

The Constitution Safeguards Us: Separation of Powers and Inhibiting the Consolidation of Governmental Authority Through Checks and Balances

By W. West Allen



W. West Allen is an intellectual property litigator and counselor in Las Vegas who represents a wide variety of international clients in federal courts. He served as chair of the FBA's Government Relations Committee for seven years and has served as a member of the FBA's board of directors for many years. In 2016, Allen received the FBA's President's Award for longstanding service to the FBA and as chair of its Government Relations Committee.

The Founders carefully laid the foundation of America's superstructure of liberty by creating within the U.S. Constitution's architectural framework an enlightened system that distributes the power allotted to government among its constituent parts. They did this because they understood that centralized state power, even within a republic, naturally leads to the abuse of power and loss of freedom. As James Madison explained, "[t]he 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."¹

This ingenious political construct of America's government that safeguards liberty by preventing the consolidation of state authority is the third foundational principle of the Constitution: *Separation of Powers* and its coordinate system of check and balances.²

In every government there are three types of power: legislative, executive, and judicial. The U.S. Constitution divides these powers into separate, coordinate, and equal branches of government. The Framers intentionally prevented any single branch of government from becoming too powerful by expressly limiting the powers of each and creating an internal system of checks and balances among the separate branches. The result is a system of self-government that assiduously diffuses centralized power. No branch of government can arrogate to itself what power it pleases. America's Constitution grants sufficient power to govern while constraining the capacity to abridge the liberties of the governed by separating the mighty powers to legislate, execute, and adjudicate, and by providing each branch the means to resist the blandishments and incursions of the others.

The Framers did this because they understood, like Montesquieu before them, the difference between liberty and democracy.³ The two are by no means syn-

onymous; indeed, history teaches that tyranny can be its worst when exercised in the name of the sovereignty of the people.⁴ Freedom exists only when there is no abuse of power, regardless of the form of government. We have learned by sad experience that every person invested with power is apt to abuse it and carry that authority as far as it will go.⁵ Often, liberty is put into existence within a particular form of government, such as a democracy, and the power of the people is confused with the liberty of the people. Liberty, however, is not simply doing what one pleases. True liberty in its complete sense has two parts: *personal* or individual liberty, consisting of the free exercise of one's own will and conscience; and *political* or social liberty, consisting of one's security and safety while living among peers in an ordered and civil society.⁶ Both elements must be present for liberty to exist. Therefore, establishing a government that both guarantees the natural right to exercise conscience freely in pursuit of one's happiness, and to do so within a society that holds this right inviolable and secure from unjust interference by others, *is* the very essence of forming a more perfect union. This is the majestic work the Framers pursued when establishing the Constitution. It is what John Adams called the "divine science" of the perfect government for liberty—enabling liberty to appear in its highest perfection.⁷

With this clear understanding, John Adams, perhaps above all his peers, caught the political vision of Montesquieu. Adams understood that an indispensable safeguard against tyranny and the guarantee of true liberty lies in the separation of the executive, legislative, and judicial powers of government. Like Montesquieu, Adams comprehended the subtle but significant difference between independence and liberty. A nation may win its independence, but a people will achieve liberty only when government protects their natural rights and refrains from abusing their

delegated authority. Accordingly, in 1780, Adams included the concept of separation of powers in the Commonwealth of Massachusetts Constitution, which was the first time in the history of the world that the concept had been adopted as a form of government. A few years later he ensured it was in the U.S. Constitution, hoping to see arise in America an “empire of liberty” of free people, without one noble or one king among them.⁸

The U.S. Constitution advances the principle of separation of powers in remarkable and profound ways that builds on the brilliance of Montesquieu and early efforts of Adams in pursuing the perfect government for liberty. Both men discerned that each of the departments of government must be separate in its functions but also subject to the checks of the others two, lest one department become abusive in performing its functions to the peril of the people’s individual and collective liberty. Power must check power by the arrangement of things, and bulwarks beyond mere parchment are needed to safeguard the people against the encroaching spirit of power. James Madison, as a central architect of liberty, joined in this noble pursuit of perfect government and, in addition to composing the first drafts of the U.S. Constitution with its progressive system of checks and balances, devoted five Federalist Papers (Nos. 47-51) to explain the wisdom of the principle. Madison’s masterful hand elevated the political principles of his predecessors into an elegant constitutional system that both diffuses power to protect liberty and integrates these dispersed powers into a workable government: As Justice Jackson has written, “It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”⁹

Our nation’s other greatest Founders shared the political intelligence and constitutional acumen of Adams and Madison. Among them, Thomas Jefferson, Alexander Hamilton, and George Washington particularly understood the critical constitutional principle of separation of powers, including the U.S. Constitution’s system of checks and balances. “The leading principle of our Constitution is the independence of the Legislature, Executive and Judiciary of each other,” Jefferson explained.¹⁰ To James Madison, Jefferson wrote, “The principle of the Constitution is that of a separation of Legislative, Executive and Judiciary functions, except in cases specified. If this principle be not expressed in direct terms, it is clearly the spirit of the Constitution, and it ought to be so commented and acted on by every friend of free government.”¹¹

Alexander Hamilton concurred: “The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other.”¹² “For I agree, ‘that there is no liberty if the power of judging be not separated from the legislative and executive powers.’”¹³

Finally, consider the wise admonition of George Washington in his Farewell Address concerning the significance of the fundamental constitutional principle of separation of powers, which included a strict admonition to all those who would fulfill the trust afforded by the American people when serving in their government:

It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the

departments in one, and thus to create, whatever the form of government, a real despotism. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositaries, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. *To preserve them must be as necessary as to institute them.*¹⁴

Washington further warned in explicit terms against those who might be tempted to unwisely institute arbitrary changes to a coordinate branch of government for political gain by reminding them that the *only* legal and proper manner to change the delicate balance among the people’s disseminated powers among their three branches of government is by constitutional amendment, as expressly set forth in the Constitution. He was most resolute on this point: “But let there be no change by usurpation; for through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.”

And finally, we have Washington’s conditional promise concerning the fundamental constitutional principle of separation of powers. It was given directly to every future generation that will inherit and carry on America’s standard of self-government to the world: If we honor the precepts set forth in the Constitution and “resist with care the spirit of innovation upon its principles” ... then “*Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian.*”¹⁵

The U.S. Constitution safeguards the American people provided that we stand fast in the liberty and constitutional principles where-with its authors have made us free. Unfortunately, too few today understand the significance of the constitutional principle of separation of powers and its coordinate system of checks and balances. Too few serving in government refrain from the seductive tendency to venture into the field of a coordinate branch to which they were neither elected nor appointed. We as lawyers and judges, as guardians of the Constitution, have a responsibility to educate them and to adhere to these constitutional principles ourselves, when applicable. As Montesquieu taught when writing the essays that guided our Founders on the truest principles of liberty and government: Our business here is “not about making people read, but about making people think.”¹⁶ May it be said of us as we attend to the standard raised up by our Founders, that we fulfilled our duty and preserved true liberty. The tribute paid by Voltaire to Montesquieu expresses the gratitude that we owe to our American Founders and all those engaged in the cause of freedom: “The human family had lost its title deeds—Montesquieu found them and restored them to their owner.” ©

Endnotes

¹THE FEDERALIST NO. 47 (James Madison). *See also*, THE FEDERALIST 51 (James Madison) (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”)

²The 2020-2021 FBA presidential messages focus on five foundational principles of the U.S. Constitution: popular sovereignty, federalism, separation of powers, the Bill of Rights, and the rule of law.

³*See generally* MONTESQUIEU, THE SPIRIT OF LAWS, Book XI,

continued on page 12

principle that Congress, not the Court, holds responsibility for the abrogation of tribal sovereignty); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (clarifying that only Congress can grant state court authority that would infringe upon the inherent sovereignty retained by Indian tribes to adjudicate claims arising within their reservations).

⁴³See, e.g., *Little River Band of Ottawa Indians*, 788 F.3d at 543-544; *Mashantucket Sand & Gravel*, 95 F.3d at 180; *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

⁴⁴*Menominee Tribal Enters.*, 601 F.3d at 670; *Merrion*, 455 U.S. at 144-45; *Montana*, 450 U.S. at 565-66.

⁴⁵*Mashantucket Sand & Gravel*, 95 F.3d at 180; see also *Little River Band of Ottawa Indians Tribal Government*, 788 F.3d at 546 (describing tribal power over non-members as being at the “periphery” of “inherent tribal sovereignty”); *Merrion*, 455 U.S. at

144-45; *Montana*, 450 U.S. at 565-66.

⁴⁶See, e.g., JAMESTOWN S'KLALLAM TRIBE TRIBAL CODE, tit. 3 Labor Code, https://jamestowntribe.org/wp-content/uploads/2018/05/Title_03_Labor_Code_9_12_14.pdf (last visited Jan. 31, 2021); MASHANTUCKET PEQUOT TRIBAL NATION EMPLOYMENT RIGHTS CODE, tit. 31, [http://www.mptnlaw.com/laws/Single/TITLE%2031%20MASHANTUCKET%20EMPLOYMENT%20RIGHTS%20LAW%20\(MERO\).pdf](http://www.mptnlaw.com/laws/Single/TITLE%2031%20MASHANTUCKET%20EMPLOYMENT%20RIGHTS%20LAW%20(MERO).pdf) (last visited Jan. 31, 2021); LITTLE RIVER BAND OF OTTAWA INDIANS FAIR EMPLOYMENT PRACTICES CODE, Ordinance #05-600-03 (July 28, 2010), www.lrboi-nsn.gov/images/docs/council/docs/ordinances/Title_600-03.pdf (lrboi-nsn.gov) (last visited Jan. 31, 2021).

President's Message continued from page 4

Ch. 4 (1748). (“Liberty is a right of doing whatever laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.”) The term “trias politica” or “separation of powers” was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, the 18th century French social and political philosopher. His treatise on political theory and jurisprudence, more than twenty years in the making, is one of the great works in the history of political thought, inspiring both the Declaration of the Rights of Man and of the Citizen in France and the U.S. Constitution.

⁴Montesquieu declared that there is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice. It was avowedly for the public good that Socrates was put to death, that the Puritans were driven from England, and that French revolutionaries sent thousands to the guillotine. The fact that a people rule through self-government is certainly no guarantee that liberty will prevail. The citizens of Greek and Roman republics possessed public rights, but no individual rights in the modern sense. The U.S. Bill of Rights was intended as a limitation of the “sovereignty of the people” and their representative government in favor of the liberty of *all* the people.

⁵MONTESQUIEU, *supra* note 3.

⁶These two aspects of liberty may be referred to by multiple names, including “Liberty of the Will” or philosophical liberty versus civil liberty or social liberty, the latter concerning the limits of power that are exercised by society (i.e. government) over the individual in order to achieve societal security. Note that extremes in either form of these two aspects of liberty naturally lead to anarchy or totalitarianism, respectfully, and abate true liberty.

⁷John Adams, *Thoughts on Government* 1 (1776). <https://www.nps.gov/inde/upload/Thoughts-on-Government-John-Adams-2.pdf> (“[A]s the divine science of politics is the science of social happiness, and the blessings of society depend entirely on the constitutions of government, which are generally institutions that last for many generations, there can be no employment more agreeable to a benevolent mind than a research after the best.”) Montesquieu believed that a nation having political liberty as the direct end of its constitution, if its principles were sound, would achieve liberty in its highest perfection. MONTESQUIEU, *supra* note 3, at Book XI, Ch. 5.

⁸John Adams, *Letter to Count de Sarsfield* (Feb. 3, 1786), <https://founders.archives.gov/documents/Adams/99-01-02-0493>.

⁹*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁰Thomas Jefferson, *Letter to George Hay* (June 20, 1807), <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl180.php>.

¹¹Thomas Jefferson, *Letter to James Madison* (Jan. 22, 1797) https://www.loc.gov/resource/mtj1.020_1107_1108/?sp=1&st=text (emphasis added).

¹²THE FEDERALIST NO. 71 (Alexander Hamilton).

¹³THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁴George Washington, *Farewell Address* (1796) <https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript> (emphasis added).

¹⁵*Id.*

¹⁶MONTESQUIEU, *supra* note 3, at Book XI, Ch. 20.

Editorial Policy

The *Federal Lawyer* is the magazine of the Federal Bar Association. It serves the needs of the association and its members, as well as those of the legal profession as a whole and the public.

The *Federal Lawyer* is edited by members of its Editorial Board, who are all members of the Federal Bar Association. Editorial and publication decisions are based on the board's judgment.

The views expressed in *The Federal Lawyer* are those of the authors and do not necessarily reflect the views of the association or of the Editorial Board. Articles and letters to the editor in response are welcome.