An excellent folder.
We must use the argument to
justify Parliament acting in the national interest
to patriate, for example.

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PRIVY COUNCIL OFFICE

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BUREAU DU CONSEIL PRIVE

SECRET

September 19, 1980

MEMORANDUM FOR ~~MR. PITFIELD~~

cc.: Mr. R. Rabinovitch

Prime Minister
to see
PMP
22.9.80.

Polarization Problem

The attached paper is a first crack at exploring the middle ground problem that you set out in your meeting with Bob and me.

David

David Ablett

DA/or
Attach.

SECRET

September 18, 1980

POLARIZATION PROBLEM

Purpose

This paper is a preliminary exploration of some lines of response to the problem posed by the polarization of views into a choice between whether the country is to be governed in a unitary or a confederal way.

Introduction

The concern the government must have at this point is not so much how the country is governed but the concept by which the country is seen to be governed.

If the Prime Minister's governing concept is seen to be republican and unitary, then the measures the government takes -- whether on the constitution, on energy, fiscal arrangements or whatever -- may be resisted because they are seen to lead in a unitary and republican way. That is, they will be assailed, not on their merits or lack thereof, but because they break with our traditions, "the Canadian way".

Mr. Axworthy's comments on Tuesday with regard to Premier Lyon's post-First Ministers' Conference performance -- his claim to have stood at the barricades against the republican and unitary state -- would indicate this problem is of more than theoretical importance in building, shaping and maintaining the national consensus for the government's constitutional measures.

The danger to the government's position lies not so much in the claims of Mr. Lyon, supported by Messrs. Lévesque, Peckford, Bennett, etc., as it lies in the fact that these claims open the way for the kind of "middle way" claim that Mr. Blakeney adroitly made at the end of the First Ministers' Conference.

This paper is primarily concerned with the Blakeney tack and the need to demonstrate that his claim to the middle way represents the true break with our traditions of parliamentary federalism.

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In doing so, it would seem important to recognize that while Premier Blakeney cannot command the resources of a national government his more limited forces fight their case from better strategic ground.

and all Premiers agreed, in their approach on Friday morning

That is, Premier Lévesque, with whom Premier Peckford is inclined to agree, is arguing from one extreme -- that of 10 unitary states acting in a confederal way -- and is casting the Prime Minister as being centralist, unitary, etc.

Some premiers, such as Bennett and Lougheed tend -- or are seen to tend -- to the Lévesque view. Others such as Davis and, to a lesser degree, Hatfield depending on the issue, are seen to tend more to the federal view.

Premier Blakeney laid claim to being in the middle and made some yards doing so. It sounds so reasonable.

Where Premier Blakeney has arguments to the left of him, arguments to the right, the federal government is not so placed. Its basic problem is that nobody is arguing for a unitary, republican, centralized state. It is extremely difficult to be seen to be in the middle of an argument when there is nobody on one side.

That, realistically, is where we are and it is not the best ground.

The claim to the middle

To say, as Premier Blakeney did, that the national interest is not determined in Parliament or by the provinces in concert but by a double majority -- somewhere in between -- is, when everything is stripped away, a fundamental challenge to our institutions of parliamentary federalism.

It may not be a republican conception but it is strikingly American in that it finds its parallel in the U.S. congressional institution known as the House-Senate conference in which the leaders of the house of the people and the house of the states must come to agreement on exact wording, for any bill.

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It is also strikingly similar to the Oligarchs of Plato's Greece -- 11 men gathering to negotiate away, if need be, the will of the parliaments and legislatures they represent in order to find common ground, assured because of the majorities they control (in most cases) that what they decide will be approved.

The similarities between Premier Blakeney's conception of the middle way and American congressional institutions aside, there is a basic difference. U.S. congressional institutions have consistently produced results. The Canadian experience with the "conference" mechanism of determining the national interest, executive federalism, has not.

The reason it produces results there but not here is that the conference is the logical, inevitable and completely consistent consequence of that fundamental concept underpinning the American congressional system, the separation of powers.

The separation of powers does not mean that one element of the system does one thing and another element another. It means that each element has power over everything.

Our system of parliamentary federalism is founded on a quite different concept flowing from our own sense of the value of parliamentary forms bequeathed us by the British, the concept of the division of powers between the federal and provincial levels.

In this concept, the very essence of parliamentary federalism, neither the federal nor provincial governments has power over everything. Each, to the contrary, has the freedom to act within the limits that have been agreed.

We have, quite the reverse of the American system where power over everything is placed everywhere, placed each power the society as a totality needs in one place or another.

This concept, that powers are not shared by governments but distributed or divided among them, is what gives us a system of parliamentary federalism and avoids our becoming -- or even tending toward as the American system has tended -- a unitary or a republican system. Parliaments, whether federal or provincial, cannot at the same time both share power and be supreme, and, thus, responsible and accountable.

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pri suppose that the Can. Senate was not in reality meant to represent the provinces. In fact it may have been meant to represent regions, as distinct from provinces.

Inevitably, in a system of distributed power, there are conflicts between those exercising power to its limit in a region and those exercising power to its limit for the nation.

On many issues, such conflicts can be resolved by the courts.

On others, our Fathers of Confederation -- and the British Parliament -- conceived a system in which the nation must ultimately prevail over the region or, as they put it, the "sectional" interest. This is the essence of disallowance, the declaratory power, etc.

The placing of these powers with the national government accountable and responsible to the national parliament is completely consistent with our system of parliamentary federalism. That is, these powers have been placed at one level of government, not the other. They might as well have been placed at the other, but they were not. And they were not shared.

In that sense, our parliamentary federalist system is as consistent with itself in all its elements as the American congressional federalist system is with itself.

Finally, it is important to note that power sharing as a central process means that conflict is a central characteristic and the ultimate goal is conflict resolution.

Our system of distributed power has a quite different goal, conflict avoidance, and the placing of the ultimate conflict resolution mechanisms with the national parliament is in itself consistent with avoiding conflict.

It is not accidental that the impulse to resolve conflict versus the impulse to avoid it is a central distinguishing characteristic between American and Canadian society as well.

When the premiers argue, as Premier Blakeney did, that the national interest is a shared thing, neither in parliament nor in the provincial legislatures, they are really calling into question the very basis of parliamentary federation - the division of powers.

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The national government can, as it offered to do, change the distribution of powers. The provinces could, as the federal government asked them to do, limit their use of powers. Indeed, it is conceivable that a future government could determine that the interest of the provinces must prevail over the nation.

But, when the provinces ask that power not be exercised by one level or the other but shared by both, it is important to recognize what a basic departure they are talking about.

Governing Mechanisms

Whether one side or the other is more American than the other is really an ultimately sterile argument, except that it has to be met.

More fundamentally, what is wrong with sharing power?

What is wrong is that we cannot -- certainly we have not been able to -- construct the mechanisms both to share power, that is a totally separate system, and consistently achieve results, without doing fundamental harm to the concepts of parliamentary responsibility and accountability that led us to distribute power rather than share power in the first place.

Moreover, each participant has been restrained in sharing the power his own parliament or legislature possesses by his own belief that to do so would violate his own responsibilities toward, and belief in, preserving the parliamentary form of government.

Thus, it has become a question of how much of the other participants' power will be shared.

This is not a problem of personalities, as has been and will be argued with regard to First Ministers' Conferences. It is a systemic problem.

Premier Lougheed's approach provides an almost uncanny illustration of this problem.

He has been the most articulate and forceful -- and effective -- of the premiers in arguing the need to share power through institutionalized First Ministers' Conferences. Economic management power is one, monetary

power another. He has resisted means -- such as the B.C. Senate proposal, Bill C-60 or the idea of the Council of the Provinces because they would reduce or eliminate the need to share power through executive federalism.

Energy is a different matter. On this, Premier Lougheed has resisted its being debated through executive federalism -- except for that aspect related to the exercise of federal powers over energy. He has preferred to negotiate bilaterally where essential, but most often, as now, to act alone -- that is, according to the accepted traditions of parliamentary federalism, each level of government to the limit of its power.

In harsh terms, he has the oil and thus the power over it. Why should he share that power?

More charitably, to share that power would be to fail to meet his parliamentary responsibilities to act and to be held accountable for acting to the Alberta Legislature and the people of Alberta.

Thus, the fundamental question of the mechanism -- and it is true at all levels -- is not how to solve a problem but how to get the other level's powers onto the table. This is not conflict resolving, but conflict creating.

Equally, because the question of what is on the agenda inevitably involves another participant's responsibilities, there is a constant effort to ensure that the responsibility stays there. In this regard, the mechanism tends to produce the reverse of the collective and individual responsibility that is the essence of the parliamentary tradition. It is, in brief, systematically irresponsible.

The recent First Ministers' Conference is a classic example. Has any participant accepted the responsibility for failure? Or offered to share it?

More fundamental may be another problem. It is virtually impossible in a political system to place power in one place without taking it from another.

If we are to have a system of executive federalist shared power, along the lines Premier Blakeney suggested, the power has to come from somewhere. The only place it can come from is the parliamentary structures of the country.

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Equally, if power is to be taken from one place and put in another - in the 'conference' - then responsibility for the exercise of powers must be placed there, too, or the system will be ultimately unstable.

The provinces, whether they realize it or not, were arguing powerfully along this line and not simply in terms of the Blakeney view.

The most important supporting strand of their argument was that the courts be kept out of powers questions wherever possible. This was true particularly on the economic powers question where, rather than have the courts decide when the right to move anywhere to find a job or sell a good or service or invest capital was being abrogated, they argued for a "political mechanism".

The same, of course, was true in the administrative solution the federal side proposed to deal with the offshore, as it was in the Council of Provinces (recognizing that this extended beyond sharing power).

The courts are the linchpin of a system of distributed power. A political mechanism is the essence, like the U.S. House-Senate conference, of shared power.

Final Thoughts

The basic question is how we got to a position where the sharing of power through executive federalism would acquire such force.

A strong argument can be made that the sources of this provincial drive to share power lies not just with provincialist sentiment in the country but in the national parliament itself, that the legitimacy of the national parliament to make national decisions has been weakened over time by the public's changing attitude toward power and what makes it legitimate.

The argument goes like this:

The senate was conceived as the means by which the regional or "sectional" interest would be represented in Parliament. The legitimacy of Senators as regional spokesmen has been undermined, in a century when legitimacy is conferred by the vote, by the fact they are appointed.

At the same time, the provinces have claimed that they legitimately represent provincial interests and -- because provincial governments answer to elected houses -- their claim is unassailable.

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The capacity to represent regional interests in parliament is much in question. This function is now broadly seen as being performed elsewhere.

But what is the national interest if it does not accommodate what is legitimately seen as the regional interest, as well as the other interests that Parliament must represent, reconcile and accommodate?

That is, the transfer of the regional representation from Parliament, in terms of legitimacy, has also called into question the legitimacy of Parliament's claim to be the ultimate repository of the national will.

At the same time, history has conspired against Parliament in terms of the Commons. The Conservatives are not represented in Quebec. The Liberals are no longer represented in the three western provinces.

Party discipline lines up not only the parties against each other but regions against each other and thus it is devalued as an instrument of national reconciliation.

The argument leads, of course, to something this government has no time to do, to parliamentary reform of a fundamental sort aimed at restoring the legitimacy of the Senate as the body of regional representation and the House as a body whose decisions reflect the national interest.

The point in setting out this argument is that, while the national interest including the regional should not reside between the Parliament and the provinces in concert, the fact that the regional interest is not seen to be accommodated in Parliament gives force to the Blakeney argument.

In the longer term, we either allow the regional interest to fall between the stools, we do the things that will create the belief that it has been returned to Parliament, or we accept that we evolve toward a shared power system and away from parliamentary federalism. The first is what we have; the second infinitely preferable to the third.

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Finally, quite apart from the parliamentary weaknesses that induced provincial and federal governments to seek ways to accommodate the regional interest to the national, the fact is that the instruments of executive federalism were created largely by federal executive decision.

That is, in the final analysis, it was the federal government that, slice by slice, brought the provinces into the conference system, invited them to share power, transferred to them responsibility for conferring benefits but not the responsibility to find the resources to finance them, and more recently the capacity to raise resources.

Equally, it was the federal government which -- again step by step -- gave provincial premiers a national forum and, through the sixties and seventies, taught them by experience to exploit the nation in the interest of the provinces they represent.

It was done deliberately, although incrementally, and for good motive -- the desire to have the national will reflect the regional -- and in the belief that, as was true 20 years ago, the federal power, constitutionally, economically and otherwise, was such that it could bear whatever might result.

The reality is a system that has systematically failed to produce results, diffused the ability of the public to hold governments accountable, become largely uncontrollable and, as the last First Ministers' Conference demonstrated, has passed beyond the limits of civility.

It is not surprising that premiers want the system strengthened -- or that, indeed, some want the provinces to have the right to call First Ministers' Conferences at provincial initiative or, at minimum, to have a provincial co-chairman, so that they can ensure the survival of the mechanism without federal approval. The system has served the provincialist interest well.

In fact, it would be very surprising if they did not want executive federalism strengthened.

D. Ablett/or