THE DOCTRINE OF 'SEPARATION OF POWERS' AND WHY CENTRAL GOVERNMENT MUST ALSO BE FEDERATED TO SECURE LIBERTY

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POWER

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CONCENTRATED IN ONE ACTOR OR GROUP WHO GOVERN AT WILL (AUTHORITARIAN)	/ SEPARATED AMONG / MANY ACTORS WHO / GOVERN VIA LAWMAKING / (REPRESENTATIVE SELF-GOVERNANCE)

The purpose of "checks and balances" is to prevent the concentration of power.

2. WHY IS THE SEPARATION OF POWERS NECESSARY TO EXPERIENCE LIBERTY?

"Right-thinking men have never had much difficulty in formulating the grand objective of good government—the maximum of individual freedom consistent, first, with a like freedom for every other individual and, second, with a stable, yet progressive society. Only thus can society attain its greatest effectiveness and the individual full usefulness and happiness. The objective has been clearly stated in varying phrases hundreds or thousands of times but never better than by Heraclitus of Ephesus 2500 years ago :

> The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.

The great difficulties have always been, first, to discover the practical means of achieving the grand objective and, second, to find the opportunity for applying these means in the ever-shifting

tangle of human affairs. A large part of man's effort over the centuries has been expended in seeking a solution of these great problems. Whenever opportunity has afforded, mankind has instinctively sought to substitute a reign of law for official whim, no matter how beneficent. Men have known from sad experience centuries before Lord Acton said it, that "Power tends to corrupt, and absolute power corrupts absolutely." A reign of law, in contrast to the tyranny of power, may be achieved only through separating appropriately the several powers of government."

[Vanderbilt, Arthur T, "The Doctrine of The Separation of Powers and Its Present Day Significance", (Univ. Nebraska Press, 1953, 1963) (Lib. Congress No. 55-7056), at p. 37(footnotes omitted)]

3 THE INFLUENCE OF MONTESQUIEU ON THE STRUCTURE OF THE FEDERAL GOVERNMENT

"But in the age-old search of the political philosophers for the secret of sound government combined with individual liberty, it was Montesquieu who first saw the light. Montesquieu ranked with Voltaire and Rousseau as one of the great influences of the eighteenth century on public affairs, not only in France, but in Europe and America. No better example of his influence can be found than James Madison, the father of our Constitution. Madison studied Montesquieu's The Spirit of Laws in a postgraduate course at Princeton, and it has been said that his knowledge of it "was so accurate that twenty years after he had left Princeton he could quote it freely from memory without errors."

Montesquieu claimed to state the sociological influences on the organization of government and to analyze the constitutional requisites for the preservation of liberty. He, first among the political philosophers, saw the necessity of separating the judiciary from the executive and legislative branches of government; but this was hardly an invention, for when he wrote in 1748, the Act of Settlement (1701) had already guaranteed judicial tenure during good behavior to the English judges. He was nevertheless the first to conceive of the three functions of government as exercised by three distinct organs, each juxtaposed against the others. This scheme Montesquieu saw in the mixed government of England.144

He saw the executive as monarchic, the bicameral legislature as aristocratic and democratic, and the judiciary, perhaps because it did not fit in with this scheme, as "next to nothing." By his threefold representation of classes he hoped to balance the economic powers in society as by his threefold separation of functions he hoped to balance the political.

Montesquieu believed that there could be no liberty without the separation of functions:

> Here then is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.
>
> These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.

It is clear that Montesquieu never envisioned a complete separation of powers. He realized that the efficient operation of government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers.

[Vanderbilt, Arthur T, "The Doctrine of The Separation of Powers and Its Present Day Significance", (Univ. Nebraska Press, 1953, 1963) (Lib. Congress No. 55-7056), at p. 43-45 (footnotes omitted)]

4. OTHER SOURCES OF INFLUENCE ADDITONALLY TO MONTESQUIEU ON THE FOUNDERS' THINKING ABOUT HOW TO IMPLEMENT THE THEORY OF SEPARATION OF POWERS

"Our forefathers were familiar with English constitutional history and they appreciated, in spite of their quarrels with the mother country, the superiority in terms of individual freedom of the English constitutional government of their day with its limited monarchy over the absolute monarchies of the

Continent. They recognized Bracton's maxim "The King is below no man, but he is below God and the law" as one of the foundations of English constitutional government, and they found in Sir Edward Coke's declaration that "Magna Charta is such a fellow that he will have no sovereign" the basis for constitutional guarantees of individual freedom. In a very real sense, then, English constitutional experience, quite apart from Montesquieu's formulation of it, entered into American thinking in the drafting of the federal and state constitutions and may be regarded as a second great source of the American doctrine of the separation of powers.

The third source of the doctrine, and the one closest to the daily life of the framers of the Federal Constitution, was the unhappy experience of the American colonists with King George III and his bureaucrats, particularly in the shape of royal governors in the colonies and of the Privy Council in England. The colonists deemed themselves English subjects with all the rights of Englishmen. They became convinced they were being unlawfully denied their rights by English officialdom and in this they were supported by a substantial body of English opinion led by such men as Chatham and Burke. Their grievances were epitomized in the eloquent charges of the Declaration of Independence and require no amplification here. Particularly were they aggrieved at the centralized control of the Privy Council over the colonies, resulting in the disallowance of colonial statutes, instructions to the royal governors, and a jealous insistence on hearing in England appeals from the colonial courts regardless of the amount involved. As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction.

The fourth great source of the American doctrine of the separation of powers as embodied in the Federal Constitution was the hard common sense and political sagacity of the Founding Fathers in convention assembled. Madison had studied every previous attempt at federal government from the earliest times and was the recognized scholar of the Convention, but there were many others who were serious students of government and active

practitioners of it. Their wealth of experience in practical statecraft is reflected in the checks and balances of the Constitution as debated in the Constitutional Convention and expounded in the Federalist Papers."

[Vanderbilt, Arthur T, "The Doctrine of The Separation of Powers and Its Present Day Significance", (Univ. Nebraska Press, 1953, 1963) (Lib. Congress No. 55-7056), at p. 46-47 (footnotes omitted)].

II

1. THE INFLUENCE OF THE SEPARATION OF POWERS ON THE RELATIONSHIP BETWEEN THE SOVEREIGN STATES AND THE FEDERAL GOVERNMENT

In our system of government, the separation of the powers of the limited central government is combined with its federal relationship with the States in order to constrain power further. Diagrammatically, the distribution of all the power of governance looks like this:

APPORTIONMENT OF ALL GOVERNING POWER**:**

FEDERAL (CENTRAL) GOVERNMENT
(LIMITED BUT CENTRALIZED POWER/ NATIONWIDE REACH/ STANDARDIZING IMPACT)

POWER APPORTIONED AMONS.G THREE BRANCHES

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50 STATES
(BROAD SOVEREIGN POWER, BUT CONFINED TO THEIR BORDERS/LOCAL REACH/DECENTRALIZED IMPACT)

2. THE SEPARATION OF POWERS CONCEPT MUST INCORPORATE FEDERALISM IN ORDER TO BE AN EFFECTIVE SAFEGUARD OF LIBERTY

"Nor was the doctrine with its accompanying checks and balances the only device resorted to for curtailing governmental powers. **The Founding Fathers were equally concerned with the proper distribution of governmental power between the nation and the several states as a means of preserving the nation on the one side and individual freedom on the other.** Strong local government within each state, moreover, they took for granted from English constitutional history and their own colonial experience. **Thus governmental powers were fractionalized both horizontally and vertically in a deliberate effort to avoid an undue concentration of powers at any one spot.** Montesquieu recognized the importance of this principle as clearly as he did the significance of the separation of powers when he wrote:

> It is therefore very probable that mankind would have been at length obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. **I mean a confederate republic.**

In 1789, although to some degree a seafaring folk, we were primarily an agricultural people. Now, although agriculture is still of tremendous importance, we are primarily a manufacturing nation and urban interests tend to predominate. For a century and a quarter, barring four minor wars which today would be deemed but skirmishes, we had only one intensive conflict, the Civil War. This striking contrast with European military experience has now disappeared. In the past third of a century we have been in three World Wars—I say three because in Korea we have already lost more men and spent more in armament than in any other American war except World War II. The military has thus come, unexpectedly and unwanted, to have a dominant influence on our entire economic life. The last three quarters of a century, moreover, have been marked by the rise of big business with its tremendous aggregation of capital. This has

been matched in turn by the economic influence of powerful nationwide labor unions. The concentration of great economic power in a relatively few large corporations and in large unions has been the subject of much concern to thoughtful men. This concentration has in turn led to increased growth of governmental authority. Meanwhile time and space have been shrinking. A resident of Englewood, New Jersey may now dial directly the telephone number of a friend in San Francisco. One may go to the theatre one evening in New York, enjoy a comfortable night's sleep on a plane and have breakfast in Los Angeles at eight o'clock the next morning. Even more significant than the shrinkage of time and space in this age of overorganization has been a sense of the shrinkage of the influence of the average individual. There has been a marked tendency to think of man merely as a cog in the economic machine. Happily, however, this tendency seems to have been checked, in part because of a postwar resurgence of interest in religion which is fostering a militant faith in the worth of the individual and of his capacity for good and. in part because of our alarm over the spread of totalitarian government and its effect on the individual.

Like so many other principles in our law the doctrine of the separation of powers has had a varied history. In the period from 1789 down to the Civil War the Congress was clearly the predominant part of the national government as the legislatures were in most states. From the Civil War to the opening days of the twentieth century the courts, both federal and state, loomed large in the public eye. The outbreak of World War I marked the beginning of the hegemony of the executive branch of the government especially in the federal sphere. This same period was also marked by the expansion of the functions of the federal government at the expense of the state government and to some degree of the growth of state government at the expense of local government. **But while one department of government after another has had its day in the sun, none has ever succeeded in completely displacing the others, nor will it so long as the Federal Constitution with its underlying premise of the supremacy of law is given practical effect in the courts**.

The doctrine of the separation of governmental powers is not

a mere theoretical, philosophical concept. It is a practical, workaday principle. The division of government into three branches does not imply, as its critics would have us think, three watertight compartments. Montesquieu, as we have seen, knew better; **the three departments, he said, must move "in concert."**

This view is generally accepted. Madison, writing in the Federalist [No. 47] said: (I)t may clearly be inferred that, in saying, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he (Montesquieu) did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

The contest between the three departments in national, state and local governments still goes on from day to day with varying results, but with all of the skirmishes, sometimes none too edifying, **the goal remains constant—a government of law rather than of official will or whim. This goal can only be attained by a government of limited powers distributed both vertically and horizontally**, as a glance at the dictatorships of today and yesterday will demonstrate to all who are willing to learn from the experience of others."

[Vanderbilt, Arthur T, "The Doctrine of The Separation of Powers and Its Present Day Significance", (Univ. Nebraska Press, 1953, 1963) (Lib. Congress No. 55-7056), at p. 48-50 (footnotes omitted)(emphasis added)].

3. THE STATES AND THE FEDERAL GOVERNMENT ARE KNIT TOGETHER: THE SUPREMACY CLAUSE

The second paragraph of Article VI of the Constitution says:

> "This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States shall be the supreme **law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."**

[Const.. Article VI (1789) (emphasis added)]

Two important principles are established in this paragraph:

a. That the Constitution, federal treaties and laws predominate over conflicting State constitutions or laws. In the case of a clash, state law must give way to federal law; and

b. *State* judges must enforce all *federal law* in State jurisdictions. This provision functions to tie the State and federal governments together into a confederated republic.

COINCIDENCE? Every State officer (which includes a state judge) must take the following oath of office:

"Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation **to support the Constitution of this State and of the United States** and to perform the duties of his office faithfully, impartially and justly to the best of his ability."

[N.J. Const. [1947], Art. VII, sec. 1, par. 1]

Do you know why?

III

1. THE FOUNDING FATHERS EXPLAIN THE WORKINGS OF FEDERATED SEPARATION OF POWERS: FEDERALIST # 39

"To the People of the State of New York:

…

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles,

exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior.

On comparing the Constitution planned by the convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. ….

…

“But it was not sufficient,” say the adversaries of the proposed Constitution, “for the convention to adhere to the republican form. They ought, with equal

care, to have preserved the FEDERAL form, which regards the Union as a CONFEDERACY of sovereign states; instead of which, they have framed a NATIONAL government, which regards the Union as a CONSOLIDATION of the States." And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country could supply any defect of regular authority.

…

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act.

…

The next relation is, to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is NATIONAL, not FEDERAL. The Senate, on the other hand, will derive its powers from the States, as

political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is FEDERAL, not NATIONAL. The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many FEDERAL as NATIONAL features.

…

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly NATIONAL nor wholly FEDERAL. Were it wholly national, the supreme and ultimate authority would reside in the MAJORITY of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and principles. In requiring more than a majority, and particularly in computing the proportion by STATES, not by CITIZENS, it departs from the NATIONAL and advances towards the FEDERAL character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the FEDERAL and partakes of the NATIONAL character.

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

PUBLIUS [Federalist Papers, No. 39, January 16, 1788 (Madison) (Excerpt)]

2. WHERE DO I FIND THAT?

Please cite to at least one source in the Constitution that is an example of each of the following features of our confederated republic identified in Federalist No. 39:

a. In its foundation it is federal, not national;

b. in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national;

c. in the operation of these powers, it is national, not federal;

d. in the extent of them, again, it is federal, not national;

e. in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.