Andrew Wroe, 'Separation of Powers' in Paul Barry Clarke and Joe Foweraker (eds.), *Encyclopedia of Democratic Thought* (London: Routledge, 2001)

Governments perform three functions: executive, legislative, and judicial. In a political system with a strict separation of powers, these functions or powers are each allocated to a distinct institution of government. The major premise underlying the separation of powers is that individuals have the potential to harm others, and potential can become reality when power is concentrated in one person, faction, or institution. Thus, in separating powers, the major aim is to prevent tyranny and safeguard liberty by ensuring that no one can accumulate despotic powers. A further related aim is to ensure that laws are made in the interests of all by giving the law-making power to the people's representatives in parliament. Another is to ensure the *accountability of government. For example, the legislature is accountable to the people for the laws it makes and the executive to the people and/or the legislature for the execution of those laws. A final aim is to ensure that government operates effectively and efficiently. The rationale is that different types of institution perform different functions better than others. For example, it is often argued that putting laws into effect requires a strong, unified hand. Thus, a legislature composed of many individuals with many ideas representing many interests could not effectively execute the laws; a chief executive or president best performs the task.

Writing in the mid-eighteenth century, Montesquieu is usually regarded as the first to identify and argue for a separation of powers. While this is not strictly true—others such as George Buchanan, John Locke, and the English Levellers all previously proposed something resembling his formulation—Montesquieu provided a more profound and systematic synthesis (Gwyn 1965). He developed his argument in book 11 of <u>Spirit of the Laws</u> (1748) after studying the constitution of England. He saw there a distinction, albeit not strict, between making laws and putting them into effect. He applauded the division between the executive (the monarch) and the legislature (parliament), which itself was divided between the House of Lords (the aristocracy) and the House of Commons (the people). Such a division of powers should, in theory, prevent a concentration of power and promote liberty because the making and enforcing of laws are separated and inexpedient laws or dangerous actions are prevented. Montesquieu had his greatest influence on the founding fathers of the US, and in particular on James Madison. Madison famously noted in <u>The Federalist</u> No. 47 that 'the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny'.

While Montesquieu's analysis was certainly influential, there is a dispute among scholars over whether he was correct to describe England's constitution as separated. The answer is that he rightly recognised the existence of a separation of powers in England (although not in the form it is generally understood today), <u>and</u> he recognised it was one of several important features

of its government. It is worth examining these other features and distinguishing them from the separation of powers because this will facilitate a better understanding of the theory of separation and a deeper knowledge of how it works in practice. Briefly stated, for the separation of powers to work in practise, its theory must be violated.

In addition to a separation of powers, Montesquieu identified in England a mixed constitution, a balanced constitution, and checks and balances (Richter 1977: 86). William Blackstone, writing at the end of the eighteenth century, analysed and described the mixed constitution more succinctly than Montesquieu. He argued that the English system was different from others. It was not a democracy, aristocracy, or monarchy; it was, rather, a mix of all three. For Blackstone, democracies are virtuous and thus best in determining what the end shall be; aristocracies are wise and thus best at determining the means to reach the end; and monarchies are powerful and thus best at executing the means. In combining the three in separate institutions (the Commons, Lords, and Crown respectively), the English constitution provides all that is necessary for good government.

Another feature of the English system was a balanced constitution, which is related to, but subtly different from, a mixed one. Mixed refers to the combining in government of different classes or estates, but it says little or nothing about the distribution of power other than that it should be shared. In a balanced constitution, as in a mixed one, power is divided, but it is done so in an equal way. Each independent institution's power is balanced against the others'. And because each institution represents a different social class or estate, neither can become subservient to the other/s. In these ways, tyranny is prevented and public liberty safeguarded.

The final feature of the English system was checks and balances. Montesquieu, Blackstone, and Madison among others recognised that dividing and separating power between classes and institutions may not on its own prevent tyranny. The powerful will always desire more power. It is possible, both theoretically and practically even in a separated system, that they may appropriate the powers of others if controls are not in place to prevent them doing so. Madison argued in The Federalist Nos. 47 and 48 that delineating the separation on paper, even in a written constitution that was difficult to amend, would be a futile gesture. He quotes at length Thomas Jefferson's experience in Virginia where the legislature usurped the powers of the other branches, despite an unequivocal statement in its constitution that there should be no sharing of powers. To maintain a separation of power, then, checks and balances between institutions are necessary to prevent usurpation. What would such checks look like? On a practical level, the executive may have the power to veto legislation, especially if its passage would result in the legislature assuming the powers of others. Likewise, the legislature should be able to prevent the executive appropriating others' prerogatives, perhaps through the impeachment of executive officers. On a theoretical level, however, introducing checks and balances to guard the separation of powers actually produces a diminution of the separation. In effect, what checks and balances

do is allocate some legislative power to the executive and some executive power to the legislature. Thus, the theory of separation is violated to save it in practice.

The question, which is as important today as it was during the battle over the ratification of the US constitution, is to what extent must the theory be violated? Too few checks and the separation can be violated; too many and the separation expires. Madison sought to tackle this question, and did so with clarity and sense. He argued that executive, legislative, and judicial powers need to 'be so far connected and blended as to give each a constitutional control over the others' (The Federalist No. 48). There must, therefore, be encroachment of each upon the others, but each should maintain its own will and powers, and each should never be allowed completely to administer, appoint, or overrule another. As famously stated in The Federalist No. 51, 'defense must…be made commensurate to the danger of attack. Ambition must be made to counteract ambition'.

In the US, on the vertical dimension, the governments of the states check the national government, and vice versa. The constitution's supremacy clause gives federal laws primacy over state laws, but the tenth amendment reserves to the states all powers not enumerated in the constitution. On the horizontal dimension, the executive, legislature, and judiciary check each other. For example, the president nominates members of the supreme court, but congress appoints. Congress declares war, but the president is commander-in-chief of the armed forces. The president can veto bills passed by congress, congress can override the veto with a two-thirds majority in both chambers, and the supreme court can declare legislation unconstitutional. There are a multitude of other checks too numerous to list here. However, despite the impressive list, Madison was pessimistic that his ambition dictum would work in the legislature's case; its potential for encroachment was too great. To prevent its self-aggrandisement, the legislature was made bicameral, with each chamber responsive to different passions (electorates) at different times (*elections). Thus, checks and balances operate between different levels of government (federal vs. state), between different branches of government (executive vs. legislature vs. judiciary), and between different institutions within a branch of government (House vs. Senate).

The discussion began with a strict definition of the separation of powers. By now, however, it should be clear that a strict theory of separation is unworkable in practise. The example of the US showed that the checks and balances required to maintain the separation necessarily result in its violation. Richard Neustadt was right when he argued that the US system should not be described as a separation of powers. Rather, checks and balances between institutions create a system best described as 'separated institutions sharing powers' (1990: 29).

Such sharing, as the founding fathers intended, promotes inaction because it curtails power to change. It does not, however, prevent all change. Indeed, Madison would be surprised, perhaps disturbed, by the rise in *presidential power. (Hamilton would not). The federal government has also seen its power increase at the expense of the states. The centralisation of

power is a twentieth century phenomena, a result of depressions, world wars, and advances in communication technologies. It is also a phenomenon not specific to the US. What it shows, though, is that there is flexibility within separated systems to adapt and change. Perhaps no where is this more clear than in the United Kingdom (UK). The limited separation of powers identified by Montesquieu in the uncodified English constitution no longer exists. The executive in the form of the prime minister and the cabinet is drawn from the largest party in parliament, where strong political *parties and non-proportional electoral systems encourage artificially large majorities. The *judiciary, too, is not independent of the legislature or executive. The senior judicial officer, the Lord Chancellor, is appointed by the prime minister, sits in the cabinet, and presides over the House of Lords, where the most senior judges, the law lords, also sit.

While the UK moved slowly away from separation over many years, the crucial question facing many emerging nations is whether the separation of powers, defined strictly or otherwise, works? Should they adopt it? A definitive answer is, of course, impossible. First, it depends what 'works' means; what criteria should be used in judgement? Second, even assuming a satisfactory answer to the first question, there are many independent variables, both exogenous and endogenous to constitutional structures, confusing the picture. The structure of government is far from the only factor influencing governmental success. Ceaser (1986: 169) identifies several other potential factors: informal structures, such as political parties and *interest groups; social structures, such as *class, race, and ethnicity; and *political culture, including attitudes towards liberty, leadership and democracy. The US and Mexico cases illustrate the importance of these other factors. Both have very similar constitutional structures, with a separation of powers, checks and balances, and a federal system. In practice, however, Mexico's political culture and its informal and social structures are more important in defining its political system than its formal constitutional structures. In sum, the US and Mexico are formally similar, but practically very different. This is not to say, though, that formal structures do not matter. The case of France after 1958 demonstrates they do.

Keeping in mind Ceaser's warning that it is not only government structures that structure governments, it seems sensible to judge the separation of powers by its own aims. Does it prevent tyranny and safeguard liberty? Does it ensure that laws are made in the interest of all? Does it promote accountability? And does it result in effective and efficient government?

In response to the first question, the answer appears to be no, a separation of powers cannot on its own guarantee liberty. Even in the case of the US, it is difficult to argue all Americans across history have had their liberty protected. African Americans, first as slaves, later subject to segregation, Japanese Americans interned during world war two, communists, homosexuals, and immigrants, whether documented or not, have all had their freedom violated. It is also difficult to argue that Americans enjoy greater liberty than citizens of, say, the UK or Germany, where there is no separation of powers. While these examples demonstrate that

*minorities have at times suffered what legitimately may be labelled tyranny, does the separation of powers protect the majority against tyrannical rule? The answer at first glance is more positive; majorities have not, at least in the US, suffered at the hands of despotic rulers. However, this has less to do with the separation of powers specifically than with the democratic *elections generally. Rarely do majorities in countries with free and fair elections endure tyranny; majorities in countries without free and fair elections, even with the constitutional safeguard of separated powers, are less fortunate. This analysis also goes some way to answering the second question. Laws cannot be made in the interests of all if some have their liberty abridged.

Regarding the third question, the answer again appears to be no, separating powers does not appear to promote accountability. This negative, though, may have less to do with the separation itself and more to do with the structure necessary to maintain the separation—that is, checks and balances. If the legislature wields some executive power and the executive some legislative power, which is to be held accountable for the failed passage of a good law or the successful passage of a bad law? Put simply, accountability requires the identification of *responsibility; when powers are shared, this is problematic. Who or what is the government? Even under a strict separation of powers where there is no sharing, accountability may still prove a problem. Is poor public policy the result of the law-making process or of its implementation? As Hardin put it, 'Power must be concentrated to be held accountable' (1986: 114). One solution to these problems is to link institutions to each other and to the people through intermediate institutions, such as political parties. If the party in power does poorly in the eyes of the electorate, it is held responsible for its actions and may lose power at the next election. The problem, though, is that in a separated system it is possible (probable in the US) that different parties will control different institutions. The phenomenon of divided government produces a reformulation of an earlier question: which party is the government? Without this knowledge, accountability is difficult. Even under unified government, parties are so weak in the US as to make any talk of party accountability meaningless. As Neustadt eloquently put it, 'What the constitution separates our political parties do not combine' (1990: 29).

The final question of the four has produced the most research, and the most disagreement. How efficacious can government be when power is separated? While *democratic performance is inherently difficult to quantify, many scholars have argued that separated powers encourage stalemate, *gridlock, fragmentation, inefficiency, weak leadership, and poor public policy among other things. A cursory glance at the gun control, healthcare, and national debt problems in the US would seem to demonstrate these arguments' validity. However, are weak political parties, strong interest groups, the committee system in congress, or hyper-democracy the real culprits? The answer is that they are probable contributors, along with the separation of powers. All democracies, even those with strong parties and leaders and no separation of powers, face similar problems to the US. What the separation of powers most likely does, ceteris paribus,

is prolong the policy formulation process and exacerbate the tensions within it, making it slow and deliberative especially during times of normal politics. This was, after-all, what the founding fathers intended, and may be no bad thing. Those US scholars who look longingly at Europe's governments and those involved in establishing new constitutions around the world should remember that strong does not always equal good, and efficient does not always mean effective. They should also remember that during abnormal or crisis periods in US history the political system has proved responsive, and that effective policy solutions have been formulated—as evidenced by the growth in executive power in the cold war period, by Roosevelt's response to the depression in the 1930s, and by Johnson's response to race and poverty in the 1960s. Finally, they should also remember the US's economic, military, and cultural power; have these been achieved in spite of its governmental structures? Political scientists would hope not.

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