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Separation of Powers

CHAPTER 10

Introduction

Of the doctrine of the separation of powers, so familiar to readers of Supreme Court opinions, the Constitution says not a word. In this it sets itself apart from the constitutions of Virginia, Massachusetts, and New Hampshire (1784), whose pointed and unqualified language testifies to a general acceptance of "this invaluable precept in the science of politics" (*Federalist,* no. 47). Yet the framework of government outlined in the Constitution of 1787 presupposes the separation of powers, gives expression to it, and in so doing further refines the meaning of the doctrine. Much of the controversy over drafting and ratification turned on this question of meaning. At issue was not whether the proposed Constitution embodies the separation of powers to some extent (few denied that), but whether its separation is adequate, whether the purposes for the sake of which separation of powers is indispensable are indeed well served by the peculiar manner in which the Constitution effects and compromises that separation. By the time the new government was established, the terms in which much of the debate had been conducted had themselves been redefined and clarified. The Constitution, far from being a dubious exemplar of the separation of powers, became a classic instance of the doctrine it never mentions.

The materials assembled here may appear at odds with one another, or even hopelessly confused. But such hasty judgment overlooks the very different concerns that prompt the several authors to seek a remedy in "separation." The precursors of the Constitution were not groping in the dark in search of the full-fledged doctrine. Rather, each had a more or less clear notion of the kind of separation that would overcome a perceived evil or secure a specific good.

Why Separation?

Thus Clement Walker, a member of the Long Parliament in 1648, saw distinctly enough the kind of arbitrary, tyrannical rule against which the governed had to be protected. The remedy, he thought (no. 1), lay in a separation of governmental functions cast in terms of "the Governing power," "the Legislative power," and "the Judicative power."

For Marchamont Nedham, writing under Cromwell's Protectorate in 1656 (no. 2), the required separation is that of legislative and executive powers into different "hands and persons." As used by him, the distinction resembles the sharp dichotomy between the formation of policy and its administration favored by mid-twentieth-century American administrative theorists. Separation, for Nedham, is an indispensable means for locating responsibility and fixing accountability. An executive, unambiguously charged with executing a policy set by the "Law-makers," can be held liable for its performance or nonperformance. Let that clear line of distinction and responsibility be blurred, and liberty and the people's interest are alike in jeopardy.

John Trenchard's argument of 1698 carries Nedham's separation of persons even further (no. 4). One might say that without separation of persons there cannot be a meaningful separation of powers. Here, more than accountability is sought. The freedom of England depends on a truly representative--i.e., an uncorrupt--House of Commons serving as a check on an executive which already has the power of the sword. Given the premise that "it is certain that every Man will act for his own Interest," the only safeguard against "continual Heartburnings between King and People" consists in so interweaving the representatives' interest with that of the people that in acting for themselves, the representatives must likewise act for the common interest. As is true of many eighteenth-century writers, Trenchard here drew on arguments for separation of powers and for mixed or balanced government without sharply distinguishing the two.

Among Americans reflecting on new political arrangements in the latter half of the eighteenth century, no political authority was invoked more often than "the celebrated Montesquieu." Thanks in some measure to those Americans themselves, the name of Montesquieu is firmly attached to the doctrine of the separation of powers. But like most teachings of that subtle mind, this one has its ambiguities and invites differing interpretations. Everyone agrees that the *locus classicus* of the separation of powers doctrine is the seemingly rambling, discursive chapter on the constitution of England in the *Spirit of Laws* (see ch. 17, no. 9). The book of which this chapter forms a part is entitled, "Of the Laws which Establish Political Liberty with Regard to the Constitution"; it is with a view to political liberty that separation of powers is necessary. By political liberty Montesquieu meant "a tranquillity of mind arising from the opinion each person has of his safety." Men's minds cannot be at rest if two or three of the kinds of governmental power are held in the same hands. Montesquieu's tripartite division appears to be based on a separation of functions--legislative, executive (having largely to do with foreign affairs--Locke's "federative" power), and judicial. Montesquieu's judicial power is not, however, Hamilton's or Marshall's; nor is it the Law Lords sitting as a court of last resort. It appears, rather, in the form of ad hoc tribunals, juries of one's peers who judge of both fact and law without need for the guiding intelligence of a professional judge.

Although Montesquieu separated governmental functions and separated governmental powers, there is no clear one-to-one correspondence between the two because he did not insist on an absolute separation. Thus, although the executive is a separate branch, it properly partakes (through the veto, for example) in a legislative function. This blending or overlapping of functions is in part necessitated by Montesquieu's intention that separation check the excesses of one or the other branch. Separation of powers here reinforces or even merges into balanced government. Excesses may come from all or almost all sides. Thanks to bicameralism, the licentiousness of the many and the encroachments of the few are alike checked. The nobility mediate between a potentially overbearing lower house and the executive. The executive's power to convene and prorogue the legislature and to veto its enactments are forms of self-defense, while the legislature's power to impeach and try the agents or ministers of the executive is necessary and sufficient to hold the executive accountable to examination without holding him hostage.

If the goal is liberty--that is to say, individual safety--the model to follow (Montesquieu suggested) is that of the English constitution portrayed in his pages. But one might pursue an alternative goal with more or less separation of powers and more or less happiness--like "the monarchies we are acquainted with."

Although maintaining that sovereignty resides in the king in Parliament, Blackstone draws heavily on elements of Montesquieu's argument and adapts them to his peculiar purpose (no. 6). For all his insistence on three distinct powers--and they are now the familiar executive, legislative, and judicial powers, with the latter a recognizable judiciary with independent tenure of office--and for all his insistence on separation for the sake of warding off oppressive government, Blackstone seems less

interested in separation than he is in balance. His mechanical image fits his point; balance is to be sought not in total separation but in the artful involvement and mutual interactions of the several branches of the civil polity: executive, nobility, and people. The separation of powers and balance of social orders are inextricably interwoven.

If the instructions of the Bostonians to their representatives in the Massachusetts provincial congress are any sign (no. 8), the reasons of Montesquieu and the others had become commonplace by 1776. No less effective in directing American thoughts to the separation of powers would have been the protracted, painful controversies between royal governors, councils, and colonial assemblies. The colonists' experiences with what they saw as executive usurpations, corruption of elected officials, and manipulation of electoral processes focused their minds on suitable remedies. For the Bostonians the tripartite separation of powers, functions, and persons is a sine qua non if arbitrary power is to be checked and liberty secured. A correlative of the separation of persons is the prohibition of plural office-holding; and in the democratic context that entails adequate salaries so that officials are "above the necessity of stooping."

John Adams's early *Thoughts on Government* (see ch. 4, no. 5) similarly confirms the high expectations held for the separation of powers and the broad spectrum of ills that it would guard against: passionate partiality, absurd judgments, avaricious and ambitious self-serving behavior by governors, and the inefficient performance of functions.

The experiences under the early state constitutions and the Articles of Confederation reinforced the belief in separation. Jefferson's critique of the Virginia Constitution (no. 9) raised the familiar concerns with safety and efficiency; both to establish free principles and to preserve them once established required a division and balance that went beyond those embodied in existing arrangements. Despotism is no less despotic because "elective."

The Philadelphia Convention usually discussed the adequacy and proper degree of the separation of powers in terms of the ends to be achieved: stability (Dickinson), defense (Gerry, Madison, G. Morris, Wilson), independence (King), and proper function (Gerry). No less worrisome, however, was whether the means available to the several branches of government to defend themselves against the others might not be excessive (Franklin).

Madisonian Separation

Those who opposed the unqualified ratification of the Constitution thought that not enough had been done to secure the proper degree of separation or that the means of defense would be ineffectual. Against these Anti-Federalist contentions Madison launched the most extensive and theoretically coherent discussion of the doctrine of the separation of powers. Appealing from a literal reading of Montesquieu to the practice of Montesquieu's model, England, and appealing from the categorical injunctions of some of the state constitutions to the actual practices of those very states, Madison succeeded in developing a sophisticated line of reasoning that never cuts loose from the world of affairs. He admonished his readers to cease worrying about the dangers of yesteryear--the overbearing abuses of a hereditary king in collusion with a hereditary nobility--and guard instead against the dangers of today and tomorrow--the enterprising ambition of an assembly flush with a confidence derived from its base of popular support.

The theory of separation seems to presuppose the notion that the powers of government consist largely in making laws, executing laws, and applying them to particular cases through the rule of law. (The awkwardness of accounting for foreign and defense policy under this simple view is another matter.) From this point of view legislative supremacy appears to be a foregone conclusion, "and all

other Powers in any Members or parts of the Society [are] derived from and subordinate to it" (Locke, no. 3). But good government requires that this tendency be countered, that the legislative department be prevented from "drawing all power into its impetuous vortex" (Madison, no. 15; also no. 17). All the more is this urgent if, as Hamilton maintained, "Energy in the executive is a leading character in the definition of good government," or if, as Madison maintained, "Energy in Government is essential" (see ch. 9, nos. 9, 10). Thus, looking beyond the preoccupation with still vivid examples of domineering royal governors and plural office-holding, the authors of *The Federalist* saw in the separation of powers an effective means of serving the need for energy as well as of securing liberty.

The solution offered in the well-known *Federalist,* no. 51, builds on the separation of powers but goes well beyond it. At bottom, of course, the primary control on an aggrandizing government must be the people themselves. But, Madison noted candidly (no. 16), "experience has taught mankind the necessity of auxiliary precautions." If parchment barriers are indeed insufficient to forfend an ominous concentration of powers, and if absolute separation is neither possible nor desirable, the end in view requires a more complex and intricate institutional arrangement. Personal motives are to be enlisted in the service of a public good; relations among the parts are to be contrived to keep one another in their proper place. Going beyond his precursors and drawing on peculiar American circumstances, Madison showed the way to a double security against the usurpations of oppressive rulers--a separation of power between two distinct levels of government, and a separation of powers within each level of government. Further, he developed a theoretical case for "the extended republic of the United States," a republican safeguard against the oppression of one part of the society by "interested combinations of the majority," thereby preventing the popular guardians themselves from becoming a source of usurpation and injustice (see also Madison, ch. 4, no. 19). Thirty years later (no. 22), "the great questions" remained just that for Madison, "the experiment" of 1787 still an experiment, and the Federalist solution worthy of continued support and reinforcement.

The immediate sequel to Madison's defense and the Constitution's ratification was not silence, but continued debate. James Wilson and Nathaniel Chipman illustrate contending juristic interpretations. For Wilson separation entails a clear discrimination of powers, an independence whereby each power conducts its deliberations free of external influence, and a dependence whereby the actions of each are subject to scrutiny and control by the others. The outcome would not be deadlock, Wilson thought, but a line of movement prompted by necessity and, though (or because?) a vector of forces, closer to the requirements of public liberty and happiness. (See Lectures on Law, pt. 1, ch. 10, 1791.)

Of this Chipman (no. 18) was quite doubtful. The legislature stands, in a sense, in a privileged position. Unlike the executive or the judiciary, its members have no need of a constitutional tribunal to call them to account; as legislators they are properly and solely amenable to the tribunal of "public sentiment." What the legislature does require of the other branches is information--objections arising out of their several experiences in executing or interpreting the laws--but of the value and relevance of that information in furthering the common interest "the legislature must be the sole judges."

But what is information? And when does legislative deliberation cease to be that and come to be something more--a trespass upon the proper functions of another branch, a transgression of constitutional separation, and a threat to liberty? The materials centering on the efforts of the House of Representatives to obtain papers relating to the Jay Treaty (nos. 19, 20, 21) display the intense partisanship and the close reasoning elicited by this controversy. However clear the theory, its practical application was and would remain a matter of principled and unprincipled dispute. The resolution of disputes over constitutional separation could not be left to the parties themselves and would not be left to popular conventions, as Jefferson would have preferred (see Madison's critique and rejection, ch. 2, no. 19). Instead, another forum presented itself for resolving such disputes in the

name of the settled constitutional will of a sovereign people. *Marbury* v. *Madison* (1 Cranch 137 [1803]) was just around the corner.

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