

# Governments 14

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## Introduction

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Governments can pose a threat to constitutional authority. As institutions, they pre-date constitutional regimes and are structurally least sympathetic to its limitations. Their sceptical predisposition has only grown in the twentieth and twenty-first century, as the rise of the bureaucratic state, internationalization coupled with government-lead international law-making as well as increasing domestic regulation have only heightened the potential dominance of executive power. Functions and competences of governments are hence a central battlefield of constitutional calibration. This chapter, however, has a more specific focus.

This chapter studies the principles of gubernative organization, hence focusing on the political leadership of the executive branch and on its institutional structures.<sup>1</sup> Using the lens of presidential and parliamentary systems, it contrasts two models of gubernative organization and their evolution proceeding in four sections.

In Section 1, it observes that in theory presidential and parliamentary systems differ most starkly at the top. While the presidential system is based upon the idea of a government of one person, the President, in whom all executive power is vested, the parliamentary system is characterized by a plural government, composed of a prime minister or chancellor and ministers. Furthermore, while in the presidential system the executive is strictly separated from the legislature by rules of incompatibility, the government in the parliamentary system is regularly composed of the leading members of the majority party in parliament. Hence, where singularity and separation characterize the presidential concept of organizing the gubernative, plurality and fusion shape it in the parliamentary system.<sup>2</sup>

But then again, where theory is clear, reality often is not. Current governments more often than not depart from the theoretical model and from their original design. In Section 2, the contribution examines the US–American system as a prototype of a presidential system, observing that it has witnessed a certain pluralization of the gubernative and today features several institutions surrounding the President. Likewise, the German gubernative, analysed as an example of a parliamentary system of cabinet government, has seen a centralization, so that it is often called a ‘*Kanzlerdemokratie*’ (chancellor’s democracy) in Section 3, implying a system in which the Chancellor has a marginalized Cabinet. Both of them share a strong trend towards the institutionalization of governmental structures, often beyond the constitutional frame.

<sup>1</sup> The notion of the ‘gubernative’ is not very common, but captures more precisely than the notions of ‘executive’, ‘government’ or ‘administration’ what is meant here. The notion is based on the distinction between the politically responsible leadership of the executive branch (*the gubernative*) and the hierarchically subordinated administration or bureaucracy. Both together form the executive branch. Cf. Charles O. Jones, *The Presidency in a Separated System*, 2nd ed., 2005, 73/74; generally Armin von Bogdandy, *Gubernative Rechtsetzung*, 2000, 108–115.

<sup>2</sup> On these models of governmental systems, see Giovanni Sartori, *Comparative Constitutional Engineering*, 2nd ed., 1997; Arend Lijphart, *Patterns of Democracy*, 2nd ed. New Haven, CT: Yale University Press 2012.

In Section 4, this contribution compares these distinct systems of gubernative organization with regard to two common functions, namely to provide leadership and ensure the coherence and coordination of governmental policy. It contrasts the different starting points but also argues that a gradual convergence of both systems with regard to the increased institutionalization of the chief executive's office can be observed, largely due to similar functions and similar context factors.<sup>3</sup> The context can be seen in the general developments in the political and constitutional systems worldwide that every government has to react to. Chief among those, so it is argued, are the growing complexity of societal structures and hence of governing more generally, along with internationalization in the exercise of public authority and hence the need to cooperate much more widely with other states and actors. Finally, the last couple of years have also seen a polarization in the political spectrum of most states, which makes cooperation between the branches of government and hence the role of the gubernative trickier.

By studying gubernative organization in a comparative perspective, this contribution sheds light on a topic that is seldom considered by comparative constitutional lawyers with the field being dominated by political scientists (comparative government scholars).<sup>4</sup> Constitutional lawyers would rather discuss the powers, not the institutional structures of gubernatives – mostly in domestic settings, and only sometimes in comparative ways.<sup>5</sup> Despite this neglect, the area is a particularly fruitful

<sup>3</sup> On the convergence of parliamentary and presidential systems see also Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, *The American Journal of Comparative Law* 57 (2009), 531; José Antonio Cheibub/Zachary Elkins/Tom Ginsburg, *Beyond Presidentialism and Parliamentarism*, *British Journal of Political Science* 44 (2014), 515.

<sup>4</sup> Ludger Helms, *Presidents, Prime Ministers and Chancellors: Executive Leadership in Western Democracies*, 2005; Thomas Poguntke/Paul Webb (Eds.), *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, Oxford 2005; R.A.W. Rhodes/John Wanna/Patrick Weller, *Comparing Westminster*, Oxford: Oxford University Press 2011; William G. Howell, *Executives – The American Presidency*, in: Sarah A. Binder, R.A.W. Rhodes and Bert A. Rockman (Eds.), *The Oxford Handbook of Political Institutions*, Oxford: Oxford University Press 2008; Jose Antonio Cheibub, *Presidentialism, Parliamentarism, and Democracy*, Cambridge: Cambridge University Press 2006.

<sup>5</sup> For a comparative perspective, Jenny Martinez, *Inherent Executive Power: A Comparative Perspective*, *Yale Law Journal* 115 (2006), 2480; Paul Craig/Adam Tomkins (Eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Oxford: Oxford University Press 2005; Tom Ginsburg/Zachary Elkins/Jose Cheibub, *Still the Land of Presidentialism? Executives and the Latin American Constitution*, in: Detlef Nolte/Almut Schilling-Vacaflor, eds., *New Constitutionalism in Latin America: Promises*

field for constitutional lawyers too, as it examines the conditions under which the implementation of governmental policies, and hence democratic choices, can take place. Gubernative organization is also a mirror of general global developments. This volume is testament to a certain shift of attention to include institutions and principles as a complement to the so far dominant focus in comparative legal studies on rights and courts.<sup>6</sup>

## 1 Two Models of Gubernative Organization

In the late eighteenth century, roughly at the same time, two models of organizing the gubernative emerged. But, while the model of a presidential gubernative was intentionally drafted at the constitutional drawing table by the framers of the American Constitution,<sup>7</sup> the parliamentary model of cabinet government evolved only slowly, starting in the 1780s but continuing through the nineteenth century, most prominently in England.<sup>8</sup> Both models are concerned with the efficiency and accountability of government, but both advance different strategies to enhance these values.

*and Practices*, London: Routledge 2016, pp. 73–99. For domestic studies, see Shubhankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinances*, Cambridge: Cambridge University Press 2014; Eric A. Posner/Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, Oxford: Oxford University Press 2011; Steven G. Calabresi/Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush*, New Haven, Connecticut: Yale University Press 2008.

<sup>6</sup> See for instance Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers*, Oxford 2013; Olivier Beaud, *Federation and Empire. About a Conceptual Distinction of Political Forms*, in Amnon Lev (ed.), *The Federal Idea*, London: Hart Publishing 2017; Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State*, Oxford: Oxford University Press 2009; Katja S. Ziegler/Denis Baranger/Anthony W. Bradley, *Constitutionalism and the Role of Parliaments*, Oxford: Hart Publishing 2007. See also references in note 3 above.

<sup>7</sup> On *Hamilton* and his concept of a single executive see Richard Loss, *Alexander Hamilton and the Modern Presidency*, *Presidential Studies Quarterly* 14 (1984), 6–22; on the influence of the British example for the North American drafters see Ernst Fraenkel, *Das amerikanische Regierungssystem: Eine politologische Analyse*, 4th ed., Köln: Westdt. Verlag 1981, 244–251.

<sup>8</sup> The idea of an executive council is certainly older. But its specific combination with a parliamentary claim on the composition of this council emerged only in that time, see Karl Löwenstein, *British Cabinet Government, 1967*, 77–99; Klaus von Beyme, *Parliamentary Democracy: Democratization, Destabilization, Reconsolidation*, London: Palgrave Macmillan 2000, 415/516.

## a Unitary Government in the Presidential System – Alexander Hamilton

The basic idea and components of a presidential gubernative are best described in Alexander Hamilton's contributions to the *Federalist Papers*.<sup>9</sup> To drum up support for the new constitution in 1787, Hamilton argued for a strong and powerful gubernative. The new constitution was intended to heal the major disadvantages of the former Articles of Confederation, especially its failure to establish an effective central government. The key notion to describe what he expected from such government was therefore energy. 'Energy in the executive is a leading character in the definition of good government. [...] A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution.'<sup>10</sup> The salient prerequisite for an energetic government, according to Hamilton, is its unity. Other aspects, such as an adequate duration of its term, provisions for its support and even powers, range only second to this requirement of unity. Unity, and hence dispatch and leadership, will best be ensured by vesting the gubernative in one person. Energy and unity of the executive are achieved, however, not only through a single gubernative, but through a set of institutional and constitutional arrangements. One such arrangement, Hamilton argued, is the incompatibility between a seat in the legislature and a position in the executive branch. Incompatibility between offices in both branches is not only a 'guard against the danger of executive influence upon the legislative body',<sup>11</sup> it also separates two styles of decision-making. While the decision-making procedures in the legislature are based on differences in opinion and on deliberation, in the executive, by contrast, swift and unambiguous decision-making is preferable.<sup>12</sup>

Hamilton's presidential gubernative is counterbalanced in a system of separated powers.<sup>13</sup> The President as single executive is checked by a plural, deliberating and slow legislature<sup>14</sup> and by the judicial branch,

<sup>9</sup> James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (ed. by Isaac Kramnick), 1987, No. 67–77 'Concerning the constitution of the president'.

<sup>10</sup> *Federalist Papers*, (note 9), No. 70, 402. The need for a strong government is expressed in several of the *Federalist Papers*, cf. No. 1, 23 and 37.

<sup>11</sup> *Federalist Papers*, (note 9), No. 76, 431.

<sup>12</sup> *Federalist Papers*, (note 9), No. 70, 405.

<sup>13</sup> *Federalist Papers*, (note 9), No. 47–51.

<sup>14</sup> *Federalist Papers*, (note 9), No. 52–66.

headed by one Supreme Court, controlling the rules.<sup>15</sup> The executive post, however, is filled only by the chief executive, strictly separated from the other two branches, and without any need for consultation, deliberation or compromise. His task and duty is to act alone.<sup>16</sup>

## b Cabinet Government in the Parliamentary System – Walter Bagehot

Although concerned with the same problems as Hamilton – efficiency and accountability – an entirely different concept of organizing the gubernative is presented by Walter Bagehot's concept of the parliamentary system. Analysing the English constitution of the mid-nineteenth century, Bagehot considered the 'efficient secret' of the parliamentary system to be the 'nearly complete fusion of executive and legislative powers'.<sup>17</sup> This fusion is institutionalized in the Cabinet, which serves as a link connecting both branches, or as Bagehot put it, as 'a hyphen which joins, a buckle which fastens the legislative part of the state to the executive part of the state'.<sup>18</sup> The Cabinet as plural government is thus the heart of the entire system. Bagehot describes it as 'a committee of the legislative body selected to be the executive body'. The legislature, he goes on, 'has many committees, but this is its greatest. It chooses for this, its main committee, the men in whom it has most confidence'.<sup>19</sup> The head of the Cabinet is the Prime Minister. With regard to the selection of cabinet members, the Prime Minister is only free to organize, not to choose them since he has to select his cabinet associates from the distinct circle of most honoured members of the legislature (the 'charmed circle'<sup>20</sup>).

Bagehot outlines the advantages of the parliamentary system in direct comparison with the American presidential system. Central to him are the enhanced opportunities in the parliamentary system to communicate

<sup>15</sup> Federalist Papers, (note 9) No. 78–83.

<sup>16</sup> *Hamilton* explains the need for a cabinet in the British system (as opposed to the American) with the fact that the British system would otherwise lack a legally responsible government, since 'the Crown can do no wrong'. The American chief executive would be legally responsible though by way of impeachment, thus a Cabinet was not needed.

<sup>17</sup> Walter Bagehot; Paul Smith (ed.), *The English Constitution*, Cambridge: Cambridge University Press 2001, 9.

<sup>18</sup> *Ibid.*, 14.

<sup>19</sup> *Ibid.*, 11.

<sup>20</sup> *Ibid.*, 12.

and cooperate between the executive and legislative branches. In a presidential, separated system, he argues, not only legislative power but also executive power is weakened.

Bagehot takes issue with the incompatibility rule and hence the relation between the executive and legislative branches. The arguments for a plural gubernative are less pronounced in his text, while other writers mainly present three arguments for the Cabinet as a plural gubernative.<sup>21</sup>

First of all, the existence of the Cabinet facilitates coordination and cooperation between the different ministries and executive agencies. Cabinet is the place where information between ministers can be directly exchanged and inter-ministerial coordination is organized. Secondly, the Cabinet contributes to the coherence of governmental policies. It is the place for exchange and debate among the ministers and locus of final decision-making in all major governmental affairs, where divergent interests can be balanced and departmental egoism can be checked. A single executive, by contrast, would have difficulties in controlling what is going on in the different executive institutions. Finally, and in contrast to Hamilton's assumption, the plurality in the gubernative is often seen as the best bulwark against the abuse of power. Different members in the gubernative, it is argued, would rather check each other's power than conspire to collectively abuse it.<sup>22</sup>

In sum, two different sets of arguments for two characteristically different systems have crystallized: one argument prizes the independence of a single chief executive to ensure his energy and dispatch and his sole and clear responsibility; the other cherishes the fusion of executive and legislature in the name of effective cooperation and the opportunity to communicate and coordinate within a plural gubernative, in which all relevant executive actors are represented.

How do these models translate into constitutional systems and their gubernative institutions? The following section describes the organization of the gubernative in two constitutional systems, the US-American system based on the Constitution which Hamilton commented on, and the German system, based on the Constitution of 1949: the *Grundgesetz*.<sup>23</sup>

<sup>21</sup> See Ivor Jennings, *Cabinet Government*, 3rd ed., Cambridge: Cambridge University Press Archive 1969, 1, 232 with further references.

<sup>22</sup> Karl Löwenstein, *Political Power and the Governmental Process*, 2nd ed., The University of Chicago Press 1965, 167.

<sup>23</sup> An interesting point of comparison could also be the German *Kaiserreich*. There, problems with the coordination of executive departments under a one-man-executive played an



## 2 The Organization of Gubernative in the American Presidential System

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### a The President in a System of Separated Powers

The American Constitution places the President at the centre of the executive branch of government.<sup>24</sup> Article II, § 1, cl. 1 determines that ‘the executive power shall be vested in a President of the United States of America’. It is the President who carries the ultimate responsibility for the faithful execution of the laws, is the Commander in Chief of Army and Navy, and who has – with the advice and consent of the Senate – the power to make treaties and to appoint ambassadors and other public officials. This concentration of power is based on the President’s exceptional political legitimacy. He is elected by the people, not by Congress. He is politically responsible only and directly to the electorate.<sup>25</sup> Yet, it is also a core value of the American governmental system that power is balanced and hence the division of political power between the branches of government so that each branch checks and balances the other.<sup>26</sup> For the President this means that he is not alone in charge of the executive.<sup>27</sup> In fact, the President’s grasp of the administration is surprisingly weak and has been famously described as being the power of persuasion only.<sup>28</sup> Instead, Congress has extensive powers to shape and control the

important role. See Eduard Rosenthal, *Die Reichsregierung, 1911*, 62–74 (66/7); Hans Goldschmidt, *Das Reich und Preußen im Kampf um die Führung, 1931*; cf. Siegfried Schöne, *Von der Reichskanzlei zum Bundeskanzleramt, 1968*, 18–28.

<sup>24</sup> On the original concept of presidency, see Lawrence Lessing/Cass R. Sunstein, *The President and the Administration*, *Columbia Law Review* 94 (1994), 14; for foreign perspective see Harold Laski, *The American Presidency, 1940* (Reprint 1980). On alternative concepts in the Constitutional Convention, see Gordon Hoxie, *The Cabinet in the American Presidency*, *Presidency, Presidential Studies Quarterly*, 14 (1984), 208/209.

<sup>25</sup> The President is also legally responsible and can be impeached for ‘Treason, Bribery and other high Crimes and Misdemeanors’, Art. II, § 4. On the meaning of this instrument for the American system of government, see Fraenkel, (note 7) 244–251.

<sup>26</sup> For the classic explanation of this concept, see *Federalist Papers* (note 9), No. 51, 318–322 (Madison).

<sup>27</sup> See extensively Jones (note 1).

<sup>28</sup> Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, New York, NY: Free Press 1990, 33. The question of whether the Constitution establishes the President as the only head of the executive (concept of a unitary executive) or whether he has to share this position with Congress, has been a hotly debated question in recent years. See Bradley/Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, *Columbia Law Review* 113 (2013), 1097.



administration through organizational, financial and substantial means.<sup>29</sup> Next to the executive departments, which are established by Congress but are directly subordinate to the President, Congress also established a large number of independent executive agencies, over which the President has hardly any direct influence.<sup>30</sup>

To cope with this disaggregated administration and to compete with Congress's influence, the President has to rely on institutional help for oversight and advice – this is where first the Cabinet and, since the 1920s, increasingly the White House administration come into play.<sup>31</sup>

## b The President's Cabinet

The American Cabinet holds no formal powers. It is neither a forum for collective deliberations of governmental policies, nor is it a place where central decisions are taken. It is a merely an advisory body, while the power to take a decision rests solely with the President. An anecdote about President Lincoln is telling. He once asked his Cabinet for advice on a crucial political matter and met with opposition from the entire Cabinet. Lincoln got up and concluded: 'Seven nays, one aye – the ayes have it.'<sup>32</sup> The story underlines the difference in status between the President and the members of his Cabinet.

What is called the 'Cabinet' in the American context is not mentioned in the Constitution. Instead, it evolved as an advisory body to the President, and never became a central decision-making or coordinating body. The President's Cabinet is a gathering of the heads of the executive departments and other senior advisors of the President, convened at his leisure and without any formal powers. Legally obscure, the Cabinet

<sup>29</sup> It is central for the reader from a parliamentary system to keep in mind that the basic argument for congressional control of the executive is not democracy (as it would be in the parliamentary German context), but separation of powers. The US is a system of dual legitimacy, equally vested in President and Congress.

<sup>30</sup> See Gary Lawson, *Federal Administrative Law*, 7th ed. 2015, 7–10; see also Rudolf Steinberg, *Politik und Verwaltungsorganisation*, 1979, 107.

<sup>31</sup> The Vice Presidency is another example for a need in the American system to support the chief executive. On the Vice presidency generally, see Thomas E. Cronin and Michael A. Genovese, *The Paradoxes of the American Presidency*, 5th ed., Oxford: Oxford University Press 2017, 288.

<sup>32</sup> Hoxie, *Presidential Studies Quarterly* 14 (1984), 219; James W. Davis, *The American Presidency*, 2nd ed., 1987, 196.

evolved from practical demand and was shaped by practice and each President's personal style.

The American Cabinet is not to be confused with its namesake in a parliamentary system. The differences are profound, both with respect to composition and function. Since the presidency of George Washington, Presidents have traditionally assembled the heads of the executive departments as well as the Vice President in the Cabinet.<sup>33</sup> The composition, however, is flexible. Different Presidents chose to extend the circle according to the weight they wanted to give certain personalities, offices or the Cabinet itself.<sup>34</sup> The President's power to include somebody into the Cabinet is not restricted.

At the same time, the president's power to appoint the heads of the executive departments or agencies is constrained by two provisions. Art. II, § 2, cl. 2 prescribes that the President has to 'seek advice and consent of the Senate' on his nominees, thus giving the Senate a veto power on presidential nominees. Practically, this is more a formality than a serious burden<sup>35</sup> and legally it has seldom raised any problems with regard to cabinet officers.<sup>36</sup> Equally constrained are the removal powers of the President. In 1935, the Supreme Court qualified an earlier ruling and stated that the President could not at his pleasure remove from office a Federal Trade Commissioner before the end of his statutory term, when Congress had sought to deny such discretion to the President. Instead, the President's unqualified removal power was limited to 'purely executive officers'.<sup>37</sup> In other words, the removal power of the President does not depend on the formal status of the secretary, but more so on his function. As long as his office can be regarded as being 'purely executive', the President's removal power is unlimited. With officers who do have rather independent, or even quasi-legislative or quasi-judicial functions, his power of removal is curtailed.

<sup>33</sup> On the composition, see Anthony J. Bennett, *The American President's Cabinet*, 1996, 139–141.

<sup>34</sup> Davis, (note 32) 195, table. 8.1; James P. Pfiffner, *Strategic Presidency*, 6th ed., Boston; MA: Cengage Learning 2010, 40.

<sup>35</sup> Richard F. Fenno, *The President's Cabinet: An Analysis in the Period from Wilson to Eisenhower*, New Haven, CT: Harvard University Press 2013, 54. During the thirty-two years from the Kennedy to the first Bush administration there were 148 appointments for cabinet officers and only one of them was not confirmed (cf. Bennett, (note 33) 121).

<sup>36</sup> See Laurence H. Tribe, *Constitutional Law*, 3rd ed., 2000, § 4–8.

<sup>37</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

Another legal constraint is also characteristically different from the Cabinet in a parliamentary system: The constitution's incompatibility rule determines that members of Congress cannot hold an executive office and this changes the recruitment pool and recruitment process for cabinet members profoundly – as well as the character of the Cabinet. Cabinet members in the United States are not chosen from the group of leading parliamentarians or party politicians. They are individual and rather spontaneous choices of the President-elect.<sup>38</sup> Accordingly, they are not shaped by common political goals or battles, normally do not know each other before entering the Cabinet and hardly make up a coherent group of politicians.<sup>39</sup> Reflecting the openness of the American systems, often enough the knowledge of private professionals is tapped.<sup>40</sup>

The main functions of the Cabinet are twofold. The primary function is to advise the President and provide for direct communication between the President and the departmental heads. As the President has only limited powers to direct and control the departments, it is one of the main challenges for each incoming and incumbent President to establish a hold on the standing bureaucracy. His appointment power for the department heads and his direct link to them is thus of central importance. The other function of the Cabinet as a college is rather symbolic but no less important. The President surrounded by his Cabinet's members is a familiar picture on TV and conveys the impression of a unified and proactive government with the President as its leader. This message is directed not only at the general public, but also at the cabinet members themselves. It reminds them of their common commitment to the President, and not only to their respective departments.

### c White House Staff: The Presidential Branch

In the twentieth century, the Cabinet became overshadowed by a new institution: the White House administration. In fact, the growth of the

<sup>38</sup> Fenno, (note 35) 51–87.

<sup>39</sup> Often enough, Presidents don't know their appointees before they meet them for their 'job interview', James W. Riddlesberger and James D. King, Presidential Appointments to the Cabinet, Executive Office, and White House Staff, *Presidential Studies Quarterly* 16 (1986), 695/6; Steinberg, (note 30) 92.

<sup>40</sup> With respect to the secretaries of the defence department, see Stephen Hess, *Organizing the Presidency*, 3rd ed., 2002, 193; as to the composition of the cabinets from Kennedy to Clinton see also Bennett, (note 33) 125.

White House administration has been a dramatic development, perceived by many as resulting in the establishment of a fourth branch of government: what has been baptised the ‘presidential branch’, ‘separate and apart from the executive branch’<sup>41</sup> which, in effect, along with the White House, is not just a personal bureau for the chief executive anymore, but has developed into a virtual parallel bureaucracy, a super-ministry overseeing all departments. The need for coordination and oversight of the executive branch has immensely contributed to the growth of the White House administration. Today, some two thousand people work for the President (five hundred thereof in the White House Office), administering a budget of more than \$500 million dollars.<sup>42</sup>

The White House is marked today not only by its remarkable size, but also by its astonishing organizational complexity. All in all, the White House administration comprises some 125 offices of varying shape and importance.<sup>43</sup> They are assembled under the umbrella of the Executive Office of the President (EOP), but beyond that their organizational structure is hardly formalized. Instead, it can best be described as a solar system. Its ‘sun’ is the President, to whom all units exclusively report. They encircle the President, with different degrees of proximity to, or influence on, him. Legally, there is no formal hierarchy between the units and hardly a clear delineation of substantial and exclusive responsibilities. All in all, the White House administration under the umbrella of the EOP has evolved into a super-ministry, which basically covers and oversees all areas of policy and politics. It is a parallel bureaucracy, next to the actual departments and agencies. It is easy to imagine that managing the complexity of the modern White House has become a major problem for any presidency.<sup>44</sup>

<sup>41</sup> Nelson Polsby, *Some Landmarks in Modern Presidential-Congressional Relations*, in: Anthony King (ed.), *Both ends of the Avenue*, 1983, 20. While the White House was only a small bureau throughout the nineteenth and early twentieth century, the ‘modern’ White House began emerging since the 1920s (see also John Hart, *The Presidential Branch*, 1987).

<sup>42</sup> Burke, *The Institutional Presidency*, in: Michael Nelson (ed.), *The Presidency and the Political System*, 11th ed., Washington, D.C.: CQ Press 2018, p. 419.

<sup>43</sup> On the structures within the EOP, see James Pfiffner, *The Modern Presidency*, 6th ed., Boston, MA: Cengage Learning 2011, 109–114.

<sup>44</sup> One reason for this complexity lies in the power to establish the presidential branch, which can be exercised by act of Congress, by executive order of the President, or by a presidential submission of a reorganization plan to Congress. From a legal perspective the lack of any constitutional limit to Congress’ authority to organize the White House and

Two models of dealing with this complexity have emerged and both revolve around a central figure in the White House administration below the President: the Chief of Staff.<sup>45</sup> One model, which has been described as a pyramid, is based on a strong Chief of Staff.<sup>46</sup> It is an attempt to run the White House, despite all complexity, in a structured and (rather) hierarchical way. The Chief of Staff is especially entrusted by the President to manage the internal White House administration and to shield himself from managerial tasks.<sup>47</sup> The other model, metaphorically labelled as a circle, tries to avoid a dominant Chief of Staff and is built on the idea of direct access of (senior advisors) to the president.

Another factor adds to the complexity of the White House administration, and contributes to its specific character: the staff. The White House has almost no permanent staff. Every new President brings along his own and completely new personnel. But there is more that distinguishes the White House staff from normal bureaucratic personnel. White House staff are rarely composed of former government officials or civil servants, they are mostly recruited from those people who campaign for and with the candidate, and thus prove their strong commitment and loyalty even before the candidate is elected. As John Ehrlichman put it, there is only one qualification for working in the White House and that is the confidence of the President.<sup>48</sup>

The White House administration covers a wide range of tasks, but four main functions can be distinguished. The core units in the EOP perform, first of all, coordination and enforcement functions. They basically oversee the executive departments and agencies, coordinate the governmental policy and are supposed to make sure that narrower departmental perspectives do not prevail over the President's priorities. The Office of Management and Budget (OMB), the National Security Council and the Office of Policy Development mainly serve this function. Other units have

thus the heart of the executive branch is noteworthy. The idea of a core area of executive authority in the organizational respect, which is well grounded in German law, does not exist in American law.

<sup>45</sup> Charles E. Walcott, Shirley Anne Warshaw and Stephen J. Wayne, *The Chief of Staff, Presidential Studies Quarterly* 31 (2001), 464 with further references.

<sup>46</sup> James P. Pfiffner, *Strategic Presidency*, 2nd ed., Lawrence, KS: University Press of Kansas 1996, 19–21.

<sup>47</sup> On famous and infamous chiefs of staff, see Pfiffner, (note 46) 21/22, 32.

<sup>48</sup> John Ehrlichman, quoted from Pfiffner (note 46) 18; also compare Hess, (note 40) 180/1.

primarily advisory functions: they provide information to the President and are, from their structure and staff number, not built to oversee departments and agencies. Thirdly, there are units which have primarily outreach and communication functions, such as the Office of Global Communications, Public Liaison or Press Secretary. These are mainly located in the White House Office itself. And finally, there are those units that serve mainly administrative functions.<sup>49</sup>

These functions, most importantly in the first two categories, demonstrate to what extent the growth of the White House staff also effected the role of the Cabinet. Although originally planned as merely anonymous assistants to the President, the White House staff is today his primary advisor, partly even policy-maker on its own terms, and coordinator of policy affairs. On both accounts it is more important than the Cabinet.<sup>50</sup> The White House staff has basically eclipsed the Cabinet.

This development had practical as well as structural reasons. Practically, it is the White House staff that organizes the presidential timetable, the information flow to him and functions as gatekeeper. White House staff also has the advantages of proximity and confidence based on loyalty. It is mostly composed of long-term acquaintances or devoted campaigners for the President. Cabinet members, by contrast, are often hardly acquainted with the President and torn between their loyalty to the presidential agenda and that of their departments.<sup>51</sup> As department heads they depend not only on the President, but also on money from Congress and are in the spotlight of relevant interest groups.

The increased importance of the presidential branch has also structural reasons, which have been mentioned before. Presidents have only very limited influence over departments and agencies. Their attempts to establish agency control are doomed if they only rely on direct communication between President and Cabinet ministers. Instead, it is now the task of several White House offices to coordinate and control departmental and agency policies. Somehow consequentially, the relationship between White House staff and cabinet members is filled with distrust and frustration. The White House staff considers the cabinet members

<sup>49</sup> E.g. the Executive Residence at the White House, or the Office of Administration.

<sup>50</sup> On relations between Cabinet and White House, see Anne Shirley Warshaw, (note 45) 228–233; James Pfiffner, White House staff versus Cabinet, *Presidential Studies Quarterly* 16 (1986), 666–690.

<sup>51</sup> Bennett, (note 33) 165–167.

as ‘natural enemies’.<sup>52</sup> Cabinet members, on the other side, question the expertise and legitimacy of the White House staff. Perceiving themselves as authorized by law and politically legitimized by Senate approval, they see the younger, short-term-oriented staff in the White House as only a half-serious partner of policy making.<sup>53</sup>

In sum, the White House is characterized by a curious volatility as an institution. There is also a surprising disconnect between the continuity of organizational structures and discontinuity of personnel. One could say that while the offices remain, the officers change. In effect, the White House turns out to be an institution without institutional memory, run on the principle of discontinuity. For the presidency in the separated system of powers, however, it has become the central institutional pillar.

### 3 The Organization of the Gubernative in the German Parliamentary System

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The organization of the gubernative within the parliamentary system of Germany stands in clear contrast to the American system: the Chancellor is elected by the Parliament, the Federal government consists of both Chancellor and ministers, and there are no incompatibility rules that would prevent cabinet members from sitting in the parliament. It is a system of a cabinet government, the basic rationale of which Bagehot described. At the same time, however, the German governmental system has been characterized as a *Kanzlerdemokratie*, meaning a parliamentary system which is dominated by the Chancellor as a constitutionally resourceful and dominant leader of the Cabinet.<sup>54</sup> From the constitutional outline, the German system therefore strikes a balance between the need for gubernative coordination (through the Cabinet) and the need for gubernative leadership (in a strong Chancellor). The German system too, however has seen modifications. The Chancellor’s office, the

<sup>52</sup> Charles G. Dawes, quoted in Harold Seidman, *Politics, Position, and Power: The Dynamics of Federal Organization*, 5th ed. Oxford: Oxford University Press 1998, 72; Bennett, (note 33), 178.

<sup>53</sup> Bennett, (note 33) 179/180.

<sup>54</sup> The notion was coined with respect to the first Chancellor of the Federal Republic, *Konrad Adenauer*, but is used until today to describe a general characteristic of the system. Cf. Gordon Smith, *The Resources of a German Chancellor, Western European Politics*, Vol. 14 (1991), 57.



Federal Chancellery, plays a more dominant role today than was originally planned and the Cabinet has been undermined by the rise of informal procedures and institutions.

### a The Chancellor and the Cabinet

In the German context, the Cabinet is the institution in which coordination takes place and coherence is established.<sup>55</sup> The Cabinet is the regular and central meeting place of all ministers and the Chancellor. All major topics have to be tabled and formally decided in its weekly sessions. Constitutionally (although not always in reality) the German Cabinet has the powers and, infra-constitutionally, the organizational and procedural structures to ensure that governmental actions and substantial matters are coordinated.

The characterization of the German system as *Kanzlerdemokratie* is based on assumptions both about the political skills of the Chancellor and on her constitutional powers. As Wilhelm Hennis put it: ‘The powers of his office leave nothing to be desired. At the moment of his election his stallion is bridled and saddled; he only needs to be able to ride.’<sup>56</sup> Our question then is: what is the saddle made off?

The Chancellor’s role is constitutionally designed along three central competences.<sup>57</sup> First, the Chancellor has the power to determine the general policy guidelines of the government (*Richtlinienkompetenz*). This is grounded in her superior democratic legitimacy, since she is the only member of the Cabinet who is directly elected by parliament, but it is ultimately based on her skills of political leadership. There are no formal procedures to issue political guidelines and no legal instruments to ensure compliance,<sup>58</sup> but there are also no legal limits on how to use this competence. The right to set the course thus places the Chancellor politically

<sup>55</sup> See Part C I 2.

<sup>56</sup> Wilhelm Hennis, *Richtlinienkompetenz und Regierungstechnik*, in: Hennis, *Regieren im modernen Staat*, 2000, 129 (my translation, PD).

<sup>57</sup> For a basic description of the position of the German Chancellor in English, see Karlheinz Niclaß, *The Federal Government: Variations of Chancellor Dominance*, in: Ludger Helms (ed.), *Institutions and Institutional Change in the Federal Republic of Germany*, 2000, 65–83; Smith, (note 54) 48–61. For a historical and comparative perspective on Prime Ministers in parliamentary systems (in German though), see Beyme, (note 8) 438–456.

<sup>58</sup> Georg Hermes, Art. 65, para. 27, in: Horst Dreier, *Grundgesetzkommentar*, Vol. 2, 3rd ed., Tübingen: Mohr Siebeck 2015.

at the top of the Cabinet and gives her the constitutional basis to press in certain directions.<sup>59</sup> Although it is formally the Federal President who appoints the Cabinet, it is the Chancellor, who has the constitutional right to select and nominate them. The Chancellor's power is complemented by her right to dismiss her ministers. Here again, the Federal President only performs the formal part of the procedure as a kind of notary, whereas the material decision rests solely with the Chancellor.<sup>60</sup> In contrast to the American President, she faces no formal challenges to this power from the legislature.<sup>61</sup>

There are considerable *political* constraints, however, on whom the Chancellor can nominate.<sup>62</sup> In contrast to the American President, who is fairly free to appoint his cabinet secretaries, the German Chancellor has to select from the 'charmed circle', as Bagehot put it: the group of leading politicians from his party and party group. The Cabinet in the German parliamentary system is dependent for its existence and success on the support of parliament. The Chancellor therefore has to ensure this support by assembling the most respected and influential members of her party. The Chancellor's choice is restrained for yet another reason: Germany normally has coalition governments. It is an (unwritten) rule for the formation of these governments that every party within the government decides autonomously about its ministers and the Chancellor has no influence on the decisions of other parties.<sup>63</sup> Both constraints demonstrate that parliament and the parties forming the government are not out of the picture once the Chancellor is elected, but remain the basis of support and power.<sup>64</sup> The third element of the Chancellor's power is the competence to organize the scope and structure of the ministries. The Chancellor

<sup>59</sup> Wilhelm Hennis, (note 56) 106–141; Klaus Stern, *Staatsrecht der Bundesrepublik*, Vol. 2, 1980, 303.

<sup>60</sup> Martin Oldiges, in: Michael Sachs, *Grundgesetz*, 8th ed., München\_C.H. Beck 2018, Art. 64, para. 19.

<sup>61</sup> See *supra* B I 2.

<sup>62</sup> On German Cabinets from a sociological perspective, see Udo Kempf, *Die Regierungsmitglieder als soziale Gruppe*, in: Kempf and Merz (eds.), *Kanzler und Minister 1949–1998: Bibliografisches Lexikon der deutschen Bundesregierung*, Berlin: Springer-Verlag 2001, 7–35.

<sup>63</sup> Kurt Sontheimer, Wilhelm Bleek and Andrea Gawrich, *Grundzüge des politischen Systems Deutschlands*, 13th ed., München: Piper 2007, 312.

<sup>64</sup> Hans Meyer, *Das parlamentarische Regierungssystem des Grundgesetzes, Veröffentlichungen der Vereinigung der Staatsrechtslehrer* 33 (1975), 86; Hermes, (note 58) Art. 64, para. 6.

determines the overall structure of the Cabinet, the number of ministers and their respective fields of responsibility through special ordinances or executive orders.<sup>65</sup> Certain limits to this right hardly abridge the width of it; the *Grundgesetz*, for example, prescribes the existence of some ministries (such as the Ministry of Defense, or the Ministry of Finance), but these are hardly disposable anyway. Parliament's power of the purse could be another means to control organizational arrangements, but even this is no real thread since under German constitutional law the executive prerogative and its organizational powers are considered to be shielded against parliamentary 'blackmail'.<sup>66</sup> Equally important is the fact that the Chancellor's organizational acts are not dependent on an approval by the legislature, but are based directly on the Constitution. Parliament, even by statute, cannot interfere.<sup>67</sup>

The competences at the Chancellor's disposal are strong but the *Grundgesetz* also determines that the Federal Government is a collective body. Article 62 states that only Chancellor and ministers together form the government. Most importantly, the Cabinet has to discuss all matters that are of general political concern, be it in the realm of domestic or foreign, economic or social, financial or cultural policies. In particular, every draft of a statute (*Gesetz*), an executive order (*Rechtsverordnung*), a memorandum to the Upper House (*Bundesrat*) and every matter on which individual ministers could not agree has to be tabled in the Cabinet. Further, high-ranking appointments have to be discussed in Cabinet before a final decision is possible.<sup>68</sup>

The Cabinet not only discusses, but also makes decisions about issues of major political importance; it has the power to issue executive orders, i.e. general rules binding private individuals or rules that primarily bind the administration and finally, it can introduce bills in parliament, (Art. 76(2)), which is of special importance since most bills are prepared in the

<sup>65</sup> Gerold Lehguth and Klaus Vogelsang, Die Organisationserlasse des Bundeskanzlers seit Bestehen der Bundesrepublik im Lichte der politischen Entwicklung, *Archiv des öffentlichen Rechts* 113 (1998), 531.

<sup>66</sup> Hermes, (note 58) Art. 64, para. 20; Gerold Lehguth, Die Organisationsgewalt des Bundeskanzlers und das parlamentarische Budgetrecht, *Deutsche Verwaltungsblätter (DVBL)* 1985, 1359, 1362.

<sup>67</sup> Busse, Regierungsbildung aus organisatorischer Sicht: Tatsächliche und rechtliche Betrachtungen am Beispiel des Regierungswechsels 1998, *DÖV* 1999, 317, with further references.

<sup>68</sup> Hermes, (note 58) Art. 65, para. 33/34.

ministries. Considering these powers, the Cabinet is not just an advisory board for the Chancellor, but a decision-making body.

The actual decision-taking procedures in the Cabinet are also based on the cabinet principle, i.e. important decisions are to be taken by vote of the Cabinet as a college.<sup>69</sup> One of the rare decisions of the Federal Constitutional Court concerning the organizational provisions deals with the decision-taking procedure in the Cabinet.<sup>70</sup> In that decision, the Court held that every such decision has to be made in a procedure which ensures that: (a) every member of the Cabinet was informed about the upcoming decision; (b) a certain quorum of ministers actually take part in the decision; and (c) it is a majority which adopts the decision.<sup>71</sup>

In sum, the powerful position of the Chancellor is constitutionally balanced by a strict framework for the role and competences of the Cabinet. Its members are not only independent within their respective ministry, but also procedural equals to the Chancellor in the process of decision-making within the Cabinet and Cabinet has to decide about all major political initiatives of the government. However, as is often the case, a look at the Constitution alone does not provide for the whole picture. The German system, like the US, has seen a certain departure from its original structure and the evolution of new structures that today play a significant role in the gubernative.

## b The Federal Chancellery (Bundeskanzleramt)

The Federal Chancellery is not mentioned in the German Constitution but is today the ‘institutional center of the executive’.<sup>72</sup> It plays an irreplaceable part in the governmental process and is more than just the secretariat of the Cabinet, all that it is mentioned as in the Rules of Procedure of the Federal Government.<sup>73</sup> It is also the personal bureau of the Chancellor, a central coordinator of gubernative processes and a pivotal place for policy planning. For the Chancellor, who has no separate portfolio, it is

<sup>69</sup> Hermes, (note 58) Art. 65, para. 37.

<sup>70</sup> BVerfGE 91, 148, 166; Volker Epping, Die Willensbildung von Kollegialorganen, DÖV 1995, 719–724.

<sup>71</sup> These requirements were established with regard to the circulation procedure (*Umlaufverfahren*, § 20(2) RoP), in which a decision is not taken during a meeting but by written consent of the members of the Cabinet.

<sup>72</sup> Sontheimer/Bleek/Gawrich, (note 63) 298.

<sup>73</sup> § 21 RoP.

the central institutional basis of power.<sup>74</sup> The Chancellery in its organizational structure is a classical bureaucracy and is organized hierarchically from top to bottom.<sup>75</sup> Head of the Chancellery is a senior civil servant who is also given cabinet rank as a Minister for Special Affairs.<sup>76</sup> Its central principle of organization derives from its intended relation to the ministries. Every ministry is mirrored in the Chancellery, which means that every subdivision in a ministry finds a counterpart or mirror department (*Spiegelreferat*) in the Chancellery. Thereby, the Chancellery is able to overview and accompany every development in the ministry. It is a structure parallel to the ministries, not just observing some, but all ongoing projects in the gubernative. The civil servants of the Chancellery often create close links to the civil servants in the ministries and build up their own expertise.<sup>77</sup>

The Chancellery has mainly three functions:<sup>78</sup> As mentioned above, it serves as the secretariat of the Cabinet, scheduling Cabinet meetings, coordinating their agenda and preparing the necessary papers. The Chancellery also serves as a coordination point for what the ministries work on. It has the duty to check every proposal for a bill that comes from the ministries in a legal as well as political sense, that means to scrutinize and ensure that they are in sync with the general political direction of the government. This is the link to the third, more vague but most important function:<sup>79</sup> To plan and to conceptualize policy, to spell out and transform the guidelines of policy, which the Chancellor sets, into concrete action, projects and law. The Chancellery is more than just a coordinating bureau, it is a political bureaucracy, developing projects, planning

<sup>74</sup> On the Chancellery Ferdinand Möller-Rommel, The Chancellor and his Staff, in: Stephen Padgett (ed.), *Adenauer to Kohl*, 1994, 106–126; in comparative perspective, see Beyme, (note 8) 456–459. On the history of the institution that dates back to the German *Kaiserreich*, when it was set up as *Reichskanzlei* and personal bureau for Chancellor *Bismarck* (Schöne, (note 23) 59–70).

<sup>75</sup> Busse, (note 67) 106–116; Klaus König, *Vom Umgang mit Komplexität in Organisationen: Das Bundeskanzleramt, Der Staat* 1989, 55–58.

<sup>76</sup> This has led to much political and legal criticism, since the Chancellery is supposed to have an only servicing function and not to compete with the ministries. See Ernst-Wolfgang Böckenförde, *Die Organisationsgewalt im Bereich der Regierung*, 1964, 241/242; Brauneck, (note 76), 30–59.

<sup>77</sup> Busse (note 67) 119–121.

<sup>78</sup> Brauneck, (note 76), 12–30.

<sup>79</sup> König, *Der Staat* 1989, 60–63.

programs, and steering the process of governance. In that respect, the Chancellery secures the Chancellor's influence on the policy.<sup>80</sup>

The relationship between Chancellery and Cabinet or individual ministries is peculiar and insofar comparable to the American example.<sup>81</sup> The limits of the Chancellery's competences are vague, but strict. The legal yardstick is Article 65 and its three principles which outline the Chancellor's power to set general policy directions, departmental independence and the Cabinet's collective decision-making. The Chancellery has to find its place between these principles.<sup>82</sup> It shall coordinate the Cabinet, prepare the Chancellor's agenda and make sure that the ministries comply with them; but at the same time it must not instruct the ministries. There is no line of command since this would violate the principle of departmental independence. It also cannot place itself between the Chancellor and the ministries, receiving guidelines from her and issuing them on to the ministries, since this would violate the principle of collective decision-making. Further, it shall not grow into a kind of proxy government, with the civil servants in the Chancellery substituting the ministers.

The Chancellery's staff is another important feature. It is generally composed of (often highly qualified ministerial) civil servants who are mostly lawyers. Only in the press department, the Chancellor's personal bureau or the speech-writing unit would one find non-civil servants.<sup>83</sup> This has important consequences: their primary qualification is their professional quality, not their party affiliation. The career of a civil servant in Germany is still, and despite all party-grip on the state, more dependent on job performance than on the colour of the party. Especially in the ministerial bureaucracy, party affiliation plays a less significant role than, for example, on a local level. In the federal bureaucracy, the competition is too fierce to overtly rely on party patronage systems and the German law of civil service contains hurdles against mere political appointments. Although § 31 *Beamtenrechtsrahmengesetz*<sup>84</sup> has a provision for so-called 'political civil servants' (*politische Beamte*), this is applicable only to a

<sup>80</sup> Smith, (note 54) 50 (calling the Chancellery 'the indispensable voice and ears of the chancellor').

<sup>81</sup> See *infra* part B II 3.

<sup>82</sup> Brauneck, (note 76), 22–28.

<sup>83</sup> König, *Der Staat* 1989, 65–70.

<sup>84</sup> 'Civil Servant Framework Law'.

very small number of enumerated positions. In the case of the Federal Chancellery, this category covers only six (!) employees.<sup>85</sup> The chances of the incoming incumbent to change its staff and politicize it are therefore extremely limited.<sup>86</sup> In sum, it has to be said that the development has rather been one of centralization than politicization. The Chancellery is far from a situation comparable to the one in the White House, but its extension and development certainly have had an impact on the importance of the Cabinet. Major decisions have become much more likely to be pre-determined by decisions in the Chancellery than by deliberation in the Cabinet.<sup>87</sup> Another central reason for this has to be seen in informal institutions.

### c Rise of Informal Institutions: Coalition Rounds and Expert Groups

The cabinet system in Germany is strong as long as one limits the view to constitutional law. In political reality, but also in infra-constitutional rules, the role and importance of the Cabinet has been undermined over the past thirty years. Two dynamics have contributed to this development: first, the superimposition of cabinet rules by party logic, and secondly, a self-deprivation of the Cabinet through the deliberate transfer of decision-making powers to smaller, external bodies.

The first, and here more important dynamic, of the superimposition of cabinet rules by party logic has to be seen in the broader context of the German party system and its effect on the formation and functioning of governments. The German party system is a multi-party system. Governments therefore are almost always coalition governments of two or more parties. Understandably therefore, the coordination between the governing parties in a coalition always played a crucial role.<sup>88</sup>

<sup>85</sup> König, (note 75) 69.

<sup>86</sup> On consequences of this provision, see Hans-Ulrich Derlien, Repercussions of Government Change on the Career Civil Service in West Germany, IPSA SOG Conference Paper, 1986.

<sup>87</sup> Smith (note 54) 50. For a comparative perspective see Ferdinand Müller-Rommel, Ministers and the Role of Prime Ministerial Staff, in: Jean Blondel and Ferdinand Müller-Rommel (eds.), *Governing together*, 1993, 131–152.

<sup>88</sup> Smith, (note 54) 53/54; Wolfgang Rudzio, Informelle Entscheidungsmuster in Bonner Koalitionsregierungen, in: Hartwich and Wewer (eds.), (note 63) 123–133, Wewer, (note 63) 145–150.



The relation between cabinet rule and party demands took on a new quality, however, under the chancellorship of Helmut Kohl who, next to the Cabinet, installed a so-called coalition round (*Koalitionsrunde*).<sup>89</sup> This group convened the chairmen of the governing parties, their general secretaries, the leaders of their party groups in parliament and certain, but not all, ministers.<sup>90</sup> It was formed in accordance to party logic, not governmental rank; it served to accommodate the demands of coordination between the coalition forming parties, not to coordinate between ministries.

The group was more than a meeting point for exceptional cases, meeting, rather, every fortnight, more often if necessary. Over the years, it developed into an increasingly institutionalized body with invitations, fixed agendas, written memoranda and the logistical support of the Chancellery and certain ministries.<sup>91</sup> The group negotiated bills and major reforms, discussed general approaches to new issues, cleared treatment of the media and, in short, developed into the salient body of policy-planning and decision-making in the federal government.<sup>92</sup>

Ultimately, the constitutional rules of the Cabinet system compete with the dynamics of party politics. The formal rules are increasingly circumvented by more flexible, informal arrangements, which better accommodate the demands of political realities.

The second dynamic that contributed to the undermining of the Cabinet's role is the self-deprivation of the Cabinet through a deliberate shift of decision-making prerogatives from the Cabinet to informal bodies, such as expert commissions, civil society councils and, most importantly, negotiations between the parties holding the majority in the *Bundestag* (and hence forming the Federal Government) and those holding the majority in the Upper House, the *Bundesrat*.<sup>93</sup> This development has so

<sup>89</sup> The idea of the coalition rounds as informally coordinating groups dates back to 1961, when the liberal party (FDP) initiated such a round on the occasion of returning to the government with the CDU.

<sup>90</sup> Waldemar Schreckenberger, *Informelle Verfahren der Entscheidungsvorbereitung zwischen der Bundesregierung und den Mehrheitsfraktionen: Koalitionsgespräche und Koalitionsrunden*, ZParl 1994, 330, 334.

<sup>91</sup> *Ibid.*, 331–333.

<sup>92</sup> Schreckenberger, (note 90) 335.

<sup>93</sup> For a description of different types of these bodies, see Julia von Blumenthal, *Auswanderung aus den Verfassungsinstitutionen*, *Aus Politik und Zeitgeschichte*, 2003, B 43, 9/10.

far mostly been discussed under the heading of de-parliamentarization and was seen as a threat to the autonomy of the parliament<sup>94</sup> but, at the same time, these bodies also pre-determined the decisions of the Cabinet. Certainly, this development was driven by the government itself and by the institutional structure of executive federalism in the *Grundgesetz*, but that does not preclude it from threatening the role of the Cabinet and the idea of collective decision-making. Rather, it indicates a shift of power within the gubernative to the Chancellor and a few central or concretely involved ministers, who prepare and influence these bodies. It is also a shift to informal procedures of decision-making, which seem more effective.

#### 4 Comparative Summary

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The gubernatives in the United States and Germany are organized according to different construction plans: the US plan of a presidential system stipulates a unitary top, supported today by a number of auxiliary but subordinate bodies. The German system, following a parliamentary plan, rests on the idea of a collective gubernative composed of Chancellor and ministers. However, the description of the two systems in the previous sections has also underlined that they serve mainly two similar functional expectations. Firstly, both systems aim to facilitate political leadership, i.e. provide an institution which can set political goals, formulate policy agenda and has the means to pursue them. And second, both systems have to ensure the coordination and coherence of governmental policies, i.e. to make sure that the different departments adhere to the general policy direction, that departmental special interests do not prevail, and all relevant aspects are heard and integrated. In order to compare the two systems more directly, we can now see how they serve these functions.

At the same time, serving these functions takes place in a context that is similar for most governments, in particular an increased importance of the executive branch more generally. This rests on several factors: the growing complexity of societal structures and expectations; globalization, in both the transnational nature of many problems, and the ensuing

<sup>94</sup> On this discussion, see Martin Morlok, *Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdung der Verfassung*, *Veröffentlichung der Vereinigung deutscher Staatsrechtslehrer* (62) 2003, 72 with abundant further references.

internationalization in the exercise of public authority which all create the need to cooperate more widely with other states and other actors; finally, a polarization in the political spectrum of most states, which makes cooperation between the branches of government and hence the role of the gubernative trickier. All of these trends strengthen the role of the executive branch and in turn the role of the chief executive.

### a Facilitating Leadership: Chief Executives and their Offices

The two systems present two different concepts of leadership, each rooted in their respective composition. The American system enables swift policy-formulation and decision-taking through a radical concentration of power in one person. The President may seek advice, but he is ultimately independent and solely responsible.<sup>95</sup> 'Energy in the executive', as Hamilton called it, is the basic rationale of the American scheme of the gubernative, and this is ensured through its unity.

The German system, in contrast, prescribes a plural gubernative and combines collective and monocratic elements of leadership. In the Cabinet, Chancellor and ministers are equals and take decisions collectively.<sup>96</sup> Agenda setting is to some extent a deliberating process, in which the Chancellor is not the only overriding authority; the Ministers of Finance and Justice have veto positions and a majority of ministers could even overrule the Chancellor (though this is politically improbable). At the same time, the German Constitution too vests considerable powers in its chief executive to enable its 'energetic' lead.<sup>97</sup>

It became apparent, though, that neither President nor Chancellor could play their leading role without massive institutional support. In both systems separate offices of the chief executives evolved with considerable staff attached: the White House administration in the United States and the Federal Chancellery in Germany. They form today the organizational backbone of the gubernative lead of President and Chancellor and signal a significant centralization of governmental power in the office of the chief executive.

Both institutions have (at least to some extent) similar functions. They provide the chief executive with information and advice, they organize

<sup>95</sup> See section 2.1.

<sup>96</sup> See section 4.1.

<sup>97</sup> See section 4.2.

the Cabinet and they are instrumental in overseeing or directing the policies of the different ministries. However, they could hardly be more different with respect to their size, organization and staff: the White House employs by far more people than the Chancellery. Where the latter has all in all some five hundred employees, the inner bureau of the President, the White House Office, is alone as big as that. The Chancellery is organized in strict hierarchy and as a pyramid with a respective line of command from top to bottom. The White House, in contrast, has almost no hierarchy. All its offices are directly responsible to the President alone, which encircle him like planets encircle the sun in the solar system. The White House is also characterized by a confusing complexity with regard to the responsibilities and influence of its units. Most dramatic and far reaching, however, is the difference of their staff. The staff in the White House is mostly composed of campaign loyalists of the President, often young and without prior governmental experience. Moreover, staff is almost entirely exchanged with each new incumbent so there is no personal continuity in the White House, nor is there any institutional memory. The Chancellery, in contrast, is filled with long-time civil servants, contractually independent of the Chancellor and normally longer in the Chancellery than any incumbent.

The reasons for these differences are certainly various. The organizational complexity of the White House, for example, results to a good degree from the American system of separated powers. This gives Congress great influence over the White House' organization, which uses it incrementally, unsystematically and not seldom against the will of the President. The difference of staff continuity might be explained by the radical concentration on one incumbent in the American system and its instrumental and somewhat pragmatic understanding of government in general. In Germany, the bureaucracy has traditionally a more grounded standing than the short-time inhabitants of political offices.

## b Ensuring Coherence: Cabinet and Non-Cabinet Coordination

The gubernative also has to ensure the coherence of gubernative policies and the coordination of executive branch activities. The gubernative, as the politically responsible top of the executive branch, has to ensure that democratically endorsed policies are enforced by the executive, and

that this happens in an organized, coordinated and hence efficient way. This function highlights a central organizational difference between the German parliamentary and the American presidential systems: the status and role of the Cabinet.

In the German context, the Cabinet is the institution in which coordination takes place and coherence is established.<sup>98</sup> The Cabinet is the regular and central meeting place of all ministers and the Chancellor where all major topics have to be tabled and formally decided in its weekly sessions. Constitutionally (although not always in reality) the German Cabinet has the powers and, infra-constitutionally, the organizational and procedural structures to ensure that governmental actions and substantial matters are coordinated.

The United States lacks a direct functional equivalent. What is called the 'Cabinet' in the American context is an informal institution, not mentioned in the Constitution.<sup>99</sup> It evolved as an advisory body to the President, and never became a central decision-making or coordinating body. The difference is reflected in their respective recruitment pools. The German Cabinet, typically for a parliamentary system, is recruited from the strongest politicians of the governing party, normally the leading figures of the party group in parliament, or the 'charmed circle', as Bagehot put it. The fusion of executive and legislative power is the foundation on which the parliamentary system is built and institutionalized in the Cabinet. The American Constitution, in contrast, separates the gubernative from the parliament by a strict incompatibility rule. Presidential power is not (and is not supposed to be) based on the integration of strong party figures; they are meant to manage their department on behalf of the President, not to ensure the compliance of the President's party group in the legislature.

Coordination in the American presidential system takes place then in the White House and its numerous offices, which have taken on more and more the task of monitoring the executive departments and agencies. The White House administration is now the institution which tries to make sure that presidential directives and policy goals are complied with, that departmental activities do not collide with the President's agenda

<sup>98</sup> See section 4.2.

<sup>99</sup> See section 3.2.

and that governmental policies are somehow coordinated.<sup>100</sup> In effect, the White House and what has been baptised the 'presidential branch' (as in contrast to the executive branch) is not just a personal bureau for the chief executive anymore, but has developed into a virtual parallel bureaucracy, a super-ministry overseeing all departments. The need for coordination and oversight of the executive branch has immensely contributed to the growth of the White House administration.

In a comparative perspective, the American system of coordination still seems deficient since it lacks a central meeting point where the President is not only surrounded with strict loyalists (i.e. White House staff), but confronted with senior experts. It also lacks a place where voices from all areas of the executive branch are heard. Finally, the system of White House oversight instead of Cabinet coordination creates a continued tension between the executive departments and the presidential branch.

At the same time however, the Cabinet does not fulfil the coordination role in the German system by itself. The Federal Chancellery is important as a secretariat to the Cabinet and as manager of inter-ministerial conflicts. The Chancellery also faces similar conflicts to the White House since, in Germany too it is a fine line between admissibly disciplining the ministries and unconstitutionally commandeering them. However, the conflict between the Chancellor's office and ministries is not as grave as in the United States and a central reason for this is to be found in the collective leadership of the Cabinet as a political team. In the German parliamentary system, the Cabinet is composed of politically close actors and meets regularly, which fosters coherence. Such a committed team can have a strong grip on the executive branch departments whereas the US President, in contrast, is alone in confronting the executive since his Cabinet secretaries are much less committed to him or to a party agenda. His are much more easily captured by the special interests of their respective department and in effect, the President is much more dependent on his own institutional support to rule the executive branch than the German Chancellor is.

Problems of coordination in Germany result less from recalcitrant bureaucracies, but from political parties as external centres of power. The dynamics of coalition governments and the importance of the political parties in the parliament have resulted in a need to include the party

<sup>100</sup> See section 3.3.

chairmen or women in the political decision-making, even if they are not formally part of the Cabinet. This takes place in informal meetings, most notably the so-called coalition rounds.<sup>101</sup>

## Conclusion

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Ultimately, both systems of gubernative organization serve the two functions in very distinct ways. The presidential system has developed a strategy of guarded pluralization to better deal with increased demands. Both also converge in the increasing institutionalization of the chief executive's office, the White House and the Chancellery. This convergence in turn is an echo to the increased importance of the executive branch more generally, which can be explained by several factors. There is the growing complexity of societal structures and expectations in general, which is connected also to globalization and the transnational nature of many problems and the ensuing internationalization in the exercise of public authority, which creates a need to cooperate more widely with other states and other actors. Finally, a polarization has taken place in the political spectrum of most states, which makes the formation of governments more difficult and makes cooperation between the branches of government and hence the role of the gubernative trickier. All of these trends strengthen the role of the executive branch and in turn the role of the chief executive and her need to rely on institutionalized help.

These trends, while demonstrated here in two case studies, can be observed in many governmental systems around the world. What happened in the presidential system of the United States is mirrored in other presidential systems, in particular in Latin America and Francophone Africa. Many of these systems have witnessed an institutional pluralization as well as the increased importance and institutionalization of the presidency.<sup>102</sup> Similarly, what characterizes the development in the German

<sup>101</sup> See section 4.3.

<sup>102</sup> For the African context see Charles Fombad (ed.), *Separation of Powers in African Constitutionalism*, Oxford 2016; H. Kwasi Prempeh, Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa, *Hastings Constitutional Law Review* 35 (2009), 761; Muna Ndulo, Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power, *Vermont Law Review* 26 (2002), 769. For Latin America see Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution*, Oxford: Oxford University Press 2013, p. 148 ff.



parliamentary system finds echoes in other parliamentary systems, in particular in the Commonwealth states. The prime minister, together with the executive generally, gains importance and is institutionally strengthened, dominating her Cabinet not only by political clout but also through institutional means.<sup>103</sup> This goes hand in hand with a certain 'presidentialization' of the prime minister, as was observed in Germany.<sup>104</sup>

### Further Reading

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<sup>103</sup> C.f. Rhodes/Wanna/Weller (note 4).

<sup>104</sup> Thomas Poguntke, A Presidentializing Party State? The Federal Republic of Germany, in: Thomas Poguntke and Paul Webb (Eds.), *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, Oxford 2005.