

# Forbes Flyer No 40 (Spring 2019)

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## History reports itself

The diaspora of democracy and the charismatic leader do not always sit well. Democracy is usually stable when conventions are followed while unconvention is a charismatic leader's brand and stock in trade. With her majesty's justices of one democracy ruling against her majesty's ministers on the proroguing of the legislature and with the legislature of another considering impeachment proceedings against the head of the executive, it is apt to reconsider what Montesquieu actually said:

*IN every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state.*

While Montesquieu himself, while the US founders famously, and while the proponents of UK constitutional monarchy more subtly, each put forward a doctrine of separation of powers in support of a status quo founded in checks and balances, it is important to remember that Montesquieu expressly premises the observation above on the supervening existence of a single prince or magistrate. A fundamental convention of democracy may be a separation of powers but a fundamental convention of civil society is that followers are in want of a leader and a fundamental convention of time is that it passes. No matter how unconventional the leader, if the system already has the strongest check – the elapse of a period of time when he or she must go back to the people – it is not immediately clear that attempts by the judiciary or by the legislature to meet unconvention with unconvention can be justified merely by legal argument. It is one thing to have a leader whose unconvention creates tyranny. Then intervention is justified. It is quite another to have a leader whose unconvention merely creates division. If the other arms of government choose to use unconvention in reply, they run the risk of creating more division and not less. We shall see.

**David Ash, editor**

## The year's activities

It has been a busy year for Australian legal history. There have been papers, speeches, books and seminars, and the Flyer will provide some links in the next issue. Meanwhile, this issue sets out an index of articles appearing over the last 16 years of our existence.

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