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## Trois Sortes de Pouvoir: In Changing Times

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# PACE LAW REVIEW

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## Issue Honoring the Bicentennial of the Constitution

### *Trois Sortes de Pouvoir: In Changing Times*

Josephine Y. King†

Il y a dans chaque état trois sortes de pouvoir; la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.

On appellera cette dernière la puissance de juger . . . .<sup>1</sup>

#### *Precursive Theory*

Thus did Montesquieu with confident pen declare that three kinds of power existed in all forms of government: the legislative, the executive, and the judicial. This was but one of many conclusions and propositions expressed in *The Spirit of Laws*, an ambitious analysis of forms of government (again three — democracy, monarchy, and despotism)<sup>2</sup> and of laws (natural law, divine law, ecclesiastical law, civil law, political law, and the

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1. C. MONTESQUIEU, 2 *DE L'ESPRIT DES LOIS*, livre XI, 86-87 (1834) (originally published in 1748) [hereinafter *L'ESPRIT DES LOIS*].

2. C. MONTESQUIEU, 1 *THE SPIRIT OF LAWS*, books II, III (T. Nugent trans. 1900) [hereinafter *SPIRIT OF LAWS*].

law of nations).<sup>3</sup> In this far-ranging opus, the labor of twenty years, Montesquieu slipped easily from general observations to specific descriptive and critical examination of past and contemporaneous governments.<sup>4</sup> It is in the section "Of the Constitution of England,"<sup>5</sup> that Montesquieu articulated his views on the separate powers.

"Of the three powers . . .," he commented, "the judiciary is in some measure next to nothing . . ."<sup>6</sup> But concerning the executive and legislative functions, he recognized the existence of checks and balances in the practical operation of British government.

"The executive power . . . ought to have a share in the legislature by the power of rejecting . . ."<sup>7</sup> And, "[w]ere the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic . . ."<sup>8</sup> Furthermore, since the legislature was composed of two parts, "they check one another by the mutual privilege of rejecting."<sup>9</sup>

He did not perceive an equivalent necessity for legislative constraint upon the executive.<sup>10</sup> "But if the legislative power in a free state has no right to stay the executive, it has a right and ought to have the means of examining in what manner its laws have been executed . . ."<sup>11</sup> In general, "[t]hese three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert."<sup>12</sup>

Montesquieu's concept of a functional and structural tripartite design of government easily spanned space and time to alight on receptive soil in the American colonies. The Declara-

3. 2 SPIRIT OF LAWS, *supra* note 2, book XXVI.

4. Montesquieu wrote on such diverse topics as religion, political liberty, slavery, commerce, climate, and torture.

5. 1 SPIRIT OF LAWS, *supra* note 2, at book XI, ch. 6.

6. *Id.* at 156. "Des trois puissances dont nous avons parle, celle de juger est en quelque facon nulle." 2 L'ESPRIT DES LOIS, *supra* note 1, at 94.

7. 1 SPIRIT OF LAWS, *supra* note 2, at 159.

8. *Id.* at 157.

9. *Id.* at 160.

10. "For as the execution has its natural limits, it is useless to confine it . . ." *Id.* at 157.

11. *Id.* at 158.

12. *Id.* at 160.

tion of Independence, Articles of Confederation, public addresses, and other contemporary sources reveal familiarity with the philosophies of Hobbes, Locke, and Rousseau as well. A great and rich reservoir of English and continental political theory was available and within the knowledge of American statesmen.

### *The Constitutional Convention*

The Constitutional Convention, "une assemblée des notables" according to Dr. Franklin,<sup>13</sup> was to commence its deliberations on Monday, May 14, 1787, the "day appointed."<sup>14</sup> Only two states — Virginia and Pennsylvania — being represented on that date, the meeting was adjourned from day to day, awaiting the arrival of delegates. Not before Friday, May 25, was a quorum in attendance, enabling George Washington to note in his diary, "seven States being now represented the body was organized and I was called to the Chair by a unanimous vote."<sup>15</sup>

A few days later, Washington observed in a letter to Thomas Jefferson,

[m]uch is expected from it [the Convention] by some; not much by others; and nothing by a few. That something is necessary, none will deny; for the situation of the general government, if it can be called a government, is shaken to its foundation, and liable to be overturned by every blast. In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue.<sup>16</sup>

And so began the work of one of the most momentous constitutive assemblages of modern times, with Governor Randolph of Virginia addressing the delegates. After reviewing the defects of the Articles of Confederation, he introduced the famous Resolutions outlining the framework of a new national government.<sup>17</sup>

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13. Letter from Benjamin Franklin to Thomas Jordan (May 18, 1787) in 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 21 (1966).

14. George Washington: Diary (May 14, 1787) in 3 M. FARRAND, *supra* note 13, at 20.

15. George Washington: Diary (May 25, 1787) in 3 M. FARRAND, *supra* note 13, at 27.

16. Letter from George Washington to Thomas Jefferson (May 30, 1787) in 3 M. FARRAND, *supra* note 13, at 31.

17. Madison's Notes (May 29, 1787) in 1 M. FARRAND, *supra* note 13, at 18-23.

The necessary functions naturally fell into three major categories: a National Legislature of two branches, a National Executive (chosen by the Legislature), and a National Judiciary.<sup>18</sup> The next day, in a committee of the whole house, the assembly agreed to a first proposition: "Resolved that it is the opinion of this Committee that a national government ought to be established consisting of a supreme Legislative, Judiciary, and Executive."<sup>19</sup> Notwithstanding animated debates concerning the mode of selection of members of each branch, their authority, checks against encroachments by other departments, and proposals for a body with power to "negative" acts of the National and State legislatures, the delegates through that long Philadelphia summer accepted a functional and structural distribution of political power into three branches. Starting from the premise that the government must be given the powers necessary to meet domestic needs and foreign challenges, representatives from some of the states, nonetheless, feared that centralization of authority might produce a despotic, arbitrary executive. By providing for a Supreme Court and a bicameral national legislature with extensive enumerated powers, the new Constitution could reduce, if not eliminate, the assertion of unchecked executive power.

The Federalist Papers, brilliant political essays, elaborated the provisions of the new Constitution, urging its adoption and assuaging the fears and reservations of some who questioned its merit or efficacy. In examining the three branches of the national government established in articles I, II, and III, Madison emphasized not only the separateness of the legislative, executive, and judicial powers, but also the necessary areas of conjunction where functions were overlapping or complementary and one department could "check" encroachment by another.<sup>20</sup>

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18. *Id.* at 20-22.

19. Journal (May 30, 1787) in 1 M. FARRAND, *supra* note 13, at 30-31; Madison's Notes (May 30, 1787) in 1 M. FARRAND, *supra* note 13, at 33, 35.

20. THE FEDERALIST Nos. 47, 48, 51 (J. Madison) (Bicentennial ed. 1976). In fact, Madison seemed more concerned about legislative than executive usurpation of power.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. . . . They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. THE FEDERALIST No. 48, at 322.

Hamilton, in his exposition of the judicial power, invoked Montesquieu's uncompromising insistence on the independence of that function: "there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"<sup>21</sup> He added:

[I]n a government in which they [the three branches] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force or will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power  
 . . . .<sup>22</sup>

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The legislative department . . . being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments. . . . On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

*Id.* at 323. See also THE FEDERALIST No. 78 (A. Hamilton) (Bicentennial ed. 1976); Burns & Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575 (1987).

21. THE FEDERALIST No. 78, at 504 (A. Hamilton) (Bicentennial ed. 1976) (quoting C. MONTESQUIEU, *SPIRIT OF LAWS*).

22. THE FEDERALIST No. 78, at 504 (A. Hamilton) (Bicentennial ed. 1976).

*John Marshall's Interpretation*

Montesquieu's "next to nothing" judiciary and Hamilton's "least dangerous" and "weakest" department promptly developed into a much more powerful institution. That Chief Justice Marshall declined to entertain a weak and subservient role for the Court is manifest in his opinion in *Marbury v. Madison*.<sup>23</sup> Notwithstanding the dissembling disavowal of judicial interference in the management of the executive department and disingenuous denial of any thought of invading the legislature's prerogatives, John Marshall explicated the necessity and rationality for judicial review which have remained fundamental in our jurisprudence and the operation of the tripartite functions of government. The authority of the Supreme Court has waxed and waned over the years since Marshall's pronouncement of 1803; at times the controversy has been very bitter, and still questions are raised about the extent of the Court's participation and role as ultimate decisionmaker in various areas of public and private affairs.<sup>24</sup> Nonetheless, in cases of enormous import<sup>25</sup> the Supreme Court has reaffirmed Marshall's concept and rested its reasoning upon the arguments advanced by the great Chief Justice.

Marshall established the Court's authority to oversee the acts of the executive and legislative departments as well as all branches of State government when such acts directly or peripherally implicated constitutional issues. In *Marbury*, Marshall claimed and won for the Supreme Court the authority to rule on the constitutionality of acts of Congress and on the amenability to court process of members of the executive branch of government. Thus, in a horizontal fashion, the Court laid one hand on the office of the President and another on Congress and linked the legality of the acts of both to the Court's interpretation of the constitutional delegation of powers.

In the same opinion, Marshall adumbrated the political question doctrine. He distinguished political, discretionary acts

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23. 5 U.S. (1 Cranch) 137 (1803).

24. See generally Lusky, *Judicial Review: A Wasting Asset*, 7 PACE L. REV. 647 (1987).

25. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962).

from non-political, ministerial duties of executive officers. He recognized that in areas demanding political judgment and assessment of choices, the Supreme Court should not claim authority to override the President who, in such matters, "is accountable only to his country in his political character, and to his own conscience."<sup>26</sup> Although he might not in reality have been nearly so diffident to embark upon political decisionmaking as the carefully chosen words of his opinion would have his contemporaries believe, Marshall was astute to refrain from projecting the Court's power to such a distance. But the distinction that he drew between justiciable issues and political questions offered a rationale for future generations of Supreme Court justices to justify an avoidance of pressing issues such as representation. One wonders whether Chief Justice Marshall would have endorsed the judicial restraint advocated in the twentieth century by some of his latter day brethren. During the century before *Baker v. Carr*<sup>27</sup> decided that legislative apportionment was a justiciable issue, the doctrine of separation of powers continued to be tested and molded. *Baker* signaled a dramatic retreat from the philosophy of avoidance.

*From Gettysburg to Youngstown*

In the decades clustering around the middle of the nineteenth century, it was that other set of balances between the National Government and asserted state sovereignty which dominated American concerns. Even so, issues of separation of powers surfaced at least as a reaction to some of the bold steps taken by President Lincoln. There followed other pockets of history in which strong presidents in their own time, and later with hindsight, were charged by some with exceeding their authority and usurping functions of Congress.<sup>28</sup> The frustration of President Roosevelt with the Supreme Court during the early and very active years of New Deal legislation led to quite a different charge of overreaching. The Executive and Congress saw their legislative initiatives repulsed by the Supreme Court's declara-

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26. *Marbury*, 5 U.S. at 166.

27. 369 U.S. at 186.

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 683-700 (1952) (Vinson, J., dissenting).



tions of unconstitutionality. To some, it was the will of the people being thwarted by a small, appointed, politically unresponsive group of men who retained their posts for life. Congress, however, was not willing to support the President's radical court-packing plan.<sup>29</sup>

The best strokes of many opinions of the Supreme Court, some delicate and some bold, have developed the doctrine of the co-equal branches in cases focusing on the authority of the Court. From *Cooper v. Aaron*,<sup>30</sup> *United States v. Klein*,<sup>31</sup> *Brown v. Board of Education*,<sup>32</sup> and *Baker v. Carr*,<sup>33</sup> to *United States v. Nixon*,<sup>34</sup> the Court has elaborated its Marshallian role as expositor and final arbiter of the Constitution. One case which is not merely of historical interest, however, merits particular attention because it again focuses on the relationship of the executive and the legislative branches and because it may provide a schema for analysis of contemporary conflicts.

The Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>35</sup> arose out of a dispute between employees and steel companies concerning terms of a new collective bargaining agreement. Efforts of settlement having failed, the union gave notice of a strike. The President, convinced that a shutdown of the mills would cut off the steel indispensable to national defense at a time when American forces were engaged in the Korean War, ordered the Secretary of Commerce to take possession of the mills and keep them in operation. The steel companies challenged the seizure, alleging that the President's order was unconstitutional. The President asserted that in meeting the grave emergency, his action was authorized by the aggregate of express and implied constitutional powers.

The Supreme Court did not agree. The majority refused to extrapolate from the commander in chief power, executive authority to seize private property when the nation was not engaged in a war formally declared by Congress. Absent constitu-

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29. G. GUNTHER, CONSTITUTIONAL LAW 370-77 (11th ed. 1985).

30. 358 U.S. 1 (1958).

31. 80 U.S. (13 Wall.) 128 (1871).

32. 347 U.S. 483 (1954).

33. 369 U.S. 186 (1962).

34. 418 U.S. 683 (1974).

35. 343 U.S. 579 (1952).

tional authority, the only other source the majority was willing to accept was a statutory grant. None existed. Quite the contrary, Congress had, in deliberating the passage of the Taft-Hartley Act, expressly refused to recognize governmental seizure as a means of averting work stoppages in labor disputes. Thus, the President in this matter had acted without any affirmative constitutional support and in the face of a negative legislative decision.

Justice Jackson, in his concurrence in *Youngstown*, captured the difficulty of maintaining a balance of power between the President and Congress. "Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress."<sup>36</sup> He formulated three categories of circumstances:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can rely only upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his constitutional powers minus any constitutional powers of Congress over the matter.<sup>37</sup>

Justice Jackson's analysis of article I and article II powers, coupled with unwillingness to rely on inherent, implied, or resulting powers, convinced him that the President's seizure fell into the third category. He observed that Congress could, in situations of this nature, grant emergency powers and that the President could not singly assume the authority. But Jackson admonished: "We may say that the power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."<sup>38</sup>

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36. *Id.* at 635 (Jackson, J., concurring).

37. *Id.* at 635-57.

38. *Id.* at 654.

Justice Frankfurter's concurrence in *Youngstown* reflects the problem through a different prism. The powers and relationship of the National Executive and Legislature cannot be understood merely from a narrow view of the words of the Constitution, disregarding "the gloss which life has written upon them."<sup>39</sup>

In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress, and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by §1 of Art. II.<sup>40</sup>

Such an accretion of executive power by "adverse possession" has developed into a major political issue. Congress has undertaken substantial measures to reassert its control in internal matters, such as the Congressional Budget and Impoundment Control Act of 1974<sup>41</sup> and the Balanced Budget and Emergency Deficit Control Act of 1985.<sup>42</sup> However, the successful challenge in the courts to certain provisions of the latter act<sup>43</sup> as well as the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*<sup>44</sup> that the legislative veto is unconstitutional has yielded uneven results.

### *Stripping the Gloss*

If the President can be called to task for attempting to exercise aggregate inherent and implied powers in domestic affairs, is the executive office subject to the same restraints in foreign affairs? Clearly not, if *United States v. Curtiss-Wright Export Corp.*<sup>45</sup> remains the controlling authority.

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to

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39. *Id.* at 610 (Frankfurter, J., concurring).

40. *Id.* at 610-11 (Frankfurter, J., concurring).

41. Pub. L. No. 93-344, 88 Stat. 297 (1974).

42. Pub. L. No. 99-177, 99 Stat. 1037 (1985).

43. See generally Synar, *Congressional Perspective on the Balanced Budget and Emergency Deficit Control Act of 1985*, 7 PACE L. REV. 675 (1987).

44. 462 U.S. 919 (1983).

45. 299 U.S. 304 (1936).

speak or listen as a representative of the nation. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>46</sup>

The Court's reasoning in *United States v. Pink*,<sup>47</sup> *United States v. Belmont*,<sup>48</sup> and *Dames & Moore v. Regan*<sup>49</sup> have confirmed the gloss on the Executive's power in the area of executive agreements in particular, and by association, foreign policy in general.

Ever since the Vietnam War, the preeminence of the executive branch in the conduct of foreign relations has been challenged. The War Powers Resolution<sup>50</sup> is an attempt to ensure that Congress participates in any decision to maintain American armed forces in a theater of hostilities when there has been no formal declaration of war. The constitutionality of the provisions of the Resolution remain to be tested.

It is obvious that the conduct of foreign affairs and of war today is not what it was in the first half of this century. Subtle, ingenious, military and civilian means of influencing foreign policy have seemed to leave Congress, with its constitutionally enumerated, formal military powers outside the decisional framework of critically important choices. That, it appears, is the imbalance which Congress seeks now to redress, and even the wisdom of judges cannot precisely or permanently determine the ideal equilibrium.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses. . . . While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but inter-

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46. *Id.* at 319.

47. 315 U.S. 203 (1942).

48. 301 U.S. 324 (1937).

49. 453 U.S. 654 (1981).

50. 50 U.S.C. §1541 (1982 & Supp. III 1985). See generally Torricelli, *The War Powers Resolution After the Libya Crisis*, 7 PACE L. REV. 661 (1987); Comment, *A Bicentennial View of the Role of Congress, the President, and the Judiciary in Regard to the Power Over War*, 7 PACE L. REV. 695 (1987).

dependence, autonomy but reciprocity.<sup>51</sup>

Montesquieu, Marshall, and Madison would agree.

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51. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).