

CHAPTER I

INTRODUCTION

THE English cabinet came from the privy council. It appeared in the seventeenth century, when the privy council was beginning to decline. During a long time the cabinet developed from the older body, within it, under its shadow, separating itself slowly and in part, often disappearing within the council or in some of its phases re-establishing close connection with the parent body, sometimes seeming to be part of it, sometimes appearing of uncertain origin and connections, until at last after steady, unobtrusive growth it became well known. It was not formally recognized, however, even though it had become the greatest organ in the government of England. During the seventeenth century, in the hands of the king, it largely superseded the privy council. In the eighteenth century it absorbed power of the king and assumed the guidance of parliament, after which, in further process of time, that arrangement was worked out by which cabinet came to control parliament and yet be entirely dependent upon it—the system in which legislative and executive are merged in one organism effective and responsive to those from whom power is derived.

As time went on and as men looked farther back at the history of the cabinet so indispensable in the working of the state and now taken as a matter of course, the origin seemed more, and more obscure, and the development in most of its details had been forgotten. Like so many other things in English political life the cabinet had not been deliberately instituted or definitely founded. It had arisen almost without design in the custom and practice of

administrative life as the administration developed. Therefore its beginning was not stated in public documents, its existence was not formally recognized in law; often its name conveyed opprobrium, its members were attacked for holding unconstitutional and unlawful position. And if the origin of the cabinet was obscure, so were its nature and character difficult to determine: some considered it a committee or part of the privy council; some thought of it as a body independent that had been evolved in connection with the parent organism, alongside it or in some manner from within. Early in the eighteenth century cryptic statement was well made by Roger North: "And as offices of the law, out of clerkships, spawn other offices, so this council was derived from the Privy Council which, originally, was the same thing."¹

The beginning, then, of the task of him who writes about the origin and history of the cabinet is a study of the privy council at the time when the cabinet began. At the start, if he goes farther back, following the masters of the history of medieval institutions in England, he finds, in the evolution and metamorphosis of the *curia regis* of olden days and the king's council which afterwards appeared less dimly, much that in character and development is like what pertains to the privy council and its offshoots in the time of the Tudors and those who came after.²

¹ *Lives of the Norths* (ed. Augustus Jessopp, London, 1890), i. 299.

² In what remains of this chapter, which is based almost entirely on the work of others, I need not confess obligations to Palgrave, Stubbs, Maitland, Tout, and Adams, to whom students would have recourse, but I do wish particularly to pay tribute to Professor J. F. Baldwin, who has made the subject of the medieval council in England so peculiarly his own, and whose exhaustive work, *The King's Council in England during the Middle Ages* (Oxford, 1911), seems to me one of the most important and thorough pieces of work that has proceeded from historical scholarship in the United States.

It is well known now that in Norman times the central government of England was administered by the king with the assistance of a *consilium* (*concilium*) or *curia regis*, which had its origin in the general and unspecialized court of the feudal sovereign. It was essentially a gathering of the king's vassals, including the officers of his household. It is well known, also that from the first this council is seen in two aspects: a large body assembled on fixed occasions by summons from the king, and a smaller one meeting at frequent intervals or throughout some time. Between the two there was no positive division in respect of personnel and no definite division of labor. There was no differentiation, no specialization, for the reason that what was functioning was one body—the same *consilium* whether large or small. It was the royal council whether a court or justice or a general assembly, and this council exercised executive, legislative, judicial functions in turn without any clear discrimination respecting those who did the work.

It need not be said that this *curia* was ill-defined: perhaps its outlines and its structure were not clearly conceived or delineated even by the men who saw it and took part in its work; or, more probably, they troubled themselves little with any attempts at definition. It was the ancestor of the exchequer, of common pleas, of king's bench, of privy council, and of parliament, nay it was for a great while each one of these things. Afterwards, in spite of the divisions and subdivisions that were gradually but inevitably made good, the idea of one single institution lived on, and the various courts or members of parts were slow to separate themselves completely. They easily coalesced again, or in partial separation maintained practical connection with the parent stem, and the various divisions were wont to interchange certain names, *curia*,

consilium, parliamentum, which had been the names of each one of them or else of the one institution in which they began.

The history of the development of this organism is complicated and difficult to relate. There was constantly and naturally at work a tendency towards differentiation and ensuing division, in the course of which exchequer and common-law courts were gradually separated from the body in which they arose, while king's council and parliament slowly became distinct from each other. But this is difficult to describe exactly since the process becomes clear only through examining an infinitude of details, while it is obscured by persisting tendency which causes the divisions that are taking place to be incomplete and often to cease, and the parts that are dividing to coalesce again. Furthermore, to a great extent the process long remains a differentiation in respect of function rather than of personnel, so that one sees not two bodies forming apart one from the other, but different aspects of the same body, or the same body doing now one thing and then another.

The student contemplates a lengthy, indefinite, complex process, and sees, dimly it may be, that in course of time, exchequer and courts of law drop away from the old *consilium*, with separation of council in parliament from the permanent and ordinary council of the king; and he sees that after a while from the king's permanent council comes the secret or privy council of the king.

Down to the end of the twelfth century, whatever names were employed, there was but one body, the *curia* or *consilium*, a body sometimes large and sometimes small. During that period the terms *curia* and *consilium* or *concilium* were used synonymously or indiscriminately, but in course of time a difference established itself: *consilium* came to denote the consultative aspect,

from which developed the house of lords and the secret council of the king; *curia regis* was rather the judicial aspect from which came exchequer and courts of law.

The first tendency toward separation was in connection with the exchequer. The beginning can be discerned far back, but not for a great while was differentiation fully accomplished. Under Henry II the *curia* at the exchequer was a court of general assemblage including not only the king's officers but a varying number of the barons of the king. How largely it might be expanded in membership and function is evident in that great councils were apt to be held in the Michaelmas sessions at the exchequer. The *curia* at the exchequer was differentiated from the *curia* only in so far that certain of the king's officers were barons of the exchequer, having special duties in respect of the management of the revenue of the king. Actually in personnel the *curia* at the exchequer did not differ from the *curia regis*: it was *curia regis ad scaccarium*, and was even then in fact a council not exclusively occupied with matters financial. All this cannot be better expressed than in the old way, that the *curia* at the exchequer was the financial aspect, the *curia regis* the judicial aspect of one and the same thing.

The differentiation slowly proceeding followed, it would seem, not as the result of deliberate division of membership or function but to some extent from diverse modes of procedure. Except with respect to business dealt with there was little difference between *curia regis* and *curia* at the exchequer so long as the latter was a general court attended by the council, consultations being held at the exchequer, the other members of the council acting as a body of reinforcement for those members who were barons of the exchequer. But in course of time the exchequer came to be more separated from the council and appeared as a financial bureau with closely restricted

powers. Yet the separation of exchequer from *curia* was by no means complete, for the exchequer was still a judicial body; it remained during a considerable period afterward outside the domain of the common law, and so not subject to the limitations of the common-law courts; and in this judicial field it was still to be identified with, and it still was, the council of the king or *curia regis*.

Meanwhile the common-law courts had begun to differentiate more distinctly and after a time to separate from the *curia*. The king was the fountain and head of justice in his kingdom, and one of the principal tasks of his *consilium* or *curia* was to assist him in dispensing of justice. Henry I and Henry II employed the itinerant justices—their judges going around through the kingdom to bring the facilities of the *curia regis* to all parts of the country. Originally there was in this nothing of a division of the *curia* into parts. But in 1170 the justices going out on *itineria* were given a form according to which they were to act; and articles of instruction were given to them thereafter. That is, they were to act not with the unlimited competence of the *curia* but in accordance with certain rules of procedure laid down. In course of time, with the development of the system of writs, the justices had to take a particular kind of action in respect of a particular kind of case, carrying out their work in accordance with a formulary system. The unequal adoption of these forms by the different branches of *curia regis*, working upon matters to be dealt with, proved a great factor in bringing about differentiation and more actual separation of judicial bodies from the original *consilium*. In 1178 Henry II appointed five justices to remain permanently at the *curia regis* to hear complaints, thus effecting some centralization of the itinerancy and localization of prescribed routine. This “bench residing at Westminster” or court of common pleas was a tri-

bunal of formulary procedure and inferior jurisdiction. During the thirteenth century the court of common pleas at Westminster came to be clearly marked off from the *curia regis*.

In the time of John justices and other members of the *curia* who followed the king on his journeys about the land appear as the court *coram rege*. For a while these two bodies readily coalesce, and are seen to form a *curia* actually undivided. Just as in the seventeenth and eighteenth centuries cabinet and "committee of council" seem to be one and the same body yet none the less frequently appear as different, so for a while *curia* or *consilium* and *coram rege* or king's bench are not distinct from each other but remain different aspects of one and the same thing. Again it was difference in procedure that marked increasing separation. Early in John's reign the *curia regis* in its *coram rege* capacity tended to hear cases in accordance with formulaic procedure, until by the time of Edward I a writer defined king's bench as a court of common law, which the *consilium* was not. But the separation was gradual and indistinct and for a long while not complete. Formulaic procedure was employed only in certain classes of actions before king's bench; upon the rolls there was a mingling of conciliar cases and cases *coram rege* without apparent distinction as to character and procedure—much as the records of Marlborough's time leave the student often uncertain whether he is contemplating a memorial of cabinet or "committee", and the recurrence of pleas *coram rege et consilio suo* continued in this manner until about the time of Edward III.

In the thirteenth century there were at least three important bodies as yet only partially defined: king's bench, exchequer, and *consilium*. They were not entirely separated; they easily merged into each other; their outlines were not always clear; they were not so much separate

bodies as parts of one, and often seemed less portions of one than aspects of one and the same indefinite organization, the old *curia regis* or *consilium* of the king. The exchequer was not then a common-law court, hence it was a most convenient organ for dealing with cases for which no remedy was provided by the common law. Because it continued the older and freer procedure of the *curia regis* it might hear parties who came to make their complaint without any writ. This jurisdiction was not unchallenged: the great power of the exchequer was attacked by parliament, and a rival arose in another body of officials, the chancery, which emerged from the king's household. After the Ordinances of the Lords Ordainers chancery gained the ascendant in respect of much of the judicial work which the exchequer had been doing. The result was that the exchequer was presently left more detached from the council and with powers still more restricted.

While the common-law courts and the exchequer were appearing first dimly as aspects of the one *consilium*, then developing with more distinctness and towards a partial separation, and finally separating very largely from the body within which they had arisen, there was the while proceeding a differentiation more and more striking within the council, between *consilium* and *parliamentum*. *Consilium*, the older word, and *parliamentum*, a word which came into use in the thirteenth century, were at first two terms for one and the same idea, two appellations of the one council. Sometimes the *consilium* was large; more often it was small. Between the two forms of the *consilium*, however, no real line of distinction could for a long time be drawn. There was but one body: the smaller was not a committee or part of the larger; it was the larger, when on occasion members not usually in attendance were summoned and were present. Yet

again there was a tendency towards differentiation, which if not evident at first was destined to be very clear later on: the larger body got names of its own—*magnum consilium*, *parliamentum*, *consilium in parlamento*, the smaller body was not so called, and had no particular designation as yet.

The *consilium* or *curia* consisted of magnates sometimes specially called and of officials attached to the more permanent service of the king. Some of the members were great lords; some were the *curiales*—barons of the exchequer, justices, and others. Between the great men and the lesser there were often jealousy and conflict. By the time of Edward III the importance and independence of the professional men in parliament had declined, and the prelates and lords had absorbed their power, and there was by this time a council in parliament, the lords spiritual and temporal—in Tudor times called the house of lords, frequently opposed to and often in contest with the council outside of parliament. In the time of Henry III there had been one council, enlarged or contracted, as desired. There was not then much difference in the character of the work done in the smaller from that done in the larger body, and it has been noted that statutes were little more than judicial interpretations in legislative form. But the *curiales* were generally opposed by the magnates, whose triumph is seen clearly in the statute of 1322, when it was declared that henceforth great matters should be treated and established in parliament by the assent of the prelates, earls, barons and commonalty of the realm. The justices and professional members of the council were not mentioned.

In the period of the minority of Henry III the formation of a king's council of permanent outline and character is first seen. Yet apparently at this time no new institution was conceived. To a considerable extent the council continued to be a body of indefinite structure and

dimensions, sometimes small and sometimes large. But a tendency towards greater definiteness and more exact obligation appears when presently councillors were sworn as members. Moreover, at this time the strife between barons and king brought about the appointment of a select number of councillors responsible for the government of the realm; and in the events of 1258 and 1264 there is almost the recognition of a group of councillors for the king distinct from the *curia regis* and exchequer.

The swearing of councillors, which began under Henry III, became with Edward I a regular practice, and accordingly, to a certain extent, a permanent and definite king's council slowly developed. In the time of Edward I the terms *secretum consilium* and *privatum consilium* appear in the records to designate the smaller body working under the king. The nucleus of this council consisted not of nobles, for the experience of the past showed that they were little to be relied on for regular service, but of officers of the king's court and household, justices of the courts and barons of the exchequer with status somewhat doubtful, officers retired after long service for the king, some foreigners and others, and also certain magnates.

The council of the Edwards was a large and heterogeneous body, containing several score of men—officers, prelates, barons, knights, clerks, honorary members, foreigners, and favorites. It was not an effective working body: often the services of individual members were of more importance than the collective service of them all together. The nobles were still a varying and shifting element. From them the oath might not be exacted without their personal consent. The permanent or private council was not yet controlled by its sworn members only. The oath was not yet intended to form an exclusive body, but was administered with the intent of imposing obligation of service.

The most important consideration for understanding the structure and development of the council during the middle ages as well as for comprehension of kindred problems long afterward is recognition that there was only one council. In the eighteenth century cabinet, lords of the committee, lords justices, effective part of the privy council, were all of them one and the same under different guise, with different names, put upon different tasks for the time being. In the thirteenth and fourteenth centuries *privatum consilium*, *secretum consilium*, *magnum consilium*, were all of them the *consilium regis*, the king's council of the middle ages. And in the course of medieval times the only distinction which arose in respect of the king's councils was that which gradually developed between parliament and the private council of the king.

The differentiation that went forward may be seen in the differences and antagonisms which developed between the two principal groups of members who made up this ill-defined body. For some hundreds of years there was rivalry between the larger assembly of counsellors, which gradually became the house of lords and controlled parliament, and the smaller one, which became a council closely attached to the king. This rivalry is important in the political history of England as well as in the record of constitutional changes. The house of lords defended the common law and kept its procedure in sympathy with it; the jurisdiction of the council was outside of and even antagonistic to the common law. In the time of Richard II and the period following parliament attempted to control the council and limit its authority, but the discretionary power of the council was not greatly affected, and under the Lancastrians the principle was accepted that the council might exercise a large jurisdiction outside the common law. This conflict was sometimes a major cause of rebellions against the king and of civil wars. It affected

profoundly the character and position of the king's council in the later middle ages. In the time of Edward II was seen the fundamental antagonism between the hereditary councillors—the noblemen—and the *curiales*—household officers, clerks, and men of the king's immediate court. Under Edward III also the magnates contended against the humbler men upon whom the king placed reliance, but it was very difficult to realize the idea of a permanent council of great men, for the lords while anxious to control were generally reluctant to serve or remain with the king and give regular attendance. Under Richard II the magnates in parliament tried hard to secure about the king a permanent council of limited membership and definite responsibility, in which men of rank would serve with regularity. Generally this policy was a failure. On the other hand the king strove persistently to create a royal council which would have official and bureaucratic character. In this attempt also only partial success was achieved. There was generally an irrepressible antagonism between the old nobility and the "favorites." The result was that the council was made to contain both elements, between which as yet no equilibrium was reached.

The Lancastrian period was for the permanent council a time of supreme importance and power. Under Henry IV it contained lords, who attended irregularly, and lesser men retained with salaries. Soon opposition arose to the king, and complaints were made about the weakness of the council. In 1404 the king publicly announced "his great and continual council." The list was made at the instance of parliament. It contained the names of twenty-two councillors. Two years later a list of seventeen was announced, and most of the members were sworn in parliament before the king. Liberal salaries were paid to the members, and they acted vigorously and with success.

In the reign of Henry V the plan of deferring to the wishes of parliament continued to be carried out. The

king's council was small, consisting of great officers, prelates, and lords, who were the king's personal confidants. Usually in this reign they received no salary, reliance being put upon their loyalty and willingness to serve. On many occasions the result was what it often was in later periods—business was carried on by a few, the chancellor, the treasurer, and the keeper of the privy seal, with sometimes the chamberlain, the steward of the household, the keeper of the wardrobe, and the king's secretary. That is to say, meetings of the king's council were commonly gatherings of the king's officers with little other support. The functions of the council were mainly administrative and judicial.

Henry VI began with a council of twenty-one, most of whom had served under his father. They were appointed in parliament. Afterwards new members were chosen and sworn within the council itself. The members were paid salaries; they were to have considerable powers and great responsibilities. Presently began struggles for control between factions of the council. After a while the king was impotent. Then the old evils of society, which had been increasing for a hundred years, got beyond the control of the central government. The power of the council declined and disintegration began. Membership was enlarged, but the members failed to attend. They became powerless in judicature and administration, and by the middle of the century could no longer govern the country.

Towards the end of the middle ages there was a king's private or secret council with large and diverse powers, but more limited in size, power, and scope than the old *curia* or *consilium* from which it had descended, since from this prototype in course of time had separated almost completely other bodies—house of lords, chancery, courts, and exchequer, which once had been merged together

along with the advisers and administrative officers of the king in the more complex and indefinite body of the earlier times. The council or privy council appeared after the Wars of the Roses, in the time of Edward IV and Richard III, with power much reduced, composed of lords, knights, and minor men of the court. Soon there was a reversion to a body of officials. The great lords stayed away, and the authority of the king was paramount. During this time the judicial activities of the council were much reduced, though towards the end of the Yorkist period there were some signs of a revival of power.

Under Henry VII the council was rehabilitated and employed with greater vigor than ever. In earlier times the king had often been absent from meetings. Now he was frequently present at the sessions. Under his eye and with his encouragement the council worked with energy and with success. In 1487, after certain preliminary steps had been taken, a statute which apparently was not until later times known as the Statute "*pro camera stellata*," defined and gave parliamentary sanction to some of the long existing judicial jurisdiction of the council. Actually what was done was to set aside sessions of the council for judicial purposes, something that had been attempted before but had not been effectively carried out. The jurisdiction, also, of the chancery and the council were now more definitely divided. It has been said that in the operation of this council or court of Star Chamber there was nothing new but its vigor and purpose. The king's council had since the fourteenth century met, among other places, in the Star Chamber next to the receipt of the exchequer. Under Henry VII was instituted also the court of requests, actually a standing committee of the council composed of professional members meeting under the keeper of the privy seal, and carrying on work essentially like that done in Star Chamber.