

James Madison, Corporations, and the National Security State

Prepared remarks by Scott Horton, Liberty and Power Lecture, University of Alabama Law School, Tuscaloosa, AL, April 14, 2011

James Madison stood between 5'3" and 5'4" tall and weighed barely more than one hundred pounds. He was the most diminutive of the American presidents. He had no skills as a military leader, and he frankly acknowledged his inability to rouse crowds with his political oratory. Yet he was a giant among presidents. Our constitutional system was largely his creation; he supplied the detail and the mechanics where others furnished broad visions. I want to spend a few minutes with you looking at the problems that face us today through the eyes of James Madison. In the process, I want to focus on corporations and the growing role they play in our nation's political life. The emergence of the corporate world is one of the things that divides our times from the age of Madison, but it is also something he anticipated.

Let us start with the question of corporations and political campaigns. When the Supreme Court handed down its controversial decision in Citizens United,¹ striking down a provision of the McCain-Feingold Act restricting the corporate funding of independent political advertisements, there was a rush to discuss the case in terms of original intent--what would the Founding Fathers have thought of this decision vesting corporations with constitutional rights? Attention focused almost immediately on James Madison--he was not only the "Father of the Constitution," but also the key architect of the Bill of Rights. In fact, at a key point in his opinion, Justice Anthony Kennedy actually quotes Madison to support the holding. "Factions will necessarily form in our Republic," Madison writes in Federalist No. 10, "but the remedy of destroying the liberty of some factions is worse than disease. Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false."

This passage is in fact essential to understanding Madison's thinking about the primacy of free speech. Whether one embraces original-intent jurisprudence or not, the process of investigating the Framers' thinking is extremely important. As Livy suggests, and Machiavelli drives home in his discussion of Livy,² it is not possible to preserve a republic without being conscious of first principles and constantly returning to them. More than flags and insignia, first principles define the nation and provide a living link to the past. A society may find that times have changed and departures are necessary; but those departures should never occur unthinkingly. On the other hand, Justice Kennedy seems to think that Madison is on his side on the Citizens United question--and he's wrong about that. I have to acknowledge that, for reasons I'll come to in a minute, it's not really possible to forecast how Madison would have reacted to the issue of legislated restrictions on campaign finance with complete certainty. But I

think you'll agree that a review of what he had to say on the subject, and he said quite a bit, suggests clearly that Madison would not be pleased to be marshaled as an authority supporting the Citizens United opinion. If Kennedy wanted to pick a Founding Father to support his analysis, he picked the wrong one.

Understanding the rights of corporations under the Constitution is key to resolving Citizens United, which is surely one of the most important Supreme Court rulings in the past several decades simply because of the consequences it is likely to have for our political process. But this question invites us to take a broader look at the role that corporations play in the development of the national security state that has emerged since 1947³ and to test that against the Founding Fathers' expectations. That's what I propose to do today--it can't be a comprehensive study due to the constraints of time, but I do hope to get to the essential questions.

The Corporation at the Time of the Constitution

We should start with the recognition that "corporations" in the sense we know them today barely existed at the time the Constitution and Bill of Rights were conceived and adopted. If we scan the literature of the time, we see that the word "company" was usually attached to a partnership, which is neither a corporation nor does it have limitations on liability. In addition to partnerships, there were a handful of great royal-grant companies, such as The Hudson Bay Company and the East India Company, which played a complex political, social and commercial function--as I will explain, this particular legacy is extremely important to understanding the Framers' attitudes. The word "corporation" would have been associated with municipalities and towns,⁴ religious institutions such as churches, universities, utilities (in this age, especially companies that supplied water, dug canals and built turnpikes), mining companies and banks. In the English-speaking world, an incorporated association existed on the basis of a charter that would have been "granted" by the sovereign.

For instance, Columbia University, where I teach, came into existence in 1752 when King George II granted a royal charter to its founders--their institution, first called King's College, had perpetual life through a board of trustees. It was created by the king and could be extinguished by him as well, at any time and for any reason. The corporation had "only those properties which the charter of creation confer on it," as Chief Justice Marshall wrote in the Dartmouth College case.⁵ It could, for instance, own and dispose of real property, bring legal actions and conclude contracts only if those rights were conferred. Generally, it was assumed that a company chartered by the Crown existed to do some sort of public good, but it might well have the acquisition of property as a goal, trade for profit, the development and sale of land, or even colonization (consider for instance the Virginia Company, formed to support the colonization of Virginia). At the time of the Revolution, King's College was one of only a small handful of corporations in New York. After the Revolution, the various

states stepped into the shoes of the British sovereign, though not without controversy--as we saw in the Dartmouth College case. However, this "concessional" notion of corporate existence is significant--and also distinct from the approach that developed in the civil-law jurisdictions, where companies and corporations were viewed as the product of a "social contract." That point came to play an important role in later debates, for instance, when Madison and Jefferson argued that the power to create corporations resting with the sovereign people could not have been conferred on the federal government without express language.

The real transformation of the corporate form in America overlaps perfectly with the resurgence of the Jeffersonian party (first called Republicans, then Democratic-Republicans, finally Democrats) following the High Federalist meltdown of 1799-1800--in the administrations of Thomas Jefferson, James Madison and James Monroe, 1801-25. But it was effectively a Federalist or Whig countercurrent: the real center of activity was in New York and New England.⁶ The Jeffersonians were hostile to corporations through this period, but they were unwilling to interfere in the state grants of corporations, and by the time of Andrew Jackson they grew to accept the corporate form flourishing in the north as a powerful engine for economic growth. This background may seem fussy, but without it we really can't understand what the Founding Fathers mean when they talk about "corporations"--we may naturally assume that the word conjured the same thoughts of Exxon and AT&T that it brings today, and that would be a mistake. In fact, their understanding of "corporation" starts with the English tradition and develops into something distinct, as a vehicle of Federalist notions of economic growth, in the first quarter of the nineteenth century.

Madison's Attitude Towards Corporations

There are a number of passages in Madison's writings that help us understand his attitudes towards corporations and the role they might play in politics, and three of them are particularly useful. The first comes in the course of argument in Congress on February 8, 1791, in which he mustered his reasons for opposing Alexander Hamilton's proposal to charter a Bank of the United States. Madison began by stressing that corporations, unlike natural persons, had only the exact measure of rights that was conferred upon them by the state in express terms⁷--in other words, they did not have "inalienable rights" which arose under natural law, like the "people of the United States" invoked at the outset of the Constitution. Moreover, Madison soon made clear that he thought corporations were "powerful machines" that might well do a great deal of mischief if left unguarded. He is plainly suspicious of Hamilton's motives and talks repeatedly about "monopolies," the risk to the economy on the whole of a run on the bank, and the risk of a nation which is credit-dependent upon this bank (here he cites the East India and South Seas Companies).

In his recent book Mendacity of Hope, my friend Roger Hodge looks closely at what stands behind this almost feverish opposition to Hamilton's bank scheme. Hamilton has founded the Bank of New York, rumors were spreading that it would be merged into the national bank, helping to anchor Hamilton's control over the institution and providing a powerful vehicle that would further the political aspirations of the Federalists. In the background stands Hamilton's alter ego, William Duer, one of the great rogues of early American history, a man widely expected to take control of the bank, who within a year would be exposed as the force behind a bond scheme that almost brought down the Bank of New York. Duer was condemned to spend the rest of his life in debtor's prison. Hodge turns to a second source, an article Madison wrote for the National Gazette in 1792, for clarification:

"Madison saw, in Hamilton's financial program, a plan to give preferential treatment to a particular mercantile and moneyed interest, in order to bind it tightly to the executive's energetic agenda. His rhetoric is withering, and his weapon of choice is devastating irony. He summarizes his opponents' views in the following manner: 'In all political societies, different interests and parties arise out of the nature of things, and the great art of politicians lies in making them checks and balances to each other. Let us then increase these natural distinctions by favoring an inequality of property... We shall then have the more checks to oppose each other; we shall have the more scales and the more weights to protect and maintain the equilibrium.'

"The language here is very close to his own, yet the distinctions make all the difference. He shows how a slight shift, using the vocabulary of American republicanism, in this case the doctrine of checks and balances, can be made to pervert republican ends. 'From the expediency, in politics, of making natural parties, mutual checks on each other, to infer the propriety of creating artificial parties, in order to form them into mutual checks, is not less absurd than it would be in ethics, to say, that new vices ought to be promoted, where they would counteract each other, because this use may be made of existing vices.'"⁸

This shows us that Justice Kennedy's understanding of Madison is off the mark: the "artificial parties" to which Madison is referring are business entities, and he's saying that their voice in the political process is inherently corrupting--that the political process must be driven by natural and not artificial persons. There's no denying that Madison's fears are at least to a degree tactical. The Jeffersonian party was then anchored in the agricultural south, with some support in the small towns of the Middle Atlantic interior and among immigrants, "mechanics" (as skilled or semi-skilled laborers were then called) and the servant class in the major cities of the Northeast. The Federalists were based solidly in the merchant class of New England and the Middle Atlantic. Proposals like the one put forward by Hamilton threatened to allow them to

leverage their position as bankers and merchants through use of federal prerogatives.⁹ The Virginia of Madison and Jefferson was large and powerful, but still an essentially agrarian state not positioned to draw advantage from Hamilton's mercantile initiatives. But it must be stressed that the prime worry that guided Madison was the leveraging of a corporate charter for domestic political purposes. This he clearly feels would potentially corrupt the finely tuned political system of the U.S. Constitution, giving the Federalists unfair advantage over the Republicans, and opening the door to foreign pro-Federalist influence.¹⁰

The third source is a Madison essay that was uncovered by Gaillard Hunt from a mass of Madison papers acquired by Harper's in the late nineteenth century and published in Harper's Magazine in the March 1914 edition. We don't know the precise timing of this essay, though it was certainly written before 1832, and the topic and phrasing are reminiscent of speeches and correspondence from the 1790's. Madison's topic is "monopolies and corporations." He warns against freely granting charters to convey monopolies, argues that this frequently leads to abuse and private gain and says that the state should periodically reconsider and perhaps revoke such monopolies when granted. If we look at the period around 1800, it seems that the most frequently granted corporate commercial charters are in fact monopolies--a company is authorized to build a bridge, a toll road or to provide water to an area, and it is given a guarantee of exclusivity. This is a continuation of the practice of the British era, when chartered companies almost invariably rested on monopolies respecting some sort of trade or commercial activity. But then Madison states:

"Besides the danger of a direct mixture of religion and civil government, there is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations. The establishment of the chaplainship in Congress is a palpable violation of equal rights as well as of Constitutional principles. The danger of silent accumulations and encroachments by ecclesiastical bodies has not sufficiently engaged attention in the U.S."

We need to recall that Madison launched his career as an attorney for Baptist ministers who faced imprisonment and flogging for preaching in Virginia,¹¹ where the Anglican Church had a monopoly on the licensing of preachers. Madison's own confession remains somewhat ambiguous: he attended a Calvinist school, his writings show strong Calvinist influence, but he was married in and attended an Anglican church, and in later life expressed such critical views about established churches generally that he was often attacked as a deist or atheist. Whatever his confession (if any), Madison was a staunch believer in freedom of religious expression and believed that the nation benefited from a competition of ideas about God every bit as much as about politics and economics. But what does he mean by "accumulations and encroachments by ecclesiastical bodies"? He is intentionally opaque to some extent, but I sense his concern can be inferred from his own career: he is troubled by the Anglican

Church, the great wealth it had amassed in property holdings which were settled through corporations, and its ability to influence political life in the country through its wealth rather than the force and reason of its ideas.¹² Surely the idea of an overweening Episcopal Church seems a bit comical to modern America--but note the sequencing: anonymous accumulation of wealth through corporate vehicles, then the unseen hand of political influence.

Burke's Critique of Corporations in Politics

In addition to these sources, there is another development running in the background that should be studied. In 1786, Edmund Burke, a key ally of the Americans in the parliament at Westminster and arguably the most powerful parliamentary voice of his age, rose to move the impeachment of Warren Hastings, the former chief administrator of the East India Company in Bengal. The matter continued in fits and starts until 1795, when Hastings was acquitted. Throughout this period, it was featured in press accounts--indeed, it was sensationalized. Thomas Babington Macaulay,¹³ whose views shaped much of the scholarship in the following century, viewed this as a tragic sparring between two "great men," touching on the efficacy of colonial administration, without too much broader consequence for social and political thought--but that was a mistaken analysis. Macaulay's account greatly shaped the way later generations viewed the Hastings trial. But the debate over whether Burke's accusations were just or unfair continues to this day.¹⁴ Whether Burke's charges against Hastings can be sustained, they rested on a powerful conviction that corporations have no business assuming control over the lives of human beings in the political world. Burke had no objection to the East India Company *per se*; indeed, he and other members of his family were invested in it and thrived in part on the profits it returned. But he took moral offense to the notion that a for-profit business would effectively assume the reins of political authority over the subcontinent; he considered this corrupt, he belittled their attempts to justify it at every turn, and he spent a decade cataloging their misdeeds. Burke believed that Britain might well run an empire, but it could not do so without taking firmly into account its sovereign duty to its subjects. Indeed, Burke later wrote that his life had been dominated by two great causes--one was exposing the sham claims of liberty in the French Revolution, and the other exposing the mendacity and misrule in India of the East India Company.

There is no doubt that Burke's attacks on the East India Company were followed closely in the United States and that they were viewed favorably--Americans were never subjected to the same form of colonial exploitation that appeared in India, but the displacement of local government, the establishment of trade monopolies and the imposition of abusive taxation were shared complaints.

Burke's critique of the East India Company dovetails perfectly with Madison's own concerns about corporations. The company raj was, Burke wrote, "one whole system of oppression, of robbery of individuals, of destruction of the pub-

lic, and of supersession of the whole system of the English government."¹⁵ In sum, Burke felt that it was natural and proper for corporations to exist to turn a profit for their shareholders. But he objected to them taking over the functions of government. When he attacks the Hamiltonian national bank initiative, Madison cites the financial entanglements of the East India Company (which continually lent to the crown and extracted political concessions in return, and significantly, allowed the crown to circumvent the process of parliamentary appropriation) as a reason to oppose the measure. Madison and Burke seem joined on a number of critical points: One who governs must do so constrained by the law and motivated by the natural interests of his people. Commercial corporations naturally tend to place the drive for profits before either of those concerns. Once it has government powers, corporations will naturally turn them into an engine to create profits for their shareholders, oblivious to the needs of the populace. Burke's solution was not to urge the shutdown of the East India Company, but rather to keep it out of government--its proper business was commerce; the governance of India should be left to the British government and the governments of the princely states.

It may seem that Burke lost this battle when Hastings was acquitted in 1795, but that would be a poor measure of the power of ideas. The fact is that his criticisms sank in deeply with the British civil service and political classes, provoking a broad sense of shame about the mismanagement of India. The moral authority of the company never recovered. After the War of 1857, the validity of his critique was almost universally recognized and the raj of the "Honorable Company" was put to an end.

A Recap

So let me recap and offer some conclusions. Was Madison hostile to corporations? As I noted, there is an element of "not invented here" in his attitude, a suspicion that corporations were a Federalist tool. Still, Madison spent his waning years at the helm of what was then Virginia's largest corporation, the University in Charlottesville. He came to embrace the corporation and the concept of limited liability as useful mechanisms for commerce and economic development. He even acknowledged that the government might, from time to time, grant a monopoly to secure a vital service to the people--a utility, transportation company, bridge or turnpike road, for instance--but his view was that such a charter should be granted for a limited term, and required careful government attention to prevent abuse. He was also a staunch foe of high taxation, and just as opposed to the burdensome taxation of business corporations as individuals. On the other hand, he was very troubled by the use of anonymous societies (to use the other label then in circulation for corporations) as a vehicle for accumulation of vast and invisible wealth, for political influence and for passing on inherited wealth. Also he believed that a corporation did not, like a citizen, have "natural rights," but only the specific rights that were conferred upon it through the charter it was granted.

Does this mean that corporations have no rights under the Bill of Rights? No. That would be going too far. Consider simply the First Amendment rights of free association, speech and worship. Can those rights be meaningfully exploited today without involving corporations? Religious communities make use of corporate forms; so do political parties; and if the Birmingham News and local television stations have no free speech rights, those rights would mean little. On the other hand, Madison almost certainly believed that Congress had the right to impose limits on corporate engagement in the political sphere that would dilute the voice of natural persons. His speeches against the Bank of the United States and his attacks on the corporate holdings of the formerly established church both suggest this.

Madison and the Super-Sized Government

There is also no doubt that James Madison, confronted with the relationship between government and the world of business corporations today, would be shocked by it. His first shock would certainly be over the size of the government itself, its property, regulatory scope, employees and social programs, the enormous defense establishment. Consider that in the first administration in which he served, the attorney general, Edmund Randolph, thought he had a part-time job and continued his private law practice. There was no "Justice Department." Today with 112,000 employees and a budget of \$27.8 billion, it is the world's largest law firm--but it's still only a small-time player among the nation's bureaucracies.

The second shock would be over a government that routinely outsources its functions to corporations with little effective oversight of the process. Government spending on private contractors continues to grow exponentially, consuming an ever-increasing share of the total federal budget: in 2000, it was \$201.3 billion; in 2005, it had grown to \$377.5 billion; by 2007, it was \$439.5 billion.¹⁶ We have no current numbers for 2010, but don't be surprised if the total approaches a half trillion dollars, half of all discretionary outlays by the U.S. Government. There is a naïve but widely held assumption that when the government outsources to corporations, this somehow automatically means that the money is spent more efficiently and that the growth of the state is held in check. Actually this process has clouded the more fundamental question, which is whether the government spending reflected in these contracts is necessary in the first place, and whether the money, as expended, brings corresponding benefit to the people.

And to this we should add the Madisonian query: cui bono--who profits by this? Are these contracts a form of corruption in which the wealth of the state is privatized into the hands of a circle of cronies close to those who hold power, the matter that marks neoliberal kleptocracies from Russia to Egypt? Likely the problem is not so severe as that. These raw numbers nevertheless show us, I suspect, that corporations are extremely effective in selling the government services it doesn't need in the first place, and often at prices that are not com-

petitive in the marketplace. There is something fundamentally wrong about the relationship between corporations and the federal government.

What produces this dynamic? Madison's mentor, Thomas Jefferson, foreshadowed a process that modern political scientists call "capture," when a less-than-arm's length relationship arises between government agencies and corporations.¹⁷ "Capture" generally relates to the circumstances in which a regulatory agency is effectively taken over by the corporations which it is supposed to regulate--the classic work on this subject is Huntington's 1952 study of the Interstate Commerce Commission in the Yale Law Journal.¹⁸ But this analysis can also be applied to the process of government contracting. A contractor persuades the government of what it needs to buy; it works on procurement officers to write a tender in ways that favor its product over others. More recently, the government even gives sweeping powers to subcontract--as with multibillion dollar construction contracts awarded to Halliburton and Bechtel at the time of the invasion of Iraq in 2003. In the revolving-door world of government contracting, contract officers leave government service and secure positions with contractors themselves; indeed, they may be in the process of negotiating such moves as contracts are awarded. Complex ethics rules exist to preclude improper influence in this process, but these rules have proven very difficult to patrol and enforce.

More recently, the Pentagon has pushed back against ethics rules, arguing that government interests favor a handful of tight relationships with substantial contractors rather than an open door to entrepreneurs and new businesses.¹⁹ This argument exposes the core of the problem--there is a conscious effort to restrict the game to successful, established corporate behemoths and to shut the door in the face of the bright young man or woman with a new idea and a lot of energy. This approach is a rejection of entrepreneurship.

Military Spending as a Special Concern

Madison's focus was consistently on military spending. He initially opposed a permanent military establishment,²⁰ preferring to draw on a citizen army which would spring to life when called up. Later, during the trauma of the War of 1812, Madison changed his mind and acknowledged that a nation with territories as vast and borders as far-flung as the United States could not subsist without a permanent military. Nevertheless, throughout his career Madison was suspicious of war profiteers and military contractors, and he made no secret of the fact that he doubted their commitment to the republic. His reading of Montesquieu and the ancient Roman historians led him to think that a standing military and a continuous state of war could not be reconciled with a democratic form of government--it would over time lead to the rise of a new Caesar who would perhaps preserve the trappings of the republic, but would actually install an imperial form of governance.²¹ A military contractor is therefore a natural ally of the executive who aspires to more power than the

Constitution allots, and particularly to one who makes ready use of the war powers.

There are no simple solutions to this problem. But Madison was focused on war-making as the critical aspect. A continuous state of war was poison to the democratic process, he thought. The solution was to insure that the process of deciding to make war was shared between the executive, the Congress and the people. He framed this well in his essay on "Universal Peace:"²²

"Wars may be divided into two classes; one flowing from the mere will of the government, the other according with the will of society itself.

"Those of the first class can no otherwise be prevented than by such a reformation of the government, as may identify its will with the will of the society...

"The other class of wars, corresponding with the public will, are less susceptible of remedy. There are antidotes, nevertheless, which may not be without their efficacy. As wars of the first class were to be prevented by subjecting the will of the government to the will of society; those of the second, can be controuled by subjecting the will of the society to the reason of the society; by establishing permanent and constitutional maxims of conduct, which may prevail over occasional impressions, and inconsiderate pursuits."

This helps us understand that the Framers' intent in the Constitution is to make it difficult to wage wars of choice. It pursues this objective by separating the war powers between the executive and Congress. So, while no one would question the president's authority to defend the country under attack or to launch a riposte in response to an attack, the more enduring war power assumes a process in which Congress is consulted and gives its consent and this occurs against the backdrop of public debate. The objective is clear: the decision to wage a war should be borne by the people, Congress and the president in unity. The decision should not be a rash one borne of a desire to retaliate in the heat of the moment. It must follow a process that "subjects will to reason" as Madison says: the cost of the war and its long-term and hard-to-predict consequences must be fully explored. The risk otherwise is that the executive will use war-making as a tool to enhance his own powers and to strip the powers of the other branches.²³

Decision-Making About War: Libya in 2011

Consider now the decision reached by President Obama to commit U.S. forces to the enforcement of Security Council Resolution 1973 in Libya. Only two days before U.S. aircraft dropped bombs and unleashed Tomahawk missiles over Libya, the National Security Advisor was assuring reporters in the White House that the conflict there did not affect essential national security inter-

ests²⁴--in other words he was suggesting to them very strongly that the U.S. would not become involved militarily. The president delivered no "Oval Office speech" to the nation explaining what he was doing and asking for the people's support. Congress was not asked to give its assent, and no congressional leaders moved to do so even in the absence of a request. These developments are extremely worrisome.

My concern has nothing to do with whether the military action taken was wise or not--it's ironic to be discussing this in the context of James Madison, since though a perennial war skeptic, Madison twice was presented with the question of war with the Pasha of Tripoli (a title which might fit Moammar Qaddafi today), and twice supported it. It is clear to me that perfectly sensible people with the national security interests of the United States at heart could support it--just as they could oppose it. I am much less concerned about whether America participates in the operation in Libya than I am about how that decision, and similar choices that commit the United States to war, or put it on a path which could lead to war, are made. No one ever intends to get into an interminable quagmire, after all. But there is a normal tendency at the start of any military engagement to expect it to be resolved quickly, favorably, and cheaply. The process of public debate and congressional consultation is intended to impose at least something of a check on this kind of wishful thinking--and to ensure that there is a public acceptance of potential costs and risks in the event of war.

The war-making powers of the president are ascendant now, almost unchallenged. When the president uses these powers, he is naturally concerned about what other powers may think, and perhaps he feels the need for a Security Council resolution, but the president is almost indifferent to the checks and balances on his powers imposed by the Constitution. The latest attorney general opinion on the president's right to conduct military operations in Libya, appropriately issued on April Fool's Day, makes this point powerfully.²⁵ But is there a meaningful distinction to be drawn on this score between Carter or Reagan, Clinton or George H.W. Bush, George W. Bush or Obama? Not so much. The attorney general's opinion, issued in the form of a memorandum from the Justice Department's Office of Legal Counsel (the same shop that gave us memoranda justifying torture, eviscerating the fourth amendment, and confirming the president's power to spy on American citizens without warrants in the name of national security) makes the case that its view of presidential war-making short of formal "war" has been shared by every president since Lyndon Baines Johnson, and perhaps earlier.

This also reflects an inside-the-Beltway consensus. Both political parties are dominated by factions that value robust presidential war-making powers and give short shrift to the power of the Congress to limit their exercise. In the current Libya action we see how this is possible: the liberal interventionists who dominate the Democratic Party and the neoconservatives who set the tone for the G.O.P. joined forces in pushing for this action--Susan Rice and William Kristol, Samantha Power and Charles Krauthammer. These two groups have

considerable differences in the details of foreign policy, but they are united in their vision of a robust presidency able to project military force around the globe with little hesitancy, and no need to seek a congressional or popular mandate before doing so.

To work, our system requires the rigorous application of the underlying notion of checks and balances, as Madison expressed it in Federalist No. 51, each branch "should have a will of its own," each must possess "the necessary constitutional means and personal motives to resist encroachments of the others." But the way the political game is played in Washington today reflects a different reality: we have become a presidential republic in which the powers of Congress steadily recede, especially in the arena of foreign affairs and national security.

Sloganeering Instead of Politics

I will close with a thought from Ludwig von Mises, written just after he moved to America in the dark days that immediately preceded America's involvement in World War II. The passage was written for an American audience, because it is not included in the original German text of Mises's book. It expresses one of his essential thoughts, which seems to me especially relevant in these days:

"What is wrong with Western civilization is the accepted habit of judging political parties merely by asking whether they seem new and radical enough, not by analyzing whether they are wise or unwise, or whether they are apt to achieve their aims...

"The usual terminology of political language is stupid. What is 'left' and what is 'right'? Why should Hitler be 'right' and Stalin, his temporary friend, be 'left'? Who is 'reactionary' and who is 'progressive'? Reaction against an unwise policy is not to be condemned. And progress towards chaos is not to be commended. Nothing should find acceptance just because it is new, radical, and fashionable. 'Orthodoxy' is not an evil if the doctrine on which the 'orthodox' stand is sound. Who is anti-labor, those who want to lower labor to the Russian level, or those who want for labor the capitalistic standard of the United States? Who is 'nationalist,' those who want to bring their nation under the heel of the Nazis, or those who want to preserve its independence?

"What would have happened to Western civilization if its peoples had always shown such liking for the 'new'? Suppose they had welcomed as 'the wave of the future' Attila and his Huns, the creed of Mohammed, or the Tartars? They, too, were totalitarian and had military successes to their credit which made the weak hesitate and ready to capitulate. What mankind needs today is liberation

from the rule of nonsensical slogans and a return to sound reasoning."²⁶

America today is crippled by sloganeering that takes the place of genuine political debate. We hear of "red" and "blue," "liberal" and "conservative," "right" and "left," "Democrat" and "Republican." Political thought is aggressively channeled into these two camps. Our political discourse has assumed a numbingly binary quality. And this blinds us to some obvious facts that merit our attention. The massive growth of government has been shared since the Depression by both sides of our two-party system; those who rail against it very rarely do anything that actually reflects that criticism once they come to power. The growth of government consists both of entitlements and the construction of a massive military establishment--our government can be visualized as an insurance company with an army. Particularly on the latter score, both parties have built aggressively and almost without interruption since 1940. Madison would have disdained both, but he would have feared the second. The growth of the state affects us in ways we barely understand. It gives the state a strong and pervasive voice--we hear it at every turn emerging even from mouths we do not associate with the state.²⁷

The state's critics on the other hand, and particularly those outside of the binary political process, have an ever softer and fading voice--and political discourse of all types fades increasingly from a center stage filled with infotainment--the exploits of Paris Hilton and the latest episode of "Jersey Shore." The state has constructed a massive national surveillance apparatus, a modern Tower of Babel, harvesting and trawling through millions of communications every day, all of course just to keep us safe. Whistleblowers find themselves quickly criminalized and repressed. America today is no Orwellian nightmare. But the tools that could make it one are quickly being assembled by the state, the restraints once in place against their abuse are falling away. Now our hope against a police state rests more on the good will of those who make up the Executive Branch, and less on the checks and balances that James Madison crafted. There is reason to sound an alarm, and reason to be concerned about the limited range of our nation's political dialogue. Solving our problems has to start with a better appreciation of the problems themselves. And there is no better reference point than the nation's first principles, starting with those of James Madison.

¹ Citizens United v. Federal Election Commission, 558 U.S. 6 (2010).

² Niccolò Machiavelli, Discorsi sopra la prima deca di Tito Livio, bk 3, ch 1 (1532)("Ma come di quella battitura la memoria si spegne, gli uomini prendono ardire di tentare cose nuove, e di dire male; e però è necessario provvedervi, ritirando quello verso i suoi principii. Nasce ancora questo ritiramento delle repubbliche verso il loro principio dalla semplice virtù d'un uomo, senza dependere da alcuna legge che ti stimoli ad alcuna esecuzione: nondimanco sono di tale riputazione e di tanto esempio, che gli uomini buoni disiderano imitarle e gli cattivi si vergognano a tenere vita contraria a quelle." - "But as the recollection of these punishments fades from men's minds, they become emboldened to make new attempts against the government, and to speak ill of it, and therefore it is necessary to provide against this, by bringing the government back to its first principles. Such a return to first principles in a republic is sometimes caused by the simple virtues of one man, without depending upon any law that incites him to the infliction of extreme punishments; and yet his good example has such an influence that the good men strive to imitate him, and the wicked are ashamed to lead a life so contrary to his example.")

³ I use the expression "national security state" to refer to the American government in the form it has taken since the enactment and implementation of the National Security Act of 1947, Pub. L. No. 235, 80 Cong., 61 Stat. 496, codified at 50 U.S.C. ch. 15, which transformed the old Departments of War and of the Navy, created the Department of Defense, the National Security Council and the Central Intelligence Agency--moving the national security function to the center of the government's mission in peacetime for the first time in the republic's history. The term refers particularly to the security and intelligence components of the state.

⁴ See, e.g., Madison's remarks to the Constitutional Convention on June 29, 1787 ("The mixture of the Govt. ought to be kept in view... There was a gradation, he observed, from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty")(using "corporation" to refer to town or municipality), reproduced in The Debates in the Federal Convention of 1787, vol. 1, pp. 184-85 (G. Hunt and J.B. Scott eds. 1987).

⁵ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

⁶ Gordon S. Wood, The Radicalism of the American Revolution, 319-21 (1992), Daniel A. Crane, "Antitrust Antifederalism," 96 Cal. L. Rev. 1, 10-12 (2008).

⁷ James Madison, Speech in Congress Opposing the National Bank (Feb. 8, 1791) in Writings (Library of America ed. 1999), pp. 480-90. (A corporate charter "creates an artificial person previously not existing in law and confers important civil rights and attributes, which could not otherwise be claimed.")

⁸ Roger D. Hodge, The Mendacity of Hope: Barack Obama and the Betrayal of American Liberalism (2011), p. 111, quoting James Madison, "Parties," National Gazette, Jan. 23, 1792, reproduced in Writings, pp. 504-05.

⁹ See Madison's essay "A Candid State of Parties," National Gazette, Sep. 26, 1792 in Writings, pp. 530-32. The Federalists, he holds, believe that "government can be carried on only by the pageantry of rank, the influence of money and emoluments, and the terror of military force. Men of those sentiments must naturally wish to point the measures of government less to the interest of the many than of a few, and less to the reason of the many than to their weaknesses; hoping perhaps in proportion to the ardor of their zeal, that by giving such a turn to the administration, the government itself may by degrees be narrowed into fewer hands, and approximated to an hereditary form... (they) will be induced by the most obvious motives to strengthen themselves with the mean of influence, particularly of moneyed, which is the most active and insinuating influence." Assessing their prospects, Madison sees in the Republicans superior numbers, in the Federalists superior money--he is troubled by a system which will allow money to triumph over the greater number.

¹⁰ James Madison, "Foreign Influence," Aurora General Advertiser, Jan. 23, 1799 in Writings, p. 598 ("Money in all its shapes is influence; our monied institutions consequently form another great engine of British influence. Our Bank is a powerful one. Their capital belongs in great part to Britons, or to proprietors interested in British connections. The proprietors chuse the Directors. The directors dispense the credits and favours of the Banks. Every dependant on these therefore is a kind of vassal, owing homage to his pecuniary superiors, on pain of bankruptcy and ruin. Say ye citizens of Philadelphia, have ye not all felt or seen this influence, whenever Bank-Directors have been canvassers for votes or subscriptions?")

¹¹ Ralph L. Ketcham, James Madison: A Biography, p. 57 (1990).

¹² Note that Madison's first exercise of the veto power targeted an "Act Incorporating the Protestant Episcopal Church in the Town of Alexandria, District of Columbia" on Feb. 21, 1811. Madison reasoned that the act vested the Episcopal Church with "a legal agency in carrying into effect a public and civic duty" at odds with the First Amendment. Writings, p. 683.

¹³ Thomas Babington Macaulay, "The Impeachment of Warren Hastings" (1841).

¹⁴ Compare Nicholas B. Dirks, The Scandal of Empire: India and the Creation of Imperial Britain (2008) with Michael Edwardes, Warren Hastings: King of the Nabobs (1976) and Michael Curtis, Orientalism and Islam (2010).

¹⁵ Trial of Warren Hastings, The Writings and Speeches of Edmund Burke, vol. 6, p. 275.

¹⁶ U.S. House of Representatives, Committee on Oversight and Government Reform, Dollars, Not Sense: Government Contracting Under the Bush Administration (June 2006) and More Dollars, Less Sense: Worsening Contracting Trends Under the Bush Administration (June 2007).

¹⁷ See Thomas Jefferson, Letter to William B. Giles, Dec. 1825 in The Works of Thomas Jefferson, vol. 10, p. 356 (P. Ford ed. 1905)("Perhaps consolidation becomes the fourth chapter of the next book of their (the Federalists') history. But from their younger recruits, who having nothing in them of the feelings or

principles of '76, now look to a single and splendid government of an aristocracy founded on banking institutions and moneyed incorporations under the guise and cloak of their favored branches of manufacturers, navigation and commerce, riding and ruling over the plundered ploughmen and beggared yeomanry. This will be to them a next blessing to the monarchy of their first aim and perhaps the surest stepping stone to it.") and Letter to George Logan, Nov. 12, 1816, in vol. 12, p. 44 ("I hope we shall take warning from the example of England and crush in its birth the aristocracy of our moneyed incorporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.")

¹⁸ Samuel P. Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest," 61 Yale L. J. 614 (1952).

¹⁹ William Lynn, Deputy Secretary of Defense, Memorandum on Ethics, Integrity and Accountability, Dec. 21, 2010, accessible at <http://www.scribd.com/doc/46222150/LynnEthics1>.

²⁰ James Madison, Remarks before the Constitutional Convention (June 29, 1787), reproduced in The Debates in the Federal Convention of 1787, vol. 1, pp. 185-86. ("A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.")

²¹ James Madison, "Political Observations" (Apr. 20, 1795), in Letters and Other Writings of James Madison, vol. 4, p. 491 (1865). ("Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people. The same malignant aspect in republicanism may be traced in the inequality of fortunes, and the opportunities of fraud, growing out of a state of war, and in the degeneracy of manners and of morals engendered by both. No nation could preserve its freedom in the midst of continual warfare.")

²² James Madison, "Universal and Perpetual Peace," National Gazette, Feb. 2, 1792 in Writings, pp. 505-08.

²³ John Jay, Federalist No. 4 ("It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only

the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.")

²⁴ Anthony Shadid, "Libyan Forces Rout Rebels as West's Effort for No-Flight Zone Stalls," N.Y. Times, Mar. 15, 2011 ("Moreover, senior officials, notably the national security adviser, Thomas E. Donilon, have made it clear that the United States does not view Libya as a vital strategic interest.")

²⁵ Department of Justice, Authority to Use Military Force in Libya, Apr. 1, 2011, accessible at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>. I discuss the issues surrounding this opinion in greater depth in "How Not to Declare a War," Foreign Policy, Apr. 11, 2011.

²⁶ Ludwig von Mises, Interventionism: An Economic Analysis, p. 89 (1940).

²⁷ The growing regulatory and contractual relationship between the news media and the government produces corporations which desire to manipulate the government, but conversely which are hesitant ever to criticize it. Consider Steven Mufson and Jia Lynn Yang, "The Trials of Kaplan Higher Ed and the Education of the Washington Post Co.," Washington Post, Apr. 9, 2011 (noting that 61% of the Washington Post Co.'s total revenues come from "educational" operations that are tightly regulated by the federal government); and consider that NBC's parents GE and Comcast are both themselves heavily dependent on government contracts; as is true for Disney-owned ABC, Viacom-owned CBS and Time-Warner owned CNN. Each of these major broadcast news outlets thus has powerful commercial reasons to preserve the most positive possible relations with the U.S. government. See Glenn Greenwald, "The Washington Post's dependence on the government it covers," Salon.com, Apr. 10, 2011.