army, entrusting its management to the general highest in command (General Grant). The President yielded, knowing that if he refused the bill would be carried over his veto by a two-thirds vote; and a usage already mischievous was confirmed. In 1879, the majority in Congress attempted to overcome, by the same weapon, the resistance of President Hayes to certain measures affecting the South which they desired to pass. They tacked these measures to three appropriation bills, army, legislative, and judiciary. The minority in both houses fought hard against the riders, but were beaten. The President vetoed all three bills, and Congress was obliged to pass them without the riders. Next session the struggle recommenced in the same form, and the President, by rejecting the money bills, again compelled Congress to drop the tacked provisions. This victory, which was of course due to the fact that the dominant party in Congress could not command a two-thirds majority, was deemed to have settled the question as between the executive and the legislature, and may have permanently discouraged the latter from recurring to the same tactics.

President Hayes in his veto messages argued strongly against the whole practice of tacking other matters to money bills; and a rule of the House now declares that an appropriation bill shall not carry any new legislation. It has certainly caused great abuses, and is forbidden by the constitutions of many States. Recently the President has urged upon Congress the desirability of so amending the Federal Constitution as to enable him, as a State governor is by some recent State constitutions allowed to do, to veto single items in an appropriation bill without rejecting the whole bill. Such an amendment is desired by enlightened men, because it would enable the executive to do its duty by the country in defeating the petty jobs now smuggled into these bills, without losing the supplies necessary for the public service which the bills provide. Small as the change seems, its adoption would cure one of the defects due to the absence of ministers from Congress, and save the nation millions of dollars a year, by diminishing wasteful expenditure on local purposes. But the process of amending the Constitution is so troublesome that even a change which involves no party issues may remain unadopted long after the best opinion has become unanimous in its favour.

CHAPTER XXI

THE LEGISLATURE AND THE EXECUTIVE

THE fundamental characteristic of the American National Government is its separation of the legislative, executive, and judicial departments. This separation is the merit which the Philadelphia Convention chiefly sought to attain, and which the Americans have been wont to regard as most completely secured by their Constitution. In Europe, as well as in America, men are accustomed to talk of legislation and administration as distinct. But a consideration of their nature will show that it is not easy to separate these two departments in theory by analysis, and still less easy to keep them apart in practice. We may begin by examining their relations in the internal affairs of a nation, reserving foreign policy for a later part of the discussion.

People commonly think of the Legislature as the body which lays down general rules of law, which prescribes, for instance, that at a man's death his children shall succeed equally to his property, or that a convicted thief shall be punished with imprisonment, or that a manufacturer may register his trade mark. They think of the Executive as consisting of the persons who do certain acts under those rules, who lock up convicts, register trade marks, carry letters, raise and pay a police and an army. In finance the Legislature imposes a tax, the Executive gathers it, and places it in the treasury or in a bank, subject to legislative orders; the Legislature votes money by a statute, appropriating it to a specific purpose; the Executive draws it from the treasury or bank, and applies it to that purpose, perhaps in paying the army, perhaps in building a bridge.

The executive is, in civilized countries, itself the creature of the law, deriving therefrom its existence as well as its author-

ity. Sometimes, as in France, it is so palpably and formally. The President of the Republic has been called into existence by the Constitution. Sometimes, as in England, it is so substantially, though not formally. The English Crown dates from a remote antiquity, when custom and belief had scarcely crystallized into law; and though Parliament has repeatedly determined its devolution upon particular persons or families — it is now held under the Act of Settlement — no statute has ever affected to confer upon it its rights to the obedience of the people. But practically it holds its powers at the pleasure of Parliament, which has in some cases expressly limited them, and in others given them a tacit recognition. We may accordingly say of England and of all constitutional monarchies as well as of republics that the executive in all its acts must obey the law, that is to say, if the law prescribes a particular course of action, the executive must take that course; if the law forbids a particular course, the executive must avoid it.

It is therefore clear that the extent of the power of the executive magistrate depends upon the particularity with which the law is drawn, that is, upon the amount of discretion which the law leaves to him. If the law is general in its terms, the executive has a wide discretion. If, for instance, the law prescribes simply that a duty of ten per cent *ad valorem* be levied on all manufactured goods imported, it rests with the executive to determine by whom and where that duty shall be collected, and on what principles it shall be calculated. If the law merely creates a post-office, the executive may fix the rate of payment for letters and parcels, and the conditions on which they will be received and delivered. In these cases the executive has a large field within which to exert its free will and choice of means. Power means nothing more than the extent to which a man can make his individual will prevail against the wills of other men, so as to control them. Hence, when the law gives to a magistrate a wide discretion, he is powerful, because the law clothes his will with all the power of the state. On the other hand, if the law goes into minute details, directing this to be done and that not to be done, it narrows the discretion of the executive magistrate. His personal will and choice are gone. He can no longer be

thought of as a co-ordinate power in the state. He becomes a mere servant, a hand to carry out the bidding of the legislative brain, or, we may even say, a tool in the legislative hand.

As the legislature has been the body through which the people have chiefly asserted their authority, we find that law-making assemblies, whether primary or representative, have always sought to extend their province and to subject the executive to themselves. They have done this in several ways. In the democracies of ancient Greece the assembly of citizens not only passed statutes of general application, but made peace or declared war; ordered an expedition to start for Sphacteria, and put Cleon at the head of it; commanded the execution of prisoners or reprieved them; conducted, in fact, most of the public business of the city by a series of direct decrees, all of which were laws, *i.e.* declarations of its sovereign will. It was virtually the government. The chief executive officers of Athens, called the generals, had little authority except over the military operations in the field. Even the Roman Constitution, a far more highly developed and scientific, though also a complicated and cumbrous system, while it wisely left great discretion to the chief magistrates (requiring them, however, to consult the Senate), yet permitted the passing *pro re nata* of important laws, which were really executive acts, such as the law by which Pompey received an extraordinary command against Mithradates. The Romans did not draw, any more than the Greek republics, a distinction between general and special legislation.[1]

This method, in which the people directly govern as a legislature, reducing the executive magistrates to passive instruments, is inapplicable where the country is large, because the mass of citizens cannot come together as an assembly. It is highly inconvenient where the legislature, though a representative body, is very numerous. England, accordingly, and the

[1] *Cf.* Chapter XXXI. and notes thereto. The distinction is apt to be forgotten under a despotic monarch, who is at once the executive and the legislative authority. Nevertheless, even under an autocrat there are some general rules which his individual volition dares not change, because the universal opinion of the people approves them. The book of Daniel even represents Darius as unable to revoke a general law he has once sanctioned, or to except a particular person from its operation.

nations which have imitated England,[1] have taken a different method. The people (that is, the qualified voters) have allowed an executive to subsist with apparently wide powers, but they virtually choose this executive, and keep it in so close and constant a dependence upon their pleasure, that it dare not act against what it believes their will to be. The struggle for popular liberties in England took at first the form of a struggle for the supremacy of law; that is to say, it was a struggle to restrain the prerogative of the king by compelling his ministers to respect the ancient customs of the land and the statutes passed in Parliament. As the customs were always maintained, and the range of the statutes constantly widened, the executive was by degrees hemmed in within narrow limits, its discretionary power restricted, and that characteristic principle of the Constitution, which has been well called "The Reign of Law," was established. It was settled that the law, *i.e.* the ancient customs and the statutes, should always prevail against the discretion of the Crown and its ministers, and that acts done by the servants of the Crown should be justiciable, exactly like the acts of private persons. This once achieved, the executive fairly bitted and bridled, and the ministry made to hold office at the pleasure of the House of Commons, Parliament had no longer its former motive for seeking to restrict the discretion of the ministers of the Crown by minutely particular legislation, for ministers had become so accustomed to subjection that their discretion might be trusted. Parliament has, in fact, of late years begun to sail on the other tack, and allows ministers to do many things by regulations, schemes, orders in council, and so forth, which would previously have been done by statute, generally, however, reserving to itself a right of disapproval.

It may be asked how it comes, if this be so, that people nevertheless talk of the executive in England as being a separate and considerable authority. The answer is twofold. The English Crown has never been, so to speak, thrown into the

[1] But during and immediately after the great Civil War the Long Parliament acted as both a legislative and an executive authority, as did the Convention through part of the French Revolution. And Parliament of course still retains its power of giving what are practically executive orders, *e.g.* it can pass a statute directing a particular island to be seized or another to be evacuated, as Heligoland lately was.

melting-pot and recast, but has continued, in external form and seeming, an independent and highly dignified part of the constitutional system.[1] Parliament has never asserted a direct control over certain parts of the royal prerogative, such as the bestowal of honours, the creation of peerages, the making of appointments to office. No one at this moment can say exactly what the royal prerogative does or does not include. And secondly, the actual executive, *i.e.* the ministry of the day, retains some advantages which are practically, though not legally, immense. It has an initiative in all legislation, a sole initiative in financial legislation. It is a small and well organized body placed in the midst of a much larger and less organized body (*i.e.* the two Houses), on which therefore it can powerfully act. All patronage, ecclesiastical as well as civil, lies in its gift, and though it must not use this function so as to disgust the Commons, it has great latitude in the disposal of favours. While Parliament is sitting it disposes of a large part, sometimes of the whole, of the time of the House of Commons, and can therefore advance the measures it prefers, while retarding or evading motions it dislikes. During nearly half the year Parliament is not sitting, and the necessities of a great State placed in a restless world oblige a ministry to take momentous resolutions upon its own responsibility. Finally, it includes a few men who have obtained a hold on the imagination and confidence of the people, which emboldens them to

[1] An interesting illustration of the relations of the English executive to the legislature in the fourteenth and fifteenth centuries, when Parliament was little more than a pure legislature, is afforded by the present constitution of the tiny kingdom of the Isle of Man, the last survivor of those numerous kingdoms among which the British Isles were once divided. Its government is carried on by a Governor (appointed by the English Crown), a council of eight (composed partly of persons nominated by the Crown and partly of ex-officio members holding posts to which they have been appointed by the Crown), and an elected representative assembly of twenty-four. The assembly is purely legislative, and cannot check the Governor otherwise than by withholding the legislation he wishes for and such taxes as are annually voted. For the purposes of finance bills the assembly (House of Keys) and the council sit together but vote separately. The Governor presides, as the English king did in his Great Council. The Governor can stop any legislation he disapproves, and can retain his ministers against the will of the assembly. He is a true executive magistrate, commanding, moreover, like the earlier English kings, a considerable revenue which does not depend on the annual votes of the legislature. Here therefore is an Old-World instance of the American system as contradistinguished from the cabinet system of England and her colonies.

resist or even to lecture Parliament, and often to prevail, not only against its first impulses, but possibly against its deliberate wishes. And an English ministry is strong not only because it so frankly acknowledges its dependence on the Commons as not to rouse the antagonism of that body, to which, be it remembered, most ministers belong, but also because it has another power outside to which it can, in extreme cases, appeal. It may dissolve Parliament, and ask the people to judge between its views and those of the majority of the House of Commons. Sometimes such an appeal succeeds. The power of making it is at all times a resource.

This delicate equipoise of the ministry, the House of Commons, and the nation acting at a general election, is the secret of the smooth working of the British Constitution. It reappears in two remarkable Constitutions, which deserve fuller study than they have yet received from American or English publicists, those of Prussia and the new German Empire. There, however, the ministry is relatively stronger than in England, because the Crown retains not only a wider range of legal authority, but a greater moral influence over the people, who have had less practice than the English in working free institutions, and who never forget that they are soldiers, and the King-Emperor head of the army. A Prussian minister is so likely to have the nation on his side when he makes an appeal to it in the name of the King, and feels so confident that even if he defies the Chambers without dissolving, the nation will not be greatly stirred, that he sometimes refuses to obey the legislature. This is one of those exceptions which illustrate the rule. The legislature is prevented from gaining ground on the executive, not so much by the Constitution as by the occasional refusal of the executive to obey the Constitution, a refusal made in reliance on the ascendency of the Crown.

So far we have been considering domestic policy. The case of foreign affairs differs chiefly in this, that they cannot be provided for beforehand by laws general in application, but minutely particular in wording. A governing assembly may take foreign affairs into its own hand. In the republics of antiquity the Assembly did so, and was its own foreign office. The Athenian Assembly received ambassadors, declared war,

concluded treaties. It got on well enough while it had to deal with other republics like itself, but suffered when the contest came to be with an astute diplomatist like Philip of Macedon. The Roman Senate conducted the foreign policy of Rome, often with the skill to be expected from men of immense experience and ability, yet sometimes with a vacillation which a monarch would have been less likely to show. But the foreign relations of modern states are so numerous and complex, and so much entangled with commercial questions, that it has become necessary to create a staff of trained officials to deal with them. No large popular assembly could have either the time or the knowledge requisite for managing the ordinary business, much less could it conduct a delicate negotiation whose success would depend on promptitude and secrecy. Hence even democratic countries like France and England are forced to leave foreign affairs to a far greater degree than home affairs to the discretion of the ministry of the day. France reserves to the Chambers the power of declaring war or concluding a treaty. England has so far adhered to the old traditions as to leave both to the Crown, though the first, and in most cases the second, must be exerted with the virtual approval of Parliament. The executive is as distinctly responsible to the legislature, as clearly bound to obey the directions of the legislature, as in matters of domestic concern. But the impossibility which the legislature in countries like France and England finds in either assuming executive functions in international intercourse, or laying down any rules by law for the guidance of the executive, necessarily gives the executive a wide discretion and a correspondingly large measure of influence and authority. The only way of restricting this authority would be to create a small foreign affairs committee of the legislature and to empower it to sit when the latter was not sitting. And this extreme course neither France nor England has yet taken, because the dependence of the ministry on the majority of the legislature has hitherto seemed to secure the conformity of the Foreign Office to the ideas and sentiments of that majority.

Before applying these observations to the United States, let us summarize the conclusions we have reached.

We have found that wherever the will of the people prevails,

the legislature, since it either is or represents the people, can make itself omnipotent, unless checked by the action of the people themselves. It can do this in two ways. It may, like the republics of antiquity, issue decrees for particular cases as they arise, giving constant commands to all its agents, who thus become mere servants with no discretion left them. Or it may frame its laws with such particularity as to provide by anticipation for the greatest possible number of imaginable cases, in this way also so binding down its officials as to leave them no volition, no real authority.

We have also observed that every legislature tends so to enlarge its powers as to encroach on the executive; and that it has great advantages for so doing, because a succeeding legislature rarely consents to strike off any fetter its predecessor has imposed.

Thus the legitimate issue of the process would be the extinction or absorption of the executive as a power in the state. It would become a mere set of employés, obeying the legislature as the clerks in a bank obey the directors. If this does not happen, the cause is generally to be sought in some one or more of the following circumstances: —

The legislature may allow the executive the power of appealing to the nation against itself (England).[1]

The people may from ancient reverence or the habit of military submission be so much disposed to support the executive as to embolden the latter to defy the legislature (Prussia).

The importance of foreign policy and the difficulty of taking it out of the hands of the executive may be so great that the executive will draw therefrom an influence re-acting in favour of its general weight and dignity (Prussia, England, and, to some extent, France).

Let us now see how the founders of the American Constitution settled the relations of the departments. They were terribly afraid of a strong executive, and desired to reserve the final and decisive voice to the legislature, as representing the people. They could not adopt the Greek method of an assembly both executive and legislative, for Congress was to be a body with limited powers; continuous sittings would be

[1] In France the President can dissolve the Chambers, but only with the consent of the Senate.

inconvenient, and the division into two equally powerful houses would evidently unfit it to govern with vigour and promptitude. Neither did they adopt the English method of a legislature governing through an executive dependent upon it. It was urged in the Philadelphia Convention of 1787 that the executive ought to be appointed by and made accountable to the legislature, as being the supreme power in the national government. This was over-ruled, because the majority of the Convention were fearful of "democratic haste and instability," fearful that the legislature would, in any event, become too powerful, and therefore anxious to build up some counter authority to check and balance it. By making the President independent, and keeping him and his ministers apart from the legislature, the Convention thought they were strengthening him, as well as protecting it from attempts on his part to corrupt it.[1] They were also weakening him. He lost the initiative in legislation which the English executive enjoys. He had not the English King's power of dissolving the legislature and throwing himself upon the country. Thus the executive magistrate seemed left at the mercy of the legislature. It could weave so close a network of statutes round him, like the net of iron links which Hephæstus throws over the lovers in the *Odyssey*, that his discretion, his individual volition, seemed to disappear, and he ceased to be a branch of the government, being nothing more than a servant working under the eye and at the nod of his master. This would have been an absorption of the executive into the legislature more complete than that which England now presents, for the English prime minister is at any rate a leader, perhaps as necessary to his parliamentary majority as it is to him, whereas the President would have become a sort of superior police commissioner, irremovable during four years, but debarred from acting either on Congress or on the people.

Although the Convention may not have realized how helpless such a so-called Executive must be, they felt the danger of encroachments by an ambitious legislature, and resolved to

[1] Their sense of the danger to a legislature from corruption by the executive was probably quickened by what they knew of the condition of the Irish Parliament, full, even after 1782, of placemen and pensioners. Much of the best blood of Ulster had emigrated to America in the preceding half century, and Irish politics must have excited a good deal of interest there.

strengthen him against it. This was done by giving the President a veto which it requires a two-thirds vote of Congress to over-ride. In doing this they partly reversed their previous action. They had separated the President and his ministers from Congress. They now bestowed on him legislative functions, though in a different form. He became a distinct branch of the legislature, but for negative purposes only. He could not propose, but he could refuse. Thus the executive was strengthened, not as an executive, but by being connected with the legislature; and the legislature, already weakened by its division into two co-equal houses, was further weakened by finding itself liable to be arrested in any new departure on which two-thirds of both houses were not agreed.

When the two houses are of one mind, and the party hostile to the President has a two-thirds majority in both, the Executive is almost powerless. It may be right that he should be powerless, because such majorities in both houses presumably indicate a vast preponderance of popular opinion against him. The fact to be emphasized is, that in this case all "balance of powers" is gone. The legislature has swallowed up the executive, in virtue of the principle from which this discussion started, viz. that the executive is in free States only an agent who may be so limited by express and minute commands as to have no volition left him.

The strength of Congress consists in the right to pass statutes; the strength of the President in his right to veto them. But foreign affairs, as we have seen, cannot be brought within the scope of statutes. How then was the American legislature to deal with them? There were two courses open. One was to leave foreign affairs to the executive, as in England, giving Congress the same indirect control as the English Parliament enjoys over the Crown and ministry. This course could not be taken, because the President is independent of Congress and irremovable during his term. The other course would have been for Congress, like a Greek assembly, to be its own foreign office, or to create a foreign affairs committee of its members to handle these matters. As the objections to this course, which would have excluded the chief magistrate from functions naturally incidental to his position as official representative of the nation, were overwhelmingly strong, a compromise was made. The initiative in foreign policy and the conduct of negotiations were left to him, but the right of declaring war was reserved to Congress, and that of making treaties to one, the smaller and more experienced, branch of the legislature. A measure of authority was thus suffered to fall back to the Executive which would have served to raise materially his position had foreign questions played as large a part in American politics as they have in French or English. They have, however, been comparatively unimportant, especially since 1815.

It may be said that there was yet another source whence the executive might draw strength to support itself against the legislature, viz. those functions which the Constitution, deeming them necessarily incident to an executive, has reserved to the President and excluded from the competence of Congress. But examination shows that there is scarcely one of these which the long arm of legislation cannot reach. The President is commander-in-chief of the army, but the numbers and organization of the army are fixed by statute. The President makes appointments, but the Senate has the right of rejecting them, and Congress may pass Acts specifying the qualifications of appointees, and reducing the salary of any official except the President himself and the judges. The real strength of the executive therefore, the rampart from behind which it can resist the aggressions of the legislature, is in ordinary times the veto power.[1] In other words, it survives as an executive in virtue not of any properly executive function, but of the share in legislative functions which it has received; it holds its ground by force, not of its separation from the legislature, but of its participation in a right properly belonging to the legislature.[2]

[1] In moments of public danger, as during the War of Secession, the executive of course springs up into immense power, partly because the command of the army is then of the first importance; partly because the legislature, feeling its unfitness for swift and secret decisions, gives free rein to the Executive, and practically puts its law-making powers at his disposal.

[2] What is said here of the national executive and national legislature is *a fortiori* true of the State executives and State legislatures. The State governor has no power of independent action whatever, being checked at every step by State statutes, and his discretion superseded by the minute directions which those statutes contain. He has not even ministers, because the other chief officials of the State are chosen, not by himself, but by popular vote.

An authority which depends on a veto capable of being overruled by a two-thirds majority may seem frail. But the experience of a century has shown that, owing to the almost equal strength of the two great parties, the Houses often differ, and there is rarely a two-thirds majority of the same colour in both. Hence the Executive has enjoyed some independence. He is strong for defence, if not for attack. Congress can, except within that narrow sphere which the Constitution has absolutely reserved to him, baffle the President, can interrogate, check, and worry his ministers. But it can neither drive him the way it wishes him to go, nor dismiss them for disobedience or incompetence.

An individual man has some great advantages in combating an assembly. His counsels are less distracted. His secrets are better kept. He may sow discord among his antagonists. He can strike a more sudden blow. Julius Cæsar was more than a match for the Senate, Cromwell for the Long Parliament, even Louis Napoleon for the French Assembly of 1851. Hence, when the President happens to be a strong man, resolute, prudent, and popular, he may well hope to prevail against a body whom he may divide by the dexterous use of patronage, may weary out by inflexible patience, may overawe by winning the admiration of the masses, always disposed to rally round a striking personality. But in a struggle extending over a long course of years an assembly has advantages over a succession of officers, especially of elected officers. The Roman Senate encroached on the consuls, though it was neither a legislature nor representative; the Carthaginian Councils encroached on the Suffetes; the Venetian Councils encroached on the Doge. Men come and go, but an assembly goes on for ever; it is immortal, because while the members change, the policy, the passion for extending its authority, the tenacity in clinging to what has once been gained, remain persistent. A weak magistrate comes after a strong magistrate, and yields what his predecessor had fought for; but an assembly holds all

He has very little patronage; and he has no foreign policy at all. The State legislature would therefore prevail against him in everything, were it not for his veto and for the fact that the legislature is now generally restrained (by the provisions of the State constitution) from passing laws on many topics. (See *post*, Chapters XXXVII.–XLV.)

it has ever won.[1] Its pressure is steady and continuous; it is always, by a sort of natural process, expanding its own powers and devising new methods for fettering its rival. Thus Congress, though it is no more respected or loved by the people now than it was seventy years ago, and has developed no higher capacity for promoting the best interests of the state, has succeeded in occupying nearly all the ground which the Constitution left debatable between the President and itself;[2] and would, did it possess a better internal organization, be even more plainly than it now is the supreme power in the government.

In their effort to establish a balance of power, the framers of the Constitution so far succeeded that neither power has subjected the other. But they underrated the inconveniences which arise from the disjunction of the two chief organs of government. They relieved the Administration from a duty which European ministers find exhausting and hard to reconcile with the proper performance of administrative work — the duty of giving attendance in the legislature and taking the lead in its debates. They secured continuity of executive policy for four years at least, instead of leaving government at the mercy of fluctuating majorities in an excitable assembly. But they so narrowed the sphere of the executive as to prevent it from leading the country, or even its own party in the country. They sought to make members of Congress independent, but in doing so they deprived them of some of the means which European legislators enjoy of learning how to administer, of learning even how to legislate in administrative topics. They condemned them to be architects without science, critics without experience, censors without responsibility.

[1] This is still more conspicuously the case when the members of the executive government do not sit in the assembly. When they do, and lead it, their influence tends to restrain legislative encroachments. Even the presence of persons who are likely to be soon called on to form the executive has its influence, for they are disposed to defend the constitutional position of an authority to which they hope in their turn to succeed. This has been frequently seen in England.

[2] The modification (in 1869) and repeal (in 1886) of the Tenure of Office Act (see above, p. 64) are scarcely instances to the contrary, because that Act, even if constitutional, had proved difficult to work.