scribe the number of justices, a statute may increase or diminish the number as Congress thinks fit. In 1866, when Congress was in fierce antagonism to President Johnson, and desired to prevent him from appointing any judges, it reduced the number, which was then ten, by a statute providing that no vacancy should be filled up till the number was reduced to seven. In 1869, when Johnson had been succeeded by Grant, the number was raised to nine, and presently the altered court allowed the question of the validity of the Legal Tender Act, just before determined, to be reopened. This method is plainly susceptible of further and possibly dangerous application. Suppose a Congress and President bent on doing something which the Supreme court deems contrary to the Constitution. They pass a statute. A case arises under it. The court on the hearing of the case unanimously declares the statute to be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of the justices. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the court. The new justices outvote the old ones: the statute is held valid: the security provided for the protection of the Constitution is gone like a morning mist.

What prevents such assaults on the fundamental law — assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people, whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms. Yet if excitement has risen high over the country, a majority of the people may acquiesce; and then it matters little whether what is really a revolution be accomplished by openly violating or by merely distorting the forms of law. To the people we come sooner or later: it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend.

CHAPTER XXV

COMPARISON OF THE AMERICAN AND EUROPEAN SYSTEMS

The relations to one another of the different branches of the government in the United States are so remarkable and so full of instruction for other countries, that it seems desirable, even at the risk of a little repetition, to show by a comparison with the Cabinet or parliamentary system of European countries how this complex American machinery actually works.

The English system on which have been modelled, of course with many variations, the systems of France, Belgium, Holland, Italy, Germany, Hungary (where, however, the English scheme has been compounded with an ancient and very interesting native-born constitution), Sweden, Norway, Denmark, Spain, and Portugal, as well as the constitutions of the great self-governing English colonies in North America, the Cape, and Australasia — this English system places at the head of the state a person in whose name all executive acts are done, and who is (except in France) irresponsible and irremovable.[1] His acts are done by the advice and on the responsibility of ministers chosen nominally by him, but really by the representatives of the people — usually, but not necessarily, from among the members of the legislature. The representatives are, therefore, through the agents whom they select, the true government of the country. When the representative assembly ceases to trust these agents, the latter (unless they dissolve the legislature) resign, and a new set are appointed. Thus the executive as well as the legislative power really belongs to the majority of the representative chamber, though in appointing agents, an expedient which its size makes needful, it is forced

[1] In the British colonies the governor is irremovable by the colony, and irresponsible to its legislature, though responsible to and removable by the home government.

to leave in the hands of these agents a measure of discretion sufficient to make them appear distinct from it, and sometimes to tempt them to acts which their masters disapprove. As the legislature is thus in a sense executive, so the executive government, the council of ministers or cabinet, is in so far legislative that the initiation of measures rests very largely with them, and the carrying of measures through the Chamber demands their advocacy and counter pressure upon the majority of the representatives. They are not merely executive agents but also legislative leaders. One may say, indeed, that the legislative and executive functions are interwoven as closely under this system as under absolute monarchies, such as Imperial Rome or modern Russia; and the fact that taxation, while effected by means of legislation, is the indispensable engine of administration, shows how inseparable are these two apparently distinct powers.

Under this system the sovereignty of the legislature may be more or less complete. It is most complete in France; least complete in Germany and Prussia, where the power of the Emperor and King is great and not declining. But in all these countries not only are the legislature and executive in close touch with one another, but they settle their disputes without reference to the judiciary. The courts of law cannot be invoked by the executive against the legislature, because questions involving the validity of a legislative act do not come before it, since the legislature is either completely sovereign, as in England, or the judge of its own competence, as in Belgium. The judiciary, in other words, does not enter into the consideration of the political part of the machinery of government.

This system of so-called cabinet government seems to Europeans now, who observe it at work over a large part of the world, an obvious and simple system. We are apt to forget that it was never seen anywhere till the English developed it by slow degrees, and that it is a very delicate system, depending on habits, traditions, and understandings which are not easily set forth in words, much less transplanted to a new soil.

We are also prone to forget how very recent it is. People commonly date it from the reign of King William the Third; but it worked very irregularly till the Hanoverian kings came

to the throne, and even then it at first worked by means of a monstrous system of bribery and place-mongering. In the days of George the Third the personal power of the Crown for a while revived and corruption declined.[1] The executive head of the state was, during the latter decades of the century, a factor apart from his ministers. They were not then, as now, a mere committee of Parliament dependent upon Parliament, but rather a compromise between the king's will and the will of the parliamentary majority. They deemed and declared themselves to owe a duty to the king conflicting with, sometimes overriding, their duty to Parliament. Those phrases of abasement before the Crown which when now employed by prime ministers amuse us by their remoteness from the realities of the case, then expressed realities. In 1787, when the Constitutional Convention met at Philadelphia, the Cabinet system of government was in England still immature. It was so immature that its true nature had not been perceived.[2] And although we now can see that the tendency was really towards the depression of the Crown and the exaltation of Parliament, men might well, when they compared the influence of George III. with that exercised by George I.,[3] argue in the terms of

[1] Corruption was possible, because the House of Commons did not look for support to the nation, its debates were scantily reported, it had little sense of responsibility. An active king was therefore able to assert himself against it, and to form a party in it, as well as outside of it, which regarded him as its head. This forced the Whigs to throw themselves upon the nation at large; the Tories did the same; corruption withered away; and as Parliament came more and more under the watchful eye of the people, and responsible to it, the influence of the king declined and vanished.

[2] Gouverneur Morris, however, one of the acutest minds in the Convention of 1787, remarked there, "Our President will be the British (Prime) Minister. If Mr. Fox had carried his India Bill, he would have made the Minister the King in form almost as well as in substance." — Elliot's *Debates*, i. 361. Roger Sherman, though he saw the importance of the Cabinet, looked on it as a mere engine in the Crown's hands. "The nation," he observed, in the Convention of 1787, "is in fact governed by the Cabinet council, who are the creatures of the Crown. The consent of Parliament is necessary to give sanction to their measures, and this they easily obtain by the influence of the Crown in appointing to all offices of honour and profit." It must be remembered that the House of Lords was far more powerful in 1787 than it now is, not only as a branch of the legislature, but in respect of the boroughs owned by the leading peers: and therefore the dependence of the ministry on the House of Commons was a less prominent feature of the Constitution than it is now.

[3] George III. had the advantage of being a national king, whereas his two predecessors had been Germans by language and habits as well as by blood.

Dunning's famous resolution, that "the power of the Crown has increased, is increasing, and ought to be diminished."[1]

The greatest problem that free peoples have to solve is how to enable the citizens at large to conduct or control the executive business of the state. England was in 1787 the only nation (the cantons of Switzerland were so small as scarcely to be thought of) that had solved this problem, first, by the development of a representative system, secondly, by giving to her representatives a large authority over the executive. The Constitutional Convention, therefore, turned its eyes to her when it sought to constitute a free government for the new nation which the "more perfect union" of the States was calling into conscious being.

Very few of the members of the Convention had been in England so as to know her constitution, such as it then was, at first hand. Yet there were three sources whence light fell upon it, and for that light they were grateful. One was their experience in dealing with the mother country since the quarrel began. They saw in Britain an executive largely influenced by the personal volitions of the king, and in its conduct of colonial and foreign affairs largely detached from and independent of Parliament, since it was able to take tyrannical steps without the previous knowledge or consent of Parliament, and able afterwards to defend those steps by alleging a

His popularity contributed to his influence in politics. Mrs. Papendiek's Diary contains some amusing illustrations of the exuberant demonstrations of "loyalty" which he excited. When he went to Weymouth for sea-bathing after his recovery from the first serious attack of lunacy, crowds gathered along the shore, and bands of music struck up "God save the King" when he ducked his head beneath the brine.

[1] It is not easy to say when the principle of the absolute dependence of ministers on a parliamentary majority without regard to the wishes of the Crown passed into a settled doctrine. (Needless to say that it has received no formally legal recognition, but is merely usage.) The long coincidence during the dominance of Pitt and his Tory successors down till 1827 of the wishes and interests of the Crown with those of the parliamentary majority prevented the question from arising in a practical shape. Even in 1827 Mr. Canning writes to J. W. Croker: — "Am I to understand, then, that you consider the King [George IV.] as completely in the hands of the Tory aristocracy as his father, or rather as George II. was in the hands of the Whigs? If so, George III. reigned and Mr. Pitt (both father and son) administered the Government in vain. I have a better opinion of the real vigour of the Crown when it chooses to put forth its own strength, and I am not without some reliance on the body of the people!" — *Croker Correspondence*, vol. i. p. 368.

necessity whereof Parliament, wanting confidential information, could imperfectly judge. It was in these colonial and foreign affairs that the power of the Crown chiefly lay (as, indeed, to this day the authority of Parliament over the executive is smaller here than in any other department, because secrecy and promptitude are more essential), so they could not be expected to know for how much less the king counted in domestic affairs. Moreover, there was believed to be often a secret junto which really controlled the ministry, because acting in concert with the Crown; and the Crown had powerful engines at its disposal, bribes and honours, pensions and places, engines irresistible by the average virtue of representatives whose words and votes were not reported, and nearly half of whom were the nominees of some magnate.[1]

The second source was the legal presentation of the English Constitution in scientific text-books, and particularly in Blackstone, whose famous *Commentaries*, first published in 1765 (their substance having been delivered as professorial lectures at Oxford in 1758 and several succeeding years), had quickly become the standard authority on the subject. Now Blackstone, as is natural in a lawyer who looks rather to the strict letter of the law than to the practice which had grown up modifying it, describes the royal prerogative in terms more appropriate to the days of the Stuarts than to those in which he wrote, and dwells on the independence of the executive, while also declaring the withholding from it of legislative power to be essential to freedom.[2]

[1] George III. had pocket boroughs and a strong parliamentary following. Hamilton doubted whether the British Constitution could be worked without corruption.

[2] See Blackstone, *Commentaries*, bk. i. chap. ii. — "Whenever the power of making and that of enforcing the laws are united together, there can be no public liberty. . . . Where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. . . . The Crown cannot of itself begin any alteration in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two Houses. The legislative, therefore, cannot abridge the executive power of any rights which it now has by law without its own consent." There is no hint here, or in chap. vii. on the royal prerogative, that the royal power of disapproval had not been in fact exercised for some fifty years. Blackstone does not quote Montesquieu for the particular proposition that the powers must be separated, but has evidently been influenced by him. A little later he cites a famous dictum, "The

The third source was the view of the English Constitution given by the political philosophers of the eighteenth century, among whom, since he was by far the most important, we need look at Montesquieu alone.

When the famous treatise on *The Spirit of Laws* appeared in 1748, a treatise belonging to the small class of books which permanently turn the course of human thought, and which, unlike St. Augustine's *City of God*, turned it immediately instead of having to wait for centuries till the hour of its power arrived, it dwelt upon the separation of the executive, legislative, and judicial powers in the British Constitution as the most remarkable feature of that system. Accustomed to see the two former powers, and to some extent the third also, exercised by or under the direct control of the French monarch, Montesquieu attributed English freedom to their separation.[1] The King of Great Britain then possessed a larger prerogative than he has now, and as even then it seemed on paper much larger than it really was, it was natural that a foreign observer should underrate the executive character of the British Parliament and overrate the personal authority of the monarch. Now Montesquieu's treatise was taken by the thinkers of the next generation as a sort of Bible of political philosophy. Hamilton and Madison, the two earliest exponents of the American Constitution they had done so much to create, cite it in the *Federalist* much as the schoolmen cite Aristotle, that is, as an authority to which everybody will bow; and Madison in particular constantly refers to this separation of the three powers as the distinguishing note of a free government.

These views of the British Constitution tallied with and were strengthened by the ideas and habits formed in the Americans by their experience of representative government in the colonies, ideas and habits which were after all the dominant factor in the construction of their political system. In these colonies the executive power had been vested either in

President Montesquieu, though I trust too hastily, presages that as Rome, Sparta, and Carthage have lost their liberty and perished, so the Constitution of England will in time lose its liberty — will perish: it will perish whenever the legislative power shall become more corrupt than the executive."

[1] Locke had already remarked (*On Civil Government*, chap. xiv.) that "the legislative and executive powers are in distinct hands in all moderated monarchies and well-framed governments."

governors sent from England by the Crown, or in certain Proprietors, to whom the English Crown had granted hereditary rights in a province. Each representative assembly, while it made laws and voted money for the purposes of its respective commonwealth, did not control the governor, because his commission issued from the British Crown, and he was responsible thereto. A governor had no parliamentary cabinet, but only officials responsible to himself and the Crown. His veto on acts of the colonial legislature was frequently used; and that body, with no means of influencing his conduct other than the refusal to vote money, was a legislature and nothing more. Thus the Americans found and admired in their colonial (or State) systems, a separation of the legislative from the executive branch, more complete than in England; and being already proud of their freedom, they attributed its amplitude chiefly to this cause.

From their colonial and State experience, coupled with these notions of the British Constitution, the men of 1787 drew three conclusions: First, that the vesting of the executive and the legislative powers in different hands was the normal and natural feature of a free government. Secondly, that the power of the executive was dangerous to liberty, and must be kept within well-defined boundaries. Thirdly, that in order to check the head of the state it was necessary not only to define his powers, and appoint him for a limited period, but also to destroy his opportunities of influencing the legislature. Conceiving that ministers, as named by and acting under the orders of the President, would be his instruments rather than faithful representatives of the people, they resolved to prevent them from holding this double character, and therefore forbade "any person holding office under the United States" to be a member of either House.[1] They deemed that in this way they had rendered their legislature pure, independent, vigilant, the servant of the people, the foe of arbitrary power. Omnipo-

[1] In 1700 the English Act of Settlement enacted that "no person who has an office or a place of profit under the King shall be capable of serving as a member of the House of Commons." This provision never took effect, having been repealed by the Act 4 Anne, c. 8. But the holding of the great majority of offices under the Crown is now, by statute, a disqualification for sitting in the House of Commons. See Anson, *Law and Custom of the Constitution*, vol. i. p. 174.

tent, however, the framers of the Constitution did not mean to make it. They were sensible of the opposite dangers which might flow from a feeble and dependent executive. The proposal made in the first draft of the Constitution that Congress should elect the President, was abandoned, lest he should be merely its creature and unable to check it. To strengthen his position, and prevent intrigues among members of Congress for this supreme office, it was settled that the people should themselves, through certain electors appointed for the purpose, choose the President. By giving him the better status of a popular, though indirect, mandate, he became independent of Congress, and was encouraged to use his veto, which a mere nominee of Congress might have hesitated to do. Thus it was believed in 1787 that a due balance had been arrived at, the independence of Congress being secured on the one side and the independence of the President on the other. Each power holding the other in check, the people, jealous of their hardly-won liberties, would be courted by each, and safe from the encroachments of either.

There was of course the risk that controversies as to their respective rights and powers would arise between these two departments. But the creation of a court entitled to place an authoritative interpretation upon the Constitution in which the supreme will of the people was expressed, provided a remedy available in many, if not in all, of such cases, and a security for the faithful observance of the Constitution which England did not, and under her system of an omnipotent Parliament could not, possess.

"They builded better than they knew." They divided the legislature from the executive so completely as to make each not only independent, but weak even in its own proper sphere. The President was debarred from carrying Congress along with him, as a popular prime minister may carry Parliament in England, to effect some sweeping change. He is fettered in foreign policy, and in appointments, by the concurrent rights of the Senate. He is forbidden to appeal at a crisis from Congress to the country. Nevertheless his office retains a measure of solid independence in the fact that the nation regards him as a direct representative and embodiment of its majesty, while the circumstance that he holds office for four years only

makes it possible for him to do acts of power during those four years which would excite alarm from a permanent sovereign. Entrenched behind the ramparts of a rigid Constitution, he has retained rights of which his prototype the English king has been gradually stripped. Congress on the other hand was weakened, as compared with the British Parliament in which one House has become dominant, by its division into two co-equal houses, whose disagreement paralyzes legislative action. And it lost that direct control over the executive which the presence of ministers in the legislature, and their dependence upon a majority of the popular House, give to the Parliaments of Britain and her colonies. It has diverged widely from the English original which it seemed likely, with only a slight difference, to reproduce.

The British House of Commons has grown to the stature of a supreme executive as well as legislative council, acting not only by its properly legislative power, but through its right to displace ministers by a resolution of want of confidence, and to compel the sovereign to employ such servants as it approves. Congress remains a pure legislature, unable to displace a minister, unable to choose the agents by whom its laws are to be carried out, and having hitherto failed to develop that internal organization which a large assembly needs in order to frame and successfully pursue definite schemes of policy. Nevertheless, so far-reaching is the power of legislation, Congress has encroached, and may encroach still farther, upon the sphere of the executive. It encroaches not merely with a conscious purpose, but because the law of its being has forced it to create in its committees bodies whose expansion necessarily presses on the executive. It encroaches because it is restless, unwearied, always drawn by the progress of events into new fields of labour.

These observations may suffice to show why the Fathers of the Constitution did not adopt the English parliamentary or Cabinet system. They could not adopt it because they did not know of its existence. They did not know of it because it was still immature, because Englishmen themselves had not understood it, because the recognized authorities did not mention it. There is not a word in Blackstone, much less in Montesquieu, as to the duty of ministers to resign at the bid-