, collective bargaining is carried out on the assumption that labor and the socialist managers of industry have identical interests: maximum production at minimum cost. The total wages fund is fixed by the government in its general economic plan, and collective bargaining merely determines how that fund shall be divided among the workers.

Other Associations. The trade unions are only one of many organized groups in the Soviet Union. Others represent the professional or recreational interests of sections of the population. There are the various co-operatives, some interested in agricultural production, others in the co-operative building and management of dwellings, etc.; youth organizations, groups interested in sports; technical and scientific organizations, such as the Academy of Science of the Soviet Union; and cultural organizations. The activities of all these groups are controlled by the Communist party. Its aim is to harness the group membership into loyal and persevering work for the state, and the groups are expected to conform to these standards.

In the early days of Communist rule in Russia, for instance, a group of writers with common literary interests formed the Pan-Russian Union of Writers. During the bitter struggle between Trotsky and Stalin, this group was sympathetic to Trotsky. Stalin was instrumental in setting up a rival group, the Russian Association of Proletarian Writers (RAPP). Stalin's victory over Trotsky led to the elimination of the older association, largely through giving control of the publishing houses to the newer association, and through the activities of the secret police. Then, in the middle 'thirties, RAPP displeased the leadership of the party and a new association, the Union of Soviet Writers, was founded to take its place. All associations of whatever kind are controlled in the same way. None is permitted to organize without state authorization.

Pressure from Within. The government runs the economic system and supervises social and cultural life. Because there is very little of Soviet society outside the government, it is hard to exert pressure on the government from the outside. However, the push and pull of diverse interests is not wholly eliminated. The innumerable state organizations, government departments,

state trusts for running particular industries, state banks, state trading companies, planning agencies, and so on, compete with one another for favored treatment by the masters at the top of the pinnacle.

The managers of the various branches of Soviet industry develop a pride in their projects and have a vested interest in expanding their particular enterprises. The numerous planners themselves have pet projects the success of which seems to them vital for the welfare of the Communist society. So within the government itself, there is a wide division of interest and opinion, and therefore much devious lobbying of those who have the power to decide. However, these various interests cannot organize independently of the government and they must be cautious about the kind and intensity of pressure they exert. Indeed, what goes on is a kind of 'palace politics,' comparable to the rivalry of the courtiers for the favors of an absolute monarch.

PUBLIC OPINION

Democratic government has been defined as government in accordance with the will of the people. The people, in this sense, means the electorate, which, in the countries in question, embraces almost the entire adult population. Taken literally, government in accordance with the will of the electorate means that every member of the electorate must be consulted and must agree before a democratic government can embark on a significant line of policy.

It is clear that this is not so. Democratic legislatures often pass, and democratic executives often enforce, legislation that was not in issue at the last election. Nor does the succeeding election always bring a specific verdict of the electorate on such legislation. Even when it does, the enforcement of the legislation in the interim may have had far-reaching consequences which cannot be undone. Also, it has been remarked again and again that the electorate when it is consulted is never unanimous. There is always some dissent in some section of the electorate on whatever proposal is made for government action.

GOVERNMENT BY PUBLIC OPINION

If the familiar definition of democratic government quoted above is to correspond to realities, two qualifications must be introduced. First, govern-

ment in accordance with the will of the people cannot be taken to mean consultation on every act of government. Rather it must be taken to mean that periodically each member of the electorate is enabled to state his preference between the candidates and announced policies of two or more political parties. In casting his vote, he may be deciding on the announced policy of parties for the future, on the past record of the parties in and out of power, on the personalities of the candidates, or on some combination of these factors. It would be impossible to discover what factors were decisive for each voter. But this very uncertainty disposes the political parties to take care of their present record, their future program, and the candidates they sponsor. Pronounced attitudes in the electorate have an enormous influence on the behavior of the political parties, either directly or indirectly. Where a crisis of obviously large significance for the community sharply divides the political parties, rouses prolonged debate, and over-shadows other less critical issues, the electorate is certain to get a chance to express itself very directly on the critical question in the next election. If a majority of the electorate is opposed to the policy of the party presently in control of the government, it can change its rulers and bring to power another group of politicians with a policy more to its liking.

This brings us to the second qualification: government in accordance with the will of the people means at most that it is the will of a majority that prevails on controversial questions. Sometimes, as we saw earlier in this chapter, it is merely the will of a vocal, influential, and/or well-organized minority. The fact that there is a controversy ensures that some portion of the electorate will be dissatisfied with any decision taken. The will of the people is not necessarily the will of all. Even then, the majorities are mustered only occasionally, and say their say on only a small fraction of the specific decisions that are taken in the name of government.

The Electorate's Influence. What has just been said refers only to the influence and control exerted by the electorate through elections. However, in earlier chapters we have seen that the influence of the electorate is not limited to voting in elections. Between elections, the political parties are always looking forward to the next election, searching for methods and measures that will be popular, and trying to avoid policies that will be unpopular. Party organization, especially in Britain, and particular politicians everywhere, are constantly seeking to plumb opinion in the country. At the same time, they are attempting to influence the development of opinion. Speeches in the legislature and by the executive—whatever the medium

employed—are addressed to the country. Political leaders find many other occasions for utterance designed to enlighten, placate, or mould opinion. Elections are intermittent dramatic interventions by the electorate. Between elections, the democratic electorate maintains constant pressure on its rulers through what is generally called *public opinion*.

Those who are impressed with the effectiveness of this pressure, both in influencing the conduct of government between elections and in shaping the issues and selecting the political leadership for the next election, describe democracy as government by public opinion. The democratic governments chiefly discussed in this text respond to public opinion, but the nature and, particularly, the rapidity of the response differ considerably among them.

Interest Groups and Public Opinion. However, as we concluded earlier, as a practical matter in a democracy, public policy, the decision of what government is to do, always emerges from the competition, clash, and compromise of a great variety of individual and group interests, with important roles assigned to both political leadership and public opinion—no matter how vague and fluctuating the latter may be. It follows, then, that a basic concern of all interest groups is the character and the nature of the opinions that exist in a given community. No organized group, no group leader, can engage in the luxury of being indifferent to public opinion, regardless of whether such opinion is manifested in the full-fledged members of the interest group itself; in the ‘hangers-on’—Professor Truman calls them the ‘fellow-travelers’;¹⁷ in the unorganized mass which may or may not be neutral or indifferent; or in the hostile element of society.

DEFINING PUBLIC OPINION

Few concepts are quite as hazy as that of *public opinion*. As a distinguished observer of the field, Professor V. O. Key, once put it: ‘To speak with precision of public opinion is a task not unlike coming to grips with the Holy Grail.’ Some attempt at definition is therefore necessary.

What It Is Not. It seems to be easier to find some agreement on what it is *not*. No serious present-day student of politics would, for example, still defend the centuries’-old proverb, *vox populi, vox dei*. It is hardly that! Indirectly, popular control over governmental policy does exist in a democracy, but on a host of matters a substantial segment of the people has no well-thought out opinion at all, and either ‘go along’ or ‘don’t care’—so long as a

¹⁷ Truman, *The Governmental Process*, ch. vi.

particular policy does not obviously affect them personally. Thus, it should also be apparent that public opinion is by no means necessarily over-all *majority* opinion, for, as we have already shown, there may be many, varying 'public opinions,' and it may be difficult, indeed, to find a true majority opinion—short of a desire for peace and a belief in God. Yet opinions will usually differ sharply on how to obtain or retain the first and on the form the second should take.

What It Is. If, as many commentators on public opinion prefer,¹⁸ we separate *public* from *opinion* for the purpose of analysis, we note that '*public*' refers to a 'group'; it is synonymous with 'group.' It is *a* group which is giving attention in any way to a given issue—a government subsidy on tobacco, for example. It follows logically that there may be several divisions within the group on the issue of subsidizing tobacco—those for, those against, those in-between, and so forth.

'*Opinion*,' in turn, is the *expression* of an attitude on the controversial issue, point, or proposition of subsidizing tobacco. And *public opinion*, then, *consists of the aggregate of the opinions* (on the government subsidy) *of individuals making up the public under discussion*. It includes only those opinions relevant to the issue or situation that defines them as public, not *all* the opinions held by that set of individuals.¹⁹

Two important points should be noted about this definition. First, it asserts that there are as many publics as there are issues. Second, that public opinion consists of an aggregate of views which may be divergent and clashing, which at any rate do not all point one way. According to this definition, public opinion need not be the opinion of a clear majority of the electorate. Nor does the definition require one to believe that on every public issue a clear-cut majority opinion can always be created by opinion.

CONSENSUS. Of course, in any community that is united at all, there must be matters on which it really is united. In genuinely democratic countries, at any rate, there are always some fundamental beliefs that almost all approve—however few these may be, as recent research in the United States has shown. This is called *consensus*, and for the three countries discussed here roughly corresponds with the liberal democratic ideals outlined in Chapter II. These ideals, the consensus, are scarcely open to any debate at all because

¹⁸ See Truman, *op. cit.* pp. 218–20; John Dewey, *The Public and Its Problems* (New York: Henry Holt, 1927), pp. 12–17; and William Albig, *Modern Public Opinion* (New York: McGraw-Hill, 1956), pp. 3–8.

¹⁹ Truman, *op. cit.* p. 220.

there cannot be a really serious controversy about them, such as there can be about subsidizing tobacco.

At the other extreme, there are a multitude of matters on which there is no agreement at all. To many of them, some members of the public will give attention and make up their minds pro or con. Some issues may become so important, arouse so much interest, provoke so much discussion, that a clear majority of the electorate will come down on one side or the other. Whether it does or not, *public opinion*, as defined here, *consists of the aggregate of opinions on specific issues*.

MOULDING PUBLIC OPINION

A good many forces and factors play a role in the formulation, the determination, of public opinion. Sometimes they combine for decisive effect; sometimes one single factor is chiefly responsible for the determination. But given the complex society of our day and the pluralism of democracy, usually a combination of influences rather than a single one shapes public opinion. We have already seen, and shall again, the roles played in the process by legislatures, executives, political parties—government generally—as well as by interest groups. All these forces both mirror *and* manufacture public opinion, for good or evil. The same is true of some important others, which we shall examine briefly.

The Basic Institutions. Home (family), church, and school are generally viewed as the 'basic' institutions in a free society. Each citizen bears allegiance to, and is influenced by—be it negatively or positively—each of these three. The firmness of allegiance and degree of influence differ widely, but these institutions play a definite role—often a crucial one—in the formulation of public opinion. Strongest of them is the home or family, whence come most of man's basic values, mores and predispositions. However, depending upon the individual's tradition, belief, and attitude, the church, too, may well be a mighty factor in the influence it exerts upon its membership. And while the influence of school, no matter what the educational level, may at times be overrated in relation to that of the other two basic institutions, there is little doubt that the lamp of learning often contributes to the light, or darkness, surrounding major issues when public opinion is coming to grips with them.

Media of Communication. In a sense, church and school are media of mass

communication (means of conveying information and ideas to the masses), but that term is usually applied to the press (newspapers, magazines, and news agencies), radio and television, books, movies and theaters. In greater or lesser measure, each of these media of communication wields influence upon public opinion; indeed, they have often demonstrated power to color, mould, and create public opinion. All of us are exposed to some, if not all, of the media above, and we adopt points of view from them even as we adopt the opinions of friends, associates, parents, and members of our clubs and fraternities. One or two of the media of communication require more specific attention.

THE PRESS. The press is usually thought of as one of the most influential moulders of opinion in democratic states. But today's press suffers from being essentially 'big business,' with the possible exception of the steadily dwindling small-town dailies and rural weeklies. It may be said that the press has moved from the status of a profession to that of a big business, open only to those with the financial ability to 'make a go of it.' Gone are the days when practically each segment of political, economic, and social thought had a newspaper, however small, dedicated to expressing its views or at least had free access to one. Gone, too, are the days of spirited competition among many local papers. Instead, we have the one-newspaper town, even the one-newspaper city, and large newspaper chains span the country.

This decline of competition among newspapers, and the resultant trend toward concentration and monopoly, especially in Britain and the United States, is a simple matter of economics. To publish a newspaper in the mid-twentieth century is a major financial undertaking. To start even a four- or six-page daily small-town newspaper in the United States today, requires a minimum dollar outlay of six figures. Yet circulation has risen rapidly even as the number of newspapers has declined. At the end of 1962, daily circulation in the United States had reached 59,009,159, almost *triple* the number of readers in 1910; but the number of dailies had declined from the 1910 high of 2202 to 1850 in 1962.²⁰ Between 1952 and 1962 alone, rising production costs had killed 219 newspapers. Of the cities having daily newspapers, only 4 per cent had more than one at the end of 1962—as compared with 67 per cent in 1910. The chains, the great publishing corporations, such as Hearst, Scripps-Howard, and Newhouse, owned almost half the total number of dailies, and they have reached out to control related and associated

²⁰ All figures are taken from *N. W. Ayer & Son's Directory* (Philadelphia: N. W. Ayer & Son, 1963).

enterprises as well—e.g. news agencies, magazines, radio and television stations. In Britain, the press has undergone a similar transformation, and has been brought even closer to monopoly control. A few huge corporations control almost all the metropolitan newspapers and the bulk of the newspaper circulation in the country. In France, although circulation has declined, a larger proportion of the dailies remains independently owned and operated. A higher proportion of the French dailies is *avowedly* partisan, however.

The individuals who control and manage the great and near-great publishing corporations are absorbed in the same or similar problems as their counterparts in large industrial, commercial, and financial corporations. They talk one another's language and move in the same social circles, chiefly among bankers, industrialists, and others of the executive class. It would be surprising if their interests and associations did not influence their outlook on many public questions. Moreover, because much the greater part of the income of daily newspapers stems from advertisements, advertisers may exert considerable influence on editorial policy. On the other hand, an often totally different political and editorial attitude is expressed by these newspapers' columnists and reporters. Richard M. Nixon blamed his narrow 1960 election loss to John F. Kennedy on 'biased campaign reporting.'

These factors raise questions about what the press will do to public opinion. How, it may be asked, will readers in the United States, for example, be able to form independent, intelligent views if the wealthy and powerful owners of the increasingly monopolistic press have imposed on their newspapers, as some assert they have, a 'party-line' of 'conservative Republicanism'? There is a threefold reply:

First, increased educational opportunities enable larger segments of the public to evaluate data more carefully and more intelligently than heretofore. Second, while it is true that in national presidential elections in the United States since Woodrow Wilson's time no Democratic candidate has ever had the active support of more than 15 per cent of the press, President F. D. Roosevelt was elected four times by large majorities and President Truman won over Thomas E. Dewey in 1948 in the face of almost unanimous press opposition—he had the support of only two dailies in the entire North and East!²¹ The victories of the Labour party in the 1945 and 1950 elections in Britain were likewise won in the face of a predominantly Conservative press.

²¹ For a study of how 31 leading newspapers handled the 1952 presidential election campaign, see A. E. Rowse, *Slanted News* (Boston: The Beacon Press, 1957). In the 1956 campaign, Adlai E. Stevenson was backed by not a single newspaper among the dailies in Connecticut, Delaware, the District of Columbia, Maine, North Dakota, Rhode Island, and Utah.

Third, the press is not as close to monopoly control as discussion sometimes seems to suggest. The industry is still competitive, although the competition is, in the terms of the economist, quite imperfect competition. The competitors are limited in number, protected from the intrusion of outsiders by the large capital requirements for entrance into the industry. But they still struggle—and often struggle fiercely—for their place in the market. They do not engage in price wars, but they do fight for ‘scoops’ in the news. And they must face outside competition from pamphlets, magazines, movies, theater, radio, and television. As long as this continues, there cannot be anything approaching an organized conspiracy to censor the news.

RADIO AND TELEVISION. In providing entirely new means of communication, radio and television have become highly significant and have helped to maintain a measure of competition in the distribution of news and formation of opinion. However, the sharply limited number of wave lengths available made this communications industry semimonopolistic from the beginning, and posed at once the problem of controlling it in the public interest—a task that was given to the Federal Communications Commission. Moreover, the need for international agreements to allocate clear channels on an equitable basis has meant that governments have had to retain a much closer contact with radio broadcasting than with the press. Not only do technical factors limit the number of radio and television stations, but the amount of material presented over the air is also restricted within the inflexible boundaries of a twenty-four-hour day. Radio and television, unlike the press, cannot add a few pages to take care of extra material.

Furthermore, despite some hopeful signs to the contrary, radio and television are still primarily instruments for entertainment rather than for imparting information or formulating opinion. Even in performing the latter function, radio and television must depend on the spoken word and the screen, which, while permitting greater dramatization of events, lack the staying qualities of the written word. An appreciation of this limitation probably accounts for the repetitiveness of modern advertising on radio and television. By constricting reporting of events into brief word-pictures and screen-flashes, radio and television have helped to increase the interest of the public in news but, at the same time, they have undoubtedly strengthened the current trend toward the standardizing of ideas for easy assimilation by busy people. The pace of modern civilization gives us less and less time to sift the material from which we are expected to make decisions on increasingly

complex issues. Digests, picture magazines, the radio, and television best fit this new pattern of existence.

Radio and television have been widely regarded as valuable aids to liberal democratic politics. The recent increase in electoral participation at United States presidential elections, for one, has been widely attributed to the use of radio and television in politics, particularly television. The Nixon-Kennedy T.V. debates during the 1960 presidential campaign were viewed by an enormous audience and played a role in the Kennedy victory. The major portion of the budgets of political parties is now devoted to radio broadcasting and to the expensive television. Some observers have even gone so far as to suggest that radio and television have re-established that direct contact between political leaders and followers that characterized Athenian democracy. It is true that leaders can now appeal substantially to the whole people as did the leaders in classical times. But radio and television can only establish a one-way contact: listeners and viewers are passive rather than active participants in the discussion of ideas by their leaders. Citizens' forums, Town Halls of the Air, Round Tables, and the like make possible a limited exchange of ideas on public issues, but this is far from setting up the conditions of Athenian direct democracy. Dictators have taken full advantage of the one-way appeal of radio, and now television, to indoctrinate masses that are in no position to answer back. However, even for dictators, this type of communication is limited because mob hysteria cannot be whipped up easily amongst a scattered radio and television public. The 'fireside chats' of the late President Franklin D. Roosevelt probably exemplified the most effective political use of radio as an instrument of democracy, and the addresses by President Eisenhower and President Kennedy's 'rocking chair' news conferences did the same with television.

RADIO AND TELEVISION IN BRITAIN. Since 1927, radio broadcasting in Britain has been monopolized by the British Broadcasting Corporation, a semi-autonomous government corporation. Financed largely by listeners' fees, the Corporation permits no advertising over its radio and television stations. Regional organization of program service gives a limited range of choice for listeners. The fact that the Corporation can balance its programs and direct them to various groups, regardless of their size and purchasing power, enables it to offer a variety of fare. Opinion differs on whether that variety is comparable to the range of choice provided by sponsors in the United States. An interesting development in this connection is the establishment of a *commer-*

cial television network (I.T.V.) in Britain. It relies on advertisement for revenue and goes in for popular programs. Its long-range effect, if any, upon the present B.B.C. monopoly remains to be seen.

Working through a number of advisory committees, the B.B.C. can place its programs without thought for advertising revenue on the strictly educational value of its offerings. This would suggest that the Corporation is in a better position than broadcasters in the United States to exploit radio and television as instruments of communication and opinion-formation. Hence, cautiousness in using radio and television as positive instruments of political discussion in Britain arises not from a concern for advertising revenues but from a concern for preserving political neutrality. In developing its role as an instrument for the formation of public opinion, the B.B.C. tends to become itself an object of public opinion and partisan criticism.

This indicates the difficulties that a government-operated radio and television system encounters if it tries to stress the media's social or political functions. If it is to remain impartial, such a government-managed system cannot go far in a positive educative role, and in some instances it may be difficult for it to get general acceptance as a neutral channel of communication. The difficulties that arise from charges of political partisanship are not so acute when radio and television are left in private hands subject to governmental regulation. But then radio and television come under the control of a few; they perform such educative functions as advertisers will pay for, and their neutrality comes equally under suspicion.

URGENCY OF FREE RADIO AND TELEVISION AND FREE PRESS. In the liberal democracies, it is not easy to make radio and television—whether under private or public auspices—a positive force in enlightening or focusing public opinion. If radio and television are to assert themselves significantly outside the field of entertainment and the news summary, they require much greater encouragement and backing from an enlightened public. Radio and especially television are still young, and experience with their use and their control is still limited. But, at the moment, it is plausible to say of radio and television, as of the press, that we get the kind we deserve.

Pressure groups, public relations agencies, and propagandists of every kind try to reach the public through all the instruments of mass communications. The breakdown of democracy in continental Europe was accompanied by great blasts of anti-democratic propaganda. As a result, there is considerable demand for the curbing of propaganda. It is by no means clear, however, that the anti-democratic propaganda in Europe would have been at all effective

but for the convergence of a number of other favorable conditions. Nor is it at all clear that, given these conditions, any curb on propaganda would have saved the European democracies. Democracy depends on free discussion; it cannot afford to limit discussion except in rare circumstances on clear proof that limits are necessary. Rather it must trust that one brand of propaganda will be counteracted by another. The trust will be misplaced unless we can assure a fair degree of freedom of access to the instruments of communication. That is why a genuinely free press and an impartially administered radio and television system are of such critical importance.

MEASURING PUBLIC OPINION

Many persons and groups, both in and out of public life, seek to use public opinion and to influence it. They need, first of all, to know what it is. If it is favorable to them, they want to be able to urge that it should have its way. If it is found to be unfavorable, they want to take steps to change it. Newspapers first revealed an interest in the measurement of opinion over a century ago when they began to conduct 'straw votes' as a means of predicting election results. It is a far cry from this casual method of measurement to the refined sampling techniques now being developed and applied by some forty private polling organizations in the United States alone.

The Public Opinion Polls. The 'pollsters' divide the population into a number of categories, and select from each category a limited number of persons to be interviewed—usually the national *sample* is between 1500 and 6500²²—on the assumption that the opinions expressed by this minuscule sample, drawn from each category, will be a fairly accurate index to the state of opinion in each of the categories as a whole. Then if the samples have been selected properly, the views expressed by this public in miniature presumably come very close to the opinion of the general public—subject to a reasonable margin of error. In making up the representative samples,²³

²² In letters to Senator Albert Gore (D-Tenn.) in 1960, George Gallup and Elmo Roper—the two most prominent American pollsters—reported that their average national samples are based on 1500 and 3000 persons in their respective polls. (*The New York Herald Tribune*, February 12, 1960.) Thus, a typical national Gallup survey evidently covers but .0013 of 1 per cent of the nation's current adult population. (In 1934 Gallup had become the first person seriously to apply sampling techniques to political phenomena.)

²³ There are two major types of sampling in *commercial* polling: *stratified-quota* and *random-area*. The former consists of selecting certain factors—e.g. number of voters, age, sex, community-size, economic status, party adherence in the population—and endeavoring to represent these in correct proportion to the sample. In random sampling, on the other hand, interviewers

polling organizations must know the distribution of the population according to region, rural or urban residence, age, sex, education, occupation, race, and economic status. The samples are usually checked against official census data, election statistics, and the like to make sure that each category of the public receives its proper weight.

After the samples have been carefully chosen and weighted, it is necessary to guard against possible distortion of the results at various stages in the polling process. The wording of the questions may be ambiguous or may prompt a particular response from the person polled. This difficulty has been overcome, in part, by careful preparation of test questionnaires, which may be revised a dozen times before the final poll is taken. At the personal interview, the attitude of the questioner, his timing, or the inflection of his voice may affect the response. Careful selection, and even special training, of interviewers avowedly help to guard against error from this source.

CLAIMS OF PROPONENTS. With only about thirty years of experience, the public-opinion polls have established a place for themselves, but it is difficult to assess their usefulness accurately. The nadir of the polls came in 1936, when the *Literary Digest*, using mail ballots, predicted Landon's election by a comfortable margin largely because it had concentrated on people with a telephone listing and/or an automobile registration! When Roosevelt won by 10,500,000 votes, the *Literary Digest* did the decent thing and went out of business! Today's champions of public opinion polls contend that they make it possible to measure opinion more frequently and at the moment most appropriate for particular issues; that opinion on particular issues can be polled in isolation, free from the distracting personal factors and the multiplicity of issues that confuse elections; and that the polls also enable us to inquire whether or not public opinion on an issue like the control of venereal disease, which gets little open public discussion, has crystallized sufficiently to indicate support of government action.

It has also been argued that both legislators and administrators can make use of the polls. Members of the legislature do engage in polling their constituents in quite unscientific ways, often asking the proverbial 'When did you stop beating your wife?' variety of question to support already estab-

are assigned certain geographical areas—e.g. a block, section, township, county, city—where he interviews every 'nth' individual located at an assigned position—e.g. the fourth one-family house from the southwest corner of a block, moving west. (See Albig, *op. cit.*, ch. 11, especially pp. 200–208.) For a brief discussion of *private* polling, see the comments on the Michigan Survey Research Center (S.R.C.), *infra*, p. 394.

lished preferences. They might be able to take a firmer stand on public issues if they had a reliable means of testing the claims of the lobbyists to public support. It is sometimes suggested that the standing committees of Congress might use the polls to supplement their public hearings. In the administrative field, the United States Departments of Agriculture and Commerce have made use of polls in the working out of departmental policy as has the United States Information Agency. If public opinion polls came to be widely used by legislators and administrators, they could scarcely be conducted under private auspices. Also, it must be remembered that legislatures claim to be the experts on public opinion, and so are likely to impose sharp limits on the polling of public opinion by government departments.

Adverse Criticisms: QUESTIONABLE ACCURACY. Critics of the polls argue that the basic assumption on which the claim for accuracy in the polls rests is unjustified. They question whether opinion in each of the age, sex, economic, and other categories is homogeneous, whether the opinions expressed by the representative samples can safely be taken to be representative of the opinions held by the public as a whole. They also contend that, as the public concerned varies with each issue, the factors taken into account in making up the sample should vary with each issue.

EQUALIZATION OF OPINIONS. The polls are also criticized for assuming that every man's opinion is of equal importance. Men have equal voting power, it is true, but there is unequal influence on the votes of others in an election, and on the opinions of others in open discussion. Therefore, opinion should be assessed *qualitatively* as well as quantitatively. For example, it is necessary to give additional weight to the opinion of a political leader, although it would be extremely difficult to say how much. Through the use of what are called filter questions, the polling organizations have tried to meet this criticism. Those questions explore the information and knowledge on which individual opinions are based. In this way, some approach to qualitative analysis is presumably made possible.

DIFFICULTIES OF MEASUREMENT. However, in those instances in which the polls are prepared as a commercial product for consumption by the rank and file of newspaper readers, questionnaires normally cover a wide range of topics without going very deeply into the intricacies of any of them. Because of the nature of the market, there is a tendency to select the most recent and lively issues for measurement without sufficient regard for their complexity. For example, in 1956 a national magazine ran a readers' poll on 'who would be the victor in a hypothetical Eisenhower-F. D. Roosevelt

election contest today.' (The results gave the victory to the latter.) If the polls are to measure more than the surface drift of the moment, they must use detailed questionnaires that go more deeply into particular issues, as some polling organizations have done. Only in this way is it possible to estimate the grounds on which an opinion is based, and to judge its intensity and stability.

SHALLOWNESS. Critics also urge that, in so far as the questionnaires fail to probe beneath the surface, the polls give a misleading impression of the firmness of opinion on public issues. If a majority appears in the 'yes' column, it is popularly taken to be a matured majority opinion. Possibly, however, it may be the result of a considerable number of unreflective, uninformed judgments, judgments that would be quickly modified by open discussion. How really meaningful *are* the so-called 'closed-end' questions—i.e. those calling for a 'yes,' 'no,' or 'don't know' response? Also, these opinions are generally given by people who will never have to assume direct responsibility for them. How many of them would be prepared to act on the basis of these opinions?

IRRATIONAL ELEMENTS. A frequent criticism is that the polls tend to introduce irrational elements into elections. The desire to be on the winning side is sufficiently strong and pervasive to be a factor of some importance in elections. In so far as polls taken in advance of an election suggest a pronounced drift of opinion, the very fact that the drift is indicated is likely to accentuate it. This point has been much discussed in recent years, in Congress and elsewhere, but without any definite conclusions. It is also urged that the polls tend to undermine the representative system by encouraging the uninformed to make judgments on complex issues, and by suggesting that majorities have made up their minds on such issues.²⁴ It has already been contended in the preceding chapter that the electorate is not qualified to rule directly on intricate technical matters. Professor Hans J. Morgenthau, a confirmed critic of polls, regards them as 'the curse of democracy. The man in the street doesn't walk around with his head full of foreign-policy alternatives.'²⁵ But the majority opinion inferred from the results of a poll does not become law, and as long as public officials are dubious of the accuracy of the results, the influence of the polls on governmental action is not likely to be excessive.

²⁴ For a very hostile evaluation of polling, stressing these particular points, see Lindsay Rogers, *The Pollsters* (New York: Alfred A. Knopf, 1949).

²⁵ As quoted by *Newsweek*, January 14, 1963.

The 1948 Debacle. The striking failure of the polls to forecast accurately the 1948 presidential election weakened public confidence in the accuracy of public opinion polls but did not destroy it. The episode brought about a searching re-examination of polling techniques by the polling organizations themselves and by other interested persons and bodies. No single explanation of the miscalculations was found. Rather, a number of suggested explanations applicable to one or the other of the polling organizations emerged. They were too confident of the accuracy of their methods. They made errors in sampling and in the interpreting of the data secured by sampling. In particular, they guessed wrong on the voting behavior of the persons who were *undecided* when they were polled, and they underestimated the last-minute changes of mind among those who did state a voting preference. Moreover, while 85 per cent to 90 per cent of those polled stated a voting preference, only about 50 per cent of the electorate actually voted in the election. In their letters to Senator Gore,²⁰ Messrs. Gallup and Roper agreed that their classic blunder in 1948 resulted from their failure to 'keep checking' until the end of the campaign. But Mr. Roper went on to concede an 'unfortunate secondary influence' of polling on the opinions of convention delegates, and suggested that reassuring prior poll results lulled Republicans into disastrous complacency during the 1948 campaign.

The test of these and other explanations may come as polling organizations continue to refine their techniques. Their forecast in the next three presidential elections, 1952, 1956, and 1960—and in Britain in 1959—did not establish any firm conclusion, however; for while the pollsters proved to be correct in predicting the elections of Presidents Eisenhower and Kennedy and the victory of the British Conservative party, they so hedged their predictions as to make them of questionable value. The accuracy of the polls has improved, but they still provide merely an approximate guide to facts about views and likely courses of action by the populace.

Evaluation. As long as there is any considerable disagreement on the accuracy with which the polls measure opinion, however, they are not likely to be used widely as part of governmental machinery for eliciting the will of the people on critical issues. In the meantime, they help to focus the interest of voters on public questions; make individuals conscious of the opinions

²⁰ Cf. fn. 23, *supra*. For discussions of the polls on the 1948 presidential elections, see Norman C. Meier and Harold W. Saunders, *The Polls and Public Opinion* (New York: Henry Holt, 1949), and 'The Opinion Polls and the 1948 U.S. Presidential Election: A Symposium,' *International Journal of Opinion and Aptitudes Research*, II (1949), 309-31, 451-591, and III (1949), 1-46, 157-204.

that predominate in groups other than their own; and stimulate the flow of discussion. They have been used with increasing frequency throughout the world, especially in Western Europe—e.g. the British Institute of Public Opinion, a Gallup affiliate. They enable politicians, officials, and others to get some impression of the nature and intensity of opinion on a variety of questions, and to follow trends of opinion over a period of time. As the techniques are further tested and developed, it *may* become possible to estimate public opinion on a specific issue at a given moment, not only with accuracy, but in such a way as to create a general conviction of accuracy. Many observers doubt, however, that such is attainable at all. Indeed, one of them—far from seeing polls as a stimulant of the political process—views them as having a ‘constipating effect on the political process. It keeps things from happening. . . . Each poll catches the voter at a moment in time, and fixes him there, like a painting; but the political maturation that is going on in him is a process, and he himself may be largely unaware of it.’²⁷ Nonetheless, there is little doubt that—whatever the merit of polls and pollsters—the advent of the sample survey in the twentieth century represents a major technical development in the study of politics. It has yielded much previously undiscoverable, or only imperfectly covered, data, and has stimulated considerable new research. Especially praiseworthy has been the work of the well-financed, academically-oriented Survey Research Center at the University of Michigan, which has successfully employed a polling method of interviewing and reinterviewing a ‘panel’ of the same people, carefully selected to reflect the national electorate.²⁸

Whether or not the content of public opinion can be usefully tested and measured, there is no doubt about its existence or its massive political influence in the long run. At a given time and place, public opinion seems amorphous and purposeless, ‘like the windy blisters of a troubled water,’ as Thomas Hobbes said in another connection. But over a longish period of time, and in a broader perspective set by historical study rather than by contemporary observation, there are surging tides and onrolling waves which at least have direction, if not purpose as well. Some of them beat hard at times on the rugged shores of the community consensus before they recede and change direction. And they do not beat entirely in vain, because the contours of the consensus are gradually changed by their action.

²⁷ Samuel Grafton, ‘Polls and Politics,’ *The New York Times Magazine*, February 21, 1960.

²⁸ Cf. A. Campbell, B. E. Converse, W. E. Miller, D. E. Stokes, *The American Voter* (New York: John Wiley & Sons, Inc., 1960).

The Tides of Opinion. Historians have noted these waves and tides in various countries. In the United States, for example, clearly marked alternating periods of radicalism and conservatism throughout the life of the Republic have been identified. To go no further back than the beginning of the twentieth century, the Theodore Roosevelt-Woodrow Wilson era was one with unmistakable radical and reforming tendencies, the period from Harding to Hoover marked a sharp swing to conservatism, and the reign of Franklin Roosevelt again brought a pronounced rise of radical temper in the electorate. In the first and last of these periods, a certain type of governmental action was encouraged and readily supported by public opinion; in the intervening period, measures of this same type rarely got effective support from public opinion.

Throughout the nineteenth century, and into the maturing twentieth, the tides of radical innovation have receded, to be followed by periods of more or less marked movements towards conservatism. Yet the consensus itself has been significantly modified. On the central issue of *laissez faire versus* government intervention in economic and social relationships, of individualism *versus* collectivism, the consensus has come to tolerate, if not actively to support, collectivist measures by government action in a scale that could not have been contemplated a hundred years ago. The reason for the shift is a widespread conviction, rightly or wrongly held, that, in a complex society, a considerable measure of collectivist action is necessary to enable individuals to live fuller lives.

DEMOCRATIC LEADERSHIP AND PUBLIC OPINION

The relation of political leadership to public opinion requires special attention. We concluded above that, as a practical matter in a democracy, public policy, the decision of what government is to do, always emerges from the competition, clash, and compromise of a great variety of individual and group interests. This might be taken to mean that political leadership is a passive agent which contributes nothing to solutions but waits for the blind jostling of selfish competing interests to reach an equilibrium, out of which the solution emerges automatically. If this were so, we might well despair of political leadership as well as of public opinion. There is, however, an interpretation of democratic politics that assigns important roles to both political leadership and ill-informed, vague, fluctuating public opinion, and rescues them from futility.

The first point to recall is that there is, in a working democracy, a community consensus to which the great bulk of the people subscribe. The consensus does not consist of a set of specific solutions for current problems but rather of a set of beliefs about the ends and purposes that community life should serve. The strongest of these in the democracies in question here is the belief that the community should protect and develop individual personality, and that individual liberty is a highly important means of fostering and expressing personality.

Historically, the general acceptance of the belief in individual liberty has been associated with a related belief in the sanctity of private property as a buttress of individual personality. The latter belief is not as unqualifiedly or as widely held as formerly, but it is still of great significance, as witness the relative infrequency of theft and robbery. True, the criminal law forbids theft and robbery, but its edicts could not be enforced effectively if they did not accord with community sentiment, as witness the American prohibition law.

There is always much going on in social life that seems to flout or contradict the deeper beliefs, and these beliefs give no obvious directions about what to do to bring erring social practice into conformity with them. Massive private property, as represented by present-day capitalist economic organization, seems to limit liberty and dwarf personality for many. How far this is true is not utterly clear, because we do not know what alternative forms of economic organization would do for liberty and personality. Nor is it clear in full detail what restrictions on private property in the form of governmental regulation of economic life will bring a net enlargement of liberty. As Chapter V indicated, the electorates have accepted and governments have incorporated into their activities, substantial restrictions on the freedom of businessmen to do what they like with their property. But the debate about what more and what next still goes on. It could scarcely be otherwise in communities that believe both in individual liberty and the sanctity of private property.

It would be easy to laugh at communities that hold doggedly to contradictory beliefs. The beliefs, however, may not be inherently contradictory. What seems to be going on, at any rate, is a tenacious search for a reconciliation between them which can be incorporated into social and economic practice.

This is only one illustration of several that might be given to show that the consensus, of itself alone, rarely makes clear what to do. The consensus

does, however, limit what the interests ranged on either side of the dispute can get—and hold—by pressure on government through political channels. It also limits the choice of solutions for which politicians can hope to get the support of electoral majorities.

Leadership and the Consensus. The purpose of discussion is to search for solutions in harmony with the underlying consensus. The function of competing political parties and political leaders is the same. Democratic political leadership calls for two main qualities, which, of course, the actual leaders do not always possess. It calls for ingenuity and imagination in discovering accommodations between conflicting interests which will be at least tolerable to those concerned on both sides. The political leader needs an extensive knowledge and understanding of the conflict for which he proposes a solution. It calls also for a man who knows by heart the source and course of the deep springs of community belief and feeling, and who can thus perceive what solutions can be floated and supported on the consensus.

Such leadership is genuinely creative. It creates the necessary equilibrium between group interests. It finds the compromise which public opinion rises surely to support. It redeems the politician from being merely a broker and huckster. It is indispensable in the recurring crises of democratic societies.

The democratic leader's search is not for the ideal solution. That may be easy to see in a particular crisis, but it is often impracticable of application by a government based on discussion and consent. Lincoln the statesman knew the ideal solution of the slavery question. Lincoln the politician sought long for an accommodation that would limit the evil of slavery without outraging the belief in the sanctity of property and rending the Union, always hoping that, with time and without violence, the ideal solution could be reached. He failed in part, but no political leadership can cope with sectional and group intransigence which disrupts the underlying consensus.

Public Opinion as the Final Judge. On this interpretation, public opinion is not a sovereign legislator framing specific solutions to specific problems. It is rather a judge who hears the political leaders, the advocates of specific competing solutions, and decides between them. More correctly, it is *the court of last resort*, to which only the more stubbornly contested cases go. The final court of appeal in a judicial system does not render judgment on every dispute. In the same way, the political leaders and permanent officials who make up the government at any given moment make many decisions on which public opinion never renders any perceptible verdict. But just as the lower courts in the judicial system are guided by the precedents and past

decisions of the court of last resort, so those who currently control the government are guided by their estimate of what public opinion will stand for or support. Public opinion is always being taken into account, but there is no assurance that the ruling politicians of the moment will not misinterpret it, or even try to circumvent it. Although error may rule perversely in the lower courts for a time, the final tribunal sooner or later brings correction. The democratic hope is that at a certain temperature in public affairs, public opinion will be able to resolve on a judgment that rests squarely and securely on the community consensus.

Although the definition regrettably trails off in vagueness, public opinion is better understood, in the words of Lord Bryce, as something 'impalpable as the wind,' than as a majority will or general will originating and decreeing solutions to particular political issues. When it is thus understood, some of the obstacles in the way of public opinion's performing its function seems less formidable, although they remain too serious to be ignored. The late Raymond Clapper observed with insight: 'Never underestimate the intelligence of the American people; and never overestimate its knowledge of facts.'

Public Opinion and Liberal Democracy. The problem of public opinion can now be stated in summary form. It is widely agreed that public opinion must rule in a democracy. But the facts on which the public must form its judgments are almost innumerable, and hard to discover, sift, and interpret correctly. Because of the limitations of language and the emotional overtones of words, communication is often blocked and distorted. The difficulties of communication are intensified because the possibilities of distortion are deliberately exploited by propaganda in many quarters, because the public is so large and scattered, and because it is hard to persuade large sections of it to attend closely.

The formation of public opinion on the facts, once they are communicated, is a complex process, always influenced by whims and unforeseeable circumstances. The entire public almost never concentrates its thoughts on one specific issue. There is always a movement of individuals in and out of the particular public attending to any one issue. Even among those who give sustained attention over a long period, opinions fluctuate in response to varying moods, the introduction of new facts, and the play of discussion.

Thus it is rarely possible to know whether a majority of the electorate has reached a firm judgment on a question, or what that judgment is. Also, the electorate is unable to formulate satisfactory solutions to many problems in

which highly technical considerations have to be taken into account. In such issues, it is generally limited to choosing between alternative solutions proposed to it by political leaders.

If our concepts of democracy and public opinion require that there should be a clear majority decision in every issue, and that the majority should always rule, close study of the actual working of democracy will be disillusioning in the extreme. However, it has been urged here that the substance of democracy as it has been practiced in the countries in question is *a flexible system of adjustment between individuals and groups carried on under ultimate popular control rather than the direct enforcement of a popular will*. Also, it may be doubted whether many of those who subscribe to the majoritarian view of democracy and public opinion really hold it in any strict literal sense. Associated with the demand that public opinion must always decide and rule is the further insistence that democracy desperately needs leadership if it is to survive. Leadership must not become a prisoner of public opinion. To the contrary, public opinion responds to leadership; it has a way of accommodating itself to successful political action.²⁹ Certainly, if leadership means anything it means something more than automatic registration of a majority will. On the interpretation offered here, it consists of ingenuity and imagination in devising, for the adjustment of conflicting interests, compromises that accord with the deeper community beliefs about the fitness of things. Public opinion does not invent these compromises, but it is the final judge of their adequacy.

PUBLIC OPINION IN THE DICTATORSHIPS

In the dictatorships, open competition in the spread of information and ideas is as intolerable to the leaders as are competing political parties. The one political party settles authoritatively what is to be done in the public interest, and it does not allow its decisions to be shaken by open discussion. But even dictators need co-operation from their citizens, and co-operation depends on a favorable public opinion. Consequently, dictators spare no effort to analyze opinion.³⁰ Furthermore, since the public interest is paramount, and the actions to be taken in the public interest have been authori-

²⁹ For a strong argument against 'paying undue heed' to public opinion, see Hans J. Morgenthau, 'Is World Public Opinion a Myth?' *The New York Times Magazine*, March 25, 1962.

³⁰ Thus Mao Tse-tung: 'We must follow wherever the masses go. In no other way can we lead them.' As quoted in William Goodman, *The Two-Party System in the United States*, 2nd ed. (New York: D. Van Nostrand, 1960), p. 459.

tatively settled, it follows that everyone should support these actions. Thus the dictators want unity, and even unanimity, of opinion, and they use every device known to propagandists to secure it, or, at any rate, to create the impression that it has been secured. Governments in the dictatorships control and direct all the media of communication.

Nazi and Fascist Repression. The governments of Fascist Italy and Nazi Germany asserted very effective control over public opinion by a number of methods. First, they enacted laws creating a long list of political crimes. Vigorous criticism of the government and its policies became in both countries crimes, for which extremely severe punishments were imposed under secret and unfair methods of trial. Government spies and secret police were everywhere, and it became extremely dangerous to talk politics freely. Thus free discussion of public affairs was taken out of the sphere of public opinion.

Second, both governments brought the press, radio, motion picture films, and all other media of communication under their direct control. One could not publish a newspaper, or be a working journalist, without first securing a license from the government. Licenses were granted only to persons who could be counted on to give slavish support to the government. All newspapers had to file copies of their output with the government so that their loyalty could be checked. Any failure of support or any criticism of government policy would lead to a cancellation of the license. In this way, the Nazis and Fascists made sure that the newspapers would not discuss forbidden subjects. It was an effective censorship.

Radio was controlled by similar methods. In Germany, the government owned and operated the radio. It subsidized receiving sets with a limited range and organized mass listening groups whom the Nazi leaders then would harangue. Dr. Joseph Goebbels, the propaganda genius of Nazi Germany, whose official title was Minister of Propaganda and Enlightenment, made radio his most effective instrument. In Italy, radio was in the hands of a private monopoly rigorously regulated by the government, which decided both what would be said and what would not be said.

Nazi and Fascist Propaganda. As the use of the radio indicates, the Nazis and Fascists were not satisfied merely to restrict and limit negatively the use made of the media of communication. They wanted to use them positively to indoctrinate the people. So the third method for controlling public opinion was to set up a government agency to drench the public with propaganda. The Ministry of Propaganda in both countries provided the bulk of

the news and the ideas that went out over the air waves and into the newspapers and periodicals. Day after day, the newspapers would give the same emphasis in the news and stress identical themes in discussion under the centralized direction of the Ministry of Propaganda.

In addition, the Nazi and Fascist governments carried their propaganda into the schools, into the many youth organizations they fostered, and into every organized group and association that they allowed to exist. In these circumstances, public opinion was no longer distilled by free discussion among the people. It was instead a synthetic nostrum of the Ministry of Propaganda. The highly centralized governmental organization bound the citizen's body and efforts to the tasks set him by the party leaders. The highly centralized propaganda machine tried to shackle his mind as well.

PUBLIC OPINION IN THE SOVIET UNION

Unlike Nazi Germany and Fascist Italy, the Soviet Union has not established a Ministry of Propaganda. The Soviet press is, however, under the strict control of the state and the Communist party. As in all other spheres of Soviet life, the party exercises its control through organized participation and through the placing of reliable party members in key positions. *Pravda* (Truth), the party's daily, is the most influential Soviet newspaper; its prestige exceeds even that of *Izvestia* (News), the government's organ. As in the Nazi and Fascist dictatorships, and despite the specific guarantees of Article 125 of the Soviet Constitution of 1936, the government controls the press through the device of permitting only the most ardent supporters of the existing regime to hold responsible journalistic jobs, and through the operation of a censorship agency whose task it is to assure that every publication in the Soviet Union meets the requirements of the state. In the case of newspapers this means not only that certain stipulated topics must be ignored, but also that specified other matters *must* be discussed.

As a result of this censorship, the content of the Soviet press is vastly different from that of newspapers in the liberal democracies. News of an economic nature is given the most prominent place, the biggest headline usually proclaiming a victory on the production front. The sensationalism of some sections of the British, French, and American press, which is based on the overemphasis of sexual crimes and on representations of alluring female figures, is paralleled in the Soviet Union by a sensational treatment

of political crimes and the printing of bulging production figures. The U.S.S.R. has set up its own 'public opinion poll' system, which is illustrative of the use of poll data for self-fulfilling propaganda.

Criticism—within Limits. It has been suggested above that dictators need the co-operation of their citizens. The Soviet leaders know that enthusiastic co-operation is hard to get without two-way communication between rulers and ruled. Whether in Leningrad or Chicago, individuals like to be consulted, to have a chance to say their say and to vent their criticism. Indeed, the expression of criticism is a safety valve for releasing pent-up annoyances and frustrations. Accordingly, within limits which he is never allowed to forget, the individual citizen is allowed—and even invited—to discuss and make suggestions on public issues. These limits cannot be defined precisely in positive terms, but a fair impression of them can be gained by seeing what matters are placed beyond the realm of free discussion. Generally, there are three broad forbidden areas:

One, basic Communist theory, as defined by the leaders, must not be questioned. Two, the top leaders themselves must not be 'unduly' criticized. Three, once governmental or party policy on some matters has been authoritatively *decided*, its correctness cannot be debated. On the whole, matters not falling in these three categories are left open for public discussion. Since criticism in the realms of high policy is excluded, discussion is largely confined to matters of detail, of the effectiveness with which policies and objectives are being pursued in daily administration. Here it certainly does not lack vigor, often taking the form of vitriolic denunciations of state officials and state agencies that are thought to be falling down on the job. The public thus has a chance to vent its discontent, and the leaders are able to gauge the drift of opinions on various matters and to strain some useful ideas from the flow of criticism.

IN THE PRESS. The Soviet press is one of the most effective media for this kind of Soviet 'self-criticism.' Its contents are mainly composed of government press releases and numerous letters from citizens describing conditions in all parts of the Soviet Union. The amateur journalists, who write these letters or articles, report on the successes or failures of a variety of activities and enterprises. Their stories are usually simply told and are always based on personal experience. The otherwise dull-gray uniformity of the Soviet press is greatly lightened by these personal accounts of Soviet life, and many students of the Soviet press attribute the undoubted popularity of Soviet newspapers to the articles and letters written by these far-flung voluntary

correspondents. Another bright spot is the illustrated humor magazine, *Krokodil*, with cartoons that poke fun at certain aspects of Soviet society and government. Moreover, much telling literary criticism of the excesses of the Stalin era was widely popularized and disseminated in the early 1960's.³¹

The Press an Instrument of Government. Despite the measure of freedom accorded the Soviet citizen in expressing his views on a variety of subjects, no assurance is given the correspondent that his contribution will be published. All letters to the editor are subject to 'clearance' in the editorial office of the party-controlled newspaper. The press is closely censored. The censorship determines what the Soviet citizen shall be told about what is going on inside the country, and in the world outside. The Iron Curtain, as it is called, though it has been lifted somewhat for limited travel in the U.S.S.R. by foreign tourists, not only curtails sharply what the Western world can find out about events in the Soviet Union; it also insulates the Soviet citizen from all contact with foreign ideas, and limits his knowledge of facts and events in the outside world to what his leaders tell him. Essentially, the press is a device used by the government for creating consent and selling the official policy to the masses whose sales resistance is low in the absence of any competing commodity.

OTHER MEDIA. The Soviet radio and other media are controlled in much the same manner as the newspapers. The government of the Soviet Union, which, at first, had to deal with an overwhelmingly illiterate population, has relied heavily on public posters and moving pictures for the moulding of opinion. Literature, art, music, and the sciences are all under government censorship or control. Education, which has been notably advanced by the Communist dictatorship, has also been drawn into the service of the party dogma. The rulers see to it that education in Communist doctrine and government policy is not confined to the schools, but is carried on in the professional, recreational, cultural, and occupational associations, and in the armed services.

In this way, the Soviet leaders eliminate all widespread public discussion of ideas and information that challenge or throw doubt on the government. To fill the void thus created, all channels of communication are used to bring to the people the 'facts' they should know and the ideas they must

³¹ For example, see the 1962 publications of Yevgeny Yevtushenko's poem accusing Stalin of anti-Semitism and of the sensational autobiographical revelations of life in a Stalin forced labor camp in the 1950's by Alexander Solzhenitsyn, *One Day in the Life of Ivan Denisovich* (New York: E. P. Dutton Co. and Frederick A. Praeger, 1963).

accept. Public opinion, if it can be said to exist at all in the Soviet Union, is not the product of free discussion, nor is it the final judge of the policies of the government.

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XI

Representation and Electoral Systems

INTRODUCTORY

Historical Background. To understand what this so-called representation is or can be, it is necessary to recall some history and venture some analysis. The democracies of the ancient world practiced *direct* democracy. The citizens of the city-state *participated directly* in the making of laws and the governing of the city. Lacking the device of representation, the Roman Republic was unable to provide for effective popular participation in government when it expanded too far beyond the confines of the city. Representation is a medieval invention, apparently originating in the practice of the early Christian Church in calling together representative councils to deal with matters affecting the government of Christendom. With the emergence of kings in the feudal societies of Europe, the custom of calling representatives from the communities under their sway developed. Simon de Montfort called representatives of the counties and boroughs to Westminster in 1265 with momentous results, but he did not invent representation. Nor did Edward I who, in 1295, so capably brought together representatives from all the segments of society he considered helpful that the meeting he called has ever since been referred to as the 'Model Parliament.' Representation was already widely used in the medieval world.

EMPHASIS ON THE LOCAL COMMUNITY. In the thirteenth century, and in most instances up to the nineteenth century, the county or borough was a close-knit community with a high degree of economic self-sufficiency in which individuals were bound together by customary relationships. What

division of labor and economic specialization there was, was local, not national and international. Without the modern means of communication, there was little movement of individuals from one community to another and little intercourse between communities. People lived and died and found the entire meaning of their lives in a single area. The dialects, which often still differ from county to county, testify to the distinctiveness of the communities that were represented.

They were social unities in much the same sense in which today, rightly or wrongly, we attribute unity to the nation. We have little difficulty in thinking that the government or an ambassador can represent the common interests of the nation in international negotiations. It used to be just as easy, and perhaps easier, to think that a representative could represent the county or borough in the councils of the monarch. He could air the grievances of his community and combine with other representatives in petitioning the monarch to redress them.

EMPHASIS ON INDIVIDUALS. An election district today is not such a community with a distinctive unity of its own which one man can represent. Election districts are now strips of territory in which so many voters live, and their boundaries are always being readjusted so as to contain roughly the same number of voters in each district, and thus to give representation by population. This practice of readjusting the boundaries of election districts gives the clue to the modern theory of representation. It is individuals and not communities which are represented, although for the sake of convenience a territorial basis is customarily employed. This is partly owing to the modern emphasis on individualism. But the older theory could not be maintained today because no longer do local communities possess a distinctive unity. Economic specialization transcends the local community and also the nation. The vital interests of individuals are linked to persons, circumstances, and events far beyond the locality. It should be noted, however, that here practice does not entirely accord with theory. The member of the legislature does represent certain common interests of his constituency, as when he manages to secure a new highway or a new post office.

Modern transport and communications have given extraordinary mobility to the population, making them a nation of transients without deep consciousness of locality. As has already been pointed out, the great ease of communication has facilitated the organization of many communities of interest, economic, social, and cultural, which are at least nation-wide and not connected with any locality. The local undertaker is now likely to be

at least as much interested in the shoptalk of the annual embalmers' convention as in the death of his neighbors. The result is that the older social unity based on territory has been broken into a multitude of diverse specialized interests. And governments today are engaged in all sorts of activities that can help or harm these specialized interests, thus inviting people to mix calculations concerning their narrow specialized interests with their opinions about national public policy.

The older localism and the theory of representation appropriate to it have been outmoded. It may help to emphasize the change to point to a remaining vestige of the older theory: The Constitution of the United States gives equal representation to the states in the Senate. The states are still regarded as communities that can be represented, and are thus entitled to be represented as such, not merely as heterogeneous collections of individuals. But even here, the forces just discussed have been at work, and the unity of particular states in the federation is somewhat artificial and pretentious.

EMPHASIS ON THE NATION. The situation today is profoundly different in another respect. As long as the monarch was in reality the government he expressed the general interests of the nation, however defective that expression may have been. Even if he was no more than a leader in war, he made and executed the policy of national defense. The representatives to his councils acknowledged this, although grudgingly. Their function was to act as a check on him, limiting the demands made by the whole on the parts. The monarch and his civil service withstood these pressures, asserting their interpretation of what was needed to maintain the unity and integrity of the country.

When the monarch was reduced to a figurehead or dethroned, the legislature composed of representatives of local interests became supreme. If the members of the legislature represented only their constituencies, who now spoke for the nation? It was a recognition of the inescapable necessity of some body with a unified conception of the national interest which led the framers of the first republican Constitution of France to declare that the deputy—i.e. the member of the legislature—belongs to the nation. He was to represent the nation and speak for it and not for the narrow purposes of his constituency.

The same provision appeared in the Constitution of the Weimar Republic, established in Germany in 1919 at the end of World War I. However, despite some distinguished advocacy of it, this view never caught hold in Britain and especially the United States, where it is the general assumption that the

member of the legislature represents the electors of his constituency. Despite this seeming defect in Anglo-American theory, Britain and the United States have not suffered as much from lack of national unity as have continental European countries. The explanation is that theory is of little account unless it is workable in practice, and to say that the deputy belongs to the nation accomplishes nothing unless the deputy and a majority of his fellows can agree on what should be done on behalf of the nation. Until the grim necessities of the atomic age compelled some changes, most Continental democracies—save the Scandinavian countries and Switzerland—never seemed to attain this agreement, being plagued by a multiple-party system, while the two-party system in Anglo-American countries has almost always produced a majority view of the national interest.

Without going into the many factors of history and geography that are responsible for this difference, the short explanation is that most of the democracies on the continent of Europe have always been split by so many deep cleavages that they could never get to the point of agreeing that there were only two important sides to the story. There were always many important sides to the story requiring narration at length by many political parties. Britain and the United States have always had a deeper political unity, a wider acceptance of the liberal democratic political ideals outlined in Chapter II. Partly because of this, they have always been the foremost experts in working out practical procedures for mediating differences. With the possible exceptions stated above, the processes of discussion have always worked more temperately and more fruitfully in the Anglo-American world than anywhere else.

At any rate, the important point for present purposes is that when the monarch lost his power and gave up his function of integrating the parts of the country as a whole, political parties took his place. As we shall explain later, the executive and civil service govern the country; but their ability to do it depends on the support of a political party that has won a majority of the electorate. As has already been argued, political parties in a two-party system are not divisive but unifying influences. In their never-ceasing search for votes they build bridges across local and personal prejudices, sectional and occupational antagonisms. In a democracy, which cannot fall back on some authoritative statement of the national interest but must always manufacture the national interest out of the consent of the people, the unifying function is indispensable. In societies where the ultimate political ideal is the releasing of individual personality in conditions of freedom, the

political parties are a procedural device for integrating the inevitable diversity of views into the unity of action that is vital for the running of any government. The burden of European experience shows that where political parties fail to perform this task, dictators arise who do. But, as we have already seen, they do it by destroying spontaneity and stifling diversity—by negating the liberal democratic ideals.

DIRECT DEMOCRACY

The direct democracy, to which we briefly alluded at the beginning of this discussion, is an attempt to get around the problem of representation—to outflank it. Generally, it takes one of three forms today: the *referendum*, the *initiative*, and the *recall*. A fourth, the historic *New England town meeting* (or any other town meeting), while still practiced on a limited scale, is necessarily confined to small local communities and school districts.

The Referendum. Briefly, the referendum—or, as it is still sometimes called, the *plebiscite*—is simply the referral of a question to the electorate on the ballot, usually at the time of a general election. This question may be one of general policy ('Do you favor the sale of alcoholic beverages in your county?'); it may be on a piece of legislation (such as the passage of a soldiers' bonus); it may be on a proposed constitutional amendment (such as the extension of the term of office of the governor of a state); or it may be on a measure initiated by the people (such as appropriations for a new school). Referenda generally become law upon receiving a majority of the votes cast.

A referendum may be either on a part of or on the entire bill. It may be *compulsory* in the sense that the constitution requires the legislature to submit a certain measure or constitutional amendment to the populace, or it may be *voluntary*, whereby the legislative body uses its discretion whether or not to refer the question to the people. In some of the American states a certain number of voters—5 per cent of the registered electorate in Oregon, for example—may *compel* the referral of any question at all. In certain other states some types of legislation are exempt from the referendum process. Thus, in Massachusetts all laws relating to religion, religious institutions, the status of judges, and the establishment or abolition of courts, are constitutionally beyond the pale of referenda.

The Initiative. Under the initiative a certain per cent of the voters—usually

between five and ten—will propose a bill, which then may become law in one of two ways: by approval of the legislature or by endorsement in a referendum at a subsequent election. An initiative is customarily confined to proposals for ordinary legislation, but in parts of the United States (e.g. California) and in Switzerland it is also employed for the purpose of proposing constitutional amendments. The initiative is a much severer test of the ingenuity and intelligence of the voter because here he creates and does not simply criticize others. And since it may well be the 'brain child' of a small group of citizens, the initiative represents a possible source of special or minority legislation, which flies in the face of the democratic concept of majority government.

The Recall. In some respects the recall, although employed far less frequently than the other two devices of direct democracy, is not only the most interesting but also the most controversial and most dramatic of the three. The recall, in short, permits the electorate to remove elected public officials from office prior to the expiration of their term, for whatever reason deemed valid by the voters. In view of the gravity of that step, initiation of a recall vote requires the approval of a substantial per cent of the electorate, ordinarily at least 25 per cent of the vote cast in the preceding election. In the recall election itself, a majority of all the votes cast, or sometimes even of all those registered, is necessary to recall the official.

While not used as frequently as the referendum and the initiative, the recall is not merely a theoretical example of direct democracy in the United States. Mayors of Los Angeles, Detroit, and Seattle have been recalled. The Governor, Attorney General, and Secretary of Agriculture of North Dakota were recalled in 1921, although the same electorate proceeded only one year later to elect its just recalled Governor Frazier to the U.S. Senate! A move by the voters of Wisconsin to recall U.S. Senator McCarthy in 1954 failed by a narrow margin. Close to 1000 cities of 10,000 inhabitants and over have provided for the recall. And Oklahoma, at least until World War II, had the interesting record of attempting either to recall or to impeach practically all its governors!

Present Usage. Direct democracy has almost disappeared on the *national* level of government, except in Switzerland. There the initiative and the referendum are still used with some frequency. In April 1963, for example, the Swiss, by a vote of 537,387 to 268,858, rejected a proposed constitutional amendment that would have banned the manufacture, import, transit, use, and storage of atomic weapons. Where direct democracy is used in other

countries, it is confined to subordinate levels of government. Thus, in 1963 in the United States, where *direct* democracy is not practiced on the *national* level, twenty-one states provided for the referendum, nineteen for the initiative, and twelve for the recall. In addition to the states, however, a considerable number of local communities has some form of direct democracy.

Evaluation. The advocates of direct democracy attribute the ills of representative democracy to the political parties. They insist that parties get between the electorate and the legislature, and that the legislators forget their pledges and enact bad, or fail to enact good, legislation because the parties that dominate the legislature serve interests other than those of the people. Underlying this analysis is the assumption that the electorate could be counted upon for wisdom and a unified conception of the public good, if only it were enabled to express itself! By authorizing the voters to *by-pass* the parties and the legislature through direct democracy they would be able to participate *directly* in lawmaking.

While the various schemes of direct democracy have never had any serious advocacy in Britain, the experience of many American states with political corruption and boss-controlled legislatures has provided a great temptation for popular intervention. Indeed, direct legislation by the electorate has put some useful legislation in force in some states. It may also be of some use as a standing threat against parties and legislatures that have eluded popular control. However, there are other ways of restoring a measure of popular control. The defects of direct legislation outweigh its merits:

IGNORES THE COMPLEXITY OF LAWMAKING. In the first place, lawmaking in a complex society is not a simple process. For example, to many, the moral issue in proposals for prohibition may be quite clear, to others not. The effectiveness of such legislation if enacted depends on its detailed provisions such as the definition of 'intoxicating,' what is a 'medicinal use,' the apparatus for controlling import and manufacture, and the question whether it is purchase and sale only, or use as well, which are to be prohibited. These are complex questions. And if use is prohibited, enforcement depends on how far the police are to be authorized to search premises and persons on suspicion. Who will say that such interference with the right of privacy is not another and more complex question?

Legislation of this kind and in this detail cannot be placed on the ballot in readily understandable terms, let alone terms enabling the public to discern the deeper issues involved. Complex legislation should only be

enacted after extended debate and discussion have eliminated crudities and obscurities, foreseen difficulties and provided for them, and tempered the wind as much as possible to the particular private interests that are to be shorn by the law. Direct legislation requires the voter to take it or leave it in the raw form in which the zealots framed it, without the clarification that comes from discussion and without any modification by minority protests.

ASSUMES A UNIFIED POPULAR WILL. Proposals of this kind assume that the laws that should be made for the common good are simple questions, on which a unified popular will infallibly singles out the correct answer. In fact, the electorate entertains many views shaded in various ways, and a majority opinion has to be created by organization and effort. The parties are professional organizers of opinion and they do not ignore such opportunities. The multiplying of the occasions of voting is not likely to diminish greatly the power of party machines. The special interests that will be directly advanced or prejudiced by the proposed law spend money and pour out propaganda. For example, experience shows that both the temperance and the liquor interests can be counted on for zeal and overstatement, and they will bombard the electorate with biased information and arguments in plebiscites on the liquor question. The influence of parties and special interests is by no means eliminated.

Direct legislation is supposed to educate the citizen and revive his interest in public affairs. But, generally speaking—although some experienced observers emphatically dissent here¹—experience in the United States does not support this argument. There, roughly half the voters who go to the polls and vote for candidates for office fail to vote by design or oversight, on the laws submitted for their decision on the same ballot. Indeed, numerous measures have been passed or rejected with little more than a quarter of the electorate voting. This suggests that many voters feel themselves more competent to choose men than to make laws. The instinct is sound. If the candidates put forward by the parties are not to their liking, those who feel keenly the need to improve the quality of political life can take more effective steps than resort to direct legislation. Through active participation in party affairs, they can influence the choice of candidates with a smaller expenditure of time and energy than it takes to learn enough to vote wisely on particular measures.

¹ Cf. James K. Pollock, *The Initiative and Referendum in Michigan* (Ann Arbor: University of Michigan Press, 1940).

To revert to the discussion in Chapter IX, it is clear that direct legislation flies in the face of the principle that the political parties take the responsibility for public policy and for administering and enforcing the laws, and that the voters do all they can as voters when they examine the stewardship of the parties at election times. The people cannot directly make the laws and govern the country. Perhaps a prohibition law cannot be enforced at all. Certainly it cannot be enforced except when the executive, the government of the day, puts great vigor and determination behind it. If the people want the laws enforced, the only way open to them is to concentrate responsibility for the detailed provision of the laws and their administration on the political party that currently enjoys the support of a majority, and then punish it for its failures at election time. Between elections they can warn their parties of their desires and intentions by influence on the local party associations. It is a political axiom that the members of the parties in the legislature are extremely sensitive to clearly expressed opinion.

THE DILEMMAS OF REPRESENTATION

Two major dilemmas present themselves to the student of representation. One is concerned with the already introduced problem 'who or what' is to be represented,² the other with 'how' representation is to be made effective. To resolve the latter dilemma, a decision must be made between geographical (territorial) and occupation (functional) representation—i.e. whether representation in the legislative body ought to be based on residence or on occupation. The former dilemma compels a choice between two different concepts of representation: one which places the nation as a whole first on the scale of values, the other which looks upon the local constituency as being of primary importance. These two dilemmas must now be analyzed separately.

THE FIRST DILEMMA

The Meaning of Representation. Mr. Noah Webster, in defining the verb 'to represent,' demonstrated well its enigmatic nature. In one sense it

² For an interesting, although debatable, assignment of the representative into the roles of 'trustee,' 'delegate,' and 'politico,' see Heinz Eulau, *et al.*, 'The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke,' *American Political Science Review*, 53 (September 1959), 742.

means 'to serve with *delegated* or *deputed* authority.' In the other, it signifies 'to give *one's own impression and judgments*.' The supplied italics convey the first dilemma: whom or what does the representative represent? That he is intended to be a link between the people and their government is quite clear. But what sort of a link? Is he to be a mere 'servant,' an 'errand-boy,' a faithful mouthpiece for Dogpatch? Little more than a 'tool,' to use a favored American colloquialism? Or is he to be a link who will be free to express his views and cast his vote in accordance with his own analysis and judgments on behalf of his constituents, *but with due regard to the fact that the latter are but one segment of the whole nation*? It is tempting to give a rapid categorical answer in behalf of the second proposition, for it would seem to be the logical and obvious one. It is not!

THE IDEALISTIC VIEW. Although close to two centuries have passed since Edmund Burke delivered his famous speech to his constituents of Bristol, England, the analysis he gave of the duty of a representative still personifies the classic, the ideal, the *national* view:

Certainly, gentlemen, it ought to be the happiness and the glory of a representative, to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion high respect; their business unremitted attention . . . But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living . . . *Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion.*³

And earlier in his speech, he had lectured his voting public on the proper meaning of a representative assembly:

Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where not local purposes, not local prejudices ought to guide, but the general good resulting from the general reason of the whole.⁴

Clearly this is an idealistic concept of representation—which, in effect, emphasizes the *deliberative* role of the legislature at the expense of its *representative* role. Desirable though its consummation may be, it is clearly

³ Edmund Burke, *Works*, vol. I (London: Bell and Daldy, 1871), p. 446. (Italics supplied.)

⁴ *Ibid.*

unattainable, given the realities of politics, especially in a country as heterogeneous as the United States. Yet even in the more homogeneous France and the still more closely knit Britain, the Burkean view is hardly a realistic one—although the tight party discipline and attendant governmental machinery in the latter make it more nearly attainable there. Even in the United States, legislators will appear on the political horizon from time to time who can either afford to take the national view because of their ‘safe’ constituencies, or who are willing to take it at the risk of almost certain defeat—as President Kennedy so ably pointed out in the case studies in his *Profiles in Courage*.⁵ But they are exceptions, all too likely to become unsuccessful candidates, such as George M. Abbott, a congressional aspirant from Vermont, who bravely announced:

The office for which I am a candidate is properly called a United States Representative. I feel that a man holding that office should consider the general welfare of the whole nation above the benefits of certain groups. *If a man holds a United States office, his first loyalty should be to his country.*⁶

Mr. Abbott remained a private citizen.

The Realistic View. Generally, representatives have adopted the parochial view—the attitude of catering to the local constituent interests first, and to those of the nation second; they have found it to be much healthier politically. Thus, U.S. Senator Olin D. Johnston (D.-S.C.):

I fully realize that my duties in the Senate should be for the best interest of the nation as a whole; however, *my duties and obligations are to the people of South Carolina first of all.*⁷

Others may not state it quite so bluntly, but the quotation above is generally accepted as the norm by the vast majority of the people’s representatives. Even such independent legislators as the maverick from Oregon, Wayne Morse—whose political affiliations while in the U.S. Senate have ranged from Republican to Independent to Democrat—when once berated by a questioning student because of his support of the high import duties on Australian wool, retorted, ‘If you want me in the U.S. Senate in order to vote for progressive measures, *I’ve got to remain there*, and I *won’t* if I vote against such a major economic interest of my state.’

⁵ New York: Harper & Brothers, 1956.

⁶ *The New York Times*, July 10, 1950. (Italics supplied.)

⁷ *Ibid.* July 9, 1950. (Italics supplied.)

The first dilemma of representation is thus actually more of a philosophical nature than of a practical one, for as long as geographical representation is used in the democracies the local, or back-home, view will take precedence over the national one, despite protestations for the record to the contrary. The conflict, of course, is often more apparent than real. Genuine national interest consists also of recognition of vital local interests. There is little doubt, however, that every representative would, on occasion, like to follow the example set by U.S. Representative John S. McGroarty, who wrote the following note to one of his California constituents: 'One of the countless drawbacks of being in Congress is that I am compelled to receive impertinent letters from a jackass like you in which you say I promised to have the Sierra Madres mountains reforested and I have been in Congress two months and haven't done it. Will you please take two running jumps and go to hell.'⁸

THE SECOND DILEMMA

The second dilemma, geographical versus occupational representation, has not really presented a serious practical issue. All present-day states that have a representative form of government base representation on territory, sometimes termed the 'political' system. Nor has any country, other than on paper, or in a purely advisory capacity—as will presently be indicated—or as a by-product of dictatorship, ever actually practiced *bona fide* occupational or functional representation, which is also sometimes referred to as 'guild socialism.' Two illustrations of the practice in dictatorships may be noted. One was Mussolini's Corporate State. In 1939, after some thirteen years of preliminary experimentation, Fascist Italy set up the Council of Corporations, chosen by occupational representation, which superseded the already emasculated Chamber of Deputies that had historically been chosen by territorial representation. It never had an opportunity to prove its merit, if any, in action, but it certainly failed to save Italy from its impending fate.⁹

⁸ As quoted in John F. Kennedy, 'The Challenge of Political Courage,' *The New York Times Magazine*, December 18, 1955, p. 13.

⁹ The Portuguese 'benevolent dictatorship,' established by Dr. Salazar in 1928, still resorts to a type of corporate body at the 'parliamentary' level. It consists of representatives of local authorities, industrial committees, and other corporations, including organizations of both employers and employees. The body has no legislative power but, according to the Portuguese Constitution of 1933 which established it, the National Assembly is obliged to submit all bills to it for its 'opinion' ere a final vote on their passage may be taken. In effect, the legislative process in Portugal is often 'in suspense,' with the Government legislating more or less by decree.

Occupational or Functional Representation. The advocates of occupational, or functional—as it is sometimes called—representation contend that specialized economic interests need direct representation, something which the legislator chosen by the geographic method is allegedly not capable of giving adequately. Where farmers, industrial workers, industrial employers, independent tradesmen, and so forth, feel the impact of government action in diverse ways, how—so goes the case—can the member of the legislature who may be a doctor, lawyer, worker, or employer, represent all their interests fairly? In addition to that problem, the proponents of occupational representation allege the inability of the average voter to register an intelligent vote—which, they contend, would also be remedied by the adoption of the proposal.

How It Would Work. Often recommended by its advocates for adoption by democratic Britain, France, Germany, Ireland, and Italy, occupational representation thus abandons the commonly accepted method of representation based upon geography or residence, and substitutes a type of representation based upon vocational or economic activity. Hence it is sometimes referred to as the 'economic' system of representation. Under it, the legislative representatives owe their election and give their allegiance to a particular economic group, such as engineers, carpenters, miners, farmers, physicians, and so forth, rather than to the people at large living in a particular territorial area.

The mere mention of such a system brings to mind its inherent, and probably insuperable, difficulties. Politically and socially divisive, it would almost by definition pit employers against employees and, very likely, the groups would battle among themselves. It would stimulate class consciousness. It would place a premium upon differences in station and activity. And it would render compromise difficult. In addition to these objections, there is the basic and vexatious question of the weight of representation to be given each group. Nevertheless, there has been some dabbling with occupational representation:

FRANCE. As far back as 1925, the French established a *National Economic Council* which, while largely an advisory body, was supposed to be, but did not have to be, consulted on all proposed economic legislation, *except on the budget*. It was continued in revised form under the Fifth Republic as the *Economic and Social Council*. The 229-member body consists of representatives of some twenty-five or thirty groups of workers, employers,

farmers, 'economic and social interests overseas,' artisans, co-operatives, family and home associations, among others. They serve for five years; sixty-five appointed by the Government, the balance by the interests. The Council does not initiate legislation, but may advocate social and economic reforms; may be consulted by the executive branch on all social and economic matters; and it must be consulted on 'public economic programs and plans'—again with the exception of the budget. To date the influence of the Economic and Social Council has been slight at best. And we may well ask *how* and *where* the line will be drawn between an 'economic' and a 'non-economic' (or political) proposal. How can the budget be exempted from 'economic' consideration? Something more will be said about the institution in connection with the discussion of the administrative process in Chapter XVII.

GERMANY. The framers of the Weimar Republic attempted to establish functional representation of an even more unusual kind. Article 165 of the 1919 Constitution provided for a special legislative chamber, a 'corporate assembly,' known as the *Reichswirtschaftsrat*, roughly translatable as National Economic Management Advisory Body, which was to advise the lower house of the national legislature, the *Reichstag*, on economic and social matters. Selected by the various interest groups, and appointed by the Minister for Economic Affairs, the *Reichswirtschaftsrat* consisted initially of some three hundred, later two hundred, members. These represented broad occupational groups, such as transportation, agriculture, forestry, the professions, banking, commerce, and industry. Wherever appropriate, employers and employees were accorded equal representation within each of the groups. Both the *Reichstag* and the departments of the executive branch of the government were constitutionally required to consult the *Reichswirtschaftsrat* before introducing legislation of 'fundamental, social and economic importance.'

It is not surprising that the Weimar Republic's attempt to represent functionally was a complete failure. The employers and employees within each occupational group failed to see eye to eye on anything except the most rudimentary measures, thus rendering combined policy all but impossible. Moreover, the *Reichstag*, the political branch, sensing a potential rival, took a dim view of the economic and social branch and did its utmost to render it ineffective and meaningless. It rarely, if ever, consulted the *Reichswirtschaftsrat* as was its constitutional duty—and the ministries pur-

sued a similar course. Thus the *Reichswirtschaftsrat* remained little more than a paper device, denied effective power in the constitution and shorn of influence in practice.

Such has been the general history of occupational representation. However attractive in theory, it is not a workable device. In a democracy, the collective action undertaken by government must put its main emphasis on what unites rather than on what divides. Moreover, pressure or interest groups are quite capable of getting their points of view across to legislators—and executives! Indeed, one of the most notable purposes of the various administrative agencies that make up the bureaucracy is to supply, in some measure, the functional representation which does not *per se* exist in the legislative branch.

ELECTORAL SYSTEMS

Varieties. It is one thing to accept geographical representation as the best method of representation. It is quite another to devise the *type* of representation that will best suit a particular country. Consequently, many different systems have been employed, ranging from the United States' Single Member District system of Plurality Elections for its House of Representatives, to Ireland's Single Member Transferable Vote system of Proportional Representation for its *Dail*, to Australia's mixture of proportional and single member district-preferential systems of election for its Parliament. By and large, however, the chief difference in viewpoint may be boiled down to the two major antagonists: proportional representation (P.R.) *versus* single member district (S.M.D.) representation. There are many different systems of representation—between 1875 and 1963 the French changed their electoral system at least seven times—but they all can be fitted into one or the other of the two categories. Before examining in some detail the diverse mechanics of the several systems, their basic differences should be clarified.

NON-PROPORTIONAL SYSTEMS. The basis for the non-proportional type of elections is the single member district—a geographical area of varying size. From this area *one* person is elected to represent it in the legislature. His election may be based upon a *plurality* vote, as in the case of United States congressional districts, where whoever has the greatest number of votes wins, regardless of the number of candidates running; or it may be based upon an *absolute majority* vote, as in the case of the Australian House of Representatives, where the victor must poll at least one-half plus one of all the

votes cast. But in either case the winner takes all in the sense that he will be the sole representative from the area involved—no matter how many other candidates may have participated in the election race.

Hence, the chief objection to the S.M.D., winner-take-all, non-proportional system of representation, is quite clear: It is fundamentally impossible to represent heterogeneous individual opinions and group interests through representatives chosen by a plurality of votes in a single member election district. In a sense, the victor speaks only for that segment of the population which voted for him. The system does not accurately reflect in the legislature, as would proportional representation, the diversity of opinions and interests in the electorate.

PROPORTIONAL SYSTEMS. Diametrically opposed to the S.M.D. concept, P.R. requires a *multiple* member constituency. Here the electoral area is always large, frequently an entire state or region. Each such area sends *several* representatives to the legislature, ranging from four, in parts of Ireland, to as many as 120, in Israel.

This system ensures that each political party or party-group—as has been characteristic of France from time to time—will send representatives to the legislative body *in proportion to its share of the total votes* cast in the electoral area in question. Taking the simplest possible example, let us assume an election in a six-member electoral district, in which a total of 60,000 votes have been cast: 30,000 for Party A, 20,000 for Party B, and 10,000 for Party C. Party A would therefore be entitled to three, B to two, and C to one seat in the legislature. Here the winning party does not, as in the S.M.D. systems, 'take all,' but only his due proportion of the vote. (Of course P.R. is seldom as clear-cut and never so mathematically simple as our example would indicate!)

At first glance, P.R. is obviously the more just and, because minority parties and groups are represented in accordance with their numbers, the more democratic of the two major systems. But is it a workable one? Does it make for stable government? Before trying to answer these questions, we shall discuss the variants of the two systems, beginning with the several forms of non-proportional representation.

NON-PROPORTIONAL REPRESENTATION

(1) *Single Member District System of Plurality Elections.* The 435 members of the U.S. House of Representatives, and the 630 members of the

British House of Commons, are elected by direct popular vote by this system. The two countries are divided into as many districts as there are members in their respective lower houses. Even if a state is entitled to but one congressman, all districts in the United States are designated numerically within each state, e.g. the 'Second Congressional District of Pennsylvania,' which happens to be one of six in Philadelphia. Those in Britain are given geographical designations, such as 'Limehouse,' Earl Attlee's old district in London which he represented for many years while he was a Commoner. As many individuals as care to may run in the election, provided they have met the necessary qualifications. However, there can be only one winner: he who succeeds in obtaining the *plurality* of the votes cast on election day, even if that plurality is only *one* vote, and it does not matter if the winner's plurality happens to be less than a *majority* (one-half of the votes cast plus one) of the total votes.

(2) '*At Large*' System of Plurality Elections. Closely related to (1) is the *at large system*. It signifies elections by plurality from a large constituency, usually an entire state in the United States, with the names of candidates appearing on every ballot in the state. The 'at large' system is employed for the direct election of all U.S. Senators; for the election of the members of the U.S. House of Representatives from the five states—Nevada, Delaware, Wyoming, Alaska, and Vermont—entitled to only one such representative; and, on occasion, for the election of a congressman in a new district which his state, for political or administrative reasons, has not as yet incorporated into the established district system. The representatives in the latter two groups are known as 'U.S. Representatives at Large.'

(3) '*Run-off*' or '*Second Ballot*' Majority Elections. In most Southern states of the United States, victory in the direct primary elections of the Democratic party is usually tantamount to election in the general election in November because of no, or merely token, opposition by Republican candidates. Consequently, most of the Southern and Border states use the *Run-off* or *Second Ballot* Majority Election in primaries for both national and local offices.¹⁰ This practice requires the winner of a primary race to obtain an *absolute majority* of all the votes cast. However, if no one thus succeeds, the two top vote-getters must face a Run-off, also known as Second Ballot, against one another, customarily within a month after the

¹⁰ In 1963, there were eleven states with the Run-off: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, and Virginia.

initial race—a fairly common occurrence. In Florida, for example, no gubernatorial candidate had ever been elected to office without a Second Ballot until Governor Leroy Collins achieved that goal in the 1956 primary. The result is more often like that of the December 1959 gubernatorial primary election in Louisiana when eleven candidates divided some 1,000,000 votes. No one candidate obtained a majority; New Orleans Mayor de Lesseps S. Morrison and ex-Governor Jimmie H. Davis were the leading vote-getters with 271,816 and 209,765 votes, respectively. Consequently, a month later a Run-off election was held between these two men, which Mr. Davis won by a plurality of 70,000 of the 900,000 votes then cast. Subsequently, Davis easily defeated the Republican candidate.

(4) *Cumulative Vote Elections*. A rather uncommon type of non-proportional voting is the *Cumulative Vote*, which has been used since 1872 by the State of Illinois for the election of the members of the lower house of its legislature. Its purpose is to encourage the election of a minority party candidate through the accumulation of multiple votes. Under the system three members of that branch are chosen from each of the 59 assembly districts of approximately equal population into which the state is divided. Each voter is to cast three votes, which he may distribute in one of three ways: He may cast his three votes for one candidate; split them equally between two; or cast single votes for three. Apparently, the Cumulative Vote in Illinois has indeed produced minority group representation in nearly all districts. It has also evidently encouraged a longer tenure in office than legislators in nearly all other states enjoy.¹¹ It should be added, however, that there exists some doubt on the part of some experts on constitutional law in Illinois as to the legality of the above-described splitting other than one whole vote for each of three.

(5) *Preferential Vote Majority Election*. The last and most intricate type of non-proportional representation is the *Preferential* or *Alternative Vote*. Because it is often confused with P.R. it needs to be clearly described. It, too, is based upon single member constituencies, but the winner must get an absolute *majority*, and not merely a plurality, of the votes cast. At present, it is best known for its use in Australia to elect the members of the House of Representatives. Under the Preferential or Alternative Vote, *all* candidates running for office in the single member constituency appear on the ballot

¹¹ For the best work in this field, supported by many statistics, see George S. Blair, *Cumulative Voting* (Urbana: University of Illinois Press, 1960).

in alphabetical order (although determining position by lot is now advocated by many in Australia). Only one person can win, but he must attain an absolute *majority* of all the votes cast.

The voter is required to *rank* the names appearing on the ballot by placing 1, 2, 3, and so forth, according to his preferences among the candidates. He is generally required to mark a preference for each candidate. At the end of the election day, the ballots are examined to determine how many *first* choices each candidate has received. To illustrate, in an Australian Parliamentary election in the 1950's, the total number of 'firsts' cast for the six candidates running was 23,086. They were distributed as follows:

Anderson	6,542
Edwards	4,372
French	942
Jenkins	7,138
Metcalf	2,168
Young	1,924
	23,086 = total number of 'firsts'

A *majority* of 'firsts' would have been 11,544 votes, but since no candidate received that many first-place votes, the next step was to consider the transferring of preferences: The candidate with the lowest number of 'firsts,' French, is declared 'not elected'; his 942 ballot papers are then examined, all 'number-two-preferences' in them become 'number-one's,' and these 942 are transferred to the candidates entitled to them. If it is assumed that French belonged to the same political party as Young, the bulk of the former's 'number-two-preferences' would normally go to Young, others drifting to the other remaining candidates, with the following results:

	<i>Old Total</i>	<i>From French</i>	<i>New Total</i>
Anderson	6,542	51	6,593
Edwards	4,372	27	4,399
Jenkins	7,138	31	7,169
Metcalf	2,168	102	2,270
Young	1,924	731	2,655

But still no one has received the necessary majority! Consequently, the man with the next lowest number of 'firsts,' Metcalf, is now declared 'not elected,' setting in motion the next step: the *second* preferences of those 2,168 voters who gave him their first preference; the *third* preference of the 102 votes he obtained from French; and perhaps the third preference of

'seconds' that Metcalf voters had marked in favor of French, are distributed among the remaining four candidates.

This process of elimination and distribution of preferences to candidates still in the running goes on until one candidate has obtained a clear majority of the votes cast. It is not surprising that sometimes the candidate who is ultimately declared 'elected' as the member from that district, was third or fourth in a field of six at the end of the count of 'first preferences.' (It should be noted, however, that today a more usual number of candidates for most contests for the Australian House of Representatives would be three or four.)

While many varieties of this system exist elsewhere, the above illustration typifies the operation of the Preferential or Alternative vote. Despite its seeming intricacy, particularly so to those unfamiliar with the method, the Australians regard it as satisfactory.

PROPORTIONAL REPRESENTATION

Application. Proportional representation has been widely adopted in the Western democracies. Various versions of this controversial system are presently, or have until recently been, used in national elections—for at least one of the two houses of parliament—in, among others, Sweden, Denmark, Norway, Holland, Belgium, Finland, Ireland, France, Western Germany, Italy, Switzerland, Israel, Australia, New Zealand, and several others. Britain and the United States, devoted to the single member district system, have shunned P.R., although some local communities in the United States have used it from time to time in municipal elections. In 1963 a score of medium-sized cities did so. New York City employed it for ten years, but abandoned it when two Communists continued to be re-elected to its City Council under the system. Cincinnati, an early adherent to P.R., substituted a cumulative system for P.R. in 1957.

Authorship. Although there exists some doubt as to its inventor—certain writers trace it to the days of the French Revolution, others to the Danish statesman, Carl Andrea—P.R. was evidently first spelled out in detail by Thomas Hare, an English barrister, between 1857 and 1859 in two dull books, *The Machinery of Representation* and *Treatise on the Elections of Representatives, Parliamentary and Municipal*. The scheme was embraced by John Stuart Mill, who popularized it in his celebrated *Considerations on Representative Government*. He referred to it as 'one of the very greatest

improvements yet made in the theory and practice of government.' A form of the single transferable vote of P.R., as devised by Andrea, was used for the first time in Denmark in 1856. Its application, however, was limited to the election of fifty-five of the eighty members of the then single-chamber *Rigsraad*.

Today many variations of P.R. exist. Generally speaking, however, we may distinguish between two main types: the Hare system, named after its originator, also known as the Single Transferable Vote, present chiefly in English-speaking countries; and the List system, of which there are several variations, used predominantly by continental Europe.

(1) *The Hare System*. The most consistent and devoted user of the Hare system has been Ireland, which employs it to elect the entire membership of its Dail Eireann—although it had a close call in 1959 when its electorate retained it by the narrow margin of 486,989 to 453,322. The Hare system is highly complicated, precise, mathematically intricate, and time-consuming in tabulation. It has, however, the inherent and undeniable virtue of giving weight to every vote.

The ballot resembles that used for the Preferential Vote for the Australian House of Representatives. Of course the vital difference—as outlined above—is that under P.R. the constituency is a multiple one, whereas the Preferential system is a variant of the S.M.D. type.

voting. The Irish voter marks his ballot-paper, on which the names of all candidates appear in alphabetical order, by placing the figure 1 opposite the name of the candidate of his first choice. He then places the figure 2 opposite the name of his second choice, 3 opposite that of his third choice, and so forth, until a figure appears opposite as many names as there are seats at stake in the voter's particular constituency. However, there can be only one figure 1 on the ballot, and a ballot-paper which either does not contain such a figure, or has the figure 1 more than once is invalid. Assuming that four seats were to be filled in a constituency, the voter's ballot might look as follows:

<i>Name</i>	<i>Rank</i>
Bragan	
Costello	1
Dwyer	4
Flaherty	
Murphy	2
O'Brien	3

COUNTING THE VOTES. In the first step of the count, all the ballot-papers for the whole constituency are placed into one large pile and are then *sorted according to the first preferences* recorded for the candidates. All invalid papers are destroyed. After the total number of valid papers has thus been established, the next step is to calculate the *quota* according to the following much-misunderstood formula:

$$\frac{\text{Total Number of Valid Ballots}}{\text{Number of Seats plus 1}} \text{ plus 1} = \text{Quota}$$

Conveniently assuming that 100,000 valid ballot-papers have been cast, and that the total number of seats at stake in that constituency are four, the quota would be established as follows:

$$\frac{100,000}{4 \text{ plus } 1 = 5} = 20,000 \text{ plus } 1 = 20,001, \text{ the Quota}$$

Hence the quota is 20,001 and only four candidates can attain it. It represents the smallest number of 'firsts' that each of four candidates can get out of 100,000 votes.

If, on the first complete count of all valid ballots, no candidate succeeded in obtaining a number of 'firsts' equal to or greater than the quota of 20,001, the candidate with the *lowest* number of 'firsts' is eliminated. His ballots are then transferred to those candidates for whom the 'second' preferences on these ballots are recorded—again very much in the manner described earlier in connection with the Preferential system in Australia.

However, it might happen, especially in the case of a popular candidate, or one with strong party backing, that one of the candidates received a *surplus* of 'firsts,' i.e. *more* than the necessary 20,001. In that case, the successful aspirant for office is declared 'elected,' and his surplus is sorted according to number 2 preferences on the ballot declared surplus; these are transferred appropriately, thus again ensuring that every vote counts at least in some manner. This sorting and shifting, declaring 'elected' and 'not elected,' continues until such time as the required number of places have been filled, if necessary turning to number 3 choices. It is a procedure that has been known to take several weeks.

There is an element of chance in the transfer of the surplus votes because of their re-entry into the remaining count of votes for other candidates. The question usually asked here is 'just *which* ballots in the pile of the candidates having a surplus will be the ones to be transferred?' Assuming, in our

example, that candidate Dwyer had received 20,100 'firsts,' 99 of these would be surplusage and thus subject to transfer. Most countries using the Hare system would simply select these 99 papers at random. Ireland attempts to be more scientific about it by re-examining *all* the papers to determine the closest possible relationship between 'first' and 'second' choices of the various voters, so as to do full justice to their intent. In any event, experience has shown—and several mathematicians have so testified—that the element of chance is far more apparent than real, and that no substantial injustice is done.

(2) *The List System.* There are various List systems of P.R. In general, the List system emphasizes a political party's *list* rather than individual candidates—as is true in the case of the Hare system of P.R. Some countries, e.g. Israel, employ the straight party list. West Germany combines the List system of P.R. with a variation of the S.M.D. type for the lower house of its legislature. Denmark does likewise for its unicameral *Folketing*, with at least 60,000 votes necessary for a party to get representation in it. The aim is to keep P.R. from degenerating too much into splinter parties. Others, Belgium, Italy, Sweden, Holland, Finland, and Norway, for instance, use sundry versions of the List system that permit the indication of at least one, and often several, numerical preferences among the names on the party lists. Switzerland uses the *panachage* List system, under which the voter may 'pick and choose' his candidates among *all* the lists on the ballot—he is thus not confined to one party's list. And finally, the Weimar Republic, as well as Czechoslovakia from 1919 to 1938, resorted to a *flexible quota* system, whereby for every 60,000 and 30,000 votes cast, respectively, a political party was entitled to one seat in the lower house of the legislature. The latter's size thus depended on the total turnout of voters.

THE STRAIGHT LIST. Although attacked by Prime Minister Ben-Gurion as 'ridiculous and injurious,' the best current example of the inflexible List system of P.R. is that employed by Israel for its one-house parliament, the 120-seat *Knesset*. Each party prepares one lengthy list for the whole country, incorporating the names of 120 candidates, its favorites appearing at the top. The ballot shows the lists of all political parties; the voter must vote for *one list only*. At the end of election day, the total number of ballots cast is divided by 120—the number of seats available—and the resultant quota becomes the yardstick in the distribution of the seats in the *Knesset*. Any party that receives at least 1 per cent of the total vote is entitled to participate in the distribution of the seats. This particular List system, a rigid and fairly simple

arrangement, provides few mathematical problems. But the voter is deprived of the ability to designate which particular candidates on his party's list he may wish to see in the *Knesset*. A premium is thus placed upon party discipline.

THE MIXED LIST. The Mixed List, sometimes known as the *d'Hondt* system after Victor d'Hondt of the University of Ghent, the originator of its 'average quota' computation, is a departure from the Straight List. As used in Belgium, Holland, Denmark, Norway, and Sweden, for example, it permits the voter to indicate on his party's list the, however limited, numerical order in which he wishes to see individuals selected, once the number of available seats have been established by virtue of the votes cast and the quota. This method preserves the concept of the party list, but more or less abridges the party's power to determine the order in which candidates are elected from the list. In Belgium and Denmark, however, the voter's choice is limited to just *one* designation; larger freedom of choice, usually up to three, is available to voters in Italy, Norway, and Sweden. In again other instances, freedom of choice differs between upper and lower houses, e.g. Holland.

These are a few illustrations of the List system of P.R. It is much less complicated than the Hare system, but it also reflects less faithfully the individual voter's choice. Yet both main types of P.R. are far more accurate indications of voter preference than the non-proportional systems. Why, then, has P.R. been unable to replace the single member district system universally?

PRO AND CON P.R.

Arguments Pro. Many of the arguments advanced in favor of P.R. are difficult to refute from a theoretical point of view. Among them are:

1. It is a truly democratic system, for it secures minority representation in the precise ratio of minority votes.
2. Every vote counts; there are no wasted votes, which are inevitable in the winner-take-all systems.
3. It is mathematically accurate.
4. Every politically active group of any size will normally have some representation in the legislature.
5. It provides greater freedom of choice for the voter and thereby raises his interest in the body politic.
6. It tempers the domination of political machines.
7. It eliminates the evils of the *gerrymander*—the practice, so common in the United States, of deliberately dividing election districts to

favor the party in power—since there are no districts to be gerrymandered.

Arguments Con. While not denying some of the theoretical claims of the advocates of P.R., its opponents base their arguments largely on practical considerations.

1. It creates splinter parties; it balkanizes the party structure.
2. It encourages bloc voting and extremism.
3. It is divisive; it renders compromise extremely difficult, if it does not eliminate it entirely; it encourages 'minority-thinking' and freak candidatures.
4. Majority government—government by a single political party with a majority of the seats in the legislature—is usually impossible or at best difficult to attain under P.R.; hence the latter militates against governmental stability.
5. It centralizes control of political parties by strengthening party machines.
6. It confuses the voter. In the words of Lord Morley, 'a voting system that smacks of decimals and algebra does not strengthen the state.'
7. It weakens the intimate contact with the constituency that is possible under the S.M.D. system.

Many other arguments have been advanced on both sides, but those enumerated represent the main ones.

AN EVALUATION

Any objective evaluation of electoral systems must take into account the particular needs of each country, its form of government, and its political complexion. For example, it does not follow that, just because the Single Member District System of Plurality Elections works well within the framework of the government of the United States, it will be equally suitable for Belgium, Israel, or Switzerland. Conversely, although Proportional Representation has been found highly satisfactory for Sweden, Norway, and Denmark, it may be totally unsuitable for Britain.

The old proverb, that the proof of the pudding is in the eating, is still applicable: P.R. has served the Scandinavian lands very well, indeed, because it has never prevented the formation of stable coalitions, normally composed of the Social Democrats plus one of the small parties, for purposes of

governing. West Germany, too, uses a mixed system of P.R., which has to date helped to produce a genuinely stable system of government. On the other hand, it failed to provide a solution for the electoral problems of the Fourth Republic of France, which experimented with two variants of the system. There it brought a splintering of political parties, whose very multiplicity rendered government by coalition ultimately impossible, contributing heavily to the frequent turnover of governments of the day. Yet it would be grossly inaccurate to attribute the fall of the Fourth Republic simply to its electoral systems. (The Fifth Republic adopted a two-ballot 'run-off' type of S.M.D.)

There is no doubt that P.R. reflects accurately the political viewpoints of the various groups that comprise the electorate. Political minorities are represented equitably; their interests cannot be submerged in the same fashion as under the S.M.D. system. Winners do not take all—only their due share. No vote is wasted. The practice of the gerrymander, one of the most objectionable political devices used in the United States—although it came under historic attack by the U.S. Supreme Court in 1962, its effect is as yet undetermined¹²—disappears under P. R. Moreover, although P.R. does tend to splinter parties in several instances, a good case can be made for the contention that in certain countries, France for one, splinter parties would exist with or without P.R. in any free election. Finally, while it would admittedly be more difficult for one party to obtain a working majority in the legislature, such a majority is by no means unattainable, as the experience of the Scandinavian countries proves conclusively. Even in New York City's experiment with P.R., from 1937 to 1947, the Democratic party held a consistent majority in the City Council.

The overriding question that arises, however, is whether the main purpose and object of a legislature, and through it of government, is to reflect the political opinions of the populace in proportion to strength on election day, or whether it is to provide effective responsible government. It is true, of course, that a legislative body ought to represent majority and minority groups of opinion—but it need hardly be based on a precise arithmetic distribution. Majorities have to placate minorities before they can become majorities. It is regrettable when, as has sometimes occurred through the quirks of political accident, a party which gets less than a majority of the popular vote obtains a majority of the seats in a parliament, but it is not necessarily catastrophic. With a two-party system, and without P.R., both the

¹² *Baker v. Carr*, 369 U.S. 186 (1962).

British and American legislatures—whatever other vices they may have—have managed to be reasonably representative.

The primary aim of responsible government ought to be stability. It should put down a deep keel which will respond to the general drift of public opinion, but not to all the choppy waves that agitate its surface. In the West an unresponsive legislature is replaceable by way of the ballot box, although gerrymandered districts may render that much more difficult in the United States than in Great Britain. P.R. was by no means the sole cause for the downfall of the Weimar Republic or the French Fourth Republic—but it was a contributing factor. As has been explained earlier, not once in the history of the struggling Weimar Republic did any political party succeed in obtaining a majority of the seats in the *Reichstag*, thus necessitating constant coalition government, for which the Germans were neither suited temperamentally nor prepared politically. The situation in France was different; but there, too, no political party was ever able to gather a majority of the seats in the National Assembly in the entire twelve-year history of the Fourth Republic. Given the French love for diversity in politics, it may well not be attainable with the new S.M.D. system either, but the Fifth Republic is still too youthful to permit a meaningful judgment.

When all is said and done, however, we must revert to the basic premise that the *legislature must speak for the nation*. Where only two parties are in the field, each knows it must work for a majority in the constituency and in the country. Each knows it must put out bait for the wavering voters, generally the moderates who look at both sides of a question. Each must court significant minorities, and these necessities make for a middle-of-the-road platform and for candidates who have a general appeal. That is to say, minorities are not ignored and they are not entirely unrepresented, because one or other of the party platforms takes their less extreme demands into account.

On the other hand, minority groups of opinion know that their chances of electing members of their own are slim except where they happen to be heavily concentrated in particular constituencies. They tend to swing to one or the other of the two parties, hoping for some consideration in return for support and often bargaining for it. While the middle-of-the-road program may not attract them, it does not positively repel. With reluctance, yet with some minimum of consent, they come into the fold. Extreme views do not construct a party for their propagation unless conditions are such as to encourage them over a long period of time.

This is the party system working at its best. It compels everyone to concentrate on what he shares in common with others, to search for the unifying ideas and policies. It compels everyone either to forget differences or to minimize and compromise them, instead of exaggerating them. And since both parties are competitively engaged in the same task, looking for a basis of unity on which to construct a majority, it draws them closer together rather than forcing them further apart. However, when it becomes electorally possible for minorities to count confidently on getting at least a few seats, they often reject middle-of-the-road programs and set out in full cry to realize their interpretation of the good life. Once a small bloc gets into Parliament, a minority has a forum from which to expound its gospel, and it hopes, as sects always do, to win the world to the obvious truth of its views. Once the core of a party is formed, it tends, as in all organizations, to become important for its own sake as well as for its purposes and thus to perpetuate itself.

When the minorities begin to withdraw their support from the two old parties, these, in turn, change their character. The premium paid for moderation diminishes, and they tend to take more dogmatic positions, hoping to hold a following with strong convictions. As the number of significant parties grows, it becomes unlikely that any one party will get an absolute majority of the seats in the legislature. Not expecting to have the sole responsibility of governing, parties are no longer under the necessity of working out a practicable platform. Since responsibility can no longer be concentrated on them, they cease to feel a sense of responsibility. They devise their programs to attract a fervent following whose particular interests they push, rather than to provide an acceptable policy for the country as a whole.

The Need for Solid Majorities. We come again to some hard realities that were mentioned earlier. Government action is collective action taken on behalf of the whole and, if it is not to be self-defeating, it cannot give expression to all the cross-purposes entertained by particular members and parts of the whole. Presumably, something is to be accomplished by common action and, if it is to be done with consent, it cannot pander to extremes. Also, the immediate effect of much of government policy is to shift burdens from one set of shoulders to another. As long as this is so, there will be disgruntled minorities even though they get direct representation in the legislature. Even if the majority in the legislature agree to do nothing, the minorities that had hoped to shift some of their burdens will be disgruntled.

There is therefore no cure. The best that can be offered is a palliative to

be found through government's being limited in its actions in so far as is humanly possible to matters on which something approaching a community of view can be found. Democratic government may not survive unless action is so limited, and unless a sensitive mechanism is available for discovering which policies of action can hope to find a broad base of consent. The two-party system, or the type of P.R. system prevalent in Scandinavia which—to all intents and purposes—operates as a two-party coalition, is the best instrument so far found for this delicate task.

It will be retorted that election by a mere plurality in contests among three or more parties is intolerable. That may be our conclusion if such contests are to become a general and permanent feature of political life. It is not at all clear, however, that degeneration into a multiple-party system is inevitable. All our social institutions must face periodic crises. The sick do not always die and institutions often surmount their crises. An electorate that has had experience of the ease of fixing responsibility under the two-party system and cabinet government is likely to abandon a party that shows, by running third in several successive elections, that it has little chance of gaining a majority. Less rational considerations, such as the desire to be on the winning side, work in the same direction. The excision of such a party may be painful, as all surgical operations are, but those who genuinely cherish democratic government will not shrink from it if it ensures the continued life of the two-party system.

The Problem of Integration. It cannot be repeated too often that the capital problem of politics in a democracy is integration, drawing people into an effective unity on the collective action that government is to undertake in their name, while at the same time cherishing and protecting diversity in their private lives.

Reflection on this fundamental point leads to conclusions applicable to occupational representation as well as to proportional representation. In a democracy, the collective action undertaken by government must put its main emphasis on what unifies rather than on what divides. There is no need, then, for every interest to be specifically represented in political decisions. It is only when the government runs everything and everybody that the demand of every interest for representation becomes legitimate. Within a framework of order firmly maintained by consent because it is in the main limited to those things on which consent, however grudging, can be gained, all sorts of diversities may be permitted self-assertion. Individuals may live rich lives engrossed in a great variety of interests, even though these inter-

ests lack direct political representation. The present scheme of representation, through single-member territorial constituencies, in countries that are already well-integrated politically, seems to come closer to giving what is required of a representative system.

Yet it is sufficiently clear that the common interest almost always requires the circumscription or regulation of particular interests or mediation by the government between conflicting interests. In an interdependent society with an advanced technology like ours, this regulation and mediation are always complex questions and, as the argument for occupational representation shows, the interests involved need to be represented in some way. As we pointed out at some length in the preceding chapter, fortunately there are other ways of representing them, and also the minority groups of opinion on whose behalf proportional representation is asked, than by giving them seats in the legislature. Interests know how to organize lobbies to influence the government and the legislature. They can be—and often are—represented on advisory committees attached to the government departments that administer the laws affecting group interests. They even get representation in the administration itself, as when the board enforcing minimum wage laws includes representatives of employers and employees. Participation in government by organized interests and pressure groups is an accomplished fact.

REPRESENTATION AND ELECTIONS IN THE SOVIET UNION

Although the forms of Soviet representation, as manifested in the electoral system, resemble those of the liberal democracies, elections in the Soviet Union and in the Anglo-American countries fulfill completely different functions. In Britain, France, and the United States, elections are devices for asserting control by the people over the government, and therefore representing the will of the people faithfully in the legislature is a central problem in democratic politics. In the Soviet Union, however, elections are instruments used to rally the people behind the policy desired by the leadership of the Communist party. Since the main function of Soviet elections is not to elicit from the public a decision as to who shall represent it in the councils of government, i.e. which party shall temporarily control the state, there really is no genuine problem of representation in Soviet politics.

Electoral practices in the Soviet Union differ radically from those found in non-Communist countries. On the surface, it is true, there are certain similarities. It has already been noted that elections are held at regular intervals, based on a universal, direct, and equal suffrage. The country is divided into electoral areas on the basis of a fixed number of citizens per delegate, except in the case of elections for the 645-member Council of Nationalities—the upper branch of the national legislature—where the number of delegates to be assigned to each of the various national areas is fixed by the Constitution. As in the liberal democracies, Soviet elections pass through three phases: *nominations*, *campaigns*, and *voting*. The similarity noted thus far ends at the nomination stage. For, in the liberal democracies, it is the last stage, the actual vote, which determines who shall be the people's representatives, whereas *in the Soviet Union, this is decided by the nomination*. Once all candidates have been nominated, the outcome of Soviet elections is a foregone conclusion, for in all electoral districts the candidates bearing the direct or indirect stamp of approval of the Communist party are unopposed.

Nominations. The right to nominate candidates is granted by the Constitution 'to public organizations and societies of the working people.'¹³ In practice, this means that almost any organization approved by the state—and there are no others—can nominate a candidate for one of the soviets, whether it be for a village soviet or for the Supreme Soviet of the U.S.S.R. It should be recalled at this stage in the discussion that all approved organizations in the Soviet Union are dominated by the Communist party. No candidate—even if he is not a member of the party—would be out of sympathy with the aims and methods of the party.

Once a number of candidates have been nominated by the various organizations in an electoral district, such as trade unions, Red Army units, and workers on collective farms, the local Communist party unit calls a conference at which delegates from all the nominating organizations in the electoral district meet informally to discuss the nominees. Out of this conference comes an agreement on the best candidate. Once he is picked, the organizations which have nominated the other candidates withdraw their nominations, and only *one candidate remains to be voted on at the forthcoming election*. Thus the local Communist party organization and a few delegates from other organizations really pick the winning candidate, although it is quite clear that 'public organizations' of varied types do exercise considerable initiative in *proposing* candidates for nomination at the local

¹³ Constitution of the U.S.S.R., Art. 141.

level. Many of these candidates are members of the party, but there is always a considerable proportion of non-party candidates who are sponsored by what is called the 'Bloc of Communist and non-party people,' the official label under which the 1429 official candidates for the Supreme Soviet seek votes.

The Soviet system of nomination bears some resemblances to the direct primaries in the United States, particularly to most Democratic primaries in the deep South, where the outcome of an election is really decided at the primary stage, because the Republican party is generally too weak to give the Democratic candidate a run for his money—with increasing exceptions in the more industrialized states, however. The difference between the United States primaries and Soviet nominations is that the former *do* provide effectively for wide popular participation in *selecting* a candidate for the impending general election.

Campaigns and Elections. The Soviet nominations are followed by a most intensive election campaign. The purpose of this device is not to convince the public of the relative merits of the contesting parties—for, of course, there is no contest—but to serve purposes of the Soviet State: to explain the policies of the Communist party; to extol its accomplishments; to honor and glorify its loyal servants; to compare the results of Communist rule with that of the czars; to give the government an aura of legitimacy; to explain the economic policies of the Soviet state. In sum, the campaign is designed to educate the masses in Communist doctrine and to whip up their enthusiasm for the Communist cause and the national leaders. All the means of mass propaganda available to the modern totalitarian state are employed in the pre-election drive, and the citizens are subjected to severe social pressure to ensure a large vote on election day, for abstention is viewed as a 'serious neglect of duty.'

Voting, which is carried out in a festive spirit with flags flying and music everywhere, is extremely heavy on election day—one of the few official holidays. In 1958, for instance, 99.7 per cent of the eligible voters went to the polls, and only 500,000 or 0.4 per cent voted against the official candidates, either by crossing out their names on the ballot or by writing in others. Either of these steps is regarded and counted as a negative vote. Such results are widely heralded by the regime as all but unanimous popular approval.

Elections, then, fulfill a different role in Soviet politics than in countries which have the two-party or multi-party systems. They are another expression of the principle of 'democratic centralism,' which assures that all un-

desirable candidates are prevented by the party from contesting an election, and enables the vast mass of Soviet citizens to take part in the pre-election discussion and in the vote itself. In the light of this function of Soviet elections, the problem of representation is virtually non-existent.

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XII

The Executive—The Mainspring of Government

We have distinguished one of the organs of government as the executive and described its function as executing or carrying out the law. It is now necessary to carry the distinction further and define the function more precisely. In the broadest sense, the executive includes all those engaged in or associated with the active manipulation of men and things in the name of the government. The discussion of the scope of modern government action has indicated the extraordinary range of activity involved.

Who Is It? The executive in this wide sense includes the Chief of State, be he monarch or president. It includes the small group who, through their positions as heads of the great government departments, are in direct command of the manifold activities of government. This is the ministry or cabinet, known in Britain and France as the government, in the sense of (at this writing) Mr. Macmillan's Government and General de Gaulle's Government, and in the United States as the administration, in the sense of Mr. Kennedy's Administration. For convenience of nomenclature, we may call them the *temporary, or political*, executive. The executive also includes the tens, and even hundreds, of thousands of civil servants who may be described as the *permanent* executive because, in the main, they do not now change with a change of government. It also includes the armed forces who, while they cannot be said to carry out the law, do act as agents of the government in whatever they do.

Indeed, it is a gross understatement of the function of the executive to say

that it carries out the law. It is often said that the executive carries out the will of the state. If we leave aside the metaphysical question whether the state has an identifiable will, the statement is helpful because it directs attention, not to specific laws that are enforced, but to a complex total of actions of a bewildering variety, many of which are not the execution of laws but discretionary actions that the law permits without commanding. For example, the executive runs the vast household of the modern state, buying rope for the navy and pens, ink, and paper for the civil service, hiring servants, constructing or renting office space, and a thousand other jobs of domestic management. The government provides a great many services that cannot always be described as the carrying out of mandatory laws. There is ordinarily no law requiring the government to conduct geological surveys, maintain diagnostic laboratories or experimental farms. They are lawful because the appropriate legislature, national or state, has granted money for the purpose.

THE EXECUTIVE AS THE MAINSPRING OF GOVERNMENT

In sheer numbers, the executive far outstrips the other two powers. Where judges are numbered by dozens and legislators by hundreds, the executive counts in tens of thousands. Its importance is not merely numerical. In the typical nation-state of today, with a central government exercising a wide authority over an extensive territory and millions of people, the executive is truly the mainspring of government. It makes the wheels go around. Germany and Italy under the Nazi and Fascist dictatorships proved that nation-states can continue in some fashion without a functioning legislature and without a judiciary of significant independence. But when the executive breaks down, as it did in Nazi Germany in the closing days of World War II, the central government collapses.

Its Significance. The reasons for this are quite simple. We know that large business enterprises will not run without the guidance of great executives. Government today, in terms of the scope of its operations, is the largest of all enterprises. It therefore must have leadership. That leadership must be continuous, always devising and revising. It must be informed leadership. It must know the objectives of all the activities carried on. It must also know, or have readily available, detailed information on the problems government is supposed to be solving. Government cannot undertake to improve public

health or public education unless it knows in detail what is wrong. It cannot regulate and promote agriculture unless it knows a great deal about agriculture. Even then, the problem is often so complex that trial and error is the only way to approach solutions. So, in order to decide intelligently what to try next, the knowledge gained in the course of administration is indispensable.

There is a steady accumulation of this kind of information in every government department that is effectively organized, and there is often much more of it concentrated there than anywhere else. It is not that the executive necessarily knows best what should be done; often, it does not. But it has a body of information, of expertise that is indispensable in deciding what *can* and what *cannot* be done. The legislature usually does not have it. This explains why so much legislation today is framed by the executive, and why the role of the legislature is increasingly that of criticizing, rejecting, or approving executive proposals, and—at least in the United States—‘investigating’ their operation once they have become law. Much more will have to be said about this later. For the moment, the point is that if the vast apparatus of present-day government is to perform satisfactorily the tasks laid upon it, there must be continuous initiative by a body that knows the detail of the work and imparts drive and direction. This initiative must come from the executive itself. The legislature is too far away from the complexities of administration; it is not continuously and exclusively absorbed in the study of these matters, and it is always too numerous and often too torn by political battle to give unified and vigorous direction to the daily work of government.

The Roles of Executive and Legislature. The fact is that the emphasis in the literature of the last hundred years on the vital role of the legislature in maintaining democratic control of government has led many to the unwarranted belief that the legislature is the government. Reference to history as well as to current realities should correct this mistaken impression rapidly. Historically, the first origin of central government almost everywhere is in a war leader, or a conqueror, who seizes control of a territory and uses the reserve of force at his command to control the population.

At this stage the executive is everything. The limitations on it are the limitations of nature and the passive or other resistance of the population. There are no internal restraints. To take only one but not an isolated example, the government of William the Conqueror in England was not distinguished from his own personal household. Legislative and judicial institutions

emerged later and only slowly became effective brakes on executive action. The essence of government is an executive. It represents the focus of leadership. The legislature and judiciary are merely the instruments for constitutionalizing it.

No matter how fully representative a legislature may be, it cannot govern the country. The great weakness of the Third and Fourth Republics in France, whatever the deeper causes of their collapse, was that the legislatures would not abide a strong executive. Lacking this, no effective leadership existed to prepare the country to meet the Nazi menace, to withstand the shock of military disaster, or to meet the mounting Algerian crisis. The immense concentration of executive power in de Gaulle under the Fifth Republic, and the attendant emaciation of legislative power, followed almost inevitably.

One of the most serious defects of the Articles of Confederation, the first attempt at a national government for the United States, was the failure to provide for distinct organization of the executive power, all powers granted being placed in the hands of the Congress. Similarly, the state constitutions as maintained throughout the nineteenth century did not provide for effective organization of the executive power. While they established the office of Governor, they denied him any substantial authority, dispersing executive power into many hands. The result was a weak executive and a very low level of efficiency in state government. The efficiency of state government did not begin to rise until the movement to reorganize the state executive power was launched in the Midwest in 1917.

To insist on the executive as the essence of government is not a depreciation of the legislature. Rather it reveals the tremendously important and essential role of the legislature as a check, or brake, on an energetic executive. This is vital for the maintenance of constitutionalism, an importance underlined by Lincoln's doubt, whether a government—i.e. an executive—that was strong enough for surmounting emergencies, would not be *too* strong to be kept under effective control by its people. With the aggrandizement of the executive through the great extension of governmental action, and its need for vigor if it is to do efficiently all the tasks assigned to it, the need for checks on the executive is greater than ever before in the history of liberal democratic government.

Executive Leadership. Accepting the necessity for strong executive leadership, it should be clear that that leadership is not provided by the executive defined in the sense of including tens of thousands of civil servants. Leader-

ship is always the function of one or a few. Too many cooks spoil the broth, and what holds for soup holds for government as well. Every numerous body that wants to accomplish anything has to set up an executive committee, and there is ample testimony that if such a committee is to give really vigorous direction to affairs its membership should not exceed ten and had better be five. There is indeed an argument that a plural executive suffers too much from cross-purposes and indecision, and that the executive should be headed by a single person. This argument prevailed in the constitutional convention in Philadelphia in 1787—and in fact, if not in theory, in the de Gaulle Constitution of 1958. Neither the shareholders nor the board of directors of a great business enterprise try to run the daily affairs of the enterprise. They appoint a general manager who is popularly known—and revered and despised by turns—as a ‘big executive.’

What It Means. In the preceding paragraph a quite different but commonly used sense of the word ‘executive’ emerges. *Executive* means commanding men and directing affairs rather than the direct and immediate carrying out of particular objectives in all their detail. This latter aspect of the work of big organizations, be they business or government, is called, by contrast, *administration*. The executive generally means the small group, the cabinet members, who head the great departments of government and thus direct the multifarious efforts of the civil service and who, because they are in command, must supply the initiative and leadership that is necessary. On the one hand, they furnish drive and direction for governmental administration. On the other hand, the civil service funnels to them the continuous stream of information and experience gained in the course of administration from day to day. Using this information to develop their own conception of public needs, and keeping in mind what the legislature wants or will stand for, the executive matures legislative proposals for the consideration of the legislature.

In these functions, the executive is greatly aided by a small group of higher civil servants, their immediate subordinates in the departments, and it is almost impossible to disentangle the separate contributions of the two groups. There are some who say that these few higher civil servants make by far the greater contribution and are the real governors of the modern state. However, because the executive has the *responsible* command, and is always contributing fresh ideas not gleaned from the civil service, it may justly be described as the mainspring. Therefore, the discussion in this chapter will be directed to the executive in the narrow sense.

THE CHIEF OF STATE AND CHIEF EXECUTIVE IN THE UNITED STATES: THE PRESIDENT

THE INSTITUTION

A frequently quoted old chestnut is Sir Henry Maine's statement that the King of Britain reigns, but does not govern; that the President of the United States governs, but does not reign; that it has been reserved for the President of France neither to reign nor to govern. This assertion can validly still be made solely with respect to the British Chief of State. Since the birth of the Fifth French Republic, the President of France both rules and reigns and, notwithstanding the many congressional, and some latent judicial, checks upon his powers, the mid-twentieth century American President also reigns as well as rules. The latter is, as President Franklin D. Roosevelt once put it, 'King, Prime Minister, party leader—all rolled into one.' And Woodrow Wilson rightly called the President 'the pivot of the whole [American governmental] structure.' He symbolizes the people and he also runs their government. He is both Chief of State and Chief Executive, thus combining functions that are separated in Britain.

It is true that being an elected person, the President arouses antagonism as readily as devotion, and that the Constitution comes closer to being the symbol of unity in the United States than does the President. Since the latter lacks the divinity that hedges a monarch, the Americans have had to find their symbol in an abstraction. The Civil War was fought to preserve the Union, not the kingdom of Abraham Lincoln. Nevertheless, the President represents the focus of democratic leadership in the United States today. He is the one truly national institution—the only national office elected with a national constituency that can truly represent the national interest.

Moreover, as Professor R. E. Neustadt has pointed out so ably,¹ the President has four additional, sometimes overlapping constituencies: (1) the 'governmental' constituency—the public officials who serve under him; (2) the 'partisan' constituency—his party; (3) the 'congressional' constituency—the legislature; and (4) the 'overseas' constituency—foreign states.

The Chief of State. The President is the formal Chief of State who per-

¹ Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: John Wiley & Sons, 1960), p. 7.

forms many of the legal and ceremonial functions of the Queen of Britain. He opens public buildings, charity drives, and the baseball season. He chats with delegations which range from the Boy Scouts to the League of Women Voters. He receives ambassadors from, and is the official medium of intercourse with, foreign countries. He is the commander in chief of the armed forces. He gives formal assent to legislation, although his veto may be overridden by a two-thirds vote of both houses of Congress. If he neither assents nor vetoes, the measure automatically becomes law after a lapse of ten days, Sundays excepted, provided Congress is still in session; if it has adjourned in the meantime, the bill is killed by such inaction, known as the 'pocket veto.' The regular sessions of Congress are fixed by law and he cannot change them, just as he cannot prorogue or dissolve Congress, unless its two houses cannot agree on an adjournment date. The principle of the separation of powers limits his interference with Congress to the calling of special sessions in emergent circumstances. He may pardon and reprieve criminals. The formal acts of government are performed in his name.

The Chief Executive. The President also holds the executive power of the United States, and thus he governs within the ambit of power given by the Constitution. It is impossible, in fact, to make any clear distinction between his functions as Chief of State and as Chief Executive. Thus he not merely signs the pardon that frees a convicted criminal; he also decides with the assistance of the Attorney General whether a pardon shall be granted. This latter is a function that in Britain rests not with the monarch but with the Home Secretary. The President not only promulgates ordinances, he decides upon and takes responsibility for their content. His official functions as the executive of the United States are so vast that he cannot begin to give personal attention to the compass of his office. In most matters he accepts the carefully considered and carefully channeled advice of his subordinates.

Selection and Election of the President. Nominated by one of the two major political parties at its national convention, and elected largely through the campaign efforts of that party, the President on attaining office becomes the leader of his party and, presumably, the leader of public opinion. What sort of person is he?

QUALIFICATIONS. According to Article II of the Constitution, anyone who is 'a natural-born citizen,' at least thirty-five years of age, and who has resided in the United States for fourteen years, is eligible for the high office. However, so many unwritten qualifications and customary requirements exist that the proud American claim, 'anyone in the United States can grow up to be

President,' must be viewed in the light of the composite picture of the thirty-five Presidents to date. According to it, the typical American President is:

fifty-five years old, White, Protestant, male, happily married, of Anglo-Saxon ancestry, with a B.A. college degree, from one of about seven major non-Southern states that have a fairly large electoral vote and are not 'one-party' states, with a brief military or, preferably, more extensive legal and administrative background—and without an easily definable record on major controversial issues.

Not many qualify or are 'available' under these circumstances—yet the election of John F. Kennedy in 1960 proved that no longer is a man's religion necessarily a barrier to the highest office in the land.

TERM OF OFFICE. The President is elected for a four-year term. Until the ratification of the Twenty-second Amendment in 1951 no limit on the number of terms existed, although it had become customary for a President to seek no more than two. Franklin D. Roosevelt, however, ran for and gained a third *and* a fourth term in 1940 and 1944, respectively. Grover Cleveland won the popular vote thrice—in 1884, 1888, and 1892—yet he lost the middle election in the electoral college. Now, however, no President can serve more than two terms, or a maximum of ten years—the latter in the event of a Vice President succeeding to the presidency with two years or less of the old term remaining.

THE ELECTORAL COLLEGE. The President is elected by the absolute majority vote of an 'electoral college' of 538 members to which each of the states contributes a number of electors equal to the total number of senators and representatives to which it is entitled in Congress. These electors, chosen as the laws of the separate states prescribe, meet and ballot for the candidates for the presidency. The ballots are then sent to the capital, and are opened and counted by the President of the Senate in the presence of the entire Congress.

ELECTION MECHANICS. Thus far goes the written Constitution, which intended the electors to exercise their personal judgment in casting their ballots. But the development of two strong political parties has resulted in a complete change in the substance behind these forms. At national conventions called for the purpose, the two parties each choose a party candidate for President. The laws of each state enable each party to nominate a complete slate of candidates—usually prominent party workers or heavy financial contributors—for election to the electoral college. On the day fixed for the

presidential election, the electorate in each state in effect votes for either the Democratic or Republican slate of candidates for the electoral college *in that state*. When the electors so chosen meet, they almost always vote for either the Democratic or Republican candidate for the presidency. But since they are pledged from the beginning to vote for the candidate of the party that nominated them, the result is a foregone conclusion as soon as it is known which complexion of electoral slate has been chosen in each state. However, only two states—California and Oregon—require by *law* that the electors heed their pledges. As a result, occasional defections have occurred, the most recent in 1948 and 1956, when electors pledged to Truman and Stevenson, respectively, voted for 'Dixiecrat' candidates, and in 1960, when an elector pledged to Nixon cast his ballot for Senator Harry F. Byrd of Virginia (who was not even a candidate).

The later formalities—the electors' meeting to cast their votes, the dispatch of these ballots to Washington, and the grave proceedings there—are now empty forms whose only justification is the necessity of complying with the precise requirements of the written Constitution. The spirit changes but the letter remains.

In effect, the President is elected by popular vote. This is not quite an accurate statement because it is still the number of electoral votes that counts, and it is possible for a candidate to win a majority of the votes of the electors without having a majority of the popular vote. Presidents Wilson in 1912, Truman in 1948, and Kennedy in 1960 were the last to come to office without a popular majority. But even when he gets a majority of the popular vote it cannot always be said that the President is the popular choice, because the process of nomination often produces presidential candidates whose decisive merit is that they are inoffensive to the important diverse elements in the party—e.g. Warren G. Harding in 1920 and John W. Davis in 1924, both nominated as a result of deadlocks among party leaders, the former on the tenth, the latter on the one hundred and third convention ballot.

DIFFICULTIES. It is also possible, however, that a person who obtains more *popular* votes than his opponent or opponents still loses because he has not received an *absolute majority* of the votes in the electoral college. This happened in 1824, 1876, and 1888. In the first case, Andrew Jackson obtained 50,000 more votes than his closest opponent, John Quincy Adams, but the House of Representatives—where under the Constitution elections are thrown for decision when no candidate has received the necessary majority in the electoral college—chose Adams, for a variety of reasons. In 1876, the

famous 'disputed' or 'stolen' election, Democrat Tilden had 250,000 more popular votes than his Republican opponent, Hayes, but lost by one vote in the electoral college—after a stormy, lengthy, politically charged investigation of twenty disputed electoral votes. In 1888 Cleveland defeated Republican Benjamin Harrison by 100,000 votes, but lost the election because Harrison had sixty-five more votes in the electoral college, largely due to the latter's narrow victories in the most populous states, including New York.

REFORM? As a result of some of these inequities, there have been many, and recurring, calls for the abolition or reform of the electoral college. Measures toward that end abound in every session of Congress. None has succeeded to date, chiefly because of the opposition of the small states which fear a resultant loss of power. In 1950, the Lodge-Gossett Resolution, a proposed constitutional amendment which would have divided the electoral vote of the candidates in each state in precise proportion to the popular vote, passed the Senate, but was defeated in the House of Representatives.²

Presidential Succession. The Constitution provides for the succession by the Vice President, who is nominated and elected to his office in the same manner as the President, in case of the latter's 'Removal from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office.'³ Seven Vice Presidents have thus succeeded to the presidency, all due to deaths—four by natural causes, three by assassination.⁴ A delicate and enigmatic problem is posed by the meaning of the term *inability*. Although history proves that Presidents have indeed been 'inable' or 'disabled' because of illness—e.g. Garfield, Wilson, Eisenhower—the problem has never been tackled really seriously, despite a host of recommendations for remedial legislation. It may well be, as a close student of the inability question has stated it, that the problem 'is quite insoluble . . . [it] will always be a messy situation . . .' even if on the surface it were to yield to overt 'legal' or 'practical solutions.'⁵

In 1947, Congress passed the Presidential Succession Act, which provides for the following order of succession after the Vice President: the Speaker of the House of Representatives, the President *pro tempore* of the Senate, and

² For an authoritative treatment of electoral reform, see Lucius Wilmerding, Jr., *The Electoral College* (New Brunswick, N. J.: Rutgers University Press, 1958).

³ Article II, sect. 1, cl. 5.

⁴ Lincoln, Garfield, and McKinley were assassinated; W. H. Harrison, Taylor, Harding, and F. D. Roosevelt died in office.

⁵ Clinton Rossiter, *The American Presidency*, rev. ed. (New York: Harcourt, Brace and Co., 1960), pp. 221–2. See also Ruth C. Silva, *Presidential Succession* (Ann Arbor: University of Michigan Press, 1951).

then the heads of the cabinet departments in order of their creation, beginning with the Secretary of State.

The Vice President. The Founding Fathers viewed the office of the Vice President as a spot for the second-best man in the country, perhaps as a step to the top. But partly because of the development of the party system and the niggardly role assigned to the Vice President under the Constitution—as presiding officer of the Senate with a vote only in the very rarely occurring case of a tie—the significance of the office and its incumbents declined rapidly. Indeed, even the first of these, John Adams, referred to it as ‘the most insignificant office that ever invention of man contrived.’ More often than not occupied by an amiable mediocrity, selected by the national convention as a political ‘sop’ to disappointed wings of the party, or as a ‘balancer’ of the presidential ticket, the vice presidency became somewhat of a national joke. Thus Theodore Roosevelt, after having been nominated as Vice President in 1900, wrote General Leonard Wood, ‘. . . by the time you receive this you will have learned . . . that I have been forced to take the veil.’ Wilson’s Vice President Marshall likened himself to ‘a man in a cataleptic fit’ who is aware of all that is going on around him, but incapable of doing anything about it. Wilson himself commented that ‘the chief embarrassment in discussing the office is that in explaining how little there is to be said about it one has apparently said all there is to say.’⁶ Several early occupants of the office referred to their position as ‘His Superfluous Excellency’—a phrase coined by Benjamin Franklin—and Vice President Curtis once suggested that the least the people who curiously stared into his office while on their way to important appointments elsewhere could do was to throw him some nuts.

GROWTH IN IMPORTANCE? Ever since F.D.R.’s time, however, the vice presidency has been accorded a new lease on life. Since the days of Roosevelt’s first Vice President, John Nance ‘Cactus Jack’ Garner, the Vice President regularly attends, and in the absence of the President conducts, cabinet meetings. Beginning with Alben Barkley, affectionately known as the ‘Veep’ throughout the country—whom Clinton Rossiter has called ‘probably the most distinguished man nominated for the office’⁷ since Calhoun in 1825—the Vice President was given an important statutory position as a member of the National Security Council. President Eisenhower, more than any other

⁶ For a summary of these and other reactions see Arthur Edson, ‘L. B. J. Is Third Johnson V.P.,’ in *The Philadelphia Sunday Bulletin*, January 22, 1961, Sec. 2, p. 5.

⁷ Rossiter, *op. cit.* p. 138.

President before him, not only delegated many ceremonial and consultative functions to his Vice President, Richard Nixon, but, within limits, made him an active participant in his Administration; a role also delegated to Lyndon Johnson by President Kennedy. Still, Nixon had complained in 1958 that the 'Vice President is a unique official of government. He has access to information in all areas, but power in none.'⁸ Nonetheless, at long last the office is the subject of new study and experimentation. Yet there is, concurrently, a gnawing awareness that the establishment of a strong, perhaps independent, Vice President might bring with it a serious undermining of the President's own position.

The President's Cabinet. The framers of the Constitution did not want to create a replica of George III, but they were fully aware that an executive must be able to act with energy and undivided purpose. To that end, they vested the executive power in one man. But one man could not run even the United States government of 1789. Executive assistants had to be provided. From time to time, Congress has created departments of the executive, now ten, each of which is headed by a secretary. These heads of departments early became known collectively as the President's *cabinet*. He has to rely heavily on them for directing the executive work of government for which he alone is responsible. His appointments to the cabinet must be approved by the Senate, but the Senate has to date refused but eight times to ratify his choice—the last time in 1959 by the margin of three votes (49:46) in the case of President Eisenhower's nomination of Lewis L. Strauss to be Secretary of Commerce. It has generally taken the view that the President as the responsible executive should not be restricted in his choice of those on whom he must rely.

SELECTIONS. As far as the Constitution goes the President's selections are limited only by the separation of powers, which prevents a member of Congress from holding an office under the United States. In practice, many political factors influence a President's appointments. He normally, but not always, picks men who are members of his own political party but, with the exception of the post of Postmaster General, which—with an occasional exception—by tradition goes to his successful campaign manager or his party's national chairman, they are not necessarily the principal political leaders of the party. In contrast to the situation in Britain, a political career in the United States is not significantly advanced by elevation to the cabinet.

⁸ As quoted by Douglass Cater in *The Reporter*, November 27, 1958, p. 10.

Whether as cause or consequence of this, Presidents tend to consider other qualifications such as executive capacity and experience as being more important than political leadership. President Eisenhower's cabinets contained several successful heads of large business concerns, such as General Motors, Proctor and Gamble, and Eastman-Kodak.⁹

Cabinet posts generally go to men who have been active in party politics without becoming distinguished party leaders. They must be distributed with an eye on the different wings or factions of the party. The great geographical sections of the country and the great economic interests of labor, agriculture, and capital also claim representation, and cannot be entirely denied. The Departments of Agriculture, Commerce, and Labor must generally be headed by men who have the respect, if not the confidence, of agriculture, capital, and labor respectively.

In addition, there are always some more personal considerations. One cannot be elected President without accumulating obligations to staunch lieutenants and supporters. It would be ungracious as well as impolitic to forget these obligations entirely in forming a cabinet. And there is almost always an intimate personal friend or even a relative—e.g. Attorney General Robert Kennedy in his brother's cabinet—whom the President takes into his cabinet. A great many factors have to be considered and balanced in selecting the cabinet.

THE PRESIDENCY AT WORK

Heavy Burdens of the President. The members of the cabinet direct the work of the departments and advise the President on matters coming within his charge. Each has his own department to administer within the generally broad limits laid down by congressional legislation and by the President's decisions on broad questions of policy. When they are held, meetings of the cabinet with the President serve two main purposes. First, they provide a forum for discussion and settlement of questions that affect two or more departments. The scope of present-day government activities ensures that there will always be some interdepartmental questions to be resolved. Second,

⁹ President Eisenhower's first Secretary of Labor was Martin Durkin, an ex-plumber and the sole Democrat in the cabinet, who resigned after less than eight months in office. He used to describe himself as a member of 'the Ike Cabinet of eight Millionaires and one Plumber,' and lamented that 'each time I entered a cabinet session during a policy meeting all the other members would stop talking.'

they enable the cabinet to discuss together and advise the President on matters of policy on which he wants advice—a desire that varies widely among Presidents.

All Executive Power Concentrated in the President. Discussions in the cabinet are confidential. Until President Eisenhower introduced his smoothly functioning quasi-military staff-and-command system—quickly scrapped by his successor—no records of these discussions were kept. It still rests with the President what public announcements, if any, are to be made as a result of discussions. The expressed views of members are not executive decisions marking out lines of policy, but merely recommendations to the President. He may, as did President Eisenhower, treat the members of the cabinet as colleagues whose combined judgment he is willing to follow. But there is nothing in the Constitution making them colleagues who share the power and responsibility for decision. Rather, they are his subordinates and subject to his command.

SUBORDINATE POSITION OF CABINET. Accordingly, he may ignore their advice. He may make decisions affecting their departments without consulting them. Indeed, President Kennedy's approach to cabinet meetings provides a sharp break with the formal, almost ritualistic methods of President Eisenhower. Believing meetings of the cabinet quite frankly to be a waste of time, President Kennedy has viewed them as little more than 'pleasant affairs,' has called them but very infrequently, and, in general, has preferred to be in touch with cabinet members individually or in small groups. Often, a President's most confidential advisers are not in the cabinet at all. This was true in the cases of Harry Hopkins, F.D.R.'s intimate co-worker, and Milton Eisenhower, President Eisenhower's brother. Even when the President's entire cabinet votes against his proposal, he may say, as Lincoln did on one occasion when his seven cabinet members opposed something he favored: 'Noes, seven, Ayes, one: the Ayes have it!' President Polk, who insisted on regular cabinet meetings—he called some 400 in his four years in office—nevertheless readily exercised the presidential prerogative of ignoring the collective opposition of his cabinet. Thus he wrote of a measure he had just vetoed, '... having made up my mind that I could not sign the Bill under any circumstances, it was unnecessary to consult the Cabinet on the subject.'¹⁰

The cabinet is not collectively responsible with the President for the deci-

¹⁰ As quoted by Sidney Heyman in 'The Cabinet's Job as Eisenhower Sees It,' *The New York Times Sunday Magazine*, July 20, 1958, p. 38.

sions taken. He is the executive and he alone carries the responsibility. The cabinet, as Professor R. F. Fenno, Jr., its closest modern student has so well observed, is weakest in making direct contributions to policy decisions and in interdepartmental co-ordination; it is strongest in its role of a political sounding board—presidential adviser and ‘as a forum in which some overall administrative coherence’ is obtainable. However, as Professor Fenno goes on to point out, whereas the cabinet *as a group* ‘draws its life breath from the President, . . . as individuals the cabinet members are by no means so dependent upon him.’¹¹

A MEASURE OF INDEPENDENCE. Thus, acting as individual department heads, members of cabinets have indeed been known to wield a considerable amount of independence of the President—e.g. Jesse Jones as Secretary of Commerce and in other positions close to the business community under President Franklin D. Roosevelt from 1933 to 1944. The possibility of such independence, however limited, is enhanced by the fact that, in addition to policy-making, the cabinet is also a vital sounding board for *public opinion*. The various department heads respond to different sources of such opinion, and a ‘popular member’—‘popular’ with his particular ‘constituency’—often serves admirably to draw support to the President; or, as in the case of Jesse Jones (whom the President finally fired when he had enough) to stimulate opposition. Be that as it may, to be a ‘strong’ cabinet member, the department head must have strong non-presidential ‘public’ prestige, party following, legislative support, or roots of influence in his own department. This may well mean that, in effect, the member often operates not as a part of the formal body, but independently—and it sometimes means that he will operate to get for his area of responsibility the bigger piece of the pie ere a fellow cabinet-member moves in to do the same for his. In this sense, the political help which the President receives, thus does not come from the cabinet as a group, but from its individual members operating outside the group—and not infrequently with untowardly tenacious individualism (of which examples in addition to the case of Jesse Jones would be F.D.R.’s Secretary of the Interior Harold L. Ickes, President Truman’s Secretary of Commerce Charles S. Sawyer, and President Eisenhower’s Secretary of the Treasury George M. Humphrey).

SOLE PRESIDENTIAL RESPONSIBILITY. But whatever the roles of the cabinet and his other advisers, there is no doubt whatsoever that the President is very

¹¹ Richard F. Fenno, Jr., *The President's Cabinet* (New York: Vintage Books, 1959), pp. 155 and 248. (Italics supplied.)

limited in attempts to shift the burdens of his office. No interest of power and consequence is willing to accept a denial of its demands from the head of a department, but insists on having a decision from the President. Because the cabinet cannot compel the President to take account of their views, they often do not give him the blunt, candid criticism he needs, although they are neither irresponsible nor unco-operative. He can dismiss them at will, but it is often politically inexpedient to reveal a rift in the cabinet. There is constant danger that they—and his unofficial advisers—will become sycophants flattering him with too ready confirmation of his views. At any rate, like all men who reach a high pinnacle of authority, the President is likely to be isolated and lonely. President Truman viewed his position—and it was one he loved and respected—as ‘the loneliest office in the world.’ And after but two weeks in office, President Kennedy wistfully remarked, ‘the President is quite alone at the top!’

Help for the President. The steadily growing burdens of the office of President, and the weakness of the cabinet as an advising and deliberating body, led to the establishment of a White House Office under President Roosevelt in 1939. It is a part of the President’s personal domain, called the *Executive Office of the President*. In addition to the White House Office, which had 300 employees in 1963, it consists of the National Security Council, the Central Intelligence Agency, the Bureau of the Budget, the Office of Emergency Planning, and the Council of Economic Advisers. All of these report directly to the President. They will be discussed briefly later.

THE WHITE HOUSE OFFICE. As the name implies the White House Office consists of the people deemed essential to the President in his intimate day-to-day operations and comprises his personal staff. Under President Eisenhower, they were headed by the *Assistant to the President*, who in the person of former Governor Sherman Adams of New Hampshire attained a position of immense power and influence. From his assumption of office early in January 1953 until his forced departure from the scene in 1958 as a result of his questionable acceptance of certain gifts from an enterprising private citizen, Mr. Adams—with the full knowledge and consent of the President—exercised more power than any other presidential aide in modern times. Nothing and no one could reach the President without the approval of Adams. Indeed, President Eisenhower quite specifically required that every major document and recommendation reaching his desk bear the marking ‘O.K.—S.A.’ But Adams’s successor, General Wilton B. Persons, was neither

given nor did he exercise the degree and scope of authority vested in his predecessor, and the post was summarily abolished by President Kennedy even prior to his inauguration.

Other important members of the White House staff usually are personal presidential assistants for press relations, congressional relations, speech-writing, economic affairs, national defense, foreign affairs, atomic energy affairs, appointments, and others. Then there is the group of personal attendants—military aides, physicians, secretaries, a special legal counsel, and so forth. It must be restated that none of these people reports to any other member of the executive branch except the President.

STAFF WORK. Presidents take different approaches to the work they expect from their staffs. President Eisenhower relied as heavily on the staff system in the White House as he had in the Army—it answered precisely the needs of the military man and national hero, who had little penchant for detail and placed the concept of ‘harmony’ and ‘teamwork’ above every other facet of his entourage (quite in contrast to Franklin D. Roosevelt, for one, who delighted in what he saw as the benefits of heady competition and even strife among his immediate subordinates). Thus President Eisenhower also caused the establishment of a cabinet secretariat, headed by an executive secretary, through whom the President endeavored to make of the cabinet an effective co-ordinating board that would produce the teamwork in his Administration which he craved so much. And he relied on the cabinet and his staff for collective advice more than had any of his predecessors—and infinitely more than his successor.

The latter, disdaining and fearing the kind of lofty isolation his predecessor seemed to relish, set out at once to make the White House, his office, the very fountainhead of governmental action. A free-wheeling innovator in the exercise of presidential power, Kennedy has shown a clear preference for the direct, personal approach, a desire to deal with problems from their inception to proposed solution and decision. He has demonstrated an undisguised distaste, if not contempt, for formal agenda and committee and staff meetings. The concept of a Sherman Adams, indeed any so-called ‘No. One Assistant’ is out—instead President Kennedy surrounded himself with six or eight bright and young associates who work closely *with* him, but never *instead* of him. Under Kennedy, as one close observer of the Washington scene commented with insight, the staff has been shaped to meet the needs of a President with ‘abundant stores of restless energy, with a great capacity for

assimilating detail, and with a taste for tackling issues before the rough edges are planed away in co-ordination.¹²

Main Functions of the President. A brief summary cannot give a just impression of the scope of the executive office. The Constitution charges the President to see that the laws are faithfully executed. Today, this means that he must supervise the vast range of regulation and services of the positive state in so far as they are federal and not matters for the separate states. Congress annually piles new duties on the executive, many of which are really of a legislative nature.¹³ Whether through delegation by Congress or through the inherent ordinance power of the executive, the President must now make ordinances and regulations which, in sheer bulk, dwarf the output of Congress into insignificance. He must see to the appointment and direction of the officers necessary for the tasks in hand. The Senate shares in some 45,000 appointments to the 'higher' offices, including the federal judiciary, postmasters, military appointments, and the major executive officers. The 'lower' offices are mostly filled by heads of departments under civil service regulations. Yet the President must personally attend, perfunctorily or otherwise, to some 6000 appointments in the course of a year. Subject to certain civil service regulations, he has power to discipline and remove the civil servants of the United States. He has absolute power of removal over 'purely executive' officials, such as members of his cabinet or his Executive Office. Members of the independent regulatory commissions, such as the Interstate Commerce Commission, however, can be removed by him only for specific causes of mal-, mis-, or non-feasance in office. Of course, he has no power of dismissal over the judiciary at all.

He has charge of the conduct of foreign policy, subject to Senate approval of treaties, by a two-thirds vote, and to congressional support by way of necessary appropriations and legislation. While Congress declares war, it is his task to see that the war is fought with energy and intelligence to a successful conclusion. Much discretionary power and heavy responsibility lie with him to deal with all emergencies affecting the nation, whether war or civil disturbance. He must thus keep the peace of the country and ascertain obedience to law and order—as was so dramatically demonstrated by the dispatch of federal troops to Arkansas, Mississippi, and Alabama by Eisenhower in 1957 and Kennedy in 1962 and 1963, respectively, in order to secure com-

¹² Joseph Kraft, 'Kennedy's Working Staff,' *Harper's Magazine*, December 1962, p. 30.

¹³ The natural query whether this does not violate the separation of powers will be considered later.

pliance with federal court orders that had been deliberately defied by the governors of the three states. In addition, and under present conditions, he must give much of his time to the developing of legislative policy, despite the separation of powers. More will be said on this point later. Finally, the administrative organization of the government of the United States is now so huge that it is a tremendous task to combat its inertia, subdue its internal rivalries, and erase its cross-purposes. Testimony is almost unanimous that the President's burden is too great for any man to carry, despite some of the recent innovations we have just discussed.

AGGRANDIZEMENT. It has already been said that the positive state has everywhere aggrandized the executive. The American presidency is a striking illustration of this truth. The executive must actually perform the tasks of modern government, tasks of such importance to the economy and community life that inefficiency or failure is serious. The President is responsible, and his powers tend to become commensurate with the responsibility. He may need assistance in the exercise of his powers, but he cannot delegate their substance. In any crisis that requires something to be done, almost everyone looks to the President. The country, it is said, needs leadership and knows it. Congress, for reasons that will appear, is peculiarly unfitted to give this leadership, and so it must come from the President. As President Truman put the matter,

The President, who is Commander in Chief and who represents the interest of all the people, must be able to act at all times to meet any sudden threat to the nation's security. A wise President will always work with Congress, but when Congress fails to act or is unable to act in a crisis, the President under the Constitution, must use his powers to safeguard the nation.¹⁴

THE NATION'S LEADER. The clearest and most dramatic proof of this comes in the field of foreign affairs. Congress can legislate the country into isolationism, and the Senate can reject all entangling alliances. Yet the President actually conducts foreign policy, and he may take irrevocable steps which in effect commit the country to intervention. While he cannot make treaties, he can make *executive agreements* with foreign states, which often are as effective as treaties. His power to recognize, or to refuse to recognize, newly established governments can be used with decisive effect. In short, his conduct of foreign affairs, as one interpretation of Franklin Roosevelt's policy

¹⁴ *The New York Times*, February 18, 1956.

from 1939 to 1941 would have it, may make war inevitable. And when it comes, the President who has been preparing for it, while Congress has not, is likely to have the major share in deciding how it is to be fought.

President Roosevelt and his advisers, and not Congress, framed the New Deal. It is true this was an emergency like war, but Theodore Roosevelt and Woodrow Wilson exercised similar, if not as great, influence on legislation. The legislation of today is often enacted in general terms. Its detailed application depends more and more on rules and regulations and particular discretionary decisions taken by the executive. The President—or his subordinates over whom he has power of control—exercises these discretionary powers, and the great interests of the country find they must deal with the President as well as with Congress.

At every turn, eyes are focused on the President. His constitutional powers are not at all equal to what he is expected to do. But the fact that everyone listens when he speaks, and that he can reach everybody through the radio, television, and press conferences, often gives him decisive influence where he lacks power. The White House has been called the biggest pulpit in the country. The man who can sway this congregation has something better than formal power. The more serious issue is whether one man can do what is now expected of the President. Be that as it may, it is to him, above all others, that the people look for leadership.

THE EXECUTIVE IN BRITAIN

THE BRITISH CHIEF OF STATE: THE MONARCH

A discussion of the British executive must first take account of the position of the hereditary monarch. In wraith-like legal formalism devoid of substance, the monarch—today Queen Elizabeth II—is the executive. The members of the cabinet are Her Majesty's ministers who tender her advice. While in reality they take all responsibility for actions of the government, legally their acts are the acts of the Queen. Even the judges are Her Majesty's judges, though no monarch since the Stuarts has interfered with the course of justice. The monarch must assent to bills before they become law, but the last refusal was in 1707. The monarch is the head of the state, but it is an office devoid of actual power. The legal rule that the monarch can do no wrong, combined with the conventional rule that he must act on the advice of his ministers,

shifts both responsibility and power to the ministers. The legal forms are merely echoes of a time when the monarch had the reality of power.

Surviving Rights. Out of the wreck of his former pre-eminence the monarch has saved what Bagehot called 'the right to be consulted, the right to encourage and the right to warn.' Because his consent, however perfunctory, is required for statutes and many other official acts, he could not well be deprived of all contact with affairs of state. His ministers keep him advised on major issues and they receive in return such counsel and caution as he cares to give them. Governments change and ministers come and go. A monarch who has had many years on the throne has the opportunity for a wide grasp of public affairs. If he joins study and effort to ability, his position obviously enables him to wield great influence. His hand is strengthened by the social popularity with the masses of the people that the monarchy has enjoyed in the present century. Queen Victoria exercised the three rights above to the full and not without effect. But she was the last powerful British monarch. Both she and Edward VII had very substantial influence in foreign policy. Gladstone viewed her as the 'external leader of the opposition party.' George V took a great interest in domestic matters. George VI was a symbol of British determination during World War II, and he had a luncheon-consultation once a week with his Prime Minister, Winston Churchill.

The Monarch's Personal Prerogatives. In addition, the monarch has certain ill-defined personal prerogatives, chiefly relics of the past. The monarch appoints the Prime Minister and is under no *legal* obligation to accept advice as to the choice—although such advice is customarily sought and given. As long as one party has a clear majority in Parliament and that party has an acknowledged leader, the monarch has, in reality, no choice, but must accept that acknowledged leader as Prime Minister. Queen Victoria's selection of Lord Derby in 1858 was probably the last clear-cut case of monarchical preference. However, if the Prime Minister dies or resigns, and the majority party has no acknowledged leader, or if after a three-or-more-cornered election fight no party gets a clear majority, the monarch has the personal responsibility of picking a Prime Minister. This represents power as well as influence, and it may assume critical importance if three or more political parties become a permanent feature. George V is credited with a leading role in the formation of the National Government coalition under Ramsay MacDonald in 1931. Queen Elizabeth II in 1957 was confronted with a choice between Conservatives Macmillan and Butler to succeed the resigned Sir Anthony Eden, because the Conservative party had not selected a leader to replace

him. However, the Queen, of course, sought the counsel of the two senior statesmen of the party, Churchill and Lord Salisbury, who evidently advised her to send for Mr. Macmillan.

The monarch has the formal *legal* power to dismiss his ministers, and it is sometimes argued that he may constitutionally dismiss them on his own motion if he believes that the cabinet, while holding the support of the majority in Parliament, has decisively lost the support of the electorate. More accurately, it is suggested that the monarch, if he so believes, may threaten dismissal as a means of securing the consent of the Prime Minister to a dissolution of Parliament, thus bringing on an election to test the matter; and that if the Prime Minister refuses, the monarch may dismiss the cabinet. This is not likely to occur.

Some quarters also maintain that in certain circumstances the monarch may refuse the request of the Prime Minister for a dissolution of the House of Commons, if he has grounds for thinking that an alternative government can get the parliamentary support the Prime Minister has lost. It is contended that the monarch is the guardian of the constitution and that if a government is flouting the will of the people, or is seeking to recoup its fortunes by suddenly springing an unnecessary election on trivial grounds, he may intervene. But this, too, is far more theoretical than real.

All matters touching the relationship of monarch, cabinet, and Parliament are supposed to be settled by the conventions of the constitution, resting on past precedents and practice. Yet on the two points of the monarch's prerogatives above, the precedents are confusing and inconclusive, affording room for difference of opinion. However, royal intervention has far greater dangers for the constitution than those it is intended to meet. If the monarch turns out to be wrong in his judgment and the country supports the government he threatened to dismiss, or if his alternative government gets no parliamentary support and the succeeding election returns to the House of Commons a clear majority supporting the party leader to whom he refused a dissolution, relations between the monarch and that leader's party are bound to be seriously strained. The monarch will be blamed for taking sides, and if the political party that stood to benefit from this intervention does not repudiate his action, it will be turned into a party of the monarch's friends—a return to the days of George III!

Need for Neutrality. In trying to guard the constitution, the monarch may wreck it. If he is to retain his throne in a system of parliamentary government he must, at all costs, retain his neutrality. Of such stuff constitutional

monarchy is made. He must bide his time and wait for the *electorate* to say whether the cabinet has lost its sympathy. Even at the expense and confusion of an unnecessary election, he must let the electorate punish an over-crafty cabinet.

Yet the breakdown of the traditional two-party system into three or more parties of comparable strength will put an alarming burden on the Chief of State. He has to find a Prime Minister who must be someone who can throw together a coalition. At times it will be tempting, and on rare occasion even legitimate, to try other combinations without resorting to a dissolution and a new election every time a government is defeated in the House. The genuinely important present-day function of the monarch is to stand as a symbol of unity, and there is a natural disposition to hope that the monarch may express that unity at times when the factiousness of numerous parties threatens to make orderly government impossible. No doubt the monarch can appeal to whatever unity underlies party faction and, in so far as it exists, exert a moderating influence and perhaps tide the country over particular crises. The continuity and security of his office should enable him to take an objective view not always reached by the leaders of political parties. But the factiousness of numerous parties is generally symptomatic of a deeper disunity, and if so, the monarch may get little more for his pains than charges of partisanship.

The Monarch as a Symbol of Unity and Continuity. The effectiveness of the monarch as a symbol of unity, to convey a sense of continuity, as long as the duties of his office do not require him to take sides, is not open to question. Steady allegiance to Country, Nation, Community is difficult to obtain because most people are not greatly moved by abstractions. The living figure brings the argument for subordinating our desires to the good of the whole down to the level of common experience. The monarch can call men to arms more effectively than can the Country or the Nation. The good that governments do can be ascribed, through the monarch, to the people; the evil they do can be pinned on the ephemeral government of the day. The opposition which obstructs that government maintains its prestige more easily because it is Her Majesty's Loyal Opposition. It is loyal to the permanent common interests and fundamental aspirations of the British people, while opposed to the audacity of a temporary parliamentary majority.

In fact, the symbol has triumphed over the person. As the case of the abdication of Edward VIII shows, a monarch who does not outwardly conform to the proprieties that move the bulk of the nation must go. Some are

disposed to think the symbolism too powerful. The monarch is inevitably a symbol of conservatism, of what has been revered in the nation's past. By nurturing that reverence and projecting it strongly into the present, the monarch may retard necessary social change. The monarch cannot lead in a new attitude toward divorce; he must be a symbol of old attitudes. Yet there is no doubt that in Britain the monarch is identified with the fundamental aspirations of the British people. He is a symbol of the past, present, and future—a personification of British hope. Even the Labour party, which wants to change much in Britain, does not wish to abolish the monarchy. Only the tiny British Communist party does. No monarchy in the world is more secure or more respected than Britain's—to which the present Queen's popularity, after more than eleven years of rule, bears eloquent witness.

THE CABINET AS THE BRITISH EXECUTIVE

In Britain, the executive, in the narrow sense under consideration here, is the *cabinet*. It consists of the Prime Minister and about twenty colleagues who are the appointed heads of the more important of the roughly thirty-five departments of the government. It has now approximately twice as many members as it had a hundred years ago. As the activities of government expanded, important new departments—labor, education, housing, public works, and so on—were organized, and room had to be found in the cabinet for their heads. It is now admittedly too large for effective discussion and decision, but it is difficult to reduce.

Members of Parliament. The monarch calls on the leader of the majority party in the newly elected House of Commons to be Prime Minister. The Prime Minister is then free to choose his cabinet. The only *constitutional limitation* is that the persons he chooses must either have a seat in Parliament or get one without delay. The linking of the cabinet with Parliament is vital to the British system of fusion of powers and thus differs radically from the American system.

The British Parliament is composed of two chambers, the House of Commons and the House of Lords. While members of the cabinet may be chosen from either House, the great majority are always selected from the House of Commons. The selection of the Earl of Home as Foreign Secretary by Prime Minister Macmillan in 1960 excited sharp attacks from both Labourites and Conservatives. Custom now decrees that the Prime Minister *must* be a Com-

moner. The last to be chosen from the House of Lords was Lord Salisbury, in 1900. As we shall see later, the House of Lords is not representative of the electorate and has lost most of the powers it once had. The House of Commons does represent the electorate, and only by retaining its confidence can the cabinet retain office. It is said that the cabinet is responsible to Parliament, but it would be more accurate to say it is responsible to the House of Commons.

Selection by the Prime Minister. As a matter of practical politics, the Prime Minister in picking his cabinet has to give weight to roughly the same kind of considerations as affect the President's choice of a cabinet. The Scots and the Welsh and the various sections of England must not be forgotten. Important social and economic interests cannot be passed over. Certain alliances within the party support the Prime Minister's leadership. These must be held together and the bargains on which they are based must be kept. In addition, the Prime Minister's choice is further limited by factors that the President can ignore. Not only must the British cabinet be chosen from Parliament, but certain members of Parliament, particularly of the House of Commons, have special claims to consideration. Members of former cabinets, members who are able parliamentarians and effective critics when the party is in opposition, are difficult to exclude. It may even be necessary for the Prime Minister to include in the cabinet an unsuccessful rival for the leadership of the party, as Macmillan did in choosing Butler as an important member of his first cabinet in 1957. There may be some claimant for cabinet rank whose only recommendation is that it will be safer to have him inside than outside. Many exceedingly delicate decisions must be made, for the Prime Minister, unlike the President, must pick a team of colleagues who will work together and always defend one another in public, who can command the respect of the House of Commons and retain the confidence of the majority therein, who can defend their departments effectively in Parliament as well as direct them efficiently.

MINISTERS OF THE MONARCH. The members of the cabinet are all ministers of the monarch, a body of equals because each is equally commissioned to advise Her Majesty. They need to be united by mutual respect, if not by affection. It is, of course, impossible for twenty men genuinely to agree on all major issues. At the same time, it will not do for foreign policy to commit itself to preparation for war, while financial policy insists on a sharp cut in all government expenditures. Major policy is a unity; the ship of state

cannot sail in different directions at one and the same time. Hence the conventions of the constitution, which seek to get from the team the concerted action that a monarch or a President can supply.

Team Work. While each minister is responsible individually to Parliament for the operation of his department, *all members of the cabinet are responsible collectively* for each department and for general policy. This does not mean that all decisions are taken collectively; that is physically impossible today. It does mean that when a minister has taken an important decision on his own initiative, the others must either defend him in the face of parliamentary criticism or throw him to the wolves. As a result, each minister hesitates to take important decisions without prior consultation with the Prime Minister at least, and each takes a personal interest in what the others are doing. Every decision taken in cabinet must be supported by all. A minister who is doubtful of the wisdom of a decision must either conceal his misgivings or part company with his colleagues. The latter course of action was taken, for example, by the Marquess of Salisbury over policy on Cyprus in the Macmillan cabinet in 1957. Lord Melbourne is reported to have told his cabinet on one occasion that he did not much care what decision was taken as long as they all told the same story. Mistakes in policy are not likely to be as immediately disastrous to confidence, in Parliament and in the country, as are evidences of internal disagreement.

COMMON PARTY ALLEGIANCE. It is therefore vitally important for the Prime Minister to pick a good team and hold it together. The greatest single advantage he can have in his selection is to be able to choose it from a single, well-disciplined political party. This ensures, to begin with, a certain similarity of view and temperament, with all members having strong loyalties to the party and hesitating to jeopardize its fortunes by open dissension. Equally important, the political fortunes of each are bound up with those of the party. Each knows that the party will punish revolts, and this disciplines toward agreement. These favorable conditions do not exist when a cabinet is chosen from a coalition of parties (of which contemporary Italy, for one, is a case in point). In 1932, the cabinet of the National Coalition could not agree on tariff policy, and publicly announced an agreement to differ on this question. Such a formula will work only within very narrow limits, and it weakens a government dangerously.

As long as it works within the confines of a two-party system, the British cabinet is a remarkably successful device for combining vigorous and unified direction, joint counsel, and mutual criticism, and for the maturing of deci-

sions through discussion. When working satisfactorily, the cabinet system provides for each of its members desirable frank discussion and blunt criticism. But it will not work satisfactorily when the cabinet has to be pieced together from two or more parties.

The Captain of the Team. Every team needs a captain, and this leadership is accorded to the Prime Minister. It is commonly said that the only significance of the 'prime,' is to make him *primus inter pares*, first among equals. This phrase, however, means nothing unless it means he is something more than an equal. With the coming of the popular franchise and strongly disciplined political parties, it was inevitable that the acknowledged leader of the majority party would have significant pre-eminence in the cabinet. He is a key figure in the central organization of the party, he leads the party in Parliament and in election campaigns, and so has an immense influence on the policy and platforms of the party. Lord Walpole viewed him as the 'political ruler of England.' There is much drama in leadership and little in complex policies, no matter how important they may be for the country. That section of the electorate which is not rigidly frozen in its party allegiance, does not—as indeed one cannot—separate men from measures. Thus general elections have tended to become personal contests between the leaders of the rival parties, and the verdict at the polls to become the choice of a Prime Minister by the people. He has a mandate to lead which his colleagues lack. It is thus fair to say that today the 'P.M.' is no longer *primus* among the *pares* in the cabinet—but *primus*, with the other cabinet ministers acting as responsible and competent team assistants.

HIS PRE-EMINENCE. The Prime Minister's pre-eminence is evident at every turn. He is the channel of communication between the cabinet and the monarch. In sudden emergencies that do not give him time to consult the cabinet, he will act on his own initiative. Particular ministers after consulting him will often take decisions they would not risk on their own judgment. The House of Commons and the country expect him to make all important statements on policy. He is, again in Walpole's words, 'the keystone of the arch.' On advice from him, the monarch will dismiss a minister or force his resignation, e.g. Hugh Dalton, the Chancellor of the Exchequer, in 1947. Most important, it is now settled as a result of the practice of recent years that the decision to advise a dissolution of Parliament rests solely with him. This is a heavy weapon to keep hanging over the heads of a cabinet that cannot make up its mind.

BUT NOT THE CHIEF EXECUTIVE. Yet he remains the captain of a team and has

not become Chief Executive for two main reasons. First, the other ministers of the cabinet are equally responsible to Parliament and thus have an equal personal stake in policy. He has to carry them with him. Second, his leadership of the government depends on maintaining control over the House of Commons. He cannot risk frequent resignations and dismissals, nor weak and unconvincing support of policy by his colleagues on the floor of the House, for that will undermine the solidarity of the party majority. The knowledge that they must all hang together or hang separately not only disposes them to earnest effort at agreement, but also limits what the Prime Minister can do with his unquestioned pre-eminence. It ensures the fullness of discussion and candor in criticism that the President of the United States often fails to get in his cabinet even when he solicits it.

The Functions of the British Cabinet. The broad functions of the cabinet can now be stated very briefly. As heads of departments, they furnish direction and drive to the activities of the civil service. They defend the actions of their departments in Parliament, discharging their responsibility to Parliament by answering without demur the most trivial questions in minute detail. No civil servant is ever asked or allowed to defend himself in Parliament. The minister is responsible for every action, and he does not shirk it. Collectively, they must co-ordinate the work of their separate departments, ironing out interdepartmental disputes, and thus integrating the diverse activities of hundreds of thousands of civil servants.

A COMMITTEE OF PARLIAMENT. As an executive committee of Parliament, they must organize the work that the House of Commons particularly is expected to do in a session. They allot the time to be spent on particular matters, prepare the budget and the legislative program that the House is to consider. They pilot government bills through the House, explaining their purpose and meaning and defending them against criticism. Through their pervasive control, they channel the energies of the House, which otherwise would be largely dissipated in discussion, into concrete accomplishments in the form of legislation.

It is through the cabinet that Parliament effects its criticism and surveillance of daily administration. On the other hand, the cabinet brings to Parliament the accumulated knowledge and experience which the civil service collects in the course of administration, and which is a vital ingredient in the making of policy for the future. It brings these data forward not in a heterogeneous mass, but transmuted into either proposed amendments to existing laws or matured plans for new legislation. It almost invariably persuades Parliament

to accept its program without substantial modification because it can rely on a disciplined party majority in the House of Commons, fortified in its loyalty by the threat of a dissolution of Parliament. This gives rise to the charge that the cabinet dictates to a subservient House of Commons—an indictment that will be considered later. At present, it is sufficient to see why Bagehot described the cabinet as a buckle linking Parliament and the executive—meaning the executive in the broad inclusive sense—and why it can also be described as the mainspring of government.

CO-ORDINATION OF POLICY AND ADMINISTRATION. Directing the work of a department in a government which engages in such a wide range of activities is in itself a heavy burden on a minister, even when he can rely on a number of able senior civil servants. When the tasks of co-ordinating the work of all departments, defending his department and general government policy in Parliament, maturing policy and guiding legislation through Parliament are added, it can be seen why the cabinet is said to be overworked and the job of the Prime Minister to be an exhausting one. The Prime Minister does not normally take on the work of a heavy department, but he has a host of other concerns from which his colleagues are free. There are several posts that are sinecures, such as Lord Privy Seal and Lord President of the Council, and the Prime Minister generally gives these to men whose advice and assistance on general policy are needed, but who do not wish to carry, or do not have time to perform, exacting administrative burdens. Despite this, many devices to ease and simplify the work of the cabinet have had to be introduced.

Easing the Burdens of the Cabinet. PARLIAMENTARY SECRETARIES. For many years, it has been the practice to appoint one or more parliamentary secretaries in each of the important departments of government. The parliamentary secretaries—who are political adherents of the government—are members of the *ministry* but not of the cabinet. Such posts are generally given to promising younger men in the party to keep them satisfied for the moment and train them for higher things. They assist the ministers in administration, and in answering questions and defending their departments in the House.

CABINET COMMITTEES. As the volume of decisions to be taken by the cabinet grew, and as these decisions came to involve more and more considerations, cabinet meetings became more frequent and discussions more prolonged, interfering with the time available for other pressing duties. Some relief has been found in the use of small cabinet committees. Many problems concern two or more departments very closely and others in minor degree or scarcely

at all. Small *ad hoc* committees of the cabinet are set up to try for agreement on such issues, thus saving the time of the larger body for more general questions. If the committee can agree, the cabinet as a whole seldom needs to spend time on the matter. Committees are now an established feature of cabinet procedure, even flowering out in subcommittees where the issues are complex. While it does not remove them, this procedure helps to meet the mounting pressures of the positive state.

WAR CABINETS. The cabinet is now about twice as large as it should be for effective discussion and speedy decision—another reason for seeking relief through small committees. The delay involved in reaching decisions becomes quite intolerable in time of war. Lloyd George summed it up by saying you cannot wage war with a Sanhedrin. When he became Prime Minister in World War I, he set up a small War Cabinet of five members (later enlarged). These had no departmental duties and devoted themselves to planning the conduct of the war. As almost every aspect of domestic policy was necessarily subordinated to the dominant aim of winning the war, the War Cabinet was, in effect, *the cabinet*. The use of this small inner cabinet made for more rapid dispatch of business, but the divorce of deliberation on policy from the direction of administration in the several departments proved to be most unsatisfactory.

A war cabinet was again set up by Churchill in World War II. It did not follow the earlier precedent in this respect, but was largely composed of ministers who headed the departments most vitally concerned with prosecuting the war. The best decision on what to do next cannot be made without knowing in detail what is now being done and bringing that experience to bear on the decision. The solution of the problem of the overlarge and overworked cabinet is not to be found in separating the thinking from the doing.

THE PROBLEM OF SIZE. At the end of the war in Europe, the Labour Government came to power. It had a large program which involved much greater government activity and much greater congestion of cabinet business than existed at the outbreak of war. Between 1939 and 1948 six entirely new, and presumably permanent, departments of government concerned with the public interest in food, fuel and power, civil aviation, supply, national insurance, and town and country planning came into existence. The total number of departments increased sharply. On the other hand, Prime Minister Attlee reduced his cabinet to seventeen members. The ministers of the new departments, and some others as well, were not accorded cabinet rank.

This makes necessary still further use of committees. Many weighty ques-

tions on which the cabinet must decide will involve departments whose heads are not in the cabinet. These latter are drawn into discussions and decision on matters affecting their departments through membership in appropriate cabinet committees. No device has yet been found to reduce the cabinet to the most effective size of perhaps ten or twelve.

SUPER-MINISTRIES. But the British have been experimenting. In World War II, Prime Minister Churchill created, and occupied with great distinction, the office of Minister of Defence. This office was not an amalgamation of the departments concerned with navy, army, and air force. They remained intact, but Mr. Churchill, as Minister of Defence, took over the strategical conduct of the war with such over-all supervision and co-ordination of the fighting services departments as was required for the purpose.

The Ministry of Defence Act of 1946 aimed to adapt this arrangement for permanent use. It provided for a Minister of Defence, charged with formulating and applying a unified policy for all the armed services of the country. Since his appointment under this Act, the Minister of Defence had been a member of the cabinet, and the First Lord of the Admiralty, the Secretary of State for War, and the Secretary of State for Air had ceased to be members of the cabinet. The Minister of Defence was given supervisory powers over them and their departments. It came as no particular surprise, then, that in July 1963 the government announced the establishment of a unified Ministry of Defence, very much along the lines of the United States Department of Defense, established in 1947. The new British cabinet department was designed to absorb the Admiralty, War Office, and Air Ministry, although the 'separate entities' of the army, navy, and air force are to be maintained.

Here perhaps is the first instance of a new kind of organization, a super-ministry charged with co-ordination of a number of departments whose heads are not in the cabinet and who will almost certainly be subordinated to the super-minister. The cabinet may come some day to be composed largely of such super-ministers. A further tendency in this direction can be detected in the conferring on the Chancellor of the Exchequer of a co-ordinating role in matters of economic policy. Furthermore, although the War Cabinet has disappeared, there is still a small inner group in the cabinet on whom the Prime Minister places special reliance. This may well be a super-ministry in embryo. At any rate, the effective working of the cabinet system under present circumstances seems to require a still further concentration of responsibility and power in the hands of fewer men.

THE CABINET SECRETARIAT. The scope and complexity of cabinet duties is underlined by the establishment of a cabinet office under a secretary to the cabinet. Originally the cabinet was a cabal about whose very existence there was doubt. The doubt has vanished, but the deliberations have remained secret in the highest degree. Throughout the nineteenth century, however, the proceedings of the cabinet were most informal. A minister who wished to raise a matter notified the Prime Minister beforehand and then spoke to the point at the meeting. The agenda was in the Prime Minister's head and the only record of decision was the minute made by the Prime Minister for the purpose of informing the monarch. This gives some indication of the easy tempo of British government in the nineteenth century.

This lack of system became unworkable during World War I. A secretary to the cabinet was appointed in 1917 and has continued ever since. He prepares the agenda for, and keeps the minutes of, cabinet meetings. Except in cases of urgency, a minister who wants to bring a matter to cabinet must first consult the other departments concerned and then prepare a memorandum setting out the matter in detail. The cabinet office then circulates the memorandum several days before the meeting at which it will be raised. Thus all members of the cabinet are apprised in advance of the nature of the question, and those particularly concerned have had time to develop their views on it. A dozen or more higher civil servants will have posted their particular ministers on how the matter affects their departments. Business can be dispatched more rapidly and with a fuller knowledge of what is involved in the decision. Extraordinary precautions are taken to ensure the secrecy of these memoranda and of the minutes of cabinet meetings. Indeed, every cabinet minister takes a solemn oath not to disclose them.

THE CHIEF OF STATE AND CHIEF EXECUTIVE IN FRANCE: THE PRESIDENT OF THE REPUBLIC

THE INSTITUTION: DE GAULLE'S CREATION

Given the traditional French fear of a strong executive, a person who had just emerged from a deep sleep since the dramatic and drastic events of the Spring of 1958 in France would indeed have to ask whether he were in the right country! Few, if any, institutions of democratic government in the history of that philosophy have ever undergone such radical surgery as that inherent in the contrast between the institution of the executive of the Fourth

(and Third) and the Fifth Republic of France. What until Charles de Gaulle's return to and re-assumption of power had been little more than a symbol of unity and continuity in the British mould in the case of the old Chief of State, and an insecure, troubled, ineffective, quarrelsome, and short-lived institution of executive power and authority in the case of the old Council of Ministers or cabinet, has been moulded by President de Gaulle into a powerful fountainhead of extraordinary potency and influence. Not perhaps so much as a result of the Constitution of 1958—although, as we saw in Chapter IV, it was drafted by de Gaulle, Michel Debré, and their Gaullist associates and clearly reflects their wishes and governmental creed of a strong executive—but largely because of the decisive, strong, even autocratic personal leadership of General de Gaulle. Coupled with the peculiarly difficult and delicate problems left by the Fourth Republic, notably Algeria, de Gaulle has forged in his person as *le Président de la Cinquième République* the kind of strong and powerful executive that, on a reading of French republican history, would have had to be deemed both impossible and illogical.

Yet the weakness and instability of the Fourth Republic, which featured twenty-five cabinets in the mere dozen years of its existence, and the profound national emergency brought about by the festering sore of the Algerian problem, capped by the military revolt there of May 1958, caused incumbent President René Coty to issue the call that had become an almost foregone conclusion: *de Gaulle au pouvoir!* Emerging from twelve years of self-imposed retirement from active politics, Charles de Gaulle did just that, essentially presenting his countrymen with a choice of 'me-or-chaos.' With his investiture as the twenty-fifth and last *premier* of the moribund Fourth Republic, after having listened to his short seven-minute speech outlining the terms on which he had accepted the call to power, the once proud French Parliament in effect faded away, leaving the Republic to General de Gaulle. The electorate approved the proposed de Gaulle Constitution by a four to one margin in September 1958 and under its provisions—to be described presently—he was elected as the first President of the Fifth Republic by almost 80 per cent of the valid ballots cast three months later, with Michel Debré thereupon becoming the first Prime Minister.

Election: Indirect and Direct. According to the original Article 6 of the de Gaulle Constitution, the President of France is elected for a seven-year term of office (no limits on the number of terms being indicated) by a huge electoral college—numbering 81,761 officials!—consisting of the members of Parliament, local government representatives of metropolitan and overseas

departments, members of overseas assemblies and those of the member states of the Community, and—by far the most sizable group—members and delegates of the municipal councils of France and overseas departments. It was this body that elected de Gaulle President. The theory that underlay such an electoral college was the belief that it would be less likely than direct popular election to ‘squander’ votes among many candidates and that it would be more likely to choose a truly national figure than the ever-bickering, ever-political Parliament—which had thus selected the two Presidents of the Fourth Republic, Vincent Auriol and René Coty.

But in the Summer of 1962 de Gaulle suddenly announced that he would take to the people, in a referendum, the question of whether future presidential elections should be held by popular vote! He was motivated by the conviction that only by such popular approval could a President of less personal stature than he maintain his own executive authority against the assaults of Parliament. As we have seen, the Constitution provides for an orderly amendment procedure, involving consultation with Parliament, prior to submittal of a proposal to the people. But in the face of the nearly unanimous judicial opinion in France that the prescribed Parliamentary channel only was constitutional, the President deliberately determined to bypass Parliament and go directly to the people—a clear indication that he was prepared to subjugate Parliament even more, if possible. The National Assembly did fight back and toppled the first Pompidou Government on the referendum issue by a censure motion, with de Gaulle then immediately exercising his constitutional prerogative of dissolving the Assembly. He proceeded with the referendum, which, after several threats to resign if he were to lose, he won by the rather modest margin of 61.8 per cent of the popular votes cast. Yet, despite dire predictions, he gained a resounding victory in the almost immediately following elections to the new National Assembly, giving him and his party majority control of the lower chamber for the first time in the history of republican France, and thus turning a setback by Parliament and a less-than-enthusiastic referendum endorsement into a victory of major proportions at the polls. ‘Again I was right, despite everyone,’ the President crowed.

Chief of State and Chief Executive: Powers. Combining certain powers of the British cabinet and the American presidential form of government, but, as will become apparent, being exactly like neither of the two and not the sum of both, the President nonetheless is, in effect, both Chief of State and Chief Executive, with the Prime Minister or Premier cast in the role

of his Chief of Staff or, as some would have it, busy Chief Clerk. Briefly summarized, in addition to the obvious ceremonial functions and powers of a Chief of State, his more important constitutional, independent powers are: selecting the Premier; presiding over the Council of Ministers; dissolving the Chamber of Deputies, but no more frequently than once a year and not while Article 16 (see below) is in force (the Senate is not dissolvable at all); vetoing a request for a popular referendum from the legislature or the ministry; submitting legislation directly to the people in a referendum; appointing and removing high officials; negotiating treaties and protocols; commanding the armed forces; sending messages to Parliament; signing laws and decrees; referring matters to the Constitutional Council for a ruling on their constitutionality; pardoning and reprieving. In effect, if not in constitutional theory, the President also selects most of the members of the Council of Ministers. Indeed, he is a powerful crisis executive—a far cry from the reignless, ruleless figurehead of the republics of old. Yet there remains to be discussed an even more potent constitutional provision, Article 16.

ARTICLE 16. This famous emergency power—shades of the Weimar Republic's Article 48—constitutes all but *carte blanche* to the President to assume such power to all intents and purposes at his discretion. For, according to the language of that provision of the Constitution:

When the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures commanded by these circumstances, after official consultation with the Premier, the Presidents of the assemblies and the Constitutional Council.

De Gaulle's insistence upon that provision had its roots in the utter collapse of France's Third Republic when Germany invaded the country in 1940 and, only to a slightly lesser extent, the inability of the leaders of the Fourth Republic to cope with the Algerian situation. On April 23, 1961, de Gaulle invoked the authority thus given to him by the sweeping terms of Article 16 as a result of the abortive attempt of segments of the French Army in Algeria to seize power. He made relatively little use of it and, partly in response to popular criticism, and partly because he had crushed the rebellion, he relinquished it about five months later. It is, of course, intriguing to contem-

plate the use of this extraordinary power in the hands of one less dedicated to *la patrie* and less proven than the revered first President. To build constitutional safeguards upon personalities is a dangerous governmental game.

THE COUNCIL OF MINISTERS OR CABINET

Powers. Also known as 'the Government,' the Fifth Republic's Council of Ministers, quite unlike those of the preceding republics, functions wholly in the shadow of the strong President, whose creature and executor it is. In the President's image it devises and executes policy; proposes legislation; ratifies ordinances and decrees and supervises their administration and execution. It represents the day-to-day workhorse of the executive branch, presided over by the Premier who is 'the President's man' in name and in fact.

An extraordinarily significant power bestowed by Article 38 of the Constitution upon 'the government' i.e. the Council of Ministers, is that of the making of 'ordinances' or 'decrees' for a limited period in order to 'carry out its program.' It must ask Parliament for an enabling act to invoke this power to supplant 'measures that are normally within the domain of law.' Premier Debré sought, and was given, such emergency power for his cabinet for an entire year and applied it to a host of subjects.

Composition. Theoretically chosen by the Premier, but actually by the President with the active advice and concurrence of the former, the Gaullist cabinets have all reflected the kind of governmental virtues so close to the heart of Charles de Gaulle: non-partisanship; fierce loyalty to duly constituted authority (and de Gaulle); expertise, preferably obtained through long-term apprenticeship in the upper echelons of France's fine civil service; and relative youth—an almost heretical suggestion for cabinet membership in the days gone by! The Constitution of the Fifth Republic eliminated its predecessors' requirements for formal cabinet investiture by the National Assembly, but the Debré cabinet and the cabinets of his successor, Georges Pompidou, were presented to that weakened body as a matter of courtesy—or perhaps as a cynical game.

To date, the cabinets of the Fifth Republic have averaged about twenty-five members, with the second Pompidou cabinet consisting of twenty-nine as of the Autumn of 1963. A majority are inevitably practicing or nominal Gaullists (members of the U.N.R.)—but by design members of other political parties have also been represented, notably those of the Catholic M.R.P.

and the Independents and Peasants. Twenty-one of the members of the above-mentioned Pompidou cabinet had sat in Parliament at one time or another, but the Constitution forbids simultaneous membership in Parliament and the Executive—a radical departure from the Third and Fourth Republics, where it was customary, although not required as in Britain.

Ministerial Responsibility. Under the Third Republic the ministers were responsible to both chambers of the legislature; under the Fourth solely to the lower branch, the National Assembly; under the Fifth Republic, the latter accountability still obtains. Thus the ministers are collectively responsible to the National Assembly and 'individually responsible for their personal actions.' But, as has been pointed out, and will be demonstrated in some detail in the two succeeding chapters, the responsibility is more theoretical than real, given the personal and constitutional umbrella provided by the strong executive and the so markedly weakened power and effectiveness of the legislature. Unlike the members of cabinets of old, which represented a host of coalition government parties, suffered from constant turnovers, and engaged in frequent and prolonged disagreements among themselves, the members of the cabinets of the Fifth Republic function very much like a team—somewhat as the British cabinet does, but without the latter's effective power as the center of gravity of governmental authority.

The Prime Minister or Premier. The personal choice and—to date, certainly—the confrere and loyal servant of the President of the Republic, the Premier is truly the instrument of presidential will, presumably without political or personal ambitions beyond those of serving his President and through him *la France*. Invested with power to initiate legislation, and clothed with the mandates of power from the office of his superior, the Premier thus enjoys infinitely more scope and authority than did his politically embroiled, short-tenured predecessors of the Third and Fourth Republics. In the latter, for example, a Premier was hardly *primus inter pares*; he was fortunate to be *par*, let alone *primus*! Today under the Fifth Republic he is *primus* without question, yet that primacy could easily be exaggerated, for it is not so much his own primacy that causes the smooth functioning of the executive branch, but the primacy of the President who invests his Premier with the necessary tools in addition to those provided by the Constitution. No longer, as was so abidingly true of Premiers of the past, must he, to stay in office, be keen, rugged, intelligent, suave, a bit of a comedian so as to appeal to sixteen political parties at once, with a facility for phrases

such as 'we must govern in the center with the aid of the right to reach the goals of the left,' and ever necessarily be ready to leave office.

The Premier of the Fifth Republic is surrounded by advisers and a large personal staff which aid him in research, co-ordination, and execution of policy. Attached to his office also is a regular governmental department known as the 'Services of the Prime Minister,' which in turn has a unit reminiscent of the type of cabinet secretariat and staff favored by President Eisenhower. Moreover, a host of administrative offices and services has direct links with that of the Prime Minister. Although shorn of so much of its power, Parliament's support is both necessary and useful, at least in the domestic sphere, and Premier Debré found it expedient to institute a practice of consulting with and advising influential members of the chief Government party, U.N.R.—a practice that was continued by his successor.

THE DILEMMA

Generally pleased, indeed, with and proud of their national hero-President, who solved the desperate Algerian problem with great determination and personal courage and brought a real measure of order and stability to their governmental process, many a Frenchman—and many a Francophile outside of France—nonetheless does not feel entirely comfortable in the face of the institution he has permitted Charles de Gaulle to create. The memories of past tyrannies die hard; the names of Macmahon and Boulanger—let alone those of Napoleon I and III—are not forgotten and often serve to rekindle the lasting fears of a strong executive. Charles de Gaulle—although he has been called 'autocrat,' 'constitutional dictator,' 'enlightened Bonapartist,' and 'republican royalist'—*bien*, but what of a successor? The haunting doubts and fears are uppermost in the minds of many responsible leaders of public opinion of the nation that is thus still torn between the evident need for governmental stability—a state of affairs that certainly should not be viewed as a luxury—and the fears of old, frequently revived by current drastic government executive action in the name of order and domestic peace.

In striking contrast to the past, Charles de Gaulle has created a President of France with enormous power and prestige and he has brought order and renewed *grandeur* to the House of France. But he has done so largely as a result of the unmistakable stamp of his own inimitable personality upon both domestic and international affairs. Yet after President de Gaulle, not only 'who?' but 'what?'

DICTATORSHIP MAGNIFIES THE EXECUTIVE

The term 'dictatorship,' as we have already noted, is derived from the practice of the ancient Roman Republic in conferring very wide powers on a single man during a serious emergency. Nazi rule in Germany, Fascist rule in Italy, and Communist rule in the Soviet Union have all been called dictatorship because of the enormous power, acknowledged pre-eminence, and carefully fostered adulation of one man. Mussolini was the Duce, the leader. Hitler was the Führer, the leader. Until his massive deflation by Khrushchev, Stalin was, in the Soviet Union, 'our great Stalin,' the leader who was almost deified in the eyes of the masses. These men were the dictators of their respective countries.

Enormous Power. It is not at all clear, in any of these instances, how power has been distributed between the dictator and the small group he gathered round him. It is not necessary for present purposes to decide the difficult question whether all or any of these dictators ever exercised in their own persons supreme and irresponsible power. For it is at least true that, in each instance, enormous power, free of all constitutional limitations, was concentrated in the hands of the leader and the few who shared his confidence. In that sense, Fascist Italy and Nazi Germany were dictatorships, and the Soviet Union is a dictatorship today, despite some of the changes wrought under Khrushchev.

The executive is the one utterly indispensable arm of government. Anyone who wants to wield decisive power must control the executive. The legislature and the judiciary are important mainly to put effective limits on the power of the executive and make it responsible. But when power transcends all limits, the legislature and judiciary become meaningless and the executive is everything. In each of the three countries in question, a small clique got its hands on the executive and then magnified its power.

Rule by Decree. In Italy before Mussolini, and in Germany before Hitler, there had been a parliamentary system—however ineffective—resembling that of Britain, with a cabinet as the executive. The Nazis and Fascists worked their way to control the cabinet. The leading members of the party became the cabinet ministers. Mussolini became Prime Minister. Hitler became Chancellor and President of Germany. Once in control of the executive, they usurped the place of the legislature by making substantially all

laws by *executive decree*. Their decrees forbade all other political parties and made the judiciary subservient. Enormous power, free of constitutional checks, was concentrated in the executive, the small clique of leaders of the Fascist and Nazi parties. So it essentially still is in the U.S.S.R. today.

THE EXECUTIVE IN THE SOVIET UNION

It was pointed out in Chapters III and IX that all important decisions in the Soviet Union are reached in the highest councils of the Communist party. This means, in effect, that executive power in the U.S.S.R. is not in the hands of an organ of the government, but is the prerogative of the high functionaries of the Communist party. However, most of the information on which decisions are based comes from the state bureaucracy, which is manned in part by officials who are not members of the party.

The Formal Executive. Formally, the Soviet structure of government provides an executive and a legislature in the sense that these terms are used in Britain, France, and the United States. The Supreme Soviet of the U.S.S.R. is the legislature, and the Council of Ministers of the U.S.S.R. is the executive, theoretically responsible to the Supreme Soviet. *Theoretically*, only the Supreme Soviet can promulgate laws and the Council of Ministers alone can carry them out and supervise their administration. Unlike Britain, France, and the United States, however, the Soviet Union has established a third body which, in practice, combines some of the functions of the legislature and the executive. It is the Presidium of the Supreme Soviet of the U.S.S.R., a committee of some thirty members, appointed by the Supreme Soviet, which in practice is the effective working part of the Supreme Soviet.

THE PRESIDIUM OF THE SUPREME SOVIET. The Presidium issues decrees which have the force of law, and it has no administrative responsibilities; in this sense, it is a legislative body. However, it has a variety of executive functions, such as the appointment of high officials, ordering mobilization of the armed forces, proclaiming martial law, and even declaring war if such declaration has to be made while the Supreme Soviet is not in session. It also has judicial power—but, of course, no effective judicial review—in that it interprets the laws and annuls such decisions of the executive as it finds contrary to law. Finally, it carries out many of the dignified functions of government that are the prerogative of the Chief of State in Britain, France, and the United States. It creates titles of honor, awards decorations, and

exercises the right of pardon. Its chairman, who in a sense is 'President of the U.S.S.R.,' signs all decrees of the Presidium and receives foreign ambassadors on behalf of the U.S.S.R. Soviet congratulations to President Kennedy on the occasion of his inauguration were extended by Leonid I. Brezhnev, the Chairman of the Presidium of the Supreme Soviet of the U.S.S.R. The Presidium thus has some share in executive power.

COUNCIL OF MINISTERS. The Council of Ministers—its size has fluctuated between 25 and 65, the latter as of August 1963—which is designated by the Constitution as the executive of the Soviet government, corresponds more closely to the British and French than to the United States cabinet. It is appointed by the Supreme Soviet of the U.S.S.R., and the various ministers introduce proposals for new laws in the Supreme Soviet, which are invariably adopted without change.

Key Position of the Executive. In the Soviet Union, the government directs the whole economic life of the country and exercises far-reaching control over most aspects of social and cultural life. The work that wholesale Soviet socialism puts on the executive of the Soviet Union is enormous and far exceeds that of British Labour cabinets in their efforts at piecemeal socialism. The Council of Ministers is appointed for a four-year term; it consists of a chairman (the Premier), several vice-chairmen, the chairman of GOSPLAN, the State Planning Commission of the U.S.S.R. (a committee of the Council charged with the over-all planning of the Soviet economy), the chairman of the Arts Committee (which supervises and controls the creative arts), and the various ministers of the U.S.S.R. The last group comprises the heads of some fifty administrative departments of the government, which control all aspects of Soviet life. The Soviet ministers have in their charge not only the departments of government common to all countries, such as Foreign Affairs, Defense, Agriculture, and Finance, but many others as well. The names of a few of these ministries will suffice to indicate the wide scope of the Soviet 'cabinet': Aircraft, Power Stations, Cinematography, and Grocery Supplies.

DECENTRALIZATION? However, under the Khrushchev-initiated decentralization of the Soviet Union's industrial empire into forty economic regions, already outlined in Chapter VI, a considerable number of the ministries were abolished, and their tasks transferred to the governments of the various union republics, but under the supervision of the State Planning Commission (GOSPLAN). Nevertheless, economic control over industries of 'obvious national concern' is being retained at the national level—such as the

ministries of Aviation, Shipbuilding, Electronics, Chemicals, and Transportation and Medium Machinery.

AN INNER GROUP. In view of its unwieldy size and the realities of the center of gravity of power, dominant control of the Council of Ministers is exercised by its own Presidium. Consisting in 1963 of eight members, it was headed by Khrushchev as Chairman of the full Council, Kosygin and Mikoyan as First Deputy Chairmen, and five other members classified as Deputy Chairmen. This is the group that 'runs the show,' subject to the Party's wishes.

MORE THAN A CABINET. The Council of Ministers of the U.S.S.R. is not only a 'cabinet' in the British sense, but also a board of directors of that super-giant corporation, the Soviet state, which controls and directs economic and social life, turning the vast Soviet Union virtually into a company town. Bearing in mind the central importance of the executive in any enterprise that wants concrete results, it will be realized that the executive in the Soviet Union exercises very wide powers of decision. The decisions and ordinances issued by the Council of Ministers easily outweigh in number and importance the general laws passed by the Supreme Soviet and the decrees issued by its Presidium. One student of Soviet government has summarized the place of the Council as follows: 'The scope and volume of its enactments make it abundantly clear that the Council of Ministers is the greatest producer of obligatory, state-enforced, activity-guiding norms in the Soviet system.'¹⁵

The Real Executive. On paper, the Council of Ministers is a more powerful body than the British cabinet, but not so in practice. While it is true that the activities of the Council encompass a wider area than those of the British cabinet, and that its activities are rarely, if ever, subjected to severe criticism by the legislature (the Supreme Soviet), it is not as free in formulating basic policy as is the British cabinet. For the Council of Ministers is highly susceptible to control by the Communist party. The basic decisions on what is to be done in the Soviet Union are reached not in the Council of Ministers but in the 'inner cabinet' of the Communist party. The rules of the Communist party state that the party's Central Committee directs the work of the central public organizations through the party groups in them. The party's role in the making of decisions, which have the force of law, is revealed clearly in the fact that many decisions formally made by

¹⁵ Julian Towster, *Political Power in the U.S.S.R., 1917-1947* (New York: Oxford University Press, 1948), pp. 267-7.

the Supreme Soviet or by the Council of Ministers have been first made, announced, *and carried into effect* by the party.

Thus the first Five-Year Plans were prepared by the Communist party, and were actually put into effect before they were formally enacted by the appropriate governmental bodies. Many decrees of the Council of Ministers have been issued jointly by the Communist party *and* the Council of Ministers. The State Defense Committee, the war cabinet of the Soviet Union, for example, was created in 1941 by a joint decree of the Presidium of the Supreme Soviet, the Central Committee of the Communist party, and the Council of Ministers (then known as the Council of People's Commissars). However, it must be recognized that since at least some of the most influential members of the Council of Ministers are usually members of the top echelon of the Communist party as well,¹⁶ a built-in system of interlocking controls exists.

Nevertheless, the lesser Soviet ministers are not, as a rule, men who have spent many years in politics or private pursuits, but are rather experts in particular fields of the Soviet economy. They are successful managers of various sectors of that economy, and as such their strength lies in a familiarity with a particular sector of industry rather than in a deep understanding of the broad issues of public policy. It is the detailed technical information that they supply to the party, which enables the latter to formulate the broad outlines of Soviet policy. The really important decisions in the Soviet Union are made by the leaders of the Communist party who, in the final analysis, control not only policy, but also the personnel who carry it out.

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¹⁶ Pertinent examples in 1963 were Khrushchev, Kosygin, and Mikoyan.

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XIII

The Legislature: Its Functions and Procedure

In the tripartite division of powers, the legislature makes the laws. This function includes the imposing of taxes and the appropriating of money to particular items of expenditure. The legislature is *in theory* the most august authority within the constitution. In the Third and Fourth Republics of France, virtually all effective power was concentrated in the legislature—but those days are gone. In Britain, as we have seen, Parliament has the formal power to amend the constitution, although, of course, the exercise of power is restricted by the conventional requirement of a mandate from the electorate. By making laws and appropriating public money, the legislature sets the tasks of the executive, determines what public services are to be rendered, and within what limits the government is to operate. In democratic theory, the legislature represents the people, or the community; it is supposed to exercise general surveillance over the executive to see that, in its actual administration, government is for the people and not against them. Even in the United States, with an independently elected executive, this is expected of the legislature in some degree. The surveillance works through the cabinet system in Great Britain and Canada, for example. In the United States it operates through the detailed legislative control of finance and administration and, increasingly, through investigations carried out by legislative committees. Under the Fifth Republic of France, however, there is little, if any, meaningful legislative surveillance.

The powerful weapon of impeachment is also potentially available in the

United States. The Constitution authorizes the House of Representatives to bring charges against, and the Senate to try, executive officers from the President down by this method. However, it has been used so rarely that it cannot be said to be a working method of the legislature for controlling the executive. There have been only twelve cases of impeachment proceedings launched under the federal Constitution. Only four of these resulted in convictions, and the convicted parties in every case were federal judges,¹ not members of the executive. It may well become as obsolete as it has in Britain, where the last case of successful impeachment of a minister before the House of Lords was in 1805. Although the House of Lords no longer exercises this power, it has other judicial functions that are still alive. The nine Law Lords in the House of Lords, together with the Lord Chancellor and certain other peers, constitute the final court of appeal for Great Britain and Northern Ireland. These are historical survivals and need no extended comment here. The making of laws and keeping watch over the executive are the significant lawmaking functions today—augmented by such collateral tasks and duties as advising the executive, informing the public and reflecting it, and regulating its internal organization.

SIGNIFICANCE OF THE LAWMAKING FUNCTION

The high significance of the lawmaking function will be made clear by recalling the discussion of liberal democratic ideals of government in Chapter II. The ideal of individual freedom involves the right of private judgment. Democratic ideals, taken as a whole, are phrased in such general terms that when men exercise private judgment there is a wide diversity of opinion on what government should and should not do. The ideal of the rule of law as expressed in constitutional provisions requires governments to act in accordance with law. Individual freedom cannot be abridged except through law. Respect for individual personality requires discussion and debate as a means for composing differences of opinion on what to do to further the ideals. Finally, it is assumed that men are sufficiently rational to undertake discussion and to submit to persuasion on the basis of logic and evidence.

¹ U.S. District Court Judge J. Pickering ('insanity,' 1804); U.S. District Court Judge W. H. Humphreys ('support of secession,' 1882); U.S. Commerce Court Judge R. A. Archbald ('taking favors from litigants,' 1913); and U.S. District Court Judge H. L. Ritter ('bringing his Court into scandal and disrepute,' 1936).

The liberal democratic legislature is an institution constructed under the compulsion of these ideals and designed to promote their realization. In a society composed of millions of persons, all cannot meet for discussion. Through the electoral system, these millions elect to the legislature persons who are supposed to represent their views. This representation is admittedly imperfect but it does bring together some kind of cross section of the principal diverse views in the community. If some significant body of opinion is deeply dissatisfied with the existing state of affairs, and fails to get the adjustment it wants through discussion and voluntary action at a lower level, it will sooner or later find a way of proposing a law to the legislature.

The legislature has no magic formula for dealing with such proposals. It is itself representative of diverse views and interests and, therefore, has no agreed view on the matter, in the initial stages at any rate. It can only proceed in patient pedestrian fashion by hearing what is to be said on both sides and collecting as much data as it can on the issue in question. Ultimately, of course, it will have to come to a decision because it is the final authority for composing the clashing demands of private judgment, conscience, and interest. The only appeal beyond its decision is to force and violence, which dishonor and frustrate human personality. So it has to find a solution that will at least be tolerable to almost all concerned. Only rarely will any one course seem both acceptable and right to the legislators who have to decide. Lawmaking is normally a compromise based on debate and majority decision with due regard for minority rights.

The liberal democratic legislature is organized with a view to performing this supreme function. It has a structure of committees for collecting facts and for giving detailed examination to issues. It has rules of debate designed to allow the frankest expression of views and, at the same time, to prevent that unfettered license of expression which destroys mutual respect among the members. In addition to trying to provide the proper atmosphere for rational discussion, the rules of debate aim to guide discussion along orderly lines. The liberal democratic legislature also has rules for compelling, at some point, an end to discussion, and then a decision by majority vote. Finally, as we said in Chapter IX, it has a system of political parties that runs the organized machinery of the legislature, and in the end submerges the private reservations of members in majority decisions. A judgment on how well it now performs these functions will be essayed later—it suffices to note here that the past two generations have witnessed a seemingly unrelenting decline both in its power and its prestige.

CHARACTERISTICS OF THE DEMOCRATIC LEGISLATURE

The British and French Parliaments and the Congress of the United States are *bicameral*, composed of upper (or second) and lower chambers. The lower or popular chamber is in each case made up of representatives of territorial units, or constituencies, chosen by substantially adult suffrage. Attempts are made—rarely with complete success—to so draw the lines of the constituencies that each member represents roughly an equal number of individuals. The lower chamber is ‘popular’ in the sense that it mirrors the nation, the nation being regarded as a number of collections of individuals resident in particular territorial areas. In the United States, the lower chamber, the 435-member House of Representatives, is chosen for a fixed period of two years, being regularly renewed at the end of that time by a fresh election. In Britain, the maximum life of the 631-member House of Commons is five years, but it may be cut short at any time by a dissolution leading to a general election. In France, the maximum life of the 465-member National Assembly is also five years; but the President of the Republic may, upon consultation with the Premier and the presiding officers of both houses of Parliament, cut its life short at any time, after which no further dissolution may take place for one year.

THE ROLE OF UPPER CHAMBERS

Decline of Upper Chambers. Except for those countries where federalism and bicameralism were logically allied in order to give particular geographical representation to the constituent states or provinces, the advent of the twentieth century saw a marked decline in the power of the upper (or second) ² chambers in the Western democracies. The extension of the suffrage brought with it a rise of nation-wide political parties, which were prepared to cut across the various special groups and interests in order to

² ‘Upper’ is the more precise term, for ‘second’ is not inevitably tantamount to ‘upper’—viz. the ‘Second Chamber’ of the Estates General (the legislature) in the Netherlands, which is the ‘lower,’ and more powerful, of the two houses, thus corresponding to the House of Commons, the National Assembly, and the House of Representatives, for example. Hence ‘upper’ will be used here and throughout the text.

win votes. In fact they were compelled to do so to succeed and survive. The days were soon gone when the two branches of the legislature were afforded the luxury of representing special class interests, and not much else.

The decline in the power of the upper chambers commenced with the *Parliament Act of 1911*, which, as we shall see, struck the British House of Lords a crippling blow. The political children of World War I and World War II subsequently did what the Mother of Parliaments had done—although a reservation will be entered later regarding the West German *Bundesrat*. Today most, but not all, upper chambers have indeed become 'secondary.' If they have not been entirely abandoned, they are little more than chambers of reflection and revision, debating societies, political 'Siberias,' or chambers of protest and delay. However, they are by no means useless. Such weak, or relatively weak, upper houses as the British House of Lords, the French Senate, and the Canadian Senate, at least, perform important functions of polishing and clarifying legislation.

The British House of Lords. The House of Lords antedates the period of deliberate devising of political institutions. It is a relic of the insistence of the feudal barons that they should advise—and control—the monarch, whose centralizing ambitions always threatened to cut down their local perquisites. By the rule of primogeniture, the eldest son of the feudal lord succeeded to his father's estates and to his place on the Great Council advising the monarch. Today the hereditary peerage comprises almost 90 per cent of the House of Lords. Of course, it must be remembered that most of the great feudal houses are long since extinct; the Bohuns, Mortimers, Mowbrays, and DeVeres are 'in the urns and sepulchres of mortality.' The peers are mostly *parvenus*, having been created by royal letters patent since the seventeenth century. There are five ranks or grades of peers: duke, marquis, earl, viscount, and baron.³

CHANGING CHARACTER OF PEERAGE. Indeed, the character of the peerage has almost completely changed since the Reform Act of 1832. Most of the existing peerages have been created since that time, almost half of them since 1900. The new peers of the nineteenth century were mostly men who had succeeded in industry and commerce rather than great landlords. And in-

³ However, not all ennobled persons necessarily sit in the House of Lords. For example, there are many *viscounts* whose titles were bestowed on a 'courtesy' basis. Two *other* titled groups, *knights* and *baronets*, are not members of the peerage and do not sit in the House of Lords. In 1963 the following comprised the Lords' membership: 5 Royal Dukes; 27 dukes; 38 marquesses; 203 earls; 138 viscounts; and 523 barons (including, *ex officio*, 2 archbishops and 24 bishops).

creasingly now, peerages are granted for 'political and public services.' Conspicuous service to the state in the civil service, in the armed services, in diplomacy, or in the professions may be rewarded by elevation. Political services meriting a peerage are of various kinds. Politicians may crown their careers by going to the House of Lords. For instance, Labourite ex-Prime Minister Clement Attlee became Earl Attlee in 1955, after twenty years of leadership of his party, and Anthony Eden became the Earl of Avon in 1961. Men of eminence, whose counsel is wanted in the cabinet, but who will not fight elections or undertake departmental responsibilities, may be made peers to give them the necessary qualification for inclusion in the cabinet, as was true of Prime Minister Churchill's controversial war-time adviser on scientific affairs, Lord Cherwell. Of course, it is widely asserted that many are ennobled in return for handsome contributions to party campaign funds. Finally, the ancient barrier against women in the upper house crumbled in 1958 when the Queen named the first four women as life peers—and in the Summer of 1963 the Macmillan Conservative government enacted a Labour party proposal to enable peers to renounce their titles and run for seats in the House of Commons!

Ennoblement is not a personal prerogative of the monarch. The Prime Minister, taking such suggestion and advice as he deems fit, recommends names to Her Majesty. The monarch may object to the inclusion of particular persons, or urge a candidate of his own, and may on occasion win his point. But, generally speaking, peerages are in the gift of the political party in power.

COMPOSITION. In addition to the hereditary peers, the approximately 934-member House of Lords includes princes of royal blood; princes of the church, the twenty-six 'lords spiritual'—the two archbishops and the twenty-four senior bishops of the Church of England; representative Scottish and Irish peers, the latter now almost extinct; nine Lords of Appeal, eminent lawyers and judges who are given life peerages to carry on the judicial work of the Lords; and, since 1958, an increasing number of both male and female *life* peers.

DECLINING POWER OF THE HOUSE OF LORDS. Generally speaking, there is much doubt about the utility of non-elective upper chambers. Once the democratic principle that the will of the majority should prevail was widely accepted, it was inevitable that any forthright challenge of that will by a non-elective upper chamber should be regarded as insolent presumption. So when a trial of strength came in Britain over Liberal Prime Minister

Lloyd George's budget in 1909,⁴ the result was the aforementioned Parliament Act of 1911, an ignominious defeat for the House of Lords. By the Act, its power over money bills, which had already been modified by convention, was completely removed—except for a meaningless thirty-day *suspensive veto*. A bill certified by the Speaker of the House of Commons to be a money bill no longer needed the Lords' consent before becoming law. They retained a veto on non-money bills, but this could be overridden if the Commons passed the measure thrice in three successive sessions in a period of not less than two years. The Lords came to have only a suspending power.

Another trial of strength occurred in 1947. The Labour party came to power in 1945, pledged to introduce a large measure of socialism. Fearing that the conservative-minded House of Lords would veto important socialist measures and hold them up for two years, the Labour party majority in the House of Commons passed a bill reducing the period of the suspensive veto of the House of Lords from two years to one. The House of Lords rejected this bill, but the House of Commons passed it again in 1948 and in 1949, thus making it law within the terms of the Parliament Act of 1911. A bill now becomes law over the veto of the House of Lords by being passed twice by the House of Commons in two successive sessions.

Thus the House of Lords is now restricted to very narrow functions. It is sometimes suggested that it can be revived and made highly useful by making it elective, as is the United States Senate. But if its members are elected at the same time and on the same franchise as the lower house, they are likely to reflect much the same electoral opinion as the lower house and therefore to be superfluous. If they are elected at different times, or on a different franchise, they may represent different popular moods or different general convictions respectively. The result would either be deadlock or, as the experience of the United States suggests, the practical primacy of one house over the other.

REMAINING FUNCTIONS. The alternative reform, which can be accommodated to an almost infinite variety of ways of appointing the upper chambers, is the one adopted in Britain of deliberately reducing the powers of the upper chamber to a mere suspending power. The voice of the people is the voice of God, but God speaks through fallible parties and politicians. The majority in the lower chamber, either in the first flush of victory or in the

⁴The Lords had rejected that budget largely because it contained a 20 per cent tax on unearned increments in land—and the landed gentry viewed the land tax as a death blow.

hectic dying hours of a busy session, may well pass measures that, on longer consideration, they would not. So an upper chamber can check such legislative impulses without doing violence to the democratic dogma. Benjamin Franklin likened this process to 'Brother Philip Sober taking care of Brother Philip Drunk.'

Also, the lower chamber in countries with parliamentary government is badly congested because of the enormous grist of legislation, and because it is a forum for criticism of the executive and for party maneuvers, which take up a great deal of time. The upper chamber does not suffer much from these latter distractions. By sheer oversight, bills coming from the lower chamber often lack provisions necessary to their effective administration, or contain clauses involving unnecessary difficulties or hardships for particular groups. The upper chamber has time to spend in trimming and polishing the measures which come rough-hewn from the lower chamber.

These suspending and revising functions are the main functions now performed by the House of Lords. Yet even these are subject to criticism. No major legislative proposal, except in wartime, goes through the lower chamber without being preceded by extensive discussion there and in the country. There is, it is often urged, no justification for permitting the House of Lords to postpone the enactment of such a proposal for a further period.

However, it may be doubted whether any reform is of such immediacy that time spent in broadening consent to it through the slow erosion of opposition is not well spent. For democracy is as much a matter of gaining the consent of minorities as it is of giving effect to the will of the majority. There is much to be said for the suspending function. The revising function also is important—as the Lords proved in forcing a change in the Commons' Suspension of Capital Punishment Bill in 1948 and 1958. There is much to be said for a second chamber which has time for searching inquiry into the confused and complex facts that give rise to proposals for legislation. As we shall see later, one of the chief defects of legislatures today is that they rarely know enough about the facts to frame the laws most effectively. Lord Morrison, who as Herbert Morrison sat as a Labour M.P. in Commons for a third of a century, wrote convincingly that the 'very irrationality of the House of Lords and its quaintness are safeguards for our British democracy. . . . We have a considerable capacity for making the irrational work.'⁵

⁵ Herbert Morrison, *Government and Parliament: A Survey from the Inside*, 2nd ed. (London: Oxford University Press, 1959), p. 194.

The French Upper House. True bicameralism existed in the Third French Republic. The legislature was divided into two approximately equally powerful branches, the popular house—the Chamber of Deputies—and the *Senate*. The latter owed its creation in 1873 to the demands of the *Orléanistes*, the monarchist faction among the framers of the French Constitution, who agreed to support the Third Republic provided the republicans would support the establishment of a strong second chamber. This was accomplished, and the Senate proved to be a powerful, conservative body indeed—the scourge of many cabinets, which fell at the Senate's pleasure. It was a body of some three hundred members, of whom one-fourth served for life and the balance for a nine-year term, elected indirectly by an electoral college composed of representatives and governmental officials of the various *départements* of France. The Senate, in the words of Léon Gambetta, was 'primarily an assembly of the *communes* of France.'

The Constitution of the Fourth Republic, however, deprived the Senate of much, if not most, of its power, and changed its name to the *Council of the Republic*. The framers of the Constitution, following in the wake of the diminished power of the British House of Lords, deemed it unhealthy for governmental stability to have the French Council of Ministers—the cabinet—serve *two* masters. Hence that upper house was much weaker than the old French Senate, although more powerful than the British House of Lords.

THE SENATE OF THE FIFTH REPUBLIC. No longer the simple advisory body that its predecessor was, the upper house of the Fifth Republic is once again called the *Senate*, and has had some of the powers of its earlier namesake restored. While it lacks the power to overthrow the Government either by a vote of no confidence or by the adoption of a motion of censure, it is once again able to introduce legislation and give to as well as demand from the government opinions and explanations concerning policy. It cannot be dissolved, as can the National Assembly. It can block legislation or tie up bills in which the government is not truly interested by the 'shuttle' method (*la navette*). Here a disputed bill—save financial legislation—may be passed back and forth between the two houses indefinitely, unless and until the Government intervenes and forces it through the Assembly by a compelled vote, usually following an unsuccessful Conference Committee between the two houses. But except for its contingent legislative equality and its effective right to veto any change in its own status, the Senate—despite its renovated prestige—in effect remains a subordinate legislative chamber, for, after all, the Government is not responsible to it.

ELECTION AND COMPOSITION. Members of the Senate are elected indirectly by electoral colleges in each of the *départements*, in some by majority vote, in others by P.R. The 307 senators, of whom about one-fifth come from French overseas territories, serve overlapping nine-year terms; one-third of the Senate is elected at three-year intervals. Gambetta's remark about the location of power in the old Senate is still applicable—for the electoral system continues to emphasize the municipal councils, albeit with diminished emphasis.

A Note on the West German Bundesrat. Although fairly powerful and/or interesting upper chambers exist—e.g. the Swiss *Council of States* and the Senates of Canada, Australia, and Switzerland—a special note, in addition to a discussion of the truly powerful United States Senate, of course, is in order regarding the upper house of West Germany, the unique *Bundesrat*. The Bonn Constitution provided its upper house with a considerable measure of legislative power. Its approval is mandatory for all constitutional amendments as well as for all federal legislation bearing upon the tax, territorial, and administrative 'interests' of the *Laender*—an extensive field, indeed! Moreover, it possesses the authority to scrutinize all government bills before they are submitted to the lower house (the *Bundestag*) and it has a suspensive veto on all legislation. However, its veto may be overridden either by a simple or two-thirds majority of the *Bundestag*, depending upon the veto vote in the upper body. In addition to these powers, the *Bundesrat* also participates in the election of the judges of West Germany's new Constitutional Court. However, on balance, the upper house is clearly subordinate to the lower branch.

Yet what are perhaps more remarkable than any influence and prestige it may be able to wield on the federal level, are its composition and attendant significance as a link between the *Laender* and the central government. The *Bundesrat* is unique in that its membership—a total of forty-one in 1963 based upon a scale geared to the population in the ten states or *Laender*—consists of *delegates appointed by the Laender governments*. These delegates—who are almost always ministers—are required to cast their votes as a unit, regardless of whether the *Land* government 'back home' is a coalition of several political parties. Hence, the *Bundesrat* is not only more of a delegate *cum* representative body than a legislative one, but also a body which necessarily plays down party allegiance in favor of federalist requirements. Whether this intriguing attempt to forestall the natural Germanic tendencies toward centripetal government will succeed in the long run remains to be

seen. But it would seem to be a noble effort and, to date, on the whole a successful one.

The United States Senate. In a perceptive study an ardent, although not uncritical, admirer of the United States Senate characterized what he fondly termed the 'Institution,' as the 'one touch of authentic genius in the American political system, apart . . . from the incomparable majesty and decency and felicity of the Constitution itself.'⁶ There is little doubt of the prestige and power of this natural habitat of compromise, this Institution, this Club, that 'lives in an unending yesterday where the past is never gone, the present never quite decisive and the future rarely quite visible.'⁷ Let us briefly examine this uniquely American phenomenon.

Background. The United States Senate was a deliberate construction with aim and purpose. Sheer imitation of the British system and colonial precedents were factors, but two other considerations were decisive. First, a number of states of greatly unequal size and population were being federated under a national government. Representation in the lower federal chamber was to be on the basis of population, and it was thought that giving the states equal representation in the upper chamber would safeguard the interests of the less populous in the general councils of the nation—a defense which the states still maintain and cherish on many, but not on all, issues.

Second, the American Constitution was formed at the outset of extension of the franchise toward adult suffrage. It was widely feared that the people, and the representatives they chose for the lower chamber, would easily be swayed by gusts of emotion and even moved by the baser passions of envy and cupidity. It was thought to be important for stability, for the security of minorities—propertied and otherwise—that an upper chamber representing more conservative elements, and not chosen by popular vote, should check the vagaries and the envious appetite of the lower chamber. It was for this reason that indirect election was originally chosen as the method of recruitment.

But the House of Representatives has not been nearly so passion-ridden as was feared. It is true that for many years before the change to popular election in the United States, the Senate was a bulwark of the great business interests against regulation by government and was popularly derided as 'a millionaires' club.' But this was owing, perhaps, as much to the general domination of all American political life by big business in that period as to

⁶ William S. White, *Citadel: The Story of the U.S. Senate* (New York: Harper, 1957), p. ix.

⁷ *Ibid.* p. 2.

the indirect election of senators. Since direct popular election was introduced, the Senate has come increasingly to be moved by the impulses at work within the electorate as a whole.

COMPOSITION. The Senate of the United States has 100 members, two from each state in the Union. The Constitution originally provided for their election by state legislatures. But in 1913, pressure for more direct democratic choice, combined with indignation at the manipulation of state legislatures by would-be senators, forced the Seventeenth Amendment to the Constitution, providing for popular election of the senators in each state for a six-year term; one-third retire every two years and are replaced by new elections, thus combining a degree of continuity with frequent election.

THE POWER AND PRESTIGE OF THE SENATE. The Senate is a very powerful body. The President, who does not find it necessary every day to cater to the lower house, is almost continually compelled to woo the Senate. Even President George Washington had to—though he objected vehemently.⁸ For the Senate shares with him in the appointing and treaty-making power, thus gaining prestige and influence. 'Senatorial courtesy' is a well-settled usage of the Constitution by which the Senate—upon the appeal of members of the 'Club' immediately involved—normally refuses to confirm certain presidential appointments⁹ unless the President has first consulted the senators of his party from the state concerned. In effect this assures to senators of the President's party control over a considerable number of appointments to government jobs in their respective states, and it may forge for them a powerful connection with the political party machines in the states.

The six-year term frees them from frequent distraction over re-election, from which, by contrast, a member of the House of Representatives, with a two-year term, is scarcely ever free. The continuity of membership afforded by staggered senatorial elections every two years is a great advantage. The fact that the Senate has less than a quarter of the number of members of the lower chamber contributes greatly to the quality and effectiveness of debate, although in the Senate, too, the real work is done in committee rather

⁸ 'I'll be damned if I ever go to *that* place again,' he declared when the Senate had refused to abide by his wishes for ratification of the Jay Treaty on the spot, during his presence on the floor of the Senate.

⁹ However, this concept is actually 'relaxed' when the Senate deals with cabinet nominees, apparently believing that the President, on that level, ought to be able to get the men he wants. From 1789 though 1963 only eight cabinet-designees had been rejected—one each of Presidents Jackson, Johnson, Coolidge, and Eisenhower (Admiral Strauss as Secretary of Commerce), and four of President Tyler.

than on the floor. All these factors, in turn, make the Senate attractive to able men. Members of the House of Representatives aspire to, and frequently achieve, the Senate, thus giving it greater resources of mature political experience.

As a result, the Senate is much more than a check on the lower chamber. Although the Constitution gives both chambers equal powers in *legislation*, except for reserving to the lower chamber the initiation of all revenue bills, the Senate is far more often the dominant partner in legislation. It amends, at will, legislation coming up from the lower chamber, not excluding revenue bills; smothers many such bills in committees; and originates a large share of those finally enacted. When the two chambers disagree on a bill, and a compromise has to be arranged through a conference committee, the Senate generally makes fewer concessions. Thus the widespread doubts about the effectiveness of upper chambers certainly do *not* apply to the Senate of the United States. In prestige and power it has no equal among the liberal democracies.

THE LOWER CHAMBERS

The role and function of the lower chambers of the three leading countries at issue, which we have already seen in relation to political parties in Chapter IX, will be further delineated in conjunction with the discussions on legislative policies, organization and procedures to follow in this chapter and in the next chapter on executive-legislative relations, but a few general observations are in order now. As has become apparent, the center of gravity of legislative power lodges in the lower branches of Parliament in Britain and France. But the noun 'power' must be interpreted with considerable tentativeness in both instances. Especially is this true in the case of the National Assembly of the Fifth Republic, which in fact has practically been shorn of truly meaningful legislative authority, perhaps not so much by the provisions of the de Gaulle Constitution of 1958—although in its Title V it specifically determines and circumscribes its legislative power—as by that document's interpretation by the first President of the Fifth Republic, who has made no secret of his disdain for *le régime des partis*. When the National Assembly did challenge him late in 1962 in connection with his announcement of taking to the people in a referendum the question of direct election of the President, he accepted that challenge readily, and the resultant

national elections seemed to prove him correct in his analysis of how far the people would support him—very far!

Britain's House of Commons, operating against the backdrop of a largely unwritten constitution, with its implications of legislative supremacy, does theoretically, at least, possess the kind of overriding residual power once envisaged for legislative bodies as the instrumentality of the popular will. But, as the last chapter has demonstrated, the exigencies of time and the facts of life of the political process have combined to reduce and curtail the effective power of Commons both drastically and dramatically. Commons has been compelled by the facts of party government to abdicate to the cabinet, headed and led by the Prime Minister, who, aided by the superbly disciplined political party in power, in turn reflects the majority opinion of the British electorate. The House of Commons can still bring down the Government, but it does so at the risk of political suicide. Its functions—symptomatic of the decline of legislative bodies everywhere—are now largely those of approving, amending, adjusting, correcting, and legitimating.

Although this conclusion applies broadly also to the House of Representatives in the United States, there are highly significant differences. Independently elected for two-year terms for office, and functioning under a system of separation of powers, the House reflects the federal structure of the American system of government, with its undisciplined party system. It swings its weight, however negative that may be, in the essentially 'no-saying' character of its impact. Almost four and a half times as large as the Senate, and saddled with the necessity to run for office every two years, the House is clearly the less influential of the two bodies; but it does have influence, particularly in financial legislation (see the following chapter), and its veto power over policy-making initiated by the executive is as real as it often proves to be exasperating.

Yet to see a truly powerful lower chamber in a Western liberal democracy, in action, one must look to the House of Representatives in New Zealand—where there is neither a second chamber to restrain it nor a written constitution; where the House does not share powers with a President; and where there are no provincial or state governments. It should be noted, however, that this power structure has existed only since 1950. Prior thereto, for nearly a hundred years, there had been an upper house, the Legislative Council; but it declined in prestige, played an ever diminishing role in government, and was finally abolished.

THE DEMOCRATIC LEGISLATURE AT WORK

THE LEGISLATURE WHEN PARTY LINES ARE DRAWN

In turning now to the organization and working of the more active and more or less powerful chambers of these legislatures, it will be recalled that the members of the United States House of Representatives, the British House of Commons, and the French National Assembly are popularly elected by what is virtually universal suffrage, and that a system of political parties dominates the processes of election in each of these countries. We noted in Chapter IX that the political parties take a commanding role in the working of the legislative processes also. None of these lower chambers, nor the United States Senate, can be understood unless that role is kept constantly in mind. It accounts for many of the features of these legislatures that the public regards with impatience. When party lines are really drawn, the legislature is not the active center of decision where great speeches sway opinion and make history. When party leaders speak, they speak to the country as a whole, or at any rate to groups outside the legislature. Many members do not speak at all; most of them speak but little, and then mostly to their constituencies. When party lines are drawn, they vote in accordance with party considerations. This is a very large part of the explanation of the empty seats—except when the party whips descry an approaching division or roll-call—the seeming triviality of debate, the scant attention, and the almost discourteous lack of overt concern to what is being said.

Power Contest. Parties are arranged against each other in competition for power, for the sweets of office, as well as for the power to carry out the program wanted by the interests in the electorate that support them. The psychological atmosphere thus generated is one of struggle, and when the parties are fully deployed in the legislature they tend to contest every inch of ground, whether or not truth and the public interest are at stake. In these clashes, personal feuds and rivalries tend at times to overshadow issues of principle as inspiration for debate. As long as parties continue to play their present role, legislative proceedings will be deeply affected by them. Yet many people expect legislatures to behave as if political parties did not exist.

ROLE OF THE OPPOSITION. The overshadowing significance of parties, where it exists, must not be taken to mean that the legislature is no more than a

Punch and Judy show in which the puppets move through the unseen manipulations of parties. We should be in a bad situation, indeed, if laws were made and announced by a secret junta. Many men will acquiesce in private to decisions they would not defend in debate. When they know that they must justify their proposals in what is, despite all detraction, the greatest forum in the country, before an opposition that will pounce on the slightest offense to the public sense of decency, a restraining influence of immense weight comes into play. One great service of the opposition lies not in its spoken criticisms, but in the mere fact of its being there.

Moreover, there are always two or more sides to a story, and the majority party has not heard all of the other side until the opposition has had its say. Concession to the arguments of the opposition follows oftener than is generally believed. The public, despite its disillusionment, gets from the dramatic clash of parliamentary debate a grasp of great issues of public policy, which it cannot get in any other way until much larger resources are thrown into political education. Finally, new laws made each year are only a tiny fraction of the old ones that are being administered day by day. Oppressive, wasteful, or neglectful administration will be a black mark against the party that presently controls the executive power if its behavior can be given wide publicity. Questions in the House of Commons in Britain, the mere existence of the National Assembly in France, and investigations by the United States Congress, expose such matters to the public gaze, and the executive proceeds more or less warily. Here again, it is not the actual gleanings of legislative surveillance which are of supreme importance but the ever-present threat of investigation.

Discussion of many matters relevant to a well-rounded account of the place of the legislature in modern government must be postponed to later chapters. Here we are primarily concerned with the legislature as a distinct organ of government, and main emphasis will be on internal organization and procedure and on the role of parties in it. The emphasis will be highly selective and partial and, for Britain and France, will concentrate on the *lower* chambers. The internal workings of each of the legislative bodies under review is a study in itself, and only the briefest sketch designed to bring certain important features into relief can be offered.

LEGISLATIVE COMMITTEES

The growing torrent of legislation that must be enacted to meet demands of the positive state puts increasing pressure on legislatures. Even where

party organization formulates almost all of the new legislation and guides it to the statute book, as in Britain, these measures must be explained to the legislature and enacted by it. Time must also be found for debating general policy and examining the trend of administration of the manifold activities of government. It is not only a question of time but also of the sheer size of the legislature. The British House of Commons, the French National Assembly, and the United States House of Representatives are all too large for effective deliberation. Consequently, there is increasing reliance on committees to divide the labor and thus to provide for more effective discussion. Woodrow Wilson stated it well: 'Congress at work is Congress in committee.'

Committees in Congress. In both chambers of the United States Congress a well-developed system of committees antedates the rush of legislation, which has been rising for seventy-five years. This elaborate organization into committees was rendered necessary by the absence there of a general executive committee like the cabinet in Britain. Many permanent *standing committees*, also known as 'subject matter committees,' were formed, each to carry some part of this function of examining proposals for legislation, and deciding which of them should be recommended to the chambers. As the mass of legislative work mounted, these committees came to dominate Congress in somewhat the same fashion that the British cabinet dominates the House of Commons. The standing committees are appointed after each congressional election for a period of two years. In each chamber, there is a standing committee for each of the important recurring subjects of legislation, such as Judiciary, Appropriations, Foreign Affairs, and so forth. The number of standing committees has varied from time to time. The Legislative Reorganization Act of 1946 provided for a sharp reduction in their number, from forty-eight to nineteen in the House of Representatives and from thirty-three to fifteen in the Senate; by 1963 each house had increased its committees by one.

SELECTION. Each party is entitled to membership on each committee roughly proportionate to its strength in the chambers. When the time comes to appoint committees, the members of each party in each chamber meet in party caucus and select a 'Committee on Committees.' Each Committee on Committees then nominates members of its own party to fill the quota to which the party is entitled on the standing committees of the chamber. These nominations are ratified almost as a matter of course by the appropriate party caucuses and the chambers as a whole.

As we shall see later, the standing committees of Congress substantially

make the laws. Those who choose the standing committees have a great influence on what laws are made. The Committees on Committees are composed in each case of a rather small group of party leaders or their nominees. For example, the Democratic Committee on Committees in the House of Representatives is composed of Democratic members of the powerful tax-writing Committee on Ways and Means. This gives some indication of the extent to which the party system, if not the majority party, can control Congress. In fact, the majority party can control decisions of the standing committees when it chooses.

SENIORITY. In addition, the chairmanship of each standing committee traditionally goes to the member of the majority party in the chamber who has had the *longest continuous service* on the committee. This is the frequently attacked 'seniority system.' A skillful chairman who has had long experience on a committee, and has accumulated a wide knowledge of the range of matters with which the committee deals, can exercise a powerful influence on its deliberations—for good or evil. The seniority system puts a heavy premium on politically 'safe' election districts. Thus, when the Democrats are in power, between twenty-two and twenty-eight of the thirty-six chairmanships normally go to Southern or Border representatives under this rule by longevity. When the Republicans are in power most of the chairmen come from the Midwest or New England. Chairmanships are gained and retained, once wrote Senator Kefauver (D.—Tenn.), by 'seniority, sectionalism, and senility.'¹⁰ It is hence not surprising that probably no other institutional aspect of Congress is subject to as much outside criticism as the seniority system—and none is less likely to be altered!

STANDING COMMITTEES AT WORK. All bills and proposals for legislation go automatically to standing committees before being considered by the House as a whole. To aid themselves in reaching the recommendations they will make to the House, and/or to publicize their work, the committees hold public and private meetings, where civil servants, disinterested experts, and lobbyists representing the interests concerned are heard pro and con on the subject. Enormous numbers of proposals for legislation are quietly smothered in committee. Less than 10 per cent of those referred to committee ever emerge therefrom. Those not killed or 'pigeonholed' in committee are often subjected to major operations, which remake them in such a way that their sponsors sometimes hardly know them. Of course, the majority party can

¹⁰ Estes Kefauver and Jack Levin, *A Twentieth Century Congress* (New York: Duell, Sloan and Pearce, 1947), p. 267.

theoretically control the committee and, if it is so disposed, compel it by a 'discharge petition'¹¹ to report to Congress bills that the party is backing, or that the President, provided he is of the same party, urgently wants to go forward—but it is highly reluctant to interfere with committee procedures, and only twice within the past generation has a discharge petition been successfully invoked.

The vital work of the United States Congress is done in these standing committees. With most of the discussions being private, speeches are to the point and not, as on the floor, to the constituencies. Representatives of protesting groups are heard, and they often get some portion of the concessions for which they press. The form in which the bill is finally reported out is generally, but not always, satisfactory to the majority party. Congress rarely makes significant changes in any bill that is positively recommended by the standing committees, although not every bill that emerges necessarily passes. In other words, the committees are performing some of the functions of the British cabinet, but they far less often hew to a party line.

In this way, the labor of the legislature is divided and a bigger harvest of legislation is produced. However, it must be said that in so far as the effective decisions are taken by small committees and sub-committees, ranging in number from twelve to fifty members, the representative character of deliberation on lawmaking is greatly impaired. Attempts are made to distribute membership of committees geographically, but that does little to repair the damage to the representative principle. Also, the system suffers from the nemesis that pursues all divisions of labor—the difficulty of combining the separate specialized efforts into a harmonious whole. Very effective work is done on specific pieces of legislation, but not always with sufficient recognition of their relation to general policy. The British cabinet system, by concentrating responsibility for the formulation of all aspects of policy on a single body, keeps the necessity for integrating the legislative program in the foreground, and the British House of Commons therefore is marked, as Congress is not, for debates of high quality on the general policy of the government. What is true of Britain here applies to France, too, but to a much lesser extent.

JURISDICTION. The legislative work of Congress has been divided among these standing committees in such a way that each committee in each chamber has a well-defined area of jurisdiction corresponding closely to the field

¹¹ A petition which must be signed by an absolute majority of the members of the house of Congress concerned.

of operations of particular departments and agencies of the executive. Most of the committees divide themselves into sub-committees to enhance efficiency. Staffs of experts assist these committees in their work. These, and other provisions of the Legislative Reorganization Act of 1946, to be referred to later, are improving the effectiveness of the detailed work of standing committees in particular fields of public policy.

OTHER COMMITTEES. In addition to standing committees, *select*, or *ad hoc*, committees are appointed to inquire into *special* issues of concern when they are thought to require it, such as the well-known Kefauver Crime Committee in 1951 and the McClellan Committee on Improper Practices in the Labor or Management Field in 1957. Also, the fact that the two chambers are equal in legislative power often brings them to deadlock on some piece of legislation. Since both chambers must accept a proposal in identical form before it can be sent to the President for his action in the lawmaking process, an acceptable compromise must be found. The usual device is a *conference committee* consisting of a small number of members of both chambers who are familiar with the particular piece of legislation and who search—sometimes long—for a solution, which both houses may accept or reject but may not amend. There are, furthermore, several small but influential *joint committees*, composed of members from both houses of Congress, which deal with matters of an unusually technical or sensitive nature, such as the Joint Congressional Committee on Atomic Energy.

THE HOUSE RULES COMMITTEE. No account of committees in the United States Congress would be complete without reference to the perpetually controversial Committee on Rules of the House of Representatives. (The Senate has a Rules Committee, too, but it is of no comparable significance.) This small, immensely powerful committee of fifteen senior members of the House, ten from the majority party and five from the minority, determines, in effect, when the formal rules of the House are to be temporarily departed from, what priorities are to be observed in the agenda, and the nature of, and time limits on, debate. It is a most important agency of majority party control but it has also been a thorn in the side of the House. 'Rules' is both a traffic manager for and a killer of bills. Its chairman wields authority second only to that of the Speaker and is courted by the President—when indeed he is courtable at all—much the way a foreign dignitary is!

Committees in the House of Commons. The British House of Commons, always averse to standing committees on the ground that, in practical effect, they make inroads on the supremacy of a representative Parliament,

managed to avoid any substantial development in this direction until the beginning of the twentieth century. It was able to do so for two reasons: First, the cabinet is largely a committee of the House for framing and guiding legislation. Second, the practice of resolving the whole House into committee for various purposes gave some of the advantages of committee procedure.

'Committee of the Whole,' as it is called, is formed by the Speaker's leaving the chair and giving over his duties to a less exalted chairman of committees. Party reins are slackened and rules of debate are relaxed. For example, members may speak more than once to the point under discussion, and the majority cannot summarily cut off debate by moving that the previous question now be put. All financial proposals, and other bills of unusual importance, still go to Committee of the Whole.

SELECTION. The pressure of work is inexorable and, after some exploratory use of standing committees, they came into general use in 1907. However, there are still only six or seven. Aside from one that specializes in Scottish affairs and one that deals with private members' bills, these are general-purpose committees, designated A, B, C, D, and E. They take whatever assignments are given them by the Speaker on the advice of the Committee of Selection. To provide for expert assistance and specialist interest, the Committee of Selection may add to the normal nucleus of *circa* twenty members another thirty or so temporarily for the purpose of considering a particular bill.

The Committee of Selection is nominated by the party leaders and confirmed by the House at the beginning of each session. The Committee, in turn, nominates the standing committees, taking counsel with the party whips. The chairmen are not necessarily of the majority party, and, while the party whips are not brandished in committee, party persuasion is still within call.

AT WORK. Normally, all public bills (including private members' bills) that are not financial bills are referred to the standing committees *after* second reading in the House of Commons. However, the second reading approves the general principle of the bill, narrowing the scope of discussion in committee to details—in striking contrast to the United States where 'the sky is the limit' on committee action on pending legislation—many of which are of a technical character. Often the decision on these matters of detail will turn on questions of fact or scientific judgment.

Discussion in Commons' committees must be restricted to these details. For example, if the bill in question is one to establish a code of safety and

sanitary measures in industrial establishments, the committee cannot debate the issue of whether the law should interfere with the way in which industrial employers run their factories; for that question has already been answered in the affirmative on second reading. The committee must settle down to deciding what particular sanitary and safety measures are necessary to preserve health and prevent accidents.

So there is not so much room for division on party lines and not much temptation to make speeches to the country at large in a small committee whose proceedings get little publicity. Members even of the majority party supporting the government may press for modifications, and within limits the government will concede them, if the argument in committee is cogent or if the debate on second reading has indicated a strong case for some adjustment. But the leaders of the majority party are far from giving the committee its head, and they can apply closure to speed it toward its report. Unlike the practice in the United States, the committees do not provide hearings for private interests concerned. However, while the bill is in committee, private interests may press their views strongly on the cabinet.

LACK OF PRESTIGE. Thus British committees lack the power and prestige of their American counterparts. They can neither smother bills nor make major amendments that cut into the principle of the bill, e.g. they cannot eliminate from the factory bill all requirements for sanitary precautions. On the whole, membership in them is not sought but evaded. Being general-purpose committees, they make no appeal to members with specialized knowledge or interest, and members who go on a committee for the narrow purpose of a single piece of legislation will often ask to be relieved once it has been reported to the House. Professor K. C. Wheare has made the observation that the crucial distinction between the British and American committee systems, in matters of bringing special knowledge and interest to bear on bills, is that in Britain members with special knowledge and interest 'go to the bills' by pursuing them to whatever committee Mr. Speaker has referred them, whereas in the United States the bills 'go to the members' with special knowledge and interest.¹²

The House of Commons is jealous of the committees. Yet it could not do its work without delegating this discussion of detail, and its only alternative is to extend still further the growing practice of limiting legislation to a statement of general principle and delegating the power to fill in details to

¹² Kenneth C. Wheare, *Government by Committee: An Essay on the British Constitution* (New York: Oxford University Press, 1955), p. 135.

government departments. The significance of this practice will be taken up later, and it will suffice here to say that it, too, is irksome to the House. So the trend toward greater reliance on committees continues.

SPECIALIZED COMMITTEES. It is often urged that specialized committees should be set up to attract the sustained effort of members according to their interest. To each such committee would be assigned the scrutiny of one of the great government departments. It would consider the legislative proposals and the annual estimates of that department and make a close study of its administrative operations. In this way, Parliament would move toward a better understanding and a more effective control of the complexities of government.

The experience of some of the democratic governments of continental Europe, and the dominant position of committees in Congress in the United States, clearly indicate that such committees would compete with the cabinet for primacy, and it is likely that the party leaders, in order to preserve intact their instrument of unified action, would have to make the practical scope of such committees much narrower than is suggested. There is also the question already noticed, whether concentration on specialized competence in these committees would not detract from the quality of discussion the House of Commons now provides on general policy.

SELECT COMMITTEES. The House of Commons often uses select committees to inquire into particular subjects of great importance, or to give special consideration to particular bills that propose drastic change. Their function is inquiry into complex issues rather than the discussion of legislative detail. Accordingly, they are customarily small committees of fifteen members or less, chosen for their knowledge of or interest in the particular subject matter—such as the 1959 Committee on Procedure. They hold hearings at which interested parties appear and give evidence. When expressly authorized by the House they may compel the attendance of witnesses and require the production of documents. Detailed records of their proceedings are kept and printed along with their formal reports. In short, their function is similar to that of a royal commission of inquiry, although it is performed in a less pretentious manner.

Legislative Committees in France. While there are standing committees, known as *commissions générales parlementaires*, in both chambers of the French Parliament, our concern here is with those in the National Assembly. Structurally, the *commissions*—as we shall call them henceforth—resemble the standing committees of Congress in that they are committees on partic-

ular subjects or fields of legislation. Despite this structural similarity, however, a distinct functional difference exists: congressional committees are primarily designed for legislative functions, but the chief task of the French *commissions* is to keep a day by day check on the executive—ineffective as this may be under the Fifth Republic. As a rule, each ministry is under the surveillance of a *commission*, the range and sphere of which encompasses, among several others, its own activities, e.g. Foreign Affairs, Defense, Education, etc. This used to be a striking parallelism, which under the Third and Fourth Republics accorded to the *commissions* a control over policy on a par with that of the ministers themselves, but now no longer in practice under the Fifth.

SELECTION AND COMPOSITION. In 1963 there were six permanent *commissions* in the National Assembly (and the Senate) whereas under the Fourth Republic nineteen special committees existed. With the latter arrangement, much of the work of one often quite naturally overlapped that of another. In some cases the *commissions* were hard put, indeed, to justify their existence. Such a large and specialized group of committees was likewise susceptible to much intensive lobbying and domination by various interest groups.

The reforms of the de Gaulle Constitution sought to eliminate the above evils not only by expanding the *commissions'* fields of jurisdictional subject matter, but by specifically limiting their number to just six new and much larger ones, thus drastically reducing their importance—in addition to the dramatic over-all reduction in power and influence of the legislative body generally. The six *commissions* extant in 1963 and their membership were Culture, Family, and Social Affairs (120), Foreign Affairs (60), National Defense and Armed Forces (90), Finance and Economic Planning (60), Constitutional Laws, Legislation, and General Administration (90), and Production and Exchange (120). When questions of great urgency and/or importance arise, *ad hoc* committees are elected by a majority of the Assembly. There is no set membership size on these committees and they expire when their work has been completed.

Although known as 'permanent' *commissions*, the six units are elected by their fellow legislators for one session, and they, in turn, elect their own chairman. In general, however, the principle of seniority is adhered to. As in Congress, but unlike the House of Commons, the French *commissions* reflect quite closely the strength of the various parties in the Assembly. The standing rules require their selection by P.R., based upon party groups that

have thirty or more members. No one may become a member of a *commission* except through membership in such a group.

At Work. All bills are read to the Assembly as they are received from the Government, and may—or may not—be referred to a *commission*. Bills referred to *commissions* must be reported out; ‘pigeonholing’ is strictly forbidden—as indeed it was under prior republics. Public hearings, such as in America, are unknown to the French *commissions* as information discussed is often considered classified and confidential, yet conferring with proponents and opponents of legislation is customary. But the *commissions* may now administer oaths only if such power is expressly granted by the National Assembly. Outside experts are invited to give their views, as are the ministers concerned. The latter now can no longer be required to appear before a *commission* but, in line with a policy initiated by de Gaulle’s first Premier, Michel Debré, they usually do so! The chairman of a *commission*, who bears the lofty title *Monsieur le Président*, is, of course, no longer the influential figure in either the *commission* or the legislative process that he represented in the pre-de Gaulle days.

THE *RAPPORTEUR*. The key figure in a particular piece of legislation in the past never was the President of the *commission*, but its *rapporteur*, or ‘reporter.’ While in Britain a government bill is explained, defended, and piloted through Parliament by the appropriate minister, and in Congress by the chairman of the standing committee or one of its sub-committees, in pre-de Gaulle France it was the *rapporteur* who had charge of the bill when it emerged from the *commission*. He was designated as its reporter upon the initial consideration of the bill by the *commission* and, in effect, he eclipsed the minister—who introduced the bill in the first place. As long as *rapporteur* and minister co-operated, the French committee system worked smoothly, but abuse was notorious, and many a *rapporteur* made his minister’s life miserable—not surprising in a country that had both a multi-party system and a coalition government. In a sense the *rapporteur* was a quasi-minister. A successful *rapporteur* used his job as a stepping stone to a high governmental position, as the eleven-times Premier Aristide Briand did.

Today, under the Fifth Republic the *rapporteur* still plays a role in the *commission*, but it has become more or less of a mechanical nature, for it is the minister concerned who guides his own bill through Parliament. And inasmuch as the National Assembly must vote on his bill, subject to such amendments as the Government may allow, the once commanding position

of *rapporteur* has become decisively subordinate to the minister who has sponsored the legislation—a true reflection of the demise of France's legislature under the new Constitution.

RULES OF PROCEDURE IN THE LEGISLATURE

A glance at the rules of legislative procedure should now enable us to sketch the process of lawmaking in the legislature. Every deliberative body needs rules of procedure to expedite business and also to protect the rights of speech and of protest from abridgment or abuse. Rules against the abuse of the right of speech are particularly required to maintain the equable temper of discussion, without which deliberation cannot be carried on at all.

In the House of Commons. In the long course of its development, the British House of Commons built up an impressive body of *customary* rules of procedure. These remain the basis of its procedure at the present day, but they have been extensively supplemented by deliberately adopted written rules, known as 'standing orders,' covering the order of business, time to be allotted to various kinds of business, stages of debate on measures, and other matters. By majority vote, the House may suspend or repeal any rule of procedure as it sees fit. Thus the majority party controls the procedure of the House. Standing orders give the cabinet about four-fifths of the time of the House, and a session rarely goes by without the cabinet's having to encroach on the limited time left for private members' business.

CLOSURE. By the adoption in standing orders of various forms of *closure* early in this century, the cabinet can use its supporting majority to close discussion at once, or at a definite future hour, and to select which of a number of proposed amendments to a bill shall be discussed and which rejected without discussion. Closure is a drastic power but, as a result of the demand for more and more legislation and government action, the hard choice is between more talk and less completed business, or more business disposed of and less talk. One may sympathize generally with the latter alternative, but it must not be forgotten that the real function of Parliament is to talk reluctant people into consent to measures they dislike. Closure is a necessary instrument under present circumstances, but if not used sparingly and with wisdom it will strangle a deliberative assembly.

In Congress. The colonial legislative assemblies of North America followed the British rules of procedure of the time, and Congress has been deeply

influenced by them. Thomas Jefferson, when Vice President, drew up for the Senate a famous *Manual of Parliamentary Practice*, based on the British model. The House of Representatives adopted this manual in 1837. It is still the core of congressional procedure, although it is now surrounded by many modifications and additions. Both the House of Representatives and the Senate can change their rules by majority vote. The two Committees on Rules, dominated by the majority party, propose changes which the chambers accept. The House of Representatives has rules corresponding to the British closure provisions, and they are used not only to limit but at times to strangle debate.

CLOSURE IN THE SENATE. For long, the Senate made no provision in its rules for restricting freedom of debate and recognized the right of minorities to continue talking indefinitely in protest against majority measures. On occasion, senators have turned in prodigious performances, speaking many hours at a stretch, supplementing ideas and arguments with verse and prose, and sometimes with matter of lesser quality. They may work in relays, keeping the house in continuous session around the clock, or *solo*, until they are exhausted. These *filibusters*, as they are called, sometimes accomplish their purpose of wearing out the majority and thereby blocking or defeating the legislation. Sometimes their purpose is merely to call the country's attention to a particular controversy, as Senator Wayne Morse did in his then record solo-filibuster of almost twenty-three hours, without a break, against the Offshore Oil Bill in 1953.

Even under a mild form, as adopted in 1917, closure in the Senate was used only four times. Since the enactment of new closure rules in 1949 and 1959, the former requiring the affirmative vote of two-thirds of the full membership of the Senate, the latter two-thirds of those present and voting (there being a quorum) closure was used just once—on the 'Telstar' bill in 1962. Whatever the influence of the threat of closure may be, it has had no significant influence on debate in the Senate, and filibusters still take place. Of course, the relatively small membership of the Senate reduces somewhat the necessity for restrictive measures, and debate is often held within limits by agreement among the leaders of the parties that a vote shall be taken at a definite future time.

In Britain, the cabinet containing the leaders of the majority party takes the leadership in expediting business within the framework of the rules. It has a program prepared at the opening of every session. It takes up most of the time of the House and sees to it that the important items on its pro-

gram are dealt with and brought to some conclusion. In the United States, the executive does not *per se* lead in Congress, and its place is taken by the floor leaders, rules committees, and steering committees of the majority party.

In fact, in each chamber, each party has a small steering or policy committee. Naturally, the steering or policy committee of the majority party is the significant one, as the pushing of party measures, the enforcing of the timetable, and changes in the order of business generally originate there. The chairman of the committee is either the floor leader of his party or a very influential member. The floor leader is aided by the *whips*, who herd the members of their party into the chamber for roll-calls. If some members of the party are wavering on an issue that calls for party solidarity, the caucus meets and *tries* to work to a position that all will be willing to support—but, as we have seen, this goal is by no means always attainable in the United States Congress.

In the French National Assembly. Rules of procedure in the Assembly—indeed in both branches of the French Parliament—now resemble those of the House of Commons more than those of Congress. Both members of the ministry and individual legislators may introduce legislation. Government-sponsored bills, known as *projets de loi*, which are invariably introduced by the ministers involved, almost always pass. But only a very few of the private bills, called *propositions de loi*, become law.

In effect, the French ministers, as already indicated, themselves guide the proposed measures through the Assembly. Under the Fifth Republic, it is the French ministry—very much like the British executive—which fixes the legislative agenda, unlike the American executive who must bow to the leadership of the legislature for those vital purposes.

CLOSURE. Standing Orders govern the *clôture* or closure. While closure was attainable even in the Third and Fourth Republics, its use was far more circumscribed than in the House of Commons. Often it was extremely difficult to achieve—since there was no responsible (or other) majority to invoke it. However, the Assembly did rather frequently agree to a form of ‘restricted debate’ on non-essential bills—a pre-determined classification—under which a limited number of members might speak five minutes each. This practice—which governs under the Fifth Republic—closely resembles that prevalent in the United States House of Representatives. Closure was never a popular or frequent practice in the French legislature, most of whose members preferred to accentuate the French love for individualism—even at

the risk of governmental chaos! But now those days, too, are gone, and the Government possesses the weapons to compel legislative action—ultimately on pain of doing without the legislature, if necessary.

Thus in France the Gaullist majority, and in Britain and in the United States the majority party, has procedure within its control and can enforce its will by drastic methods. This is particularly true of Britain and France. In the United States, however, divided majority parties sometimes make 'cracking the whip' difficult. When the chips are really down enough pressure can usually be brought to bear upon the members. But as even the most popular of American Presidents have found out, there comes a point when other loyalties engendered by the federal system obviate those to party.

FORMAL STEPS IN LAWMAKING

Lawmaking in Britain. In Britain, government bills, almost the entire grist of public bills, are drafted by the executive. The department whose special concern a bill is consults with the other departments affected, and civil servants contribute their experience and work out specifications of the technical means required to reach the desired end. When a completed draft of what is wanted has been approved by the cabinet, it goes to the parliamentary counsel to the Treasury, a drafting expert who fits the bill with legal clothing or, more precisely, drafts a bill that will accomplish legally the desired results.

First reading in the House of Commons follows. It is generally reading by title only and never more than notice of motion to bring the bill forward for discussion at a later date. On second reading, the principle of the bill, the general question whether such legislation as this is necessary or desirable, is discussed. While it is not unknown for the government to withdraw a bill after an onslaught on it at second reading, it is extremely rare. After all, the government claims a mandate from the people to pursue its policy, and its bills are the central part of that policy. The bill is passed on second reading and is referred to a standing committee.

As already explained, the committee considers the bill in detail clause by clause, sometimes making amendments at its own behest, but mainly at the government's. When this overhauling is completed, the bill is reported back to the House. At report stage, as it is called, the House considers the bill in detail. But if the time saved in committee is not to be wasted at the report stage, this consideration must be limited and fewer amendments are moved

at report stage than in committee. As soon as report stage is finished, the third reading may be moved. At this final stage, only verbal amendments may be introduced, so that the debate on the third reading tends to rehearse the debate on the second reading. Despite the reservations of the House about standing committees, the really thorough consideration of the bill in detail is given in committee. After passage by the House of Commons, the bill goes to the House of Lords. It may be added that private members draft their own bills, but this is of little import, as such bills have almost no chance of becoming law.

Lawmaking in Congress. In the United States, bills considered desirable by the President may be drafted in the government departments and introduced into one or the other chamber of the legislature by a member of Congress who is of the President's political party. A high proportion of the important measures put before Congress are now initiated in that manner. Congress, however, considers many measures that are not inspired, or even favored, by the executive. Any member may introduce a bill, and the committees often have proposals before them that they wish to put in the form of a bill looking toward legislation. For a long time, Congress had to find its resources of draftsmanship where it could, but some years ago provision was made for the appointment of legislative counsel as officers of Congress to draft bills for its committees and members. In addition, the Legislative Reference Service of the Library of Congress serves as the principal congressional research arm. Special interests, wanting legislation on their behalf, often also draft their own bills and have them presented to Congress. This extensive private enterprise by individual members of Congress and outside groups in introducing bills largely explains why such heavy slaughter of bills occurs in committees.

All bills introduced are given first reading by title only, and are immediately referred to the appropriate committee. In the Senate, first and second readings, both quite perfunctory, are commonly given at the same time before the bill goes to committee. The real deliberative effort, it will be recalled, takes place in committee. The House of Representatives, when a bill is reported to it favorably by committee, generally contents itself with acceptance, rejection, or minor amendment on second reading with little debate. If serious debate and amendment are desired and are acceptable to the steering committee of the majority, the House resolves itself into Committee of the Whole for the purpose. Third reading immediately precedes final passage and occurs without debate.

In the more individualistic Senate, with fewer members, less restrictive rules of procedure, and looser party control, bills favorably reported by committee are likely to get closer examination and more discussion. Amendments are freely offered and debated; whether they have a chance of acceptance depends on whether the measure is one respecting which party lines are drawn. Third reading immediately precedes the final vote on the bill.

Lawmaking in France. We have already seen that bills may be introduced in the French legislature by either private members or ministers. Since there is no legislative or parliamentary counsel, as in Britain and the United States, private members draft their own bills, sometimes with the assistance of members of the Assembly President's legal staff. Bills sponsored by the government are drafted by civil servants who have had some legal training. Often ministers call upon the *Conseil d'Etat* for aid, for this highest administrative court also acts as technical adviser to the government in the drafting of bills and ordinances.

Once introduced by title—its first reading—in the National Assembly, a bill is referred to the appropriate standing *commission*, which cannot bury it but must report it to the Assembly. Upon the report to the floor by the commission's *rapporteur*, a general debate on the measure ensues. This is the second reading. If the bill survives that stage, the Assembly proceeds to a consideration of its various sections; amendments are now in order and are voted upon. Ultimately, the finished bill receives its third reading, and the final vote is taken. Any 'restricted debate,' if previously sanctioned by the Assembly at the commission's behest, occurs at this stage. The completed bill then goes to the Council of the Republic, to be processed in accordance with the procedure described earlier.

In a constitutional regime, all taxation must be approved by legislation, and no expenditure of public money can be made without authorization of the legislature. Taxing and appropriation measures are legislation of vital importance, subject to some special rules. As the course of financial legislation brings out most clearly the working relationship of the executive and the legislature, discussion of it will be postponed to the following chapter, which is devoted to those relationships. For the same reason, discussion of legislative surveillance of administration might be postponed, as some attention will have to be given to it there in any case. On the other hand, a description here of the mechanisms used, and the time available, for inquiring into administration will help to round out discussion of the legislature,

and to clear the ground for undivided attention to the essence of legislative-executive relationships.

CONTROL OF ADMINISTRATION BY THE LEGISLATURE

The Methods in the House of Commons. In Britain, the executive is in the legislature and responsible to it. A vote of censure of its administrative performance may cause the downfall of the cabinet just as well as rejection of a government bill. In practice, a motion of censure is rarely successful because the government can generally rely on its majority to preserve it from such disasters, and its demands on the time of the House do not leave much time for the debating of administration. Despite the enormous range of present-day activities of government, the time available for discussing administration in the normal annual session of Parliament is estimated at less than thirty days.

QUESTIONING MINISTERS. A more effective means of criticizing the administration is the right to ask questions of the executive. An hour is set aside each day for oral or written questions addressed by a member to a minister. The questioner may be seeking sheer information, but more often he picks on some incident of administration, perhaps the grievance of one of his constituents against a minor government official or on some unwary remark of a member of the government in the House, or elsewhere, in the hope of forcing the minister into a damaging statement about the policy of the department he is administering. He wants an oral reply, and he needs the right to ask supplementary questions of a minister who is evasive. The question hour is a battle of wits, the minister trying to score off the hecklers and they trying to skewer the minister with a question that cannot be answered without putting him and his department in a bad light. It is an important technique of opposition. Ministers always fear that if there is a chink in their armor, questions on successive days will probe for it until it is found. Civil servants—whom the minister protects loyally in the House, but whom he excoriates afterwards for their mistakes—are extremely wary in what they do. Where thousands of civil servants are dealing daily with hundreds of thousands of citizens, it is important to have a forum where grievances against their conduct can be aired and misdeeds corrected.

The House of Commons would be swamped with questions if each member were not strictly limited in the number to which he can demand oral answers. Only a fraction of the opportunities for grilling the executive for its

administrative actions can be followed up. And, of courses, many of the best opportunities are missed even in Britain, because most members of Parliament are not at all conversant with the details of administration. For that matter, the minister himself does not know too much about them, but he is coached by civil servants who know vastly more about these details than anyone else. The actual contest is on unequal terms. The real control is the knowledge that gross maladministration will certainly be exposed on the floor of the House and thus broadcast to the public.

The Methods in Congress. Members of Congress in the United States cannot question the executive on the floor of the legislative chambers, but they do debate administrative action and vote critical resolutions that make specific recommendations. They go further at times and enact detailed laws directing the minutiae of administration. In recent years the congressional committees, particularly the Appropriations Committees, have developed a practice of attaching to their reports to Congress a variety of instructions and limitations, designed to control very closely the expenditure of some portions of the money appropriated.

INVESTIGATIONS AND PUBLICITY. Most important, Congress makes investigations into the conduct of the executive, generally through the Committees on Government Operations of the two chambers, but sometimes through a special committee set up to investigate some particular aspect of executive stewardship. These committees ask, and often but by no means always get, from the executive access to books, papers, and documents; but they cannot compel the President to surrender them. They frequently require government officials as well as private citizens to appear and testify before them. Newspapers customarily give almost hysterical publicity to these investigations, with the unfortunate result that they often become witch-hunts or sensational trials of particular individuals, rather than sober investigations into public administration.¹³ They are sporadic rather than continuous, and often they

¹³ Space does not permit an over-all discussion of congressional investigating committees and their practices. They have performed many useful tasks of unearthing facts and informing the public, but some of their methods have come under considerable fire. In 1957, the United States Supreme Court ruled, in a case involving the refusal of one Watkins to answer certain questions put to him by the House Committee on Un-American Affairs on the grounds of the freedoms guaranteed under the First Amendment, that there were limits to the authority of Congress to inquire. The Court held 6:1 that there is no general authority to expose the private affairs of individuals without justification; that Congress is not a law enforcement or trial agency; and that '*no inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of Congress.*' (*Watkins v. U.S.*, 354 U.S. 178. Italics supplied.) In subsequent decisions the Court retreated somewhat from this holding, but reiterated the need to pursue fair procedures (e.g. *Barenblatt v. U.S.*, 360 U.S. 109, 1959).

are not launched until after the horse has been stolen. Nevertheless, congressional investigations may well be educators of public opinion, and the executive has a well-founded fear of their probings, particularly those of the Senate. They are perhaps as effective as the separation of powers permits them to be. At any rate, they confirm the anticipation of the framers of the Constitution in that they fan the latent hostility between the legislature and the executive.

COMMITTEE OVERSIGHT. Under the Legislative Reorganization Act of 1946, the standing committees are authorized to maintain continuous oversight of administration in the field of public policy assigned to each committee. Thus the committees of the two chambers, which originally studied and reported a particular legislative proposal, are now charged with sustained scrutiny of administration of that legislation. With the aid of sizable, expert, and well-paid staffs, the committees can give closer and steadier attention to the conduct of administration, if they do not indeed try to exercise detailed supervision of it. This may make for closer contact between the legislative and executive, but not perhaps for more harmonious relationships.

The Methods in the French National Assembly. Under the Third and Fourth Republics, scrutiny of the French administration by the legislature was very exacting; it was achieved by three devices: the *commissions*, questioning of the ministers, and *interpellations*. But under the Fifth Republic, with Parliament wholly subordinated to the executive, these devices are no longer meaningful.

INTERPELLATIONS. The interpellation used to be the chief legislative threat to the life of a French Government, and it was keenly feared by all ministries. A formal demand upon the government for information, to which the minister concerned had to reply, it culminated in serious debate and a vote. If the vote was adverse, the government fell. The interpellation was as much feared as it was abused, a powerful legislative weapon, much used for heckling by the members of the Assembly. Today, however, with only a limited and difficult censure-procedure at its disposal—to be explained in detail in the next chapter—the National Assembly has been all but stripped of what was once its dread power—although it can still topple the Government, as it did, in what proved to be a Pyrrhic victory, in the case of the first Pompidou Government in 1962.

QUESTIONING. Legislative control over the administrative process used to be aided also by oral and written questioning of the ministers, although oral

questioning—in contrast to interpellation—was always of far less significance in France than the questioning of ministers in Britain. The number of written questions submitted to the ministers annually was about equal in France and Britain—roughly four thousand—but the average number of oral questions in a session of the Fourth Republic's National Assembly was only seventy, while that in the House of Commons averages thirteen thousand. In the Fifth Republic's National Assembly merely the weekly Friday 'question period' remains, when the deputies are free to request responses to certain specific questions and criticize aspects of Government policy in a brief debate.

COMMISSIONS. Probably the most effective immediate supervision over administration used to be imposed by the standing *commissions* and by the special *commissions* of inquiry which were appointed by the Assembly from time to time. They were forever digging into the details of administration. Here again, the French practice was closer to that of the United States than of Britain. The British, conceding the role almost entirely to the cabinet, do not use committees to control or supervise the administration. The French standing *commissions* constantly subjected ministers to questioning, investigations, and general harassment, in effect putting them into the prisoner's box along with the civil servants. Like congressional committees in the United States, they interfered actively in the administrative process, and so wielded a great deal of power that in Britain is primarily exercised by the cabinet. Yet once again, the de Gaulle Constitution, with its strong executive government, has severely reduced what was once a potent weapon of legislative oversight. Nonetheless, despite the already explained downgrading of the role of the *commissions*, which rendered them into six 'big little legislatures' rather than effective parliamentary bodies of executive control and supervision, they can still delay, question, and bargain with the ministers. In that sense only they continue to serve as a check upon administration.

WHAT IS WRONG WITH THE DEMOCRATIC LEGISLATURE

Excessive Burden. Present-day democratic legislatures are ridiculously overworked. Despite the increasing length of sessions, legislatures cannot give careful consideration to many of the laws they enact, and they can find only a limited time in each session to examine the vast administrative machine of the government. Moreover, they could not accomplish what they do if

they were not guided and controlled by a relatively small group of men, the leaders of the political parties. Important decisions have to be delegated to committees which are not really representative, and debate has to be curtailed. It is scarcely true nowadays, in more than a formal sense, that legislatures make the law.

Need for Expertise. Yet legislatures are vitally necessary as censures of parties and of administration. There is great need to improve the quality of their work. No doubt their procedure, which is still redolent of more leisurely bygone days, could, and must, be improved. But if the demands of the positive state are to continue to mount, it cannot be emphasized too strongly that the greatest need is to improve the legislators' knowledge of the complexities with which they are asked to deal. The average member does not stand very far above the general standard of the good citizen, often called the man in the street. This is the kind of watchdog of government that a democracy wants, not a walking encyclopedia so devoted to the accumulation of information that he loses the common touch. Unfortunately, it would require a superman without any other distractions to understand what is involved in the present-day range of legislation and administration. And if the legislature does not understand what the government is doing, constitutionalism can only have a precarious existence.

It is often complained that the quality of legislators has declined, that today none can compare with the gigantic figures of the statesmen of the past. Close observers who have tried to measure the stature of the legislators of earlier days are almost unanimous in denying the decline. If the quality of deliberation and legislative action has dropped, the clue is to be found, not in the quality of the legislators but in the extraordinary expectations of what it should be possible to accomplish by legislation. When the accomplishments fall short of the expectations, as they often do, the tendency is to blame the legislators. Rarely is sufficient allowance made for the inherent difficulty of what they are expected to do.

Negativism. Perhaps a far more serious charge is that today's legislatures have primarily become negative bodies. Where they are still able to do so effectively—like the Congress of the United States—they say 'no' not only with relish but with abandon. Rarely, or so the charge goes, does the legislature innovate; it confines itself to saying 'no' to the innovators—i.e. the executive. The oft-quoted characterization of the typical Congressman, in the Al Capp tradition, as 'a gross, groggy creature who woke from his nap only at the sound of the gavel and, after voting an invariable "Nay," imme-

diately went back to sleep,'¹⁴ is unfair because it paints with far too coarse and broad a brush—but it cannot be gainsaid that some of the attitudes of certain legislators would seem to give that impression, at least to the layman.

It is true, however, that the evidently ever-increasing congressional tendency of waiting for the initiative to come from the White House—and the appearance of helplessness until that initiative is forthcoming—represents a serious fact of legislative life today. Time was when Congress, now the sole remaining institution of potential legislative strength among those herein discussed, would advance and further a host of ideas on its own. Whether or not of its own doing, today it confines itself largely to vetoing, approving, adjusting, correcting, amending, and legitimating—which may, of course, merely reflect a dire necessity of government in a time and world of crisis that calls for strong executive leadership. It thus invites the stern evaluative conclusion of so astute an observer as the sometime President of the American Political Association, that:

Representative bodies, the institutional embodiment of democratic ideology, have by the compelling force of events lost both power and prestige. Their role in the initiation of public policy has been diminished by losses to pressure groups and administrative agencies; their authority to decide many issues has, of necessity, been delegated to the administrative services. They have been driven toward a role of futile and uninformed criticism, at its worst motivated either by partisan or picayune considerations.¹⁵ ✓

There are few signs, if any, that this analysis will stand in need of drastic revision in the foreseeable future.

THE LEGISLATURE UNDER THE DICTATORSHIPS

The executive always governs. The main functions of the legislature are to impose effective constitutional restraints on the executive and to make such laws as the elected representatives of the diverse interests in the electorate can agree to support by majority vote. In the dictatorships, where

¹⁴ See H. H. Wilson, *Congress: Corruption and Compromise* (New York: Rinehart & Co., 1951), p. 2.

¹⁵ V. O. Key, *Politics, Parties, and Pressure Groups*, 4th ed. (New York: Thomas Y. Crowell Co., 1958), p. 368. And one of their own members, Sen. Joseph S. Clark (D.-Pa.), termed them "the greatest menace of the successful operation of the democratic process." (*The New York Herald Tribune*, May 27, 1963.)

constitutional restraints on the executive are repudiated, and the executive makes by decree such laws as it likes, the legislature ceases to be overworked. The German *Reichstag* under Hitler enacted only seven laws in seven years. As we shall see presently, the supreme legislature in the U.S.S.R. meets infrequently. No attempt is made to have it perform the great functions the legislature performs in liberal democratic countries.

Insignificant. In fact, it ceases to be a significant organ of government. Elections to the legislature are carefully controlled by the dictator and his henchmen. In Germany under Hitler, and in the Soviet Union today, only one candidate stands for election for each seat in the legislature. The voters are not given alternative choices. Yet almost all voters go to the polls, and they vote almost unanimously for the 'official' candidate. In Italy, popular election in territorial constituencies was abolished by the Fascist regime in 1939. Thereafter, to the end of the Fascist regime, the legislature was made up of representatives of various occupational groups, as was explained in Chapter XI. However, the Fascist leaders always controlled the choice of representatives by these groups. Thus dictatorships ensure that the legislatures will ever be composed of those who will support the leaders. The legislatures cease to be genuinely and freely representative of the various interests, impulses, and aspirations in the community.

Something will be said presently about the functions of the legislature in the Soviet Union. It is sometimes asked why Mussolini and Hitler bothered to have legislatures at all, and the answer is that they were demagogues anxious to give a convincing demonstration of government by popular consent—a mere front. The carefully rigged elections were occasions for showing, both at home and abroad, how truly popular their regimes were. The legislature itself was one more stage from which these grand-opera dictators and their supporting casts could harangue the nation in interludes between the deafening applause of the members of the legislature. Fascist and Nazi legislatures had nothing in common with Congress and Parliament.

THE LEGISLATURE IN THE U.S.S.R.

The formal structure of the Soviet legislature, the *Supreme Soviet of the U.S.S.R.*, resembles that of the major democracies. The Supreme Soviet is elected by universal suffrage for a definite period of four years and consists of two equi-powerful chambers: one, the 784-member *Soviet* (or *Council*)

of the Union, represents the citizens on the basis of one deputy for 300,000 people; the other, the 645-member *Soviet (or Council) of the Nationalities*, represents the various union republics, autonomous republics, autonomous regions, and national areas, somewhat as the United States Senate represents the states of the Union. In theory, the Supreme Soviet can be dissolved by the *Presidium of the Supreme Soviet*—the standing committee of the legislature which is almost continuously in session—whenever an irreconcilable disagreement arises between the two branches, but this power of the Presidium has never been used.

According to the Constitution, the Supreme Soviet of the U.S.S.R. is the 'the highest organ of state power in the U.S.S.R.'¹⁶ It appoints the executive authority, the Council of Ministers, who are directly responsible to it. It elects the judges of the highest courts in the Soviet Union. The judges, once appointed, are not responsible to it. However, the Presidium of the Supreme Soviet has the theoretically extremely important power of *interpreting* the laws of the Soviet Union. In the Western world, both the interpreting and the applying of law are reserved to the judiciary. In the Soviet Union, the judiciary is restricted to the applying of the law. There is no such thing as judicial review of legislation and no observance of the separation of powers. Moreover, the Supreme Soviet can change the existing division of powers at any time because it can amend the Constitution by a two-thirds majority vote.¹⁷

A Rubber Stamp for Executive Decrees. The principal concern here, however, is to see how the Supreme Soviet carries out its function of legislation. It has been noted already that the legislatures in Britain, France, and the United States cannot give adequate time to the consideration of all the laws they enact. If the Supreme Soviet were actually to make all the laws needed in the Soviet Union, where the government directs and controls almost all aspects of life, it would have to be in continuous session day and night the year round. In fact, it usually meets only twice a year and the average length of its sessions is three to eight days, into which it crowds all the formalities observed by Western legislatures, including organization, committee work, the budget, and review of pending legislation!

It is therefore obvious that the Supreme Soviet is not a legislative body like Parliament or Congress, making adjustments between the diverse interests in the electorate through prolonged discussion, and fixing the terms

¹⁶ Constitution of the U.S.S.R., Art. 30.

¹⁷ See Chap. XV, *infra*, for a detailed discussion of the Soviet judiciary.

of the adjustments in new legislation. It is equally obvious that the Supreme Soviet does not hold the Council of Ministers to a strict accounting through careful criticism of administration. Despite its exalted position in the Constitution, it is merely a rubber stamp, giving formal assent to decisions and enactments of its Presidium, the Council of Ministers, and the Secretariat of the Communist party.

A MITIGATING FACTOR. It should not be assumed, however, that the Supreme Soviet has no significant function in the Soviet state. It is an essential part of a peculiar Soviet institution, usually referred to as '*democratic centralism*.' This often-used term is advanced as 'the guiding principle of the organizational structure of the Party,' and is outlined by *The Rules of the Communist Party of the U.S.S.R.* in a four-point definition, of which the key point is 'the absolutely binding character of the decisions of higher bodies upon lower bodies.'

The main reason for this institution is the belief that the Soviet Union should be administered by a highly centralized government—as is indeed inevitable when the government has to do the over-all economic planning for the nation—but that mass participation should also be elicited in the implementing of decisions. Striving for the appearance of public approval, the Soviet leaders have made numerous concerted efforts to induce a large number of citizens to take part, in one form or another, in discussions about state policy. The most effective method, for this purpose, has been the system of soviets, or councils, of which the Supreme Soviet is merely the highest expression, the summit of a pyramid of soviets.

The Structure of Democratic Centralism. At the base of this structure of councils are the village soviets—of which there are some seventy thousand—and the city soviets, which are usually elected on the basis of one deputy for one hundred inhabitants. Above these local councils are soviets covering a larger administrative area. Above these again are soviets for still larger regions and territories, then the soviets of the union republics, and finally at the top, the Supreme Soviet of the U.S.S.R. Millions of citizens take part in the work of these numerous soviets, work consisting not only of legislation but also, at the lower levels, of the supervision of the state administration. For example, the local soviets have certain limited powers of supervision over the operation of the state-owned factories situated in the local areas. It is almost as if city councils in the United States were given power to supervise some aspects of local post offices.

Each soviet has an executive committee which is responsible not only to

the soviet that elects it, but also to the executive committee of the soviet directly above it in the hierarchy. This means, for instance, that the executive committee of the highest soviet in each of the union republics, the Union Republic Council of Ministers, is not only responsible to its own constituting body, the Supreme Soviet of the Union Republic, but also to the executive committee of the Supreme Soviet of the U.S.S.R., which is the U.S.S.R. Council of Ministers. A similar arrangement in the United States would make the state legislatures responsible to the federal cabinet, or perhaps to a committee of Congress.

CRITICIZING METHODS. The hierarchical structure of the soviets, with authority extending downward from the top, as well as the tight party control over the executive committees of all soviets, enable the party leaders to permit mass participation in many of the functions of government without running the risk of seeing their policies defeated by the popularly elected soviets. All decisions of the Supreme Soviet of the U.S.S.R. are binding on the lower soviets, and the inferior councils do not discuss measures that have been decided by a superior soviet. Rather, they criticize the ways in which laws and decrees are carried out in the area over which they have jurisdiction, and they inform the superior soviet of the success with which government policy is carried out. The members of the soviets are particularly well suited to this, for they are all employed in some state enterprise or collective farm, and can consequently judge the effects of government policy from firsthand experience in the Soviet economy.

NO LEGISLATING. The function of the Supreme Soviet, therefore, cannot be compared with that of legislatures in liberal democratic states. It does not make the laws. This function is carried on by its Presidium, and by the executive, the Council of Ministers. It does not criticize and control the executive in any direct or effective fashion. The Supreme Soviet of the U.S.S.R. is important, not as a legislative body but as the summit of a system of soviets, and is designed to realize the ideal of 'democratic centralism.' The soviets, the highest as well as the lowest, are not legislative bodies in the Anglo-American and French sense, but barometers and thermometers enabling the leaders to read the political pressures and temperature of opinion in the Soviet Union. They enable the mass of Soviet citizens to feel that they have a hand in government and, within specific and rigid limits, to air some of their criticism of government action and officials. Whatever the theory behind this system and whatever the meaning given the word 'democratic' in the phrase 'democratic centralism,' the system of soviets in actual practice

provides 'an upward stream of political intelligence, suggestion and accounting from the lower organs and a downward stream of laws, decrees, and instructions from the apex, or central organs.'¹⁸

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¹⁸ Julian Towster, *Political Power in the U.S.S.R., 1917-1947* (New York: Oxford University Press, 1948), pp. 207.

XIV

The Relationship Between the Executive and the Legislature

The legislative and executive organs in the United States, Britain, and France have been described and their distinct functions have been outlined. Although the legislature has been weakened everywhere, it still makes the laws, levies taxation, appropriates public revenues for the executive to spend, and keeps some check on the activities of the executive. At least in theory, the executive cannot pursue any course of action affecting the rights of citizens except as authorized by, or inferred from, law. The legislature sets the tasks of the executive and is thus superior to it even where the rigid separation of powers makes them co-ordinate organs. The executive runs the household economy of the government, carries out the laws, and supplies the services authorized by legislation.

As we have already seen, however, this is a rank oversimplification. Many of the objects and purposes pursued by governments today are not accomplished merely by making laws. A law and an appropriation of public revenue to the purpose are essential, but the vigor of administration by the executive sets the measure of success. Much legislation in the positive state is to no purpose unless the legislature can transmit to the executive the impulse that put the law on the statute book. The executive, in turn, often finds the laws cannot be made to work with the best economy of effort, or at all, unless they are amended, and the executive must be able to transmit its experience in administration to the legislature. Indeed, the question whether a particular law is workable, or even desirable, may turn on the

data and experience accumulated by the executive in trying to enforce it.

As we shall see later, there is even ground for saying that the making of laws and the administration or enforcement of them are not two distinct processes. Most laws enacted nowadays are attempts to correct some social abuse or to ease the tension caused by some conflict of interests. The legislature never knows all the factors involved. It is clear that something should be done, but it is not clear what or how. Accordingly, it often legislates in vague general terms, instructing the executive to exercise a discretion and experiment with possible solutions. The executive makes detailed rules and regulations which are law tentatively, to be modified and recast in the light of the results. Wartime legislation affords the clearest example here. The laws for controlling prices in the United States were not made full-fledged at the time when the fixing of prices was first introduced. Something had to be done. It was not clear what should or could be done, and the general policy was launched with much fear and trembling. The law of price control was developed and refined in great detail in a continuous stream of rules, amendments, and interpretative orders, as experience suggested or compelled. As someone has put it concisely, the law was being made while it was being administered and enforced, and it was being administered while it was being made. The same is true of much of the legislation of the past sixty years.

Of course, it was never possible to separate completely the legislature and executive, and it was never attempted. Today, the scale and importance of governmental action make it imperative to have a very considerable degree of co-ordination between the two organs. It is not enough that they should check one another; everyone expects them to work together as a team to promote the good life. Therefore, the working relationships between them are an important subject of inquiry. The relationships in Britain, France, and the United States are in marked contrast. An examination of these contrasts should illuminate the much-debated question of merits and demerits of presidential and parliamentary systems of government, and give some insight into the workings of democratic government.

LEGISLATURE AND EXECUTIVE IN BRITAIN

Fusion. The British legislature and executive are not separate but are in fact almost entirely fused. The cabinet, as a committee of the legislature,

links the administration to the legislature. The impulses that move the legislature move the executive also, and the information and experience gained in administration are readily available to the legislature in its deliberations on policy. This fusion might not be particularly significant if it were not for the fact that both legislature and executive are in the grip of the same political party. Without party control, the executive committee of the House of Commons might be of one view while the majority of the members took another view; or more likely, there would be several factions differing in opinion with the cabinet and among themselves. In reality, *it is the party which links the executive and legislature*. The Prime Minister and his colleagues in the cabinet are the leaders of the majority party in the House of Commons. As we have seen, these leaders have already gained, through the party councils, party adherence to a platform that they themselves had a very large share in making. They come to the House of Commons with a program, a disciplined majority to support it, and a mandate from the electorate to use the majority to push the program.

Power of Dissolution. At bottom, however, parties in a democracy are unstable combinations and the concurrence of a majority with the cabinet would often be uncertain were it not for the power of dissolution. The Prime Minister has the right to ask the monarch for a dissolution of Parliament at any time and the latter—to all intents and purposes—has no choice but to comply. Members of Parliament naturally do not want to face the election that follows a dissolution, because it is expensive, makes heavy demands on energy, and is uncertain in result. The weapon of dissolution is rarely used because the mere fact of its existence generally holds the waverers in line. As long as the political situation gives one party a clear majority in the House of Commons, Parliament lives out the greater part of its allotted span of five years, and during that period the party program is steadily pushed forward under the leadership of the cabinet.

Cabinet Moulds Legislation. The cabinet monopolizes the drafting of legislation, bringing to the task of all the information, experience, and expertness of the civil service. Subject to minor qualifications, the cabinet gets what legislation it wants from Parliament and prevents the enactment of laws it does not want. Indeed, a private member is so limited in the bills he may introduce that the annual total of such measures is normally less than twenty—all of them more or less non-controversial. From 1939 to 1948 private member bills vanished altogether! Thus the cabinet is prepared to enforce vigorously all the laws enacted. The fact that a single body, the cabinet,

moulds the legislative program ensures at least a minimum of coherence and unity in that program, so that the administrators are not called on to enforce measures that are contradictory or inconsistent with each other. In so far as modern legislation and administration are inseparable, the British system of government is admirably adjusted to meet the situation.

Party Government versus Parliamentary Government. However, British government is no longer parliamentary government in the classic sense. A hundred years ago, the cabinet was continuously dependent on the will of the legislature, which might be asserted against it at any time. The power of the legislature to deny support to the cabinet, and the power of the cabinet to dissolve the legislature, maintained a balance in which direct responsibility of the executive to the legislature was assured, and frivolous obstruction and irresponsible self-assertion by the legislature were prevented. Both legislature and executive were compelled to estimate closely the temper of the electorate. If the executive found itself hampered by attitudes in the House of Commons that it thought would not get support from the electorate, it would demand a dissolution. If the executive took a line that the House thought the electorate would reject, it would challenge the executive. Government in close correspondence with electoral opinion was assured. Also, predominance in government went to the body best able to estimate electoral opinion. In the absence of strong central party organization to keep it informed, a dozen or so men in the cabinet could not hope to guess as accurately at electoral opinion as could the House of Commons. Government therefore was parliamentary government.

PARTY ASCENDANCY. With the extensions of the franchise, electoral opinion became harder to estimate and easier to mould. Thus central party organization was developed to mould and estimate opinion. With its emergence, leaders of the majority party, who either are in the cabinet or work closely with it, ceased to be inferior to the House of Commons in their guesses at public opinion. At the same time, the central party organizations reached out to influence the choice of candidates and the content of the party program, and to associate candidates and program with the party leadership, until elections came to be primarily contests between the party leaders. There is no great exaggeration in saying that today the Prime Minister is elected by the people and given a popular mandate to carry out the announced policy of the party. The cabinet now has direct relations with the electorate; it is not *merely* a committee of the House of Commons.

In these circumstances, the House of Commons inevitably lost its pre-

eminence and British government became party government. In this view of the matter, it has been suggested that the Parliament Act of 1911, which stripped the House of Lords of its powers, was not so much a victory of the House of Commons over the House of Lords as it was the final triumph of party government over parliamentary government.¹ The last obstacle to control of Parliament by the parties was removed. Since 1892 only two governments have fallen through a vote of lack of confidence, and neither of these had the support of a single party with an over-all majority in the House of Commons: the Salisbury Conservative Government in 1892 and the Baldwin Conservative Government in 1923. (The Rosebery Liberal Government, which fell in 1895, is not counted here, for its demise came on a routine motion and a snap division, and was really caused by internal dissension in the Liberal party rather than by the adverse vote in the House.)

Cabinet Dictatorship. Those who focus attention solely on events in the House of Commons see a disciplined party majority invariably supporting the proposals of the cabinet, and they conclude that Britain has been governed for half a century or more by series of approximately four-year cabinet dictatorships. The average member has lost his independence and his influence on legislation, and he is grimly compelled to vote the party line on most occasions. Some even argue that the House of Commons is fast becoming, as the monarch and the House of Lords have already become, a dignified rather than an efficient part of the British constitution.

If we keep in mind some salient points of the preceding chapters, we can make some estimate of this charge of cabinet dictatorship. The executive is the one indispensable element of any government. The more things a government is expected to do, the more important executive leadership becomes, and the widespread activities of present-day governments have everywhere aggrandized the executive. If a government is to be democratic, political parties must organize majorities and find the policies that majorities will support. The party with the majority must rule, and the legislature must register its decisions as long as it holds a majority. Any organization as large in number and as complex in function as a political party becomes a prey to oligarchical tendencies, and the leaders of the party are the active deciding elements in many issues. When the party wins power in an election, the

¹ See Don K. Price, 'The Parliamentary and Presidential Systems,' *Public Administration Review*, III (1943), 317-34. This article prompted a critical reply by Harold J. Laski in *Public Administration*, IV (1944), 347-59. See also Don K. Price, 'A Response to Mr. Laski,' *ibid.* 360-63. The interchange provides an illuminating discussion of the two systems.

party leadership makes or becomes the cabinet. *The executive is undoubtedly the mainspring of the British system of government.*

To estimate whether the cabinet exercises a dictatorship during its period of office, one must look beyond the House of Commons to see who rules the ruling party. The discussion in an earlier chapter indicates that this is not an easy question to answer. The central organization and the parliamentary leadership of the party have enormous leverage on the party. On many matters, they have their way either because the rank and file of the party supporters do not know what is involved, or because they cannot agree on instructions to the leadership. This is far from saying that the leaders can do what they like with impunity. There are always rival would-be leaders in the party who will swim into prominence and power on any strong current of opinion in the party, if the present leaders do not canalize that current by making accommodations for it. Even if they are adept at heading off revolts among the rival would-be party leaders, they always face the danger that disgruntled elements of their popular support, unable to get concessions to their point of view, will transfer their allegiance to the opposition, thus imperiling their party's chances in the next election.

PARTY LEADERS. That is to say, the power of the party leaders, although impressive at a given moment when the party line has been settled, and always effective against individual malcontents, is always contingent on their holding the leadership of the party and securing a majority for the party at the next election. They are therefore responsive to all pronounced trends of opinion in the party or in the electorate; they are anxious, indeed, to anticipate them. The ease or difficulty with which they hold majority support in the House of Commons is the measure of their success. The fact that the party majority always supports the cabinet may not mean much more than that the cabinet has correctly interpreted the will of the majority.

The necessity of running the gauntlet of debate and criticism in the House of Commons always disposes the cabinet to caution and moderation. Not infrequently, bills introduced by the cabinet are modified, or even withdrawn, because of criticism by the opposition and pressure from members of the majority party. Even during World War II, when Britain's desperately critical position might have been expected to bring full acquiescence in cabinet leadership, there were many instances of this kind. Moreover, it is not repeated trials of strength between the horse and the fence that keeps the horse in the pasture, but the fact that the fence is there and

the horse knows it. The opposition, as well as the party majority in the House, has an influence over the cabinet that cannot be measured by counting the number of collisions between the cabinet and the House. No simple cliché suffices to describe the relations between the cabinet and the House of Commons.

CO-ORDINATION. Party government in Britain has ensured the co-ordination of legislature and executive necessary to meet the demands of present-day governmental activities. It enables the legislature to enact, and the executive to administer effectively, complicated and far-reaching measures of social and economic adjustment. It is the only method thus far discovered for combining strong vigorous government with democratic control. Of course, it has inevitable costs, and these may become so high as to bankrupt democracy. The consistency and coherence of its public policy, for which the system is praised, involve uniformity of treatment that often cannot take sufficient account of special needs and special circumstances. For example, the British government did not respond effectively to the needs of the depressed industrial areas of the country in the 1920's. The individual members of Parliament for the depressed areas could not escape from the discipline imposed by their parties so as to combine in a bloc for the forcing of special concessions to their constituencies. It may be inevitable, but it is not an unmixed good to have the policy of the country framed in party councils rather than in Parliament. Among other disadvantages, to be considered later, it unfortunately reduces Parliament's prestige in the eyes of the country. Thus, in an issue devoted to 'the sadly diminishing role of Parliament,' the influential *Economist* observed: 'With the single exception of the overthrow of the Chamberlain Government in the supreme crisis of 1940, the great deterrent function that once made Parliament an occasional unmaker of ministries has diminished into a small deterrent function of regular Parliamentary fuss.'²

The most serious danger does not arise from the fusion of executive and legislature, but from the fact that it becomes increasingly difficult for the electorate, the rank and file of the party, and even for members of Parliament to understand what is involved in the policies that the party leadership works out in conjunction with the numerous experts in the civil service. This difficulty, however, arises out of the demands for extensive governmental action, rather than out of the form of political organization.

² Vol. cxxvi, no. 6104, August 20, 1960, p. 705.

LEGISLATURE AND EXECUTIVE IN THE UNITED STATES

Separation. In the United States, the executive and legislature are clearly separated. Neither the President nor any member of his cabinet can sit in the legislature. The legislature is cut off from any *direct* access to the information and experience that the executive accumulates, and the executive cannot participate *directly* in the framing and pushing of legislation. The terms of office of each are fixed by the Constitution, and the legislature therefore cannot bring the executive to terms by the threat of a vote of lack of confidence, as in Britain and—now to a much lesser degree—in France. It has to work *indirectly* through its control of appropriations and its ubiquitous committees of investigation, through senatorial refusal to confirm presidential appointments, through refusal to enact or emasculation of proposed legislation desired by the executive, or through enactment of laws in such detail that they confine the executive to exactly prescribed tasks. The executive cannot persuade the legislature to come round to its view, or halfway to that point, by threatening dissolution. It has, of course, a veto power to prevent any legislation that cannot summon a two-thirds majority in Congress, and hints dropped to congressional leaders that it might be used are sometimes effective. The President can always get some leverage on Congress by delaying patronage appointments. He can, as Franklin D. Roosevelt did successfully on occasion, appeal directly to the people over Congress's head.

The Oscillations of Leadership. The formal constitutional relationships work against, rather than for, the co-ordination that has been premised as necessary. The President, who gets some kind of an over-all view from the information flowing to his desk from the administration and from the country, cannot help trying to give a lead in legislation and, as usual, the efforts of one or a few to tell the many what to do cause almost continual tension between him and Congress. As a rule, it takes an emergency, such as war or depression, to secure for the executive the legislative leadership that the British cabinet normally enjoys. The presidential leadership exercised by Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, and Franklin Roosevelt is explained, in large measure, by certain critical conditions in the period of their rule. There are other instances of less dramatic interest.

CYCLES? In fact, the federal government has oscillated between presidential

leadership and congressional leadership with such regularity as to prompt the suggestion that this oscillation, rather than rule by alternating political parties, is the striking feature of American politics. A case can be made for the existence of historical 'cycles' or 'eras' of such oscillation. When Congress leads, it does not lead vigorously in any particular direction, but gives itself over to the play of sectional, local, and group interests. The country periodically tires of the bickering and of the combinations of selfish interest that get their way in Congress. Thus, when a crisis looms, attributable sometimes in part to the lack of political leadership, a President comes to power with a popular mandate for action. With this popular support, an astute President can for a time master the diverse forces in Congress and push a legislative program like the New Deal, unified in purpose if not in all its concrete detail, as F.D.R. did so successfully between 1933 and 1938.

But in the past, at any rate, these periods of effective legislative-executive co-ordination have been short. Many sectional and group interests are inevitably alienated or disappointed, the mood for united action and concentrated leadership passes, and the President's pre-eminence vanishes. At the next election, the country chooses, almost deliberately it would appear, a chief executive who is unfitted by ability and temperament for vigorous leadership, e.g. the choices of Harding and Coolidge after Wilson. One trend, however, is generally discernible in these oscillations. The executive, with the rare exception of a Harding, grows steadily in functions and importance. The authority of the President, when it declines, scarcely, if ever, falls back to the previous low point.

CONGRESSIONAL DEVICES. Much of the time, Congress tries to lead, or leads negatively by obstructionism, and its leadership is divided among its committees. Their chairmanships, or 'fiefs,' as we have noted in the preceding chapter, go by seniority to those of the majority party with the longest continuous service on the respective committees. This puts a premium on *safe* constituencies where opinion changes slowly, and where common sectional or local interests return the same champion to Congress again and again. Thus the most powerful men in Congress are often capricious, aged and stubborn, virtually autonomous, representative of 'back-water' areas of the community, little stirred by changing currents of opinion in the nation as a whole. In these circumstances, there is no unified national leadership, and while a modicum of party discipline, such as it is, generally keeps business moving through Congress, it has comparatively little effect on the content of that business.

Lobbies and sectional interests launch bills in committees and often work up combinations, which generally do not follow party lines, to support them. In the securing of appropriations to be spent for local amenities in the constituencies, members of Congress co-operate in supporting each other just as the pioneer settlers assisted one another in rolling up logs for buildings, or to be burned. This 'logrolling' and its associated device, the 'pork-barrel'—legislation designed to favor the congressman's home district—are always prominent features of congressional leadership in financial and other legislation.

The President, elected by the country as a whole and representing the nation, tries to rally his party in Congress against this kind of legislation and may check the more cynical bargains by his veto. He cannot always prevent the enactment of legislation he dislikes and often cannot get support for legislation he thinks desirable. He may even be required to administer legislation that cannot be made effective, because administrative experience and data were ignored in the framing of it, or because adequate funds were not appropriated for its administration. Congress at times acts irresponsibly, yielding to pressures and enacting legislation it does not genuinely believe in, and counting on the President to take the odium of vetoing it. The worst situations, of course, develop when the President is of one party and the majority in Congress of another, which has been the case during almost one-fifth of the history of the American presidency. But even when the President's party is in a majority, it often turns out either that the leaders of that majority in Congress are not in sympathy with him or that they cannot control their followers. Both of these factors were present during much of President Truman's regime, for example.

Significance of Weak Party Discipline. This suggests that it is not so much the formal constitutional relationship of the legislature and the executive as the character of the party system that determines the real relationship. As already explained elsewhere, the national political parties in the United States are not disciplined parties with a centralized leadership, as are those in Britain. The party platform is a collection of vague resolutions which does not lay down a clear-cut party policy. The national central party organization is a temporary committee for fighting elections every four years, and not for maintaining disciplined party support of a program between elections. Unlike the British central party organizations, it cannot veto the nomination of particular persons as party candidates in the constituencies. Attempts by the President, as the leader of his national party,

to influence nominations have generally failed. Thus the choice of candidates is dictated by local and sectional considerations, which ensure that those elected to Congress will reflect local and sectional interests and will be dependent on these interests for re-election. Woodrow Wilson lamented that as a rule the President is not dealing with 'Congress' at all, but with 'the elders of the assembly . . . the dissociated heads of little legislatures.'

SECTIONAL DIVERSITIES. To put it concisely, the national parties are loose federations of state parties which lack unity of purpose. They never have clear-cut programs and, without such a program and a mandate from the electorate to enforce it, there is no strong urge for rigid party discipline. In times of crisis, a President may come to office, as Franklin Roosevelt did more than once, with a mandate from the nation. His ability to execute it comes more from his appeal to the nation over Congress's head than from the disciplined support of his party in Congress. The 'two separate and equal' branches are not acting as partners but as competitors. Even if the executive were fused with, and given power to dissolve, the legislature—as in Britain—executive dominance of the legislature would not necessarily result. This result could be obtained only if the sectional diversities of the United States were overcome by means of unified and disciplined national parties.

LEGISLATURE AND EXECUTIVE IN FRANCE

The Past: Legislative Supremacy. From what has been said in preceding chapters regarding the far-reaching changes evoked by the de Gaulle Constitution and the resultant government reorganization, it will not be a surprise to find a totally altered relationship between executive and legislature in the Fifth Republic when compared with its predecessors. In brief, in the Third and Fourth Republics the legislature was omnipotent and the executive weak, ineffectual, and unstable. Cabinets were little more than a tool of government at the mercy of the legislature. In the Fourth Republic, for one, although the cabinet was responsible only to the National Assembly (it had been responsible to both houses of Parliament in the Third), fully twenty-five cabinets came and went during the brief dozen years of that ill-fated Republic's existence, averaging less than six months in office! The two major reasons for this instability, already alluded to in earlier discussions, were first and foremost, the undisciplined multi-party system—no

party ever gaining a majority of the popular vote or seats in Parliament in the history of the pre-Fifth Republics: second, the severe, if not crippling, limitations on the cabinet's power of dissolution. As a result, the fact that the French, like the British, had a government of fusion of powers, with the ministry or cabinet in a sense a committee of Parliament, was all but meaningless in the face of the utter inability of the executive branch to assert itself against the legislature.

LIMITED DISSOLUTION. In the Third Republic, the President had power to dissolve the Chamber of Deputies, provided the Senate concurred. Only one such dissolution took place, however—and it was that of the famous *le seize Mai*, 1877, when Marshal Macmahon, the pro-royalist, authoritarian President, dissolved the strongly republican, progressive Chamber with the consent of a monarchist, conservative Senate. Not only did Macmahon's action backfire and result in his resignation one year later, but, as a direct consequence of his strong-arm technique, no cabinet or President ever again attempted to dissolve the Chamber during the remaining sixty-three years of life of the Third Republic. Moreover—until 1959—the presidency was never again entrusted to a 'strong man.'

Recognizing the ineffectiveness of the provisions for dissolution of the legislature in the Third Republic, the framers of the Fourth Republic attempted unsuccessfully to provide for a stronger method of dissolution without, however, creating a strong executive. The Constitution of 1946 provided for the dissolution of the Assembly by the President of the Republic, but only upon request of the Council of Ministers and the advice of the Assembly's President. Moreover, no dissolution could take place during the *first* eighteen months of the five-year term of the Assembly, and during the remaining forty-two months it could be accomplished only if within a space of any eighteen months during that period *two* cabinets had been toppled from power as a result of either a specific motion of censure or a specific vote of 'no confidence' by an absolute majority vote of the Assembly.

IN PRACTICE. Yet of the first twenty-four ministries that collapsed after the beginning of the Fourth Republic, only two combined to bring about the National Assembly's dissolution. The other twenty-two toppled as a result of internal dissension among the multi-party membership, fell during the first eighteen months, simply resigned, failed to be followed by a legislative vote of censure or 'no confidence' in the cabinet within the necessary span of time, or were forced out of office by less than an *absolute* majority vote. The one historic instance of dissolution took place on December 1,

LIFE SPAN OF PREMIERSHIPS IN THE FOURTH FRENCH REPUBLIC *

<i>Chronological Order</i>	<i>Premier</i>	<i>Number of Months in Office</i>
1	de Gaulle (1946)	2
2	Gouin	4½
3	Bidault	6
4	Blum	1
5	Ramadier	10
6	Schuman	7¾
7	Marie	1
8	Schuman	5 days
9	Queuille	12¾
10	Bidault	8
11	Queuille	2 days
12	Pleven	7½
13	Queuille	4
14	Pleven	4¾
15	Faure	1¼
16	Pinay	9½
17	Mayer	4½
18	Laniel	11½
19	Mendès-France	7½
20	Faure	10¾
21	Mollet	16
22	Bourgès-Maunoury	3½
23	Gaillard	5
24	Pflimlin	19 days
25	de Gaulle † (1958)	7½

* Chart begins after de Gaulle's provisional government and does not include either of the first two provisional regimes.

† Inaugurated as President of the Fifth Republic, Jan. 8, 1959.

1955, in the last six months of life of that Assembly. It occurred as a result of the overthrow of the ministries of Premier Mendès-France on February 5, 1955, followed by that of M. Faure on December 1, 1955—both on absolute majority votes of no confidence that forced the two cabinets out of office. Had either one simply 'resigned,' the provision could not have been invoked. But in the face of strong opposition even among members of his own party, including M. Mendès-France, Prime Minister Faure, with the aid of President Coty, was determined to teach the Assembly a lesson. Hence, for the first time in seventy-eight years—and for the last time until de Gaulle's dissolution of the National Assembly of the Fifth Republic late in 1962—a

French Assembly was sent home by the executive power prior to the completion of its full term of office. Yet the newly elected Assembly predictably reflected precisely the same political division as the dissolved one.

Götterdämmerung. But the time-honored French doctrine of *se débarrasser* (getting rid) of a ministry, at the whim and will of the sovereign legislature, with the tacit approval of the electorate and its representatives under the multi-party system, was doomed. The doctrine that had produced 133 changes in the French executive from 1871 to 1958, in the face of the electorate's practice of returning roughly the same proportion of multi-party legislators to the Assembly election after election—the very same period during which Britain had only twenty-seven executives and the United States seventeen—ended with the dawn of the de Gaulle Republic.

A NEW TUNE

Bearing the stamp of Charles de Gaulle's utter, openly acknowledged, and avowed contempt for parliamentary institutions and the despised regime *des partis politiques*, the Constitution of 1958 provided for a totally revamped relationship between legislature and executive. The foregoing separate chapters on these two branches have already demonstrated the extreme downgrading of the former and the far-reaching enhancement of the power of the latter. The innovations and surgery brought about and performed as a result of the new basic document and the new climate of executive supremacy are additional proof, if such were needed, of the New Era.

Separation of Power. Where once there was fusion of the powers of the executive and the legislative branches, the new order calls for strict *separation*. Without necessarily going so far in all of its aspects as the separation provided by the Constitution of the United States, that of the Fifth Republic makes clear in its Article 23 that the

office of member of the Government shall be incompatible with the exercise of any Parliamentary mandate, with the holding of any office at the national level in business, professional or labor organizations, and with any public employment or professional activity.

The organic law that was passed to implement the above provision does permit an 'on leave' status for civil servants who may have been asked to join the cabinet or who may have been elected to Parliament, and it permits simultaneous holding of municipal office. But election to Parliament now

definitely *precludes* concurrent membership in the cabinet. Consequently, when ten members of the National Assembly were asked to join the first cabinet of Prime Minister Debré early in 1959, they were compelled to turn over their Assembly seats within a month to ten 'alternate' candidates who had run with them in the 1958 parliamentary elections—a Gaullist innovation consistent with his philosophy of stability and continuity.

Power of Dissolution. Although its application, particularly the frequency thereof, is at best uncertain, it is now readily possible for the President of the Republic to dissolve the National Assembly. Article 12 of the Constitution provides that he may do so after consultation with the Premier and the heads of the two houses of Parliament—although apparently he will not necessarily have to consult the former. New general parliamentary elections must then take place within twenty to forty days, and no further dissolution may be effected for the period of one year. Moreover, the Assembly may not be dissolved while the emergency provisions of Article 16, described in Chapter XII, are in force. Other than these two limitations, however, no barriers are placed into the path of dissolution.

No barriers, however, other than political considerations—which have caused President de Gaulle, for one, to tread very gingerly in this area. For he quite correctly assumed that repeated dissolution might well defeat his basic purposes and both make a martyr out of Parliament and call too much attention to it in the eyes of a nation still somewhat uncomfortable in the knowledge of a President with greater power than anyone since Napoleon III. Thus de Gaulle refused to follow Premier Debré's advice to dissolve the National Assembly after the signing of the Algerian cease-fire agreement and the subsequent referendum that ratified it. Indeed, he refused to dissolve it at all until, with still one year of its five-year term at stake, his hand was forced when on October 5, 1962, an enraged National Assembly defeated the first Pompidou Government on a vote of censure over the presidential referendum issue. But the new elections, following closely upon the heels of de Gaulle's triumph—though one somewhat less than overwhelming—on the referendum question, brought a resounding victory to the Gaullist forces who obtained sufficient seats to form the first majoritarian government in the history of Republican France.

Legislative Weapons. Although they may well prove to be of questionable ultimate potency, the Constitution of 1958 does provide for three methods whereby Parliament may endeavor to enforce Governmental responsibility. In the first place, and most ambiguous of the three, the Premier seems to be

constitutionally obliged to submit his program to the National Assembly 'after deliberation by the Council of Ministers.' However, while he has done so in each instance to date, and although considerable discussion, even some walkouts by legislators have ensued on occasion, it is doubtful how much the provision really means short of a formal motion of censure or confidence.

CENSURE AND CONFIDENCE. Although a far cry from the powerful weapons of earlier legislatures, the legislature of the Fifth Republic possesses certain means of enforcing Governmental responsibility in the two additional methods of passing a vote of censure—as the National Assembly did in the instance mentioned above—or by defeating it on a no-confidence vote.

After discussing it with his Council of Ministers, the Premier may thus designate a policy issue 'a matter of *confidence*.' In the absence of the introduction of a motion of censure by the deputies within twenty-four hours, the issue is presumed to have been approved by them, *with or without a vote*. But it is possible, of course, to present such a motion of censure in accordance with the rules of procedure and the provisions of the Constitution (see below), and this does afford the Assembly an opportunity to hold the Government responsible. Thus, when in 1959 Premier Michel Debré—presumably on orders of President de Gaulle—made a matter of confidence the plan, so dear to the heart of his Government, to establish an independent nuclear striking force for France, a motion of censure was promptly introduced, quickly signed by the requisite minimum of one-tenth of the deputies. On the actual vote, however, the Opposition was able to muster but 203 out of 552 votes—a respectable total, but still short of victory by 74 votes. It represented the third censure test on a matter of confidence faced—and won—by Premier Debré within one calendar year, and it proved to be the most dangerous by far. On the two previous occasions the Opposition had been able to muster but 109 and 122 votes, respectively, against him.

The Constitution of 1958 is quite specific regarding *censure* motions. Article 49 spells out in considerable detail the procedure to be employed by the National Assembly. Its chief features are: first, a motion of censure must be signed by at least 10 per cent of the constitutional membership of that legislative body; second, the vote on the motion must be taken no sooner than forty-eight hours after its introduction; third, only those votes in its *favor* are counted; fourth, it is considered passed only if an absolute majority votes affirmatively in its favor; and fifth, if it is defeated, its signatories may not introduce another motion during the balance of the legislative

session. (But this latter restriction does not, of course, apply to situations in which the Government has made an issue a matter of confidence, as explained above.)

The first formal censure motion against the Government of the Fifth Republic was filed by the National Assembly late in November 1959 in connection with the 1960 budget. Angry and frustrated, irked by their minor role—made doubly real in the face of restrictions upon the traditional legislative power of the purse—the deputies introduced a censure motion, sponsored by Socialists and radical Socialists. Yet although a clear majority of the Assembly vocally *condemned* the Debré budget—which, among other things, had mandated cuts in war veterans' pensions—only 109 deputies actually voted 'aye' when the question of censure was put to a vote. Since only 'aye' votes count, the fact that far more than a majority abstained was but hollow comfort for the embittered legislators, and Debré had weathered a dangerous storm. The Senate then unanimously (247:0) rejected the budget—but it was a futile act of defiance, since the upper house lacks the power to overthrow the cabinet. All it meant, in effect, was that Premier Debré was compelled to force it through the Assembly once more, which he did after agreeing to some amendments, thus enacting it into law.

However, as already mentioned in passing, the National Assembly did bring down a Government, that of Georges Pompidou, on the presidential referendum issue on October 5, 1962. Charging the President and his regime with a breach of the spirit and letter of his own Constitution, the six-count, severely worded motion of censure carried easily, with 280 members of the now 480-member house voting in its favor—39 more than needed. Highlighting the acrimonious debate was the opening statement by the eighty-four-year-old World War II Premier, Paul Reynaud, initially an ardent de Gaulle supporter, who explained with much emotion why so many of his colleagues were now constrained to turn their backs on the President:

He has wanted to be George VI and Churchill. He has not accepted the republican concept according to which France exists in its Parliament. He has slid toward personal power . . . The constitution has been violated, Parliament has been despoiled.³

Utterly unimpressed with this argument, President de Gaulle—on the following morning—announced his decision to dissolve the National Assembly, and reappoint his defeated Premier who was constitutionally com-

³ *The New York Times*, October 6, 1962.

pelled to resign after the adverse vote, until a newly elected chamber would assemble. When the results of these elections brought de Gaulle the resounding, aforementioned victory, he redesignated Georges Pompidou his Premier of the third cabinet of the Fifth Republic.

Executive Supremacy. When the third edition of this text went to press in 1957, the weakness of the French executive in relation to the legislature was painfully evident, and had been very well stated in 1954 by Pierre Mendès-France, who at that time was an active member of the Assembly, a cabinet minister, and soon to be Prime Minister. Addressing an Assembly that had forced two cabinets out of office within one month, he commented:

The Assembly is the judge without appeal of the action of the government. But a government cannot fulfill its mission if it is assailed every day in this body, if its members and its chief are obliged to consecrate their efforts and their time to innumerable discussions so often sterile.

Parliament legislates, it controls the executive. But the executive ought to be in a position to govern and to administer to meet its responsibilities without any other preoccupation than to realize the program fixed in clear agreement with the National Assembly. It ought not to be arrested in its work by the constant fear of being overthrown. Parliament has the right to withdraw its confidence from the government at any instant; the government ought to be able, at every instant, to act as though it were assured of existing for 20 years.⁴

Three years after Mendès-France had been driven from office, de Gaulle came to power—bringing with him the very embodiment *plus* of the kind of executive power alluded to by the former's words. Yet today one of the President's most eloquent critics—although he had now even lost his seat in Parliament—is Mendès-France! He is not alone. Yet there can be no gain-saying that de Gaulle and his Constitution have brought the kind of stability to France that seemed as impossible of achievement as it was widely deemed desirable. The haunting question whether it has been purchased at too great a price—a prostrate legislature, an all-powerful President—is in the lap of the uncertain future. As these lines are written (Autumn 1963) France and its new Constitution thrive under the stern, dedicated, highly personal direction of the man whom Franklin Roosevelt used to refer to as 'Joan of Arc' and whose proved devotion to *la patrie* is such that he views himself as indistinguishable from it.

⁴ Pierre Mendès-France, as quoted by Herman Finer in *Governments of Greater European Powers* (New York: Holt, 1956), p. 441.

FINANCIAL LEGISLATION

In concrete terms, the relationship of the executive and the legislature is best illustrated by the case of financial legislation. He who controls the purse occupies a key position in government, as in other activities. The control of taxation and public expenditure is of high importance for constitutional government, and on this ground, too, financial legislation deserves separate examination. A government required to act in accordance with law, must secure specific laws to justify its imposition of taxes and its expenditure of public revenues.

FINANCIAL LEGISLATION IN BRITAIN

Role of the Treasury. A standing order of the British House of Commons provides that all estimates, i.e. proposals for expenditure of public money, must come from the executive and from it alone. The budget is thus necessarily prepared by the cabinet. In practice, it is prepared by the Treasury, as the department of finance is called (which supervises all the functions normally assumed in the United States by the Treasury Department, the Bureau of the Budget and the Civil Service Commission). By a process of close co-ordination between officials of the Treasury and of other departments, a draft of the annual estimates is worked out and submitted to the Treasury several months in advance of the beginning of the next fiscal year.

The Treasury requires that every increase in a department's estimate be supported by detailed explanation. Since the Chancellor of the Exchequer, the member of the cabinet responsible for finance, must bear the odium of proposing additional taxation, the Treasury is the one department of government unflaggingly devoted to economy. Its attitude toward the estimates submitted by the other departments depends on its forecast of next year's revenues, and on the general policy of the government toward increase or decrease of taxation. In any event, the other departments of the government must justify their estimates to a vigilant Treasury, which may veto any item or insist on a general reduction. A department that thinks it has a grievance may first appeal to the Chancellor of the Exchequer and then to the Prime Minister, or to the cabinet as a whole. Generally speaking, however, the *Treasury has the last word* on the content of the estimates submitted to Parliament.

Role of the House of Commons. Meanwhile, the revenue proposals that are justified or dictated by the estimates are worked out by the Treasury, and after the cabinet has approved them, the Chancellor of the Exchequer presents his budget containing both estimates and revenue proposals to the House on 'Budget Day.' The Chancellor's speech, always eagerly awaited, is inevitably long and detailed—*strict secrecy* having been preserved until his appearance before the House. (An inadvertent advance 'leak' to the press by the then Chancellor of the Exchequer, Hugh Dalton, led to his resignation in 1947.)

The House then resolves itself into the Committees of the Whole House on Supply and on Ways and Means, and considers the financial proposals in terms of departmental policy, since the allotment of a mere twenty-six days for such discussion prohibit detailed analysis of the budget. The thirty-six-member Estimates Committee examines 'such estimates as may seem fit to the committee,' taking different executive departments in turn, so that all of the various estimates get a more thorough screening than the Committee of Supply can accomplish in the time allowed. In practice, the latter's time is taken up in discussing a few groups of expenditures or 'votes,' and the others are rushed through with little or no consideration. Millions upon millions of pounds are always voted in haste at the very end.

A private member *may not move an increase or a shift* in the destination of an item in the estimates, because that would violate the standing order referred to. He may move that particular items be decreased or entirely disallowed. However, except in very trivial matters, the cabinet regards such a motion as one of want of confidence in the government, and party discipline ensures its defeat. Pressure may persuade the government to modify its financial proposals, but it is now unknown for the House openly to force a revision.

The House of Commons accepts these proposals as reported to it and approved by the Committee of the Whole. Since the House of Lords has no power in money matters, other than to delay them for thirty days, the estimates almost invariably emerge from Parliament in an Appropriation Act and the revenue proposals in a Finance Act as true copies of the original proposals of the Chancellor of the Exchequer. The most striking indication of the general expectation that the cabinet will carry its financial proposals unchanged is the law, enacted in 1913, providing that changes in taxation proposed in the Chancellor's budget speech shall come into effect on the day following 'Budget Day.'

EXECUTIVE CONTROL. The system enables the executive, who alone knows in full detail the activities and needs of the various departments of government and the probable yield of the sources of revenue, to draft the financial legislation. It ensures unified responsibility for public expenditure. The appropriations are not arrived at by polling the diverse and unrelated preferences of individual members of Parliament. The executive does not have to countenance raids on the Treasury by blocs of members in order to get support for its main proposals. It surveys the entire field of proposed expenditures and enforces a coherent program. It is unlikely, as has occurred in America, for example, to appropriate funds for the draining of swamps in aid of agriculture and, at the same time, to authorize expenditures on restoration of swamps for the protection of wildlife. The expeditious enactment of financial legislation is also assured.

It is often said that the Chancellor of the Exchequer is the financial boss in Britain. There is much exaggeration in this view. Despite his strong bias for economy, public expenditures have risen sharply and steadily for the past seventy years. The reasons for this are clear and they operate in the United States and France as well. The permanent officials in other departments always see reasons for expanding their activities and extending their establishment. The balance of electoral demand comes down on the side of more government services. The members of Parliament would like to make the best of both worlds, and cut taxes while raising expenditures. Since they cannot, they generally acquiesce in or plump for the latter. From their point of view, the serious thing about cabinet control of finance is not their inability to reduce estimates, but their inability to *raise* them. The cabinet as a whole responds to these inclinations and the Chancellor of the Exchequer is always fighting a rear-guard action on expenditures.

It is, however, a resolute rear-guard action. Incautious department heads, who advance inadequately supported or extravagant proposals, get badly mauled. In another figure sometimes used to depict the situation, the Treasury is the watchdog of the public purse. Within the lines of policy laid down by Parliament, it enforces strict economy, and supervises the household operations of the various departments in aid of efficiency. In this limited sphere, the Chancellor of the Exchequer may be said to be a financial boss. As Parliament does not examine the estimates in full detail, it is necessarily done by an executive agency.

Control of Expenditures. When it comes to the expenditure of the money voted by Parliament, the Treasury, through an accounting officer in each

department, sees to it that the money is spent on the purposes for which it was voted. However, Treasury control is not regarded as a sufficient guarantee of probity in such matters. The Comptroller and Auditor General, appointed by the executive for life tenure, but in effect an officer of Parliament, and enjoying the same independence and tenure of office as a judge, audits all the government accounts and reports irregularities to the Treasury. The most important of his duties is to make an annual report to Parliament. This report is a guide to an active select committee of the House of Commons, the Committee of Public Accounts, which examines the use of departmental funds to ascertain that money is spent as the House has directed, and reports to the House on financial irregularities. It is a small committee of fifteen members, with a chairman and a majority of its members *drawn from the opposition*. It probes vigorously in the public accounts, and the government departments take great pains not to incur its censure. It is a very effective instrument of legislative surveillance over the executive.

✓ FINANCIAL LEGISLATION IN THE UNITED STATES

The worst indictment of the separation of powers in the United States is based on the method of enacting financial legislation. Even those who generally approve the separation of powers are unhappy about its consequences in finance. Revenue bills must originate in the House of Representatives, but aside from this unimportant, although emotion-charged, provision—the Senate may, and often does, amend these House-initiated measures at will—each house of Congress has a wide initiative in finance. The President makes a budget and proposes it to Congress, *but Congress does what it likes with his proposals, and when it chooses*.

Before 1921 there was not even the semblance of a unified budget. The government departments worked out their own estimates, and the Secretary of the Treasury submitted them to the House of Representatives along with an estimate of tax revenues for the coming year. The House at once distributed the estimates to its various committees. In these committees, officials of the departments of government, interest groups, and the different sections and localities of the country all clamored for appropriations. Each committee responded to these pressures, and produced a set of appropriations for the sector of government activity with which it was concerned. The budget, as reported to the House by several committees, consisted of several unrelated proposals tied together in a bundle. A similar

process went on in the committees of the Senate after the estimates were passed by the House. No single government department or legislative committee ever looked at the budget as a unified whole. Every department and every committee put in its separate demands without too much concern as to what the total was. Thus the President utterly lacked the authority financially to control the executive branch for whose actions and policies he was responsible under the Constitution!

Bureau of the Budget. In 1921, an advance toward British budgetary practice was made. The Budget and Accounting Act passed in that year provided for the establishment of an executive agency, the Bureau of the Budget, headed by a Director appointed by the President without Senate confirmation, and placed under the Treasury Department. The Bureau became responsible to him directly and alone when President Roosevelt, by an executive order in 1939, transferred it into the Executive Office of the President. The Bureau thus came to represent the central controlling authority needed by the President to manage the financial policies of the entire executive branch.

FUNCTIONS. The Director of the Budget's functions resemble those of the Chancellor of the Exchequer, his bias being toward efficiency and economy in the public services. Working with departmental and agency officials, the Bureau of the Budget, which is now located in the Executive Office of the President, goes carefully into the demands of the departments. These must be submitted by October 1 for the fiscal year commencing on the following July 1. The Director cuts and trims what he thinks fitting and, subject to an appeal by the department to the President, he has the last word. The estimates are the amounts that the President and his advisers, on careful consideration, think necessary for the work of the executive. While the estimates are being prepared, the Bureau makes a forecast of the probable receipts from taxation and decides what modification of the taxation system, if any, should be recommended to Congress. When these estimates and calculations have been completed and drawn together in a budget, the President submits it to both houses of Congress. The necessity, under present conditions, of executive drafting of financial legislation has been recognized.

It should also be pointed out that in addition to its budgeting tasks, the Bureau is charged with being a clearing house for legislation; the writing of veto messages; and the general improvement of the organization and management of the executive branch. Its stature has increased constantly.

Appropriations Committees. Under the law of 1921, each house has to

set up a Committee on Appropriations to which all estimates must go. The estimates for expenditure go first to the Committee on Appropriations of the House of Representatives. They are considered, often in great detail, by the twenty-one sub-committees of the fifty-member Appropriations Committee—the largest standing committee in Congress—which call officials to explain and justify particular proposals for spending, and hear others who wish to support or oppose particular appropriations. The powerful sub-committees—whose chairmen are frequently as arbitrary and vindictive as they are conscientious and able—often force commitments from officials as to how the administrative work, to be supported by particular appropriations, shall be carried on. In this way, substantial continuous legislative control over administration is secured.

A similar procedure is later followed in the Senate Committee on Appropriations when the appropriations, as passed by the House, are reported to the Senate. Thus all estimates for expenditures must pass through, and be approved by, a single committee of each house of Congress. This, however, is as far as the copying of the British practice of unified responsibility for appropriations goes.

The Appropriations Committee of the House of Representatives reduces some items in the executive proposals and increases others. It may hamstring a particular branch of the administration by cutting its estimates sharply. Through other committees of the House, other legislation, inspired by congressional blocs and not by the President, requiring an appropriation of public money for its execution, will emerge. In this way, large sums may be added by the Appropriations Committee to the proposals of the executive. 'Pork' is still distributed from the pork-barrel!

PIECEMEAL APPROPRIATIONS. Furthermore, the Appropriations Committee of the House of Representatives does not draw all the appropriations it recommends into a single appropriation bill. Rather, it sends forward to the House, one after the other, about a dozen bills endorsing appropriations for the various departments and agencies. The House makes minor, but rarely substantial, changes in these bills without ever considering the appropriations as a whole at a given time.

After appropriation bills pass the House, they are sent to the Senate where further modifications and additions are frequently made by the Senate Committee on Appropriations. Government departments and private interests that were disappointed by the action of the House committees often try their luck again before the Senate committee, ordinarily with considerable

success. Again, when the appropriation bills are reported to the Senate for action, members of the Senate may force significant amendments, usually additions.

COMPROMISES. After the Senate has added its thoughts to the estimates, the bills go back to the House for its assent to the changes made by the Senate. If, as often happens, the House refuses to accept these as they stand, a conference committee of the two houses is appointed to find a compromise on which both can agree.⁵ When it is found, the bills get their final readings in both houses and are sent to the President to be signed. Two important facts should be noted here in connection with appropriation bills: one, that no appropriation may be made that has not been authorized by previous legislation; and two, that no *authorization* measure can *appropriate* funds itself.

Even in the periods of strong presidential leadership, the action of the legislature may seriously distort the budget as proposed by the President, both by reductions and additions. The appropriations for one of his cherished projects may be cut and his pledges of economy thwarted. Thus Congress *reduced* President Eisenhower's foreign aid request for fiscal 1958 by \$900,000,000 but *added* a river and harbor projects bill, a favorite 'pork-barrel.' The President has the power of veto, of course, but Congress rarely gives him a chance to use it. Appropriations known to be obnoxious to him are frequently attached as *riders* to appropriation bills covering vitally important votes of money. Since, unlike some forty governors of the several states, the President cannot veto *particular items* in a bill, but must accept the bill or reject it *as a whole*, he has little choice but to accept. Congress further tightened its hold on the purse strings in 1958 by providing for a ceiling on actual spending of old and new appropriations in any given year, thus giving it more control over actual spending in that year. This would have an effect especially on such areas as national defense, atomic energy, and foreign aid—areas in which much spending is from funds appropriated but unused in previous fiscal years. The unified responsibility of the British system is still lacking.

Ways and Means Committees. The revenue, or tax, side of the budget is similarly handled by the legislature. The revenue-raising proposals of the

⁵ Until such an agreement—involving also matters of policy and procedure between the two appropriation committees—was finally found after almost four months in July 1962, their feuding octogenarian heads treated the country to an exasperating long-run *opéra-bouffe* that tied up billions of dollars for government payrolls and projects and all but brought the machinery of government to a halt.

Bureau of the Budget go to the Committee on Ways and Means of the House and the Committee on Finance of the Senate. Although the Constitution provides in Article I that revenue bills must originate in the House of Representatives, this does not, in practice, as we have seen, prevent the Senate from introducing new revenue proposals in the guise of amendments to the revenue measure passed by the lower house of Congress. Both houses alter the revenue proposals of the executive as much as they see fit. Officials, representatives of the reluctant taxpayers, and other interests are heard. Log-rolling and the push and pull of a great variety of interests are marked features of the framing of tax measures as well as appropriation measures. These practices are found on a grand scale elsewhere, too, particularly in the revisions of the protective tariff, which have always been the scene of unremitting struggle between the various sections and economic interests of the country.

CONGRESS AS BOSS. The President cannot depend on getting the kind of taxes he wants. Nor can he depend on getting tax measures that will bring in the revenues he sees to be necessary to meet governmental expenditures. During World War II, for example, Congress more than once cut his tax recommendations very sharply. Congress has always exercised the right to change, as it sees fit, the appropriations recommended by the President. The executive prepares the budget, but Congress takes it apart and acts on the different parts of it without considering it as a related whole. This is generally agreed to be extremely unsatisfactory.

The Legislative Reorganization Act. The Legislative Reorganization Act of 1946 attempts to meet the situation. It provides that, at the beginning of each session, the four 'money' committees of both houses of Congress shall meet jointly, and, with the President's budget as a guide, prepare and report to Congress on February 15 (or later, if agreed-upon) a proposed 'legislative budget' for the coming year. Spending ceilings were to be established and, if the estimated expenditures exceed the estimated revenues, the resolution introducing the budget in Congress was to contain a clause requiring the public debt to be increased by an amount sufficient to bring the two totals into balance.

It has never been clear how this provision is to be enforced, or how the congressional budget it envisages is to be brought into relation with the budget prepared by the President. The original bill out of which the Act developed contained a provision that, if Congress should later approve appropriations in excess of the total they had adopted earlier in the financial

resolution, the President should be authorized to reduce appropriations by the amount necessary to restore balance—i.e. in effect, giving him the item veto. This provision was rejected by Congress, thus limiting the effectiveness that the law is likely to have. The 'legislative budget' was tested in 1948 and 1949, but failed to produce the expected economy. It has not been used since. In 1950, however, an attempt was made to adopt a 'single package' method of introducing all appropriation measures as one bill, much after the method used in the House of Commons. But, like the 'legislative budget,' this plan was quickly abandoned by the House Appropriations Committee.

Most of the provisions of the Legislative Reorganization Act dealing with financial legislation have been ineffective, and pork-barrel legislation has continued to make a properly planned budget impossible. The lack of a presidential item veto, rivalry between the two houses of Congress, and the inability of members of Congress to come to grips with one complete appropriation bill, are some of the more important reasons for failure.

Supervision. The law of 1921 setting up the Bureau of the Budget for the executive branch also provided for the General Accounting Office, headed by the Comptroller General—a type of financial watchdog responsible to Congress. This official is appointed by the President and confirmed by the Senate for one non-renewable fifteen-year term, and he is removable only by impeachment and conviction, or by a joint resolution of both houses of Congress. He has two principal functions. First, he makes decisions whether particular expenditures, proposed by the executive departments, are authorized by the appropriations Congress has made. Second, he investigates and audits all branches of the public accounts to see whether there have been irregularities in the expenditures made, and reports the results of his work to the President and to Congress.

While Congress has not had active standing committees on the public accounts, it should be recalled here that the Legislative Reorganization Act of 1946 directs the standing committees of both houses on expenditures, now known as the Committees on Government Operations, and also the standing committees on particular fields of legislative and executive activity, to maintain continuous surveillance over the work of the executive branch of government, checking on both economy and efficiency. The legislation looks to the abolition of special investigating committees—an unlikely result—and the establishment of more effective checks on all branches of administration.

The Serious Weakness. This account of the enactment of financial legis-

lation points to the greatest weakness of American federal government for present-day purposes. The weakness arises from the impossibility, already noted, of keeping present-day legislation and administration in separate compartments. In an age when governments are expected to enact and administer efficiently a great quantity of complicated and interrelated legislation of the highest importance, it is vital to be able to bring home responsibility for failure. The nation, which elects the President, tends to hold him responsible for failure, but he generally lacks the power to carry his view of what ought to be done. Congress rarely thinks in terms of the whole program, but reacts for and against particular items of it under the stimulus of a great variety of conflicting pressures, intensified by a desire to assert itself against the Administration. Even when it does think in terms of the whole, it lacks the information necessary for fully informed and wise decisions and is, in any event, unable to ensure that administration will be carried on in accordance with its view. Moreover, the means through which the electorate could enforce responsibility on Congress are lacking. Party discipline does not dominate Congress; voting commonly does not follow party lines. The parties do not line up for and against an extensive program in Congress, and nothing therefore would be gained by trying to hold the parties responsible. Where disciplined parties inviting responsibility do not exist, the electorate cannot enforce responsibility. If they did exist, the formal separation of powers probably would not give any great trouble. The parties would see to it that President and Congress became a harmonious team. But for reasons already described at some length, there is little, if any, likelihood of the emergence of major disciplined parties in the United States.

Of course, the present situation is not without advantages. Any threat of executive dictatorship gets short shrift. Policy is not made in secret party councils but in Congress, where the vital forces of the nation find free expression. Effective integration of policy is difficult, but then it is not as important in Washington as it is at Westminster. In Britain, there is no middle term between the national government and the municipalities. Whatever is demanded of government that cannot be done locally by the municipalities must be done by the national government, which has had to respond to the full impact of the great expansion of government activities.

♢ A CONSEQUENCE OF FEDERALISM. In the United States, the states stand as autonomous governments between the national and municipal governments. Much of what we demand of governments today is carried out by numerous state governments and, as long as it is done acceptably there, it does not

require such close integration and disciplined action at the national level. Because of the federal system, the national government still retains some of the characteristics of an alliance between states for furthering a limited set of common interests. An alliance of states does not need, and no one expects it to have, the close-knit governmental organization necessary for a unitary state. It is necessary to realize that federalism is an important factor in the workability of the legislative-executive relationship at Washington. The future of that relationship is involved in the fate of federalism.

Changes? For several years there has been a steady flow of proposals for change, some of which advocate bringing legislative-executive relationships somewhat closer to the British pattern. Such proposals indicate widespread current dissatisfaction with the existing relationships. However, if the state governments, as genuinely independent authorities, can carry a large part of total government load, arguments for formal changes designed to secure the efficiency of the British system are not completely convincing.

It is hard to estimate how far formal changes in legislative-executive relationships would be effective. If it is true that the success of the British legislative-executive relationships is largely due to the existence of firmly disciplined political parties, the issue really is whether the national parties of the United States are capable of comparable discipline. If there are forces at work in the party system, and the nation as a whole, fostering more effective party unity on more specific and more coherent programs, formal changes in legislative-executive relationships would aid the development. But if the national parties remain loose combinations of state parties, as they have given every indication of doing, such changes would be likely to have a very limited effect, if any.

FINANCIAL LEGISLATION IN FRANCE

In Britain, the ultimately effective power over financial legislation rests with the cabinet. In the United States it is vested in Congress. In the France of the Fourth Republic, the actual 'boss' of financial legislation was the National Assembly, or more accurately, its *commission* on finance, which was the most powerful of all the French parliamentary *commissions*, i.e. standing committees. The Minister of Finance prepared the annual budget, but his role was only little more than that of an errand boy for the finance *commission* which, as an agent of the National Assembly, and enjoying its strong support, held the fate of all taxation and appropriation measures in

its hands. As might be expected, in this area, too, the Fifth Republic has wrought significant and drastic changes.

Executive Preparation. The French budget under the Fifth Republic is prepared annually by the Minister of Finance whose role, in this connection, is somewhat comparable to that of the British Chancellor of the Exchequer or the Director of the Budget in the United States, but the Minister has far less authority to propose reduction or revision. Indeed, his influence in modifying his cabinet colleagues' requests is quite minor unless he obtains vigorous, personal backing from the Premier. Under the Fifth Republic it is the Council of Ministers as an entity that wields decisive influence over revenue-raising proposals. The Minister of Finance subsequently consolidates the various budgetary requests into one national budget of income and expenditures. The finished product is then transmitted to the National Assembly.

In the National Assembly. In the days of old, the Minister would, with considerable trepidation and foreboding, present it to the finance *commission* of the Assembly, which then 'processed' it thoroughly—having *carte blanche* on the budget. The *rapporteur*, appointed by the *commission* to be in general charge, and who might well be a future Minister of Finance, became the key person in the budgetary process—he often referred to it as 'my' budget—and the Government was often constrained to approach him on bended knee. When the *commission* had completed its work, after deliberations lasting several months, it reported the budget, usually in piecemeal fashion, to the floor of the National Assembly, where it was steered through by the *rapporteur*. In thus steering the budget through the Assembly, the *rapporteur* and the *commission* might be friend or foe of the individual deputies as well as the cabinet. The individual deputies, acting for themselves or their constituents, and the Minister of Finance, acting on behalf of the cabinet, both had to coddle, cajole, and plead with the *rapporteur* and his *commission* to adopt, cancel, or restore items. In the absence of party discipline and parliamentary majorities, the budget stage thus frequently proved to be the graveyard of governments. More than one-half of the votes of confidence taken in the Fourth Republic were on the budget.

IN THE FIFTH REPUBLIC. In line with the downgrading of the legislative branch, its power on the budget and financial bills generally was seriously curtailed, of course, under the Constitution of 1958, whose Article 47 specifically deals with the role of Parliament in this sphere. Designed to avoid Parliament's potential delaying tactics as well as to reduce its power and influence, the National Assembly is now required to complete the first read-

ing of the budget in forty days after its receipt. If that time limit is not met, the Government is empowered to send the budget on to the upper house, which is given fifteen days to act on it. If no legislative action has been taken over a span of seventy days, the Government may then apply its provisions 'by ordinance,' i.e. decree. Times have indeed changed! Moreover, if the budget is not presented by the Government in time to ascertain promulgation before the beginning of the new fiscal year, the Constitution authorizes the Government to request the Assembly to sanction taxation and collection powers *by decree*, which may be done in either of two ways: by asking the Assembly ten days prior to the close of its session to vote the parts covering collection of taxes and general expenditures as a matter of 'urgency,' or by asking it two days before the end of the session to authorize the collection of taxes under the assumption that the necessary financial bill will be passed in the next session.

Under the Fifth Republic, as already discussed in connection with the matter of confidence and censure, finance bills must first go to and be voted upon by the National Assembly, but the Senate is not bound by the results of the first vote of the Assembly. This was demonstrated when the Senate rejected the 1960 budget after the Assembly had failed to muster sufficient votes to defeat Premier Debré on a motion of censure. Disagreements between the two houses are resolved by way of conference committees and the Premier's watchful eye—but, failing of agreement, the Senate's authority is nullified if the Government succeeds—as it did in the case of the 1960 budget—in forcing the bill through the Assembly for a second time. Individual deputies have no power to move to raise or lower items in the reported budget; nor may they introduce a resolution whose effect, if it were adopted by the Assembly and accepted by the Government, would be to reduce revenues or increase expenditures. In brief, the sole manner in which the Parliament of the Fifth Republic can effectively assert itself on the budget, if the Government refuses to agree to suggested changes, is to overthrow it on a no-confidence vote or on a successful motion of censure. How difficult this is to do—and of what doubtful political wisdom—we have seen.

Surveillance. Unlike the situation in Britain and the United States, a really effective method of pre-spending audit does not exist in France. However, a post-audit system does operate with a modicum of efficiency. It is concentrated in the Ministry of Finance, backed and checked by the Court of Accounts (*Cour des Comptes*), a fairly effective unit of jurists who are appointed for life and are surrounded by an expert technical staff. Another

check of sorts is the interesting group of 250 'Inspectors of Finance,' a small, prestigious elite corps of top civil servants who, like the members of the *Cour des Comptes*, have all been graduated from the excellent *École Nationale d'Administration*—the National School of Administration for civil servants (to be described in Chapter XVI). The Inspectors are the means by which the Ministry of Finance watches over the complex administration of the nation's financial policy. After having undergone rigorous initial examinations, studies, and field work, an Inspector is attached to the Ministry, which at first sends him to the provinces to become familiar with the intricacies of financial administration at the rural, municipal, and departmental levels of government. Ultimately he is given higher posts in the Ministry of Finance—which has proved to be a stepping stone to excellent positions in both government and private business for the holder of the coveted title of Inspector of Finance. But that institution is no substitute for a genuinely effective system of post-audit, and de Gaulle's announcement, early in 1963, of a 'renovation' in that area, as well as many other administrative spheres, was welcome.

CONCLUDING THOUGHTS

The key to the legislative-executive relationships, indeed the index to the understanding of liberal democratic government, as a whole, is to be found in the state of mind of the electorate—in public opinion, that vaguest and most elusive element in government. All the analysis of the preceding chapters has been leading to this conclusion. The people may not be able to make the laws, but the state of the public mind, in its divisions, diversities, and confusions as well as in the electoral majorities it produces from time to time, has an influence that is decisive *in the long run*. Its influence bears powerfully on the way the constitutions themselves work, as well as on the laws that are made and the manner in which they are administered.

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XV

The Judiciary and the Law

We have discussed at some length legislative and executive organs and functions. Attention must now be turned to the judicial power, the third element in the threefold classification. In comparing the judicial organs and their functions in the United States and Britain, more similarity and less contrast will be found than was observed in comparisons of legislatures and executives. The United States has drawn its decisive legal and judicial traditions from Britain. For several reasons, the judiciary is a conservative force in any society, and ordinarily it does not respond to changing fashions and needs as rapidly as other parts of government do. Thus, there is a marked similarity and, in the main, only superficial differences.

However, there is more pointed contrast between the legal and judicial systems of continental Europe, which stem from *Roman* or *civil law*, and what is often called the Anglo-American or *common law* system. France will be briefly treated as an illustration of the former. But even here the differences are often superficial rather than basic, because both systems were moulded by the age-long Western political tradition. The most striking contrast is with the perversions of the civil law system that the Fascists and Nazi dictators set up in Italy and Germany, and with the Soviet legal and judicial system, all shaped by negations of the Western political tradition. Some of the more revealing differences will be noted at particular points.

THE JUDGES

SELECTION AND TENURE

The Rule of Law is one of the strongest elements in the liberal democratic creed. It is designed, however, as a means to a further end, the securing of individual freedom under law. The securing of freedom under law has two distinct aspects or stages. First, the law must mark out, at one and the same time, an area of individual freedom of action and an area of clearly defined prohibitions of individual action, e.g. the criminal law. Further to this, if the law is to provide an equal freedom, it must not deny to some what it concedes to others; it must not establish privilege. Second, the law must rule; it must be made effective through observance and enforcement. Good laws will come to nothing if they can be disobeyed with impunity. To make the Rule of Law effective, there must be a resolute and impartial judiciary devoted to the impartial administration of justice. Appointment and tenure of judges, and the organization of the courts through which they administer justice, are of the highest importance.

Tenure. Reference to Chapter IV will remind us that, in the major British and French courts and in the federal 'constitutional' courts of the United States,¹ the judges are appointed by the executive to hold office during 'good behavior,' and that to all intents and purposes they can be removed only for specific causes, determined in advance, by the Constitution or the legislature. No English judge, for example, has been removed since the Act of Settlement of 1701. In the United States, judges of the federal 'constitutional' courts can be removed only by impeachment of and conviction for 'treason, bribery, or other high crimes and misdemeanors.'² Agitations for compulsory retirement of aged justices have been unsuccessful, mainly on the not very convincing ground that this opens the way for political interference

¹ Federal '*constitutional*' courts are those created under Article III of the U.S. Constitution, and are hence governed by its tenure safeguards. They comprise the U.S. Supreme Court, the U.S. Circuit Courts of Appeal, the U.S. District Courts, the U.S. Customs Court, the U.S. Court of Customs and Patent Appeals, and the U.S. Court of Claims. The federal '*legislative*' courts are created under Article I of the U.S. Constitution; their judges, not being governed by the tenure requirements of Article III, usually serve from four- to fifteen-year terms, as provided by law. Among these '*legislative*' courts are the U.S. Court of Military Appeals and the Territorial Courts. Those in the District of Columbia are both '*legislative*' and '*constitutional*.'

² As of 1963, nine federal jurists, including one Supreme Court Justice (Samuel Chase), had been impeached by the House of Representatives, but only four of these were convicted by the Senate and thus removed from office.

with the independence of judges. Thus their tenure is for life or until voluntary retirement, and they enjoy independence of the executive. Despite the fact that they often make decisions displeasing to the executive and the legislature, there is seldom any responsible suggestion of removing them in the absence of corruption.

This security of tenure is not so fully enjoyed by the lesser magistrates and justices of the peace. In Britain and France, these are appointed and removed by the executive. In the United States, the *state* judges, as distinct from the federal, are elected in most states by popular ballot for relatively short terms. Being dependent on re-election, they cannot enjoy the same assurance of independence. Election of judges is generally considered to be an unwise extension of the democratic principle, but there are only a few states in which election has not been used.

Selection. Appointment of the judges in Britain and France is in the hands of the government of the day; but in France—where since the Fifth Republic prospective judges attend the ‘National Center of Judicial Studies’ (*Centre National d’Études Judiciaires*) for a four-year course—special competitive examinations are given to the candidates, and standing in these examinations must normally be taken into account. In the United States, the appointment of federal judges is made by the President, with the consent of the Senate, which often insists on a critical investigation of the nominee; it is thus a form of political patronage. In Britain, this patronage is shared by the Lord Chancellor and the Prime Minister. In France today, patronage plays an even lesser role in the appointment of judges. There, the eleven-member High Council of the Judiciary³ nominates a panel of prospective higher judges, from which the President and the Minister of Justice *must* choose, and it advises the latter on the appointment of lower court judges.

Generally speaking, appointments in Britain and the United States go to persons who have been active supporters of the party in power. As a rule, the capacity and integrity of prospective appointees are also carefully considered, but in each country there have been instances in which it was difficult to see any merit except services to the party. As there are generally equally capable lawyers in each party, there have been few serious abuses. In fact, there are more complaints today about the general outlook of appointees than over their party affiliations, for reasons yet to be discussed. This is seen

³ This *Conseil Supérieur de la Magistrature* consists of the President of the Republic, as chairman, and the Minister of Justice, as vice-chairman *ex officio*; plus nine appointive members with legal background, selected by the President for a once-renewable term of four years, partly on the recommendation of the *Cour de Cassation* and the *Conseil d’État*.

most clearly in appointments to the Supreme Court of the United States, where the President, at least, is usually more genuinely concerned over the broad political philosophy of his choice—the nominee's so-called '*real politics*'—than the party label. Yet many a President has subsequently been grievously disappointed in those '*real politics*.'

Limitations. One limitation on choice must be pointed out. The judges in the Anglo-American system must be chosen from the ranks of the legal profession. No matter how able or learned in the law a man may be, he cannot be a judge in a superior court *unless* he is a member of the Bar in good standing. Almost invariably, lawyers in active private practice or public office are appointed, although, in recent years, a number of academic lawyers with distinguished records in teaching and research have been appointed to the Supreme Court and other federal courts of the United States, e.g. Mr. Justice Felix Frankfurter, who was a Professor of Law in Harvard University at the time of his appointment to the Supreme Court by President F. D. Roosevelt in 1939.

BARRISTERS AND SOLICITORS. In Britain, lawyers who aspire to the bench almost always come from the branch of the legal profession known as *barristers*, rather than from the ranks of the *solicitors*. (The British law student initially decides to which class of lawyer he wishes to belong.) The approximately twenty thousand solicitors are, in a sense, the 'office lawyers' of the profession. They comprise the 'workhorses' for minor cases, try cases in the lower courts, do most of the routine legal office work, and deal directly with clients. The little more than two thousand barristers, on the other hand, argue cases in the higher courts, are highly experienced, specialized lawyers, and receive most of their cases from the solicitors rather than from the client direct.

The limitation of judgeships to members of the Bar in Britain and the United States is not thought to be strange, but natural and inevitable. Yet it is in sharp contrast to the practice of continental Europe,⁴ where a lawyer who elects private practice⁵ abandons all thought of a *judicial* career.

⁴ The phrase 'continental Europe' as used in this chapter refers principally to Western Europe and does not include the Soviet Union or those countries of East-Central Europe which now have Communist-dominated governments. They are excluded because their practice in legal matters is quite different in many respects from the long established tradition of Western Europe.

⁵ The private practitioner of the future will choose among the specialties of *avocat* (roughly similar to the British barrister); *avoué* (the equivalent of the British solicitor); and *notaire* (a lawyer trained especially in the drafting and registration of legal papers). Those who wish to become *public prosecutor* must follow a course similar to that of future judges.

Continental judges are always trained in law, but are chosen from the civil service and not from the lawyers who appear as advocates in the courts. The young French law student of twenty-seven or under, who aspires to be a judge, goes from his university to the National Center of Judicial Studies, whence he is either assigned as a judge to a court, to the high office of the public prosecutor, or to the Ministry of Justice. He may hope within twenty years to rise by promotion step by step up the higher rungs of the judicial ladder. When a judge hopes for promotion from a lower to a higher court, he is exposed to the temptation to please his superiors in the Ministry of Justice, or even politicians who have influence there, although the Council of the Judiciary now serves as a 'check' on politics. By contrast, in the Anglo-American system higher judicial posts are infrequently filled by promotion, although President Eisenhower's appointments of Associate Supreme Court Justices Harlan, Brennan, and Whitaker did represent 'promotion' from state and lower federal courts. The term 'promotion' here does not, however, carry the same connotations as it does in the Continental system.

SIGNIFICANCE OF AN INDEPENDENT JUDICIARY

Complete independence of the judicial power may seem to sort ill with democracy, which means popular control of government. In the nineteenth century this view prevailed in most states of the American Union, bringing popular election of judges for short terms. There have been abuses of the security of tenure of appointed judges, but they have been rare. The law that the judge gives his oath to uphold is a body of relatively certain rules, and as long as he is true to his oath there is not much room for popular control of his actions. Also, he is a member of an ancient profession which has, despite apparent exceptions, a great devotion to the ideal of an impartial law. A judge who obviously abandons impartiality or gives an interpretation of law that lawyers generally think to be obviously wrong, loses caste in the legal profession. Self-respect and the desire to stand well with their professional brethren are powerful controls on the judiciary.

This is a better safeguard of the impartial administration of justice and maintenance of freedom under law than putting judges under direct control of the government. In dictatorships, of course, the primary function of the judiciary is not maintenance of freedom under law, but rather securing of the overriding interests of society, as interpreted by the dictator and the

elite he gathers around him. Accordingly, the judiciary is a tool to be manipulated, not a vital institution to be safeguarded from outside influences.

Under the dictatorships the judiciary remains an important institution for settling disputes between private citizens and interpreting the law applicable to such disputes. New judicial functions arise from the revision of the criminal law to include a number of political offenses against the regime, which cover not only overt actions against the state, but also unconstructive attitudes of mind. Generally, special tribunals for defense of the state against its internal enemies are established, but sometimes persons accused of political crimes are tried in the ordinary courts. Great care is taken therefore to ensure that all judges shall have the appropriate attitude toward cases coming before them. In Germany and Italy, the Nazis and Fascists dismissed summarily all judges and court officials who were unsympathetic to them. They thus destroyed the security of tenure of the judges, and they appointed as judges only those who could be counted on for subservience. In the Soviet Union, as we shall see later, the Communist party has exercised effectual control over appointment or election of judges who hold office only for short terms. Finally, in all three dictatorships, the legal profession ceased to be an independently organized profession and came under government control.

THE COURTS

STRUCTURE

Judges do not give authoritative interpretations of the law at their own pleasure, or, as a general rule, at the request of the executive or legislature. They *interpret* the law while sitting in court to settle disputes between parties appearing before them. The Anglo-American courts are just as important a part of the judiciary as the judges. A court is not merely a physical location and a collection of equipment, like stage properties. It is an institution with a set of officials and records, an atmosphere, and an orderly though complex procedure for hearing and deciding disputes.

The courts of continental European countries can be described, for the sake of contrast though not with complete accuracy, as branches of a Ministry of Justice, which is, in turn, an executive department of the central government charged with the administration of justice. Before the coming of dic-

tatorship, at any rate, the judges had security of tenure and independence but they were even then, in a sense, civil servants. The Ministry of Justice organized courts in districts across the country to serve the public somewhat after the fashion of the organization of postal services. Officials of the court are civil servants who keep the records, and make and work the rules of procedures in concert with the judges.

Freedom from Government Control. In England and Wales,⁶ the courts were always the King's courts, with their roots in executive decree of the early Norman kings. However, at an early date in English constitutional history, they became practically autonomous and their development was powerfully influenced by the legal profession. The practicing solicitors are still spoken of as officers of the court. For centuries, the judges and officials were paid, not from the general revenues, but from fees collected from litigants. The judges made—and still make—the rules of court procedure, just as they generated the unique atmosphere of decorum which prevails in a court.

The English courts were reorganized on a statutory basis by Parliament in 1873, and many of the anomalies and anachronisms of six hundred years of customary accretion were cut away. The salaries of the judges and the sums needed for maintenance of the courts are now permanent charges on the public revenues, and do not come up for annual appropriation and debate. The executive does not appoint or exercise control over any significant number of the officials of the courts. Appointment of officials is largely in the hands of the Lord Chief Justice, and they do their work under the direction of the judges. There is no Ministry of Justice, as in France. The Lord Chancellor, a member of the House of Lords—he is its Speaker—and of the cabinet as well as a judge, has a small administrative department, but it exercises very little control. The courts are still largely autonomous and in so far as they need to be ruled, they are ruled by the judges.

In colonial days in America, courts modeled on the English type were created by executive order or act of the legislature. Later, in the United States, the state constitutions prescribed the structure of the state courts in considerable detail, and thus limited greatly the power of the state legislatures to modify the judicial systems. The national Constitution, by contrast,

⁶ For convenience hereafter referred to as England, since Scotland and Northern Ireland, the other two members of the United Kingdom of Great Britain and Northern Ireland, operate separate court systems.

contains only the briefest of provisions on the federal judicial structure,⁷ which has been established almost entirely by Congress. One of the first orders of business of the First Congress of the United States was to pass the Judiciary Act of 1789, which created the framework of the American judicial system.

Once established by whatever means, the courts in the United States were given much of the autonomy of English courts in the administration of justice. In the United States, some court officials are elected and some appointed. The Supreme Court of the United States makes the rules of procedure for the federal courts. In some states, the state legislatures, and in others the judges, make the rules of procedure, but there is no general executive supervision of the administration of justice. The federal government has a Department of Justice with a member of the cabinet, the Attorney General, at its head, but it is not a Ministry of Justice in the continental European sense. It is rather the department of the Attorney General, the legal adviser of the government and its attorney in all legal questions, lawsuits or otherwise, in which the government is interested. The courts and the judges are autonomous in the administration of justice—but this has not given them immunity from outside criticism.

The Price of Autonomy. The continental European system has many advantages, particularly in ensuring adequate decentralization of courts for the convenience of local litigants, a simple, inexpensive procedure, and an expeditious handling of cases. Its weakness and dangers are illustrated by the problem of judicial promotions, though as already mentioned, in France this is no longer as serious a problem as it once was. To what extent are impartiality and independence endangered when the executive branch of government participates largely in the administration of justice? The fear of executive interference has always thus far prevented the establishment of Ministries of Justice of the continental European type in Britain and the United States. As a result, there is a confusing multiplicity of courts, each autonomous and separate within the range of matters assigned to it.

In England, the judicial system is centralized in London. Apart from the justices of the peace and the county courts, dealing with petty criminal and civil cases respectively, and the assize circuits, there is no adequate decentralization. When large issues are at stake, they must go as a general rule to the courts sitting in London, and the litigants must go there, too, at great expense, a prohibitive burden on the poor. In the United States, there

⁷ The Constitution of the United States, Art. III and Amendment XI.

is satisfactory decentralization for the trial of most matters in the first instance, but appeals must go to the state capitals or even to the national capital. In continental Europe, on the other hand, the final appeal as well as the original trial is heard in the locality.

In the Anglo-American system, despite many reforms, procedure in the courts is still complicated, adding to cost and often involving delay. It is suited to the convenience and to the sense of professional fitness of the lawyers—every profession tends to develop a distinctive ritual—rather than to the needs of poor litigants. However, it must be said in its defense that it is admirably suited to protect the rights of those who can afford its expense and delay. The same can be said of the two, or three, or even four successive appeals that may be taken from one court to another, contrasted with the single appeal open to the parties in most of continental Europe.⁸

The Anglo-American legal profession never forgets the meddling of the Stuarts in the administration of justice, and resists all proposals that a government department should organize and supervise judicial services on a mass-production basis, as has been done, for example, in employment office and postal services. It takes justifiable pride and satisfaction in saying that genuinely impartial courts are *open to all*. Yet, despite substantial, steady but slow improvements, and a continuing agitation for more, it has no adequate answer to the English judge who retorted, 'So is the Ritz Hotel!'

This question cannot be discussed in detail here. It has been sketched for two reasons: to point to the main features of the problem, and to bring out the significance of the following account of the structure of the courts.

THE JUDICIAL HIERARCHY

In both the United States and England, the court structure is in the form of a *hierarchy* with its base on the justices of the peace scattered across the country—on the magistrates in the urban areas—and its apex in a final central court of appeal. At the lowest level, the justices of the peace frequently are laymen without legal training, unpaid, or paid only in small fees collected in the course of their work.⁹ Their jurisdiction is generally limited

⁸ Before he was finally executed 12 years after sentencing, Caryl Chessman had managed to file 14 appeals in the California courts and 28 in the federal courts!

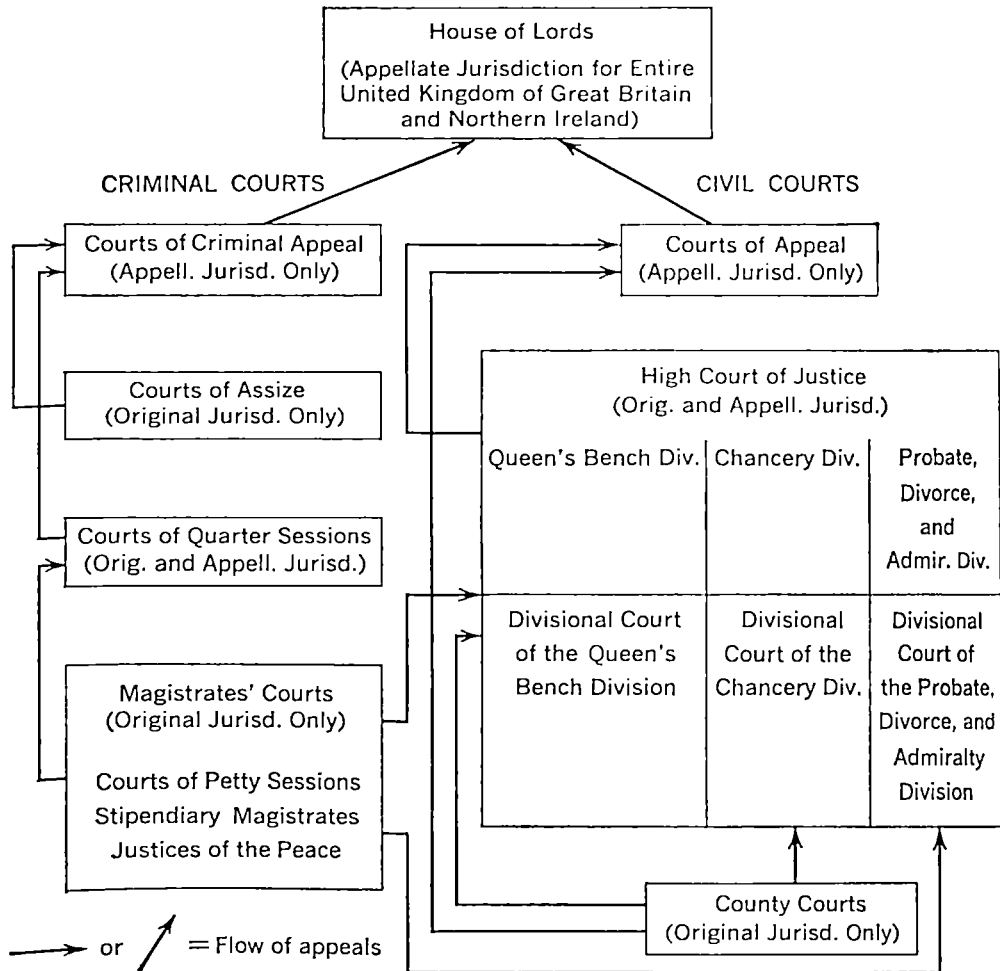
⁹ A 1955 study of the minor judiciary in North Carolina showed that *not one* justice of the peace then had a law degree; that 75 per cent had never gone to college; and that 40 per cent had never even attended high school! (Isham Newton, *The Minor Judiciary in North Carolina*. Unpublished Ph.D thesis. University of Pennsylvania, 1956.)

to the trial of lesser crimes and misdemeanors, but it may cover small civil claims as well. In the towns and cities, they are supplemented on the criminal side by police magistrates, who are now usually required to have at least some legal training.

The next tier of courts in England is county or district courts, staffed by judges chosen from the legal profession with permanent tenure, whose jurisdiction is limited to civil claims involving relatively small amounts. Generally speaking, no such tier of courts exists in the United States. In some of the larger cities, there are municipal courts of comparable limited civil and criminal jurisdiction. There are, of course, county and district courts in the states of the United States but, as will be seen below, they are courts with general rather than limited jurisdiction. At the next level in both countries are the courts with general first instance jurisdiction, i.e. courts with authority to try all cases of important civil or criminal consequence. Above this again, there are always courts of appeal to which disappointed litigants have, in most matters, a right of appeal, and there may be, in certain special circumstances, one or even two further appeals to still higher courts. Courts of first instance are generally composed of one judge sitting alone, while courts of appeal have a bench of several judges. This pattern may be set forth briefly for each country.

In Britain. In England and Wales (Scotland and Northern Ireland, as has been pointed out earlier, are distinct areas for the administration of justice) the county courts are limited in authority to small civil claims. The court with general jurisdiction in the first instance is the *High Court of Justice*, which has several divisions, all sitting in London. However, judges of this court periodically go on circuit, holding assizes, or sittings, in the 'assize towns' across the country. The bulk of the assize work is criminal, but civil disputes may be heard there too. The *Court of Criminal Appeal* sits in London, hearing solely appeals from persons convicted of criminal offenses by justices of the peace, stipendiary magistrates, and judges of assize. In *civil* matters, an appeal lies to the *Court of Appeal* in London and thence, in some but rare circumstances, to the *House of Lords*, which is the highest court of appeal in the realm and the sole United Kingdom-wide judicial body. The judicial functions of the House of Lords are performed by the Lord Chancellor, nine Lords of Appeal—eminent lawyers elevated to the House of Lords for this particular purpose—and any peer who has at some time held high judicial office. Only in very special circumstances can an appeal in a *criminal* case be carried to the House of Lords from the Court

THE CRIMINAL AND CIVIL COURTS OF ENGLAND AND WALES



of Criminal Appeal, and lately such appeals have averaged but one a year.¹⁰

In the United States. Each state in the United States has its own judicial hierarchy, and there are as many systems as there are states. A common pattern, however, can be discerned. Immediately above the level of *justices of the peace*, police magistrates, and municipal courts, such as juvenile courts, family relations courts, and traffic courts, stand the *county or district courts*.

¹⁰ Richard M. Jackson, *The Machinery of Justice in England*, 3rd ed. (Cambridge: Cambridge University Press, 1960), p. 112.

These courts, sitting in the county court houses in the county towns, are courts of first instance for almost all civil cases and for criminal cases of a serious nature. They are therefore not at all comparable to the county courts in England. In some states, the county court system still reveals the defects to be expected from a lack of unified responsibility for the whole system. Generally, the judges can sit only in their own court and can only hear cases arising in their own district. So the judge in one county may be idle while the judge in an adjoining county is overwhelmed with work. However, many states—New Jersey is a praiseworthy example here—have established ‘judicial councils’ composed of judges, lawyers, state officials, and laymen, which are making progress in meeting this and other defects.

Some states have decentralized district courts of appeal. The presence, or absence, of intermediate courts of appeal depends largely on the density of population and the volume of litigation in the state. Whether they have these courts or not, every state has, at the apex of the hierarchy, *a supreme court*, as it is usually, but not always, called. It constitutes a final court of appeal sitting at the state capital. In cases that involve an interpretation of the national Constitution and a decision whether or not certain rights can be claimed thereunder, there is the possibility of an appeal from it to the Supreme Court of the United States in Washington.

Except where some such question arises, state courts try almost all cases turning on the interpretation of the state constitution and laws. The jurisdiction of the federal courts is set out in section 2 of Article III of the Constitution, as restricted by Amendment XI. It includes a variety of special matters that need not be detailed here. Most of this special jurisdiction of the federal courts turns on the question of the *parties to the dispute* rather than the subject matter. For example, disputes between two or more states, or between a state and a citizen of another state when the state is the plaintiff, must be tried in the federal courts, regardless of the subject matter of the controversy. Where the dispute is between citizens of different states, it may be tried in the federal courts *if* the controversy involves ten thousand dollars or more, but arrangements may be made to handle that type of case in a state court. The main work of the federal courts is to try cases arising under the laws of the United States, principally laws made by Congress. For example, when the mails are used to commit a fraud, the same act may be at once an offense against the law of a particular state *and also* an offense against the laws of the United States regulating the use of

the post office. For the former offense the culprit would be tried in a state court, for the latter in a federal court.

TWO SEPARATE SETS OF COURTS. Thus, there are in the United States two complete and quite separate sets of courts, *federal and state*, exercising, in each state, jurisdiction over the same people and the same territory. Serious conflicts of jurisdiction are avoided because, generally speaking, the federal courts interpret and apply federal laws, and the state courts interpret and apply the state laws. The jurisdiction of the federal courts is not declared by the Constitution to be an *exclusive* one. As far as the Constitution goes, the cases federal courts are competent to try might be tried and decided in state courts. Congress, however, has provided by statute that in certain types of cases and controversies covered by Article III, the federal courts shall have exclusive jurisdiction, e.g. those dealing with 'domestics or domestic servants' of foreign diplomats.

FEDERAL COURTS. At the lowest level in the federal 'constitutional' court structure stand the *United States District Courts* in some ninety districts across the United States. At the next level are the eleven *United States Courts of Appeal*, one for each of ten circuits and one for the District of Columbia. These courts, commonly called 'Circuit Courts of Appeal,' were established to take from the Supreme Court some of the burden of appeals from the District Courts. There is now *no general right of appeal* from the lower federal and the state courts to the *United States Supreme Court*, except in a few cases specified by law.¹¹ These cases come to it on what is—somewhat awkwardly—known as a writ of *appeal*, but only if the Supreme Court regards the issue involved to be of a 'substantial federal question.' In all other instances, the Supreme Court decides, on the circumstances of each application for review, whether it will hear the appeal or not. If a minimum of four justices agree to hear an appeal, the Court issues a writ of *certiorari*. The test applied is whether or not, in the opinion of the Court, the case raises a question of 'substantial' constitutional or public importance. In addition to hearing appeals, the United States Supreme Court may act as a court of first instance in a very limited number of matters, particularly in disputes involving *foreign* ambassadors, ministers, or consuls, and in certain

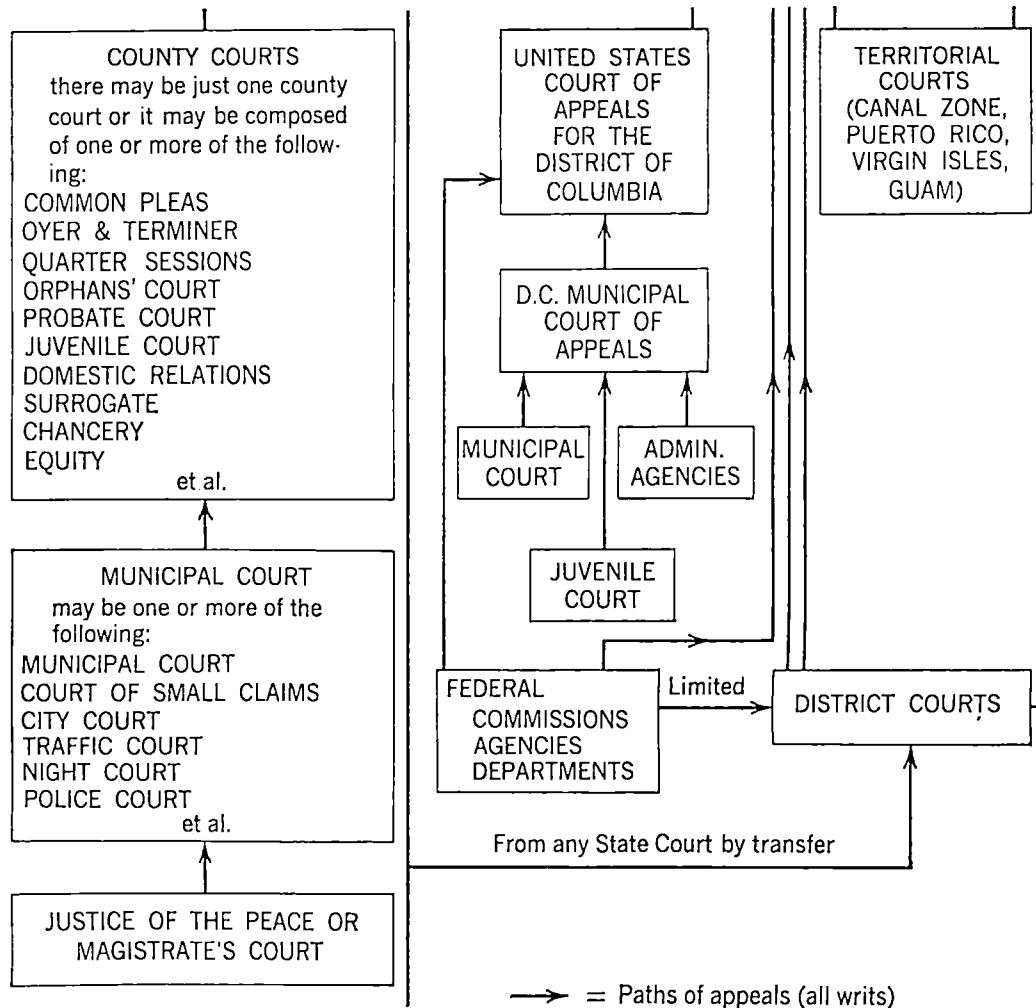
¹¹ Generally speaking, and omitting several of the more technical situations, these are limited to cases in which (a) the highest *state* court has declared a *federal* law or a federal treaty unconstitutional; (b) a *federal* court has declared a *state* law or a provision of a state constitution unconstitutional; and (c) when the highest state court has *upheld* a state law or a provision of a state constitution *against* the challenge that it *conflicts* with the federal constitution, a federal law, a federal treaty, or any provision thereof.

disputes in which a state is a party, particularly those between two or more states. But the Court's original jurisdiction has become a very minor fraction of its work.

THE APEX OF POWER. The Supreme Court is, of course, the most dazzling jewel in the judicial crown of the United States. It is the sole court mentioned in the Constitution, all others having been created by statute. It stands at the pinnacle of the judiciary—all others bow before it. In no other liberal democracies do we find a court that is accorded the same power, the same prestige, and the same awe-inspiring reverence as the Supreme Court of the United States. In a very real sense, the Constitution of the United States is what a majority of the members of the Supreme Court say it is at any given time. It is, in Lord Bryce's words, 'the living voice of [the] Constitution.' Indeed, if the concept of Jean-Jacques Rousseau's 'general will' (*la volonté générale*) is to be found on any governmental level in the United States at all, it is in the opinions and decisions of the dignified, learned members of the United States Supreme Court. The Supreme Court is the chief guardian of the Constitution and of the people's liberties—and there are many citizens who rest far more quietly in the knowledge of *that* guardianship than if it were primarily exercised by one of the other two major branches of the government. For the latter are close, indeed, to what Judge Learned Hand once called 'the pressure of public hysteria, public panic, and public greed.'

In France. The French have two entirely separate court systems, the *ordinary*, or regular, courts which concern us here, and the *administrative* courts, to be discussed briefly later.

The de Gaulle judicial reforms of May 1, 1959, dispensed with the tradition of the local justice of the peace, of whom some three thousand used to dispense justice, more or less, in every *canton* of France. Now the lowest ordinary court is the *Court of Instance* (*Tribunal d'Instance*), one of which is to be found in the capital of every *arrondissement* and has chiefly civil jurisdiction. Each of these 455 tribunals has several trained judges, but decisions are usually rendered by a single judge. At the next higher level is the *Court of Major Instance* (*Tribunal de Grande Instance*). These 172 tribunals have both original and appellate jurisdiction in civil cases throughout the *département*—the highest administrative subdivision in France. Each case is tried by several judges, with the decision reached by majority vote. Appeals from these courts of instance in civil cases go to one of the twenty-seven *courts of appeal*, each of which has charge of several *départements*.



From five to seven judges sit *en banc* here. Appeals in criminal cases go to one of the *assize courts*, which also have original jurisdiction in serious crimes. One such court, with jury, sits in each of the *départements*, and is usually staffed with three judges chosen from the courts of appeal and the courts of major instance.

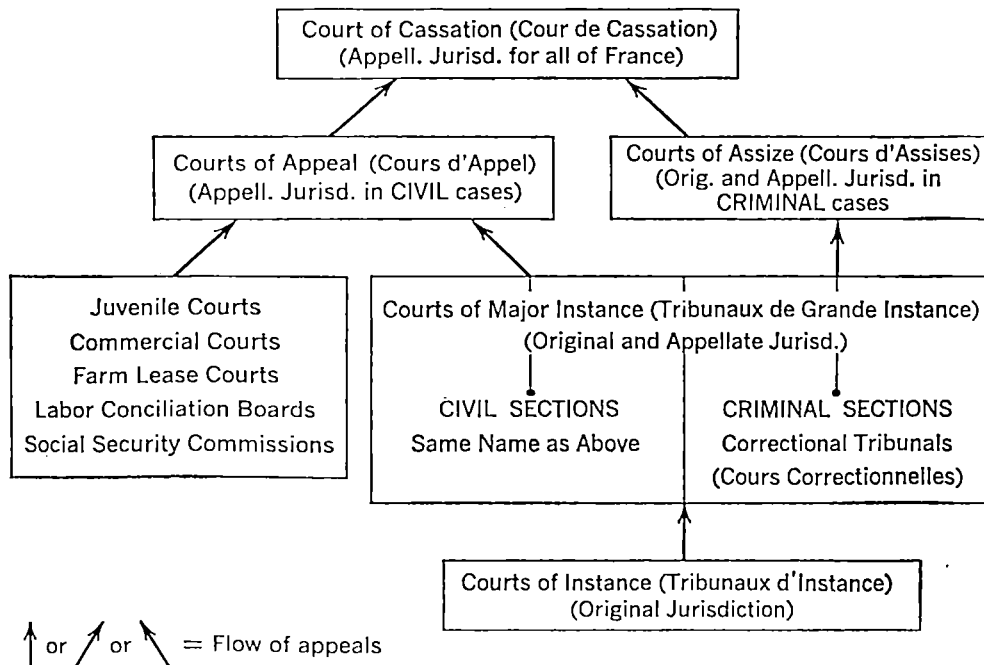
At the pinnacle of the ordinary courts of France is the *Cour de Cassation*. This is really the Supreme Court of France; it sits in Paris and has eighty-three judges. It is divided into three *chambres*, each presided over by a 'president'—that favorite French term. One *chambre* handles all requests or petitions; one, points of law in civil appeals; the third, points of law in criminal appeals. Unlike the United States Supreme Court, but like the House of Lords, the Court of Cassation has no original jurisdiction and, while it may 'break' (*casser*) decisions of lower courts upon appeal, it is not an appellate court, for it may only 'break' or 'quash' the point of law of the lower court, not its judgment. It cannot *retry* cases. All cases must come to it from lower courts. After the Court of Cassation has broken a point of law in a case, it remands it to the same *level* of court whence it came, but not to the same *court*. And although its procedure resembles, in part, that of the United States Supreme Court, and its prestige is great, the Court of Cassation does not possess the power of judicial review.

THE FUNCTIONS OF THE COURTS

It is somewhat misleading to say that the function of the judiciary is to interpret and to apply the law. The essential primary function of the judiciary is to hear and decide disputes. Sometimes disputes in the courts are entirely concerned with questions of fact, and judges have only to decide the baffling question of which party to believe. Often, however, a dispute involves differing interpretations of the law and, in order to give a decision, the judges may have to determine what is the proper interpretation. But their job is to give a judgment on the dispute, or, at most, a *declaratory judgment*, stating the rights of particular persons arising from a specific set of actual facts, and they generally refuse to give gratuitous opinions on the law that are not necessary for the decision in hand.

Need of a Case or Controversy. The general rule in the Anglo-American system is that the courts cannot be set in motion to grind out interpretations of law in the absence of a dispute between parties with an interest in the result. The courts are always open to hear charges that a particular person

THE REGULAR (ORDINARY) COURTS OF THE FIFTH FRENCH REPUBLIC



has committed a crime, or complaints that the civil rights of the complainant have been infringed. The law, however, does not require the courts, or even enable them, to resolve doubtful points that come casually to their attention. Nor does it enable them, except in a few special circumstances, to give advice to perplexed individuals who are in doubt as to what the law requires them to do.

In certain circumstances, through the issue of a *writ of mandamus*, the courts will order a public official to perform a duty specifically imposed on him by law. In certain other limited circumstances, the courts will issue an *injunction*, a writ restraining particular persons, whether officials or not, from performing acts that, if performed, would be infringements of the rights of other specified persons. Normally, however, it is only when an aggrieved person comes forward, asserting that a wrong has been done, and that he should be compensated, or that the culprit should be punished, that the courts are set in motion.

Punishment but not Prevention. It follows that in almost all cases the action of the courts is compensatory or punitive and not preventive. As a

general rule, individuals cannot be restrained by judicial action merely on the ground of a plausible suspicion that they are about to commit a wrong against the state or another citizen. Thus, in wartime, the legislature has always been obliged to pass special legislation authorizing the detention of persons who are strongly suspected of seditious aims and traitorous designs not yet put into execution. The abuses to which such powers of detention are always open, and sometimes put, emphasize the importance for individual liberty of restricting very sharply preventive action by the executive or by the courts. Risks of wrongdoing which sometimes would be irreparable are involved, but *the law expresses the liberal democratic faith that individual freedom is worth the risk*. There is also the difficulty of being sure that a man is of an irresistibly vicious state of mind, and the consequent danger of appalling injustice. It has been thought better that the risks should be taken and punishment or compensation provided after the event.

The extreme hesitation of the Anglo-American system to embark on preventive action is not just laziness on the part of the judges or untidy administration of justice. It rests squarely on the beliefs in individual freedom and responsibility. If any confirmation of this is needed, it can be found in the practice of the dictatorships. Since the latter have no strong faith in the individual, and regard him primarily as a means to more important ends, law in their system ceases to be primarily concerned with individual rights and the correlative duties to respect the rights of other individuals. Instead, it puts its main emphasis on the duties of individuals toward the state, and the judges must constantly underline this emphasis in their decisions. If individuals are uncooperative or grudging in their attitudes, there is every reason to make an example of them. The judiciary is an instrument for safeguarding the regime and promoting the conception of the good life entertained by the rulers.

Accordingly, these courts are not concerned merely with acts done, but also with the motives, character, and general attitude of the citizens. In Nazi Germany, for example, the courts often penalized individuals or denied them redress because they had a bad attitude and would no doubt be led into actual transgression, if they were not checked beforehand. The Nazi courts thus had preventive as well as compensatory and punitive functions. Similar instances could be cited for Fascist Italy and the Soviet Union.

Executive Consultation of the Judiciary. In this condition of the law in the United States and Britain, it would seem to follow, too, that neither the

executive nor the legislature can require the judges to give authoritative interpretations of the law or 'advisory opinions' *in the absence of an actual dispute between parties*. Broadly speaking, this is true. In the United States, the federal Constitution and most state constitutions prevent it in the absence of constitutional amendment for that purpose. In Britain, the executive is not permitted to consult the judges on the meaning of particular laws or on the legality of particular executive action already taken or proposed to be taken. Of course, the supremacy of Parliament makes it possible for that body to enact a law at any time requiring the judges to give such opinions. Suggestions for such legislation have been made in the United States, but thus far only a few states have passed the enabling constitutional amendments.¹² However, as already indicated above, all American courts may give *declaratory judgments* which, while not 'advisory' opinions *per se*, do state the rights of particular persons in a controversy *prior* to actual injury without, however, attaching any consequential or coercive relief to that judgment—and federal 'legislative' courts (but not the 'constitutional' courts) may give actual advisory opinions. Such judicial opinions, when given, are authoritative in the sense that they have the prestige of a considered statement of the court, but ordinarily they are no more than advice to the executive and do not form precedents binding the courts in later litigation.

The reason why governments nowadays should want advisory opinions from the judges before disputes arise is very clear, particularly in federal states. Much of today's legislation must be actively administered by the executive, and this often requires the setting up of new offices and employment of hundreds and even thousands of additional civil servants. It often involves also a very drastic readjustment of their practices by numerous individuals and businesses. Unfortunately, however, it is not always easy, in the United States, to be sure legislation is constitutional, and the decision ultimately rests with the courts. Some eighty-five federal and seven hundred state laws, or parts thereof, have thus been held *ultra vires*. Important parts—indeed, thirteen separate laws—of President Roosevelt's New Deal legislation, largely enacted in 1933, were held unconstitutional by the Supreme Court between 1934 and 1936, after a vast administrative apparatus to enforce it had been set up and put to work. The purpose of advisory

¹² As of 1963, constitutions of ten of the states did permit 'advisory' opinions: Alabama, Colorado, Delaware, Florida, Massachusetts, Maine, North Carolina, New Hampshire, Rhode Island, and South Dakota.

opinions by the judges would be to get a settlement of the constitutional issue *before* administrative enforcement of the legislation begins.

In Britain, the judiciary cannot declare legislation unconstitutional, but it must interpret the meaning of legislation when disputes turning on its meaning arise. The judges sometimes give interpretations that surprise and even dismay the executive and upset its program of enforcement of the law. As a result, there has been some agitation for a law that would enable the executive to get judicial interpretations in advance. Such proposals are resisted on the ground that they would unduly strengthen the hand of the executive and tend to knit the executive and judiciary into one. If the executive can get opinions from the judges beforehand, while the individual who resists the intervention of officials in the sphere of his interests cannot, the latter is put at a serious disadvantage.

Judicial Control of Government Officials. The force and bearing of this argument cannot be fully appreciated without looking closely at one of the traditional roles of the Anglo-American judiciary. It was pointed out in Chapter IV that the judiciary has been relied on to enforce the Rule of Law against citizen and government official alike. If government is to be servant and not master, its actions must be limited by predictable rules which are interpreted and applied by some authority independent of the executive. This has been done in the past mainly by the judges of the same courts that settle disputes between citizen and citizen and, in the absence of a law clearly conferring special powers and privileges on the government official, they have required him to observe the standards applicable to private citizens. In this sense, one law interpreted by one set of judges rules everybody. The Rule of Law, or the supremacy of law, as it is generally known in the United States, is a very important principle of Anglo-American constitutions.

So the official who is thought to have exceeded his powers overzealously can be brought before an impartial court on the complaint of the aggrieved person. If the police detain a person on suspicion of crime for any considerable time, without bringing him to trial for a specified offense, his jailer can be compelled to appear in the court on a writ of *habeas corpus* and, if he cannot show that the detention is lawful, an order for release will be made. Equally, if an official seizes an apparatus which he claims is used for making illicit alcohol in violation of the excise law, and which the owner insists is used only for laudable scientific experiment, the owner can have both the fact and the law determined by the judiciary.

IN BEHALF OF PRIVATE RIGHTS. In such disputes, the judges do not normally

lean in favor of the official. If they lean at all, it is the other way. For the Anglo-American legal tradition, of which more will be said later, makes the judiciary a champion of private rights and interests against any suggestion of highhanded action by governments. The independence of the executive which the judge enjoys is not always free from antagonism. So the legal profession and the judges regard any suggestion that judges should collaborate with the executive as a threat to individual liberty. The judges, it is said, should not be asked to interpret a law giving powers to the executive until they see, in the actual disputes arising, what use the executive is trying to make of the law in question. The dangers involved in such proposals may be exaggerated. Yet the general rule that judges are to decide disputes over the lawfulness of things already done, and not to foreclose freedom of action by preventive measures or by interpretations of law in advance of action, is an important buttress of constitutionalism.

Today, when great accomplishments are expected of governments, and achievements depend largely on the energy and efficiency of the executive, it is clear why the executive should want to find out from judges in advance what the judges will uphold. This is particularly true when the judges are inclined to be unsympathetic to the executive. And it applies with special force because in the Anglo-American system the official is *personally liable* for damages when he exceeds his powers. The jailer who detains a person unlawfully is liable for heavy damages even though his motives are of the best. Hence when officials are in doubt as to their powers, they are likely to be timid and hesitant in enforcing the law. While this is some protection against executive highhandedness, it also detracts from the vigor of administration. The methods by which constitutionalism has been buttressed are often hindrances to far-reaching governmental action.

Continental European System Contrasted. At this point, it may be useful to introduce a contrast with the European legal and judicial systems which differentiate between their treatment of governmental and private disputes.

FRENCH ADMINISTRATIVE COURTS. In France, for example, the courts that judge between citizen and citizen have no authority to deal with disputes to which the government, or an official of the government as such, is a party. A claim that an official has exceeded his powers in executing his official duties, and has thus committed a wrong against a private citizen, is heard in one of a number of easily accessible special courts known as *administrative courts*, headed by the important *Council of State* (*conseil d'état*). The

conseil d'état is a powerful, highly respected body, which has both original and appellate jurisdiction in administrative law and, as we saw in Chapter XIII, acts as a technical adviser in the drafting of bills and ordinances. These courts are very closely connected with the executive, and the judges who sit in them—career personnel, steeped in the law—perform many executive as well as judicial functions. Moreover, the rules of law applied to the settlement of disputes in these courts differ from the rules applied to disputes between citizen and citizen. There is a *special body of law, called administrative law*, which governs in the administrative courts.

The only comparably constituted court known to English history is the *Court of Star Chamber*, which was a branch of the executive and dealt with controversies between the government and the subject. Its memory is infamous because it applied to the officials of the Tudor and Stuart monarchs a different standard from that applicable to the ordinary citizen, and often relied on reasons of state and political expediency to deny redress to citizens in conflict with the Crown. It was abolished three hundred years ago, but even today any suggestion of the creation of administrative courts in the Anglo-American world evokes its image in the minds of the legal profession and others.

It was long thought in these circles that the French administrative courts were similar devices for enabling the executive to escape the restraints of law. In fact, however, since the establishment of the democratic Third Republic in 1870 (whatever may have been true prior to that period), the administrative courts have been impartial and upright, leaning in favor of neither the official nor the citizen, although there has been some criticism that the government has been 'too tough' on itself. They give the average citizen better protection against official over-zealousness and mistakes than does the Anglo-American system. They are easily accessible and have a simple, expeditious, inexpensive procedure. If they find the official at fault, they award immediate compensation to the injured party, which is paid not by the official personally but out of the public treasury. They are quick to detect and to veto abuses of power by officials. In Britain and the United States, on the other hand, until a few years ago, the law generally did not impose on the government and the public treasury any responsibility for official wrongdoing. The official himself has always been liable, but a judgment against him is often worthless because he has not the financial resources to meet it.

LINKING OF JUDICIARY AND EXECUTIVE. Despite the obvious advantages in

the French system, Anglo-American opinion clings to the ideal of a judiciary completely independent of the executive and of one law for citizen and official alike. There is a profound suspicion of any judiciary closely connected with the executive and of any special law for testing the validity of governmental action. To the argument that the French administrative courts are, in fact, impartial, it is retorted that what is wanted is not merely justice now, but an assurance of justice in the future.

That assurance is thought to be lacking where the judges are part of the executive, and therefore open to executive pressure. Support for this view is to be found in the experience of Germany and Italy with dictatorship. These two countries had systems of administrative courts on the French model. As soon as the Nazis and Fascists got control of the executive in these two countries, the impartial independence of the administrative courts was overwhelmed, and they became mere tools for consolidating the power of the dictators. So, for that matter, did the French administrative courts under the Vichy regime and under German occupation.

However, Britain and the United States have now recognized the obvious justice of the French system in making the public treasury liable for wrongful acts committed by officials in the course of carrying out their duties. In 1947 and 1946, acts were passed by the British Parliament and the United States Congress, respectively, giving the right to sue the public treasury in some, but not all, of these circumstances. The official, however, remains personally liable as before, and the injured person may elect to sue him instead of, or along with, the state.

Also, as we shall see in detail later, the legislature in adding continuously to the tasks of the executive often gives special powers and privileges to particular officials, and even sets up special administrative tribunals to judge the exercise of these powers. That is to say, the unsympathetic judiciary finds the legislature cutting down materially its function of judging disputes between officials and citizens. The great enlargement of governmental activities in the last seventy years has affected even the judiciary and has made, despite the protests of the legal profession, substantial breaches in the Rule of Law as it used to be understood.

Judging Disputes. The upshot of this discussion of the functions of the judiciary is that its primary function is to judge disputes and to interpret the law as far as is necessary for that purpose. Of course, such interpretations are openly made and furnish guides to the meaning of the law for persons who find themselves in circumstances similar to those in which

judges have given decisions. The effect of judicial interpretation in a particular case goes far beyond the particular dispute. How far it goes depends on 'the law,' just as the limits of the judges' power to give interpretations have been said to depend on 'the law.' In fact, throughout this chapter, a number of conclusions have been ascribed to 'the law' and differences between different legal systems have been noted. It is necessary now to inquire what is meant by 'the law.'

THE LAW

THE ORIGIN AND NATURE OF LAW

It has been said that the function of the legislature is to make the law. In almost all countries in the world, however, there is a great deal of law in force that has never been made by a legislature. Despite their large annual turnout of legislation, present-day legislatures do no more than add to or make minor alterations in a vast body of law that is derived from other sources. Although it lacks the stamp of a legislature, this body of law regulates far more human relationships and is better observed and enforced than are the laws made by legislatures.

Non-Legislature-Made Law. We have here an element of great importance for government and politics, which is not generated by the political and governmental mechanisms we have been describing. To explain the origin and growth of law, and to define its identifying characteristics, would require a large volume; so it must suffice to give summarily some clues as to its origin and nature without attempt at precise definition. The law, in the sense of a body or system of rules, takes form through the ages just as does a language or a literature, or an art like painting or sculpture. The current generation builds on the past, rejecting parts of it while maintaining or transforming other parts of it. There is always an interaction between the tradition that is handed down and the needs and desires of the present. Just as the Greeks developed certain canons of art and literature that still command respect, and reappear again and again in many different dresses, so the Romans, for example, developed a body of legal rules, principles, and ideas that still retain authority in various guises in modern systems of law.

CUSTOM. Every civilization and every society in the course of development secrete, by a process of social chemistry which has never been fully explained, a legal system of more or less distinctiveness. It is closely akin to *custom*, which is a set of rules and practices with its roots in the past, and which is always being subtly modified and developed in the present. People living together in a society find out almost subconsciously that certain practices and patterns of behavior are a support, if not a pre-condition, of social life and that other ways of acting are detrimental to or destructive of it. In the most primitive societies, there are always numerous rules to be observed often involving elaborate and intricate ceremonies. At this stage, there may be both law and custom, but it is generally impossible to tell one from the other. Both are enforced by the threat of social ostracism, or worse, and by threats of supernatural punishments.

RELIGION. In these early stages, indeed, it is often impossible to distinguish either law or custom from religion. The priests conduct the ceremonies, interpret the customs, and maintain the authority of the taboos. Sometimes it can be said that the germ of a legal profession is to be found in the priesthood. Legal systems never break entirely free of these early associations. Even today, rules that only recently were no more than custom, now and then become recognized and enforced as rules of law. While no one is now likely to confuse the lawyer and the priest, everyone will have noted how moral and religious feeling help to maintain the authority of the criminal law. Equally, the ideas of justice and fair dealing that find expression in the rules and principles of the law have been impressed on it by moral and religious feeling and by the ethical standards that are honored in the community.

Law Distinguished from Custom and Religion. It is not easy to say at what point a system of law emerges from custom and religion. Somewhat arbitrarily, we can pick the point at which the priest, who is almost always associated with the interpretation and enforcement of rules of social behavior in primitive societies, is able to supplement the sanctions of custom and religion by calling on some reservoir of organized physical force to enforce his decrees. When this happens, we can say that the priest has become a judge and the rules that are enforced in this way are law. Customary rules are obeyed because of habit or fear of censure by one's fellows. The rules of morality are obeyed generally because of a fear of, or a respect and reverence for, divine authority. Most of the law gets support from these sources

too. Some even contend that no rule of behavior can be law unless it accords with the community's sense of what is right and fitting.

LAW DEFINED. In any event, all are agreed that what distinguishes law from custom and morality is the additional sanction of sheriffs, bailiffs, police, jails, and armed forces to be called into operation if needed to coerce the stubborn. *So law is defined as the body of rules backed by the organized force of the community.* The government controls this organized force, and thus law has in it a political element lacking in custom and morality. All three are made up of rules for controlling the behavior of men in society, but law alone conjures up the judge-interpreter, the army, and the policeman.

If this is the nature of law, the judges play a double role. They are agents of the government for determining in what circumstances organized political force is to be turned loose on individuals. They are also agents of the community, as distinct from the government, for seeing to it that disputes are settled according to law, i.e. in ways that do not outrage the community sense of right. In fact, the judges in the Anglo-American world do not think of themselves as agents of the government, but as the servants, or high-priests, of the law.

Judges as Servants of a Higher Law. They have been confirmed in this attitude by the persistence of a belief that was first articulated by the Stoic philosophers before the Christian era. As we saw in Chapter II, the Stoics believed in a law of nature, universally binding because it expressed the permanent demands of man's innermost nature. By reflecting on man's essential nature, human reason could unerringly define the right rules for regulating human relationships. Particularly in the United States, lawyers and judges have been deeply influenced by the conception of a law rooted in reason and nature which has a higher validity than the laws made by a legislature. Most of this higher law, they think, is enshrined in the Constitution of the United States, written there by men who had grasped the rational law of nature.¹³

VARIED SOURCES. This is the fundamental significance of the substantial independence that Anglo-American judges enjoy. The *law they interpret is older than the government* and gets much of its support from sources other than the government: custom, morality, reason, and nature. It is on this

¹³ See, for example, the excellent essay by Professor Edward S. Corwin, *The Higher Law Background of American Constitutional Law* (Ithaca: Cornell University Press, 1929).

ground that judges claim to decide whether or not the acts of the government and its officials are according to law. It is partly on this ground that judges in the United States have made good their power to declare laws made by legislatures void, unconstitutional, as being contrary to a higher law—the *Constitution*. It is on this ground that the judges are sometimes unsympathetic to laws made by the legislature.

Legislation as a Source of Law. However, legislatures do make law, and in ever-growing abundance. In Britain, the law made by the legislature, known as *statutory law*, overrides all other law that may be contradictory to it. Everywhere, law made by the legislature is for the purpose of changing older law in some respect. Law, like constitutions, must always be capable of change to meet changing conditions and new needs and desires. But deliberate, conscious change by legislatures is largely a modern phenomenon. Never before have legislatures undertaken to alter law as radically and as frequently as present-day legislatures do.

Before the Industrial Revolution, law, with its roots in custom, changed slowly as custom changed. Generally, this sufficed because the pace of social change that determines the need for change in the law was very slow. By processes that do not concern us here, law was adjusted almost imperceptibly, just as social change was imperceptible at any given time. But, as everyone knows, the Industrial Revolution and the continuing technological developments it set going have made more changes in the material conditions of life in two hundred years than had occurred in the previous two thousand. These economic and social transformations upset the old customary ways of life and created most of the disorder and maladjustments that legislatures are trying desperately to cure. The law handed down from the past, like the customs by which men lived, fails to maintain order and security in the rapidly changing conditions. Hence the feverish activity of legislatures, trying to patch and improvise by deliberate changes of, and additions to, the law. Most of the new governmental functions outlined in Chapter V involved substantial changes in the law. Statutes add greatly to the bulk of law to be interpreted.

Chapter XVII will explain something of the impact of legislative law-making on the inherited legal system and on the work of the judiciary. Here it is important to emphasize that there are inherited legal systems and that, despite their being outmoded in some particulars, they still are of great importance. There are numerous legal *systems*, but we need to comment on

only three of them: the *Roman* or civil-law system; the *English* or common-law system; and the new *Soviet* system. Among them, they hold sway over most of the civilized world today.

CIVIL LAW AND COMMON LAW SYSTEMS

Origin and Development of Civil Law. Civil,¹⁴ or Roman, law had its origin in the custom and religion of the tribes that founded the city of Rome. Over a period of a thousand years, the primitive tribal law of Rome was transformed by the slow piecemeal work of priests, judges, and lawyers into the law of a great empire, ruling the then civilized world. It reached its maturity before A.D. 200. When Rome fell, its law fell with it, and the barbarian tribes who overran the Empire brought their own *customary law* with them; among them were the Anglo-Saxons, who moved to Britain. By the end of the Middle Ages several systems of law, owing little to Roman law, had developed in Europe out of the customs of the barbarians, among them the English *common law*.

The Renaissance, which revived the study of ancient art and literature, also aroused great enthusiasm for Roman law, a record of which had happily been preserved. The main reason for this enthusiasm is not far to seek. The Renaissance was marked by beliefs in individualism and human rationality. The Roman jurists, who were most influential in shaping the Roman law in the stages of its highest development, were also Stoic philosophers moved by beliefs in the dignity of the individual, in the brotherhood of man, and in a universal law discoverable by reason. This, by the way, is another instance of the deep roots of the Western political tradition.

ADOPTIONS. Just as the classics became the foundation of the educational system, so Roman law was adopted in most of continental Europe as the main body of law, superseding, for most purposes, native law. In the course of time, the countries of Western Europe framed codes of laws suitable to modern conditions but based on Roman law, e.g. Napoleon's famous *codes*

¹⁴ Civil, as used here in connection with *law* or legal *systems*, must not be confused with its meaning in civil *jurisdiction* or civil *action*. As used in connection with the latter two concepts, the term *civil* refers to a case at law between private persons and/or private organizations. There, redress in a personal interest for some right or wrong is sought, such as a breach of contract, a divorce action, or a defamation of character suit against another private person. A *criminal* offense, on the other hand, is brought in the name of the government. It involves an accusation that the defendant has violated some specific prohibition contained in a law for which a penalty has been statutorily provided, such as homicide, espionage, or rape. In the present context, it is the derivation of *civil* from *civis*, meaning citizen. The Romans talked of the *jus civile*, the law applicable to a Roman citizen, whether in his public or private relationships.

in France. The modernized Roman system has been adopted in countries as different as Japan and Turkey, and, of course, it was carried to the colonies of the continental European states. Thus the Canadian province of Quebec, the American state of Louisiana, and most of Latin America have incorporated into their legal systems varying portions of Roman law.

Scotland went over to the civil law, but England did not, retaining her native system of law. This is just another aspect of the remarkable continuity of English political and social development, without revolutionary breaks with the past. English law by 1500 was more fully developed than any of the native systems of continental Europe. It had called into existence a close-knit legal profession, and at the Inns of Court in London vigorous law schools were maintained, where the native tradition was imparted to each succeeding generation of lawyers. These factors aided in resisting the appeal of the classics in the field of jurisprudence. English law made good its claim to survive and become a rival of Roman law in the modern world.

Origin and Development of Common Law. At the time of the Norman Conquest, custom ruled the land and ruled it variously in different parts of England. The administration of justice was entirely in the hands of local assemblies of neighbors who met to deal with deviations from the customary ways of behavior. The Norman kings pledged themselves to maintain the laws of Edward the Confessor. To help in maintaining order and improving their grip on the kingdom, they gradually took the administration of justice away from the local assemblies and put it into the hands of their officials.

These officials traveled up and down the country on the king's business, dealing with, among other things, disputes brought to their attention. They were often puzzled over what rules to apply to these controversies. The custom in different areas was often conflicting or divergent, and it was difficult to know what the laws of Edward the Confessor were. They did notice, however, that on many matters there was a similarity in custom across the country. They met the difficulty by resolving to apply 'the common custom of the realm.' In this way they came to talk about the *common law*—common because it was generally observed throughout the realm.

MORE THAN CUSTOM. This is the origin of the name and the system of English, or common, law. But it must not be thought that its sole content continued to be common custom. Where customs conflicted, or none could be found, the particular officials who gradually came to specialize in judging disputes relinquished to others the administrative aspects of the king's business, invented new rules, or borrowed from Roman and canon law. To

take only one example, the law of property in land came to be perhaps the most distinctive branch of the common law. It was partly based on prevailing custom, but in the main it was developed in great detail by the judges themselves with one dominant purpose in mind: to meet the needs of the feudal system which the Norman kings had brought to England and on which they had to rely for governing the country for two hundred years. The monarch was the overlord and all England was his estate. Everyone who held land held it of the monarch, directly or indirectly. The law of property comprised the rules for the orderly administration of this estate. Many other similar, if not so striking, illustrations could be given. The law is rooted in custom, but it responds through the creative work of the judiciary to the dominant needs of the time.

This law, which was first shaped for the needs of feudal England, survived into the modern world and was made over through the centuries into a system of law adequate for a great commercial and industrial civilization and a world empire. Legislation, i.e. lawmaking by a legislature, played no highly significant part in this development until the second quarter of the nineteenth century. It was the work of succeeding generations of judges who never lost touch with the past, but who also responded more or less slowly to changing needs. The common law was brought to the English colonies on the Atlantic seaboard and there adapted, first to the needs of pioneer America, and then later to the needs of industrial America. All British colonies settled by people of British origin took the common law with them, and so it spread around the world. It was not, however, generally imposed on conquered colonies settled by non-British European stock. South Africa has its Roman-Dutch law, the version of Roman law adopted in Holland, just as Quebec has a version of the French civil law.

The Changing Content of the Common Law. Law must change when new needs can no longer be denied, but its prime function in any given period is to minister to order and stability. For this purpose, the law must have a fair degree of certainty. The sense of security which is the basis of orderly life depends on knowing what others will do or can be held to do in the future. Those who plan for the future must be able to find out what the law permits and requires. As a Lord Chancellor of England has said, 'Amid the cross-currents and shifting sands of public life, the Law is like a great rock upon which a man may set his feet and be safe.'¹⁵ A law that

¹⁵ Quoted from Lord Sankey in the *Report of the Committee on Ministers' Powers* (London: His Majesty's Stationery Office, Cond. 4060, 1932), p. 6.

is always changing is uncertain and defeats its own purpose. Moreover, if it is admitted that judges can change the law, people lose confidence in it and in them. Accordingly, judges are sworn to apply the law as they find it. For the best of reasons, and with complete honesty and considerable truth, the judge insists that he does not make law but only interprets it. Nevertheless, in the course of interpreting, he sometimes does make it. Sometimes, when the United States Supreme Court is accused of 'legislating,' the charge has a modicum of truth—yet this is a very subtle and difficult problem. Mr. Justice Holmes put the matter into focus thusly: 'Judges *do and must* legislate . . . [but they] can do so only interstitially; they are confined from molar to molecular motions.'¹⁶

The explanation of the paradox of certainty and change is that judicial change in the law must be so slow as to be imperceptible, even to judges, unless they have a deep knowledge of history. It can be proved that glaciers flow although casual observers will deny it flatly. Similarly, the movement of law is by a succession of slight shifts in interpretation of some of its rules, the total effect of which will often not be noticed in one generation. As long as social change and economic change were also slow, this method of adaptation of law might suffice. But by the middle of the nineteenth century, the pace of social change was so rapid, its effects so widespread, and the clamor of new needs so insistent, that leadership in the adaptation of law was forced on elected legislatures.

PRIVATE LAW. There is no way of measuring what proportion of the law today is common law and what is statute law made by the legislature. Broadly speaking, the great bulk of *private* law, the law applicable to relationships between private citizens, is still common law, although modified here and there by statutes. This includes the law of *tort* (civil wrongs such as trespass, slander, deceit, assault, and so on); the law of personal relations, such as those between husband and wife, parent and child; and the law relating to property and contract. In Britain and the United States, it includes, in part, the criminal law, but that is increasingly becoming coded.

PUBLIC LAW. Most of the recent legislation concerns *public* law, the law applicable to relationships between government and the individual. Much of public law is still common law, but statute has added to it in recent years, giving new rights and powers to officials and creating new duties and rights for individuals vis-à-vis the government. As we have seen, the great cause of legislation is the extension of government activities. The assumption of these

¹⁶ *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1916), at 221. (Italics supplied.)

new functions always requires some adjustment of the relationship between the government and the individual.

The content of common law is an arduous study in itself and little that is useful can be said about it in a short space. But there are some general characteristics of the system that are important for a study of present-day government and which offer marked contrasts to civil law.

Contrasts between Common Law and Civil Law. The common law is unwritten law in the sense that there is nowhere to be found a compendious set of written rules which authoritatively states that law. Plenty of books have been written on all branches of common law, and they are a great assistance in finding the law. Yet none of them is in any sense binding on the courts, which must always base their decision on some earlier decision of a court, called a precedent.¹⁷

PRECEDENTS. For hundreds of years, the cases, or judicial decisions, that involved a significant interpretation of law have been collected together in hundreds of volumes, called the law reports. The report of a case contains a statement of the facts of the dispute, the judge's decision, and something of his reason for thinking that the law justified the decision. That is to say, there is in every case, explicit or implicit, a statement of the law applicable to the given facts. To find the law applicable to a dispute arising today, it may be necessary to consult five precedents, or fifty, or even more. Anyone who wishes to master the common law as a whole must master the law reports, 'this codeless myriad of precedent, this wilderness of single instances.'

There was a time when this could be done, but it is past. The accumulation of precedents is now too great. The principal stock-in-trade of the lawyer nowadays is a knowledge of how to use the numerous digests and indices available as guides to the law reports, and a technique for interpreting what he finds there. He collects the cases that are similar to the one he has in hand, noting differences and judging of their significance. He then tries to frame a general rule that will explain these cases. He works inductively from the particular to the general, and applies it to his own case. The judge does the same, remembering that precedents which bind him are decisions in the courts that stand above his court in the hierarchy. Once the highest court of appeal has ruled on a particular question, its decision is binding on itself and all lower courts, until the legislature changes the rules. This, however, is truer of Britain than the United States, where it does not necessarily follow that the *highest* court itself will always follow the rule of *stare*

¹⁷ The rule that precedent should be followed is known as *stare decisis* ('let the decision stand').

decisis. The latter is a 'principle of policy and not a *mechanical formula* of adherence to the latest decision. . . .'¹⁸ The doctrine is relatively flexible in America—and 'requires a careful weighing in each doubtful case of the advantages of adherence to precedent and the necessity for judicially planned social and economic progress to supplement legislative progress.'¹⁹

CODES. In contrast, the *civil law is written law*. It is always to be found in an authoritative code of general rules which the judge is to apply, and he is not permitted to base his decision on precedent to the neglect of the written code. This is a much neater and less cumbersome system and, on the surface, would seem to leave the layman less at the mercy of the lawyer. However, there is a somewhat esoteric technique for interpreting the provisions of the code and applying it to facts, which only trained lawyers possess. Also, despite the formal ban on precedents, the courts do develop settled practices in applying the code, which come to much the same thing. There is a large body of authoritative doctrine over and above the letter of the code.

INTERPRETATIONS. Both systems have a set of rules for interpreting the meaning of legislation enacted by the legislature. In the civil law, these are few and relatively simple. In the common law, they are much more numerous, having been developed in great detail because every decision of a court interpreting the meaning of some section of a statute is itself a precedent to be followed in later interpretation of the same section. Thus, just as the Supreme Court of the United States has expounded the meaning of the American Constitution at great length, so the Anglo-American judiciary amplifies the meaning of all statutes that come into question in cases before it. The Statute of Frauds, for example, enacted by the English Parliament in 1677, contains only a few hundred words. It now takes a substantial book to explain in detail what the courts over two hundred and fifty years have held it to mean. Almost every word in it has been given a special common-law meaning which may or may not have been present to the minds of the Parliament that enacted it. The statute has been knit into the fabric of the common law.

This is a necessary process because every piece of legislation, whether socially wise and necessary or not, is upsetting to the legal system, as a system. Like the grain of sand in the oyster, it is an irritant until it is well

¹⁸ Mr. Justice Felix Frankfurter, in *Helvering v. Hallock*, 309 U.S. 106 (1940), at 119. (Italics supplied.)

¹⁹ Robert A. Sprecher, 'The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied,' *Journal of the American Bar Association*, 31 (1945), 501-9.

overlaid with precedent. Great pearls of judicial ingenuity—not to say wisdom—are the result. The interpretation of statutes is a creative process adding much to what the legislature has said, and sometimes stultifying its purpose.

The Individualism of the Common Law. Another important characteristic of the common law is its individualism. We have already noticed the tenderness of judges to individuals and individual rights, and their fairly frequent lack of sympathy with certain types of current legislation that restrict in one way or another individual freedom of action. This attitude finds expression in many of the rules and principles of the common law. For example, there is the principle, subject to certain exceptions, that no one should be held liable to pay damages to another unless the injury complained of was due to his personal neglect or fault. To take one instance of this, an employer was not liable for injuries suffered by an employee in the course of his employment, unless they could be shown to be owing to the personal fault or carelessness of the employer. If an employee was injured owing to the fault of a fellow employee, or through his own carelessness, arising perhaps from fatigue, he had no claim on his employer. As already explained, this rule has been changed by legislation.

There are other instances. The common law has always been watchful, since Stuart times, of designs by the government against the property of the subject. Accordingly, legislation imposing taxation is always interpreted strictly, and if the intention of the legislature is not expressed in the clearest of language, the courts are likely to interpret it favorably to the taxpayer and against the government. Ingenious lawyers find loopholes, and the judges insist that it is the duty of the legislature to plug them, if they are to be plugged at all. Similarly, in legislation authorizing the government to regulate business and economic life, restriction of the freedom of businessmen to do as they like with their property is always involved, and no amount of argument on the necessity to protect the public interest will persuade the courts to uphold the actions of the government beyond what the law requires. However, many of these laws are drawn quite broadly.

THE IDEAL. It is sometimes said that the common law has no conception of the public interest but only an ideal of the protection of private rights. It would be more correct to say that the common-law conception of the public interest is the greatest possible freedom for individuals. A famous English judge once said that the highest principle of public policy is that you should

not lightly interfere with freedom of contract.²⁰ The ideal is that everyone should be free to make his own bargains and then be required, as a responsible individual, to make the best of the bad along with the good.

In short, the legal system, which adjusts itself only slowly to changing conditions, to some extent still pays homage to *laissez faire*, which has long been abandoned by public opinion and legislatures as a guide to sound public policy. In many situations, legislation now requires individuals to ensure the safety of others, quite irrespective of the issue of fault. Today's workmen's compensation laws require employers to pay into a fund that compensates injured workmen, even when the accident was the workman's own fault. When legislation provides for minimum wages and maximum hours of work, it interferes with freedom of contract. When the legislature authorizes regulation of public utility industries, it restricts rights of property and limits freedom of contract. In fact, most of the new activities of government, outlined in Chapter V, involve substantial restrictions and limitations of this character. The individualism of the common law and the collectivist measures of present-day legislatures are by no means entirely reconciled to one another.

SAFEGUARDS FOR THE ACCUSED. The temper of the common law on contests between individuals and the state comes out most clearly in criminal trials, where the judge acts, not as an agent of the government bent on getting a conviction, but as an impartial umpire trying to balance the scales of justice evenly. This is one of the consequences of the Anglo-American system of *accusatorial* judicial procedure, whereas under the Roman law system of *inquisitorial* procedure the French judge, for example, is bent upon obtaining a conviction. However, in the latter procedure much careful preliminary investigation by a professional judge, known as the *enquête*, precedes the trial—in a sense a sort of grand jury indictment. If the investigating judge (*juge d'instruction*) is unable to detect any clear evidence of apparent guilt, the case is unlikely to reach the trial stage. He operates in a system which refuses to concede to the contending parties control over the submission of evidence. Thus, in a very real sense, a criminal trial in a French court is an investigation rather than the slugging match between batteries of opposing lawyers so characteristic of courtroom procedure in England and America.

Some of the safeguards available to the accused under the Anglo-American

²⁰ Sir George Jessel, M.R., in *Printing and Numerical Registering Co. v. Sampson*, 19 Equity Cases 462 (1875), at 465.

common law system—several of which have already been discussed in connection with civil liberties in Chapter VIII—may be listed. It must be kept in mind, however, that not *all* of these safeguards necessarily or automatically accrue to the *accused* on *both* the federal and the state level of government in the United States:

1. The writ of *habeas corpus* ensures that the accused will either be tried within a limited time or released. He cannot be kept in a dungeon for years while the police torture him into confession, or wait for Providence to send further evidence against him.
2. At a reasonable time before trial, an *indictment*, or charge, must be laid against him. It must set out a specific offense, alleged to have been committed at a specific date and place. In capital 'or otherwise infamous' criminal cases in the United States, this is usually done by a *grand jury*.
3. He must have ample time to prepare his defense.
4. He is entitled to the expert assistance of a lawyer before and during the trial.
5. He must be tried in open court, normally before a jury of his peers²¹ where he confronts his judge face to face. The evidence against him must be sworn to by witnesses *viva voce* in the court, and there must be full opportunity for cross-examination—a powerful weapon in exposing falsehoods. Under certain conditions, this safeguard is tempered by governmental use of confidential data.
6. He cannot be compelled to give evidence that may tend to incriminate him. It is his own choice whether he goes into the witness box at all or not. (However, we have seen that this safeguard has been abridged in the United States in certain cases, e.g. those involving the 'national security,' wherein testimony may now be compelled under the Immunity Act of 1954 in return for immunity from prosecution or jeopardy arising out of incriminating testimony thus compelled.)
7. Any reasonable doubt that is unresolved at the conclusion of the case must tell in favor of the accused.

²¹ Space does not permit an extensive discussion of juries, that fascinating and controversial feature of judicial systems. There are various types of juries but, essentially, a jury is simply a group of people that has been assembled by a public official to answer a question. Juries originated in England about eight hundred years ago; they have been alternately praised and attacked ever since. Their use has declined somewhat in Britain and France, but they are still widely employed in the United States. This is particularly true of the *petit*, or *trial*, jury, a twelve-member body of local citizens, who presumably listen impartially to both sides of a case and, upon the conclusion of the trial, armed with the judge's *charge* to it, arrive at a verdict of conviction or acquittal. On the federal level, unanimity is always required; failure to attain it results in a *hung* jury. Some of the American states do not require a unanimous verdict, and some do not always furnish juries, especially not in civil cases.

8. He can appeal against a conviction, but the state—except in a few cases, e.g. Connecticut and Vermont—cannot appeal against an acquittal.

Of course, the habitual criminal thrives on these safeguards. But where they are absent, the contest between the individual and the state may be a very unequal one, and the government can harry its political enemies through criminal law. The contest may also be unequal in civil disputes between the government and private persons or interests, and there is something to be said for the tendency of the judges to lean in favor of the latter. The government, when it takes action in the courts in civil matters, is a resolute litigant, determined to get its pound of flesh!

Reactions against Judicial Individualism. The imperatives of public policy are always paramount, and private interests must be subordinated. The initially unsympathetic attitude of the judiciary to collectivist legislation, along with other considerations to be explained later, provoked a counter-attack by the legislatures in common-law countries. In many instances, they have taken away, or restricted, the power of the judiciary to decide disputes that involve the interpretation of such legislation. To give only one example, in Britain, and in most of the states of the United States, issues concerning a workman's right to compensation for industrial accident are no longer decided by the courts, but by an executive agency, the Workmen's Compensation Board or the Industrial Accidents Commission.

Whether the imperatives of public policy require this kind of action or whether less drastic steps would suffice is not yet settled. A great constitutional controversy has raged over the question for the last four decades in Britain and the United States, and still rages. More will be said about it in discussing the administrative process. It is raised here to show that, as in other fields of government and politics, the growth of governmental functions has had a deeply disturbing effect on the judiciary and the legal system. Under this pressure, long-established techniques for helping to ensure that government shall be servant and not master are being revised.

The characteristics of the Anglo-American judicial system that have been outlined all have an important bearing on government and politics. They make it clear that the independence of the judiciary is not adequately stated by pointing to the fact that the judges cannot be dismissed by the executive. The judges administer justice in courts that are controlled by them and not

by civil servants. The greater part of the law they interpret and apply does not depend on the legislature or executive for its authority and vitality. They are the bearers of a legal tradition that dictates impartiality in private disputes and, in disputes in which the government is concerned, an aloofness from the urgencies finding expression in legislative and executive action. The system as a whole is more concerned with the protection of private rights than with the enforcement of the public interest as conceived by the legislature. Legislatures in haste to make many far-reaching adjustments of private rights and interests often find these judicial attitudes irksome. What the outcome will be is far from clear.

JUDICIAL SELF-RESTRAINT. It should be noted, however, that judicial attitudes have shifted perceptibly toward a recognition that the legislature, which presumably expresses public opinion, must be accorded the leadership in the process of social adjustment. For some time now the English courts, in interpreting statutes, have shown more sympathy than formerly with the policy Parliament is trying to enforce. Since the 'court-packing' battle of 1937, American judges, particularly the justices of the United States Supreme Court, who can mount a heavier attack on statutes from the eminences of the Constitution, have—with some notable exceptions—more and more withheld their fire. This is true especially in the realm of economic and social legislation, but the Court has continued to give far closer scrutiny to its responsibility of saying 'no' to government in matters concerning the cultural freedoms—the Bill of Rights. Yet this attitude is not a brand-new phenomenon by any means. Throughout the years, the Supreme Court has reiterated time and again that it is not supposed to serve as a check against inept, unwise, unrepresentative, unfair, or even undemocratic legislators. Thus, Mr. Chief Justice Waite wrote almost a hundred years ago, 'for protection against abuses by legislatures, the people must resort to the polls, not to the courts.'²² Emphatically, the question is not one of wisdom and fairness, but of constitutionality! No one has stated this fact more pungently than Mr. Justice Holmes in a colloquy with the then sixty-one-year-old Mr. Justice Stone: 'Young man, about 75 years ago I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, "Goddamit, let 'em do it."'²³

²² *Munn v. Illinois*, 94 U.S. 113 (1876).

²³ As quoted by Charles P. Curtis in his *Lions Under the Throne* (Boston: Houghton Mifflin Co., 1947), p. 281.

This self-limitation is called judicial self-restraint.²⁴ It can be seen even in matters touching the freedoms of the First Amendment to the Constitution, although as we have noted, these have been sporadically viewed as preferred freedoms by varying Court majorities since the end of World War I. In general, the post-1937 Supreme Court—the ‘new’ or ‘Roosevelt’ Court—has been loath to interfere with the judgment of legislatures, state as well as federal. Since that time—as of Autumn 1963—only eight provisions of congressional enactments have been held to be *ultra vires* by the Court—all of these because they infringed personal liberties safeguarded under the Constitution²⁵—although a considerable number of state laws have been voided by it. When it can reasonably do so, the Court upholds legislative action in all but clear-cut violations of the Constitution. As we have indicated, some justices go further along this line than others—‘judges are men, not disembodied spirits,’ commented Mr. Justice Frankfurter once—and some are inclined to allow less legislative leeway in the field of freedom of speech, for example, than in that of interstate commerce. Some, as was so characteristic of Justice Frankfurter, are almost always willing to stand by the legislative judgment, no matter how repugnant it may appear to others. Thus, in his 1951 opinion, concurring with the majority of six in upholding the constitutionality of the Smith Act of 1940, he stated this oft-reiterated conviction:

Even when moving strictly within the limits of constitutional adjudication, judges are concerned with issues that may be said to involve vital finalities. The too easy transition from disapproval of what is undesirable to condemnation as unconstitutional, has led some of the wisest judges to question the wisdom of our scheme in lodging such authority in courts. But it is relevant to remind that in sustaining the power of Congress in a case like this nothing irrevocable is done. *The democratic process at all events is not impaired or restricted. Power and responsibility remain with the people and immediately with their representatives.* All the Court says is that Congress was not forbidden by the Constitution to pass this enactment. . . .²⁶

Yet in their dissenting opinions Justices Black and Douglas found that that is precisely what the Constitution does forbid!

²⁴ For an enumeration of ‘The Sixteen Great Maxims of Judicial Self-Restraint’ see Henry J. Abraham, *The Judicial Process* (New York: Oxford University Press, 1962), pp. 310–26.

²⁵ For a listing and explanation of these, see *ibid.* pp. 253–4.

²⁶ Mr. Justice Felix Frankfurter, concurring opinion, in *Dennis v. U.S.*, 341 U.S. 494 (1951). (Italics supplied.)

THE LAW AND JUDICIARY IN THE SOVIET UNION

The Soviet approach to law, although some of its branches have retained certain of the strong influences of the civil law system of bourgeois continental Europe,²⁷ is totally different than that of the Anglo-American countries. The Marxist doctrine of economic determinism recognizes law merely as a tool in the hands of the ruling class; in countries where a division of the population into economic classes still persists, the courts and the judiciary are part of the state which exists for the exploitation of the underprivileged by the ruling class. That is to say, legal systems are but reflections of the economic systems within which they operate. According to this view, law, as hitherto known, will disappear when the state withers away.

Law as Instrument of the Ruling Elite. The architects of the Soviet Union realized that a Communist society could not be set up overnight; and consequently, they designed a legal system to meet the requirements of a society in transition from a capitalist to a Communist order. The law became the instrument of the dominant class—the proletariat—in its struggle with the enemies of the new regime. Today, despite the full liquidation of the capitalist class, the regime does not yet feel secure, and law continues to be an instrument for protecting the interests of society as conceived by the ruling group—although a series of mild reforms were adopted in the mid and late 1930's and some more significant ones as recently as 1957-58, when a new penal code was instituted. In contrast to the West, therefore, Soviet law is not conceived of as being impartial and independent arbiter between individuals, and between the state and individuals, but is frankly admitted to be an instrument for supporting and strengthening Communist society. There is nothing individualistic about the Soviet system of law.

It was said in Chapter III that the Communists in the Soviet Union, at present at any rate, hold the individual in low esteem. They believe that the interests of the individual must always be subordinated to the interests of the proletariat as a whole. They believe, moreover, that the Soviet state embodies the interests of all its citizens, since all capitalists have been eliminated and the Soviet Union is an incipient classless Communist society. So when-

²⁷ See the monumental study edited by Vladimir Gsovski and Kazimierz Grzybowski, *Government, Law, and the Courts in the Soviet Union and Eastern Europe* (New York: Frederick A. Praeger, 1959), which makes this point repeatedly—while concurrently acknowledging that Soviet law is unique.

ever a clash occurs between what the individual claims as a right according to the law, and what the leaders believe to be necessary state policy, the individual's claim is sacrificed to what is held to be the interest of the collectivity, the Soviet Union. Thus, at an international conference in 1948, Andrei Vyshinsky told a Western diplomat: 'I do not accept the contention that policy ends where law begins. Law is an instrument of politics.'²⁸

In effect, then, Soviet law is little more than a tool in the hands of the leaders for enforcing conformity to the party line. There is no real separation of powers between the judiciary and the other organs of the state, and in all matters that relate to charges of political crime, the administration of justice is dominated by the group of leaders who form the summits of the party and governmental organizations.

Structure of the Soviet Courts. In conformity with the general pattern of Soviet organization, the structure of the judiciary corresponds to the general structure of the soviets described in Chapter XIII. At the base of the hierarchy of Soviet courts is the '*Comradely Court*.' These courts actually lie outside the judicial system proper and are informal meetings of citizens in factories or apartment houses convoked to settle disputes that arise among their members. There is no prosecutor or defense lawyer, and no rules of evidence are adhered to. The group concerned elects one or more 'judges,' who can reprimand the guilty parties, impose very small fines (up to ten dollars in 1963), and make certain recommendations to the authorities. He has somewhat the same functions as a justice of the peace in the Anglo-American world.

The *People's Court* is the lowest regular court. These courts have original jurisdiction in both civil and criminal cases and are organized on a district basis throughout the Soviet Union. Their judges, who are elected in the districts by universal suffrage for five-year terms, require no legal training in spite of the fact that their jurisdiction covers a wide variety of cases, from disputed alimony to murder. A single judge presides over each court but is joined by two *people's assessors*, or 'juror judges' as they are sometimes called. The people's assessors have equal powers with the judges, are elected in the same manner for two-year terms, and now sit on military as well as civilian courts. The people's courts decide the bulk of criminal and civil cases in the Soviet Union. Their judges and assessors can handle numerous and important cases without the benefit of legal training because Soviet law, unlike Anglo-American law, is not based on precedent. Each case is con-

²⁸ Quoted in George C. Guins, 'Soviet Law—Terra Incognita,' *Russian Review*, ix (1950), 17.

sidered on its own merits, and in passing judgment the judges and assessors need not consider the decisions made in earlier cases on similar facts.

Above the people's courts stand the successive tiers of the Soviet judicial structure. Each soviet appoints the judges for its respective region, territory, or area. These several courts act as courts of appeal for cases decided in the courts immediately below them in the structure, and also have original jurisdiction in the more serious civil and criminal cases, such, according to the code, as those related to 'counter-revolutionary activities, crimes against administrative orders when they involve particular danger to the state, the pillaging of socialist property, and other important economic crimes.'

Each Union Republic has a Supreme Court, whose five professional judges and the ubiquitous assessors are elected by the Supreme Soviet of the Union Republic for a term of five years. Endowed with both original and appellate jurisdiction, these courts supervise all judicial activities within their respective republics, and act as appeal courts for cases which have been decided in the courts of the tier immediately below them.

Supreme Court. The highest judicial body is the *Supreme Court of the U.S.S.R.* elected by the Supreme Soviet of the U.S.S.R. for a term of five years. The Supreme Court consists of a chairman, two deputy chairmen, nine professional judges, and twenty people's assessors. (Prior to the reforms of 1957, it had seventy-eight judges and thirty-five assessors.) It is divided into three functional divisions or *collegia*, dealing with criminal, civil, and military matters. It is 'charged with the supervision of the judicial activities of all the judicial organs of the U.S.S.R. and of the Union Republics.'²⁹ Until 1957 it was empowered to hear cases not judged by lower courts, but now it cannot hear such cases unless they have been heard below—i.e. in local courts, regional courts, and supreme courts of regional republics. It lacks the power of judicial review. The Communist party, not the Supreme Court, decides on the constitutionality of legislation or the legality of the actions of the state authorities. Nor can the Supreme Court interpret laws; this function is given by the Constitution to the Presidium of the Supreme Soviet.³⁰ Its main tasks, in addition to overseeing the judicial system of the Soviet state, are to issue general judicial rules and to act as a court of cassation in important cases.

The Procurator General. The function of supervising the lower soviet courts is shared by the Supreme Court with the Procurator General (*prokuror*) of the U.S.S.R., whose office is one of the highest in the Soviet

²⁹ Constitution of the U.S.S.R., Art. 104.

³⁰ Ibid. Art. 49 (c).

Union. (As a matter of historical interest it may be noted that the Soviet procuracy with its function of 'general administrative supervision' is not a creation of the Soviet Union but of Tsar Peter the Great in 1711! It was re-introduced by the Communists in 1922, having lain more or less dormant since 1864.) The meetings of the U.S.S.R. Supreme Court cannot be held without the presence of the Procurator General. He, and not the Supreme Court, is granted 'supreme [general administrative] supervisory power to ensure the strict observance [and execution] of the laws by all Ministries and institutions subordinated to them, as well as by officials and citizens of the U.S.S.R. generally.'³¹ Unlike the Attorney General in the United States, the only office in the Anglo-American world that can be compared at all to that of the Procurator General, he is not formally an agent of the executive power but, according to Soviet legal theory, operates independently of it. He is not appointed by the Council of Ministers but by the Supreme Soviet of the U.S.S.R., and his term of office, which is seven years, exceeds that of the Council of Ministers by three years.

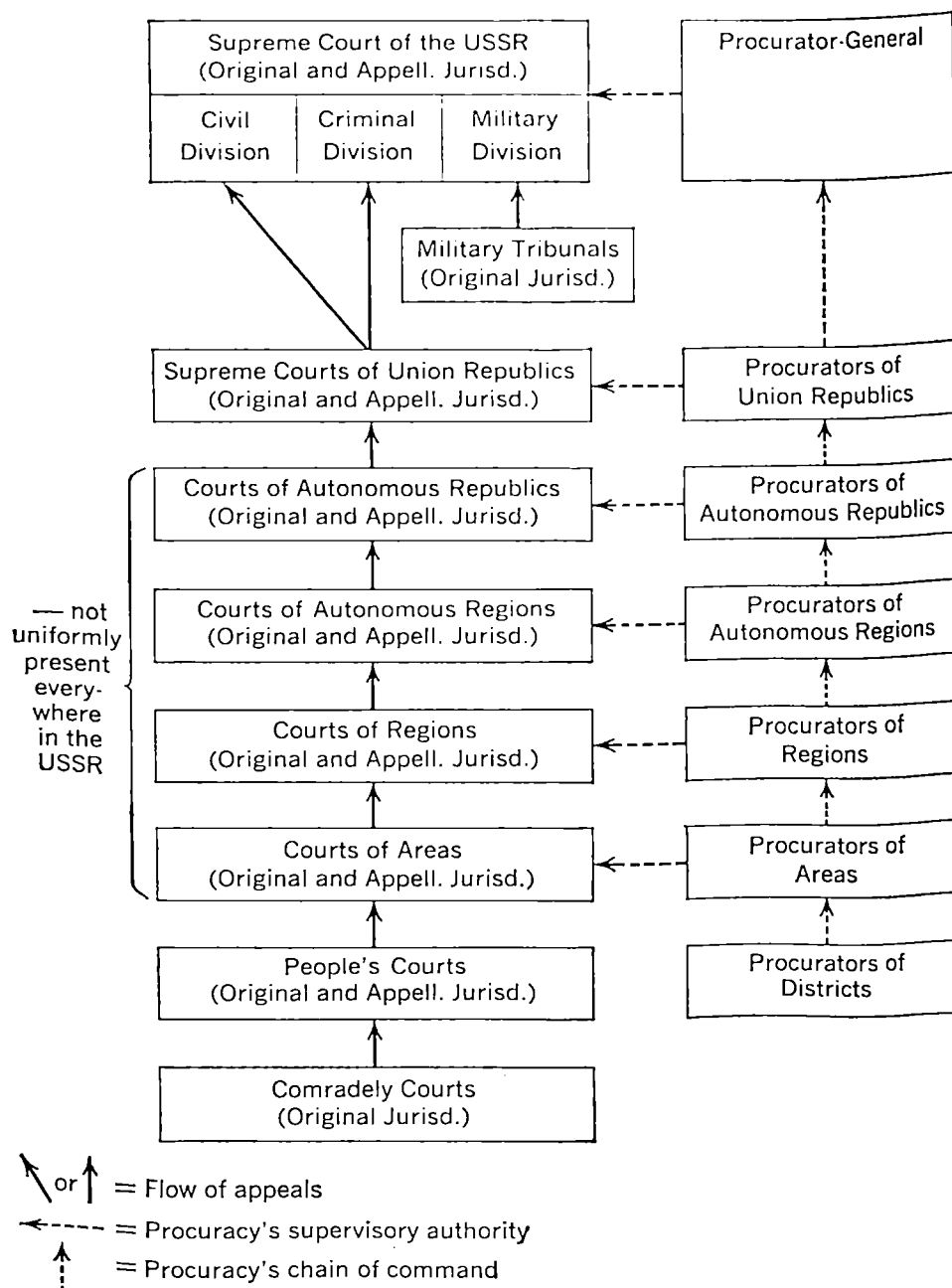
The Procurator General personally appoints a procurator, for a five-year term, as his agent at every level of the Soviet structure from the district to the Union Republic. These procurators exercise such powers and functions as are delegated to them by the Procurator General. The powers, often ill-defined, consist generally of investigating the commission of offenses, laying charges against and prosecuting offenders. It was as Procurator General that Andrei Vyshinsky conducted the famous prosecutions for treason against many Soviet leaders in the purges of 1936 and 1937. The courts are subject to extensive supervision by the Procurator General. He has power to bring to the attention of the Supreme Court lower court decisions that he deems too severe or too lenient and he may reopen a completed or closed trial by means of a device known as 'the protest' within a two-year period. If it is asked to whom the Procurator General is responsible, the answer is to the dominant leaders of the Communist party at a given time. Indeed, Vyshinsky described the Procurator General as the 'watchman of socialist legality, the leader of the policy of the Communist party and of Soviet authority, the champion of socialism,'³² and Nikita Khrushchev—although professing certain doubts about the jurisdictional limits of the procuracy—asserted that it 'must stand guard over the laws of the Soviet Union.'³³

³¹ Ibid. Art. 113.

³² *The Law of the Soviet State* (New York: The Macmillan Co., 1948), p. 537.

³³ Glenn G. Morgan, *Soviet Administrative Legality: The Role of the Attorney General's Office* (Stanford: Stanford University Press, 1962), p. 249, quoting *Izvestia* of January 25, 1958. Professor Morgan's book is a fine work devoted exclusively to the procuracy.

THE JUDICIARY AND PROCURACY OF THE USSR



RECENT CONCERN FOR 'LEGALITY.' Ever since Stalin's death in 1953, and particularly since 1955 under Khrushchev, there has been much talk in U.S.S.R. government and party circles about 'Soviet legality,' and the new law on the judiciary, enacted in 1957-58, stressed the concept of 'Soviet legality.' For example, the official newspapers, *Pravda* and *Izvestia*, have repeatedly stated that 'violations of Soviet legality' will not be tolerated. Talks by Russian leaders have professed concern for the adoption of sundry judicial safeguards. A group of Soviet legal scholars, headed by Professor M. S. Strogovich of the influential Academy of Sciences, issued a public appeal for a liberalized criminal code in 1957 which was adopted late in 1958. This concern may well have arisen out of the demand from the new middle class of bureaucrats, technicians, and factory managers for more protection from capricious arrest and punishment than they have enjoyed. The New Soviet Criminal Code provides *inter alia* a number of rights for the accused, especially during the preliminary investigation, and clearly seems to place the burden of proof on the prosecutors. However, it remains to be seen how much these—and other ³⁴—ostensible improvements will mean. It is problematical how many, if any, meaningful changes have actually been effected. At any rate, there has been no apparent move to deprive the Communist party of its ability to wield the final power in judicial matters.

Essential Functions of the Soviet Judiciary. To date, the clearest description of the functions of the judiciary in the Soviet Union is still given in a Soviet law of 1938 relating to the judiciary. It is there declared that the general purpose of the courts is 'to educate the citizens of the U.S.S.R. in a spirit of devotion to the fatherland and to the cause of Socialism, in the spirit of an exact and unfaltering performance of Soviet laws, careful attitude towards Socialist property, labor discipline, honest fulfilment of State and public duties, respect towards the rules of the Socialist Commonwealth.'³⁵ The entire emphasis is on the duties of the citizen, and the first imperative for the courts is to educate the citizen in the socialist way of life in 'Socialist legality,' as the law of 1957 stated it. Soviet jurists have often retorted that the Anglo-American judiciary has also been primarily con-

³⁴ In May 1957, the Soviet Deputy Procurator-General, P. I. Kudryavtsev, announced that the Soviet Union has released more than 70 per cent of its prisoners and eliminated two-thirds of its labor camps in Siberia in the four years since Stalin's death. (*The New York Times*, May 16, 1957.)

³⁵ Quoted in James T. Shotwell (ed.), *Governments of Continental Europe*, rev. ed. (New York: Macmillan, 1952), p. 752.

cerned with protecting a way of life, with enforcing the rule of bourgeois capitalism. There is some justice in the retort. It would be nearly accurate *if* it went further and asserted that the Anglo-American judiciary has strived *to maintain the liberal democratic way of life*, including the capitalistic economic system.

A wide sphere of individual liberty involves constant striving and competing which would be destructive of liberty if there were not clear definitions of what the individual is entitled to do, and what he must refrain from doing so as to preserve the rights of others. Accordingly, the judiciary in a liberal democratic system must put a heavy emphasis on individual rights. In a society where other values are supreme, the judiciary must defend those values. In the Soviet Union, the supreme aim is to maintain and strengthen Communist society. Both the law and the judiciary are instruments of this purpose. Their actions are co-ordinated with the Soviet and Party apparatus. Their main functions are to define the duties of the individual to Communist society and to see that he carries them out.

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XVI

The Civil Service

The threefold classification of governmental powers placed the civil service as a minor branch of the executive. This classification was worked out in a period when central governments had very few functions, and these were carried out or 'executed' by a relatively small number of officials working under close supervision of the Chief of State, or his immediate confidants and advisers. Until the end of the *laissez faire* period, those who expounded the classification were not concerned to improve the efficiency of the central government, but rather to devise effective checks on its action. Accordingly, it was rarely thought worth while to treat the civil service as a separate category or to study its distinctive organization.

Historical Background. Yet wherever a central government has established its sway over a wide territory and large population, there has always been a functioning civil service, by whatever derisive term it may have been called. History tells us much about the great ministers of state, the Cecils and the Richelieus, and the magnitude of their accomplishments. It tells us little about the instruments of their will, always a considerable body of officials. As the Norman and Angevin monarchs strengthened their grip on England, they developed an efficient civil service. Probably the actual order of events was in the reverse: as an effective civil service was developed, the monarchs improved their hold on the country. Certainly the first step was the Domesday Book of 1086, a census and a permanent record enabling William I to see

the size and character of the kingdom he had won and to devise instruments of control. The compilation could not have been made without a body of devoted servants, who at the time were still a part of the king's household staff. In this body is to be found the germ of the British civil service, and historians are only now tracing its development through many vicissitudes, but with unbroken continuity, to the present day.

IMPORTANCE OF THE CIVIL SERVICE TODAY

Historians generally concentrate on those aspects of the past that are connected with the urgencies of the age in which they live. Today, the civil service and the tasks of public administration they perform are seen to occupy a position of central importance. We have noted an enormous expansion in the activities of government, and the voluminous detailed work this involves is performed by the civil service. When governments restrict immigration, impose a tariff on imports, or establish a postal service, it is civil servants in the garb of customs and immigration officials and postmen who do the work. When it is decreed that children's allowances or old-age pensions are to be paid by the government, it takes thousands of officials to make the investigations, keep the records, pay the claims, and supervise the service. We have already seen something of the range of civil service action involved in governmental regulation of various aspects of economic life. At every turn, officials are now expected to do many things which the community wants done quickly and well. The civil service has grown enormously, and it spends or distributes a large portion of the national income. Everyone has a vital interest in what it is doing and how it does it.

The decision by the legislature that the government should undertake a particular service is only the first step. The decision to fight a war will come to nothing unless an effective organization for the purpose can be put together. Some of the laws made nowadays are left entirely to the courts to apply, but most of them, on the analogy of war, require positive action by the government. In effect, the legislature declares war on poverty, ill-health, ignorance, and social injustice as internal enemies of the social order, and it commands mobilization of the civil service to promote health, education, and economic well-being.

Importance of Administration. Whether the specific measures agreed on

are done well or ill, or at all, depends on administration, and administration is a difficult art at best. Public administration is greatly complicated in a democracy by the necessary insistence that officials should be kept under control and made responsible to the governed. As we have watched the development of government activities on a large scale, we have come to realize the vital importance of securing efficient organization of and action by the civil service, and at the same time of ensuring effective control of administration on behalf of the governed. It is not at all clear how these two objectives are to be won. This and the succeeding chapter will attempt an introduction to the problem by discussing the organization of the civil service and methods currently used for controlling it.

Size of the Civil Service. Before going on to these matters, it will be well to get some idea of the magnitudes involved. In 1840, Britain had a population of 18 millions, and the central government employed 17,000 civil servants. In 1963, the population had risen to 53 millions, and the civil service was 1.3 millions in number. In 1840, the population of the United States was 17 millions, and there were 23,000 civil servants in the employ of the federal government. By 1963, the population had risen to 185 millions, and the federal government employees numbered 2.5 millions. In 1840 France had a population of 36 millions, and there were already some 135,000 civil service employees. In 1963, France's population had increased to 46 millions, and the civil service rolls had swelled to 1.5 millions.¹

The figures for the United States do not include the very substantial numbers in the state civil services. For this and several other reasons, such as the inclusion of all public school teachers in France—who are, in fact, employees of the central government—the figures for the three countries are not truly comparable, and they are given here only to show what massive enterprises these governments are. A breakdown of the totals to indicate what these thousands are busied in doing would be significant, but it would introduce complications that would take too much time to explain. As an instance, however, it may be said that in each country about a quarter of the total are post-office employees. A relatively few great government services of this kind account for the bulk of the civil servants.

SIZE OF ADMINISTERED EXPENDITURES. Another useful index to the magnitude and importance of the civil service is the proportion of the national income

¹ In 1963 the highest ratio of *all government employees* to citizens was present in New Zealand, which had one of the former for every 25 of the latter. This compared with one for 74 in the United States and one for 102 in Britain.

administered by or distributed through the civil service. In the United States, \$90 billion passed through the hands of the federal government in 1963, or about 25 per cent of the estimated national income. In the same year, the British and French central governments handled approximately 35 and 30 per cent, respectively, of the estimated national income for that year. Here again the figures are not strictly comparable because the United States figures do not include the expenditures of state governments; this accounts in part for the lower percentage.

It should also be cautioned that no worth-while judgment about the wisdom of such expenditures can be made without careful attention to the objects on which the expenditure was made. The public gets a variety of services of great, perhaps inestimable, value in return, and only a small portion of the outlay goes to salaries and wages of civil servants. Also, a large proportion of each total consists of what are called 'transfers of income'—sums raised by taxation and distributed to the needy members of the population in the form of social services, such as unemployment aid, old-age pensions, and the like. Nevertheless, the civil service has to be relied on largely for seeing to it that government outlay of whatever kind gets the results aimed at, so there is a vital public interest in its efficiency.

New Dimensions of the Administrative. For these reasons, we must discuss the civil service almost as if it were a separate branch of government. To the legislature, judiciary, and executive we must add the administration, or administrative, as it is often called. Unlike the other three, however, it has no sphere of action in which it can count on going its own way. Formally, as was explained in Chapter XIII, it is under the direction of the executive, the cabinet or the President, and therefore is a part of the executive. In fact, it is now so vast, and its operations so extensive and complex, that neither the President nor the cabinet can give really close supervision and direction to its activities. Officials make every day a multitude of decisions that are not approved in advance by the responsible executive, and often cannot, in practice, be reversed by it. This has led some observers to say that the civil servants are the real governors of the country. One well-known comment on the French civil service is that France is not a democracy but a bureaucracy! This is the substance, such as it is, behind the cries of 'bureaucracy,' which, of course, means government by officialdom. Some attention will be given to this matter in the next chapter after the structure and characteristics of the civil service have been outlined.

STRUCTURE AND CHARACTERISTICS OF THE CIVIL SERVICE

HIERARCHICAL ORGANIZATION

Subject to minor qualifications, civil service organization is *hierarchical*. The old and familiar model to which it can be compared is military organization. At the base are the great mass of private soldiers whose duty is to obey, and at each succeeding higher level wider and wider powers of command are lodged until the commander in chief with over-all authority is reached. The civil service hierarchy can be most easily described by starting at the top and indicating descending levels of decreasing authority. At the apex stands the cabinet, the ministry, or the President; they control the civil service, but are not a part of it since their tenure is temporary and political. The service is divided into a number of departments, each headed by a member of the cabinet who is assisted by a permanent secretary (to use the British structure as an illustration). Each department is divided into a number of divisions headed by an assistant secretary, and each division into a number of sections headed by a principal. The administrative heads of the sections, divisions, and departments are assisted in their work of direction and control by a small number of secretaries and assistants known as the Cadet Corps of Assistant Principals. In the sections are the bulk of the civil servants carrying out the work of the government.

Physically, the civil servant may be located in the central departments in the capital or in one of the branch offices scattered through the country, or even in a foreign country. But wherever he is located, *he is firmly fixed somewhere in the hierarchy*. If he has subordinates, they are directly answerable to him; he in turn answers to his immediate superiors. At each level, a great many routine operations that can be performed without seeking the sanction of higher authority are carefully prescribed. Instructions, requests, or suggestions from the top are sent down the line of authority step by step, and complaints, information, and requests for instructions from the lower levels go up in the same way. One of the great sins against officialdom, just as it is in the military service, is to by-pass furtively an immediate superior in seeking the higher reaches of authority. There are sound reasons for the taboo on such action, but it is clearly one of the reasons for the ponderousness of the government machine when unprecedented situations arise.

Clear Lines of Authority and Responsibility. It is not quite inevitable that civil service organization should take this hierarchical form, but no other form has yet been discovered that fits the requirements of present-day democratic government. The civil servant exists to serve the community in the way in which the community wants to be served. It has already been argued that the only workable criterion of what the community wants is what the majority party insists on or is prepared to support. The only way of ensuring that the spirit of public policy will be made flesh among us, is to have a clear line of authority descending from the political heads of the government to the lowest civil servant. Otherwise, there is no way of galvanizing a civil servant into action at the command of the majority party. Also, it would be impossible for the public to enforce responsibility on the civil service for sins of omission or commission if a search had to be made in every case through the civil service for the particular individuals who acted or failed to act in a given situation. It can be done only if responsibility can invariably be thrown on a few identifiable persons at the top. This necessitates a line of responsibility from the lowest civil servant to the top. Command downward and responsibility upward is the essence of hierarchy. So is loyalty, flowing in *both* directions.

These considerations do not, of themselves, necessitate the interposition of several levels of authority between the mass of civil servants, who do the work, and the head of the department at the top. But other factors do make it necessary. Many of the operations of the civil service are performed at great distance from the capital—fully one-half of the French civil servants, for example, are engaged in local government—and it is physically impossible to consult the minister on every problem of decision that arises locally. More important, each department of government employs hundreds or thousands of civil servants, and it is just as impossible for the secretary at the head of the department to supervise personally the activities of each as it is for the general to command each regiment, company, and platoon in detail. There must be several ascending levels of authority, at each one of which certain problems of discipline and direction arising from below are drawn off and decided, so as to ensure that only the large and vital questions reach the desks of the busy secretary and his immediate aids. In short, much of the work of administration has to be decentralized if it is to be done with any efficiency.

Specialization of Function. Dividing the civil service into departments is partly for the purpose of decentralizing the bulk of decisions that have to

be made in running any large organization. It is also for the sake of getting the advantages of specialization, which are vital for the success of any large organization. The clerks in a country general store are generally able to serve at any counter. But the great merchandising units of the large cities are department stores with at least a separate sales staff for each department. In the same way, governments find it necessary to set up separate departments to specialize in the regulation of transport, commerce, and labor matters, in supplying services to agriculture and to war veterans, in supervising public health, education, and so on. Yet these departments cannot be water-tight compartments. The department of education is always having to concern itself with questions of the health of children; the regulation of transport is always raising questions that affect labor and agriculture; and the supplying of services to agriculture bristles with problems of education.

The Problem of Co-ordination. No matter how the work is divided, the work of each department impinges on several other departments. The same is true of the division of work within the divisions and sections of each department. So a great part of the work of heads of sections, divisions, and departments is the co-ordination or integration of the several work units under their control. And perhaps the most vital part of the work of the executive, be he President or cabinet, is the co-ordinating of the work of the separate departments of the governments. The more the advantages of specialization are sought, the more pressing become the task of integration, the settling of disputes between departments, and ensuring that they do not frustrate one another by working at cross-purposes. The hierarchical organization gives the unity of ultimate command necessary for this purpose.

The same problem exists in corporate private enterprise where frequently the work of tens of thousands of employees has to be organized and directed. Although the problems of large-scale public and private enterprise are by no means identical, students of the vitally important art of management are reaching in the study of one kind of enterprise conclusions that can be applied to the other.

PROBLEMS OF SIZE. Unity of command alone does not ensure co-ordination. It is fair to contend that there is a strict limit to the number of departments a chief executive can co-ordinate. Some experts even place a number, such as ten, fifteen, or twenty, on it. The reason is that the number of inter-relationships increases with the number of departments by geometric progression and soon become too numerous for the mind to grasp. Therefore, the administrative answer to continually increasing activities of government

is bigger departments with more levels of decentralization within each of them rather than more departments. Co-ordination can only be maintained by increasing the distance from the apex to the base, thus slowing action and decision still more. This implies that there may be a point at which colossal, highly centralized organization breaks down. Certainly present-day governmental organization makes very heavy demands on administrative skill and ingenuity.

One of the devices for co-ordination is to have one or more departments whose main functions are to control and co-ordinate certain aspects of internal management of all other departments. The chief of staff of an army is supported by a staff that is engaged in thinking and planning rather than in active field command. Government also has agencies for this purpose. The most obvious of these is the treasury, or department of finance. We have already seen how this department, through its control over departmental estimates and its power of audit of expenditures, maintains a powerful check on other departments. Sometimes, the treasury, as in Britain, has control over personnel also, thus becoming an efficiency expert for the chief executive and performing for him a great many of the tasks of co-ordination. Other aspects of departmental housekeeping may be similarly centralized.

Such devices make organization still more complex. They are an aid to efficiency and co-ordination only if the administrative skill necessary to operate them is available. For example, a staff agency for planning and co-ordinating the work of the various departments may be attached to the President or cabinet. Rivalry commonly develops between the civil service heads of departments and the staff agency about *who* is to have the ear of the executive in decisions affecting a particular department, and the department may find a major interest in sabotaging the proposals of the staff agency. Administration may be made worse rather than better by this refinement. For instance, there were numerous conflicts of this order between members of President Roosevelt's 'brain trust' and the 'personal staffs' of Presidents Eisenhower and Kennedy and the administrators in the departments.

THE LINKING OF POLITICS AND ADMINISTRATION

In Britain. It would merely be confusing to try to describe and contrast in a brief space the administrative structure of the three governments. It is necessary, however, to see at this stage how the political and administrative are linked together. In the course of this exposition, some concrete indica-

tions of the structure may be given. In Britain, the *cabinet* is the link. It is the agency of final co-ordination, and unity of command is ensured by the conventions of unanimity and collective responsibility. The British administration is divided into about thirty-five departments, each headed by a minister. Roughly half of these ministers are not of cabinet rank.

Directly under the minister is a senior civil servant who is the minister's deputy, performing for him most of the work of administering the department. He is appropriately called the permanent secretary of the department because his post, acquired by promotion within the civil service, gives him security of tenure. Many of the notable accomplishments of British administration are largely due to the teamwork of the amateur minister and his *parliamentary secretary* (described earlier)—who are, after all, politicians and not administrators—and the expert permanent civil servant in the direction of the department. It is through their collaboration that public policy as indicated by elections and party majorities is reconciled with what is administratively possible or inevitable.

ADMINISTRATIVE CLASS. The department is divided into divisions, and divisions are sub-divided into sections, each headed by *permanent* civil servants—assistant secretaries and principals, respectively. These and their secretaries and immediate assistants, and the permanent secretary and his assistants, form what is known in Britain as the *administrative class* of civil servants. They are occupied not in performing the services that their department provides for the public, but in administering the departments. They see to it that legislation and other political decisions that come down from above are turned into action. Whether or not the department is an effective working unit depends on the quality of the direction they give. They funnel up to the cabinet all those problems of administration that have political implications, whether they are internal problems of administration or concern the relation of the department to the public. These problems are not sent up in the raw form in which they arise. It is the function of the administrative class to collect all the available data that may bear on the decision in the direction of the department, to submit memoranda outlining the alternative courses open, and to explain in detail what the consequences of the alternative choices are likely to be.

The minister and the cabinet, who are always having to decide grave questions about people they have never seen and about situations they have never examined at first hand, rely on the administrative class to supply them with every fact and argument that may have a bearing on the decision,

except, of course, political expediency, in which they themselves are the experts. This circulation up and down through the administrative class sets the tone and temper of the department, determining whether its performance will be mediocre or distinguished. When we come to consider the methods of recruiting civil servants, special attention will have to be given to the selection of the administrative class—a small, highly qualified, dedicated group.

In the United States. The President stands at the apex of authority and responsibility. The members of his cabinet are his subordinates for controlling the departments and keeping him in touch with administration. With the exception of the Postmaster General and the Attorney General, members of the cabinet carry the title of Secretary. Each is the political head of one of the ten executive departments. In addition, there are some forty-five other executive agencies outside the departments, which are neither under the supervision of any member of the cabinet nor under the direct control of the President. Most of these agencies have developed since the turn of the century as a direct consequence of the rapid growth of the activities of the federal government. For example, depression in the 1930's and war in the 1940's each brought a great expansion in the activities of the federal government and a new rash of these more or less independent executive agencies. Indeed, at the peak of World War II, they totaled almost a hundred. The dismantling of the war organization and executive reorganization have reduced them to their present number.

INDEPENDENT AGENCIES. The character of these executive agencies, the purposes for which they were created, their rise and fall, and their permutations and combinations are a distinct province of knowledge. Generally speaking, most of them have arisen as a result of the rapid expansion of activities of the federal government over the last seventy years. The Interstate Commerce Commission and the Federal Trade Commission, briefly noticed in Chapter V, now have a long history—close to eighty and fifty years, respectively—as agencies for regulating certain aspects of economic life. Others, such as the Securities and Exchange Commission and the National Labor Relations Board, were established for similar purposes in the economic confusion of the 1930's. Again others, like the now defunct Reconstruction Finance Corporation, and those now drawn together under the Federal Housing and Home Finance Agency, were creations of the depression period to provide services for certain groups in the community rather than to apply coercive regulation. Others of earlier creation are the

Bureau of the Budget and the Civil Service Commission, set up to assist in the internal housekeeping of the national administration. After World War II, the Atomic Energy Commission and the Economic Co-operation Administration were created to deal with urgent post-war problems affecting the security of the United States. These are merely illustrations to show the range and importance of independent agencies.

In the next chapter, attention will be drawn to some of the reasons which were thought to justify giving these agencies independent status outside the regular departments. Meanwhile, it should be noted that in recent years there has been much severe criticism, however varied, of the wisdom of maintaining this welter of independent executive agencies. Their conduct of administration often has been unsatisfactory. Their conceptions of their particular functions often have been out of harmony with the general policies the President as the responsible chief executive is trying to enforce. The President has not had the power to direct co-ordinating control of them, with the result a lack of consistency even to the point of cross-purposes in the administration as a whole. Moreover, even if he had such power as a matter of law, expert judgment is unanimous in saying that the co-ordination of the work of the ten departments and the many executive agencies would be an impossible burden on the President.

REORGANIZATION. Separate official investigating bodies, e.g. the President's Committee on Administrative Management in 1937, the two Hoover Commissions on Organization of the Executive Branch of Government in 1949 and 1955, and others repeatedly since, have recommended a sharp reduction in the number of independent agencies. In pursuance of some of these recommendations, several successive *Reorganization Acts* were passed by Congress after 1933, the most recent one in 1963, giving the President power to reduce, consolidate, and reorganize most, but not all, of the numerous executive agencies, subject to a variety of resolutions of disapproval by Congress. Considerable executive reorganization has already been accomplished under these Acts—70 per cent of the recommendations of the first Hoover Commission had been adopted by the end of 1957. Further reduction of the number of independent agencies may be hoped for, but it is not certain. Many of these agencies—the Interstate Commerce Commission, for example—have proved to be all but politically 'untouchable.'

DEPARTMENTAL STRUCTURE. To return to the internal structure of the ten regular departments, none of them has an official corresponding to the permanent secretary in Britain. There is no administrative chief of the

department linking it as a whole to the political head. In almost all departments, there is an undersecretary, acting as a deputy for the secretary, and also several assistant secretaries, all political and temporary, almost certain to go when the secretary goes. Each department is divided and subdivided in a way difficult to describe because there are no standardized terms of description—despite repeated recommendations to that end by the Hoover Commissions. But each department is divided into bureaus, offices, or services—corresponding to the British division—and each of these is headed by a bureau chief, or director, under the surveillance of an assistant secretary. As a rule, each assistant secretary gives some over-all supervision to several bureaus or offices within the department.

The bureaus are divided into divisions—corresponding to the British sections—and headed by assistant bureau chiefs. In some departments, these divisions are still further divided into branches, and the branches into sections. Similar division and subdivision are found within the larger of the independent executive agencies. The bureau chiefs, assistant bureau chiefs, and their immediate assistants are the key administrators. With ever lessening exceptions, these are career civil servants who survive changes of government.

This structure as described does not provide adequately for departmental integration and, in recognition of this in recent years, the secretaries of the departments have been surrounding themselves with assistants who help them in planning and co-ordinating the work of the department, and one of whom often acts as its 'general manager,' with most of the duties, but not the acknowledged position, of the permanent secretary in British departments. Administrative-political collaboration goes on at the bureau level between the bureau chief and the assistant secretary, and also at the top between the secretary of the department and his acting 'general manager.'

In France. While the members of the Council of Ministers determine the over-all administrative policy and must assume the responsibility for it, the permanent civil servants—the *fonctionnaires*—constitute an integral and powerful component of French administration. Their strong position has always been largely attributable to their permanence in office. Prior to the days of the Fifth Republic, ministries came and went at an average of two per year, but the *fonctionnaires* continued their tasks unmoved by, if not oblivious to, the changes at the top of the political structure. Under de Gaulle, who drew the most important ministers from the ranks of the higher civil servants because he mistrusted 'politicians,' the *fonctionnaires*

were provided not only with a stable, centralized executive authority but also with welcome direction and co-ordination. This has not, however, served to diminish their importance, and it still remains true that to a greater degree than in Britain, and to a *much* greater degree than in the United States, the French permanent civil servant influences and makes policy.

MINISTERIAL STRUCTURE. A minister, the political chief, heads each of the roughly twenty-five departments of the French executive branch. The departments are organized along strictly hierarchical lines. Each *minister* surrounds himself with a more or less personal *cabinet* of appointees and an *undersecretary*, who is either a political ally or a *civil administrator*, i.e. a member of the highest level of the French civil service on leave of absence. Each ministerial department is sub-divided into *services*, *bureaus*, and *sections*, each headed by chiefs and staffed by civil servants of definite classification and rank. The vast majority of these civil servants hold permanent appointments, based upon special schooling or competitive examinations, to be described subsequently.

CLOSE LINK TO PARLIAMENT. As already indicated, the instability of French cabinets of the past and the frequent interdepartmental shifting of ministers served to emphasize and perpetuate the power, prestige, and influence of the *fonctionnaires*—a situation which has not been changed by the stable Fifth Republic. Moreover, since French civil servants are not expected to embody the strict political neutrality of the British, or even the less pervasive neutrality of the American civil servants, a link may exist between many members of the French Parliament and the civil servants. Indeed, deputies may be civil servants 'on leave'—a permissible practice under French law even in the Fifth Republic—and subsequently return to their position in the executive branch! On the other hand, the drastic decline of legislative power under the de Gaulle Constitution has robbed parliamentary membership of much of its erstwhile attractiveness. But it remains true that more than any other democratic civil servant the French *fonctionnaire* bridges politics and administration.

COMMON FEATURES OF CIVIL SERVICES

With this brief glance at the hierarchical structure, and what it involves, it should be possible to understand some of the characteristics of a civil service, or, to use the terminology of contempt, a bureaucracy. The features

to be considered appear in more or less exaggerated form in every large-scale organization where many persons work together to make a common product, or to achieve a common result, in which the contribution of each is not easily, if at all, distinguishable. They appear in large industrial and commercial corporations, and also in the bureaucracies of the dictatorships. Those selected for discussion are found in more marked degree perhaps in the civil services of democratic states than anywhere else.

That they are so found is mainly because of the fact that the civil service in a democracy works under very peculiar conditions. The control exercised over it from the top is both more lax and more severe than in other bureaucracies. Because of conflicting and unreconciled interests in the electorate, in the legislature, and in the political parties, direction of the civil service is often vacillating and lacking in vigor. Many groups think it better to let sleeping dogs lie and do not want to rouse the civil service into unwonted activity. There are always influences tending to let the civil service go slack. On the other hand, because the civil service deals so much with the private interests of groups and individuals whose rights must be respected to the letter, except in so far as legislation authorizes interference, there is very rigid control of the actions of the service from the top. There is more reliance on the bit and the tight rein than on the spur. The sphere in which the civil service is free to act imaginatively and to explore the way to new pinnacles of achievement is very small, although this is probably less true of the French civil service for reasons indicated above.

No Objective Test of Efficiency. One characteristic has important consequences in all directions. Government usually has an unchallenged monopoly of the activities it carries on. This is obvious in the case of the postal services, but no less true in most other things. Government is mainly occupied in doing the things that it has been decided, rightly or wrongly, we will not or cannot do effectively for ourselves, either individually or by voluntary co-operation. This is just as true of the regulation of business as it is of the provision of social security.

The existence of a monopoly means that there is no direct and automatic test of efficiency. Postal rates may be too high, but it cannot be proved by pointing to a competitor who provides the same service at lower rates. Those who are convinced they are being overcharged cannot bring the government to terms by transferring their account to a competitor. Government never has to face the hard choice of increasing the efficiency of its staff or going out of business because more efficient producers are underselling it on the

market. As a result, government is sometimes viewed as an easy-going employer, satisfied with short hours, a modest pace of work, and easy discipline. Some civil servants may be dismissed for overt or covert political activity, or for certain other reasons, to be described presently, but rarely for slackness or incompetence. (Of course, the same may today be said for certain areas of private employment.)

In time of war, however, the relative calm of the civil service gives way to bustle and feverish activity. Those at the top drive harder because they have a goal that challenges all their powers. Conflicts of interest within the community are set aside while the one supreme aim is being pursued. Also many, if not all, civil servants find an incentive that is sometimes lacking in peace. Where the individual applies himself to a task he has set himself and masters it, there is a savor both to the challenge and the accomplishment. In any large organization, by contrast, it is extremely difficult for any one person in it to grasp the objectives at which the organization is aiming, or to see the relation of his duties to that objective. Moreover, we have seen that it is hard to get agreed definitions of the public interest, and civil servants are sometimes lukewarm about the goals at which they are expected to be aiming. Powerful incentives for the rank and file in a large organization are hard to find. Where the public interest can be objectified in the winning of a war, the difficulty is in part overcome. Democracies have not yet found how to give a comparable crystallization of the public interest in time of peace. This helps to explain the frequent criticism that the rank and file of the civil service is stolid, unimaginative, and lackadaisical. The rank and file lack a sense of mission.

Impersonal Character. Another feature of large organization is its impersonal character. The owner and operator of the country store comes into direct contact every day with his customers and employees. This is not true either of the manager of the department store or of the Postmaster General. When a service is on a mass-production basis, it must be conducted on the assembly-line principle, relying to a great extent on highly standardized and invariable procedures. In addition, those in control in central governments rarely see the persons or situations on which they may have to give final decisions. There are generally several levels of authority between those who make final decisions and those who carry them out.

So the private citizen cannot see those who finally decide unless he can invoke political influence, and the civil servants whom he can see, and with whom he has to deal, are obliged to treat him distantly and imper-

sonally. They cannot respond to individual cases and appeals as their instinct or reason suggests. They are acting under precise orders or under rules that limit their authority. The relation of the civil servant to his immediate superiors is also impersonal, because they too are not free agents but must answer to those above them.

PAPER WORK. The best index to the impersonal quality of civil service relationships is the pervasiveness of paper work. The standardized procedures by which departments are run, the rules and regulations which are at once the guide and protection of all subordinates, are only the beginning of the written work. All significant decisions made and actions taken are recorded as permanent evidence of what has been done, and as a guide for the future. Much of the discussion within a department as to what can or ought to be done goes on paper. The complaints, suggestions, and requests for instructions made by subordinates are recorded. If their immediate superior thinks he cannot or should not deal with the issue raised, he records his views and sends the file on. Like a snowball, it picks up comments, suggestions, queries as it moves along.

Busy heads of departments have not time to go through all this information, and they may require an assistant to prepare a *précis* or a memorandum on it. At any stage, the responsible official to whose desk a matter has come may think more information is needed, and someone is detailed to collect it and to comment on what he finds—more material added to a growing file. In the same way, complaints from aggrieved members of the public or questions raised in the legislature set going the procession of files from one desk to another. Most of the administrators deal far more with papers than with persons or concrete situations. There is constant danger that they will identify reality with what they see, that they will regard this paper world as the real world and keeping their desks clean as the acme of accomplishment.

Impersonality and paper work are characteristic of large organization in general. Governments that are strictly responsible to the governed suffer from them in a marked degree. They are expected to act and act vigorously in many matters. It is also insisted that they should do what is right and shun injustice and wrongdoing. It is not easy to combine these virtues because such governments always act under limited authority. Beyond the margins of that authority, they come at once into collision with the vested rights and interests of individuals and groups.

Reliance on Rules and Precedents. Even where they have clear discretionary

power, there is an insistent demand that they act justly. In the public mind, justice means, among other things, equality of treatment. There is not necessarily a great outcry when a merchant treats one customer differently from another. But if one recipient of unemployment relief or an old-age pension is treated differently from another, the government is likely to be called upon to justify it. A fierce light beats on constitutional governments as well as on thrones. Under the cabinet system, at any rate, political responsibility is concentrated on the political heads of the civil service, and they know that careless action may cost them dearly at the next election.

They therefore tend to limit very narrowly what can be done by their subordinates on their own discretion, and to insist that doubtful matters shall be referred to superiors for decision. They likewise tend to insist that where a discretionary power is to be exercised, the past practice should be consulted to see what has been done in similar cases, and that doubts about whether the past practice covers the present circumstances should also be referred to superiors. The civil servant at the lower levels of authority, however, who deals with living persons and concrete situations, is immersed in rules, precedents, and instructions. It requires great circumspection to obey them all, and his caution may make him almost immobile. It is not easy to see how else he can keep out of trouble with his superiors, or the political heads can know what is being done in their names in distant places. The civil servant who will not stay in the rut of routine lives dangerously. In the rut, there is safety and peace.

Red Tape. There is no need to search further for the explanation of 'red tape.' The term originally gained currency through the fact that the British government departments tied up their files with a red binding tape. It is now used as a compendious description of the way these files are built up. To the citizen, red tape means the perverse insistence on the letter of rules and regulations, the completion of inquisitive forms and seemingly irrelevant questionnaires, the non-committal and evasive letters of civil servants relying on the security of their routine, the 'passing of the buck' to superiors and to other bureaus and other departments. It is infuriating to all who suffer delay or denial in their urgent affairs. In its more extreme forms, it is due to faulty or inefficient organization, or to the stupidity or unnecessary timidity of officials, and therefore can be cured.

But for much of the red tape there is good and sufficient reason not apparent on the surface. It is the necessary concomitant of large organization and constitutional government. Large organization demands departmentalized division of labor, standardized procedures, and routine. Constitutional

government demands hierarchical structure with its concentration of authority and responsibility, and extreme caution in exploring the boundary between public duty and private right.

Classification of Personnel. Another common feature of large organization is standardized procedures for dealing with personnel. This is really an aspect of the impersonality already noted, but it deserves separate comment. Effective financial control requires standardization. Financial control has to be worked through a budget of expenditures prepared in advance and adhered to in execution. Budgeting is not possible if each head of a department is free to make what bargains he likes with his subordinates about pay. The only way to prevent this and to stick to a budget is to *classify* all the positions in the department and assign a fixed rate of pay for each class.

There is another imperative reason for classification. It has already been pointed out that, in a large organization, there is no indisputable criterion of what the services of particular persons are worth. So the employee who works in a niche, unseen by the heads of the department, has no effective way of bringing his worth forcibly to the attention of his superiors, and no assurance that favoritism among his superiors will not prefer the less deserving in matters of pay and promotion. While he cannot be assured of exact justice, he can be protected against the grosser kinds of injustice, and his morale consequently strengthened, by a classification of the positions in the entire service to the end that there should be no discrimination between employees in the same class—that there should be equal pay for equal work.

There is, of course, plenty of heartache in any classification that seeks to reduce tens of thousands of positions to a relatively small number of categories, because few positions can be exactly equated. Some measure of rough justice can be had by careful allotting of similar jobs to one class, assigning to each class a scale of pay and increases, and fixing the terms of promotion, transfer, vacation, and retirement allowances, if any. Some measure of equity in these matters is a necessity. Most civil servants get little chance for self-expression and little of the satisfaction of personal achievement in their work. The most concrete of the substitutes open to them are pay increases, promotions, and other perquisites. Their concern with equity on such points may become an obsession and have a most serious effect on the *esprit de corps* of the organization.² The proof of these assertions is to

² The discussion above of common features of civil services relies heavily on Herman Finer, *The Theory and Practice of Modern Government*, rev. ed. (New York: Holt, 1949), ch. xxvii.

be found in the importance now attached by large enterprises, whether public or private, to the growing art of personnel management.

CLASSIFICATION, TENURE, AND RECRUITMENT OF THE CIVIL SERVICE

Classification of a civil service is important for still another reason. It is a prerequisite to recruiting the civil service by any other method than political patronage and spoils, a condition of selecting the man for the job instead of the job for the man. If posts are to be filled by merit rather than by political preferment, it is necessary to know what kind of merit is required. Positions must be classified according to the general nature of the work done, and to the qualifications necessary for doing it, so as to arrive at methods of testing the fitness of applicants. This brings up one of the large issues of democratic government, the method of recruiting the civil service. We have seen that large organization, and particularly a civil service, has a number of peculiar characteristics. All these create serious problems of securing and maintaining efficiency. The first step in meeting these problems is to secure a high quality of the personnel. There are also important principles of organization and administration to be observed, but these cannot make the service better than the personnel of which it is composed.

Fivefold Classification. Before turning to methods of recruitment in Britain, the United States, and France, something should be said generally about classifications. In each country, there are hundreds of classes of positions and the plans on which they are based vary considerably. Yet from the point of view of the kind of work performed rather than of the precise range of duties in each case, a civil service can be divided into *five quite distinct grades or classes*. It is useful for preliminary appreciation of the make-up of a civil service to set them out:

1. *Administrative*—the work of general management such as organizing, directing, planning, and co-ordinating.
2. *Professional*—the class of experts such as doctors, lawyers, economists, entomologists, engineers, and a whole range of scientists concerned with public health, fisheries, forestry, agriculture, and the like.
3. *Clerical*—all the office workers who, working under supervision, are engaged in the voluminous paper work of the government, including

the immediate supervisors concerned with the detail of office management.

4. *Skilled industrial workers*—engaged in maintenance, printing, and government enterprises such as the mint and the arsenals.
5. *Unskilled workers*—employed on various tasks at roughly the level of skill of day labor.

There are a number of civil servants whom it would be difficult to fit into any of these classes, but they are only a small fraction of the total.

Defects of Recruitment by Party Patronage. In 1850, when *laissez faire* was at its peak, civil services were the playthings of politics. With the exception of Prussia, which had had for a long time a career service recruited by merit and enjoying security of tenure, those who controlled the governments in most Western countries disposed of civil servants and their posts as they saw fit. Democracy inherited rather than invented political patronage. The favorites of monarchs and ruling cliques were succeeded in government posts by the favorites of politicians. Although the United States for a time rivaled the excesses of the older regimes, the significant fact is that civil service reform almost everywhere has been carried through under democratic auspices. The zeal of reformers has found enough support in public opinion to make steady advances in the methods of recruiting for the public service.

At the same time, the changing role of government has played an important part. As long as central governments did little but maintain internal order and security from foreign aggression, there was no urgent need for a highly efficient civil service. When governments undertook to regulate many aspects of social and economic life, and to provide a wide variety of essential services, the tasks to be performed became too complex and too important to be left in the hands of a civil service haphazardly recruited by patronage. In 1855, when civil service reform began in Britain, it had already been recognized that the central government had to do something about the social confusion caused by the Industrial Revolution. The first legislation in the United States came as a result of the assassination of President Garfield by a disappointed office-seeker in 1881, when Congress, urged on by President Arthur, passed the Pendleton Act of 1883. It established a Civil Service Commission of three members and provided for open competitive examinations, forbidding discrimination for political reasons.

Extensions of the merit system have, on the whole, kept pace with the expansion of activities of government. Government's role of regulator and

dispenser of services began later, and for a considerable time developed more slowly in the United States and France than in Britain. Broadly speaking then, civil service reform has followed closely the growing importance of government in the everyday life of the community. In France, on the other hand, no comprehensive civil service law was passed until 1945-46. However, reform-movements had begun to take place as long ago as the days of Napoleon Bonaparte, and many series of orders and decrees, handed down by cabinets and individual ministers, helped to bring about an early, though piecemeal, merit system.

As long as the spoils of office went to the victor in the last election, it was difficult to attract competent persons to temporary insecure service with the government. Even if able men did come to it by chance, a reversal of party fortunes in a few years often put them out just as they were mastering their jobs. *Esprit de corps*, the indispensable condition of efficiency in a large organization, could not be had in these circumstances. Moreover, party politicians had not the necessary techniques, even if they had had the will to select the many kinds of expert and highly specialized talent that governmental activities now require. Without some recognition of the merit principle, governments could not do the things they do today. This consideration brings us to the important matter of the civil servant's tenure of office.

Tenure of Office. Without security of tenure, the merit system of appointment would mean practically nothing. Consequently, while dismissal is possible, of course, for certain specified reasons, such as malfeasance in office, serious misconduct or unauthorized political activity—although, as we shall presently see, the latter category does not entirely apply to France—the merit-appointed civil servant enjoys what is, in effect, life tenure. Government administrators frequently feel hampered and frustrated because of the barriers to dismissal, but they must face the fact that secure tenure is one of the more attractive compensations of government employment. Actually, there are several ways and means of bringing pressure to bear on an 'undesirable' employee—for example, transferring him to another position. But the requirements, in all three countries, that the employee be supplied with some sort of a written notice of charges and given an opportunity for a hearing before some kind of review board or commission, serve as effective checks against wrongful suspension or dismissal.

LOYALTY AND SECURITY. About 1940, however, a new and vexatious issue arose in the realm of dismissal of civil servants, namely what to do about

government employees who were allegedly 'disloyal' or 'security risks.' Rightly or wrongly, the problem has been of particular concern to the United States, where it reached a peak in the years following World War II. The French initially viewed the matter as merely a passing phase, exaggerated out of all proportion by the Americans for domestic political reasons; consequently, they generally chose to ignore it more or less until the days of the Algerian crisis during the de Gaulle regime, when widespread attempts at subversion, chiefly led by adherents to the armed forces, also brushed members of the civil service. The British, with considerable distaste, began to show concern as a result of the revelations of defections to the Soviet Union, early in the 1950's, by some highly placed civil servants heretofore thought thoroughly loyal. A security program was then instituted, but it is one heavily weighted on the side of protecting the individual, and it has been carried out with great circumspection and without any fanfare or publicity.

Even before the entry of the United States into World War II, a series of statutes and executive decrees called for the exclusion of Communists, Nazis, and Fascists from government employment. Until approximately 1947, this took chiefly the form of 'security checks' by the Federal Bureau of Investigation of prospective civil servants. Anyone whose 'loyalty' was deemed to be open to a 'reasonable doubt' by the personnel officer of the hiring agency was removed from the list of eligibles. Moreover, from 1942 on the heads of certain 'sensitive' executive departments and agencies were authorized to dismiss summarily any employee whose dismissal was deemed by the former to be 'warranted by the demands of national security.'

Early in 1947, the intensification of the 'cold war,' a growing congressional pre-occupation with the whole issue of 'loyalty,' and an increasing national concern about internal security—based partly upon several well-publicized instances of past or present pro-Communist activities by some government employees—combined to cause President Truman to issue a 'loyalty order.' This order, which culminated in an intensive loyalty investigation of *all* government employees, provided for the removal from employment of, and the refusal of employment to, a particular person if 'on all the evidence, *reasonable grounds* exist for belief that the person involved is disloyal.' This terminology was made more rigid in 1951 by changing 'reasonable grounds' to *reasonable doubt*.³ It was rendered still more rigid by an executive order

³ Seth Richardson, then Chairman of the Loyalty Review Board (established under the security program), commented that the purpose of this change in the standard was to *lessen* the degree of proof; it is easier to justify a doubt than to support a positive finding. ('The Federal Employee Loyalty Program,' *Columbia Law Review*, 51, May 1951, 555.)

by President Eisenhower in 1953 which established as the test of acceptability or retention the concept that a person's employment by government 'shall be clearly consistent with the interests of national security.' And Congress gave statutory authority to the heads of certain 'sensitive' agencies—e.g. the State and Defense Departments, the Atomic Energy Commission—to dismiss summarily any employee as a 'poor security risk.'⁴

THE DILEMMA. The loyalty-security program has been steeped in almost constant controversy. On the one hand, the government assuredly has a right and a duty to ascertain the loyalty of its employees, and the Supreme Court has held repeatedly that government employment is a *privilege* and not a *right*.⁵ On the other hand, some of the procedures to which the government resorted in the administration of the program have been widely condemned—such as the denial of the right to confront adverse witnesses or to be told their identity and the acceptance of the idea of 'guilt by association,' based either on a list of private organizations viewed as subversive by the Attorney General, or on personal associations with 'suspect' persons (even if these were close relatives, as parent or spouse).

In one important test, the *Bailey* case,⁶ in which both horns of the dilemma were in evidence, the procedures of the federal loyalty-security program were upheld by an equally divided (4:4) United States Supreme Court. The four justices who voted to side with the ruling of the—also divided—lower court, which upheld the program, did so on the basis of that tribunal's judgment that the President, lacking congressional restrictions, may remove from government service any person of whose loyalty he is not completely convinced. But on another occasion, Justices Black and Douglas, speaking as two of the four dissenters in *Bailey*, and expressly referring to it, voiced the concern of those who are deeply disturbed by some of the characteristics of the program. The jurists warned that 'the entire loyalty program grossly deprives government employees of the benefits of constitutional safeguards' (Black), and that it is 'a subversive influence of our own design that destroys us from within' (Douglas).⁷ Although it has never met the *constitutional* issue of the programs, the Court, as of 1956, employing statutory interpretations as its weapon, began to make clear to the executive branch

⁴ Of some 5 million federal employees investigated by 1963, some 5,000 (or 0.1 per cent) either left the service voluntarily or were dismissed on loyalty-security grounds, the latter accounting for roughly one-tenth of the total. (These figures do not include those adjudged 'poor risks' for other reasons.)

⁵ See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), for example.

⁶ *Bailey v. Richardson*, 341 U.S. 918 (1951).

⁷ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

that it was expected to proceed strictly within the limits of the law. Thus it ruled 6:3 that, by the language inserted into a 1950 statute, Congress had intended to limit the program to *sensitive* positions.⁸ In 1955 it held 7:2 that in the dismissal of a Dr. John Peters, the Loyalty Review Board had exceeded its statutory authority.⁹ In 1957 the Court held 8:1 that former Secretary of State Acheson had violated the regulations of his own department and wrongfully discharged an employee as a security risk.¹⁰ And in 1959, continuing its increasingly firm insistence upon proper procedural safeguards, the Supreme Court ruled that if a department endeavored to dismiss an employee under its loyalty-security program, it must live up to its rules, even if the employee is not under the civil service laws.¹¹

A special twelve-member Commission on Government Security appointed jointly by President Eisenhower and Congress in 1955 was asked to investigate the entire security program. It submitted its report in 1957 and recommended a long-range, thorough overhauling. It reported that its study had shown the loyalty-security programs in force for government employees to be a 'hodge-podge, sorely trying public confidence, and causing fear and unrest in Government ranks.'¹² The 800-page report urged prompt action, but to date (Autumn 1963) Congress has not been disposed to enact remedial legislation—although several government agencies have quietly modified their procedures in order to meet the standards prescribed by the Supreme Court's decisions.

RECRUITMENT IN BRITAIN

The scope and methods of appointment by merit may now be considered. In Britain, the *entire* civil service has been withdrawn from political patronage. Appointments are under the control of the Civil Service Commission, a board of three members, experienced public servants usually, who are appointed by the Crown but enjoy substantial independence. The chief functions of the Commission are to determine qualifications for entrance and to test applicants for the possession of these qualities. (Questions of pay, promotion, discipline, and working conditions are the province of the Treasury.) Once certified by the Commission, candidates at the top of the list are appointed as positions open up.

⁸ *Cole v. Young*, 351 U.S. 356 (1956).

⁹ *Peters v. Hobby*, 349 U.S. 341 (1955).

¹⁰ *Service v. Dulles*, 354 U.S. 363 (1957).

¹¹ *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

¹² Summary of Recommendation of the Commission on Government Security, as reported in *The New York Times*, June 23, 1957.

Competitive Examinations. Generally speaking, the tests are made by open competitive examination. The largest exceptions to this rule are the skilled and unskilled handworkers, who are recruited through the employment exchanges and certified by interview only. No satisfactory examination has been found to test a janitor's handiness with a coal scuttle, and even manual skills do not lend themselves easily to testing. Professional and scientific workers are chosen by competitive interview from among those who are already members of the professions or holders of scientific degrees. The clerical group are chosen by open competitive examinations of great variety combined with interviews. The examinations for this group are partly tests of special aptitude and partly tests of general knowledge and intelligence, with the emphasis strongly on the latter. The administrative class are chosen by *competitive written general examinations*, usually covering eight academic subjects including social sciences, humanities and natural sciences, but also extending to some technical ones. Since the adoption of certain testing revisions in 1947-57, increasing importance—some contend the main emphasis—is now placed on oral interviews, consisting of a battery of sharply challenging individual and group interviews. No attempt is made to test their aptitude for or knowledge about the particular duties to which they will be assigned. It is sought rather to discover those who have the imagination and intellect, the industry and self-discipline necessary to master a number of fields of academic study.

PROMOTIONS. It must not be thought that all posts are filled by appointment from the outside as they fall vacant. Indeed, almost all the recruiting from the outside in the administrative and clerical classes is from the sixteen to twenty-four years of age group for posts at the bottom of the particular class for which they are chosen. Almost all the higher posts are filled by promotion. In some instances, promotion is made to depend on the results of a competitive examination among a selected group of candidates, and opportunities for promotion within any one grade or class are closely related to the type of examination given. One that tests special aptitude for a particular task may give no clue at all to capacity to rise. On the other hand, examinations that test general knowledge and intelligence are likely to discover a civil servant who will quickly learn to master a routine instead of letting the routine master him. He is likely to be able to deal with novel situations and therefore to be worthy of promotion. This kind of ability is of great importance for those in the higher clerical positions, sometimes called the executive class, who have to do with office management and supervision.

The Administrative Class. General intelligence and adaptability are most needed, however, in the administrative class of roughly 3200 men and 300 women. We have already seen that this class occupies the key positions in governmental administration. There is a most intimate relationship between the capacities of this group and the effective execution of laws passed by the legislature. It largely depends on them whether the lessons to be learned in administration of particular laws are brought to the attention of the political heads of the government as material for deciding on changes and amendments. They are concerned with policy as well as administration, and consequently need breadth of mind and interests as well as mastery of routine. These considerations led in Britain to the adoption of the *highly academic written and oral examinations* already described. Experience has more than justified the decision. The most serious criticism made of the method of recruiting the administrative class is that for practical purposes the nature of the qualifying examinations—with their stress on broad cultural training in the liberal arts—almost limits membership of the administrative class to top graduates of Oxford and Cambridge.

It is not so much that the examinations are so difficult, as they are more or less based on the course of studies followed and the life in the ancient universities. So the key group in the civil service is almost exclusively drawn from the upper middle-class, who alone in the past have enjoyed any considerable access to these educational advantages. The Labour party in Britain regards this situation as a criticism of the class structure and the educational system rather than of the method of choosing the administrative class. Therefore, in addition to supporting a widening of the basis of recruitment, they are trying in a variety of ways to widen the avenues to higher education, so that more and more able sons of the working class can go to the universities and thus become eligible for appointment to the administrative class.

RECRUITMENT IN THE UNITED STATES

The federal Civil Service Commission in the United States is a board of three members appointed by and responsible to the President, subject to confirmation by the Senate but carrying on its work relatively free of political interference and control. Its chairman serves as chief administrative officer. Its main work is to examine and certify candidates for entrance to the federal civil service. The Commission has broader functions than its British counterpart. It is charged with working out the details of classifications of positions within a general plan adopted by Congress; participates

in the establishing and working of schemes for rating the efficiency of civil servants; and has power to investigate the fairness of disciplinary measures such as suspension, dismissal, and demotion. Thus it has a partial responsibility for personnel management within the service.

Merit and Spoils. On the other hand, the scope of its control of appointments is *not as wide* as that of the British Commission, for it rests with Congress to say what posts shall be filled by competitive tests or other scrutiny of qualifications made by the Commission. In 1963 there were still 200,000 permanent posts in the service not yet under the merit system.¹³ Even within the *classified service*, i.e. positions to be filled by merit, numerous exceptions are specified by Congress or by presidential orders, based upon statutory authority. Under such authority, for example, President Eisenhower was able to 'declassify' some fifteen hundred top-ranking civil service jobs between 1954 and 1957, thereby enabling their replacement with patronage appointments. The positions in question were viewed as being of a 'confidential or policy-determining nature.' The practice of making and continuing temporary appointments, sometimes for years, also makes holes in the merit system even within the classified service. It is to be noted, too, that none of the higher administrative officials whose appointments must be confirmed by the Senate comes within the jurisdiction of the Commission. These are still a substantial group, and include a goodly number of the extremely important bureau chiefs already referred to. Much room for patronage appointments still remains, and these are generally used according to the exigencies of party politics. There is still considerable support in the United States for the argument that government jobs are a form of reward. An illustration of this contention is the so-called Veterans Preference Act, whereby five points are automatically added to the examination scores of all ex-service men. Disabled veterans, their wives, and widows are accorded even more favorable treatment when applying for a government job. While special job consideration for war veterans is not peculiar to the United States, it is nowhere as extreme and costly.

Examinations. Within the classified or merit service, appointments are almost all made on the basis of competitive tests, which may or may not consist of written examinations. Generally speaking, written tests are used to test applicants for the more subordinate positions requiring clerical, man-

¹³ Among these were attorneys, chaplains, intelligence specialists, policy-determining positions, part-time 'professional experts,' and 'key positions which involve close personal relationships between incumbents and the head of agency or his key officials.'

ual, or other operative skill to be applied under the close direction of superiors. Applicants for posts requiring professional or scientific knowledge and attainments are usually rated by interview, and by evidence of their knowledge and experience derived from sources other than a formal written examination.

GREATER SPECIALIZATION. The types of examinations given differ—although not as markedly as formerly—from those used in Britain. The civil service examinations in Britain are accommodated to the educational system, and try to draw some of the best products of the system into the civil service at an early age with little regard for specialized skills. In the United States, most examinations have always been drafted with an eye to the posts to be filled, and are therefore *framed to test technical competence*. Also, they are open to older age groups than in Britain. There is a much greater variety of examinations, and while they provide a good test of capacity for a particular job, they do not as a rule test capacity for other work to which the civil servant may be promoted.

Selection of Key Administrators. Unlike Britain, the United States has not adopted an academic examination on a wide variety of subjects for selecting general administrative capacity, with the welcome exception of the Federal Service Entrance Examination. This examination, which is *general* in scope, is now administered annually to prospective college graduates, and has become a fertile source for recruitment. But the Civil Service Commission does not recognize a distinct administrative class. Probably this is in part due to an equalitarian philosophy which dislikes fencing off higher posts as a preserve for those who have enjoyed superior educational advantages. It is partly owing to the fact that quite a few of the higher posts are subject to senatorial confirmation and so remain actively political. There is, of necessity, an administrative class, but its ranks are filled either by promotion from other classes in the service or, more rarely, by appointments from outside the service.

The undersecretaries and assistant secretaries are political appointments and change when a new President comes into office, if not before. They, and the bureau chiefs and assistant bureau chiefs, are the key administrators. As already noted, a substantial number of the bureau chiefs are still in the *unclassified service* and open, as far as the law goes, to political pressure and appointment. However, there is a growing practice to fill these posts by promotion, even when they are unclassified, and to give the holders of them security of tenure. That is to say, higher administrative work, at least in

part, is becoming a career in the United States just as it is in Britain. Nothing more clearly reveals the changing attitudes towards the civil service arising from the necessities of present-day government. The efficient conduct of public administration is now so important to the community, and makes such demands on skill and knowledge, that it cannot be left to amateur partisans who come and go. It is being recognized that the men who run a department must not only understand it but must also feel themselves to be a part of it. It is not easy otherwise to account for the self-restraint of politicians in the face of plums of such size and succulence.

Expansion of Career Service? It is believed by many in the United States that this tendency must go further, and that all high administrative posts in a department below the rank of assistant secretary must be brought into a career service. Also, it is urged that special attention be paid to the recruiting of an administrative class. It is not enough that posts should be filled by promotion. It is necessary to ensure that there shall be in the service a sufficient number of able men with administrative talent who will look forward to, and deserve, promotion to the highest posts. As matters now stand, most of those who are promoted to be chiefs of bureaus were originally brought into the service as specialists of one kind or another and not as administrators. What is true of them is true also of their immediate assistants and of heads of the divisions into which each bureau is divided. No one would think of recruiting bomber pilots solely by promotion of ground crew who proved themselves handy. In its own way, a government department is just as sensitive an engine with just as close a relation between skillful handling and distinguished performance. On these grounds, it is argued that the British method of recruiting the administrative class should be adopted. In evaluating the over-all problem, Professor Max Beloff, a long-time British observer of the American scene, was moved to comment: 'The *damnosa hereditas* of Jacksonian democracy, the view that one man is as good as another, that any literate citizen can do almost any job, and that a Democracy can do without an administrative (and military) élite must be eliminated once and for all.'¹⁴

Expert opinion in the United States, however, is not of one mind on the point. For example, it is contended that in Britain there is scant possibility of promotion from the clerical class into the administrative class, and therefore administrative work has so far been very largely a career for the talents of those lucky enough to be well-born and well-educated. An unstratified

¹⁴ *The American Federal Government* (New York: Oxford University Press, 1959), p. 204.

society cannot make such a discrimination but must keep clear the road from the bottom to the top. The office boy who becomes chief of a bureau will bring with him an experience that is a surer guide in departmental matters than the knowledge British administrators get from books and memoranda. Whether or not this contention is sound, it is clear that the contrast between Britain and the United States on this point goes beneath the surface and is founded on still deeply rooted marked differences in social outlook and social conditions. There are signs, however, that some of these differences have begun to lessen.

HOOVER COMMISSION RECOMMENDATIONS. In its 1955 Report, the Second Hoover Commission, expressing deep concern with the civil service, declared the 'greatest weakness in government today' was the need for improved expert management, ranging downward from the political appointees and career administrators. It recommended the creation of a 'senior civil service group,' of non-partisan, well-paid administrators of exceptional skill and experience (i.e. an administrative class) whose competence and integrity had been demonstrated in government service.

It also called for more politically appointed executives to take over much of the partisan work, concern for which has threatened the usefulness of many career executives who had become embroiled in political battles. The report of the Commission further urged higher pay for top managers, better training programs, and greater use of merit pay increases. This, it said, would attract more able men and women to government service, and stem the costly employee turnover which has averaged 25 per cent annually for the past twenty years. Responding to the Commission's call for a career service, and in the absence of any action by Congress, President Eisenhower, by Executive Order, established machinery for 'A Career Executive Service' in 1957. But the Presidential board of five members, established under it to administer the service, never properly functioned, Congress refused to support it, and the program has remained a paper tiger.

The question of how to organize and co-ordinate the work of hundreds of thousands of civil servants is of immense importance, especially in the United States, because of the headlong growth of the federal administration in the present century, and particularly in the last three decades. As we have already seen in connection with the Executive Office of the President, for instance, a considerable overhauling has been under way for the past few years, largely as a result of the searching inquiries by the Committee on Administrative Management and the two Hoover Commissions on Organi-

zation of the Executive Branch of the Government. Much remains to be done, however, in order to bring about more effective administrative organization of the federal government—not to mention the state governments—of which the civil service is but one vital arm. The general matter of administration will be given consideration in the succeeding chapter.

RECRUITMENT IN FRANCE

In view of the extreme centralization of the French system of government, and the frequent change of ministries prior to the de Gaulle Fifth Republic, the French civil service—especially the *fonctionnaires*, the permanent civil servants—has long commanded considerably more power in government than those of Britain and the United States. But France lagged far behind the latter two countries in establishing a uniform, national civil service system. It was not until 1945-46 that the Civil Service Directorate (*Direction de la Fonction Politique*) was established in the General Secretariat of the Premier. The Directorate is a central personnel office charged with the unification and classification of the merit system, which heretofore had been scattered over more than 125 different statutes covering recruitment and classification in the various ministries. While the French civil service never suffered from the extremes of the 'spoils system' that was prevalent for so long in the United States, personal patronage by and on behalf of the ministers and members of Parliament was very common. The statutes finally adopted in 1945-46, however, have combined to bring about many commendable reforms. Today, while not entirely free from patronage and favoritism, the French civil service is largely based upon a unified, classified merit system. The department heads may still select their subordinates, but these must have previously met the entrance requirements of the service and have been classified by the *Direction* according to their ability.

Classification. France has the simplest classification system in Europe. A civil servant is in class A, B, C, or D in accordance with his academic ability and his vocational training. In class A are the *civil administrators*, who are practically identical with the British administrative class. Responsible for top-echelon policy decisions in the highest ranks of the civil service—e.g. the *grand corps* of the diplomatic service, the Council of State, the Court of Accounts, and the Inspectorate of Finance (all described elsewhere in these pages)—they are recruited through the *École Nationale d'Administration*, the National School of Administration, to be described below.

At the next highest level, class B, are the *secretaries of administration*, the office managers, accountants, and translators, who are 'in charge of the execution of current operations' and, according to the law of 1945, 'execute certain specialized functions which require sound administrative knowledge and experience.' Into class C fall the clerks and typists, and into class D the skilled and unskilled workers. (Only class A requires a degree from a school of higher learning.)

Selection and Examinations. The new French civil service system adopted the British emphasis on examinations, testing broad educational ability rather than the American emphasis on specialized, practical experience. The secretaries of administration and the lower classes are thus generally recruited by competitive examinations, geared to various levels of secondary education, although in most cases of older persons a certain number of years of public service may be substituted for formal schooling. But the members of the small, powerful class of civil administrators are now all recruited through the National School of Administration (E.N.A.).

THE ÉCOLE NATIONALE D'ADMINISTRATION. Established in 1945, this unique institution graduates from eighty to ninety civil administrators annually, all of whom are guaranteed high positions in the ministries and other top-level executive agencies. There are at most 140 openings for admissions to the school annually, and as many as 1500 applications for these are usually received. To be eligible, applicants must either have had five years of experience in the public service, usually in class B, or they must have been graduated from the Institutes of Political and Social Sciences of the several universities. The total number of vacancies is equally divided between the two groups. To be admitted, they must pass stiff competitive examinations geared to their previous public service field or to their academic background. These oral and written examinations test not only areas of general knowledge of the fields the administrators might enter, but also their ability to make 'command decisions.' The course at the school lasts three years, and it embraces concentrated academic studies in one of four fields—General Administration, Economic and Financial Administration, Social Administration, External Affairs—as well as a considerable amount of practical on-the-job training in public agencies in Paris and in the provinces. The courses are taught by leading social scientists and public servants. Neither Britain nor the United States has a civil service training institution akin to the valuable and interesting French *École Nationale d'Administration*.

Prerogatives. The statute of 1946 also provided for a comprehensive series

of rules and regulations for all civil servants, i.e. the *fonctionnaires*. Differences between various departments and agencies, and provisions for exceptions to rules, are subject to approval of a 'watch-dog committee,' the statutorily established Superior Council of the Civil Service. Civil servants have the right to appeal any disciplinary action or policy to this body. With few exceptions, civil servants are not permitted to have other remunerative jobs simultaneously, and they are forbidden to be members of organizations that might compromise their 'independence.'

The *fonctionnaires* may belong to civil service unions—but not to others—and many, although not all, are permitted to strike. While their union membership is permitted in Britain and the United States, strikes by government employees are forbidden in the latter and considered an unacceptable practice in the former. Contrary to the British and American prohibition on political activity, French civil servants are not only permitted to run for partisan political office while holding their jobs but, as noted earlier, they may also obtain a 'leave of absence' from their civil service position if they gain an elective or appointive office. Promotions are based on merit and seniority. Salary scales compare unfavorably with the other two countries, but allowances and other benefits are very liberal, and all classes or grades enjoy a comfortable degree of protection against unwarranted dismissal or suspension.

The French civil servants today possess legally stipulated privileges that exceed both in kind and extent those of their British and American colleagues. But their responsibilities are greater, too: not infrequently they have the burden of steering a foundering ship of state through stormy water. They must be professionals in every sense of the word.

Conclusion. We come back to the principal emphasis of the chapter—the problem of over-all governmental management. Without defending every enterprise in which present-day governments engage, it is clear that a host of their complex interrelated activities are vital to the stability and well-being of the society. These activities must be planned intelligently, skillfully coordinated, and effectively executed. To ensure this, the civil service itself must be made a highly efficient machine. As the discussion in this chapter shows, considerably more attention has been paid in recent years to invigorating the administration than to improving the performance of either the legislature or the judiciary.

The executive branch of government, occupying, as it does, a strategic position, will, with the backing of a superior civil service, strengthen itself

still further vis-à-vis the other organs of government and the electorate. Without unduly hampering the administration in its efforts to perform its vital functions quickly, surely, and well, how are we to ensure that it does not oppress the governed? An introduction to this burning issue will now be essayed.

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XVII

The Administrative Process

The last chapter dealt mainly with internal aspects of the civil service. Here attention is to be focused on the external relations of the civil service—its connections with and its impact on members of the public. These are of great variety. Almost all the activities of government recounted in Chapter V involve action by civil servants affecting some or all members of the public. Sometimes the government provides a *service* such as the post office or the employment exchange. Sometimes it is *mixed service and regulation* as in public health activities. The government maintains diagnostic clinics and laboratories for analysis, and also enforces pure-food regulations and a minimum of sanitary measures on municipalities and individuals. Sometimes it is *purely regulation*, as when employers are required to pay minimum wages and maintain safety devices, and when public utilities are required to provide certain standards of service at fixed rates.

Where a service only is being supplied to the public with or without charge, the public wants little more than efficiency, courtesy, and equality of treatment from the civil servant. If he knows his job, the public is satisfied with good manners from the post-office clerk, and with sympathetic understanding of the plight of the unemployed from the clerk in the employment exchange. But when civil servants are engaged in regulating our lives, other considerations enter. Here the official has power to require us to do or not to do something *and* he is backed by the organized power of the government. He must act firmly and without fear, favor, or discrimina-

tion, because he is expected to enforce the public interest even if it is at the expense of private interests. Of course, his firmness will be less galling if it is gloved in courtesy. We do—and should—resent any unnecessary brusqueness by sanitary inspectors, customs officials, and highway police.

The Need for Limits. Beyond all this, however, is the prime need of good assurance that there will be a limit to the regulating. There must be some way of ensuring that the sanitary inspector sticks to the sanitary code, the customs official to the tariff schedule, and the highway police to the traffic regulations. They cannot be permitted to follow intuition and impose their own personal conceptions of what ought to be done in the public interest. It is true that their superiors control them and surround them with instructions they must obey. This is small comfort to those whose protests against official action are met by the answer that 'orders are orders and must be carried out.' The difficulty is that the officials with whom the citizen has to deal directly rarely make the decisions that affect him, and he cannot get face to face with those who do.

This fact complicates greatly the problem of controlling the administrative actions of government. On the one hand, men will often make decisions they would not make if they had also the painful duty of imposing those decisions on protesting individuals. On the other hand, men will enforce without question drastic decisions made by others, decisions they themselves would shrink from making if they had to explain and justify them to those affected. So, where regulation enters, the vital question is a very ancient one: *quis custodiet ipsos custodes*—how to control the controllers, how to permeate the entire civil service with a sense of responsibility.

A hundred years ago, the short—and, on the whole, adequate—answer was that official action was bounded everywhere by the law and that no one could be required to do, or refrain from doing, any act except as required by the letter of the law. The law—either common law or statute law—defined in fairly precise detail what burdens or restrictions government could impose, and the courts were available to punish any official who overstepped or commanded his subordinates to overstep the limits set by law. Of course, it has never been possible to reduce government to an automaton carrying out the dictates of clearly defined laws. There were even then in the hands of the governments in question some discretionary powers not sharply bounded by law. But such powers were few, and they did not affect deeply the character of economic and social life, the terms on which individuals and groups live together in the community.

Modern Requirements. This short answer is by no means a complete answer today. We have noted that the present-day legislature cannot enact all the laws in all the detail necessary, and that it delegates a good deal of lawmaking power to the executive. We have also seen that the power of the courts to sit in judgment on official action has been progressively limited by legislation in the past seventy years—with some notable exceptions, as will be seen in the Administrative Procedure Act of 1946 in the United States. There is a widening sphere of action open to the executive which the courts are not permitted to control. In a broad sense, officials are still bound by the law; but the difficulty is that, over a substantial part of the field of government, the law gives them a *discretionary power* to make rules and regulations, and then to decide what burdens and restrictions the rules and regulations justify them in imposing on individuals in concrete situations.

DISCRETIONARY POWERS AND SUBORDINATE LEGISLATION

THE DISCRETIONARY POWERS OF THE ADMINISTRATIVE

The discretionary powers just referred to are conferred by the legislature on the executive. The executive in the narrow sense, the President or cabinet, cannot itself exercise this authority. The decisions to be taken are so numerous, and so often require long study and expert knowledge, that they are of necessity taken by members of the civil service, the administrators. It is always possible, of course, for the President or cabinet to intervene, but it is not common, and in France this is unlikely. The manner of exercise of discretionary powers by officials is often described as the *administrative process*. Good manners and courtesy in dealing with the public are, as we have seen, highly desirable qualities in a civil service, but the success or failure of a government in its public relations does not necessarily raise constitutional or serious political questions. However, the rapidly growing importance of the administrative process does raise important political and constitutional questions which must be discussed.

The Debate on Administrative Discretion. In the period between the two World Wars, the controversy over delegation of legislative and judicial powers to the executive overshadowed all other constitutional discussion in Britain and the United States. France, with a well-established tradition of such delegation as a matter of practical need for purposes of governing, and a smoothly functioning system of administrative courts and

administrative law, already explained in Chapter XV, did not engage in such discussions. The French administrative system and experience were, however, much debated by British and American writers—a debate that produced a large, and sometimes acrimonious, literature. The practice of delegation was attacked as undermining the very foundations of constitutional government. According to this view, the legislature, whose function it is to make whatever laws are needed and to control the executive, abdicates *pro tanto* when it confers lawmaking powers on the executive. The representatives of the people betray the trust reposed in them when they let an unrepresentative civil service define what the public interest requires. The rule of law, which subjects official action to scrutiny by independent courts, has been a vital safeguard of individual liberty. In so far as the judging of disputes between the government and citizens is taken away from the courts, a most salutary external check on the government is weakened. To allow a government official to judge finally in such disputes is to make the government a judge in its own cause—a violation of the elementary canons of justice. In short, it was argued that the well-tried methods of ensuring that government should be servant and not master are being abandoned.

NECESSITY? The practice of delegation was supported, however, on the ground of necessity. Legislatures, it was said, have neither the time nor the technical knowledge to make in full detail all the laws the public now expects them to make. Democratic legislatures would have been completely overwhelmed and discredited long ago had they not had the wit to limit themselves in many matters to the discussion and settlement of general principles of legislation, leaving the voluminous details to be filled in by the executive with rules and regulations. For several reasons the common-law courts—in contrast with the French administrative courts—are quite unsuitable tribunals for deciding disputes that arise out of much present-day legislation: Sometimes it is the sheer number of disputes that the judiciary with its present organization and procedure could not begin to handle expeditiously. Sometimes it is the highly technical issues that arise, calling for expert knowledge which the judges do not possess. Sometimes it is the judges' lack of sympathy with the purposes of the legislation—purposes the public wants carried out whether the judges approve of them or not. In short, according to this contention, nineteenth-century machinery of government will not meet twentieth-century needs. Cautious experimenting over the last seventy years has produced the administrative process as a partial answer to the new needs.

The debate subsided with the outbreak of war and the need to concentrate

all energies on military objectives. It was resumed on the return of peace with many new arguments made available to both sides by the experience of war organization. In organizing for total war, the democratic governments relied heavily on the administrative process, and developed it at a fantastic rate to a point far beyond its peacetime scope. The legislatures, while reserving to themselves the decision on a few great matters of principle, delegated the planning and management of the war to the executive. The laws that assigned to the population their several duties and responsibilities in the common effort were almost entirely made by the executive through rules and regulations and orders-in-council. Very few of the innumerable disputes that arose between governments and private interests in the war organization ever came before the courts. They were settled either by negotiation or by orders and directives emerging from the executive or from one of the many administrative boards and alphabet agencies that the executive established to aid in the task of winning the war.

DANGERS? This experience lends support to the view that the administrative process is the inevitable instrument of large-scale governmental operations. At the same time, it is far from refuting the contention that the administrative process has grave dangers for liberal democracy. Indications were not lacking during the war that government by administrative order and decision can easily get out of hand. The debate has become sharper than ever. In the United States, for example, a score of big government agencies underwent a long siege of investigation and criticism in the late 1950's and early 1960's—with rather mixed and uncertain results, however.

The place to be accorded to the administrative is one of the big issues facing democratic government. The time has not come to suggest a conclusion. It is much more important at present to try to understand *what is involved*. Some appreciation of its scope must be gotten. Its character, whether virtuous or vicious, must be estimated and that can only be done by seeing what it does and how it does it. Finally, it cannot be judged at all without some understanding of its causes.

Why Administrative Discretions Are Given. Its causes can be suggested at once, leaving fuller verification to emerge from a discussion of its scope and character. The administrative process is the result of the great expansion in the activities of governments in the last seventy years. In Chapter V, a distinction was made between the negative state of the nineteenth century and the positive state of the twentieth, and some of the sweeping social and economic changes contributing to the shift were indicated. In the *negative*

state, *laissez faire* was the ideal. Within a framework of order provided by government, each person was expected to take care of himself, either by his own efforts or in voluntary co-operation with others. Little was expected of governments. The legislature could itself make whatever small supplementary additions to or modifications of the common law were required. The laws, whether common law or statute, were adequately enforced by the courts' punishing those who broke them and thus deterring the bulk of the population from infringing them. The technique, if not the aim, of government was negative. It contented itself, in the main, with saying, 'Thou shalt not.'

CONSEQUENCE OF THE POSITIVE STATE. In the *positive* state, government ceases to be merely an umpire calling fouls and retiring offending players to the cooler. It becomes a schoolmaster of the old school, setting lessons that the citizens positively must learn. The aim of the teaching is to get people to do the things necessary to ensure minimum standards of health, education, safety, and economic well-being for all. The materials set out in Chapter V show how numerous are the fields in which government is pushing the realization of one or other of these standards. The attaining of these standards is regarded as so important that, wherever possible, government defines in great and precise detail the rules of deportment for well-behaved citizens in a complex society. For the same reason, government takes vigorous steps to enforce observance of rules and standards. It is not regarded as sufficient in many instances to have courts punish those who disobey; they must be made to obey. So government gets into a great deal of inquisitorial and supervisory activity after the fashion of schoolmasters. We are in the era of the positive state because the state is now concerned to get positive results. It says, 'thou shalt,' and maintains a great inspectorial and enforcement staff to enforce its commands.

The executive is the only branch of government equipped to put energy into getting concrete results. Wars, for example, are directed by the executive and not by legislatures and courts. So the growth of government activities and the shift in the role government is expected to play have aggrandized the executive. The legislature sets the broad objectives of public policy. The executive uses its administrative establishment to expound those objectives in innumerable rules and regulations and to enforce their observance. The way in which this enlarges the discretionary power of officials will be made clear by concrete illustrations that are actual instances of discretionary powers generally found in the United States or Britain. France, as already noted,

falls into a separate category in the administrative process. Some of the United States illustrations are drawn from the state rather than the federal sphere, because government action in the former is often more closely related to common experience and therefore should be easier to understand. The purpose is to indicate the *nature* of a common development and not to measure its scope in either one of the governments under consideration.

The Special Case of France. In line with the practice characteristic of other Continental states, administrative discretion has always been considerably greater in France than in either Britain or the United States. In administrative matters, centralized France thus gives the state a much wider latitude. The French ministers, individually as well as collectively, either by virtue of delegation of power or by departmental policy, are authorized to issue a variety of *decrees*—rules and regulations that have the force of law, but that are *not regarded as law* (except as authorized by Parliament under the emergency-decree procedure of Article 38 of the de Gaulle Constitution).

As a rule, decrees cannot formally be law for the reason that if a decree were to be regarded as *law*, it could not be effectively contested in the administrative courts, since the French separation of powers forbids judicial interference with legislation, other than via the extra-judicial Constitutional Council, which cannot 'interfere' with ordinary legislation unless it is asked to do so by the President, the Premier, or the presiding officers of the two houses of the legislature. Therefore, because it is *not* regarded as law, a minister's decree-making power is subject to check by the system of administrative courts, headed by the Council of State (*conseil d'état*). That system, as we saw in Chapter XV, provides redress to the injured citizen far more expeditiously, more simply, and more inexpensively than is available under the common-law system.

DELEGATION OF LEGISLATIVE POWER TO THE EXECUTIVE

The giving of discretionary power to the executive to make rules of law may be looked at first. In most present-day legislation, the legislature does not attempt to make the law in all its concrete detail. It sketches in outline broad general principles and delegates power to fill in details. Sometimes in Britain, as in the emergency legislation authorizing the executive to fight the war, the power delegated is very wide. In the United States, certain constitutional restrictions, and a natural desire of Congress to limit the

executive, have, on the whole, prevented the grant of extremely wide legislative powers.

Usually, the power given is limited to making rules under one particular statute such as the pure-food law or the law regulating the issue and sale of corporate securities. Even here, the power is sometimes stated generally, 'to make such rules and regulations as may be necessary for the operation of this Act,' and is not limited to making rules on certain specified and narrowly limited matters.

Scope of Subordinate Legislation. Sometimes in Britain the power is delegated to the cabinet. Such delegations can be readily identified as they are always exercised by order-in-council. Sometimes it is given to a minister of a particular department, or to a board or commission outside the departmental structure such as the Railway Commission. In either case, rules and regulations so made are generally known as delegated, or subordinate, legislation. In the United States, the rule-making power may be conferred on the President, on one of the members of the cabinet, or on one of the many independent boards and commissions such as the Federal Communications Commission or the Securities and Exchange Commission.

It will be recalled that the separation of powers imposed by the Constitution of the United States reserves the exercise of legislative power to Congress. This might be thought to prevent all delegation to executive agencies of power to make rules and regulations. It does prevent the grant of *extremely wide general powers* of legislation such as are occasionally given by the legislature to the executive in Britain. But the Supreme Court has always upheld the validity of the delegation of *clearly defined and limited powers* to make detailed regulations. In this way, room has been made within the Constitution for extensive subordinate legislation by the executive.

It is impossible to give, in a short space, any accurate impression of the scope and extent of the practice of subordinate legislation. Half the statutes of the British Parliament enacted in the 1920's gave such power to the executive. The proportion is now much higher. In sheer bulk, the annual output of subordinate legislation greatly exceeds the annual output of the legislature.

Even in what are called normal times, the number of pages of orders-in-council, rules, and regulations put out by the executive under a statute generally far exceeds the number of pages covered by the statute itself. In periods of emergency, legislative lawmaking is completely dwarfed by executive rule making. The rules made in one year under the Agricultural

Adjustment Act, one of the Roosevelt New Deal measures for meeting the great depression in the United States, covered more pages than all the laws relating to agriculture passed by Congress since the founding of the Republic. The rules made under the National Industrial Recovery Act, another of these measures, filled 10,000 pages in the two years of its existence. The emergency of war carried this development to hitherto unimagined lengths. In 1946, immediately after the war, some nineteen hundred federal statutory provisions either authorized or required executive agencies to make rules and regulations. Many of these were of minor importance, but the figure gives some idea of the reliance on subordinate legislation.

REASONS FOR SUBORDINATE LEGISLATION

Lack of Time. Obviously, no legislature could begin to debate and enact a fraction of the rules that emergencies call for. But even in the normal activities of present-day governments, the legislature cannot find time for much of the detailed lawmaking. The terms on which the citizen can use facilities of the post office, for example, depend much more on regulations made by the Postmaster General than on laws made by the legislature. These regulations fix the size and weight of packages and determine what matter shall enjoy mailing privileges at particular rates. They provide for determining, within the context of the general law on the subject, what is dangerous, immoral, or fraudulent matter, and for prohibiting transmission of such matter through the mails. They also fix, among other things, conditions of the issue of money orders and postal notes, of registration of letters, and of insuring of parcels.

The exact scope of the rule-making power relating to the post office varies from country to country, but postal regulations generally cover a very wide field. The legislature could take time to make these rules, but only at the expense of deliberation on other matters. The upshot is that in many fields of legislation, the legislature debates and fixes the general policy, and the administration makes most of the detailed rules thought necessary to carry out that policy.

Many of the questions to be decided in making post-office regulations require special knowledge. The size and weight of parcels and the scope of insurance and special-delivery facilities, among other things, can only be fixed by those who have had considerable experience in the post-office business and know the general conditions in which it is to be conducted. What-

ever regulations are made must be approved and issued by the Postmaster General, but they are not made by him. They are made by the permanent civil servants who do the work of running the post office.

Need for Detailed Expert Knowledge. Often the question what the details of the law should be depends on expert technical or scientific knowledge. Legislatures are not chosen for their scientific attainments; hence experts in the civil service must be relied on. The details of legislation prescribing safety measures in factories and other work places must be adjusted to the conditions of a great variety of industrial establishments. In some instances, it may be enough to require the fencing and covering of exposed machinery. But if protection is to be afforded against physical injury from such risks as explosions, and against industrial diseases in the more complicated industrial processes, measures must be worked out through careful study of the different kinds of risks, and of the kinds of provisions that will combat them, in all types of establishments and processes. Expert engineering and other scientific knowledge is vital to success. In one state after another, the fixing of details of the safety code has been delegated to an administrative agency. Scientific knowledge has been applied, in one way and another, in most spheres of economic and social life, and when government intervenes in these spheres, it must master the elements of science involved as well as take account of economic and political considerations.

Moreover, when government undertakes to regulate economic matters, it must bring a wide knowledge of economic facts to its decisions. A legislature may decide, for example, that employers of labor must pay at least a minimum wage and be content with a maximum number of hours of work per week from each employee. But the minima and maxima must be related to the cost of living and to the state of the labor market. Also, conditions vary so widely in different industries that a single standard of minimum wages and maximum hours often cannot be set for all industries and employments affected by the law, although the United States Congress has repeatedly endeavored to do so. So there is a practice in some jurisdictions to leave it to an administrative agency to make orders prescribing, within certain broad limits laid down by the legislature, the exact minima and maxima for different employments. The proportion of apprentices and learners to be allowed in each trade, the minimum scale of payment to them and to handicapped or partially disabled workers, are often similarly fixed.

Reliance on copious subordinate lawmaking in this particular field has gone considerably further in Britain than in the United States, where

Supreme Court decisions holding minimum-wage and maximum-hour laws to be unconstitutional delayed for a long period extensive experimenting with this kind of legislation. Not until 1938 did the Congress succeed in passing a comprehensive federal wage and hour law, the Fair Labor Standards Act, which, upon challenge, was held constitutional by the Supreme Court three years later.¹ But it does afford a simple illustration of what occurs nowadays in many fields. The complexity of industry and economic life is such that the legislature, after deciding on a broad policy of regulation, has to leave much of the necessary rule making to the administrative.

Frequent Changes in the Rules. The intricate regulations that we have seen to be necessary in one sphere of government activity after another, can hardly ever be laid down once for all. In some instances, it is by no means clear what should be done, and the regulations must be tentative and experimental. In other instances, such as the minimum-wage laws, the interests being regulated discover loopholes in the regulations, and these must be plugged by changes in and additions to the regulations. In any field of regulation, new circumstances and new conditions not contemplated when the law was made emerge from time to time, and the rules must be adjusted to them. That is to say, much of present-day legislation is continually in a process of adjustment and change. Adjustment can be made best by a body that can act quickly at any time and that is close to the experience gained in trying to make the law effective. This is another reason for lodging powers of subordinate legislation with the administration.

It is clear that the political executive, the cabinet or President, is no more able to make all these regulations than is the legislature. Subordinate legislation frequently issues in their name and, because the civil service is under their command, they can modify or veto proposed regulations at any time. If an influential body of opinion is aroused over a piece of subordinate legislation, it will be able to get the political executive to examine carefully the content of the rules and regulations and perhaps to modify it. Short of insistent and convincing external pressure, the political executive accepts without much question what its informed and expert advisers propose on the details of subordinate legislation. Keeping this qualification in mind, it will be convenient henceforth to speak of subordinate legislation as being made by the administration, meaning civil servants in government departments or in independent boards and commissions sometimes set up to assist in the administrative process.

¹ *United States v. Darby*, 312 U.S. 100 (1941).

CONTROL OF SUBORDINATE LEGISLATION

Because it is often left to civil servants to say how the general principles declared by the legislature shall be applied to concrete situations, they have a substantial discretionary power to determine how the law shall bear on individuals and groups. In fact, it is often impossible to say who will be affected in what ways and how much, until regulations have been framed and issued. So lobbies and pressure groups are almost as much concerned with the deliberations of the administration in framing regulations as they are with the deliberations of the legislature. With a vital interest in the way civil servants exercise their discretion, the pressure groups likely to be affected are always seeking access to the administration to present their suggestions and protests.

For example, when regulations are to be made under the minimum-wage law, a large number of employers' organizations and several trade unions are likely to ask to be heard. For every exercise of a power of subordinate legislation, there is a cluster of interests with representations to make. They try to persuade the civil servants, or the political executive, or both, how the discretion should be exercised. The legislature, the representatives of the people, has no direct part in the making of these rules. What then ensures that the civil servants will exercise their discretion conformably to the public interest or the will of the legislature?

Legal Limits on Rule-Making Power. In the first place, the legislature sets limits to rule-making power and any rules that go beyond the power granted are invalid. If the minimum-wage board, which is authorized to fix minimum wages, presumes to fix maximum wages as well, no one need obey the maxima so set. In the Anglo-American system, it is always possible to refuse to obey subordinate legislation on the ground that the legislature never gave the necessary power to make it, and the courts are open to test such a contention. In this way, subordinate legislation can be kept within the limits laid down by the legislature.

The effectiveness of such a check depends on how clearly the legislature has specified the limits. We have already noticed the power given to the post-office department to make rules on certain specific matters. If the grant of power is thus limited to particular specified matters, there are reasonably clear limits set to administrative rule-making powers. But often the statute goes on to give the administrative authority in question power 'to make

such rules and regulations as may be necessary to carry out the provisions of this act.' Where this is done, the courts find it considerably harder to say what the precise limits of the rule-making power are. If the legislature wants to impose sharp control, it should be chary of the use of general phrases. But the frequency of such phrases in grants of rule-making power suggests that the legislature is impressed with the need for flexible grants of power.

Review of Rules by Legislature. Second, the legislature can require that subordinate legislation shall be 'laid on the table' in the legislature within a stated time after it is made. In this way the legislature knows what regulations have been made and can find opportunities of debating those it does not like. It can, if it so desires, enact a law repealing any or all subordinate legislation. It can go further and repeal the delegation, taking all rule-making power away from a particular administrative agency.

In the United States, Congress has not made any significant use of the device of requiring subordinate legislation to be tabled. In France, the executive's power to issue decrees without specific legislative authority obviates such a requirement without, however, negating the—now sometimes theoretical—parliamentary power of intervention in its prescribed spheres of authority. In Britain, Parliament often but not invariably inserts such a requirement in particular statutes delegating legislative power. But in practice, little use was made of the opportunity for a long time, and regulations were rarely taken off the table. There are so many of them and their subject matter is so complicated and technical that busy members of the legislature preferred to allot their time to matters that paid larger dividends in public attention. In 1944, however, a select committee of the House of Commons was established to give sustained scrutiny to the subordinate legislation tabled in the House and to report to the House on particular rules and regulations that seemed to merit special consideration. As a result of the work of this committee, Parliament passed an act in 1946 standardizing some of the procedures for enacting, tabling, and publishing subordinate legislation. These checks are proving to be reasonably effective. If outrageous regulations are made, they will be debated in the House, and someone will have to answer for them. So the administration always keeps the House in mind when framing subordinate legislation.

Control by Political Executive. Third, the political executive that controls the civil service is the instrument of the ruling political party, and the parties are responsive to electoral opinion. Therefore the cabinet or Presi-

dent is concerned with the content of subordinate legislation. Proposed regulations which, if enacted, might rouse significant sections of opinion, are likely to get careful scrutiny by or on behalf of the political executive. In some respects, this scrutiny is closer in Britain than in the United States. As we shall see later, many of the powers of subordinate legislation granted by Congress are placed in the hands of the independent executive agencies of the national government. In their daily work, these agencies are all more or less independent of the President and he generally has no effective power to check their rule-making activities.

Consultation of Interest Groups. Fourth, one of the best indications of what reactions to subordinate legislation can be expected is the attitude of the interest groups concerned. There are, therefore, varying degrees of consultation in all three countries between the executive and interest groups when controversial regulations are being framed or amended, which provides the most continuous check on subordinate legislation. The nature of this consultation will be considered more fully at a later point in this chapter. It should be noted here, however, that Congress often lays down in the statute itself certain requirements as to how the rule-making authority is to proceed in making rules. In recent years, there has been a growing legislative tendency to require particular administrative authorities to hold a hearing, at which interested persons and groups are entitled to appear, *before* regulations are made. In 1946, Congress thus passed the Administrative Procedure Act, which requires, as a general rule, that almost all administrative rule making shall be preceded by a formal hearing. The procedure to be followed at the hearing is specified in some detail and resembles that followed in judicial trials.

Constitutional Limitations. A fifth kind of check on subordinate legislation, peculiar to the United States, is of *occasional* importance. It arises from the fact that its Constitution establishes the separation of powers and also certain guarantees of private rights which no governmental agency is entitled to override. If Congress delegates to the executive or to an administrative agency an *unfettered discretion* to make rules without imposing, at the same time, standards or principles to control and limit the exercise of the discretion, the courts may in due course hold this to be an unconstitutional delegation of legislative power to the executive. This occurred notably in the case of one of the most famous and most controversial of the New Deal measures, the National Industrial Recovery Act of 1933. Two years after its enactment, the United States Supreme Court declared it

to be unconstitutional as an illegal delegation of legislative power by Congress to the President. 'This is delegation running riot,' wrote Mr. Justice Cardozo. 'No such plenitude of power is susceptible of transfer.'² However, no federal law has fallen since 1935 on the grounds of illegal delegation of legislative power to the executive. In certain limited circumstances, the procedure followed by the administrative authority in fixing its rules and regulations or the content of the rules themselves may be held by the courts to violate due process of law. If so, the rules in question are invalid.

In Britain and France, where the same constitutional provisions do not exist, subordinate legislation is not open to attack on these grounds. The courts can only inquire whether the legislature has manifestly authorized the rule-making body to do what it has done, but in France the administrative courts provide a convenient source of redress to the injured citizen.

ADMINISTRATIVE ENFORCEMENT OF THE LAW

When subordinate legislation, enacted under the powers given in a particular statute, has defined with some exactness what individuals are to do or refrain from doing, the executive is ready to enforce the general policy laid down by the statute. As already explained, the requirements of the positive state often cannot be met merely by having courts impose fines or imprisonment on those who infringe the regulations. The framers of the general policy are not so much concerned to punish offenders as to ensure that regulations will be obeyed and thus achieve positive results. Accordingly, the legislature often arms the executive with still further powers.

License and Inspection. In many of the functions of government outlined in Chapter V, the administration is authorized to employ inspectors with power to enter premises and conduct investigations to see whether the law is being obeyed. Where particular trades and businesses are being extensively regulated, the legislature often authorizes the administration to require individuals or corporations engaged in one of these businesses to take out a license or permit. If inspection shows serious infringement of the law, the license may be cancelled or suspended and the right to engage in that

² *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935). A section of the N.I.R.A. had already been declared unconstitutional earlier that year in *Panama Refining Co. v. Ryan*, 293 U.S. 388.

particular business taken away. These are powerful weapons for compelling obedience.

For example, in enforcing certain portions of the pure-food laws, the government does not wait until the poisoned consumer of canned meat starts an action in the courts against the manufacturer. It establishes a permit system, and sends inspectors into the factories to see that the legal conditions on which the permit is issued are being obeyed. If not, it may suspend the permit, or, in some circumstances, refuse to allow the manufacturer to use approved labels, until he takes adequate steps to comply with the law. However, in enacting such an inspection system, the legislature must guard against 'undue statutory vagueness' lest it run the risk of a declaration of unconstitutionality, as occurred with a section of a pure-food law in 1952 in the United States.³

Preventive Justice. License and inspection and similar techniques have a very wide application. It is not now regarded as satisfactory that those who carelessly allow disastrous fires to break out should be punished after the event. The victims can sue the culprit for damages, but too often this is just the old case of locking the stable after the horse is stolen, and often the culprit has not the means to make good the damage he has caused. The community is reaching for an enforced standard of safety, and the legislature authorizes the government to employ fire inspectors to enter premises and insist on a minimum of precautions against fire. Minimum standards of sanitation are not sufficiently enforced by keeping the courts open to punish those who ignore the sanitary code. Medical health officers are authorized to inspect premises and to placard those they find are not reasonably fit for human habitation. Similar illustrations could be found in many fields of government activity.

This is what is called *administrative*, as distinct from judicial, *enforcement of the law*. In discussing the Anglo-American judicial system we saw that judicial enforcement of the law is, by long tradition, punitive and compensatory rather than preventive. It punishes wrong and does not try directly to compel people to do right. Administrative enforcement does try to prevent wrongdoing. It is no exaggeration to say that this can be a colossal task if it is undertaken in many branches of human affairs. In part, it explains why the negative state could get along numbering its judges in dozens, while the positive state must count its civil servants in thousands or even millions.

³ *United States v. Cardiff*, 344 U.S. 174.

It also goes far to explain the increasing inroads on the constitutional principle of the rule of law, referred to in earlier chapters. This principle was explained as ensuring that government officials could not impose burdens on the citizens by their own decision, but could only do so through the decision of a court that the law justified the burden. With few exceptions, this principle ruled in the era of the negative state.

The Administration Decides. In the last seventy years, the exceptions have eaten deeply into the principle. The owner of premises may find them closed without the courts' having first decided the issue whether they are fit for human habitation or not. The Securities and Exchange Commission in the United States, in its regulation of brokers and stock exchanges, has power in specified circumstances to revoke licenses of brokers and to cancel the registration of securities, thus preventing trading in these securities on a national stock exchange. Commercial disputes over the correct grade of particular lots of grain are settled with virtual finality by officials of the federal Department of Agriculture in the United States. Foreigners who enter the United States unlawfully may be expelled without being able to get their case before a court. These are but a few instances drawn from widely different fields in which the legislature has conferred on administrative authorities the power of deciding issues and/or enforcing the law. The agencies or officials who possess such powers are often called *administrative tribunals*.

SOME COURT REVIEW. It must not be thought that the courts are excluded from all consideration of the exercise of powers of the kind just described. Sometimes, the statute that grants such powers to administrative agencies expressly provides for a limited appeal from the decision of the agency to the courts which have a varying power to review most kinds of administrative action. The scope of judicial review will be considered later. It is sufficient here to remember that it does exist, and that it is considerably broader in the United States than in Britain, again remembering that the case of France is a special one because of its system of administrative courts.

It may be that some of these instances of administrative power should be approved and others rejected. It is not the present purpose to suggest whether particular inroads on the authority of the courts to settle disputes are justifiable or not. The purpose rather is to examine the nature of the administrative process and see the main reasons for its increasing use. This can only be done by considering still further instances of its use.

ADMINISTRATION AND THE RULE OF LAW

ADMINISTRATIVE ADJUDICATION

We have seen that the legislature often cannot make the law in detail for lack of knowledge of all the circumstances to which the law is to be applied. It lays down a general policy in terms of a standard of health or safety that it desires to be achieved. In a significant numbers of instances, it is recognized that the administration, for the same reasons, cannot make precise rules and regulations, and the legislature makes the best of it by authorizing the administration to apply the standard to particular cases as they arise. For example, it has long been found necessary to have laws regulating railways and other public utilities because of their monopoly position. Such enterprises, if unregulated, always produce a variety of abuses. They charge exorbitant rates, discriminate between their customers, and give poor service with a take-it-or-leave-it attitude. It is clear enough, to take the case of railways, that the law should require them to act *reasonably*. But to define in advance *what* would be *reasonable* in all the possible circumstances of railway operation is an impossible task. Thus, on these vital points, the legislature merely says that railways must charge reasonable rates, provide reasonable facilities, avoid unreasonable delay in transporting commodities, and refrain from favoring one shipper over another. It then authorizes an administrative agency, the Interstate Commerce Commission in the United States, the Railway and Canal Commission and the Railway Rates Tribunal in Britain, to apply these standards to particular complaints as they arise, and, in the case of rates, to fix certain standard rates of charges for the future.

Application of Vague Standards. In one sense, the commission *judges* disputes between the railways and their customers, interpreting the law as stated in the standard of reasonableness set by the legislature. In another sense, the commission *makes law*, not by general rules, but by a special order for each case as it comes up. In fact, the experts on legal theory are not agreed as to whether many of the activities of these commissions are legislative or judicial. For present purposes, it does not matter which is the correct view. The essential point is that any body authorized to take all the circumstances of a particular case into account has important discretionary power to affect the rights of those who appear before it.

In the United States for many years, attempts were made to regulate railways by minute rules of law interpreted and applied by the judiciary. They were not effective. In Britain for many years, the function of applying to particular cases the vague standards mentioned above was left to the courts. This too was unsatisfactory and was abandoned. The body that is to enforce these standards on railway companies must know the technical ramifications of railway management and engineering as well as the part played by railway transportation in a diversified economy. The courts do not possess this expert knowledge. In the end, in both countries, the legislature delegated the power of regulating railways to a specialized administrative agency which devotes most, if not all, of its time and energy to railway regulation, and which can draw on the necessary expert talent.

There are a great many other instances, always increasing in number, in which the legislature has authorized administrative agencies to apply vague standards to particular cases and thus to modify the rights and liabilities of citizens. Such instances are most commonly found where regulation of some aspect of economic life is being undertaken. The legislature has a view of the desired result, which it embodies in a standard. At the same time, it recognizes the impossibility of visualizing in advance the almost infinite number of different combinations of circumstances that may arise, and of making precise rules of law to cover them.

PROBLEMS OF REGULATION. In fact, law is not at all a suitable technique for regulating the innermost intricacies of human relationships. Regulation by fixed rules of law is only workable where you can specify particular kinds of conduct as undesirable and forbid them. It is one thing to enact a law that makes wife-beating a criminal offense. It is an entirely different thing to lay down a complete code of fair and sympathetic treatment of wives, by following which a man would fully honor the standard of conduct set by his marriage vows. If comprehensive regulation of marital enterprise ever becomes necessary, it will have to be done by an administrative agency with power to decide according to the particular circumstances of each case.

Law can regulate the margins but not the minutiae of conduct. If the minutiae must be closely regulated, the appropriate technique is military discipline, with every hour and every movement of the soldier subject to command. So where government regulation of a trade or business becomes very extensive, there are at least plausible arguments for government ownership and operation where the necessary discipline can be imposed. Administrative regulation of economic life of the order outlined in Chapter V is a

halfway house between free private enterprise subject to general rules of law, on the one hand, and state ownership where the government gives all the orders, on the other. It is not yet clear whether the halfway house can be made a permanent stopping place.

LAW OR DISCRETION? Thus there is today a large sphere where the courts no longer judge disputes because there is no law for them to apply. The judgments to be made in many fields of governmental activity involve *discretion*, and the exercise of discretion requires a judgment on what public policy should be. In a democracy, the legislature and the majority party are the authorities on public policy for the time being. Therefore, discretion in the hands of administrative agencies has to be controlled either by the legislature or by the political executive, which, in turn, is responsible through the legislature and/or the political parties to the electorate. In this way, the discretionary decisions made by administrative agencies can be kept in touch with the policy that the authorities on public policy want to enforce.

Expert and Rapid Decision. Also, the discretion can only be exercised satisfactorily in many instances by those with expert knowledge. An administrative tribunal, such as the Interstate Commerce Commission or the Railway Commission, generally specializes in one type of problem and can be staffed with experts. The judiciary has to deal with all sort of disputes and cannot be expected to have a wide range of expertness in railways, sanitary engineering and so on.

THE EXAMPLE OF SOCIAL SECURITY. There is still another class of modern legislation which confers the power of settling disputes on administrative agencies to the exclusion of the courts. This is the legislation making provision for social security. Where it is decided that the government should make certain payments to those persons who suffer from particular types of misfortune, it is necessary, either by statute or by subordinate legislation, to define carefully the conditions on which persons can claim such payments. For example, old-age pensions are payable only to those who can show that they belong to a certain category of age, residence, need, etc. A claim for a pension, or an application for cancellation of one now being given, will raise issues that one might expect to be settled by the judiciary. However, almost invariably, an administrative agency, such as an old-age pensions board, is given power to decide whether a pension should be granted or canceled, reduced or increased in amount.

The reasons for taking claims to social security payments away from

the courts are several. Claims for and disputes over pensions, unemployment-insurance benefits, and the like are very numerous. The judicial system with its cumbrous, if not dilatory, procedure could not begin to handle all the claims and disputes that arise, and delays would amount to denials of justice. Most people who make such claims are needy persons and can afford neither delay nor expense. Accordingly, such cases commonly go to administrative tribunals, which use a summary procedure adapted to the kind of cases arising and settle all disputes without significant cost to the claimants.

The Demands of the Positive State. Encroachment of the administrative on the preserves of the judiciary is going on in many fields. It is everywhere related to the assumption of positive tasks by government. It is a response to the demands of the positive state for *preventive rather than punitive action*, for close collaboration between the making of law and the interpreting and enforcing of law, for expert knowledge, sympathetic interpretation, flexible procedure, and rapid decision in settling claims and disputes. It is impossible to give any meaningful statement of the extent of the encroachment beyond saying that there are scores of administrative agencies with powers of this kind in each of the countries under study here. The significance of the development can be stated most clearly by saying that the more complex the functions assigned to government, the more specialized administrative tribunals must be used to settle the arising disputes.

The Scandinavian Ombudsman. An intriguing institution, designed to provide simple redress for grievances wrought by administrative action, is the Scandinavian Parliamentary Commissioner or *ombudsman*. This tribune of the people, which originated in Sweden in 1809, has become increasingly popular and, especially since its adoption, and highly successful operation, by Denmark in 1955, has found increasing favor particularly among the smaller states. Thus, by August of 1963, the institution was in use in varying degree and with varying impact in Sweden, Denmark, Norway, Finland, West Germany, New Zealand, and the Philippines, with several others, including Britain, the State of Connecticut, and the City of Philadelphia giving it more or less serious consideration.⁴

Not designed to replace judicial procedure *per se*, the *ombudsman* (using the Danish one as an illustration here) is a legislatively appointed administrative watchdog whose duty it is to publicize and thus help ferret out any

⁴ For a comprehensive view of the *ombudsman* see, for example, the Symposium on *Ombudsmen*, 109 *University of Pennsylvania Law Review* 1057-126 (June 1961).

cases of mis-, mal-, and/or non-feasance by members of the executive—in Sweden even the judicial—branch of the government. In his investigatory position he remains detached from the other branches, thus side-stepping political intervention; he is allowed a free hand to look into the deeds and records of any executive-administrative official or department. Anyone at all, be he a private citizen or a public official, may without cost register a complaint with the *ombudsman* who, if he deems the complaint to be properly within his jurisdiction and worthy of investigation, will proceed with dispatch and thoroughness. The result of the investigation will either be exoneration or an official ‘criticism’ of the administrative action or practice by the *ombudsman*.

Normally, the public criticism will suffice to bring about remedial action, but if no such action is taken the *ombudsman* is empowered to ‘instruct’ the public prosecutor to take the matter to court. As of this writing the latter action has never been necessary under the Danish system, whose first *ombudsman*, the Professor of Criminal Law at the University of Copenhagen, Stephan Hurwitz—unanimously elected and re-elected by Parliament—has proved to be a great success both institutionally and personally. His judicious and statesmanlike handling of the office has given him a universally excellent press and has prompted inquiries and invitations from all over the world.

But the question arises whether the *ombudsman*—however successful the institution has proved to be in a small, thoroughly homogeneous land, blessed with a united, politically alert, and knowledgeable electorate, such as Denmark—is not to a large degree a palliative of decreasing value as the size of the state involved increases. It may well be the better part of wisdom for the states under discussion in this text to try harder to make the traditional controls work, and to labor on the refining of additional procedural practices and attitudes from the inside.

JUDICIAL REVIEW OF ADMINISTRATIVE ADJUDICATION

On Constitutionality. The question arises how can the administrative encroach on the sphere of the judiciary in the United States, in view of the prominent place occupied by the separation of powers in the American Constitution? Article III of the Constitution clearly vests the judicial power of the United States in the federal judiciary. Many of the powers to make

discretionary decisions that Congress confers on administrative agencies have been held not to involve exercise of the judicial power. Numerous other such powers, however, contain undoubted judicial elements. Article III, as interpreted, does not forbid Congress to give the initial exercise of judicial power to an administrative agency, but it does prevent Congress from making such an administrative adjudication final and conclusive. That is to say, where specifically judicial power is so delegated, the decisions made are always open to fairly extensive judicial review by the courts.

LIMITING THE SCOPE OF ADMINISTRATIVE ADJUDICATION. The separation of powers thus limits the scope of administrative adjudication in the United States. We have already noted above that the National Industrial Recovery Act of 1933, for example, was declared unconstitutional by the United States Supreme Court as constituting an illegal delegation of legislative power by Congress to the executive. In Britain, where the separation of powers is not written into the constitution, and in France, where it is applied differently, the legislature may make any administrative adjudication final and conclusive if it wishes.

Apart altogether from the question of the separation of powers, the judiciary in both the United States and Britain retains significant power to review administrative decisions that affect the rights of citizens, whether these decisions are specifically judicial or not. This power may arise from the terms of the particular statute conferring administrative powers, or from accepted principles of the common law, supplemented in the United States by the due process clauses of the Constitution. For example, as alluded to earlier in this chapter, in 1952 the Supreme Court struck down 8:1 a section of the Federal Food, Drug and Cosmetic Act, dealing with factory inspection, as 'lacking in *due process* because of vagueness.' In its broadest outlines, which alone can be discussed in brief space here, this power of judicial review is much the same in both countries. In France, however, the presence of the administrative court system all but obviates the need for that particular power.

On Excess of Power. It is for the legislature to say, within the limits, if any, imposed by the constitution, how far administrative adjudication is to go. In many statutes that give the administration power to decide particular issues, provision is made for an appeal to the courts on questions of interpretation of the law. In addition, each such statute always limits the matters that the official is empowered to decide. If the latter presumes to decide questions the statute does not authorize him to decide, his decision

has no validity, and the courts, on application to them, will so hold. For example, an administrative order was made some time ago by the United States Department of Justice under the immigration laws for the deportation of one Ng Fung Ho, then a resident in America, as an undesirable alien. Ng Fung Ho, however, claimed to be a citizen by birth and could thus get the judiciary to decide this question of citizenship. For, held the Supreme Court, while the administration has power to deport aliens, it has no power to deport natural-born citizens. 'Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.'⁵ Nor, as that same tribunal had occasion to rule in 1962, did the Federal Power Commission have power to approve a merger of two natural gas pipelines while an anti-trust suit challenging the merger was before the courts.⁶ Every power of administrative decision is subject to limits, and the courts can always be invoked to see that these limits are not transgressed.

On Fairness of Procedure. The courts also retain power to examine the fairness of the procedure of administrative agencies. For example, if the agency fails to give a party notice of proceedings being taken against him or an opportunity to tell his side of the story, the courts will, on request, set aside the decision against him. Also, if the decision is obviously and scandalously wrong, as when there was no substantial evidence to support the finding of fact on which the decision is based, it is possible for the courts to intervene.

In Britain, the power of the courts to review the procedure followed by an administrative agency rests mainly on the common law and so can be modified or removed by an act of the legislature. In the United States, in the absence of a statute imposing more stringent procedural requirements, it rests on the due process clauses of the Constitution and therefore is beyond the power of Congress. Also, the effect of the due process clauses is to extend the scope of judicial review of administrative decisions considerably further in the United States than in Britain.

Prescribing Procedure by Law. The legislature may, if it sees fit, prescribe in detail the procedure that administrative agencies are to follow in making decisions. This is rarely done in Britain and France, but, in recent years, Congress has frequently specified the procedure to be followed by particular agencies.

⁵ *Ng Fung Ho v. White*, 250 U.S. 276 (1922).

⁶ *California v. Federal Power Commission*, 369 U.S. 482.

THE ADMINISTRATIVE PROCEDURE ACT OF 1946. Moreover, the Administrative Procedure Act of 1946, already referred to, lays down uniform rules of procedure for almost all administrative agencies of the federal government. It also enlarges the possibilities of judicial review of administrative action. It subjects to judicial review a number of agencies hitherto exempt from it and opens to judicial review some kinds of administrative action which, prior to the Act, were not subject to scrutiny by the courts.⁷

The Act is an attempt to recapture for the judiciary much of the ground it has lost through the rise of the administrative process. It is worth noting that the Act was sponsored by the American Bar Association, and thus represents another stage in the determined struggle of the organized legal profession against recent trends in administration. The New Deal and World War II brought a great advance in the use of the administrative process in the United States. The Administrative Procedure Act of 1946 was designed as a major counter-offensive. Yet the American Bar Association, still disturbed by the range and extent of administrative discretion, in the spring of 1955—and at least twice since—officially petitioned Congress to strip such federal agencies as the Federal Trade Commission and the National Labor Relations Board of their quasi-judicial authority, and to establish separate administrative courts to assume these judicial functions. The Second Hoover Commission made a similar recommendation for an Administrative Court of the United States, to consist of three sections having jurisdiction, respectively, in the fields of taxation, regulation, and labor.

Limited Judicial Review on Merits. One other important characteristic of judicial review of administrative action in the United States should be kept in mind. In the absence of express authorization by the legislature, judicial review does not entitle the courts to try the *merits* of the case and render a decision settling the issue between the parties. It merely entitles them to *quash* the administrative decision for some specified defect and, in effect, require the agency to retry the case as the courts of appeals have had occasion to do repeatedly in connection with F.C.C. awards of T.V. channels, for example. The reason for this limitation is clear enough. The courts are experts on matters of law and fair play. But the substance of the issue decided by the administrative agency is often a highly technical question as, for example, in railway or airline regulation. Thus in 1957, the

⁷ For example, the Act provides that every executive agency give full publicity to its formal procedures; that ample notice of contemplated adoption of rules be given; that persons compelled to appear be permitted counsel; that employees or officials engaged in investigating cases have no part in deciding them.

United States Supreme Court denied to four airlines a review of a Civil Aeronautics Board order revoking their licenses to operate as *irregular* carriers. The administrative agency rather than the courts is the competent expert on the substance of the matter to be decided by it. As one judge put it in a private interview: 'The courts can try to keep the game clean. But the public should be made to understand that they [the courts] do not have the responsibility for administrative decisions.'⁸

Another important limitation arises out of the fact that, in practice, judicial review can be brought into operation only in a mere fraction of the great numbers of issues dealt with by the administrative agencies. In any case, the problem of the scope of judicial review of administrative constructions of statutes is part of the difficult and broader problem of the review of questions of law and 'mixed' questions of law and fact.

SPECIAL ADMINISTRATIVE UNITS

THE INDEPENDENT REGULATORY BOARDS AND COMMISSIONS

We should now be able to understand the current discussions about the role of boards and commissions in present-day government. The powers of subordinate legislation, administrative adjudication, and administrative enforcement of the law discussed in this chapter are conferred on the executive. In Britain and France, they are, in almost all cases, conferred on one or another of the existing departments of government and the minister at the head of the department is responsible to Parliament for their exercise. Or—as will be shown shortly—a *government corporation* is established. But in the United States, boards or commissions outside the regular departments are often—although not always—set up to exercise such powers, particularly when powers to hear and settle claims and disputes are involved. These are known as the *independent regulatory commissions*. Here, too, sometimes, as in the case of the Tennessee Valley Authority (T.V.A.), for example, the device of the government corporation, an autonomous unit whose stock is wholly owned by the government and financed by congressional appropriations, is employed.

In the United States. In setting up independent boards, the legislature takes the view that since the functions to be exercised resemble judicial functions, they should be exercised by bodies with some independence of

⁸ As reported by Anthony Lewis in *The New York Times*, March 15, 1958.

the government of the day. Accordingly, these agencies are kept outside the departmental structure and they are not directly under the control of the President or the cabinet. While the commissioners are appointed for specific terms of office by the President, subject to approval by the Senate, they are removable only for certain causes, as spelled out by Congress in the statute creating the commissions—e.g. 'inefficiency, neglect in office or malfeasance.' Ordinarily, no more than a bare majority of the commissioners may belong to the same political party. In their everyday operations, the commissions are more or less independent of both the executive and the legislature. They are often called 'the fourth branch of government.' Some of the more famous in the United States are the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, and the Federal Power Commission.

POWERS AND ACTIVITIES. There is widespread, vigorous criticism of the powers and activities of these boards and commissions. In part, the criticism is aimed at their independence. They are not judges, members of an ancient profession sworn to uphold the law, yet they have independence of a kind accorded to judges. They are instruments for enforcing the policy of the legislature and the dominant political party, yet they are, to some degree, independent of both legislature and executive. The essence of the criticism, however, is that each of them is a government in miniature, violating the doctrine of the separation of powers. For most, if not all, of these boards and commissions also have powers of subordinate legislation—they make rules and regulations. Moreover, they possess powers of inspection and investigation, thus performing executive functions. They are authorized to launch and carry through prosecutions of offenders against the laws they are administering. In many matters, they are themselves the judges of whether individuals are meeting the requirements of the laws and vague general standards they are administering.

COMBINED POWERS. So a board is often, at one and the same time, *lawmaker, detective, prosecutor, judge, and jury*. Those who make the law also interpret and enforce it. The board is likely to be biased in favor of the policy it is trying to enforce. Allowing a board or government department or anyone else to be judge of his own case leaves something to be desired. It is easy to point to instances of capricious, if not oppressive, use of this panoply of powers—abuses which advocates of the separation of powers have always feared.

On the other hand, it is argued that this combination of quasi-legislative,

quasi-executive, and quasi-judicial powers in the hands of a board or commission is not likely to be seriously abused as long as the legislature has—as it undoubtedly has—the authority to take back from these bodies the powers it has given them. Up to a point, this argument is correct. It is correct only in so far as the legislature has a genuine alternative. If it is necessary that we should rely ever more heavily on government to perform complex functions, and if these functions can only be performed through the use of wide administrative discretions, the legislature has not a genuine alternative. It cannot abolish administrative agencies and powers; it can merely reshuffle them.

Attacks on the Independence of the Commissions. The independent regulatory boards and commissions of the federal government in the United States are under heavy fire. Some of these attacks have come from high-level, responsible groups created by the Congress and/or the President to study the problem.⁹ The attacks, covering a wide range, have aimed at two major objectives: first, that almost all boards and commissions be brought into one or the other of the ten great departments, where their work would be subject to direction by the President. Second, that the judicial functions of these agencies be separated, and be performed by officers substantially independent of both President and Congress.

The first recommendation is based upon the conviction that the President should be the over-all co-ordinator of all administrative policy, in order to bring it into line with general governmental policy. Such a step would open the work these independent regulatory boards and commissions have been performing to direct political influence, but it would also ensure clear lines of responsibility, culminating in the President, who, in turn, is responsible to the electorate for his conduct of administration. Moreover, there has been mounting criticism of the commissions as being easy prey to the wishes of the industries they are supposed to regulate, and their incorporation into the regular governmental departments is viewed as an ameliorative step in that connection.¹⁰

⁹ See the reports by the President's Committee on Administrative Management (1937); the Attorney General's Committee on Administrative Procedure (1939); the (First Hoover) Commission on Organization of the Executive Branch (1947); the Second Hoover Commission (1953); and the Harris Committee of the House of Representatives (1958 ff.).

¹⁰ 'A subtle malady which is apparently institutional rather than personal in its incidence is the tendency of the independent regulatory commissions not to die, but to fade away; with advancing age they tend to *become the servants rather than the governors of the industries which they regulate*, and attain a sort of dignified stability far from the objectives which they originally sought.' (Report of a Subcommittee of the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess., 1951, p. 60. Italics supplied.)

The second point is strongly supported by an important segment of the legal profession, which contends that administrative bodies should not be allowed to perform essentially judicial functions. The already-mentioned specific recommendation of the Second Hoover Commission here was the establishment of one large administrative court with branches having specialized jurisdiction.

With the exception of some relatively minor reshuffling as the result of the first recommendation, no really significant action has been taken on these two areas of dispute. Legislators are prone to view these agencies as 'arms of Congress' and hence their business. There is the greatest diversity of counsel on what to do about independent boards and commissions and the administrative process. The most prevalent view, however, is clearly that reform, not abolition, of the agencies is the wiser course. As one of his very first actions, the then still President-elect Kennedy appointed ex-Harvard Law School Dean James M. Landis to issue a report on the regulatory agencies. The remedies suggested by Landis emphasized centralized planning, rather than segregating functions. But, not surprisingly, only some of the Landis Report's recommendations were accepted by Congress in 1961. In order to keep the over-all matter of improving the workings of federal regulatory agencies alive, the President then created the eighty-six-member *Administrative Conference of the United States*. Paralleling the well-established *Judicial Conference of the United States*, representing the federal courts, which had in fact recommended the creation of such an administrative group, the new body immediately embarked upon a series of important and timely recommendations.

The Case of Britain. The problem of keeping administrative discretion adequately under control remains acute even though the powers are always housed in a government department. Although the device of independent boards and commissions is little used in Britain, the same arguments are broadly applicable to the British situation. The same combination of discretionary powers is widely used there. The principal difference is that they are generally given to government departments rather than to independent boards and commissions. This difference has one important consequence. In Britain, anyone who is dissatisfied with the treatment he has received at the hands of the administration can use what influence he has to get redress through political means. He may get members of Parliament to air his grievance in the House of Commons or he can seek direct access to the minister in charge of the department concerned.

This may mean much or little in the cases of particular individuals. It does mean that discretionary administrative powers are always exercised in accordance with the views of the government of the day. Those who can move the ruling political party can influence the use made of the kind of powers we are considering here. Yet where the powers are in the hands of independent boards, there is no assurance that they will be so immediately responsive to the political pressures that can be exerted on the government through the ruling political party. But it would be wrong to suppose that they are sheltered from all external pressure in the way in which judges are. Whether effective or not, pressure may be applied either through political channels or by representations made directly to the heads of the administrative board. The *Crichel Down* case illustrates both aspects:

THE CRICHEL DOWN CASE. Briefly, this *cause célèbre*, which occupied headlines in Britain for months, if not years, derives its name from a three-part farm in Dorset, converted to Air Force Ministry use in 1937. The land, which was needed for a bombing range and was appropriated much against the wishes of the several owners and tenants, was transferred to the Ministry of Agriculture in 1949, which equipped the farm at considerable expense as a single-unit model farm. Despite considerable public criticism, and the clamor of former owners to be permitted to buy back or rent the land at prices higher than their erstwhile compensation, the Ministry proceeded with its project—ultimately renting it to a tenant wholly unrelated to the original owners over the latter's violent protests, augmented by similar protests by their legislative representatives. Believing itself to be driven into a corner, the Ministry then persisted in what a number of papers called 'bull-headed bureaucratic obstinacy.'

Spearheaded by the dogged efforts of one Lt. Commander Marten, one of the interested, ignored, and 'bullied' unsuccessful applicants for the land, the case resulted in 1954 in a full-dress debate in the House of Commons; an official public inquiry; the voluntary resignation of Sir Thomas Dugdale, the Minister of Agriculture, although he had been unaware of all the facts in the case and was fully trusted by the House; and the proffered resignation, rejected by Prime Minister Winston Churchill, of the two junior ministers more directly involved. The official investigation by Sir Andrew Clark, Q.C., appointed by Sir Thomas, had found that although there was no trace of 'anything in the nature of bribery, corruption, or personal dishonesty,' there was gross ineptness and arrogance on the part of the bureaucrats involved, proving that 'the public official can be as stupid, as inaccurate, as wrong-

headed, as selfish, as mendacious, as obstinate as if he were in private employment.' Pointing out that this was essentially a matter of the position of the civil servant toward his minister, Sir Andrew's report concluded that too many inexperienced junior officials had been permitted to participate in important decisions; that the attitude of the bureaucrats had been one of 'the public be damned'; that the case involved serious interdepartmental 'tangles and botches, leaving the right hand not knowing what the left is up to'; and that the decisions taken were either made without knowledge why they were made or wrongly made on the basis of incorrect data. If it did little else, the *Crichel Down* case served to focus a glaring spotlight upon the administrative process and its personnel and became a considerable object lesson for both.

The Franks Committee Report. The *Crichel Down* case and others like it led indirectly to general dissatisfaction with the piecemeal system of administrative tribunals and boards of enquiry. As a result, in 1957 Parliament established the Committee on Tribunals and Enquiries, under the chairmanship of Sir Oliver Franks, whose terms of reference included examination of 'an important part of the relationship between the individual and authority.' Its report stressed the basic desire to balance the rights inherent in that relationship. Observing that a thorough revamping was needed in the then existing system of organizing the diverse rules of procedure that characterized each new tribunal and board, the Franks Committee charged that Parliament had created an immense system of 'judicature piecemeal,' and called for common grounds of procedure for all. The Committee asked that all hearings be open to the public; that if a citizen could not, or did not choose to, be represented by legal counsel, the administrative agency involved likewise should not have counsel; that 'a statement of reasons' behind all decisions made be filed; and that all investigating reports be made part of the public record.

THE COUNCIL ON TRIBUNALS. But, the most important recommendation of the Franks Committee was its proposal for the creation of the Council on Tribunals. Since instituted, this Council enjoys general supervision over all administrative tribunals. Its members visit the hearings to study methods of procedure; it is consulted ere new tribunals are established; and it advises on rules of procedure before a tribunal begins to operate. To a degree, the Council on Tribunals contains some of the elements of the Danish *ombudsman*, especially in its capacity of receiving and investigating complaints against tribunals coming to it from aggrieved citizens. But as presently

constituted, its powers and stature fall considerably short of that of the Scandinavian institution. Nonetheless, as H. W. N. Wade has observed, the Council's aim 'is not to conquer new territory, but to promote peace, order and good government in the territory already won.'¹¹

The Public Corporation in Britain. It should be mentioned that in one very important field of administration, the operation of the nationalized industries, Britain relies increasingly on agencies outside the government departments and beyond the detailed control of the cabinet. When an industry or business is nationalized, it is not operated under a regular government department but is put in the hands of a public corporation, like the British Broadcasting Corporation or the National Coal Board.

These corporations—which are not confined to Britain but are used widely in France and, as we have seen, sometimes in the United States as well—have the same kind of structure as a private corporation except that the shares are publicly owned and the boards of directors are appointed for a fixed term by the government of the day. Once appointed, a board has a wide independence of action in determining policy for the industry and in administering its detailed operation. The statutes creating these corporations generally give one or other of the ministers in the cabinet power to give directions to the public corporation on matters of broad general policy, but they preserve him from any responsibility for short-run policy and day-to-day management.

CONTROL AND AUTONOMY. Control of the public corporation by the public on whose behalf it operates is therefore intermittent and indirect. At infrequent fixed intervals, the corporation must come to Parliament to have its charter renewed. It is required to submit annual reports and financial statements to the minister and to Parliament, and these can be debated. Borrowing for capital purposes requires the consent of the Treasury, and directives on general policy issue from the political executive from time to time.

The public corporation in Britain has an autonomy comparable to that of the regulatory boards and commissions in the United States. It is therefore a very significant exception to the general British insistence that officials who work out and apply public policy must be subject to direct control by a responsible minister. The reason given for the exception is that when the government goes into business, it must apply business methods rather than civil service methods, and must be free of the normal political control and meddling imposed through Parliament and the cabinet.

¹¹ 'The Council on Tribunals,' Public Law 351 (1960).

The wide use of the public corporation in Britain today raises sharply a problem mentioned before: how is a government that does so many things for us to be kept under popular control? British experience with the public corporation over a period of time is likely to throw important light on this question.

ADMINISTRATION AND THE PUBLIC

INTEREST GROUPS AND ADMINISTRATION

Legislative and judicial control of the administrative process are not of themselves sufficient for keeping the administration from getting out of hand. From the point of view of the interests concerned in any particular aspect of administration, the legislature and courts are too remote and the methods of control too roundabout. Thus, they always want to have direct access to the administration to press their views and protests on the President or cabinet, or on the officials themselves. We have already seen that there is always a cluster of pressure groups wanting to be heard when subordinate legislation is being framed. Similarly, various interests always want to be heard when the administration has a discretionary power of making decisions in particular cases.

The Case for Consulting Interest Groups. Despite its employment of numerous experts in various subjects, the government is always conscious of inadequate knowledge about the complex matters it is undertaking to regulate. For example, in the framing and amending of standards for use in the grading of grain, the United States Department of Agriculture has always consulted representatives of producers, shippers, traders, and processors of the grains in question. The government also knows that it is much easier to enforce its regulations if it can get the co-operation of the interests concerned. But this co-operation is not likely to be had unless the government takes the interests into its confidence, listens to their representations, and makes adjustments here and there in deference to them.

Accordingly, the government generally welcomes the approach of the interests. The administration of many of the more complex activities of government today is carried on by close and continuous collaboration between the political executive, the administrative officials, and the various interests concerned. Generally speaking, there is as much collaboration of this kind where the administration is organized under an independent board

as where it is housed in a government department. For example, the Federal Trade Commission in the United States encourages the *Trade Practice Conference*. This is a conference of the members of one industry, profession, or trade to adopt self-imposed 'codes of fair procedure,' which are to serve as guides to all concerned members, and which are frequently adopted by the Commission itself.

GROUP ORGANIZATION. It has been said that administration sets the measure of a law. Certainly the decisions taken nowadays by the administration under its discretionary powers are often the vital decisions as far as the individuals and corporations affected are concerned. It follows that in so far as pressure groups find the administration accessible and responsive, they are better represented in government than if they had been allowed to elect representatives to the legislature. More than that, the influences that mould administrative action are often decisive in determining the content of a particular government activity. Interests that are well-organized and recognized by the government get deference and consideration, while unorganized interests do not. In administration, as in legislation, the importance of group organization emerges clearly. Interests must be effectively organized if they wish to make their weight felt in present-day government.

There is a body of opinion that looks for salvation in a fuller organization of all significant interests in the community. It doubts whether democratic control of administration can be made effective through the legislature and the judiciary. It wants to develop direct connections between the branches of administration enforcing particular laws and the various sections of the public interested in those laws. In relation to any particular law or government activity, some interests will want more vigorous administration and more extended application, while others will want less. Under their pressure and counter-pressure, the administration can shape its action to a form that all the interests will accept and will co-operate in making effective. Democratic government in this way will shed most of its coercive aspects, and become a great co-operative enterprise in which all groups share in the administration of those activities which concern them.

Interests versus the Public Interest. This proposal should not be too hastily branded as utopian. Trying to approach the administration via the political party, the legislature, and the political executive may involve a long and hazardous detour. There is little doubt that organs of direct consultation will increase in number and importance. Yet there are two problems to be considered. First, the experience of the United States with this kind of con-

sultation is not wholly reassuring. Because of the number of independent boards and commissions, and the inability of the President in recent years to co-ordinate and maintain control of all branches of the administration, administrators in the United States in many of their activities have had more freedom to respond to group pressures and to negotiate with the interests concerned than have administrators in Britain. In too many cases, the result has been that the most powerful interests concerned with a branch of the administration have gained a predominant influence over the administration for a time and diverted it to their purposes. At various times and under various circumstances, as we noted earlier, this has been true.

The influence of the railroads with the Interstate Commerce Commission, of the American Farm Bureau Federation with the Department of Agriculture, and of the American Legion with the Veterans Administration are well-known illustrations. Congress may be swayed by one interest, now by another; but the administrative agencies, so long as their functions remain unchanged, are always concerned exclusively with the same general interests. These pressures upon agency commissioners are 'almost inconceivable' in the words of one Washington expert. After their appointment 'they live in a world somewhat akin to [the late] Marilyn Monroe's, since everybody who sees them from then on has something on his mind.'¹²

Second, the interests immediately and consciously concerned with a particular field of government action are not the only interests with a stake in the matter. It is often thought that the only interests concerned with the fixing of minimum wages and maximum hours of work are employers and employees. In fact, everyone who is concerned with the level of prices for goods or with health or education has a lively interest in the matter. It is almost impossible to get all the interests with a stake in administrative decisions fairly represented. For this reason, control through the political parties, the legislature, and the political executive, which alone represent the broad general and unorganized interests, is extremely important.

If administrative discretion is to be kept under control, a combination of the older, more indirect, methods of control through the legislature and the political executive and the newer, more direct, consultation between administration and interests affected must be used. The means by which the legislature, and the cabinet or President, control administration have been described in earlier chapters. It remains to indicate briefly how the interested sections of the public make contact with the administration.

¹² William C. Burt, as quoted by Alan F. Westin (Ed.), *The Uses of Power* (New York: Harcourt, Brace and World, Inc., 1962), p. 225.

Methods of Consulting Interests. In Britain, the United States, and France, when subordinate legislation is to be framed it is standard practice for the department or administrative agency that has the matter in hand to consult the organized interests. Copies of the proposed regulations are circulated to the associations and their comments are invited. In the United States it is common, even where not required by statute, to arrange a conference or public hearing where all sides can make representations. In this way, the administration gets expert knowledge of the complexities it is expected to regulate. It may learn that certain of the proposed regulations are really unworkable, that others rouse violent opposition and attract little support. It hears all the objections before it acts, and decides what concessions or modifications it can afford to make. On the other hand, the fact that the interests are consulted disposes them to co-operate even when the decision goes against them. And after the regulations have been enacted and put into effect, the interests keep in touch with the administration with complaints and suggestions. When a considerable experience of their operation has accumulated, discussions looking to their revision may be held. There is here a complex interaction between rulers and ruled.

In a less formal way through correspondence and interview with officials, pressure groups make representations about administrative decisions in particular cases. In the United States, officials often attend meetings and conventions of the various associations, addressing them on the policy and work of their department or agency. This is rarely done in Britain, where officials are subject to closer check by the political executive and generally refuse to discuss matters of policy in public. In France, on the other hand, the multi-party system is made to order for powerful interest groups, which exploit the presence of weak, undisciplined, relatively small political parties to put sharp pressure on deputies and administrators alike. Nowhere among the liberal democracies was the immediate influence of pressure groups as obvious and as constant as during the Third and Fourth Republics in France. The presence of the National Economic Council, to be discussed briefly below, partly contributes to that influence.

THE USE OF ADVISORY COMMITTEES AND BODIES

Wherever possible, the methods used by pressure groups to influence the legislature are used to urge their views on the administration. These methods are mostly informal and have not yet hardened into a well-established practice. There is, however, one recurring pattern of consultation that is

widely used—the advisory committee. This device has been described optimistically as the democratic answer to the challenge of the corporate state. The corporate state meets the problem discussed in this chapter by formally turning over the functions of government to associations or corporations directly representative of interests, as Fascist Italy, for one, purported to do. In the process, democracy disappears. The advisory committee, it is alleged, meets the need for giving representation to and getting co-operation from the interest groups without destroying democracy. How is this accomplished?

Meeting a Need. When the government is faced with a complex and arduous task of administration aimed at realizing some objective of the positive state, it can set up a committee representative of the interests affected to advise the administrators. In so far as the interests are organized in active associations, persons who play leading roles in the associations can be put on the committee. Interests that are not organized effectively can also be given representation. A number of persons can be appointed to the committee to speak for consumers or for the general public. For example, the Advisory Council on Social Security, attached to the Social Security Administration in the United States Department of Health, Education and Welfare, is composed of representatives of employers, labor unions, and the general public. And consumers at large were given an 'official voice' by President Kennedy in 1962 with his establishment of the Consumers Advisory Council—representing the fulfillment of a 1960 campaign pledge. Such committees, like the British monarch, have influence but no power to say what the administration shall do. They have the right to advise, to be consulted, and to warn. If they do their job, administration will be carried on under the watchful eye of representatives of those directly interested in what is being done.

The French National Economic Council. While by no means to be viewed as a substitute for the activities of interest groups—which independently engage in efforts to influence administrators—the Economic Council serves, in a sense, as a constitutionally created gathering place for pressure groups in government. Designed as an advisory body at the legislative level, this 229-member unit is composed of representatives from some twenty-five or thirty 'economic and social interest groups.' It must be remembered, however, that its power is chiefly *advisory*: it may not initiate legislation, but may advocate social and economic reforms; may be consulted by the executive branch on all social and economic matters *except* the budget, and in drafting of departmental rules and regulations concerning the 'national economy';

and it *must* be consulted in the compiling of rules of administrative procedure for *those* laws on which it had previously been asked for official advice and on 'public economic programs and plans'—again with the exception of the budget. As was already explained in Chapter XI, the influence of the Economic Council has been spotty, at best. The members and their respective interests are often in bitter disagreement; it meets irregularly; and there is much absenteeism and abstention from voting. It has been of some definitely constructive value to the government on certain important national questions, such as labor policy, price and wage problems, tariff matters, and the Schuman Plan—but it cannot be relied upon as a permanent source of solid advice and support. Moreover, it is regarded with considerable suspicion by many, if not most, legislators, and it is frequently ignored by them. Individual pressure groups are also highly suspicious of the Council.

Advantages. Through advisory committees, the administration can get quickly and in advance the reactions of various sections of the public on what it proposes to do. It can tap the practical experience and expert knowledge which are essential to making governmental regulation of complex affairs practicable. By consultation and discussion it can also explain to the representatives of various groups what ends and purposes the government is trying to accomplish. In so far as it succeeds in educating these representatives they, in turn, will carry the explanations to their membership, and the chances of getting co-operation from those who are to be regulated are increased. While the member of the legislature, among other duties, maintains liaison between the government and a territorial constituency, the member of the advisory committee maintains liaison between the government and a functional constituency.

The positive state cannot accomplish what it is trying to do unless it gets widespread co-operation as well as general acquiescence from the public. The advisory committee is calculated to improve the quality of administration, to foster an atmosphere of co-operation, and to make possible continuous scrutiny of the exercise of discretionary administrative powers. It is on these grounds that the advisory committee is sometimes put forward as the democratic answer to the corporate state.

Defects. Advisory committees are now widely used as instruments of the administrative process in Britain and the United States, and—on a somewhat different basis—through the National Economic Council in France, and reliance on them is increasing. Generally, they are designed to give representation to interests, organized or unorganized. However, particular per-

sons are often appointed solely because they possess knowledge that the government hopes to be able to use. Advisory committees are useful for the purposes indicated, but they cannot be regarded as an adequate solution for the problems raised in this chapter. In practice, there is continual difficulty in getting able persons to accept membership and take an active interest in the work of the committee. This arises mainly from the fact that the committees are advisory only; they have no power to insist that their recommendations be accepted, and interest therefore tends to lag. It can be maintained, perhaps, if the administration shows itself willing to accept any unanimous recommendation. But any such practice would turn the substance of power over to the advisory committee, and this the administration cannot do. It takes great skill on the part of the administration to get useful results from advisory committees.

The truth is that the organized interests want power and not merely influence in the matters that affect them. If provision is made by the legislature for the government to intervene in the struggle of conflicting group interests, those group interests want to have some share in the control of the administrative agency that tries to regulate the conflict. They have met with some success in this claim. For example, it is not uncommon for administrative agencies that regulate employer-employee relations to be composed of equal numbers of representatives of employers and employees, with or without provision for a neutral chairman or other members to represent general public interests. Where the government undertakes to confer benefits on particular organized interests, those interests want a share in administration. So when the legislature provides for compulsory marketing of agricultural produce through a marketing board, the compulsory powers, which only the legislature can confer, are often delegated, in part at least, to boards composed of producers, or of producers, dealers, and processors, of the particular product concerned. The powerful interests want to participate directly in administration and bend the administrative process to their purposes.

THE SIGNIFICANCE OF THE ADMINISTRATIVE PROCESS

This is not necessarily objectionable where the interests that get control are the only interests with a stake in the matter. However, this can only rarely be true. As we have already seen, there are generally wider interests involved. The existence of wider interests, which are likely to be prejudiced

when administration is diverted to serve narrow and immediate interests, is the reason for insisting on primacy of control through political parties, the legislature, and the political executive. It is also the reason for the demand, so insistent in the nineteenth century, that civil servants should be neutral tools obeying the hand of the legislature and political executive. The legislature and executive, it was contended, expressed adequately the common good and the national interest, and there was no place for the imaginative civil servant with ideas of his own. Today, by contrast, there is a wide demand that civil servants have a positive constructive attitude toward their work, putting energy and even passion into the accomplishment of great tasks.

The Importance of the Civil Servant. This reversal of attitude toward the civil servant is the clearest possible indication of the great change wrought by the rapid growth of governmental functions and the development of the administrative process. Legislatures and executives can no longer express the full content of public policy. The officials are given discretion to expound it in detail. They need, therefore, knowledge, imagination, and a strong will if much is to be accomplished. Yet when civil servants give a marked display of these qualities in their daily work, they are accused in many quarters of despotic ambitions. The question remains acute how civil servants can be genuinely creative and still kept under control. The administrative process, as sketched here, is the result of tentative groping in the last forty years for an answer to this question.

It must be remembered, of course, that the civil servants who have a substantial discretion to exercise, and who are expected to be genuinely creative, are very few in number. They are generally senior officials standing close to the top of the hierarchy in each department. The vast majority of civil servants are, as the last chapter indicates, cogs in an impersonal organization, firmly clamped in a restricting routine with little chance to follow their inclinations or sympathies in their work. Indeed, it seems to be a general tendency in large-scale organization to impose a confining discipline on the many and to make overwhelming demands on a few for creative thought and action. The discretionary powers lodged with a few administrators merit the attention given to them here, because the decisions they are expected to make are vitally important decisions. More and more, the decisions taken in the course of administration affect the character of community life and the basic terms on which economic and social groups in the community live together.

Ultimate Responsibility. Accordingly, we often hear the charge that the

higher officials of the civil service really govern the country. There is no doubt that the political executive relies considerably on these officials for suggestions on policy, on what to do in the public interest. But final decisions must always rest with the political executive, which is ultimately responsible to the electorate. The political executive must retain the support of a political party and it must take account of views of organized pressure groups. The civil service is drawing closer to the formulation of policy, but it is still a long way from governing the country. It is, however, undoubtedly true that if government is to be all things to all men, the executive—in the broad sense including President or cabinet and civil service—must be vigorous, imaginative, and possessed of wide powers. The unsolved problem is how to maintain a powerful executive and at the same time to ensure its continued responsibility to the governed.

A Consequence of the Positive State. Most of the previous exposition and discussion in this book has been meant to converge on this point. At the beginning, it was stated that the essence of liberal democracy is a determination that government shall be servant and not master. Constitutions were framed for that purpose in a day when little was expected of governments. It was explained that the fundamental role of political parties is to enable the governed to change their rulers peaceably, to keep power contingent on their approval, and to construct electoral majorities that will support certain general lines of governmental action.

The great expansion in governmental functions in the last seventy years was sketched and asserted to have imposed great strain on the constitutions under consideration. In particular, it was seen that the tasks of the legislature and executive have been complicated immensely by the new burdens. A legal and judicial system, whose procedures and traditions were firmly fixed before the great expansion in governmental functions, and designed to support a negative rather than a positive conception of government, was seen to be unsuited on a number of points for meeting present-day demands. The rise of pressure groups, some of the divisive tendencies within the political parties, and the widespread dissatisfaction with the present system of representation were traced to the same source. The principal, although not the sole, effort to adjust these constitutions to the radically changed conception of the appropriate functions of government has been the development of the administrative process.

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XVIII

Democratic Trends

The preceding chapters have outlined and compared in a general way the main features of the structure and working of government in the United States, Britain, and France. The striking contrast offered by the government of the Soviet Union has been presented at several points. The description given falls far short of what would be necessary to explain the complex operations of these four governments as going concerns. No one will know them well unless he observes them at work and reads widely in books that give detailed exposition. The caution given at the beginning may be repeated; the working of any system of government is the study of a lifetime.

No system of government can be understood even in an elementary way without some reference to the ends it is designed to serve. For this reason, the discussion began with a consideration of ideals of government. The basic structure and much of the actual working of government in the United States, Britain, and France are a response to liberal democratic ideals. Similarly, the practical implications of the Communist ideals explain the essential character of government in the Soviet Union. The practice of the Nazi and Fascist dictatorships becomes more intelligible when related to their rejection of democratic ideals. Although the hostility and bitterness between the United States and its allies on the one hand, and the Soviet Union and its allies on the other, are to be explained partly on the ground of a clash of material interests, they also spring from sharply different conceptions of social, economic, and political organization.

The clash between the Soviet Union and the liberal democratic societies of the United States, Britain, and France is the central political fact in the world today. In the United States and Britain, there are small but vigorous minorities crusading for Communist ideals; in postwar France, the Communist minority has usually been able to poll between one-fifth and one-quarter of the popular vote. These minorities insist that liberal democratic ideals are shams, and that liberal democratic government is merely a cloak for exploitation of the masses. Democracy is subject to challenge from within. It is also subject to challenge from without. It is impossible to say at what moment citizens of Britain, the United States, and France may be required to risk their lives in what is essentially a struggle over social and political ideals.

In still larger perspective, there are the confusions and doubts within the ranks of the liberal democrats themselves. While holding firmly to the value of individual personality as the ultimate ideal, they are much more perplexed than they were seventy years ago on the appropriate means of serving that ideal. Specifically, there is disagreement on how far we can permit the government to go in organizing our lives without making it our master. The collapse of democracy under internal strains in many countries in Europe in the last generation or so shows that democratic government is not impregnable, that there are conditions in which it will not work. There is no generally accepted explanation of why it has failed in these instances. This adds to the perplexity. So at every point we are compelled to go beyond an examination of the structure and working of particular governments and ask what purposes they are designed to serve, and how their structure and operation are related to those purposes. It is important to grasp the essential features of democratic beliefs and to see their implications for government and politics. When this has been done, one is better able to estimate the significance of changing trends in democratic government.

For these reasons, description has been limited to the main outlines of the governments of the United States, Britain, and France, and to contrasting sketches of the principal features of government in the Soviet Union, thus reserving a good deal of space for elementary analysis of the significance of what has been described. It was pointed out at the beginning that liberal democratic government is expected to serve two principal related ends or purposes. First, democracy, defined as government by, of, and for the people, seeks to ensure a close correspondence between what the people want and what the government does. For government is an instrument for

the purposes of the men associated together in the state. Second, a democracy that is liberal seeks adequate guarantees of a large sphere of freedom of thought and action for individuals as the indispensable means of serving the claims of individual personality.

The manner and degree in which the main institutions of government in the United States, Britain, and France contribute to these ends have been discussed. An attempt has been made to explain the essential functions that the different organs of government are expected to perform and the nature of the difficulties in the way of a satisfactory performance. By way of contrast, it has been pointed out that government in the Soviet Union is organized differently and works differently because it has been designed for quite different ends. The same point was made briefly with respect to the Fascist dictatorship in Italy and the Nazi dictatorship in Germany. There is immensely more to be said on all these matters, and many students of the subject would question some of the explanations suggested here. Yet there is no doubt that these are matters of vital import, and there is little use in the study of government and politics unless it contributes to an understanding of them.

SUMMARY OF TRENDS IN DEMOCRATIC GOVERNMENT

New Activities of Government. We have seen that the main institutions of government do not remain unchanged from one generation to another. They have been considerably modified in the last two generations in the United States, Britain, and perhaps somewhat less so in France. The modification has come about in response to the rapidly expanding activities of government. The new activities have not only added greatly to the total of government business, but they have also made the conduct of that business much more complicated and difficult. It is no longer possible to make a clear-cut classification of the powers of government into legislative, executive, and judicial. It was shown that in many fields nowadays the law is being made in the course of its administration, or execution, and that it is being administered while it is being made. Not only is it clear that the judges sometimes make law while they are interpreting it and applying it to particular cases, but also that the administration often exercises judicial functions when it rules on claims and disputes in the course of administration.

Rise of the Administrative. The fact is that the administration has become in some measure a government within a government. It makes a great deal

of law by rules and regulations, orders-in-council, and decrees; it executes and enforces the law generally; and it exercises substantial powers of a judicial nature. Some students of the subject urge that if analysis is to be realistic we must add a fourth power, the administrative, to the traditional classification of the three powers of government. It is at least clear that the older classification does not sufficiently explain the facts.

If the tripartite classification of the powers of government is now inadequate, the doctrine of the separation of powers that rests on this classification is also defective. Whether or not the separation of powers is necessary to protect the liberties of the citizen against the government—a point on which liberal democrats are in disagreement among themselves—there is no doubt that governments cannot perform efficiently their present-day tasks if they are bound by rigid separation of powers. This is conceded even in the United States, where the separation of powers is written into the Constitution, and much thought is being given to ways and means of greater legislative-executive collaboration. In all three countries, it is still generally and strongly believed that the judiciary should be independent of both legislature and executive. Judicial independence has been maintained, but at the cost of taking the power to adjudicate on numerous matters away from the judiciary and reposing it with the administrative. This is particularly true in France—whose de Gaulle Constitution of 1958 theoretically resuscitates a system of separation of powers. Indeed, the clear proof that strict adherence to the separation of powers interferes with the performance of the present-day tasks of government is the rise of the administrative, in which are frequently joined powers of legislating, of executing, and of judging.

It does not necessarily follow, of course, that the administrative will swallow the other powers. The legislature—with the exception of France under the Fifth Republic—still fixes the broad objectives and methods of administrative action and the judiciary still applies certain canons of legality to administrative discretion. It may be possible to limit the mingling of legislative, executive, and judicial powers to certain areas of governmental activity. New and better devices of control may be devised. Much depends on whether the functions of government continue for an indefinite period to grow more numerous and complex.

Aggrandizement of the Executive. Frequent reference has been made to the aggrandizement of the executive. The rise of the administrative is the most striking aspect of that aggrandizement, for the administrative is always under the control and direction of the executive. The administrative is a part

of the executive, and they have been treated separately here only for purposes of exposition. Another important factor in the strengthening of the executive is its indispensability in lawmaking. The legislature cannot make effective laws on most subjects without constant reliance on the data and experience gathered by the executive in the course of administration. In Britain and France the executive has gained an almost unchallenged initiative in legislation, and even in the United States the trend is clearly in that direction.

The members of the legislature, coming from all walks of life and having a short tenure of office that frequently is not renewed by the electorate, are the amateurs in government. They have an advantage in being closer to the currents of public opinion than the civil service, but even the most intelligent of them are at a decided disadvantage in technical matters when ranged against expert civil servants with permanence of tenure. The legislatures have not taken adequate steps to adjust their procedure to the increased tempo and growing complexity of government. So they are becoming much more dependent on the executive to invent policies for them to approve. Moreover, governmental administration has so wide a range and so many ramifications, which can only be understood after long, patient, and skilled investigation, that legislatures are steadily becoming less effective critics of administration. They criticize, but they often do not know what to criticize, or what to regard as a satisfactory answer to their criticisms. Perhaps the most serious aspect of the aggrandizement of the executive is that the intricacies of the administrative machine and of the operations it is performing leave the legislature in a state of bewilderment and frustration.

Dilemma of Political Parties. In theory, at least, the legislature still makes the decisions on ultimate policy, fixing the general line that government is to take. But the legislature does what the ruling political party or political bloc wants it to do. Although the authority of the majority party is not so extensive in the United States Congress, it now controls the legislature both in Britain and France. If the legislature is weak, it is partly because the political parties have not established secretariats to help them to formulate policy, to explore ways of putting their policies into practice, and to study administration in detail to see how the policies of the opposing party work out in practice. In fact, the parties have brought vote-gathering to a fine art, but they have not taken comparable pains to study public policy and its administration. By and large, the parties have not adapted themselves to the great expansion of governmental functions.

Whatever the weakness of a two-party system, it is an improvement on the shifting coalitions of a multiple-party system, except as it is seen in Scandinavia. Government is expected to do every day so many things of vital importance that it must act vigorously and consistently if the tasks are to be accomplished. These requirements are not likely to be met unless one party has a clear majority in the legislature. However, the great range of governmental action and the consequent rise of numerous pressure groups which seek to influence or control governmental action, are making it difficult to secure or maintain a *vigorous* two-party system.

One of the most significant features of American politics is the internal weakness of the national parties. Blocs in Congress often act like splinter parties. As already noted, part of the alarm over the activities of pressure groups in Washington is justified because of the weakness of the discipline maintained by the majority party in Congress. Britain has the better disciplined two-party system. However, even there, divisive influences must not be overlooked. Firmness, vigor, and coherence in public policy are needed as never before, but there is some doubt whether the well-disciplined majorities, which alone can impregnate public policy with these qualities, will be forthcoming—especially in Washington.

Questionable Scope of Court Authority. The courts have maintained their independence, but the scope of their authority is being narrowed and the discretionary powers of government officials correspondingly increased. How greatly the rule of law is threatened by this development depends on how far it goes. An essential safeguard of liberal democracy would be lost if a numerous officialdom with wide powers were completely free from control by the judiciary. On the other hand, the judges cannot—and never could—supervise all governmental action. Today, they are not entirely satisfactory interpreters of much of the legislation under which officials hold their powers. The truth is that the judges are best fitted, by tradition and training, to interpret and apply the common law. The common law with its roots in custom has been largely made up of general rules of conduct applicable to all, rules that are observed in most instances because they accord with the community sense of right. In those relatively few instances in which common law rules were not obeyed voluntarily, the loose organization and the dilatory procedure of the Anglo-American judicial system sufficed for a long time to enforce obedience.

The rapid economic and social changes of the last hundred years have upset habitual and customary ways of life, causing much insecurity. The

common law has not been able to adapt itself to these changes. Attempts are therefore made to adapt the law by legislation. But, as we have seen, much of the legislation now being passed does not make law in the sense of establishing general rules of conduct for all. Rather it authorizes administrators to make different orders for different situations, and to enforce them. In many human relationships, law is being superseded by discretionary administration. The scope of the judicial power narrows, because judges are not administrators but interpreters of law. Yet, withal, in the United States a disturbing tendency has developed of 'passing the buck' to the courts—especially the Supreme Court—on major policy matters that the executive and the legislature have been unwilling and/or unable to tackle, e.g. the racial problem and equitable redistributing of legislative constituencies.

Trend Toward Centralization. The great growth in the functions of government has not merely modified the relationship of the legislative, executive, and judicial powers; it has also altered the relationship between the different levels of government. When government is required to do many things, and when everything it does has numerous effects on other aspects of life which in turn may have to be regulated, the advantage goes to the government with the longest reach because it can control more of the factors involved. Thus local government loses authority to the senior government and comes under its direct and detailed supervision. In a federal system, the state governments lose powers to the national government. They become less able to fend for themselves, and their autonomy within the federal system is restricted, if not threatened with extinction. The trend toward centralization has been a marked feature of the last seventy years.

SIGNIFICANCE OF THE TRENDS

In summary form, these are the trends that can be observed in liberal democratic government. If we were to summarize the outstanding characteristics of modern dictatorship generally, we should find that they were rejection of the separation of powers and the rule of law, atrophy of the legislature, subordination of the judiciary, unchallenged dominance of the executive, and centralization of all power in the senior government at the expense of local and state autonomy. All these features look like projections of the recent trends in democratic government.

Modern one-party dictatorships are marked by an utter concentration of power in the hands of government. The uses made of this concentrated

power confirm the democratic fears of all-powerful governments and democratic arguments for limiting and controlling sharply the powers of government. The individual becomes a means to the ends thought good by the leaders and ceases to be an end in himself. The most alarming thing is that once government escapes from confining checks, it is immensely difficult, if not impossible, to restore them.

The situation in the dictatorship makes this crystal clear. Power concentrated in the hands of a small clique of leaders is not checked in any way by judicial institutions, and is no longer contingent on the party winning the next election. For the one party takes no chances on losing the next election. The only way to break its rule is by revolution. And revolution is almost impossible because all unofficial organizations that might become centers of opposition are stamped out. The secret police are everywhere, and every meeting that lacks official blessing meets in the shadow of the forced labor camp.

The recent trends in democratic government are mainly the result of great increases in functions of government in the last seventy years. These functions continue to grow and the trends are being projected further along the same lines. Some liberal democrats think the trends are approaching the point, if they have not already passed it, where it will be impossible to maintain popular control of the government, and government will become master and not servant. They think the liberal democracies are thus traveling the totalitarian road.

Other liberal democrats, particularly the democratic socialists, have more confidence in the resources available for popular control of a powerful government. Of course, governments get out of hand when liberal democratic ideals are rejected or when faith in them declines seriously. They insist, however, that if we hold fast to liberal democratic ideals, we have standards for controlling government action. Even more important, we will elect to power in government men who are themselves loyal to these ideals, men who will direct the work of government to enlarging the possibilities for individual personality. There is no serious danger, they say, until the electorate begins to elect imperious men of dictatorial temperament. As long as we elect good men, we will get good results.

The liberal democrats who fear the constant expansion of the power of government reply that we are, in fact, losing our faith in the liberal democratic ideals. Growing government activities are, in almost all cases, responses to popular demand for greater social equality and more social security at

the expense of individual freedom. Precious qualities of individual personality can only be preserved and developed through a large measure of freedom and a willing acceptance of the risks and responsibilities that freedom entails. According to this view, if we go on wanting to exchange freedom and responsibility for security provided by government, we shall have lost the essence of the democratic ideal and also the means of keeping government under control.

As has been noted from time to time in this book, these issues are being debated at length in the United States, Britain, France, and the other liberal democracies with a great range of data and arguments being brought into the discussion. The data and arguments cannot be rehearsed here, and therefore no judgment on the debate should be offered.

CONCLUSION

A few points can be stated by way of conclusion. It is clear enough that liberal democracy cannot survive where power is concentrated as it has been in the modern dictatorships. Yet the democracies are still a long way from such a concentration of power, and it is open to them to halt the trends described here before they present us with the monolithic state. There is now much more concentration of power in democratic governmental structure than there was in 1900, and this is not without its alarming aspects. But it is not necessarily beyond human ingenuity to find improved methods of control as counterpoises to the aggrandizement of the executive and the growing predominance of national over local and state governments.

This is the crux of the matter. If government is going to perform many positive services for the community, there must be greater concentration and less dispersion of power than that which marked the age of *laissez faire*. But wherever power is lodged, devices are needed to ensure that it can be called to account. The more power is concentrated, the more nicely calculated the means of controlling it must be. The elaboration of new and more effective controls has not kept pace with the growing concentration of power. More thought must be given to such controls in the immediate future. And it is not going too far to say that some caution will have to be exercised in adding still further to the positive functions of government. If the democratic ideal of the supreme importance of individual personality is clearly understood and firmly held by the bulk of the people, and if enough persons with an informed intelligence participate actively in democratic poli-

tics, there is little doubt that the needed controls will be devised and the required caution will be exercised.

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XIX

International Politics

The world is divided into a number of separate, independent states. There were some 118 to 125 in 1963, depending on what is reckoned to constitute independence. Each of these is ruled by a separate government whose prime objective is to safeguard the independence of its particular state. Some, the liberal democratic governments, want independence so that their people will be free to pursue the good life within the national framework of order already firmly established. Others, like the old Nazi and Fascist dictatorships, wanted freedom for the state so that it could pursue its mission in the world. The Soviet Union wants to maintain its independence in order to show the world, and particularly the new states, by a variety of methods, how communism will settle its problems. But for whatever reason, each government still regards its freedom of action vis-à-vis the outside world as the highest law. It acknowledges no political superior from whom it accepts orders.

Of course, particular states often have something in common with some of the other states. Twice in twenty-five years, Britain, France, and the United States found a common interest in resisting German designs in Europe. The United States and Great Britain have always shared a common language and a large element of common tradition. Since the nineteenth century, they have both adhered to substantially the same ideal of government. In general, they have shared a desire to maintain the *status quo*, i.e. the preservation of the existing distribution of power and status in the world. For these reasons, war between them is most unlikely, if not unthinkable. Bismarck, the realistic German statesman of the nineteenth century, said the

most important fact about international politics was that the United States spoke the English language. Later German statesmen failed to see the significance of this, to the sorrow of their country. It would not be easy to find two other states with anything like as much in common, with the possible exception of some of the members of the Commonwealth. Most of them have much less, and many of them seem to have nothing.

INTERNATIONAL POLITICS VERSUS DOMESTIC POLITICS

Although they are primarily self-regarding, states do not exist in isolation. Each has relationships with some or all of the others. Those that have common boundaries have line-fence disputes. Several may covet the resources of undeveloped areas of the world and thus get into a scramble for spheres of influence of one sort or another. Each has raw materials, finished products, or skills that some of the others need. Commercial intercourse and international exchange of goods and services develop. When the means of transport and communication reach into the furthest corners of the world, intercourse between states is on a world-wide scale. As a result, every state is brought into relationships with almost all the others. What happens between North Korea and South Korea profoundly affects the relationships of the United States to other states. These relationships between states are the content of international politics.

Different Politics. Politics within a single state is concerned with the adjusting and ordering of the relationships between individuals and groups within that state. International politics has to do with the adjustment of relationships between separate states. There is a deep difference between international politics and domestic politics within the household of a particular state. The individuals and groups involved in domestic politics are all subject to one superior authority, the government, which makes and enforces law, preserves order, and keeps them all in check. The separate states, whose relationships are the stuff of international politics, acknowledge no superior authority or common lawmaking body, and reserve the right to be disorderly if they wish. Hence, while we can talk about international politics, we cannot talk about international government, for there is no such thing, although some would consider the U.N. a step in that direction.

There is another and deeper difference between international politics and the domestic politics of liberal democratic states in particular. Individuals in the liberal democratic state are united by habit and custom, the innumerable

ties that come from living together in peace and security over a long period of time. They are also united by widespread allegiance to liberal democratic ideals. There is a voluntary cohesion out of which, as we have seen, an unmistakable public opinion arises from time to time.

Different Climate and Environment. The people of the United States, Britain, and France are governed by public opinion as well as by the restraint of superior force in the hands of the government. In the community of states, or the family of nations as it is sometimes called, there is little or no community or family feeling. The several states have not lived together in peace and security, but rather in fear intensified by recurring wars. There is no unifying ideal held by all the people of all the nations. Consequently, there is no voluntary cohesion that unites people across national boundaries, no international public opinion that puts restraints on the actions of particular states in the way in which public opinion in the United States or Britain or France operates as a restraint on the actions of individuals and groups.

At most, there are widely shared aspirations for world peace, dreams of world order without any genuine agreement across boundaries on ways and means, terms, and conditions. So far at any rate, each of the powerful states wants peace and order on its own terms, consistent with its own independence and security. So international politics works in an entirely different climate and environment from liberal democratic politics.

The principles and procedures of liberal democratic domestic politics do not operate in international politics. The analysis that explains the former does not apply in any significant way to the latter. The techniques of adjustment that settle conflicts and maintain order in the former—discussion, compromise, the making and enforcing of new laws, the impartial judiciary, settling disputes in accordance with accepted law—cannot be transferred bodily to the latter. That is why prescriptions for world order and peace originating from liberal democratic sources have failed to work. The lack of a common unifying ideal, and of an unquestioned common superior authority in the latter case, makes such transfer improbable.

Distinct Subject of Study. International politics therefore is a distinct and separate subject of study. Not only are the facts entirely different; the postulates and assumptions from which analysis must start are different. A separate book, and not merely a chapter, is needed to give an adequate introduction to the subject. There are, however, two important reasons for looking at international politics in a book on liberal democratic government.

First, the continuance of liberal democratic government in any country

depends on some minimum of stability and order in international relations. Liberal democracy does not thrive on war, because war exalts the authoritarian elements and personalities in a society, and increases tremendously the social dislocations and maladjustments. Continual war or threat of war may burden the processes of discussion and compromise beyond what they can bear and compel reliance on authoritarian methods and personalities. Most important, liberal democratic ideals claim a universal validity, and must seek the allegiance of all men. They aim at peace, harmony, and mutual respect among men, and hope in them may well be abandoned if they are continually frustrated by war. It is important to see something of the conditions on which their continuance and their projection on a world scale must be estimated.

Second, the contrast with international politics should help to clarify still further the principal characteristics and conditions of democratic politics. Both kinds of politics are made of the same basic human nature and the same psychological drives. Presumably, there is nothing in human nature as such which prevents lawlessness, violence, and insecurity *within* national boundaries yet at the same time manifests itself *across* national boundaries. Men have had to learn the secret of political unity and to work out the institutions and procedures that secure internal peace. We forget them at our peril, and a contrast that sharpens their outlines improves our grip on them. By the same token, there is reason to hope. For presumably there is nothing in nature that prevents the establishment of world order and peace if the appropriate conditions for it are brought into existence. But a universal wish for it is not enough.

A SYSTEM OF STATES

The situation that confronts us is a system of states, or a state system, the members of which cannot live in isolation from one another. They are continually enmeshed in relationships that affect one another's interests, effective power, and security; as an entity, they have not been able to establish these relationships on a permanently peaceful basis. The term, *state system*, is justified despite the disorderliness of their relationships. For these relationships show a recurring pattern of aggrandizement, diplomacy, war, peace treaties, alliances, counter-alliances, and so on. The modern state system emerged in Western Europe in the sixteenth century, at the end of the

Middle Ages. It has now expanded to embrace all the states in the world and we are living in the advanced stages of its tribulations. However, it is by no means the first state system known to human history and exhibiting these characteristics.

OLDER STATE SYSTEMS

Some of those which are a part of the history of the Western world may be noted. For several thousand years before Christ there were successive state systems in what is now called the Middle East, where repeatedly a number of separate, independent states contended with one another after the fashion mentioned. In the millennium before Christ, the numerous Greek city-states composed a state system of their own. Despite common language, common gods, and common culture, they were unable to live together permanently at peace. The disastrous Peloponnesian War between Athens and Sparta found most of them ranged on one side or the other. In the five hundred years before Christ, expanding maritime intercourse in the Mediterranean drew the states that lined its shores into a state system which culminated in the death struggle between Rome and Carthage.

In the later Middle Ages the city-states of the Italian peninsula, Florence, Genoa, Pisa, Milan, Venice, and so on, participated in a state system. It was as a diplomat in the service of the city of Florence that Niccolò Machiavelli got his experience of the methods necessary for survival in such a system, and which he immortalized in his famous book *The Prince*. These methods consisted so largely of fraud, treachery, and violence that the record has shocked the civilized world ever since and has made 'Machiavellian' a term of reproach.¹

Their Usual Fate. The usual fate of such state systems at some time or other in their history has been the loss of independence of the several states and their subjugation by the strongest one among them. They were brought into a political unity, or at any rate some kind of peace, by conquest. The Babylonian, Assyrian, and Persian Empires successively swallowed up the ancient state systems of the Middle East. The Greek city-states were subdued by Philip of Macedon; and his son, Alexander the Great, incorporated them into his short-lived empire that stretched from the Greek peninsula to the borders of India. After the destruction of Carthage, Rome made herself mis-

¹ For the contention that Machiavelli himself was not really a 'Machiavellian,' see Henry J. Abraham, 'Was Machiavelli a Machiavellian?' *Social Science*, xxviii (1953), 25-30.

ness not only of the Mediterranean basin but also of the then-known world. The Roman Empire established the *pax Romana*, the Roman peace, and held it steadily for hundreds of years, partly through the power of its legions, and partly through an effective system of law and administration. In most of the state systems of the past, the price of prolonged peace has been forcible unification by a single great power.

The Roman Empire collapsed completely in Europe about A.D. 400, but the memory of the peace and security it provided in its best days has never quite died from the minds of Europeans. With the revival of Europe in the Middle Ages—roughly from A.D. 900 to 1500—attempts were made to restore the universal empire under the joint auspices of the Papacy and the Holy Roman Empire. In this period Europe had a tenuous sort of unity. Its people had a religious unity under the Catholic (universal) Church, which moderated the tensions among them. The Holy Roman Empire, under the leadership of an elected Emperor, claimed to be the heir of the old Roman Empire, and tried with indifferent success to exercise a loose dominion over Europe. The desire for political unity was there, but it was mostly ineffective.

Europe was far from enjoying universal peace during the Middle Ages. However, the effective units of power were mostly small feudal principalities. Subsistence agriculture, which was the prevailing mode of production, could not sustain prolonged or extensive wars. The difficulties of transportation and the state of technology in general were also limiting factors. The conditions for a full-fledged state system did not exist.

THE MODERN STATE SYSTEM

The modern state system emerged in Western Europe after the close of the Middle Ages. From small beginnings, a number of feudal lords and their successors managed over long periods of time to consolidate large territories under their control, in much the same way that land-hungry farmers expand, and to set themselves up as kings. Large areas, France, England, Spain, Austria, and Holland, roughly as we now know them, became united under a single political control. These kingdoms rejected the overlordship of the Holy Roman Empire. Each asserted the right to consider only its own interests in its dealings with the others.

Its Development in Europe. The term 'sovereignty' came into use in the sixteenth century to denote the status of a ruler who was supreme in his own territory and acknowledged no superior external political authority above

him. His might became right. At about the same time, the Reformation broke the religious unity of Europe, severing the bonds that might have helped to unite people across frontiers. Britain and Holland became Protestant; Spain, France, and Austria remained officially Catholic. From about 1650 to 1750 Europe was rent by religious wars, sometimes civil wars, but increasingly wars between what we now call nation-states.

The process of development into separate independent states was at the same time a process of division. The prince who established order and security firmly within his boundaries helped to enthrone anarchy on his frontiers. The double process went on from the sixteenth century to the twentieth century. As communications improved and trade, wealth, and population grew, more and more states were drawn into the European state system. As the Napoleonic wars show, Russia had been drawn into it by the end of the eighteenth century. Germany and Italy were not unified until after the middle of the nineteenth century, but they rapidly became great powers. After the readjustments in the peace treaties at the end of World War I, there were twenty-six separate, independent states in Europe, each devoted to maintaining its independence.

Its Expansion on a World Scale. However, as World War I clearly showed, the European state system had become world-wide. The War of 1914-18 began in Europe but the whole world was drawn into the conflagration. The participation—however reluctant—by the United States, for example, showed that it had a vital stake in the results of the conflict. World War II also began in Europe, but decisive battles in it were fought in Africa, Asia, and even on the borders of Australia and in the oceans of America. All the states in the world have become neighbors in the sense that what happens between any two of them may affect decisively *all* the others.

At the same time, the states, or powers, that really count are becoming fewer and bigger. At the outbreak of World War II the Great Powers, those that dwarfed all the others in military power, numbered eight: Germany, the Soviet Union, Britain, France, Italy, the United States, Japan, and China. In 1963 there were just two of these, the United States and the Soviet Union, but with Communist China a potential third—and, as we shall see, a growing pluralism in the offing on the international horizon generally. The vital decisions are no longer exclusively being taken in European chancelleries. The European states, excluding the Soviet Union, are today little more than pawns in a bigger game. They are reaping the fruits of their inability to keep Europe from wasting her strength in exhausting wars.

The world as a whole is having to come to terms with the consequences of the European state system with the present situation growing out of its history. The pattern of intercourse between states is largely that developed in the experience of European states in dealing with one another. All the means and devices for trying to maintain peace have been thought out primarily for application to the European state system. Hence, any discussion of international politics still requires close attention to it.

THE RISE OF NATIONALISM

The European states that emerged at the end of the Middle Ages were first dynastic states. They were ruled by monarchs whose power stayed in the family and was passed on to their descendants, the Tudors, the Stuarts, the Bourbons, Hapsburgs, and Hohenzollerns. However, they all developed, or divided, sooner or later, into nation-states. A *dynastic state* is one in which the bond of union among the people is common subjection to a monarch, who is not quite a god but who claims the awe and reverence of a god. The European dynasties each claimed to rule by Divine Right. A *nation-state* is one in which the bond of union among the people is the feeling of a common nationality, or nationalism. The feeling of loyalty and reverence is transferred from the monarch to the nation. The nation is deified and its welfare and interests are the highest law. The sovereignty of the monarch, already referred to, becomes the sovereignty of the nation.

Exclusiveness of Nationalism. The unification of the separate European states laid the foundations of modern nationalism. The more or less diverse people, who were held together in peace in these kingdoms, gradually developed a common consciousness. They became Englishmen or Frenchmen. As the sense of national fellowship grew, it was accompanied by a sense of national exclusiveness. Finding out what they had in common was accompanied by a discovery of how different and superior they were to other national groups. National pride and national exclusiveness went hand in hand. In the Middle Ages, the universal Church taught the brotherhood of all men and sought to secure for itself the highest loyalty of all men. For modern nationalism, it can almost be said that the brotherhood of man stops at the national frontier. The widest loyalty that now attracts the masses of men is the nation-state. Millions fought, suffered, and died for it in both world wars.

Napoleon scourged Europe not only by his military genius, but by exploiting the passion of French national feeling. Hitler desolated Europe in the

name of the world-mission of the German people. The ferment in the Far East and Africa against domination by the white race has been, in part at least, due to the stirrings of nationalism. The Soviet Union, which claims to have a universal message of hope for all men, has not hesitated in recent years to stimulate Russian nationalism and to turn czars and czarist generals into national heroes.

Liberal democratic ideals are stated in universal terms and those who hold them assert their universal validity. Yet these ideals have been principally effective in the modern world in strengthening national cohesion in the countries where they are held. When it is proposed to feed the starving peoples of other countries, it has to be explained or 'sold' in large part at any rate—especially in the United States—as a measure for our own security. Nationalist feeling and loyalty are almost everywhere an obstacle to wider loyalties.

Nationalism and Total War. Even after the sovereign states of Europe arose, the memories of the cultural and religious unity of Europe in the Middle Ages lingered on. In the eighteenth century, educated people could still think of themselves as Europeans, and eighteenth-century wars were gentlemen's games played according to rules, by professional soldiers for limited stakes. When peace was made, the victors did not try to humiliate the vanquished. They made peace coolly with an eye to their own self-interest but without vindictiveness. Twentieth-century wars are fought by entire populations roused to the highest pitch of passion by their governments. Less and less attention is paid to the rules of the game. Nazi Germany, the archetype of this strident nationalism, did not even show its opponents the courtesy of declaring war, but struck without warning. So did Japan. When nations are convinced that they are fighting for their existence, they will use almost any methods, and they make peace vindictively, which rouses a passion for revenge. Twentieth-century wars are total wars, and nationalism is one of the main factors making them so.

Yet it will not do merely to condemn nationalism. The good life requires order and security. The existing nation-states provide the only order and security that is effective in the world today. On the basis of national feeling, the nation-states have provided a more civilized order over wider areas than any previously known political organization.

WIDER LOYALTIES. It is true that wider loyalties are necessary for the effective establishment of world peace in our day. But the tragic difficulty is that it has never been clear how these wider loyalties are to be focused and nour-

ished. One can give loyalty to the idea of world peace, and most people do. Ideas alone, however, will not secure peace. That requires the establishment of the institutions of world government as a focus for loyalty. Until they take concrete and promising form, few are prepared to compromise the substance of order and security on a national basis for the shadowy possibility of a world order.

Perhaps what is needed in terms of institutions is to duplicate the achievement of the United States on a world scale. This was not easy to do, and even then it did not preclude a fierce civil war. It is infinitely harder to do on a world scale amid the confusion of tongues, cultures, and passionate nationalisms, although the United Nations and various regional arrangements, both to be discussed later, have tried to point the way.

THE IMPLICATIONS OF A STATE SYSTEM

To understand the nature of the problem and its difficulties, it is necessary to look very closely at the motives that move states in a state system. Each state cherishes its freedom, and knows that the others cherish their independence. Freedom, whether for individuals or for states, leads to self-expression, the trying out of one's powers and capacities in the environment. As innate powers and capacities, whether of individual men or of groups of men associated together in a state, are tested and developed, they call for a larger arena in which to test and express them still further.

Power-Drives of Men and States. When men learned to fly, they were not content with showing that a heavier-than-air machine could be kept in the air. There began a competition to see who could fly farthest, fastest, highest, and longest. Even yet, no limit has been set to these ambitions. As long as the contest is directed to conquest of a material environment, it does not raise directly any political question. However, the environment in which self-expression takes place is social as well as material. For many, the intoxication of directing and controlling other people is greater than that of mastering the purely material environment. It is not true of all persons, nor are all states always seeking to exercise power over their neighbors. But it is always true of enough persons and enough states to make it a dominating factor in both domestic and international politics.

If self-expression through power-seeking is not checked, it comes to regard the sky as the limit, 'the restless search of power after power that ceaseth only in death,' as Hobbes expressed it in his *Leviathan*. It becomes imperial-

ism in one form or another. This is why every political system which accepts freedom as a value to be protected must be concerned to check and limit the power of individuals, organized groups, and governments as well. This is why every political system that does not accept freedom as a value is likely to end in the arbitrary power of a few over the many.

CURBS. There are several ways of checking imperialistic self-expression. Ideals which inculcate respect for the claims of others to freedom and self-realization are the strongest check, because they operate directly on motivation. In the Anglo-American world, while there have been some embarrassing exceptions, we see relatively little evidence of power-thirst in ourselves or our neighbors, and this has at times made it difficult there to appreciate the essential character of international politics. Another way is to persuade power-seekers that particular ambitions are inherently incapable of realization. For a long time, men put little effort into trying to fly because it seemed to be out of the question. Switzerland and Denmark do not want to conquer the world. One state will not try to conquer all the others if on any careful estimate successful conquest seems to be impossible. If one state seeking to dominate is always confronted by an effective combination of states against it, its imperialistic ambitions will be checked. Finally, there is the check of a superior political authority which is found in the government in domestic politics, but does not exist in international politics.

URGES. The urges to imperialistic self-expression that move individuals move states also, the drive for power in the latter case being much more complex in motivation. Just as the farmer covets the next piece of land to round out his holdings, so some states want to extend their boundaries to their 'natural' frontiers, e.g. Germany's demand for Danzig and the Polish 'Corridor' before World War II. The feudal lords of Europe before the sixteenth century and the monarchs after that time were literally land-hungry farmers. From 1650 to 1750, the monarchs of Europe were also moved by religious imperialism, the desire to further a particular religious cause. At other times, as in the late nineteenth century, it is colonial imperialism, a search for raw materials, markets, and fields of investment for an expanding capitalism. Or it may be a Mussolini-inspired Italian dream for a *mare nostrum* and a Greater Italy abroad. Whatever the motivations, when the state expresses in international politics deep desires of its millions of people, it is a massive phenomenon. When millions of Germans and Japanese are convinced, as they were before World War II, that Germany and Japan are suffocating for want of *Lebensraum* for their people, an explosive force of terrifying power is built up.

Fear Provokes Security Measures. In a state system in which each state is sovereign, considerations of power, of the organized force needed for security or for realizing ambitions, must always be dominant. While some states may be satisfied and content with the *status quo*, it is almost unthinkable that they should all be. Even those content with the *status quo* cannot feel secure and must live in fear, unless they are satisfied that all other states are equally content, and will continue to be so content. This is a far-reaching statement because it really says that no state in a state system can ever feel secure. Yet it must be true for a very simple reason:

The decisive motivation in a state system is the desire of each state to preserve its freedom now and in the future. If this desire were removed, there might be a voluntary political unification as in the Thirteen Colonies in 1789, and the separate state system might come to an end. For each to be able to preserve its freedom in the future, it must be alert to the power its neighbors now possess, or are likely to possess in the near future. Even if these neighbors are now pacific in demeanor and devoted to the arts of peace—increasing their industrial potential—a new set of statesmen may arise there at any time who will decide to use this power for imperialistic designs. So, even if all states in a state system were presently content with the *status quo*, considerations of power would still take priority in the calculations of statesmen, and each state would feel compelled to take measures for its own security. Of course, the people and the statesmen of particular states may forget that this is true. The democratic world did forget it between the two World Wars with almost fatal consequences.

Security Measures Provoke Fear. Most states remember most of the time. Each is thus disposed to take such steps now as it can to protect itself in the future. But when a state increases its armaments, or seeks an expansion of territory to the natural defense line of a sea or range of mountains, it is likely to provoke fear in some or all of the other states, because they lack any assurance about the purposes to which this increase of power will be put. Fear then is likely to provoke counter-preparation by other states. Almost before they know it, the strong powers in a state system may slide insensibly into an armament race, and thence into open war.

Even when one state has outdistanced all the others in its effective power, it still does not feel secure. It knows itself to be the object of widespread fear, envy, and suspicion by the other states. Alliances are formed, or may be formed, against it. So its disposition is to take still further anxious and alarming measures to protect itself. It may even come to the point of thinking that security requires the subjection of all the others. Small, weak states

have to resign themselves to seeking the protection of a stronger state. But the stronger they become in relative terms, the more do they have to attend to considerations of power.

To explain international rivalry and power-seeking leading to repeated wars, it is not necessary to postulate imperialistic ambitions as a primary motive. It is enough to postulate a tendency on the part of human organization to seek to extend and to use power. If this is assumed to be an inherent tendency, then each state must be on guard constantly against the possibility that the enlarging power of other states is becoming the instrument of imperialistic designs. In particular instances, the possibility may or may not be a reality. The existing rivalry between the United States and the Soviet Union may not be due to a determination by the Soviet Union to dominate the world. The leaders of the Soviet Union may be convinced that the inherent character of capitalism is driving the United States inevitably to war against communism as represented by the Soviet Union, and their whole policy since 1945 may be primarily defensive in purpose. For all we know with utter certainty, this *may* be true. But equally, for all we know with utter certainty, it may *not* be true.

The Risks of a Trusting Policy. The critical questions are these: who is prepared to make, and act on, the assumption that current Soviet policy is really defensive, caused by fear; who is prepared to take the responsibility and risk of stopping all military preparations that might add to that fear? It is not merely that the assumption might be mistaken, but also that the consequences of acting on mistaken assumption in this situation are likely to be irretrievable. No responsible statesman will take the risk.

If we take up again the contrast with domestic politics it will help to make the situation in international politics clear. While there are struggles for power in domestic politics, they are moderated by various factors. There is at least some mutual trust based on widespread adherence to common ideals. The conflicting ideals of the United States and the Soviet Union heighten enormously their mutual distrust. Mutual trust within the United States and Britain is greatly strengthened by two other considerations.

First, there is the knowledge that others, while they may wish us ill, are restrained in their designs on us by fear of the law and of the government which exists to enforce general security. Second, the consequences of misplaced trust are not nearly so likely to be irretrievable, and risks can be taken with a lighter heart. For, even if we are mistaken in trusting our fellows and they wrong us, we can still seek redress through the force of

public opinion, through the award of damages or punishment against the wrongdoer by the courts, and through physical coercion of him by the government if necessary. States that take wide risks for peace in international politics and guess wrong have no such recourse to retrieve their position. They must retrieve their position, if at all, by their own efforts. This gives a desperate character to gambling in international politics. Yet, as the King of Siam sang in a Broadway musical, 'unless somebody trusts somebody, there will be nothing left on earth excepting fishes!' Perhaps not even they, given modern radiation-polluted waters.

THE OLD AND NEW BALANCE OF POWER

When several sovereign states face one another in a state system, even the most pacific is driven to try to amass enough power to persuade others not to attack it. If the power of two states between which tension exists appears approximately equal, each is likely to feel that the outcome of a war is too uncertain to risk it. As long as this conviction is general among the several states, there is equilibrium, or balance, of power, and peace, although essentially an unstable peace.² However, the different states in the modern state system have almost always been unequal in power, in population, resources, skill, and organizing capacity. Generally, there have been a few great powers with a larger number of smaller powers in descending order to the point of insignificance.

Alliance and Counter-Alliance. In this situation, varieties of maneuvers are possible for trying to maintain a balance of power. The most frequent historical pattern has been systems of alliances. This was certainly the case until the appearance of the two super-powers, and the consequent introduction of a bipolar or two-bloc system of strength that, of course is potentially tempered by the de Gaulle-conceived (perhaps wishfully) 'third force' of the Old World or even the Afro-Asian bloc. For example, before World War I, there was the Triple Alliance of Germany, Austria-Hungary, and Italy, the last proving unreliable in the event. Facing it was the Triple Entente of France, Russia, and Britain, the last not firmly attached till the last minute. Every particular historical effort at balance is too complex for brief description. A simplified model will help to give some inkling of the mechanics of the classic balance of power.

² For an interesting dissenting viewpoint, see A. F. K. Organski, *World Politics* (New York: Alfred A. Knopf, 1958), ch. 11.

Assume a situation in which State A is clearly greater in power than any other single state. Because of that power there are doubts, justified or not, about its pacific intentions. Or State B, the next of the lower order of powers, may want to gain for itself by maneuver the advantages of A's position. Each of the lesser powers standing alone, B included, is outweighed by A. But B and C, which have a common interest in checking A, might in firm alliance together so balance the power of A as to give a feeling of considerable security against attack or severe diplomatic pressure by A.

This technique of alliance, once applied, cuts both ways. If A now thinks there is a preponderance of power against it threatening its security, it may seek a counter-alliance with State D, which thinks it has reason to fear the ambitions of B or C, or both. The tendency then is for all states of significant power to be drawn into alliance on one side or other of the scale. If that happens, and the alliances and counter-alliances hold firm, all the resources of the technique of balance of power have been exploited. The balance is never likely to be exactly even, and events in any one or other of the states concerned may tip it sharply one way or the other. If an occasion for war arises, war is likely to be the result.

The Need for a Balancer. More delicate adjustments and more effective use of the balance of power were possible, if one of the stronger states in the system felt sufficiently secure and sufficiently satisfied with the *status quo* to afford some detachment from the struggle for security that engrossed the others. Given sufficient diplomatic skill and coolness, it could act as a balancer, standing in the middle, and throwing its weight, now on one side of the scale and now on the other, to redress dangerous tips of the balance.

The balancer could not make any permanent alliance. It had to keep both sides in doubt about its policy so that they would always be courting its favor, and it could award its temporary support only on conditions that tended to preserve the balance. This accomplished, it could use its greater freedom of action to pursue policies for its own advantage. As long as the balance worked, of course, the balancer not only maintained its own freedom but also the independence of the other states and general peace as well.

Britain as Balancer. For a long time, Great Britain was this balancer in the European balance of power. Her insular position made her secure from attack, at least as long as Europe was divided into a number of competing powers. From the sixteenth century on, her primary interests were not in Europe, but in her maritime empire. She looked with detachment on the

European scene. Her interests in continental Europe were of a very limited character as long as a balance of power was maintained. Her one constant aim was to prevent the political consolidation of Europe under a single power, to prevent any drastic alteration of the *status quo*.

She never committed herself permanently to any one ally or set of allies. Successively, she supported coalitions against Spain, France, and Germany precisely *because* these states in turn became so strong as to threaten the balance of power. From the seventeenth to the nineteenth centuries, France was the power to be feared—witness the long British struggle against Napoleon. The unification of Germany in 1870 soon made it the greatest European power. So Britain moved to the side of France—witness the two successive struggles against Germany in the twentieth century.

PAX BRITANNICA. Freed from hampering commitments on the Continent of Europe, Britain enjoyed great freedom in the rest of the world. In the nineteenth century particularly, when her naval supremacy and economic leadership were unquestioned, she maintained throughout the world what might be called *pax Britannica*. She herself profited immensely from this situation. But so also did many other non-European states. For example, the *pax Britannica*, in large measure, provided security for the states of the Western Hemisphere without requiring them to expend significant resources on military and naval establishments until the twentieth century. It was the *pax Britannica*, rather than the breadth of the oceans, which enabled North American isolationism to continue into the twentieth century. It was only when British power declined and ceased to be an effective balancer that its significance became clear.

Precariousness of Balance of Power. This balance of power, even if it responded to the diplomacy of a skillful balancer, did not always prevent wars. It did not ensure permanent peace. There were recurring wars throughout the history of the efforts to maintain a European balance of power. Its primary purpose was not to ensure peace but to ensure the continued freedom and independence of the states within a state system. States that wanted to preserve their freedom within a state system were compelled to play power politics with the balancing technique. The most that can be said for the above-described balance of power is that it tended to make war less frequent and on occasion brought long periods of peace. What peace it did bring was inherently precarious.

Reasons. It was and is inevitably so for several reasons. First, power cannot be exactly weighed. God is not always on the side of the biggest battalions.

The morale of the soldier counts too. So does the morale of the civilian population in this age of 'total wars,' when states throw the whole of their industrial power into the fight. So neither available raw materials nor industrial potential can be overlooked in any consideration of power. It is extremely difficult to know when there is a 'balance,' and different statesmen will make different estimates and draw different conclusions about the likely outcome of a war. What is needed is not only approximate balance in fact but also a general belief that it does exist.

Second, the larger powers are rarely content with a balance, or static equilibrium, that limits their freedom of movement and action. Each of them wants for itself something of an edge, a preponderance of power on its side to enable it to demand and get what it wants. Even though each wants to maintain the balance, each wants to get a favored position in it. The struggle for advantage is constantly threatening to upset the balance. This is certainly true in the case of the 'bipolar' balance of power between the two post-World War II colossi, the United States and the Soviet Union.

Third, this balance of power will only work when the most that any state can objectively hope to do is to maintain its freedom and check the designs of others on it. As long as ambition beyond this point seems incapable of realization, each state accepts the balance as the least of evils and works in its own, and no doubt often misguided, way to maintain it. In these circumstances, the states have a common interest in the balance, if in nothing else.

Ambitions for Domination. However, there is always danger that one state may attain such power that its ambitions shift from attempts to get the most favorable position within a balance to an attempt to destroy the balance by decisive domination of all the others. Then the game ceases to be played for limited stakes within a balance and wars cease to be fought for limited objectives. The very existence of the several states is at stake, and wars are likely to become total wars.

Because the complete domination of Europe became an element in German calculations in World War I, her enemies were not content to check her but imposed a humiliating peace. The result was a second desperate effort by Germany to make herself mistress of Europe, a total war for mastery and not for freedom within a balance. The probability that the Soviet Union has conceived an even more grandiose ambition for mastery gives an especially desperate character to international politics today. Even if Britain or an incipient European or other federation were strong enough

to contemplate the role of balancer between the United States and the Soviet Union, there would be no point in redressing the balance in favor of a power which, as far as outward actions go, shows no disposition at all to be content with balance.

A 'New' Balance of Power? This brings us to a crucial development concerning these considerations: The entire concept of the 'balance of power' underwent a dramatic and radical transformation in the years following the end of World War II. The power of the United States and the Soviet Union became so overriding vis-à-vis their allies or satellites, that these two, in their new role as super-powers, determined the balance of power between them. In the words of Professor Hans J. Morgenthau, '. . . the balance of power has been transformed from a multipolar into a bipolar one.'³ What we have in the early 1960's is, to all intents and purposes, a two-bloc system, whatever the possibilities of the various incipient 'third forces' may be.

As we have already seen, other factors, such as nationalism, have contributed to the emergence of total war in the twentieth century. It is enough at present to see that—whatever its modern form—the technique of balance of power, to which has now been added *the balance of nuclear terror*, does not prevent war, and is unlikely to be workable at all in the immediate future unless there are presently unforeseeable changes in the relations of the United States and the Soviet Union and the rest of the world. One further point may be added. Where there are half a dozen great powers and a number of lesser but still important powers, a great many different combinations are possible. The diplomatic maneuvers needed to explore them take time, and peace prevails at least for longish intervals. But where two super-powers dwarf all the rest, the resources of diplomacy are painfully few, and the situation is likely to move to a climax much faster.

INTERNATIONAL LAW AND ORGANIZATION

INTERNATIONAL LAW

Attention will now be turned to international law and organization. *International law* is another approach to the regulation of relationships between sovereign states—i.e. between governments or between the government of one state and the subjects of another. It merits attention because

³ For a penetrating discussion of the balance of power, which has been much relied upon in these pages, see his *Politics Among Nations*, 3rd ed. (New York: Alfred A. Knopf, Inc., 1960), parts iv and vii.

some have thought it could be developed into a system of rules capable of ensuring peace between states, on the analogy of the role law plays in maintaining peace and order between individuals within the state.

The emergence in Europe in the sixteenth century of independent, sovereign states that acknowledged no superior authority above them, was followed by savage wars among them in the first half of the seventeenth century. The absence of all rule and measure in these collisions shocked civilized Europeans, and in their midst, Hugo Grotius (1583-1645), a Dutch jurist, wrote a book entitled *The Law of War and Peace*. In it, he assembled a body of rules and principles for governing the relations of sovereign states with one another.

Grotius's Rules. Although he built on the work of many predecessors, he is regarded as the founder of modern international law. He made a coherent system of the rules, and he gave cogent reasons for states accepting them as unconditionally binding on them. As his title indicates, he did not conceive international law as forbidding war. He tried rather to formulate laws that would regulate the peaceful intercourse of states and thus reduce the occasions for war. He also tried to establish laws of war that would help to isolate and confine the conflict and regulate the actual course of hostilities after the fashion of the rules of a game.

Although there were conferences and multilateral treaties, there existed, of course, no international legislature to make these into laws. The sovereign states had just rejected the notion of any political authority superior to themselves. Grotius did not assume to make rules out of whole cloth, nor did he ask for them to be accepted on his authority. In part, his work was a collection of customary rules that had been widely observed in the intercourse and mutual dealings of different political authorities for hundreds of years. In part, it consisted of an appeal to the law of nature both as a source of rules and as proof of their binding obligation on states.

The law of nature, it will be recalled, was a product of Stoic philosophy. There are, it was contended, certain rules binding mankind generally because these rules express the minimum conditions on which men can live together. For example, the law of nature requires all men to keep their covenants, to keep faith in what they have promised. If such a rule is unconditionally binding on all men, it should equally be binding on all states, which are, after all, only instruments of human purposes. Accordingly, it was argued, states are under an obligation to abide loyally by the treaties and engagements entered into with other states.

Development of the System. The first attempt to regulate directly the relations of the modern sovereign states was through a system of international law. From the seventeenth century to the twentieth century the system was steadily developed and refined by the writings of jurists, the establishment of new customary patterns of behavior, the decisions of judicial tribunals, and the elaboration of a great network of treaties. Some of these treaties were bilateral only, regulating the relations of the signatory states on some specific subject. Increasingly after 1850, treaties were multilateral, signed by almost all the powers of consequence and intended to declare law that would be binding on all states. The first of these was the Declaration of Paris in 1856, laying down certain rules relating to war at sea.

The Hague Peace Conferences of 1899 and 1907 were great international assemblies, called for the express purpose of making international law on a great many subjects. A third such assembly was projected for 1914, and these periodic assemblies might have developed into a continuing international legislature *if* their machinery had not been too weak to prevent the great world-wide wars that intervened. These wars revealed new and unsuspected dimensions and terrors in the conflicts of sovereign states, and they led to entirely new departures in trying to regulate international relations.

Range and Effectiveness. Before the outbreak of World War I, there was a system of rules and principles covering most of the typical relationships that arise between states in times of peace. Procedures were defined for settling disputes between states by peaceful methods: *mediation or conciliation* (inviting a disinterested party or parties to *suggest* settlement of a dispute, without a binding commitment of its acceptance by either party to the dispute); *arbitration* (settlement of a dispute by a neutral party or parties, which both sides commit themselves to accept); and submission to *judicial determination*. The laws of peace were reasonably well observed and procedures for peaceful settlement were used to dissipate many tensions. The laws of war and of neutrality defined the rights of belligerents and of neutrals. The laws of war laid down many rules of the game for actual hostilities and increasingly tried to outlaw the more horrible weapons. They also laid down rules designed to protect non-combatants from injuries unrelated to the pursuit of strictly military objectives, and to ensure fair treatment—in the Geneva Convention, for example—to prisoners of war and to the sick and wounded. Despite glaring examples to the contrary,

the laws of war have by no means been universally ignored, even in the last two World Wars. (Crime makes news while law-abiding conduct does not.) The most widespread and persistent violations have probably been in the laws protecting neutrality and non-combatants, and these largely because the conditions in which a genuine neutrality or non-combatant status is possible are ceasing to exist.

Never Successfully Outlawed War. While international law does have large achievements to its credit, it has not been able to prevent the deterioration of international relations into world-wide wars, where neutrality is almost impossible and little distinction is made between combatants and non-combatants. Of course, international law has never purported to prevent wars, but only to minimize their risks and to moderate their conduct. In recognition of this, it has many loopholes. A treaty ceases to be binding on the parties to it when there is an essential change in the circumstances contemplated by them at the time of signing it. A great many of the disputes arising between states are not 'justiciable.' That is to say, political issues are raised on which there is no rule or principle of law to be interpreted or applied by a judicial tribunal. In certain ill-defined circumstances of a grave threat to the safety of the forces under his command, a military commander is entitled to disregard some of the laws of war. Each state, of course, interprets qualifications of this kind in its own interests.

Moreover, as domestic politics prove only too well, it is hardly possible to settle every issue by law. Politics frequently intervenes. The problems of resolving conflicting legal and political questions are enormous—witness the bitter segregation controversy in the United States. On the other hand, in domestic politics within a given state the chief function of law has been to prevent violence through severe punishment, putting the incorrigibly lawless behind bars and deterring all the others from violent action. The disruptive violence of war has always been one of the chief enemies of civilized society. Since World War I there has been no doubt that war on its modern scale threatens the very existence of civilized society. Why did international law not forbid and prevent it?

LACK OF AN EFFECTIVE COMMON SUPERIOR. It is scarcely necessary to state the answer. Within a given state, the individuals who are its members all owe allegiance to a common superior, the government. Laws lay down their rights and duties, and forbid everyone to take the law into his own hands. Law and government ultimately compel everyone to submit his disputes to judicial determination in a court. When that court pronounces its decision,

the government possesses overwhelming force to enforce acceptance of the decision. More than that, in any well-ordered state with prospects for continuance, the great majority of individuals support the government in the application of whatever force is necessary to enforce the law.

These conditions do not exist in the society of states. By definition, the states in a state system are each independent and sovereign. There is no effective common superior standing above them possessed of sufficient force to coerce them. Since the end of the Middle Ages there has not even been the fiction of such a superior above the separate states of Europe. In the world today the United States and the Soviet Union, and probably Communist China, can each overawe any other lesser power. But where is the international authority backed by the necessary power to compel them to submit their differences to judicial determination and abide the result (leaving the United Nations aside for later discussion)? If one of them has its rights infringed by the other, what alternatives has it to suffering the wrong in silence or taking the law into its own hands?

ENFORCED BY SELF-HELP. International law lacks the sanction of dependable legalized coercion applied by an acknowledged superior authority. The coercive sanctions actually available for its enforcement have to be applied by the party seeking redress. A state that thinks its rights under international law have been violated is entitled to apply pressure for their recognition by the offender. A variety of reprisals, as they are called, could be, and have been, used for this purpose: occupation of territory of the offending state, seizure and destruction of property belonging to it or its citizens, and the blockade of its ports.

The state applying the pressure decides what is sufficient provocation for reprisals, and the severity of them. As a rule, reprisals are used only by strong states against weak ones. Used against a strong state, they are likely to be regarded as acts of war. Used by one citizen against another within a state, they would be unlawful acts, a form of self-help that is always outlawed in the early stages of political development. But self-help is the only readily available sanction of international law, and if reprisals are thought inappropriate or fail when applied, the next stage is war to impose retribution on the offender.

WEAKNESS OF THE MORAL SANCTION. In Chapter XV, law was defined as the body of rules backed by the organized force of the community. It was noted that there are in any society many customary and moral rules that lack this backing and yet are widely observed. International law bears a greater re-

semblance to such customary and moral rules than it does to the law of a given state, strictly defined. Much of it is based on the established custom of states in their relationships with one another, and has, therefore, the sanction of custom. Many of its rules make a moral claim on states; they ought to be obeyed because they are right, because they accord with the Christian and Stoic traditions of Western civilization. International law has depended for its authority very largely on the sanctions of custom and morality. Unfortunately, these sanctions are weak and uncertain because modern men, under the influence of nationalism, have tended to think that the safety of their own nation comes first and makes the highest moral claim on them.⁴

PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

Until the total wars of the twentieth century, it was widely believed that the sanctions of custom and morality were very strong, that states really wanted to live together in peace under international law. The frequency of war was attributed in large part to inadequate machinery for settling disputes that arise between states.

Disputes are inevitable in human relationships under the conditions of freedom, as is shown by their frequency in the United States, France, and Britain. The success of public order in these countries depends largely on procedures, a judiciary, and a system of courts for dealing with disputes. If there were not an impartial arbiter readily available, disputes would frequently degenerate into violence. In the belief that this reasoning applied to the relations between states, much effort was put into the development of peaceful procedures of settlement in the late nineteenth and early twentieth centuries.

Mediation or conciliation and arbitration had long been accepted and fairly well-defined methods for trying to settle disputes between states. States in controversy would on occasion accept the good offices of another state as mediator or refer the controversy to some impartial body for conciliatory suggestions based on fairness or compromise. A celebrated example here is the successful effort of President Theodore Roosevelt to settle the Russo-Japanese conflict with the Treaty of Portsmouth in 1905. But mediation or conciliation procedures never involved any obligation on the disputants and were advisory only. Nor has international law, apart from special arrange-

⁴ See J. L. Brierly, *The Law of Nations*, 6th ed (Oxford: The Clarendon Press, 1963) for an illuminating account of the nature, principles, and prospects of international law.

ments by treaty, ever asserted a legal obligation on states to submit their disputes to arbitration.

Machinery for Arbitration. Arbitration has always involved an agreement between states to submit a particular dispute, or class of dispute, between them to the decision of a board of arbitrators named by them. The arbitrators make an award in which they are guided by the rights of the parties according to international law, but they are entitled to take other non-legal factors into consideration. Once the award is made, international law does impose an obligation on the parties to abide loyally by its terms.

TREATIES. During the nineteenth century there was a steady increase in the number of disputes submitted to arbitration by special agreement—an example being the settlement of the *Alabama* claims case between the United States and Britain in 1872. At the end of the century arbitration treaties between particular states specifying in advance the kinds of disputes they agreed to submit to arbitration became common. The United States made such treaties with a dozen states in 1908. The Hague Peace Conferences of 1900 and 1907 declared in favor of the principle of compulsory arbitration, but it failed to put in the Convention for the Pacific Settlement of International Disputes any binding obligation to that effect. The Conference of 1899 did establish what is called the *Permanent Court of Arbitration*. Rules of procedure were laid down and a permanent secretariat established at The Hague. It did not appoint a permanent body of judges, or arbitrators, but merely provided a panel from which signatory states could choose arbitrators for a dispute. It was not a court in any real sense, although it did facilitate the submission of disputes to arbitration. The Hague tribunal has not been used since 1940, although there have been renewed recent calls for an arbitral convention.

Despite the growth of arbitration and arbitral machinery, it has done little to lessen the serious threats of war in international relations. No general treaty imposing on states a legal obligation to submit disputes to arbitration has ever been signed. Special arbitration treaties have generally been limited in application to disputes involving legal questions. Even then, most of them expressly exclude from arbitration disputes that affect the vital interests, the independence, or the honor of the states signing the treaty. These are precisely the issues on which states go to war. Arbitration treaties and arbitral awards have been quite faithfully observed by states for the simple reason that they refuse to submit to arbitration those issues which are of vital importance to them.

THE INTERNATIONAL COURT

To supplement the machinery for arbitration, The Hague Peace Conference of 1907 proposed the creation of a *genuine international court*, to be called the *Judicial Arbitration Court*. It was to be a permanent body, composed of jurists of high reputation and available for the deciding of all disputes between states that raised questions of law. Its conclusions would not be arbitral awards based partly on compromise and other non-legal factors, but rather judgments according to the letter of the law. It was thought that states would welcome the opportunity to get such justice, and that the court's decisions would rapidly build up a body of authoritative interpretations of international law. The project came to nothing, because a number of states insisted on the unacceptable condition that each state should have the right to nominate a judge. The establishment of such a court was postponed until after the end of World War I.

The attempts made since World War I to improve the machinery for settlement of international disputes will be considered in the discussion of the League of Nations and the United Nations. It will be convenient here, however, to follow through the efforts to set up an international court. Under the auspices of the League of Nations, the *Permanent Court of International Justice* was established in 1921. Under the auspices of the United Nations, it has been continued as the fifteen-member *International Court of Justice*, with its Constitution substantially unchanged. The seat of the new Court, like that of the old one, is in the impressive Carnegie Peace Palace at The Hague.

Jurisdiction of the Court. Proposals to make *compulsory* the reference of disputes to it were rejected. It was given power to decide only those cases which the parties to a dispute referred to it. However, an *optional clause* was inserted in the Statute of the Court enabling a state to submit itself to the compulsory jurisdiction of the Court. By doing so, a state acknowledged the jurisdiction of the Court to decide any dispute between it and any other state similarly submitting itself to compulsory jurisdiction, in so far as the dispute raised legal questions or justiciable issues.

About fifty states signed the optional clause of the old Permanent Court. In 1963, thirty-nine had accepted compulsory jurisdiction of the International Court, but many have so hedged their signatures with special reservations that they have almost denied the very compulsory jurisdiction to which they have voluntarily submitted. For example, by virtue of the so-called Connally

Amendment,⁵ the United States has expressly excluded disputes on matters which are 'essentially within [its] domestic jurisdiction,' the term 'domestic' to be determined by the United States! In substance, the jurisdiction of today's International Court of Justice depends on the consent of states, and it covers, at most, disputes in which some *legal issue* is involved. For instance, in 1949 the Court ordered Albania to pay £2,363,051 to Britain as compensation for damages to British destroyers resulting from Albania's illegal mining of the Corfu Channel in 1946.⁶ Many disputes raise issues not covered by the rules of international law, and it is not easy to say when a non-legal issue is, or is not, involved. This opens the door for evasion by states which think a decision of the Court will likely go against them. In the absence of an effective and powerful international authority enforcement of a decision of the International Court of Justice depends on voluntary obedience by the losing state. More significant, of course, is the fact that no state can be compelled to come before the Court—all of which, in the words of Walter Lippmann, reduces it to a small side show.

The domestic judicial system within a given state belongs to a different world. There, individuals must submit their disputes to judicial decision. All issues are, or become, legal issues when the essentials of public order are at stake. The sovereign state does not want to submit its vital interests wholly to law and judicial decision. In these circumstances, international law will not ensure peace, no matter how well developed the rules of international law may be or how good the judicial machinery for applying them.

THE LEAGUE OF NATIONS

Almost every large-scale war since the sixteenth century has inspired one or more proposals for some kind of union of states to preserve peace on the ground that war is the common enemy of all states and that there is a common interest in abolishing it. Almost invariably, these schemes proposed an international assembly representative of states to make laws governing international relations, and some mechanism for settling international disputes. The Quaker William Penn, the German and French philosophers Kant and Rousseau, and the English legal reformer Bentham all made such plans. The

⁵ Named after Democratic Senator Tom Connally of Texas, then Chairman of the Senate Committee on Foreign Relations.

⁶ For a short résumé of other cases in which the Court rendered judgments, see Stephen S. Goodspeed, *The Nature and Function of International Organization* (New York: Oxford University Press, 1959), pp. 322-7.

only plan of this kind that ever took concrete form prior to the League of Nations was the Holy Alliance, formed in 1815 by the monarchs of Russia, Austria, and Prussia and designed to protect the peace against a recurrence of the wars that followed the French Revolution. It was effective for only a very limited period of time. It was succeeded by the Concert of Europe, which consisted of a general understanding between the Great Powers of nineteenth-century Europe that they should, when occasion demanded, take concerted measures to preserve peace. The Concert of Europe failed, of course, to prevent World War I.

The Need and the Hope. The notion of united action by the several states to prevent war was not at all new when World War I led everybody to reflect still more earnestly on how to preserve peace. Before the end of the war, numerous plans were put forward, particularly in Britain and the United States. It was urged more strongly than ever that war is the universal enemy, that all states have a vital, common interest in eliminating it, and that they have a common purpose to achieve collective security guaranteed by all states to each state. What is needed, it was thought, are institutions and procedures through which this community of purpose can express itself. States should therefore agree among themselves to create these institutions and procedures. Once created and set going, the good faith and community of interest of states would be sufficient to maintain peace. French proposals went beyond this to the establishment of a military force under international authority to coerce lawbreakers, but they were rejected in the final event.

The Treaty of Versailles in 1919 set the terms of the settlement of World War I. The first twenty-six articles constituted the Covenant of the League of Nations. The terms of the Covenant were a synthesis of the main British and American views on how to secure peace, with a faint recognition of French views.

It is not necessary for present purposes to describe in detail the structure of the League of Nations, or of the several auxiliary organizations created under it, to deal with such matters as the treatment of labor throughout the world and the administration of colonial territories. The important questions at this distance are the essential organization it provided for ensuring peace and the reasons for its failure.

The Essence of the League. The League of Nations was a covenant, or treaty, between the forty-two sovereign states who became its original members. They obligated themselves only to the strict terms of the covenant and no further. The aim of the League was to secure international peace and

collective security through peaceful settlement of disputes. The core of the Covenant was Article 10, in which the member states undertook 'to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League.' It was thus committed to maintenance of the *status quo* of the Treaty of Versailles, which, in turn, was founded on the principle, only imperfectly honored in its express terms, of the *self-determination of all nations* including the principle of peaceful change. In effect, the Covenant was a guarantee of the sovereignty and independence of the then existing states.

The Organs of the League. The organs of the League, the institutions through which the will for peace was to be made effective, were an Assembly, a Council, and a Secretariat. The *Secretariat* comprised the permanent staff of officials of the League, working under the direction of the Assembly and Council. The *Assembly* was framed on the model of a legislature, each member state being represented in it, and each state having one vote. It was to meet periodically to deal with any matter affecting the peace of the world. Essentially a deliberative body with power to advise and recommend, it lacked power to make laws which would extend the obligations of member states beyond the terms of the Covenant. Generally speaking, its decisions relating to issues of peace and war had to be by *unanimous vote*, exclusive of the votes of representatives of the parties to a dispute.

The *Council* was, in substance, a small executive committee of the Assembly in which the Great Powers had permanent seats, and a number of non-permanent seats were rotated among the other powers. It met at least four times annually. Like the Assembly, it could deal with any matter affecting the peace of the world. Its principal functions, in the present focus of interest, were the settlement of international disputes. Intractable disputes requiring attention by the League were to be referred, in the first instance, to the Council. The Council, in turn, might refer them to the Assembly, and the Assembly had power to deal with them, but the Council had the main responsibility for devising settlement. Like the Assembly, its critical decisions had to be *unanimous* except for the representatives of the parties to the dispute in question.

Obligations of the Covenant. Each member of the League agreed to undertake four principal obligations designed to ensure peaceful settlement of disputes: First, to submit any dispute with another member that was likely to lead to war to arbitration, judicial settlement, or inquiry by the Council, and not to resort to war until three months after the award, judicial decision, or

report of the Council; second, to abide loyally by any award or judicial decision, and not to make war against any member state that complied with its terms; third, that, if the Council made a unanimous—subject, of course, to the exception of the representatives of the parties to the dispute—report on a dispute referred to it, members of the League would not go to war against any complying party; and fourth, if any member resorted to war in disregard of its covenanted promises, it would be deemed to have committed an act of war against all the other members, who undertook in that event to break off all relations and intercourse with the offending state, and to lend assistance of specific kinds to those who were disciplining the offender.

Sanctions of the Covenant. The aims of these four promises were to ensure a cooling-off period for hot tempers, to isolate an offender by refusing to fight on his side, and to bring him to his senses by denying to him the society of all other members. The sanction for enforcing these obligations was ostracism, and the Covenant further provided for canceling the membership of an offender by a vote of the Council. These are the sanctions of a gentlemen's club. It was ignored that the members of this particular club were sovereign states, compelled by circumstances of their relationships to think in terms of power, and that effective sanctions would have to speak in those terms.

A SERIOUS GAP. It is true that Article 16, as a gesture to French proposals, authorized the Council 'to recommend to the several governments concerned what effective military, naval, or air force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.' This vague clause could not be read as compelling a state to go to war in support of the sanctions of the League. Moreover, if the Council failed to bring in a unanimous report on a dispute, all members regained full freedom of action. War was not categorically forbidden. The Covenant was binding only on members, but although it made provision for dealing with disputes involving non-members, the Covenant at best did not compel stronger measures against non-members than the members. And while it is further true that, between 1928 and 1930, all the great powers and almost all the significant lesser powers signed the Pact of Paris, renouncing war 'as an instrument of national policy' in their relations with one another; but the Pact contained no sanctions of its own. No means were provided for enforcing it against a signatory that violated it. It filled a gap in the Covenant of the League with another piece of paper.

The League was successful in settling many minor disputes in which lesser

states were involved, yet was never able to settle a dispute which concerned the vital interests of one of the great powers. It did not take effective action when Japan invaded China in 1931. When Italy attacked Ethiopia in 1935, and economic sanctions under the League were actually applied, it was soon discovered: (1) that Mussolini was not a gentleman; (2) that the members of the League could not co-operate effectively in applying the full force of the voted economic sanctions—partly because that might turn a little war into a big one; and (3) that members would not contemplate the military sanction of superior force against Italy. After this disaster, the futility of the League was generally recognized, and no attempt was made to use its machinery to prevent Germany's reoccupation of the Rhineland in 1936 and her seizure of Austria in 1938 and of Czechoslovakia in 1939. The sovereign states thus rushed headlong into World War II.

REASONS FOR FAILURE OF THE LEAGUE

Non-Membership of Major Powers. Many explanations of the failure of the League have been offered. For example, much has been made of the fact that the United States was *never* a member, and that the Soviet Union did not become one until 1934, two years after Japan's and Germany's withdrawal—when the League had already substantially failed. No doubt the absence of these two great powers from the League in the critical post-war reconstruction period of the 1920's was a serious defect. Indeed, at any time during its existence, at least two of the then major powers were not members of the League.

Attachment to the Status Quo. Further, the League was committed from the beginning to maintain the *status quo* of the Treaty of Versailles with no specific provision for its alteration. This too was a serious defect. For reasons that cannot be discussed here, Germany, Italy, and Japan were each deeply dissatisfied with it; they came to a fierce determination to change it, and to do so at the expense of other members of the League.

However, peace must always stand from moment to moment on a *status quo* of some kind; otherwise there can be no peace or security at all. Whether or not peace can be maintained among sovereign states depends on whether tolerable revisions of an intolerable *status quo* can be negotiated by consent. Even if both the United States and the Soviet Union had been members from the beginning, Germany, Italy, and Japan would still have demanded the same changes in the *status quo*. Of course, with the United States and the

Soviet Union actively participating in the councils of the nations, the course of events might have been vastly different. For example, France might have been less fearful, and concessions to Germany might have been worked out that would have kept Hitler an obscure agitator and demagogue.

Lack of a Superior Enforcing Authority. But the effectiveness of negotiation and concession would still have depended on the will of the states concerned to accept them. If the will was there, wise diplomacy would suffice. (The forum for discussion provided by the League would perhaps have been an aid to diplomacy.) If the will was lacking, then the League had nothing essentially new to add to diplomacy in maintaining peace, because it had no means of coercing by force those who broke its covenants. Three hundred years before the collapse of the League of Nations, Thomas Hobbes wrote its epitaph: 'Covenants without the sword are but words and of no force to bind a man at all.'

This judgment on the League of Nations is not too severe, but a word of further explanation must be added. No scheme which leaves full sovereignty in the several states will ensure permanent peace. A superior authority with adequate coercive power is necessary. That alone, however, is not enough. Individuals within the state are restrained from law-breaking by the fact of the sword in the hands of the government. Yet we know from experience that if the *status quo* which the government maintains becomes intolerable to large groups within the state, there will be rebellion and even revolution.

The reason dissatisfied groups within the state accept the *status quo* is that they hope to be able to negotiate a change in it by peaceful political means; and having negotiated it, they count on the coercive machinery of the government to compel the acceptance of the change by those who might otherwise resist it. Moreover, there is a general disposition to appease minority groups because the government exists to set limits to their demands. Germany, Italy, and Japan could not count on this process of peaceful change through the League. By the same token, the states that did try to appease them late in the game found there were no limits to their demands. There was no superior authority able to compel Germany, Italy, and Japan to accept limited concessions as final.

THE UNITED NATIONS

The alliance of states that fought World War II against Germany, Italy, Japan, and their satellites came in the course of the conflict to call themselves the United Nations. The representatives of these victorious powers met at

San Francisco in 1945, at the close of the European phase of the war, and agreed on the Charter of the United Nations as the basic constitution of a new world organization to maintain peace. With the lessons of the failure of the League of Nations before them, they improved on the Covenant in a number of particulars, but they did not, as indeed they could not in any practical way, curtail their own sovereign power by conferring it on a superior political authority, despite some language to the contrary in Article 25. They did not create a super-state, nor did they return to the League system of an organization of all states to preserve peace. Setting aside the form of the Charter and looking at substance alone, the new organization for world peace still reveals many aspects of a gentlemen's club.

Improvements over the League. However, in addition to the victorious powers, membership is open to 'all other peace-loving states.' By 1963 virtually all of the states in the world, the old and the new, the significant—except Communist China—and the not-so-significant, and *including the defeated powers of World War II*, except Germany, had been admitted to membership—totaling more than 112. Their association together is expressly based on the formal principle of 'the sovereign equality of all members.'

The central principles and obligations of membership are more rigorous and clear cut than they were in the Covenant. Under Article 2, all agree to the principle of peaceful settlement of their international disputes, and to refrain from 'the threat or use of force against the territorial integrity or political independence of any state. . . .' In substance, this is a renunciation of war for any purpose except temporary self-defense against armed attack until the United Nations takes effective measures against that attack. This right of self-defense is expressly provided by Article 51. As we shall see later, there are much sharper sanctions in the Charter for compelling obedience to these principles than there were in the Covenant. Also, there is a clear obligation on the member states to provide the necessary means to make military and other sanctions effective against aggressors, when called upon to do so by the Security Council of the United Nations. And, as will be demonstrated, the United Nations has a number of genuine achievements on its record.

Furthermore, the League had just two power centers, London and Paris; the U.N. has any number—including New Delhi and Cairo as well as Moscow and Washington. Whereas any but a British or French Secretary-General was unthinkable under the League, the three first Secretaries-General of the U.N. were a Norwegian, a Swede, and a Burmese. Indeed, any but a 'small' or 'neutralist' nation Secretary-General would be unthinkable for the United Nations.

Organs of the United Nations. Like the Covenant of the League, the Charter provides for a General Assembly, a Security Council, a Secretariat, and a number of auxiliary organizations, such as the eighteen-member Economic and Social Council and the fourteen-member Trusteeship Council. There are also several specialized agencies.⁷

THE ASSEMBLY. The *General Assembly* is composed of representatives of all the member states, each member state having one vote. The requirement of unanimity in decisions of the Assembly of the League has not been imported into the procedure of the General Assembly under the Charter. Instead, votes relating to important issues of peace and war are taken by a *two-thirds majority*. Some see in this distinct advance, a recognition that an otherwise sovereign state can be bound without its own consent. But, in fact, the General Assembly has no effective power to make decisions binding on any state, whereas the League Assembly had in formal terms power to make any decision that the Covenant authorized to be made.

According to the terms of the Charter, the United Nations Assembly was empowered only to discuss, investigate, and recommend. By Article 24, the members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf.' And, under Article 12, when the Security Council is exercising this function in respect of a dispute or troubled situation, the Assembly could not even make recommendations unless requested to do so by the Security Council. Experience with the League showed clearly that whatever lesser powers might decide to do, effective action depended on the Great Powers. They alone had the power to act, and the U.N. Charter placed responsibility where the power lies by denying the General Assembly any decisive voice in relation to the enforcement of the Charter. However, as will be explained below, with its Uniting for Peace Resolution of 1950 the General Assembly gained an increase in its power, not envisaged by the authors of the Charter.

THE SECURITY COUNCIL. *The Security Council* is a small body of eleven members. Five of its seats are permanently allotted to China, France, the Soviet Union, Britain, and the United States, the Great Powers according to 1945 standards. The other six seats are rotated among members of the General Assembly representing various agreed-upon sections of the world,

⁷ Among the more important and generally quite successful of these specialized agencies are the: Food and Agriculture Organization, International Bank for Reconstruction and Development, World Health Organization, International Civil Aviation Organization, and United Nations Educational, Scientific and Cultural Organization (UNESCO).

chosen by election for a period of two years. Each member on the Council has one representative and one vote. By Article 27, decisions on all 'procedural' matters are by majority vote of seven out of the eleven members. Again, the rule of unanimity is dropped. However, Article 27 goes on to provide that 'on all other matters' *the affirmative vote of seven must include the concurring vote of all five of the permanent members*. That is to say the Great Powers can never be outvoted by the non-permanent members; and furthermore, no critical decision can be taken by the Security Council without the concurrence of such of the five Great Powers on the Council as are present and actually vote on the decision.⁸ In other words, *each of them can impose a veto on any proposal for coercive measures*.

The Security Council is not an executive committee of the General Assembly. As we have noted, the framers of the Charter envisaged the General Assembly as a deliberating and not a deciding body, with the Security Council as the effective organ of the United Nations, and the Assembly advisory to it. The powers and functions of the Security Council represent the major contribution of the Charter to the political problems of international peace and security.

THE SECRETARY-GENERAL. Preceding editions of this book did not dwell upon the Secretary-General, who heads the 4000-employee Secretariat which, through its core of international civil servants, services the various organs of the United Nations, but the increased importance of the office calls for some comment. He is empowered to call the Security Council's attention to any matter which he believes to be a threat to the peace and security of the world. The initial occupant of the office, Trygve Lie of Norway, after first moving gingerly, quickly endeavored to use the prestige of his office to settle international disputes, and thus incurred the enmity of the Soviet Union, which denounced him for supporting the U.N. intervention in Korea and compelled his resignation in 1953. His successor, Dag Hammarskjöld, reputed to be 'softer' than his predecessor, soon proved himself to be a master of the art of compromise in private negotiations. With the skilled diplomacy of his forebears in Sweden, he intervened in major crises without precipitating undue controversy—such as his mission in 1955 to Communist China, where he caused the release of eleven American prisoners of war, and his endeavors to strengthen the Arab-Israeli armistice in the Middle East in 1956. He played a major role in the settlement of the Suez Canal crisis later

⁸ As will be seen later, the Soviet Union was boycotting the Council during the time of the Korean crisis of 1950, and her absence was interpreted as precluding any consideration of her vote.

that year, during which he took the floor in the Security Council and roundly denounced the invasion. When he was given a second five-year term of office in 1958, he announced that he would continue to use his agency as an independent force for peace. Soon he found himself at odds with the Russians, who declared that they would not support him again, and instead called for the creation of a 'troika' of secretaries-general, to be composed of one 'Western,' one 'Eastern,' and one 'Neutral' member.

But Dag Hammarskjöld continued his efforts, capped in a sense by the 1960 Congo intervention, which directly resulted in his death in 1961. He worked always to enhance the effectiveness of the United Nations and in the process, in the words of one of the many glowing obituaries, he built himself and his office into one of the great hopes for world peace. His successor, U Thant of Burma, less assertive and more acceptable to the Eastern bloc, nonetheless evidently resolved to continue the office of the Secretary-General in the spirit and tradition of his predecessor.

Obligations and Sanctions of the United Nations. In Articles 33-37, members undertake to submit their disputes to settlement by mediation or conciliation, arbitration, judicial decision, or some other peaceful means. If these methods fail to settle a dispute, the members agree that it shall be referred to the Security Council. Articles 36 and 37 authorize the Security Council to intervene at any stage of a dispute with recommendations on procedure, methods of adjustment, and terms of settlement. By Articles 41 and 42, the Security Council has power to decide what sanctions of an economic, military, or other character shall be applied to enforce its decisions.

Articles 43-47 provide the machinery for organizing and applying economic and military sanctions. No international army or police force is contemplated: rather, the members of the United Nations undertake to supply contingents on call from the Security Council. A Military Staff Committee composed of the military chiefs of staff of the permanent members of the Security Council is to advise and assist the Security Council in the planning and execution of military sanctions. As we have already seen, the members agree that the Security Council acts for them in maintaining international peace and security. Finally, by Article 25, the members agree 'to accept and carry out the decisions of the Security Council.'

Lesser Powers Firmly Bound. These provisions go much further than the Covenant of the League. Members agree to accept the decision of the Security Council in a dispute concerning them. That is to say, they agree to keep the peace against their own will. They agree to take orders from the Security Council in support of military sanctions, which may amount to war. If mem

bers live up to the Charter, they have subjected themselves to a superior authority, the Security Council.

In assessing this last statement, it is necessary to remember the voting procedure in the Security Council, which is the key to everything else. Decisions require the *affirmative vote of seven* of the eleven members, *including the concurrence of all the permanent members* present at the time of the decision and voting. If all permanent members, i.e. the five Great Powers, are in agreement on an issue, they can always be sure of getting two of the remaining votes necessary for an effective majority. Great powers have many ways of securing the assent of lesser powers. In these circumstances, the lesser powers are clearly subject to coercion from above under the Charter. But this really is nothing new. Sovereign equality of large and small states has always been a pretense. The small ones have always had to submit to the big ones. The vital issues of war and peace arise out of the disorderliness and quarrels of the Great Powers.

Great Powers Able To Veto. Under the Charter, the Great Powers, like all the rest, promise to submit their intractable disputes to the Security Council, and to abide by its decisions. But all the Great Powers have seats on the Security Council, and *each has a veto on decisions affecting coercive action against it*. There is no diminution of sovereignty here. As far as compelling the Great Powers to keep the peace is concerned, the United Nations is no advance at all on the League of Nations.

The basic assumption underlying the Covenant of the League of Nations was that almost all nations wanted peace more than anything else and could agree on the measures to secure it. The basic assumption underlying the Charter of the United Nations was that the nations that stuck together to win World War II would stick together to enforce peace on the world. Both assumptions have been proved wrong in the event. From the date of the signing of the Charter, the Soviet Union and the United States drew rapidly apart, exhibiting the mutual fear and suspicion that is the constantly recurring, if not the normal, condition of the two greatest powers in a system of independent states.

Dominant Position of the Super-Powers. These two are still so dominant that when they are in agreement—as they seemed to be, for practical purposes, during the Suez Canal crisis in 1956—Britain and France, theoretically also ‘great powers’ under the Charter, had no choice but to acquiesce. So the workability of the Charter really depends on the ability of the United States and the Soviet Union to pull together. If they were able to do so, world peace would be assured. If they cannot, the Charter does not provide any truly effec-

tive means to restrain them from war. However, deliberations of the Assembly and the Council may have some deterrent effect on them. The discussion of vital international questions by these bodies registers with some accuracy what the other states in the United Nations think of the policies pursued by the super-powers and, as the Cuba crisis of 1962 proved, they serve to keep channels of communication between the principal powers open. In so far as there is any international public opinion, it is brought to bear persuasively on the super-powers in this way. Moreover, within the obvious limitations of the realities of power, there is no question of the growing importance and moderating influence of the smaller states, the so-called 'neutralist' ones, and the new blocs, e.g. the Afro-Asian bloc—which defeated the older and greater powers in the Algerian vote in 1961, for one.

There has been much criticism of the veto of the Great Powers in the Security Council as the fatal weakness of the United Nations. It is urged that no power should have a right to vote in a decision on a dispute to which it is a party. Two comments must be made on this argument: First, as things still stand, the United States and the Soviet Union are parties to every significant international dispute in any corner of the world in the sense that each considers that it has a vital interest in its outcome. Certainly the Soviet Union can foment disputes in many corners of the world which bear very directly on the security of the United States. Effective removal of the veto would almost require the forbidding of the two super-powers to vote on decisions for compulsory settlement of any dispute.

VETO POWER REFLECTS REALITIES. Second, the veto is a recognition of realities which cannot be changed merely by altering voting procedures. If the United States and the Soviet Union cannot settle their outstanding differences by peaceful negotiation and compromise, it is wildly improbable that both of them would accept a settlement determined on by the unanimous decision of all other members of the Security Council. (Indeed, both might refuse.) If either super-power refused, how could the Security Council impose effective military sanctions on it without relying almost entirely on the military forces of the other super-power party to the dispute? The Great Power veto in the Security Council does not weaken the Charter of the United Nations. *It is weakened rather by the fundamental realities of power politics in a system of sovereign states.* What the veto does is to prevent the world from forgetting these realities.

A Major Test: Korea. The foregoing analysis of the United Nations provides little comfort for anyone. There would be profound relief and thankfulness if logic and the unfolding of events should prove it wrong. In fact,

the analysis given here is supported rather than refuted by the Korean incident of 1950-51, the first major open test of the workability of the United Nations Charter. It precipitated the greatest international crisis since the end of World War II.

When the attack on South Korea by North Korea came before the Security Council at the request of the United States on June 25, 1950, one day after the invasion, the Soviet Union was still on a boycott of that body which it had begun that January against the presence of Nationalist China. The Security Council requested—although it did not command—the imposition of sanctions by a 9:0 vote,⁹ and the United States immediately threw in its weight to enforce them. The United Nations appealed to the other member states to contribute military forces. Only sixteen promised to do so, but forty-three others pledged moral support. The very limited response to this appeal made it clear that if the United Nations' decision was to be enforced in Korea, the power of the United States would be the decisive force—especially since its occupation troops were readily available in sizable numbers in Japan and other nearby bases.

Despite active military intervention in Korea by the Chinese Communists on November 5, 1950, there could be no doubt of the ability of the United States to punish North Korean aggression over a period of time, at least if the Soviet Union did not intervene actively on the other side. In short, what took place in Korea under the form of action by the United Nations was an incident in the power struggle between the Soviet Union and the United States.

PEACE EFFORTS. Nevertheless, member states in the United Nations did swing into action to attempt to restore peace. Twelve Arab-Asian states, under India's leadership, succeeded in establishing a Cease-Fire Commission under the sponsorship of the General Assembly. Communist China's non-membership status complicated matters, and long debates ensued in the Security Council as well as the Assembly. Prospects for peace seemed dim, although the fighting, after many advances and retreats, had become localized around the 38th parallel in the spring of 1951. The main obstacle to a negotiated peace now appeared to be Communist China, and more than fifty member and thirteen non-member states complied with a General Assembly suggestion for an embargo on war material shipments to the Chinese mainland.

Finally, it was pressure by the Soviet Union in the summer of 1951 that

⁹ Yugoslavia abstained; those voting in favor were Nationalist China, Cuba, Ecuador, Egypt, France, India, Norway, the United Kingdom, and the United States.

prompted the North Koreans and Chinese to agree to discuss a cease-fire and an armistice. Lengthy negotiations commenced, aided by a Neutral Nations Repatriations Commission, but not until July 1953 was an armistice agreement concluded at Panmunjom. The agreement is still in force—but Korea is also still a divided country. Nevertheless, the Korean episode must be recorded as a major, and at least partly successful, effort of the United Nations, whose forces still patrol the 38th parallel.

Other Achievements. Whatever its weaknesses, the United Nations organization has recorded several achievements in settling political disputes: In 1946, after a long Security Council debate, the Soviet Union withdrew its forces from Northern Iran. In 1949, in response to Security Council appeals to stop the fighting in Kashmir between India and Pakistan, a cease-fire went into effect, and U.N. observers began to police the demarcation lines. Also in 1949, the Security Council adopted a resolution calling for a cease-fire between Netherlands and Indonesian forces, and the grant of independence to Indonesia—which the Dutch conceded one year later. Still later in 1949, various armistice agreements were signed between United Nations-created Israel and the several Arab states who had warred against Israel upon its establishment in 1948. The armistice agreements were completed in accordance with Security Council resolutions, and with the help of Dr. Ralph J. Bunche, the United Nations mediator. At the end of busy 1949, the Big Four found themselves unable to reach agreement on the disposition of the Italian colonial possessions in Africa, and they referred their problems to the General Assembly. The latter adopted a resolution setting up Libya as an independent state, and making other provisions for Italian Somaliland and Eritrea. The Soviet blockade of Berlin of 1948–49, while settled by direct negotiations among the Big Four, was before the Security Council and the General Assembly throughout that time. In 1958 a fifteen-nation U.N. observer unit was sent to Lebanon to ensure its territorial integrity against Syria, and another U.N. mission provided on-the-spot mediators for Jordan.

THE SUEZ CANAL. The two most dangerous problems to come before the United Nations since Korea concern the Suez Canal and Congo crises. The Suez Canal crisis occurred in October 1956 with its invasion—as a result of at least some Egyptian provocation—by Israel, Britain, and France. Strong pressure, both inside and outside of the U.N., from the United States and the Soviet Union—for once on the same side of the fence, albeit for different reasons—prompted the three invading states to withdraw. A United Nations Emergency Force, composed of 6000 troops from several small neutral member states, such as Denmark and Yugoslavia, moved almost immediately

into the border zones between Egypt and Israel to keep the two antagonists apart. The prestige of the United Nations had reached a high point, and the debates raging in the General Assembly were heard by millions who heretofore had had but little interest in, and regard for, the world organization.

THE CONGO. Belgium's abrupt granting of independence to the Congo in June 1960, was too much for this ill-prepared, strife-torn, ill-led land. Chaos ensued, and the Belgian troops returned to protect Belgian lives and property. Acting upon the appeal of the Congo's new Prime Minister, the pro-Russian Patrice Lumumba, the U.N. Security Council, with Secretary-General Hammarskjöld acting with determined rapidity and efficiency, sent ultimately 18,000 troops and observers from twenty-seven small and neutralist countries, chiefly from Asia and Africa. Internal order was partly restored. But the subsequent secession of the rich province of Katanga, under the pro-Belgian President Moïse Tshombe, continued to keep the new 'nation' in turmoil. Congo reunification became the goal of the United Nations and its forces, under the authority of Security Council resolutions requiring them to keep the peace, rid Katanga of foreign mercenaries, and promote but not dictate Congo unity. It proved to be an involved and frustrating task, not only of peace-keeping but also of nation-building. During its course—one that was still far from complete late in 1963—Lumumba was murdered; Congolese leaders came, went, and arrested each other; the Soviet Union and the United States accused each other of intervention—and Dag Hammarskjöld lost his life in a Congo plane crash in this major U.N. effort to maintain peace. Whatever its ultimate outcome, the U.N. learned much from the Congo operation, diplomatically, militarily, and organizationally. Walter Lippmann might well call the U.N. program in the Congo the world's most sophisticated example of international co-operation.¹⁰

Expanded Role of the General Assembly. Late in 1950—as already indicated—the United Nations General Assembly, taking matters into its own hands, set up new machinery, designed to deprive aggressors of the possible protection afforded them by the veto in the Security Council. In the *Uniting for Peace Resolution*, adopted by an overwhelming majority, provision was made for convening the Assembly on twenty-four hours notice to discuss and recommend on the advisability of taking some action that had already been blocked by exercise of the veto in the Security Council. The Assembly, it will be recalled, is empowered to make recommendations on critical issues by a two-thirds majority of those present and voting. Although the Assembly is

¹⁰ As quoted by Clark Eichelberger, 'Anarchy or a Monument to Cooperation?' *Saturday Review*, July 14, 1962, p. 12.

limited to making recommendations, and has no power under the Charter to order the member states to take action, the new plan proposed that the Assembly should give leadership in organizing sanctions against an aggressor, sanctions which may then be imposed despite the veto in the Security Council.

Aside from any question of the constitutionality of this resolution under the United Nations Charter, its adoption is a revolutionary move, striking at the central provisions of the Charter, which relied on Great Power unanimity to keep the peace. While the new plan may enable the United Nations to escape the hampering effects of the veto, it has two serious defects. First, the Assembly can merely recommend. The several member states are left free to decide whether to act on the recommendation. Second, there is the danger that a majority made up of small states without effective military power will try to push the Great Powers to punitive action, which may start a general war. In deciding whether to undertake punitive action laden with these risks, each Great Power will consider whether its own vital interests call for such action. If the conclusion is in the negative, it is almost unthinkable that it should allow its judgment to be overcome by a vote of the United Nations Assembly. Those on whom the burden and responsibility of action falls cannot thus easily be deprived of the power of deciding when action is to be taken.

However, it is a fact that since the passage of the Uniting for Peace Resolution and the Korean War the political role of the General Assembly has expanded materially at the expense of the Security Council. Moreover, when it was unable to do more than pass general resolutions, it resorted to the device of delegating authority to the Secretary-General to implement them. These developments have altered the character of the United Nations. The General Assembly may still only be able to recommend, but its recommendations now carry considerable weight. It possesses considerable residual power.

Evaluation. Despite its spotty and often disheartening record, the United Nations is thus far from a useless organization. Modern transport and communications have unified the world in a physical sense, and the effect is to multiply relationships between states. There are thus many international problems besides the critical ones of peace and war. Many of these can be dealt with by international co-operation, and the solving of them may ease tensions that would otherwise intensify into occasions for war. The Economic and Social Council, the Trusteeship Council, and the other specialized agencies of the United Nations, which have been alluded to earlier but cannot be discussed here, can do and have already done important work of social

amelioration. Among their achievements are the programs of technical assistance to underdeveloped nations, capital development, and aid in dealing with problems of health, housing, literacy, child welfare, labor standards, and development of industry. And much has been done to assist a host of United Nations-administered trust territories to achieve independence and self-government. It can be hoped that the habit of international consultation will grow with practice. It is no small achievement to create a forum for discussion where the statesmen of the world can meet to enlarge their mutual understanding, and improve their mutual respect in so far as there is a will on all sides to do so. This is an essential first step even if it does not take us far toward the elimination of war. Moreover, the educative effect of the deliberations of the United Nations on the people of the world should not be underestimated. But to date, at least, it remains nonetheless true that the United Nations cannot maintain peace between the super-powers if one of them is resolved to break it.

CONDITIONS NEEDED FOR A WORKABLE WORLD-STATE

The Soviet Union and the United States cannot be coerced except by an acknowledged superior authority—a world-state. However, even a world-state would be an empty shell unless it drew to itself immediately the primary loyalty of the great bulk of the people of the United States, the Soviet Union, and all other important states. In a sense, the problem is to duplicate the founding of the United States of America on a world scale. As far as forms and machinery are concerned, we already know how to do it. The main features of the Constitution of the United States are a model ready made for the architects of world federation.¹¹ But constitution makers cannot supply everything necessary to make a constitution work. The people of the Thirteen Colonies on the Atlantic seaboard in 1789 had something the peoples of the world lack today.

Common Feeling and Common Ideals. Despite the differences in habits, outlook, and interests in the several colonies at that time, the people living in them had already a considerable degree of unity. They had just thrown off a common allegiance to the British Crown, but that common subjection had given them the habit of living in peace and consultation together. They were predominantly of one ethnic stock and they had a common language. They had essentially similar views in religion, and a common political tradition

¹¹ See G. A. Borgese, *Preliminary Draft of a World Constitution* (Chicago: University of Chicago Press, 1948) for a draft on the main lines of the United States Constitution.

derived from Britain, which was rapidly taking shape as one of the main expressions of the wider liberal democratic tradition. Finally, they had the clearest of common interests in keeping all European powers out of the North American continent. They understood, respected, and within limits trusted one another, even though they did not always agree. Such peoples are ripe for political unification.

It is scarcely necessary to point out how far the diverse peoples of the world are from such ripeness. For example, there would have to be some measure of agreement on the aims and purposes of the single world order into whose care and keeping the security and welfare of all was being submitted. What common ideals of government would there be to justify such trust and submission? Would it be the liberal democratic ideals or the Communist ideals? The bitterness of the clash between these two sets of ideas is now so great as to threaten to tear the world apart. On this ground alone, voluntary world federation is out of the question at present, although many thoughtful plans have been advanced—notable among them that by two eminent American legal minds, Grenville Clark and Louis B. Sohn.¹²

Adjustments in the Status Quo. To come down from the level of ideals to mundane interests, a world government would have to take the necessary steps to prevent civil war. There is no point in exchanging wars between sovereign states for recurring civil wars. And it must be remembered that the people of the United States, with all they had in common, nevertheless incurred a terrible civil war. To prevent civil war, the world government would have to make major political adjustments to ensure tolerable conditions for the various peoples of the world. Tariffs would have to be lowered to allow goods from countries with low standards of living and low costs of production to compete in Britain, the United States, Canada, and so on, with goods produced by workers with high standards of living. Even more challenging, the world government would have to take measures to relieve the pressure of population in badly crowded areas of the world. Among the principal outlets for such surplus population are the empty spaces of the United States, Canada, and Australia.

Nothing is said here about the wisdom or effectiveness of such measures. The pressure of native colored peoples with low standards of living and

¹² See their remarkable work, *World Peace Through World Law*, 2nd ed. rev. (Cambridge: Harvard University Press, 1960). To maintain peace, and using the present organs of the U.N. as a base, they advocate a world legislature with a carefully worked-out system of Proportional Representation; an executive council chosen by and responsible to the legislature; a world police force composed of volunteers, selected by quota to obviate any state's or bloc exerting undue influence; international courts and other tribunals to deal with all disputes between nations; and a reliable world revenue system with funds collected from all states.

restricted living space on a genuinely democratic world federation would be immense. To refuse to yield to it might cause civil war. To pass such measures and try to enforce them would also cause civil war in the present climate of opinion. Accordingly, when it is said that the peoples of the world do not want war, the statement is undoubtedly true. It is necessary, however, to add that peoples often want to get or to keep things that cannot be got or kept without war. There is but little evidence amid the rampant nationalism of our time of common international ideals, of the mutual respect and spirit of accommodation necessary to found and maintain a world federation.

Subordination of National Interests. The limited project of a federation of Western European states has been discussed continually since the end of World War II. In 1957, the heads of the governments of France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg—already joined in a common market for coal and steel—agreed to pool their atomic resources and to merge their economies in a common tariff-free market. It was henceforth to be known as the *European Economic Community* or simply *Common Market*, and has already been described.¹³ A political union was held out as a future possibility. There is at least a possibility that a stable, solid federation of Western Europe, which made a new great power approaching that of the two super-powers, might do more than anything else to relieve tension between the United States and the Soviet Union, and give the world a breathing spell. There are the most cogent reasons for Britain to take a strong lead in this movement, for the British people are unusually intelligent and accommodating in political matters. Yet for reasons noted earlier,¹⁴ after having long been reluctant even to consider entering such a federation, their application to enter the Common Market as a full partner in 1962 was rebuffed by France—although perhaps not irrevocably. The core of the matter still remains: national interests are the solid ones, and there is little or no disposition to subordinate them to international welfare.

CONCLUSION

The main elements of a somber situation may now be recapitulated, or recalled from common knowledge. Physically, the world has been unified by modern transport and communication. High economic productivity enables the world to employ great numbers of men and many resources entirely in destruction. The range and destructiveness of the new weapons make destruc-

¹³ Cf. Chapter V, pp. 127 ff.

¹⁴ Ibid.

tion of civilization more than an idle speculation. The passions of nationalism turn wars into struggles by entire populations. The technical possibilities of total war are fully employed by nationalistic feeling. There is no assurance of escape from recurring total wars except a world state.

The Vicious Circle. A world state cannot be willed, created, and maintained without a substantial consensus on a world scale, a widely accepted international ideal of government, a world public opinion. An exclusive nationalism monopolizes the political loyalties of men and keeps them continually fighting one another. We cannot have a world-state because we need first to create a consciousness of the world community. We cannot have a consciousness of a world community because we do not have a world state to keep peace while the different nations learn to live together on a basis of mutual respect and mutual concession. This is the vicious circle in which the world finds itself.

The discussion in this chapter is intended as a background for the understanding of the dilemma. To go on and discuss the international politics of the present day in any revealing way would require too much space. In any case, the situation is so fluid, new and unforeseen events follow one another so quickly, that any analysis of the current situation is soon outdated.

Several considerations bearing on current events should, however, be stated. First, a long period of confusion in the wake of World War II was inevitable. The disruption was so extreme that order in many parts of the world still rests on military force, although it is not entirely fanciful to hope for more settled conditions as efforts toward recovery from the war continue briskly. Second, international tension is inevitably heightened where there are only two super-powers that really count.

Third, there are now hopeful signs that the recovery of Western Europe will be followed by close economic and political integration, thus producing in time a powerful make-weight between the Soviet Union and the United States. Fourth, the emergence of Communist China as a very powerful state, and the growing tension between her and the Soviet Union, tempers Soviet truculence toward the West. It may be hazarded now that Soviet fears of China are roughly of the same order as her fears of the United States. As long as the United States maintains 'second-strike capability,' the Soviet Union knows that a nuclear attack on the United States would bring prostrating retaliation and expose a shattered world to Chinese domination. The Soviet Union knows well that her present consequence in the world is a legacy from the internecine wars that exhausted Western Europe. The Soviet

leaders strongly desire to weaken the United States but not, as one may guess, at a cost that would deliver the Soviet Union as well as the rest of the world to China. For the time being then, the balance of nuclear terror does work, and so maintains an uneasy peace.

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In a book of this scope, certain broad, basic texts may properly be listed repeatedly as basic references for many, if not most, of its nineteen chapters. Not having attempted to do so in the body of the text, we shall enumerate some of these 'staples' here. A few will be designated *general works* in view of their wide range; others are listed here under the four countries with which they, and our work, deal. The balance of the suggested references for further reading appear at the end of each appropriate chapter.

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APPENDICES

The Constitution of the United States

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, *which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years,*¹ and excluding Indians not taxed, *three fifths of all other Persons.*² The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; *and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence*

¹ Altered by the Fourteenth Amendment.

² Rescinded by the Fourteenth Amendment.

*Plantations one, Connecticut five, New-York six, New-Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*³

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*,⁴ for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; *and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*⁵

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

*The Congress shall assemble at least once in every year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different day.*⁶

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel

³ Temporary provision.

⁴ Modified by the Seventeenth Amendment.

⁵ Modified by the Seventeenth Amendment.

⁶ Superseded by the Twentieth Amendment.

the Attendance of absent Members, in such manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general

Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

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 Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; —And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

*SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.*⁷

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

⁷ Temporary provision.

No tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law, and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

SECTION 1. The Executive Power shall be vested in a President of the United States of America. *He shall hold his Office during the Term of four Years,*⁸ and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the

⁸ Modified by the Twenty-second Amendment.

*President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote: A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.*⁹

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of the Constitution, shall be eligible to the Office of President, neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:— "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge

⁹ Superseded by the Twelfth Amendment.

necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction:—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—*between a State and Citizens of another State*; ¹⁰—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and *between a State, or the Citizens thereof, and foreign States, Citizens or Subjects*.¹⁰

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

¹⁰ Restricted by the Eleventh Amendment.

SECTION 2. *The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*¹¹

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

*No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*¹²

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, wherever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; *Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article;*¹³ and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

*All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.*¹⁴

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

¹¹ Made more explicit by the Fourteenth Amendment.

¹² Superseded by the Thirteenth Amendment in so far as pertaining to slaves.

¹³ Temporary clause.

¹⁴ Extended by the Fourteenth Amendment.

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

G^o WASHINGTON—Pres^t
and deputy from Virginia

New Hampshire	{ John Langdon Nicholas Gilman			{ Geo: Read Gunning Bedford jun
		Delaware		{ John Dickinson Richard Bassett Jaco: Broom
Massachusetts	{ Nathaniel Gorham Rufus King			
Connecticut	{ W ^m Sam ^l Johnson Roger Sherman	Maryland		{ James McHenry Dan of St ^t Tho ^s Jenifer Dan ^l Carroll
New York	{ Alexander Hamilton			
		Virginia		{ John Blair— James Madison Jr.
New Jersey	{ Wil: Livingston David A. Brearley. W ^m Paterson. Jona: Dayton			
		North Carolina		{ W ^m Blount Rich ^d Dobbs Spaight. Hu Williamson
Pennsylvania	{ B Franklin Thomas Mifflin Rob ^t Morris Geo. Clymer Tho ^s FitzSimons Jared Ingersoll James Wilson Gouv Morris	South Carolina		{ J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler.
		Georgia		{ William Few Abr Baldwin

AMENDMENTS TO THE CONSTITUTION

Articles in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

ARTICLE I

[The First Ten Articles Proposed 25 September 1789; Declared
in Force 15 December 1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI

[Proposed 5 March 1794; Declared Ratified 8 January 1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII

[Proposed 12 December 1803; Declared Ratified 25 September 1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for the President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the *fourth day of March*¹⁵ next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The Person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the

¹⁵ Superseded by the Twentieth Amendment.

purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII

[Proposed 1 February 1865; Declared Ratified 18 December 1866]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV

[Proposed 16 June 1866; Declared Ratified 28 July 1868]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

ARTICLE XV

[Proposed 27 February 1869; Declared Ratified 30 March 1870]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.—

ARTICLE XVI

[Proposed 12 July 1909; Declared Ratified 25 February 1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII

[Proposed 16 May 1912; Declared Ratified 31 May 1913]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII

[Proposed 18 December 1917; Declared Ratified 29 January 1919]

SECTION 1. *After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.*

SECTION 2. *The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.*

SECTION 3. *This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress.*¹⁰

¹⁰ Rescinded by the Twenty-first Amendment.

ARTICLE XIX

[Proposed 4 June 1919; Declared Ratified 26 August 1920]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The Congress shall have power by appropriate legislation to enforce the Provisions of this article.

ARTICLE XX

[Proposed 2 March 1932; Declared Ratified 6 February 1933]

SECTION 1. The terms of the President and Vice-President shall end at noon on the twentieth day of January, and the terms of Senators and Representatives at noon on the third day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice-President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

SECTION 5. SECTIONS 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI

[Proposed 20 February 1933; Adopted 5 December 1933]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress.

ARTICLE XXII

[Proposed 24 March 1947; Adopted 26 February 1951]

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. The article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

ARTICLE XXIII

[Proposed 6 January 1960; Adopted 3 April 1961]

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XXIV

[Proposed 27 August 1962; Adopted 24 January 1964]

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

The French Constitution

Adopted by the Referendum of September 28, 1958,
and Promulgated on October 4, 1958

PREAMBLE

The French people hereby solemnly proclaims its attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble of the Constitution of 1946.

By virtue of these principles and that of the free determination of peoples, the Republic hereby offers to the Overseas Territories that express the desire to adhere to them, new institutions based on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic evolution.

ARTICLE 1

The Republic and the peoples of the Overseas Territories who, by an act of free determination, adopt the present Constitution thereby institute a Community.

The Community shall be based on the equality and the solidarity of the peoples composing it.

TITLE I

ON SOVEREIGNTY

ARTICLE 2

France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

The national emblem is the tricolor flag, blue, white and red.
The national anthem is the 'Marseillaise.'
The motto of the Republic is 'Liberty, Equality, Fraternity.'
Its principle is government of the people, by the people and for the people.

ARTICLE 3

National sovereignty belongs to the people, which shall exercise this sovereignty through its representatives and by means of referendums.

No section of the people, nor any individual, may attribute to themselves or himself the exercise thereof.

Suffrage may be direct or indirect under the conditions stipulated by the Constitution. It shall always be universal, equal and secret.

All French citizens of both sexes who have reached their majority and who enjoy civil and political rights may vote under the conditions to be determined by law.

ARTICLE 4

Political parties and groups shall be instrumental in the expression of the suffrage. They shall be formed freely and shall carry on their activities freely. They must respect the principles of national sovereignty and democracy.

TITLE II

THE PRESIDENT OF THE REPUBLIC

ARTICLE 5

The President of the Republic shall see that the Constitution is respected. He shall ensure, by his arbitration, the regular functioning of the governmental authorities, as well as the continuance of the State.

He shall be the guarantor of national independence, of the integrity of the territory, and of respect for Community agreements and treaties.

ARTICLE 6¹

The President of the Republic shall be elected for seven years by direct universal suffrage.

The procedures implementing the present article shall be determined by an organic law.

ARTICLE 7¹

The President of the Republic shall be elected by an absolute majority of the votes cast. If this is not obtained on the first ballot, there shall be a second ballot on the second Sunday following. Only the two candidates who have received the greatest number of votes on the first ballot shall present themselves, taking into account the possible withdrawal of more favored candidates.

¹ Amendments: Adopted by popular referendum October 28, 1962.

The voting shall begin at the summons of the Government.

The election of the new President shall take place twenty days at the least and thirty-five days at the most before the expiration of the powers of the President in office.

In the event that the Presidency of the Republic has been vacated, for any cause whatsoever, or impeded in its functioning as officially noted by the Constitutional Council, to which the matter has been referred by the Government, and which shall rule by an absolute majority of its members, the functions of the President of the Republic, with the exception of those provided for by Articles 11 and 12 below, shall be temporarily exercised by the President of the Senate and, if the latter is in his turn impeded in the exercise of these functions, by the Government.

In the case of a vacancy, or when the impediment is declared definitive by the Constitutional Council, the voting for the election of a new President shall take place, except in case of *force majeure* officially noted by the Constitutional Council, twenty days at the least and thirty-five days at the most after the beginning of the vacancy or the declaration of the definitive character of the impediment.

There may be no application of either Articles 49 and 50 or of Article 89 of the Constitution during the vacancy of the Presidency of the Republic or during the period that elapses between the declaration of the definitive character of the impediment of the President of the Republic and the election of his successor.

ARTICLE 8

The President of the Republic shall appoint the Premier. He shall terminate the functions of the Premier when the latter presents the resignation of the Government.

On the proposal of the Premier, he shall appoint the other members of the Government and shall terminate their functions.

ARTICLE 9

The President of the Republic shall preside over the Council of Ministers.

ARTICLE 10

The President of the Republic shall promulgate the laws within fifteen days following the transmission to the Government of the finally adopted law.

He may, before the expiration of this time limit, ask Parliament for a reconsideration of the law or of certain of its articles. This reconsideration may not be refused.

ARTICLE 11

The President of the Republic, on the proposal of the Government during [Parliamentary] sessions, or on joint motion of the two assemblies, published in the *Journal Officiel*, may submit to a referendum any bill dealing with the organization of the governmental authorities, entailing approval of a Community agreement, or providing for authorization to ratify a treaty that, without being contrary to the Constitution, might affect the functioning of [existing] institutions.

When the referendum decides in favor of the bill, the President of the Republic shall promulgate it within the time limit stipulated in the preceding article.

ARTICLE 12

The President of the Republic may, after consultation with the Premier and the Presidents of the Assemblies, declare the dissolution of the National Assembly.

General elections shall take place twenty days at the least and forty days at the most after the dissolution.

The National Assembly shall convene by right on the second Thursday following its election. If this meeting takes place between the periods provided for ordinary sessions, a session shall, by right, be held for a fifteen-day period.

There may be no further dissolution within a year following these elections.

ARTICLE 13

The President of the Republic shall sign the ordinances and decrees decided upon in the Council of Ministers.

He shall make appointments to the civil and military posts of the State.

Councillors of State, the Grand Chancellor of the Legion of Honor, Ambassadors and envoys extraordinary, Master Councillors of the Audit Office, prefects, representatives of the Government in the Overseas Territories, general officers, rectors of academies [regional divisions of the public educational system] and directors of central administrations shall be appointed in meetings of the Council of Ministers.

An organic law shall determine the other posts to be filled in meetings of the Council of Ministers, as well as the conditions under which the power of the President of the Republic to make appointments to office may be delegated by him and exercised in his name.

ARTICLE 14

The President of the Republic shall accredit Ambassadors and envoys extraordinary to foreign powers; foreign Ambassadors and envoys extraordinary shall be accredited to him.

ARTICLE 15

The President of the Republic shall be commander of the armed forces. He shall preside over the higher councils and committees of national defense.

ARTICLE 16

When the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures commanded by these circumstances, after official consultation with the Premier, the Presidents of the assemblies and the Constitutional Council.

He shall inform the nation of these measures in a message.

These measures must be prompted by the desire to ensure to the constitutional governmental authorities, in the shortest possible time, the means of fulfilling their assigned functions. The Constitutional Council shall be consulted with regard to such measures.

Parliament shall meet by right.

The National Assembly may not be dissolved during the exercise of emergency powers [by the President].

ARTICLE 17

The President of the Republic shall have the right of pardon.

ARTICLE 18

The President of the Republic shall communicate with the two assemblies of Parliament by means of messages, which he shall cause to be read, and which shall not be followed by any debate.

Between sessions, Parliament shall be convened especially for this purpose.

ARTICLE 19

The acts of the President of the Republic, other than those provided for under Articles 8 (first paragraph), 11, 12, 16, 18, 54, 56 and 61, shall be countersigned by the Premier and, should circumstances so require, by the appropriate ministers.

TITLE III

THE GOVERNMENT

ARTICLE 20

The Government shall determine and direct the policy of the nation.

It shall have at its disposal the administration and the armed forces.

It shall be responsible to Parliament under the conditions and according to the procedures stipulated in Articles 49 and 50.

ARTICLE 21

The Premier shall direct the operation of the Government. He shall be responsible for national defense. He shall ensure the execution of the laws. Subject to the provisions of Article 13, he shall have regulatory powers and shall make appointments to civil and military posts.

He may delegate certain of his powers to the ministers.

He shall replace, should the occasion arise, the President of the Republic as chairman of the councils and committees provided for under Article 15.

He may, in exceptional instances, replace him as chairman of a meeting of the Council of Ministers by virtue of an explicit delegation and for a specific agenda.

ARTICLE 22

The acts of the Premier shall be countersigned, when circumstances so require, by the ministers responsible for their execution.

ARTICLE 23

The office of member of the Government shall be incompatible with the exercise of any Parliamentary mandate, with the holding of any office at the national level in business, professional or labor organizations, and with any public employment or professional activity.

An organic law shall determine the conditions under which the holders of such mandates, functions or employments shall be replaced.

The replacement of members of Parliament shall take place in accordance with the provisions of Article 25.

TITLE IV

THE PARLIAMENT

ARTICLE 24

The Parliament shall comprise the National Assembly and the Senate.

The deputies to the National Assembly shall be elected by direct suffrage.

The Senate shall be elected by indirect suffrage. It shall ensure the representation of the territorial units of the Republic. Frenchmen living outside France shall be represented in the Senate.

ARTICLE 25

An organic law shall determine the term for which each assembly is elected, the number of its members, their emoluments, the conditions of eligibility and ineligibility and the offices incompatible with membership in the assemblies.

It shall likewise determine the conditions under which, in the case of a vacancy in either assembly, persons shall be elected to replace the deputy or senator whose seat has been vacated until the holding of new complete or partial elections to the assembly concerned.

ARTICLE 26

No member of Parliament may be prosecuted, sought, arrested, detained or tried as a result of the opinions or votes expressed by him in the exercise of his functions.

No member of Parliament may, during Parliamentary sessions, be prosecuted or arrested for criminal or minor offenses without the authorization of the assembly of which he is a member except in the case of *flagrante delicto*.

When Parliament is not in session, no member of Parliament may be arrested without the authorization of the Secretariat of the assembly of which he is a member, except in the case of *flagrante delicto*, of authorized prosecution or of final conviction.

The detention or prosecution of a member of Parliament shall be suspended if the assembly of which he is a member so demands.

ARTICLE 27

All binding instructions [upon members of Parliament] shall be null and void.

The right to vote of the members of Parliament shall be personal.

An organic law may, under exceptional circumstances, authorize the delegation of a vote. In this case, no member may be delegated more than one vote.

ARTICLE 28

Parliament shall convene, by right, in two ordinary sessions a year.

The first session shall begin on the first Tuesday of October and shall end on the third Friday of December.

The second session shall open on the last Tuesday of April; it may not last longer than three months.

ARTICLE 29

Parliament shall convene in extraordinary session at the request of the Premier, or of the majority of the members comprising the National Assembly, to consider a specific agenda.

When an extraordinary session is held at the request of the members of the National Assembly, the closure decree shall take effect as soon as the Parliament has exhausted the agenda for which it was called, and at the latest twelve days from the date of its meeting.

Only the Premier may ask for a new session before the end of the month following the closure decree.

ARTICLE 30

Apart from cases in which Parliament meets by right, extraordinary sessions shall be opened and closed by decree of the President of the Republic.

ARTICLE 31

The members of the Government shall have access to the two assemblies. They shall be heard when they so request.

They may call for the assistance of commissioners of the government.

ARTICLE 32

The President of the National Assembly shall be elected for the duration of the legislature. The President of the Senate shall be elected after each partial re-election [of the Senate].

ARTICLE 33

The meetings of the two assemblies shall be public. An *in extenso* report of the debates shall be published in the *Journal Officiel*.

Each assembly may sit in secret committee at the request of the Premier or of one tenth of its members.

TITLE V
ON RELATIONS BETWEEN PARLIAMENT
AND THE GOVERNMENT

ARTICLE 34

All laws shall be passed by Parliament.

Laws shall establish the regulations concerning:

- civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties; the obligations imposed by the national defense upon the persons and property of citizens;

- nationality, status and legal capacity of persons, marriage contracts, inheritance and gifts;

- determination of crimes and misdemeanors as well as the penalties imposed therefor; criminal procedure; amnesty; the creation of new juridical systems and the status of magistrates;

- the basis, the rate and the methods of collecting taxes of all types; the issuance of currency.

Laws shall likewise determine the regulations concerning:

- the electoral system of the Parliamentary assemblies and the local assemblies;

- the establishment of categories of public institutions;

- the fundamental guarantees granted to civil and military personnel employed by the State;

- the nationalization of enterprises and the transfer of the property of enterprises from the public to the private sector.

Laws shall determine the fundamental principles of:

- the general organization of national defense;

- the free administration of local communities, the extent of their jurisdiction and their resources;

- education;

- property rights, civil and commercial obligations;

- legislation pertaining to employment, unions and social security.

The financial laws shall determine the financial resources and obligations of the State under the conditions and with the reservations to be provided for by an organic law.

Laws pertaining to national planning shall determine the objectives of the economic and social action of the State.

The provisions of the present article may be developed in detail and amplified by an organic law.

ARTICLE 35

Parliament shall authorize the declaration of war.

ARTICLE 36

Martial law shall be decreed in a meeting of the Council of Ministers.

Its prorogation beyond twelve days may be authorized only by Parliament.

ARTICLE 37

Matters other than those that fall within the domain of law shall be of a regulatory character.

Legislative texts concerning these matters may be modified by decrees issued after consultation with the Council of State. Those legislative texts which may be passed after the present Constitution has become operative shall be modified by decree, only if the Constitutional Council has stated that they have a regulatory character as defined in the preceding paragraph.

ARTICLE 38

The Government may, in order to carry out its program, ask Parliament to authorize it, for a limited period, to take through ordinances measures that are normally within the domain of law.

The ordinances shall be enacted in meetings of the Council of Ministers after consultation with the Council of State. They shall come into force upon their publication, but shall become null and void if the bill for their ratification is not submitted to Parliament before the date set by the enabling act.

At the expiration of the time limit referred to in the first paragraph of the present article, the ordinances may be modified only by law in those matters which are within the legislative domain.

ARTICLE 39

The Premier and the members of Parliament alike shall have the right to initiate legislation.

Government bills shall be discussed in the Council of Ministers after consultation with the Council of State and shall be filed with the Secretariat of one of the two assemblies. Finance bills shall be submitted first to the National Assembly.

ARTICLE 40

Bills and amendments introduced by members of Parliament shall not be considered when their adoption would have as a consequence either a diminution of public financial resources, or the creation or increase of public expenditures.

ARTICLE 41

If it appears in the course of the legislative procedure that a Parliamentary bill or an amendment is not within the domain of law or is contrary to a delegation [of authority] granted by virtue of Article 38, the Government may declare its inadmissibility.

In case of disagreement between the Government and the President of the assembly concerned, the Constitutional Council, upon the request of either party, shall rule within a time limit of eight days.

ARTICLE 42

The discussion of Government bills shall pertain, in the first assembly to which they have been referred, to the text presented by the Government.

An assembly, given a text passed by the other assembly, shall deliberate on the text that is transmitted to it.

ARTICLE 43

Government and Parliamentary bills shall, at the request of the Government or of the assembly concerned, be sent for study to committees especially designated for this purpose.

Government and Parliamentary bills for which such a request has not been made shall be sent to one of the permanent committees, the number of which shall be limited to six in each assembly.

ARTICLE 44

Members of Parliament and of the Government shall have the right of amendment.

After the opening of the debate, the Government may oppose the examination of any amendment which has not previously been submitted to committee.

If the Government so requests, the assembly concerned shall decide, by a single vote, on all or part of the text under discussion, retaining only the amendments proposed or accepted by the Government.

ARTICLE 45

Every Government or Parliamentary bill shall be examined successively in the assemblies of Parliament with a view to the adoption of an identical text.

When, as a result of disagreement between the two assemblies, it has become impossible to adopt a Government or Parliamentary bill after two readings by each assembly, or, if the Government has declared the matter urgent, after a single reading by each of them, the Premier shall have the right to have a joint committee meet, composed of an equal number from both assemblies and instructed to offer for consideration a text on the matters still under discussion.

The text prepared by the joint committee may be submitted by the Government for approval of the two assemblies. No amendment shall be admissible except by agreement with the Government.

If the joint committee fails to approve a common text, or if this text is not adopted under the conditions set forth in the preceding paragraph, the Government may, after a new reading by the National Assembly and by the Senate, ask the National Assembly to rule definitively. In this case, the National Assembly may reconsider either the text prepared by the joint committee or the last text adopted [by the National Assembly], modified, when circumstances so require, by one or several of the amendments adopted by the Senate.

ARTICLE 46

The laws that the Constitution characterizes as organic shall be passed and amended under the following conditions:

A Government or Parliamentary bill shall be submitted to the deliberation and to the vote of the first assembly to which it is submitted only at the expiration of a period of fifteen days following its introduction.

The procedure of Article 45 shall be applicable. Nevertheless, lacking an agreement between the two assemblies, the text may be adopted by the National Assembly on final reading only by an absolute majority of its members.

The organic laws relative to the Senate must be passed in the same manner by the two assemblies.

Organic laws may be promulgated only after a declaration by the Constitutional Council on their constitutionality.

ARTICLE 47

Parliament shall pass finance bills under the conditions to be stipulated by an organic law.

Should the National Assembly fail to reach a decision on first reading within a time limit of forty days after a bill has been filed, the Government shall refer it to the Senate, which must rule within a time limit of fifteen days. The procedure set forth in Article 45 shall then be followed.

Should Parliament fail to reach a decision within a time limit of seventy days, the provisions of the bill may be enforced by ordinance.

Should the finance bill establishing the resources and expenditures of a fiscal year not be filed in time for it to be promulgated before the beginning of that fiscal year, the Government shall immediately request Parliament for the authorization to collect the taxes and shall make available by decree the funds needed to meet the Government commitments already voted.

The time limits stipulated in the present article shall be suspended when Parliament is not in session.

The Audit Office shall assist Parliament and the Government in supervising the implementation of the finance laws.

ARTICLE 48

The discussion of the bills filed or agreed upon by the Government shall have priority on the agenda of the assemblies in the order set by the Government.

One meeting a week shall be reserved, by priority, for questions asked by members of Parliament and for answers by the Government.

ARTICLE 49

The Premier, after deliberation by the Council of Ministers, may pledge the responsibility of the Government to the National Assembly with regard to the program of the Government, or with regard to a declaration of general policy, as the case may be.

The National Assembly may question the responsibility of the Government by the vote of a motion of censure. Such a motion shall be admissible only if it is signed by at least one tenth of the members of the National Assembly. The vote may only take place forty-eight hours after the motion has been filed; the only votes counted shall be those favorable to the motion of censure, which may be adopted only by a majority of the members comprising the Assembly. Should the motion of censure be rejected, its signatories may not introduce another motion in the course of the same session, except in the case provided for in the paragraph below.

The Premier may, after deliberation by the Council of Ministers, pledge the Government's responsibility to the National Assembly on the vote of a text. In this case, the

text shall be considered as adopted, unless a motion of censure, filed in the succeeding twenty-four hours, is voted under the conditions laid down in the previous paragraph.

The Premier shall be entitled to ask the Senate for approval of a general policy declaration.

ARTICLE 50

When the National Assembly adopts a motion of censure, or when it disapproves the program or a declaration of general policy of the Government, the Premier must submit the resignation of the Government to the President of the Republic.

ARTICLE 51

The closure of ordinary or extraordinary sessions shall by right be delayed, should the occasion arise, in order to permit the application of the provisions of Article 49.

TITLE VI

ON TREATIES AND INTERNATIONAL AGREEMENTS

ARTICLE 52

The President of the Republic shall negotiate and ratify treaties.

He shall be informed of all negotiations leading to the conclusion of an international agreement not subject to ratification.

ARTICLE 53

Peace treaties, commercial treaties, treaties or agreements relative to international organization, those that imply a commitment for the finances of the State, those that modify provisions of a legislative nature, those relative to the status of persons, those that call for the cession, exchange or addition of territory may be ratified or approved only by a law.

They shall go into effect only after having been ratified or approved.

No cession, no exchange, no addition of territory shall be valid without the consent of the populations concerned.

ARTICLE 54

If the Constitutional Council, the matter having been referred to it by the President of the Republic, by the Premier, or by the President of one or the other assembly, shall declare that an international commitment contains a clause contrary to the Constitution, the authorization to ratify or approve this commitment may be given only after amendment of the Constitution.

ARTICLE 55

Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party.

TITLE VII
THE CONSTITUTIONAL COUNCIL

ARTICLE 56

The Constitutional Council shall consist of nine members, whose term of office shall last nine years and shall not be renewable. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly, three by the President of the Senate.

In addition to the nine members provided for above, former Presidents of the Republic shall be members *ex officio* for life of the Constitutional Council.

The President shall be appointed by the President of the Republic. He shall have the deciding vote in case of a tie.

ARTICLE 57

The office of member of the Constitutional Council shall be incompatible with that of minister or member of Parliament. Other incompatibilities shall be determined by an organic law.

ARTICLE 58

The Constitutional Council shall ensure the regularity of the election of the President of the Republic.

It shall examine complaints and shall announce the results of the vote.

ARTICLE 59

The Constitutional Council shall rule, in the case of disagreement, on the regularity of the election of deputies and senators.

ARTICLE 60

The Constitutional Council shall ensure the regularity of referendum procedures and shall announce the results thereof.

ARTICLE 61

Organic laws, before their promulgation, and regulations of the Parliamentary assemblies, before they come into application, must be submitted to the Constitutional Council, which shall rule on their constitutionality.

To the same end, laws may be submitted to the Constitutional Council, before their promulgation, by the President of the Republic, the Premier or the President of one or the other assembly.

In the cases provided for by the two preceding paragraphs, the Constitutional Council must make its ruling within a time limit of one month. Nevertheless, at the request of the Government, in case of emergency, this period shall be reduced to eight days.

In these same cases, referral to the Constitutional Council shall suspend the time limit for promulgation.

ARTICLE 62

A provision declared unconstitutional may not be promulgated or implemented.

The decisions of the Constitutional Council may not be appealed to any jurisdiction whatsoever. They must be recognized by the governmental authorities and by all administrative and juridical authorities.

ARTICLE 63

An organic law shall determine the rules of organization and functioning of the Constitutional Council, the procedure to be followed before it, and in particular the periods of time allowed for laying disputes before it.

TITLE VIII

ON JUDICIAL AUTHORITY

ARTICLE 64

The President of the Republic shall be the guarantor of the independence of the judicial authority.

He shall be assisted by the High Council of the Judiciary.

An organic law shall determine the status of magistrates.

Magistrates may not be removed from office.

ARTICLE 65

The High Council of the Judiciary shall be presided over by the President of the Republic. The Minister of Justice shall be its Vice President *ex officio*. He may preside in place of the President of the Republic.

The High Council shall, in addition, include nine members appointed by the President of the Republic in conformity with the conditions to be determined by an organic law.

The High Council of the Judiciary shall present nominations for judges of the Court of Cassation [Supreme Court of Appeal] and for First Presidents of Courts of Appeal. It shall give its opinion, under the conditions to be determined by an organic law, on proposals of the Minister of Justice relative to the nomination of the other judges. It shall be consulted on questions of pardon under conditions to be determined by an organic law.

The High Council of the Judiciary shall act as a disciplinary council for judges. In such cases, it shall be presided over by the First President of the Court of Cassation.

ARTICLE 66

No one may be arbitrarily detained.

The judicial authority, guardian of individual liberty, shall ensure respect for this principle under the conditions stipulated by law.

TITLE IX

THE HIGH COURT OF JUSTICE

ARTICLE 67

A High Court of Justice shall be instituted.

It shall be composed of members [of Parliament] elected, in equal number, by the National Assembly and the Senate after each general or partial election to these assemblies. It shall elect its President from among its members.

An organic law shall determine the composition of the High Court, its rules, and also the procedure to be followed before it.

ARTICLE 68

The President of the Republic shall not be held accountable for actions performed in the exercise of his office except in the case of high treason. He may be indicted only by the two assemblies ruling by identical vote in open balloting and by an absolute majority of the members of said assemblies. He shall be tried by the High Court of Justice.

The members of the Government shall be criminally liable for actions performed in the exercise of their office and deemed to be crimes or misdemeanors at the time they were committed. The procedure defined above shall be applied to them, as well as their accomplices, in case of a conspiracy against the security of the State. In the cases provided for by the present paragraph, the High Court shall be bound by the definition of crimes and misdemeanors, as well as by the determination of penalties, as they are established by the criminal laws in force when the acts are committed.

TITLE X

THE ECONOMIC AND SOCIAL COUNCIL

ARTICLE 69

The Economic and Social Council, whenever the Government calls upon it, shall give its opinion on the Government bills, ordinances and decrees, as well as on the Parliamentary bills submitted to it.

A member of the Economic and Social Council may be designated by the latter to present, before the Parliamentary assemblies, the opinion of the Council on the Government or Parliamentary bills that have been submitted to it.

ARTICLE 70

The Economic and Social Council may likewise be consulted by the Government on any problem of an economic or social character of interest to the Republic or to the Community. Any plan, or any bill dealing with a plan, of an economic or social character shall be submitted to it for its advice.

ARTICLE 71

The composition of the Economic and Social Council and its rules of procedure shall be determined by an organic law.

TITLE XI
ON TERRITORIAL UNITS

ARTICLE 72

The territorial units of the Republic are the communes, the Departments, the Overseas Territories. Other territorial units may be created by law.

These units shall be free to govern themselves through elected councils and under the conditions stipulated by law.

In the departments and the territories, the Delegate of the Government shall be responsible for the national interests, for administrative supervision, and for seeing that the laws are respected.

ARTICLE 73

Measures of adjustment required by the particular situation of the Overseas Departments may be taken with regard to their legislative system and administrative organization.

ARTICLE 74

The Overseas Territories of the Republic shall have a special organization, which takes into account their own interests within the general interests of the Republic. This organization shall be defined and modified by law after consultation with the Territorial Assembly concerned.

ARTICLE 75

Citizens of the Republic who do not have ordinary civil status, the only status referred to in Article 34, may keep their personal status as long as they have not renounced it.

ARTICLE 76

The Overseas Territories may retain their status within the Republic.

If they express the desire to do so by a decision of their Territorial Assemblies taken within the time limit set in the first paragraph of Article 91, they shall become Overseas Departments of the Republic or member States of the Community, either in groups or as single units.

TITLE XII
ON THE COMMUNITY

ARTICLE 77

In the Community instituted by the present Constitution, the States shall enjoy autonomy; they shall administer themselves and manage their own affairs democratically and freely.

There shall be only one citizenship in the Community.

All citizens shall be equal before the law, whatever their origin, their race and their religion. They shall have the same duties.

ARTICLE 78

The Community's jurisdiction shall extend over foreign policy, defense, currency, common economic and financial policy, as well as over policy on strategic raw materials.

It shall include, in addition, except in the case of specific agreements, the supervision of the tribunals, higher education, the general organization of external transportation and transportation within the Community, as well as of telecommunications.

Special agreements may create other common jurisdictions or regulate any transfer of jurisdiction from the Community to one of its members.

ARTICLE 79

The member States shall benefit from the provisions of Article 77 as soon as they have exercised the choice provided for in Article 76.

Until the measures required for implementation of the present title go into force, matters within the common jurisdiction shall be regulated by the Republic.

ARTICLE 80

The President of the Republic shall preside over and represent the Community.

The institutional organs of the Community shall be an Executive Council, a Senate and a Court of Arbitration.

ARTICLE 81

The member States of the Community shall participate in the election of the President according to the conditions stipulated in Article 6.

The President of the Republic, in his capacity as President of the Community, shall be represented in each State of the Community.

ARTICLE 82

The Executive Council of the Community shall be presided over by the President of the Community. It shall consist of the Premier of the Republic, the heads of Government of each of the member States of the Community, and the ministers responsible for the common affairs of the Community.

The Executive Council shall organize the cooperation of members of the Community at Government and administrative levels.

The organization and procedure of the Executive Council shall be determined by an organic law.

ARTICLE 83

The Senate of the Community shall be composed of delegates whom the Parliament of the Republic and the legislative assemblies of the other members of the Community shall choose from among their own membership. The number of delegates of each State shall be determined according to its population and the responsibilities it assumes in the Community.

The Senate of the Community shall hold two sessions a year, which shall be opened and closed by the President of the Community and may not last longer than one month each.

The Senate of the Community, when called upon by the President of the Community, shall deliberate on the common economic and financial policy before laws on these matters are voted upon by the Parliament of the Republic and, should circumstances so require, by the legislative assemblies of the other members of the Community.

The Senate of the Community shall examine the acts and treaties or international agreements, which are specified in Articles 35 and 53, and which commit the Community.

The Senate of the Community shall make executory decisions in the domains in which it has received delegation of power from the legislative assemblies of the members of the Community. These decisions shall be promulgated in the same form as the law in the territory of each of the States concerned.

An organic law shall determine the composition of the Senate and its rules of procedure.

ARTICLE 84

A Court of Arbitration of the Community shall rule on litigations occurring among members of the Community.

Its composition and its jurisdiction shall be determined by an organic law.

ARTICLE 85²

By derogation from the procedure provided for in Article 89, the provisions of the present title that concern the functioning of the common institutions shall be amendable by identical laws passed by the Parliament of the Republic and by the Senate of the Community.

The provisions of the present title may also be amended by agreements concluded between all the States of the Community; the new provisions shall be put into force under the conditions required by the Constitution of each State.

ARTICLE 86³

A change of status of a member State of the Community may be requested, either

² Second paragraph is an Amendment: Adopted by Parliament, May 18, 1960.

³ Last three paragraphs constitute an Amendment: Adopted by Parliament, May 18, 1960.

by the Republic, or by a resolution of the legislative assembly of the State concerned confirmed by a local referendum, the organization and supervision of which shall be ensured by the institutions of the Community. The procedures governing this change shall be determined by an agreement approved by the Parliament of the Republic and the legislative assembly concerned.

Under the same conditions, a member State of the Community may become independent. It shall thereby cease to belong to the Community.

A member State of the Community may also, by means of agreements, become independent without thereby ceasing to belong to the Community.

An independent State not a member of the Community may, by means of agreements, join the Community without ceasing to be independent.

The position of these States within the Community shall be determined by agreements concluded to this end, in particular the agreements mentioned in the preceding paragraphs as well as, should the occasion arise, the agreements provided for in the second paragraph of Article 85.

ARTICLE 87

The special agreements made for the implementation of the present title shall be approved by the Parliament of the Republic and the legislative assembly concerned.

TITLE XIII

ON AGREEMENTS OF ASSOCIATION

ARTICLE 88

The Republic or the Community may make agreements with States that wish to associate themselves with the Community in order to develop their own civilizations.

TITLE XIV

ON AMENDMENT

ARTICLE 89

The initiative for amending the Constitution shall belong both to the President of the Republic on the proposal of the Premier and to the members of Parliament.

The Government or Parliamentary bill for amendment must be passed by the two assemblies in identical terms. The amendment shall become definitive after approval by a referendum.

Nevertheless, the proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in this case, the proposed amendment shall be approved only if it is accepted by a three-fifths majority of the votes cast. The Secretariat of the Congress shall be that of the National Assembly.

No amendment procedure may be undertaken or followed when the integrity of the territory is in jeopardy.

The republican form of government shall not be subject to amendment.

TITLE XV
TEMPORARY PROVISIONS

ARTICLE 90

The ordinary session of Parliament is suspended. The mandate of the members of the present National Assembly shall expire on the day that the Assembly elected under the present Constitution convenes.

Until this meeting, the Government alone shall have the authority to convene Parliament.

The mandate of the members of the Assembly of the French Union shall expire at the same time as the mandate of the members of the present National Assembly.

ARTICLE 91

The institutions of the Republic, provided for by the present Constitution, shall be established within four months after its promulgation.

This time limit shall be extended to six months for the institutions of the Community.

The powers of the President of the Republic now in office shall expire only when the results of the election provided for in Articles 6 and 7 of the present Constitution are proclaimed.

The member States of the Community shall participate in this first election under the conditions derived from their status at the date of the promulgation of the Constitution. The established authorities shall continue to exercise their functions in these States according to the laws and regulations applicable when the Constitution becomes operative, until the authorities provided for by their new regimes are set up.

Until it is definitively constituted, the Senate shall consist of the present members of the Council of the Republic. The organic laws that determine the definitive composition of the Senate must be passed before July 31, 1959.

The powers conferred on the Constitutional Council by Articles 58 and 59 of the Constitution shall be exercised, until this Council is set up, by a committee composed of the Vice President of the Council of State, as chairman, the First President of the Court of Cassation, and the First President of the Audit Office.

The peoples of the member States of the Community shall continue to be represented in Parliament until the measures necessary to the implementation of Title XII have been put into effect.

ARTICLE 92

The legislative measures necessary for the setting up of the institutions and, until they are set up, for the functioning of the governmental authorities, shall be taken in meetings of the Council of Ministers, after consultation with the Council of State, in the form of ordinances having the force of law.

During the time limit set in the first paragraph of Article 91, the Government shall be authorized to determine, by ordinances having the force of law and passed in the same way, the system of elections to the assemblies provided for by the Constitution.

During the same period and under the same conditions, the Government may also adopt measures, in all matters, which it may deem necessary to the life of the nation, the protection of citizens or the safeguarding of liberties.

Constitution of the Union of Soviet Socialist Republics, 1936 (As Amended)

CHAPTER I—THE SOCIAL STRUCTURE

ART. 1—The Union of Soviet Socialist Republics is a socialist state of workers and peasants.

ART. 2—The political foundation of the U.S.S.R. is the Soviets of Working People's Deputies, which grew and became strong as a result of the overthrow of the power of the landlords and capitalists and the conquest of the dictatorship of the proletariat.

ART. 3—All power in the U.S.S.R. belongs to the working people of town and country as represented by the Soviets of Working People's Deputies.

ART. 4—The economic foundation of the U.S.S.R. is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instruments and means of production, and the elimination of the exploitation of man by man.

ART. 5—Socialist property in the U.S.S.R. exists either in the form of state property (belonging to the whole people) or in the form of co-operative and collective-farm property (property of collective farms, property of co-operative societies).

ART. 6—The land, its mineral wealth, waters, forests, mills, factories, mines, rail, water and air transport, banks, communications, large state-organized agricultural enterprises (state farms, machine and tractor stations and the like), as well as municipal enterprises and the bulk of the dwelling-houses in the cities and industrial localities, are state property, that is, belong to the whole people.

ART. 7—The common enterprises of collective farms and co-operative organizations, with their live-stock and implements, the products of the collective farms and co-operative organizations, as well as their common buildings, constitute the common, socialist property of the collective farms and co-operative organizations.

Every household in a collective farm, in addition to its basic income from the common collective-farm enterprise, has for its personal use a small plot of household land and, as its personal property, a subsidiary husbandry on the plot, a dwelling-house, livestock, poultry and minor agricultural implements—in accordance with the rules of the agricultural artel.

ART. 8—The land occupied by collective farms is secured to them for their use free of charge and for an unlimited time, that is, in perpetuity.

ART. 9—Alongside the socialist system of economy, which is the predominant form of economy in the U.S.S.R., the law permits the small private economy of individual peasants and handicraftsmen based on their own labor and precluding the exploitation of the labor of others.

ART. 10—The personal property right of citizens in their incomes and savings from work, in their dwelling-houses and subsidiary husbandries, in articles of domestic economy and use and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law.

ART. 11—The economic life of the U.S.S.R. is determined and directed by the state national-economic plan, with the aim of increasing the public wealth, of steadily raising the material and cultural standards of the working people, of consolidating the independence of the U.S.S.R. and strengthening its defensive capacity.

ART. 12—Work in the U.S.S.R. is a duty and a matter of honor for every able-bodied citizen, in accordance with the principle: "He who does not work, neither shall he eat."

The principle applied in the U.S.S.R. is that of socialism: "From each according to his ability, to each according to his work."

CHAPTER II—THE STATE STRUCTURE

ART. 13—The Union of Soviet Socialist Republics is a federal state, formed on the basis of a voluntary union of equal Soviet Socialist Republics, namely: The Russian Soviet Federative Socialist Republic, the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic, the Uzbek Soviet Socialist Republic, the Kazakh Soviet Socialist Republic, the Georgian Soviet Socialist Republic, the Azerbaijan Soviet Socialist Republic, the Lithuanian Soviet Socialist Republic, the Moldavian Soviet Socialist Republic, the Latvian Soviet Socialist Republic, the Kirghiz Soviet Socialist Republic, the Tajik Soviet Socialist Republic, the Armenian Soviet Socialist Republic, the Turkmen Soviet Socialist Republic [and] the Estonian Soviet Socialist Republic.

ART. 14—The jurisdiction of the Union of Soviet Socialist Republics, as represented by its higher organs of state power and organs of state administration, embraces:

- a) Representation of the U.S.S.R. in international relations, conclusion, ratification and denunciation of treaties of the U.S.S.R. with other states, establishment of general procedure governing the relations of Union Republics with foreign states;
- b) Questions of war and peace;
- c) Admission of new republics into the U.S.S.R.;
- d) Control over the observance of the Constitution of the U.S.S.R., and ensuring conformity of the Constitutions of the Union Republics with the Constitution of the U.S.S.R.;
- e) Confirmation of alterations of boundaries between Union Republics;
- f) Confirmation of the formation of new Territories and Regions and also of new Autonomous Republics and Autonomous Regions within Union Republics;
- g) Organization of the defense of the U.S.S.R., direction of all the Armed Forces of

the U.S.S.R., determination of directing principles governing the organization of the military formations of the Union Republics;

- h) Foreign trade on the basis of state monopoly;
- i) Safeguarding the security of the state;
- j) Determination of the national-economic plans of the U.S.S.R.;
- k) Approval of the consolidated state budget of the U.S.S.R. and of the report on its fulfillment; determination of the taxes and revenues which go to the Union, the Republican and the local budgets;
- l) Administration of the banks, industrial and agricultural institutions and enterprises and also trading enterprises of all-Union importance; the general guidance of industry and construction of Union-Republican importance;
- m) Administration of transport and communications;
- n) Direction of the monetary and credit system;
- o) Organization of state insurance;
- p) Contracting and granting of loans;
- q) Determination of the basic principles of land tenure and of the use of mineral wealth, forests and waters;
- r) Determination of the basic principles in the spheres of education and public health;
- s) Organization of a uniform system of national-economic statistics;
- t) Determination of the principles of labor legislation;
- u) Legislation concerning the judicial system and judicial procedure; criminal and civil codes;
- v) Legislation concerning Union citizenship; legislation concerning rights of foreigners;
- w) Determination of the principles of legislation concerning marriage and family;
- x) Issuing of all-Union acts of amnesty.

ART. 15—The sovereignty of the Union Republics is limited only in the spheres defined in article 14 of the Constitution of the U.S.S.R. Outside of these spheres each Union Republic exercises state authority independently. The U.S.S.R. protects the sovereign rights of the Union Republics.

ART. 16—Each Union Republic has its own Constitution, which takes account of the specific features of the Republic and is drawn up in full conformity with the Constitution of the U.S.S.R.

ART. 17—The right freely to secede from the U.S.S.R. is reserved to every Union Republic.

ART. 18—The territory of a Union Republic may not be altered without its consent.

ART. 18a—Each Union Republic has the right to enter into direct relations with foreign states and to conclude agreements and exchange diplomatic and consular representatives with them.

ART. 18b—Each Union Republic has its own Republican military formations.

ART. 19—The laws of the U.S.S.R. have the same force within the territory of every Union Republic.

ART. 20—In the event of divergence between a law of a Union Republic and a law of the Union, the Union law prevails.

ART. 21—Uniform Union citizenship is established for citizens of the U.S.S.R.

Every citizen of a Union Republic is a citizen of the U.S.S.R.

ART. 22—The Russian Soviet Federative Socialist Republic includes the Bashkirian, Buryat-Mongolian, Daghestan, Kabardinian-Balkar, Karelian, Komi, Mari, Mordovian,

North Ossetian, Tatar, Udmurt, Checheno-Ingush, Chuvash and Yakut Autonomous Soviet Socialist Republics; and the Adygei, Gorny Altai, Jewish, Kalmyk, Karachayevo-Cherkess Tuva and Khakass Autonomous Regions.

ART. 23—Repealed.

ART. 24—The Azerbaijan Soviet Socialist Republic includes the Nakhichevan Autonomous Soviet Socialist Republic and the Nagorny Karabakh Autonomous Region.

ART. 25—The Georgian Soviet Socialist Republic includes the Abkhazian Autonomous Soviet Socialist Republic, the Ajarian Autonomous Soviet Socialist Republic and the South Ossetian Autonomous Region.

ART. 26—The Uzbek Soviet Socialist Republic includes the Kara-Kalpak Autonomous Soviet Socialist Republic.

ART. 27—The Tajik Soviet Socialist Republic includes the Gorny Badakhshan Autonomous Region.

ART. 28—The solution of problems pertaining to the administrative-territorial structure of the regions and territories of the Union Republics comes within the jurisdiction of the Union Republics.

ART. 29—Repealed.

CHAPTER III—THE HIGHER ORGANS OF STATE POWER IN THE UNION OF SOVIET SOCIALIST REPUBLICS

ART. 30—The highest organ of state power in the U.S.S.R. is the Supreme Soviet of the U.S.S.R.

ART. 31—The Supreme Soviet of the U.S.S.R. exercises all rights vested in the Union of Soviet Socialist Republics in accordance with Article 14 of the Constitution, in so far as they do not, by virtue of the Constitution, come within the jurisdiction of organs of the U.S.S.R. that are accountable to the Supreme Soviet of the U.S.S.R., that is, the Presidium of the Supreme Soviet of the U.S.S.R., the Council of Ministers of the U.S.S.R., and the Ministries of the U.S.S.R.

ART. 32—The legislative power of the U.S.S.R. is exercised exclusively by the Supreme Soviet of the U.S.S.R.

ART. 33—The Supreme Soviet of the U.S.S.R. consists of two Chambers: the Soviet of the Union and the Soviet of Nationalities.

ART. 34—The Soviet of the Union is elected by the citizens of the U.S.S.R. voting by election districts on the basis of one deputy for every 300,000 of the population.

ART. 35—The Soviet of Nationalities is elected by the citizens of the U.S.S.R. voting by Union Republics, Autonomous Republics, Autonomous Regions, and National Areas on the basis of 25 deputies from each Union Republic, 11 deputies from each Autonomous Republic, 5 deputies from each Autonomous Region and one deputy from each National Area.

ART. 36—The Supreme Soviet of the U.S.S.R. is elected for a term of four years.

ART. 37—The two Chambers of the Supreme Soviet of the U.S.S.R., the Soviet of the Union and the Soviet of Nationalities, have equal rights.

ART. 38—The Soviet of the Union and the Soviet of Nationalities have equal powers to initiate legislation.

ART. 39—A law is considered adopted if passed by both Chambers of the Supreme Soviet of the U.S.S.R. by a simple majority vote in each.

ART. 40—Laws passed by the Supreme Soviet of the U.S.S.R. are published in the

languages of the Union Republics over the signatures of the President and Secretary of the Presidium of the Supreme Soviet of the U.S.S.R.

ART. 41—Sessions of the Soviet of the Union and of the Soviet of Nationalities begin and terminate simultaneously.

ART. 42—The Soviet of the Union elects a Chairman of the Soviet of the Union and four Vice-Chairmen.

ART. 43—The Soviet of Nationalities elects a Chairman of the Soviet of Nationalities and four Vice-Chairmen.

ART. 44—The Chairmen of the Soviet of the Union and the Soviet of Nationalities preside at the sittings of the respective Chambers and have charge of the conduct of their business and proceedings.

ART. 45—Joint sittings of the two Chambers of the Supreme Soviet of the U.S.S.R. are presided over alternately by the Chairman of the Soviet of the Union and the Chairman of the Soviet of Nationalities.

ART. 46—Sessions of the Supreme Soviet of the U.S.S.R. are convened by the Presidium of the Supreme Soviet of the U.S.S.R. twice a year.

Extraordinary sessions are convened by the Presidium of the Supreme Soviet of the U.S.S.R. at its discretion or on the demand of one of the Union Republics.

ART. 47—In the event of disagreement between the Soviet of the Union and the Soviet of Nationalities, the question is referred for settlement to a conciliation commission formed by the Chambers on a parity basis. If the conciliation commission fails to arrive at an agreement or if its decision fails to satisfy one of the Chambers, the question is considered for a second time by the Chambers. Failing agreement between the two Chambers, the Presidium of the Supreme Soviet of the U.S.S.R. dissolves the Supreme Soviet of the U.S.S.R. and orders new elections.

ART. 48—The Supreme Soviet of the U.S.S.R. at a joint sitting of the two Chambers elects the Presidium of the Supreme Soviet of the U.S.S.R., consisting of a President of the Presidium of the Supreme Soviet of the U.S.S.R., fifteen Vice-Presidents—one from each Union Republic—a Secretary of the Presidium and sixteen members of the Presidium of the Supreme Soviet of the U.S.S.R.

The Presidium of the Supreme Soviet of the U.S.S.R. is accountable to the Supreme Soviet of the U.S.S.R. for all its activities.

ART. 49—The Presidium of the Supreme Soviet of the U.S.S.R.:

- a) Convenes the sessions of the Supreme Soviet of the U.S.S.R.;
- b) Issues decrees;
- c) Gives interpretations of the laws of the U.S.S.R. in operation;
- d) Dissolves the Supreme Soviet of the U.S.S.R. in conformity with Article 47 of the Constitution of the U.S.S.R. and orders new elections;
- e) Conducts nation-wide polls (referendums) on its own initiative or on the demand of one of the Union Republics;
- f) Annuls decisions and orders of the Council of Ministers of the U.S.S.R. and of the Councils of Ministers of the Union Republics if they do not conform to law;
- g) In the intervals between sessions of the Supreme Soviet of the U.S.S.R., releases and appoints Ministers of the U.S.S.R. on the recommendation of the Chairman of the Council of Ministers of the U.S.S.R., subject to subsequent confirmation by the Supreme Soviet of the U.S.S.R.;
- h) Institutes decorations (Orders and Medals) and titles of honor of the U.S.S.R.;
- i) Awards Orders and Medals and confers titles of honor of the U.S.S.R.;
- j) Exercises the right of pardon;

- k) Institutes military titles, diplomatic ranks and other special titles;
- l) Appoints and removes the high command of the Armed Forces of the U.S.S.R.;
- m) In the intervals between sessions of the Supreme Soviet of the U.S.S.R., proclaims a state of war in the event of military attack on the U.S.S.R., or when necessary to fulfill international treaty obligations concerning mutual defense against aggression;
- n) Orders general or partial mobilization;
- o) Ratifies and denounces international treaties of the U.S.S.R.;
- p) Appoints and recalls plenipotentiary representatives of the U.S.S.R. to foreign states;
- q) Receives the letters of credence and recall of diplomatic representatives accredited to it by foreign states;
- r) Proclaims martial law in separate localities or throughout the U.S.S.R. in the interests of the defense of the U.S.S.R. or of the maintenance of public order and the security of the state.

ART. 50—The Soviet of the Union and the Soviet of Nationalities elect Credentials Committees to verify the credentials of the members of the respective Chambers.

On the report of the Credentials Committees, the Chambers decide whether to recognize the credentials of deputies or to annul their election.

ART. 51—The Supreme Soviet of the U.S.S.R., when it deems necessary, appoints commissions of investigation and audit on any matter.

It is the duty of all institutions and officials to comply with the demands of such commissions and to submit to them all necessary materials and documents.

ART. 52—A member of the Supreme Soviet of the U.S.S.R. may not be prosecuted or arrested without the consent of the Supreme Soviet of the U.S.S.R., or, when the Supreme Soviet of the U.S.S.R. is not in session, without the consent of the Presidium of the Supreme Soviet of the U.S.S.R.

ART. 53—On the expiration of the term of office of the Supreme Soviet of the U.S.S.R., or on its dissolution prior to the expiration of its term of office, the Presidium of the Supreme Soviet of the U.S.S.R. retains its powers until the newly-elected Supreme Soviet of the U.S.S.R. shall have formed a new Presidium of the Supreme Soviet of the U.S.S.R.

ART. 54—On the expiration of the term of office of the Supreme Soviet of the U.S.S.R., or in the event of its dissolution prior to the expiration of its term of office, the Presidium of the Supreme Soviet of the U.S.S.R. orders new elections to be held within a period not exceeding two months from the date of expiration of the term of office or dissolution of the Supreme Soviet of the U.S.S.R.

ART. 55—The newly-elected Supreme Soviet of the U.S.S.R. is convened by the outgoing Presidium of the Supreme Soviet of the U.S.S.R. not later than three months after the elections.

ART. 56—The Supreme Soviet of the U.S.S.R., at a joint sitting of the two Chambers, appoints the Government of the U.S.S.R., namely, the Council of Ministers of the U.S.S.R.

CHAPTER IV—THE HIGHER ORGANS OF STATE POWER IN THE UNION REPUBLICS

ART. 57—The highest organ of state power in a Union Republic is the Supreme Soviet of the Union Republic.

ART. 58—The Supreme Soviet of a Union Republic is elected by the citizens of the Republic for a term of four years.

The basis of representation is established by the Constitution of the Union Republic.

ART. 59—The Supreme Soviet of a Union Republic is the sole legislative organ of the Republic.

ART. 60—The Supreme Soviet of a Union Republic:

a) Adopts the Constitution of the Republic and amends it in conformity with Article 16 of the Constitution of the U.S.S.R.;

b) Confirms the Constitutions of the Autonomous Republics forming part of it and defines the boundaries of their territories;

c) Approves the national-economic plan and the budget of the Republic, and constitutes the economic administrative areas;

d) Exercises the right of amnesty and pardon of citizens sentenced by the judicial organs of the Union Republic;

e) Decides questions of representation of the Union Republic in its international relations;

f) Determines the manner of organizing the Republic's military formations.

ART. 61—The Supreme Soviet of a Union Republic elects the Presidium of the Supreme Soviet of the Union Republic, consisting of a President of the Presidium of the Supreme Soviet of the Union Republic, Vice-Presidents, a Secretary of the Presidium and members of the Presidium of the Supreme Soviet of the Union Republic.

The powers of the Presidium of the Supreme Soviet of a Union Republic are defined by the Constitution of the Union Republic.

ART. 62—The Supreme Soviet of a Union Republic elects a Chairman and Vice-Chairmen to conduct its sittings.

ART. 63—The Supreme Soviet of a Union Republic appoints the Government of the Union Republic, namely, the Council of Ministers of the Union Republic.

CHAPTER V—THE ORGANS OF STATE ADMINISTRATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS

ART. 64—The highest executive and administrative organ of the state power of the Union of Soviet Socialist Republics is the Council of Ministers of the U.S.S.R.

ART. 65—The Council of Ministers of the U.S.S.R. is responsible and accountable to the Supreme Soviet of the U.S.S.R. or, in the intervals between sessions of the Supreme Soviet, to the Presidium of the Supreme Soviet of the U.S.S.R.

ART. 66—The Council of Ministers of the U.S.S.R. issues decisions and orders on the basis and in pursuance of the laws in operation, and verifies their execution.

ART. 67—Decisions and orders of the Council of Ministers of the U.S.S.R. are binding throughout the territory of the U.S.S.R.

ART. 68—The Council of Ministers of the U.S.S.R.:

a) Co-ordinates and directs the work of the all-Union and Union-Republican Ministries of the U.S.S.R. and of other institutions under its jurisdiction and governs the republic economic councils and the economic councils of the economic administrative areas through the Councils of Ministers of the Union Republics;

b) Adopts measures to carry out the national-economic plan and the state budget, and to strengthen the credit and monetary system;

c) Adopts measures for the maintenance of public order, for the protection of the interests of the state, and for the safeguarding of the rights of citizens;

d) Exercises general guidance in the sphere of relations with foreign states;

e) Fixes the annual contingent of citizens to be called up for military service and directs the general organization of the Armed Forces of the country;

f) Sets up, whenever necessary, special Committees and Central Administrations under the Council of Ministers of the U.S.S.R. for economic and cultural affairs and defense.

ART. 69—The Council of Ministers of the U.S.S.R. has the right, in respect of those branches of administration and economy which come within the jurisdiction of the U.S.S.R., to suspend decisions and orders of the Councils of Ministers of the Union Republics, of republic economic councils, and of the economic councils of the economic administrative areas, and to annul orders and instructions of Ministers of the U.S.S.R.

ART. 70—The Council of Ministers of the U.S.S.R. is appointed by the Supreme Soviet of the U.S.S.R. and consists of: the Chairman of the Council of Ministers of the U.S.S.R.; the First Vice-Chairmen of the Council of Ministers of the U.S.S.R.; the Vice-Chairmen of the Council of Ministers of the U.S.S.R.; the Ministers of the U.S.S.R.; the Chairman of the State Planning Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the Commission of Soviet Control of the Council of Ministers of the U.S.S.R.; the Chairman of the State Vocational and Technical Education Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Labor and Wages Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Automation and Machine Building Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Scientific and Technical Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Aviation Technology Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Defense Technology Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Radio Electronics Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Shipbuilding Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Chemistry Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Construction Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Grain Products Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the State Foreign Economic Relations Committee of the Council of Ministers of the U.S.S.R.; the Chairman of the Committee of State Security of the Council of Ministers of the U.S.S.R.; the Chairman of the Board of the State Bank of the U.S.S.R.; the Director of the Central Statistical Administration of the Council of Ministers of the U.S.S.R.; the Chairman of the State Scientific Economic Council of the Council of Ministers of the U.S.S.R.

The Council of Ministers of the U.S.S.R. includes the Chairmen of the Councils of Ministers of the Union Republics as *ex officio* members.

ART. 71—The Government of the U.S.S.R. or a Minister of the U.S.S.R. to whom a question of a member of the Supreme Soviet of the U.S.S.R. is addressed must give a verbal or written reply in the respective Chamber within a period not exceeding three days.

ART. 72—The Ministers of the U.S.S.R. direct the branches of state administration which come within the jurisdiction of the U.S.S.R.

ART. 73—The Ministers of the U.S.S.R., within the limits of the jurisdiction of their respective Ministries, issue orders and instructions on the basis and in pursuance of the laws in operation, and also of decisions and orders of the Council of Ministers of the U.S.S.R., and verify their execution.

ART. 74—The Ministries of the U.S.S.R. are either all-Union or Union-Republican Ministries.

ART. 75—Each all-Union Ministry directs the branch of state administration entrusted to it throughout the territory of the U.S.S.R. either directly or through bodies appointed by it.

ART. 76—The Union-Republican Ministries, as a rule, direct the branches of state administration entrusted to them through corresponding Ministries of the Union Republics; they administer directly only a definite and limited number of enterprises according to a list confirmed by the Presidium of the Supreme Soviet of the U.S.S.R.

ART. 77—The following Ministries are all-Union Ministries:

The Ministry of Foreign Trade; the Ministry of Merchant Marine; the Ministry of Railways; the Ministry of Medium Machine Building; the Ministry of Transport Construction; the Ministry of Construction of Electric Power Stations.

ART. 78—The following Ministries are Union-Republican Ministries:

The Ministry of Higher and Specialized Secondary Education; the Ministry of Geology and Conservation of Mineral Resources; the Ministry of Public Health; the Ministry of Foreign Affairs; the Ministry of Culture; the Ministry of Defense; the Ministry of Communications; the Ministry of Agriculture; the Ministry of Finance.

CHAPTER VI—THE ORGANS OF STATE ADMINISTRATION OF THE UNION REPUBLICS

ART. 79—The highest executive and administrative organ of the state power of a Union Republic is the Council of Ministers of the Union Republic.

ART. 80—The Council of Ministers of a Union Republic is responsible and accountable to the Supreme Soviet of the Union Republic, or, in the intervals between sessions of the Supreme Soviet of the Union Republic, to the Presidium of the Supreme Soviet of the Union Republic.

ART. 81—The Council of Ministers of a Union Republic issues decisions and orders on the basis and in pursuance of the laws in operation of the U.S.S.R. and of the Union Republic, and of the decisions and orders of the Council of Ministers of the U.S.S.R., and verifies their execution.

ART. 82—The Council of Ministers of a Union Republic has the right to suspend decisions and orders of the Councils of Ministers of its Autonomous Republics and to annul decisions and orders of the Executive Committees of the Soviets of Working People's Deputies of its Territories, Regions and Autonomous Regions, and also the decisions and orders of the republic economic councils and the economic councils of the economic administrative areas.

ART. 83—The Council of Ministers of a Union Republic is appointed by the Supreme Soviet of the Union Republic and consists of:

The Chairman of the Council of Ministers of the Union Republic; the Vice-Chairmen of the Council of Ministers; the Ministers; the Chairmen of the state committees and commissions and directors of other agencies of the Council of Ministers set up by the Supreme Soviet of the Union Republic in accordance with the constitution of the Union Republic.

ART. 84—The Ministers of a Union Republic direct the branches of state administration which come within the jurisdiction of the Union Republic.

ART. 85—The Ministers of a Union Republic, within the limits of the jurisdiction of their respective Ministries, issue orders and instructions on the basis and in pursuance of the laws of the U.S.S.R. and of the Union Republic, of the decisions and orders

of the Council of Ministers of the U.S.S.R. and the Council of Ministers of the Union Republic, and of the orders and instructions of the Union-Republican Ministries of the U.S.S.R.

ART. 86—The Ministries of a Union Republic are either Union-Republican or Republican Ministries.

ART. 87—Each Union-Republican Ministry directs the branch of state administration entrusted to it, and is subordinate both to the Council of Ministers of the Union Republic and to the corresponding Union-Republican Ministry of the U.S.S.R.

ART. 88—Each Republican Ministry directs the branch of state administration entrusted to it and is directly subordinate to the Council of Ministers of the Union Republic.

ART. 88a—The economic councils of the economic administrative areas direct the branches of economic activity entrusted to them and are directly subordinate to the Council of Ministers of the Union Republic.

In Union Republics where republic economic councils are formed, the economic councils of economic administrative regions are subordinate in their activities to both the Councils of Ministers of the Union Republics and the republic economic council.

The economic councils of the economic administrative areas, within the limits of their jurisdiction, issue orders and instructions on the basis and in pursuance of the laws of the U.S.S.R. and of the Union Republic, and of the decisions and orders of the Council of Ministers of the U.S.S.R. and the Council of Ministers of the Union Republic.

ART. 88b—The republic economic council coordinates the economic activity of the economic councils of economic administrative regions and is directly subordinate to the Council of Ministers of the Union Republic.

The republic economic council, within the bounds of its competence, issues resolutions and directives on the basis and in execution of the laws of the U.S.S.R. and the Union Republic and of the resolutions and directives of the Council of Ministers of the U.S.S.R. and the Council of Ministers of the Union Republic.

The republic economic council has the right to suspend the resolutions and directives of the economic councils of economic administrative regions.

CHAPTER VII—THE HIGHER ORGANS OF STATE POWER IN THE AUTONOMOUS SOVIET SOCIALIST REPUBLICS

ART. 89—The highest organ of state power in an Autonomous Republic is the Supreme Soviet of the Autonomous Republic.

ART. 90—The Supreme Soviet of an Autonomous Republic is elected by the citizens of the Republic for a term of four years on a basis of representation established by the Constitution of the Autonomous Republic.

ART. 91—The Supreme Soviet of an Autonomous Republic is the sole legislative organ of the Autonomous Republic.

ART. 92—Each Autonomous Republic has its own Constitution, which takes account of the specific features of the Autonomous Republic and is drawn up in full conformity with the Constitution of the Union Republic.

ART. 93—The Supreme Soviet of an Autonomous Republic elects the Presidium of the Supreme Soviet of the Autonomous Republic and appoints the Council of Ministers of the Autonomous Republic, in accordance with its Constitution.

CHAPTER VIII—THE LOCAL ORGANS OF STATE POWER

ART. 94—The organs of state power in Territories, Regions, Autonomous Regions, Areas, Districts, cities and rural localities (stanitsas, villages, hamlets, kishlaks, auls) are the Soviets of Working People's Deputies.

ART. 95—The Soviets of Working People's Deputies of Territories, Regions, Autonomous Regions, Areas, Districts, cities and rural localities (stanitsas, villages, hamlets, kishlaks, auls) are elected by the working people of the respective Territories, Regions, Autonomous Regions, Areas, Districts, cities or rural localities for a term of two years.

ART. 96—The basis of representation for Soviets of Working People's Deputies is determined by the Constitutions of the Union Republics.

ART. 97—The Soviets of Working People's Deputies direct the work of the organs of administration subordinate to them, ensure the maintenance of public order, the observance of the laws and the protection of the rights of citizens, direct local economic and cultural affairs and draw up the local budgets.

ART. 98—The Soviets of Working People's Deputies adopt decisions and issue orders within the limits of the powers vested in them by the laws of the U.S.S.R. and of the Union Republic.

ART. 99—The executive and administrative organ of the Soviet of Working People's Deputies of a Territory, Region, Autonomous Region, Area, District, city or rural locality is the Executive Committee elected by it, consisting of a Chairman, Vice-Chairmen, a Secretary and members.

ART. 100—The executive and administrative organ of the Soviet of Working People's Deputies in a small locality, in accordance with the Constitution of the Union Republic, is the Chairman, the Vice-Chairman and the Secretary elected by the Soviet of Working People's Deputies.

ART. 101—The executive organs of the Soviets of Working People's Deputies are directly accountable both to the Soviets of Working People's Deputies which elected them and to the executive organ of the superior Soviet of Working People's Deputies.

CHAPTER IX—THE COURTS AND THE PROCURATOR'S OFFICE

ART. 102—In the U.S.S.R. justice is administered by the Supreme Court of the U.S.S.R., the Supreme Courts of the Union Republics, the Courts of the Territories, Regions, Autonomous Republics, Autonomous Regions and Areas, the Special Courts of the U.S.S.R. established by decision of the Supreme Soviet of the U.S.S.R., and the People's Courts.

ART. 103—In all Courts cases are tried with the participation of people's assessors except in cases specially provided for by law.

ART. 104—The Supreme Court of the U.S.S.R. is the highest judicial organ. The Supreme Court of the U.S.S.R. is charged with the supervision of the judicial activities of all the judicial organs of the U.S.S.R. and of the Union Republics within the limits established by law.

ART. 105—The Supreme Court of the U.S.S.R. is elected by the Supreme Soviet of the U.S.S.R. for a term of five years. The Supreme Court of the U.S.S.R. includes the Chief Justices of the Supreme Courts of the Union Republics, *ex officio*.

ART. 106—The Supreme Courts of the Union Republics are elected by the Supreme Soviets of the Union Republics for a term of five years.

ART. 107—The Supreme Courts of the Autonomous Republics are elected by the Supreme Soviets of the Autonomous Republics for a term of five years.

ART. 108—The Courts of Territories, Regions, Autonomous Regions and Areas are elected by the Soviets of Working People's Deputies of the respective Territories, Regions, Autonomous Regions or Areas for a term of five years.

ART. 109—The People's Judges of the District People's Courts are elected by the citizens of the districts on the basis of universal, direct and equal suffrage by secret ballot for a term of five years.

The People's Assessors of the district People's Courts are elected by general meetings of workers, office employees and peasants at their places of work or residence, and of servicemen at military units, for a term of two years.

ART. 110—Judicial proceedings are conducted in the language of the Union Republic, Autonomous Republic or Autonomous Region, persons not knowing this language being guaranteed the opportunity of fully acquainting themselves with the material of the case through an interpreter and likewise the right to use their own language in court.

ART. 111—In all Courts of the U.S.S.R. cases are heard in public, unless otherwise provided for by law, and the accused is guaranteed the right to defense.

ART. 112—Judges are independent and subject only to the law.

ART. 113—Supreme supervisory power to ensure the strict observance of the law by all Ministries and institutions subordinated to them, as well as by officials and citizens of the U.S.S.R. generally, is vested in the Procurator-General of the U.S.S.R.

ART. 114—The Procurator-General of the U.S.S.R. is appointed by the Supreme Soviet of the U.S.S.R. for a term of seven years.

ART. 115—Procurators of Republics, Territories, Regions, Autonomous Republics and Autonomous Regions are appointed by the Procurator-General of the U.S.S.R. for a term of five years.

ART. 116—Area, district and city procurators are appointed by the Procurators of the Union Republics, subject to the approval of the Procurator-General of the U.S.S.R., for a term of five years.

ART. 117—The organs of the Procurator's Office perform their functions independently of any local organs whatsoever, being subordinate solely to the Procurator-General of the U.S.S.R.

CHAPTER X—FUNDAMENTAL RIGHTS AND DUTIES OF CITIZENS

ART. 118—Citizens of the U.S.S.R. have the right to work, that is, the right to guaranteed employment and payment for their work in accordance with its quantity and quality.

The right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment.

ART. 119—Citizens of the U.S.S.R. have the right to rest and leisure.

The right to rest and leisure is ensured by the establishment of a seven-hour day for industrial, office, and professional workers, the reduction of the working day to six hours for arduous trades and to four hours in shops where conditions of work are particularly arduous; by the institution of annual vacations with full pay for industrial,

office, and professional workers, and by the provision of a wide network of sanatoria, holiday homes and clubs for the accommodation of the working people.

ART. 120—Citizens of the U.S.S.R. have the right to maintenance in old age and also in case of sickness or disability.

This right is ensured by the extensive development of social insurance of industrial, office, and professional workers at state expense, free medical service for the working people, and the provision of a wide network of health resorts for the use of the working people.

ART. 121—Citizens of the U.S.S.R. have the right to education.

This right is ensured by universal and compulsory eight-year education; by the extensive development of secondary general polytechnical education, technical vocational education, and specialized secondary and higher education on the basis of a link between training and life and production; by the comprehensive development of evening and correspondence education; by free education in all types of schools; by a system of state stipends; by instruction in the schools of the native languages; and by the organization at plants and state and collective farms of free vocational, technical, and agronomic training for the working people.

ART. 122—Women in the U.S.S.R. are accorded equal rights with men in all spheres of economic, government, cultural, political and other public activity.

The possibility of exercising these rights is ensured by women being accorded an equal right with men to work, payment for work, rest and leisure, social insurance and education, and by state protection of the interest of mother and child, state aid to mothers of large families and unmarried mothers, maternity leave with full pay, and the provision of a wide network of maternity homes, nurseries and kindergartens.

ART. 123—Equality of rights of citizens of the U.S.S.R., irrespective of their nationality or race, in all spheres of economic, government, cultural, political and other public activity, is an indefeasible law.

Any direct or indirect restriction of the rights of, or, conversely, the establishment of any direct or indirect privileges for, citizens on account of their race or nationality, as well as any advocacy of racial or national exclusiveness or hatred and contempt, are punishable by law.

ART. 124—In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the state, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens.

ART. 125—In conformity with the interests of the working people, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law:

- a) freedom of speech;
- b) freedom of the press;
- c) freedom of assembly, including the holding of mass meetings;
- d) freedom of street processions and demonstrations.

These civil rights are ensured by placing at the disposal of the working people and their organizations printing presses, stocks of paper, public buildings, the streets, communications facilities, and other material requisites for the exercise of these rights.

ART. 126—In conformity with the interests of the working people, and in order to develop the organizational initiative and political activity of the masses of the people, citizens of the U.S.S.R. are guaranteed the right to unite in public organizations; trade unions, co-operative societies, youth organizations, sport and defense organizations, cultural, technical and scientific societies; and the most active and politically-conscious citizens in the ranks of the working class, working peasants and working intelligentsia

voluntarily unite in the Communist Party of the Soviet Union, which is the vanguard of the working people in their struggle to build a communist society and is the leading core of all organizations of the working people, both public and state.

ART. 127—Citizens of the U.S.S.R. are guaranteed inviolability of the person. No person may be placed under arrest except by decision of a court or with the sanction of a procurator.

ART. 128—The inviolability of the homes of citizens and privacy of correspondence are protected by law.

ART. 129—The U.S.S.R. affords the right of asylum to foreign citizens persecuted for defending the interests of the working people, or for scientific activities, or for struggling for national liberation.

ART. 130—It is the duty of every citizen of the U.S.S.R. to abide by the Constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labor discipline, honestly to perform public duties, and to respect the rules of socialist intercourse.

ART. 131—It is the duty of every citizen of the U.S.S.R. to safeguard and fortify public, socialist property as the sacred and inviolable foundation of the Society system, as the source of the wealth and might of the country, as the source of the prosperity and culture of all the working people.

Persons committing offenses against public, socialist property are enemies of the people.

ART. 132—Universal military service is law.

Military service in the Armed Forces of the U.S.S.R. is an honorable duty of the citizens of the U.S.S.R.

ART. 133—To defend the country is the sacred duty of every citizen of the U.S.S.R. Treason to the Motherland—violation of the oath of allegiance, desertion to the enemy, impairing the military power of the state, espionage—is punishable with all the severity of the law as the most heinous of crimes.

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CHAPTER XI—THE ELECTORAL SYSTEM

ART. 134—Members of all Soviets of Working People's Deputies—of the Supreme Soviet of the U.S.S.R., the Supreme Soviets of the Union Republics, the Soviets of Working People's Deputies of the Territories and Regions, the Supreme Soviets of the Autonomous Republics, the Soviets of Working People's Deputies of the Autonomous Regions, and the Area, District, City and rural (stanitsa, village, hamlet, kishlak, aul) Soviets of Working People's Deputies—are chosen by the electors on the basis of universal, equal and direct suffrage by secret ballot.

ART. 135—Elections of deputies are universal: all citizens of the U.S.S.R. who have reached the age of eighteen, irrespective of race or nationality, sex, religion, education, domicile, social origin, property status or past activities, have the right to vote in the election of deputies, with the exception of insane persons.

Every citizen of the U.S.S.R. who has reached the age of twenty-three is eligible for election to the Supreme Soviet of the U.S.S.R., irrespective of race or nationality, sex, religion, education, domicile, social origin, property status or past activities.

ART. 136—Elections of deputies are equal: each citizen has one vote; all citizens participate in elections on an equal footing.

ART. 137—Women have the right to elect and be elected on equal terms with men.

ART. 138—Citizens serving in the Armed Forces of the U.S.S.R. have the right to elect and be elected on equal terms with all other citizens.

ART. 139—Elections of deputies are direct: all Soviets of Working People's Deputies, from rural and city Soviets of Working People's Deputies to the Supreme Soviet of the U.S.S.R., are elected by the citizens by direct vote.

ART. 140—Voting at elections of deputies is secret.

ART. 141—Candidates are nominated by election districts.

The right to nominate candidates is secured to public organizations and societies of the working people: Communist Party organizations, trade unions, co-operatives, youth organizations and cultural societies.

ART. 142—It is the duty of every deputy to report to his electors on his work and on the work of his Soviet of Working People's Deputies, and he may be recalled at any time upon decision of a majority of the electors in the manner established by law.

CHAPTER XII—ARMS, FLAG, CAPITAL

ART. 143—The arms of the Union of Soviet Socialist Republics are a sickle and hammer against a globe depicted in the rays of the sun and surrounded by ears of grain, with the inscription "Workers of All Countries, Unite!" in the languages of the Union Republics. At the top of the arms is a five-pointed star.

ART. 144—The state flag of the Union of Soviet Socialist Republics is of red cloth with the sickle and hammer depicted in gold in the upper corner near the staff and above them a five-pointed red star bordered in gold. The ratio of the width to the length is 1:2.

ART. 145—The Capital of the Union of Soviet Socialist Republics is the City of Moscow.

CHAPTER XIII—PROCEDURE FOR AMENDING THE CONSTITUTION

ART. 146—The Constitution of the U.S.S.R. may be amended only by decision of the Supreme Soviet of the U.S.S.R. adopted by a majority of not less than two-thirds of the votes in each of its Chambers.

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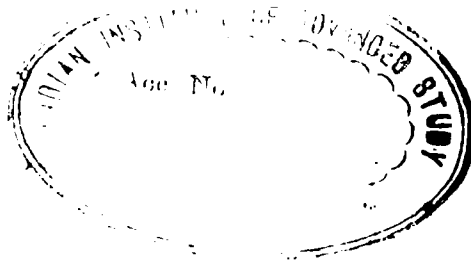
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