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# SEPARATION OF POWERS, SYSTEM OF CHECKS AND BALANCES IN LIGHT OF AMERICAN CONSTITUTIONALISM

"In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

*Thomas Jefferson*

"So enthralled have Americans become with their idea of a constitution as a written superior law set above the entire government against which all other law is to be measured that it is difficult to appreciate a contrary conception."[1] 1789 American constitution rests on genuinely shared values and hopes of its citizens. It is a true embodiment of unity of civil spirit, strength and authority. Furthermore, built on a set of common values the founding fathers instituted a system that has its roots in both the people and an authoritative document, the Constitution of United States, which as a result of the American Revolution, wrote Thomas Paine in his Rights of Man, became "a political bible" for Americans[2].

Americans had long lived under what has been called "practical constitution"[3] adhering fundamental principles of the natural law and the natural rights. Resemblance in interpreting those fundamental principles in both colonial America and in the "Mother Country" had ensured a peaceful cohabitation in the common political domain. And, too, as long as interpretations of those fundamental prin-

1 Gordon Wood *The Creation of the American Republic 1776-1787* (Chapel Hill: University of North Carolina Press, for the Institute of Early American History and Culture, 1969), p. 260.
2 See Paine, *Rights of Men, and Common Sense,* Foner, ed., *Writings of Pine,* I, 378, 29.
3 A. J. Beitzinger, *A History of American Political Thought,* (New York 1972), cpt. 1, p. 117.

ciples remained rational the colonies maintained loyalty to the Crown. But when it came to solve the controversy between the colonies and the royal authority, essence and scope of the application of those fundamental principles had to be revised diametrically. "It was during this controversy that the crucial divergence in the constitutional tradition of the English-speaking world was made."[4]

For the British, a constitution was a set of unwritten, "immutable body of principles"[5] rooted in Divine and natural law. Expressed in the common law tradition, together with natural law concept of unalienable human rights, it had become a cornerstone of the English system. Articulation of those principles remained in the exclusive jurisdiction of the parliament. And, too, the will of the legislature was superior since its power was deemed to rest on the will of the people. Thus invisible principles usually would see daylight primarily through the lenses of the legislature, whose authority remained unchallenged. And, too, customs, traditions, laws and political institutions were all regarded as the organic whole united under the common umbrella – constitution. For "Englishmen generally there could be no distinction between the "constitution or frame of government" and the "system of laws." All were one: every act of Parliament was in a sense a part of the constitution, and all law, customary and statutory, was thus constitutional."[6] Who would restrain the legislature and what would serve, as the controlling principles became a subject to deep controversy between the two political realms.

English constitutionalism attained inextricable presence in American constitutionalism, but the colonies came to deviate from their British brethren in holding that "immutable body of principles" had to be visible and embodied in a written document. And, too, constitution had to assume a different meaning, diametrically different from that Englishmen originally had perceived. Constitution had to fence out fundamental or "controlling"[7] principles as the paramount authority to minimize a scope of an appeal to merely abstract doctrines. Furthermore, all acts of the legislature had to be in compliance to constitution, and it had to be placed above an ordinary legal system of laws as "the supreme Law of the Land." Furthermore, social contract theory elevated the people to be superior to any political power in civil society. And, too, it was people who distribute power among various agents.

Based on these precepts American constitutionalism unfolded in its unique mode, which "stresses individual rights, consent of governed, the rule of law equally applied, institutional forms, separation of powers, checks and balances upon passions and interests and the conception of written constitution as "higher law" to be interpreted ultimately not by natural or common reason but by those versed in "the artificial reason of the law."[8]

4 See Gordon Wood, supra at p. 260.
5 See A. J. Beitzinger, supra at p. 116.
6 See Gordon Wood, supra at p. 261.
7 See Gordon Wood, supra at p. 261.
8 See A. J. Beitzinger, supra at p. 3.

The 1789 constitution, as Gordon Wood put in his The Creation of the American Republic 1776-1787, "was obviously not simply an old-fashioned colonial charter republicanized, not just the form of government, not merely a document separating power and liberty… rather it describes the portions of power with which the people invest the legislature and executive bodies, and the portions which they retained for themselves."[9]

The Founding Fathers favored several specific configurations in which to arrange political power, but a balance between individual liberties and public order was a paramount aim. Reaching a perfect equilibrium between these ends needed complete cohabitation of individual rights and national goals.

Tranquility in the confederation was of the paramount importance. Decades of political turmoil on the territory of confederation lead the Founding Fathers to reevaluate the guarantees provided under the Articles of Confederation. A stronger federal system was deemed to be a proper remedy to ensure peace in the several sates on the one hand and protection from possible foreign interventions on the other. Thus central government of the Union had to assume powers commensurate to the end sought by the politically self-sufficient New World. And, too, the delegated power had to be adequately distributed on both horizontal and vertical political landscape to exclude any potential imbalances. States retained all the powers not delegated to the federal government. The federal government in its turn was encapsulated within the defined and enumerated domain outlined in the Constitution.

XVIII century brought real challenges to the new political reality on the new continent. Enlargement of the political landscape was a real challenge for the New World, which the Founding Fathers turned into their victory. Republican model that Americans constructed evolved out of the compromise among the several independent states. Furthermore, a multiplicity of interests of various groups was deemed to be a positive factor towards ensuring political stability over an extended territory. Once on the federal orbit these forces would cohabit peacefully provided that government would be able to ensure a fair regulation of their interaction. The states retained the control over the whole infrastructure for the accumulation of a political power with the only restrain – those striving for the National power had to enjoy the uniformity of the federally applicable regulations.

[9] See Gordon Wood, supra at p. 283.

"There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates"

*Spirit of the Laws, Montesquieu*

There was nothing, conceptually new, in this statement in 1748, but Montesquieu expanded its conventional interpretation and articulated – "there is no liberty, if the judiciary power be not separated from the legislative and executive." By the time, when the Constitutional Convention met in Philadelphia, many Americans had experienced inconveniences sprung from the improper distribution of powers in spite of the formal acknowledgement of the concept in their fundamental laws.

Although a tripartite separation of the powers of government had been advanced by Montesquieu in his work *The Spirit of the Laws*, which was first published in 1748, "it was Americans, however, in 1776 and more emphatically in the subsequent decade who were to elevate this doctrine of the separation of three powers into what James Madison called in 1792 "a first principle of free government""[10] and along with other "auxiliary" measures, made it applicable in American practice. According to this principle, power has to be separated into three parts: legislative, executive and judiciary. And, too, it was Americans who first launched an institute of Presidency.

Perhaps the most challenging for the eighteenth century Americans was the practical implementation of what they all perfectly new on a theoretical level. The natural rights, the right to resistance and the contract theories all logically pointed towards the necessity of restrains of the political power. The colonial power structures, almost without any exceptions, followed their contemporary power separation doctrines, but a mode of its dispensation failed to produce tranquility in their respective societies. All constitutions before like 1776 did not really separated powers, leaving in the legislature major appointment, salary distribution and other regulatory powers that brought under their direct influence executives, and judiciary.

"There was [no as] the eighteenth century believed, a reciprocating relationship between the structure of the government and the spirit of its people."[11] Furthermore, existing systems exposed a danger and become the source of instability. American Founding Fathers, concerned with this situation, came out with the principally new, diametrically different way of diffusion of power.

[10] See Gordon Wood, supra at p. 152.
[11] See Gordon Wood, supra at p. 119.

American conception of separation of powers is a product of "evolutionary colonial practice and later compromises"[12] adapting the new forms to the emerging political realities. But more importantly liberty, as John Adams put it "depends upon an exact Balance,"[13] which the American colonies had long failed to establish.

The power holders in the late eighteenth century, the legislature or the executive, desperately contended for their mono statuses, and tended to diminish the role of their constituents. For example many legislatures abused their power during the period 1776 by amending, altering or changing constitutions of their states as they were pleased. The unbalanced mode became so destructive to the freedom of their constituents that transferring the sovereignty from the legislative bodies to the people at large inevitably emerged on the American political agenda. The power holders had to realize that they possessed only "a trust from the people for their good, and in several instances so far from possessing an absolute power, they ought to acknowledge that they have no power at all."[14]

In 18th century Americans managed to change the character of representation, nature of the senate and house. The colonial legislatures, claiming the full and inclusive representation of the people, gradually extended their control over magistrate and judiciary brunches. Powers they absorbed included: handling and expenditure of public money, control over the courts and judges, making private judgment as well as public laws,[15] and electing the president and vice-president of the executive councils. This was Madison's contemporary America "where the whole power of one department [was] exercised by the same hands which possess the whole power of another department," and where "the fundamental principles of a free constitution [were entirely] subverted."[16]

Bicameral legislature was a response to this extended and mistrusted legislative powers. The immense power, that legislative had absorbed during the revolutionary period, were redistributed according to the new interpretation of the principles of republicanism. Framers of the American Constitution were successful in avoiding old understanding of formation of upper houses based on different social nucleus. Furthermore, they managed to avoid mere "double representation" and elaborated entirely new organization. Since it was the power of the houses of representatives in particular that had to be checked, upper branches of the legislatures had to become more stable, if they were, as Madison said, "to withstand the occasional impetuosities of the more numerous branch."[17] This meant

12 A. J. Beitzinger, supra at p. 85.
13 See Gordon Wood, supra at p. 198.
14 See Gordon Wood, supra at p.384.
15 See Gordon Wood, supra at p.154.
16 The Federalist Papers, (American Bar Association, 2009), No. 47, p.272.
17 See Gordon Wood, supra at p.436.

different recruitment criteria, tenure, and elections became the only criterion of representation and voting as a measure people's trust.[18]

**"The love of Power is so alluring, that few have ever been able to resist its bewitching influence."**[19]

During the Revolutionary Era the majority of Americans believed that most dangerous part of the government was the executive. Fears of usurpation of power were so immense that people became cautious disposing the authority to execute laws that was "necessary for the preservation of justice, peace, and internal tranquility."[20] Since the people retained the whole power and all magistrates were deemed mere agents of their constituents, direct elections of the executive by the people become a safe mode.* Elected executive, in Hamilton's words, "not only dispenses the honors but holds the sword of the community."[21] To provide enough energy and leverage to carry its functions executives were provided both independence from legislature encroachments and the power to resist rapid enforcement of laws contrary to the peoples' will.

In the new political reality, which emerged in the late eighteenth century, the judiciary was destined to acquire a new strength and role among the political power holders. From thereafter the judiciary holds a unique position as intermediary between the people and other power holders.[22] Moreover, it managed to retain its Anglo-Saxon character, to be an assessor of legislative pronouncements before they enter into a threshold of the societal acceptance and compliance.

The legislative body, the "supreme guardian of people's sovereignty," successfully had shadowed the role of judiciary but, by the end of the eighteenth century, deploying the concept that all power belonged to the people neutralized these claims.[23] And, too, the people were deemed to be at liberty to distribute the power as they would please, and judicial review of legislation, was not considered to be encroachment on legislative authority any more.[24]

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18 See Gordon Wood, supra at p.387.

19 Address of the N.H. Convention (1781), Bouton *et al., State Papers of N.H.,* IX, 846.

20 Boston *Independent Chronicle*, May 20, 1779. See Wood on p. 432.

* The Electoral College elects the President indirectly, but here we are mainly concerned with the general principle of formation of the executive power. Later electros were elected by the people and their dedication to vote for the identified candidate made it possible to claim that American President was elected directly by the people.

21 The Federalist, supra, No. 78, p.450.

22 See The Federalist, supra, No. 78, p. 451.

23 See Gordon Wood, supra, at p.453.

24 See The Federalist, supra, No. 78.

Moreover, all actions of legislature were open to the "examination and scrutiny by the people, that is, by the Supreme Judiciary, their servants for this purpose; and those that militate with the fundamental laws, or impugn the principles of the constitution, are to be judicially set aside as void, and of no effect."[25] To secure judiciary from the improper encroachments from any brunch of the government, judges were to be appointed by the executive with the approval of the Senate during good behavior, and their allowance be fixed not subject of manipulation.

American system does not leave the separated branches in completely remote realms, but orbits them around the only power holder – the people, and thus creates a solid political system stimulating both responsibility and transparency. All branches are equal and none of them benefits of any special advantages, or retains any power to exclude the others from playing any role in the political process. To achieve these goals the framers designed a system of political casting that were meant to filter passions and at the same time keep the political process sound. All branches had to be elected in different modes and different intervals of time, and all elected deputies had to be so connected with the electorate that never loses accountability and connection.[26]

The transformation in American political thinking during the Revolutionary Era, caused a radical redistribution of powers between two main depositaries: people and political bodies, but the sole source of the power remained with the former as the only "fountain of authority."[27] The people no longer actually shared in a part of the government, but they remained outside the entire government, watching, controlling, and pulling the strings for all their agents in every branch or part of the government.[28] Furthermore, the people retained the extraordinary influence on the government through "the resort to [the constitutional] conventions, instructions [to their representatives], and other out-of-doors action."[29]

**"Ambition must be made to counteract ambition."**[30]

***Madison***

Separation of powers, as delineated by Madison in the Federalist Papers, would be mere dissociation if not interconnected by the system of check and balances. To put it simple, according to this

25 *Providence Gazette*, May 12, 1787. See Wood, supra at on p. 456.
26 See The Federalist, supra, No. 52, at p. 301.
27 See The Federalist, supra, No. 51.
28 See Gordon Wood, supra at p.388.
29 See Gordon Wood, supra at p.383.
30 See The Federalist No. 51, supra at, p. 294.

principle, each branch acts as a restraint on the power of the others and at no time all power rest with a single branch of the government.

In American system of checks and balances no branch is to be either omnipotent or defenseless. The Constitution's primary guarantee of the autonomy of each the three branches are simple and effective. Furthermore, as Justice Jackson put it, "while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."[31] Two political branches have constitutional officers who are elected by the people and not by the other branch. The judiciary, chosen by the other two, branches has great independence once on the bench. The impeachment power that Congress may assert over members of the other two branches ensures the legislature's credibility to bring to justice high ranking political officers. Each branch makes own decisions independently, but this does not necessarily suggest excluding the others from playing any role in the process of elaboration. This process is blended in a way to ensure the prospects for wise legislation, which have been a steady practice ensured by American system of checks and balances.

American system of checks and balances does not leave the separated branches in isolation from each other, but links them in a common organization of political affairs and encourages cooperation and competition. There is no "hermetic division between the Branches,"[32] but American system ensures carefully crafted power blending within each branch. To achieve these goals the Founding Fathers, along with separation of powers, designed a system of checked powers that were meant to be balanced, so that no usurpation of power would occur and tyrannical conspiracies would have counter barriers to crash on.

Each governmental branch has both partial autonomy and partial accountability to the others. Each branch also has a realm of independence, guarantees "against the invasions of the others,"[33] into which the others may not enter, and each has means to maintain accountability of the others.

The Founding Fathers were careful to protect the autonomy of each branch, especially of the legislature. Congress has the most detailed set of powers set forth in the Constitution. During the colonial history legislatures had suffered frequent executive encroachments. Accordingly, the framers of the Constitution gave Congress control over its own affairs, including control over its own membership. The two houses judge the initial eligibility of their members, Representatives or Senators, to serve. Furthermore, Congress is in full control of its personnel and processes, including the punishment or

31 See, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).
32 See, Mistretta v. United States, 488 U.S. 361 (1989).
33 The Federalist No. 48, supra at p. 343.

expulsion of the members.[34] And, too, they extended its members explicit privileges from prosecution and intimidation by the other two branches, including "for any speech or debate in either house, they shall not be questioned in any other place."[35] The legislature, in other words, is capable to ensure its own protection, and "carry into execution ... all other powers vested by this Constitution in the government of the United State, or in any department or officer thereof."

To ensure Congress's productive operation, the Founding Fathers entrusted the legislature to obtain any information for its intelligent decisions. As Madison observed, an officer's accountability to the people depends on the information they can obtain about his or her activities.

In American system of checks and balances, accountability often depends on efforts by one of the branches of government to force another to reveal information. Congress's power to investigate is one of the vital tools in accessing information retained by the other branches.[36]

Investigations usually serve as a precursor to legislate, or as an oversight mechanism that ensures the executives accountability to Congress, and ultimately to the people.[37] American legislature has two kinds of investigative functions provided by the Constitution. It investigates conditions in society and oversees executive branch. Congress may force the other branches to provide information including, issue subpoenas to government officers, and may punish disobedience by contempt.*

Impeachment is Congress's irrefutable weapon against personnel of the other two branches.[38] Both executive and judicial officers must beware of the impeachment power that the Constitution lodges in the two houses of Congress, with the House acting first to submit charges and than as prosecutor before the Senate.

The executive power, according to the Constitution, is vested in the President of the United States, and gives him multiple roles, including of commander in chief, negotiator with foreign nations, and nominator of justices, ambassadors. Congress checks each of them. The constitutional Convention gave serious attention to the method of executive appointments. The President is vested the power to

34 U.S. Constitution, Article I, par. 5 .
35 U.S. Constitution, Article I, par. 6.
36 See Watkins v. United States, 354 U.S. 178, 187 (1957) .
37 See James Hamilton, The Power to Probe: A study of Congressional Investigations, 172 (1976).
* In the early years of the republic, Congress punished contempt summarily unilaterally, by locking offenders in the Capitol until they complied, for the duration of session if necessary. In 1857, a statute made contempt of Congress a crime and provided for referral of contempt citations to Executive Branch prosecutors. More recently, a statute gave the Senate power to seek court orders enforcing its subpoenas.
38 U.S. Constitution, Article II, par. 4

nominate all officers, subject to the check of the Senate's consent, allowing the President to implement its own vision of foreign policy, influence the federal judiciary, and ensure executive autonomy.[39]

Moreover, President has enough room to accumulate energy and direct his strength to further the national goals. However, the Presidential powers in many ways are limited. He can make treaties with foreign nations, which is subject to the consent of the Senate. War-making power, army raising and funding all ensures the Commander's proper control by the legislature.

The President's Veto and Congress's power of the purse are two of the most basic checks and balances of American system. These shared powers keep the two branches acting together in mutual dependency.

Congress holds the power of the purse. The Constitution provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law."[40] The veto brings Congress to the President, because bills are so difficult to enact against his opposition. The power of the purse brings the President to Congress, because the executive can do little without money. Moreover, each of the branches can bring forth its own plenary power when the other uses its plenary power in unacceptable ways. These two great stabilizers work together to prevent power straggles between the branches from spinning out of control. Moreover, bicameral structure and exposure to the President's Veto have cabined Congress' power itself as the framers originally intended.

The Founding Fathers were careful in crafting the process of lawmaking, especially after the colonial experience of unwise legislative experiences. In addition to the veto power the Constitution gave the President an option to participate in the legislative process by "recommend[ing] to their consideration such measures as he shall judge necessary and expedient..."[41] This protects the President from laws encroaching on executive prerogatives and at the same time blends powers most effectively.[42] The Constitution requires that bills passed by Congress must be presented to the President for his approval. If he vetoes, an override requires two-thirds majorities in both houses of Congress.[43] Furthermore, the presentation requirement ensures that every new law had to survive the examination, or process of approval by three different political constituencies.[44]

39 U.S. Constitution, Article II, par. 2, cl. 2.
40 U.S. Constitution, Article I, par. 9.
41 U.S. Constitution, Article II, par. 3
42 See The Federalist, supra No. 73
43 Missouri Pacific Ry. Co. v. Kansas, 248 U.S. 276 (1919).
44 See Federalist, supra No. 73.

Moreover, both branches could, in case of deep confrontations, appeal to the people directly. The President can assert leadership against an inflexible legislature. Congress can put a stop to presidential endeavors. "The veto is, in fact, a sort of appeal to the people. The executive power... adopts this means of pleading its cause and stating its motives."[45]

The Founding Fathers failed, or deliberately left the competence of judiciary vague.[46] What the Constitution provides to foster independence of judiciary are life tenure and salary protections. Furthermore, judicial appointments are subject to careful considerations in both the executive, empowered to nominate judges, and in the Senate, under its approval mandate.

The constitution did not explicitly grant the federal Judiciary any authority to take part in the either legislative or executive decision-making processes. But to review the constitutionality of legislation, or to require the executive to obey statutory commands, have been acquired by the judiciary through careful maneuvering between the two other branches.[47] In 1803, the Supreme Court asserted both kinds of authority in the most important of separation of powers case in its history, *Marbury v. Madison*. Once the powers that Marshall asserted for the court became fully established by repeated exercise the judiciary assumed a critical role in balancing the power of the other two branches against each other. Congress received protection from executive transgressions against statutory commands, and the executive received protections from duties imposed by unconstitutional legislation.[48]

"In America the law had become king."[49]

*Thomas Pine*

Rule of law is a steam engine for American constitutional travel. It plays moderating role among power holders and maintains "a government of laws, not of men."[50] On the one hand it delineates powers and limits discretion of governmental authorities and it safeguards individuals from encroachments of the state on the other. In America it is fairly associated with equal treatment, which aspires to minimize arbitrariness while exercising political power. It requires that all players be affected alike and to the same degree. And, too, the Rule of Law provides a stabilizing legal framework for all political

45 Alexis De Tocqueville, *Democracy in America*, (Translation by Henry Reeve, NY Century Co., 1898), p. 120.
46 Christopher Collier and James Lincoln Collier *Decision in Philadelphia, The Constitutional Convention of 1787* (New York 1987), pp. 359, 360.
47 See, Christopher Collier, supra at pp. 359, 360.
48 See, Christopher Collier, supra at p. 360.
49 See Paine, *Rights of Men, and Common Sense,* Foner, ed., *Writings of Pine,* I, 378, 29.
50 John Adams, *The Works of John Adams*, ed. Charles Francis Adams, vol. 4, p. 106 (1851).

processes. Moreover, it enhances the ability of every individual, family, groups, or political parties to exercise autonomy that is to ensure tranquility of the whole country.

The American Constitution provides a multilayer filter stabilizing immediate expression of passions of various power holders. It ensures structural power division, accountability, transparency and impartiality. Representation and interplay of interests of various power holders are properly regulated. But most importantly, it places the fundamental rights above all public laws thus protecting them from any manipulations. Furthermore, the uniqueness of the American Constitution also evolves in its capacity for growth and broad application.[51] And too, "what in the final analysis gave meaning to Americans' conception of a constitution was not its fundamentality or its creation by the people, but rather its implementation in the ordinary courts of law."[52]

Shared values of the eighteenth century Americans were carefully tailored into the unique clauses in the Constitution. These symbols have been unfolding traditions, practices, and historical institutions since the emergence of the New World. And, too, although their interpretations have caused sharp divisions of the succeeding generations, these clauses have remained the powerful instruments to keep America safe, stabile, and prosperous.

[51] See A. J. Beitzinger, supra at p. 21.
[52] See Gordon Wood, supra, at p.291.