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Loyal Opposition in a Modern Democracy

*George Anastaplo**

So spoke Mardonius and stopped, having put a smooth coating on [King] Xerxes' opinion [that the Persians should invade Greece]. All the rest of the Persians held their tongues and did not venture to declare a judgment opposite to that which was in discussion. But then Artabanus, the son of Hystaspes and Xerxes' uncle—and who trusted in his kinship—spoke up: “My lord, when no opposing opinions are presented, it is impossible to choose the better, but one must accept what is proposed. When such opposites are stated, it is as it is with gold, the purity of which one cannot judge in itself, but only if you rub it alongside other gold on the touchstone and see the difference”

— Herodotus, *History*, VII, 16

I.

January 20, 2001 marked the inauguration of a new President of the United States of America. It also celebrated a constitutional way of life which is critical to the workings and prospects of democracy in the modern world. This was a peaceful transfer of power between political parties that is no longer seen as remarkable in the United States but that was extraordinary when it first occurred in 1801.

A change of President in the United States sometimes means only a change of personnel, not of political party, in the Executive Branch of the Government. This could be seen, for example, when George H.W. Bush succeeded Ronald Reagan in 1989. But at other times, a change of political party is seen as well, as has happened (since the Second World War) in 1953, 1961, 1969, 1977, 1981, 1993, and 2001. The most dramatic form of the changing of the guard, therefore, finds the

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Loyal Opposition actually taking over. Those who have exercised the powers of the Executive then become the Loyal Opposition, albeit an opposition that could at once begin to work toward its eventual return to power. It is no surprise, therefore, when the party in opposition begins questioning the new President's programs shortly after he is inaugurated, if not even before.

Loyal Opposition in a modern democracy usually takes the form of competing, yet somehow cooperating, political parties. The loyal opposition to those in power both depends upon and contributes to other institutions, such as a free press and the economic organization of the community. The possibility of loyal opposition helps to insure what the Declaration of Independence called "the Consent of the Governed," which can be considered the foundation not only of democracy but also of all just regimes. At the very least, those who exercise power are obliged to confront the opinions and the organized political efforts of all significant elements in the country. An acknowledged constitutional system provides the soil in which the institution of the Loyal Opposition is rooted. Among the problems posed by a constitutional system are the difficulty of accommodating an opposition which criticizes the party in power and offers its own programs as alternatives and the difficulty of managing a peaceful transfer of power between two political parties.

Those in the United States who do take over the Executive have not been merely in opposition up to that point. Typically, they have been serving either in the national legislature or in State governments. Although they may have been excluded from the national executive up to that point, they may themselves have been in control of the national legislature or in control of one or more branches of State governments—with loyal oppositions of their own to deal with. A parliamentary system is quite different from a presidential system in that the executive usually depends for his authority upon the support of the majority of the legislature.

However much the American Presidency is dramatized these days, the national executive can even find itself serving, in effect, as a loyal opposition: The President may be obliged to try to do what he can to put a brake on the efforts and policies of the national legislature, especially when that legislature is controlled by the party that also controls important State governments. Furthermore, it can be misleading to consider the Republicans to have *returned* to power in 2001 with the inauguration of a Chief Executive, however important the President is in conducting the foreign policy of the country and in proposing measures for Congress to consider. Rather, the Republicans in 2001 extended to the Executive the considerable power they already had in Congress.

Loyal Opposition may be built into any system, such as that in the United States, which has an effective separation of powers. Each of the three branches of government—legislative, executive, and judicial—has a tenure in office and an array of powers that are largely independent of the other two branches. Separation of powers is reinforced when powers are distributed, as in the United States, not only among the branches of the national government but also between the national and State governments. In addition, there can be divisions within both the legislative and executive branches. That is, there may be within the legislative branch not only a vigorous opposition party helping to shape legislation but also critical divisions in the majority party, especially when, as in the United States, individual members of Congress are largely independent of any national political party. Also, there may be within the executive branch not only a permanent bureaucracy for the President to contend with but also a significant difference among his political supporters.

The United States Constitution, for example, originally provided that the Vice President would be the person who secured the second highest number of electors for the Presidency. This meant, in effect, that the President would likely have as his Vice President someone who had been an electoral opponent. Thus, John Adams's Vice President in 1797 was his political rival, Thomas Jefferson, who would defeat him in the following Presidential election. This particular source of divisiveness within the Executive was changed in 1804 by the Twelfth Amendment, which provides for separate votes by the electors for the President and Vice President, thereby permitting the coupling of candidates for these two offices. This reflects and reinforces the development of political parties in the United States. It is now virtually assured that the President and the Vice President, however incompatible they may be personally, will come from the same political party.

II.

Americans are accustomed to the possibility that the Loyal Opposition of one period may serve as the leaders of the next. The great precedent for this sort of transformation in the United States is provided by the movement in 1801 from the Presidency of John Adams to that of Thomas Jefferson—from a Federalist Party Administration to a Republican Party Administration. This is often referred to as the first significant instance in modern times of a peaceful transfer of power from one political party to another, at least in a country as large as the United States.

That was in dramatic contrast to the bloody turmoil that the French Revolution had created during the preceding decade. President Jefferson, in his First Inaugural Address (of 1801), after taking note of the vigorous election campaign to which the country had just been subjected, asked for unity:

But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans; we are all Federalists. If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it.

Earlier in this 1801 Address, the new President had urged his fellow citizens to bear in mind this “sacred principle”: “[T]hat, though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect and to violate which would be oppressive.”

Sixty years later, the institution of a Loyal Opposition working within a constitutional framework was severely tested in the United States when the Southern States attempted to secede from the Union upon the election of Abraham Lincoln to the Presidency. This began the Civil War in 1861. Even so, some elements of the constitutional precedent established in 1801 were already well entrenched. Thus, although the country was still very much at war, President Lincoln stood for reelection in 1864 and was prepared to turn over the presidency to his opponents if defeated—to opponents who would probably have abandoned his war policies.

President Lincoln, in his July 4, 1861 message to Congress, at a time of growing rebellion in the South, called upon his people to

demonstrate to the world that those who can fairly carry an election, can also suppress a rebellion—that ballots are the rightful, and peaceful, successors of bullets; and that when ballots have fairly, and constitutionally, decided, there can be no successful appeal back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections.

Earlier that year, in his own First Inaugural Address, President Lincoln spelled out what he considered to be at the core of the secession to which the Southern States had resorted in response to Lincoln’s election:

[T]he central idea of secession, is the essence of anarchy. A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whatever rejects it, does, of necessity, fly to anarchy or to despotism.

Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left.

The majority principle argued for here by President Lincoln means that there is likely to be a minority that has a respected place in the system, a minority that can endeavor to promote and build upon “deliberate changes of popular opinions and sentiment.” Such a minority, working within the constitutional system, is what is usually known as the Loyal Opposition.

III.

The term “Loyal Opposition” goes back, for modern constitutionalists, to British experience. The English government came to be understood as made up of those Ministers who enjoy the confidence of the Monarch, a confidence that Ministers now earn by the support they secure in the House of Commons. Or, as Walter Bagehot, a distinguished constitutional scholar, put it, “It has been said that England invented the phrase, ‘Her [or, His] Majesty’s Opposition’; that it was the first government which made a criticism of administration as much a part of the polity as administration itself. This critical opposition is the consequence of cabinet government.”

Those members of the House of Commons who do not support the government are, in the usual situation, the Loyal Opposition. Their opposition is not to the Monarch, but rather to the Government (or its policies), a government that they are prepared to replace at any time with one of their own.

The rule of the English Parliament (the “mother of Parliaments”) was established in 1688, permanently eclipsing the power of the Monarch. It took another century before the modern institution of the Loyal Opposition was established. Winston Churchill described late eighteenth-century developments in Britain:

It was an old tradition that politicians not in power need not bother to attend Parliament, but should retire to their country estates and there await the return to royal favour and a redistribution of the sweets of office. Individualists of different schools, such as Shelbourne and Henry Fox, consistently opposed [Edmund] Burke’s efforts to organise them into a party. “You think,” Henry Fox had written to [Lord] Rockingham, “you can but serve the country by continuing a fruitless Opposition. I think it impossible to serve it at all except by coming into office.”

Burke’s efforts included promotion of a consistent program to be advocated in Opposition and realized in office.

The preponderance of governmental powers in Great Britain is exercised or regulated, directly or indirectly, by Parliament. It is, therefore, clearer in that country than in the United States precisely where the Loyal Opposition is, for the most part, located. It is found in the House of Commons, reinforced heretofore by its milder counterpart in the House of Lords. It is the House of Commons which, in principle, authorizes and empowers the government of the day, with the Loyal Opposition prepared to provide an alternative government whenever the House of Commons is prepared to support it. (This change usually comes about after a general election has changed party alignments in the House of Commons.)

It has come to be understood, in Great Britain and elsewhere, that things go better for all political parties when there *is* an opposition to keep the government on its toes. A victorious Prime Minister could even observe, after the opposing party seemed to fall apart in the 1900 election, that "the dual character of the English parties is for the moment destroyed." He then expressed the hope "that our opponents will get into fighting trim before long," because "it is bad for us, and it is bad for the country, if they continue to occupy a position so little conspicuous and effective as that which they occupy at the present time." That a formidable adversary is necessary for the most effective exercise of power is recognized in an institution as "authoritarian" as the Roman Catholic Church (with its institutionalized debates during the canonization process).

The institution of the Loyal Opposition usually depends upon a system of elections and limited terms of office in the elected branches of the government. Such a system offers recognized opportunities for the challengers of those in power. It is not considered unpatriotic, or in any way disrespectful, to attempt to replace those who happen to hold office for the moment. Meaningful elections depend, at least in modern circumstances, upon a wide-ranging freedom of speech, not only in the legislative body itself, but also in the country at large. An elementary requirement here is that the opponents to the government be considered entitled to have access to adequate secretarial and other material resources and to the major organs of communication.

This legitimation of opposition has as an important corollary a firm limitation upon prosecutions for sedition and treason. Opponents of the Government tend to be at risk unless there is a stringent limitation placed upon the scope of such prosecutions. Edmund Burke, the English statesman, warned in 1777 against "confounding the unhappiness of civil dissension with the crime of treason." A decade later, the rule was laid down in the American Constitution that "Treason

against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." A few years later, the First Amendment to the Constitution confirmed that Congress could make no law "abridging the freedom of speech, or of the press."

IV.

The appropriate forms of, and limitations upon, opposition to rulers have always been concerns of political men and women. At times, the dangers facing the country incline citizens to forget their differences, at least for the time being, as they prepare to deal with the enemy.

This may be seen, for example, in the way that the Republican Party fell in line behind the leadership of Franklin D. Roosevelt once the Second World War began. This is reflected in the front-page editorial, the day after the attack in 1941 on Pearl Harbor, that was published by the *Chicago Tribune*, a newspaper which had been up to that time a bitter critic of the Democratic Administration in Washington:

[T]he thing that we all feared, that so many of us have worked with all our hearts to avert, has happened. That is all that counts. It has happened. America faces war thru no volition of any American.

Recriminations are useless and we doubt that they will be indulged in. Certainly not by us. All that matters today is that we are in the war and the nation must face that simple fact. All of us, from this day forth, have only one task. That is to strike with all our might to protect and preserve the American freedom that we all hold dear.

Similar sentiments could be heard after the 2001 assaults on the World Trade Center and the Pentagon. But even in such ominous circumstances, the jailing of *political* opponents in the United States is questionable. When it has happened, it has generally come to be recognized as a mistake not only because of the hardships suffered by the jailed critics but also because of the useful criticism that the country was denied.

V.

It does take experience and discipline on the part of a people not to regard conscientious criticism as really subversive. There are, moreover, times and places when any opposition (not just armed opposition) to the Government is regarded as disloyal, if not even as an act of treason. But Harry Kalven, Jr., an American constitutional scholar, has argued,

Seditious libel is . . . the hallmark of closed societies throughout the world. Under it criticism of government is viewed as defamation and

punished as a crime. The treatment of such speech as criminal is based on an accurate perception of the dangers in it; it is likely to undermine confidence in government policies and in the official incumbents. But political freedom ends when government can use its powers and its courts to silence its critics. In my view, the presence or absence in the law of the concept of seditious libel defines the society. A society may or may not treat obscenity or contempt by publication as legal offenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society no matter what its other characteristics.

Central to the way that the Loyal Opposition conducts itself is the understanding that the country or regime is more worthy of allegiance than any of its parties or personalities. Certain principles and ends are presupposed, standards that are far more important than the ambitions or interests of the contenders. Ambition is not ruled out, but it should be an ambition both to excel within the regime and to be recognized as an exemplary citizen. The Loyal Opposition wants to supply the leadership for the country, a leadership that in turn will be opposed according to the same rules.

The Government is thus put on notice that there *are* others equipped and prepared to replace it. In those times and places where the institution of Loyal Opposition is recognized, deliberation and choice replace accident and force in the making and unmaking of constitutions and governments.

If a government does not conduct itself pursuant to the constitutional processes and expectations of the regime, it is vulnerable. In the extreme case there can be recourse by the opposition to the sacred right of revolution. The revolutionary citizen makes an appeal, in these circumstances, to the principles of the regime. That is, he presents himself as loyal to the regime in opposing, by force if necessary, the usurper. A limited form of such opposition may be seen in the recourse to civil disobedience. The institution of the Loyal Opposition, with its dependence upon genuine elections and freedom of speech, tends to make recourse to the right of revolution unnecessary.

VI.

In order to make this kind of system work routinely (not just in response to invasion or other grave national crisis), it takes people of an appropriate character and, related to that, people with salutary experiences. The people's experiences include practice in dealing with recognized adversaries in an organized manner.

The most obvious experience of this character comes from everyday involvement in associations where parliamentary rules, of one kind or another, are relied upon. There are in the United States, for example, innumerable organizations that operate according to parliamentary rules that are in turn adapted from those used in Congress. Such rules are designed to foster useful debate and to maintain good order, permitting the majority to work its will in due course. They are related intimately to the institution of freedom of speech.

The adversary system which dominates judicial proceedings in the United States accustoms Americans to contend with each other in a disciplined fashion. An effort is made by courts to get at the truth in the matter at issue, with a view to doing justice. This is not unlike what physical scientists do in attempting to discover the truth about their subjects.

Perhaps the earliest training in disciplined competition occurs in athletic contests. Both participants and partisan spectators get used to both winning and losing; they may even learn that winning cannot be everything, and that how one wins (as well as how one loses) can very much matter.

A different, and perhaps the most extensive, form of instructive competition in the United States may be seen in the activities of multitudes in the economy of the country. Efforts to establish a market economy in various parts of the world testify to the considerable instruction and experience upon which such an economy relies.

All of these pursuits operate according to accepted rules. People learn that success and satisfaction depend, more often than not, upon sensible choices and hard work. They also learn that those who slack off, lose confidence, or misjudge a situation are apt to be replaced by some of their competitors.

Richard M. Nixon once observed, "There is one thing solid and fundamental in politics: the law of change. What's up today is down tomorrow." This is, in part, because the Loyal Opposition of the moment may itself not be of one mind except with respect to opposing the Government. After all, the Opposition is often a coalition of divergent interests, which coalition in turn must deal, when in power, not only with those it has replaced but also with the divisions within its own ranks.

VII.

We return to the character of the people that it takes for a constitutional system to work properly. The people make possible and shape a regime, and are in turn shaped by that regime.

The British Colonies in North America, for example, were shaped well before the Revolution of 1776 by considerable experience in self-government. The regime established by the Constitution of 1787 has helped the American people become practiced in the way that public affairs should be conducted. This became so much, and so obviously so, that Walter Bagehot could observe that “the men of Massachusetts” could “*work* any constitution.”

The Loyal Opposition in a democracy both reflects the opinion of the people at large and is aware of what should be done if it should come to power. Both the Government and its Loyal Opposition continually appeal to the people. This, it has been suggested, means an important role for the Press. The Press not only must inform the people but also must help shape the people so that they can make proper use of what they learn from the Press. Thus the Press, which can itself be spoken of sometimes as a branch of the Loyal Opposition, must not be limited in its nay-saying to what the Government of the day is saying and doing. Since the people are, in these circumstances, the ultimate sovereign, a responsible press must make efforts at times to oppose and reform public opinion, something that can at times be difficult, if not even dangerous, to do.

It has been assumed in this essay on the Loyal Opposition in a democracy that the people, directly or indirectly, select the government. But however it is selected, a sensible government takes advantage of opportunities to determine what is going on—and, especially, what the people are saying and what they will put up with.

It should not be forgotten, in any event, that sound arguments have been made from antiquity to the effect that the best rulers do not truly want to rule, that they assume the burdens of office more because of a sense of duty than because of any desire to exercise power. This approach does seem to be a lot to hope for—but such a teaching does put an electorate on notice about the risks of excessive ambition.

A Loyal Opposition should be welcomed by those who do happen to be in power for the time being, especially if they are reminded that it is far more important that there be good rule than that there be particular rulers. Useful restraints upon mere ambition can also be supplied by well-established religious faiths in a community, however troublesome politically such faiths can be when their adherents are permitted to

become as fanatical in their deeds as they may happen to be in their language and opinions.

VIII.

The political life of a community cannot be all-consuming if there is to be an orderly movement in and out of office. Cutthroat politics are more apt to be avoided if it is not a life-and-death matter whether one is in office or has access to patronage.

Those who are out of office should be assured that they can still use their talents and energies to live decently and securely. Otherwise, the prospect of losing can be shattering—and desperate measures are apt to be resorted to in order to avoid that fate. There must be, that is, competing centers of power, prestige, and wealth somewhat independent of government control.

It remains to be seen whether a stable democracy, on a large scale, is possible in modern times without a market economy. This bears upon whether an opposition press can be reliably financed, whether there are refuges for the losers and disfavored outside of government, and whether power can be distributed efficiently throughout the community.

This is not to deny that a market economy can itself be ruthless in its operations. But if adequate “safety nets” are provided for the unfortunate, there can be more of a sense of self-determination and opportunities being available and less of a sense of oppression and exploitation being suffered than there are apt to be in those systems where allocation of resources and privileges is made by the authorities.

In a free political order and a market economy, ambition is apt to promote energy and application, moving the talented far more and far longer than any bureaucracy is either inclined or equipped to do. In looking out for oneself in accordance with the generally accepted rules of the game, one is expected to make the contribution one is equipped and permitted to make in the community.

IX.

Ambition *is* needed if there is to be a healthy political life. That is, people are needed who want to distinguish themselves in serving the community. Yet ambition can also be corrosive, especially when there are old grievances to be avenged or exploited. We have seen in the Balkans in recent years, and are seeing in the Middle East today, what can happen when no ethnic group in a multi-ethnic political association can contemplate with equanimity the prospect of being part of the Loyal Opposition.

The ancient Athenians had, instead of the humane tradition of Loyal Opposition, the arbitrary institution of *ostracism* to fall back upon when it was feared that anyone was becoming too big for the regime to be able to handle with safety. Thus, a prominent man could simply be banished for a term of years by the vote of his fellow citizens, even though there had been neither an indictment nor a trial. In the Western World, the classic case to be avoided of ambition running wild has been the emergence of Caesarism in Republican Rome. (This was anticipated by Thucydides' Alcibiades.)

Rome's remarkable successes abroad contributed to the subversion of the Republic at home, especially as its leading men so distinguished themselves in their military commands as to secure the allegiance of armies. This was a far cry from the precedent of a Cincinnatus who could answer his country's call in a great emergency and then return to his modest farm once he had done what had been expected of him. Cincinnatus provided a model for men such as George Washington in the United States.

At the heart, then, of a vital spirit of Loyal Opposition is the settled opinion in the community that there are things more important than one's own interests, or even the interests of one's party. It is a dedication to established common objectives that reminds political opponents that what unites them should be considered far more significant, and more enduring, than what happens to divide them for the moment.