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Cabal, Intrigue, and Corruption in Democratic Systems

The traditional doctrine of the separation of powers has been criticized unsparingly from a variety of perspectives. Adam Przeworski, for example, writes that the rise of political majorities, able to dominate the legislative and executive branches simultaneously, has made the doctrine "anachronistic" to the point that it "just makes no sense."[1] American progressives, by contrast, attacked the separation of powers for the contrary reason, not because it was unworkable but because, "with its elaborate barriers to the exercise of effective governmental power,"[2] it worked too well, introducing so many veto points into the system that political paralysis and therefore status-quo or anti-reform biases were inevitable.

Without addressing such controversies, I propose to look at seventeenth- and eighteenth-century theories about the separation of power from another angle. My working premise is that classical liberals advocated the separation of powers as a remedy to a number of perceived pathologies in republican government. But exactly what pathologies did they have in mind?

Diagnosis dictates remedy. Therefore, by taking the remedy proposed by liberal constitutionalists as our starting point, we can walk back the cat and reconstruct, from their proposed cure (the separation of powers), the disorders they considered most likely to afflict "a government wholly elective."[3]

I will be taking most of my examples from the Framers of the American Constitution and the seventeenth- and eighteenth-century writers on whom they drew. Either by force of habit or in a rhetorical attempt to mollify Anti-Federalist forces, the authors of the *Federalist Papers* continued to cite Montesquieu's claim: "Lorsque, dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement."[4] As a result, commentators regularly assume that the primary purpose of the separation of powers was to prevent the tyrannical oppression and violation of private rights that Montesquieu, and those who invoked him to oppose the Framers' centralizing plan, feared most. This is highly unlikely, however, because the principal

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[1] Adam Przeworski, *Democracy and the Limits of Self-Government* (Cambridge University Press, 2010), p. 137.
[2] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998), p. 290.
[3] *Federalist* #66.
[4] Montesquieu, *De l'esprit des lois*, Book XI, Chapter 6; James Madison's paraphrase reads: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands [even if popularly elected] may justly be pronounced the very definition of tyranny" (Federalist #47).

threat to which the Framers were responding in 1787 was not tyranny but the contrary, namely, "an unequivocal experience of the inefficacy of the subsisting federal government" under the Articles of Confederation.[5] Specifically, the new Constitution was designed to allow the fragile American republics, recently broken away from British control, to pool their efforts and coordinate their collective defense, not to mention their joint seizure of western lands, in a dangerously hostile international environment. The driving impulse behind the proposed Constitution, including its scheme for separating powers, was to create a more not a less powerful central government.

To be sure, Madison argued, paraphrasing Montesquieu, that "Ambition must be made to counteract ambition."[6] But the main emphasis throughout the *Federalist Papers* is not on the way the separation of powers promises to limit, obstruct, check, arrest, impede, shackle, hinder, or brake potentially cruel and repressive power. Indeed, Hamilton repeatedly urged his readers never to "forget how much good may be prevented, and how much ill may be produced, by the power of hindering that which is necessary from being done."[7] The Framers' relatively attenuated concern for hindering tyranny, which seemed to them a remote threat at the time, helps explain why the Anti-Federalists opposed the Constitution they drafted and accused it of containing (what else?) the seeds of tyranny.

But if the American Framers did not intend the separation of powers primarily as a barrier against the threat of tyranny and the violation of private liberty, what was its purpose from their perspective? They advocated the separation of powers as an obstacle against a different form of arbitrary rule, namely, the abuse of public office for personal advantage which, while leaving personal liberties largely undisturbed, would fatally erode public liberty and thereby destroy republican government at its root. More specifically, they designed the separation of powers to discourage and obstruct favoritism, self-dealing, rent-seeking, concealment of incompetence, corruption, and collusion among elected officials against the public interest. Such betrayals of the public trust by elected officials may be so hard to eradicate precisely because they are not monstrously tyrannical. They entail no shocking violation of private rights and thus give rise only to weak and erratic movements for reform. To preserve republican government, therefore, elections must be supplemented by the separation of powers.

Alexander Hamilton nicely summarizes the threat that the Framers had in mind when he asserts that "cabal, intrigue, and corruption" are the "most deadly adversaries of republican government."[8] These, more than tyranny, were the fatal adversaries that the

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[5] *Federalist* #1; moreover, the American Framers were too well-schooled in the idea of the division of labor, articulated by Adam Smith among others, not to see any efficiency gains in functional specialization. Deliberation vs. action, foreign affairs vs. domestic affairs, peacetime governance vs. the conduct of war, making laws vs. punishing crimes and settling private disputes—they were perfectly aware from the study of the history of politics, of the common benefits that would accrue from assigning different bodies of men to these distinct tasks. The Framers could just as justly pronounced the accumulation of all powers, legislative, executive, and judiciary, in the same hands to be the very definition of amateurishness.

[6] *Federalist* #51; "Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir" (Montesquieu, *De l'esprit des lois*, Book XI, Chapter 4).

[7] *Federalist* #22.

[8] *Federalist* #68.

separation of powers was originally designed to defeat or at least to keep at bay. The inescapable vulnerability of republican government to such potentially fatal disorders is what led classical liberals to agree with Montesquieu that "all would be lost," even in a wholly elective government, if the entire range of governmental powers was controlled by a compact group of individuals. Whatever critics say about the separation of powers itself, no one could possibly contend that this grim diagnosis itself no longer makes sense today or that subsequent advances in democratic constitutionalism have made the classical liberal alarm at "cabal, intrigue, and corruption" of merely antiquarian concern.

The Restraint of Frequent Elections

Democratic constitutionalism aims to prevent "the elevation of the few on the ruins of the many,"[9] a pattern which is dismayingly ubiquitous if not universal throughout the political history of mankind. The legally or politically binding obligation to hold periodic elections is the primary constitutional means for fostering "the control of politicians by citizens."[10] The interests of the rulers will never be perfectly aligned with the interests of the ruled. But these interests can either be drawn closer together or allowed to drift farther apart. In his search for half-a-loaf, James Madison stressed that "A dependence on the people is, no doubt, the primary control on the government."[11] More specifically Madison repeatedly wrote about "free government, of which frequency of elections is the cornerstone,"[12] placing the essence of constitutional government in fixed-calendar elections which political incumbents cannot safely, without risking ouster or overthrow, delay or suspend. Rulers who are "created by our choice, dependent on our will"[13] have a strong, if not irresistible, incentive to act in the interest of the "the great body of the people of the United States."[14]

This democratic legitimacy formula is a potent one. On the other hand, as Madison was the first to acknowledge, "Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people."[15] Their wholly realistic fear that elected officials might betray the electorate led the American Framers to build a variety of mechanisms into the Constitution designed to maintain "a proper responsibility to the people" among elected officials and to prevent "their degeneracy" *after* they are elevated to high office. No piece of constitutional machinery is more important in this respect than the

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[9] *Federalist* #57.
[10] José María Maravall, "Accountability and Manipulation," *Democracy, Accountability and Representation*, edited by Adam Przeworski, Susan Stokes, and Bernard Manin (Cambridge University Press, 1999), p. 154.
[11] *Federalist* #10.
[12] *Federalist* #53; the British have no "Constitution," according to Madison, because Parliament, at the time, had the legal right to perpetuate itself beyond the term for which it was elected: "The important distinction so well understood in America between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country" outside the American states (#53).
[13] *Federalist* #25.
[14] *Federalist* #57.
[15] *Federalist* #10.

aforementioned "restraint of frequent elections."[16] A system in which office is held *pro tempore* will "bind the representative to his constituents."[17] Because of constitutionally specified term-limits (two-year terms in this case),

> the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.[18]

The habitual exercise of power, that is Madison's premise, tends inevitably to efface the office-holder's initial gratitude toward those who put him into office. Having been elected, after a few months, ceases to exert much restraint on the conduct of elected officials whose gratefulness to voters naturally pales with time. In the words of Hamilton: "It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust."[19]

The anticipation of an *upcoming* election helps alleviate this misfortune by counteracting the natural post-electoral forgetfulness of public officials, working as an anti-amnesiac and refreshing the elected leaders' failing memory of their debt to the people who elected them. By injecting, in this way, a degree of insecurity or uncertainty into the lives of rulers, the system of frequent elections makes them more attentive to the needs and concerns of ordinary citizens. It also shapes the rulers' role-consciousness, wrenching incumbents from the superciliousness of incumbency and inducing them to think of themselves less grandly, at least in the run-up to the next election, as candidates solicitous of public approval.

That periodic elections, which incumbents cannot safely ignore, are the principal (not the sole) constitutional mechanism for aligning the interests of the rulers with the interests of the ruled is true not only in theory but also in practice. Powerful evidence that frequent elections impose serious restraints on incumbents is provided by the furious and often homicidal efforts expended by self-dealing incumbents everywhere in the world who are threatened by an upcoming vote. They systematically rig, reschedule or cancel elections. They stuff ballots, intimidate voters, purge rival candidates from the lists, make coups d'état, declare states of emergency and so forth. Anticipating the moment when their power might cease, when their exercise of it would have to be reviewed and when they would therefore be forced to descend to the level from which they were raised, self-dealing rulers have historically sought to undercut or destroy the extraordinary power of

[16] *Federalist* #57.
[17] *Federalist* #57.
[18] *Federalist* #57.
[19] *Federalist* #62.

frequent elections to oust from office those incumbents who have failed to discharge faithfully the trust placed in them by their fellow citizens. The daily papers are so crowded with examples of elected leaders who, when the next election occurs, manipulate or ignore electoral results, that further illustrations here would be superfluous.

Asymmetries of Information

Without contesting the republican principle that government must be based on the consent of the people,[20] Madison had his doubts about the "input" side of democratic government. He understood perfectly well "the vicious arts by which elections are too often carried."[21] In a passage cited above, he wrote about how men of factious tempers could "obtain the suffrages" by "intrigue" and "corruption" or by playing on "local prejudice."[22] The American Framers, needless to say, knew nothing of political marketing or the application of advertising techniques to political campaigns. But they were perfectly aware that the will of the people does not always develop autonomously but is frequently shaped and manipulated by various "strategies of concealment,"[23] including the dissemination of false rumors and other species of strategic disinformation. Moreover, the accountability of the rulers to the ruled, even when frequent elections are constitutionally required, depends on the electorate's willingness and ability to gather information about the rival candidates and pay attention. No constitution can guarantee that this important precondition will be reliably and consistently fulfilled, however. This is why, as John Jay wrote: "the activity of party zeal, taking advantage of the supineness, the ignorance, and the hopes and fears of the unwary and uninterested, often places men in office by the votes of a small proportion of the electors."[24]

Asymmetry of information undermines the control of politicians by citizens. If elected officials, once in office, can use administrative and other resources to misinform the voters and keep them in the dark, then they, the incumbents, can successfully liberate themselves from the restraint of frequent elections, even without resort to vote rigging and other more dramatically anti-democratic methods. This is one of the principal mechanisms by which office holders can, in Maravall's phrase, manipulate accountability. Asymmetry of information, where incumbents know things that the voters need to but do not know, is one of the deepest problems of democracy. The most frequently mentioned solution to this problem is a form of the separation of powers, namely a pluralistic media, insulated from manipulation by incumbents, where multiple outlets provide the ruled with information that their rulers would prefer them not to unearth.

The restraint of frequent elections is weak unless it is supplemented by multiple independent sources of information about the behavior of incumbents. This insight

[20] *Federalist* #22.
[21] *Federalist* #10.
[22] *Federalist* #10.
[23] Maravall, "Accountability and Manipulation," p. 192.
[24] *Federalist* #64.

provides an excellent starting point for understanding classical separation-of-power theory. Before turning to liberal theorists, however, it may prove useful to look at a passage from a great pre-liberal work in comparative political scholarship and theory, namely the *Six Books of the Republic* (1576), a work well-known to the American Framers. In this passage, Bodin provides a lucid explanation of how the separation of powers can help solve the intelligence deficit that naturally afflicts over-mighty monarchs whose word was their command. The relevance of Bodin's reasoning to democratic theory becomes obvious if we simply replace, in thought, his royal sovereign with the sovereignty of the people.

The French king, Bodin observes, has an extremely difficult time learning what his provincial agents are doing in his name. He cannot easily solve this monitoring or oversight deficit bureaucratically, by assigning a second set of officials to keep tabs on the first. The solution chosen, Bodin tells us, is *parliamentary immunity*, that is, the independence of one state body from the discretionary reach of another. Representatives in the Estates General have the right to complain loudly about the behavior of any of the king's agents, and to do so without any fear of punishment. Legally exempt from any liability for accusations leveled in the Estates General, representatives provide the king with information vital to his rule but which he would otherwise have no way of obtaining. Here is what occurs in the assembly, to whose members, while the body is in session, the royal power to punish does not extend: "la sont ouïes et entendues les justes plaints et doleances des povres sujects, qui jamais autrement ne viennent aux oreilles des Princes: la sont descouverts les larins, concussions, et voleries qu'on fait sous le nom des Princes qui n'en sçavent rien."[25]

A cognitive failure to get the facts straight is seriously disabling for any wielder of power. A grant of immunity to those who receive and transmit complaints against royal officials was expressly devised, in Bodin's account, to facilitate the free flow of useful information and therefore to allow the principal to monitor his agents. Because the assembly's members could not be penalized for speaking freely, they could provide the king with vital intelligence about his own operatives that would otherwise be hidden from him.

Formulated differently, the "constitutionally protected" assembly functioned as a watchdog or whistle blower. A proto separation-of-powers system was apparently embraced by a formally unlimited monarch in order to solve the monitoring problem, that is, to provide the king with information he needed to enforce his will effectively. This institutional structure, while limiting the king's discretion in one sense, increased his power in another sense, allowing him to control his agents and ensuring that they operated in his interests rather than in their own interests while invoking his name.

Already in 1576, in other words, and in a monarchical system commonly, although erroneously, called "absolute," parliamentary immunity was described as a core principle of constitutional government, crafted explicitly to serve the informational needs of the powerful. It was a fetter on the king's discretion designed to help him keep an eye on his

[25] Jean Bodin, *Les six livres de la république*, vol. 3, (Paris: Fayard, 1986), p. 207.

agents and make sure that they are carrying out his instructions when they operate in remote localities. If he insisted on the crown's prerogative to censure political speech, by contrast, the monarch might be inadvertently helping his subordinates, all of whom were originally appointed by him, to keep secrets from himself. That a similar logic can apply to the relation between a democratic electorate and the officials they elect goes without saying.

The Alchemy of Power

To understand better the contours of problem that auxiliary precautions were intended to resolve we should look to John Locke. Even when raised to high office neither by dynastic secession nor by conquest but rather by periodic elections, individuals will "come to have a distinct interest from the rest of the community, contrary to the end of society and government."[26] This is an arresting claim, worth pondering at length. It implies that the prospect of being defeated in the next election is a necessary but insufficient condition for aligning the interests of the rulers with the interests of the ruled. Even apart from strategies of concealment and various other legal and illegal schemes that incumbents use to reduce their exposure to defeat at the polls, the mere anticipation of a future election will not close the gap between the interests of the rulers and the interests of the ruled. This is because, according to Locke and his followers, the very exercise of power has a powerfully transformative effect on office holders. It gives them new interests contrary to the interests of those over whom they wield power.

Locke's subtle point here is that holding power, however it was achieved, affects not only a person's opportunities but also his motivations. This inescapable alchemy of motivations among those who obtain power electorally is what is meant by the slogan that, even when it is democratically bestowed, power corrupts. This tendency of power to corrupt, in the sense of giving the powerful interests distinct from those of ordinary people, is one of the principal problems which the separation of powers, in ideal theory, is meant to solve.

Writing almost two centuries later, John Stuart Mill helps us understand what Locke had in mind. His argument is that all human beings have many different interests, selfish and social as well as short-term and long-term. When a candidate is elected to office, some of these interests are thrust into the forefront while others are pushed into the background. Mill's thesis, too, is that the possession of political power changes not only a person's opportunities but also his or her motives. More specifically, power enhances "the disposition to prefer a man's selfish interests to those which he shares with other people, and his immediate and direct interests to those which are indirect and remote."[27] The morally corrupting effect of the exercise of power itself tempts even democratically elected officials to view their office less as a public trust to promote the community's long-term interests than as private property to be exchanged for short-term personal advantage.

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[26] John Locke, *Second Treatise of Civil Government*, §143.
[27] John Stuart Mill, Chapter 6, *Considerations on Representative Government.*

To plumb fully the function of the separation of powers, we need to dwell a bit longer on the *psychological* consequences of concentrated and unilateral power. Locke's idea that power-wielders come to have a distinct interest from the rest of the community is a good starting point, but it does not go far enough. A better guide to this aspect of the problem is Montesquieu's *Lettres persanes*, where the pathological effects of unrestrained power on the power-wielder himself is laid bare. Montesquieu's case for the separation of powers, developed in *De l'esprit des lois*, is undoubtedly based on his insights into the mental unbalance, megalomania, and loss of contact with reality produced by the unchecked power of the lord of the harem.

Equally helpful for understanding the way unchecked power corrupts the moral character and psychological stability of its wielder is once again John Stuart Mill. This, according to Mill, is what it means to say that power corrupts:

> The moment a man, or a class of men, find themselves with power in their hands, the man's individual interest, or the class's separate interest, acquires an entirely new degree of importance in their eyes. Finding themselves worshipped by others, they become worshippers of themselves, and think themselves entitled to be counted at a hundred times the value of other people, while the facility they acquire of doing as they like without regard to consequences insensibly weakens the habits which make men look forward even to such consequences as affect themselves. This is the meaning of the universal tradition, grounded on universal experience, of men's being corrupted by power.[28]

Power corrupts, to repeat, because its possession affects not only opportunities but also motivations. In Mill's account, the possession of power does not create wholly new motives. Rather high office enlivens or strengthens some preexisting motives while muffling and weakening others. This process guarantees that the dominant or driving motives of power-wielders, even if elected and facing reelection, will deviate substantially from the leading motives of the rest of society. In Hamilton's words, even under the restraint of frequent elections, "the representatives of the people" will be tempted to view themselves as "superior to the people themselves."[29]

The prospect of a future election is a powerful restraint, but not powerful enough, on its own, to discipline the corrupt new motivations produced by the enjoyment and exercise of power.

This was Madison's position precisely. To prevent the interests of elected officials from deviating from the interests of their constituents, frequent elections do not suffice. Instead, "auxiliary precautions"[30] are required. All of these precautions involve the same remedy that we observed in the case of asymmetry of information, namely "plural

[28] John Stuart Mill, Chapter 6, *Considerations on Representative Government.*
[29] *Federalist* #78.
[30] *Federalist* #10.

agency."[31] To prevent the wielders of delegated powers from misusing those powers and subsequently insulating themselves from electoral reprisal, the electorate must delegate distinct powers to independently elected or appointed sets of officials. These officials must play no role in each others' appointments or remuneration, but each must have an incentive to warn the electorate, between elections, when they spot rival politicians betraying the public trust.

These considerations help explain why Madison refers to "the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct" as "the sacred maxim of free government."[32] He shared Locke's pessimistic view of human nature, agreeing that "it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them."[33] This blending of powers inevitably recreates "privilege" in the etymological sense of private-interest law. This is true because any man or group of men who have both the legislative and the executive power "may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage."[34]

The idea that elected officials, in the absence of the separation of powers, will abuse their public trust for private purposes is central to a wide rage of republican theories. To explicate his conventional claim that "Il n'est pas bon que celui qui fait des loix les execute," for example, Jean-Jacques Rousseau immediately adds: "Rien n'est plus dangereux que l'influence des intérèts privés dans les Affaires publiques."[35] Rousseau is an important author from our perspective because he was fundamentally skeptical about the capacity of popular elections, even when supplemented by the separation of powers, to obstruct the hijacking of public functions by private interests: "L'esprit universel des Loix de tous les pays est de favoriser toujours le fort contre le foible, et celui qui a, contre qui n'a rien; cet inconvénient est inévitable, et il est sans exception."[36] Far from being neutral and impartial, law is soaked through with partiality and favoritism. In every known society, therefore, "l'on fait passer faussement sous le nom de lois des décrets iniques qui n'ont pour but que l'intérêt particulier."[37]

In the end, Rousseau had little faith that the separation of powers would actually solve the problem he had in mind. But his theory does help us pinpoint the disease that, ideally, the separation of powers would help cure. It was not tyranny but rather the penetration of public affairs by unchecked private interests that presented the most imminent threat to republican government.

If the same people can make, revise, interpret and selectively execute the laws, they will be faced with an irresistible temptation to indulge in self-dealing or self-serving behavior.

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[31] *Federalist* #46.
[32] *Federalist* #47.
[33] Locke, *Second Treatise*, §143.
[34] Locke, *Second Treatise*, §143.
[35] Rousseau, *Du Contrat Social*, III.4.
[36] Rousseau, *Émile* in *Oeuvres complètes* (Paris: Pléiade, 1969), Vol. IV, p. 524.
[37] Rousseau, *Du Contrat Social*, IV.1.

They will have no compunction about imposing onerous burdens on the public, knowing that they retain the discretionary power to exempt their family, friends, and political allies. All people trust themselves more than they trust others. As a consequence, a group of legislators who simultaneously exercise all executive and judicial functions will willingly grant unlimited power to those (themselves) who are charged with executing the laws. By contrast, a separate and distinct lawmaker "will take care not to entrust" a separate and distinct executive magistrate "with so large a power,"[38] for fear that such a power could be used against the legislators themselves.

The constitutional remedy for "unjust and partial laws"[39] is to force the lawmakers to see enacted laws from the viewpoint of ordinary citizens who have to live under them. This is possible only if the lawmakers are deprived of the power to exempt anyone, including themselves and their friends, from the effect of the legislation they enact. That denial of a power to the legislature can only be achieved if the discretion to apply or not apply the law is given to agencies that can act independent of the legislature, namely what we would call the executive and judicial branches of government. In Locke's time, before the rise of the full-time professional legislator, the same end could be achieved by the relative brevity and infrequency of legislative sessions. As he wrote, "in well-ordered common-wealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers persons, who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made."[40] Here again Madison follows Locke to the letter. Because they are expected to rotate in and out of power and because they do not wield either the executive or judicial power, legislators under the new Constitution will be able to "make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society."[41] The separation of powers will compel the lawmakers to see the laws they pass from the standpoint of the citizens who will have to live under their sway. Thus, at least in ideal theory, the separation of legislative and executive power adds an additional restraining effect to the periodic elections of the lawmakers. It is, according to Locke, "a new and near tie upon them to take care, that they make [laws] for the public good."[42] According to Madison, too, the separation of powers, annexed to periodic elections, represents "one of the strongest bonds by which human policy can connect the rulers and the people together."[43]

This image of a "separation" that serves as a "tie" or "bond" seems incongruous at first. Thinking of the way competition between rival producers can ultimately serve the interests of consumers, by lowering prices while improving the quality of products or services, can help resolve the dissonance and make the underlying idea easier to

[38] William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979), Vol. I, Chapter 2, p. 142.
[39] *Federalist* #78.
[40] Locke, *Second Treatise*, §143.
[41] *Federalist* #57.
[42] Locke, *Second Treatise*, §143.
[43] *Federalist*. #57.

understand. But an even more useful window into Locke's conception is provided by the idea of *divide et impera*, once a maxim of the masters of mankind instructing the few how to rule the many, but eventually inverted by modern republican writers. Plural agency allows the electorate, which cannot make politics into a full-time job, to play various elected officials off against one another. In such a system, if it works as intended, periodic accountability to the electorate would be supplemented between elections by a form of peer review by rival delegates of the electorate.

Manipulating Accountability

In contemporary democracies, one of the most common ways in which elected officials acts as judges in their own cases involves strategic redistricting, especially for the purpose of creating safe seats, insulated from electoral disapproval. Gerrymandering allows incumbents to shape how the voice of the electoral majority is registered politically. By reconfiguring opportunistically the electoral map, rulers can insulate themselves from the disciplining (or anti-amnesic) effect of frequent elections.[44] To play a variation on the Brechtian irony, gerrymandering by elected officials allows the government not to elect a new people but at least to refract the popular will, in the rulers' favor, through a specially crafted distorting lens.

Contrary to uplifting populist rhetoric, constitutional theory classifies the democratic electorate as a *pouvoir constitué* which can express its will only within the four corners of preexistent procedures and rules. To the extent that a large collectivity can be said to rule itself (obviously open to debate), it can do so only *through* enduring institutional structures, that are publicly known before the voting begins, including rules specifying who can and cannot vote and run for office. Among the most important of these preexisting institutions, in fact, are the electoral districts into which voters are subdivided. The impact of electoral districting is so pervasive and decisive that the same distribution of popular votes among rival parties can lead to radically different electoral outcomes depending on the way district lines are drawn. The dilemma this poses for democratic theory and constitutional design has already been stated. Frequent elections are designed to align the interests of the rulers with the interests of the ruled by making it constitutionally impossible for incumbents to remain in office without faithfully administering the trust that has been temporarily lodged in them. So how do voters, who can act effectively only through their elected representatives, ensure that the latter do not replace the popular will with their own, manipulating electoral districting schemes to dilute the power of voters to oust representatives who have not faithfully fulfilled their duties to their constituents?

This dilemma is deep and perennial. In the United States, at least, it has also proved highly resistant to rational reform, much to the detriment of democracy because safe seats notoriously repress turnout by making the outcome of elections into a foregone conclusion. For the historian of ideas, the point to stress here is that the dilemma was

[44] Carlos Salinas Maldonado, "Ortega cambia el mapa de Nicaragua," *El Pais* (11/04/2011).

already shrewdly discussed by John Locke in the context of rotten burrows.[45] His conclusion was that the task of remedying mal-apportionment caused by urbanization and other demographic shifts cannot reasonably be given to the very assembly which benefits from the mal-apportionment. This would make the assembly judge in its own case, an arrangement that would certainly offer too great a temptation to self-dealing, given the known frailty and partiality of human nature, and would thereby make a mockery of the dependence of the rulers on the ruled. From the standpoint of democratic theory, control over electoral districting by representatives who are elected on its basis would represent the end of constitutionalism, the principal aim of which is to prevent the autonomous self-perpetuation of elected officials, able to disregard the wishes of their voters by shrewdly deploying the increasing returns to power.

Locke's proposed solution to this problem was none other than the separation of powers, namely, the assignment of the power to redistrict, in the wake of natural demographic shifts, to a power completely independent of the elected assembly. For Locke, the power to periodically draw new electoral districts should be assigned to Britain's dynastic king. The king's duty to redistrict rationally, according to the *Second Treatise*, would ensure that "the people shall chuse their representatives upon just and undeniably equal measures, suitable to the original frame of the government."[46] Not surprisingly, other institutions have also been proposed as appropriate for exercising control over districting, including the Supreme Court of the United States. Successful or not, what all such reform proposals have in common is a recognition that, in order to unclog the channels of political change,[47] the power to redistrict must be lodged in governmental departments or agencies wholly independent of the representative assembly itself. The restraint of frequent elections, on its own, does not help align the interests of the rulers with the interests of the ruled so long as the rulers can determine how votes will be distributed across an electoral map of their own design. Even if the separation of player and referee has proved unavailing, in this case too, it helps us focus more clearly on the perennial and present threat to democratic governance that we share with the earliest theorists of constitutional democracy: the threat of self-dealing elected politicians.

Joint Agency

Because it involved an element of specialization and the division of labor, the Framers certainly agreed with the traditional idea that the separation of powers would add efficiency to the government.[48] Some officials would specialization on deliberation, others on action, and still others on resolving disputes. At the same time, the various departments of government, including magistrates elected at the state level, are

[45] John Locke, *Second Treatise*, §157-§158.
[46] Locke, *Second Treatise*, §158.
[47] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).
[48] In 1926, U.S. Supreme Court Justice Louis Brandeis seemed to dissent from this interpretation, arguing that "The doctrine of the separation of powers was adopted by the Convention of 1787, *not to promote efficiency* but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting), *my emphasis*. How arbitrary power could be possibly be efficient, Brandeis does not explain.

incentivized "to sound the alarm to the people"[49] in case the occupants of rival branches begin to treat public resources as private assets. All people behave differently when watched than when unwatched, and "differently" here usually means morally worse. (Interestingly enough, Hamilton argued that the same watchdog or whistle-blower function could be played by opposition parties within the national legislature. In case of abuse of power, "the public attention will be roused and attracted to the subject by the party in opposition."[50])

Madison reiterated the commonplace that "power is of an encroaching nature."[51] But he also knew that power was of a shirking nature. Power loves unilateralism because unilateralism decreases the opportunities for the executive's conduct to be exposed to the light of day. Hence, the constitutional separation of powers, whatever protection it provides against tyranny, also makes it more difficult for political officials to hide behind a veil of secrecy. According to Montesquieu, "dans un État libre, la puissance législative . . . doit avoir la faculté d'examiner de quelle manière les lois qu'elle a faites ont été executes."[52] The legislature also has the right "d'appeler en jugement," that is, to impeach and try executive officials and therefore, by implication, to examine the conduct of executive officials in order to be able to ascertain whether or not their misbehavior rises to the level of an impeachable offense. In this way, at least ideally, the separation of powers compels rulers to explain their actions, on the record, for a critical public, too, to examine and criticize.[53]

In any case, the benefits promised by specialization and mutual monitoring, even taken together, do not exhaust the promise of the separation of powers from the American Framers' perspective. Equally important was what they called "joint agency." Following Montesquieu's idealized reconstruction of the British system, the Framers rejected the idea that a separation of powers involved watertight compartments or strict functional specialization. In the workable systems, such as the British, the "departments are by no means totally separate and distinct from each other."[54] What the Framers favored, by contrast, was a system of joint agency, whereby decisive actions required the simultaneous assent of constitutionally independent agencies or groups of individuals.

The wielder of unilateral power, able to act without the consent of an independent peer, is likely to behave with less moral integrity than the wielder of a shared power who can only act with such consent. For example, if the President had the sole power to make appointments in his hands, according to Hamilton, he "would be governed much more by his private inclinations and interests"[55] than by the public good. The Senate's "partial

[49] *Federalist* #44.
[50] *Federalist* #26.
[51] *Federalist* #48.
[52] *De l'esprit des lois*, VI.5.
[53] "For this kind of accountability to be effective, there must exist state agencies that are authorized and willing to oversee, control, redress, and if need be sanction unlawful actions by other state agencies" (Guillermo O'Donnell, "Horizontal Accountability in New Democracies," *Journal of Democracy* 9.3, 1998).
[54] *Federalist* #47.
[55] *Federalist* #76.

agency" in the appointment's process is "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[56] Only a President of the highest moral character would be able to resist the blandishments of incompetent office-seekers and personal acquaintances if he was constitutionally permitted to make appointments unilaterally. By inhibiting to some extent the President's freedom to make patronage appointments, the advice-and-consent clause protects the community from being ruled by incompetent cronies. The Constitution supplies the defect of better motives, therefore, by insulating the President to some extent from his own private animosities and affections, not to mention his temptation to sell office for private gain.

When Madison says that a good Constitution should oblige the government "to control itself,"[57] he means that it should prevent incumbents from yielding to the temptation to prefer their private interests to the interests of the country and thereby "to betray the solemn trust committed to them."[58] The most obvious way in which that can happen is when office holders pass laws, create policies, or deliver judicial decisions in exchange for private payments from interested parties. The importance of this problem from the Framers' perspective is clear from the Constitution itself, especially the reference to "bribery" in Article 2, Section 4 Impeachment Clause, summarized in the *Federalist Papers* as follows: "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."[59] Making Bribery into an impeachable and then prosecutable offense was one way of helping "to guard one part of society against the injustice of the other part."[60]

A similar argument reappears in the *Federalist*'s commentary on the Treaty-Making Clause. Given the political context of the late eighteenth-century, the most obvious threat of bribery in the U.S. came from "foreign gold"[61] or "the desire in foreign powers to gain an improper ascendant in our councils."[62] Hamilton, for example, explicitly contemplates the possibility that "a few leading individuals in the Senate" could "have prostituted their influence in that body as the mercenary instruments of foreign corruption."[63]

The constitutional requirement that the President obtain the Senate's consent to treaties is meant to make it more difficult and costly for foreign powers to purchase treaties biased against U.S. interests.[64] Hamilton returns repeatedly to "The security essentially intended

[56] *Federalist* #76.
[57] *Federalist*, #51.
[58] *Federalist* #55.
[59] *Federalist*, #69.
[60] *Federalist*, #51.
[61] *Federalist* #55.
[62] *Federalist* #68.
[63] *Federalist* #66.
[64] *Federalist*, #75.

by the Constitution against corruption and treachery in the formation of treaties."[65] In other words, ""The JOINT AGENCY of the Chief Magistrate of the Union, and of two thirds of the members of a body selected by the collective wisdom of the legislatures of the several States, is designed to be the pledge for the fidelity of the national councils in this particular."[66] The requirement of joint agency in treaty-making makes bribery more expensive and difficult to accomplish by discreetly lifting the secrecy bribery necessarily requires. So concerned were the Framers about the illicit influence of foreign gold on the making of treaties that Hamilton seems briefly willing to abandon the supermajoritarian threshold that the Constitution actually requires for the Senate's ratification of a treaty made by the executive:

> Suppose the necessity of our situation demanded peace, and the interest or ambition of our ally led him to seek the prosecution of the war, with views that might justify us in making separate terms. In such a state of things, this ally of ours would evidently find it much easier, by his bribes and intrigues, to tie up the hands of government from making peace, where two thirds of all the votes were requisite to that object, than where a simple majority would suffice. In the first case, he would have to corrupt a smaller number; in the last, a greater number.[67]

Shining through passages such as this we can discren the Framers' dominant concern to insulate the policy-making process from capture by well-resourced groups with interests contrary to those of the American public.

Human beings, including elected officials, can sometimes behave honorably and according to a professional code of ethics. There is nevertheless "a degree of depravity in mankind which requires a certain degree of circumspection and distrust."[68] Distressingly enough, the "history of human conduct"[69] gives constitution-makers reason enough to prepare for worst-case scenarios. The massive transfer of private resources into the pockets of elected officials in exchange for special-interest policies, laws, and judicial decisions is a disorder apparently inseparable from electoral politics:

> Hence it is that history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments. How much this contributed to the ruin of the ancient commonwealths has been already delineated. It is well known that the deputies of the United Provinces have, in various instances, been purchased by the emissaries of the neighboring kingdoms.[70]

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[65] *Federalist* #66.
[66] *Federalist* #66.
[67] *Federalist* #22; cf. "A nation, with which we might have a treaty of commerce, could with much greater facility prevent our forming a connection with her competitor in trade, though such a connection should be ever so beneficial to ourselves" (*Federalist* #22).
[68] *Federalist* #55.
[69] *Federalist* #75.
[70] *Federalist* #22.

To today's reader, Hamilton's insistence that "One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption"[71] seems dated, especially in the large and immensely wealthy country that the United States has subsequently become. Nevertheless, his basic argument still holds:

> In republics, persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which, to any but minds animated and guided by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty.[72]

The warning that elected officials can find "compensation" for betraying the public trust retains all its original force. Elected officials in American and elsewhere routinely exploit their office for private gain, denying honest services to their constituents and concealing conflicts of interest. My point is that this syndrome was already all-important to the Framers. It comes up repeatedly throughout the *Federalist Papers*, and served as a driving motivation for their attempts to institutionalize a separation of powers.

Temptations to Prostitution

Another place where the illicit-compensation factor appears is in Hamilton's discussion of the jury trial. The constitutional requirement of jury trials in criminal cases gives the jury partial agency in the judge's decision. This arrangement is presumably meant to prevent arbitrary depravations of liberty; but it also makes it less effective to offer bribes to the judge: "The temptations to prostitution which the judges might have to surmount must certainly be much fewer, while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes."[73] To reduce the lure of bribes, the judge's verdict is made to hinge upon the independent decision of twelve randomly selected citizens. These jurors are much less vulnerable to bribes than sitting judges because the former are suddenly plucked out of the anonymous body of people and just as abruptly dispersed back into the multitude.

Joint agency of judge and jury is designed to make corruption, or the sale of public services for private benefit, more difficult:

> It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity

[71] *Federalist* #22.
[72] *Federalist* #22.
[73] *Federalist* #83.

> of either. The temptations to prostitution which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes.[74]

The U.S. Constitution requires juries in criminal case because the jury trial makes a direct and palpable contribution to "the preservation of liberty." By contrast, the Constitution makes jury trials in civil case optional, even though there is a lot to be said in their favor: "The excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty."[75] What makes jury trial in civil cases desirable, even if not constitutionally required, is that it contributes not to preserving personal liberty but to preventing public corruption, that is, the capture of state institutions by private interests:

> The strongest argument in its favor is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter.[76]

The fact that "the trial by jury" is "a valuable check upon corruption"[77] does not mean that it is foolproof. Jury tampering is always possible.

> The sheriff, who is the summoner of ordinary juries, and the clerks of courts, who have the nomination of special juries, are themselves standing officers, and, acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see, that it would be in the power of those officers to select jurors who would serve the purpose of the party as well as a corrupted bench. In the next place, it may fairly be supposed, that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character.[78]

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[74] *Federalist* #83.
[75] *Federalist* #83; it should be added that unilateral power-wielders are more vulnerable to threats of blackmail than the wielders of joint or shared power. Hamilton also defends the Electoral College on the grounds that it is well-designed to resist corruption. The crafters of the proposed Constitution, he says, "have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes" (Federalist #68). And he continues: "Their transient existence, and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so, to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives, which though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty" (Federalist #68).
[76] *Federalist* #83.
[77] *Federalist* #83.
[78] *Federalist* #83.

What is fascinating here is the suggestion that the judiciary may be better able to resist corrupt tampering because of the solidarity characteristic of a professional guild. Individuals can be picked off one-by-one. Only power can resist power, and that means only the organized power of the judiciary, infused with an esprit de corps, can resist the seductive power of under-the-table payments.

Speaking of the abuse of office for private gain, Hamilton wrote that "the convention have guarded against all danger of this sort, with the most provident and judicious attention."[79] In particular, the Constitutional Convention strove to discourage cabal, intrigue, and corruption, that is, "to make it as difficult as possible for [elected officials] to combine in any interest opposite to that of the public good."[80] Its principal plan for discouraging the abuse of public office for private advantage was the separation and sharing of powers: "If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system."[81]

The genius of the system was best illustrated by the requirement of joint agency of bodies whose members are recruited by wholly different methods for the making of laws, policies, and judicial decisions. This system makes corruption much more difficult than it would otherwise be. That is why Madison seems so confident about "The improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are placed."[82]

A simple example of how the separation of powers inhibits perfidious combinations is bicameralism:

> In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it.[83]

Federalism is also relevant, but for our purposes it will suffice to consider the legislative, executive and judicial branches. Each branch of government had partial agency in the functions of the other branches. No branch, ideally, can do its job without the agreement of another independent branch. This arrangement makes corruption more difficult. Unilateral power, by contrast, provides the ease and convenience of one-stop shopping for the briber or corrupter. Corruption is immensely simplified "where the whole power

[79] *Federalist* #68.
[80] *Federalist* #66.
[81] *Federalist* #57.
[82] *Federalist* #55.
[83] *Federalist* #62.

of one department is exercised by the same hands which possess the whole power of another department."[84] This is why the separation of powers is said to serve an anti-hijacking function, and thereby to provide a "sentinel over public rights."[85]

The separation of powers could be easily undermined, needless to say, if one branch could use its own resources to subordinate the members of a supposedly coequal branch to its private will. To make this more difficult, the U.S. Constitution contains another auxiliary precaution, designed to prevent the executive from corrupting the legislature by trading offices for votes of support. Madison is fully conscious that "the dispensation of appointments" could serve as a "fund of corruption" providing the executive with a power of "subduing the virtue" of Congress.[86] The purchase of legislature by executive, among other things, would destroy the plurality of agency on which, for instance, protection against corruption by foreign gold depends. This is not an wholly unsolvable problem, however, because:

> fortunately, the Constitution has provided a still further safeguard. The members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during the term of their election. No offices therefore can be dealt out to the existing members but such as may become vacant by ordinary casualties.[87]

This safeguard may seem laughably feeble to today's readers. But even skeptics can nevertheless agree that the separation of powers will not function if informal relations create "a combination between the executive and legislative in some scheme of usurpation."[88] If we focus on Congressional oversight of executive action, then executive payoffs to members of Congress amounts to either collusion or regulatory capture, pathological developments that channel benefits to a select few while dumping burdens on the many.

Asymmetries of Carrots and Sticks

Why are special interests able to dominate a democratically elected government despite the restraint of frequent elections? Why are governments in multi-party democracies so often in hock to business? One answer is asymmetry of information as discussed above. A second answer concerns asymmetries in the capacity to reward and punish. Special interests are able to provide a public official with an immediate and concrete reward in exchange for an immediate and concrete service. Lobbyists and bribe-givers have no problem evaluating the performance of the official whom they have suborned. Voters are in a very different position. They have to evaluate the performance of elected officials over a number of years in a wide variety of unrelated activities. Performance standards in

[84] *Federalist* #47.
[85] *Federalist* #51.
[86] *Federalist* #55.
[87] *Federalist* #55.
[88] *Federalist* #25.

such a context are necessarily subjective and disputable. Moreover, democracy only functions if those ousted electorally from office do not lose too much. If losing is too costly, incumbents will not allow themselves to lose, thereby destroying the principle of alternation in office which lies at the heart of democracy. Hence, the sanction of refusing to re-elect, wielded by voters, is by definition a relatively weak sanction. To make things worse, the money provided by special interests in return for special favors has become essential for reelection. In addition, business interests can credibly promise office holders a future high-paid job in their industry, a form of deferred compensation much more valuable than anything that the electorate can offer. Finally, corporations can undermine the watchdog role of independent media by purchasing television networks and confusing public perceptions of government conduct with deliberate campaigns of disinformation.

What all this means is today is that, given the penetration of politics by immense quantities of money, the restraint of frequent elections will not suffice to align the interests of the rulers with the interests of the ruled. In the U.S., the "iron triangle" among the Department of Defense, the aerospace and arms industry, and Congressmen seeking campaign funding and jobs in their districts is a perfect illustration of how the system of checks and balances can be gamed to produce the very legislation against the public interest that it was designed to prevent.

Unilateral Power and Cognitive Bias

"No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[89] The classical legal principle *nemo iudex in causa sua* underlies many of the most persuasive arguments in favor of the separation of powers.

We have already seen how unilateral power, exercised without any opportunity for independent oversight, corrupts the moral integrity of public officials. Another example is provided by Montesquieu's remark that, in monarchical regimes, "le prince a souvent les confiscations: s'il jugeait les crimes, il serait encore le juge et la partie."[90] If the prince is able to appropriate the property of anyone convicted of a serious crime, then the prince obviously should not be able to decide unilaterally about guilt or innocence. The incentives for impartial justice would disappear under the prince's irresistible temptation to exercise his role of judge for the benefit of himself as a party to the dispute.

So much for integrity. We now turn to the ways in which unilateral power corrupts their cognitive faculties as well.

Self-monitoring is notoriously lax and ineffective. Police commissions established to investigate police abuse have a predictable tendency to whitewash the alleged offenses. Monitors of the safety of nuclear power reactors or off-shore drilling rigs, when they are

[89] *Federalist* #10.
[90] *De l'esprit des lois*, VI.5.

paid a handsome bonus by the industry they are assigned to regulate, tend to produce reports that grossly understate risks to public safety. Many other examples could be evinced to illustrate the potential cognitive downsides of unilateralism. For an example of the converse, namely the potential cognitive benefits of the separation of powers, we might consider Amartya Sen's argument that famines disappeared in India when a free press was introduced points to the same idea, namely that governments perform more effectively when watched than when unwatched.[91]

The most familiar application to the executive branch of the principle that no man should be judge in his own case occurs in criminal trials. Government prosecutors, like anyone else, occasionally make mistakes. This is inevitable because, as Hamilton says, "the causes which serve to give a false bias to the judgment" are both "numerous" and "powerful."[92] John Jay elaborated on this point: "The pride of states, as well as of men, naturally disposes them to justify all their actions, and opposes their acknowledging, correcting, or repairing their errors and offenses."[93] No one, including a government prosecutor, should be permitted to be judge in his own case for the simple reason that human beings have an aversion to admitting their errors. This is why a single man or group of men should never be allowed to be both "le juge et la partie," both referee and player.

The executive branch's need for an independent "reality check" (or even "sanity check") is built into the American legal system, both at the micro-level of criminal trials and at the macro-level of checks and balances. To hinder the fatal slide from desirable flexibility to undesirable arbitrariness, the U.S. legal and constitutional system requires the executive branch to test the factual premises of the use of force in some sort of adversarial process. This is one of the most important ways in which the separation of powers can enhance governmental effectiveness.

Correcting avoidable error is just as important a purpose of the separation of powers as preventing tyranny and oppression. The separation of executive and judicial power, as just discussed, provides an institutional realization of a political culture that valorizes justification before an independent and informed tribunal. America's eighteenth-century Constitution, seen along these lines, is based on three still-valid principles: All people, including politicians, are prone to error; all people, especially politicians, dislike admitting their blunders; and all people relish disclosing the miscalculations and missteps of their bureaucratic or political rivals.

The Constitution attempts to operationalize these principles, roughly speaking, by assigning the power to make mistakes to one branch and the power to correct these mistakes to the other two branches and to the public and the press. Its structural provisions, when combined with certain basic rights (such as freedom of political dissent), set forth a series of second-order rules, that is, rules specifying the process by

[91] Amartya Sen and J.H. Dreze, "Democracy as a Universal Value" in *Journal of Democracy*, vol. 10, 3 1999, p. 8.
[92] *Federalist*, #1.
[93] *Federalist*, #3.

which concrete decisions and first-order rules are to be made and revised. If America's eighteenth-century Constitution is still helpful in dealing with twenty-first century threats it is largely because its second-order rules embody a distrust of false certainty and a commitment to procedures that facilitate the correction of mistakes and the improvement of performance over time.

One of the Founders' basic assumptions was that the executive branch will, on balance, perform better if compelled to provide both Congress and the courts with plausible reasons for its actions. If a government stops being compelled to provide plausible reasons for its actions, it is very likely, in the relatively short term, to stop having plausible reasons for its actions. For example, if the President goes to war unilaterally, without having to answer hard questions about his contingency plans and back-up plans, it is less likely they he will succeed. Obligatory consultation is not a "check" on his power, except in the sense of a "sanity check," something that (in the case of war) the American executive dearly needs but does not often receive.

Consider now a somewhat mysterious but fascinating passage in *De l'esprit des lois*, where Montesquieu is defending the strict separation of executive and judicial power: "Les lois sont les yeux du prince; il voit par elles ce qu'il ne pourrait pas voir sans elles. Veut-il faire la fonction des tribunaux? il travaille non pas pour lui, mais pour ses séducteurs contre lui."[94] What does this curious passage mean?

Where there is power, there pressure is applied. Political power is a magnet not only for the application of pressure by groups intensely interested in the outcome of political decisions. Political power is also a magnet for disinformation fed to power-wielders in the hopes of manipulating them to act unknowingly in the interests of groups with hidden private agendas. (Think of the tribal informants in Pakistan and Afghanistan who mislead American drone operators into thinking that a personal or clan rival is a member of al Qaeda or the Taliban.) Judicial independence protects the state from deliberately crafted disinformation. That is the implication of Montesquieu thesis that a king who acts as a judge is laboring for impostors who aim to deceive him.

High evidentiary standards, imposed by independent judges, might seem at first to be hurdles over which government prosecutors must leap in order to achieve the criminal convictions they seek. In this sense, high evidentiary standards restrict the government's freedom of maneuver. On the other hand, these same limits on the government also *protect the government* from witness malice and other attempts by private parties (jilted lovers, disgruntled coworkers, convicted felons seeking early release, and so forth) to inject disinformation into the criminal justice system in an attempt to use state power to exact personal revenge or achieve other illicit ends.

In other words, high evidentiary standards, administered by independent courts, insulate executive officials from private manipulation (or "capture") by tying their hands to some extent. Relinquishing power in one domain may increase the executive branch's power overall, in other words, not only because of the obvious advantages of specialization but

[94] *De l'esprit des lois*, Book VI, Chapter 5.

also because this selective abdication of control reduces the incentives of inveterate dissemblers to feed disinformation into the deliberative processes by which the executive makes policies and decisions.

A unilateral power is much more likely to be duped by disinformation than a power that is subject to independent monitoring. The great literary mise-en-scène of this political truth is Shakespeare's *Othello*. When Othello was accused by Desdemona's father of seducing her with drugs, the accusation was tested before an independent tribunal, the Council of Venice, which told the father that "to vouch this is no proof,"[95] eventually dismissing the charges after allowing Othello and Desdemona to tell their side of the story. But later, when Iago, speaking untruth to power, persuades Othello of Desdemona's infidelity, Othello does not say "to vouch this is no proof." He does not allow Desdemona to tell her side of the story or submit the case to an independent tribunal. By playing both *le juge et la partie*, Othello loses rather than gains autonomy. His insulation from an institutional mechanism for the correction of errors makes him not free but rudderless. Othello's wrongful murder of his innocent wife is therefore a standing reminder of the vulnerability of unilateral and unchecked power to manipulation by malicious purveyors of false information. Admittedly, being publicly corrected may wound the vanity of power-wielders in the short term. But it will benefit the community in the long term. In that sense, the separation of powers depends on the "virtue" of rulers, that is, their willingness to subordinate the personal short-term advantage for long-term systemic benefits to the community as a whole. Perhaps the promise of the separation of powers is so rarely realized because such virtue in rulers is itself so rare.

Pretended Dangers

Constitutionalism itself is impossible without some version of the separation of powers. According to Article 16 of the Déclaration des droits de l'homme et du citoyen of 1789, for example, no society can be said to have a constitution of any sort unless *la séparation des Pouvoirs* is established.[96] The most compelling evidence for this claim arises in the context of declarations of emergency. In contemplating the necessity defense of executive action without legislative approval, Hamilton draws a sharp distinction between real necessities and "supposed necessities of the State."[97] He remarks on "how easy would it be to fabricate pretenses of approaching danger."[98] If he invokes the Roman "dictatorship" as a positive model for emergency rule,[99] it is because he knew that, in early republican Rome, the power to declare an emergency did not belong to the man who eventually exercised emergency powers. Constitutionalism itself comes to an end where the man whose power becomes nearly unlimited in an emergency is judge in his

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[95] "To vouch this is no proof,
Without more wider and more overt test
Than these thin habits and poor likelihoods
Of modern seeming do prefer against him" (*Othello*, Act I, scene 3, lines 107-109)

[96] "Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution."

[97] *Federalist* #26.

[98] *Federalist* #25.

[99] *Federalist* #70.

own case, that is, where he also has the unilateral power to decide if there is an emergency or not.

This example not only reveals the inseparability of constitutional rule and the separation of powers. It also reinforces the importance of the separation of powers as a barrier against cognitive bias. The identical problems of combing the roles of *partie* and *juge* occurs in the regulatory context, where it is commonly argued that the job of risk assessment needs to be assigned to an agency different from the one assigned to perform risk management. If the two roles are combined, it is frequently and plausibly argued, risk assessment will be subtly skewed to serve the interests of the risk manager, thereby reducing the objectivity and there utility of the initial evaluation.

To illustrate this point we need only recall the refusal of the Bush Administration to permit a serious congressional inquiry before going to war in Iraq. As a result, no hard questions were asked. The Administration did not have to explain, even behind closed doors, what plans it had for post-war Iraq. The catastrophic results are well-known.[100] The President's constitutional duty to consult with Congress before going to war is no mere quaint relic of the eighteenth century. It reflects the danger of engaging in military operations, that can easily spin out of control, without being forced to think through the consequences, not to mention without making sure that there is enough support in the country to support an extended war effort, if that turns out to be required.

Acutely aware of how easy would it be to fabricate pretenses of approaching danger, the Framers insisted that Congress, not the President, had the exclusive right to declare war, while they gave the President the right to command troops in the field. The President's powers expand considerably in wartime. To give the President the power to declare war would therefore be to make him judge in his own case, creating a temptation to self-dealing that is incompatible with constitutional government. Needless to say, Dick Cheney would disagree. He has repeated and publicly stated that the executive's constitutionally imposed obligation to submit to legislative and judicial oversight interferes dangerously with the executive branch's ability to defend the nation. The constitutional answer, informed by an awareness of the cognitive function of checks and balances, is that some level of legislative and judicial oversight might have forced the executive to take reasonable care, something that in the case of the Iraq war it did not do.

Advocates of the Imperial Presidency, especially in wartime, claim that sharing war powers with the legislative and judicial branches is like driving a car with the brakes on. Liberal constitutionalists, by contrast, view the unilateralist approach to managing emergency as like sailing a ship without any ballast. Ruling by executive decree while bypassing obligatory consultations with Congress may seem, at first, like the path of least resistance. But it will make it more difficult to sustain government efforts in the long-run, especially in matters of national security where costs and sacrifices can be enormous.

[100] Today, one worries about the results of President's Obama's hasty decision to intervene in Libya without consulting Congress or having to answer any hard questions.

Neither the Department of Justice nor the Department of Defense was allowed to try Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks who was arrested in 2003, perhaps because a public trial would have discredited the myth of an Osama-Saddam connection, one of the principal delusions that sustained public support for the misbegotten war. The incompetent, misinformed, and counter-productive handling of the entire "war on terror," in fact, reveals what can go wrong when the executive branch insists on being judge in its own case.

A fascinating reflection on how absence of restraint affects cognition is the following: "Restraint is always in part the cognitive attention to multiple possibilities in a situation; when all restraint is lost, the cognitive universe is simplified in a single focus."[101] This line of thought may help explain how unilateral power produced Cheney's tunnel-vision, or obsessive, focus on the threat of Iraqi WMD even while he neglected a multitude of even more imminent and serious threats. Only an executive power that exposes itself to second opinions and sanity checks from a variety of independent observers has any chance to react adequately to the complexity of the threat environment. A unilateral power, locked in a bunker and insulated from outside perspectives, is likely to fixate irrationally on a single threat at the cost of ignoring dangers emanating from quite different sources.

Maladies that Cannot be Cured

The separation of powers can only help align the interests of rulers with the interests of the ruled under certain social conditions. The principal condition is that the interests of the rulers and the interests of the ruled not be too far apart to begin with. If the two sets of interests are utterly and irredeemably at odds, constitutional remedies will be futile.

In the early twenty-first century, the capacity of frequent elections and the separation of powers to inhibit the abuse of elective office for private advantage seems to have been considerably diminished by the influence of money in politics. This trend reflects a wider social tendency for the rich and the powerful to take care of themselves while neglecting the poor and the weak. By ring-fencing their privileged lives and using private doctors, private schools, private policemen and so forth, the rich and powerful seem to feel that they inhabit a different society from their less fortunate co-citizens. By using off-shore tax shelters, they place their private wealth beyond the reach of redistributive governments interesting in public investment for the community as a whole. Attacks on public schools, common in many Western democracies, seems to reflect a decision by capitalist entrepreneurs that there is no need to educate a domestic workforce, since the mobility of capital makes foreign labor easy to exploit.[102] The

[101] Jonathan Shay, M.D., *Achilles in Vietnam: Combat Trauma and the Undoing of Character* (Scribner, 1994), p. 86.

[102] That this is a myopic attitude is suggested by the principal difference between public and private schools. While private schools educate students, public schools integrate students as well. The negative consequences for the elite of un-integrated immigrants in their countries is perhaps too remote for them to take it into account, confirming Mill's suggestion that the rich and powerful do not learn how to think ahead.

replacement of mass armies with much smaller all-volunteer armies with push-button weapons means that the propertied elite feel additionally liberated from any obligation to take care that their fellow citizens are healthy, literate, and committed to a common enterprise. Their banquet-in-a-fortress life habituates them to ignoring the interests and concerns of ordinary citizens. There is no way that a constitutional mechanism, such as the separation of powers, can effectively counteract such a tectonic shift in social relations. To cite Hamilton, "this is one of those calamities for which there is neither preventative or cure."[103] Admittedly, "If the representatives of the people betray their constituents,"[104] an extra-constitutional remedy might conceivably be sought in a violent popular revolution. But in increasingly corrupt modern "democracies," revolutionary movements are unlikely to gather any steam. This is because faithless and profiteering officials have learned to leave personal liberties largely untouched and to content themselves with abusing their office and plundering the public treasury for private gain while consigning the wider public to an increasing restricted but not palpably oppressive public sphere.

[103] *Federalist* #26.
[104] *Federalist* #28.