

# The Gubernative in Presidential and Parliamentary Systems

## Comparing Organizational Structures of Federal Governments in the USA and Germany

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Introduction	1
A. Theoretical Models of Gubernative Organization	3
I. Unitary Government in the Presidential System – Alexander Hamilton	4
II. Cabinet Government in the Parliamentary System – Walter Bagehot	6
B. The Organization of the Gubernative in the American Presidential System	8
I. The President in a Separated System	8
II. The President's Cabinet	9
1. Legal Obscurity and Political Longevity	9
2. Composition of the Cabinet	11
3. Organization and Functions of the Cabinet	12
III. White House Staff: The Presidential Branch	14
1. Evolution and Legal Foundation	14
2. Organization, Management and Staff	16
3. Functions of the White House and Its Relationship to the Cabinet	19
IV. The Vice Presidency	20
C. The Organization of the Gubernative in the German Parliamentary System	23
I. The Chancellor and the Cabinet	23
1. The Chancellor's Role	24
2. The Cabinet Principle	26
II. The Federal Chancellery ( <i>Bundeskanzleramt</i> )	28
1. Evolution and Legal Foundation	29
2. Organization and Functions	30
3. Chancellery Staff: Non-Partisan and Loyal?	31
III. Informal Institutions: Coalition Rounds and Expert Groups	33
D. Comparative Summary	35
I. Facilitating Leadership: Chief Executives and Their Offices	36
II. Ensuring Coherence: Cabinet and Non-Cabinet Coordination	37
III. Trends and Conclusion	39

## Introduction

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 char-

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acterized by a plural government, composed of a Chancellor and Ministers. Furthermore, while in the presidential system the executive is strictly separated from the legislature, 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<sup>1</sup>, plurality and fusion shape it in the parliamentary system.<sup>2</sup>

But then again, where theory is clear, reality often is not. Both, the US American and the German constitutional systems, which will be analyzed in this paper with regard to how they organize their gubernative, depart from the theoretical model and from their original design. The American<sup>3</sup> system, regarded as the prototype of a presidential system, features today several gubernative institutions surrounding the President: the Cabinet, the Vice President, and the White House administration. The President is hence not the whole gubernative. The German governmental system, in contrast, is designed as a parliamentary system of cabinet government, but is often called a “*Kanzlerdemokratie*”, implying a system in which the Chancellor has a marginalized Cabinet.

This paper will describe and explain the basic rationale and components of the American and the German systems of organizing the gubernative. At the same time, it tries to make sense of the significant modifications that both systems have undergone with respect to the institutional set-up of their gubernative. The paper will argue that both systems have been shaped over time by similar functional expectations and challenges.

It will proceed in four steps. The first part will outline the basic rationale of and arguments for the presidential and the parliamentary model of organizing the gubernative. It will do so by consulting two classical texts on this subject, Alexander Hamilton’s essays on the President in the “Federalist Papers” and Walter Bagehot’s description of cabinet rule in “The English Constitution”<sup>4</sup> (A). On this basis, the paper will first describe the US system. Starting with the President it will try to show how the need for advice and coordination led to the rise of impor-

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<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. The term “government”, which is often used to name the political pinnacle of the executive branch, is too vague, since it can also mean all branches of government and the process of governing. The term has also been considered misleading with respect to the American system, since it conveys a sense of a collective institution, see Charles O. Jones, *The Presidency in a Separated System*, 2<sup>nd</sup> 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*, 2<sup>nd</sup> ed., 1997; Arend Lijphart, *Patterns of Democracy*, 1999; Winfried Steffani, *Parlamentarische und präsidentielle Demokratie*, 1979.

<sup>3</sup> All references to the term “American” in this paper denote the US.

<sup>4</sup> James Madison/Alexander Hamilton/John Jay, *The Federalist Papers* (ed. by Isaac Kramnick), 1987; Walter Bagehot, *The English Constitution*, 2<sup>nd</sup> ed., 1872 (Reprint 1978).

tant gubernative structures that surround the President today (B). The German system, in contrast, is based at the outset on a greater balance between gubernative coordination through the Cabinet and political leadership by the Chancellor, but still faced the need for more efficient instruments of political leadership and for the accommodation of party logistics in coalition governments. This resulted in an empowered Chancellery and a demoted Cabinet that is often circumvented by informal procedures (C). Finally, the summary will draw some comparative conclusions (D).

A short methodological remark: this is a comparative paper, since it juxtaposes two political systems, but it is chary of its own comparison. It is based on the understanding that the two constitutional systems presented here are profoundly different, and can be understood only in their historical evolution, individual constitutional setting and political dynamic. There is not enough room to fully outline these aspects here.<sup>5</sup> Therefore it is rather an attempt to describe both systems coherently and point out the most distinct and characteristic differences and similarities.

## A. Theoretical Models of Gubernative Organization

In the late 18<sup>th</sup> 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>6</sup>, the parliamentary model of cabinet government evolved only slowly, starting in the 1780s but continuing through the 19<sup>th</sup> century, most prominently in England.<sup>7</sup> Both models are concerned with the efficiency and accountability of government, but each advances a different strategy to enhance these values.

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<sup>5</sup> See Ernst Fraenkel, *Das amerikanische Regierungssystem*, 2<sup>nd</sup> ed., 1960, 242/243; on the challenges and difficulties of comparative constitutional law, see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, *Yale Law Journal* 108 (1998/9), 1225; Karl-Peter Sommermann, *Funktionen und Methoden der Grundrechtsvergleiche*, in: D. Merten/H. Papier (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Vol. I, 2004, 659.

<sup>6</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 on the North American drafters see Fraenkel (note 5), 244-251; Jürgen Heideking, *Die Verfassung vor dem Richterstuhl*, 1988, 331-333.

<sup>7</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, *Das parlamentarische Regierungssystem*, 3<sup>rd</sup> ed., 1999, 415/516.

## I. 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>8</sup> Written in order 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 the 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>9</sup>

The salient prerequisite for an energetic government, according to Hamilton, is its unity. "That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."<sup>10</sup> Other aspects, such as an adequate duration of its term, provisions for its support and even powers, rank only second to this requirement of unity. And unity means, Hamilton stresses, that governing power should neither be given to a "plurality of magistrates of equal dignity", nor be attached to a council, "whose concurrence is made constitutionally necessary to the operations".<sup>11</sup> Unity and hence dispatch and leadership will best be ensured by vesting the gubernative in one person.

Hamilton presents three major arguments for a presidential, one-man model of the gubernative. First, a single chief executive minimizes the "danger of difference of opinion" within the governing body.<sup>12</sup> Whether discord arises out of honest disagreement or because of individual self-love or injured pride, it undermines the clarity and swiftness of decision-making. Even if a single executive were only bound to consult a Cabinet, "cabal" would be probable and able "to distract and to enervate the whole system of administration" or "sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness".<sup>13</sup> This is the opposite of what is needed.

His second objection to a "plurality in the executive is that it tends to conceal faults and destroy responsibility".<sup>14</sup> Public opinion, lacking knowledge about who argued for a decision, would be restrained. Opportunities of detection of miscon-

<sup>8</sup> Federalist Papers (note 4), Nos. 67-77 "Concerning the constitution of the president".

<sup>9</sup> Federalist Papers (note 4), No. 70, 402. The need for a strong government is expressed in several of the Federalist Papers, cf. Nos. 1, 23 and 37.

<sup>10</sup> Federalist Papers (note 4), No. 70, 403.

<sup>11</sup> Ibid., 405.

<sup>12</sup> Ibid., 404.

<sup>13</sup> Ibid., 405.

<sup>14</sup> Ibid., 405.

duct in office would be diminished. Hence, the attribution of clear responsibility for improper decisions would be difficult in a plural gubernative.

Finally, the danger of abuse, according to Hamilton, is less severe with a one-man executive than if it were to be composed of the most powerful men in a polity. "When power is placed in the hands of so small a number of men, [...] it becomes more liable to abuse, and more dangerous when abused."<sup>15</sup>

Energy and unity of the executive are achieved, however, not only through a single gubernative, but through a set of institutional and constitutional arrangements. The single gubernative is thus but one element of the broader governmental structure and complemented by other elements. One such element, Hamilton argues, is the incompatibility between a seat in the legislature and a position in the executive branch. Incompatibility between offices in both branches is a "guard against the danger of executive influence upon the legislative body".<sup>16</sup> It also separates two styles of decision-making. The legislature is a plural body and its decision-making procedures are based on differences in opinion and on deliberation; in the executive, by contrast, swift and unambiguous decision-making is preferable.<sup>17</sup> Another element that Hamilton regards as important is an independent appointment power of the President.<sup>18</sup>

Hamilton's presidential gubernative is counterbalanced in a system of separated powers.<sup>19</sup> The President as single executive is checked by a plural, deliberating and slow legislature<sup>20</sup> and by the judicial branch, headed by one Supreme Court, controlling the rules.<sup>21</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>22</sup>

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<sup>15</sup> Ibid., 408. Another reason though less striking for Hamilton is the expenses: to finance all members of the government would be "an expenditure too serious to be incurred for an object of equivocal utility" (408).

<sup>16</sup> Federalist Papers (note 4), No. 76, 431.

<sup>17</sup> Ibid., No. 70, 405.

<sup>18</sup> Ibid., No. 72, 412.

<sup>19</sup> Ibid., Nos. 47-51.

<sup>20</sup> Ibid., Nos. 52-66.

<sup>21</sup> Ibid., Nos. 78-83.

<sup>22</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. His defense of the presidential system also had an anti-parliamentary twist. Hamilton distrusted any parliament as being easily politically manipulated. The American chief executive would not be responsible to parliament, but only to the voter every four years, and thus be better shielded from populist fever.

## II. Cabinet Government in the Parliamentary System – Walter Bagehot

Walter Bagehot's concept of the parliamentary system presents an entirely different concept of organizing the gubernative. Although concerned with the same problems as Hamilton – efficiency and accountability – he describes a model with almost the opposite features.<sup>23</sup>

Analyzing the English constitution of the mid-19<sup>th</sup> century, Bagehot considers the “efficient secret” of the parliamentary system to be the “almost complete fusion of executive and legislative powers”.<sup>24</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>25</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>26</sup>

The head of the Cabinet is the Prime Minister. Although formally appointed by the Queen, he is in fact chosen by parliament.<sup>27</sup> The selection of cabinet members is not really in the hands of the Prime Minister. He is only free to organize, not to choose them because he has to select his cabinet associates from the distinct circle of most honored members of the legislature (the “charmed circle”<sup>28</sup>). “Between the compulsory list whom he must take, and the impossible list whom he cannot take, a Prime Minister's independent choice in the formation of a Cabinet is not very large; it extends rather to the division of the Cabinet offices than to the choice of the Cabinet Ministers.”<sup>29</sup>

Bagehot outlines the advantages of the parliamentary system in comparison with the American presidential system. Central to him are the enhanced opportunities in the parliamentary system to communicate 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. “The executive is crippled by not getting the laws it needs, and the legislature is spoiled by having to

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<sup>23</sup> A major German theorist on cabinet government has (to my knowledge) not emerged. A prominent and early defender of the parliamentary system, though, was Max Weber (see Weber, *Parlament und Regierung im neugeordneten Deutschland*, 1919, reprinted in: Weber, *Gesammelte Schriften*, 1971). But he focused less on the organization of the gubernative than on the disadvantages of a parliament without political responsibility. On the reservations of German political thought with respect to parliamentary systems, see Ernst Fraenkel, *Deutschland und die westlichen Demokratien*, 1957, esp. 32-47.

<sup>24</sup> Bagehot (note 4), 10/11.

<sup>25</sup> *Ibid.*, 14.

<sup>26</sup> *Ibid.*, 11.

<sup>27</sup> *Ibid.*, 11/12.

<sup>28</sup> *Ibid.*, 12.

<sup>29</sup> *Ibid.*, 12.

act without responsibility; the executive becomes unfit for its name, since it cannot execute what it decides on; the legislature is demoralised by liberty, by taking decisions of which others (and not itself) will suffer the effects.”<sup>30</sup> In effect, this leads to a severe deficiency in executive responsibility.

Bagehot is critical of the incompatibility rule for yet another reason. In his view it makes political life unattractive for talents, and thus keeps the most capable people away from executive office. “To belong to a debating society adhering to an executive (and this is no inapt description of a congress under a Presidential Constitution) is not an object to stir a noble ambition.”<sup>31</sup>

As Bagehot takes issue with the incompatibility rule and hence the relation between the executive and legislative branches, the arguments for a plural gubernative, the second characteristic of the gubernative in the parliamentary system, are less pronounced in his text. Other writers, however, present mainly three arguments for the Cabinet as a plural gubernative.<sup>32</sup>

First of all, the existence of the Cabinet facilitates coordination and cooperation between the different ministries and executive agencies. The Cabinet is the place where information between ministers can be directly exchanged and inter-ministerial coordination is organized. If there is no meeting point for all heads of executive agencies, it is argued, the necessary multi-lateral coordination between the different executive actors would hardly be possible.

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. It is therefore in the Cabinet, so the argument goes, that divergent interests can be balanced and departmental egoism can be checked. A single executive would have difficulties in controlling what is going on in the different executive institutions and ensuring that the policies of all ministries are balanced and in tune with each other.

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>33</sup>

In sum, arguments for two characteristically different systems arise: one 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

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<sup>30</sup> Ibid., 17.

<sup>31</sup> Ibid., 27/8. Bagehot discerns another major advantage of the parliamentary system in its educative effect. A parliamentary executive has to defend its policies in the legislatures, because the latter can remove the former from office. This constant and public debate contributes to the responsiveness of the executive as well as to the attention of the general public (Bagehot (note 4), 21/22).

<sup>32</sup> See Ivor Jennings, *Cabinet Government*, 3<sup>rd</sup> ed., 1969, 1, 232 with further references.

<sup>33</sup> Karl Löwenstein, *Verfassungslehre*, 4<sup>th</sup> ed., 2000, 171.

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? What would be their constitutional and/or real powers and roles, and their interaction? The following parts of this paper shall describe the organization of the gubernative in two constitutional systems, the US system, which is based on the Constitution, which Hamilton commented on, and the German system, based on the Constitution of 1949, the *Grundgesetz*.<sup>34</sup>

## B. The Organization of the Gubernative in the American Presidential System

### I. The President in a Separated System

The American Constitution places the President at the center of the executive branch of government.<sup>35</sup> Art. 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 (Art. II, § 3), who is the Commander in Chief of Army and Navy (Art. II, § 2, cl. 1), and who has – with advice and consent of the Senate – the power to make treaties and to appoint ambassadors and other public officials (Art. II, § 2, cl. 2). The only other gubernative actor provided for in the Constitution, the Vice President, has no executive function and is hardly more than the official heir of the President (25<sup>th</sup> Amendment). This concentration of power is based on the President’s exceptional political legitimacy. The President is elected by the people, not by Congress (Art. II, § 1). He is politically responsible only and directly to the electorate.<sup>36</sup>

However, the President is only one person, and he depends on structures of institutional support. Over time, these structures have evolved. The presidency today is a multifaceted set of institutions. The Cabinet, White House administration and Vice President, all of whom surround the President, have acquired important

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<sup>34</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 important role, see Eduard Rosenthal, *Die Reichsregierung*, 1911, 62-74 (66/7); Hans Goldtschmidt, *Das Reich und Preußen im Kampf um die Führung*, 1931; cf. Sigfried Schöne, *Von der Reichskanzlei zum Bundeskanzleramt*, 1968, 18-28.

<sup>35</sup> On the original concept of the presidency, see Lawrence Lessig/Cass R. Sunstein, *The President and the Administration*, Columbia Law Review 94 (1994), 14; for a 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*, *Presidential Studies Quarterly*, 14 (1984), 208/209; see also Richard F. Fenno *The President’s Cabinet*, 1963, 13-16.

<sup>36</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 5), 244-251.

functions. The centralized model has been pluralized. Before we turn to the analysis of these institutions, however, we have to take a brief look at the broader governmental system, in which the presidency is placed. Only this can explain the rather astonishing proliferation of gubernative actors.

The American governmental system is a system of separated powers. Its core value is the division of political power between the branches of government, so that each branch checks and balances the other.<sup>37</sup> For the President this means that he is not alone in charge of the executive, but other branches of government exert influence over the executive branch too.<sup>38</sup> In fact, the President's grasp on the administration is surprisingly weak and has famously been described as being the power of persuasion only.<sup>39</sup> Instead, Congress has extensive powers to shape and control the administration through organizational, financial and substantial means.<sup>40</sup> Congress can delegate tasks to and impose policies on the administration; it can establish and organize executive structures and partly insulate them from the control of the President; and it always has the "power of the purse" to maintain its influence. Aside from 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>41</sup>

To cope with this disaggregated administration and to compete with Congress' influence, the President has to rely on institutional help for oversight and advice. Which institutions and organizational system developed to do this will be explained now.

## II. The President's Cabinet

### 1. Legal Obscurity and Political Longevity

The Cabinet was the first gubernative institution to emerge after the Constitution was ratified; hence it is not mentioned in the Constitution itself. Art. II, § 1, as

<sup>37</sup> For the classic explanation of this concept, see *Federalist Papers* (note 4), No. 51, 318-322 (Madison).

<sup>38</sup> See extensively Jones (note 1).

<sup>39</sup> Richard E. Neustadt, *Presidential Power*, 1960, 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 Steven G. Calabresi/Saikrishna B. Prakash, *The President's Power to Execute the Law*, *Yale Law Journal* 104 (1994), 541; Lessig/Sunstein (note 35), 1; Elena Kagan, *Presidential Administration*, *Harvard Law Review* 114 (2001), 2243.

<sup>40</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>41</sup> See Gary Lawson, *Federal Administrative Law*, 3<sup>rd</sup> ed., 2004, 7-10; see also Rudolf Steinerberg, *Politik und Verwaltungsorganisation*, 1979, 107.

stated above, vests the executive power in the President. And although according to Art. II, § 2 the President “may require the Opinion in writing, of the principal Officers in each of the executive departments, upon any subject relating to the Duties of their respective Offices”, this clause is neither obligatory nor does it foresee regular meetings of the “principal officers”. The incompatibility clause of Art. I, § 6, cl. 2 prevents the formation of a committee of Congress to be part of the executive.<sup>42</sup> Also the law hardly acknowledges the existence of a Cabinet. The first statutory reference to the “President’s Cabinet” as a college was made only in 1907, by an act concerning the salary of cabinet members.<sup>43</sup> Beyond that there are few traces of this institution. As Richard Fenn o put it: “The American cabinet was in 1793 and is today an extralegal creation, functioning in the interstices of law, surviving in accordance with tradition, and institutionalized by usage alone.”<sup>44</sup>

Legally obscure, the Cabinet evolved from practical demand and was shaped by practice and each President’s personal style. Its origins lie in the presidency of George Washington.<sup>45</sup> When he sought advice on the Indian treaty in August 1789, his original choice was to discuss the issue in the Senate. But his effort was not particularly welcomed by the senators, who argued that the separation of powers doctrine and the incompatibility clause would not allow them to cooperate.<sup>46</sup> Washington then turned to the heads of the executive departments, which happened to be his political friends.<sup>47</sup> Their first meeting took place in April 1791 and developed into a continued though informal practice. Only in the mid-1790s were these meetings noticed by the public, and only since Jefferson’s presidency has the Cabinet been regarded as an established institution.<sup>48</sup>

However, the American Cabinet is not to be confused with its namesake in a parliamentary system. The differences are profound, both with respect to composition (2.) and function (3.).

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<sup>42</sup> Anthony J. Bennett, *The American President’s Cabinet*, 1996, 3.

<sup>43</sup> An Act making appropriations for the legislative, executive and judicial expenses of Government, 59<sup>th</sup> Congress, United States Statutes at Large, Vol. 34, 993.

<sup>44</sup> Fenn o (note 35), 19. German scholarship on the American political system almost ignores the cabinet, cf. Emil Hübner, *Das politische System der USA*, 3<sup>rd</sup> ed., 1993; Rainer Prätorius, *Die USA. Politischer Prozeß und soziale Probleme*, 1997; but see Ludger Helms, *Die historische Entwicklung und politische Bedeutung des Kabinetts im Regierungssystem der USA*, *Politische Vierteljahresschrift* 1999, 65-89; Steinberg (note 41), 86-98.

<sup>45</sup> Hoxie (note 35), 212.

<sup>46</sup> Fenn o (note 35), 15/16.

<sup>47</sup> Thomas Jefferson as Secretary of State, Alexander Hamilton as Secretary of the Treasury, John Knox as Secretary of War and John Adams as Vice President.

<sup>48</sup> Hoxie (note 35), 214; the further history is described *ibid.*, 215-226; on the 20<sup>th</sup> century see also Fenn o (note 35) and Bennett (note 42).

## 2. Composition of the Cabinet

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>49</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>50</sup> President George W. Bush, for example, gave cabinet rank to the head of the Environmental Protection Agency (EPA) in order to convince his candidate for this post to take up the job.<sup>51</sup> Other high-ranking officials have been included, such as the US ambassador to the UN, the US trade representative or even senior White House advisors.

The President's power to include somebody in the Cabinet is not restricted. There is no law on that. However, his 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 "the 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>52</sup> and legally it has seldom raised any problems with regard to cabinet officers.<sup>53</sup>

The other legal constraint, however, marks a characteristic difference from the Cabinet in a parliamentary system. According to the incompatibility rule, Art. I, § 6, cl. 2, members of Congress cannot hold an executive office. This changes profoundly the recruitment pool and recruitment process for cabinet members – and the character of the Cabinet. Cabinet members in the US are not chosen from the group of leading parliamentarians or party politicians. They are individual and rather spontaneous choices of the President-elect.<sup>54</sup> Accordingly, they are not shaped by common political goals or battles, normally don't know each other before entering the Cabinet and hardly make up a coherent group of politicians.<sup>55</sup> Often enough, they are not politicians at all. Instead, typically and reflecting the openness of the American system, the knowledge of private professionals is

<sup>49</sup> The list of represented departments today includes Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury and Veteran Affairs. The Attorney General was included even before the Department of Justice was established in 1870. On the composition, see Bennett (note 42), 139-141.

<sup>50</sup> James W. Davis, *The American Presidency*, 2<sup>nd</sup> ed., 1987, 195, table. 8.1.; James P. Pfiffner, *Strategic Presidency*, 2<sup>nd</sup> ed., 1996, 40.

<sup>51</sup> Stephen Hess, *Organizing the Presidency*, 3<sup>rd</sup> ed., 2002, 166.

<sup>52</sup> Fenno (note 35), 54. During the 32 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 42), 121).

<sup>53</sup> See Laurence H. Tribe, *Constitutional Law*, 3<sup>rd</sup> ed., 2000, § 4-8.

<sup>54</sup> Fenno (note 35), 51-87.

<sup>55</sup> Often enough, Presidents don't know their appointees before they meet them for their "job interview", James W. Riddlesberger/James D. King, *Presidential Appointments to the Cabinet, Executive Office, and White House Staff*, *Presidential Studies Quarterly* 16 (1986), 695/6; Steinberg (note 41), 92.

tapped.<sup>56</sup> Moreover, Presidents traditionally appoint at least one member from the opposition party to the Cabinet, hardly conceivable in a parliamentary setting.

Two more aspects seem remarkable about the composition of the American Cabinet. First of all, it is interesting to note who is absent. The American federal administration is composed of executive departments and independent executive agencies, but the Cabinet assembles mainly the heads of departments. Hence, a considerable number of executive agencies are not represented in the Cabinet and thus not directly connected to the President.

Even more remarkable are the abridged removal powers of the President. In 1926 the Supreme Court struck down a law from 1867<sup>57</sup> by which Congress had limited the President's power to remove cabinet secretaries, and had tried to link it to the consent of the Senate, i.e. parallel to his appointment power.<sup>58</sup> In 1935, however, the Court qualified its 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>59</sup> Hence, the removal power of the President does not depend on the formal status of the secretary, but more 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.

In consequence, this also means that the legal statuses of cabinet members within a single Cabinet differ remarkably. The Secretary of Defense, for example, is regarded as merely instrumental to the President's will, helping to carry out the Constitution's explicit directives as Commander in Chief. He is thus considered a "purely executive officer". On the other hand there are those who help the President to carry out duties imposed by statute, and are thus more closely regulated by Congress and insulated from the President's removal power. The Secretary of the Treasury is one such example.<sup>60</sup>

### 3. Organization and Functions of the Cabinet

The American Cabinet holds no formal powers. It is neither a forum for collective deliberations on governmental policies, nor is it a place where central decisions

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<sup>56</sup> With respect to the secretaries of the defense department, see Hess (note 51), 193; as to the composition of the cabinets from Kennedy to Clinton see also Bennett (note 42), 125.

<sup>57</sup> § 1 of Act regulating the Tenure of certain Civil Offices, March 2, 1867, US Statutes at Large, Vol. 14, 430.

<sup>58</sup> *Myers v. United States*, 272 U.S. 52 (1926), the majority opinion was written by Chief Justice Taft, himself a former President.

<sup>59</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>60</sup> Paul Verkuil, Separation of Powers, the Rule of Law and the Idea of Independence, William and Mary Law Review 30 (1989), 332-333; Lessig/Sunstein (note 35), 1; also Tribe (note 53), 711-715.

are taken. It is a merely 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>61</sup> The story underlines the difference in status between the President and the members of his Cabinet. As their titles already indicate, cabinet members are "secretaries" rather than "ministers"; they are subordinates to the President, who appoints them and can give them orders.

The Cabinet is thus not a place where the coherence and coordination of governmental policies is organized. This is reflected in its low level of structured organization.<sup>62</sup> A cabinet secretary in the Executive Office of the White House is responsible for the organization of cabinet meetings.<sup>63</sup> His task, however, is a light one. Normally, no memos are circulated before the meetings. The frequency of cabinet meetings depends on the style of the President. They tend to be rather irregular and even seldom, especially the longer a President is in office.<sup>64</sup> All in all, there is nothing which could be qualified as an institutional coherence beyond tradition and the incumbent's style.<sup>65</sup>

The main function of the Cabinet then is twofold. The primary function is to advise the President and provide for direct communication between the President and the departmental heads. The President has only limited powers to direct and control the departments. Although they are formally subordinate to him, 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 are thus of central importance. This is highlighted by a rather unusual step of the second Bush administration. Based on a directive by Bush's Chief of Staff, cabinet secretaries are ordered to spend several hours a week at the White House compound in order to foster the communication between the President and his Cabinet secretaries and to coordinate policies.<sup>66</sup> However, the directive also shows that it is less the Cabinet as a college, which is important, and more the communication with, and advice of, the individual cabinet member.

The other function of the Cabinet as a college therefore is symbolic one. 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

<sup>61</sup> Hoxie (note 35), 219; Davis (note 50), 196.

<sup>62</sup> Bennett (note 42), 159-162, 212; Pfiffner (note 50), 44-47.

<sup>63</sup> Bradley Patterson, Ring of Power. The Expanding Role of White House Staff in the Government, 1988, 27-30; Bennett (note 42), 141-44.

<sup>64</sup> Bennett (note 42), 134-138.

<sup>65</sup> On the styles of the postwar Presidents, see Jones (note 1), 80-121; on President Reagan's attempt to establish a structure of cabinet sub-committees, see Bennett (note 42), 183-196; Pfiffner (note 50), 49-53.

<sup>66</sup> Washington Post, March 31, 2005, p. A01 (by Michael A. Fletcher).

cabinet members themselves. It reminds them of their common commitment to the President, and not only to their respective departments.

### III. White House Staff: The Presidential Branch

#### 1. Evolution and Legal Foundation

In the 20<sup>th</sup> century, the Cabinet has been overshadowed by a new institution, the White House administration. In fact, the growth of the White House administration has been a dramatic development, perceived by many as resulting in the establishment of a fourth branch of government, the presidential branch, “separate and apart from the executive branch”.<sup>67</sup>

Throughout the 19<sup>th</sup> and early 20<sup>th</sup> centuries, the White House was only a small bureau. Presidents were supported by their private secretaries and a few clerks. In 1922, the official administrative and clerical staff in the White House still totaled only 31.<sup>68</sup> The “modern” White House began emerging in the 1920s. The Budget and Accountability Act of 1921 shifted responsibility for the federal budget from Congress to the White House, thereby widening its tasks immensely.<sup>69</sup> President Franklin Delano Roosevelt, confronted with acute problems of how to govern an increasing number of executive agencies, effectively “re-founded” the institution and created the basic structure of the modern White House. In 1937, he set up the President’s Commission on Administrative Management<sup>70</sup> to find new ways of managing the White House workload. This Commission concluded that “the President needs help”.<sup>71</sup> In reaction to its report, Congress’ Reorganization Act of 1939 established a central new office in the White House, the Executive Office of the President (EOP). Shortly afterwards, Roosevelt’s Executive Order 8248 of September 8, 1939 established five divisions within the EOP, including the White House Office and the Bureau of Budget.<sup>72</sup>

Further additions by Congress and later Presidents extended the number of offices within the White House, depending on the current political priorities and the

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<sup>67</sup> Nelson Polsby, *Some Landmarks in Modern Presidential-Congressional Relations*, in: Anthony King (ed.), *Both Ends of the Avenue*, 1983, 20; also John Hart, *The Presidential Branch*, 1987. – The rise of the White House administration has led to further dynamics of politicization, centralization and bureaucratization, cf. Davis (note 50), 167; John P. Burke, *The Institutional Presidency*, 418, in: Michael Nelson (ed.), *The Presidency and the Political System*, 2000, 425-436; Terry M. Moore, *The Politicized Presidency*, in: James P. Pfiffner (ed.), *The Managerial Presidency*, 2<sup>nd</sup> ed., 1999, 144-161.

<sup>68</sup> Hart (note 67), 21.

<sup>69</sup> Davis (note 50), 162; Louis Fisher, *The Politics of Shared Powers*, 1998, 222-226.

<sup>70</sup> Also known as Brownlow Commission, named after its chairman Louis D. Brownlow.

<sup>71</sup> President’s Commission on Administrative Management, *Report of the Committee with Studies of the Administrative Management of the Federal Government (1937)*, 5; cf. Burke (note 67), 418/9; Hart (note 67), 29.

<sup>72</sup> Hart (note 67), 29-34.

incumbent. Major, but by far not exclusive extensions were made in 1946<sup>73</sup>, 1947<sup>74</sup>, 1969<sup>75</sup>, 1970<sup>76</sup> and 1977.<sup>77</sup> President Bush, to name only the last incumbent, added four new offices to the White House.<sup>78</sup> Today, some two thousand people work for the President (five hundred thereof in the White House Office), administering a budget of more than \$ 230 million dollars.<sup>79</sup>

From a legal perspective, the establishment of the presidential branch has taken place through three different devices: by act of Congress, by executive order of the President, or by a presidential submission of a reorganization plan to Congress.<sup>80</sup> The easiest and most commonly used means for internal reorganizations is by issuance of an executive order. This is a presidential directive relating to the affairs of the executive branch and based on the President's constitutional authority as chief executive.<sup>81</sup> The legally most contentious method is the presidential submission of reorganization plans. Those are based on broad grant-of-reorganization authorities delegated to the President by Congress through statute. On such a basis, the President could reorganize according to the submitted plan, unless Congress specifically disapproved. However, this procedure was struck down as unconstitutional by the Supreme Court in 1983.<sup>82</sup>

The third way of reorganizing the White House administration is politically as well as legally remarkable; this is by act of Congress. Politically, it is perhaps less astonishing that Congress tries to control White House structures and tasks, but it is certainly remarkable that over the years it was Congress that contributed most to the creation and growth of the presidential branch, by adding more and more

<sup>73</sup> The Employment Act of 1946 created the Council of Economic Advisors.

<sup>74</sup> The National Security Act of 1947 created the National Security Council.

<sup>75</sup> The National Environmental Policy Act of 1969 established the Council on Environmental Policy.

<sup>76</sup> Domestic Council, established by Reorganization Plan No. 2 of 1970, renamed as Office of Policy Development in 1981.

<sup>77</sup> Office of Administration, established by President Carter's executive order 12028 of Dec. 12, 1977; on this development, see Davis (note 50), 164-167; Samuel Kernell, *The Evolution of the White House Staff*, in: Pfiffner (ed.), (note 67), 39-42.

<sup>78</sup> Two of them (the Office of Strategic Initiatives, led by Karl Rove, and the Office of Faith-Based and Community Initiatives) were campaign promises, another two reactions to 9/11 (Office of Homeland Security and Homeland Security Council, established by executive order 13228, and Office of Global Communication, established by executive order 13238).

<sup>79</sup> Burke (note 67), 419. The numbers differ from one study to another. Bradley Patterson, for example, counts 3400 employees, and only \$ 100 million in the budget (Patterson (note 63), 339). On the problems of measuring the size of the White House Staff, see Charles E. Walcott/Karen M. Hull, *White House Staff Size: Explanations and Implications*, *Presidential Studies Quarterly* 29 (1999), 638-656.

<sup>80</sup> Hart (note 67), 38-41.

<sup>81</sup> George A. Krause/David B. Cohen, *Presidential Use of Executive Orders*, *American Political Quarterly* 1997, 458-474; Phillip J. Cooper, *Power Tools for an Effective and Responsible Presidency*, *Administration & Society* 1997, 531.

<sup>82</sup> *INS v. Chadha*, 478 U.S. 919 (1983); see also Louis Fisher/Ronald Moe, *Presidential Reorganization Authority*, *Political Science Quarterly* 1981, 302-318.

responsibilities and organizational structures.<sup>83</sup> From a legal perspective the lack of any constitutional limit to Congress' authority to organize the White House and thus the heart of the executive branch is noteworthy. The idea of a core area of executive authority over organization, which is well grounded in German law, does not exist in American law.<sup>84</sup>

## 2. Organization, Management and Staff

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 different shapes and importance.<sup>85</sup> They are assembled under the umbrella of the 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.

Among the numerous units<sup>86</sup> in the EOP, five stand out.<sup>87</sup> There is, first, the White House Office, which serves the President in the performance of his most immediate tasks and assembles his closest and most senior advisors.<sup>88</sup> It is something like a personal bureau of the President. However, this office alone, as mentioned above, has about five hundred employees, as many as the German Federal Chancellery. Secondly, the Office of Management and Budget (OMB) evaluates and coordinates management procedures in the federal departments and controls the administration of the federal budget. It also prepares the federal budget and is thus of salient importance. Moreover, it is the only unit in the White House the staff of which is mostly continuous. There is, third, the Council of Economic Advisors, which analyzes economic performance and provides economic policy recommendations to the President. The Office of Policy Development, fourth, advises the President on domestic and economic policies. And finally the National Security Council advises and assists the President in all aspects of national security pol-

<sup>83</sup> See Acts as cited above, (notes 73-78).

<sup>84</sup> Steinberg (note 41), 318-332; also *infra* Part C.I.1. The executive privilege, which the Supreme Court has recognized, is the right to withhold certain information, and does not include any organizational powers, see Tribe (note 53), § 4-14, 4-15.

<sup>85</sup> Davis (note 50), 161; Burke (note 67), 422; Steinberg (note 41), 47-85.

<sup>86</sup> These units are called either "office" or "council", but their label doesn't imply any organizational or legal consequences.

<sup>87</sup> For details, see James P. Pfiffner, *The Modern Presidency*, 4<sup>th</sup> ed., 109-114; Hart (note 67), 41-95; Steinberg (note 41), 47-85.

<sup>88</sup> It includes the offices of the Chief of Staff, the Staff Secretary, the General Counsel, the Secretary of Cabinet Affairs, Intergovernmental Affairs, but also the Office of the Press Secretary, Speechwriting and of the First Lady, among others.

icy (foreign, domestic, military, etc.).<sup>89</sup> 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 that will plague any presidency. Two models of dealing with this complexity have emerged and both evolve around a central figure in the White House administration below the President: the Chief of Staff.<sup>90</sup> One model is based on a strong Chief of Staff. It is the 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. This system was invented by President Eisenhower and deployed by most subsequent Republican Presidents.<sup>91</sup> It has been described as a pyramid.<sup>92</sup>

The other model, metaphorically labeled as circle, tries to avoid a dominant Chief of Staff and is built on the idea of direct access (of senior advisors) to the president. It was developed by President Roosevelt and used by subsequent Democratic Presidents. They ran the White House more on the idea of teamwork and open doors. Especially Kennedy organized and coordinated the White House by himself. Every advisor could approach him without any Chief of Staff as gatekeeper. But this model came close to chaos, and later Presidents, especially Carter, who tried to use a similar style, had major problems and later on installed a Chief of Staff.<sup>93</sup>

A variant of the first model was tried out by the Reagan administration, which deployed not just used one Chief of Staff but a troika of managerial advisors, who split responsibilities.<sup>94</sup> The model worked well in the beginning, but lost its efficiency when the lines of responsibilities got blurred. In the second term Reagan

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<sup>89</sup> On the legal bases of these units, see The United States Government Manual 2003/4, published by the Office of the Federal Register, 87.

<sup>90</sup> Charles E. Walcott/Shirley Anne Warsaw/Stephen J. Wayne, *The Chief of Staff, Presidential Studies Quarterly* 31 (2001), 464 with further references; also Richard Neustadt, *Does the White House Need a Strong Chief of Staff?*, in: Pfiffner (ed.), (note 67), 69-74.

<sup>91</sup> Eisenhower's Chief of Staff was Sherman Adams, a former Governor of New Hampshire, who became the absolutely central advisor, strict gatekeeper, and lightning rod of the President. Other Chiefs of Staff also became famous – or infamous, especially H.R. Haldeman who served as Nixon's Chief of Staff, or Donald Regan who directed Reagan's Office in the second term, see Pfiffner (note 50), 21/22, 32.

<sup>92</sup> Pfiffner (note 50), 19-21; Hess (note 51), 188, 226/227.

<sup>93</sup> Pfiffner (note 50), 24/25. About Clinton's experiences with a mixed model, see *ibid.*, 159-163; also Anne Shirley Warsaw, *Powersharing: White House-Cabinet Relations in the Modern Presidency*, 1996, 207-212.

<sup>94</sup> Warsaw (note 93), 137-140; Collin Campbell, *Managing the Presidency*, 1986, Chapter 4; Pfiffner (note 50), 25-30.

returned to the model of just a single Chief of Staff and had with Donald Regan an especially powerful one.<sup>95</sup>

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. This is not quite how it was planned.<sup>96</sup> The original plan distinguished between the White House Office, which was intended to have only the personal and therefore politically and newly chosen staff of the President<sup>97</sup>, and the other units of the EOP, which were to comprise all the institutional and thus continuous staff. This distinction has broken down though over the years. All offices of the EOP have become progressively more responsive to individual Presidents, rather than to the continuous office of the presidency. Today, all units under the umbrella of the EOP serve directly the incumbent President.

But there is more that distinguishes the White House staff from normal bureaucratic personnel. White House staff is regularly not composed of former government officials or civil servants. It is 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>98</sup> But White House staff is not only loyal, it is also regularly very young, and less experienced in national administration than most cabinet officers, let alone the personnel of the executive departments and agencies.<sup>99</sup> White House staffers are known as “highly intelligent, and unashamedly on the make. They take chances, they cut corners, and unlike politicians they sometimes have a little spontaneity and irreverence left in them.”<sup>100</sup>

All these aspects underline the curious volatility of the White House as an institution. They also point to 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.

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<sup>95</sup> The partly disastrous results of the rule of a Chief of Staff led to a discussion on whether a Chief of Staff is actually recommendable, see James P. Pfiffner, *The President's Chief of Staff*, in: Pfiffner (ed.), (note 67), 75-104; Burke (note 67), 428-432.

<sup>96</sup> Hart (note 67), 30; also Steinberg (note 41), 36-39.

<sup>97</sup> The Brownlow Commission had envisioned six staffers for this office, see Hart (note 67), 27/28.

<sup>98</sup> John Ehrlichman, quoted from Pfiffner (note 50), 18; also compare Hess (note 51), 180/1.

<sup>99</sup> Riddlesberger/King (note 55), 694/5.

<sup>100</sup> Patrick Anderson, *The President's Men*, 1969, 469.

### 3. Functions of the White House and Its Relationship to the Cabinet

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 OMB, the National Security Council and the Office of Policy Development mainly serve this function. Secondly, other units have primarily advisory functions. They provide information to the President and are due to their structure and number of staff not built to oversee departments and agencies. The Council of Economic Advisors and the Council on Environmental Quality are such units. 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>101</sup>

These functions, most importantly in the first two categories, demonstrate to which extent the growth of the White House staff has also affected 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>102</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, controls 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 loyalties to the presidential agenda and that of their departments.<sup>103</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 would

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<sup>101</sup> E.g. the Executive Residence at the White House, or the Office of Administration.

<sup>102</sup> Famous victims of this shift were frustrated Secretaries of State (e.g. William Rogers or Cyrus Vance) who collided with the White House's National Security Advisor (Kissinger, Brezinski) and complained about restrained access to the President and decreased influence on the decision-making. These examples show that White House advisors often outplay their cabinet counterpart. For an extensive analysis of the relation between Cabinet and White House, see Warsaw (note 93), 228-233; Davis (note 50), 165, 169-172; James P. Pfiffner, *White House Staff versus Cabinet*, *Presidential Studies Quarterly* 16 (1986), 666-690.

<sup>103</sup> Bennett (note 42), 165-167.

be doomed, were they to rely only 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. President Nixon vastly increased the White House staff to counter the administration in the departments, which he perceived as mainly hostile to his plans.<sup>104</sup> Later Presidents, most prominently Reagan and Clinton, installed review procedures between White House and departments on agency rulemakings.<sup>105</sup> The task of coordinating governmental policies has insofar completely shifted to the White House staff – and thus limits the independence of the departments. Legally, it is solely the President (or the Vice President), who has the competence to command the departments.<sup>106</sup> EOP units only prepare presidential actions. But in effect, it is now the White House staff, which organizes the presidential influence on departments and agencies.

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 as “natural enemies”.<sup>107</sup> Cabinet members, on the other side, question 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 an only half-serious partner in of policy making.<sup>108</sup>

#### IV. The Vice Presidency

The Vice presidency is another example of a need in the American system of government to help the chief executive in directing an immensely grown administration despite fairly limited powers and capacities. Like the Cabinet in earlier years and the White House administration in recent years, the Vice presidency has become instrumental in sharing the President’s tasks.<sup>109</sup>

Constitutionally, the Vice presidency is a weak office. The Constitution states only two and rather ambiguous functions. Section 1 of the 25<sup>th</sup> Amendment<sup>110</sup> states that “[i]n case of removal of the President from the office or of his death or

<sup>104</sup> Richard P. Nathan, *The Plot That Failed: Nixon and the Administrative Presidency*, 1975, 45.

<sup>105</sup> Executive Orders 12291, 12498 and 12866; see Richard H. Pildes/Cass R. Sunstein, *Reinventing the Regulatory State*, *Chicago Law Review* 62 (1995), 3-11; Kagan (note 39), 2272-2281.

<sup>106</sup> Kagan (note 39), 2284-2298.

<sup>107</sup> Charles G. Dawes, quoted in: Harold Seidman, *Politics, Position, and Power*, 1970, 72; Bennett (note 42), 178.

<sup>108</sup> Bennett (note 42), 179/180.

<sup>109</sup> On the Vice presidency generally, see Joseph A. Pika, *The Vice Presidency: New Opportunities, Old Constraints*, in: Michael Nelson (ed.), *The Presidency and the Political System*, 2000, 535; Thomas E. Cronin/Michael A. Genovese, *The Paradoxes of the American Presidency*, 2<sup>nd</sup> ed., 2004, 288; Martin Bertschi, *Die Vizepräsidentschaft in den USA*, in: Isabelle Häner (ed.), *Nachdenken über den demokratischen Staat*, 2003, 155-181.

<sup>110</sup> This amendment replaced Art. II, § 1, cl. 6 in 1967.

resignation, the Vice President shall become President". The Vice President is hence the constitutional heir of the President and, as has often been noted, by his mere presence reminds the President of his own mortality.<sup>111</sup> Secondly, the Vice President is president of the Senate, with the right to have the tie-breaking vote, Art. I § 3 (4). This function is ambivalent, too, because it places the Vice presidency between two branches – the executive and the legislative, making it a "constitutional hybrid".<sup>112</sup>

However, in the past thirty years the Vice presidency has developed politically into an increasingly influential and highly sought-after office. Since Gerald Ford<sup>113</sup>, a line of powerful Vice Presidents increased the equipment and broadened the competences of the office, culminating in the unprecedented clout held by Albert Gore and Richard Cheney. If the Vice presidency for the greater part of American history was an institution of only, if at all, secondary importance, it is today an important office and considered to be an excellent launching pad for a presidential campaign.<sup>114</sup>

The increased importance of the Vice presidency is demonstrated by and based on organizational aspects. The Vice presidency has grown in regard to budget, staff, office and access to the President. Gerald Ford as Nixon's Vice President increased the budget to build up more staff, including assistants for press relations, speechmaking as well as policy staff.<sup>115</sup> He also enhanced the perquisites of the Vice presidency, from a better airplane to an official residence in an upgraded location: originally located somewhere on Capitol Hill, it is now directly in the White House.<sup>116</sup> The Vice President's office is today almost a replica of the President's, with a national security adviser, press secretary, domestic issues staff, scheduling team, Chief of Staff and counsel's office. Of especial importance within the White House hierarchy is also the time that an adviser spends with the President. Rockefeller was the first Vice President to get at least a weekly slot in the President's calendar, and Mondale won full access to all information that went to the president<sup>117</sup>; today, every working day in the White House begins with a meeting of President Bush and Vice President Cheney.

<sup>111</sup> Pika (note 109), 538.

<sup>112</sup> Thomas E. Cronin, Rethinking the Vice-Presidency, in: Thomas E. Cronin (ed.), Rethinking the Presidency, 1982, 329.

<sup>113</sup> As Vice Presidents of President Nixon.

<sup>114</sup> Sidney Milkins/Michael Nelson, American Presidency: Origins and Developments, 3<sup>rd</sup> ed., 1999, 418; but see Arthur M. Schlesinger Jr., The Imperial Presidency, 1974, 478-480, and (based on empiric material) Danny M. Adkinson, The Vice Presidency as Apprenticeship, Presidential Studies Quarterly, Vol. 13 (1983), 212-218.

<sup>115</sup> Paul C. Light, The Institutional Vice Presidency, Presidential Studies Quarterly Vol. 13 (1983), 198-200; Milkins/Nelson, (note 114), 414.

<sup>116</sup> Davis (note 50), 365; Milkins/Nelson, (note 114), 414. Ford also pressed for a redesigned seal for the office. The old one had shown an eagle at rest; the new one displays a wingspread eagle with a claw full of arrows and a starburst at its head.

<sup>117</sup> Pika (note 109), 535-537; Light (note 115), 209/210; Milkins/Nelson, (note 114), 415.

As important as these organizational aspects is the breadth of functions that Vice Presidents today perform for the President.<sup>118</sup> Vice Presidents today serve as senior advisor to the President and have multiple activities to advance the presidential agenda. Often, they chair commissions to prepare central legislative projects of the President.<sup>119</sup> They are also important to lobby Congress. These activities stand next to more traditional and less influential tasks of, for example, taking on diplomatic missions. Only a few of these functions are based in law, although the few exceptions are indicative. There is, for example, the membership of the Vice President in the National Security Council.<sup>120</sup> This provides the Vice President with considerable insight and influence, since this normally is the most important circle for all foreign and domestic security discussions. More far-reaching is that Vice Presidents are now legally entrusted with supervising the rulemaking of the executive agencies.<sup>121</sup> This gives the Vice President very broad influence over the shape and content of domestic legislation and the implementation of government policies.

Certainly, the rise of the Vice presidency exists only at the sufferance of the President.<sup>122</sup> The constitutional law has not been changed, and even in statutory law the changes have been few.<sup>123</sup> Nevertheless, the rise has a certain logic to it, since there are good reasons for any modern President to rely on his “Veep” in a much more substantial way than done before. First of all, the Vice President brings along a distinct loyalty to the President and his agenda, which he cannot expect from the executive branch. President and Vice President campaign together for a certain political program; the latter also owes his position to the President alone. As Paul C. Light observed: “As presidential doubts about executive branch loyalty grew, the Vice president’s stock increased.”<sup>124</sup> And secondly, the President can hardly afford not to use the manpower and support of another senior advisor. The chief executive is certainly dependent on help from trusted and experienced sources. To use the Vice President thus means only to strengthen the White House and presidential branch.

All in all, the rise of the Vice presidency is another aspect and sign of the massive centralization of power in the presidency, which has characterized the development of the American governmental system in the 20<sup>th</sup> century. *Vis-à-vis* Congress, the presidency has gained ground, although the constitutional limits are un-

<sup>118</sup> Cf. Cronin/Genovese (note 109), 292/3.

<sup>119</sup> Richard Cheney, for example, chaired Energy Policy Task Force, Albert Gore was in charge of legislation on environmental projects.

<sup>120</sup> § 3 National Security Act Amendment of 1949, US Statutes at Large, Vol. 63, 579.

<sup>121</sup> Executive Order 12866, § 2 c, § 4 (c), 3 Federal Register of September 30, 1993; Kagan (note 39), 2288.

<sup>122</sup> Milkins/Nelson, (note 114), 419.

<sup>123</sup> There are suggestions to extend the presidency’s backing to two, six or even eleven Vice Presidents, e.g. Herman Finer, *The Presidency: Crisis and Regeneration*, 1960, Chapter 6; Edward S. Corwin, *The President: Office and Powers*, 4<sup>th</sup> ed., 1957, 297-299; Hermens, *Choice of the Framers*, *Presidential Studies Quarterly* 11 (1981), 9-27. For an overview see Davis (note 50), 397-400.

<sup>124</sup> Paul C. Light, *Vice Presidential Power*, 1984, 134.

changed. Within the executive branch, however, the shift has been dramatic. Cabinet and executive departments have constantly lost power, whereas the President, supported by his White House staff and the Vice President, has extended his organizational standing and procedural influence.

### C. The Organization of the Gubernative in the German Parliamentary System

The organization of the gubernative in Germany stands in clear contrast to the American system. The German Constitution establishes a parliamentary system. Here, the Chancellor is elected by the parliament, the Federal Government consists of both Chancellor and ministers, and the incompatibility rules do not prevent cabinet members from sitting in the parliament. It is the system of a cabinet government, the basic rationale of which Bagehot described. The German governmental system at the same time, however, 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>125</sup> From the constitutional outline, the German system therefore strikes a greater balance between the need for gubernative coordination (through the Cabinet) and the need for gubernative leadership (of a strong Chancellor). However, the German system too has seen modifications. The Chancellor's office, the Federal Chancellery, plays today a more dominant role than originally planned. And the Cabinet has been undermined severely by informal procedures and institutions.

This chapter will outline this German system, again asking about its relevant gubernative institutions, their functions and the underlying scheme of their interaction. It will start out with the constitutional bodies, Cabinet and Chancellor, and then move to the infra-constitutional or informal institutions.

#### I. The Chancellor and the Cabinet

Title VI of the German Constitution, which deals with the Federal Government (*Bundesregierung*), opens with a one-sentence provision: "The Federal Government shall consist of the Chancellor and the Federal Ministers", Art. 62 *Grundge-*

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<sup>125</sup> The notion was coined with respect to the first Chancellor of the Federal Republic, Konrad Adenauer, but is still used 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; Renate Mayntz, *Executive Leadership in Germany*, in: Richard Rose/Ezra Suleiman (eds.), *President and Prime Minister*, 1980, 139-170; Karlheinz Nicolauß, *Kanzlerdemokratie – Bonner Regierungspraxis von Konrad Adenauer bis Helmut Kohl*, in: Hans Hermann Hartwich/Götrik Wewer (eds.), *Regieren in der Bundesrepublik I*, 1990, 131-133; see also Karlheinz Nicolauß, *Bestätigung der Kanzlerdemokratie?*, *Aus Politik und Zeitgeschichte*, Bd. 20, 1999, 27-38.

setz.<sup>126</sup> The central provision determining competences and roles within the cabinet is Art. 65. It reads: “The Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits, each Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall resolve differences of opinion between Ministers. [...]” These sentences state three principles. First, they elevate the Chancellor within the Cabinet and empower him to set (and be responsible for) the general policy directions of the government, Art. 65 cl. 1 (*Richtlinienkompetenz*). Secondly, it guarantees the autonomy of the cabinet members as heads of their respective ministries, Art. 65 cl. 2 (*Ressortprinzip*). And finally, it confirms the basic principle of a plural cabinet rule, according to which decisions of the government are collective decisions, Art. 65 cl. 3 (*Kollegialprinzip*).<sup>127</sup> Art. 65 hence combines monocratic and collective elements of government and lays down the principle of a cabinet government.<sup>128</sup>

### 1. The Chancellor’s Role

The characterization of the German system as *Kanzlerdemokratie* is based both on assumptions about the political skills of the Chancellor and on his 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>129</sup> Our question then is: what is the saddle made of?

The Chancellor’s role is constitutionally designed along three central competences.<sup>130</sup> First, the Chancellor has the power to determine the general policy guidelines of the government (Art. 65 cl. 1). This principle is further developed in the Rules of Procedure (e.g. §§ 2, 3, 9, 12, 17(2), 21 RoP). It is grounded in his su-

<sup>126</sup> “Die Bundesregierung besteht aus dem Bundeskanzler und aus den Bundesministern”. – The term “Cabinet” is not used in the *Grundgesetz*, but commonly understood as a synonym for Federal Government. We may therefore speak of the Cabinet and mean the plurally composed Federal Government in Germany.

<sup>127</sup> The following text will concentrate on the first and third principles, leaving out the second, the so-called *Ressortprinzip*. It mainly insulates the ministers from detailed and regular commands from the Chancellor, see Georg H e r m e s, Art. 65, par. 28-31, in: Horst Dreier, *Grundgesetzkommentar* Vol. 2, 2000.

<sup>128</sup> Beyond these constitutional rules, the Rules of Procedure of the Federal Government establish more detailed rules on the relation between the gubernative institutions (*Geschäftsordnung der Bundesregierung*, *Gemeinsames Ministerialgesetzblatt* (GMBL.) 1951, 137 (GMBL. 2002, 848), hereinafter RoP).

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

<sup>130</sup> For a basic description of the position of the German Chancellor in English, see Karlheinz N i c l a u ß, *The Federal Government: Variations of Chancellor Dominance*, in: Ludger Helms (ed.), *Institutions and Institutional Change in the Federal Republic of Germany*, 2000, 65-83; S m i t h (note 125), 48-61. For a historical and comparative perspective on Prime Ministers in parliamentary systems (in German though), see v o n B e y m e (note 7), 438-456.

perior democratic legitimacy, since he is the only member of the Cabinet who is directly elected by parliament, but it is ultimately based on his skills of political leadership. There are no formal procedures to issue political guidelines and no legal instruments to ensure compliance.<sup>131</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 at the top of the Cabinet and gives him the constitutional basis to press in certain directions.<sup>132</sup>

The Chancellor, secondly, has the power to choose the members of his Cabinet. Although it is formally the Federal President who appoints them, it is the Chancellor, who has the constitutional right to select and nominate them, Art. 64. It is a settled practice that the President has no formal right to refuse the Chancellor's proposals unless certain legal requirements are not fulfilled.<sup>133</sup> The Chancellor's power is complemented by his right to dismiss his ministers. Here again, it is the Federal President who performs the formal part of the procedure as a kind of notary, whereas the material decision rests solely with the Chancellor.<sup>134</sup> In contrast to the American President he faces no formal challenges to this power from the legislature.<sup>135</sup>

There are considerable political constraints, however, on whom the Chancellor can nominate.<sup>136</sup> In contrast to the American President, who is fairly free to appoint his cabinet secretaries, the German Chancellor has to reward the "charmed circle", as Bagehot put it, that is 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 his 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. The Chancellor has no influence on the decisions in other parties.<sup>137</sup> Both constraints demonstrate that parliament and the par-

<sup>131</sup> Hermes (note 127), para. 27.

<sup>132</sup> Hennis (note 129), 106-141; Klaus Stern, Staatsrecht der Bundesrepublik, Vol. 2, 1980, 303.

<sup>133</sup> Klaus Schlaich, Die Funktionen des Bundespräsidenten im Verfassungsgefüge, in: Josef Isensee/Paul Kirchhof, Handbuch des Staatsrechts II, § 49, para. 28; Liesegang, in: Ingo von Münch, Grundgesetz Kommentar, 2<sup>nd</sup> ed., 1983, Art. 64, para. 4.

<sup>134</sup> Martin Oldiges, in: Michael Sachs, Grundgesetz, 2<sup>nd</sup> ed., 1999, Art. 64, para. 8.

<sup>135</sup> See *supra* Part B.I.2.

<sup>136</sup> Joachim Jens Hesse/Thomas Ellwein, Das Regierungssystem der Bundesrepublik Deutschland, Vol. 1, 8<sup>th</sup> ed., 1997, 303; in a comparative perspective, see von Beyme (note 7), 344-359; on German Cabinets from a sociological perspective, see Udo Kempf, Die Regierungsglieder als soziale Gruppe, in: Udo Kempf/Hans-Georg Merz (eds.), Kanzler und Minister 1949-1998, 2001, 7-35.

<sup>137</sup> Göttrik Wewer, Richtlinienkompetenz und Koalitionsregierung, in: Hartwich/Wewer (eds.), (note 125), 147; Kurt Sontheimer/Wilhelm Bleek, Grundzüge des politischen Systems der Bundesrepublik Deutschland, 10<sup>th</sup> ed., 1998, 309.

ties forming the government are not out of the picture, once the Chancellor is elected, but remain the basis of support and power.<sup>138</sup>

The third element of the Chancellor's power is the competence to organize the scope and structure of the ministries (*Organisationskompetenz*). This right is inferred from his competence of Art. 64 to nominate his ministers and supported by § 9 RoP.<sup>139</sup> The Chancellor determines the overall structure of the Cabinet, the number of ministers and their respective fields of responsibility through special ordinances or executive orders.<sup>140</sup> Certain limits to this right hardly abridge the scope 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 would hardly be disposable anyway. Parliament's power of the purse could be another means to control organizational arrangements. But even this is no real threat, since under German constitutional law the executive prerogative and its organizational powers are considered to be shielded against parliamentary "blackmail".<sup>141</sup> Equally important, 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>142</sup>

## 2. The Cabinet Principle

Germany might be a *Kanzlerdemokratie*, and the competences that are at the Chancellor's disposal are strong. But the *Grundgesetz* also determines that the Federal Government is a collective body. Only Chancellor and ministers together form the government, as stated in Art. 62. What exactly does this mean? What competence does the Cabinet have? And how is it organized?

<sup>138</sup> Hans Meyer, *Das parlamentarische Regierungssystem des Grundgesetzes*, Veröffentlichungen der Vereinigung der Staatsrechtslehrer 33 (1975), 86; Hermes (note 127), Art. 64, para. 6.

<sup>139</sup> Hartmut Maurer, *Zur Organisationsgewalt im Bereich der Regierung*, in: Paul Kirchhof (ed.), *Staaten und Steuern*, FS Vogel, 2000, 331; Ernst-Wolfgang Böckenförde, *Die Organisationsgewalt im Bereich der Regierung*, 1964, 139-144; Hermann Butzer, *Zum Begriff der Organisationsgewalt*, *Die Verwaltung* 1994 (27), 157; see also Volker Busse, *Regierungsbildung aus organisatorischer Sicht*, *Die öffentliche Verwaltung (DÖV)* 1999, 313-322.

<sup>140</sup> Gerold Lehnguth/Klaus Vogelsang, *Die Organisationserlasse des Bundeskanzlers seit Bestehen der Bundesrepublik im Lichte der politischen Entwicklung*, *Archiv des öffentlichen Rechts* 113 (1998), 531.

Especially telling was the organization of the first Schröder Cabinet in 1998. The Social Democrats had campaigned on a dual ticket: Gerhard Schröder as an economy-friendly, flexible, Blair-like type of politician and Oskar Lafontaine as a more traditional, left-wing, union-friendly chairman of the party. After the election, in order to reward Lafontaine, Schröder created a "super-ministry" which combined the finance and the economy department and nominated Lafontaine as its head. Lafontaine (at least for a short time) became the most powerful German minister. Cf. Busse (note 139), 313.

<sup>141</sup> Hermes (note 127), Art. 64, para. 20; Gerold Lehnguth, *Die Organisationsgewalt des Bundeskanzlers und das parlamentarische Budgetrecht*, *Deutsche Verwaltungsblätter (DVBl.)* 1985, 1359, 1362.

<sup>142</sup> Busse (note 139), 317, with further references.

According to § 15 RoP, 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*), of an executive order (*Rechtsverordnung*), of a memorandum to the Upper House (*Bundesrat*) or every matter on which individual ministers could not agree has to be tabled in the Cabinet. Also, high-ranking appointments have to be discussed in Cabinet before a final decision is possible.<sup>143</sup>

The Cabinet not only discusses, but also decides on the issues of major political importance. It has the power to issue executive orders, i.e. general rules binding private individuals (*Rechtsverordnungen*, Art. 80) or rules that primarily bind the administration (*Verwaltungsvorschriften*, Art. 84(2)). It has certain appointment powers, for example, with regard to the chairman of the *Bundesbank* (Federal Bank). Finally, it can introduce bills in parliament, Art. 76(2), which is of special importance since most bills are prepared in the ministries. Considering these powers, the Cabinet is not just an advisory board for the Chancellor, but a decision-making body.

The working rhythm and organizational structure of the Cabinet correspond to this powerful position. It meets weekly, on Wednesday mornings. Meetings of the Cabinet convene the Chancellor and all ministers, and also the personal assistant of the Chancellor, a deputy of the Federal President and a deputy of the Federal Press and Information Office, § 23 RoP. Meetings are thoroughly prepared. Each discussion point in a Cabinet meeting has to be prepared in advance by the ministry, which leads the work on that point.<sup>144</sup> The office of the Chancellor, the Chancellery, coordinates the preparation, if a matter involves several ministries. Every Monday, moreover, all deputy ministers meet to prepare the cabinet meetings and clear contentious questions as far as possible.<sup>145</sup> The organizational aspects are dealt with in the Chancellery which – in this respect – serves as a secretariat to the Cabinet.<sup>146</sup> Meetings are moreover confidential. Especially prohibited is disclosure of information about positions of individual cabinet members or their votes, § 22(3) RoP.

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>147</sup> Normally, decisions are taken by consensus. Disagreements are settled in

<sup>143</sup> Her mes (note 127), Art. 65, para. 33/34.

<sup>144</sup> Volker Busse, Bundeskanzleramt und Bundesregierung, 2<sup>nd</sup> ed., 1997, 82; Oldiges (note 134), Art. 65, para. 32.

<sup>145</sup> The cabinet committees (*Kabinettsausschüsse*) are another instrument of coordination among the ministries and preparation of cabinet meetings. They are established by decision of the cabinet (*Kabinettsbeschluss*); currently there are five such committees, see Volker Busse, Die Kabinettsausschüsse der Bundesregierung, DVBl. 1993, 413; Volker Busse, Änderungen der Organisation der Bundesregierung und Zuständigkeitsanpassungs-Gesetz 2002, DÖV 2003, 412; Böckenförde (note 139), 243.

<sup>146</sup> More about the Chancellery, see supra Part B.II.2.

<sup>147</sup> Her mes (note 127), Art. 65, para. 37.

direct conversations between the ministries involved, or are eventually mediated by the Chancellor, § 17 RoP. If an agreement cannot be reached, however, a formal vote has to be taken. More precisely: every important decision has to be agreed upon by the majority of the Cabinet, § 24 RoP. One of the rare decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*) concerning the organizational provisions deals with the decision-taking procedure in the Cabinet.<sup>148</sup> The Court held that every such decision has to be made in a procedure which ensures (a) that every member of the Cabinet was informed about the upcoming decision, that (b) a certain quorum of ministers actually take part in the decision and that it is (c) a majority which adopts the decision.<sup>149</sup>

Even though all members of the Cabinet are formally equals, certain members have special rights in the decision-making procedure. The Minister of Finance, for example, has a veto power for all matters that are of financial significance. Those matters which were vetoed have to be discussed again and can be affirmed only with his consent, § 26(1) RoP. A similar power has the Minister of Justice in matters that contradict good and settled law.

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 on all major political initiatives of the government. However, Chancellor and Cabinet are not the only relevant gubernative institutions; 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.

## II. The Federal Chancellery (*Bundeskanzleramt*)

The Federal Chancellery is not mentioned in the German Constitution but is today the “institutional center of the executive”.<sup>150</sup> It plays an irreplaceable part in the governmental process and is more than just the secretariat of the Cabinet as what it is mentioned in the Rules of Procedure of the Federal Government.<sup>151</sup> It is also the personal bureau of the Chancellor, a central coordinator of gubernative

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

<sup>149</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>150</sup> Sonthemer/Bleek (note 137), 311.

<sup>151</sup> § 21 RoP.

processes and a pivotal place for policy planning. For the Chancellor, who has no separate portfolio, it is the central institutional basis of power.<sup>152</sup>

### 1. Evolution and Legal Foundation

The institution dates back to the German *Kaiserreich* of 1871, although it is not to be confused with its namesake, the *Reichskanzleramt*, which was the (only) federal ministry at that time. Instead, the institution comparable to what is today the Chancellery was founded only in 1878 and was called the *Reichskanzlei*. It was established as a personal bureau for Chancellor Bismarck and consisted only of a very limited, mostly clerical staff.<sup>153</sup> This office was kept through all following German political systems, the Weimar Republic and the Third *Reich*, as the most immediate bureau of the chief executive. After World War II it was re-established even before the Federal Republic was founded.<sup>154</sup>

The Chancellery of the Federal Republic was formally erected immediately after the first general election in 1949. It had a staff of 120 employees, who were organized into two units: one dealt with budget and personnel affairs of the Cabinet and of the Chancellery itself, the other coordinated cabinet matters and inter-institutional affairs. Soon, a personal bureau of the Chancellor and a press office were added.<sup>155</sup> Since then, the Chancellery has grown immensely. Today, more than five hundred civil servants work there.

The exact legal basis for establishing the Chancellery has been subject to debate.<sup>156</sup> It is not disputed, however, that the *Grundgesetz* allows for the Chancellor to establish and organize an office that supports and coordinates the Cabinet and his own tasks. Generally accepted is also that the organization of the Chancellery is a competence of the Chancellor and thus beyond the reach of parliament. It is considered to be a part of the core executive competence of organization.<sup>157</sup> The le-

<sup>152</sup> On the Chancellery generally, see Busse (note 144); Ferdinand Müller-Rommel/Gabriele Pieper, *Das Bundeskanzleramt als Regierungszentrale*, Aus Politik und Zeitgeschichte, Bd. 21-22, 1991, 3-13; Ferdinand Müller-Rommel, *The Chancellor and His Staff*, in: Stephen Padgett (ed.), *Adenauer to Kohl*, 1994, 106-126; Jens Brauneck, *Die rechtliche Stellung des Bundeskanzleramtes*, 1994. On the bureaus of Prime Ministers in parliamentary systems in a comparative perspective, see von Beyme (note 7), 456-459.

<sup>153</sup> Schöne (note 34), 59-70 with many references.

<sup>154</sup> Günther Behrendt, *Das Bundeskanzleramt*, 1968, 9-26.

<sup>155</sup> *Ibid.*, 30; Schöne (note 34) 184-199.

<sup>156</sup> Some scholars base it on Art. 86 cl. 2 *Grundgesetz*, which grants the Federal Government the power to establish federal administrative agencies (Böckenförde (note 139), 136-138). Others contend, that this provision concerns only agencies, but not the government as such. Instead, they propose to base it on the Chancellor's general competence to organize the structure of the Federal Government, Art. 65 cl. 1, 64 *Grundgesetz*, see e.g. Wolf-Rüdiger Schenke, *Die Bildung der Bundesregierung*, Jura 1982, 57; extensively on this question Brauneck (note 152), 60-92.

<sup>157</sup> Maurer (note 139), 345; Meinhard Schröder, *Aufgaben der Bundesregierung*, in: Josef Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. III, 2<sup>nd</sup> ed., 1996, 591; but see Hans Meyer, *Die Stellung der Parlamente*, in: Hans-Peter Schneider/Wolfgang Zeh (eds.), *Parlamentsrecht und Parlamentspraxis*, 1989, 138/9.

gal bases of the concrete organizational structure of the Chancellery are organizational decrees, so-called *Organisationserlasse*, which the Chancellor issues.<sup>158</sup>

## 2. Organization and Functions

The Chancellery in its organizational structure is a classical bureaucracy. It is organized hierarchically from top to bottom.<sup>159</sup> Head of the Chancellery is a senior civil servant or deputy minister (*Staatssekretär*), also called chief of Chancellery, §§ 7, 23(I) RoP. Since the 1960s has been the tradition to give this deputy also cabinet rank as a Minister for Special Affairs.<sup>160</sup>

The Chancellery's structure comprises six departments. Three of them cover the classical areas of policy: foreign relations, domestic affairs and finance-economy; one more oversees the intelligence services (*Nachrichtendienste*); a fifth is a press department, responsible for all media aspects of the Federal Government. Finally, there is one general department that organizes personnel and other internal matters of the office. Every department is headed by a senior civil servant (*Ministerialdirigent*). Every department is then divided and organized into smaller units, called "*Referate*", another word for small departments. The Chancellery by now is composed of fifty of these smaller units.<sup>161</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 observe and accompany every development in the ministry. It is a structure parallel to the ministries, observing not just 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>162</sup>

The Chancellery has mainly three functions.<sup>163</sup> As mentioned above, it serves as the secretariat of the Cabinet, scheduling Cabinet meetings, coordinating their agenda and preparing the necessary papers, §§ 7(I), 21(I) RoP. The Chancellery also serves as a coordination point for what the ministries work on, §§ 2, 16, 17 RoP. It has the duty to check every proposal for a bill that comes from the ministries in a legal as well as political sense, which means to scrutinize and ensure that they are in sync with the general political direction of the government. This is the

<sup>158</sup> Busse (note 139), 315/6.

<sup>159</sup> Busse (note 144), 106-116; Klaus König, Vom Umgang mit Komplexität in Organisationen: Das Bundeskanzleramt, Der Staat 1989, 55-58.

<sup>160</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 – or even the Chancellor with whom the Chief of the Chancellery is equal as minister and member of the Cabinet, see Böckenförde (note 139), 241/242, Footnote 39; Brauneck (note 152), 30-59.

<sup>161</sup> On informal or more flexible structures, see König (note 159), 58-59.

<sup>162</sup> Hesse/Ellwein (note 136), 311; Busse (note 144), 119-121.

<sup>163</sup> Busse (note 144), 116-129; Brauneck (note 152), 12-30.

link to the third, more vague but most important function<sup>164</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 programs, and steering the process of governance. In that respect, the Chancellery secures the Chancellor's influence on policy.<sup>165</sup>

The relationship between Chancellery and Cabinet or individual ministries is peculiar and insofar comparable to the American example.<sup>166</sup> The limits of the Chancellery's competences are vague, but strict. Legal yardstick is Art. 65 and its three principles of the Chancellor's power to set general policy directions, of departmental independence and of the Cabinet's collective decision-making. The Chancellery has to find its place between these principles.<sup>167</sup> It is to 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. Also, it cannot place itself between the Chancellor and ministries, receiving guidelines from him and issuing them on to the ministries, since this would violate the principle of collective decision-making. Neither may it grow into a kind of proxy government, with the civil servants in the Chancellery substituting for the ministers.

### 3. Chancellery Staff: Non-Partisan and Loyal?

The Chancellery's staff is yet another important feature. It is generally composed of civil servants, highly qualified ministerial civil servants, mostly lawyers. Only in the press department, the Chancellor's personal bureau or the speech-writing unit would one find non-civil servants.<sup>168</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 right color 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. Moreover, the German law of civil service contains hurdles against mere political appointments. Although it has a provision for so-called "political civil servants" (*politische Beamte*), § 31 *Beamtenrechtsrahmengesetz*<sup>169</sup>, this is applicable only to a very small number of

<sup>164</sup> König (note 159), 60-63.

<sup>165</sup> Smith (note 125), 50 (he calls the Chancellery "the indispensable voice and ears of the chancellor"); Hermes (note 127), Art. 65, para. 17/18.

<sup>166</sup> See supra Part B.II.3.

<sup>167</sup> Brauneck (note 152), 23-28.

<sup>168</sup> König (note 159), 65-70.

<sup>169</sup> "Civil Servant Framework Law".

enumerated positions. In the case of the Federal Chancellery, this category covers only six (!) employees.<sup>170</sup> The incoming incumbent's ability to change and politicize his personnel is therefore extremely limited.<sup>171</sup>

However, it seems attractive to every Chancellor to use the Chancellery as more than just a bureaucratic device and transform it into a policy powerhouse, dominated by party associates. Twice, the attempt was made:

The first took place when Willy Brandt became Chancellor in 1969 and Horst Ehmke administrative head of the Chancellery. Their approach was not so much a blunt politicization, but a belief in the ability to plan government, to rationalize governance.<sup>172</sup> It was the attempt to build up a system of coordinated policy planning, directed out of the Chancellery. It was also an attempt to make the Chancellery the dominant center of Cabinet coordination and thus establish its primacy over the ministries. Brandt and Ehmke extended the staff, reshaped the system of departments and created a new department for planning.<sup>173</sup> But they mainly failed.<sup>174</sup> Their program was too ambitious, met suspicion in the ministries and contradicted the instincts of the bureaucracy in the Chancellery.<sup>175</sup> The process slowed down, and stopped when Ehmke left the Chancellery in 1972.

Chancellor Helmut Kohl took a different approach to the Chancellery when he entered the office in 1982. He was the first Chancellor who actually managed to convert the Chancellery into an office mainly dominated by party associates.<sup>176</sup> The long duration of his term allowed him to staff the Chancellery with a progressively loyal staff of Christian Democrats. But beyond this, Kohl systematically chose and used the heads of the departments in the Chancellery as his most intimate circle of advisors. The Chancellor himself, the head of the Chancellery and the heads of the three classical departments within the Chancellery met every morning in the office to discuss the current political situation, plans and initiatives and the press.<sup>177</sup> This group, based on the resources and manpower of the Chancellery, became the most important advisory board to Kohl. The Chancellery under Kohl surely gained more power than ever before.

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<sup>170</sup> König (note 159), 69.

<sup>171</sup> Cf. Klaus König/Frank Kroppenstedt, *Neutralisierung der Bürokratie*, ZfP 1977, 240-249. The consequences of this provision are described in Hans-Ulrich Derlien, *Repercussions of Government Change on the Career Civil Service in West Germany*, IPSA SOG Conference paper, 1986.

<sup>172</sup> Mayntz (note 125), 164-166; Renate Mayntz/Fritz Scharf (eds.), *Planungsorganisation: Die Diskussion um die Reform von Regierung und Verwaltung des Bundes*, 1973. For a fascinating account of this time in Ehmke's autobiography, see Horst Ehmke, *Mittendrin*, 1994.

<sup>173</sup> Steinberg (note 41), 397-400.

<sup>174</sup> Hesse/Ellwein (note 136), 311; Mayntz (note 125), 166.

<sup>175</sup> Manfred G. Schmidt, *Regieren in der Bundesrepublik Deutschland*, 1992, 38/9.

<sup>176</sup> Clay Clemens, *The Chancellor as Manager*, in: Clay Clemens/William E. Paterson (eds.), *The Kohl Chancellorship*, 1998, 34, 42; Sontheimer/Bleek (note 137), 310/1.

<sup>177</sup> Wewer (note 137), 148.

In sum, it has to be said that the development has rather been one of centralization than politicization. The Chancellery is far away from a situation comparable to the one in the White House. But its extension and development certainly has 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>178</sup> Another central reason for this has to be seen in informal institutions.

### III. 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 twenty years. Two dynamics have contributed to this development: first, a superimposition of cabinet rules by party logistics, and secondly, a self-deprivation of the Cabinet through deliberate transfer of decision-making powers to smaller, external bodies.

(1) The first and here more important dynamic of a superimposition of cabinet rules by party logistics 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 has always played a crucial role.<sup>179</sup>

The relation between cabinet rule and party demands took on a new quality, however, under the chancellorship of Helmut Kohl. Apart from the Cabinet, he installed a so-called coalition round (*Koalitionsrunde*).<sup>180</sup> This group convened the chairs of the governing parties, their general secretaries, the leaders of their party groups in parliament and certain but not all ministers.<sup>181</sup> It was formed in accordance with party logistic, not governmental rank; it served to accommodate the demands of coordination between the coalition parties, not to coordinate between ministries.

<sup>178</sup> Smith (note 125), 50; for a comparative perspective, see Ferdinand Müller-Rommel, Ministers and the Role of Prime Ministerial Staff, in: Jean Blondel/Ferdinand Müller-Rommel (eds.), *Governing Together*, 1993, 131-152.

<sup>179</sup> Smith (note 125), 53/54; Wolfgang Rudzio, Informelle Entscheidungsmuster in Bonner Koalitionsregierungen, in: Hartwich/Wewer (eds.), (note 125), 128-133; Wewer (note 137), 145-150.

<sup>180</sup> The idea of 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. The Grand coalition (1966-1969) also used an informal circle. But these institutions were of secondary importance and under Chancellors Brandt and Schmidt disappeared again, see Wewer (note 137), 147.

<sup>181</sup> Waldemar Schreckenberger, Informelle Verfahren der Entscheidungsvorbereitung zwischen der Bundesregierung und den Mehrheitsfraktionen: Koalitionsgespräche und Koalitionsrunden, *Zeitschrift für Parlamentsfragen (ZParl)* 1994, 330, 334.

And the group was more than a meeting point for exceptional cases. It met every fortnight, more often if necessary. Over the years, it developed into an increasingly institutionalized body with invitations and fixed agendas, with written memoranda, and with logistical support of the Chancellery and certain ministries.<sup>182</sup> The group negotiated bills and major reforms, discussed general approaches to new issues, cleared treatment of the media, in short: developed into the salient body of policy-planning and decision-making in the Federal Government.<sup>183</sup> The Cabinet, on the other side, developed more and more into the “notary” of the coalition round.<sup>184</sup> The logic of party politics and the demands of party coordination had clearly superimposed the constitutional rules of cabinet government.

Under Chancellor Schröder, the coalition round was abandoned, but not the primacy of party logic. In exchange for the external round of party chairs and party group leaders, the party group leaders were simply invited to take part in the cabinet meetings.<sup>185</sup> Hence, the coalition round was now simply incorporated into the Cabinet. Party Logistics led the Red-Green government to another change in cabinet rules: the coalition agreed that the smaller coalition partner should have a blocking minority in cabinet decisions. Both decisions endanger the constitutional rules of the Cabinet.<sup>186</sup> The first overstretches the permissible circle of guests of the Cabinet<sup>187</sup>, the blocking minority for the Green party contradicts the majority rule for cabinet decisions, § 24(2) RoP. These rules can, of course, be changed. But the developments nevertheless underline, that 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.

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<sup>182</sup> Ibid., 331-333.

<sup>183</sup> In later years, the coalition round even formed subcommittees for certain policy projects, like health care or tax reform. Each working group was headed by one of the major members and could invite members of the parliament as experts. See Schreckenberger (note 181), 335.

<sup>184</sup> Compromises, once found in the round of party heavy weights, were not discussed and even less changed in the cabinet. Consequentially, two categories of ministers evolved: Those who were part of the round and those who were not. Famous is the complaint of a have-not, the Minister for Postal Affairs who was informed about major details of the post reform (and its privatization) only in a cabinet meeting, see Ludger Helms, *Das Amt des Bundeskanzlers*, ZParl 1996, 704; Schreckenberger (note 181), 339-341.

<sup>185</sup> Wolfgang Zeh, *Die parlamentarische Kontrolle der Regierung durch Mehrheit und Minderheit*, in: Friedhelm Hufen (ed.), *Bundesstaat-Parlament-Opposition*, 2001, 47; Volker Busse, in: Karl-Heinrich Friauf/Wolfram Höfling (eds.), *Berliner Kommentar zum Grundgesetz*, Art. 62, para. 13.

<sup>186</sup> Meinhard Schröder, *Kritische Tendenzen im normativen Umriss von Regierung und Parlament*, in: Michael Brenner (ed.), *Der Staat des Grundgesetzes*, Festschrift Peter Badura, 2004, 521; Martin Morlok, *Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung?*, *Veröffentlichung der Vereinigung Deutscher Staatsrechtslehrer* 62 (2003), 72. On the legality of the coalition round under Kohl, see Schreckenberger (note 181), 341-344.

<sup>187</sup> Cf. § 23 RoP.

(2) A second dynamic contributed to the undermining of the role of the Cabinet, and that was the Cabinet's self-deprivation of the Cabinet through a deliberate shift of decision-making prerogatives from the Cabinet to informal bodies, like 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>188</sup> This development has so far mostly been discussed under the heading of de-parliamentarization and was seen as a threat to the autonomy of parliament.<sup>189</sup> But at the same time, these bodies also pre-determine 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 exclude the possibility that it threatens the role of the Cabinet and the idea of a 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.

#### D. Comparative Summary

The American and the German gubernative are organized according to different construction plans. The American plan of a presidential system stipulates a unitary pinnacle, the President, 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. Comparing these two distinctly different systems is, as any comparison is, a methodological challenge.<sup>190</sup> We can and shall do so, however, by analyzing the way in which institutions in both systems serve certain functions. The description of the two systems in the previous parts has underlined that they react to similar functional expectations. Very broadly, two functions of gubernative organization can be distinguished. First, both systems aim to facilitate political leadership, that is to provide an institution which can set political goals, formulate policy agenda and has the means to pursue them. And secondly, both systems have to ensure the coordination and coherence of governmental policies, that is to make sure that the different departments adhere to the general policy direction, departmental special interests do not prevail and all relevant aspects are heard and integrated.

How do both systems compare with respect to these functions? What are their comparative characteristics?

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<sup>188</sup> For a description of different types of these bodies, see Julia von Blumenthal, *Auswanderung aus den Verfassungsinstitutionen*, *Aus Politik und Zeitgeschichte*, Bd. 43, 2003, 9/10.

<sup>189</sup> On this discussion, see Morlok (note 186), with abundant further references.

<sup>190</sup> See literature on comparative law in note 5.

## I. Facilitating Leadership: Chief Executives and Their Offices

The two systems present two different concepts of leadership, 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>191</sup> “Energy in the executive”, as Hamilton called it, is the basic rationale of the American scheme of the gubernative, and 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>192</sup> Agenda setting is to some extent a deliberative process, in which the Chancellor is not the only overriding authority. The Ministers of Finance and Justice have veto power, 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>193</sup> He is the only gubernative actor who is directly elected by parliament. He has the power to set the general policy directions and to nominate (which is tantamount to: appoint) and dismiss his ministers, and can thereby discipline recalcitrant ministers. He also has the power to organize or even establish new ministries, and is in this respect decidedly more powerful than the American President, who is clearly limited by Congress. However, the leadership tools of Chancellor and President are ultimately aimed at different targets: while the Chancellor is empowered to steer his Cabinet, the President has to convince the other branches of government.

It became apparent, though, that neither President nor Chancellor could play a 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 US and the Federal Chancellery in Germany.<sup>194</sup> They form today the organizational backbone of the gubernative leadership of President and Chancellor and signalize 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 the Cabinet and they are instrumental in overseeing or directing the policies of the different ministries. But 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 a line of command

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<sup>191</sup> See Parts B.I., II.3.

<sup>192</sup> See Part C.I.2.

<sup>193</sup> See Part C.I.1.

<sup>194</sup> See Parts B.III., C.II.

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 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 differences in 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. There is no personal continuity in the White House, nor is there any institutional memory. The Chancellery, in contrast, is filled with longtime civil servants, who are contractually independent of the Chancellor and normally stay 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 high degree from the American system of separated powers. This gives Congress great influence over the White House's organization, which uses it incrementally, unsystematically and not seldom against the will of the President. The difference in 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-term inhabitants of political offices. However, especially the difference in size has also to do with the existence of other institutions, which contribute to the coordination of the executive branch, as we will see now.

## II. Ensuring Coherence: Cabinet and Non-Cabinet Coordination

The organization of the gubernative also has to ensure the coherence of gubernative policies and the coordination of executive branch activities. The gubernative, as politically responsible apex 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>195</sup> The Cabinet, basically just another word for the government, 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.

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<sup>195</sup> See Part C.I.2.

The US lacks a direct functional equivalent. What is called “Cabinet” in the American context is an informal institution, not mentioned in the Constitution.<sup>196</sup> 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 voluntary gathering of the heads of the executive departments and other senior advisors of the President, convened at his leisure and without any formal powers. Yet, the most telling difference between the German and the American Cabinets lies in their respective recruitment pool. The German Cabinet, typical for the parliamentary concept, is recruited from the strongest politicians of the governing party, normally the leading figures of the party group in parliament, the “charmed circle”, as Bagehot put it. The fusion of executive and legislative power is the fundament on which the parliamentary system is built, and this fusion is 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. His cabinet members, tellingly called secretaries, not ministers, are rather spontaneous choices, often hardly acquainted with the President – or politics. They are meant to manage their departments on behalf of the President, not to ensure compliance of the President’s party group in the legislature.

But if the American Cabinet is not the place where governmental policies are actually coordinated, where is it? The answer points back again to the White House. The White House and its numerous offices have increasingly taken on 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 and that governmental policies are somehow coordinated.<sup>197</sup> In effect, the White House and what has been baptized the “presidential branch” (as in contrast to the executive branch) are not just a personal bureau for the chief executive anymore, but have 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.

Another institution has been drawn into the task of coordination and control in the US, the Vice presidency.<sup>198</sup> According to the Constitution, the Vice President is hardly more than the official successor to the President, a post without any functional equivalent in Germany. However, it has grown in importance over the past thirty years as another auxiliary office, supporting the President. Vice Presidents today play an important role as senior advisor to the President, as liaison to other branches of government generally and as supervisor of agency rulemaking in particular.

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<sup>196</sup> See Part B.II.

<sup>197</sup> See Part B.III.3.

<sup>198</sup> See Part B.IV.

In a comparative perspective, the American system of coordination still seems deficient. 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.

It has to be added, though, that also in the German system the Cabinet does not fulfill the coordination role by itself. The Federal Chancellery is important as a secretariat to the Cabinet and as manager of inter-ministerial conflicts. And the Chancellery faces similar conflicts as 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 Chancellor's office and ministries is not as grave as in the US, and for different reasons. A central reason 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. 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. They are much more easily captured by the special interests of their respective department. 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 than from political parties as external centers 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 chairmen or -women in the political decision-taking, even if they are not formally part of the Cabinet. This has been organized through informal meetings, most notably the so-called coalition rounds.<sup>199</sup>

### III. Trends and Conclusion

As we survey the two systems of organizing the gubernative, certain trends become apparent that have changed the American and the German systems of government, even without amendments to their constitutions.

Both systems have seen a considerable centralization of power in the offices of their respective chief executive. The American President as well as the German Chancellor have built up their own institutional support, giving themselves an organizational standing that was originally not foreseen. This trend might at first glance be more surprising with regard to the US, considering that it originally had only one gubernative actor, hence little more to centralize. The development has

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<sup>199</sup> See Part C.III.

been explained, however, as a reaction to the weakness of the President in a separated system and to the growth of governmental tasks in general. In Germany, centralization of gubernative power in the Chancellor's office is less dramatic than in the US, and has been based on the already strong constitutional powers of the Chancellor. It nevertheless had a deteriorating effect on the position of the Cabinet.

More characteristic of the German system, though, has been a trend towards informal structures in the gubernative. This refers most prominently to the coalition rounds, which assemble the heads of the governing parties in an informal setting outside the Cabinet or informally include them into the Cabinet meetings. It is curious, although perhaps not all too surprising that this informalization takes place in the German system, which is – in comparison to the US – much more regulated by legal norms. But it goes to show that the constitutional set-up is only predominant insofar as it captures the central powers. In the German case, it fails to account for the dynamics of coalition governments and the power of party politics.

Comparing the two systems, similarities become apparent, not least because both systems face universal challenges to the process of governing. These challenges create a need for institutionally strong and visible leaders, and led to the establishment of powerful offices to oversee and steer the gubernative. They also call for a common tendency towards small and rather flexible or informal centers of power. The components of the Cabinet in the German system seems already too numerous; the American President alone is powerless. However, the differences between the two systems remain fundamental, and they are not just differences in numbers between a unitary or plural gubernative. More important for an understanding of the respective systems is the relation between the gubernative and the legislature. Their separation in the presidential system and their effective fusion in the parliamentary system respectively are the ultimate key to understanding these two constitutional systems and their models of organizing the gubernative.