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“The Military Lays Open the Civil, and the Civil Betrays the Military Anarchy”: *La tranquillité publique* and Separation of Powers, 1789-1790

Rafe Blaufarb

- 1 Over the course of its two-year existence, the Constituent Assembly formed committees which carried out much of its work. Originally, their function was a purely legislative one. As Camus, the Assembly’s archivist, recalled, the committees were to “préparer les décrets relatifs aux diverses matières dont l’Assemblée avait à s’occuper, de voir entre plusieurs membres qui se surveillassent les uns les autres des pièces qui ne peuvent être examinées que sur le bureau, et d’en rendre compte à l’Assemblée”. But, continued Camus, “la nécessité des circonstances a forcé les comités à aller au-delà de leur institution première” and to take on functions that could be described as judiciary and executive. The Assembly’s new laws elicited requests for clarification from local officials; the committees provided answers and sometimes legal rulings on contentious issues. At the same time, the disruption of the royal state’s authority and the reorganization of the kingdom’s administrative structure compelled the committees to step into the void and perform vital functions of governance. As Camus saw it, “l’inertie du pouvoir exécutif, si marquée à différentes époques, [a] contraint les comités à suivre directement et par eux-mêmes l’exécution des lois”.¹ “Dans la suspension ou l’inertie momentanée de tous les pouvoirs, les citoyens ne pouvaient tendre les bras que vers l’Assemblée nationale.”²
- 2 Contemporaries were well aware of the committees’ propensity to take on an executive role. While those on the left saw this as necessary to save the Revolution from enemies and anarchy, those on the right condemned it as a violation of the principle of the separation of powers. Historians and constitutional scholars have tended to approach the committees in the same way. Scholars sympathetic to the French Revolution, and the revolutionary tradition more broadly, have cast the expansion of the committees’

activities as necessitated by pressing circumstances. Albert Mathiez defended it as a necessary step, given "la résistance royale".³ In contrast, those with less sympathy have denounced it as unnecessary and unconstitutional, if not frankly dictatorial. Paul Bastid concluded that, through its committees, "l'assemblée non seulement surveille l'exécutif, mais empiéta bien souvent sur ses fonctions, en dépit de la séparation des pouvoirs".⁴ Henri Olive claimed that the "principale caractéristique" of the National Assembly was "une concentration entre leurs mains de tous les pouvoirs et un exercice, tantôt immédiat et le plus souvent indirect, par l'organe des comités, des fonctions du roi ou de ses ministres".⁵ As for Frédéric Braesch, he noted that the list of "empiétements" would be "longue à dresser". Finally, F. Maury underlined the tendency of the committees to "s'immiscer dans toutes les questions".⁶ These examples could be multiplied.

- 3 The negative assessments judge the expansion of the committees' functions against the constitutional ideal of the separation of powers. This is problematic for a number of reasons. First, some committees pursued missions, such as the abolition of feudalism, that had no previous ministerial counterpart and so cannot be described as executive (or, for that matter, legislative or judicial). Tasks of this sort, that involved dismantling the Old Regime or building a new order, were truly revolutionary, hence pre-constitutional, and thus transcended the norm of separation. As André Castaldo cogently put it, "l'analyse juridique de leur fonction, à partir du principe de la séparation des pouvoirs, omet un aspect fondamental : il revient à la Constituante d'instaurer ce principe, non de le subir. Sa nature révolutionnaire et dictatoriale le lui interdit."⁷ The negative assessments of the expansion of the committees' roles depends on the existence of an accepted standard—separation of powers—that was still under construction at the time. Since there was no settled definition of that standard until the end of the Constituent Assembly (and even then, it was still contested), it is absurd to judge its committees according to it.⁸ In short, there could have been no violation of the boundaries between the executive, legislative, and judiciary before those boundaries had been demarcated by the Constitution of 1791.
- 4 Rather than violating the principle of the separation of powers, the committees' "encroachments" and "usurpations", most of which occurred as part of the Assembly's efforts to rule a country in the throes of revolution, were part of the process by which the deputies worked out that constitutional principle. Scholars, particularly legal historians, have approached the National Assembly's construction of its particular version of separation of powers from a purely theoretical angle.⁹ They focus on the Assembly's debates over issues such as the royal veto and ministerial responsibility. But these explicitly constitutional debates were not the only manner in which the deputies defined the boundaries and articulated the relationship between the three branches. In even its most mundane actions of governance, the Assembly could not help but venture onto constitutional terrain.
- 5 The public disturbances which roiled France during the first years of the Revolution help explain what Camus saw as the force driving the expansion of the committees' functions, the dysfunction of the executive power. Executive dysfunction was manifest in many areas, but perhaps nowhere more than in the inability to maintain public order. In 1789 and 1790, large parts of France were wracked by popular upheavals which often turned violent. Food shortages, real or imagined, led to urban upheaval. In the countryside, the Assembly's decisions to provisionally maintain the collection of

hated royal taxes and feudal dues provoked waves of unrest that the leading historian of the subject has described as *jacqueries*.¹⁰ The persistence of these disorders led the Assembly and its committees to consider measures of public order that tested and defined a multiplicity of constitutional relationships, including the internal organization of the executive power, the relationship between its different components both to each other and to the king, and the relationship between executive and legislative branches. The challenge of public order was one of the earliest domains in which the constitutional ideal of separation of powers was worked out in practice.

The Law of August 10th, 1789

- 6 Before the Constitution, before the Declaration of Rights, even before the Night of August 4th, the deputies of the National Assembly were confronting challenges to public order, which they generally referred to as *la tranquillité publique*. Crime, organized banditry, riot, and, sometimes, revolt had on occasion troubled the peace of France long before 1789. The pre-revolutionary crisis of 1787-1788 had injected a new political element into the issue of public order, and collective movements, sometimes violent, became part of the emerging revolutionary dynamic. Indeed, if one views the taking of the Bastille as a manifestation of the wider pattern of public disorder, then one could claim that the Revolution owed its survival to the collapse of *la tranquillité publique*. But once Louis XVI had dismissed his hard-line ministers, dispersed the troops that had been ringing Paris, and recalled Necker, the problem of public order assumed a more ambivalent political valence in the eyes of the revolutionary deputies. In contrast to earlier episodes, like the *journée des Tuiles*, it was no longer clear that public disorder served either the cause of liberty or the Assembly's attempt to consolidate a new regime. To varying degrees and for contrasting reasons, all of the deputies feared that now that the King had capitulated and accepted (at least formally) the Assembly's legitimacy, further upheavals could only jeopardize what had been gained. Public order had to be restored, and the deputies began considering how to do so just as soon as the crisis of mid-July was over. With these very first attempts to ensure *la tranquillité publique*, the deputies found themselves venturing onto uncharted constitutional terrain.¹¹ Thus, before their formal debates on the Declaration of Rights and the Constitution had begun, the problem of public order was already raising the key questions about the separation of powers that would occupy the deputies for the next two years.
- 7 The first sustained discussion of how to restore *la tranquillité publique* began on July 20th, 1789, less than a week after the taking of the Bastille. Far from calming the country and assuaging its fears of plots and conspiracies, the actions of the Parisians had provoked a wave of disorders that rippled outward from the capital. Alarmed, the Second Estate deputy, the comte de Lally-Tollendal rose to paint a terrifying picture of the state of the country. Concluding a speech punctuated with words and phrases like "révolte terrible," "meurtre," "carnage," and "torrents de sang," he proposed three measures to restore order. These were a proclamation by the Assembly reassuring the people that liberty had been saved and that they needed to return to their customary docility, provisions for the speedy trial of the guilty, and the formation of "milices bourgeoises" throughout the country.¹² Although greeted with an initial burst of enthusiasm, as soon as the applause had died down, Lally's proposals launched a wide-ranging debate that

only grew more heated over the next two weeks as increasingly disturbing reports began to reach the Assembly not only from Paris, where mob violence persisted, but also from the provinces where a trend of anti-seigneurial actions appeared to be developing. In the course of these discussions, the Assembly failed to agree on a response to the troubles. But it did broach at least seven major constitutional issues.¹³ These were the necessity of royal sanction for the Assembly's decrees, ministerial responsibility, the legislature's right to intervene in the organization of the armed forces, control of the National Guard, the nation's right to judge crimes of *lèse-nation* (often phrased in terms of the Assembly's right to establish a special tribunal), and the credibility and legitimacy of the Assembly itself. In addition, these initial public order debates led directly to the creation of the Assembly's two most activist committees, the committee of reports and the committee of investigations.¹⁴

- 8 By early August, when it had become clear that the troubles in the countryside were not isolated incidents, but part of a massive movement of panic that was threatening life and property across much of the country, the Assembly finally took a decisive step. On the Night of August 4th, it abolished feudalism to assuage the peasantry and, in the same moment, dissolved the fabric of the Old Regime by abolishing seigneurial justice, venal office, provincial privilege, personal privilege, and more. The Night of August 4th is justly celebrated. But it is often forgotten that this was not the Assembly's initial response to the Great Fear. Rather, the Assembly's first instinct was to repress the revolt. As late as August 3rd, the Assembly was still considering how to "remettre les anciennes lois en vigueur" and "maintenir [...] la tranquillité publique".¹⁵ France was on the brink of the abyss, and the Assembly was in no mood to hold out olive branches.¹⁶ Instead, the Assembly dramatically shifted course the following evening with its sweeping abolitions. But the initial idea of repression was not forgotten. Indeed, having made such generous concessions to the peasantry, the Assembly was now determined to tolerate no further acts of disorder. The peasants had what they wanted; the Assembly now expected docility—and was seemingly prepared to enforce it by muscular means.
- 9 The Assembly returned to the question of how to maintain *la tranquillité publique* on August 10th, immediately after the definitive list of abolitions had been decreed. Discussion began with a proposal from the *comité de rédaction*, presented by Target, for "le rétablissement de la tranquillité publique." It contained four basic provisions. The first authorized both the National Assembly and municipalities to requisition any and all military force (National Guards, army troops, and the *maréchaussée*) to "poursuivre et arrêter les perturbateurs du repos public".¹⁷ The second directed that rioters be tried by the ordinary courts, but that all materials relating to the ringleaders be forwarded to the assembly so that it could "remonter à la source des désordres et pourvoir à ce que les chefs de ces complots soient soumis à des peines exemplaires". The third called for each municipality to draw up a list of the "gens sans aveu" in their midst and place them under surveillance. Finally, the fourth article ordered the kingdom's military forces to take a loyalty oath. Different categories of military personnel would take different oaths. The "milices nationales" would swear before their commander "de bien et fidèlement servir le maintien de la paix contre les perturbateurs du repos public". This oath mentioned neither the King nor, for that matter, any other authority to whom the citizen soldiers would be subordinated. In contrast, the oath for the royal troops required them to swear fidelity to three supreme authorities, the nation, the King, and the law, and to obey the laws of military discipline. The formulation of the

officers' oath was slightly different, reflecting the Assembly's distrust of the military leadership. They were to pronounce their oath to the nation, the King, and the law "à mains des officiers municipaux" and "de ne jamais employer ceux qui seront sous leurs ordres contre les citoyens, si ce n'est sur la réquisition des officiers civils ou municipaux."

- 10 The deputies' initial reaction was mixed. Some found the proposals too harsh, others too weak. Dupont felt it unfair that the measure lacked provisions for warning rioters before the use of force. He suggested that the *comité* add language similar to the British mutiny bill, which required that notice be given before shots were fired. The duc de Châtelet enthusiastically agreed—perhaps less from the considerations of moderation that had motivated Dupont than the fact that the British law condemned to death those who violated it. This draconian threat, the *duc* enthused, would dissuade riotous gatherings. But even this was not enough to satisfy the entirety of the Assembly. One unnamed marquis asked for the addition of even sterner stuff: collective punishment for villages in which châteaux were burned.¹⁸
- 11 These initial discussions about the mechanisms of repression soon gave way to considerations of an explicitly constitutional nature. It was Mounier who launched the new strand of debate. He was concerned that one of the project's provisions compromised a fundamental aspect of the principle of separation of powers. By allowing the Assembly to requisition the troops, he argued, the plan "réunirait le pouvoir exécutif et le pouvoir législatif" in the hands of the Assembly, whereas its only power should be law-making. Mounier added that this confusion of executive and legislative power was not merely a point of constitutional principle, but would have dangerous practical consequences. If the soldiers saw that it was the Assembly, rather than the King or their officers, which was directing the army's operations, they "se croiraient en droit de refuser l'obéissance à leurs chefs". At critical moments, the soldiers would hesitate. Before executing their officers' orders, they would demand municipal authorization, and "il faudrait lire à chacun d'eux la réquisition des officiers civils". From a passive instrument of executive power, the army would become a reasoning, deliberating, litigating body of citizens. These arguments succeeded in persuading Target and the *comité de rédaction* to remove the provision allowing the Assembly to requisition troops.¹⁹
- 12 The comte de Mirabeau spoke after Mounier and echoed his constitutional and practical concerns. However, he focused on the military authority the law gave to the municipalities. He noted the dangers posed by "l'étendue de pouvoirs" the law gave to local civil authorities and warned that "l'influence des municipalités sur la juridiction militaire" was a serious constitutional question that should not be prejudged in this law, but rather be considered later in the course of discussion of the constitution itself.²⁰ He developed his concerns several days later, on August 13th, when the Assembly briefly reopened discussion of the law to correct some poorly-worded phrases concerning the officers' oath.²¹ Mirabeau argued (in vain, as it turned out) that "la formule [du serment] n'est pas plus pur en principe qu'heureux en rédaction."

Jamais les forces militaires ne doivent être subordonnées aux forces civiles, ou bientôt il n'y aurait plus d'armée, surtout si dans le régime actuel, elles étaient soumises à la volonté des municipalités, qui ne sont que des établissements monstrueux de despotisme. J'ai bien entendu parler de l'aristocratie militaire, judiciaire, de l'aristocratie de l'église ; mais je n'ai jamais connu une plus cruelle, une plus tyrannique autorité que celle usurpée par les officiers municipaux, et ce

serait là porter à son comble que de mettre encore dans leurs mains le dernier moyen de l'oppression.²²

- 13 I have underlined the phrase "dans le régime actuel" because it is essential to understand why Mirabeau, a firm supporter of the Revolution at this stage, could have expressed such vehement hostility to municipal authority. On August 13th, 1789, when he pronounced these words, the existing municipal structure of the Old Regime, based on self-recruiting oligarchies and venality, was still in place—and nowhere more so than in his native Provence. Yet, even when these old corporate municipalities had been swept away and replaced by new ones chosen by popular election, Mirabeau would still worry about giving them control over the military forces. As we will see, in his later interventions on the question of *la tranquillité publique*, Mirabeau would express consistent concern that the attribution of military authority to the municipalities risked shattering the executive power itself and threatening the unity of the nation.
- 14 Both Mounier and Mirabeau moved, unsuccessfully, that the Assembly postpone voting a law-and-order measure decree "après la constitution".²³ What did they mean by this? If we bear in mind that, in 1789, the word "constitution" meant the separation of powers²⁴, then their call for postponement was actually an appeal to their colleagues to avoid prejudging that separation through decrees of circumstance. Yet, in this instance and more that would follow, the imperious demands of public order would force the Assembly to do just that—to make what amounted to constitutional determinations—long before the discussion of the constitution had been completed.

The Loi Martiale (October 21st, 1789)

- 15 The next major step the Assembly took into the domain of *la tranquillité publique* was the passage of the infamous *loi martiale*. Proposed on October 21st, 1789, it was approved by the Assembly and sanctioned by the King on the same day—a testimony to the pressing circumstances which provoked it.²⁵ This law would become notorious, largely because it was invoked as the legal basis for firing on the crowd of republican petitioners gathered on the Champ de Mars on July 17th, 1791. Yet, as a measure of public order, it did not break new ground, but merely added several relatively minor provisions to the law of August 10th. These additions were a procedure for giving riotous crowds a peaceful means of expressing their grievances, a tripartite warning protocol to be observed before force was used, and a provision to try those accused of public order violations in the Châtelet court (that is, until the Assembly organized a special tribunal for judging crimes of *lèse-nation*). In all other respects, the *loi martiale* conformed to the August 10th law, notably in its most significant provision: granting the municipalities exclusive authority to requisition armed force to repress civil strife. Because it departed so little from the earlier law, and also because it was passed in such haste, the *loi martiale* provoked scant debate. What little there was tended to rehash concerns that had been raised on August 10th.
- 16 In one important respect, however, the Assembly's discussion was novel: it displayed a heightened degree of sensitivity to the politics of public opinion. Political circumstances had changed significantly since August 10th, and this added a new consideration—concern that the public would hold the Assembly responsible for attempts at repression—that would crop up in all subsequent debates over public order.

On August 10th, the trouble was in the countryside, where the peasantry was rising against feudalism. Though gravely menacing, the troubles were far away in the provinces. On October 21st, this was no longer the case. The locus of public disorder had shifted to the Paris region and the capital itself. On October 6th, the royal family had been forcibly taken from Versailles to Paris. This had not calmed the people of the capital. Fears of counterrevolutionary plots continued to spread, and bread shortages exacerbated the general unease. On October 21st, a baker, Denis François, was hung by a crowd which believed he was conspiring to starve the people.²⁶ Panicked Parisian municipal officials, who believed that this presaged worse to come, rushed to the Assembly and begged it to do something to preserve order. It was in the midst, both spatially and emotionally, of this supercharged context of political emotion and subsistence fears in the capital that the Assembly took up debate on a new measure of public security.

- 17 Within hours of the Parisians' plea, the *comité de constitution* presented a proposal for a *loi martiale*, a proposal that the Assembly, terrified by the prospect of spiralling disorder in the capital, would pass with very little debate. But two deputies, Pétion de Villeneuve and Mirabeau, expressed deep misgivings about the political consequences that might ensue were the Assembly to pass a new law of repression in the current circumstances. Pétion warned that "il serait dangereux que le peuple crût que nous pouvons exercer une surveillance qui est hors de nos fonctions ; bientôt il nous rendrait responsables des événements". Instead of taking responsibility for muscular measures that would garner the Assembly popular opprobrium were they to succeed, and public discredit were they to fail, Pétion proposed a politically-expedient solution: let the King take responsibility: "Faisons-lui [le peuple] connaître que nous avons rendu les décrets qui dépendaient de nous, et que c'est au pouvoir exécutif de veiller à leur exécution."²⁷ Mirabeau shared these views, urging the Assembly to demand that the executive power make known "quels moyens, quelles ressources" it needed "pour assurer les subsistances de la capitale," give it those resources, and then hold it responsible for whatever ensued.²⁸ Rather than taking on its own shoulders responsibility for dealing with the crisis, Pétion and Mirabeau argued, the Assembly should shift the burden to the executive. Their position, it seems, was determined at least as much by political considerations (largely the desire to avoid public disapproval) as by constitutional scruples about the separation of powers.

- 18 The Assembly brushed off these warnings and passed the law in record time, perhaps reassured by the thought that it would be the municipalities (who alone had the power to order repressive action) rather than the Assembly that would bear responsibility for events. But one deputy did speak out against the measure and called upon the Assembly to assume the burden of governance forthrightly: Robespierre. Imagining the negative consequences on public opinion of a new law of repression, he began by denouncing the current subsistence troubles as a plot cunningly hatched by the enemies of the Revolution in order to discredit the Assembly:

Ceux qui ont suivi la Révolution ont prévu le point où vous êtes ; ils ont prévu que les subsistances manqueraient ; qu'on vous montrerait au peuple comme sa seule ressource ; ils ont prévu que des situations terribles engageraient à vous demander des mesures violentes, afin d'immoler à la fois et vous et la liberté.²⁹

- 19 But instead of urging the Assembly to shift responsibility to the executive power, Robespierre called upon his colleagues to take matters forthrightly and energetically into their own hands. Instead of new measures of repression against the starving

people, what was needed was “un tribunal vraiment national [...] pour découvrir la source de nos maux”.

Nous sommes tombés dans une grande erreur, en croyant que les représentants de la nation ne peuvent juger les crimes commis envers la nation. Ces crimes, au contraire, ne peuvent être jugés que par la nation, ou par ses représentants ou par des membres pris dans votre sein. Qu'on ne parle pas de Constitution quand tout se réunit pour l'écraser dans son berceau.³⁰

- 20 The idea of revolutionary “dictatorship”—a term essentially synonymous with the negation of the principle of separate powers—was already in the air.³¹

The Troubles of January and February 1790

- 21 The relative calm of November and December 1789 allowed the Assembly to establish a new structure of local administration. Its main elements were 83 departments and approximately 40,000 municipalities. Their personnel was to be elected during the early months of 1790 and assume their public functions soon thereafter.³² In January, however, during electoral operations, reports began to reach the Assembly of new outbreaks of anti-seigneurial violence concentrated in (but not exclusive to) the southwest and Brittany.³³ On February 9th, 1790, the *comité des rapports* responded with a decree inviting the king to “donner incessamment les ordres nécessaires pour l'exécution du décret du 10 août”.³⁴ A debate followed. Although brief, it drew the basic battle lines that would characterize the Assembly's more extended deliberations on the intertwining questions of *la tranquillité publique* and “la régénération du pouvoir exécutif” in the second half of February 1790.
- 22 Left-leaning deputies denied that the disorders were as serious as reported, blamed them on counterrevolutionary forces, and argued for measures of conciliation rather than repression.³⁵ Those on the right thought the cause of the troubles was the weakness of executive power and called upon the Assembly to revive it.³⁶ As would be the case throughout the February debates over public order and executive power, it was the right which articulated the most sophisticated constitutional arguments, while the left remained relatively silent. Maury took the lead. He argued that the *comité des rapports*' proposal to “recourir au pouvoir exécutif” was dangerous in its current state of weakness and degradation, for such an appeal could only “le compromettre inutilement” by exposing its impotence for all to see. “Quelle autorité lui reste-t-il ?”, he asked, and in the next breath answered :

Les grands tribunaux sont en vacances ; les tribunaux ordinaires du second ordre, munis d'une force suffisante pour attaquer individuellement les malfaiteurs, sont incapables de s'opposer à une émeute populaire : ils ne peuvent juger en dernier ressort. Les troupes soldées sont inutiles au pouvoir exécutif depuis que vous avez sagement décrété qu'elles ne peuvent marcher contre les citoyens que sur la réquisition des officiers municipaux ; les officiers municipaux, effrayés de la multitude des brigands, n'oseront pas invoquer la force armée. Les milices nationales ne sont point aux ordres du pouvoir exécutif, elles ne sont pas instituées dans les campagnes, et c'est loin des villes que les grands désordres se commettent. Ainsi le recours au pouvoir exécutif est donc démontré illusoire dans ces circonstances malheureuses ; il est insuffisant, il serait compromis.³⁷

- 23 In Maury's view, the restoration of order required that the executive power be rehabilitated. And the key to this was allowing the army to act “sans qu'il soit besoin de la réquisition des officiers civils”. These arguments, however, were in vain. The

Assembly declined to take such a drastic step, decreeing instead (as the comité des rapports had proposed) that the king be "supplié" to direct the municipalities to execute the decree of August 10th.

- 24 This step failed to produce calm in the troubled parts of the country. On February 16th, just one week after passage of the measure, the Garde des Sceaux reported to the Assembly that a serious disturbance had taken place in Béziers.³⁸ Townspeople had risen up and seized several collectors of the hated *gabelle*. The colonel of the regiment stationed in the town had begged the municipality to authorize him to restore order and liberate the tax collectors. Whether from fear, sympathy with the rioters, or simple incompetence, not a single municipal official agreed to his request. The troops were thus standing idly by while the crowd hanged five of the *gabelleurs*. Shocked at the inaction of the municipal officials, the Assembly ordered the *comité de constitution* to draft a new law-and-order measure as rapidly as possible. The measure, the Assembly directed, would specifically address "le cas où les officiers civils refuseraient de recourir aux moyens qui leur sont confiés".³⁹
- 25 Two days later, on February 18th, Le Chapelier presented the *comités'* draft decree to the Assembly.⁴⁰ It exuded a marked degree of suspicion toward municipal officers, both by threatening them with punishment if they did not requisition armed force when necessary and by enabling other local elements to act in their stead. According to the draft decree, municipal officers would be "tenus de proclamer la loi martiale." If they failed to do so, they would be "déchus de leurs fonctions et déclarés incapables de remplir aucun emploi de l'administration publique". The decree even envisioned the possibility that municipal officers might encourage or lead riots, in which case they would be "poursuivis extraordinairement, déclarés prévaricateurs dans leurs fonctions et punis comme tels". The decree's tone of distrust was compounded by further provisions which allowed "les officiers de justice", four municipal notables, or eight inhabitants who met the property qualifications to vote to overrule a hesitant council and requisition armed force—including the line army and *maréchaussée*—on their own authority. In such cases, the ranking military officer would assume the "fonction d'officier civil" in reading the required three warnings and drawing up a procès-verbal describing what ultimately transpired.
- 26 This extraordinary law—extraordinary for crossing so many constitutional lines of separation and setting so many local authorities on a collision course with one another—immediately drew fire from Barnave when debate opened two days later, on February 20th.⁴¹ He denounced the measure as "directement opposée au but que ses rédacteurs se sont proposé [...] elle est propre à faire naître l'anarchie." It had two fatal problems. The first was that it blurred the lines between separate constituent elements of the executive branch—municipal and judicial authority—by splitting the power of military requisition between them. "Rien ne me semble plus vicieux," he declaimed, "car si la liberté publique exige que les pouvoirs ne soient pas concentrés dans une même main, la même liberté exige que des puissances homogènes ne soient pas réparties dans des mains différentes." To allow judges and magistrates to summon armed force was to "empiéter[r] sur le pouvoir municipal." This was not just a question of abstract constitutional principle, with no real-world consequences, but risked stirring up conflict within the localities. "Accorder aux uns et aux autres la disposition du même pouvoir [avant tout, le pouvoir militaire !], c'est mettre la même force entre les mains de deux puissances rivales."

- 27 The second problem Barnave highlighted was that the draft decree fragmented authority within the municipality itself, again setting up potentially dangerous rivalries. To allow four notables to requisition military force against the wishes of the rest of the municipal council, was to "accorder à la minorité l'empire sur la majorité". To allow eight "citoyens éligibles" to requisition armed force on their own authority was to encourage factional violence. What was to prevent, Barnave wondered, a group of such citizens from ordering the use of force against local enemies, even personal enemies, who might be assembled peacefully? "Une assemblée peut être nombreuse sans être criminelle." With such a multiplicity of potentially rival municipal elements possessing the same, potentially contradictory power to requisition the army, *maréchaussée*, and National Guard, who would these forces obey? What if eight *éligibles* called out the troops and the municipal officers countermanded that order? Who would the troops obey? If they obeyed the *éligibles*, then the authority of the municipality would be "compromise" and "torrents de sang" might flow. What the *comités* should have done, Barnave insisted, was to have focused on the problem of municipal responsibility for inaction in the face of threats to *la tranquillité publique*, "comme il l'aurait dû". Instead, the draft decree did nothing in this regard but pronounce "deux peines vagues et insuffisantes". If it were passed and went into effect, municipal officers who shirked their duty would be "quittes pour la perte de leur emploi et l'interdiction de toute fonction administrative".
- 28 Barnave's barrage of well-aimed shots sank the measure, which must rank as one of the most poorly-conceived pieces of legislation ever drafted by the comité de constitution. Its rapporteur, Le Chapelier, did not even attempt to defend it. Instead, he informed the Assembly that the comité had already abandoned the flawed plan and, in the forty-eight hours since it had presented it, had drafted a new one.⁴² This he proceeded to read article by article.⁴³ Its overall thrust was to correct the most glaring problems of the first draft decree and to threaten recalcitrant municipal officers with more specific, more stringent penalties. Thus, it eliminated the judicial officers' right to requisition military force, as well as the provisions allowing notables and *éligibles* to do the same. As for the new punishments negligent municipal officers would face, it mandated that they would be "privés de leurs offices, déclarés incapables d'exercer à l'avenir aucune fonction publique : condamnés au tiers, et de la réparation qui sera adjugée à ceux qui auront souffert dans leurs personnes ou dans leurs biens, et de la restitution des sommes que le trésor public aurait pu perdre par le pillage de ses caisses ou le défaut de perception des impôts". As before, municipal officers who encouraged or participated in disorders would be "poursuivis extraordinairement". But the new measure added a new element: collective responsibility for the inhabitants of communes in which troubles occurred. Since "tous citoyens devant concourir au rétablissement de l'ordre public troublé," a commune in which disturbances broke out would be held "responsable des deux-tiers de la restitution des sommes enlevées", to be collected by an extraordinary levy on all of its tax-paying residents. Rather than assuming failure and non-compliance on the part of municipal officials (as the first draft decree's articles on judicial, notable, and eligible requisition seemed to do), the new proposal sought instead to bludgeon the municipalities—officers and inhabitants alike—into maintaining *la tranquillité publique*.
- 29 The comité's proposal again elicited outrage from both the right and the left. As with all previous law-and-order measures, left-wing deputies found it too harsh. Pétion de

Villeneuve felt it was unjust to hold municipal officials in rural areas responsible for quelling disorder when “dans les campagnes, il n’y a pas de force armée [...] pas même de milice nationale”.⁴⁴ Briois de Beaumetz found it insulting that the draft decree could imagine that “le feu de la sédition” might originate with municipal officers. He warned of the fatal discredit “de semblables suppositions” would bring to the new municipal order and to revolutionary civic culture more generally. They would “dégrade[r] les municipalités naissantes [et] étouffe[r] dans l’âme de plusieurs citoyens le désir d’être appelés aux dignités municipales”.⁴⁵ In contrast, the right found the measures too weak. As Cazalès saw it, France was facing “la guerre de ceux qui n’ont rien contre ceux qui ont quelque chose.” The circumstances demanded decisive action to nip the insurrection in the bud. The only way to do this, he believed, was to authorize “le Roi de prendre les mesures qu’il croira les plus propres à assurer la tranquillité publique” and “d’investir le Roi pour trois mois seulement de toute la plénitude de la puissance exécutive”. He realized that many in the Assembly would protest that “c’est s’exposer au risque de donner trop de force au pouvoir exécutif.” But, he argued, the real threat to the Revolution was the Assembly’s paralysing suspicion of the king’s motives. “La constitution n’a plus rien à craindre que de nous-mêmes”.⁴⁶ Duval d’Eprémesnil agreed and upped the ante by urging the Assembly to “imposer aux brigands par une grande terreur” by allowing individual “provinces, victimes des insurrections, de fixer le terme” of royal repressive power.⁴⁷

30 Up to this point, debate over the new draft law had elicited only brief (albeit sharp) comments that merely touched upon key constitutional issues: the composition and authority of the executive power, its relationship to the municipalities, and control of the *force publique*. But these issues would be analysed in a series of interventions by the right-wing deputies Malouet, the abbé de Bonneval, and the comte de Montloisier. In their respective appeals for the “rétablissement de la tranquillité publique” and the “régénération du pouvoir exécutif,” they argued that the organization of the executive power was still incomplete and that this carried grave political risks for France. In the face of these constitutional arguments, the left and centre were largely silent. Only Robespierre and Mirabeau spoke, the former denouncing any and all law-and-order measures as counterrevolutionary plots and the latter pleading that the situation would automatically resolve itself once the constitution had been completed and set in motion.⁴⁸

31 The right-wing deputies’ primary assertion was that the constitutional articles that had already been decreed had not defined the executive branch and left it disarticulated by failing to give it an effective means of controlling the *force publique*—one of its indispensable components. As the abbé de Bonneval put it, the executive power was “indiqué” in the constitution, but “il n’y est pas constitué”.⁴⁹ Malouet developed this aspect of the argument at length.⁵⁰ He argued that the fundamental problem was that the king was being confused with the executive authority. This was a mistake because the king represented “l’empire et la souveraineté” while the executive power “en est l’instrument.” What had made France a monarchy before 1789 was that the instruments which constituted the executive power (the army, the courts, etc.) were united under the direction of a single man, whereas in a republic they were under the authority of multiple magistrates. The Assembly had bred confusion by declaring France a monarchy while organizing the components of the executive power in a republican fashion. France was a monarchy in name only.

- 32 The current laws (of August 10th, October 21st, and the pending proposal on *la tranquillité publique*) gave the king no real authority over the municipalities—a situation which, because of the municipalities' exclusive right to requisition armed force, effectively stripped him of authority over the armed forces.

Que tout autre corps ou individu participe à ce droit souverain, les différentes parties de la société politique doivent alors se trouver fréquemment dans un état de guerre ou d'anarchie, et il n'y a plus de gouvernement ; car le pouvoir de gouverner doit être actif et irrésistible dans les routes qui lui sont tracées, puisqu'il n'est autre que la loi agissante [...] La conséquence [du projet de loi et du principe de réquisition municipale] ne peut être que les corps intermédiaires agissent, disposent, arrêtent le pouvoir exécutif par leur volonté propre et absolue ; car alors je ne vois plus de chef suprême et de la force publique, subdivisée en autant de parties qu'il y a de municipalités, se trouve en effet dans leurs mains.⁵¹

- 33 The Assembly's fear of royal threats to the nation's hard-won liberty was itself raising an even greater threat to liberty. It risked subjecting the nation to "une multitude de volontés et de pouvoirs redoutables pour chaque citoyen, mais insuffisants pour en protéger un contre plusieurs." To make matters worse, the proposed decree compounded the fragmentation of executive power by addressing itself only to municipalities in isolation and providing no means for coordinating their action. "On n'y voit point le lien commun qui les unit à la puissance publique et à sa direction supérieure. Le pouvoir exécutif se trouve séparé du monarque et agit sans son intervention." If all these subordinate administrative bodies continued to be able "par leur propre force [à] se donner l'impulsion qui leur est nécessaire, s'ils la recevaient d'eux-mêmes, ils seraient eux-mêmes le pouvoir exécutif".

- 34 A France without an effective supreme executive to coordinate the activities of 40,000 quasi-sovereign municipalities, each with its own armed forces, would quickly descend into anarchy. Malouet envisioned the resulting chaos this way.

Alors, une municipalité disposera exclusivement dans son territoire, de la circulation des grains et du numéraire ; favorisera une insurrection, relâchera à son gré la discipline militaire ; retardera la perception des impôts ; une ville pourra en affamer une autre ; des réquisitions contradictoires par diverses municipalités pourraient armer différentes troupes les unes contre les autres. L'autorité des magistrats, celle des officiers militaires, sans bases fixes, sans point d'appui, serait incertaine et précaire ; il n'y aurait de puissant, de redoutable, dans la capitale et dans les provinces que les passions et les erreurs de la multitude ; le corps législatif perdrait bientôt son autorité, et nous verrons reparaître les horreurs de l'anarchie.

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- 35 From the municipal anarchy would flow dramatic political, even constitutional consequences. Malouet's greatest fear was that this chaotic administrative system would breed republican habits and, ultimately, produce a republican—or a despotic—form of government. Indeed, as he saw it, the current system of virtually independent municipalities was already republican in all but name. Bit by bit, it was getting the French used to the idea of living without a king. "S'il n'y avait point de roi, mais seulement des troupes soldées et des capitaines dans les provinces, les municipalités n'auraient à faire ni plus ni moins que ce qu'on leur prescrit, et les capitaines pourraient aussi, sans autre supérieur que les assemblées administratives, remplir la mission de confiance qui leur est imposé." As Montloisier put it, "c'est de cette manière [qu']on accoutume les peuples et que nous ne nous accoutumions nous-mêmes à nous passer du roi."⁵³ "Ce n'est point en jetant un voile sur le trône," Malouet warned, that the Assembly would protect the nation's hard-won liberty. "Si son influence n'a une

activité protectrice, ou elle s'effacera tout à fait et réduira la royauté à un vain simulacre, ou les premiers mécontentements du peuple rappelleront le despotisme sous des formes nouvelles." Either way, Malouet concluded, "la constitution, par cette loi, sera ou cessera d'être monarchique".

- 36 It was true, Montloisier acknowledged, that the ancient republics had known liberty without kingship. But they had only been able to preserve their liberty with "une égalité, je ne dis pas seulement légale, mais totale et rigoureuse." They knew that whenever "le sommet du gouvernement est vide, il faut trembler et s'armer tout de suite contre ceux qui tendent à en approcher, car cette cime est d'autant plus facile à usurper qu'elle n'est pas occupée." And in the end, those ancient republics invariably let down their guard, and despotism followed. History held lessons for France:

Envisagez la suite nombreuse de ces tyrans de Rome, esclaves devenus assassins de leurs maîtres, et assassinés à leur tour par d'autres esclaves; envisagez le sort du peuple romain lorsque des chefs sans force et des lois sans vigueur le livrent à la discrétion d'une soldatesque effrénée ; envisagez cette soldatesque elle-même, lorsqu'elle commencera à porter ses regards sur les trésors et les dignités de l'empire, et lorsque son glaive, dirigé contre les barbares, osa se tourner contre les citoyens. Français, voyez le peuple romain, mais que dis-je ? Voyez-vous vous-mêmes... C'est bien alors que le premier audacieux qui voudra escalader les hauteurs du trône s'y placera avec impudence et commandera le respect et la servitude des Français !

- 37 Executive power abhorred the void; if not filled—and filled properly—it would be occupied one way or another—if not by a general, then by the new revolutionary bodies:

Il est de toute importance pour la liberté que ce soit nous qui fassions l'autorité royale et non pas que l'autorité royale se fasse. Il est de toute importance que nous la fassions vaste et étendue, ainsi que le comporte un grand royaume, car si nous nous rapprochons trop de ses limites, la nécessité, la force des choses, et le cours des événements l'obligeront un jour de s'étendre malgré nous et malgré tout, et dès lors tout est perdu. Il est de toute importance que nous la fassions au plus tôt ; car, flétrie et avilie comme elle l'est, il lui faudra plus d'un jour pour se relever et remonter au degré de splendeur qui lui est nécessaire ; il est de toute importance que nous la fassions au plus tôt, car toutes ces nouvelles corporations plantées sur un terrain neuf et composées de détriments anciens, cherchaient déjà ou chercheront bientôt à étendre le plus qu'elles le pourront leur existence vivace; encore quelques jours et tout le terrain sera occupé. On cherchera de toutes parts l'ancien emplacement de la monarchie et le monarque ne sera plus et la monarchie sera détruite.

- 38 Or, as Malouet darkly hinted, if the king "cessait d'être nécessaire [au] Bonheur [de la nation], il deviendrait redoutable à sa liberté".⁵⁴ The executive power was going to exist in some form; it was far better, the right-wing deputies argued, to organize it deliberately and constitutionally than to leave its ultimate fate to the uncertain fortunes of municipal anarchy.
- 39 These deputies—and perhaps others who were growing disenchanted with the Revolution's course—suspected that the current disarticulation and disempowerment of the executive was not caused by neglect or incompetence, but was rather the result of a deliberate left-wing strategy to discredit the monarchy. The executive power's current "inaction" was, Bonneval charged, "forcée." If royal prestige and power were but "vains simulacres, si tout peut se faire sans lui, ou ne pas se faire sans lui [...] ce n'est pas un tel roi que nous voulons".⁵⁵ For Montloisier, the Assembly's public order

laws seemed to have been purposefully designed to give to "la puissance royale tous les caractères d'une puissance qu'on a l'intention de tenir oisive, et qu'on voudrait pourtant avoir l'air d'occuper". Formally atop the executive branch, but unable to direct the actions of the subordinate powers which composed it, the king was being revealed as nothing more than "un membre parasite placé en dehors de la constitution, une véritable superfétation politique." Montlosier urged his colleagues in the Assembly to recognize the republican direction their approach to the executive was taking.

Soyons francs : si dans un moment de convulsion et de crise, l'action royale ne nous est pas nécessaire, elle nous le sera encore moins dans les temps de calme et de paix. Ah ! Si la démocratie à laquelle nous tendons était le seul asile de la liberté et que nous puissions y arriver sans un crime, je serais le premier à vous le conseiller... Mais quand je considère votre luxe, votre corruption, vos arts, vos grandes villes, votre éloignement des mœurs antiques et patriarcales, et plus que tout, vos vingt-quatre millions d'hommes... dès lors, il n'est plus possible de délibérer ; il faut absolument que nous ayions une monarchie.

40 But given how the monarchy was taking shape via the Constitution, how its powers were being hollowed out by laws on the administrative organization of the territory and the decrees on public order, there seemed to be a deliberate design to make the king "l'ennemi de ses sujets". The *comité de constitution*'s draft law on the restoration of *la tranquillité publique* was a case in point. By ordering the king to restore order, but depriving him of the means to do so, it rendered him "à la fois incapable de tout et coupable de tout". If the municipal repression was ruthless, the king would be blamed for the violence. If it was ineffective and disorder spread, the king would also take the blame. Although the constitution held that the king was legally inviolable, he would be held responsible by the most powerful tribunal of all—the court of public opinion.

41 The right-wing deputies warned that this strategy would backfire. While the *comité de constitution*'s draft decree simultaneously disarmed and discredited the king, Bonneval warned, it would also undermine municipal authority. Far from guaranteeing liberty, the decision to vest in the municipal officers the power to requisition the *force publique* could only "les compromettre et les intimider"—thus furthering the anarchy that would ultimately destroy liberty.⁵⁶ In Montlosier's view, the attempt to discredit the king by stripping him of effective control of the municipalities would dissolve the separation of powers and lead to the concentration of all power in the hands of the Assembly. The independence of the municipalities, far from preserving liberty, would subjugate the whole nation to that single body.

Par quel aveuglement va-t-on investir des corporations particulières d'un pouvoir qui ne convient qu'à lui [le monarque] ? Par quel aveuglement va-t-on isoler ces corporations de la seule force qui doit faire la leur ? À qui obéiront-elles dans ces municipalités qui bientôt vont avoir chacune une armée à leur disposition ? Aux districts ? Et les districts sans doute aux départements ? Et les départements à l'Assemblée nationale ; d'où il résultera en dernière analyse que le Roi, s'il veut être quelque chose dans son royaume, sera forcé de se mettre sous le commandement du corps législatif aussi bien que des districts, des départements, et des municipalités.⁵⁷

42 The "premier audacieux qui voudra escalader les hauteurs du trône" might not be a general at all, but the revolutionary assembly itself.

43 Despite the right's impassioned appeals for the regeneration of the executive authority, the debate did not produce a significantly new approach to the problem of *la tranquillité publique*. The decree that ultimately passed (proposed by Barnave in lieu of the *comité de*

constitution's version) remained very close to the existing laws of August 10th and October 21st. All it added to these measures were articles increasing the responsibility of municipal officers and the inhabitants of their communes and calling upon municipalities to help each other in quelling threats to public order.⁵⁸ The decree did not grant the king any new authority over the *force publique*. Within weeks, it would be put to a new test—and the constitutional lines between the powers further strained—when a wave of indiscipline swept through the army.

Conclusion

- 44 The story of how the National Assembly grappled with the problem of public order adds new dimensions to the classic question of the separation of powers. Traditionally, investigations of this constitutional question have concerned themselves solely with the three major branches of government. They have given little attention to alternative ways of distributing sovereignty within the constitution⁵⁹, nor have they attended to the internal composition of the branches themselves. Rather, the scholarship on the separation of powers tends to be abstract and theoretical, treating the legislative, executive, and judicial powers as monolithic blocks, rather than composite entities under construction. They assume that the constitutional challenge of establishing separate powers consists essentially in high-level legislative debates over where the lines between these blocks should be drawn and how the relationship between them should be articulated. The National Assembly's efforts to maintain *la tranquillité publique* show that the history of the separation of powers during the French Revolution was more complicated than this. They show that the definition and separation of powers was as much a bottom-up as a top-down process. That is, the separation of the great constitutional branches of government occurred in the course of constructing those branches through the organization of their respective subordinate powers (armies, law courts, local administrative institutions, etc.), and the great lines of demarcation between them drawn bit by bit as the relationships between these subordinate powers were defined. For example, when Barnave argued on February 20th, 1790, that judicial officials could not be given the power to requisition troops without encroaching on the executive power, he was demarcating between two of the major branches (the judiciary and executive) by defining the functions of their subordinate, constituent parts (local courts and the military). As this example shows, these fundamental demarcations occurred not in a theoretical realm of abstract legislative debate over explicitly constitutional issues like the royal veto or ministerial responsibility, but rather in the context of a beleaguered Assembly trying to come to grips with a pressing revolutionary situation. This paper has looked at just one of these situations—the recurrent disorders of the countryside—but there were others that also led the Assembly onto constitutional terrain.⁶⁰ In the revolutionary context of 1789-1790, virtually any question of governance could raise constitutional issues. The line between policy and constitutional theory was blurred; indeed, it was only after a constitution had been hammered out (in part through the day-to-day process of governance) that this conceptual distinction could even arise.
- 45 Revolutionary political considerations also influenced the construction and articulation of the major constitutional powers. Primordial in this regard was the fraught relationship between the Assembly and the King. Historians have emphasized the

aspects of this relationship that tended toward direct confrontation. But the tension between the Assembly and the King often expressed itself in more subtle, indirect ways. Both the Assembly and the King were aware that there was a third force at play, a force more powerful than either of them: public opinion. The struggle between the Assembly and the King thus often expressed itself as a competition to win the approval of the public or avoid its censure. This engendered a politics of blame and responsibility that played a role in determining the constitutional demarcation of the powers and the definition of their respective spheres of authority. The politics of blame and responsibility runs through all the Assembly's debates and is present in the considerations of right-wing deputies as well as of those on the left. When it came to the question of restoring *la tranquillité publique*, the deputies' political calculus was particularly complicated. In addition to their fear that an empowered King might turn his arms against the Assembly, the question of whom the public would hold responsible for the repression—whether it succeeded or failed—was on all the deputies' minds. If the King was authorized to use force and the repression succeeded, would he be blamed for the bloodshed? Or would he be credited with saving life and property? Or if it failed, would he be humiliated and discredited? The same considerations applied if the Assembly took responsibility for restoring order into its own hands. Would the Assembly be praised for restoring order, blamed for its violence, or revealed to be impotent were the repression to fail? These considerations seem to have weighed on the approach the Assembly adopted to the problem of *la tranquillité publique*: to give the executive branch formal responsibility for restoring order without giving it adequate means to actually do so (those means being reserved to each individual municipality). Does the Assembly's reluctance to take responsibility help explain why it declined to adopt measures to allow it to control the executive, such as a true system of ministerial responsibility?⁶¹ Does this political calculus of blame and responsibility also help explain the rather extreme version of separation of powers that ultimately entered into the Constitution of 1791? Considerations of a theoretical order might have entered into the deputies' calculations, but the recurrence in their debates of terms like "compromettre," "discréditer," and "coupable" suggests that the politics of blame was also a factor.⁶²

- 46 Finally, the Assembly's efforts to maintain *la tranquillité publique* highlight a neglected dimension of revolutionary France's constitutional structure. The municipalities seem to have been the lynchpin of the entire governing structure of the New Regime, the point where taxes got collected, the *force publique* was deployed, and, at the primary level, justice was dispensed. In other words, the municipalities were the institution responsible for translating the most regalian attributes of sovereignty (fiscality, coercion, and justice) into the daily life of the French people. The municipalities were how they experienced the constitutional powers—whether separate or not. In fact, the municipalities combined both executive and legislative attributes. On the one hand, they were responsible for collecting taxes under the authority of the legislature. On the other, they were responsible for local administration under the aegis of the executive.⁶³ This constitutional confusion ran even deeper, penetrating the very essence of the municipalities. While they were elective, and thus partook of the same fundamental principle of legitimacy as the legislature, they were subordinated in most of their activities to the executive power, a power whose legitimacy derived from an entirely incompatible source, heredity. The municipalities thus encapsulated the contradictions in the relations between the legislative and executive branches under the Constitution

of 1791. Yet, they barely figure in the works of constitutional historians of revolutionary France. This is a pity, but it is also an opportunity, for their constitutional hybridity and location at the nexus of theory, policy, and practice make them an ideal location to study the separation of powers during the French Revolution.

APPENDIXES

Document 1 : Le marquis de la Tour du Pin, « Discours sur l'organisation de l'armée et le pacte fédératif des troupes avec les gardes nationales » (4 juin 1790)⁶⁴

Le corps militaire menace de tomber dans la plus turbulente anarchie [...]. Les liens de la discipline relâchés ou brisés; les prétentions les plus inouïes affichées sans détour, les ordonnances sans force, les chefs sans autorité, la caisse militaire et les drapeaux enlevés, les ordres du roi même, bravés hautement; les officiers méprisés, avilis, menacés, chassés, quelques-uns même captifs au milieu de leur troupe, y traînant une vie précaire au sein des dégoûts et des humiliations; et pour comble d'horreur, des commandants égorgés sous les yeux et presque dans les bras de leurs propres soldats [...]

Ces insurrections militaires, elles peuvent, tôt ou tard, menacer la nation même, et l'intérêt de la sûreté réclame ici votre intervention [...]

Le roi n'a cessé de donner ses ordres pour arrêter ces excès ; mais dans une crise aussi terrible, Messieurs, votre concours devient indispensable pour prévenir les maux qui menacent l'état. Vous unissez à la force du pouvoir législatif celle de l'opinion, plus puissante encore. Déployez-les en cette occasion ; que de graves et sévères principes, énoncés par le corps national, donnent aux proclamations du monarque ce caractère auguste et sacré du vœu général Qu'à votre voix, les têtes les plus indociles se courbent sous le joug de la loi. Assurez l'état, l'honneur, et peut-être la vie des généreux officiers, qu'on a vus, dans ces jours de troubles, aussi patients, aussi modérés, aussi respectueusement soumis à vos décrets [...]

Vous avez fixé les limites de l'autorité militaire et de l'autorité municipale ; l'action que vous avez permise à cette dernière sur l'autre est bornée au droit de requérir; mais jamais ni la lettre ni l'esprit de vos décrets n'ont autorisé les communes à déposer, à juger des officiers, à commander aux soldats, à leur enlever les postes confiés à leur garde, à les arrêter dans les marches ordonnées par le roi, à prétendre en un mot asservir l'armée de l'état aux caprices de chacune des cités, ou même des bourgs qu'elle traversera. Qui mieux que vous, Messieurs, peut concevoir combiner ce conflit illégal qui pourrait, en peu de temps, affaiblir l'obéissance militaire, énerver le pouvoir et dénaturer la constitution.

Document 2 : Edmund Burke, Reflections on the Revolution in France⁶⁵

The imbecility of any part of that puerile and pedantic system, which they call a constitution, cannot be laid open without discovering the utter insufficiency and mischief of every other part with which it comes in contact, or that bears the remotest relation to it. You cannot propose a remedy for the incompetence of the crown, without displaying the debility of the assembly. You cannot deliberate on the confusion of the army of the state, without disclosing the worse disorders of the armed municipalities. The military lays open the civil, and the civil betrays the military anarchy. I wish everybody carefully to peruse the eloquent speech (such it is) of Mons. de la Tour du Pin. He attributes the salvation of the municipalities to the good behavior of the troops. The troops are to preserve the well-disposed part of those municipalities, which is confessed to be the weakest, from the pillage of the worst disposed, which is the strongest. But the municipalities affect a sovereignty and will command those troops which are necessary for their protection. Indeed, by the necessity of their situation, and by the republican powers they have obtained, must, with relation to the military, be the masters, or the servants, or the confederates, or each successively; or they must make a jumble of all together according to circumstances. What government is there to coerce the army, but the municipality, or the municipality but the army? To preserve concord where authority is extinguished, at the hazard of all consequences, the assembly attempts to cure the distempers by the distempers themselves; and they hope to preserve themselves from a purely military democracy, by giving it a debauched interest in the municipal.

NOTES

1. *Archives parlementaires* (AP in the following notes), vol. 34, Camus, "Notice générale et particulière des travaux des comités de l'Assemblée Nationale constituante", 13 octobre 1791, p. 202.
2. *Ibid.*, p.209.
3. Albert MATHIEZ, "La Révolution française et la théorie de la dictature. La Constituante", *Revue historique*, vol. 161, 1929, p. 313.
4. Paul BASTID, *Le gouvernement d'assemblée*, Paris, Cujas, 1956, p. 134.
5. Henri OLIVE, *L'action exécutive exercée par les comités des assemblées révolutionnaires*, Marseille, Imprimerie nouvelle de Marseille, 1908, p. 51 and 150.
6. Frédéric BRAESCH, *1789 : l'année cruciale*, Paris, Gallimard, 1940, p. 19 ; F. MAURY, "Le gouvernement de Louis XVI devant l'Assemblée constituante" *Annales de sciences politiques*, 4^e année, Paris, Alcan, 1900, p. 503.
7. André CASTALDO, *Les méthodes de travail de la Constituante : les techniques délibératives de l'Assemblée Nationale, 1789-1791*, Paris, PUF, 1989, p. 253.
8. The prospect of implementing the theory of separation of powers in France was inconceivable before 1789, given that absolutism was based on the idea that "les pouvoirs législatifs, exécutifs et judiciaires résidaient tous ensemble et intégralement dans la personne du roi." (Henri Olive, *L'action exécutive...*, *op. cit.*, p. 3).
9. The literature is vast. The fundamental work is Michel TROPER, *La séparation des pouvoirs et l'histoire constitutionnelle française*, Paris, LGDJ, 1973. It summarizes the key pioneering works of

Raymond Carré de Malberg and his student, Charles Eisenmann. Some other essential interventions in the debate include Olivier BEAUD, "Michel Troper et la séparation des pouvoirs," *Droits*, 2003 1, p. 149-172 ; Marc LAHMER, « Le Moment 1789 et la séparation des pouvoirs », *Jus Politicum* 12, <http://juspoliticum.com/article/Le-Moment-1789-et-la-separation-des-pouvoirs-887.html> ; Carlos PIMENTEL, « Le sanctuaire vide: la séparation des pouvoirs comme superstition juridique », *Pouvoirs*, 2003 102, p. 119-131. On the separation of powers in the specific context of the French Revolution, see André CASTALDO, *Les méthodes de travail...*, op. cit. ; Paolo COLOMBO, *Governo e Costituzione: La trasformazione del regime politico nelle teorie dell'età rivoluzionaria francese*, Milano, Giuffrè Editore, 1993, and Léon DUGUIT, *La séparation des pouvoirs et l'assemblée nationale de 1789*, Paris, Larose, 1893.

10. Anatoli ADO, *Paysans en Révolution : terre, pouvoir, et jacquerie, 1789-1794*, Paris, SER, 1996. See also John MARKOFF, *The Abolition of Feudalism: Peasants, Lords, and Legislators in the French Revolution*, University Park (PA), Pennsylvania State University Press, 1996.

11. Momcilo MARKOVIC, *Paris brûle ! L'incendie des barrières de l'octroi en juillet 1789*, Paris, L'Harmattan, 2019.

12. AP, vol. 8, p. 252-3.

13. Claude MAZAURIC, "Bordier Jourdain, la fête jacobine", in *Jacobinisme et Révolution : autour du Bicentenaire de quatre-vingt-neuf*, Paris, Messidor, 1984, p. 143-195.

14. Maria BETLEM CASTELLA I PUJOLS, *Revolució Poder I Informació. El control de la informació a les Assembles parlamentàries Durant la Revolució francesa (1789-95)*, thesis in history, Universitat Autònoma de Barcelona I and Université Paris 1 Panthéon-Sorbonne, 2008.

15. AP, vol. 8, p. 336.

16. *Ibid.*, p. 337.

17. The question of authority over the armed forces would remain the central contentious issue in all future debates on *la tranquillité publique*. The stakes were high, not just for the question of separation of powers, but for the notion of sovereignty that would preside over the new polity. For, as Jean-Paul Bertaud put it, "l'espace par excellence du pouvoir, la marque essentielle du Souverain" was the military. Cited in Marc BELISSA's important article on Sieyes' plan to reorganize the ministry of war, "Pouvoir exécutif, centralité législative: le débat sur l'organisation du ministère de la guerre (janvier-février 1793)", *AHRF* 314, 1998, p. 700.

18. AP, vol. 8, all citations on p. 376.

19. *Ibid.*, p. 376-377.

20. *Ibid.*, p. 377.

21. The principal one was to change the requirement that military officers swear their oath "des mains des officiers municipaux" to "en présence des officiers municipaux."

22. AP, vol. 8, p. 433-434.

23. Both orators used these exact words.

24. Marc LAHMER, "Le Moment 1789", *cited art.*, p. 19.

25. Michel PERTUÉ, "Loi martiale, état de siège et législation révolutionnaire", dans Bernard Gainot and Vincent Denis (ed.), *Un siècle d'ordre public en Révolution (de 1789 à la Troisième République)*, Paris, SER, 2009, p. 77-131.

26. Riho HAYAKAWA, "L'Assassinat du boulanger Denis François le 21 octobre 1789", *Annales historiques de la Révolution française* 333, 2003, p. 1-19.

27. AP, vol. 9, p. 474.

28. *Ibid.*, p. 475.

29. AP, vol. 9, p. 474.

30. *Ibid.*

31. Mathiez cites even earlier examples, as well as discussing the constitutional implications (especially for the theory of separation of powers) of the concept of revolutionary dictatorship.

See Albert MATHIEZ, "La Révolution française et la théorie de la dictature", *Revue historique*, vol. 161, fasc. 2, 1929, p. 304-315. See also Albert SOBOUL, "Problèmes de la dictature révolutionnaire (1789-1796)", *AHRF*, 55 251, janvier-mars 1983, p. 1-13.

32. By the laws of 14 and 22 December 1789, with their accompanying instructions. These decrees formally subordinated the departments and municipalities to the executive power, but did not actually give the executive effective means of ensuring that the municipalities followed its orders. Guillaume Glénard has concluded that "les bornes de l'action des municipalités sont uniquement celles de la loi et non celles fixées par les instructions ou les ordres d'administrations supérieures. Celles-ci échappent donc à tout encadrement hiérarchique". Guillaume GLÉNARD, « Les rapports entre les pouvoirs administratifs locaux selon la Constitution de 1789 », in Michel Biard (ed.), *Querelles dans le clocher : tensions et conflits entre les autorités dans les chefs-lieux de département (1790-1795)*, Mont-Saint-Aignan, Presses universitaires de Rouen et du Havre, p. 21.

33. Ado found that 300 rural parishes were affected and 100 châteaux burned, mainly in the southwest, during the period December 1789-February 1790. He considers this the second great *jacquerie* of the Revolution (Anatoli ADO, *Paysans en Révolution...*, op. cit., p. 159-170). Markoff considers it to have been the third largest anti-seigneurial movement during the Revolution (after the Great Fear and the violence of Spring 1792), but judges it to have been the second-largest tax revolt during the period (John MARKOFF, *The Abolition of Feudalism...*, op. cit., p. 275, 282-3). A key moment in the Assembly's *prise de conscience* of these renewed movements was the publication of the vicomte de Mirabeau's notice about "des excès commis dans le Bas-Limousin, le Quercy, et la Bretagne". (AP, vol. 11, p. 366-373).

34. AP, vol. 11, p. 536. It is perhaps significant that the Assembly invoked the measure of August 10th, 1789 rather than the *loi martiale* of October 21st. The former was actually more repressive because it did not contain the elaborate provisions for giving riotous crowds an opportunity to express their grievances and warning them before shots were fired.

35. The most outspoken proponents of this position were Lanjuinais and Robespierre.

36. On the problem of executive power in the French Revolution more generally, see Paolo COLOMBO, "La question du pouvoir exécutif dans l'évolution institutionnelle et le débat politique révolutionnaire", *AHRF* 319, janvier-mars 2000, p. 1-26 ; Michel TROPER, "La nation d'exécution dans les constitutions révolutionnaires", *Revue française d'histoire des idées politiques* 34, 2011/2, p. 299-310 ; Michel BIAUD et Pierre SERNA (ed.), *Une Révolution du pouvoir exécutif ?*, *AHRF* 332, avril-juin 2003 ; Alexandre GUERMAZI, Jeanne-Laure LE QUANG, Virginie MARTIN (ed.), *Exécuter la loi (1789-1804)*, Paris, Éditions de la Sorbonne, 2018.

37. AP, vol. 11, p. 537. Maury's proposal was supported by Cazalès.

38. *Ibid.*, p. 613 : "Mémoire concernant les désordres qui règnent dans quelques provinces", 16 février 1790.

39. *Ibid.*, p. 615. The idea was Mirabeau's.

40. The text of the draft decree is in *Ibid.*, p. 641. The *comité de constitution* and the *comité des rapports* collaborated on it.

41. Barnave's scathing critique is found in *Ibid.*, p. 652-653.

42. *Ibid.*, p. 653.

43. This prompted complaints from across the political spectrum that the project was a rush job and that the Assembly could not possibly express a sound opinion about a measure it had not even read. One enraged deputy, Duval d'Eprémessnil, even accused the *comité de constitution* of usurping "la dictature des propositions" (*Ibid.*, p. 655).

44. *Ibid.*, p. 654.

45. *Ibid.*

46. Predictably, Cazalès was charged with seeking to institute "la dictature". *Ibid.*, p. 655.

47. *Ibid.*, p. 656.

48. Robespierre argued that the executive would use any new authority granted to it to use troops to intimidate voters and influence the imminent elections for departmental officials. Mirabeau argued that the constitution was like a clock: until its pieces were all in place, it would be madness to try to animate it with executive power. On the contrary, he claimed that merely completing the constitution would by itself regenerate the executive. *Ibid.*, p. 665-666 and 673-674 (Robespierre), and p. 670-671 and 679-680 (Mirabeau).

49. *Ibid.*, p. 674.

50. *Ibid.*, p. 656-8.

51. *Ibid.*, p. 676 (Bonneval).

52. *Ibid.*

53. *Ibid.*, p. 677.

54. *Ibid.*, p. 657.

55. *Ibid.*, p. 674.

56. *Ibid.*, p. 675.

57. AP, vol. 11, p. 682-684, Annexe à la séance du 23 février 1790 : "Suite de l'Opinion de M. de Montloisier sur la Régénération du PE".

58. As the application of these three law-and-order measures has never been studied systematically, it is not possible to say what their effects were, nor if the penalties they directed toward negligent municipalities were ever levied.

59. Alternatives to the tripartite (legislative, executive, and judiciary) and binary (legislative and executive) models of constitutional separation can be found not only in the *cahiers de doléances*, but also in constitutional projects considered by the Constituent Assembly. See, for example, Thouret's *Analyse des idées principales sur la reconnaissance des droits de l'homme en société, et sur les bases de la constitution*, which was presented to the *comité de constitution*. It envisioned a quadripartite division of powers, with the fourth branch, "le pouvoir administratif", to consist of a three-level structure of local and provincial assemblies (AP, vol. 8, p. 325-331).

60. Examples include the resistance of various *Parlements* in late 1789 and early 1790 to the Assembly's decrees abolishing them, and the *affaire de la Tourette* (also known as the *affaire de Bournissac*) that took place in Marseille at roughly the same time.

61. Olive considers it a "chose extrêmement curieuse" that the assembly, "tout en admettant la suprématie du législatif, ne voulurent pas établir un control légal sur l'exécutif, et refusèrent, quant à ceux, d'employer le moyen le plus simple, savoir le contrôle direct de l'assemblée sur les ministres." (Henri OLIVE, *L'action exécutive...*, op. cit., p. 20-21).

62. Charles WALTON, *Policing Public Opinion in the French Revolution: The Culture of Calumny and the Problem of Free Speech*, New York, Oxford University Press, 2009.

63. Section II, articles 1 and 2 of the law of December 22, 1789.

64. AP, vol. 16, p. 95-6.

65. Garden City, NY, Anchor Press/Doubleday, 1973, p. 233-4.

ABSTRACTS

The question of the principle of the separation of powers during the French Revolution has been of some interest to constitutional scholars. Pioneering scholars in the field, such as Carré de

Malberg and Eisenmann, have charged the committees of the various revolutionary legislatures with usurping executive power and thus blurring the constitutional line between the legislative and executive branches of government. More recent scholarships, notably Castaldo's excellent work, have shown that the committees never deliberately sought to encroach on executive power, but were rather impelled to assume certain executive functions by the revolutionary context in which they operated. This article agrees with Castaldo's position and goes further by arguing that it was the dysfunction, paralysis, and bad faith of the executive that required the revolutionary assemblies and their committees to exercise basic governing functions the Crown failed or refused to execute. It was in the crucible of this process, the article suggests, that key lines between legislative, municipal, and executive powers were drawn.

La question du principe de séparation des pouvoirs durant la Révolution française a intéressé les spécialistes de l'histoire du droit constitutionnel. Des pionniers de cette discipline, comme Carré de Malberg et Eisenmann, ont accusé les comités des différentes législatures révolutionnaires d'avoir usurpé le pouvoir exécutif et, ainsi, d'avoir brouiller la frontière entre les branches législative et exécutive du gouvernement. Des études plus récentes, notamment l'excellent travail de Castaldo, ont montré que les comités n'ont jamais volontairement cherché à empiéter sur le pouvoir exécutif, mais qu'ils ont plutôt été forcés d'assumer certaines fonctions exécutives par le contexte révolutionnaire dans lequel ils opéraient. Cet article soutient le point de vue de Castaldo. Il montre aussi que c'étaient les dysfonctionnements, la paralysie et la mauvaise foi de l'exécutif qui poussèrent les assemblées révolutionnaires et leurs comités à exercer des fonctions de gouvernance élémentaires que la Couronne se montrait incapable ou peu désireuse d'assurer. L'article suggère que c'est par ce processus que furent tracées les principales lignes de séparation entre les pouvoirs législatif, municipal et exécutif.

INDEX

Mots-clés: force publique, tranquillité publique, séparation des pouvoirs, garde nationale, municipalités, pouvoir exécutif

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