THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION

SECOND EDITION

by

DOUGLAS W. KMIEC
Professor of Constitutional Law and
Caruso Family Chair in Constitutional Law
Pepperdine University School of Law

STEPHEN B. PRESSER
Raoul Berger Professor of Legal History
Northwestern University School of Law

JOHN C. EASTMAN
Professor of Law and
Director of the Claremont Institute Center for
Constitutional Jurisprudence
Chapman University School of Law

RAYMOND B. MARCIN
Professor of Law
Catholic University of America
Columbus School of Law

LexisNexis™

Chapter 3

A STRUCTURALLY-DIVIDED, BUT WORKABLE, GOVERNMENT

This Chapter deals primarily with the division of federal power into three co-equal branches: legislative, executive, and judicial. Since the scope of legislative power is taken up in a concentrated way in Chapter Four, the examination of legislative authority here is limited to its interplay with executive and judicial interests. In comparison, more time is spent in this Chapter ascertaining the breadth of judicial and executive authority, although, by design of the founders, much of the definition of these powers, too, is drawn out of the dynamic and overlapping relationship among the three great departments.

A. Historical Antecedents

1. Dividing Governmental Power

In fashioning the structure of the American government, the framers were not writing upon a blank slate. By their own admission, they were greatly influenced by the work of Charles de Montesquieu, a French jurist, who visited England in the early 18th century and was particularly fascinated with England's political institutions. Reflecting upon his English visit, Montesquieu wrote *The Spirit of the Laws*, published in Geneva in 1748. The book was unpopular with the French regime, but was widely read throughout England and other parts of Europe. The passage that follows is sufficient to reveal the framers' debt to Montesquieu.

CHARLES DE MONTESQUIEU
THE SPIRIT OF LAWS (1748)
***reprinted in* 35 GREAT BOOKS OF THE WESTERN WORLD 67-79**
(Mortimer J. Adler et al. eds. & Thomas Nugent trans., 2d ed., Encyclopaedia Britannica 1990)

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.

The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

* * *

Hence it is that many of the princes of Europe, whose aim has been levelled at arbitrary power, have constantly set out with uniting in their own persons all the branches of magistracy, and all the great offices of state.

As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole body of the people. But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbours than of that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; but it is proper that in every considerable place a representative should be elected by the inhabitants.

* * *

Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws, or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform.

* * *

Of the three powers above mentioned, the judiciary is in some measure next to nothing: there remain, therefore, only two; and as these have need of a regulating power to moderate them . . . .

The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch (sic), is better administered by one than by many: on the other hand, whatever depends on the legislative power is oftentimes better regulated by many than by a single person.

But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.

Were the legislative body to be a considerable time without meeting, this would likewise put an end to liberty. For of two things one would naturally follow: either that there would be no longer any legislative resolutions, and then the state would fall into anarchy; or that these resolutions would be taken by the executive power, which would render it absolute.

It would be needless for the legislative body to continue always assembled. This would be troublesome to the representatives, and, moreover, would cut out too much work for the executive power, so as to take off its attention to its office, and oblige it to think only of defending its own prerogatives, and the right it has to execute.

Again, were the legislative body to be always assembled, it might happen to be kept up only by filling the places of the deceased members with new representatives; and in that case, if the legislative body were once corrupted, the evil would be past all remedy. When different legislative bodies succeed one another, the people who have a bad opinion of that which is actually sitting may reasonably entertain some hopes of the next: but were it to be always the same body, the people upon seeing it once corrupted would no longer expect any good from its laws; and of course they would either become desperate or fall into a state of indolence.

* * *

Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers.

But it is not proper, on the other hand, that the legislative power should have a right to stay the executive. For as the execution has its natural limits, it is useless to confine it; besides, the executive power is generally employed in momentary operations. . . .

But if the legislative power in a free state has no right to stay the executive, it has a right and ought to have the means of examining in what manner its laws have been executed; . . . .

But whatever may be the issue of that examination, the legislative body ought not to have a power of arraigning the person, nor, of course, the conduct, of him who is entrusted with the executive power. His person should be sacred, because as it is necessary for the good of the state to prevent the legislative body from rendering themselves arbitrary, the moment he is accused or tried there is an end of liberty.

In this case the state would be no longer a monarchy, but a kind of republic, though not a free government. But as the person entrusted with the executive power cannot abuse it without bad counsellors, and such as have the laws as ministers, though the laws protect them as subjects, these men may be examined and punished. . . .

Though, in general, the judiciary power ought not to be united with any part of the legislative, yet this is liable to three exceptions, founded on the particular interest of the party accused.

The great are always obnoxious to popular envy; and were they to be judged by the people, they might be in danger from their judges, and would, moreover, be deprived of the privilege which the meanest subject is possessed of in a free state, of being tried by his peers. The nobility, for this reason, ought not to be cited before the ordinary courts of judicature, but before that part of the legislature which is composed of their own body.

* * *

It might also happen that a subject entrusted with the administration of public affairs may infringe the rights of the people, and be guilty of crimes which the ordinary magistrates either could not or would not punish. But, in general, the legislative power cannot try causes: and much less can it try this particular case, where it represents the party aggrieved, which is the people. It can only, therefore, impeach. But before what court shall it bring its impeachment? Must it go and demean itself before the ordinary tribunals, which are its inferiors, and, being composed, moreover, of men who are chosen from the people as well as itself, will naturally be swayed by the authority of so powerful an accuser? No: in order to preserve the dignity of the people, and the security of the subject, the legislative part which represents the people must bring in its charge before the legislative part which represents the nobility, who have neither the same interests nor the same passions.

Here is an advantage which this government has over most of the ancient republics, where this abuse prevailed, that the people were at the same time both judge and accuser.

The executive power, pursuant of what has been already said, ought to have a share in the legislature by the power of rejecting, otherwise it would soon be

stripped of its prerogative. But should the legislative power usurp a share of the executive, the latter would be equally undone.

* * *

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.

As the executive power has no other part in the legislative than the privilege of rejecting, it can have no share in the public debates. . . .

Were the executive power to determine the raising of public money, otherwise than by giving its consent, liberty would be at an end; because it would become legislative in the most important point of legislation.

If the legislative power was to settle the subsidies, not from year to year, but for ever, it would run the risk of losing its liberty, because the executive power would be no longer dependent; and when once it was possessed of such a perpetual right, it would be a matter of indifference whether it held it of itself or of another. The same may be said if it should come to a resolution of entrusting, not an annual, but a perpetual command of the fleets and armies to the executive power.

* * *

When once an army is established, it ought not to depend immediately on the legislative, but on the executive, power; and this from the very nature of the thing, its business consisting more in action than in deliberation.