The Breakfast Club
Constitutional Minute for 4 January 2022

Separation of Powers

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." James Madison, Federalist 47.

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself." James Madison, 1788.[i]

When designing a government, you must "get it right." Should you fail, government can become "intolerable" and "evil."[ii] James Madison suggested in Federalist 51 that the greatest difficulty in framing any government involves "obliging" the government to "control itself." Why? Madison also provides the answer: "*The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse*."[iii] Madison had not here discovered any new insight, he was merely paraphrasing Baron Montesquieu from 40 years before: *"Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[iv]*

Historically, the two great mechanisms for preventing abuse of governmental power have been two great principles: "checks and balances" and "separation of powers." Today, I will consider the later, examining first the Framers' plan for such a separation and then the principle's present condition.

By May 1776, when the Continental Congress proposed that the colonies *"adopt such government as shall, in the opinion of the Representatives of the People, best conduce to the happiness and safety of their constituents in particular, and America in general,"[v]* the English colonies in America already had a long association with tri-partite government and separation of powers. Each colony had its Executive, Legislative and Judicial branches, and the powers attendant to each were generally well established: the Legislature made the laws, the Executive executed them, and the Judiciary adjudicated them. Nevertheless, there was sufficient "wiggle room" involving those powers that it was still necessary to pay close attention to their assignment in any new constitution, be it state or national.

"It was in seventeenth-century England that [the doctrine of separation of powers] emerged for the first time as a coherent theory of government, explicitly set out, and urged as the 'grand secret of liberty and good government.' From there the separation of powers doctrine migrated to France, where Montesquieu gave it its classical formulation in The Spirit of the Laws *(1748), and to the colonies, where American founders and framers creatively adapted it.[vi]*

The men who wrote the state constitutions of 1776-1780 understood the concept. One example is Virginia: *"That the legislative and executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other, …"*

Delegates to the Constitutional Convention of 1787 agonized over the assignment of power they gave each branch of government; Madison discussed the issue in Federalist 47 and 48; and delegates to the ratifying conventions which followed criticized some of these allocations – but then voted to ratify.

Today, an honest assessment of the separation of powers doctrine finds numerous violations and encroachments that have weakened the Framers original design. Most of these have been intentional.

Delegation of Power. Congress makes the laws, right? Correct, except when they don't. Delegating power is not new, everyone in authority does it: a Power of Attorney is a delegation of power to someone to take legal actions on your behalf. But a good Power of Attorney is careful to define and limit the powers it delegates.

In the U.S. Constitution, We the People delegated legislative power to Congress: *"**All** legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[vii]* (Bold emphasis added)

John Locke insisted that: *" [The Legislative Power] being but a delegated Power <u>from the People</u>, they, who have it* (i.e. Congress), *cannot pass it over to others."[viii]* (Emphasis added)

In 1989, the Supreme Court took exception to Locke's view: *"… our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, <u>Congress simply cannot do its job absent an ability to delegate power under broad general directives</u>. Accordingly, this Court has deemed it "constitutionally sufficient" if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[ix]* (Emphasis added).

The Mistretta opinion today allows Executive Branch agencies such as the DOE, HHS, TSA, EPA, OSHA, IRS, to promulgate "rules" that have the power of laws passed by Congress. Break a rule devised by these unelected bureaucrats and you could go to jail. Wha? you weren't aware of an obscure rule? Too bad for you.

Usurpation of Power. *"[L]et there be no change (in constitutional power) by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed.[x]*

The largest usurper of legislative power has been the presidency. Twenty-sixth President Teddy Roosevelt believed that*: "The executive power [is] limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers."* *"Otherwise, the President has unlimited power,"* he might have added in summary. Presidential Executive Orders are the chief means used (abused) by Presidents who find the Constitution's sparse presidential powers too confining. I will cover Executive Orders in greater detail in a separate essay. A brief example: the Constitution gives Congress the exclusive power to "declare war," yet numerous presidents have unilaterally ordered military action when the U.S. was not under "sudden attack."

I would be remiss if I didn't at least mention the usurpation of legislative power by the Supreme Court which occurs when Justices simply "make things up" instead of finding the law. "This court is not a legislature" wrote Chief Justice John Roberts in *Obergefell v. Hodges* as he watched his court legislate from the bench. I will address this violation of separation of powers, judicial activism, in a later essay. *Brown v. Board of Education* and *Roe v. Wade* have both been cited as examples of judicial activism.

More to come…

[i] Publius, *Federalist 51,* February 8, 1788

[ii] See *Common Sense*, by Thomas Paine, January 9, 1776.

[iii] James Madison, speech in the Virginia Constitutional Convention, 1829.

[iv] *De l'Esprit des Loix,* XI, 4.

[v] John Adams, *Preamble to Resolution on Independent Governments*, 2nd Continental Congress, 15 May 1776.

[vi] Paul Seaton, *Restoring the Separation of Powers With MJC Vile*, found at: https://lawliberty.org/classic/restoring-the-separation-of-powers-with-m-j-c-vile/

[vii] U.S. Constitution, Article 1, Section 1. 1787.

viii John Locke, Second Treatise on Government, 1690.

[ix] *Mistretta v. United States* (1989)

[x] George Washington, Farewell Address, 1796.