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THE FAILURE OF CONSTITUTIONAL
EMERGENCY POWERS UNDER
THE GERMAN REPUBLIC

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The Failure of Constitutional Emergency Powers under the German Republic

BY

FREDERICK MUNDELL WATKINS



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To
MY MOTHER

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F. M. W.

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THE FAILURE OF CONSTITUTIONAL
EMERGENCY POWERS UNDER
THE GERMAN REPUBLIC

INTRODUCTION

AT THE PRESENT TIME few questions of political organization are of more immediate concern than the problem of constitutional emergency powers. The problem itself is almost as old as constitutional government. Because of the fact that they involve the maintenance of legal restraints upon the exercise of political authority, there is always a danger that constitutional systems will prove incompatible with effective action in periods of exceptional difficulty. From ancient Rome down to the present most constitutional states have therefore considered it wise to provide some regular means for the suspension of normal political procedures in the face of temporary crises. But even though the need has long been recognized in theory, there has seldom been a time when emergency institutions loomed so large as they do today in the realm of actual practice. In America the constitutional experiments of the first New Deal are still a recent memory. In France, from the time of Poincaré onward, successive governments have shown an ever increasing tendency to use special decree powers for the accomplishment of their legislative and budgetary programs. Even in England there have been occasional intimations that all is not quite as usual with the elderly mother of parliaments. Emergency institutions are never more important than in an age of recurrent constitutional tension. Under the conditions now prevailing it is probable that institutions of this character will long continue to play a prominent part in the world in which we live.

The significance of this particular aspect of modern constitutional government has never been more clearly shown than in the case of the German Republic. During the past few years we have grown accustomed to thinking of Germany exclusively in terms of National Socialism. The spectacular doings of Hitler and his associates should not be allowed to make us forget, however, that this was a country once reckoned as one of the more important seats of modern constitutionalism. The Weimar Constitution remained in effective operation for nearly fifteen years, and during most of that period there was a sincere and generally successful effort to govern the Reich in accordance with liberal democratic

principles. But at the same time, as a consequence of its position as a defeated and bankrupt power, Germany was even more seriously subject than most constitutional countries to the strains and stresses of post-war readjustment. Nowhere was the need for emergency action more obvious, and nowhere were the means more readily available for the satisfaction of that need. The provisions of the Weimar Constitution were such as to give the German government a quite exceptional degree of freedom in the application of constitutional emergency powers. Thus in the case of the German Republic unusual need and unusual opportunity combined to produce a remarkably extensive series of experiments in emergency action. Up to the present time no other country has ever had the occasion to go so far in this direction.

To describe and analyze this particular aspect of German constitutional experience is the task to which we propose to address ourselves in the course of the present study. Although the life of the Republic itself was comparatively short, the history of emergency action under the Weimar Constitution is a tale both long and varied. Because of the recurrent difficulties to which the country was subject, constitutional emergency institutions of one sort or another were in operation during nearly one-half of the entire period from the fall of the Empire to the rise of Hitler. On many occasions these measures were clearly successful in contributing to the defense of the Republic. At other times their influence was even more clearly harmful from the standpoint of constitutional government. What were the conditions underlying the moments of success? What were the weaknesses that ultimately led to failure? These are the questions with which we shall be concerned throughout the ensuing pages.

Considered simply as a contribution to the history of modern Germany, a study directed along these lines has much to recommend it. It is true that the problem of constitutional emergency powers is far from being the sole or even the most important factor in the life and death of the German Republic. Many other considerations would also have to be taken into account in any definitive history of the Weimar Constitution. But unfortunately the time is not yet ripe for the writing of such a history. Many new documentary sources will have to be opened up, and many special studies will have to be completed before it will be possible to provide a satisfactory general treatment of this complicated

problem. The present investigation is intended simply as one of the many needful preliminary studies. In view of the importance of the subject, however, it may well lay claim to the attention of anyone who is interested in the history of the Weimar Constitution.

But the material here presented is also capable of serving a much more general purpose. So far as the German Republic itself is concerned, the Weimar Constitution is already a topic of purely antiquarian interest. Even the most incorrigible optimist would hardly deny that the Weimar system is dead beyond all hope of recovery. Happily there are other constitutional states, however, in which the problem of constitutional emergency powers is still a living issue. And in all the countries where it has arisen, the problem has presented itself in surprisingly similar forms. Many of the essential strengths and weaknesses of modern emergency institutions are common to all modern constitutional states. No country as yet can compare with Germany in the richness and variety of its experience with institutions of this particular sort. Detailed acquaintance with this experience is for that reason quite indispensable to anyone who would hope to deal intelligently with this increasingly important issue of contemporary politics. The dead must truly die in vain unless the living are wise enough to profit by their example. The example of Germany is nowhere likely to prove more useful than in connection with the problem of constitutional emergency powers. If the present volume can contribute in some small measure to a more general understanding of these matters, it will have rendered a service to the cause of constitutional government.

CHAPTER I

CONSTITUTIONAL EMERGENCY POWERS AND THE WEIMAR ASSEMBLY

THE Weimar Republic was founded during one of the most troubled periods in the history of modern Germany. At the close of the World War conditions in that country were not far removed from anarchy. With the collapse of military resistance the ruling classes were for the time being almost wholly discredited. Among the existing organized groups, only the long despised Socialists were left with prestige enough to maintain the authority of a united Germany. The Revolution of 1919 was therefore marked by the voluntary transfer of authority from Prince Max of Baden, last of the imperial chancellors, to a cabinet headed by the aging Socialist leader, the one-time saddle-maker Ebert. No more abrupt break with the aristocratic traditions of the past could well have been imagined, but even a royal prince could see by this time that drastic changes were needed to save the country from disaster. In view of the fact that royal and aristocratic leadership was bankrupt, the only hope lay in a bold appeal to new and untried forces in the community.

Even the most powerful and experienced of governments would have been sadly taxed by the problems facing Germany at this particular juncture. The Allied blockade, which had already subjected the country to four years of semi-starvation, was maintained with undiminished rigor until the signing of the Versailles Treaty almost a year later. With the cessation of war industries, unemployment had become a further problem. Rising monetary inflation and mounting famine prices made it possible even for those who remained at work to maintain their wages at the subsistence level only by a frequent and disruptive use of the strike weapon. Political action of the very strongest character was needed to deal with a social crisis of this magnitude.

Unfortunately the circumstances then prevailing were not in the least favorable to the adoption of vigorous political measures. Even though it represented what was undoubtedly the strongest single force still remaining in Germany, the Ebert government

was for some time able to exert no more than a bare minimum of control over the country as a whole. The disappearance of the old political order had led in many localities to the establishment of independent revolutionary governments, many of which were hostile to the central authorities. At one time, under the leadership of an uncommonly persuasive journalist named Kurt Eisner, there was even a soviet republic in Bavaria, normally the stronghold of all that is most reactionary in German political life. Demobilization added fuel to the flames. After four years of hopeless and disheartening sacrifice the discipline of the military had finally broken down. Hordes of armed and disorganized veterans, long used to the ways of war and bloodshed, were suddenly let loose upon the country, swelling the ranks of the revolutionaries and establishing in many places a virtual reign of terror. Inspired by recent events in Russia, a mushroom growth of soldiers' and workers' councils began to usurp the functions of government in widely scattered areas. A still further complication was provided by the separatist movements which, with the support of the French army of occupation, soon began to appear in the neighborhood of the coveted Rhine. At a time when unified action was more necessary than ever, the apparent tendency was toward an immediate dissolution of political life in Germany.

Out of this welter of conflicting authorities the supporters of liberal democracy finally emerged as the masters of a reunited Germany. It is true that the Socialists, to whom the conduct of affairs had been entrusted, were themselves divided on the issue of constitutional government. Inspired by recent successes of the Communists in Russia, many German Marxists would have preferred to see the creation of a soviet republic. Ebert and the majority of his cabinet all belonged, however, to the more conservative wing of German Marxism, which had long been converted from revolutionary to parliamentary methods. From the moment of their accession to power their efforts were accordingly directed toward the election of a national assembly favorable to the establishment of a liberal constitution.

Fortunately for the success of the government program, this preference for constitutional government was shared not only by the bulk of the middle classes, as represented in such political organizations as the Democratic and Center parties, but also by a majority of the Marxian proletariat itself. For a time it seemed,

indeed, as though the growth of soldiers' and workers' councils might lead in Germany as in Russia to the adoption of a more radical point of view. Years of courageous leadership in the face of persecution had served, however, to give the older and more conservative Socialist leaders a strong moral hold on the laboring masses of the country. In a period of revolutionary ferment these were the men to whom the workers instinctively turned for guidance. Even though the movement was too strong to be openly opposed, Socialists of the democratic persuasion were soon able to gain effective control in a majority of the soldiers' and workers' councils. This made it comparatively easy to stifle radical tendencies in the interest of moderate constitutionalism.

In some cases this result could be accomplished only by force. Left-wing Marxists known as Spartacists were particularly strong in the city of Berlin. When the moderate tendencies of the government were made known, this group felt no hesitation in trying to accomplish its purposes by force of arms. Savage street fighting brought large sections of the capital under the control of irregular leftist forces. For several weeks the situation remained serious enough to be reckoned as a substantial threat to the life of the Republic.

From this dangerous predicament the authorities were finally rescued by the coöperation of the army. In spite of its recent losses in the field the German military machine still retained a good deal of its old efficiency, and the aristocratic officers who commanded it were more than willing to aid the efforts of any government which offered protection against the radical proletariat. With this support the government was able to make short work of the Spartacists. Direct responsibility for the conduct of affairs was assumed by the Socialist leader Noske, then minister of the interior, who proceeded to crush the revolt with a ruthlessness soon destined to make him one of the most bitterly hated men in Germany. The full force of the army was let loose on the rebellious working quarters of Berlin. Liebknecht and Luxembourgh, the only well-known leaders to be found in the Spartacist ranks, were shot "while escaping arrest." The result was a lasting setback to the cause of revolutionary Marxism in Germany.

From this time onward the future of constitutional government was practically assured. Forcible opposition having been

suppressed, it was now possible to hold elections for a national constituent assembly. The result was a complete vindication for the policies of the government. Although the Majority Socialists themselves were disappointed in the hope of securing an absolute majority in the constituent body, they were able in combination with the Center and other constitutionalist parties to command more than two-thirds of the total membership. A popular victory of these dimensions could hardly fail to convince even the extremists as to the imminence of constitutional government in Germany. Thus in the early months of 1919, when the National Assembly began to hold its sessions in the sleepy but historic city of Weimar, it was clear that many of the worst difficulties were already in the background.

But if the elections marked a forward step in the history of German constitutionalism, the memory of recent troubles was still sufficiently vivid, and the pressure of present difficulties was still sufficiently acute, to exert considerable influence on the deliberations of the Weimar Assembly. This influence was particularly marked in connection with the problem of constitutional emergency action. When constitutions are framed in a period of comparative tranquillity, it is easy to overlook or to minimize the importance of emergency institutions as a factor in the life of constitutional states. The calm prevailing in Philadelphia during the year 1787 is no doubt responsible in some measure for the fact that our own fundamental document has so little to say on the subject. The Weimar Assembly, on the other hand, was placed throughout the entire period of its existence in the position of a nominally sovereign authority which is able to command no more than a bare and uncertain minimum of obedience. The very choice of Weimar as a scene for its deliberations was due at least in part to the fear that mob violence would thwart proceedings in any larger city. All during its session the news of strikes, riots, and insurrections in other parts of the country continued as a nerve-racking accompaniment. Few constituent bodies have been forced to carry out their work in an atmosphere of more immediate and pressing danger. This made it inevitable that the Weimar Assembly should take an unusual degree of interest in the problems of emergency government.

Under the circumstances it would have been hard for any responsible observer to overlook the fact that action of the most

drastic character might soon be needed to insure the establishment and maintenance of a republican regime in Germany. When Dr. von Delbrück rose in the course of debate to observe that "peace and order can be maintained only if the legitimate government has the right to repress violent disturbances of the peace by measures of equally drastic violence,"¹ few of his hearers were disposed to dismiss the statement as academic. In the words of the distinguished jurist Preuss, who contributed more than any other one person to the drafting of the Weimar Constitution, "If ever there was a time in the course of history when dictatorial powers were indispensable to a political regime, this was certainly the case in the early days of the German Republic."² This circumstance is clearly reflected in the deliberations of the Weimar Assembly.

The problem was not, to be sure, a wholly new thing in German political experience. As a matter of fact, the need for constitutional emergency powers is sure in the long run to arise in any constitutional system.³ This general proposition was amply confirmed by the experience of pre-war Germany. During the conflict Allied propagandists did their best to inflame democratic sentiment by speaking of the Hohenzollern regime as an example of pure autocracy. Whatever its failings from a strictly liberal standpoint, it can hardly be denied, however, that the old German Empire was a more or less typical constitutional state. Private citizens were safeguarded against the arbitrary exactions of executive authority by an elaborate bill of rights. The principle of judicial independence was fully recognized, the power of legislation vested in a federal parliament. Just as in the case of other constitutional systems, the rigidity of these limitations upon normal governmental functioning soon made it necessary to consider the desirability of greater flexibility in periods of sudden emergency. Even in the days of the Empire, Germany had been forced by its very position as a constitutional state to give some attention to the problem of constitutional emergency powers. Thus when the Weimar Assembly came to deal with the question a

¹ Session of July 5, 1919 (*Sten. Ber.*, vol. 327, p. 1335).

² Hugo Preuss, "Reichsverfassungsmässige Diktatur," *Zeitschrift für Politik*, vol. XIII (1923), p. 97ff., at p. 100.

³ For a more extended analytical treatment of this question, see F. M. Watkins, "Constitutional Dictatorship," *Public Policy* (Cambridge, Mass., 1939), ed. C. J. Friedrich and E. S. Mason.

considerable body of experience was already available to serve as a guide for its deliberations.

The chief emergency institution of imperial Germany was the so-called state of war, in outline closely modeled on the more celebrated French "state of siege."⁴ According to Article 68 of the Imperial Constitution the emperor was authorized to invoke this provision whenever he felt that "the public safety was in danger." The state of war was then proclaimed in the affected regions with a lavish blowing of trumpets and other prescribed formalities. This proclamation was automatically followed by a number of important legal consequences. Executive powers were transferred from the civil to the military authorities. Special military courts were established for the punishment of certain specified crimes. Various provisions of the bill of rights, including such privileges as the freedom of speech and of assembly, were also suspended for the duration of the emergency. Except in matters of legislation the state of war provided a basis for the temporary suspension of all the more important checks normally imposed upon the activities of government. Just as in the case of the French state of siege, the cure for crisis conditions was sought through a temporary appeal to stringent military rule.

Unlike the state of siege, however, the state of war found its main field of usefulness as a corrective to the dangers of federalism. The jealousies of independent princes, which had long deprived the German nation of effective political union, were only partially overcome at the foundation of the Empire. The powers granted to the central government were for that reason modest in the extreme, and the federal principle continued at all times to stand as the most vigorously restraining element in German constitutional life. Under these circumstances the state of war acquired particular importance as the sole ultimate guarantor of German national unity. Since the army was under the immediate command of the emperor himself, the result of establishing military rule was to place all powers of government in the hands of a unified central authority. This served to insure the country against any conclusive resurgence of local particularism.

It is true that this statement is subject to one important qualification. According to the terms of the treaty whereby Bavaria was admitted to the Reich, it was stipulated that the king of

⁴ Regarding this see Watkins, *op. cit.*

Bavaria should remain the peacetime commander of all military forces stationed within the limits of his kingdom. This meant that in time of peace the emperor could gain no additional authority by declaring a state of war in that particular region. With this single exception, however, military rule was available at all times to serve as an antidote to the weakness of an otherwise extremely federal system.

So far as the scope of emergency powers is concerned, the state of siege and the state of war were closely parallel. In providing checks against the abuse of those powers, on the other hand, the German arrangements stand as a marked regression from the established French prototype. The right in Germany of determining when the public safety was endangered was left exclusively in the hands of the emperor himself. As commander of the very same military forces which stood to profit most directly by the appeal to emergency measures, he clearly was not the right person to trust with unlimited discretion in so vital a matter. In contrast with the French system of allowing the state of siege to be inaugurated only by act of parliament, the German state of war can only be described as one of the less wisely circumscribed forms of modern emergency action.

Experience with this particular institution had been sufficient to give the German public of 1919 a quite definite attitude toward the problem of emergency rule. In many circles the prevailing sentiment was one of distinct hostility. During the hectic wartime years from which the country was just emerging, the suppression of civil liberties had gone to extreme lengths in Germany, as indeed in most of the belligerent nations. In these emotionally exhausted countries the immediate result of release from the tension of war discipline was to produce an equal and opposite reaction in favor of liberty at all costs. All this tended to make people look with distaste upon any suggestion for the establishment or maintenance of vigorous emergency institutions in Germany.

General considerations of this sort were reinforced, moreover, by a number of specific grievances. During the late hostilities the state of war had been freely invoked against opponents of the government. It was applied with particular rigor to those few representatives of left-wing Marxism who had continued to work for the cessation of hostilities. Under these circumstances it was only natural that it should have aroused a certain amount of en-

mity in the ranks of the peace party. When the collapse of military resistance brought this party temporarily into the ascendant, it was equally natural that it should seek to abolish the institution. Leaders of the naval mutiny at Kiel, which served as a starting point for the revolution of 1918, put this forward as one of the main items on their list of projected reforms. Such an attitude made it difficult to envisage any sort of increase in the scope of emergency powers under the Weimar Republic.

These considerations were not without influence on the deliberations of the Weimar Assembly. In the course of debate representatives of the small but articulate group of left-wing Marxists were particularly fond of referring to wartime experience as a motive for caution in the adoption of emergency measures. "We all have vivid recollections," said their spokesman, Dr. Cohn, "of the extreme manner in which the military authorities during the war used [their emergency powers] to abuse the freedom of the press and to hinder scientific progress. To many members of the present Assembly it is a matter of personal experience. We know how they annihilated the right of assembly, and deprived innumerable individuals of their personal freedom."⁵ To Dr. Cohn and his associates these facts seemed enough to discredit the very idea of constitutional emergency powers.

This point of view did not extend, however, to the bulk of the Assembly. It is true that the Majority Socialists, who occupied a more or less dominant position in that body, had been trained by decades of political opposition to regard all emergency institutions with suspicion. By assuming leadership of the Kiel mutiny they had, moreover, committed themselves at least tacitly to the abolition of the state of war. But in spite of these considerations the weight of their influence was finally cast on the other side of the scales. Vested with the responsibilities of government in a period of unusual difficulty, they soon came to recognize the value of emergency powers. In the suppression of the Spartacist revolt the Ebert government had been quite as ruthless as any of the administrations of pre-war Germany. The circumstances of the moment were such indeed that it would have been hard for any supporter of the newly established Republic not to appreciate the need for vigorous action. When the time came to deal with these matters in the National Assembly it is not surprising,

⁵ *Sten. Ber.*, vol. 327, p. 1329.

therefore, that the liberal democratic bloc was almost solidly in favor of including explicit emergency arrangements within the framework of the Weimar Constitution.

On this particular issue the normal liberal majority was largely supported, moreover, by parties of the extreme right. The possessing classes were at this time mainly preoccupied with the danger of Communism. This circumstance, combined with an inherited predisposition toward things authoritarian, made them especially eager to see the government vested with strong emergency powers. The rightist deputy Delbrück gave voice to a very general fear when he observed that the denial of adequate legal resources would simply mean that "Spartacus and his ilk could disturb the public peace at will, while the government would be forced to stand with its hands in its pockets doing nothing."⁶ Still much too terrified to dream of counter-revolution on their own behalf, the reactionaries were disposed to regard the Republic more as a heaven-sent protector than as a rival. Their only hope was to make it strong enough to save them from the wrath of a seething proletariat.

Because of its peculiar historical position the Weimar Assembly was more than ordinarily well disposed, therefore, to recognize the need for constitutional emergency powers. Only those at the extreme left stood out in opposition to this general point of view, and in the face of the huge majority arrayed against them their efforts were from the beginning doomed to failure. Altogether there was a marked tendency to discount anything the Independent Socialists might have to say on the subject. As the more or less avowed proponents of soviet institutions, they were not unreasonably suspected of a desire to overthrow the democratic republic by force of arms. Although their remarks were ostensibly based on the purest principles of liberal constitutionalism, it was not hard to give them a less disinterested interpretation. Republican spokesmen were fond of pointing out that there was no mystery in the fact that persons like Representative Cohn fought shy of measures designed for the maintenance of public order. Thus, when the time came for a final decision, the Independent Socialists were able to secure few converts. With the support of an overwhelming majority, the principle of constitutional emergency powers was included among the provisions of the Weimar Constitution.

⁶ *Sten Ber.*, vol. 327, p. 1335.

CHAPTER II

EMERGENCY PROVISIONS OF THE WEIMAR CONSTITUTION

THE emergency provisions of the Weimar Constitution are notable as being the most extreme adopted in recent times by any major constitutional state. In the field at least of *non-legislative action* the tendency of most liberal constitutions has been to grant extensive emergency powers without subjecting them to adequate limitation. In the case of Germany this tendency was not only exemplified in a particularly daring form but also extended to the ordinarily more narrowly circumscribed realm of emergency legislation. To an even greater extent than most constituent bodies, the German National Assembly was anxious to give the government every possible advantage in dealing with crisis conditions. The result was to provide the Republic with an unprecedentedly broad basis for the exercise of emergency authority.

All the emergency powers specifically granted under the Weimar Constitution were incorporated in Article 48 of that document. Because of their importance as a basis for subsequent action, the provisions of this article are well worth reproducing in full at this point.

If any state fails to perform the duties imposed upon it by the federal constitution or by federal laws, the president may hold it to the performance thereof with the aid of the armed forces.

If public safety and order in the German Reich is materially disturbed or endangered, the president may take necessary measures to restore public safety and order, intervening if necessary with the aid of the armed forces. To this end he may temporarily suspend, in whole or in part, the fundamental rights established by Articles 114 [personal liberty], 115 [inviolability of dwelling places], 117 [secrecy of postal, telegraphic and telephonic communications], 118 [freedom in the expression of opinion], 123 [freedom of assembly], 124 [freedom of association] and 153 [private property].

The president must immediately inform the Reichstag of all measures adopted by authority of the first or second paragraphs of this Article. These measures are to be revoked upon demand of the Reichstag.

In cases where delay would be dangerous the cabinet of a state government may for its own territory take provisional measures as specified in paragraph 2. These measures are to be revoked on demand of the president or of the Reichstag.

Further details will be regulated by federal law.

Discriminating readers have no doubt observed that the whole even of this brief article is not devoted strictly to the problem of emergency action. The first paragraph deals with the so-called power of federal execution, which is related only in the vaguest possible way to the subject matter of the ensuing paragraphs. True emergency institutions depend, logically enough, on the presence of an actual state of emergency. In the words of the second paragraph of Article 48 itself, public safety and order must be "materially disturbed or endangered." No such limitation is to be found in the case of paragraph one. Federal execution is permissible whenever a state has violated its legal duties toward the Reich, regardless of whether or not that action constitutes a material threat to public safety and order. Fundamentally this is not so much a problem of emergency action as a special aspect of the more general problem of law enforcement. This conclusion is borne out by the fact that in the original draft of the Weimar Constitution, as well as in the text of the preceding Imperial Constitution, federal execution and the emergency power were placed in separately numbered articles. In connection with the problem of constitutional emergency powers, the original separation may be conveniently retained.

Upon turning to the more immediately relevant sections of Article 48 few observers can fail to be impressed by the remarkable scope and flexibility of the powers there granted. It is true that the phrase "necessary measures" is vague in the extreme. If narrow principles of construction had been applied at this point, the whole article might well have become a thing of quite limited significance. The courts were always content, however, to follow the government in recognizing practically anything as permissible under the terms of the grant. This opened the way to some of the most drastic experiments in emergency action ever attempted within the framework of a modern constitutional state.

The original purpose of Article 48 was to provide a basis for measures similar to those previously taken under the state of war. In its main outlines the institutional structure of the Republic was not essentially different from that of the Empire. Like most constitutional systems of the present time, both were built around the principle of a liberal bill of rights supported by a tripartite separation of powers between legislative, executive, and judicial organs of government. The principle of federalism was

also retained, although in a much less extreme form than before the war. In the face of temporary emergencies the Weimar Republic was therefore subject to much the same general sort of breakdown as its predecessor. Under the Empire the main function of the state of war had been to provide a means of overcoming the limitations implicit in the bill of rights, the independence of the judiciary, and the principle of federalism. This continued to be the main purpose of emergency powers throughout the lifetime of the Republic.

From the beginning it was clear that all measures previously undertaken on the basis of the state of war might legitimately be classed as "necessary measures" within the meaning of Article 48. It is true that the suspension of seven specified articles from the bill of rights is the only element in this program accorded the dignity of specific mention in the constitution, but the enumeration of particular forms of action did not keep other forms from being read into the more general provisions of the act. Under the authority of Article 48 emergency tribunals similar to those established under the state of war were allowed to assume functions normally exercised by regular courts of law. Military commissioners were vested as before with the right of asserting federal authority in areas normally reserved to the state governments. Even Bavaria was no longer guaranteed against these temporary suspensions of the federal principle. Many of the resulting measures were unpopular in the extreme. Even in the heat of anger few people were tempted, however, to deny the legal propriety of these long-established methods of emergency action.

But if the phrase "necessary measures" could be interpreted as authorizing everything previously included under the state of war, there was nothing to prevent it from being made to include a good deal more. Earlier arrangements had been marked by rigorous formality. The proclamation of a state of war entailed a number of specific legal consequences which might neither be increased nor decreased by authority of the government. Under the provisions of Article 48, on the other hand, the incidents of emergency action were left almost wholly indeterminate. This made it possible for the executive to use his ingenuity in devising special measures to deal with special situations. In pre-war Germany emergency powers had perforce to be exercised by military commanders. The post-war executive was free to vest these powers in

any person civil or military who appeared at the moment to be suitable. Under the old constitution all specified provisions of the bill of rights were automatically suspended by the proclamation of a state of war. The new document expressly authorized the president to suspend these articles "in whole or in part." Within the terms of an authority to take all "necessary measures" there was almost no limit, indeed, to the number of possible variations. All this marks a definite break with the usual civil law tradition of restricting the executive to a single fixed pattern of emergency action. In the amazing flexibility of its grant of powers Article 48 can only be compared with the common law institution of martial rule.¹

As a successor to the state of war, Article 48 marks a very real increase in the scope of emergency authority. This represents no more than a small part, however, in the actual extension of emergency institutions under the Weimar Constitution. The state of war was limited wholly to action of a non-legislative character. So far as the problem of emergency legislation is concerned, arrangements under the Imperial Constitution, like those of most constitutional states, were extremely limited in scope. This in a way was rather surprising, for it so happens that the need for emergency ordinance powers was recognized in the constitutions of many component states in the old German Reich. In order that the state might not suffer from the lack of speedy legislative action, German princes were generally given the power of issuing emergency ordinances with the force of law in case of really serious need. These precedents were not followed in the federal constitution. Through the use of constitutional amendment it was possible here as elsewhere to accomplish a good deal in the form of specific enabling acts delegating temporary legislative authority to the executive. During the World War this procedure was actually used on a number of occasions. Original executive prerogatives in the field of legislation were allowed, on the other hand, to play no part in the constitutional life of imperial Germany. This is one of the points on which constitutional practice under the Weimar Republic is most significantly to be distinguished from earlier constitutional precedents.

The growth of emergency legislation in post-war Germany was

¹The contrast between civil and common law traditions of emergency rule is more fully developed in Watkins, *op. cit.*

due for the most part to the flexibility of Article 48. No specific reference to the problem is to be found either in the constitution itself or in the debates of the constituent assembly. So far as the intention of the framers is concerned, there can be no doubt that they were thinking solely of non-legislative action along the lines of the earlier state of war. There was no intrinsic reason, however, why emergency legislation might not be regarded as one of the "necessary measures" to be taken in time of danger for the preservation of public safety and order. The consequences flowing from this fact were serious in the extreme.

Some little difficulty was met in securing general acceptance for so extended an interpretation of Article 48. During the first few years of the Republic the issue did not arise in such a form as to stimulate much public interest. The attempt to issue emergency legislation at the time of the inflation crisis soon had the effect, however, of bringing the subject to the fore, and for a time this was one of the most bitterly controversial questions in the whole field of German constitutional law. The matter was brought to a head in 1924, when a number of leading jurists met to discuss the problem in the well-known university town of Jena. At this conference² there was one party, headed by the professors Carl Schmitt and Edwin Jacobi, which maintained that the word "measures" could only have reference to specific acts of administration. According to this school of thought, the extension of emergency powers to the field of legislation was an act of purest usurpation on the part of the German president. This point of view never succeeded, however, in gaining many supporters, and it was not long before a line of unimpeachable judicial decisions had placed the legality of presidential decrees beyond all possible question.

From this time onward emergency legislation was destined to remain as one of the most significant features of German constitutional life. Full recognition was accorded to the principle that emergency action may involve no permanent alteration in the established constitutional order. In legislative no less than in administrative matters, the seven articles specifically mentioned in Article 48 were accepted as the only constitutional provisions which might even temporarily be disregarded. But in the realm

² For the proceedings see *Verhandlungen der Vereinigung der deutschen Staatsrechtler*, vol. I.

of ordinary as distinguished from constituent legislation the competence of the president was not less extensive than that of parliament itself. Full use was made of this authority in all the subsequent crises of Republican history.

Of course presidential decrees were legitimate only in so far as they might help to restore public safety and order. Considering the essentially conservative nature of this purpose, the casual observer might be tempted to suppose that this would preclude the use of Article 48 as a basis for legislative experiments of an extreme or novel character. Such was not in fact the case. In the use of constitutional emergency powers conservatism has properly to be reckoned from a political rather than from a social or economic point of view. When acting on the basis of his emergency powers, the duty of a German president was purely and simply to reestablish conditions under which the Weimar Constitution might once again be set in effective operation. If the stability of that constitution could be insured only by permanent alterations in the social and economic life of the country, it was not merely his right but also his duty to issue emergency decrees to that effect. The depressions of 1923 and 1930 provided many occasions for action of this sort. Under the distressed conditions then prevailing the Stresemann and Brüning governments had no hesitation in issuing legislative decrees as far-reaching and experimental as anything authorized by parliament itself. The legality of these decrees was never effectively challenged.

So far as the scope of emergency power is concerned, therefore, German constitutional arrangements were remarkably complete. In recognizing the need for extreme freedom of action in the administrative realm the Weimar Constitution did little more than to follow the precedents set by other liberal states. England and America, in particular, have long been accustomed to the idea that all "necessary" measures are permissible in a time of stress. This is the legal basis of martial rule, which is recognized as the principal emergency institution in all common law countries. Most constitutional states are relatively cautious, however, when it comes to the extension of emergency measures into the field of legislation. On this point at least there was an element of almost unprecedented boldness in the provisions of the Weimar Constitution.

It is true that the institution of delegation was less developed here than in many older constitutional systems. Through deference to the principle that delegated powers may not in turn be redelegated, enabling acts in Germany were always forced to take the form of constitutional amendments. Since the terms of the *Weimar Constitution* made constituent action appreciably more difficult than ordinary legislation, requiring a two-thirds as contrasted with a simple majority in both houses of parliament, enabling acts were thereby rendered unavailable in many situations where they might easily have been invoked in a country like England or France. Comparative austerity in this respect was entirely overshadowed, however, by the fact that full powers of emergency legislation were present in any case as part of the presidential prerogative to take "all necessary measures." It would be hard to imagine a more comprehensive grant of legislative authority.

In the presence of so dangerous a power the German Republic ought clearly to have been provided with more than ordinarily vigorous safeguards against the danger of abuse. Unfortunately, the framers of the *Weimar Constitution* were content to leave it with even less than the already inadequate measure of protection to be found in other constitutional states. It is true that this particular aspect of the problem did not wholly escape the attention of the National Assembly. Under the Imperial Constitution the proclamation of a state of war had depended wholly on the discretion of the emperor himself. Recognizing the dangers of this situation, the founders of the Republic were at some pains to place an external check upon the president in his use of Article 48. The attempt was even less successful, however, than the comparable efforts to be found in other constitutional systems.

In accordance with the usual civil law tradition, the framers of the *Weimar Constitution* relied on the legislature as a primary safeguard against the abuse of emergency powers. The device of judicial review, on which common law countries place their main reliance for the limitation of martial rule, was never seriously considered in this connection. Since the custom of the German judiciary had always been to accept findings of the government in matters of fact, the courts were consistent throughout the lifetime of the Republic in their refusal to inquire into the actual necessity of any measures taken on the basis of Article 48. This

left the legislature as the only independent authority with full power to control the executive.

All acts of the president, including emergency measures, had by the terms of the Weimar Constitution to be countersigned by a chancellor responsible to parliament. This fact in itself would have sufficed to give the legislative authorities a certain measure of control over the use of emergency powers. But in order to place the matter beyond all possible question it was also stipulated that all measures taken on the basis of Article 48 should be reported to the Reichstag "immediately" and "revoked upon demand." This was the provision by which the founders hoped to preserve the German Republic against the abuse of constitutional emergency powers.

For all their surface plausibility these hopes were doomed to speedy disappointment. In view of the fact that legislative and executive branches of government are both apt to be controlled by a single party or coalition of parties, it is dangerous enough in any case to rely exclusively on the legislature to check the excesses of executive authority. In the case of Article 48 this characteristic defect of the civil law system was combined, however, with an even more serious deficiency. Vitiating though it may be through the operation of common party loyalties, a certain degree at least of formal control is insured in France by reason of the fact that the authority of parliament is positive rather than negative in character. The state of siege can only be inaugurated in that country by a positive act of legislation. This stands in marked contrast to the situation as it existed in Germany under the Weimar Constitution. Instead of being called upon to authorize the adoption of emergency measures, the German Reichstag was left with nothing more than the right to demand the revocation of measures already in effect. In other words, the burden of positive action was placed not on the proponents but upon the opponents of emergency action. This made it possible for a really determined executive to escape responsibility through a policy of deliberate obstruction.

Under the terms of the Weimar Constitution it was particularly easy for the German executive to interfere with the normal functioning of parliament. Article 25 entrusted him with the right of dissolving the Reichstag at any time, and there was nothing to keep him from using this right to prevent the revocation of emer-

gency measures. The danger of interference with emergency decrees was even given on one occasion as the official cause of dissolution¹ During the three months which might elapse before the election and convocation of a new Reichstag, the country was left without any authority legally capable of questioning the government in its use of Article 48. This situation could be prolonged indefinitely by the simple device of dissolving each successive Reichstag before it had a chance to take positive action. It is true that the constitution expressly provided that dissolution might not be ordered twice "for the same cause." As a matter of practical politics it would also have been difficult for any government to retain its hold on the country in the face of repeated defeats at the polls. Legally speaking, it was wholly up to the president, however, to decide whether or not any two dissolutions were "for the same cause." Under these circumstances no parliament vested with a mere negative right of rejection could hope to offer lasting guarantees against the abuse of emergency powers.

The unsatisfactory nature of these arrangements was recognized by many jurists in Germany and elsewhere. As a matter of fact, the framers of the Weimar Constitution themselves did not intend the provisions of Article 48 to remain as the sole basis for the organization of constitutional emergency powers under the Republic. The last paragraph of the article expressly states that further details are to be regulated by federal law, and the original assumption was that the extraordinary powers there granted would soon be circumscribed. The facility of subsequent amendment was even used as a stock answer to the objections of Independent Socialists and others who thought the original grant of powers to be unduly comprehensive. Clearly the provisions of Article 48 were regarded even by its friends as something less than a final solution to the problem of emergency government.

Unfortunately, the promise of later improvements was never brought to fulfillment. During the first few years of the Republic, conditions were so chaotic that supporters of the existing order were unwilling to consider legislation which might hamper the effectiveness of governmental action. With the restoration of public order, on the other hand, the whole question tended to drop quietly out of sight. In view of the fact that existing arrangements had not yet done much actual harm, it was hard to arouse

¹ Decree of September 12, 1932, *RGBl.*, pt. I (1932), p. 411.

general interest for the enactment of supplementary legislation. Public opinion in a time of prosperity is usually too preoccupied with other matters to concern itself with anything so academic as the problem of constitutional emergency powers. German emergency institutions were therefore permitted to retain their original imperfection down to the very end of the Republic.

From the standpoint of constitutional government in Germany this was a tragic situation. The very imperfection of its arrangements is largely responsible, however, for the fact that post-war German experience is incomparably illuminating as a field for the study of modern emergency institutions. On the one hand, the unusual flexibility of Article 48 made it possible for the authorities to explore the potentialities of emergency action in every conceivable sphere of political life. The result of these experiments was in many cases so favorable as to dispel all doubts regarding the utility of emergency powers as a means for the defense of modern constitutionalism. But Article 48 was also destined to play a leading role in the developments which led to the destruction of constitutional government in Germany. In the course of its brief existence the Weimar Republic succeeded in illustrating all the more important potentialities and limitations of contemporary emergency institutions. A knowledge of these developments is for that reason especially valuable to any one interested in the problems of modern constitutional government.

CHAPTER III

THE COMMUNIST INSURRECTION OF 1920

THE primary function of constitutional emergency powers is to assist in the conduct of military operations. In ancient Rome the work of a dictator was almost wholly martial in character. The continuing importance of military considerations is indicated by the fact that most of the basic emergency institutions of modern times are known by such phrases as state of siege, state of war, and martial rule. Once the principle of emergency action has been recognized, there is no reason why it should not be extended to purely civil matters. Under the conditions of contemporary government, with its ever-increasing interest in social and economic affairs, there has even been a tendency for the civil aspect of crisis situations to cast all others in the shade. But military rule still appears, in modern no less than in ancient times, as the fundamental core of crisis government. Nowhere has the value of emergency institutions been shown to better advantage than as an aid to the prosecution of military measures.

During the immediate post-war years civil insurrection was one of the most serious problems faced by the authorities of the German Republic. The adoption of the Weimar Constitution was not by any means sufficient in itself to rescue the country from the chaotic situation in which it had been left at the close of the war. Deplorable social and economic conditions still continued, providing fertile soil for the development of revolutionary agitation. It is true that the proponents of revolutionary Marxism were never again so powerful as during the months immediately following the close of the war. The Spartacist revolt in Berlin, which took place before the beginning of the Weimar Assembly, marks the all-time high point of left radicalism in Germany. But even though the Republic was never again forced to withstand so dangerous an attack from this particular quarter, the wave of revolutionary Marxism was not yet wholly spent. Several years were still to pass before Communist insurrections could finally be eliminated as a factor in German political life.

During this period the gradual decline of revolutionary Marx-

ism was more than counterbalanced, moreover, by a rapid growth of revolutionary sentiment on the extreme right. Many members of the older governing classes had been willing to support the Republic only so long as it had seemed a necessary shield against Communism. When this particular menace faded it was not long before they began to dream of counter-revolution on their own account. The first practical fruits of this renewed self-confidence were harvested in the month of March, 1920. At this time a band of ex-soldiers, led by a certain well-connected *Junker* named Kapp, managed by a sudden military coup to take possession of the city of Berlin, sending the government in headlong flight to the remote security of Stuttgart. Only a few days were required to demonstrate the impotence of this movement, the earliest of all insurrectionary attempts on the part of the extreme right. The momentary success it enjoyed was more than enough, however, to encourage the efforts of other right radical groups. For several years thereafter the danger of reactionary violence continued to be even more serious than the threat of revolutionary Marxism.

During the earlier part of its existence the Republic was repeatedly subject, therefore, to forcible attack by the extremists of two opposing camps. The resulting political tension was in many respects more dangerous than anything experienced up to the time of the National Assembly, when leftist sedition had seemed to be the sole effective threat. Frequently it seemed as though the nation itself was on the verge of collapsing under the strain. Sometimes the trouble originated in leftist circles. At other times the initiative was assumed by reactionaries. Between the two, the government was never left for long without an occasion to try the effectiveness of Article 48 in connection with the problem of civil insurrection.

To trace the entire history of emergency action in this period would be at once tedious and unprofitable. Like most other human activities, rebellion tends in the long run to sink into a groove of unvarying routine. In their attempt to overthrow the Republic by force of arms, successive insurrectionary movements were forced in the nature of things to follow a more or less uniform plan of action. Countervailing efforts on the part of the government were equally unvarying. The investigation of a single characteristic instance will serve, therefore, to tell us all we need

to know about this particular phase in the use of constitutional emergency powers. Of all the insurrectionary threats encountered after the adoption of the Weimar Constitution, none called for more extensive military operations than the Communist insurrection of 1920. In considering the effectiveness of Article 48 as an aid to military action, we can do no better than to confine our attention to this particular episode.

The Communist insurrection of 1920 was the most serious of all leftist attempts to overthrow the Weimar Constitution by force of arms. Central Germany was the principal scene of these disorders, which took place during the spring and early summer of that year. Ever since the war the great industrial cities of Westphalia had been subject to sporadic attacks of civil violence, and it was only with the greatest difficulty that the authorities had at any time been able to retain control over the situation. No section of the country offered a likelier encouragement to leftist hopes. When the government found itself temporarily occupied with the Kapp insurrection, the strategists of revolutionary Marxism decided that the occasion was propitious for a striking demonstration of power. Workers were called to the barricades throughout the Ruhr and adjacent regions. At one time as many as seventy thousand proletarian volunteers are said to have been stationed along a regularly organized "Red front" from Essen to Lippe. In the very heart of industrial Germany full-fledged civil warfare was once again a reality.

The fact that this movement would be ultimately crushed was obvious from the beginning. Modern warfare is so much a matter of training and equipment that irregular forces can seldom hope to beat a regular army in the field. This lends peculiar significance to the fact that even in the face of wartime losses and Allied restrictions the German government was still able to command the services of a highly efficient military machine. Thoroughly professionalized and led by the cream of the old-time officer corps, this model army could be relied upon to show no sign of Communist disaffection. The Communists, on the other hand, had nothing better to offer than a hastily improvised army of volunteers. The equipment of this army was bad, its leadership inexperienced. The result of a meeting between two such forces could never be seriously in doubt.

Considering that the government was bound to win in any case,

it might perhaps be supposed that this was not a suitable occasion for the use of emergency powers. But the fact is that the resources of Article 48 were seldom used more freely or with more striking effect than at this particular juncture. When a country is faced with anything so disruptive as civil insurrection, sound public interest demands not only that the disturbance should be quelled but also that it should be quelled as rapidly as possible. In the case of Germany in 1920 this was a matter of particular importance. Burdened as it was by war losses and by the Allied bill for reparations, the financial and industrial structure of the country was in no position to withstand any additional strain. This circumstance lent a peculiar significance to the Communist insurrection of that year. Considering that the regions controlled by the insurgents included some of Germany's most productive industrial areas, it was inevitable that the whole national economy should suffer greatly throughout the duration of the emergency. Vital interests were involved in securing the earliest possible liquidation of the situation. By increasing the efficiency of military action, the emergency provisions of Article 48 were able to make a significant contribution in this direction. The result was a distinct service to the cause of constitutional government.

In the face of civil insurrection the main purpose of constitutional emergency powers is to give the military the same freedom in dealing with fellow citizens that would normally be exercised in relation to a foreign enemy. Members of a constitutional state are endowed with legal rights safeguarding them against many forms of administrative action. Even when they are engaged in overthrowing the legal system which guarantees these rights, they are still able under normal circumstances to rely on them for protection. The situation is one which for obvious reasons cannot be tolerated indefinitely. In primitive societies the resulting impatience is often expressed in the drastic form of outlawry. The social group whose standards have been too outrageously flouted proceeds in some well-recognized form to withdraw its protection from the offender, who thereupon becomes a fitting target for any active marksman. In modern times a similar result is obtained through the use of emergency powers. This was the main service of Article 48 in the Communist insurrection.

The measures adopted in this case were not essentially different from those formerly taken under the state of war. The gen-

eral in command of the local military district was vested with full authority to administer the affected area. So far as the conduct of civil affairs was concerned, this authority was shared with a civil commissioner. With regard to the conduct of military operations it was expressly provided, however, that the general should be subordinate only to the minister of war. This fact combined with concurrent powers of civil administration served to give him virtually complete responsibility for the government of the region. At the time of the Weimar Assembly a good deal had been made of the fact that the provisions of Article 48 would make it possible to demilitarize emergency action. This did not prevent the government, in a period of threatening civil disorder, from appealing as before to the resources of full military administration.

One principal consequence of this development was to transfer the authority of all state and local organs into the hands of the federal government. Under the circumstances this was a matter of considerable importance. All manifestations of governmental authority are likely to assume military significance in a region *where military operations are being extensively prosecuted*. In time of war any separation of civil and military functions may consequently be attended by the most unfortunate results. In the case of foreign warfare, especially when operations are being conducted on enemy territory, it goes almost without saying that the military will assume responsibility for the civil functions of government. The needs of civil warfare are essentially the same.

The local situation in central Germany was such, moreover, as to render military control especially desirable. Local organs of government reflect the state of local rather than of national sentiment. At a time when liberal constitutionalists were still able to command a safe majority in the country as a whole, the Communists were not without influence on the local authorities of many different regions. This was especially true in central Germany, where left radical strength was at all times particularly concentrated. Under these circumstances the suspension of local authorities could only be regarded as a common-sense measure of defense on the part of the federal government.

The real nub of emergency action in such cases is to be found, however, in the suspension of civil liberties. When foreign enemies begin massing for an attack it is eminently proper to disperse them by superior force of arms, to pursue them to cover, to appro-

priate their weapons, and to hold them prisoner for the duration of hostilities. From a strictly military point of view, similar measures are equally desirable when the enemy forces are composed of civil insurrectionists, but the legal situation is much more complex. Unless actual revolutionary intent can be proved in each individual instance, the dispersal of any group of citizens may come in conflict with the freedom of assembly. Pursuit may involve an impairment of the right against searches and seizures, while the confiscation of arms is complicated by many obscure considerations with regard to the law of private property. The arrest and imprisonment of an apparent revolutionist is even more dangerous. Unless appropriate proofs are forthcoming the responsible authority at once lays himself open to the charge of violating freedom of the person, perhaps the most jealously guarded of all constitutional rights. From the standpoint of effective military action nothing could be more disastrous than to force an army to spend all its time rebutting legal charges. If foreign and domestic enemies are to be treated on anything like a plane of military equality, it is necessary that civil rights should be suspended in large measure for the duration of the emergency.

In the Communist insurrection of 1920 this result was secured by suspending all seven of the articles mentioned in Article 48. This made it possible to proceed for all practical purposes as if the revolutionists had been foreign rather than domestic enemies. Lest public gatherings should serve as an occasion for the outbreak of civil disorder, the meeting of any considerable number of people was permitted only rarely and under the most rigid supervision. Elaborate searches were carried out for all weapons which might conceivably be used by the insurgent forces. Proceedings against the personnel of those forces were conducted in accordance with a wartime statute which gave the commander a right to order the summary arrest, for as long as three months, of all persons "dangerous to the safety of the Reich." All this led to a considerable increase in the effectiveness of military action.

Even more important than these directly military consequences was the effect upon the control of public opinion. Although propaganda is an essential instrument of all modern warfare, its peculiar possibilities are revealed most strikingly in connection with the

problem of civil insurrection. Whenever a contest is being waged between nations or other social units of long standing, efforts to undermine the morale of the enemy are circumscribed by loyalties of a relatively deep-seated character. In a time of civil warfare, on the other hand, political relationships are in a peculiarly fluid state. The outbreak of internecine strife marks the collapse of an established social order. During the transition period necessary for the consolidation of new loyalties, the line between opposing forces is bound to be more or less nebulous. Comparatively few habitual restraints are available at such a time to hinder individuals or groups from changing sides in the course of conflict. This makes for an unusual degree of receptivity to propagandist efforts. In a period of civil insurrection control of the press, radio, and other channels of communication is therefore apt to be even more significant than usual in determining the outcome of military operations.

This consideration applied with particular force to the situation now under discussion. To a quite unusual extent the Communist insurrection of 1920 was a product of systematic agitation. In the earlier stages of the movement party publications, public meetings, and open-air demonstrations had been used with considerable effect for the encouragement of revolutionary objectives. Handbills were distributed calling upon the workers to mount the barricades for a decisive struggle against the forces of world capitalism. Recent successes of the Bolsheviks in Russia were played up prominently as a sign that the hour of the proletariat was at hand. Lacking as they were in arms, munitions, and other direct instrumentalities of power, the Communists were forced to rely almost entirely on their skill in arousing the masses to fanatical enthusiasm. This was their only chance of success in an admittedly desperate venture.

Under these circumstances the establishment of rigorous censorship was clearly to be recommended as a measure for the defense of constitutional government. The military commander accordingly proceeded to suppress all leftist publications within the affected area, and to forbid the importation of similar publications from other parts of the country. Groups suspected of leftist leanings were also forbidden to participate in public demonstrations or otherwise to exercise the right of free speech. During the really critical period it goes without saying that the power of

the established authorities was never sufficient to make the enforcement of these orders wholly effective. So long as the insurrection itself continued, a fair amount of leftist propaganda was bound to remain in circulation. But by cutting off the Communists from many of the more important channels of mass agitation the government was able to place its own propagandists in a position of definite advantage. Attempts to corrupt the loyalty of the army and to arouse new forces of popular opposition were placed under a severe handicap, while the rebels were left without means of defense against the official counter-propaganda. This served to hasten the collapse of revolutionary opposition. Much of the credit for this result is due to Article 48, which alone could justify the imposition of so rigid a censorship within the terms of the Weimar Constitution.

A few words still remain to be said about one more aspect of military rule. The emergency tribunal was a device of which full use was also made in suppressing the Communist insurrection of 1920. When the revolt broke out one of the first acts of the government was to inaugurate special measures for the prosecution of the insurgents. According to the terms of a decree issued on the basis of Article 48¹ the penalty for such crimes as arson, bombing, and sabotage committed within the affected regions was increased from imprisonment to death. The same punishment was made permissive also in the case of persons found under arms as voluntary participants in a riotous assemblage. And, for the more effective enforcement of these various regulations, authority was also granted for the creation of special emergency courts.

These tribunals were to be of two different sorts. The first were known as extraordinary war courts. Manned by three professional jurists, they tried the above-mentioned offenses in accordance with a specially simplified form of procedure. In the case of actual insurrection or a serious breach of the peace this procedure was not considered, however, to be sufficiently extreme. Under these circumstances the minister of war was further empowered to authorize the establishment of still another type of emergency tribunal, to be known as a court martial, vested with jurisdiction over all cases arising out of the crime of riotous assemblage. Courts martial were to be appointed directly by the

¹ Decree of January 13, 1920, *Sten. Ber., Anlagen*, vol. 341, p. 2240, no. 2131.

military commander responsible for the restoration of public order in any given district. Like the extraordinary war courts, they were to be composed of three members, but in this case legal training was not a necessary qualification for office. The only formal stipulation was that all members should be reputable persons more than twenty years of age. An army officer was to preside over its deliberations. The procedure laid out for these courts was summary in the extreme, and it was expressly provided that all decisions should be handed down within a period of twenty-four hours. Death by shooting was the only penalty they could lawfully impose, the sentence being carried out immediately upon ratification by the military commander. No provision was made for any sort of appeal. Thus the powers of the courts martial were even more summary than those of the extraordinary war courts. Between the two the authorities were provided with a more than ample basis for the exercise of emergency jurisdiction within the regions affected by the Communist insurrection.

Considerable use was made of the powers contained in this decree. Tribunals of both sorts were set up in various parts of central Germany by authority of the minister of war or of the appropriate military commander, and their activities played an appreciable part in the ultimate suppression of the Communists. Through the extraordinary war courts, emergency jurisdiction was established over many cases which would normally have fallen to the regular judicial authorities. It was in their own courts martial, however, that the military authorities placed their main reliance for the suppression of Communist activities. Tribunals of this sort were set up from time to time in many different places, and prisoners were sentenced with a lavish hand. Although the lack of records makes it impossible to give any close estimates on the subject, there can be no doubt that the number of real or supposititious rioters who met their death in this way was considerable. Whatever the actual figures may have been, the courts martial were certainly efficient as an instrument for attacking the morale of the proletariat. Fear of their ruthless methods did much to break the backbone of Communist resistance. Such was the principal contribution of these organizations to the suppression of the Communist insurrection.

The fact that terroristic methods could be employed is to be taken, of course, as a measure of the difference between foreign

and civil warfare. In international conflicts the slaughter of prisoners has long since been abandoned, but the position of domestic enemies is in this respect a rather different one. A revolutionist is guilty not only of injuring the state but also of violating his duty under the law of that state. This makes him liable to punitive as well as to strictly military action. Extreme measures of this sort may not always be wise. When rebels are strong enough to offer effective reprisals, there is nothing to be gained by exciting them to violence. In the American Civil War, for example, regard for the safety of Union prisoners made it inexpedient to shoot captured Confederates as traitors to the republic. But in the case of the Communist insurrection in Germany the power of the established authorities was so great that drastic measures could be employed without danger. The result was a determined and successful effort to terrorize the proletariat by the use of judicial penalties.

The activities of the courts martial were generally regarded, however, as the least satisfactory aspect of this particular experiment in military rule. Even though judicial terrorism may be an effective form of emergency action, the resulting threat to innocent lives is to be justified only on the grounds of immediate danger to the life of the state. Considered on this basis the work of the courts martial was bound under the circumstances to impress many impartial observers as being unduly extreme. Aristocratic army circles were much too deeply imbued with the hatred of Communism to remain strictly within the requirements of military necessity in dealing with a leftist insurrection. Even the more moderate brands of Marxism were anathema to many of the officers responsible for the conduct of military operations. This gave their judicial work a reactionary bias which could not fail in the long run to arouse the indignation of important elements in the community.

Hostile sentiment developed from so many different quarters that on April 3, after an effective life-span of less than three months, the decree authorizing courts martial was finally revoked. The extraordinary war courts, which approached much more closely to the norms of judicial procedure, were felt to be relatively inoffensive. Tribunals of this sort were accordingly allowed to function for some little time thereafter. But an emergency jurisdiction so extreme as that represented by the courts martial

was felt to be unnecessary and undesirable, at least in the later phases of resistance to a hopelessly shattered insurrection. In spite of repeated protests from the military authorities, who maintained that their efforts to restore public order were being prematurely hampered, the institution was not subsequently revived. This episode is well worth noting as an indication that the mechanism of parliamentary review was still working effectively at this time as a check upon the abuses of emergency action.

On the whole the Communist insurrection of 1920 may be taken, therefore, as a striking illustration of the benefits to be derived from constitutional emergency powers as an aid to the prosecution of military operations. Through the use of Article 48 the army was able to proceed almost without legal hindrance in dealing with the rebels. This led to the rapid liquidation of a situation which for a time had threatened to be a serious drain upon the Republic. By the end of spring order had been restored in the affected districts to such an extent that the state of emergency was finally declared, after a number of intermediate modifications, to be wholly at an end. The last vestiges of military rule were abolished by a decree of June 12. Within a period only slightly longer, therefore, than the traditional six months of dictatorship in ancient Rome, the use of emergency powers was followed by the restoration of normal political methods. Allowing for the imperfection, inseparable from all human enterprise, it would be hard to ask for a result more wholly satisfactory from the standpoint of constitutional government.

CHAPTER IV

THE BEER HALL *PUTSCH* OF 1923

IN THE various revolutionary crises of post-war Germany the resources of Article 48 were never used more extensively than in connection with the Communist insurrection of 1920. Sometimes the disorder was so slight and so easily quelled that there was no need to depart greatly from the norms of constitutional government. Sometimes the very magnitude of the crisis paradoxically served to produce the same result. The sole function of constitutional emergency powers is to release existing forces from the paralysis of constitutional restraints. This is significant only on those occasions when adequate power resources are actually available for release. Full emergency powers are for that reason apt to be neglected not only in periods when the authorities are too strong to need them but also in periods when they are too weak to use them. Occasions of the latter sort were not infrequent in the life of the German Republic.

The inadequacy of government power resources was particularly apt to be felt in connection with the repression of right extremists. A respectable force recruited from the class of retired military men could almost invariably be rallied to the cause of reactionary insurgency. But these were also the circles from which the republican army itself had been drawn, and when the time came for a trial of strength between two such groups the attitude of the regular troops was frequently open to question. In the face of left radical attacks the loyalty of an aristocratically dominated army left nothing to be desired. In the face of comparable rightist movements the authorities could never be sure that their own forces would not at the decisive moment be found joining the opposition. This circumstance did much to limit the government's freedom of action in dealing with reactionary attempts upon the Republic.

If the Ebert regime had been able at the beginning to train reliable forces of its own, this difficulty might have been avoided. Gustav Noske, the minister in charge of military arrangements, has since been criticized by many of his fellow Marxists for recruit-

ing the new army from aristocratic rather than from proletarian circles. The activity of left wing Marxism itself was to some extent responsible, however, for producing this unfortunate result. During the first crucial months of its existence, repeated violence on the part of Spartacists and other left radical sympathizers gave the struggling new government no time to embark upon the slow and laborious process of military reform. Because of the need for immediate action, existing military resources had perforce to be used for the defense of the Republic. In a period of vigorous leftist agitation there was no reason to suppose, moreover, that a proletarian army would be more reliable from the standpoint of constitutional government than one made up of aristocrats. Under these circumstances it is hard to conceive of any decision other than the one actually made. The result was to place reactionary elements in a sadly favorable position.

This weakness first became apparent at the time of the Kapp *Putsch*. When the legally constituted government of Germany had been humiliated to the extent of being forced to abandon its own capital, it was only natural to suppose that the episode would be followed by a drastic assertion of emergency authority. Certainly it would have been hard to imagine a more clear or more immediate threat to the life of the Republic. But even though the army on this occasion was vested with powers no less extensive in form than those exercised in the subsequent Communist insurrection, it was allowed to take little part in the actual handling of the crisis. The loyalty of the military was so dubious that the authorities simply did not dare to risk them in a direct trial of strength with the insurgents.

Fortunately the government at this time was still in the hands of Socialists. Relying on their purely extra-official connection with the trade union movement, Socialist ministers called upon the workers to demonstrate their loyalty in the form of a general strike. This led almost immediately to the collapse of the Kappists. In the absence of reliable military forces, however, the provisions of Article 48 were able to contribute little or nothing to the attainment of this highly satisfactory result.

An even more striking example of the general reluctance to apply sanctions against extremists of the right occurred in the year 1923. At this time the Reich continued for more than a month to suffer defiance at the hands of a disloyal state govern-

ment without making any decisive use of its legitimate emergency powers. This situation was brought to a climax in the so-called Beer Hall *Putsch*, in which an obscure political agitator named Adolf Hitler played his first unprepossessing role upon the stage of world history. In some ways this was perhaps the most taxing of all the insurrectionary crises of post-war Germany. As an instance of emergency action hampered by the possession of limited power resources, the episode is well worth considering in detail.

The immediate origins of the crisis were laid in the summer of 1923. By this time the period of uncontrolled monetary inflation was approaching its disastrous climax, and it was not long before the resulting economic distress had served to produce a rapid increase of anti-republican agitation throughout the length and breadth of Germany. This was especially true in Bavaria, always a stronghold of right radical sentiment. Revolutionary organizations of the monarchist or nationalist persuasion soon began to make remarkable strides in the ever-romantic land of the Wittelsbachs. One of the most successful of these organizations was the German National Socialist Workers' Party, unpretentiously founded in Munich some three years previously. Clearly, the tinder was being laid for a first-class conflagration.

On September 26 these developments came to a head with the abandonment of passive resistance in the Ruhr. After more than six months of unremitting effort to drive out the invader through the use of economic sanctions, the government was finally forced to admit that bankruptcy made it impossible to proceed further along these lines. This humiliating capitulation to the power of France, however necessary from a purely practical point of view, was sure to arouse the most violent opposition in nationalistic circles. Rightist agitation rose in a hysterical crescendo. When the government's change of policy was made known, the National Socialists alone announced that they would hold fourteen separate mass meetings on the following day in the single city of Munich. Obviously Bavaria was on the threshold of serious disorders. The time to use emergency measures was once again at hand.

The first step in this direction was taken appropriately enough by the Bavarian state government. According to paragraph 4 of Article 48, state cabinets were authorized within the limits of their own territory to make use of federal emergency powers "in

cases where delay would be dangerous." As soon as the abandonment of passive resistance was announced, the Bavarian authorities proceeded to avail themselves of this right. By order of the state cabinet the seven stipulated articles of the federal bill of rights were suspended, and a state commissioner was appointed to exercise full administrative powers within the territorial limits of Bavaria. Complete emergency resources were thereby made available for use in the approaching crisis.

Unfortunately the invocation of emergency measures by the state of Bavaria was even more disturbing to the friends of constitutional government than any of the difficulties it purported to allay. The trouble was that control of the Bavarian government had for some time rested in the hands of right extremists headed by a well-known monarchist, Premier von Knilling. The state commissioner appointed by this government was a certain Baron von Kahr, another avowed monarchist who wasted no love on Adolf Hitler, but was reputed to be indulging on his own account in reactionary intrigues. The appropriateness of this selection was officially defended on the ground that the Baron's undoubted influence in rightist circles made him an ideal person for the maintenance of order in a strongly rightist locality. In many quarters it was strongly suspected, however, that the maintenance of order would not be the sole preoccupation of an emergency regime headed by a man of this particular persuasion.

Under these circumstances the federal government decided that it would be wise to intervene in the Bavarian situation. Thus the appointment of Commissioner von Kahr was followed on the very same day by a decree of the federal government invoking the provisions of Article 48 throughout the territorial extent of the Reich. This made it permissible for commanders of the various army districts to take over the powers of local government in the regions subject to their respective command. No immediate attempt was made on this basis to supplant the Kahr regime in Bavaria. For the time being the federal government considered it advisable to play a waiting game and see just how much the local authorities would accomplish if left to their own devices. As a measure of precaution it was thought desirable, however, to have a federal commissioner stationed in the background with full authority to defend the interests of the Reich in case they should be threatened.

The events of the next few days served on the whole to confirm the supporters of constitutional government in their distrust of the Bavarian authorities. The first act of the state commissioner was to issue a general prohibition upon mass meetings. As a retort to Hitler's immediate and highly spectacular program of public addresses, this measure was satisfactory enough, but from that time onward little was done to interfere with the activities of right radical groups. When it came to the disarmament of Socialists or to the dismissal of leftist officials Commissioner von Kahr seemed, on the other hand, to be acting with considerable vigor. Were these measures inspired by a desire to defend the interests of constitutional government, or by the hope of eliminating potential sources of resistance to an approaching rightist coup? The fact that they were being carried out by an avowed monarchist made it only too probable that the latter was the true interpretation.

Suspicion as to the loyalty of the state regime soon led to a demand for direct federal action. It is true that the appearance of willful inactivity may possibly have done Commissioner von Kahr an injustice. Since the forces at his disposal for the suppression of right radicalism were clearly limited, the policy of concentrating on leftist activities might well have seemed the only way of dealing with the situation. The analogy between the methods used by the state government and those subsequently adopted by the federal authorities is in itself an indication that both may have been acting in response to common necessities. Under the circumstances it was only natural, however, that partisans of the Republic should have preferred to see the conduct of affairs vested in an authority whose loyalty was less seriously open to question. Thus the Reich cabinet soon came to the conclusion that it would be well advised to act on its own behalf in the Bavarian situation. On September 28 the minister of war ordered the local military commander, General von Lossow, to suppress the *Volksische Beobachter*, then as now the principal daily newspaper of the National Socialists. By this act the federal government gave notice that it was no longer prepared to rely exclusively on the Bavarian government for the suppression of subversive movements on the part of right extremists.

Although this step was designed modestly enough to prevent a small band of reactionaries from provoking breaches of the peace,

it actually had the effect of placing the second largest state government in a position of open rebellion against the authority of the Reich. When the wishes of the federal authorities were made known, Commissioner von Kahr flatly refused to allow the *Völkische Beobachter* to be suppressed. An even more sinister turn of events was provided by General von Lossow, the local army commander and federal commissioner, who refused to obey the orders of his own military superior, the minister of war. In the face of repeated representations it was not until October 4 that publication of the offending newspaper was actually suspended, and even then the greatest care was taken to make sure that state rather than federal authority should provide the formal basis of action. From that time down to the Beer Hall Putsch of November 8, there was little pretense of respecting the authority of the Reich within the territorial limits of Bavaria.

Some attempt was made to find legal justification for this action on the grounds that the preservation of public order was primarily a function of state government. Under the terms of the Weimar Constitution, which deprived Bavaria of all the special privileges it had retained under the old Empire, there was no plausible basis for any such contention. Bavarian governments were always willing, however, to overlook changes in their earlier federal status. In 1922 a previous state cabinet, being displeased with a recent federal law for the repression of reactionary terrorism, had calmly proceeded on the basis of Article 48 to suspend the operation of that law within the territories subject to its control. Protests on behalf of the federal government were met with the bland assertion that the enforcement of repressive measures in a region so predominantly rightist in sentiment would lead to serious breaches of the peace, for the avoidance of which the state authorities were empowered by the terms of Article 48 to take all "necessary measures." This novel doctrine, so threatening to the maintenance of German federal unity, was hardly defensible from a legal standpoint. Unfortunately the circumstances were such that the federal government could not well afford to insist upon its rights. The matter in this particular instance was therefore settled by a compromise in which the acquiescence of Bavaria was secured at the cost of substantial changes in the original statute.¹

¹ This episode is fully discussed in Johannes Mattern, *Bavaria and the Reich* (Baltimore, 1923).

The result was a distinct encouragement to all subsequent claims by the Bavarian government for preferential treatment.

It is true that subversive action by the state authorities was usually joined with declarations of the most unswerving loyalty. In the crisis of 1923 one of the most illuminating statements of the Bavarian position was given by the insubordinate federal commander, General von Lossow. "The Bavarian government has no intention of breaking faith with the Reich. . . . All we ask is that the government of Berlin, with its pronounced Marxist leanings, shall not be permitted to interfere with the government of Bavaria and with the Bavarian state commissioner in such a way as to impair the effectiveness of Bavaria as a principal stronghold of German nationalist sentiment."² In other words, Bavaria claimed nothing less than the right to act as spokesman for the true interests of the nation, even in the face of contrary decisions on the part of the national government. It would be hard to imagine a more blatant assertion that the part is larger than the whole.

These developments brought Germany face to face with an extremely serious crisis. It was bad enough that intervention by the state authorities should have prevented the Reich from stopping National Socialist preparations for the approaching Beer Hall *Putzsch*. But even this was not the most disquieting aspect of the developments in Bavaria. At a time when much of the country was controlled by foreign troops, and when the ravages of inflation were inflicting untold hardship on all classes of the population, the maintenance of effective central authority was at best a task of no small difficulty. Eager to weaken the forces of its traditional enemy, the French army of occupation was busily engaged in subventioning autonomist movements in all the more likely regions of south Germany. No region was more promising than Bavaria itself. Under these circumstances defiance on the part of the Bavarian government was nothing less than a threat to German national unity. This lent the crisis a national significance far greater than any mere question of defending the particular institutions embodied in the Weimar Constitution.

Protracted success in the defiance of legitimate authority in Bavaria could not fail, moreover, to encourage the ambitions of extremist groups elsewhere. In the neighboring states of Saxony and Thuringia the Bavarian crisis was almost immediately fol-

²Reported in the *Frankfurter Zeitung*, October 23, 1923.

lowed by additional manifestations of radical activity. This time the threat came primarily from the direction of the extreme left. Because of its unusually large industrial population, central Germany was notable at all times as a stronghold of revolutionary Marxism. Even the Social Democrats tended to be more radical in those regions than in other parts of the Reich. Under the stimulus of armed reaction in the south, these tendencies began to increase at a most alarming rate. As the Bavarian menace grew, leftist fears were not slow in finding political expression. On October 12, just two weeks after the spectacular insubordination of General von Lossow in Bavaria, the government of Saxony was taken over by a leftist coalition in which the Communists were included for the first time. Shortly thereafter a similar development took place in Thuringia as well. In both these states the effect of Bavarian right radicalism had been to produce an equal and opposite reaction.

The effect of raising Communists to cabinet rank was to give the whole trend of politics in central Germany a dangerously leftward twist. Even though revolutionary Marxism was not yet in a position to exert undivided control over the policy of the state governments in question, the proletariat was officially encouraged to take up arms on its own behalf. A widespread movement was begun to organize class-conscious workers in a system of military companies known as proletarian hundreds. Unlike the efforts of the rightists, these measures were not solely directed against the authority of the Reich. In the first instance they were intended as a means of defense against the possibility of an invasion by reactionary forces from Bavaria. But even under these conditions a good deal of potential dynamite lay hidden in the fact that leftist state authorities were presuming, in much the same way as their rightist adversaries, to organize and direct military action without reference to the plans or wishes of the legally constituted federal government.

The possibility of using the proletarian hundreds for the destruction of the Republic was also recognized quite frankly in the calculations of revolutionary Marxists now belonging to the Saxon cabinet. At a public meeting in Leipzig on October 16 the Saxon minister of finance, a Communist by the name of Böttcher, openly justified the arming of the proletariat on the grounds that Red dictatorship was now the only possible alternative to White dic-

tatorship in Germany. Such statements could hardly lend much comfort to supporters of the Weimar Constitution.

In the fall of 1923 a situation had arisen, therefore, which called for the strongest possible assertion of federal authority. Under the impact of simultaneous left radical and right radical movements, the German nation presented the uneasy spectacle of a man galloping madly in all directions. Drastic emergency measures were needed, and if adequate power resources had been available there is no doubt that they would have been used. Unfortunately the position of the federal government was not strong enough to support a great deal of positive action at this time. Three months earlier Stresemann, in a private letter to the former Crown Prince,³ had expressed grave doubts as to the loyalty of the Reichswehr in the face of any general explosion of right radicalism. Subsequent developments were by no means calculated to encourage greater optimism. During the period of his chancellorship, as a glance at the published Stresemann papers will show, the physical impossibility of coercing Bavaria was one of the many unpleasant yet inescapable data constantly present in the mind of that realistic statesman. The result, as in the case of the Kapp *Putsch*, was to hold the use of emergency powers within much narrower bounds than in many a situation where the need was much less obvious.

It is true that in Saxony and Thuringia the resources of Article 48 were used with considerable vigor. So far as the coercion of state governments is concerned the emergency authority of the Reich was never exercised more drastically than against the leftist cabinets which took office on this occasion. Four days after the establishment of the Zeigner government in Saxony the local military commander used his powers as federal commissioner to order the dissolution and disarmament of all proletarian bodies. Acting in accordance with the precedent set by the Bavarian von Kahr, the Saxon cabinet flatly refused to allow this order to be carried out. In this case the consequences of defiance to legitimate federal authority were immediate and drastic. All governmental functions within the territorial limits of Saxony were taken over by the army, which then proceeded in the face of badly scattered opposition to disarm the proletarian hundreds by force. A few

³ This letter is to be found in Eric Sutton's English translation of the Stresemann papers, *Gustav Stresemann, His Diaries, Letters and Papers* (New York, 1935), vol. I, pp. 212-215.

days later similar steps were also taken in Thuringia. In both regions stringent military rule was maintained as long as the left coalition remained in office. Only when the existing state governments had been forced out and new cabinets purged of Communist elements set up in their place was the situation regarded by the military authorities as being ripe for the withdrawal of emergency measures.

In Bavaria, on the other hand, the possibilities of direct federal action were limited as never before in the history of the Republic. The defection of General von Lossow had the effect of cutting the Reich off from all direct channels of communication with the army units stationed in that region. When the minister of war on October 20 finally tried to discipline the offending officer by removing him from his position, the Bavarian government simply proceeded to assume control over the military forces and to replace *him in command*. *The troops were then made to swear an oath of allegiance to Bavaria as well as to the Reich*. For the time being, relations between the central authorities and the Bavarian army were effectively severed. This left the government without the support of any considerable power resource within the affected regions.

Thus in spite of the fact that the position of the Bavarian government was even more threatening than that of Saxony and Thuringia, the federal authorities were never in a position to use weapons more fearsome than exhortation and expostulation in dealing with the situation. It is true that the rights of the central government might conceivably have been upheld by the device of sending in troops from other parts of Germany, but the success of such a proceeding would have been dangerously problematical. To leave the rest of the country without its usual complement of soldiers was not a measure lightly to be undertaken at this particular time. Even if adequate forces could have been spared for the purpose it was by no means certain, moreover, that they would prove in the end to be more reliable than their predecessors. During the past few weeks there had been several disturbing indications that the whole army might be on the point of deserting to the reactionaries. A mysterious mutiny which took place at this time in the Prussian fortress of Cüstrin was felt to be particularly portentous. The possibility of French intervention on the side of Bavarian autonomists was yet another factor to be taken into con-

sideration. Altogether the Stresemann government could hardly be blamed for shrinking from the risks of drastic federal action. When Hitler finally made his decisive effort to overthrow the Republic by force of arms, Kahr and Lossow were still left, therefore, as the only effective representatives of federal authority in Bavaria.

The actual consequences of this situation were surprisingly favorable to the cause of German constitutionalism. In the hour of final decision the various right radical factions proved incapable of arriving at a common plan of action. Commissioner von Kahr and his supporters were interested mainly in restoring the Bavarian monarchy, while Adolf Hitler's loyalties were almost entirely directed toward the person of Adolf Hitler. On the eve of the Beer Hall *Putsch* the National Socialist leader tried to remedy this situation with a characteristic touch of melodrama. By the simple device of holding a pistol at the head of the state commissioner, he forced that startled official to make a public declaration of his adherence to the movement. But this dramatic episode, which ought perhaps to be reckoned as the earliest and most limited of the National Socialist plebiscites, served no other purpose than to demonstrate the moral insignificance of enforced consent. Once he had regained his freedom of movement, Commissioner von Kahr proceeded to wire frantic declarations of loyalty to the Berlin government. The sincerity of these protestations was demonstrated on the very next day, when he and von Lossow joined forces to crush the insurrection. The victory march of National Socialism was dissipated in a hail of bullets, and before many hours had passed its supporters were in full flight. In the final reckoning, no emergency regime could have served more effectively than the Bavarian state commission to safeguard the interests of the Weimar Constitution.

Ultimate success was not by any means enough, however, to silence criticism of the Stresemann policy in Bavaria. The fact that a reactionary government was allowed to defy the Reich with impunity, while Saxony and Thuringia were severely punished for resistance of a rather less blatant character, impressed many fair-minded people as being inequitable in the extreme. The Social Democrats were particularly disturbed by this appearance of favoritism toward the parties of the right. Indignation rose to such a point that the Socialist ministers finally decided to resign

from the national cabinet. This was one of the main causes which led on November 2 to the fall of the Stresemann coalition.

Even though their own interests were not directly in question, bourgeois liberals were also disposed to demand that the various offending states be treated on terms of more nearly approximate equality. "There are only two possibilities," declared the influential *Frankfurter Zeitung* in one of its characteristic utterances on the subject. "It is necessary either that the military state of emergency be abandoned entirely, or that it be enforced on equal terms in all parts of the country, in Bavaria as well as in Saxony."⁴ This represents the attitude of a large sector of contemporary public opinion. On the whole it is probably safe to say that the emergency activities of no German government were ever subjected to a more persistent and widespread attack than was directed against this particular aspect of the Stresemann policy.

But for all its well-intentioned vehemence most of this criticism was sadly irrelevant. It is true that ultimate success should not blind us to the possibility that more adequate measures might perhaps have been found to deal with the situation by which the Stresemann government was confronted. Some other and perhaps more skillful student of conditions might have decided that the risk of military disaffection was not really great enough to warrant postponing a trial of force with the Kahr regime in Bavaria. A more adequate analysis of the situation might also have led to the conclusion that the destruction of proletarian organizations in central Germany was premature as long as there was any possibility of using them to check the spread of reactionary violence. On grounds of pure expediency it might conceivably have been maintained, therefore, that the unequal treatment of Saxony and Bavaria was actually unwise. But the opponents of Stresemann were not disposed to argue the matter on this basis. For the most part they were content simply to assert as a self-evident proposition that emergency measures can only be justified if they are applied with equal force in all equally disturbed areas.

This attitude stems from a dangerous and widely held misconception regarding the proper use of constitutional emergency powers. The fact is that efficiency rather than equality is the primary standard to be applied in judging the propriety of emergency action. Whenever a number of equally guilty persons have

⁴October 18, 1923.

been rendered equally accessible to the power of the state, it is obvious that inequality of treatment would be a violation of justice. Because of the fact that the problem of power has in the very nature of things to be solved before a case can be brought to the courts for adjudication, equality is recognized as the valid norm of all judicial conduct. Considerations of a quite different sort begin to arise, however, as soon as we pass from the judicial realm of adjudication to the executive realm of law enforcement. Although the apprehension of all lawbreakers is the ideal objective of police action, the attainment of that end is limited in practice by the extent of effective power resources. These resources are seldom fully adequate. The various police forces of the United States are able, for example, to lay hands on no more than a small proportion of those who indulge in the great American pastime of murder. When power is inadequate all that can be hoped is that it will be used as effectively as possible. If some murderers must escape, it is at least worth while to capture as large a number as possible. So long as equal treatment is meted out to those actually caught, there is no injustice in the fact that they are arrested while others go free. In the absence of power resources, maximum efficiency rather than perfect equality has perforce to be accepted as the measure of activities directed toward the enforcement of law. The case of constitutional emergency powers is only a special instance of this more general problem.

The unequal treatment of equally guilty governments could not in itself be taken, therefore, as proof that there was anything unjustifiable about the Stresemann policy of 1923. In order to turn this circumstance into an occasion for reproach it was necessary to show either that the power resources of the government were actually adequate to the needs of the situation or that, being inadequate, they were not applied in such a way as to produce the maximum effect. To establish either one of these propositions would have been extremely difficult under the conditions already described as existing at this particular time.

The actual scope of Stresemann's intervention was a good deal broader, moreover, than it appeared to be on the surface. Individual phases of the crisis were so closely interrelated that emergency measures applied at any one point were sure to have a certain effect throughout the entire system. Mention has already been made of the fact that the rise of left radicalism in

Saxony was conditioned by the concurrent growth of reactionary activities in Bavaria. The establishment of proletarian hundreds was intended in the first instance as a means of resistance against a possible reactionary coup. But this was far from being a one-way relationship. If the fear of National Socialism was capable of stimulating proletarian efforts in Saxony and Thuringia, the ensuing Communist menace was no less strongly calculated, in the hands of skillful agitators, to frighten members of the middle classes into the fascist camp. Both extremes were strengthened by mutual opposition. The result was a single vicious circle which threatened the very existence of the Republic.

Vigorous intervention on the part of the federal authorities made it possible to nip this disastrous process in the bud. When military measures were first taken against the Zeigner government, Stresemann assured his reluctant colleagues that determined application of the constitution in Saxony would also strengthen the position of the Reich in relation to Bavaria.⁵ Once again in this instance the Chancellor's rare political judgment was amply confirmed by the event. Ruthless action against the proletarian hundreds in Saxony served not only to safeguard the propertied classes of Germany from an immediate challenge to their position but also to demonstrate that the government was not so strongly under the control of Marxists as the reactionaries were fond of saying. For citizens wavering on the brink of fascism, this circumstance did much to facilitate reconciliation with the principles of political liberalism. This meant a corresponding reduction in the effectiveness of reactionary agitation. Indirectly but none the less surely emergency action in central Germany began to bear fruit in Bavaria itself. Soon there were signs that the peak of rightist sentiment was already past. The ludicrous failure of the Beer Hall *Putsch* was due in no small measure to the fact that Hitler was goaded into precipitate action by the knowledge that his star was in the descendant. Thus in spite of the fact that federal emergency powers were used hardly at all in this particular region, the resources of Article 48 were able indirectly to make a considerable contribution to the solution of the crisis in Bavaria.

The whole episode may be taken, therefore, as a classic example of constitutional emergency powers exercised in the face of inad-

⁵ See Stresemann's notes on the cabinet meeting of October 27 in Sutton, *Gustav Stresemann*, vol. I, pp. 181-183.

quate power resources. Because of the peculiar difficulties of its position, the Stresemann government was not able to meet all its enemies simultaneously and with equal vigor. Only the states of central Germany were open to immediate action. But by concentrating all its forces on the one strategically promising front, the government was able to win a crushing victory which served in the end to weaken enemy resistance on all the other fronts as well. The result was a signal triumph for the cause of constitutional government.

CHAPTER V

THE NEW TECHNIQUE OF REVOLUTION

IN CONNECTION with the problem of civil insurrection, constitutional emergency powers were almost always successful in contributing to the maintenance of the Weimar Republic. So long as it could rely on the support of its own highly efficient military machine, the government had little to fear from a direct attack by insurgent forces. During the years immediately following the revolution of 1918, when political loyalties were still in a state of flux, it was not always possible to depend on this support. But the tradition of military discipline was a powerful factor in German national life, and one of the main purposes of that tradition had always been to place armies at the disposal of legitimate authority. Even in the earlier days of the Republic the breakdown of military loyalty never went so far as to persuade regular troops to turn their arms against the government. With the return to more normal conditions the old tradition of political neutrality was revived to such an extent that the army soon became a reliable positive instrument as well. A regular army equipped with full emergency powers was practically irresistible. In all the history of the Republic there was never a time, therefore, when the government was not finally in a position to frustrate insurrectionary attempts upon the Weimar Constitution.

Increasing recognition of this fact soon led to the abandonment of direct military action as a technique for the destruction of constitutional government in Germany. The first people to learn that insurrection was not a paying proposition were the Communists. After the collapse of their efforts to dominate central Germany in 1920, even the most daring members of that party were not disposed to seek a repetition of the incident. Because of the general reluctance to employ strong measures against them, the reactionaries were a good deal slower in learning to respect the armed forces of the government. The prompt failure of the Kapp *Putsch* proved little or nothing in this respect, being accomplished more by the strike weapon than by military sanctions. At the time of the Beer Hall *Putsch*, however, a major rightist coup

finally came into conflict with the Reichswehr. The result was a miserable fiasco which served to give reactionaries as well as revolutionary Marxists a wholesome respect for the terrors of military rule. From that time onward no attempt was ever made by either group to overthrow the Republic by force of arms.

The next five years were a period of orderly constitutional development in Germany. By the end of 1924 the more pressing difficulties of the immediate post-war period had been very largely liquidated. Under the leadership of Stresemann and other liberal statesmen, the tragedy of the Ruhr invasion was followed by Locarno and the admission of Germany to membership in the League of Nations. One of the first fruits of this new policy of conciliation was the Dawes plan, which served with the aid of foreign loans to place German finances on a temporary working basis. This made it possible for the long-starved country to begin sharing in the mushroom prosperity of the fabulous nineteen twenties. With the relaxation of economic stress a corresponding improvement began at once to make itself felt in the realm of domestic politics. Anti-republican movements which had long thriven on sentiments of misery and despair were forced increasingly into the background. The result was a period of welcome relief from the need for emergency government.

Unfortunately this state of affairs was not destined to be of long duration. As the hectic decade drew on toward its close, the upward swing of prosperity was cancelled by a world depression of almost unprecedented severity. Disastrous enough in other countries, this change was felt in Germany with a peculiarly catastrophic force. The annihilation of liquid capital in the period of the inflation had left the German economic system almost wholly dependent on foreign short term loans for the satisfaction of its daily financial needs. A few short years of prosperity had not been enough to make possible the accumulation of reliable reserves. When the period of stringency arrived, therefore, it found Germany in a much more vulnerable position than the other industrial nations of the world. The ensuing collapse was for that reason even more complete.

These developments were followed by a renewal of extremist pressure on the Weimar Constitution. Even at the height of prosperity, parties dedicated to the destruction of the Republic

had been able to retain a fair degree of strength in Germany. Unusually able leadership had made the Communists and the National Socialists particularly successful in this direction. The widespread distress and discouragement natural to a depression period made it easy for both these extremist groups to win fresh converts. Returning to the fray with renewed vigor, they were able within an amazingly short period of time to regain their old position as an immediate threat to the maintenance of constitutional government. This marks the beginning of a crisis which was to end only with the fall of the Republic.

The character of extremist opposition during the later period was notably different, however, from that of corresponding movements in the immediate post-war years. Although the Communists and National Socialists never entirely lost hope of corrupting the loyalty of the armed forces, their efforts were at no time crowned with such a degree of success as to justify them in risking a trial of strength with the established authorities. The result was to force anti-republican energies into comparatively legitimate channels. By electing avowed enemies of the existing system to positions of official responsibility, much could be done to destroy the effectiveness of constitutional government. Even in the period of direct revolutionary action the extremist parties were never entirely blind to the advantages of capturing legitimate authority. During the last years of the Republic, the increasing unlikelihood of successful insurrection left them no choice but to concentrate all their energies in this direction.

The National Socialists were the most explicit in the abandonment of insurrectionary tactics. After the failure of the Beer Hall *Putsch*, Hitler had several months in prison for undisturbed reflection upon the significance of his experience. From that time onward the conquest of legitimate authority was consistently held forth, in the face of strenuous objection by restless elements in his own party, as the official goal of National Socialist activity. At an important hearing before the Supreme Court at Leipzig in 1930 Hitler himself stated the new party policy in the clearest possible terms. "The Constitution gives us the ground on which to wage our battle, but not its aim. We shall become members of all constitutional bodies, and in this manner make the Party a decisive factor. Of course, when we possess all constitutional rights we shall then mould the state into that form which we con-

sider to be the right one."¹ This is a far cry from the martial heroics of the Beer Hall *Putsch*.

The position of the Communists was much the same in practice. Although the dogmatic commitments of the party were such that they could not pin hope upon the ultimate success of parliamentary reform, they also were forced by practical necessity to recognize the inadvisability of an immediate attempt to overthrow the state by force of arms. Their policy during the crucial years was accordingly directed, like that of the National Socialists, to the election of party members to positions of public trust. Even in the last stronghold of revolutionary Marxism, the triumph of non-insurrectionary tactics was temporarily complete.

All this necessitated a thorough revision of extremist methods in the later years of the Republic. So long as insurrection was the primary consideration, radical parties could afford to concentrate on the creation of a small but efficient striking force of fanatically devoted followers. This was the basis on which the Bolsheviks had succeeded in gaining control over Russia. Electoral success under a democratic system, on the other hand, rests upon the ability to attract widespread mass support. As soon as the attention of German extremists had been focused upon the conquest of legitimate authority, propaganda had accordingly to be recognized as the main instrument of revolutionary action in Germany. Impressed by the comparative ineffectiveness of German propaganda methods during the World War, Hitler and his associates made a particularly exhaustive study of modern publicity methods. Many of the most interesting and realistic passages of *Mein Kampf*, the National Socialist bible, are devoted to the analysis of propaganda problems. The Communists and other extremist groups were not left far behind. In all circles the creation of mass hostility toward the Republic was now recognized as constituting the very core of revolutionary action. This was in marked contrast with the more limited objectives of earlier extremist agitation.

It would be a mistake to suppose, however, that the adoption of electoral methods involved the abandonment of illegal violence as a means for the attainment of revolutionary ends. As a matter of fact, private armies were maintained throughout this period on a

¹ Quoted in Konrad Heiden, *A History of National Socialism* (New York, 1935), p. 134.

quite unprecedented scale by the extremist parties of Germany. The most spectacular of these irregular forces were the National Socialist Storm Troops. Conspicuous in their neat brown uniforms, these worthies soon became a characteristic feature of the revised German landscape. The corresponding cohorts of the Communists were less numerous and less decorative, but hardly inferior from the standpoint of discipline and zeal. Devoted in large measure to the dissemination of election propaganda and to the furtherance of other legitimate party interests, these private armies were also quite ready to use violence for the accomplishment of their purposes. The total result of their activities was to make illegal force a problem hardly less serious in the later than in the earlier days of the Republic.

The only difference between the two periods is to be found in the fact that the immediate objectives of revolutionary violence had in the meantime been significantly changed. Up to the time of the Beer Hall *Putsch*, the attention of extremist forces was directed primarily toward the task of overcoming the army and the police. The program of later revolutionary movements called, on the other hand, for the employment of these same forces against private individuals and organizations. Instead of aiming directly at the destruction of state instrumentalities, private armies were now content to war upon rival political parties and other vulnerable enemies. This was the real meaning of the shift in German revolutionary tactics.

It is true that the extremists had always used violence to a considerable extent for the purpose of hampering their political rivals. One obvious method of accomplishing this result was to break up opposition meetings by noisy or disorderly interruptions. In view of the fact that the tradition of fair play is one of the most artificial and widely despised articles in the dogma of political liberalism, it is not surprising to find that this was employed from the very beginning as a resource of extremist agitation. It was primarily for the defense of National Socialist meetings, and for offensive operations against the meetings of other political groups, that the Storm Troops were first organized in the summer of 1921. Early the next year Hitler himself was sentenced to three months' imprisonment for participating in one of the attacks on a Communist gathering. Other radical groups were no less enthusiastic in the use of similar methods. In the light of this and subse-

quent experience in Germany and elsewhere, the consensus of opinion has always been to describe this as one of the most useful weapons in the repertory of anti-constitutional action.

But, even though the practice of breaking up public meetings was not uncommon in the immediate post-war years, it was only in the later period that the situation became really acute. From 1930 onward disturbances were fostered in a thoroughly systematic manner by the Communist and National Socialist parties. Bloody brawls became the all too usual background for the traditionally persuasive arts of the orator. In the end conditions became so bad that any major political meeting had to be reckoned as a potential threat to the public peace, to be held only under the most elaborate police safeguards. From the standpoint of maintaining a free electoral system, no elements in the liberal bill of rights are more important than the provisions guaranteeing freedom of speech and of assembly. As time went on, the action of ruthless minorities served in ever larger measure to nullify these basic articles of the Weimar Constitution.

Nor was this by any means the only way in which illegal violence could be used to strike at the roots of political liberalism. No feature of modern constitutional government is more important than the party machinery, without which there can be no possibility of organizing any mass electorate for the effective expression of public opinion. Unfortunately the mechanism of party action is also particularly vulnerable, and few of the resulting possibilities were overlooked by enemies of the established order during the last few years of the Republic. Since the vendors of newspapers are forced by the nature of their job to remain in a more or less isolated and exposed position, it was easy to bully them with regard to the sale of newspapers and other party publications. Party workers were also subjected to increasingly serious indignities and dangers in the conduct of their lawful business. The bombing of party headquarters and the assassination of opposition leaders may be mentioned as examples of the more extreme forms of action occasionally adopted at this time. The prevalence of these and other measures long served to prevent any normal functioning of the German party system.

The most important manifestation of civil violence was to be found, however, in that continuing series of public disturbances which came to be known, in the heroic terminology of the ex-

tremists, as "the struggle for the mastery of the streets." Although extreme differences of opinion are always in some danger of leading to breaches of the peace among rival partisans, there has never been a time when conflicts of this sort were fostered more systematically than during the last phase of extremist activity in Germany. Storm Troopers and members of the corresponding Communist groups were encouraged to adopt a consistently provocative attitude toward all political opponents. The resulting brawls were so frequent that it became unsafe in many places for the adherents of rival organizations to appear in public without the support of a gang of hoodlums. In this way the effects of political terrorism were brought home not only to party workers but also to the rank and file of various political parties.

Trivial as such episodes might be in themselves, the effect of such a policy continued year after year was to accumulate a quite respectable total of casualties. Of course the struggle for the mastery of the streets was not maintained uniformly at all times and places. Disturbances were more frequent in the larger cities than in the country, and even in the cities they were largely confined to the crowded working quarters where National Socialists could be found living in close proximity to Communists. Periods of activity alternated, moreover, with periods of relative calm. Sometimes civil violence rose to such a pitch as to amount almost to civil warfare.² On July 17, 1932, for example, systematic rioting between Communists and National Socialists continued for many hours to defy all efforts of the police in widely scattered parts of the country. At other times all would be quiet on the radical front. Statistics on the subject are notably unreliable. For one thing, the fact that a breach of the peace was liable to punishment as a criminal offense made it advantageous for the radicals to conceal many of their wounded from the authorities. Most observers were inclined to estimate, however, that the number of persons killed in the period 1930-1932 mounted well into the hundreds, while the list of more or less serious casualties must certainly have mounted high up in the thousands. In comparison

² "From June 1 to July 20, 1932, 461 political riots occurred in Prussia. Eighty-two persons were killed and 400 seriously wounded" (A. C. Grzesinski, *Inside Germany*, New York, 1939, p. 132). Grzesinski during the period mentioned was police president of Berlin.

with later conditions, the blood let in the Beer Hall *Putsch* was a mere drop in the bucket.

All this was in the highest degree threatening to the stability of the Weimar Republic. It is true that the extremists were rather more violent in opposition to one another than to the various constitutionalist parties. Even under these conditions the nature of the struggle was such, however, that the supporters of constitutional government could not fail to suffer most acutely in the end. The blood of the martyrs is the seed of political no less than of other churches, and one of the more notable effects of so protracted a struggle was to make martyrdom a cheap commodity well within the reach of all. By the simple exploit of getting killed in his own home by Communists, an unprepossessing young procurer like Horst Wessel was able to gain admission to the ranks of the demigods, with the result that the land of Bach and Beethoven is now marching to the strains of a particularly undistinguished air. This is only one instance of the remarkable propaganda values to be gained from a well-placed death. Through the effects of mutual opposition, the fanaticism of right and left extremists was fanned to a white-hot flame. In the process both groups gained immeasurably at the expense of German constitutionalism.

Spectacular violence was also useful as a means of winning converts to the Communist and National Socialist causes. Of all the difficulties encountered by small minority parties in their attempt to win a broad basis of popular support, none is more serious than the difficulty of gaining the attention of the general public. Most people are slow about attending the meetings or reading the publications of an obscure political group. Under these circumstances even the most arresting propaganda is likely to achieve no more than a limited circulation. The policy of civil violence provided the German extremists with an unusually easy means of overcoming this initial handicap. The news value of spectacular breaches of the peace was so great that even the most ardently republican newspapers soon found themselves devoting a considerable amount of space to the activities of radical parties. Like torso mysteries in an American tabloid, these items were kind to the circulation department. The more unfavorable the light in which violent episodes were described, the more likely were they to arouse the curiosity of readers with regard to other

efforts of the extremist groups. The result was to give the Communists and the National Socialists a much more rapid hearing than could have obtained in any other way.

Illegal violence also served in a more direct and immediate fashion to alienate supporters of the Weimar Constitution. To some people the systematically terroristic methods of the extremists were hopelessly distasteful. In a period of desperate misery sheer physical action will always tend, however, to correspond with the emotional needs of many unfortunate people. These are the times when the whole sum and substance of political wisdom seems to be embodied in the statement that "something must be done." The emotional requirement of all disoriented souls is to find something positive to cling to. Under the circumstances it was inevitable, therefore, that the ruthless march of private armies, in contrast with the unromantic drabness of ordinary political action, should exert a wide emotional appeal to the German people.

The longer these armies were permitted to commit breaches of the peace, the greater was it likely that their prestige would become. One of the primary functions of modern government is to preserve the reign of law. Long contact with the advantages of settled government has led people to assume as a matter of course that they will be protected from anything really extensive in the way of civil violence. When large numbers of Germans began to find themselves in daily terror for the preservation of their lives and property, it was no more than natural for many of them to conclude that the existing political system was bankrupt. The best chance of security seemed to lie in an alliance with one or another of the successfully contending factions. This consideration did much to increase the effectiveness of radical appeals in the later years of the Republic.

As a means of bringing illegal pressure to bear upon constitutional government the new technique of revolution was no less effective, therefore, than the older methods of direct insurrectionary action. The only difference was that vulnerable private individuals and organizations were now substituted for strongly protected public officials as the main targets of revolutionary action. By interfering with the normal operation of the party system, organized violence served to prevent the country from making effective use of one of the most vital mechanisms of con-

temporary politics. By subjecting the general population to the daily spectacle of lawless insecurity, it went a long way toward undermining the prestige of legitimate authority. Even after the abandonment of insurrectionary tactics civil violence had thus to be reckoned as a very substantial threat to the maintenance of the Weimar Constitution.

CHAPTER VI

THE LIMITS OF NON-LEGISLATIVE ACTION

IN RESPONSE to the new campaign of civil violence, constitutional emergency powers were used almost as freely in the later as in the earlier years of the Weimar Republic. Ordinarily the problem of suppressing sporadic breaches of the peace is one that can be met by routine police action, but organized violence on the grand scale is not an ordinary matter. In spite of the fact that the German police were unusually efficient in developing techniques for the defense of public meetings and for the suppression of other forms of radical lawlessness, it soon became apparent that no amount of skill would suffice for the prevention or detection of all illegal attacks upon the established order. At best the authorities could do no more than to control the most dangerous manifestations of civil violence, and there were times when even this modest achievement was seriously in jeopardy. Crises occurred during which it was felt that routine police methods would no longer be enough to maintain the indispensable minimum of public order. Something more effective was required in the way of public action. On these occasions, no less than in the insurrectionary crises of former years, the use of emergency powers under Article 48 immediately came to mind as a possible means of achieving the desired results.

One obvious resource was to suspend the constitutional provisions guaranteeing freedom of speech and of assembly. Considering that the creation of disturbances at public gatherings was a prime article in the new technique of revolution, the prohibition of such gatherings was bound to suggest itself as a way of minimizing breaches of the peace. The peculiar violence attendant upon National Socialist and Communist meetings made these the likeliest of all occasions for disorder. These, consequently, were the ones most frequently suppressed. But if the extremists were content to keep the larger proportion of their brickbats circulating within the family group, they were also by no means averse to interfering with the activities of government parties. Thus there were times when the government felt that the interests of public

order could only be served by forbidding the meetings of all parties indiscriminately. During the summer of 1932, for example, an absolute ban on political gatherings was maintained throughout the territories of the Reich for a period of three weeks. Even this drastic impairment of civil liberties did not impress the authorities as being too high a price to pay for relief from the pressure of political gangsterism.

Suspension of the freedom of association was another device of even more basic significance in which the government indulged from time to time. Ostensibly devoted to the furtherance of legitimate party ends, most of the quasi-military organizations then in operation were perfectly legal under the existing state of law. The actual part they played in furthering the new program of civil violence was such, however, as to make them a dangerous force in the life of the community, and emergency powers were occasionally invoked to suppress them in whole or in part. At the end of 1931 a small but significant beginning was made in the form of an executive decree prohibiting the wearing of party uniforms in any public place. In the spring of 1932 this was followed by a much more severe measure ordering the immediate dissolution of all private armies. This was directed primarily against the National Socialist Storm Troops, the largest and most troublesome of the quasi-military organizations. The headquarters and other premises of the Brown Shirts were promptly padlocked, and all the equipment found therein was confiscated by the police. This was a drastic step, impairing normally guaranteed rights of property and the freedom from searches and seizures, as well as the freedom of association. Under the circumstances there could be no doubt, however, as to the propriety of thus using emergency powers for the defense of the Weimar Constitution.

Although these were by all odds the most significant measures, all the other main resources of emergency administration were also used on occasion during the last few years of the Republic. Sometimes the police were so hard pressed that it was thought advisable, as formerly in the case of civil insurrection, to set up a military state of emergency in various parts of the country. Berlin and the Province of Brandenburg were governed in this way for a whole week in the summer of 1932. Nor was the extension of emergency powers to the judicial realm entirely unknown at this

time. Although nothing comparable in severity with the courts martial of 1920 was to be found in the later period, Article 48 was occasionally invoked for the establishment of emergency tribunals. For example, a decree of August 9, 1932, was issued for the creation of courts acting under an especially summary form of procedure to deal with cases of political terrorism. Few of the recognized emergency devices were overlooked by the authorities in their final attempt to cope with the problem of revolutionary violence.

In marked contrast, however, with the long line of earlier successes, the use of emergency powers in this later period was almost wholly unavailing. While emergency measures were actually in force there would be a temporary recession of civil disorders. But these gains were never in any sense conclusive, and as soon as the pressure was relaxed by the authorities the old extremist campaign would be resumed with undiminished vigor. Thus the later years of the Republic were enlivened by no such victories as the defeat of the Communist insurrection or the collapse of the Beer Hall *Putsch*. In spite of all efforts to the contrary, illegal force continued to be used with ever-increasing effect from the end of 1930 down to the fall of constitutional government in Germany. The reasons for this failure are well worth investigating as an illustration of some of the more significant limitations of modern emergency institutions.

It is true that the ineffectiveness of these later measures was due in part to the quite accidental circumstance that considerations of party politics served to prevent governments of the period from using emergency resources to the full. Even though most devices were employed at one time or another during the years 1930-1932, the authorities were generally reluctant to proceed vigorously against the extremists, especially against the National Socialists. Chancellor Brüning, who remained in office during the greater part of the period in question, seems to have been over impressed by the consideration that fear of an active nationalist movement might force additional concessions from the foreign statesmen with whom he was constantly negotiating. The fact that Communists and National Socialists were apparently engaged in a war of mutual extermination also tended to give the supporters of constitutional government a false sense of security. All this served to prevent strong measures from being

taken during the earlier phases of the crisis, when such measures would have had the greatest chance of success.

This state of affairs was not essentially changed until the beginning of 1932. At that time a growing demand for energetic measures was expressed in many circles, particularly among the Social Democrats on whom the government depended for parliamentary support. The dissolution of the Storm Troops followed on April 13, and for a time it seemed as though a really comprehensive attempt would at last be made to suppress civil violence through the use of emergency powers.

Unfortunately this was no more than a passing phase. Chancellor Brüning himself fell from power at the end of the month, to be followed by a series of governments which had very little sympathy for this particular aspect of the Brüning program. Papen and Schleicher, the next two chancellors of Germany, were both prepared as monarchists to weight the scales of government toward the side of the reaction. Both were also influenced by the hope of gaining National Socialist support in parliament. The fall of Brüning was almost immediately followed, therefore, by a policy of increased leniency toward the efforts of Hitler and his party. On July 15 the ban recently imposed upon the Storm Troops was lifted. From that time onward no really consistent and wholehearted effort was ever made to use the resources of Article 48 against the National Socialists. This fact alone would suffice to explain the failure of constitutionalists in dealing with the problem of civil violence in Germany.

Accidental circumstances of this sort were only partly responsible, however, for the ineffectiveness of constitutional emergency powers in the later period of German constitutional history. The real difficulty lay in the fact that the newly adopted tactics of revolution were almost wholly proof against the effect of temporary expedients. During the years when insurrection was still the characteristic form of revolutionary action, extremist energies were allowed to accumulate over a period of time and then expended in a single decisive effort to overthrow the established regime. This led to a series of strictly temporary crises calling for equally temporary remedies, a situation ideally favorable to the employment of emergency measures. After the abandonment of insurrectionary methods all this was changed, however, by the increasing reliance of anti-republican forces upon the use of

guerilla tactics. The usual policy of small military groups in the face of superior effectives is to destroy vulnerable outposts and communications while systematically avoiding any direct engagement. By these means small guerilla bands are often able to maintain themselves indefinitely as a thorn in the side of regularly constituted governments. The new revolutionary tactics in Germany were based on a similar conception as to the value of inconclusive action. Instead of dissipating their forces in intermittent outbursts, the extremists learned to husband their strength in such a way that the pressure of civil violence could be maintained as a more or less permanent factor in the life of the community. The result was a crisis far too lasting ever to be met on a strictly emergency basis.

In the face of continuous pressure the real need of Germany was for permanent reform rather than for temporary palliatives. Whenever the political structure of a country is such that existing forces of opposition are in a position to throw it into lasting confusion, there is nothing to do but to change that structure. This fact may give rise to a tragic dilemma. In order to prevent the triumph of illiberal opponents, the supporters of liberalism may themselves be forced to abandon the institutions of constitutional government. The peculiar danger of modern revolutionary tactics, as developed in recent times by extremist parties in Germany and elsewhere, lies precisely in this direction. But, even though constitutional methods may have ultimately to be abandoned, there can be no advantage in dealing with a permanent situation on anything less than a permanent basis.

Fortunately it is not by any means necessary that curative measures should in all cases be carried to such extreme and tragic lengths. Although the maintenance of free competition in the arena of politics is the very essence of constitutional democracy, it is not requisite or even possible that all forms of political self-expression should be equally tolerated. Buying beer for the electorate is in itself a perfectly feasible form of party competition, but most modern states have found it wise to divert party efforts in other directions. So long as all competitors are equally free to use certain channels of political action, there is nothing shocking from the liberal standpoint in the fact that certain other channels, such as beer-buying, have also been denied to all. Permanent measures of defense against the more subversive activities

of its enemies are not incapable of being reconciled, therefore, with the maintenance of constitutional government.

In this respect, as in so many others, the art of making an effective constitution lies in the ability to strike a balance between opposing considerations. If the tolerated forms of political action are unduly limited in scope there is danger, on the one hand, that legitimate opposition will be rendered ineffective. A situation of this sort must serve in the long run to subvert the basic principles of liberal democracy by forcing important elements of the community to seek political expression outside the regular constitutional framework. But if the ends of constitutional government can be thwarted by excessive stringency the toleration of too many forms of political action is also a serious mistake. In the early days of *English parliamentary government* systematic beer-buying did much to confuse the expression of public opinion. This fault is shared by many contemporary manifestations of party competition. One of the most important problems of constitution-building is to draw an effective line between those manifestations which should and those which should not be tolerated by public authority. As circumstances change, new adjustments have constantly to be made. In a period characterized like the present by a rapid evolution of political tactics, the very maintenance of constitutional government may depend on the skill and resolution of liberal statesmen in dealing with the ever-shifting aspects of this particular problem.

The proper line to be taken under such circumstances was admirably illustrated in the immediate post-war years by the development of press laws in Germany. In their desire to provide an arena broad enough for effective party competition the founders of the Republic went very far indeed in the direction of liberating the press from legal restraints. This soon had the effect of encouraging extremist parties to use their newspapers as a channel for the incitement of violent opposition to the established political order. The tone of radical journalism became fantastically unrestrained. On the whole it is probably safe to say that the resources of the press have never been used with more immediately subversive effect than in the earlier days of the Weimar Republic.

The climax of these developments was reached in the summer of 1921. At that time the reactionary press began clamoring for the assassination of many prominent persons, and it was not long

before the press campaign had begun to bear practical fruit. Stimulated by the heroics of patrioteering journalists, self-appointed saviors of the Fatherland made repeated attempts, all too frequently successful, on the lives of leading supporters of the republican regime. An especially spectacular episode occurred in the month of August when Erzberger, leader of the important Catholic Center party, was shot down by a young bravo of the extreme right. The murder was promptly acclaimed by the *Deutschen Tageblatt* as a "natural act of lynch justice," and, in view of the fact that this particular statesman had recently been singled out as the target for an especially slanderous and vituperative press campaign, it was easy to see where the assassin had found his inspiration. The power of the press has seldom been more licentiously displayed.

This tragic event had the effect of convincing the German public that the time had come for the adoption of an entirely new policy with regard to freedom of the press. Under the stress of popular indignation, the government immediately proceeded to suppress eight of the most notorious reactionary publications. For the time being this could only be done as an emergency measure on the basis of Article 48. But even though an immediate palliative was not without its uses it was clear that there was nothing essentially temporary about the journalistic abuses which had served as a prelude to tragedy. Little or nothing in the previous press campaigns had been illegal under the existing state of law, and as soon as the temporary ban was removed there would be nothing to prevent them from continuing their subversive work with renewed vigor. Clearly the need was for a permanent rather than for a temporary change in the conditions of party competition in Germany.

This need was boldly and in the end successfully met. Before the murder of Erzberger was many weeks old, emergency measures were replaced by a "Law for the Protection of the Republic" designed to prevent any repetition of the worst abuses of press freedom. After the no less shocking murder of the liberal industrialist Rathenau, which took place in the following year, this enactment was reinforced by an even more drastic "Second Law for the Protection of the Republic." The combined effect of these two statutes was to outlaw many subversive forms of political activity, including slanderous and vituperative press campaigns, and

to set up a permanent court for the trial of all such offenses against the security of the state. Although this meant the cutting-off of several previously recognized channels of political competition, the changes did not go far enough to prevent the effective continuance of constitutional government. Limitation did not involve any complete muzzling of the party press. The result of that limitation was an immediate improvement in the conditions of German political life.

During the later years of the Republic similarly beneficial consequences might perhaps have been derived from a similar policy of permanent reform. Perplexing as the new revolutionary tactics undoubtedly were from the standpoint of political liberalism, the fact remains that a good many promising lines of action were visible at the time. Both the highly successful laws "*for the Protection of the Republic*" were made up largely of provisions drawn from earlier emergency decrees. Many of the temporary measures adopted in later years would have been almost equally promising as a basis for lasting changes in the legal and constitutional structure of the country.

The Brüning government's prohibition upon the wearing of party uniforms is an interesting case in point. The true significance of this step can be appreciated only by one who is fully aware of the importance of dress as an element in the traditional technique of liberalism. The spirit of compromise essential to liberal democracy requires that all men should think of themselves as members in a common civil community. Identity of dress has always been recognized as one of the most effective ways of fostering the cohesiveness of social groups. The practice of all liberal societies has accordingly been to encourage all their citizens to dress as much alike as possible. It is not by any means an accident that the age of universal liberalism was also the age of the universal sack suit.

For the maintenance of constitutional government no device could be more appropriate, therefore, than the prohibition of political uniforms. By giving direct visual expression to the existence of political cleavages in the community, distinct methods of dress serve to perpetuate and accentuate those same cleavages. Men lose their identity as citizens and appear as living political cartoons. Vague abstractions like "Communism" and "Fascism" are never so breath-takingly real as when they descend from the

comfortable remoteness of newspaper headlines and begin to walk the streets. The result is an immediate increase in party violence which can only be overcome by forcing political abstractions back into the headlines.

In many liberal countries the appearance of party uniforms has been followed by legislative changes designed to outlaw this particular form of party activity. The Public Order Act of 1935, passed in answer to the disturbances created by Sir Oswald Mosley's fascists in England, is one of the more recent and significant examples of a widespread trend in this direction. Effective party competition has been maintained in the past without the use of private armies and uniforms. In the light of recent experience most liberals are convinced that the future can best be safeguarded by preventing them from operating in the present. The wisdom of imposing such a ban has generally been confirmed by the result.

Adopted as a temporary expedient the same policy proved, on the other hand, to be rather less than useless in the case of Germany. No attempt was ever made, as in the comparable press crisis of 1921, to follow up initial emergency action with a permanent legislative program. The result was to deprive the country of any lasting respite from the pressure of private military organizations. When the original ban was lifted from the Storm Troops within a few weeks of its inception, there was nothing to prevent the old party uniforms from appearing on the streets as freely as ever. The only real effect of applying Article 48 in this case was to give the general public a temporary rest from, and therefore renewed interest in, a spectacle which might otherwise have been growing stale with the passage of time. By encouraging the authorities to deal with permanent problems on a temporary basis, emergency resources served on the whole to do more harm than good to the cause of constitutional government in the later years of the Weimar Republic.

A certain amount of positive danger was involved, moreover, in the substitution of administrative discretion for legislative action in matters of this sort. If political life is to be kept on a basis of free competition it is necessary that all political groups should be allowed to act on a plane of strict legal equality. Anyone with authority to discriminate between the various parties, by excluding some of them in whole or in part from access to the political arena, would himself be in a position to determine the outcome of

elections. Political liberalism is based on the opposite assumption that elections should determine the location of authority. In connection with the later phases of civil violence in Germany, the use of emergency powers was always open to objection from this particular standpoint.

The trouble was that repressive measures undertaken on an emergency basis did not have even ostensibly to be applied with equal effect to all political parties. Extremist papers were frequently suspended, government organs almost never. Government parties were permitted to hold public meetings at times when the opposition was denied the exercise of similar rights. Since the activities of extremist groups were apt to be more violent than those of other organizations, discrimination along these lines had a good deal to recommend it from the standpoint of proper constitutional defense. Unfortunately there was no way of telling whether the governments exercising emergency powers were more concerned with public or with party ends. Opposition meetings and publications might legitimately be suppressed as dangerous to the maintenance of public order, but they might equally well be forbidden as a means of relieving government parties from the pressure of legitimate competition at the polls. The result was to allow the government to exert a dangerous measure of control over the basic electoral processes on which they themselves were theoretically supposed to depend.

This was a problem implicit in all the manifestations of emergency authority, in the earlier as well as in the later years of the Republic. But if the possibility of abuse was a very real thing in periods of civil insurrection, the initial need for emergency measures was at least comparatively clear. In connection with the later manifestations of civil violence, on the other hand, the threat to constitutional government was much less obvious in any given case. The controversial nature of the decisions involved made it peculiarly necessary that the right to decide on the need for emergency measures be placed in safe hands. Thus it was in the final period of revolutionary disorder that weaknesses in the limitation of Article 48 first began to make themselves felt as a really serious factor in the life of republican Germany.

The danger was considerable even during the Brüning regime. It is true that the Reichstag continued to meet at intervals throughout the period of his chancellorship, which meant that there would

be no lack of opportunity to demand the revocation of unsuitable emergency measures. Under the circumstances then existing, however, the legal rights of parliament were politically meaningless as a check upon possible abuse. The government enjoyed the support of a majority in the Reichstag. All the members of that majority were equally in terror of extremist competition. When it was a question of repressing National Socialist and Communist activities, whether legal or illegal, they themselves stood to profit by drastic action quite as much as did their leaders in the cabinet. The question was essentially a party issue, on which there could be no significant cleavage of interest between the legislative and executive organs of government. Although the position of the Reichstag was still legally unimpaired, this served in practice to exempt the Brüning regime from any impartial check upon the use of emergency powers.

During the second half of 1932, under the chancellorships of Papen and Schleicher, a much more dangerous state of affairs was brought into existence. Being unable to command any considerable measure of parliamentary support, these regimes were able to maintain themselves only by the device of dissolving successive Reichstags before they had a chance to pass a vote of no-confidence. The inability of the Reichstag to act left the government answerable to no other authority whatsoever. This made it possible for a small reactionary minority in control of the cabinet to use the resources of Article 48 to repress the liberal majority which still remained in the country as a whole.

The new authorities were not slow in exploiting the possibilities of the situation. A particularly striking example of abuse in the application of constitutional emergency powers occurred in the summer of 1932, when Chancellor von Papen proceeded on the basis of Article 48 to remove the Social Democratic government of Braun and Severing from the conduct of affairs in the state of Prussia, appointing a federal commissioner to rule the territory in their stead. The campaign of civil violence, then at its height, had been particularly severe in the great industrial cities of Prussia. The failure of the state authorities was given as the official reason for intervention by the federal government, but the efforts of the federal commissioner were actually no more energetic than those of the able and devoted government so recently displaced. The only real result was to drive the loyal Social Democrats from

one of their few remaining strongholds. This marks an appreciable step toward the destruction of constitutional government in Germany.

Thus the later years of the Republic were marked by an ever-increasing breakdown of constitutional emergency institutions. In the early days of insurrectionary violence Article 48 had seemed a great success. As an aid to the conduct of military operations, its value was demonstrated on many critical occasions. Further developments in the technique of revolution soon had the effect, however, of revealing both the dangers and the limitations of this particular form of emergency action. Because of the difficulty in estimating the significance of guerilla operations at any given moment, the possibility of abusing emergency powers was much greater now than in the period of clear-cut revolutionary outbursts. The result, as in the case of the Braun-Severing episode, was to throw sad light on the failure of Article 48 to place any really effective external checks upon the discretion of the executive. And in proportion as emergency measures became more dangerous, they also became more ineffective. In the face of long term changes in the political structure of the community, the use of temporary expedients served merely to divert responsible authorities from the need for permanent constitutional reforms. Altogether there can be no doubt that Article 48, once an asset, was now becoming a distinct liability to the cause of the German Republic.

CHAPTER VII

INFLATION AND THE ENABLING ACTS

AS A FEATURE of marked importance in the life of the German Republic, emergency legislation was a rather late development. Civil insurrection was by all odds the main emergency problem of the immediate post-war years, and the complications to which it gave rise were almost wholly administrative in character. It is true that there were factors in the situation which also tended to place unusual burdens on the legislative authorities. In addition to the normal business of government, the National Assembly and the ensuing Reichstag had to deal with a number of special problems. Both were faced with the extraordinary triple task of establishing a new constitutional system, of negotiating peace with a victorious enemy, and of shifting the country back from a wartime to a peacetime economy. Under the weight of such a program it was almost inevitable that there should have been a certain tendency to use exceptional forms of legislation. The fact of the matter is that the first two years of the Republic witnessed the passage of no less than four enabling acts. No striking use was ever made, however, of the powers thus granted, and the practice was soon discontinued. Safely dominated by a coalition of left-center republicans, the Reichstag was able to fulfill its responsibilities without relying to any appreciable extent on emergency methods of legislation. With all the other troubles of these earlier years, parliamentary breakdown at least did not yet have to be reckoned as a major emergency problem of the Weimar Constitution.

Hardly more significant in practice than the earlier acts of delegation was the Emergency Law passed in the month of February, 1923.¹ When the French invaded the Ruhr in a final attempt to force the payment of impossible war indemnities, the German government at once proceeded to ask the Reichstag for a special grant of power. The general response to this appeal was highly gratifying. In the face of an invasion by foreign capitalists it was not impossible even for Communists and Nationalists to find a basis for joint patriotic endeavor. An enabling act vesting

¹ *RGBl.*, pt. I (1923), p. 147.

the government with extensive legislative authority was passed by an overwhelming majority of the Reichstag. But, commendable as the spirit of the occasion was, the ensuing months did not in fact provide much opportunity for use of the powers thus granted. A good deal more than legislation was needed to discourage Poincaré and the French industrialists in their attempt upon the Ruhr. As a demonstration of national unity the passage of the Emergency Law was an event of no small value; as a basis for legislative action it was even less important than the previous acts of delegation.

The first really striking occasion for the use of emergency legislation followed later in the same year. This crisis was due at least in part to the policy adopted by the government at the time of the Ruhr invasion. In order to prevent the French from profiting through the control of this rich industrial area the Germans tried to keep all mines and factories closed throughout the occupation. This in turn made it necessary to provide lavish public relief for workers and employers who would otherwise have been left without any means of livelihood. Unfortunately the expense of subventionizing so large and populous a district could be met only by a resort to drastic monetary inflation. In the end it was the financial structure of Germany rather than the patience of France which gave way under the strain. At home and abroad the paper mark gradually became worthless. The lack of an effective medium of exchange led to a virtual paralysis of German economic life. Under the pressure of unbearable distress the policy of passive resistance had therefore to be abandoned, while the country turned its energies to the task of economic rehabilitation. The result was a sudden parliamentary crisis during which the resources of delegation were given a chance to show as never before what they could contribute to the maintenance of constitutional government in Germany.

On this occasion the breakdown of normal legislative methods was not only more severe in degree but also different in kind from anything previously experienced in the history of the Republic. Hitherto the need for emergency methods of legislation had arisen solely as a result of technical and procedural limitations inherent in the normal parliamentary process. Enabling acts were designed either to relieve the pressure of business on the Reichstag or else to secure more rapid action than that body could supply. At the

time of the inflation crisis, on the other hand, the main threat to legislative efficiency was political rather than technical in character. This circumstance lends peculiar interest to the developments of the period.

The real trouble lay in the fact that it was increasingly difficult at such a time to find parliamentary majorities willing to assume the responsibilities of government. With the exhaustion of public credit, a rigorous balancing of the budget was now left as the only road to financial rehabilitation. This fact was recognized in principle by all the more responsible elements of German political life. After a period of reckless expenditure the necessary readjustments could not possibly be effected, however, without widespread sacrifice, and the problem of allocating this sacrifice was a burning party issue. The Social Democrats were convinced that the budget should be balanced through the imposition of higher income taxes without a cut in the social services. Other parties felt that the proper road to reform must be sought through the reduction of government expenditure. In a Reichstag where no single party was ever strong enough to govern by itself, the task of forming legislative majorities was a thorny one at best. In the tumultuous days of the inflation crisis, when fear lent energy to all special interest groups, it was harder than ever to find a basis for common legislative action.

Under these circumstances it was only natural that the authorities should have been tempted to explore the possibilities of emergency government. Since the powers of the president were already beginning to be recognized in the field of legislation, the provisions of Article 48 were available for immediate use. Chancellor Stresemann, the brilliant conservative statesman who had been called to the head of affairs at this distressing juncture, proceeded almost at once to avail himself of these opportunities. During the first few weeks of his regime a round dozen or so of decrees were issued on the basis of Article 48 to deal with some of the more insistent problems of currency and finance. This is notable as the first extensive use ever made of a device which came in later years to form the very core of emergency legislation in Germany.

The Stresemann government was not content, however, to rely on Article 48 alone for the accomplishment of its purposes. To begin with, legislative applications of the presidential prerogative were not yet fully accepted as a legitimate emergency resource.

This was a serious matter in a country like Germany, where even revolutionary action had to assume the guise of legitimacy in order to gain its ends. A government seeking to impose drastic sacrifices on all classes of the community could hardly afford, moreover, to dispense with the prestige of direct parliamentary support. Only the passage of an enabling act could place the new regime in a satisfactory position for the exercise of legislative authority. From the beginning this was a leading objective of the Stresemann administration.

Early in October the draft of an enabling act was ready for submission to the Reichstag. In final form the provisions of this enactment read as follows:

The federal government is authorized to take those measures which it considers to be absolutely necessary in the financial, economic and social realms. Fundamental rights guaranteed in the Weimar Constitution may be disregarded in the process.

This authorization does not extend to regulations affecting hours of labor, nor to the reduction of pensions, social insurance or unemployment insurance.

Decrees issued on this basis shall be reported without delay to the Reichstag and to the Reichsrat. On demand of the Reichstag they are to be revoked immediately.

This law goes into effect on the day of promulgation. It shall cease to operate at the very latest on March 31, 1924, and shall lapse even before that time with any change in the party composition of the present government.²

This enabling act gave rise to far more violent opposition than any previous proposal for the delegation of legislative powers in Germany. The recent triumph of fascism in Italy had done much to shake the morale of constitutional government in other parts of the world. Under these circumstances it was not hard to make people think that the ruin of constitutionalism was involved in any proposal for the increase of executive power. When Stresemann brought his bill before the Reichstag, this was the line taken by opponents of the measure, particularly by the Communists and other representatives of the extreme left. According to their interpretation of the event, the Reichstag was simply being asked of its own free will to surrender its powers to a second Mussolini. The fact that anyone should even have dared to make such a suggestion was hailed by the extremists, by those on the right as well as by those on the left, as a sign that the time of constitutional government was already drawing short.

Arguments of this sort did not carry sufficient weight to prevent

² *RGBl.*, pt. I (1923), p. 943.

the proposed enabling act from being quickly passed. The task was not by any means a wholly easy one. According to the terms of the Weimar Constitution, the passage of constitutional amendments could be accomplished only with the support of a two-thirds majority in the Reichstag, with the further proviso that a quorum of two-thirds the total membership be present at the time. In view of the fact that some members in any large body are bound to be absent in any case, this made it possible for minorities of even less than 33 per cent to block action by a policy of deliberate abstention. Such were the tactics adopted by the opponents of this and other acts of delegation in Germany. But even though the scales were tipped thus heavily in their favor the enemies of Stresemann were not able to thwart him on this particular occasion. At a time when political cleavages were so bitter as to hinder the enactment even of ordinary legislation the much more difficult forms of constitutional amendment were still available as a basis for emergency legislation.

The failure of opposition to the Stresemann enabling act was due in large measure to the fact that checks upon the abuse of power were more than sufficient in this particular case to forestall legitimate criticism. According to the terms of the act itself, all emergency powers were to lapse with any change in the party composition of the government. But the Stresemann cabinet, having been built with a view to the broadest possible concentration of effort in a time of national crisis, was based on an extremely wide coalition including representatives from nearly all the parties not actively opposed to the maintenance of the Weimar Constitution. This made it possible for each political group, by the simple process of withdrawing its delegation from the cabinet, to exercise immediate power of life and death over the Stresemann enabling act. A statesman so limited could hardly be feared as a second Mussolini.

The result was to reconcile practically all supporters of the government coalition to the enactment of emergency powers. Since the parties included in the cabinet were nominally able to control more than three-quarters of the whole Reichstag, this meant that the passage even of a constitutional amendment was within the bounds of possibility. The final margin of safety was not particularly large. As the left-wing members of a bourgeois government, the Social Democrats tended to be especially uncomfortable

about the matter of emergency powers. Although most of them were reconciled to the enabling act by the addition of a specific guarantee prohibiting the reduction of pensions and social insurance, some persisted in defying party leadership and joining the Communist opposition on this particular issue. This defection served for a time to place the issue in doubt. But on the whole the Social Democrats were a well-disciplined group, and when the vote was actually taken the leaders managed to deliver an overwhelming proportion of their massive delegation. Three hundred and thirteen deputies, three more than two-thirds of the total membership, were finally recorded as supporters of the Stresemann enabling act.

The promulgation of this act on October 13 marks the beginning of one of the greatest of all modern experiments in executive legislation. During the next three weeks it was used as the basis for no less than forty emergency decrees, many of them far-reaching in character. Since the restoration of German credit in foreign and domestic markets was the most important problem of the moment, many of the decrees were directed toward that end. As an indication of financial good faith after a period of violent inflationary excess, the return to a balanced budget was the most constructive move of all. The government accordingly proceeded to overhaul the tax structure and to cut government expenditure in every possible field. A good many of the decrees were also directed toward the relief of immediate distress. Many of the problems met were technical in character. The range of subjects treated was also quite diverse. But in spite of the great complexity of the current situation, the powers contained in the enabling act were sufficient to provide the requisite legal backing. On this basis alone, and at a time when the Reichstag itself was able to accomplish but little in the way of positive action, the Stresemann government was able in three short weeks to lay the foundations for a comprehensive scheme of national rehabilitation.

Unfortunately this work was soon cut off by a most untimely interruption. The date fixed in the enabling act had given it a maximum life of five and a half months. This was the government's original estimate as to the probable duration of the immediate legislative crisis. Under the terms of the act it was also stipulated, however, that the whole thing could lapse at any time with a change in the party composition of the then existing cabi-

net. In view of the unwieldy nature of the Stresemann coalition, it was obvious from the beginning that this might prove a serious limitation. The course of events soon served to show these were no idle fears.

The crisis arose, curiously enough, out of an issue which had no direct bearing upon the problem of emergency legislation. Throughout the month of October the Stresemann government had been wrestling not only with the difficulties of an unprecedented economic crisis but also with the problem of civil insurrection. These were the crucial weeks, described above in Chapter IV, which finally reached their climax in the Beer Hall *Putsch*. These were also the weeks when the government was being criticized for having dealt more harshly with the leftist governments of Saxony and Thuringia than with the reactionary government of Bavaria. As responsible left-wing members of the Stresemann coalition, the Social Democrats were particularly sensitive on this point. On October 31 the Social Democratic delegation in the Reichstag held a caucus and presented the government with an ultimatum. Further participation in the coalition was made dependent upon three conditions: the revocation of the military state of emergency within the Reich, the active prosecution of the Kahr regime in Bavaria, and the abandonment of repressive measures in Saxony. The rejection of these terms led on November 2 to the resignation in a body of all the Socialist ministers. Although the point at issue was concerned exclusively with the use of non-legislative powers under Article 48, this change in the party composition of the government automatically brought the Stresemann enabling act to an end. Thus the action of the Social Democrats, without having the least effect on the Bavarian situation to which it was addressed, was fatally destructive from the standpoint of emergency legislation.

Germany now found herself in much the same position as before the passage of the original act of delegation. In view of the fact that the reform program had only just begun, this meant that the efforts of the preceding month would have to be reproduced. Although the Stresemann government resigned immediately after the defection of the Social Democrats, most of its members, including Stresemann himself, were retained in the succeeding Marx cabinet, and there was no real discontinuity of policy. When the enabling act ceased to be available, the new regime promptly re-

turned to the use of Article 48 for the continuance of its legislative program. No less than ten decrees were issued in this way during the month of November. But the government still preferred to act on the basis of delegation. Efforts were accordingly revived to secure the passage of a new enabling act.

When Chancellor Marx made his first appearance before the Reichstag early in December, the text of such a bill was the first piece of business brought up for the consideration of that body. The text offers several interesting points of comparison with the earlier Stresemann measure:

The federal government is authorized to take those measures which it considers to be absolutely necessary in view of the distressing circumstances of the people and of the Reich. Fundamental rights guaranteed in the Weimar Constitution may not be disregarded. Before being issued, all ordinances are to be discussed in secret session with committees chosen by the Reichstag and by the Reichsrat, each to consist of 15 members

Decrees issued on this basis shall be reported without delay to the Reichstag and to the Reichsrat. They are to be revoked on demand of the Reichstag or of the Reichsrat. In the Reichstag two readings separated by an interval of at least three days shall be necessary for the completion of such a demand

The Reichstag committee mentioned in paragraph 1 shall also be authorized, at the discretion of the Reichstag, to consider proposals relative to ordinances issued under the law of October 13, 1923 [the Stresemann enabling act].

This law goes into effect on the day of promulgation. It shall cease to operate on February 15, 1924.²

Clearly, the grant of powers here intended was a good deal broader than any previously envisaged by the authorities of the Reich. Whereas the Stresemann government had been confined in its efforts to certain specific, if broadly defined, fields of governmental activity, the cabinet was now left free to take all "necessary" measures. Reservations affecting hours of labor and other favorite pieces of Social Democratic legislation were also eliminated from the draft of the new act. Only in regard to constitutional limitations was the new government less freely endowed than its predecessor. But the right to overlook such limitations, an ill-advised provision which in other hands might well have proved incompatible with the spirit of constitutional government, had never been greatly used in practice, and repeal did little to limit the effective scope of emergency authority. On the whole there can be no hesitation in saying that the Marx enabling

² *RGBl.*, pt. I (1923), p. 1179.

act was the broadest basis for legislation by delegation ever established in Germany.

This increase of emergency powers was combined, moreover, with an even more marked decrease in the powers of parliamentary control. It is true that some small concessions were made in the opposite direction. By limiting the life of the measure to the unusually short period of a little more than two months the Marx government hoped to forestall some of the criticism that would certainly have been aroused by any longer deviation from normal parliamentary methods. Another move toward the conciliation of parliamentary opinion is to be found in the provision setting up supervisory committees in the two houses of parliament. The significance of this latter concession was limited, however, by the fact that the committees were empowered to act only in an advisory capacity, and the crucial innovation was quite opposite in tendency. Unlike its predecessor, the Marx enabling act was not limited to the lifetime of a single coalition. The elimination of this provision had the effect of depriving the various government parties of that absolute veto power which had done so much to reconcile them to the proposals of Stresemann. Instead of spending all its efforts in an attempt to conciliate parliamentary opinion, the new government was determined to secure the enactment of a measure which would insure the uninterrupted completion of its emergency program.

All this made it a good deal harder than before to gain the requisite measure of parliamentary support. Now that the Social Democrats had joined the opposition, the parties represented in the cabinet were able to command no more than a bare majority in the Reichstag. This meant that the support of non-government members would have to be found for the passage of any constitutional amendment. In view of the fact that the Communists and the German Nationalists were opposed to the very maintenance of the existing regime, the Social Democrats were left as the only possible hope. Even the conciliatory Stresemann measure, enacted at a time when the Social Democrats were members of the ruling coalition, had not been able to gain the suffrage of a united delegation. Under the much less favorable circumstances of the Marx enabling act, it was hard to see why the opposition should not be hopelessly increased.

One peculiar element in the situation was to be found, however,

in the widespread fear evoked at this time by the prospect of a return to the use of presidential powers. At the beginning of his campaign Chancellor Marx stated definitely that, if the proposed measure was not adopted with all due speed, the Reichstag would be dissolved and the emergency program pushed through on the basis of Article 48. To most supporters of the Republic this was a most disquieting suggestion. Emergency powers so imperfectly subject to control were even then felt to be so dangerous that people were prepared to sacrifice a good deal in order to forestall constitutional development along these lines. In the course of debate this point of view was characteristically stated by the Social Democrat Scheidemann. "The continued application of Article 48 would shake constitutional government in the Reich to its very foundations, impairing the position of popular representatives far more seriously than the enabling act could ever do."⁴ These considerations were not without importance in determining the final outcome of the proceedings.

The threat of dissolution was even more effective as a means of coercing Social Democratic deputies. The current Reichstag had been elected during the earlier months of the Republic and was no longer representative of the state of public opinion in Germany. At the date of the first elections sentiment in favor of the Republic had been at its height. This made it possible for the various constitutionalist parties, including the Social Democrats on the left, to elect approximately three-quarters of the total membership. But the ensuing years had been marked by a steady increase of activity on the part of radical groups, particularly those of the extreme right. Under these circumstances it was obvious that the effect of fresh elections would be to reduce the size of all constitutionalist delegations. This fact made it difficult for any of these parties to stand out against the demands of a government vested with the power of dissolution.

In the final vote on the Marx enabling act, the decisive effect of this consideration was shown in the clearest possible terms. The German Nationalists and the Communists, rightly sensing that they had much to gain by forcing an immediate dissolution, were careful to place every conceivable obstacle in the way of the proposed emergency measure. For the Social Democrats, on the other hand, the prospect of a new election was unqualifiedly dis-

⁴Session of December 5, 1923 (*Sten. Ber.*, vol. 361, p. 12299).

troubling. Even though the most serious threat at this time was from the direction of the extreme right, developments on the extreme left were also disquieting. Unrepresented as a separate political group at the time of the first elections, the Communists were now efficiently organized and prepared to cut away a large part of the Social Democratic following. The passage of an enabling act hardly seemed too high a price to pay for the postponement of such a disaster. Although the left wing again showed signs of rebellion, the full resources of party discipline were marshalled in favor of the new constitutional amendment. In the face of abstention by all its real opponents, the measure was finally adopted by the narrow but sufficient margin of 313 to 18. By the use of quite unusual coercive opportunities, the government had once again succeeded in overcoming the obstacles set by the Weimar Constitution as a check upon the delegation of legislative authority.

The Marx enabling act was promulgated on December 8. During the two months which followed, the extraordinary powers granted were used more freely than ever before, rendering this the most spectacular period of emergency legislation in the history of the Republic. On the basis of this one enactment no less than seventy legislative decrees were issued. Although problems of taxation, currency, and finance were naturally given precedence under the circumstances, there was also no hesitation in using emergency powers to deal with the broader aspects of social policy. The worst fears of the Social Democrats were confirmed, for example, by the issuance of a decree repealing their hard-won statute on the eight-hour day. Decrees providing for a thoroughgoing revision of the judicial system, long swamped by litigation arising from the inflation chaos, may be mentioned as yet another instance of wide-ranging effort to deal with the current crisis. Many of the measures taken were calculated to arouse the most serious opposition. Immediately after the passage of the enabling act the Reichstag had voted, however, to go into recess until February 20. The result was to leave the government free for the time being to carry out the whole of an extremely comprehensive program for the restoration of German national life.

From the standpoint of party politics the great significance of these developments lay in the fact that, in the face of pressure from the special interest groups, the government was able to

present a single consistent policy for the approval of the electorate. No one appreciated the importance of this matter more clearly than Chancellor Marx himself. When emergency powers had finally lapsed and the Reichstag reconvened, it seemed for a time as if the whole program was about to be subjected to a process of detailed criticism and amendment. This danger was at once forestalled by vigorous government action. On February 26 the Chancellor appeared in person before the Reichstag and announced in the most uncompromising terms that the government would insist upon the whole series of emergency ordinances being accepted or rejected as a unit. This was an unexpected limitation on the right of parliament to demand the revocation of all emergency decrees. But Chancellor Marx insisted that none of the seventy-odd individual measures could properly be considered in any other way than as component parts of a single emergency program. "The government is of the opinion," he said, "that the whole of its reformatory endeavor would be seriously jeopardized if any one of the more indispensable ordinances were to be revoked or amended in any essential particular."⁵ Standing on the record of its emergency program as a whole, the cabinet was prepared if necessary to appeal for the support of the electorate.

On March 13 persistent efforts at piecemeal legislation were accordingly followed by the dissolution of the Reichstag. By this drastic step the success of the Stresemann-Marx legislative program was finally insured. During the period which had to elapse before the first meeting of a new parliament, there was no authority in Germany capable of interfering with the existing body of emergency legislation. It is true that this only served to postpone the decision for a little more than two months. If opposition to the emergency program had still continued unabated, there would have been nothing to prevent the next Reichstag from pressing for the revocation of unpopular measures. The danger of any such development had been largely eliminated, however, by the time the opportunity arose. The drastic reforms accomplished by the Stresemann and Marx governments, combined with the beneficial effects of the Dawes plan, soon led to a marked improvement of social and economic conditions in Germany. To undo that work of reconstruction was hardly thinkable. Even though the elections of May 4 went more strongly than was expected against

⁵ *Sten. Ber.*, vol. 361, p. 12463

the government parties, no substantial effort was made to interfere with the achievements of the earlier regime. The claims of special interest groups could no longer hope to prevail in the face of manifest advantage to the general public welfare.

The events of the inflation period may well be taken, therefore, as a typical illustration of the benefits to be derived from emergency legislation. Although the provisions of the Weimar Constitution were not particularly favorable to the passage of enabling acts, special conditions made it possible to employ that device on two significant occasions. The results were all that could have been desired. For the time being legislative functions were largely absorbed by the executive branch of government. Of the hundred and thirty-odd legislative measures published between October 13, 1923 and February 15, 1924, no less than a hundred and ten were issued on the basis of enabling acts, while more than half of the remainder were executive decrees issued by authority of Article 48. But the incorporation of strict time limits in the original acts of delegation made it impossible for any government, however ill-disposed, to continue exercising power on this basis long after the need for emergency measures had passed. Once these measures had served to bring the crisis under control, there was nothing to prevent the immediate resumption of normal parliamentary methods. The success of this particular experiment goes a long way toward establishing the value of enabling acts as an emergency resource of modern constitutional government.

CHAPTER VIII

THE LEGISLATIVE METHODS OF CHANCELLOR BRÜNING

THE MARX ENABLING ACT was the last example of its kind prior to the chancellorship of Hitler. Even under the best of circumstances it was not easy to secure the two-thirds majority required for the passage of constitutional amendments. During the middle years of the Republic there was no need for any such appeal to the resources of delegation. The increased prosperity of the middle twenties made it possible to get along without any significant departure from the norms of constitutional action. This happy state of affairs was soon interrupted, however, by the economic debacle of 1930. From this time onward there was no lack of opportunity for the use of exceptional measures. Unfortunately, none of the governments in power during this period was ever in a position to overcome the constitutional obstacles to an act of delegation. The result was a series of experiments in other and more dangerous forms of emergency legislation.

From the standpoint of legislative procedure, the greatest difference between the earlier and the later crises of German constitutionalism is to be found in the rise of parliamentary intransigence. During the earlier period the more virulent forces of opposition had been largely content to seek expression outside the parliamentary arena. At the time of the Beer Hall *Putsch* the National Socialists, for example, had been completely unrepresented in the Reichstag. All this was changed with the abandonment of insurrectionary tactics. From 1924 onward every major effort of the National Socialist and Communist parties, up to and including the new campaign of civil violence, was devoted directly or indirectly to the conquest of mass support at the polls. As time went on these efforts were crowned with an ever-larger measure of success. The German system of proportional representation made it possible for any change in the popular standing of parties to find immediate expression in the composition of the Reichstag. Each increase in the number of extremist deputies stood as a further obstacle to the normal conduct of government. The history of emergency legislation in the later years of the Republic is little

more than a record of the attempt to cope with difficulties arising out of this unhappy situation.

The rise of parliamentary intransigence is most significantly to be traced from the election of May 4, 1924, when the National Socialists made their first appearance in the arena of national politics. In spite of the fact that they had just been subjected to the humiliation of the Beer Hall *Putsch*, they were able at this time to return the respectable total of thirty-two delegates. This number, when added to the even more impressive total of sixty-two Communist votes, was enough to give the leading enemies of the Republic practically one-fifth of the entire Reichstag. Even at this early date the problem of parliamentary intransigence was a matter of no small consequence.

Improved conditions soon led, however, to a marked decline in mass radicalism. At the elections of December 7 the National Socialists were reduced to fourteen and the Communists to forty-five members. The next test, held at the very height of post-war prosperity on May 20, 1928, had no significant effect upon the position of the two extremist parties. A trifling decline in the number of National Socialists was compensated by a slightly larger increase in the Communist delegation. For more than five years the total extremist representation in the Reichstag was held down to the proportion of one in eight. This offered no substantial obstacle to the maintenance of constitutional government.

All this was abruptly changed with the second major depression. When the German people went to the polls on September 14, 1930, a growing mood of desperation found immediate expression. In response to a shift of popular favor almost without parallel in the history of modern party politics, the National Socialist delegation was suddenly raised from 12 to 107 members. Since the Communists were also able to record appreciable gains, this served to place the extremists in control of practically one-third of the Reichstag. Two further elections held in the course of 1932 had the even more disastrous effect of bringing the combined total above the half-way point. From that time onward huge extremist delegations never ceased to act as a drain upon the vitality of German constitutional life.

The great significance of these developments lay in the fact that they tended to withdraw an ever-larger proportion of deputies from participation in the responsibilities of government. During

the whole of the period from 1930 to 1933 the attitude of both the main extremist parties was one of complete intransigence. After the failure of their efforts at collaboration in the Saxon government of 1923, the Communists adopted a policy of rigorous non-coöperation with other parliamentary factions. This policy was continued without change down to the fall of the Republic. Ever since the advent of Hitler and the collapse of German Marxism, orthodox Communists have been pleased to discover that there are advantages in creating a united front with Socialists and other responsive liberals. Devotion to a previous stage of Communist orthodoxy served to prevent similar efforts from being so much as considered in the critical years of German Marxism. No matter how seriously their own position might be threatened the Communist delegations could be relied upon at all times to refrain from supporting the efforts of any liberal government.

Although the attitude of the National Socialists was characteristically less doctrinaire, they also were unavailable in practice for the purposes of coalition politics. It is true that the experiment of a liberal-Nazi cabinet was actually tried on occasion in some of the German states. A government of this sort was established in Thuringia, for example, at the beginning of 1930. The conditions surrounding these experiments were not such, however, as to encourage any extension of the practice to the field of national politics. As the price of participation in any state cabinet the National Socialists regularly insisted on the appointment of one of their own leaders to the ministry of the interior. In view of the fact that this was the ministry vested with control of the police, the direct consequence of such an agreement was to place the power resources of the state in the hands of its bitterest enemies. The possibility of federal supervision kept the resulting situation from becoming too dangerous in the case of lesser units within the Reich. In the case of the federal government itself, admission of the National Socialists to a similar position of control would have amounted to complete surrender. This was not an acceptable basis for collaboration with any true friend of the Weimar Constitution.

Because of the extreme intransigence of their attitude, any increase in the number of National Socialist and Communist deputies had to be reckoned as a serious drag on the maintenance of constitutional government in Germany. So long as neither of the

two extremist parties was willing to cooperate with other political groups, and so long as neither was individually in a position to command an absolute majority of the Reichstag, the indispensable task of forming government majorities had perforce to be accomplished in other parts of the chamber. In our next chapter we shall have to discuss the consequences of the situation which arose in 1932, when the election of legislatures more than half extremist made the formation of any such majority an arithmetical impossibility. Even in its earlier stages the crisis is well worth considering, however, as an illustration of dangers implicit in the structure of modern constitutional government.

Under the normal conditions of party politics, the action of opposition groups is hardly less constructive than that of the cabinet itself. The modern principle of parliamentary responsibility, as exemplified in Germany and elsewhere, is based on the assumption that there will always be a majority party or coalition of parties ready to shoulder the burden of positive action. This means that there should always be one or more opposition parties prepared to criticize and, if necessary, take over the functions of government. Elections are significant only in so far as the electorate is actually presented with a choice between alternative possibilities of leadership. By offering a concrete means of escape from the conditions of the present, opposition parties make it possible for dissatisfied elements of the community to find political expression. As a factor in the dynamic interplay of liberal politics, his majesty's loyal opposition is just as important as his majesty's loyal government.

The real tragedy of parliamentary intransigence lies in the fact that it inhibits the formation of a loyal opposition. During the years 1925-1930, when the extremists controlled only one-eighth of the German Reichstag, nearly 40 per cent of the remaining members could be allowed to stay outside the government without preventing the formation of a working majority. This made it unnecessary to combine the right and left wings of the republican front in support of a single cabinet. Under these conditions the more important shifts of public opinion could still find expression in a corresponding alternation between governments of the right center and of the left center respectively. When the proportion of extremists rose to one-third, the defection of more than a quarter of the remaining members would have been sufficient, on

the other hand, to prevent the formation of any government. Majorities had now to be sought through the union of practically all the non-extremist parties in support of a single cabinet. Great political skill was needed for the accomplishment of so unnatural a union, and even if the operation were successful it could have no other effect than to render the choice of governments virtually meaningless as a channel for the expression of political differences. As the question of support or opposition to the government became ever more rigidly determined by the single issue of dictatorship versus democracy, other living issues were forced increasingly into the background. The result from 1930 onward was a progressive strangulation of parliamentary life in Germany.

Now it so happens that this was a peculiarly unfortunate moment for the impairment of normal parliamentary functions. Even a normally constituted Reichstag would have been hard pressed to deal with the legislative needs of the second great depression. In many ways the effects of this catastrophe were not unlike those encountered five years before as a result of the inflation crisis. Once again the country was faced with the hardships of acute monetary deflation. Deficit financing, currency manipulation, and other inflationary devices used elsewhere to mitigate the effects of sudden economic collapse were quite beyond the question in Germany. Memories of the last inflation were still too vivid to permit any fresh experiments along these usually tempting lines. In the face of lowered tax receipts and of increasing relief needs the German government had no choice but to work for an immediately balanced budget. This called as in the inflation crisis for widespread sacrifices. Once again it was hard to find any parliamentary majority willing or able to bear responsibility for the imposition of such burdens. At a time when the rise of mass intransigence made necessary the formation of unusually broad coalitions, the country was faced with conditions which would have tended to disrupt even a normal government majority. The result of this twofold strain was to bring the institutions of parliamentary government to the verge of complete paralysis.

The situation first came to a head in the summer of 1930. At this time the Reichstag of 1928 was still in session, which meant that the problem of parliamentary intransigence did not yet have to be reckoned with as a serious factor. Even under these rela-

tively favorable circumstances the political difficulties normal to a deflation period had already begun to make themselves felt, however, in a very serious form. Declining receipts and mounting expenditures made it necessary for Chancellor Brüning, the scholarly and able Catholic leader recently summoned to the head of affairs in Germany, to bring forward proposals for a drastic increase of federal and local taxation. For weeks parliament debated the issue without coming to any positive conclusion. None of the special interest groups to which the various parties were subservient were willing to add to their current difficulties by consenting to any substantial increase of their own tax burdens. At a time which called for unusually prompt action Germany was faced with the prospect of a prolonged legislative deadlock.

Under these circumstances, the government decided that the moment had come to make drastic use of its emergency powers. On July 16 the Brüning tax program was enacted in the form of two executive decrees issued on the basis of Article 48. This was the first appeal to emergency authority in more than five years, and the opposition was quick to denounce it as an act of usurpation. But Chancellor Brüning asserted that the public safety and order were endangered by the failure of parliament to supply adequate financial resources. When the Reichstag proceeded, by a vote of 236 to 221, to demand the revocation of these controversial measures two days later, he accordingly dissolved that body. Although both the decrees were withdrawn at once, they were substantially reënacted on the same basis ten days later. From that time down to the first meeting of the next Reichstag, there was no authority in Germany capable of checking the government's freedom in the use of this and other emergency measures.

The danger of recognizing emergency legislation as a part of the presidential prerogative was never more clearly shown than in this particular episode. Officially the action of the authorities was designed, in the words of Finance Minister Dietrich, to counteract the operation of "selfish party politics, which make it impossible to carry on the work of government."¹ The threat to public safety and order lay simply in the danger of prolonged legislative deadlock. But the uncompromising attitude of government parties may be quite as significant as the intransigence of the opposition in preventing the adoption of a commonly acceptable program,

¹ Session of July 18, 1930 (*Sten. Ber.*, vol. 428, p. 6516).

and that attitude is very likely to be increased through the possession of autocratic powers. Under the circumstances then existing the possibility of compromise might have been remote in any case. If the authorities had not been in a position to impose their own views upon "selfish" party politicians there is some reason to suppose, however, that greater energy and patience would have been devoted to the task of finding a common basis for action. The great weakness of legislation by prerogative lies in the fact that it has a tendency to create as well as to cure the breakdown of normal legislative functions.

Fortunately the immediate results in this case were beneficial rather than harmful to the cause of effective legislative leadership. Although the elections of September 14 brought a spectacular increase of strength to the Communist and National Socialist parties, they also had the indirect consequence of strengthening the position of the Brüning government. At the time of dissolution, impartial observers had predicted that the Social Democrats would gain in the ensuing contest. This hope was largely instrumental in persuading the members of that important delegation to vote against the emergency decrees. But even though the Social Democrats had not recently been participating in the responsibilities of government, their previous association with the parties still in power served in defiance of all expectations to prevent them from profiting by the current mood of discontent with the conduct of government. Under the coalition system, as exemplified in Germany and elsewhere, there is a tendency for middle-of-the-road parties to remain in office almost without interruption. Advantageous as this arrangement may be from the standpoint of political continuity, it also has the disadvantage of denying the public the pleasure of a completely new deal in periods of profound disillusionment. The two-party system of the United States, with its wholesale periodic changes in the personnel of government, is much more apt to keep people contented with the existing order of things. The immense emotional release following the defeat of President Hoover is a significant case in point. Under the conditions that existed in Germany, on the other hand, the lack of anything really fresh in the way of loyal opposition made it inevitable that the voters should be driven into the arms of the extremists. Instead of gaining at the elections, the Social Democrats lost ten seats. The result was a quick change in the attitude and tactics

of that still important party, a change which persisted down to the fall of the Republic.

The election immediately served to strengthen Brüning's hand in dealing with the Social Democrats and other members of the dwindling constitutionalist front. Realizing that the tide of public opinion was running against them, and that any elections held in the near future would work to the advantage of their extremist competitors, all were now determined to make substantial sacrifices for the preservation of the *status quo*. Because of their fundamental divergence from the aims of bourgeois party politics, the Social Democrats still felt that they could not accept a place in the Brüning cabinet. But the number of extremist deputies was now so great that no government could stand without the support of this, still the largest of all party delegations within the German Reichstag. The fall of Brüning could only lead, in the absence of any other visible majority government, to a fresh dissolution and fresh elections. In order to avoid this danger the Social Democrats had no choice but to support the chancellor they had so recently defied. From that time onward every vote of confidence was sure to find them lodged on the side of a cabinet they did not dare to join.

But if the 1930 elections did much to strengthen the Brüning regime, they fell short of giving it a normal parliamentary basis. Even though the Social Democrats might prefer the maintenance of the *status quo* to the prospects of immediate dissolution, it would have been suicidal for them to be associated too closely with each and every policy adopted at this particular time. Even the threat of dissolution would not have been sufficient to persuade the Social Democrats to coöperate in the enactment by ordinary means of the entire Brüning program. Necessary though it might be under the existing conditions of parliamentary intransigence, a bourgeois-Marxist majority was far too unnatural a thing to be held together by ordinary parliamentary methods.

The years 1930-1932 were marked in Germany no less than in the rest of the world by a progressive deterioration of the economic situation. So long as the bourgeois parties remained in control, this meant that ever more drastic efforts would have to be made to bolster up the faltering capitalistic system. These steps were taken with characteristic vigor and determination under the leadership of Chancellor Brüning. In order to prevent the dis-

orders attendant upon the collapse of vital industries, large sums were loaned from the public treasury to save banks and other private institutions from bankruptcy. In order to maintain the financial position of the government in the face of these and other exceptional demands, government expenditures were at the same time reduced on such items as salaries, pensions, and other social services. Whether these were or were not the most effective means of dealing with the situation is a matter of opinion. There can be no doubt, however, that a true Marxist would have had some difficulty in justifying them to his particular electorate. In a period of extreme economic stringency a Social Democrat could hardly dare to sponsor the measures adopted by any bourgeois government.

If Germany had been free in the use of delegation, the time would now have been suitable for the passage of an enabling act. A safe majority of the existing Reichstag was willing to support the Brüning government on all essential matters. This fact was demonstrated by the numerous votes of confidence recorded during the years 1930-1932. Many of the members of that majority were reluctant, on the other hand, to accept responsibility for the government's specific measures. Accountability to a particular electorate made it much more difficult for them than for the executive to assume positive leadership in the crisis. Under like circumstances the method of delegation has often been employed in France to excellent advantage. If a simple majority of the German Reichstag had been able to act with equal freedom, there can be no doubt that they too would have sought relief through similar devices.

Unfortunately the practice of the Weimar Constitution was such that the desired results could only be accomplished on the much more perilous basis of presidential authority. In a Reichstag where the Communists and National Socialists alone accounted for 32 per cent of the membership, the passage of a constitutional amendment would have called for the collaboration of practically all the remaining deputies, ranging all the way from extreme monarchists of the German Nationalist party to the fairly radical left wing of the Social Democratic party. Such a combination would have been beyond the wildest dreams of political virtuosity. The result was to leave Article 48 as the sole basis for emergency legislation.

During the first few months after the election of the new Reichstag, the Brüning government made serious efforts to minimize the use of emergency measures. Normal parliamentary methods were still employed to secure the enactment of most projected legislation. It is true that no less than eight decrees were issued during this period on the basis of Article 48. This figure is not particularly impressive, however, in comparison with the contemporary total of thirty-six regular statutes. In matters of national legislation the Reichstag had not yet ceased to occupy the center of the stage.

The resulting strain on the loyalty of Brüning's ill-assorted following was so great, however, that from March 26 onward it was found advisable to resort to a much more extensive use of emergency measures. No longer concerned with actual legislation, the Reichstag began to spend most of its time in recess. From March 27, 1931, to May 8, 1932, there were just two sessions of three days each. No legislation was passed on either occasion, the main purpose of both meetings being to vote confidence in the government. A somewhat longer session began on May 9 of the latter year, at which time two statutes were passed by normal parliamentary methods. But these were the only legislative accomplishments recorded by the Reichstag during the entire period from March 27, 1931, to May 30, 1932. Since the number of emergency decrees issued at the same time was approximately sixty, there can be little hesitation in saying that the executive was the really important source of legislative authority during the later months of the Brüning regime. It would be hard to imagine a more thoroughgoing experiment in emergency legislation.

In the face of threatened parliamentary breakdown the political situation in Germany had now managed to settle down into a state of fairly stable equilibrium. So long as the government continued to have the support of a Reichstag majority, there was no reason why the legislative needs of the country should not continue to be satisfied indefinitely through the use of Article 48. The practice of appealing to parliament for periodic votes of confidence served at the same time, as in the case of an enabling act, to accomplish these results without impairing the authority of the regular legislative body. By the summer of 1932 the Brüning regime had already been maintained on this basis for nineteen

difficult months. The mandate of the existing Reichstag had still two more years to run. Under the circumstances there was every reason to hope that the supporters of constitutional government would be able to keep the ship of state afloat until the storm was over.

The only immediate difficulty came from the direction of the presidency. Under normal conditions the principle of parliamentary responsibility stood as a limitation upon the powers of that official in relation to any government supported by a majority of the Reichstag. If Chancellor Brüning had been acting on a normal parliamentary basis, or even by authority of an enabling act, he would have had little or nothing to fear from the possibility of presidential interference. But in the case of Article 48 the cabinet derived its legal powers from the president rather than from the Reichstag. The Weimar Constitution expressly vested the right of taking emergency measures in the chief of state, while parliament was given nothing more than a negative right of rejection. Even when emergency powers were exercised on his behalf by a majority cabinet, it was only natural for the president to feel a certain responsibility for the content of decrees issued so directly in his name. The continuing support of the presidency was a matter of peculiar importance, therefore, to any regime which depended for its existence upon the use of Article 48.

In the spring of 1932 the Brüning regime found itself in danger of losing that support. President Hindenburg, the venerable monarchist on whom everyone had come to rely for the defense of the Weimar Constitution, was approaching the end of his first seven-year term. The strongest candidate for the succession was none other than Adolf Hitler. With a National Socialist as president it was clear that the resources of Article 48 would cease to be available for the use of anyone interested in the defense of the Republic.

Fully recognizing the dangers of this situation, Chancellor Brüning persuaded Hindenburg to run for a second term. All the resources of the government coalition were placed behind his candidacy. The result was a decisive defeat for the National Socialist leader, and the election of President Hindenburg for seven more years. From that time onward it seemed as though nothing but the death of the aged statesman could threaten the stability of the Brüning regime.

Such confidence was all too quickly undeceived. Although President Hindenburg had never actually failed to support Chancellor Brüning in the use of emergency powers, his conservative heart had long felt misgivings with regard to some of the more radical policies of the government in question. In a period of complete economic prostration it was inevitable that state action should have come in frequent conflict with vested property rights. The cry of socialism was promptly raised. All this had little effect on the President so long as the interests of his own class, the aristocratic landowners of Prussia, were substantially unaffected. But the problem of agricultural rehabilitation was also a matter of immediate concern. In the spring of 1932 it became known that the Chancellor was about to use his emergency powers for the liquidation and redistribution of hopelessly bankrupt estates, a large proportion of which were to be found in the President's own homeland of East Prussia. The result was a sudden change in the course of political life in Germany.

In the face of so serious a threat to the position of his own immediate friends and neighbors, the President rapidly lost confidence in the government. Before the date of the elections it would not have been politic to do anything to antagonize his principal supporters. The second term was not many weeks old, however, when Hindenburg proceeded to inform his chancellor that he would not allow a program of "agrarian bolshevism" to be inaugurated in his name. Balked in a fundamental part of his emergency program, Brüning tendered his resignation on May 30. Although the government still had a safe majority in the Reichstag, the President was now prepared to exercise his own discretion in preventing the abuse of emergency powers. The resignation was accepted with alacrity. In this way one of the most promising of all modern experiments in constitutional emergency action was brought to an untimely end.

On the whole the experience of the Brüning regime is mainly notable, therefore, as an example of the harm that can be done to constitutional government through the imposition of unduly stringent conditions upon the use of delegation. By limiting the passage of enabling acts to the forms of constitutional amendment the founders of the Weimar Republic believed that they were safeguarding the authority of the Reichstag. The actual result was just the reverse. In a situation well suited to the use of

delegation, the insuperable difficulties of the amending procedure made it necessary for Chancellor Brüning to experiment with the more dangerous resources of Article 48. Action on this basis served to shift responsibility for the course of legislation from the Reichstag to the president. The final consequence of this unnatural situation was to secure the dismissal of the last German chancellor ever to enjoy the support of a true parliamentary majority. This was a long step toward the destruction of the Weimar Constitution.

CHAPTER IX

THE PERIOD OF PRESIDENTIAL GOVERNMENT

THE FALL of Chancellor Brüning marks the beginning of a brief interlude in German constitutional history which can best be described as the period of presidential government. If the powers of the president under Article 48 had been purely negative in character, the danger of any such development would have been relatively slight. But unfortunately the provisions of the Weimar Constitution made it possible for Hindenburg himself, acting through a chancellor of his own choosing, to continue in the use of those same emergency powers which had just been denied to representatives of a parliamentary majority. Such was the course followed during the immediately ensuing months. The result was a dangerous concentration of authority in the hands of a single man, the president of the German Republic.

Colonel Franz von Papen, the next chancellor of the Reich, was a strictly personal appointee of the aged chief of state. As an obscure member of Brüning's own Center party, which remained unswerving in its loyalty to the more distinguished statesman, Papen himself was able to command no party following in the Reichstag. The other members of his government, soon mentioned with derision as the Barons' Cabinet, were even less considerable figures from the standpoint of party politics. For the most part they were fashionable noblemen, many of them not even members of parliament, whose sole claim to attention lay in the fact that they were friends and fellow clubmates of the new chancellor. As conservative aristocrats they were admirably suited, however, to act as personal representatives of a conservatively aristocratic president. So long as the powers of government were to be exercised in the President's name on the basis of Article 48, these were the men he wished to see entrusted with the conduct of affairs.

The maintenance of such a regime was obviously impossible so long as the Reichstag of 1930 remained in session. For all their desire to avoid the dangers of a fresh election at this time, members of the Brüning majority could hardly be expected to support

a wholly alien chancellor Under these circumstances the only way to prolong the life of the government was to prevent the Reichstag from meeting The appointment was therefore accompanied by an order for immediate dissolution By this simple device the President was able to give his own personal representative three months of complete freedom in the use of Article 48. For the period at least of the approaching elections there could be no legal interference with the course of presidential government in Germany.

The dangerous implications of such an experiment were obvious from the beginning. In the summer of 1930, when Chancellor Brüning decided to impose his views of tax reform upon a reluctant Reichstag, the authority of the president had still been available to serve as an independent check on the abuse of emergency powers. Inadequate as this safeguard may have been, it was certainly better than nothing But when Hindenburg in turn decided to overthrow Brüning, and to replace him by appointees of his own choosing, there was no one left to exercise any sort of independent judgment on the matter. The personal relationship between president and chancellor was now so close that neither could be described as an independent organ of government. It would be hard to imagine a less satisfactory basis for the exercise of constitutional emergency powers.

The elections of July 31 did nothing to improve the situation. The growth of extremist sentiments during the past two years had been so rapid that the Communist and National Socialist parties, formerly limited to less than one-third, were now able to control more than one-half of the Reichstag. This meant that the problem of parliamentary intransigence was about to enter on its final and most disastrous phase. Perplexing as the task of government had been under the conditions of the previous assembly, there was at least some consolation in the fact that majorities could still be formed within the membership of a single major group. In the Reichstag of 1932, on the other hand, power was divided between three minority factions. The National Socialists were now the largest party. With an unprecedented delegation of 230 they alone were able to account for 38 per cent. An additional 6 per cent was controlled by the German Nationalists, who even then were flirting with the possibility of a coalition with Hitler. But, even though this made the right radicals the strongest major group,

their combined total of 44 per cent was still appreciably short of a majority. At the other side of the chamber the Communists stood with a compact and well-disciplined delegation of 15 per cent. This left the various supporters of the Weimar Constitution, comfortably preponderant in the preceding Reichstag, with a maximum strength of 41 per cent. An assembly divided along such unpromising lines was even less well situated than before to carry on the work of parliamentary government in Germany.

Just as in the case of Brüning, however, the immediate consequence of growing extremist sentiment at the polls was to strengthen the position of the existing government. It is true that Papen himself still remained without any considerable measure of support in the Reichstag. Only the small delegation of German Nationalists was greatly attracted by his offers. But even though the absolute strength of the government was unchanged by the outcome of the elections, its relative position was considerably improved. If there had been any immediate possibility, as in the preceding Reichstag, of creating a majority cabinet, it would have been hard to find justification for the retention of Chancellor von Papen. Normal principles of parliamentary responsibility required that the conduct of affairs should be placed in the hands of men supported by a majority of the Reichstag. In a situation where no government majority was available there could be relatively little objection, however, to the retention of a minority group enjoying the confidence of President Hindenburg. So long as parliament itself was unable to take positive action, presidential rule had perforce to be accepted as a means of avoiding complete stoppage in the state machine.

It is true that emergency measures may not have been entirely indispensable even in this case. If chaos had been the only alternative to coalition, the Reichstag might have been able in the long run, and in spite of its unfortunate composition, to find an effective basis for action. Since the left radicals, as the smallest of the three major groups, had much the least to gain by precipitating any sort of general collapse, there was always a possibility that they would be persuaded to join the liberals in a common fight against fascism. Although the dogmatic optimism of sheltered party officials in Moscow made it difficult for the German Communists to behave realistically at this time, the emergence of a

clear-cut crisis might even then have served, as in subsequent years, to encourage the development of united-front tactics. Another possible though much less promising road to coalition might have been discovered through the collaboration of National Socialists with some of the liberal parties. But on this occasion, as in the days of Brüning, the easy availability of emergency powers made it relatively unnecessary for the Reichstag to strive for the discovery of an effective common program. The obstacles to normal parliamentary action were greater at this time than ever before, but even in the Reichstag of 1932 the presence of Article 48 was probably no less a cause than a cure for the breakdown of parliamentary functions.

For the time being there was little apparent change, however, in the routine of political life in Germany. Throughout the immediately ensuing months the legislative activity of the Reichstag remained at approximately the same level of stagnation as during the latter portion of the Brüning regime. The statute book for the six months which elapsed from the rise of Papen to the fall of Schleicher records forty-two emergency ordinances, mostly legislative in character, as contrasted with three parliamentary enactments. The actual use of emergency powers was also largely the same as before. It is true that both the presidential governments were disposed to favor conservative interests. For the time being even the most hopelessly bankrupt estates of East Prussia were safe from all but the more benevolent forms of state interference. But in a situation of such gravity as that by which the German nation was then faced there was no room for anything like complete freedom in the choice of objectives. Remedial policies were dictated by the pressure of external circumstances which could not well be gainsaid, and which would have operated with equal force upon any government which happened to be in power at the time. In a country where currency and credit inflation were equally out of the question, rigid economy had to be the keynote of all financial endeavor. This meant that the efforts of a political regime could only be directed toward the relief of the most obvious and undeniable deflationary stresses. Under Brüning and Papen alike, social services were cut to the subsistence level, taxes were raised to the point of vanishing returns, and key industries were successively bolstered against the threat of bankruptcy. The fact that one government was parliamentary and the other presidential

was not in itself sufficient to preclude a certain measure of continuity in German legislative policy.

Once again the Republic was provided with an unusually interesting occasion to explore the possibilities of constitutional emergency action. In the face of an unprecedented breakdown of normal parliamentary methods Article 48 still continued as in the days of Brüning to provide a basis for the maintenance of indispensable governmental functions. It is true that the stability of this solution was not entirely beyond question. If President Hindenburg had chosen this moment to die, or the National Socialists to win a Reichstag majority, the result would have been to render presidential government unavailable for the defense of the Republic. Under the immediate circumstances it could hardly be said, however, that there was any real lack of emergency powers to deal with the current crisis. Even at this late date the effective use of such powers might still have led to the triumph of constitutional government.

Unfortunately these potentialities were not destined to be realized in practice. The trouble was that Papen and his fellow clubmen were not in the least interested in the maintenance of the Weimar Republic. Socially and economically they were affiliated with that section of the German aristocracy which had always been most contemptuous of parliamentary democracy. In these ultrafashionable circles the solution of Germany's problems had long been sought through a return to political absolutism, preferably under monarchist auspices. Such was the underlying program of both the presidential cabinets that followed Chancellor Brüning. For the accomplishment of this purpose the gentlemen of the *Herrenklub* were prepared to exploit to the full their new official position. As a result, the powers of Article 48, still potentially valuable for the defense of the Republic, were used in a deliberate attempt to overthrow the Weimar Constitution.

Within less than a month of its inception, the unconstitutional aspirations of the Papen government were all too clearly revealed. The occasion, already described in a previous chapter, was the invocation of Article 48 for the purpose of removing the Braun-Severing cabinet from the conduct of affairs in Prussia. As a measure for the defense of constitutional government the appointment of a federal commissioner at this time was wholly meaningless; the competence of the state authorities to maintain

public order was hardly open to question. As a move in the contrary direction, however, the act was quite intelligible. In the hands of a loyal Social Democratic administration, the police forces of Prussia had long been recognized as the main bulwark against extremist movements in Germany. The transfer of those forces to the command of monarchists had therefore to be reckoned as a serious step toward the destruction of the Republic.

If any doubts still remained as to the significance of this episode, they were soon removed by an even more glaring abuse of emergency power. Shortly after the deposition of the Braun-Severing government the federal commissioner proceeded as acting head of the Prussian administration to appoint a new state delegation to the federal Reichsrat. As an unprecedented attempt on the part of the Papen government to gain control over the upper house of parliament this action in itself was already serious enough. As a prelude to future constitutional changes it was even more startling in its implications. Under the terms of the Weimar Constitution, which placed the Reichsrat in a place of definite inferiority with relation to the Reichstag, there was comparatively little to be gained by securing control over the former body. The former Imperial Constitution, on the other hand, had recognized a comparable chamber, then known as the Bundesrat, as the primary source of legislative authority. Under these circumstances Chancellor von Papen's sudden interest in the Reichsrat could hardly be interpreted otherwise than as part of a reactionary plan to restore the previous balance of parliamentary forces in Germany. Clearly the groundwork was being laid for a definite move against the Weimar Constitution.

The ultimate outcome of this plan was distinctly disappointing. In its general indifference to constitutional standards, the Papen regime failed to back up its action with any sort of adequate preparation. It did not even bother to make sure that the appointment of state representatives was within the legal competence of federal commissioners. This, for a government unwilling or unable for the time being to depart from the framework of the constitution, was a sad miscalculation. The question of formal competence was one of those purely legal issues on which even a Continental judge could feel no hesitation in acting. When the action of the federal authorities was challenged by the deposed

state government, the supreme court proceeded to rule that the appointment of state representatives by a federal commissioner was a wholly illegal act. The result was not only to prevent the cabinet from carrying out its plan of ruling the country through a self-chosen Reichsrat but also to throw general discredit upon the intelligence and good faith of the presidential regime.

Shortly before the handing down of this decision, moreover, the ineptness of Papen's leadership had been less significantly but even more inexcusably demonstrated in another episode. In view of the fact that the government could not possibly command a regular majority in the first parliament elected after its accession, it was obvious from the beginning that the only way to prevent a vote of no-confidence would be to dissolve that body before it had a chance to take positive action. After the election of July 31 the Chancellor accordingly proceeded to secure an undated order of dissolution from his friend the President. But when the occasion for using it actually arrived at the session of September 12, the precious document proved to have been temporarily mislaid. By the time it could be located and brought before the Reichstag, the vote of no-confidence was already in full swing, and the National Socialist speaker refused to pay any attention to the attempted interruption. The final score was 513 to 38 against the government. Although the legality of proceeding to a vote under these circumstances was extremely questionable, the fact remained that the Chancellor's carelessness had subjected the government to a quite unnecessary demonstration of public distrust.

Because of its very inefficiency, however, the presidential regime still held some promise for the future of constitutional government in Germany. A powerful and efficient cabinet devoted to the furtherance of absolutism would have been a serious danger. A weak cabinet was in a position to do little for the accomplishment of its aims. Lacking the power for any more decisive forms of action, the Papen government had little choice but to keep the *status quo* relatively intact until such time as a more favorable opening might appear. In the case of any immediate improvement in the situation of the country it was entirely possible that the supporters of constitutionalism would prove the ultimate beneficiaries of such a waiting game. A presidential regime strong enough to maintain the routine functions of government and at the same time too weak to accomplish its own subversive pur-

poses was now the best available means of carrying the Republic successfully through its constitutional crisis.

The hope of some such development was, if anything, confirmed by the results of the second Papen election. When the voters next went to the polls, on November 6, they provided the friends of constitutional government with the first real scrap of comfort they had known for many months. Instead of the usual gain, the proportion of extremist seats suffered the small but significant drop of 2 per cent. More important still, it was on this occasion that the National Socialists suffered their first serious reverse. Although their 196 seats still made them the most numerous party in the Reichstag, their strength had now sunk from 38 to 34 per cent. It is true that more than half of this loss was compensated by gains on the part of their potential allies, the German Nationalists, but the result was none the less encouraging to the supporters of the constitution. Under the impact of defeat the National Socialist movement began to show signs of internal disintegration. Financial support for the prosecution of expensive propaganda became increasingly hard to find. Altogether there was ample reason to believe that the tide of parliamentary intransigence had finally passed its peak. Time at last was working on the side of constitutional government.

Once again the German political situation seemed to have reached a phase of stable equilibrium. Now that the danger of an immediate National Socialist majority had passed, there was no legal reason why the system of presidential government could not be maintained indefinitely on the basis of Article 48. It is true that the conduct of affairs could not long be left in the hands of Chancellor von Papen. After the adverse decision of the supreme court in the Prussian affair, that unlucky individual was hopelessly discredited. By November 16 the situation had become so intolerable that the debonnaire statesman, though still enjoying the almost pathetic confidence of the aged President, was forced to resign. But this did not in itself necessitate any radical change in the existing system of government. General von Schleicher, the former minister of war, was simply promoted to the head of the cabinet. The apparent result was to give the presidential system a renewed lease of life.

Just as in the case of Chancellor Brüning, however, this relatively favorable situation was shattered by the intervention of

President Hindenburg. Considering that the personnel of the Schleicher cabinet, largely identical with that of its predecessor, had been drawn from the aristocratic and military circles to which the President himself belonged, the government's chances of survival would have seemed on the face of things to be extremely good. But even though the General was a man of aristocratic background and military training, his attitude was by no means that of a typical *Junker*. Clothed with the responsibilities of office, he proved to be rather more concerned with the fostering of industrial than of agrarian interests. This served to weaken his position in those *Junker* circles most closely associated with the President and his informal advisers. The jealous intrigues of ex-Chancellor von Papen, and the desire of many influential persons for something more decisive in the way of subversive action, should also be reckoned as factors in the situation. From these and other sources pressure was brought to bear on the aged President, with prompt results. On January 30, 1933, Schleicher was dismissed and Hitler appointed chancellor of the German Reich.

This event marks the effective end of constitutional government in Germany. Although the exact motives underlying the transaction have never been made wholly clear,¹ it is probably safe to say that the ultimate consequence of Hitler's appointment came as something of a surprise to President Hindenburg and to ex-Chancellor von Papen, who acted as one of his principal advisers in the affair. Certainly there was no intention of letting Hitler have things all his own way in the new regime. The government included only three Nazi as against nine non-Nazi members, most of them held over from the preceding regime. The general expectation seems to have been that Papen and his aristocratic associates would continue on the basis of their overwhelming numerical superiority in the cabinet to have a commanding voice in the determination of public policy, while profiting by the popular strength of Hitler's mass following. The only trouble with this daring plan, a trouble shared with many of Papen's inspirations, lay in the fact that it was completely unrealistic. Although Hitler had been willing to accept a minority position in the cabinet, he had been careful to secure the indispensable ministries for his

¹ The best available treatment of this complex affair is to be found in J. W. Wheeler-Bennett, *Wooden Titan. Hindenburg in Twenty Years of German History* (New York, 1936).

National Socialist associates. He himself held the chancellorship, Frick was minister of the interior for the Reich, and Göring minister of the interior for the state of Prussia. This last office was perhaps the most important of all, for it had the effect of delivering the most powerful police force of Germany into the hands of National Socialists. The result was to remove the largest obstacle still opposed to the triumph of the movement.

The experiment in presidential government was finally destined to end, therefore, in one of the worst disasters in the history of modern constitutionalism. Because of a serious defect in the provisions of the Weimar Constitution, it was possible for the president of the Republic to exercise final and uncontrolled discretion with regard to the use of vital emergency powers. This was a dangerous state of affairs violating one of the most important conditions of successful constitutional government. So long as the president used his powers wisely all was well. But unlimited discretion is always liable to abuse, and there were at least two occasions when President Hindenburg employed the powers of Article 48 to the manifest disadvantage of the constitution they were intended to defend. With the dismissal of Chancellor Brüning, unthinkable if the President himself had not been in a position to authorize emergency measures, the last vestiges of parliamentary responsibility were needlessly destroyed. With the dismissal of Chancellor von Schleicher, a relatively harmless though unfriendly regime was replaced by one far more dangerous to the maintenance of the Republic. Whether these decisions were the honest mistakes of an infirm old man trying to the best of his abilities to defend the interests of the constitution he had sworn to uphold, or the result of a deliberate purpose to overthrow the existing system, is an interesting historical problem but one not particularly relevant to the question here at issue. Treacherously or mistakenly, the fact remains that the discretion of President Hindenburg was applied repeatedly to the detriment of constitutional government. A system of emergency powers which leaves so much to the uncontrolled discretion of a single man can only be regarded as a failure. This fact has never been more strikingly shown than in the outcome of presidential government in Germany.

CHAPTER X

THE LAST ELECTION CAMPAIGN

ALTHOUGH the doom of the Republic was already sealed, the history of emergency action under the Weimar Constitution does not end directly with the fall of Chancellor von Schleicher. As a matter of fact the appointment of Hitler brought little or no immediate change in the legal structure of German political life. It is true that a cabinet of National Socialists and German Nationalists was able to command a considerably larger measure of support than had been at the disposal of any government since Brüning. With the toleration of the Center party, which could have been obtained at this time upon assurance of the government's willingness to remain within the framework of the constitution,¹ it would even have been able to count on a majority. Hitler and Papen were not interested, however, in the maintenance of constitutional government. In spite of the possibility of normal parliamentary support, the new cabinet immediately proceeded to order the dissolution of the Reichstag. This left the government free to continue as before in the use of Article 48.

So far as the formal aspects of the situation are concerned the position of the new regime was hardly distinguishable from that of the preceding presidential cabinets. The political realities of the moment were such, however, as to shift the ultimate power of decision in emergency matters from the president to the chancellor. In the absence of parliamentary or popular backing the last two presidential governments had been strong only in the confidence of Hindenburg himself. Under these circumstances there had been no need to hesitate about dismissing them as soon as their policies ceased to give satisfaction to the President. With Hitler, on the other hand, the situation was entirely different. The new chancellor was important not only as the beneficiary of presidential favor but also as the leader of the largest and most militant party in the country. After the failure of Papen and Schleicher there could be little doubt as to the necessity of mass support for

¹ For a statement of the basis on which negotiations were being carried on at this time, see the *Frankfurter Zeitung* of February 2, 1933

the success even of presidential cabinets. Hitler was the only man capable of bringing mass support to any government of the right. This made it very hard to prevent him from using his own discretion in the exercise of constitutional emergency powers.

With all the advantages of their situation, however, the National Socialists were still by no means prepared to depart openly from the precedents of German constitutional life. Respect for the forms of law had still to be reckoned as a powerful political force. If the extremists had proceeded at once on a course of flatly illegal action, they would still have been in danger of provoking a repetition of the old Beer Hall fiasco. In the rapidly aging mind of the President one of the few fixed ideas seems to have been a desire to save his honor as a soldier by living up to the terms of his constitutional oath. Even at the risk of civil war he would probably have summoned up his waning energies sufficiently to order out the Reichswehr against any chancellor who tried under his signature to perpetrate a clear-cut violation of the Weimar Constitution. The loyalty of the army to its honored wartime commander was secure beyond all question. To attempt an illegal coup under these conditions would have been extremely unwise. For the time being, at least, there was no real choice, therefore, but to continue acting within the established framework of the Weimar Constitution.

Fortunately for the success of Hitler's efforts, the provisions of Article 48 were such as to leave little or nothing to be desired from the standpoint of a statesman seeking the destruction of constitutional government. Emergency powers once useful to the friends of the Republic were hardly less capable of service to its bitterest enemies. With the rise of Hitler the history of the Weimar Constitution was therefore destined to enter upon a new and highly illuminating phase. Constitutional provisions designed for the protection of the Republic were now for the first time used with complete ruthlessness to secure its overthrow. Every legal weakness was exploited to the full. The result was to throw more glaring light than ever before upon the inadequacy of Germany's solution to the problem of constitutional emergency powers.

During the first five weeks of Hitler's chancellorship, the period with which we are concerned in the present chapter, the non-legislative uses of Article 48 were the ones most useful to the government for the accomplishment of its subversive purposes.

All the efforts of the National Socialist party were now concentrated on the problem of gaining a smashing victory at the election of March 5. Considering that in the past three years they had already succeeded in raising their Reichstag membership from 2 to 34 per cent, it did not seem unduly optimistic to hope that they might now be able to secure an absolute majority. Their chances of success were not so good, however, that they could afford to neglect the advantages of Article 48. Even in the days of triumphant liberalism it was not always possible to resist the temptation to use emergency powers for the purpose of increasing government chances at the polls. In the hands of a regime unrestrained by constitutional scruples these same powers could be made a powerful weapon for the creation of electoral majorities. Throughout the period of the last electoral campaign this was the principal function of constitutional emergency powers in Germany.

This does not mean to say, of course, that the National Socialists were disposed to place sole reliance on the use of official powers. The most important side of their activities is to be found in the intensification of party activity, which continued without abatement throughout the campaign period. In the history of modern electioneering there has never been a more determined effort than was made by the National Socialists at this time. All the resources of modern advertising were applied on an unprecedented scale to the task of drumming up mass support for the followers of Hitler. Huge demonstrations, staged without regard to cost and managed with the greatest skill, were held in every corner of the country. Party uniforms and flags appeared in profusion. While public speeches and radio addresses followed one another in a steady stream, the printing presses were also worked overtime in an attempt to keep pace with the flood of party publications. For years the National Socialists had been recognized as the most skillful technicians of political propaganda in Germany if not in the world. Supported by ample funds and fired to enthusiasm by the prospect of immediate victory, the party was now prepared to expend itself in a last decisive effort to gain the votes of the German people.

So far as their own electoral efforts were concerned, the main advantage derived by the National Socialists from the possession of authority was the negative boon of freedom from the threat of government intervention. This was important with regard even

to the more legitimate aspects of party action. In previous elections Hitler had often been handicapped in his appeals to the general public. Even the most liberal chancellors had not been entirely proof against the temptation to invoke emergency powers for the purpose of suppressing opposition meetings and publications. The possession of authority made this the first election in which the National Socialists were wholly safe in the enjoyment of their legitimate right to court the favor of the German electorate.

Considerably more significant was the corresponding effect upon illegal aspects of the National Socialist campaign. Under preceding administrations there had usually been at least a half-hearted effort to defend the reign of law against the extremist violence. All this was changed under the chancellorship of Hitler. As the head of a government ostensibly dedicated to legitimate methods the *Fuhrer* had to make a certain show of maintaining order in the Reich. Illegal activities by party members were for that reason never officially countenanced. Under the direction of National Socialist ministers it was only to be expected, however, that the bulk of police activity would in practice be devoted to the repression of left radical rather than of right radical lawlessness. Throughout the crucial weeks preceding the Reichstag elections only the most perfunctory efforts were made to bring National Socialist offenders to justice.

The consequence of this situation was a sudden increase in the scope and importance of terroristic activities in Germany. During the course of this critical campaign period the efforts of opposition parties were subjected to every conceivable form of intimidation. Headquarters and printing establishments were destroyed. Party workers were beaten and killed with ever-increasing frequency. Attempts to hold meetings or other public demonstrations were met with the threat of riotous interruption. The so-called "struggle for the mastery of the streets" now entered on its final phase. Once the protection of the police had been withdrawn from enemies of the government, there was nothing to prevent the Storm Troopers from making life quite unendurable for persons unfortunate enough to have attracted their unfavorable attention. Every possible use was made of the resulting opportunities.

Of course the authorities were not in a position publicly to

justify activities of this sort. Thus when the Storm Troops received an undue amount of publicity on one occasion for breaking up a meeting addressed by ex-Chancellor Brüning, the National Socialist leader Göring was quick to point out that the culprits were really Communists in disguise. This announcement was coupled with a not entirely consistent plea for the maintenance of greater discipline in the National Socialist ranks. But if measures of terroristic violence had to remain without official sanction, they were none the less effective on that account. In the first instance it was to the Storm Troops and other irregular forces that the National Socialists looked for help in attempting to prejudice the results of the forthcoming elections. The possession of legal authority was valuable mainly as a guarantee against official interference with the campaign of party terrorism which had long been a mainstay of extremist action in Germany.

But apart from this strictly negative advantage Chancellor Hitler was also able to make considerable positive use of Article 48. Even though the unofficial work of the Storm Troopers was highly effective in hampering the electoral efforts of their opponents, a good deal more could be accomplished with the direct coöperation of the police. Numerous precedents were to be found in the history of earlier German chancellorships. Throughout the entire campaign period these precedents were revived and extended with unexampled freedom.

Still one of the most useful weapons in the repertory of emergency action was the right to prohibit the public meetings of opposition parties. In view of the fact that mass demonstrations were always an especially effective feature of National Socialist agitation, the Hitler government was apt to be especially hard on shows calculated to serve as a counter-attraction to its own best efforts. Shortly after the establishment of the new regime it was decided, for example, to stage an elaborate state funeral in honor of Hans Maikowski, a perfectly undistinguished Storm Trooper who had the good luck to be shot at this particular time. This was a characteristically ingenious stroke of propaganda. Since the only state funerals previously held under the Republic had been in honor of the intrinsically more notable figures of Ebert and Stresemann, every effort had to be made to render the affair impressive. Unfortunately the Social Democrats of Berlin had been planning on that very same day to hold a large mass meeting

of the Anti-Fascist League. A rival attraction of this magnitude could hardly fail to detract from the official spectacle. The Social Democrats were accordingly forbidden to assemble. By this simple device the government was able to gain a marked advantage for the prosecution of its own propaganda efforts.

Measures of a more general sort were also used from time to time. In this respect, as in so many others, the Communist party was destined to be the worst sufferer from National Socialist activity. On February 2, for example, all Communist meetings and demonstrations throughout the extent of Germany were prohibited by order of the police. This order was for the duration of a single day only, but a fortnight later the ban was reimposed for an indefinite period. At the same time it was announced that Storm Troopers would be enlisted as a special police force and sent to keep armed guard over all political meetings in Germany. Whenever they felt that the attitude of opposition speakers was becoming unduly critical, these none too impartial arbiters were authorized to disperse the gathering. During the course of a crucial election campaign all the opposition parties were thereby hindered in the use of one of the most important channels of modern electioneering.

In the face of private violence, freedom of the press is apt to prove less vulnerable than freedom of assembly. This circumstance lent particular importance to the fact that the provisions of Article 48 could be used as a basis for the imposition of an official censorship. One of the first acts of the new regime was to issue an emergency decree drastically limiting the right to criticize the government in print. The result was to place the entire opposition press under a handicap which could hardly have been imposed even by the most determined campaign of unofficial violence.

The Communists as usual were the worst sufferers. On February 11 their principal newspaper, the *Rote Fahne*, was suspended for a period of two weeks. Subsequent extensions of the original ban served to prevent that well-known organ from ever reappearing. Other Communist publications were suppressed at an even earlier date. During much the greater part of the election campaign the leaders of this important party were almost entirely cut off by law from the use of printed propaganda.

But if the proponents of revolutionary Marxism received the

worst treatment, it must not be supposed that the Draconian press laws of the National Socialists were devised exclusively for their benefit. From the very first the Social Democrats were also subjected to interference of an extremely drastic character. It is true that their publications were not usually suspended for any great period of time. The threat of suspension was held over them, however, as a guaranty of compliant behavior. In February their principal newspaper, *Vorwärts*, was banned for three days as punishment for the crime of printing a Social Democratic election manifesto. Before the month was out it was suspended once again, this time for criticizing the government's action in dismissing a police chief who had so far forgotten himself as to defend Communists against an attack by Storm Troopers. Other Socialist publications were also condemned at frequent intervals. Even though the party press was not brought to an absolute standstill, the financial and emotional strain attendant upon these periodic visitations could not fail to impair it materially as a source of opposition to the government.

The other great opposition group at this time was the Center party of ex-Chancellor Brüning. Although the Catholic leaders were allowed, by virtue of their relatively conservative position, to escape with rather less interference than their former Marxist colleagues, they also were not free from the pressure of official censorship. The most striking event of this sort occurred on February 18, when the entire Catholic press, including several hundred papers, was suspended indefinitely for printing a party manifesto against the government. This ban was lifted only upon receipt of the most humiliating apologies. Some indication of the fullness of National Socialist domination in the new government is to be found in the fact that the well-known paper *Germania*, in which Hitler's own sponsor and fellow cabinet member, Franz von Papen, had long been the chief stockholder, was not exempted from the general order of condemnation. In the long run every major party of the opposition was made to feel the effects of press censorship at this particularly crucial juncture.

All this might seem on the face of things to give the National Socialists a quite sufficient advantage. The proponents of the Third Reich were not by any means content to stop at this point, however. Although a denial of the freedom of press and assembly would serve to bar opposition parties from the use of certain im-

portant channels of political agitation, a good many other resources of modern electioneering were still left open to them. Much could be accomplished, for example, through the use of direct personal canvassing. The only way of reducing political competition to an absolute minimum would be to attack the basic structure of opposing party groups. This pointed to the outlawry of all opposition parties as the ultimate goal of National Socialist activity. Without daring to proceed immediately to the full attainment of that end, the Hitler government was able to make significant progress in this direction before the date of the election.

The obvious first object for such an attack was the Communist party. Since the Communists at this time were by their own confession dedicated to a program of violent revolution, they were the most plausible target for measures taken "in the interests of public safety and order." From the beginning the new regime showed a strong tendency to direct its emergency powers not only against the specific activities of Communist organizations but also against their very existence. The padlocking of party headquarters and police searches in the homes of party leaders began almost as soon as Hitler had entered the chancellor's office. So long as the organization itself continued to function, the National Socialists could never be entirely at rest.

Unfortunately for the success of their efforts, it was not possible to adopt the most extreme measures right at the beginning. Some striking indication of an immediate threat to the life of the Republic was needed in order to justify drastic action in the eyes of the President and people of Germany. On February 24 the long-padlocked national headquarters of the Communist party, Karl Liebknecht House in Berlin, were raided by the police in an attempt to discover appropriately incriminating documents. The resulting disclosures were not impressive. But time was drawing short. The date of the elections was fast approaching, and within three days the National Socialists themselves created the pretext they had long been waiting for. On February 27 the palace of the German Reichstag was destroyed in an incendiary fire. The long vigil of National Socialism was at an end.

In the face of so striking an event the government felt that it could at last provide public justification for the adoption of extreme measures. The National Socialists immediately announced that the fire had been intended as a signal for a nation-wide insur-

rection by revolutionary Marxists. Before the flames themselves had been extinguished, Communist leaders were being arrested in all parts of Germany for complicity in the outrage. Even the Social Democrats were not excluded from inquiry. This action was followed on the very next day by an emergency decree which gave the danger of "Communistic acts of violence" as the official reason for ordering the destruction, root and branch, of the entire Communist party. No time was lost in putting this decree into effect. The Storm Troops were at once pressed into service as a special auxiliary police for the arrest of political suspects. Concentration camps were established in profusion. Although the Communists were the ostensible object of attack, left wing Socialists and other members of the constitutional opposition were not infrequent victims. During the critical five days preceding the election many of the bitterest rivals of the government were thus effectively removed from the arena of party competition.

All this involved no departure from the formal requirements of the Weimar Constitution. Even so drastic a step as the outlawry of an important opposition party was not without precedent in the history of the Republic. Although the constitution guaranteed freedom of association, this brought no protection to organizations dedicated to the accomplishment of illegal ends. At the beginning of 1924 the National Socialists themselves had been subjected on this basis to repressive measures hardly less extreme than those now directed against the Communists. The failure of the Beer Hall *Putsch* in Bavaria was shortly followed by a decree proclaiming the National Socialist party an illegal organization. Hitler and other leading members of his party were arrested and tried for complicity in the recent insurrection. The *Völkische Beobachter* and other party properties were confiscated, and it was not until more than a year had passed that the National Socialists, after repeated assurances as to the abandonment of insurrectionary tactics, were again permitted to organize openly for the furtherance of their political program. In its use of emergency powers the Hitler regime was not forced to go much beyond the lines laid down by previous administrations.

But if the external requirements of the law were respected, as much cannot be said for the spirit of measures undertaken by the Hitler government. According to the terms of Article 48, an immediate threat to the public safety and order was the only

proper basis for the use of emergency powers. The ban imposed on the National Socialists in 1923 had followed in the train of a series of overt actions undoubtedly insurrectionary in character. During the weeks preceding the election of 1933 the use of repressive measures was much less clearly needful as a means for the defense of constitutional government.

Under the conditions then existing there could be no real basis for fearing an immediate threat to the maintenance of public order. It is true that the National Socialists were themselves able in some measure to bring a real emergency situation into being. The withdrawal of police protection in the face of ruthless attack by the Storm Troopers made it necessary for members of the opposition to take steps for their own defense, but in spite of the provocation to which they were subjected there was little plausibility in the suggestion that the Communists were actually planning a coup at this time. Even more fantastic was the suggestion that a threat to the maintenance of the Republic was to be found in the election activities of the Social Democratic and Center parties. This would have been a remarkable change of front on the part of political groups which had always stood as the defenders of constitutional government in Germany. Altogether there can be no hesitation in saying that emergency powers were abused in the first few weeks of Hitler's chancellorship as never before in the history of the Republic.

From a purely external standpoint, however, there was never any need to depart from the norms of absolute legality. Since the courts refused at all times to pass on the need for emergency measures, the ultimate right of decision remained for the time being in the hands of the executive. Executive power in turn was vested in a National Socialist chancellor. Under these circumstances there was nothing to prevent Article 48 from becoming an effective legal agency for the destruction of the Republic.

The consequences of this situation were serious in the extreme. Respect for the constitution was still a significant factor in German political life. If the National Socialists had been forced even at this late date to act in open defiance of the law, the chances are that they would have provoked decisive opposition. Unfortunately, the easy accessibility of emergency powers made it possible for them to clothe subversive purposes in the forms of established legality. The result was to deprive the constitutionalists of any

clearly legitimate occasion to rally in support of the existing order. Through the agency of Article 48 the force of law was not only eliminated as an obstacle to, but turned into a positive weapon for the attainment of National Socialist ends. This fact alone would suffice to outweigh all its previous services to the cause of constitutional government.

CHAPTER XI

THE END OF THE GERMAN REPUBLIC

FROM the beginning of the National Socialist regime the activities of the party were all directed toward one object, the passage of an enabling act. The election of a favorable Reichstag was important to the party primarily as a condition for the attainment of that end. It is true that up to that point in the history of the Republic the process of legislative delegation had never been used otherwise than for the purpose of defending the Weimar Constitution. The precedent established in the chancellorships of Marx and Stresemann was not incapable of being used, however, in a contrary direction. Although the conditions surrounding previous grants had always been carefully limited, there was no legal reason why future parliaments should not use their unlimited powers of constitutional amendment in a much less cautious sense. Emergency powers exercised within the framework of a constitution can be constitutionally guaranteed against abuse; emergency powers exercised on the basis of individual constitutional amendments may be all too freely formulated in any given case. By rejecting the enabling act as an incident of normal legislative procedure, the founders of the Republic no doubt felt that they were safeguarding the position of parliament. The actual result was to provide Hitler with an effective instrument for the destruction of constitutional government in Germany.

For a time it seemed, indeed, as though the parliamentary situation might offer some obstacle to the completion of the National Socialist program. Strenuous as the efforts devoted to it had been, the election of March 5 was rather disappointing in its results. Even though the party succeeded in electing 288 members, this was not enough to realize the National Socialist ambition of being the first parliamentary group ever to gain an absolute majority in Germany. In a Reichstag of 647 seats the followers of Hitler were able to command no more than 44 per cent. The presence of a sizeable German Nationalist delegation brought the combined strength of the government to the respectable total of 53 per cent.

But even this was a good deal less than the two-thirds majority required for the passage of an enabling act.

From the standpoint of Hitler this was a most unsatisfactory state of affairs. It is true that now, for the first time since the days of Brüning, there was a possibility of governing by normal parliamentary majority in the Reichstag. But this would have been a disastrous introduction to the glories of the Third Reich. Denunciation of the evils of parliamentary government had always been a staple of National Socialist agitation. From the beginning their appeal to the electorate had been based on the promise of absolutism. A *Führer* chosen on this basis could hardly afford to descend to the level of a parliamentary chancellor.

Under these perplexing circumstances the happy conjunction of Article 48 and the Communists once again came to the aid of a distressed government. Although the Communist party had been outlawed several days before the election, no attempt was made to exclude its candidates from the ballot. To do so would simply have meant swelling the vote of other opposition parties. Even in the face of persecution the Communists had been able to retain their position as third largest group in the newly elected parliament, with a delegation of no less than 81 members. Ever since the Reichstag fire, however, the government had been using its emergency powers for the arrest and imprisonment of Communist leaders. Shortly before the first session of the new Reichstag this development was brought to a final conclusion. An order was issued for the arrest of the entire Communist delegation.

Of all the actions of the Hitler cabinet, this is the one which may with best justification be described as a *coup d'état*. Certainly the use of emergency powers to prevent duly elected members from attending the sessions of parliament was an act without precedent in the history of the Republic. By Article 37 of the Weimar Constitution it was provided that "no member of the Reichstag or of a state assembly shall during the session, without the consent of the house to which he belongs, be subject to investigation or arrest on account of any punishable offense, unless he is caught in the act, or apprehended not later than the following day." In view of the fact that this was not one of the seven constitutional provisions legitimately to be suspended on the basis of Article 48, the exclusion of Communist deputies might well be interpreted as a violation of parliamentary immunities.

This view of the matter is the one now favored, indeed, by the National Socialists themselves. The legend of a defiant and heroic past is a thing of no small moment to a party which feeds so largely on the hope of a defiant and heroic future. Disturbed by the uninspiring tameness of the actual road to power, prominent jurists of the newer Germany have been at some pains to emphasize every possible element of illegality in the situation then existing. Their purpose has been to show that the Third Reich, for all the benevolent patronage of President Hindenburg, was a strictly revolutionary product. In this attempt no episode has given greater comfort than the exclusion of the Communist deputies.

A criminal is never less reliable, however, than when he starts boasting of his crimes. The truth of the matter is that even this last application of emergency powers was not at the time susceptible to attack as a clear-cut abuse of emergency discretion. Although the framers of the Weimar Constitution intended to prevent governments from inflating their majorities by the arbitrary arrest of opposition deputies, action taken after the election and before the first meeting of a Reichstag would not seem to fall within the scope of a prohibition limited to periods when the legislature is in session. Still further loopholes were to be found in the proviso that arrests might be permitted when the culprit was "caught in the act, or apprehended not later than the following day." Whatever the actual rights of the matter may have been, the exclusion of the Communists cannot be said to have involved any really blatant violation of constitutional forms. The action might perhaps have been reversed on an appeal to the courts, but events were now moving too rapidly for the application of such remedies. At this crucial time there was no authority in Germany legally capable of challenging the discretion of the government. Article 48 had rendered its ultimate disservice to the Weimar Republic.

✓ Encouraged by this success, the National Socialists felt strong enough to take immediate steps for the establishment of the Third Reich. The exclusion of so many opposition deputies naturally served to alter the party situation in the Reichstag. In the revised body the National Socialists were able to account for more than half the total membership. In conjunction with the German Nationalists their strength was now somewhere in the neighborhood of 60 per cent. The new Reichstag was only three days old,

therefore, when Hitler felt that the time had come for the introduction of a drastic enabling act known as the "Law for the Relief of the People and of the Reich." For the sake of comparison with earlier acts of delegation, the provisions of this measure are worth reproducing in full at this point.

National laws may be enacted by the national cabinet as well as in accordance with the procedure established in the Constitution. This applies to the laws referred to in Article 85, paragraph 2 and in Article 87 [These articles provide for parliamentary control of the budget]

The national laws enacted by the national cabinet may deviate from the Constitution in so far as they do not affect the position of the Reichstag and of the Reichsrat. The powers of the president remain unchanged.

The national laws enacted by the national cabinet are to be prepared by the chancellor and published in the *Reichsgesetzblatt*. They come into effect, unless otherwise stipulated, upon the day following publication. Articles 68 to 77 of the Constitution do not apply to laws enacted by the national cabinet. [These articles were the ones governing procedure in the enactment of national legislation]

Treaties of the Reich with foreign states which concern matters of national legislation do not require the consent of the bodies participating in legislation. The national cabinet is empowered to issue all provisions necessary for the execution of such treaties.

This law becomes effective on the day of publication. It becomes invalid on April 1, 1937; it also becomes invalid when the present national cabinet is replaced by another.¹

In line with the usual legalism of National Socialist procedure, this measure was designed with an eye to deriving every possible advantage from earlier constitutional precedents. Some of its provisions were lifted bodily from the Stresemann enabling act. Limitation of the enactment to the lifetime of the existing government is a notable case in point. Superficially the whole proposal seemed hardly more than the repetition of an experiment already carried out with success in an earlier crisis of republican history. The keen edge of opposition could hardly fail to be blunted by an appearance so distinctly reassuring.

Except for the formal method of enactment there was no real point of contact, however, between the Hitler enabling act and earlier instances of parliamentary delegation. Whereas the emergency powers of the Stresemann government had been limited to a maximum period of six months, the National Socialists were asking for four years of legislative authority. The danger of so extensive a deviation from normal legislative procedure was still further enhanced by the circumstance that the government was

¹ *RGBl.*, pt I (1933), p. 141.

now for the first time to be freed from the necessity of reporting its measures to the Reichstag or of revoking them upon demand of that body. In the scope of powers granted and in the elimination of parliamentary restraints, the Hitler enabling act was without precedent under the Weimar Constitution.

From a strictly formal standpoint, moreover, there could be no justification for placing the right of constitutional amendment within the scope of constitutional emergency powers. For the purpose of safeguarding established institutions in the face of temporary stresses, it may sometimes be necessary to vest the executive with legislative power. The grant of amending powers is an entirely different matter. A process of constitutional amendment, as contrasted with the temporary suspension of constitutional rights, is by definition incompatible with the maintenance of an existing constitutional order. Thus the inclusion of arrangements to this effect may be taken as an infallible sign that a given regime is intended to be unconstitutional rather than constitutional in character.

The essential soundness of earlier enabling acts is attested by the fact that, no matter how deeply the government was allowed to become involved in legislative problems, it was never entrusted with the exercise of amending powers. It is true that the Stresemann measure did authorize the cabinet to disregard "fundamental rights guaranteed in the constitution" in the course of its legislative efforts to deal with the problems of inflationary collapse. This broad provision was probably unwise. But even in this case the powers granted were expressly limited to the "financial, economic and social realms," which meant that there could be no excuse under the provisions of the act for the introduction of permanent changes in the political structure of the country. In accordance with a sound appreciation for the limits of constitutional emergency powers, it was generally recognized that the decree powers of the president under Article 48 could offer no substitute for a process of constitutional amendment. A similar restriction was also observed in substance in all the early acts of delegation.

Under the terms of the Hitler act the situation was suddenly changed. By the provisions of this sweeping grant it was proposed that the cabinet be given an absolute right to issue decrees deviating from the constitution, the only proviso being that such decrees

might not affect the position of parliament or president. This offered no guarantee against interference with the power of member states, with the organization and functioning of political parties, with the position of the judiciary, and with other vital elements in the political structure of the country. Within these areas the government was in effect given the right of changing the constitution by decree. This fact alone suffices to remove the Hitler enabling act from the true category of constitutional emergency action.

But in spite of its many unorthodox features the "Law for the Relief of the People and of the Reich" was promptly passed by the German Reichstag. The parliamentary situation then existing was such that this result could be obtained only with the support of constitutionalist members. Even after the expulsion of the Communists, the Social Democrats, Centrists, and other opposition parties still amounted to more than a third of that body. Considering that all these groups had been elected on a program of uncompromising hostility to the policies of the government, their presence ought theoretically to have stood as an invincible bar to the passage of constitutional amendments. In practice it was not even a momentary obstacle to the progress of National Socialism.

A sufficient explanation of this circumstance is to be found in the fact that even before the first session the backbone of opposition in the new Reichstag had been effectively broken by the action of the government. Even though the recent purge had been applied only to Communists, the deputies actually ejected were not by any means the only ones to feel the menace of Article 48. The trouble was that measures available for use against revolutionary Marxists were almost equally applicable to the members of other political groups. Parliamentarians who had not yet been bundled off to concentration camps were in no position to say how long their immunity would last. The treatment of Communists was not so pleasant that men would lightly risk sharing their fate. Under these circumstances even the bitterest enemies of National Socialism might be tempted to show a certain tolerance for the government's legislative program.

✍ The position of the Social Democrats was especially insecure. From the moment of the Reichstag fire strenuous efforts had been made to implicate them in the alleged Communist conspiracy, and even though extreme measures had yet to be taken against them

as a group, the government was at great pains to impress them with the fact that their immunity was enjoyed only on the barest sufferance. When the homeless parliament held its first session, with all the trappings of nationalistic fervor, in the historic Garrison Church at Potsdam, all Social Democratic members were officially excluded from the building. Since the occasion was purely ceremonial in character, this did not entail the denial of any substantive right. The episode could hardly leave room for doubt, however, as to the conditions under which the remaining Marxists would be permitted to participate in subsequent business sessions of the Reichstag.

Opposition under these circumstances could have served no other purpose than to crown the Republic with the halo of a martyr's death. Now that the exclusion of the Communists had opened up a whole new avenue of action, there was nothing to prevent the government from inflating its majority to any desired point. At the first sign of recalcitrance Social Democrat, Centrist, or even German Nationalist deputies could be sent flying in a body from the scene of their labors. Resistance to the demands of Hitler was now a futile, though still perhaps a desirably heroic gesture. A certain proportion of the opposition deputies, mostly Social Democrats, were brave enough to risk death for their convictions. But even more were convinced that the sacrifice was not worth while. When the Hitler enabling act was finally put to the vote on March 23 it was passed by the overwhelming majority of 441 to 94.

This event marks the effective establishment of the Third Reich in Germany. As a matter of legal form it is true that the new absolutism had yet to be placed on a permanent basis. Nothing short of a fresh appeal to the authority of the Reichstag would suffice to extend the enabling act beyond the appointed deadline, April 1, 1937. If the German Nationalists should at any time become dissatisfied with the course of events it was also technically within their competence, through the withdrawal of representatives from the cabinet, to bring the experiment to an even earlier conclusion. But no matter what the flaws of their legal position, the National Socialists were now in effect the masters of German destiny. Unlike the Social Democrats in the time of Stresemann, non-Nazi members of the Hitler cabinet were for all their numerical preponderance at no time in a position to risk a trial of strength

with their associates. Increasing control over the power resources of the state made the National Socialists even more formidable than in the weeks preceding the Reichstag elections. The backing of a strong parliamentary and popular following also made it unlikely that Hitler would ever have to suffer interference from the aged President, who was still legally competent to demand the resignation of chancellors and to call for the election of fresh Reichstags. Under the circumstances then existing, the Third Reich was practically sure to maintain a firm legal basis for at least four years.

The powers contained in the enabling act were so comprehensive, moreover, that the government was not likely to find difficulty in controlling the actions of any parliament which might subsequently assemble. It is true that the cabinet had no right to decree changes in the legal position of the Reichstag or of the Reichsrat. Unfortunately nothing was said about preserving the complicated party structure which lies at the basis of any effective parliamentary system. The National Socialists had taken great care to see that they were left with a free hand in dealing with such matters. Shortly after the passage of the enabling act, this foresight bore fruit in the systematic destruction of all political and other organizations which might conceivably oppose the maintenance of a Third Reich in Germany.

The labor unions were the first to go. On May 2, 1933, the Social Democratic unions were dissolved by order of the government. All their offices, printing establishments, bank accounts and other assets were at the same time confiscated and presented to the National Socialists. Within the next few days Catholic and other labor organizations found it prudent to dissolve voluntarily. The result was to give the official party a monopoly in the field of industrial relations.

This in itself was a severe blow to the prospects of future opposition, for union labor had always been a powerful element in the voting strength of Marxist and to a lesser extent of Catholic parties in Germany. Parallel steps were soon taken, moreover, against the forces of the non-Nazi right. On June 21 the Stahlhelm and other veterans' organizations, long recognized as the nucleus of German Nationalist support, were officially disbanded. The fact that the cabinet itself was still largely made up of members from that same party could not suffice to keep the blow from

falling. By these and other similar measures the National Socialists soon succeeded in making themselves the only political group in Germany with an organized popular following.

These preliminary steps pointed as a natural consequence to the direct prohibition of all political parties. On June 22 the status of outlawry long since imposed upon the Communists was finally extended to the Social Democrats. A few days later the German Nationalists, yielding to a pressure they were no longer able to resist, voluntarily dissolved. The Catholic parties held out longest. On the first day of July all non-religious Catholic organizations were accordingly suppressed by the Prussian government, with the usual arrangements for confiscation of property. Less than a week later the Center party and its more conservative affiliate, the Bavarian People's party, had also surrendered to the inevitable. Within four months of its passage the Hitler enabling act had been used to procure the forcible or voluntary dissolution of all opposition groups. The National Socialists were left as the only legitimate party in Germany.

From this time onward the establishment of legal absolutism was only a matter of form. The final step was taken in the month of November, 1933. At the Reichstag elections then held, candidates of the National Socialist party alone were allowed to appear on the ballot. A parliament chosen on that basis could hardly be expected to offer resistance to the passage of government measures. In a chamber limited to his own well-disciplined supporters Hitler was able to secure unanimous approval for a new and more drastic act of delegation to supplement the already extensive powers at his disposal. Known as the "Law for the Reconstruction of the Reich," this measure not only abolished the last remaining vestiges of German federalism but also gave the cabinet an explicit and unlimited right to "determine new constitutional law."² From a purely legal standpoint the establishment of absolutism ought no doubt to be reckoned from January 30, 1934, the date when this second enabling act was set in operation. But once the government had been recognized as having a right to disregard constitutional limitations in dealing with opposition parties, everything else followed as a consequence. For all practical purposes the passage of the earlier amendment may therefore be taken as the decisive moment in the establishment of the Third Reich.

² *RGBl*, pt I (1934), p 75.

The great significance of these developments, both for Germany and for the rest of the world, is obvious. From the standpoint of constitutional emergency powers the main importance of the story is to be found, however, in the modest but none the less interesting light it throws upon the more general problem of legislative delegation. In comparison with the vast advantages gained from Article 48, the institution of the enabling act can only be described as a minor factor in the triumph of National Socialism. Even without the support of precedents, Hitler would have been able to use the amending process as an effective means of overthrowing the Weimar Constitution. The danger is one against which no constitutional system is ever wholly safe. But the danger in this instance was increased by the circumstance that an apparently similar procedure had been used in earlier crises to the manifest advantage of the Republic. If German constitutional practice had made it possible for the enabling acts of Marx and Stresemann to be passed by ordinary rather than by constituent legislation, no analogy would have been available for the support of subsequent anti-constitutional action. By forcing delegation into the unnecessarily drastic form of constitutional amendment, the founders of the Republic made it possible for yet another form of emergency action to develop into an instrument for the destruction of the Weimar Constitution. In other parts of the world today the supporters of constitutional government have much to learn from this unfortunate example.

CHAPTER XII

THE GENERAL PROBLEM OF CONSTITUTIONAL EMERGENCY POWERS

TO THE STUDENT of present-day politics the history of emergency action under the Weimar Constitution is interesting for the light it throws on the general problem of constitutional emergency powers. With the establishment of the Third Reich in Germany, emergency institutions ceased to be a factor in the life of this particular Republic. A government regularly vested with absolute authority has no need to appeal for special powers in the handling of crisis situations. But even though the problem of constitutional emergency powers is dead in Germany, it is still a living issue in those countries which continue to rely on the methods of constitutional government. To what extent have these states been more successful than their unfortunate sister republic in providing an adequate answer to the problem? In the light of German experience it is hardly too much to say that the very existence of modern constitutionalism may rest upon the answer to this question.

In some ways the results of the German experiment are rather reassuring. They serve, for example, to confirm the wisdom of most constitutional states in refusing to vest the executive with prerogative powers in the realm of emergency legislation. Certainly there can be no doubt that the history of Germany was disastrous in this respect. At best, the use of presidential decrees was only a perilous substitute for enabling acts, and the final result was a progressive deterioration in the position of German parliaments. To some extent these difficulties may be ascribed, of course, to the unprecedented looseness of Article 48. The emergency decree provisions of pre-war Germany may be taken as an illustration of the fact that much can be done to limit the abuses even of legislative prerogatives. But on the whole it is probably safe to say that more is to be lost than to be gained by the adoption even of the most carefully considered arrangements of this sort. The maintenance of parliamentary authority is so vital, and the natural tendency to executive predominance is so great, that there

can be no real security in a system which allows legislative measures to be enacted without the direct sanction of parliament

It is true that a critically threatened country may not always be able to dispense with legislation during those frequent recess periods which interrupt the activity of modern assemblies. If no provision is made under these circumstances for the issuance of emergency decrees, usurpation of authority will be the inevitable consequence. The dangers of such a practice are immediate and obvious.

In order to avoid a situation of this sort it is not by any means necessary, however, to follow Germany in recognizing the propriety of executive legislation. The most interesting line of action yet discovered is to be found in the constitution of Czechoslovakia. By Article 54 of that once effective document express provision was made for the issuance of emergency legislation during parliamentary recesses, but the right of enacting such legislation was vested in a standing committee of parliament rather than in the executive branch of government. This is perhaps the best method yet devised for securing the advantages of emergency legislation without weakening the position of the regular legislative authorities. When other countries feel the urge to deal with the problem, they can do no better than to consider this as a precedent for possible future action.

From the standpoint of legislative delegation, the history of post-war Germany is also calculated to lend encouragement to the supporters of modern constitutional government. Liberal circles have long been suffering from a tendency to regard each and every occasion for the passage of enabling acts as additional proof of "the bankruptcy of parliamentarism." The frequent employment of this device in France has been thought particularly sinister. But the experience of Germany goes to show that this is the safest and potentially one of the most useful weapons in the armory of modern emergency action. As a means of rallying popular support for unpopular measures of financial retrenchment it has proved indispensable in helping countries to solve the recurrent post-war problem of runaway inflation. In the case of Germany the main trouble with the process of delegation lay in the fact that it could not be used freely enough. This circumstance should be taken to heart by the statesmen of other liberal nations.

A good deal of thought could profitably be devoted, however,

to the problem of deriving the greatest possible benefit from this extremely useful device. The episode of the Hitler enabling act would alone be enough to suggest that our present arrangements leave something to be desired. The trouble is that, under the provisions of all modern constitutions, the legislative or amending authorities are free to exercise their own discretion with regard to the terms of each successive act of delegation. In Germany the period selected for the continuance of emergency powers ranged all the way from less than three months to more than four years. Provisions for the establishment of concurrent parliamentary checks were similarly varied in character. During the earlier years of the Republic the results were fairly adequate. A natural desire to maintain their own position served to prevent the members of parliament from granting legislative authority with undue abandon. In a Reichstag controlled by a well-disciplined National Socialist majority there was no legal obstacle, however, to the passage of an enabling act grossly incompatible with the requirements of true constitutional government. So long as there is a possibility of similar developments in other countries, the practice of legislative delegation can never be regarded with full confidence by the friends of constitutional government.

The only way of avoiding this difficulty would be to impose definite constitutional limitations upon the process of delegation. If the forms of constitutional amendment are used for the passage of enabling acts there can be no question of doing anything along these lines; restraints upon the amending process are necessarily ineffective. But if delegation is permitted on a normal legislative basis, as in France, there is no reason why effective checks upon the abuse of that power should not be incorporated within the structure of the constitution itself. One obvious reform would be to limit the maximum duration of any single enabling act to a definitely prescribed period. Three months would probably be adequate for the purpose. The concurrent review of emergency legislation by parliament or by parliamentary committees is yet another matter that might well be considered in this connection. A very little development along these lines is all that would be needed to make legislative delegation a satisfactory instrument of modern crisis government.

Unfortunately the picture becomes much less promising as soon as we turn to the parallel and in many ways far more important

problem of non-legislative action. For all their unhappy effect in the later phases of civil violence, the provisions of Article 48 were undoubtedly able on many occasions to render valuable service to the Republic. Failure to provide adequate checks upon the abuse of those powers made them almost equally effective, on the other hand, as a weapon for the destruction of that same constitutional system. In this respect the analogy between Germany and other liberal states is much too close for comfort.

By a curious but instructive coincidence all the more critical weaknesses of present-day emergency arrangements are exemplified in the history of this single unfortunate country. In one form or another all the more important constitutional states of our time rely either on the state of siege or on martial rule for the satisfaction of their emergency requirements. Now the characteristic defect of the state of siege consists in its exclusive reliance on partisan legislatures for the prevention of possible abuses. The folly of relying on a party majority to check the activities of its own leaders was never more clearly demonstrated than in the ultimate crisis of the German Republic, when the presence of a National Socialist majority made it possible for Hitler to proceed without legal hindrance to the destruction of the Republic. In England and America, on the other hand, where the power of the judiciary serves to maintain a relatively independent check upon the abuse of emergency powers, an even more serious danger arises out of the fact that the control thus exercised is negative rather than positive in character. Unlike the state of siege, which cannot ordinarily be inaugurated without positive legislative authority, the law of martial rule can be inaugurated on his own responsibility by the executive himself, the only restraint upon abusive action lying in the possibility of future rejection by a competent court of law. The danger implicit in such a situation was also fully illustrated in the history of Germany. Because of the fact that the powers of the Reichstag in relation to Article 48 were limited to a mere right of rejection, Chancellor Hitler was able at a crucial period to gain complete freedom of emergency action through the simple expedient of dissolving the Reichstag. If the founders of the Weimar Constitution had started out with that very thing in mind, they could hardly have provided a more exhaustive summary of the dangers implicit in both the major institutions of modern emergency government.

For all their potential value, therefore, it is probable that many of our present emergency institutions will have in the end to be entered on the debit rather than on the credit side of contemporary parliamentarism. It is true that all the weaknesses of Article 48 are seldom if ever to be found united in the arrangements of any other single country. It is also true that the state of siege and martial rule have both existed for some time without giving rise to serious difficulties. But unfortunately the same thing could just as well have been said of Germany at a corresponding stage in its development. During most of the lifetime of the Weimar Republic the provisions of Article 48 were hardly less successful, on the non-legislative side, than the comparable arrangements of other liberal states. Although minor breakdowns had already taken place on occasion, there was no time prior at least to the chancellorship of von Papen when the balance of advantage from the use of emergency powers did not lie on the side of constitutional government. The dangerous potentialities of the situation were not fully realized until the provisions of Article 48 had been subjected to the strain of a National Socialist government. In the face of comparable stresses there is no real reason to believe that the arrangements of other countries would not be equally subject to breakdown.

As a matter of fact, the situation in most constitutional states is even now similar to that of the early German Republic. Just as in the case of Article 48, there has never been a time when the powers of martial rule or the state of siege have not been abused to a certain extent. During the past few years in the United States, for example, there have been many flagrant attempts to use emergency powers for the accomplishment of illegal party ends. The recent use of martial rule by the governor of Rhode Island for the purpose of closing down a race track profitably and legally operated by one of his political opponents is an interesting case in point.¹ The late Huey Long's resort to this same weapon in setting aside the hostile city government of New Orleans is a more serious instance of the same general character. In their ultimate tendency, if not in their immediate consequences, both episodes are almost as dangerous as Papen's celebrated move against the government of Prussia, already described as the most flagrant example of con-

¹ Admirably summarized in an extended pamphlet by Zechariah Chafee, *State House versus Pent House* (Providence, 1937).

stitutional abuse in pre-Hitler Germany. Neither of the offending governors has been forced to give a legal accounting for his acts. In the United States of today no less clearly than in the earlier days of the Weimar Republic, a thoughtful observer will find that the lines of future constitutional breakdown are already clearly drawn.

The only way of remedying this unfortunate situation would be to devise more effective safeguards against the abuse of emergency powers. It is true that a reduction in the scope of those powers might seem at first glance to offer an even more satisfactory method of approaching the problem; when a given institution has been found liable to abuse the easiest thing to do is to abolish it forthwith. But the unfortunate fact is that the need for emergency powers is implicit in the very nature of constitutional government. The need is directly proportional, indeed, to the effectiveness of legal checks in controlling the activities of statesmen. If a really elaborate structure is to achieve maximum stability in the face of temporary emergencies, drastic emergency powers will almost certainly prove indispensable in the long run. The real problem is not so much to curtail the use as to limit the abuse of those powers.

Much could be done in this respect by combining the best features of the institutions already existing in civil and common law countries respectively. If it were provided, as in the state of siege, that emergency powers should be exercised only by authority of the legislature, the advantages of a positive check would at least be partially insured. If the courts of law were at the same time empowered, as in the case of martial rule, to review the actual need for all emergency measures taken on this basis, the dangers of partisan abuse in parliament would be limited by the supervision of a more impartial body. As agencies for the control of executive discretion, the legislature and the judiciary both possess elements of peculiar and to some extent of complementary strength. Perhaps the best way of insuring adequate results is to make all emergency actions subject to their joint authority.

In many countries the adoption of such a reform would involve drastic, not to say impossible, changes of established constitutional practice. The judicial review of executive measures is so foreign to the tradition of most Continental countries that it might well prove, for example, to be impracticable as a check upon the state

of siege in France. In England the tradition of parliamentary supremacy gives rise to similar difficulties in any case where the use of emergency powers is based on the authority of a specific legislative act. The habit of these and other modern states is to rely primarily upon the legislature for the control of governmental action. Under these circumstances the only hope for an improvement in emergency institutions lies in the adoption of measures which will serve at least to increase the effectiveness of parliamentary oversight.

In the United States, on the other hand, there is nothing at all unrealistic about the idea of imposing concurrent legislative and judicial checks upon the emergency powers of state and federal executives. Something along these lines seems already to have been accomplished, indeed, in connection with the problem of legislative delegation. In American no less than in German constitutional law it is recognized as a general rule that the forms of constitutional amendment are required as a basis for the passage even of a temporary enabling act. The need for a less cumbersome procedure in time of crisis is so very pressing, however, that the courts have often been tempted to modify the theory in practice. During the World War, for example, the Overmann Act gave the president a right to issue all the detailed regulations necessary to put into effect the general principle of an army draft. Although this was clearly a grant of functions normally exercised by the American legislature, which is notable for the detailed particularity of its enactments, the constitutionality of the act was upheld by the Supreme Court. This was reconciled with the formal prohibition upon legislative delegation by the simple and entirely natural process of asserting that, whenever a legislature has done all that can "reasonably" be expected in laying down the general principles of action, any further rule-making powers that may be conferred upon the executive are to be regarded as administrative rather than legislative in character. Since the amount of legislation reasonably possible varies with the conditions of any given situation, it is possible for the Supreme Court in its discretion to sanction a good deal of executive legislation on this basis in a time of emergency.² The result is to place legislative delegation, to the limited extent to which that device is still available in the United

² On this point see the anonymous note entitled "Some Legal Aspects of the National Industrial Recovery Act," *Harvard Law Review*, vol. XLVII, p. 85.

States, under the joint supervision of judicial and Congressional authority. A similar degree of caution might also be applied with profit to other emergency institutions

Certainly few questions of contemporary government are more difficult than the problem of providing an adequate basis for constitutional emergency powers. Any systematic attempt to deal with it has the effect of uncovering glaring weaknesses in the structure of modern constitutionalism. If the judiciary is to serve as a check upon the discretion of legislative majorities it is necessary, for example, that the judicial personnel should be beyond any powers of immediate control on the part of those same majorities. In spite of its actual failure, President Roosevelt's recent court-packing plan shows that even the Supreme Court of the United States, certainly the most powerful of all judicial bodies, is not beyond the threat of such interference. The position of other judiciaries is even less secure. In this connection it is perhaps worth observing that the previously mentioned experiment with martial rule in Rhode Island was shortly preceded by the dismissal of the entire Supreme Court of that state, an act permissible under the state constitution by simple majority vote of the legislature. No constitutional system can guarantee the ultimate maintenance of judicial checks unless it provides rigid specifications with regard to the number, tenure, and functions of judges. This example alone is enough to show how widespread are the ramifications of any attempt to solve the problem of constitutional emergency powers.

Under the existing circumstances it is not likely that any serious effort will be made in this direction. In the case of Germany we have already had occasion to observe that the provisions of Article 48, for all their inadequacy and in the face of explicit promises to the contrary, were never actually subjected to legislative elaboration. The trouble was that emergency powers were never a living issue except in periods of emergency. Under normal circumstances the very idea of a departure from normal constitutional methods was so remote, and at the same time so disquieting, that practical politicians had nothing to gain by bringing the matter up. Under crisis conditions, on the other hand, the immediate desire for efficiency automatically tended to obscure the need for more effective restraints upon the abuse of emergency powers. The result in Germany was to prevent anything from being done

to remedy a potentially disastrous situation. Similar forces of inertia elsewhere are likely to produce similar results.

From the standpoint of constitutional government this conclusion can hardly be other than disquieting. It is true that legal considerations of this sort are not likely in the long run to be the sole or even the most important determinant of future political developments. Many a revolution in the past has succeeded in open defiance of established constitutional practice. But, with all its limitations, respect for the forms of law has none the less to be regarded as a substantial power resource. Under the increasingly troubled conditions of our own time the supporters of parliamentary democracy have nothing to lose and everything to gain by keeping that force firmly lodged on their own side of the fence.

If circumstances are such that the enemies of constitutionalism can gain their ends only through a course of flatly illegal action, their task will be comparatively difficult. The failure of Hitler in the period of civil insurrection is an interesting case in point. But if the provisions of the law are such that constitutional government can be overthrown by legal or quasi-legal means, the problem of revolution is immensely simplified.

During the last years of the German Republic it is entirely possible, for example, that the supporters of the Weimar Constitution could have prevailed in an actual show of force. Resistance would have been especially promising at the time when the Braun-Severing government was removed from the conduct of affairs in Prussia. Through respect for the legitimate powers of Article 48, defenders of the established order were actually forced, however, to retreat from position to position without putting up any really concentrated opposition. In the absence of clearly illegal action on the part of extremist governments, devotion to the constitution served to inhibit rather than to stimulate the efforts of its supporters. The result was to give the decision to Hitler practically by default.

This is the real danger of modern emergency arrangements. By obscuring the difference between revolutionary and non-revolutionary action, inadequate emergency arrangements prevent the force of constitutional government from being brought to an effective focus in time of need. For the same reasons that have been shown to operate in the case of the Weimar Constitution,

the seeds of self-destruction are present in other constitutional states. Potentially, the resources of constitutional emergency powers are capable of rendering great service. As things now stand, however, they can only be reckoned as an element of weakness in modern constitutional government.

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BIBLIOGRAPHICAL NOTE

ABBREVIATIONS

RGBl.

Reichsgesetzblatt

Sten Ber.

*Stenographische Berichte, Verhandlungen
des Reichstags*

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