I

INTRODUCTION: THE PROBLEM AND ITS SETTING

WRITING in 1904, Carl Russell Fish, the eminent historian of government service in the United States, concluded his searching study by remarking that "as long as the controlling element in the country [namely, business] manage their private affairs in a careful, systematic manner, we may expect the government to conduct its business on approximately the same principles."[1] Today this proposition will sound quaintly paradoxical to many Americans. A considerable part of the community has pinned its hope of salvation upon the government, precisely because business has managed its affairs in a careless, unsystematic manner. And indeed it seems curious that such an argument should have been advanced even in 1904, almost twenty years after the establishment of the Interstate Commerce Commission. For what was the purpose of organizing the Commission? It was to regulate the railroad business, and to extricate it from the hopeless condition into which men like Drew had plunged it during the preceding period. Fish himself has been careful throughout his volume to emphasize the fact that business methods were blatantly defective, that "the civil service shared in the . . . dazzling confidence in results to be obtained, the lofty carelessness as to methods of obtaining them, and all the other characteristics of the ruling class of the United States between 1830 and 1870."[2]

[1] Carl Russell Fish, *The Civil Service and the Patronage* (Cambridge, Mass., 1904), p. 245.

[2] *Ibid.*, p. 244.

Business and the Business of Government

In these rather contradictory propositions there is revealed a distinct conflict of ideas, an unspelled-out difference of viewpoint. If we are not mistaken, this conflict can be stated in a twofold proposition. In the first place, the conduct of the government service is inferior to the conduct of *some* business concerns, and superior to that of *other* business concerns. Government service does not ordinarily reach in its management the high level of perfection which the most ably conducted business concerns achieve, nor does it fall so low as the most incompetently run private company. This may explain why observers would be inclined to exhort the government to emulate the splendid achievements of business, and yet expect government to remedy the failures of business. The contradiction is due to the fact that the word "business" has been used in two radically different meanings, namely, good business and bad business. This is the first point.

The second may be stated thus: while individual business corporations have been conducted as well as could have been expected considering the management's limited information regarding the whole business trend, the system as a whole has failed, and government service has to step in as a coördinator and integrator and a long-range planner in order to prevent these breakdowns. This latter argument or proposition used to receive very little support among theorists, men of affairs, and political leaders in the United States, but the number of its adherents is unquestionably on the increase, and many of the more recent measures enacted in this country under strong popular pressure are really the harbingers of a general acceptance of some such view. Credit assistance, housing projects, home loans, power developments, and all the rest of the government's multifarious activities, initiated under the last Republican administration and carried forward with

vigor under the new Democratic administration, amount to attempts at planning on a national scale, be they ever so haphazard and chaotic. But it is neither our purpose to discuss the desirability of this development, nor to discover the extent of its future expansion or retrogression. All we are called on to do here is to note that at present this tendency is manifest on every side, and to add that it flared up at the time when the country was being scourged by a business depression of vast dimensions, which presumably indicated that something was wrong with the system as a whole.

The Constitution and the Civil Service

Viewing this trend toward more government service as at present an evident fact, the very serious problem presents itself of deciding whether or not such service can be developed without destroying the American constitutional system in the process. Voices, and by no means solely partisan voices, have been raised to maintain that it could not be so, that a large-scale setting up of regulatory authorities under the government would plunge American democracy into the bottomless sea of arbitrary bureaucracy.[3] Others have proposed to "judicialize" a whole set of independent commissions, and thus to escape the Scylla of large-scale bureaucracy, but without escaping the Charybdis of confusion and anarchy which we hoped to avoid in turning to government service.[4] There can, then, be little doubt that the problem is one of primordial importance and fraught with the most far-reaching implications. In order to circumscribe these various aspects as fully as possible before settling down to a more detailed examination of its different angles, it seems necessary to indicate more definitely what we, what most of us, understand by the American constitution, whose fate is alleged to be threatened by this development. Let us assure the reader

[3] James M. Beck, *Our Wonderland of Bureaucracy* (New York, 1932).

[4] James Hart, *Tenure of Office under the Constitution* (Baltimore, 1930).

at once that we are not concerned here with a narrowly legalistic approach to the constitution. In fact, we wish to disclaim any intention or capacity to unravel the strictly legal problem. In other words, we are not here concerned with discovering whether or not such a government service is constitutional; let the Supreme Court worry about that. Since it has been held constitutional to date, we propose to let it go at that. When we say "the American constitution" we mean the American democracy, the American popular government as a going concern, characterized as it is by a bill of rights, a system of separation of powers, popular election of the chief executive, federalism, and local self-government, as well as the peculiar features of American politics which have grown out of these several component parts of the constitution.

Legal Form and Actual Content

To be sure, all these topics are permeated by legal considerations of the most diverse kind. But as it has happened before, so it might happen again that the legal forms remain intact, while the actual nature of the constitution is fundamentally altered. Thus in ancient Rome the forms of the Republic continued to prevail, when in reality an empire had definitely replaced it, and it seems paradoxical to us that Augustus should have been looked upon as the savior of the Republic. Again, the German Republic of 1919 was in the process of being transformed from a parliamentary into a presidential democracy, when the wave of Hitlerism swept it away. These examples will show that there is something more fundamental in a constitution which tends to escape the lawyer, preoccupied as he is with formalistic elements. The extraordinary thing about the American constitution in this fundamental sense is that it has endured for such a long time and under the most varying conditions. Although the relative importance of the executive and legislative branches of the government has oscillated to some extent, neither the

president nor Congress has ever achieved supremacy. Nothing shows this fact more strikingly than that while some observers in the United States were getting worried lest the president was at last gaining the upper hand, an able French constitutional lawyer was busy proclaiming the United States a kingdom of judges.[5] Nor can the extension of the suffrage be said to have fundamentally altered the constitution of this country, although Aristotle's profound insight into matters of politics should have led us to expect a modification in view of the enormous increase in the size of the electorate. The emergent tyranny of the majority which worried De Tocqueville so much when he looked at the United States in 1831 seems not to have assumed more threatening proportions than it had in his time. If it be maintained that this tyranny burst forth in the Civil War—and many argue to the contrary—it has certainly subsided since that fatal cataclysm.

Mention of the Civil War brings to our mind, however, that the theorists of the right of secession would unquestionably say that a fundamental change had then occurred, because the United States were transformed from a federation of states into a federal state. But such a view is now held by few, and can scarcely be defended in retrospect in the face of John Marshall's constitutional doctrines. The most that could today be allowed on that score would be to admit that while it was *arguable* that the United States were a federation before the Civil War, it was not so afterward, a difference which does not permit us to speak of a *fundamental change.* In short, the constitutional order of the United States has remained essentially the same. This is not the place to discuss the circumstances of this extraordinary stability, though it be a most intriguing inquiry, except in so far as such a discussion will aid us in analyzing the implications of a responsible government service under the constitution.

[5] Édouard Lambert, *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris, 1921).

The Unique American Scene

The features of the American scene which seem most significant when one reflects upon the conditions under which government service in the United States has developed, are five: its remoteness from equally powerful neighbors, and consequent immunity from attack; the pioneering conditions which prevailed during the first hundred years of this country's political life as an independent state; the melting pot, or constant mixture of populations, producing a curious multiform uniformity and a persistently equalitarian trend all over the country; the many churches and sects scattered rather evenly throughout the country; and, finally, the two parties, held together by national elections, though each includes the most diverse local factions.

1. *Absence of Powerful Neighbors*

The significance of the first feature will be immediately apparent if we recall that government services on the continent of Europe, more particularly in France and Germany, were born of the need for maintaining large armies, developed for defense and conquest during the sixteenth, seventeenth, and eighteenth centuries.[6] These efforts grew out of the conflict between the territorial monarchies and the great city-states of Italy, the Netherlands, Germany, and Switzerland. The increasing success of such city-states, leagued together in large federations to oppose the territorial princes, often was the result of their use of large bodies of infantry drafted from among the body of citizens. Hence the princes strove to organize similar military establishments. The development of larger and larger armies stimulated immensely the growth

[6] Carl J. Friedrich and Taylor Cole, *Responsible Bureaucracy; a Study of the Swiss Civil Service* (Cambridge, Mass., 1932), Vol. I of "Studies in Systematic Political Science and Comparative Government," Carl J. Friedrich, ed.

of the monarchical public service. Professor Werner Sombart has gone so far as to say that the development of the modern state and of the modern army are identical.[7]

Though this statement is perhaps extreme, we may yet admit that it well stresses the very close parallel which the development of modern military organization and modern government exhibits. For the financial needs of these vast military establishments furthered the growth of revenue-collecting establishments, and these in turn made every effort to stimulate industrial and commercial ventures of all kinds. Of these, the great trading companies of England, Holland, France, and other monarchies are best known to Americans, because of the decisive rôle they played in opening up the American continent. Thus we see that a direct line of interrelated conditions allows us to trace the paternity of colonial governments in America to the conflicts and rivalries of European monarchs. When once established here, government service was, however, effectively removed from such stimulants, except in so far as the fights with the Indians provided the settlers with intermittent opportunities for a rather romantic warfare. It is curious that the absence of this need for military establishments in America should not have been given greater emphasis by those who were anxious to discover why government service in the United States fell into decay soon after the establishment of the federal Union, in spite of the urgent needs of an industrial society, and in spite of the fact that at the same time it flourished in Europe. We may consider that the remoteness of the United States had much to do with that decay.

2. *Pioneer Traditions*

Much has been said within the past few decades about the importance of pioneering conditions for the develop-

[7] Werner Sombart, *Der moderne Kapitalismus* (6th ed.; Munich, 1924).

ment of various aspects of American life and thought, especially since the epochal paper by Professor Turner on "The Passing of the Frontier." Professor Fish indicated how profoundly impressed he was by the importance of these conditions for the American civil service in the heyday of the spoils system when he wrote: "In the frontier states particularly, the superb self-confidence born of the pioneer's single-handed victory over nature balked not at the full measure of democracy, but boldly asserted that all men were created equally able to fulfil the duties of government offices."[8] And this was not all a boast. The conditions of pioneer life unquestionably developed a peculiar adaptability and self-reliance in these men and women, enabling them to cope with circumstances for which no previous training had prepared them. This extraordinary versatility of the American people has remained to the present day as a precious, though often unappreciated, heritage. It enabled them to "get together" and erect a vast military establishment within a few months after America's entry into the World War.[9] It enabled them once more in the trying days of the recent depression to evolve vast regulatory machinery for governmental purposes almost over night. Such an emergency reserve of inventive and coöperative capacity, reminiscent of the proverbial Yankee resourcefulness, but doubtless shared by all sections of the country, may, to some extent at least, offer a dependable substitute for permanent government services, especially for short intermittent periods of emergency. But one must not forget that the building of the American army during the war proceeded upon the secure foundation of a thoroughly trained professional army of considerable size. To use a metaphor from one of the most mysterious of nature's processes, the coalescence of a large crystal is greatly aided by the presence of a small

[8] Fish, *op. cit.*, p. 104.

[9] John Dickinson, *The Building of an Army* (New York, 1922).

but well-built crystal in the solution of the salt which is to crystallize.

3. *The Melting Pot*

The melting pot as a constituent feature of American life has also received a good deal of attention in recent years. The incredible mixture of races and peoples which has gone forward apace in the United States within the past hundred years makes it increasingly difficult to subsume the phenomena of American political life under whatever generalizations might be advanced about the mysterious "Anglo-Saxons" of hoary pedigree. But quite irrespective of such race doctrines (from the discussion of which the indulgent reader will, it is hoped, without regret excuse us), this constant arrival of newcomers on the shores of America produced problems for the governmental services wholly unknown to more homogeneous peoples, except in the domain of colonial administration. Here were thousands of men and women, intrinsically intelligent and able, who were imbued with traditions utterly at variance with those prevailing in the United States, and often even unable to follow the instructions of an official. It is common knowledge how ingeniously the wizards of Tammany Hall exploited these conditions, and perhaps the impending disaster of that venerable body is not entirely unrelated to the ever more restricted inflow of immigrants.[10] On the other hand, in the process of leveling out the inherent conflicts in the traditions of this motley crowd, the equalitarian drive received ever new impulses. If a German can be mayor, then an Irishman can be mayor; and if an Irishman can be mayor, why, then an Italian or a Czech can be mayor.

It goes without saying that the chances of friction inherent in a large organization such as the government service are not eased by the presence of group temperaments of the most varying sorts. Nor, in such an environment,

[10] M. R. Werner, *Tammany Hall* (Garden City, 1928).

can any scheme of selection on strictly educational lines be acceptable to the majority. It must almost instantaneously raise the suspicion of racial discrimination, offering a popular politician the opportunity "to tell King George where he gets off." Yet all this heterogeneity combines into a striking homogeneity, because the different constituent elements are scattered fairly evenly all over the country. To be sure, the Irish dominate in Boston, the Germans in Milwaukee, the Scandinavians in Minnesota, and so on and so forth. But as yet there are no compact racial settlements in sharply defined regional areas such as divide peoples in Europe or in Canada, nor is there any distinct prospect of there ever being any such settlements. Consequently, these diverse elements must seek a common denominator, and they find it in their common allegiance to the American constitution in its broader sense of the American community as politically organized. This intensification of their common political allegiance wholly or at least partially offsets the disadvantages of the confusion of their backgrounds and traditions. Thus "to be an American" is an ideal, while to be a Frenchman is a fact. It is possible for a government service to fall back upon this ever present aspiration of the average person to a much larger extent than is possible in Europe, where patriotic appeals more readily deteriorate into partisan efforts. I question whether Dr. Johnson would have pronounced his famous dictum that patriotism is the last refuge of a scoundrel, if he had lived to see the peculiar form of that mass emotion in the United States. For while patriotism may, and no doubt sometimes does, perform this function here too, it also elicits among the variegated welter of population elements a unifying sentiment of ethical aspiration which assists the government in conducting its numerous services not only in ordinary times, but more particularly in periods of national emergency such as the present. There are many who want to show that they are good Americans.

4. *Multiplicity of Churches*

Another feature of American life contributing to its multiform uniformity is the many different churches. Whatever may be the broader implications of that state of things in the long run—naturally churchmen, particularly Catholic ones, are not favorably impressed by this state of affairs as compared with one in which their church would prevail over all others—there can be little question that these many churches are helpful to the government service in a negative sense, in that they remove a powerful competitor intent upon dictating what fundamental law and the constitution ought to be. Instead, the churches compete with one another and thus keep alive the ethical values embodied in their doctrine which are probably the most important for a governmental service. They also find it expedient to foster the interests of the common people, whose numbers count, rather than the interests of the wealthy, and thereby remain more successful in checking doctrines like anarchism and nihilism, which are among the most effective dissolvents of a sense of responsibility and service and discipline, upon which a responsible government service depends. The many churches can thus be said to be considerably better nurseries for a growing government personnel than one or two would be. Their work along these lines must forever amaze anyone who has earnestly endeavored to set up an effective substitute for them.

5. *The Two Party System*

While Dr. Johnson pilloried patriotism as the last refuge of a scoundrel, an American senator, Roscoe Conkling, whose ire had been aroused by a civil service reformer, suggested that he would have changed his mind if he had known the possibilities of the word "reform." That it was the civil service reformer who produced the senator's indignation is significant primarily because it focuses our

attention upon the fact that civil service reform, by removing the patronage, proposes to dynamite the solid rock upon which the edifice of the American party system so securely rested. And indeed there has grown up in more recent years an appreciation of a causal connection between effective party organization and a limited amount of patronage which the early reformers used to overlook in their enthusiasm. Orders, titles, and other inexpensive honors not being readily available in the United States, the question arises of how to carry on the work of these large-scale party organizations if they are deprived of the patronage.

This is a crucial question when it is once admitted that an effective party system, and more particularly a two party system, is essential for the working of a constitutional, popular government. In the study of this feature of American life, therefore, we are returning to our consideration of the constitution in its broader political sense. Executive and legislative power may be fighting for supremacy with varying degrees of success without fundamentally affecting the American constitutional order, but if our parties were to lose their hold upon the masses, or if through financial need they were driven to seek alliance with particular interest groups (as was the case in the German Republic) and were to deteriorate into magnified lobbies, the hour of American democracy would probably have struck. A way must, therefore, be found to mark out for patronage such positions as do not require special knowledge—and the postmasterships, for example, seem to offer a good opportunity—in order to enable the parties to carry on. If that sort of arrangement could be supplemented by a cautiously initiated and well-considered scheme of public honors to be bestowed upon deserving men of affairs, it would probably make it possible to take out of patronage some of the important policy-forming and yet highly technical positions of administrative leadership, and to put them under the civil service, i.e., to make them

part of the responsible government service, without at the same time sending the American party system tumbling to the ground and American democracy with it. This raises the problem of what kind of training such positions do require, if the rough-and-tumble schooling of the hard knocks of party service will not do. But before we can successfully consider this, our concluding argument, we must undertake a more detailed consideration of the criteria of a responsible government service, and the relation it bears to the fundamental aspects of the American constitution.

II

GOVERNMENT SERVICE VERSUS BUREAUCRACY

CRITICISM of the New Deal is more and more taking the form of denouncing the "bureaucracy" which is assumed to be in the making in Washington. The popularity of this interpretation in certain quarters is shown by an article in the *Ladies' Home Journal*, entitled "The Bureaucratic Party," and written by Alice Roosevelt Longworth, an able if not an altogether unbiased observer. In this article it is flatly asserted that "our political system" is undergoing "the transformation to one-man rule, functioning through a federal bureaucracy," and therefore the set-up of governmental services in Washington is openly placed into parallel with "the tsars, those Autocrats of all the Russias, their successors, the Autocrats of the Soviets, and the Fascist dictators of the Hitler and the Mussolini type," who, the author proclaims, "could not ask for a prettier set-up for the exercise of arbitrary governmental control than the President now has."[1] Thus a bureaucratic party is said to have taken the place of the old Democratic Party of Jefferson and Jackson, of Cleveland and Wilson—though the passionate interest of Cleveland in the civil service and Wilson's reform measures, such as the Federal Reserve System, did in their day bring down upon them the denunciation that they, too, were bureaucrats. Again, the Massachusetts Republicans recently adopted a platform assailing the administration of their opponents as an "octopus of bureaucracy" and calling for a drastic curtailment of the "unprecedented bureaucracy assembled under Democratic rule."[2]

[1] *Ladies' Home Journal*, June, 1934, pp. 26 ff.

[2] *New York Times*, June 10, 1934.

What Is Bureaucracy?

Such partisan statements cannot in themselves be given separate consideration here; nor is it our task to defend the present administration against them. They are important for our present purpose in showing the wide popular interest in the extent to which our governmental services are becoming a bureaucracy, instead of remaining a responsible public service such as befits a popular, constitutional government. These apprehensions necessitate a vigorous inquiry into the whole meaning and significance of this dreaded specter of bureaucracy, a problem which has aroused the interest of political scientists for some time. Such inquiry must be conducted with a passionate determination to get knowledge through the investigation of facts, and facts alone. For perhaps there is a species of bureaucracy which is not destructive of popular government, just as there are microbes which are not destructive of human life.

A deep interest in this possibility caused the author some time ago to investigate the various aspects of the public service of so firmly established a democratic government as that of Switzerland.[3] It appeared in the course of this investigation that the public services of Switzerland, while exhibiting certain characteristics of bureaucracy, did not exhibit others which are closely associated with the notion of bureaucratic government as it is generally held. Harold Laski, writing of bureaucracy for the *Encyclopaedia of the Social Sciences*, expressed that notion clearly when he defined bureaucracy as the term "usually applied to a system of government the control of which is so completely in the hands of officials that their power jeopardizes the liberty of ordinary citizens."

[3] Carl J. Friedrich and Taylor Cole, *Responsible Bureaucracy; a Study of the Swiss Civil Service* (Cambridge, Mass., 1932), Vol. I of "Studies in Systematic Political Science and Comparative Government," Carl J. Friedrich, ed.

Bureaucracy: Label of Annoyance

If you will reread the remarks of Mrs. Longworth cited above with this definition in mind, you will find that she was probably thinking of this sort of thing in using the term "bureaucracy." But upon closer scrutiny it is found that we often also use the word "bureaucratic" to condemn delay and lack of response from the representative of a large organization, whether private or public, with whom we have to have business dealings. Thus the word "bureaucracy" is widely used to decry the acts of officials which are cumbersome and irritating to the person subjected to them. Take the following case: If you wish to collect money which has been sent to you through a postal money order on the United States Post Office, you are supposed to establish your identity to the teller before the official can give you your money. If, in answer to this request, you show a letter addressed to yourself, you will, at many post-offices, receive your money. From the point of view of conclusive evidence, this is wrong. A person may easily have found or stolen the letter as well as the money order, and a conscientious official should therefore reject this evidence as inconclusive. In fact, he should reject all evidence except that which would definitely establish your signature as bona fide, such as a driver's license. Yet insistence upon such evidence by a postal official would produce violent charges of "bureaucratic inefficiency," as I myself have heard them made by otherwise quite sensible people. Examples such as these could be multiplied a hundredfold from all kinds of administrative activities, customs inspection, immigration, health service, and all the other activities of a government.

What is the reason for these clashes of viewpoint which express themselves in the denunciation of conscientious officials as bureaucrats? It is fundamentally due to the fact that the person confronting the representative of a large organization frequently does not realize or understand

the ultimate objectives or the difficulties in attaining them. In the present case he calls "inefficient" what is really "efficient," as he would readily appreciate if he were the person who had lost the money order and who should, therefore, be protected against fraud; or if he realized that as a taxpayer he might have to help make up any loss. To put it differently, the purposes of a service organization often conflict with the more apparent interests of the individual, because they try to cover the more remote interest of the individual, *if and when* he has lost his money order, *if and when* he has to pay higher taxes to make up the loss in revenue from smuggling, *if and when* his cow dies because the cows in the neighborhood have been carelessly inspected. The post-office insists upon evidence about signatures, to protect you and your fellow citizen if and when you have lost your money. The customs inspector insists upon your opening your trunks, to protect you and your fellow citizen against higher taxes to make up the loss in revenue from smuggling; the health inspector kills your cow, so as to protect you and your fellow citizen from losing a child through tuberculosis, and so on.

This is all very obvious when stated in this way, and yet the resulting irritations and clashes of interest are beneath a great deal of the hue and cry about "bureaucracy." Of course, this is not all. Men and women who day in and day out have to watch for irregularities of conduct are bound to grow suspicious and to exasperate outsiders by their meticulous insistence upon unnecessary detail. Even in the case of our example from the post-office, it may be more efficient to allow for a certain number of slips, just as a department store calculates that a certain amount of fraud will occur in its transactions with the public, and adds a bit to the price so as not to annoy the ordinary customer with "searches and seizures." But where services are rendered at cost, and ought to be, so as to be available to the greatest number, the introduction of such policies is debatable to say the least. Anyway, they have to be

decreed from above, and cannot originate with the individual official, who is threatened with reprimands if irregularities occur in his office. Nor are they limited to government services. The conduct of officials of a privately owned electric power company, or telephone or telegraph company, may be and often is just as arbitrary and "bureaucratic" as that of a government official. We can see from this that we are really facing an aspect of all large-scale organizations engaged in work which brings them into contact with the people at large. And therefore the antagonism to "bureaucracy" is merely the expression of a mass of personal experiences of individuals who have found themselves annoyed by the contact with officials acting according to rules framed to cover a wide variety of cases rather than that of the particular complainant.

Transference of Historical Antagonism

But there is another and a more historical root to our antagonism to administrative action of government officials, to "bureaucracy." In the seventeenth and eighteenth centuries governmental bureaucracies were the bulwark of authoritarian, monarchical rule. The territorial princes had created, as we have seen, these large organizations of officials for the purpose of gathering taxes and so on. Consequently, the fierce struggle waged against these monarchs over the control of the government and its administrative services drew effective ammunition for popular oratory from the general indignation about the "bureaucracy." This sentiment was often expressed by liberal publicists on the Continent. Thus we find the widely known scholar Robert von Mohl advancing the proposition that "bureaucracy is nothing but the wrong conception of governmental tasks, carried out by a numerous and often mediocre staff which is satisfied with empty formulae and infested with all kinds of personal defects."[4]

[4] Robert von Mohl, *Staatsrecht, Völkerrecht und Politik* (Tübingen, 1860–69) Vol. II, pp. 108–9.

This natural tendency of all engaged in the fight for the victory of democracy to decry the bureaucrats as the servants of the prince (which they of course were, though to an ever more limited extent) has led to the construction of a specious opposition between democracy and bureaucracy and a consequent widespread belief that bureaucracy is necessarily "irresponsible" and therefore "undemocratic." Yet those who hold this view have never suggested any substitute for administrative officials by which we might effectively carry out the wishes of the people for regulation and control. Inasmuch as the social and economic forces of modern industrial civilization lead to many clashes of interest and to many dangers for the larger public indirectly affected by them (accidents, diseases, etc.), the demand for integration and control arises with ever increasing insistence. Since all these regulatory activities require human beings to carry them on, and human beings working together instead of at cross-purposes, the need for large-scale government service faces us as an inevitable concomitant of our industrial civilization. If this be so, we must abandon the hope of maintaining responsible constitutional government, unless there is some way of escaping bureaucracy of the arbitrary type. Is there some method by which such a bureaucracy can be made a responsible and useful part of American political life?

Criteria of a Developed Administrative Service

Able and farsighted politicians, well aware of the evil connotations of the word "bureaucracy," sought to rebaptize the child. To conjure up more pleasing prospects of the future they proposed to call that part of the government service which would be based upon merit, and merit alone, the civil service. Civil service! A nice word at the time it was first employed, stressing well the desirable aspects of a governmental business. And yet perhaps too limited in its idealistic, normative sense to carry the full

burden of meaning when we talk about responsible government service under the American constitution. Indeed, the very essence of a fully developed merit system seems different from the idea of responsibility. For if competitive examinations decide who shall enter a particular position and who shall occupy a certain position, how is there going to be any responsibility? Responsibility to whom? But before we can answer these and related questions, we must look somewhat farther into bureaucracy as a working system of human relationships, in order to determine whether there are any discoverable criteria by which we may pronounce one bureaucracy good and another bad in terms of the purpose to be achieved by it. This inquiry is likely to be most successful if we get away as far as possible from trying to decide whether we want a bureaucracy or whether we like one, and turn to the question of why and under what circumstances people have wanted one and what its characteristics have been. For if we discover the conditions under which a bureaucracy, or, if you prefer, an administration, has worked, we shall gather inferences as to possible criteria for evaluating one. We shall also get a partial answer to our central problem of whether or not a bureaucracy can be made to operate responsibly within a constitutional government like that of the United States. To anticipate the conclusion, it will appear that no government offers as favorable a setting for the development and maintenance of a responsible bureaucracy as a constitutional government with a separation of powers such as that of the United States.

Without going into the extensive historical material upon which the following propositions are based, it would be impossible to justify their use in a scientific manner. The indulgence of the reader must therefore be requested for omitting that material here.[5] A fully organized bureaucracy exhibits three elementary characteristics, and they usually appear in the order which they occupy in the

[5] See Friedrich and Cole, *op. cit.*, chap. I.

following description. Offices or functions are distributed carefully and rationally among the members of the organization and then arranged into a whole, so as to produce an elaborate system of competencies or jurisdictions. The process by which this distribution is brought about may be called differentiation, and the combination of the functions as differentiated, integration. The whole process constitutes a late phase in the division of labor. Secondly, the powers of control and coercion attached to these offices are carefully circumscribed and arranged in the way of a pyramid, so that several offices of fairly equal power are directed and coördinated by a superior office having power over them, and so on up the line. The dynamic whole of these relationships of coördination and subordination up and down the line may be called the hierarchy, and the process by which the hierarchy is created and maintained, centralization. Thirdly, definite and publicly known qualifications are required for the fulfilment of the several functions as differentiated, and since such qualifications necessitate rather elaborate preparation of the candidate, they depend upon a fixed salary, secure tenure, and regular promotion, in anticipation of which the candidate undertakes to secure the necessary training. This process may be called professionalization, and is analogous to similar tendencies throughout the length and breadth of our industrial society. These three elementary aspects of bureaucracy are, it is evident, intimately related to one another. They all represent the application of rationalized engineering techniques to the personnel problems involved in handling the manifold tasks which confront modern governments. Consequently, any general treatment of the problems of administration will contain a more or less elaborate consideration of all of them.[6]

[6] Leonard D. White, *Introduction to the Study of Public Administration* (New York, 1926); W. F. Willoughby, *Principles of Public Administration* (Washington, 1927).

1. *Differentiation and Integration*

The differentiation of functions seems such an obvious prerequisite of an administrative task of any magnitude that it is frequently given only the most cursory attention. And yet literally hundreds of years were consumed by governments in evolving even the most elementary distinctions and in discovering by trial and error that, all things considered, functional differentiation is superior to regional differentiation—a point to which our sixth chapter will be especially devoted. Nor is the process of differentiation in any way complete. To be sure, every modern government in an industrialized country now has a separate ministry (department) of foreign affairs, of finance, of commerce, of labor, and so forth, and what cannot be readily classified is thrown into the ministry of the interior. But here the simplicity ends. There are the greatest variations among the several governments when we go into further detail. Students of administration are wont to consider the problems under this heading as those of departmentalization, but in reality the problem is intimately related to the broader question of the separation of powers, to which our fifth chapter is devoted. Brief reflection will show that a rule embodying the principle of differentiated functions is more easily pronounced than put into effect, and in reality we cannot expect more than approximations to the standard. It is, moreover, important to remember that when we pass from one level of offices or activity in a large organization to the next higher one, the rule applies again between individuals on that level, but each official's sphere is larger and usually comprises within itself the spheres of several officials on the lower level. This is, in a sense, also a type of differentiation, namely between more routine and more discretionary activities. But because of its peculiar significance for the determination of responsibility of a government service, we isolate this type of differentiation as a

distinct process, namely, centralization, producing, if effective, a hierarchy.

There remains, however, another task, and that is to combine the functions as differentiated into a whole. This process may be called integration. It can never be accomplished unless there is effective centralization, i.e., sufficient power of coercion at the top to bring about the necessary adjustments. For that reason it may be questioned whether integration should not be considered in connection with the hierarchy in so far as it is effectively and rationally centralized.

2. *The Hierarchy*

In other words, the hierarchy is a concomitant of the rational distribution of functions, because as soon as an organization grows to any size, the large number of officials who exercise partly conflicting functions stand in constant need of integrating and coördinating "leadership." This seems obvious enough, and yet the implications of administrative leadership have received wholly inadequate attention. For on the one hand, the detailed and specific functions need constant reinterpretation in terms of the larger objectives which they presumably serve. On the other hand, the obstacles and difficulties encountered in the exercise of these detailed and specific functions require consideration with a view to the possible improvement or alteration of these objectives. Both these propositions will receive further consideration in chapter V, when we discuss the separation of powers. Here we must note, at least in passing, another important feature of the hierarchy. If the powers of control and coercion connected with the various offices and functions are arranged in more or less concentric circles which become smaller as we ascend to the higher regions, a single individual (or bureau acting as a unit) would presumably have ultimate control and power. Moreover, such an individual or group must be himself, like the president of the United States, a part of the hier-

archy, though not necessarily chosen from among it. This unitary central control characteristic of a fully developed hierarchy shows why monarchies were so apt in developing effective bureaucracies. But even though this tendency toward unitary leadership be inherent in the hierarchical feature of bureaucracy, or effective government service, it would nevertheless be undesirable to overemphasize this point.

It seems preferable to use the words "hierarchy" and "centralization" for the purpose of describing more generally any determinate system of distributing the powers of control and coercion by subordinating officials performing very specific and tangible functions to other officials who supervise and direct a determinate number of these officials, and who in turn may be supervised and directed by a still more limited number of "higher-ups." It must also be remembered that the control may take the form of subordinating groups of officials acting together to other groups of officials. This is the structure of the judicial system in Anglo-Saxon countries as well as in continental Europe, and although the power of coercion of the higher court over the lower ones is limited, the power of reversing a decision, crystallized in the rule of *stare decisis*, produces a similar effect. For, although the hierarchy seems to imply strict subordination, the extent to which any given hierarchy conforms to that standard varies greatly, even within given countries, and is indicated by its rules of discipline. Some rudimentary discipline is inherent in any hierarchy. The rigor of the discipline must be evaluated in relation to the purpose of the particular hierarchy. A purpose which is likely to be defeated by delay in execution will produce a more rigorous discipline. The army, and business enterprises in highly competitive fields, offer good examples of rigorous discipline, while ordinary government service and business enterprises in distinctly monopolistic fields offer good examples of the other (unless they are fraught with danger, like the railroad business, which shows

high disciplinary standards). The comparatively static condition of most governmental activities during peace time has made it possible to subject all disciplinary action to fairly elaborate judicial procedure; American government services relying on the ordinary courts, while European countries have developed disciplinary courts within the service. In our discussion of the bill of rights we hope to go into this matter further.

3. *Definite Qualification for Office*

Our third characteristic, qualification for office, has received so much of the attention of students of public administration in the United States that the problem of government personnel is treated by many people as identical with that of qualification for office. Only recently such other features as that of morale, which is a constituent element of a successful hierarchy, have been brought into the picture.[7] In view of this preoccupation with the problem of qualification it is curious that the cognate problem of training for the service has received only cursory attention until now. Yet the system of public schools and universities as we find it in Europe has its origin to some extent at least in the requirements of the government for well-trained officials.[8] Speaking rather broadly, such a system of public schools and universities fulfils the function of bringing together educational facilities and the differentiated hierarchy of official function through an elaborate system of standardized and coördinated examinations. If such coördination is effective, it becomes possible to consider the degrees from the several educational institutions as constituting, at least in part, satisfactory evidence that the person holding them is qualified for a certain function in the hierarchy. Civil service commissions may, however, turn out to be an effective substitute for such a system of coördinated schooling, from the

[7] White, *op. cit.*

[8] Walter R. Sharp, *The French Civil Service* (New York, 1931).

point of view of a highly developed governmental service. The problems which this proposition raises are discussed in greater detail in the seventh chapter.

Publicity

In conclusion, it may be well to call at least passing attention to one feature which all three elementary characteristics of a fully developed administrative body have in common, and that is the feature of publicity. It will be remembered that we insisted upon the fact that the distribution of functions had to be determinate, and that the coördination and subordination of control and coercion within the hierarchy had to be equally so. The same was said of the requirements for office. Such determinateness, insuring equality of treatment to all, is never achieved unless full publicity enables any reasonably intelligent and interested person to judge for himself. Consequently, any fully developed administrative body or bureaucracy, whether governmental or other, will give complete publicity about all its arrangements for entry, promotion, transfer, and all the other rules determining the working of the whole set-up. Of course, no real government, or even governmental unit, ever completely satisfies this standard of maturity. We shall see in the next chapter how important this publicity is for making a bureaucracy "responsible."

A Spade Is a Spade

Summarizing what has just been stated, we may say that bureaucracy is neither a system of government nor a collection of disagreeable men doing unnecessary things, but the personnel aspect of administration in all its ramifications and difficulties. It must, therefore, be faced squarely if we are to make good the hardy tradition of our forefathers who insisted upon calling a spade a spade. Let us admit, therefore, that if a highly developed governmental service or bureaucracy is an inescapable concomitant of a highly industrialized community, and if such an industrial system

produces a large urban community—an assumption which we cannot submit to analysis here, but which is generally maintained by economic historians and sociologists—and if, furthermore, such an urban population is wide awake and therefore tends toward democratic or popular government, then the maintenance of a full-fledged bureaucracy within a democracy is of paramount importance. Not only must we reject the idea that democracy is opposed to effective and large-scale, yet responsible, government service, but we are driven to recognize that the future of democracy depends upon its ability to maintain such services. It is an easy but wholly futile attempt to escape from the inexorable cataclysm which failure in this task will bring us, simply to denounce such a government service as irresponsible bureaucracy, rather than to seek ways and means of rendering this bureaucracy responsible.

III

RESPONSIBILITY

THE *Oxford English Dictionary* tells us that a responsible person is one who is answerable for his acts to some other person or body, who has to give an account of his doings and therefore must be able to conduct himself rationally. Every discussion of responsibility has to consider, therefore, to whom the government services shall be rendered responsible. The possibilities or alternatives are considerably greater than is frequently assumed. Because of the peculiar conditions under which the English government developed, there is a widespread belief in English-speaking countries that there are two kinds of responsibility, political and personal, the one enforceable through elections, and the other through courts. But in fact the constitutional order of the Middle Ages sought to make governments responsible to God, and that meant in practice to the church. If the church excommunicated a ruler as un-Christian it was not only a right, but a duty of his former subjects to depose him. Such ancient offices as that of the Keeper of the King's Conscience in England are typical of a type of responsibility in matters of government which we may call religious. And it is superficial, indeed, to sneer at it today; for it was a very powerful restraint in ages which were profoundly religious. After religious sentiment declined in the later Middle Ages and eventually when the Reformation challenged the Roman Catholic Church as the sole representative of God on earth, the problem of responsible government acquired fresh significance, at least in Protestant countries. While the Lutheran states retained a sort of religious responsibility, Calvinist and Puritan nations evolved a more strictly

political responsibility. This is not the place to enter into the doctrinal phases of this differentiation; nor can we take up the material and economic conditions which favored the Lutheran doctrine in Sweden and Saxony, while promoting the Calvinist conception in Holland and England.

When Frederick the Great pronounced his celebrated dictum, "I am the first servant of my state," he was idealizing the reality of a moral or religious responsibility which lacked the effective sanction of an ecclesiastical ban. Similarly, when Burke told his electors at Bristol that he would never "sacrifice his unbiased opinion, his mature judgment, his enlightened conscience" to them, that he did not "derive these from their pleasure; no, nor from the law and constitution," but that they were solely "a trust from Providence for the abuse of which he is deeply answerable," he idealized the reality of a political responsibility. For what he denied, namely that Parliament was a congress of ambassadors from different and hostile interests which interests each must maintain as agent and advocate, against other agents and advocates, has in fact been the shadowy side of political responsibility, just as autocratic and arbitrary abuse of power has characterized the officialdom of a government service bound only by the "dictates of conscience." Nor has the political responsibility based upon the election of legislatures and chief executives succeeded in permeating a highly technical, differentiated governmental service any more than the religious responsibility of well-intentioned kings. Even a good and pious king would be discredited by arbitrary "bureaucrats"; even a high-minded legislature or an aspiring chief executive pursuing the public interest would be thwarted by a restive officialdom. Fundamentally, these difficulties are breakdowns in the hierarchy of control and coercion as we outlined it in the previous chapter. Nor can they be altogether condemned; for while the administrative services may thus thwart the best of chief executives and legislatures, they also safeguard the community against the worst of

"kings and commons," if such should ever happen to be in power. In other words, something beyond these broader types of general responsibility must be found to fill in the interstices, where government service is far flung and technically complicated.

The Public Servant before the Court

Does the personal responsibility of each public servant, enforceable through the courts, offer the necessary safeguard? As we have said already, a predisposition has existed in English-speaking countries to answer this question in the affirmative.[1] But voices have been raised more recently which have utterly denied such a possibility.[2] Instead, it is urged that the government services themselves should become judicially minded, should be "judicialized."[3] Besides, there has for a long time existed an opportunity for the courts to pass on the validity of acts of officials of the government wherever the court's assistance was needed in enforcing the official act, and courts have had the power to issue certain writs to restrain or compel official action. What is more important, Professor Dicey's "rule of law," according to which public servants are liable for their acts in the same way and to the same extent as any private person who infringes the legal rights of another, is not altogether correct. Even in common law many public servants enjoy a certain immunity from the consequences of their acts, and other immunities are established by express statute.

Administrative Courts

Yet the multiplication of such statutes produces precisely that problem of responsibility with which we are here

[1] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (New York, 1915); Hewart of Bury, *The New Despotism* (New York, 1929).

[2] W. A. Robson, *Justice and Administrative Law* (London, 1928).

[3] John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, Mass., 1927); James Hart, *Tenure of Office under the Constitution* (Baltimore, 1930).

concerned. Nor is the problem of administrative responsibility exhausted by providing a technique for enforcing responsibility for the doing of something which should not be done. It is even more important to provide sufficient safeguards against failure to do what should be done. For administrative action is positive, and not merely restrictive; and an administrative body ought to be primarily interested in "getting something done," rather than in adjudicating differences. The solution for these difficulties seems to lie in the direction of developing judicially minded or "judicialized" administrative bodies which stand somewhere between the ordinary official and the courts at law, and whose determinations are subject to review by the ordinary law courts in matters of law, both present and future. Whether such bodies are called "administrative courts" or not seems rather immaterial, though it has given rise to heated controversy.

Subordination to the Executive, Judiciary, or Legislature?

The establishment of such "judicial boards" raises, however, very serious difficulties in connection with the hierarchical principle, as outlined before. In other words, the question posits itself, Are such administrative tribunals going to be subordinated in their operation to the executive, the legislative, or the judicial branch of the government? In which of these establishments do they belong? John Dickinson, in his remarkable study on *Administrative Justice*, was primarily concerned with their relation to the law, their significance for the time-honored principle of the supremacy of law in English and American tradition, and he therefore felt sure of the need of subordinating them to the courts, as far as rule making was concerned. W. A. Robson, in his similarly significant study on *Justice and Administrative Law*, focused attention upon the various technical tasks and the policy-forming significance of administrative findings, and therefore insisted upon effective subordination to the executive (and that meant, since

he was writing for England, to some extent also the legislative) branch of the government. The American chief justice, Taft, writing the opinion in the Myers case, was of the same mind, and the opinion was a more radical one in view of the separation-of-powers doctrine.[4] Because of this doctrine James Hart undertook to argue to the contrary that such "judicial boards" should not be made responsible to the executive but should be given independent status under the legislature, like courts. This problem of tenure is of such importance in connection with the problem of responsibility that we shall do well to examine it somewhat further at this point, though other aspects of the controversy will be treated below in the chapter on the separation of powers.

Tenure under the Executive

The reason Professor Hart set forth in his elaborate argument for making tenure of office in regulatory commissions like the Interstate Commerce Commission independent of the executive, was his belief that the "judicial attitude" can best be maintained if tenure is made secure. Moreover, the "scientific" attitude, which is a second prerequisite for the regulatory activities of these commissions and, in its need for detachment and impartiality, is closely akin to the judicial attitude, also presupposes tenure during good behavior. The long struggle for academic freedom demonstrates this convincingly, since it has always taken the form of a struggle for independence of tenure. These arguments are convincing, but unhappily Professor Hart has given them a most unfortunate turn by taking for granted an inherently unnecessary antithesis between such "judicial boards"—he calls them "administrative tribunals"—and what he stigmatizes as politico-bureaucratic bodies. This is apparently due to the fact that he tends to ignore the American civil service. Its essential characteristic is independence of tenure, and anyone familiar with

[4] *Myers* v. *The United States*, 272 U.S. 52.

the workings of the various government bureaus charged with scientific work will testify that it exhibits a very high degree of "scientific" attitude. This is true of many administrative agencies which are thoroughly part and parcel of the executive hierarchy, whether in the Department of Agriculture, the Treasury, or what not. If Professor Hart had given due consideration to this set of facts, he would have found a strong supporting argument for his thesis that the members of regulatory boards and commissions should not be removable during good behavior; and at the same time he would have seen that this permanence of tenure could be as well assured under the executive as if they had an independent status under the legislature, such as courts have.

The Rôle of the American Civil Service

In fact, as we have seen, a fully developed government service (or bureaucracy) presupposes publicly known and determinate qualifications for office which, because of the great cost, are ordinarily not acquired unless security of tenure can be guaranteed. It is therefore no accident that the highly developed bureaucracies of Europe all provide for life tenure during good behavior, frequently even protected by the rule that an official may not be removed without a judgment against him in a disciplinary court.[5] Yet, in spite of this independent tenure, a sufficient amount of integration is secured by rules regulating the internal service relationships. If the antithesis between judicial and politico-bureaucratic decisions which Professor Hart has construed were really existent, the American civil service would be doomed to failure. As it is, the hope of "judicializing" American administration, which Professor Hart cherishes as much as anyone among us, lies precisely in extending the civil service. Moreover, by constructing an antithesis between "judicialized" and administrative

[5] Leonard D. White, ed., *The Civil Service in the Modern State* (Chicago, 1930), sections on France and Germany.

decisions he has blocked favorable consideration of his inherently correct demand for making the regulatory commissions independent, because their work is not only judicial but also administrative. He himself points out that the Federal Trade Commission, in answer to criticisms, evolved a differentiation between officials prosecuting offenders (administrative) and others adjudicating cases of offense. Similarly, the Interstate Commerce Commission has, to some extent, separated legislative, administrative, and judicial tasks. An impartial, responsible attitude and behavior are as much needed in one as in the other.

Functional and Political Choice

The higher you go, the more definitely political considerations intrude themselves, whether the office is judicial or administrative. This fact has in recent years been at times obscured because the real political division is not between Democrats and Republicans, but between conservatives and progressives. Noteworthy conflicts over appointments amply prove this contention, whether the case be that of Charles Evans Hughes or Joseph B. Eastman. You cannot take these offices with vast powers attached to them "out of politics," for politics is not a bottle or any other variety of container. Politics is the struggle for power. And where there is power, there is politics. What you can do, and what you must do, is to make politics responsible. Judicial decisions are relatively responsible, because judges have to account for their action in terms of a somewhat rationalized and previously established set of rules. Any deviation from these rules on the part of a judge will be subjected to extensive scrutiny by his colleagues and what is known as the "legal profession." Similarly, administrative officials seeking to apply scientific "standards" have to account for their action in terms of a somewhat rationalized and previously established set of hypotheses. Any deviation from these hypotheses will be subjected to thorough scrutiny by their colleagues in what

is known as the "fellowship of science." In both cases, there are wide areas where doubt and controversy lead, now to indecision, now to arbitrary selection among possible alternative solutions. But a considerable responsibility remains, as is most easily seen when unqualified persons attempt to carry on such offices. If a specific designation were desirable, it might be well to call this type of responsibility "functional" and "objective," as contrasted with "general" and "subjective" types, such as religious, moral, or political responsibility. For in the former case, action is tested in terms of relatively objective problems which, if their presence is not evident, can be demonstrated to exist since they refer to specific functions. Subjective elements appear wherever the possibility of relatively voluntary choice enters in, and here political responsibility is the only method which will *insure* action in accordance with popular preferences.

Whether such administrative or judicial bodies (and hybrids between them) whose work intermittently involves such choices be subjected to the legislature, the executive, or both, depends upon whether the choices lie in the field of rule making, rule administering, or both, at least under the principle of the separation of powers (see below, chapter V). But even though such bodies are subjected to both in regard to appointment, the power of removal should probably not be vested in either, except according to a rigidly defined disciplinary procedure.

Responsibility of a Career Administrator

Another consideration, which is frequently overlooked in this connection although important because it insures vigorous action on the part of administrative bodies, is the following: If their members look upon their governmental service as their life work, they are more likely to pursue its tasks with a view to the general interest for which the service has been established than if they must cultivate outside relationships which will take care of them when they

are removed from their public post. It is this psychological factor which supplements "objective" responsibility. Moreover, its force can be greatly enhanced by insuring a career in the service. Therefore, the possibility of rising within the service on the sole recommendation of meritorious service to some extent produces a responsible government service, precisely where the patronage destroys it. The notion that an effective partisan orator or organizer qualifies himself for responsible work in, let us say, the revenue service because he "represents the will of the people" is rapidly being discredited (though recently revived in Germany). We realize today, owing to the contributions of modern psychology, that there is no such thing as a specific "will of the people" with regard to the technicalities of revenue collection or any other "objective" task or function. All the people want is "good" execution of this task. Consequently "responsibility" to the people does not require partisans of a particular general outlook, whether Republican or Democrat, conservative, progressive, or socialist, but it does require specialists who "know the ropes" and will therefore effectively execute the general rules decided upon by executive or legislative leadership in accordance with popular preferences. Fortunately, people aware of such "objective" standards and sensitive therefore to such "objective" responsibility within a given function are usually glad to be relieved of the obligation of making decisions where no objective standards are available. The very passion for objectivity and impartiality which renders them judicially or scientifically minded, or both, makes them shrink from any rash and arbitrary decision. They are delighted to leave that to the people, murmuring contentedly: Fools rush in where angels fear to tread. It is their peculiar conceit not to realize that some decision *has* to be made. To the representatives of the people, both executive and legislative, falls the difficult task of coördinating these opposing viewpoints, and thus of supplementing objective and functional by political responsibility.

IV

THE BILL OF RIGHTS AND THE GOVERNMENT SERVICES

IT is customary to look upon the bill of rights in any constitution as the instrumentality through which the arbitrary expansion of government is limited and a sphere of "natural" rights for each individual is safeguarded against political interference. The idea that certain rights are natural rights has a long history,[1] and whatever its grounds, it produces the impression that certain things, like private property, or freedom of assembly, have an existence and meaning quite apart from any government. Yet, in fact, all of them presuppose effective governmental services, and they are therefore natural only in the sense in which everything which exists is natural. If anything more specific is meant by "natural," then these rights are not natural, but social or rather political. They express the dominant ideas concerning the relations between individual citizens (for noncitizens have more limited rights) and the government.

Interaction of Government Activities and the Bill of Rights

When looked at in this light, it appears that bills of rights must necessarily undergo considerable alterations when these dominant ideas change with the changing functions of government. For as soon as new interests become important enough in the community to rally a sufficient group of people to their support, they will clamor for recognition. If this is true, the activities of the government also affect

[1] Benjamin F. Wright, Jr., *American Interpretations of Natural Law* (Cambridge, Mass., 1931).

the bill of rights and the two interact, and influence each other in turn. In determining the relations between the individual citizen and the government within a given state, the governmental services are the active, pushing factor, and the bill of rights the passive, restraining factor.

The Permanence of the American Bill of Rights

There is, then, nothing intrinsically holy about any particular bill of rights, though the existence of some such thing as a bill of rights must be considered an essential part of constitutional government, i.e., government according to law. To be sure, the bill of rights may not have become part of a written constitution. It may be embodied in long-established custom or it may be found in various legislative acts which express the public's preferences, and are not the work of the administrative services. But wherever there is a written constitution, a bill of rights is ordinarily embodied in it, and that is the situation in the United States. This is a great advantage in that the fundamental significance of the rights can be indicated and safeguarded by requiring a more than ordinary majority for their alteration. There is the corresponding disadvantage that a considerable organized effort involving the expenditure of large funds is necessary to bring about an alteration, and the system, therefore, favors the rich, at least up to a certain point. Under the conditions of modern mass civilization latent interests of the public can reach articulation much more easily if they coincide with the interests of the wealthy section of the public, than if they clash with them. To weigh this advantage and disadvantage is difficult. As long as one avoids taking the side of either the distinctly rich or the distinctly poor, but remains on middle ground, it is probably impossible to make a reasoned decision. Whatever it might be, there can be no doubt that such constitutional bills of rights do exist in the United States.

When looking over the group of provisions of the federal constitution which contain the bill of rights of American citizens as far as their dealings with the federal government are concerned (and the same would be true of the bills of rights of the several states in so far as they regulate their dealings with citizens), it is easy to fall into one of two prevalent errors. One is to assume that these rights have remained unaltered since they were embodied in the document, and the other is to hold that "there is nothing to them." In reality, these rights have undergone very considerable alterations by judicial, legislative, and executive interpretation, as well as (least of all) by constitutional amendment. Nor has the trend been uniformly in one direction; almost all of them have had their ups and downs.[2] What is more, new rights like the right to work, as expressed in unemployment insurance and other measures, have made their appearance in popular parlance and in legislation, if not as yet in constitutional law. Significantly enough, the German constitution of 1919 explicitly recognized this "right to work" as one of the fundamental rights of Germans, and whatever may have been changed since that time, this particular right the National Socialist government holds as sacred as did its predecessor. It is an expression of dominant ideas in our highly industrialized countries.

The Source of "Natural Rights"

Many people will exclaim: "Why, this right invites governmental interference with private business, while the older 'natural' rights tended to restrict it." To which it must be answered that the right to free assembly, for example, could be guaranteed against governmental interference only after it had been guaranteed against private interference by governmental action. Wherever private rights are secured through a constitutional bill of rights,

[2] Zechariah Chafee, *Freedom of Speech* (New York, 1920); Rodney L. Mott, *Due Process of Law* (Indianapolis, 1926); W. W. Willoughby, *Constitutional Law of the United States* (2d ed., 3 vols.; New York, 1929).

they must first have been created through government interference with private license. It is, in fact, well known that much more serious handicaps to freedom of speech and of assembly arise through the interference of private parties. In Germany, first the Socialists and Communists, and later the National Socialists organized their followers in such a way as to make it physically dangerous for an opposing group to hold assembly and allow them access. No more striking illustration of the necessity of governmental protection for these supposed "natural" rights could be imagined than what happened at demonstrations of Communists and National Socialists in the latter days of the German Republic. Large detachments of police, mounted or on trucks, had to be scattered through such a demonstration in order to beat off any attack by their opponents. It might be argued that this situation was unusual, fraught as it was with the potentialities of civil war. In fact, this pathological state of affairs merely serves to bring into clear relief the true nature of the normal state. Nor would it be at all difficult to duplicate these German cases by reference to the period preceding the American Civil War—as a reminder the name of John Brown alone may suffice here.

In short, a bill of rights cannot effectively regulate the relations between the individual citizen and the government unless these rights are effectively enforced by government officials, like all other legislation. A responsible government service plays, therefore, a dual rôle under a constitution which, like the American, contains a bill of rights. It has to be guardian of the very same rights which are set down to restrain its own actions. This dual function of the government service has been obscured by the erroneous and one-sided conception of bureaucracy frequently applied to it, as we have shown above. In calling the government service a bureaucracy, the law-enforcing functions of such services, be they ever so large, have been put into the background, with the result that it

is often forgotten that liberty could not survive at all if they ceased. The continued maintenance of the cherished constitutional rights of every American presupposes the effective establishment of a developed yet responsible bureaucracy.

Contradictory Demands of Natural Rights

It would be tedious to elaborate this general proposition by reference to each particular right. Certain rights have come into the discussion by way of illustration, others can readily be supplied by the attentive reader. It is necessary, however, to dwell a little more upon a point which yields an important corollary to this general proposition. It results from the existence of several such rights. Clearly there exists the possibility of conflict between two or more of them. These conflicts arise most easily when the official has to consider whether to disregard the restraint which one of these rights imposes upon him or to disregard the duty of enforcing some other. Often the freedom of assembly will only be enforceable if the freedom of speech for opposition groups is restricted. The freedom of contract cannot always be reconciled with the freedom to organize, and so forth and so on. These cases are only a special form of the general problem of conflicting constitutional provisions, a matter which concerns not only the courts, as is commonly assumed, but the administrative officials as well. For wherever such conflicts appear, administrative action is "up against it." If you make the official personally liable for acts done in pursuit of his duties, he is likely to avoid action which a court might hold to have been *ultra vires*, i.e., beyond his authority, even though the official's own better judgment of the facts would otherwise impel him to take the action.

Liability for Administrative Acts

It seems to me that this sort of situation leads to the conclusion that the liability for such actions and their

consequences should be borne by the government in its corporate totality, if we wish to secure a responsible government service under our bill of rights, not only in the passive sense, but in the active sense of responsibility for doing things. Actual experience in local government bodies where a certain amount of that type of corporate liability is allowed tends to show that objectively responsible conduct in terms of the particular function can be secured by internal disciplinary measures. Relieving the officer of the government from this type of personal liability has, moreover, the great advantage for the individual citizen that he is much more likely to secure the indemnity to which he may be entitled, because the government can bear the financial burden, whereas the officer often cannot. Thus, if in a civil dispute I, lying asleep on my porch, am accidentally shot by a soldier, the important point for me is not whether the soldier acted according to his legally defined duties; for even if he did, I may still be entitled to an indemnity as an innocent bystander. Nor does it help me to prove in court that the soldier did not act according to his legally defined duties if thereupon the soldier turns out to be too poor to indemnify me. And even if he could pay, it might be gross injustice to burden him with the liability as long as he *believed* that shooting was the only effective means of quelling the disturbance. If, as an American citizen, I am seriously damaged without due process of law by an officer of the government trying to maintain the freedom of assembly or what not, I ought to be entitled to just compensation. And this compensation should come from the party responsible for the damage, namely, the American government and the American people, who established it under a constitution. It is not a controversy between the individual officer and the individual citizen, but between the government and the individual citizen. Thus we reach the conclusion that the government really is responsible for all acts of governmental servants performed in pursuit of their various duties.

The conflict of such duties is inherent in their nature, and neither the officer nor the citizen is responsible for it.

As governmental services increase, this question gains ever greater importance. Take the increase in the police force alone. And when the government enters the "retail business," as Calvin Coolidge chose to call the proposal to operate a great power dam under government service, it should surely assume the liabilities which a private concern would bear if it were operating the plant. There are trucks which may run over somebody, contracts for light and power which may be erroneously drawn or suddenly canceled, etc., etc. If the government assumes no liability for the acts of its officers under any of these heads, it is indeed going to be a most irksome matter for those citizens who are unfortunate enough to come into contact with it. But let nobody claim this to be the result of bureaucracy. It is merely the outcome of applying the outworn formula that "the (surely by now legendary) king can do no wrong." Thus we find that under the American, or any other sound, bill of rights, every citizen should retain a measure of protection from damage to life, limb, and so on which he may innocently incur through the action of the government's officers.

Liability and Responsibility

This proposition alone will insure that a responsible government service wielding vast powers of control, supervision, and regulation of every phase of the public's activities does not take on the appearance of arbitrary bureaucracy. At the same time, under the checks of a restrictive bill of rights, it will also insure strong action on the part of the service. This is clearly as much in the public interest as the preceding safeguard. What is the use of granting such powers to various government services if the individual officer recoils from responsible action because he is held personally liable? The services will break down, chaos will ensue, and the cry will be raised: "Away with these

restraints; down with the constitution; we want action." Rather than allow this otherwise inevitable conflict to destroy the belief that responsible governmental service can be conducted within the framework of the American constitution and its bill of rights, it is better to recognize the legal liability of the government for its officers—in other words, to admit that the American king can do wrong, at least to individual citizens. If the people through their government are unwilling to accept corporate responsibility for the acts of their officers, they do not yet know what it means to conduct a responsible government in an industrial age.

Administrative Courts and the Bill of Rights

Nor is such corporate liability without precedent. On the contrary, the strictures of Dicey upon "administrative law" and "administrative courts" would have been much less severe if he had given adequate consideration to this question. Since France may be considered as infected with the tradition of royal absolutist government, let us turn to democratic little Switzerland to find precisely this sort of corporate liability enforced through a court primarily concerned with these cases. In Switzerland this court is actually embodied in a "chamber" or department of the Federal Court (corresponding roughly to our Supreme Court). It is charged with adjudicating controversies arising from administrative actions taken toward private citizens as well as from regulating ordinances that apply to the government services themselves, whenever they affect the interests of private citizens.[3] The opposition which such a development usually encounters from the government officers themselves is understandable but not acceptable. The citizen who seeks redress against the decision of an administrative official is rarely satisfied when the only appeal lies to the superiors of this official. He is inclined to suspect that justice has been denied to him.

[3] Fritz Fleiner, *Schweizerisches Bundesstaatsrecht* (Tübingen, 1923).

When such an appeal can be presented before an independent tribunal, on the other hand, the weight of the decision is increased and the moral position of the government services in the community is strengthened. There is less likelihood of an outcry against arbitrary bureaucracy. The rights of the individual citizen as guaranteed in the constitution can be interpreted in the light of adequate precedent, and indemnity may be granted for an infringement of these rights by the government in cases where the courts would hesitate to find illegal an act of a particular officer. As Fleiner has so admirably expressed it: "The authority of the government cannot be maintained by multiplying competences. It must be based upon the conviction of the citizens that all power of the government is kept within limits by the law."[4]

[4] *Ibid.*, p. 224.

V

THE SEPARATION OF POWERS AND THE GOVERNMENT SERVICES

THE famous reason given by the constitution of Massachusetts for the separation of powers into a legislative, executive, and judicial branch, namely, to make sure that this would be "a government of laws and not of men," reflects in the most striking manner the faith in general rules as the most effective means of maintaining law and order in the community. When looked at from this angle the separation of powers appears largely in the light of a control mechanism under which both the legislature and the courts are set up to keep the executive power within the limits established by the constitution. Any activities of the executive involving specific measures rather than the execution of general rules were tucked away under the police power.[1] But as the sphere of governmental action broadened, and the realm of administration as contrasted with the mere execution of laws became increasingly important, the separation of powers had the curious effect of throwing more and more power into the hands of the executive branch of the government. More and more actual rule-making authority passed over to the president.[2]

Under these conditions the American Congress as well as many of the state legislatures hit upon the device of creating separate boards and commissions, one of the first of which was the Interstate Commerce Commission. On

[1] Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (Chicago, 1904).

[2] James Hart, *The Ordinance Making Powers of the President of the United States* (Baltimore, 1925); John P. Comer, *Legislative Functions of National Administrative Authorities* (New York, 1927).

the pretext that these commissions exercised quasi-legislative functions of rule making and because they were to make recommendations to Congress for future legislation, bodies were created which were responsible to Congress and whose functions were administrative and judicial as well as legislative, or rather quasi-legislative, quasi-judicial, and administrative. If one discards the legal fiction which the prefix "quasi" expresses, one is led to conclude that the establishment of these commissions amounts to abandoning the separation of powers, or so it seems at first sight. As a result lawyers have been displaying their gift for dialectical rhetoric by tilting at the ancient doctrine as more or less completely outworn. Yet these commissions are unthinkable except under a system of separate powers, and really represent a reappearance of the tendency toward separated powers upon a lower plane. Even a cursory examination of the work of, let us say, the Interstate Commerce Commission shows it to differentiate between its legislative, judicial, and administrative functions, employing different procedures for their handling at every point.

Three Types of Decision

The idea that the separation of powers is gone from American constitutional law is due to an incomplete understanding of the doctrine. Before we can fully explore the significance of this doctrine for the working of government services under the American constitution, it is therefore necessary to examine the implications of the doctrine itself. In its fully developed form, in which legislative, judicial, and administrative or executive functions are distinguished from one another, the doctrine has not only a legal but a scientific aspect. If the doctrine suggests that the three functions as distinguished *should be* vested in separate bodies of the government, it also implies by this suggestion that governmental functions can be distinguished into legislative, judicial, and executive or administrative functions. Upon further reflection it will be seen that these

distinctions are by no means arbitrary, but represent the three possible formal types of decision which human beings can make. We may decide to do something always or never; that is the general or legislative decision. Or we may decide to do something here and now; that is the specific or administrative decision. Finally, we may decide that a certain action falls or does not fall within the rule set up by a general decision, and therefore should or should not be taken. That is the controversy-deciding or judicial decision. This elementary description of three types of decision immediately reveals the general validity of the distinctions underlying the doctrine of the separation of powers. It also indicates to some extent the inherent nature of the relation between legislative, executive, and judicial acts.

The Character of Executive Decisions

Now the curious thing about the prevalent conception of the separation-of-powers doctrine in this country is its tendency to neglect the peculiar feature of true executive or rather administrative action, viz., to decide to do something here and now. In Locke's *Essay* this action is limited to foreign affairs, while what is designated there as executive power is largely that which we now would call judicial power; for it consists of applying and executing the laws. In Montesquieu, however, the true executive power is not limited to foreign affairs, but is charged with maintaining order and security, both without and within. Thus it assumes the whole burden of the police, in the sense of active governmental administration as it was understood then. In the United States this true meaning of the executive power has forged ahead under the impact of the industrial revolution, which created additional administrative tasks in every sphere of life. These administrative tasks were, however, shot through with rule-making (legislative) and controversy-deciding (judicial) functions.

Separation of Powers in the "Independent" Agencies

Putting all these tasks exclusively under the executive meant, therefore, the gradual substitution of concentration of powers, and hence, as we have already said, Congress organized commissions and boards responsible to itself rather than to the executive. This was quite practical, from the point of view of maintaining a balance of power, but in view of the distinctly administrative aspects of the commissions' work it was bound to raise very serious difficulties for the government service as a whole. Both the differentiation from and the integration with existing administrative bodies was bound to suffer if not to fail altogether. It was bound to do so because as far as these commissions were concerned the power of control and coercion was placed in the legislature. This violated the doctrine of the separation of powers, not in its scientific, but in its legal or practical aspect. To this aspect we must now turn for a moment.

At the risk of boring the reader with platitudes, we wish to remind him once more that the doctrine of the separation of powers not only distinguishes between the powers concerned in the three types of decision—rule making, measure taking, and controversy deciding—but also insists that each of these powers should in the main be exercised separately by one person or group of persons, thus constituting a department of the government. Each of these departments, the legislature, the executive, and the judiciary, must, however, be restrained sufficiently to keep it within its sphere as distinguished, and this necessitates the introduction of certain "checks," such as the veto of the president, the power of impeachment and of pardon, judicial review, etc. It is common knowledge that these restraining "checks" give a measure of legislative power to executive and judiciary, a measure of judicial power to legislature and executive, and a measure of executive or administrative power to judiciary and legislature. Since

this is so it might be argued that there is nothing particularly revolutionary about the creation of such "independent" commissions. The executive having acquired a certain amount of quasi-legislative and quasi-judicial power through, let us say, the varied activities of the Departments of Commerce, Labor, Agriculture, and the Interior, Congress has through these commissions acquired a measure of executive and quasi-judicial power. But the difference is at once apparent when we observe that we need not add the little prefix "quasi" to the executive or administrative power thus acquired. For in reality, the quasi-judicial and quasi-legislative powers of any administrative department of the government remain definitely subject to revision by the legislature and the judiciary, while on the other hand the administrative or executive branch of the government has no means of superior coercion and control through which to affect the administrative activities of these boards and commissions. There can be little doubt that this involves serious difficulties and inconveniences and a high measure of inefficiency.

The Problem of Integration

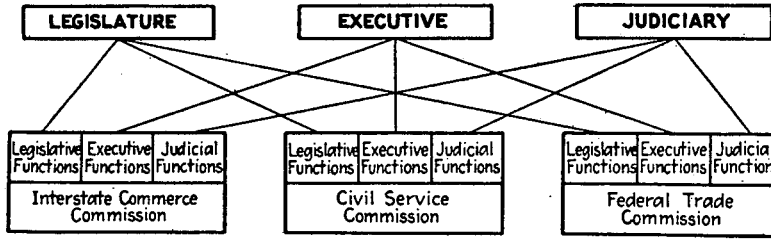
Coördination and integration of departmental activities with the activities of such "independent" agencies must be sought in the dubious technique of coöperation. It was the clear realization of these shortcomings which caused Mr. Chief Justice Taft to claim the unrestricted power of removal for the president. Against this opinion Professor Hart advanced the arguments which we have reviewed in chapter III, and with which we agreed in so far as they led to the conclusion that an unrestricted power of removal should not be vested in the president, or in anyone else. We found, however, that the distinction between "judicial" and "administrative" (politico-bureaucratic) attitudes must be rejected. This opinion now receives additional support through the discovery that all these boards and commissions have considerable administrative tasks to

fulfil, and if this distinction were admissible, nothing short of dividing these commissions into quasi-legislative, quasi-judicial, and administrative bodies would be acceptable. In reality, no such division needs to be advocated (and it would surely be difficult to put it across). All that is necessary is to seek some way of subordinating these boards and commissions in their administrative capacity to the executive, as they are already subordinated to Congress and the courts in their other capacities. How could this be accomplished?

Having rejected the power of removal because of the judicial functions of these bodies, and knowing that security of tenure seems to offer no considerable obstacle to the differentiation and integration of the highly efficient bureaucracies of various other governments, we are now ready to give the chief executive the power to promulgate such orders and ordinances and to instigate such measures as seem desirable to him in the sphere of these commissions' administrative duties. If it were found that one or more officials in a certain commission were duplicating work done in one of the departments, it would be the right and the duty of the president to consolidate these activities, by ordering the commission either to make its results available to the other department or to use the results of the department and abandon its own activities along that line. If that sort of arrangement were carried through, we should then have each of these boards and commissions, concerned as they are with special technical functions, such as railroads, monopolies, tariffs, etc., differentiated according to the separation-of-powers doctrine. Then the executive functions of each body would be subject to revision by the executive, the legislative functions to revision by the legislature, and the judicial functions to revision by the judiciary, which would give us the schema shown on page 54.

From what has been said so far it should be clear that the separation of powers exercises its main influence upon a

responsible government service under the American constitution through the particular type of differentiation of functions which it imposes. If responsibility of the services is to be maintained, it is very important that hierarchical powers of control and coercion be ordered all the way through according to this elementary differentiation. If the rise of strictly technical functions of regulation occurs in limited fields of industrial activity, such as railroads, radio, electric power, etc., and these functions are for technical



reasons vested in a separate body, its own functions will have to be, and usually are, themselves differentiated according to the distinction of functions which the separation of powers implies.

Executive and Administrative Functions

Attentive readers will have noticed that executive functions have repeatedly been referred to also as administrative functions. Naturally, the question arises as to whether there is not hidden here a differentiation according to function which the threefold separation of powers neglects. This question receives additional weight when we discover that at least in one important modern democratic government a differentiation along these lines has taken place. In Sweden, experience with parliamentary as well as royal absolutism during the seventeenth and eighteenth centuries led to the elaboration of a constitutional system under which an administrative branch has become separated from the executive. While the executive power of the Crown is conducted according to the system of parliamentary responsibility (although parliamentarism was

quite slow in establishing itself), the great public services like the Post Office are conducted with considerable independence, "according to law." The objective, functional responsibility of which we have spoken is enforced through judicial boards especially concerned with complaints against administrative action, and these complaints are facilitated by throwing all the files of the services open to public inspection. In other words, if a Swedish citizen believes he has been arbitrarily mistreated by an official, he can and frequently does request permission to look over the files which deal with that particular matter. To buttress further the responsibility of these very independent administrative services, a solicitor general, elected every year by Parliament, has the right to prosecute any employee who has failed to discharge properly his official functions. Since all administrative records are public, as we said above, and may be looked into by the newspapers, this is a formidable weapon against any arbitrary exercise of administrative functions. Considering these arrangements, it cannot astonish us that in spite of the great independence of those administrative boards, Sweden has an exemplary administrative set-up which pretty nearly fulfils all the criteria of a fully developed responsible government service. The duties, competence, and organization of these boards being outlined by permanent instructions issued by the executive, no considerable difficulties are encountered in connection with a coördinated differentiation and integration of functions.

There can be little question that the American federal government tends in the same direction of differentiating between strictly executive and purely administrative functions, though owing to historical accident so distinctly a public service body as the Post Office is part of the executive function. Nor is this arrangement likely to be altered for some time to come. As we pointed out above, the American party system will require certain positions for patronage, and the postmasterships seem a rather innocuous field

in which to practice this necessary vice. But in the functions of more recent origin we find a distinct differentiation along this line; for example, the proposal to put the Federal Reserve Board under the Treasury was defeated, and so was the earlier idea of placing the Civil Service Commission in the Department of the Interior; and Hoover's pet notion of transferring the Interstate Commerce Commission to the Department of Commerce met a similar fate. But if this trend persists, there can be no question that the chief executive must have some authority with regard to the set-up of these administrative agencies, so that their competences and functions may be and may remain well coördinated with the rest of the government services.

The Rule-making Element in Administration

The tendency to look upon the executive and the administrative branch of the government in terms of the "executor" of the law has obscured a part of the executive or administrative function which is becoming increasingly important. If the typical form of an administrative decision is to do something here and now, e.g., to break through a certain door because behind it there may be a speakeasy, it is in the nature of things inevitable that the official so doing will gather experience as he goes along. He will discover that certain things can, others cannot be done. He may find that certain rules and certain laws can be enforced while others cannot. There is necessarily something speculative, something normative and idealistic in a new rule. I as an individual, or the legislature as a group, have perceived the desirability of a certain result; thereupon they have framed a new rule calculated to achieve that result. But when the administrative official is charged with enforcing the rule, he may quickly discover that "it has no teeth," that he encounters insuperable obstacles in the path of enforcement which must be removed by additional rules granting additional power—or which may be of such a nature as to render the new rule

unenforceable altogether. It is easy to imagine rules which are so diametrically opposed to nature that they cannot be enforced.

If you will read through a report to Congress of, let us say, the Interstate Commerce Commission, you will find certain recommendations made there for the alteration of existing legislation which are based upon the fact that existing legislation is unenforceable. If, for example, legislation demands that railroads be consolidated but that existing competition be maintained, this is impossible, for every consolidation amounts in itself to a reduction of competition, and that is its purpose. If, furthermore, the Commission is directed to promote the consolidation of railroads but to see to it that strong roads combine with weak roads, and yet is given no powers of compelling such unequal wedlock, the administration of that part of existing legislation becomes an impossibility. In all such cases—and they occur wherever new rules are to be enforced or where old rules have to be enforced under new conditions—the rule-making power must seek the advice of the measure-taking, the administrative and the executive power.

Along broad lines of national policy this impact of executive and administrative experience upon the course of legislation has found expression in presidential messages to Congress, an old and well-established institution. But there are many technical subjects requiring detailed regulation where that institution is not available and where, therefore, direct guidance from the administrative officials must be and usually is sought by the legislature.[3] Though we saw above that this fact is, or at least was, used as an excuse for the establishment of the various independent commissions, the practice is by no means limited to them. Take, for example, the Department of Agriculture. An analysis of actual practice reveals that congressional committees accept the recommendations of the departmental specialists, wherever their suggestions do not seem to

[3] Robert Luce, *Congress; an Explanation* (Cambridge, Mass., 1926).

involve broad questions of national policy. The distinction between such "political" questions and mere administrative ones is, of course, rather uncertain, as may be gleaned from the fact that the McNary-Haugen bill was originally such a "technical" measure. If, then, all administrative departments are actively engaged in collaborating with the legislature, they must be admitted to occupy an important though a subordinate rôle in the process of legislation. Even if American traditions do not sanction the drafting of legislation by the central departments as a matter of course, as is done in other countries, American political practice shows these central departments engaged in drafting a good many bills. This tendency deserves encouragement; as long as the legislature retains the final word, there can be no question of an interference with the separation of powers. On the contrary, a truly responsible government service under the American constitution will show the greatest concern in improving the legislation of the United States. For among all the citizens, the technically competent specialist has an objective and a functional responsibility for such legislation. It is his task to educate the public by making available his findings as a responsible administrator of existing legislation.

No device can surpass the investigatory commission in providing a platform for a responsible official if such a commission is properly constituted. We have had some very important commissions of inquiry. "Yet such commissions of investigation ought," in the language of Professor Frankfurter, "more and more to be called into use to deflate feeling, define issues, sift evidence, formulate alternative remedies. If guided with imagination and courage, such commissions are admirable means for taking the nation to school. They should aim to ascertain facts, pose problems, and seek to enlighten the public mind."[4] They offer the legislature, which must of necessity set them

[4] Felix Frankfurter, *The Public and Its Government* (New Haven, 1930), p. 162.

up, an opportunity to call to the attention of a larger public the views of responsible officials concerned with the administration of vital legislation, and to educate the public with regard to impending improvements. If so conceived, commissions of inquiry help to round out the functioning of a responsible government service under the American separation of powers.

VI

FEDERALISM AND THE GOVERNMENT SERVICES

FEDERALISM, by dividing the source of ultimate authority, creates a great many difficulties for a responsible government service. It is therefore hardly surprising to find most administrative specialists opposed to federalism, or at least very critical of it. Their demigod, efficiency, suffers too grievously in the never ending contest between federal services and state services to leave them indifferent to this constant source of friction. Yet there are exceptions to this rule. L. D. White observes: "If administration is to be the work of a highly centralized bureaucracy, it is impossible to expect a sense of personal responsibility for good government, which the citizen only acquires when given latitude in dealing with the affairs of immediate concern to his locality."[1] Moreover, Commissioner White points out that in the early years of the American republic, decentralization was more efficient than centralization. We might add that this condition is probably not entirely a thing of the past. But our main concern in these pages is not with efficiency. In fact, we have made rather infrequent reference to this criterion. We have formulated certain criteria characteristic of a fully developed government service, and we have asked how such a fully developed government service or bureaucracy might be kept responsible. In the following paragraphs we shall attempt to show that federalism thwarts the full development of a government service, and that it thwarts also the workings of objective functional responsibility, but that it enhances, at the same time, the political

[1] Leonard D. White, *Introduction to the Study of Public Administration* (New York, 1926), p. 97.

responsibility which we found to be an essential concomitant of functional responsibility.

Regionalism and Rationalization

Turning to our first criterion, it is obvious that both the differentiation and the integration of functions are interfered with when certain geographical areas are marked out for certain functions. The particular function, e.g., child labor regulation, intrastate commerce, or public health, may become of concern to a wider area than the state comprises. In such a case a rational differentiation and integration of functions would require a widening of the area of uniform regulation; but the constitutionally fixed boundaries of states with constitutionally guaranteed spheres of competence prevents such a solution. It is, however, an error frequently made by those who contrast the reality of a federal scheme with blueprint schemes of a centralized administrative set-up to imagine that such a widening of administrative area proceeds without difficulty where federal complications are absent. In fact, local government units, like the towns and municipalities of Massachusetts, often prove under democratic conditions as difficult an obstacle to administrative rationalization as the federal set-up itself. The same thing is true elsewhere, e.g. in the Free State of Prussia, where after the war administrative reform foundered upon (among other things) the opposition of the provinces. For an established administrative organization has ways and means of obstructing change which are just as effective as, even if quite different from, the impediments of a constitutional order. Nor must we ever forget that a certain amount of arbitrariness is inescapable in practice. Regional as against functional differentiation of administrative tasks is an ancient device, found in highly centralized autocracies as well as in constitutional federal states. During his whole reign, the great administrator-king Frederick William I of Prussia struggled with the problem of the relative advan-

tages of regional versus functional differentiation, and a list of the higher offices under the English Crown will reveal at a glance that regional differentiation long held sway in the British Isles as well. People who incline toward the view that modern means of transportation and communication have eliminated the arguments which could formerly be advanced in behalf of such regional differentiation are likely to forget the large number of administrative tasks the effective performance of which turns upon the knowledge gathered by the living together in more limited communities, a matter of personal relationships and so on.

Substitution of Lesser Evils

If this is kept in view, federalism may, under certain conditions, be a valuable safeguard in maintaining a certain amount of regional differentiation of functions where such regional differentiation is more adequate and rational in view of irrational factors, such as size, great variety of climate, population, and so on. Thus in the United States, the regional differentiation in such fields as labor legislation, public utility regulation, police activities, and the like is by no means the unmitigated evil which it at times appears to be when one listens to people exasperated by the evils which it entails. For it is probable that if these activities were differentiated along strictly functional lines, so that the local labor inspector and the local policeman were each at the bottom of a national administrative body concerned with that field of activity alone, other and no less irksome difficulties would arise through their lack of coöperation. Precisely this is the lesson one learns from a more systematic inspection of the problems of differentiation and integration: that whichever way you do it, you are confronted with conflicts of competence, and lack of coöperation. If you differentiate along strictly functional lines over a wide area, it is extraordinarily difficult to secure regional coöperation between your lower-downs. Thus the proverbial lack of coöperation between state and

national officials is paralleled by a similar lack of coöperation between the Treasury and the Labor Department, let us say. Yet, in the long run, the presumption must be admitted to be in favor of functional rather than regional differentiation. Integration of activities on a certain level is simplified if the power of coercion and control is ultimately centralized somewhere. This proposition becomes immediately more evident when we turn to our second criterion, the hierarchy.

Indirect Coördination through Grants in Aid

It is the very nature of a federal state that there exist several hierarchies alongside each other. These are integrated by a constitution and, in so far as such constitution can be amended, by the amending power. For the solution of most administrative problems, this power is hardly ever available in practice. The specialized nature of such administrative adjustments does not permit of their being presented to large groups of people. Under these conditions—and they are particularly stringent in the United States, where the amending power requires large majorities and is very slow—the inherent necessities of administrative tasks have forced the federal government services into adopting an extra-constitutional device of considerable efficiency: conditions attached to federal grants of money to state and local authorities. Such federal aid frequently comes into play where the burden is too heavy for a state to bear. Wherever that is the case, it is possible to require (*a*) a minimum standard of performance and of economy, (*b*) coöperation and integration of several units within a state, (*c*) better-qualified personnel. In other words, the conditions attached to federal grants tend to insure precisely those things by which the full development of an administrative service must be tested. Thus the federal grants in aid have been fulfilling the same functions of stimulating the growth and development of

responsible bureaucracy which general fiscal control and supervision have exercised within the states. For here, too, the tradition of local self-government raised difficulties akin to those of federalism which are in the process of being overcome by a slow assimilation of standards of performance. The techniques of accomplishing this task range all the way from advice and information which can hardly be considered to contain even an element of control and coercion (though persuasion can be quite persuasive!), to total assumption of a given local activity, in which case there is no difference between indirect fiscal coördination and the establishment of an actual hierarchy of subordination and control. It may well be, however, that the usual intermediary techniques of inspection, audit, and requirement of prior permission represent a rather more adequate realization of a responsible government service under the American constitution, fulfilling all the requirements even of modern technical conditions.

This sort of indirect coördination seems to be especially justifiable in all those fields where the government service does not undertake the actual operation of productive enterprises (as it does in the case of the Post Office, or the canals), but limits its activities to regulation of privately operated business. For in regulatory administration the rule-making (legislative) and the controversy-deciding (judicial) actions will always play a prominent part. Since both these functions are more openly public, they can be coördinated quite effectively by less stringent processes than actual subordination. Erroneous rules and decisions of state agencies can be subjected to criticism by the corresponding federal agency, and at least in the judicial fields the possibility of appeal could be considered, although at present such appeals are allowed in no jurisdiction in which both the federal government and the states exercise regulatory functions. Instead, coöperative organizations have been brought into existence by certain bodies, like the Interstate Commerce Commission and the state agencies

corresponding to it.[2] Particularly in the field of research these coöperative undertakings have been extensive for a long time. Under the New Deal the mass of such activities has, of course, greatly increased, and although the federal government has usually assumed administrative leadership, the states and local bodies have coöperated on a large scale, even though the obstacles in the way have sometimes been considerable, particularly where party politics was injected into the personnel field.

Responsibility and Federalism

These tentative conclusions are greatly strengthened, if we recall what was the upshot of our consideration of the implications of a separation of powers. This doctrine we saw sets up a basic differentiation of functions which, in view of its sound theoretical starting point, reappears in technically differentiated fields, such as railroad regulation. Now under federalism, regionally differentiated regulatory activities remain subject to the legislature and the courts in the several states in so far as they involve rule-making and controversy-deciding actions. As this sort of subordination constitutes an important feature in making such governmental services responsible, the federal divisions strengthen the control of regionally dispersed activities. For even though it be claimed that the state legislatures and the state courts are on a lower plane as far as competence is concerned, and more beset by party politics—a claim which would have to be allowed for some states, but certainly would have to be rejected for others—their greater familiarity with local conditions would frequently make them more effective safeguards against functional irresponsibility of regulatory bodies. Besides, the very important function of making local administrative experience available for new legislation, which we found to be an important element in enhancing responsible function-

[2] *Thirty-sixth Annual Report of the Interstate Commerce Commission* (Washington, 1922).

ing of administrative agencies, is much more readily exercised in the state legislatures by state government services than by branches of a federal service.

Corporate Liability

What is true of the separation of powers is also true of the bill of rights. Corporate liability of administrative agencies of the government or of the government as a whole can often be justified in a more limited area where it could not be justified if liability of the whole United States were involved. If, for instance, cattle have to be killed in a certain locality, it is often readily arguable that the state should shoulder the burden inasmuch as people in the immediate vicinity profit most certainly from such preventive measures and may therefore be asked to contribute to the losses which must be inflicted by the community upon the individual, while it is not so convincing that farmers in Arizona should as taxpayers contribute to alleviating the losses incurred by such a measure when it is taken in Massachusetts.

Unity of Career and Federalism

There is another avenue of development which is very slowly opening up and which holds considerable promise for strengthening the power of subordination and control of federal regulatory bodies. This is the establishment of possibilities of transferring permanent administrators from local and state to national positions. The vast expansion of federal activities under the New Deal has pushed forward this new device for integrating state and national government services. We have already pointed out how important the career opportunities have been in other countries in cementing the hierarchy and yet rendering it functionally responsible, since superior achievement counts heavily in an official's favor, other things being equal. Nor can it be doubted that a transfer from a lower federal to a higher state post may often be very desirable in the interest of

improving the service of the state. Such interservice transfers would probably be a mighty factor in developing uniformly high standards of work throughout the federal and state, as well as local, administrations. The coöperative agencies just mentioned would seem to offer an effective link and a happy meeting ground for the several government services.

The foregoing discussion will, I hope, have shown that while difficulties for the development of a highly rationalized government service similar to those engendered by the separation of powers are produced by federalism, yet federalism, like the separation of powers and the bill of rights, is very valuable in rendering the services responsible. Moreover, certain techniques like grants in aid, coöperative organizations, and transfer of personnel are sufficient to overcome the difficulties inherent in a federal structure. Since federalism is also a valuable safeguard against overrationalization in so far as it maintains a certain amount of regional differentiation, it must be grouped with the separation of powers and the bill of rights as a useful concomitant for a fully developed responsible government service in the United States.

VII

THE EDUCATIONAL ASPECTS OF A RESPONSIBLE GOVERNMENT SERVICE

IN an earlier chapter we hinted at the central importance of relating an educational system to qualifications for office. For without adequately prepared men and women to fulfil the tasks which modern administration imposes, there can be no functional or objective responsibility to supplement the political responsibility of the chief executive. We have said that a highly developed government service cannot be maintained unless the educational facilities of the community are carefully and systematically integrated with the needs of the administrative services. Civil service commissions, setting independent examinations, are the American device for achieving such a system of coördinated schooling.

European Traditions of Training for Administrative Service

If we cast a glance at several European countries, we find profound differences in the educational objectives, but also a striking uniformity in the effort to reach them through a government-supported system of schools and universities. Leaving aside for this discussion the lower clerical positions, for which training is everywhere more or less the same, and concentrating our attention here upon what might be termed the higher administrative or governmental service, which is endowed with a certain amount of discretion, we find three distinct types of preparation, represented respectively by England, France, and Germany.

English Imperial Tradition

In England the dominant considerations are what might be termed social and cultural. The idea that a higher

servant of the Crown should be a cultured gentleman dates back to the famous reform of the Indian service by Macaulay and was carried over from the Indian service into the home services.[1] In the words of Graham Wallas: "The creation of the Home Service was the one great political invention in nineteenth-century England, and . . . it was worked out under the pressure of an urgent, practical problem—the problem of the Indian Civil Service."[2] It is well worth while to keep this "imperial" origin in mind when considering the peculiar features of the British civil service. It was a question of securing representatives of a "ruling nation," and the graduates of Oxford and Cambridge Universities seemed best fitted for that purpose. Their ancient traditions of literary and classical scholarship, combined with a proud *esprit de corps* characteristic of such a highly selective group as their student body, helped to secure the kind of man who would with equanimity shoulder the "white man's burden" in India. When this system was also applied to the home services, it escaped the attention of a good many people that there was just the tinge of a suggestion that what might be termed the "white-collared man's burden" was the essential objective. This was in keeping with English aristocratic traditions. As Robert Moses summarized the situation: "Like the English cabinet and the English aristocracy, the Indian civil service was to be opened to gentlemen who had inherited breeding and culture, and to those of the middle class who had made themselves gentlemen by acquiring the same breeding and culture."[3] Whatever the intrinsic merits of this system are when applied to the British Empire—and in our opinion they have, at least in the past, been very high—we have neither an empire nor an aristocracy in the United States, and we therefore do not conceive the problem of our governmental services as that of "rul-

[1] Robert Moses, *The Civil Service of Great Britain* (New York, 1914), chap. II.
[2] Graham Wallas, *Human Nature in Politics* (3d ed.; New York, 1921), p. 263.
[3] Moses, *op. cit.*, p. 61.

ing," but as that of "administering." Therefore we should be exceedingly cautious in drawing any lessons from English "experience." An exhaustive analysis of the conditions from which the experience arose should certainly precede any such proposals.

French Logical Tradition

In France, the dominant consideration in training higher administrative officials is given to what might be called logical and literary brilliance.[4] There is a generous infusion of legal training, covering both private and public law, but this training is not carried on pragmatically and through the analysis of cases, but logically and through the inculcation of principles. This French conception of training for the public service was started after the French Revolution, which, it will be recalled, had two great battle cries: *la raison* (reason) on the one hand, and *la nation* (the nation) on the other. Gradually, these two ideas permeated all of French life, and with it the government service. There are, to be sure, as everywhere, technical experts of a high order, but they take a back seat and do not set the tone for the whole. Now this logical and literary brilliance is inculcated into a rather limited group of students through a school and university system which is rigidly controlled by the government, both as to methods of teaching and as to subjects taught. Thus a common intellectual atmosphere is created among the upper stratum of French society which engulfs the government service as well. It is obvious that America, the melting pot of diverse nationalities with diverse cultural backgrounds, and with a federally dispersed system of schools and universities, is singularly ill adapted to the French system of educating for the public services.

German Legal Tradition

Turning to Germany, we find the training of potential servants of the government focused upon legal studies.

[4] Walter R. Sharp, *The French Civil Service* (New York, 1931), pp. 101 ff.

As in France, these legal studies are carried on dogmatically and logically rather than pragmatically and through the study of cases. Yet there does not seem the same emphasis upon logical and literary brilliance. The historical and practical aspects of the law are stressed, and periods of apprenticeship in various lines of legal practice are interwoven with theoretical studies. This emphasis upon legal training goes back to the days when the several princes employed Roman law in their struggle to overcome recalcitrant feudal forces which rested their case on established local custom. In other words, governmental centralization was then sought in terms of a superior law. In order to secure proper councilors, the princes established universities and schools, and thus a relationship developed between training for and service to the government.[5] Later the great national codes were similarly put to work to unify the Empire, and again it was of the utmost importance to have all the permanent officials fully aware of these new bodies of law, if the process of unification was to be one of uninterrupted progress. Yet the universities remained essentially state institutions, and only after the war and under the Republic were effective moves initiated for the unification of training requirements throughout Germany. While this latter phase affords a parallel to the United States, the earlier feudal past is entirely unparalleled in this country.

The American Tradition: Private and Technical

This rapid survey of the three major European countries which have reached a high state of industrialization has shown that they differ greatly in their conception of what the training for the higher government service ought to be. At the same time they resemble each other in believing that some very thorough training is necessary for a permanent government service which is to work, and in further

[5] Carl J. Friedrich, "The German and the Prussian Civil Service," in Leonard D. White, ed., *The Civil Service in the Modern State* (Chicago, 1930).

seeking such training through institutions of higher learning which at least in France and Germany are controlled by the government itself. Nothing of the kind is to be found in the United States. To forestall undue overemphasis on differences, it may be well to add here that in one field the American government has pursued a similar course: land grant state universities offer military training under the R.O.T.C. But otherwise the American federal and state governments leave the training of their future servants to privately endowed and controlled institutions of higher learning, while high schools are locally controlled, and certainly not with a view to the needs of the government. Furthermore, we do not perceive any general type of training, either social and cultural as in England, or literary and logical as in France, or legal as in Germany.

Instead the federal as well as the state governments in the United States have apparently taken people largely on the basis of their technical achievement, engineers, chemists, geologists, and so on, and let them pull together as best they could. Even the lawyer, who is found in not inconsiderable numbers in federal and state offices, is there rather as a technician: as solicitor in the Department of Labor, as land law expert in the Interstate Commerce Commission, and so forth. The fact that American administrative services have largely grown in response to public demands for this or that "service" is without doubt responsible for this situation, which is in many respects a very healthy one.[6]

Education for Administration Itself

There is, however, another aspect of the matter which is beginning to receive more serious attention, and that is the need for specialists in the art of administration itself. There is no question that the special problems which arise in connection with operating a larger and growing group of the most diverse services need the attention of a specialist.

[6] Charles A. Beard, *The American Leviathan* (New York, 1930).

And it would seem that only the recognition of such a specialist would fit in with the established traditions of the American constitution as we have outlined it in previous chapters. Any attempt to formulate a general plan and to attempt to realize that plan through a governmentally guided system of education would run counter to the set political ways of this country, and would possibly plunge the United States into experimenting with the worst features of an ill-developed bureaucracy. That, obviously, must at all costs be avoided.

Now the training of such administrative specialists, specialists in public administration, should be left to the free educational institutions and their individual initiative, as it has been left to them in other realms of professional training. There is already under way in several of the leading law schools an effort to round out their training in strictly legal matters by additional work in the other social sciences. The well-considered suggestions of an eminent American lawyer and political scientist, Dr. John Dickinson, now assistant secretary of commerce, have here in part borne fruit.[7] His further plea that law schools should require a certain amount of *preliminary* training in the social sciences has not yet, to the writer's knowledge, been acted upon, but deserves very serious attention. Certainly young lawyers with a thorough background of economics, political science, and sociology will make a very superior type of government servant. But there is no particular reason why this collateral training in the social sciences should be limited to young lawyers. As good a plea could be made for engineers, medical students, scientists, accountants, and other business specialists. It would seem that a preliminary training in economics, sociology, and more particularly the science of public administration would be highly desirable for any among them whose aspiration is to enter public office.

[7] John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, Mass., 1927), chap. XII.

But no such collateral training, desirable as it is, can give us in our governmental services the specialist in the art of administration previously referred to. That art is so complicated, and so many angles of it require careful application on the part of an able student for several years, that nothing short of a scientifically trained specialist will fully satisfy the training requirements without which an objective, functional responsibility such as we have outlined above is impossible. For the science of administration and government, like every other science, cannot be mastered without being explored in its relations to past experience and comparative examples. Experimentation is going on all over the world in various lines of administrative and governmental work, but only the specialist can know and does know where those experiments are being made, or can adequately judge their results. Such a person must be fully familiar with the difficulties and obstacles in the way of administrative achievement; he must realize how to strive for efficiency without losing sight of other and more important objectives. Above all, he must know what are the inherent limitations which the American constitution imposes upon administrative work. Such knowledge and experience will make it possible for him to guide the development of American governmental services without getting them embroiled in insoluble conflicts with the American governmental tradition and constitution as a whole. He will understand that both communism and fascism are extremist views born of the failure of actual governments to meet the needs of their peoples, and he will therefore help in realizing what is sound in their outlook without destroying the fundamental law of the land.

Monograph 8

MUNICIPAL CIVIL SERVICE IN THE UNITED STATES

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