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Forms of Government

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FORMS OF GOVERNMENT

The ink was hardly dry upon the articles of German capitulation when leaders of the labor party in England precipitated a general election and raised the banner of state socialism. There is great ferment in France and the issue there is basically socialism on the one hand and private enterprise and a free economy on the other. Both state socialism and communism are as much forms of totalitarianism as fascism or nazism. Mr. Churchill has used plain words as to the issue in England. Honesty in thought and expression requires that the issue be bluntly stated. Make no mistake about it—any form of totalitarianism means a planned economy and a welfare government administered by bureaucrats regimenting the lives of the citizenry and reducing the citizen to a pawn and a ward of government.

Whatever has been accomplished in eliminating Mr. Hitler and Mr. Mussolini—the issue of totalitarianism of which their philosophy of government was only one of several examples—is still a world-wide issue hovering over the lives of men. Totalitarianism in the form of communism is dominant everywhere that Russia rules or Russian influence predominates. Elsewhere in Europe—even in fascist Spain—the combined adherents of state socialism and communism probably constitute a majority of the people. China, when the Japanese war is over, may very easily swing completely to communism. We must not fool ourselves about totalitarianism being the actual form of government in the so-called republics of Central and South America. For example, take Brazil—except that Brazil was helpful on our side in the war and Argentina was not—there is and has been during the last few years no difference between them as to their forms of government—the one has been as autocratic as the other. Only the United States and England, Canada and South Africa have not succumbed to some form of arbitrary

central government in which the individual has lost his freedom and his importance. Even New Zealand and Australia are already committed to state socialism. The American people definitely face the issue of arbitrary government versus constitutional and representative government. Hence it is appropriate and timely to review the basic facts regarding forms of government and to remind ourselves of the nature and intendments of constitutional and representative government.

Alexander Pope, in his "Essay on Man," observed:

"For forms of government let fools contest;
Whate'er is best administered is best."

But the importance and significance of the form of government under which men live can hardly be disposed of so simply, though there may be poets, professors and politicians who tell us it can.

The old school books used to classify the forms of government somewhat as follows:

ABSOLUTE MONARCHY—where the head of state, be he king or emperor, ruled by divine right and the people had no voice in the affairs of state. Louis XIV epitomized this form of government when he said, "I am the State."

MILITARY DICTATORSHIP—of which the ancient world had many examples. In this class also may be put Napoleon's France and Cromwell's England. Such dictatorships rested upon the power and genius of great military leaders and usually passed with the death of such leaders.

LIMITED MONARCHY—where the people, through a parliament or other deliberative assembly had some voice in the making of law and the conduct of government, but where the monarch still exercised the prerogatives of a personal ruler. This was largely the situation in England from the time of the Stuart kings to the end of the Georges.

CONSTITUTIONAL MONARCHY—where the people, through the parliamentary and judicial processes, attained sufficient ascendancy over the prerogatives of the Crown to subject the will of the Crown and the conduct of the state to the restraints of a written or unwritten constitution and to the provisions of law enacted in accordance therewith. This is the England of the last century and a half.

A REPUBLIC—where the executive and all other powers of government are derived from the people and exercised with the consent of the governed but within the framework of constitutional guarantees and judicial precedents. There had never been a large scale venture in this form of government until the American experiment was launched following the American Revolution.

A DEMOCRACY—majority rule, where the government is dependent upon the will and desires of an existing majority. The simplest form of this was the old New England town meeting and its government by a particular majority voting as a group. It is not so much a government of law as a government of men, and this distinguishes a democracy from a republic. Law stabilized by constitutional guarantees and precedent under the checks and balances of a republic operates necessarily without regard to the particular and transitory passions or feelings of a particular majority. To weaken or abandon constitutional guarantees and adherence to precedent is to substitute for a government of law a

government dependent upon the will and immediate desires of a particular existing majority. Perhaps we should note in passing that the U. S. Army Manual states: "The Government of the U. S. is not a Democracy but a Republic"; that the word "democracy" nowhere appears in the Declaration of Independence, in the Constitution of the United States, in Washington's Farewell Address, in Jefferson's Inaugural, nor in Lincoln's Gettysburg Address. As applied to our federal government it did not come into general use until Woodrow Wilson's famous pronouncement of World War I, "make the world safe for democracy." Since that time the tendency has grown to substitute the word "democracy" for that of "republic" in referring to our form of government and thereby obscure the fact that our forefathers established and intended to establish a republic and not a democracy, whereby a particular majority may by its votes and the sheer force of numbers deprive minorities of fair and equal treatment by the agencies of government. Lincoln in his first inaugural said: "If a majority should deprive a minority of any clearly written constitutional right, it might in a moral point of view justify revolution—certainly would, if such a right were a vital one."

Thus, generally speaking, the forms of government briefly mentioned comprised the forms of government listed and discussed in our old school history books. If you pick up a school history of the period of 1900 you will find no mention of totalitarianism, state socialism, or communism as forms of government. These were to some extent a form of thinking on the part of certain disgruntled intellectual adventurers, like Karl Marx and others, but they had not been sufficiently dressed up in attractive and high sounding phrases and purposes to be sold to whole populations as forms of government.

With this background, we may look for a moment at the early beginnings of government. The writings of analytical jurists indicate that in the early history of the human race the phenomenon of government seems to have developed as a necessary sequel to the gregarious or group instinct of humanity—that is, the tendency of human beings to gather together and live in groups. As the Greeks said, "eis avnp oudeis avnp,"—one man is no man—that is, a man without a family, a man standing alone without other human associations, is no man at all. He counts for nothing.

When the world was sparsely settled the grouping of human beings was by families and clans, or at most by tribes. The father was the law-giver and the governor of his immediate family. The clan was made up of more or less related families. The tribe represented a group of clans. The need for some headship or control in the interest of tribal policy and tribal order necessitated the designation and the recognition of someone as a head man or chief of the tribe; sometimes there was also a headman of each clan. When tribes undertook to live together in proximity to each other and hunt and war together, necessity again required the designation of a head man as over-lord of the separate tribal chiefs. Thus the idea of headship developed naturally into the idea of kingship, and this combined with the sanctions from time to time introduced by custom and experience developed into a more or less recognizable government of the monarchical type. This was monarchy in its simplest form. The law and the control of men's lives and

property was imposed upon the community from above and involved little idea of government by the consent of the governed. Even the customs and mores of the people were in the keeping of the king to be interpreted and enforced by him. The king remained the law-giver. Perhaps from time to time he had a few counsellors, but his will was the law. Thus autocracy represented by monarchy was the simplest, most natural and most convenient form of government. It resulted from the idea of hero and hero worship combined with the gregarious or group instinct of mankind.

As fixity of abode developed and the community increased in numbers and expanded territorially and something in the nature of industry and commerce came into existence, the idea of nationality appeared. Nationality arose and asserted itself under the headship of a ruling family or dynasty which became the center of gravity toward which and around which the national law, custom and policy gravitated. Thus, much of history, until comparatively recent times, has been truly characterized as a succession of dynasties. It may be said in passing that any form of absolutism, be it Fascism, Naziism, or Communism, are only modern interludes in the historical succession of absolute and personal rule which characterizes most of the pages of history. These modern interludes, though without the trimmings and trappings of a royal personage and a royal court, are as much examples of autocratic rule over the lives and fortunes of men as any absolute monarchy in the past.

The American experiment of a constitutional and representative commonwealth is a complete antithesis to this original thesis of personal and absolute government. It involves no idea of headship or kingship or any idea of class absolutism as in Communism, nor of mass absolutism as in a pure democracy. Its fundamental idea is government by the consent of the governed, but with such constitutional guarantees and such checks and balances and such fixity, certainty, and uniformity of law that no special privileges or immunities shall accrue to any citizen or class of citizens.

While the founders of the republic believed in the principle "that all men are created equal," by asserting this principle, they did not mean that all persons were possessed of or could be assured equal mental or physical power. That is a matter which rests in the hands of God and not in the hands of the founders or in the hands of a political party. Our forefathers merely meant that there should be equality of opportunity, that any inequality should be the result of a man's own inability or lack of effort; that no artificial inequality should be imposed upon him by law, either as a result of birth or as the result of class. The purpose of the announcement "that all men are created equal" was not to create or attempt to create a fictitious equality, social or economic, but to permit inequalities to rest solely on the basis of actual differences in personality and ability.

In our form of government there were also incorporated certain principles of freedom. Freedom of speech (both of the individual and of the press), freedom of religion, but most important of all, freedom of individual initiative. As Mr. Justice Brandeis put it, "Freedom to be let alone." It was not intended by the founders of the republic that we should have a paternalistic or welfare type of government. What is

the freedom for which men have fought in all ages? It was not freedom from bad weather nor crop failure nor want. It was freedom from the power of autocratic government. It was freedom from the power of arbitrary government whether of autocrat or bureaucrat. It was freedom to work and live, each man according to his talents and deserts. Mr. Justice Brandeis said, "The makers of the Constitution conferred upon us, even as against the government itself, the right to be let alone, the most comprehensive of rights and the most valued by civilized men."

Strange that this freedom of individual action is rarely to be found in the utterances and declarations of recent times. For example take the four freedoms of the Atlantic Charter. One might have all the four freedoms and yet have no more freedom than the elephant in the zoo. He enjoys freedom of thought; he is also free to speak or trumpet when he wishes; he has freedom from want because his keeper feeds him every day, and he has freedom from fear because his natural enemies like the lion and the tiger are locked up in separate cages. But what about his freedom of initiative, freedom from arbitrary control? He lacks this as do all persons under an arbitrary government. It is this freedom of initiative and freedom from arbitrary control by government, freedom to work and live, each man according to his abilities, this freedom of individual liberty, which is the basic freedom of freemen. Without this we are without the kind of government our forefathers established. They knew the basic freedom of free men was as Justice Brandeis said—freedom from government control—the right to be let alone in our individual lives. That is why in establishing a structure of government the makers of the Constitution consciously set up checks and balances to prevent the central government and the executive from becoming all-powerful and regimenting our lives.

Our forefathers understood clearly and definitely that the so-called examples of democracy in the past had usually degenerated into tyrannies by temporary majorities as obnoxious as the tyrannies of dynasties. They understood that tyranny or absolutism on the part of a majority acting by force of numbers could be quite as unreasonable, self-willed and vicious and as destructive of individual freedom and development as the tyranny of ruling houses.

Hence they created a republic, not a democracy along the lines of the New England town meeting with which they were fully familiar. They consciously established a government of checks and balances. This was not done for the purpose of rendering the machinery of government complicated nor for the purpose of thwarting the ultimate will of the majority. The American Revolutionists were committed to be sure to the doctrine of rule by the majority, but they were not committed to the doctrine that a majority at a particular period and particularly during a period of economic and social unrest is necessarily to be interpreted as holding a final mandate to impose upon the whole of the people fundamental changes in their form of government. They proposed that so far as current political decisions were concerned, the will of the majority at stated intervals should be tried out by and through legislation, framed and passed by the elected representatives of any such majority, but always within the guarantees and the framework of the Constitution. They intended to combine and did combine representative government with constitutional government and declared outright that

the Constitution is the fundamental law of the land, that if the elected representatives or the elected executive of any given majority or party attempted by legislation or executive action to transcend or violate the Constitution or any of its provisions or guarantees, the judicial department of the government should independently determine the fact of the violation and that the executive, be he president or lesser person, should impose upon no part of the people any laws, directives or orders which violate the fundamental rights of any citizen as protected and guaranteed by the Constitution. Our forefathers felt that the safest form of government to assure freedom was a representative and constitutional commonwealth. They having established for us such a form of government, we have supposed it would remain with us. We think of government as one of the most natural and ordinary facts of life, but no particular form of government continues of its own accord. It is influenced and changed by the plans of men, sometimes sincere reformers, sometimes demagogues. Consider how quickly Fascism developed in Italy and Naziism in Germany and Communism in Russia.

Will anyone gainsay that our own form of government has undergone fundamental changes not only within our own lifetime, but within the short space of a few years? This is not a partisan matter. If we are anxious to secure the blessings of liberty to ourselves and our posterity, we must honestly recognize what has already been occurring with respect to our form of government and the tendencies that have been and are operating toward the changes. As to the fact of change, we may summon all our witnesses from the democratic "benches." Mr Hatton Sumners, of the House, has put the matter in unmistakable language on several occasions:

"Representative government is withering before our eyes. . . . Bureaus issue what are called 'directives.' One bureaucrat said recently, 'We do make the law. This order supersedes any laws opposed to it.'"

"The executive branch has in effect, through its dictatorial policy of executive decrees, usurped the powers of the legislative and judicial branches. Under the influences of these alien ideologies, there has been created a government of bureaus and bureaucrats who make the law, enforce the law, and interpret the law."

Senator Pat McCarran last year in an address at the commencement exercises of Georgetown University put the matter thus:

"It is no fallacy, and it is no quibble, to say that a large body of our law today is made, interpreted, and administered by appointive officials. Not only by executive order, but by a constant stream of 'directives' issued by various administrative agencies of the Government, rules and regulations are continually being put in force and given effect which have had no sanction by the Congress. Yet, without such sanction, and often without color of support from any constitutional source, these rules and regulations have all the force of law; more than that they are law; and frequently they actually supersede laws passed by the Congress."

“Government by administrative law breeds opportunity for personal arrogance; evades the courts; sneers at the rule of stare decisis; affords no precedents; and fortifies itself by pointing ridicule at Congress and other lawmaking bodies of our Nation.”

Senator O'Mahoney, Senator Byrd and other democrats have used as strong or stronger language.

Thus bureaucracy has infiltrated and superseded our constitutional processes. History demonstrates that bureaucracy easily becomes the instrumentality of autocratic government. In a bureaucracy as in an autocracy, the laws and the regulations which govern the lives and fortunes of the citizenry are imposed from above. Instead of developing the law by the legislative and judicial process, the law is originated, made, interpreted, administered, and enforced by the executive and his appointees, and the legislative and judicial branches of government are either by-passed or made over into instrumentalities of the executive will. One of the most important matters, being sponsored and advanced by the American Bar Association, is the pending measure before Congress for a uniform and simplified federal administrative procedure and judicial review. Much of our administrative law has come to stay, but certainly, uniformity and simplification must be achieved. It must not be, as stated by Mr. Hatton Sumners, that bureaus shall be allowed to make laws which enlarge and supersede the laws of Congress and to make decisions affecting life, liberty and property not subject in any manner to review by the courts.

Another tendency concerns itself with the general attitude of congressmen and senators and the attitude of the public with respect to their position and duty. It was not the intention of the founders of this government that congressmen and senators should be viewed as successful in the performance of duty to the extent that each is able from time to time to secure large appropriations from the national treasury for the benefit of particular constituencies. Our congressmen and senators seek public approval and election and reelection largely on the basis of what they have accomplished in the way of securing federal funds for local projects—with the result that the members of Congress are engaged in a contest with each other to see which one can make the greatest inroad on the national treasury. This attitude unfortunately is often approved and even lauded by the public through chambers of commerce and other local pressure groups, with little realization that this view has inevitably, and recently more rapidly than ever, tended to stimulate the interest of city bosses in national government and to influence such bosses to transfer their activities to the larger field of national politics. This development has taken place under our very eyes and if unchecked, will introduce into national affairs the corruption that notoriously plagued many of our American cities. The original theory and the sound theory was that a senator or a representative should be a senator or a representative in the Congress of the United States and that by his conduct and by his vote he should take into account the general good of the country and its citizens as a whole.

A tendency which reached the peak of its advance in the days of the court-packing plan, which is and was not merely a viewpoint entertained by the president, but was and still is fostered by many other

persons in high places including judges and law professors of the type who never practiced law and are both ignorant as to the nature of constitutional government and unfamiliar with the history of its functioning (and I speak advisedly), supports the specious doctrine that any action by the courts in holding acts of Congress or of state legislatures unconstitutional is usurpation of power on the part of the court. This doctrine proceeds upon a theory which completely disregards the nature of the judicial function under constitutional government. The judicial function was never intended to register the changing opinions of social or economic pressure groups or even to register the opinion of a majority of the people as to what the Constitution and the law ought to be—but to interpret dispassionately and declare the Constitution and the law as they exist—whether such interpretation satisfies a majority of the people or the president and his advisers or the members of his party or no one at all. It is a false cry to say that the will of the people has been thwarted because a particular decision may not please a particular party and its leaders, who for the time being may be in the majority and in power. The fact is the American Constitution was made by the people themselves and declared by them to be the fundamental law of the land. It may be amended by them as provided therein and they may change the method of amendment, but it is not to be amended or violated by legislative act nor by the act or opinion of the president and his party. The entire judicial power is fixed in the courts and the courts are bound to determine under their oath what are the facts and what is the law of a particular case—and this determination ends the matter for all persons and parties including the government itself and the highest officers thereof.

Another tendency affecting our form of government, is the trend toward a paternalistic or welfare type of government. A form of national paternalism which is on the way unless checked is the proposal to subsidize, and hence, control, public education. Bills have already been introduced in the Congress to allot large sums to be spent for public education and to set up a department of education in Washington to direct and supervise matters of education throughout the country. As soon as states have their public school systems geared up to these federal educational expenditures, it will be simple indeed for Washington to dictate policies in education. No local school officials will dare refuse "to cooperate" and thus forfeit the supposed benefactions. It presents a benefit scheme and as such constitutes a very serious phase of paternalism and welfare government. As Mr. Hatton Sumners said, speaking of this continued welfare aid to the states, "We have been building up a colossus beyond human understanding. We have all but reduced the states to vassals, subject to federal control by financial dependency on the treasury."

The founders of the republic understood the effect of centralized and bureaucratic power upon the progress of a free society. They knew that when government plans for its citizens and gets too close to the citizens it cramps and then destroys their freedom, and so by a constitutional and representative form of government they intended to say to the government itself, "You keep aloof from the affairs of the individual, you make such laws as will referee the game fairly, you punish when some rule of fair play is violated, but within this frame-

work of providing fair rules and enforcing fair rules, the citizens as individuals are to be left free to work, to live and to compete, each according to his talents and deserts."

Mr. Wallace says this century will be the century of the common man. Just what he means by that I do not know, but his conception of the common man everywhere thus far has been to make the common man the ward of the state, dependent upon the state for his social and economic well-being rather than on his own effort and ability. His common man, therefore, is not a free man and cannot possibly be free under such a philosophy. He may have food and raiment, but he will not have freedom. May I remind you that man does not live by bread alone. In his rise from the animal status or barbarism, he has been motivated by the opportunity for individual advancement and achievement. Go out near Seward Park in Seattle and observe the ducks in the area where they are fed through the benefaction of the late Mr. Frederick. They have become so satisfied with their social and economic well-being that they have almost lost the power to fly and sit huddled about in the quiet water from one feeding to another, waiting for the next distribution of free grain. You cannot build a strong and enduring national life on the basis of turning its citizens into sitting ducks. The majority of Americans will not long be content with a sitting-duck economy, when they finally discover that after all the noble phrase making of the last few years and a new world liberalism, they have exactly achieved the status of sitting ducks. It will be a great national tragedy if they must first actually achieve this status before they appreciate the situation and become sufficiently aroused to reestablish and restore a free society and hence a free economy. The laws that operate in the realm of government and organized society are as inevitable and immutable as the law of nature itself, and no nation nor its citizens can escape the operation of these laws. You cannot have a society of free men under a regimented economy. That is as certain as the law of gravitation.

What is our position and obligation as lawyers and citizens in connection with these tendencies in government? Lin Yu Tang, the great Chinese philosopher, recently said that Americans have become the most materialistic people in the world; that they have the best automobiles, the best plumbing fixtures and the best soap, but that their primary interest is in the immediate comforts of life, material things, rather than in the philosophy of government or in the philosophy of religion. As lawyers we are ordinarily concerned with clients and fees. We have allowed university professors, social reformers and lawyers who never practiced law to dictate legislation and reshape our law and our form of government. If the trends now in operation continue, we, or our immediate successors, may have no independent clients, but may find our clients as well as ourselves mere wards of the state.

We are inclined to forget that the world moved on for many centuries without any understanding of or any apparent desire for, such a form of government as our fathers thought out, adopted and handed down to us. In truth and in fact as a form of government, a constitutional and representative commonwealth or republic is historically a recent development and more or less an unproved experiment. Autocracy of every kind is opposed to representative and constitutional government

whether it be the autocracy of king and lords or the autocracy of Fascism, Naziism or of the proletariat, or the autocracy of executive fiat operating through innumerable bureaus or the autocracy of state socialism based on paternalism. The danger of the future lies not so much in the changes already made, though these are far reaching, as in the lack of understanding on the part of the public of what the founders had in mind in adopting and establishing a constitutional and representative government. It is this lack of understanding and the misapprehension of the underlying theory of government that is the fertile field for the promises and grandiose phrases of the politician and the reformer, and we shall move from one change to another until we shall discover that there has been a complete revolution and find ourselves no longer living under the form of government we thought was ours.

The American people, of course, have the right to abandon constitutional and representative government if they wish, and to substitute therefor bureaucracy or state socialism or communism or any other ism, but they should not be tricked into any such substitution by being fooled with high sounding phrases of a so-called new world liberalism. As lawyers, by the traditions of our profession and by our oath to support the Constitution, we are under direct and solemn obligation to see that the issue is fairly presented and fully understood by the American people.

This is our great challenge of the immediate future—it is a greater challenge than that foreseen by Webster when he stated:

“If disastrous war should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still under a new cultivation they will grow green again and ripen to future harvests. But who shall reconstruct the fabric of demolished government? Who shall rear again the well proportioned columns of constitutional liberty? Who shall frame together the skillful architecture which unites national sovereignty with state rights, individual security, and public prosperity?”

FRANK E. HOLMAN.

BAR BRIEFS

REPORT FROM THE SEATTLE BAR ASSOCIATION

A picture has just been received by the Association of T/Sgt. Norman A. Turay of Seattle, being presented with the Air Medal by Brig. General Robert D. Knapp, for meritorious achievement while participating in aerial flight. Sgt. Turay is weather station chief with a Mitchell bomber group. The sergeant's combat experience began in March, 1943, in the early days of the Tunesian campaign. It went through the Sicilian, Balkan and Italian campaigns. The group took a principal part in the “Battle of the Brenner Pass” prior to the opening of the final drive to victory. It has twice been cited by the War De-