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Colloquium in Legal, Political, and Social Philosophy

Conducted by

Jeremy Waldron and Liam Murphy

Speaker: Rob Howse, NYU Law School

Paper: Necessary Justice: “Political” Trials and the Tradition of Political Philosophy



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Necessary Justice: “Political” Trials and the Tradition of Political Philosophy**Rob Howse, NYU Law School****Colloquium on Legal, Political and Social Philosophy, NYU Law School, October 26, 2023**

Note to Colloquium Participants: This is a very first draft, citations to be completed, of a longer work in progress. In this initial part of the project I focus on Machiavelli, Montesquieu and a group of thinkers influenced by Montesquieu: the Federalist (Hamilton and Madison), Constant, Guizot, and Tocqueville. The full project will also consider ancient political philosophy (Plato and Cicero) and a number of 20th century thinkers, including Otto Kirchheimer, Alexandre Kojève and Judith Shklar.

Introduction: The Political Morality of Political Trials and the Rule of Law

The decision of a federal special prosecutor in Washington DC and a Georgia district attorney to indict Donald Trump on charges related to the 2016 Presidential election has generated a heated public debate. On one end of the spectrum of opinion are those who see nothing questionable or unusual in such proceedings, only the normal workings of the legal process; Trump is treated as any other potential accused might be on the same facts; no one is above the law and Trump’s status as a highly controversial president and candidate for 2024 is and should be irrelevant to the workings of criminal justice. At the other end of the spectrum, militant supporters of Trump view these upcoming trials as illegitimately political, a way for Democrats to obtain partisan political advantage during an election year, possibly eliminating the Republican candidate from competition. In between there is a range of views that takes in account, either in favor or against these trials, considerations such as the impact of the trials, and an eventual outcome of acquittal or of conviction, on the political fabric of American society, and fundamental values such as freedom of speech and probity in public life.

This paper is based on the premise that political philosophy might have something useful to say in unpacking and perhaps in resolving or at least refining the controversies over the impending Trump election trials. Here, I think of one of John Rawls' articulations of the mandate of political philosophy in a democratic society: "Its merit, to which it has any is that by study and reflection it may elaborate deeper and more instructive conceptions of basic political ideas that help us to clarify our judgments about the institutions and policies of a democratic regime. Political philosophy can only mean the tradition of political philosophy...texts that endure, and continue to be studied..."¹

In this spirit, I interrogate in these pages political philosophers in the "tradition" on the question of political trials. Without prejudice to how broadly or narrowly one should define the notion of a political trial, my interest here is in criminal trials of prominent political figures for exceeding the legal constraints on the exercise of power in a system of divided government, or otherwise acting against the political and constitutional order as a whole. Further, I am interested in those trials that occur within a regime, not trials of officials in a predecessor regime and a fundamental political transitions. Such trials present distinctive normative questions-"victor's justice" etc.- that have been canvassed in a wide and philosophically rich literature on transitional justice by thinkers such as Judith Shklar, Hannah Arendt, Claus Offe, Ruti Teitel.

While the designation "political" may connote the danger trials being used for partisan advantage, it may also be used to indicate a trial where *legitimate* considerations of political morality support prosecution, just as in other cases legitimate considerations of political morality may weigh against prosecution, even where it might be supported by the facts. As Ronald

1. Rawls, *Lectures on the History of Political Philosophy*, 1-3.

Dworkin wrote in a fine essay advocating non-prosecution of conscientious objectors to military service who refuse the draft, “in the United States prosecutors have discretion whether to enforce criminal laws in particular cases...This discretion is not license—we expect prosecutors to have good reasons for exercising it...”²

While some of the good reasons may stem from considerations internal to the demands of the legal process itself (limited resources, strength of evidence, availability and credibility of witnesses, etc.) others may be grounded in broader considerations of social and political morality. As Dworkin elaborates: “there are, at least prima facie, some good reasons for not prosecuting those who disobey the draft laws out of conscience. One is the obvious reason that they act out of better motives than those who break the law out of greed or a desire to subvert government. Another is the practical reason that our society suffers a loss if it punishes a group that includes...some of its most thoughtful and loyal citizens.”

Whether or not to prosecute and whom are not the only discretionary decisions that may engage political morality: the law as written may also afford considerable latitude concerning the severity of punishment and (even in a non-transitional context), also scope for pardons and amnesties. Again, it is worth hearing from the tradition of political philosophy about what reasons of political morality might properly guide such choices.

As we shall soon see, much of the consideration of political trials in the tradition of political philosophy revolves around questions of institutional choice. These questions include what kinds of political offenses are suitable for trial before legislative bodies as opposed to courts, and whether large juries or small bodies of professional judges ought to be the deciders, in what

² Ronald Dworkin, “On Not Prosecuting Civil Disobedience” *New York Review of Books*, July 6, 1968.

institutions to invest the power of amnesty or pardon, and so on. This is what Jeremy Waldron calls “*political* political theory.”³ The focus on institutions in the tradition of political philosophy when it comes to political trials may be particularly helpful in sorting the normative controversies surrounding the Trump election trials, because confidence or lack thereof in our institutions is a major factor in how one comes out on the question. Are our institutions capable of up to the task of prosecuting and trying a figure like Donald Trump other than in the disgraceful manner of a show trial or partisan political spectacle? Would such trials damage further our institutions and their legitimacy? Are these trials *required* if we are to protect our institutions from further erosion or subversion? By looking to the tradition of political philosophy, we are invited to compare our own institutions as they actually are (or the state we think they are in) with the kind of institutions that might be ideally devised to respond to the complex considerations of political morality, and political prudence, at issue with political trials.

I. Machiavelli

In modern political philosophy, the consideration of political trials in republics, or regimes of divided or limited government, naturally begins with Machiavelli. In his *Discourses*, Machiavelli analyses the successes and failures of ancient and modern republics largely in terms of the management of class conflict between the people and the elites, the great. Where such conflict became untamable, Machiavelli purports to show, republics ended up as tyrannies or tyrannical empires, or conquered by their foreign adversaries. Machiavelli suggests that where properly institutionalized, the conflict can serve the vitality and resilience of republican government, rather than undermining it. The people check the ambition of the great to break free

³ Waldron, *Political Political Theory*, Oxford University Press, 2016.

of the legal constraints of limited government; the great smooth over the ups and downs of popular passion, stabilizing the ship of state.

For Machiavelli, the ability of the people to try those who “transgress in any way against the free state”⁴ was not simply one institutional means of managing class conflict for the benefit of political freedom and stability but an *essential* one. John McCormick, a contemporary political philosopher who espouses a radical populist agenda for curing the ills of today’s liberal democracies, seeks to cast Machiavelli as an advocate for political trials as a desirable form of direct citizen participation in governance, “widely inclusive institutions and the entire citizenry’s judgment when prosecuting political crimes.”⁵

The crucial passage from the *Discourses* is as follows:

To those who are posted in a city as guard of its freedom one cannot give a more useful and necessary authority than that of being able to accuse citizens to the people, or to some magistrate or council, when they sin in anything against the free state. This order produces two very useful effects for a republic. The first is that for fear of being accused citizens do not attempt things against the state; and when attempting them, they are crushed instantly and without respect. The other is that an outlet is given by which to vent, in some mode against some citizen, those humors that grow up in cities; and when these humors do not have an outlet by which they may be vented ordinarily, they have recourse to extraordinary modes that bring a whole republic to ruin. So there is nothing that makes a republic so stable and steady as to order it in a mode so that those alternating humors that agitate it can be vented in a way ordered by the laws.⁶

The usefulness of political trials as Machiavelli articulates it here has two dimensions, neither of them that directly related to the virtues of citizen participation. First, trials serve as deterrence against would-be insurrectionists or usurpers. Second, the living passions of republican politics

⁴ I;7. “quando peccassono in alcuna cosa contro allo stato libero.”

⁵ John McCormick, “Machiavelli’s Political Trials and the Free Way of Life” *Political Theory*, Aug. 2007, pp. 385-411, p. 386.

⁶ Machiavelli, *Discourses* I.7, Mansfield/Tarcov translation. Unless otherwise indicated citations throughout are to this translations.

are such as to give rise naturally at times to claims of disloyalty or conspiracy against prominent citizens, and if these claims are not vetted in accordance with the rule of law, they will ultimately lead to scapegoating and extralegal violence, the latter highly destabilizing of the polity.

Machiavelli cites the example of Coriolanus, which will be familiar to many of us from Shakespeare's play of the same name rather than from Livy's account, upon which Machiavelli purports to rely. Machiavelli claims that had the tribunes not accused Coriolanus and summoned him for trial, the mob would have killed him. Coriolanus on Livy's account, however, never appeared for trial, was convicted in absentia, then went into exile where he worked actively against Rome with its enemy, the Volscians.⁷ According to Livy, Coriolanus's political offense was to seek to take away the legal rights of the people to participate in control of the elites through the tribunes, by abolishing that office. Coriolanus was extorting the people to give up these rights by denying them necessary food if they did not do so.

If one looks at Machiavelli's use of the example of Coriolanus in light of Livy's account, it becomes quite clear that deterrence, the first purpose of political trials suggested by Machiavelli was not fulfilled. Coriolanus, in exile, was enabled to commit the arguably even worse political crime of treason against Rome. As Machiavelli himself notes somewhat later in the Discourses, Coriolanus never ceased to reserve "a hostile spirit against the people." (I:29) One is left to wonder whether, in Coriolanus's particular case, Rome would have been more secure in the short term through the "extraordinary means" of a mob tearing Coriolanus apart. But Machiavelli's greater concern may well be the long-term consequences of settling scores outside of the rule of law, more important than short-term deterrence.

⁷ Livy, *The Early History of Rome*, tr. Aubrey de Selincourt, 2.35.

Contrary to McCormick's populist reading, Machiavelli never suggests that only the participation of the citizenship as a whole in political trials allows them to serve the two goals that Machiavelli identifies. This is evident from the crucial passage cited above, Machiavelli refers to the possibility of the "people" but also a magistrate or council dealing with accusations, without any explicit hierarchy. What is crucial is that ordinary citizens make accusations against prominent citizens in a proper open legal process, rather than spreading rumors in loggias and piazzas.

Machiavelli *does* disapprove of the judging of political offenses by *very* small councils or tribunals (above all, one suspects, those operating in secrecy). Machiavelli introduces the modern example of the judgment of on Soderini in Florence:

The incident that also occurred in Florence regarding Piero Soderini, ...occurred entirely because in that republic there was no mode of accusation against the ambition of powerful citizens. [footnote omitted]. For to accuse one powerful individual before eight judges in a republic is not enough; the judges need to be very many because the few always behave in the mode of the few. (I: 7).

Here, though, Machiavelli's concerns are arguably not populist in nature. The eight judges he refers to are the Otto di Guardia e Balìa, which instead of vetting in public accusations of citizens against prominent politicians, instead operated with its system of informers and a kind of secret police, "the mode of the few." Rather than protecting republican liberty against traitors and insurrectionists, the Otto served the interests of the ruling elite in purging other elite citizens from political power. A trial before a much larger number of judges, based upon the publicly stated accusations of ordinary citizens rather than whispers of informers and reports of spies, would be much less likely to be an instrument of intrigue and instead to serve as an antidote to it.

A very large number of judges does not mean, or need not mean, an assembly of the citizens as a whole. An adjudicative body needs to be numerous enough to prevent a trial from being a cloak and dagger operation against an ambitious but law-abiding citizen.

Later in the *Discourses*, Machiavelli comes back to this theme in his discussion of the Venetian Republic.

they created eight citizens who would fill the office of the captain.[footnote omitted] Such an order went from bad to worst, for the reasons that have been said at other times: that the few were always ministers of the few and of the most powerful. The city of Venice, which had ten citizens who could punish any citizen without appeal, guarded itself from this. {footnote omitted}. Because they might not be enough to punish the powerful, although they had authority for it, they had constituted there the Forty; and more, they willed that the Council of the Pregai, which is the largest council, be able to punish them so that if an accuser is not lacking, a judge is not lacking to hold powerful men in check. I: 49.

Here Machiavelli is pointing to a yet further consideration as to why a tribunal of few judges is not appropriate for political offenses: in the case of a powerful or influential citizen, “few” would not be enough to punish. The implication is that a small number of judges might fear that the powerful citizen and their supporters would target them with revenge if a guilty verdict were entered. There is safety in numbers, Machiavelli suggests, and the verdict of a larger, and perhaps more diverse or representative body, would be hard to pin on individual judges who could be targeted for retribution.

The case for the people judging in political trials relies on their disciplined commitment to the constitutional order, their political virtue; it is far from a self-indulgent populist exercise. In considering the case of Manlius Capitolinus, Machiavelli responds to the typical objection that the popular element tends to be fickle and inconsistent in their judgment of public matters (*Discourses*, I:59). The people sent Manlius to his death for crimes against the state but then were moved to tears at losing him. This causes Livy to remark there is nothing more vain and

inconstant than the multitude.⁸ For Machiavelli, far from evoking how the people are incapable of sound judgment, this example shows the reverse—regardless of the benefits to themselves they had received from Manlius and their affection for him, they were quite prepared to punish him when he threatened the republic as such. This is the spirit of sacrifice necessary to maintain the constitutional order, keeping powerful men in check. As Machiavelli summarizes: “the cruelties of the multitude are against whoever they fear will seize the common good; those of the prince are against whoever he fears will seize his own good.”

The right of citizens to accuse publicly and trigger the trials of prominent citizens suspected of conspiring or acting against the free republic comes with a corollary. Those who spin conspiracy theories in the shadows and cast false aspersions against such citizens are to be punished for calumny.

...as much as accusations help republics, so much do calumnies hurt. Between one side and the other there is the difference that calumnies have need neither of witnesses nor of any other specific corroboration to prove them, so that everyone can be calumniated by everyone; but everyone cannot of course be accused, since accusations have need of true corroborations and of circumstances that show the truth of the accusation. Men are accused to magistrates, to peoples, to councils; they are calumniated in piazzas and in loggias. Calumny is used more where accusation is used less and where cities are less ordered to receive them. So an orderer of a republic should order that every citizen in it can accuse without any fear or without any respect; and having done this and observed it well, he should punish calumniators harshly. They cannot complain if they are punished since they have places open for hearing the accusations of him whom one has calumniated in the loggias. Where this part is not well ordered, great disorders always follow; for calumnies anger and do not punish citizens, and those angered think of getting even, hating rather than fearing the things said against them. I:8

So open trials with witnesses and legal procedures go hand in hand with gag orders on the spread of false news in loggias and piazzas, roughly the Florentine renaissance equivalent of social media.

⁸ Livy, 6.7.

II. The French Correction: Montesquieu and his 19th century heirs, Constant, Guizot, and Tocqueville

For classical liberalism the seminal discussion of political trials is that of Montesquieu in *The Spirit of the Laws*. Montesquieu picks up where Machiavelli left off. He says that in the matter of “crimes of lese-majeste” he “might well adopt the maxim of Machiavelli” concerning the mode of the “few” (Montesquieu restates the maxim as “few are corrupted by few.”) But Montesquieu has an objection to the unalloyed populist version of Machiavelli’s proposal for political trials, the version to which McCormick is attached as the core of Machiavelli’s teaching. Where the people accuse but also judge they are both party and judge. However much this might support political “virtue”, which for Montesquieu is the principle of republicanism, there is a tension with the “civil” interest of the accused as an individual, presumably that of being tried by an independent and impartial tribunal. Thus, the populist variant of Machiavelli’s proposal where the people judge as an assembly of the whole (“en corps”) needs to be modified.

The spirit of what Machiavelli scholar Vicky Sullivan calls Montesquieu’s “correction”⁹ of Machiavelli is reflected in Montesquieu’s characteristic approach toward reform of political institutions-institutional innovations that are desirable always also turn out to have downsides, unwanted effects, that themselves require further innovation.¹⁰ Rather than rejecting ab initio the practices of ancient republics in trying political offenses before popular juries or assemblies, Montesquieu points out certain safeguards against the dangers of such trials. One such danger, apparently, is that these assemblies may degenerate into the kind of mob justice that Machiavelli seeks to avoid through public trials in accord with legal procedures. Montesquieu cites the

⁹ Vickie Sullivan, “Against the Despotism of a Republic: Montesquieu’s Correction of Machiavelli in the name of Security of the Individual,” *History of Political Thought*, Summer 2006, 263-289.

¹⁰ Robert Howse, *Montesquieu on Commerce, Conquest, War and Peace*, 31 *Brook. J. Int’l L.* (2006)

practice of Solon, the king or executive authority in Athens to require that the council responsible for criminal trials, the Areopagus, reconsider the case if there is evidence that the accused has been convicted unjustly. The logic here is that a public assembly may judge rashly, enflamed with anger and/or hatred against the accused; as Montesquieu puts it, “it will be good to have some slowness in these matter, above all from the moment that the accused is detained as a prisoner, in order that the people be able to calm down and judge the matter with cool heads (“juger de sang-froid”).

Montesquieu, in the context of ancient republics, mentioned two other safeguards against the dangers of trial by popular assembly. First, Romans allowed the accused to go into exile before the judgment (in Coriolanus’s case as we saw, he took the opportunity whether he was formerly allowed to flee or not). Second, the Romans prohibited the confiscation by the people of property of the convict. Montesquieu’s praise of both these “limitations” reflects his consistent opposition to harsh and vindictive punishments. In sum, Montesquieu is not as such against judgment by popular assembly in republics, provided the people is in a calm frame of mind and that punishment does not spill over into unconstrained revenge. Moderate punishments can be effective and should not be conflated with impunity, which does increase the dangers that the state will be undermined: “if one examines the causes of all those situations where the state was caught with its guard down (tous les relachements) one sees that this was due to impunity in the face of crimes and not the moderation of penalties.” (V:11) As Montesquieu will elaborate in Book 12, “When a republic is brought to destroy those who would overturn it, one must quickly put an end to punishment and vengeance, and even rewards [presumably to those who put down the insurrection]. One cannot impose great punishments and consequently great changes, without putting in the hands of certain citizens a great power. It is thus better, in this case, to

pardon a great deal rather than punish a great deal, to exile few rather than many, and not to touch property rather than confiscating it. Under the pretext of avenging the republic one establishes the tyranny of the avengers,....One must return as soon as possible to the ordinary course of government, where the laws protect everyone and do not put individuals in their sights.” (XII:XVIII).

A further safeguard is to hold those who make false accusations legally accountable. While Machiavelli advocated punishing those who put about calumnies in loggias and piazzas, while touting the value of open accusations before tribunals, Montesquieu is concerned that these latter also might be false and damaging to the political order and the rule of law. Thus, in Chapter XX of Book XII-entitled “laws favorable to the liberty of the citizen in a republic”-Montesquieu praises an apparent practice in ancient Athens that the accuser be punished with a fine in cases where less than a fifth of the assembly votes for conviction. He also approves of a practice in Rome where unjust accusers are subject to public shaming. Further, citing Plutarch, Montesquieu vaunts the practice of putting an accuser under guard so that they have no opportunity to corrupt the judges or the witnesses. Finally, “laws that permit a man to die based on the testimony of a sole witness are fatal for liberty. A witness affirming guilt and the accused denying it simply cancel each other out. It is the third that tips the scales.” (XII:

Like Machiavelli, Montesquieu appears to admire the ideal of citizen virtue that inspires the practice of accusations in ancient republics: “In Rome, any citizen was allowed to accuse another. This was established in accordance with the spirit of the republic, where each citizen should have a zeal without limits for the public good, where each citizen is perceived to hold the entire justice of the *patria* (tous les droits de la patrie) in their hands.” But zealotry can become overzealousness, and not all those who make accusations may do so out of these non-

partisan concerns for the public good. Montesquieu's own prescription for limited government, at least partly inspired by English constitutionalism, combines the spirit of virtue with the spirit of moderation and this is reflected in his approach to political trials.

As Montesquieu explains, political justice may become tyrannical or oppressive not only through overly harsh or broad punishments but also through vague or broad definitions or interpretations of offenses against the state, *lese-majeste* or treason. Under the Roman emperors, any kind of criticism of or objection to their exercise of power might be treated as a crime of *lese-majeste*. (XII; VIII-IX). "Henry VIII held guilty of high treason all those who predicted the death of the king. That law was certainly vague." Montesquieu suggests the intimidating effect extended to the King's doctors' failing to tell him of health risks for fear of being condemned. (XIII:X).

It is especially important to liberty not to punish mere speeches or writings as treason or other offenses against the state; at the same time, speech acts that are connecting to the actual putting into practice of a rebellion or insurrection are properly criminal. Montesquieu draws the distinction as follows: "The speeches that are connected to an action, take on the character of that action. Thus, a man who goes in a public place to exhort subjects to revolt becomes guilty of *lese-majeste* because speeches are connected action and partake of it. It is in no way the speeches that one is punishing but an act that has been committed employing speeches. They do not become crimes except when they prepare, accompany, or follow a criminal act." (XII:XII)

Montesquieu, whatever his initial apparent disagreement with Machiavelli concerning popular assemblies, turns out largely to share Machiavelli's concerns regarding the "mode of the few." This becomes apparent when Montesquieu returns to the theme of political trials, and politicized criminal justice more generally, in Book XI of the *Spirit of the Laws*. It is in Book XI that Montesquieu formulates his definition of *political* liberty of a citizen as that "peace of mind

which derives from the opinion of each of their own security, and to have that liberty, the government must be such that a citizen cannot fear another citizen.” (XI:VI). I emphasize political, because it signals not only Montesquieu’s concern with the civil interest of the individual, the protection of their life and liberty as a *natural person*, but also the impact of accusations and trials on the *citizen’s* confidence to participate in political life, i.e. the risk of intimidation or persecution through criminal allegations. It is also in Book XI that Montesquieu presents England, a monarchy in form but with divided government under the rule of law, as a model for political liberty superior to the republics that he and Machiavelli had studied.

In turning to the example of Venice, Montesquieu follows Machiavelli in approving of the shift to a larger magistrature for trying serious crimes, the Forty and perhaps even the involvement of the larger assembly the Pregadi (which Machiavelli refers to, apparently in error, as the Pregai). “The multitude of magistrates may moderate the magistrature; not all the nobles will always have the same axes to grind (tous les nobles ne concourent pas toujours aux memes desseins). One forms diverse tribunals that temper one another.” (XI:VI) Up to this point, Montesquieu seems at one with Machiavelli on how to address the dangers from the “mode of the few.” But Montesquieu introduces an additional consideration-however numerous, these magistrates are all drawn from a single permanent legislative body, the Senate.

The implication is that the Senate’s manner of judging in political trials will remain in some way tainted by entrenched political interests. Instead of standing bodies, Montesquieu proposes what appear to be juries drawn from the citizenry periodically to constitute tribunals in individual cases. “The power of judging should not be conferred on a permanent senate, but exercised by persons drawn from the body of the population at certain times of the year in a manner prescribed by law in order to create a tribunal that lasts only as long as necessity requires.”

Montesquieu continues: “In this way, the power of judging, so terrifying among men, is not attached to a certain class (etat), nor a certain profession, but is, so to speak, invisible and absent (nulle). One does not have judges constantly before one’s eyes; one fears the judiciary but not the judges.” (XI:VI) Furthermore, in the case of grave charges (“grand accusations”)-here Montesquieu probably means treason or assassination -“the accused in accordance with the law should choose the judges, or at least be able to recuse a large enough number that those who remain are perceived to be his choice.”

Montesquieu, to sum up, has more common ground with Machiavelli than one would initially suppose given that the discussion of political trials in the *Spirit of the Laws* is framed as a criticism, or correction, of Machiavelli. Montesquieu, like Machiavelli, is wary of the “way of the few” and supports open trials by larger bodies, certainly larger than the *Otto* in Florence. Indeed, as the passages just cited illustrate, Montesquieu prefers trials by bodies not dominated by entrenched elites but which are in some way representative of the people. While the normative ground of Montesquieu’s divergences from Machiavelli is sometimes offered as a concern to protect the security of individuals as private persons (modern liberalism), which Machiavelli does not necessarily share. On the other hand, Montesquieu does share Machiavelli’s concern with republican or *political* liberty. But for Montesquieu it is not only calumnies spread in loggias and piazzas but also accusations before tribunals that risk jeopardizing republican political liberty. While Machiavelli would have calumnies punished, he does not provide a deterrent to false accusations that are openly made before tribunals.

Montesquieu’s French Legacy: Constant, Guizot, and Tocqueville

Constant, Guizot, and Tocqueville are all eminent political thinkers who had turbulent political careers during the first decades of the 19th century in France, the first and (in Tocqueville’s case)

the second Restoration. As liberals they opposed the reactionary currents of the Restoration, while also abhorring revolutionary political violence (Guizot's father was guillotined during the Terror). Each sought in their own way to move French politics under the Restoration in the direction of a constitutional monarchy with separation of powers and strong representative institutions (the model of England praised by Montesquieu). These were years marked by conspiracies, assassinations, and revolts. Political trials were very much part of the order of the day.

In the case of Constant, his reflections on political trials stemmed from the interests of democrats in making ministers, who were under the king, accountable to the legislative branch. One way of doing this was to try before the assembly ministers who abused their powers or acted recklessly or incompetently. While a strong supporter of responsible government, Constant was also clearly as a liberal deeply marked by Montesquieu's doubts about political trials where the legislative branch plays the role of judge and jury and also by Montesquieu's warnings about vague or inchoate political offenses. In his 1822 work *The Responsibility of Ministers*¹¹ Constant sought to blunt and limit the role of the assembly in judgment on ministerial conduct through a distinction between situations where a minister abuses the powers that they have, betraying the state in the exercise of their duties, and those where the accusation is that the minister has acted outside the law altogether: "illegal acts, that is, the usurpation of a power that the law has not conferred." In the latter case, ministers should be tried as criminals before the ordinary courts "like all other citizens." (3)

11. De la responsabilite des ministers, Paris, 1815. Translations are my own.

To illustrate this distinction Constant draws on an 18th century English example. Wilkes was arbitrarily detained in the Tower of London on a warrant from the Secretary of State, alleging seditious libel. Constant observes that Wilkes was tried before the criminal courts and heavily fined because he had no legal authority to order such a detention. Now Constant contrasts this with a situation where habeas corpus has been suspended through legal procedures. The minister in this instance would have the legal authority to imprison Wilkes in the tower, and thus have committed no ordinary crime, but might still have to be accountable in some way for using that authority in an unjustified or abusive manner.

Now Constant questions whether the notion here of abuse of authority is too vague or indeterminate to justify accountability through a political trial in the assembly.

An unjust war, or a war badly waged, a peace treaty involving sacrifices not absolutely justified by the necessity of the moment, mismanagement of finances, the introduction of defective or dangerous forms of administration of justice, in the end, any exercise of power which, while fully authorized by law, would be harmful to the nation or vexatious for the citizens, without being required by the public interests....One sees by this non-exhaustive definition, how it would always be illusory to attempt to set down in the case of responsibility a rule that is precise and detailed, as criminal laws ought to be. (35)

Given the open-ended nature of the offense of dereliction of responsibility, Constant suggests that the ideal adjudicator would be a jury, with its “common sense.” But while a jury might in principle have sound intuitions about the dividing line between responsible and irresponsible or abusive conduct in everyday settings, in practice they would not be up to dealing with matters that “concern the great political problems, the most wide-reaching and at the same time more secret interests of the nation.” (45) The solution that Constant proposes is that ministers be held responsible and tried before the *Chambre des Pairs*, an institution of the Restoration roughly modeled on the English House of Lords. This may or may not seem plausible: Constant asserts

that the Chambre des Pairs is characterized by independence and neutrality. Presumably because the peers held their seats on the basis of hereditary title and were unlikely to become active in the government, Constant saw them, or felt comfortable portraying them, as beyond the fray of partisan politics, and immune to the political passions of the moment. Moreover, “they acquire through their social position gravitas in character that dictates mature ways of inquiry and a gentleness in mores that disposes them to consideration and deference, bringing the delicate scruples of equity to legalism.” (p. 48) However idealized this portrait of the peers may be, what is significant is Constant’s search for the kind of trial that avoid ferocious vendettas against ministers, or scapegoating where a minister exercised good faith political judgment, but where, nevertheless, the enterprise failed or the judgment proved erroneous.

Echoing Machiavelli’s concern about calumnies, or accusations in the shadows as it were, Constant is emphatic on the need for transparency and publicity where a minister is accused of dereliction of responsibility. “A secret process allows the accusation to continue to taint the minister in question in as much as it has merely been pushed away through an opaque inquiry, with the appearance of connivance, weakness or complicity.” (53) Echoing also Montesquieu’s discussion of the political dangers of harsh or vengeful punishment, Constant advocates the use of pardons once ministers are convicted, thereby forestalling any punishment. He suggests that conviction by itself, even when followed by a pardon, is a meaningful form of accountability, in identifying and confirming in a public process the misconduct of a minister. Moreover, the stigma from conviction should preclude any further electoral success of the individual in question. (69)

Guizot

Guizot published his work *Des conspirations et la justice politique* (Conspiracies and political justice) in 1821. This was a time where conspiracy theories were abundant in French politics, often focused on secret societies of young liberals who believe to be hatching plots to overturn the Restoration. In 1820 an apparent conspiracy to overthrow the government and the monarchy led to trials of prominent liberal political figures (including some deputies sitting in the lower house). In the end most of those arrested were released, and those tried were mostly acquitted. Guizot, himself a liberal, published *Des conspirations et la justice politique* in part as a response to these prosecutions, which he argued were tainted by partisanship and openly political judgments on the accused individuals.

A core concern of Guizot is to underline the evidentiary difficulties of establishing guilt for conspiracy, where it has remained at the planning stage, or perhaps a matter of mere revolutionary aspiration. “In the case of conspiracy, ... as with a great number of political offenses (delits), and when the crime, far from being consummated, has not even really begun to be executed, it is a matter non only of knowing who are guilty but also, and even to begin with, if there is a crime. A crime, whether conspiracy or otherwise, which has to no extent been realized in a complete determinate act, has to reside in a variety of circumstances more or less in themselves non-culpable, visits, meetings, speeches, cryptic letters, etc.” (37) Guizot is concerned by the opportunity that the offense of conspiracy offers to construct or fabricate a crime out of multiple “general facts” but without any single overt, objectively criminal act. This can lead to scapegoating and the persecution of political opponents. This aligns with Montesquieu’s insistence that only “speeches connected to action” should be punishable. (*Spirit of the Laws*, XII: XII)

Guizot now discusses explicitly the 1820 trials of liberal conspirators. He does not mince words: “the talk was of a faction determined to overthrow the monarchy, of a standing conspiracy that one must disable at any price. But there was nothing to it but politics...” (p. 41) Accusations that were made in the political arena relied on vague aspersions and suspicions and the claim that there was a faction animated by the general spirit of rebellion. These condemnations in the assembly, animated by partisan brawling and based on so-called “general facts” about rebellion being in the air, Guizot asserts, were completely at odds with the rule of law. “Many individuals were arrested. Despite the political allegations, one could not prosecute them on the vague basis of their being militants or conspirators. One had to find in the criminal code an offense that corresponded to the situation, and in their behavior the commissions of acts defined as criminal in the code.” (42-43) Thus, most were released without trial, as Guizot notes, and the cases that went to trial were those where the charges alleged specifically an act of rebellion or provocation to rebellion, as opposed to some vague conspiracy.

The resulting acquittals, Guizot suggests, showed that juries are capable of seeing through the political nature of the accusations in question; these were shown for what they were, when it was necessary to actually prove in a legal process a specific offense, with an *actus reus* defined in the criminal law. “Politics, which was pervasive during the legislative debates, did not enter at all into the verdicts of the juries, which judged the accused based on their own actions, and not on the general facts with which the prosecution sought to taint them.” (45-46) Guizot suggests the overall lesson of this episode is that accusations of political offenses, such as conspiracy and rebellion, do not belong in political assemblies but in ordinary criminal courts with jury trials. :

Within the courts,...nothing may enter except the law and the facts envisioned by the law. This is the place where nothing can get past the rule of law. The door is closed to all passions, all influences other than those just described. Elsewhere, their presence is

inevitable, here it would be criminal. All the formalities, all the strictures of the law, are prone to exclude such influences. Judges who are not for turning, the intermediation of juries, statutory precision, all of this attests to the wish to place the proceedings here above all influences, and to elevate them, to the extent humanly possible, to that calm and pure domain untroubled by earthly tempests, where not a single cloud obscures the clarity
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The qualification “to the extent humanly possible” indicates the aspirational nature of this idealized view of courts. The preservation of political liberty, in Guizot’s perspective, depends on how well courts measure up to this ideal of the rule of law especially in fraught and polarized political circumstances. Such were the times in which Guizot was writing, and he was obviously impressed by how the French courts rose to the occasion, as it were.

Tocqueville

Like Constant and Guizot, Tocqueville shared Montesquieu’s reservations about placing political trials in a political assembly or body such as a legislature; at the same time, Tocqueville admired the role of law in American political culture and so had to confront the practice of impeachment under the US constitution, which gave to the House of Representatives and the Senate respectively the role of prosecutor and judge of offenses by high officials, including the President. Here, Tocqueville places great emphasis on the fact that conviction upon impeachment does not have the consequence of a normal criminal conviction—the sole implication of a guilty verdict. (*Democracy in America*, Book I: Ch. 7) “In preventing political tribunals from imposing judicial punishments, the Americans seem to have thus preventing the most terrible consequences of legislative tyranny, perhaps of tyranny altogether.” Moreover, while in Europe political tribunals could judge anyone, the jurisdiction of such tribunals in the US was limited to sitting officials, of course a further implication of the sole remedy at issue being removal from office. Political tribunals had no role in trying dissenters, resisters, etc. Finally, again in Book I, Chapter 7, Tocqueville notes with concern the vagueness with which

the offences subject to impeachment and removal on conviction are defined both in the federal Constitution and also under state law. He mentions a Massachusetts law that includes as an offense maladministration-re are here reminded of Constant's treatment of the question of ministerial responsibility and the proper means of accountability. In the end, Tocqueville again reminds his European readers that, while these offenses might seem frighteningly indeterminate from the perspective of individual and political liberty, they must always keep in mind that while the consequence of conviction before a political tribunal in Europe might well be execution, the Americans had come up with a much more direct and at the same time gentle remedy where high official abuses or misuses egregiously their public mandate.

There is however one note of caution or a qualification in Tocqueville's praise for the way in which political judgment occurs in the United States: removal of from office through impeachment seems more of a remedy for ordinary maladministration as opposed to "an extraordinary weapon that society should only deploy at moments of great danger." While the remedy may be less questionable (from the perspective of liberty) it may also be less effective in the extreme situations where the political order is threatened. The European remedy of criminal punishment, in some cases severe, is problematic for its abuses, particularly of a partisan nature; but Tocqueville implies "at moments of great danger" it may be necessary and appropriate. As we shall now see, however, in turning to Madison and Hamilton in the *Federalist* papers, they never considered impeachment as an exclusive remedy but as very likely a prelude to criminal prosecution and punishment in the courts.

Montesquieu's American Legacy: *The Federalist*

As in other matters, Montesquieu's influence on the approach to political trials in the *Federalist Papers* is evident. Madison and Hamilton defend the constitution's proposed strict constitutional

limits on trials for treason, echoing Montesquieu's articulation of the dangers of a too broad or vague understanding of the offense, above all the danger to liberty of extending it to condemnation of speeches, writings or even beliefs. As Madison puts it in Federalist #43:

...new fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

In Federalist 84, answering those concerned that an explicit enumerated bill of rights was needed to protect liberty in the new federal republic, Hamilton cited the constitutional limitation on treason trials, along with inter alia the requirement of jury trials for serious criminal offenses, as among the ways that protections for liberty were already embedded in the constitutional project.

In particular, he mentions Article III:3:

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The requirement of two witnesses was one explicitly advocated by Montesquieu, it will be recalled. The need to prove an "overt act" is in accord with Montesquieu's notion that speeches unless "do not become crimes except when they prepare, accompany, or follow a criminal act." (*Spirit of the Laws*, XII:XII).

On the other hand, "tempestuous waves of sedition and party rage", as Hamilton put it in Federalist #8, are endemic to political life in a republic, even one as carefully designed in its institutions as the US federation. As he elaborates in Federalist #28:

seditions and insurrections are, unhappily, maladies as inseparable from the body politic, as tumours and eruptions from the natural body; that the idea of governing at all times by the simple force of law, (which we have been told is the only admissible principle of

republican government) has no place but in the reverie of those political doctors, whose sagacity disdains the admonitions of experimental instruction. Should such emergencies at any time happen under the national government, there could be no remedy but force.

The fear of punishment was needed as a deterrent. “The hope of impunity, is a strong incitement to sedition: the dread of punishment, a proportionably strong discouragement to it.” (Hamilton, *Federalist* #27)

Proportionality in the measures to suppress sedition and insurrection is of key importance; the *Federalist* clearly rejects impunity while also counselling against undue harshness, where punishment might appear as persecution. This echoes Montesquieu’s demand for “moderation” in political justice.

This is where the Presidential power of pardon comes into play, especially when it is used in a timely fashion:

... the principal argument for reposing the power of pardoning in this case in the chief magistrate, is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. (Hamilton, *Federalist* #74)

Hamilton was fully aware of the danger in allowing the President to pardon even the offense of treason; there might be cases where “as the supposition of the connivance of the chief magistrate ought not to be entirely excluded.” (*Federalist* # 74) But, as he explains in *Federalist* #69, “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.” Moreover, “The power of the President, in respect to pardons, would extend to all cases, EXCEPT THOSE OF IMPEACHMENT.” (Emphasis in original) In other words, a President complicit in treason

would be impeached, and could not pardon himself in order to avoid removal from office; and, once removed from office, obviously not only would no longer be capable of exercising the pardon power, but would be subject to criminal prosecution in the courts. In such a situation the President would have little leverage to extract pardons for other involved in insurrection from their successor in the oval office.

This brings us to the institution of impeachment and its relation to political justice more generally. Surely well aware of Montesquieu's strong objection to holding political trials in legislative bodies, Madison and Hamilton took particular pains to emphasize safeguards against the process being unduly influenced by partisan political passions and interests. The requirement of a supermajority vote to convict in the Senate "guards against the danger of persecution, from the prevalency of a factious spirit." So does assigning the separate roles of impeachment and trial to the House of Representatives and the Senate, respectively. Hamilton is concerned to show the "security of innocence" against partisan persecution in the Senate. He does not reflect that, on the other hand, the two-thirds voting rule might allow a partisan faction to block conviction of a *guilty* President.

In the early years of the federal constitution, the moderation and balance in the arrangements set out and defended in the *Federalist* would be placed under stress. In 1798, the majority Federalist party passed the Alien and Sedition Acts. Among other things, the Alien and Sedition Acts created a criminal offense of seditious libel, which outlawed criticism of the government made by journalists, and especially those who were Republicans, the political enemies of the Federalists. One might have thought that by strictly limiting in the constitution the scope of the offense of treason, the intent was precisely to constrain criminal punishment based on broad theories of disloyalty or disrespect to the government (Montesquieu's *lese-majeste*). Breaking

with his own political party, Madison spoke out strongly against the danger to liberty posed by the offense of seditious libel (even though the law allowed for a defense of truth). In the Virginia Report of 1800, Madison argued that the constitution contained no enumerated power that allowed Congress to criminalize political speech; indeed, he suggested that the effect of the First Amendment to the Constitution was “a denial to Congress of all power over the press.”

CONCLUSION

The necessity of political trials in a system of divided government is accepted by all the thinkers canvassed here. As is most explicitly stated by the Federalist, it is a basic law of politics in a republic that from time to time an ambitious politically influential figure will emerge who seeks in some way to break out from legal or constitutional restraints and subvert or usurp the legal and political order. Simple impunity in such situations is hardly imaginable. But if political trials are necessary sometimes, they are also risky and prone to abuse. Machiavelli, Montesquieu, Constant, Guizot, Tocqueville, and the Federalist contribute to an understanding of these risks and suggest institutional safeguards to address them. The others may lack Machiavelli’s general enthusiasm for political trials when properly designed, but they accept such trials at least as an unpleasant occasional necessity.

Among these thinkers there is a large amount of agreement that political trials should be transparent, that to the extent possible the public should be encouraged to follow them, that the deciders should be if not numerous in some way representative of or drawn from the people, not merely professional judges appointed by political elites. At the same time, all but Machiavelli political bodies such as legislative assemblies should not be meting out criminal punishments. Making office holders accountable for misconduct through removal from office may properly be done by a political body; but the authority of such a body to mete out punishments on

individuals, such as execution, imprisonment or the forfeiture of property, could easily be abused for political ends. If a political trial is conducted with scrupulous adherence to ordinary legal procedures, popular juries should prove fair-minded adjudicators the facts, not swayed by partisan political or ideological considerations; this said, ideally in the case of political trials the jury selection process should guarantee a degree of diversity and allow the accused to exclude jurors who they may perceive as politically or ideologically biased against them (Montesquieu). If we were to examine our own existing institutions against these precepts, I would argue they would stand up relatively well, at least on paper. In practice they have faltered and occasionally produced the spectacle of illegitimate political trials, or trials in tension with the preservation of political freedom: the Sedition Act trials, the McCarthy era, the prosecutions of sixties radicals are all examples of such faltering. Overall, it is not unreasonable to expect that our institutions will be capable of producing trials that accord with the basic principles of political morality in a system of divided government. Of course, many on the Trumpian right who attack the decision to prosecute operate from a generalized or dogmatic cynicism about our institutions—on this view, it's all about who has the power using it to advance their own agenda. Should we fear such cynics? My colleague Sam Issacharoff has argued that such populists are a real threat to our democracy. A decision against prosecuting Trump out of fear of their general tainting of the trials as partisan-political would be if anything to play into their hand and increase their dangerousness. *That* would certainly be questionable as a matter of political morality.

On the other hand, the child-like glee with which liberal circles in America reacted to the news of the Trump election indictments seems at odds with the spirit of moderation counseled by e.g. Montesquieu and the Federalist in the matter of political trials. The Trump movement has a very large number of supporters and remains a force in American political life. While they

predominately adhere to Trump's false narrative about the election, they are also citizens, for the most part not looking to take part in an insurrection, who still count in our democracy. If one follows Montesquieu or Madison one cannot lightly dismiss the concerns raised about freedom of speech and whether these indictments seek to punish Trump for expressing political views about the election. I am not thinking here about the positive law and jurisprudence of the First Amendment, on which I am no expert, but rather of basic political morality. If Trump is convicted on the charges in these indictments it must be because the speeches in question are connected to bringing about specific illegal actions rather than that they merely state false or otherwise unacceptable opinions. Again, my purpose here is not to delve into the legal details, but the indictments appear structured precisely to allege direct and provable links between what Trump said and the attempted or actual initiation of illegal courses of conduct.

If we consider the concern of the Federalist for proportionality, Trump is not being indicted for treason or sedition, and rightly so. The intrigues surrounding the election amount to something considerably less than a well-designed plot to overthrow the US constitutional order. A halt was put fairly rapidly to these machinations. As Issacharoff observes: "Over the course of the 2020 election and its various challenges, the institutions responsible for election administration proved remarkably resistant to the demands of the Trump campaign to set aside voting totals or to declare the results illegitimate...what should not be overlooked is the institutional resilience in the face of extraordinary pressures from Trump and his acolytes." Of course, there is a range of considerations that would affect the severity of punishment if Trump is convicted (besides the statutory sentencing parameters obviously), including not only the degree of harm to democratic process but also impacts on individual victims from intimidation and violence. But some commentators speak as if this is the occasion to punish Trump for all his political sins and

misbehavior (except those that are the subject of other criminal prosecutions, such as mishandling of classified documents). Impeachment can aggregate criminal and other misconduct. But Trump's punishment if he is criminally convicted ought not to exceed what is appropriate to the specific crimes he has been found guilty of.

According to Montesquieu, and Machiavelli and the Federalist appear to think along these lines too, moderation and even clemency are particularly important where the danger has passed, and the time has come for political adversaries within one republic to bury their grievances and reconcile. Once the misconduct around the elections has been thoroughly aired in rigorous public trials, perhaps with a mixed result of some convictions and some acquittals, would the spirit of moderation then perhaps counsel the use of pardons? Is the extremely large number of fellow citizens who regard Trump as their legitimate voice a valid consideration of political morality that could way in favor of judicious use of pardons? I find this a hard question; I suspect Montesquieu would likely say yes, and perhaps the Federalist, as well. But the question is premature since in this instance the danger is far from behind us. It continues with Trump's repeated attempts to intimidate, threaten, or otherwise attack with vindictive speech, prosecutors, witnesses, judges, jury members, judicial clerks and so on. For the time being, Machiavelli's spirit of vigilance may need to prevail over Montesquieu's moderation.