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THE INDETERMINACY OF THE SEPARATION OF POWERS IN THE AGE OF THE FRAMERS

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“[W]hat happened to separation of powers notions as the framers’ generation and the government during Washington’s presidency faced practical problems of governmental organization and the conduct of government[?]”¹ Professor Casper’s answer to this central question of his essay is very similar to that given us in recent years by Louis Fisher, another close student of the period.² Both the framers and the men participating in the first administration under the new Constitution (often, of course, the same persons) were concerned more with improving the efficiency and capabilities of the national government than with creating a system of government based on the abstract maxims of political philosophers. As Fisher put it, when the framers referred to foreign writers such as Montesquieu, “they did so to embellish an argument, not to prove it. The argument itself was grounded on what had been learned at home. Theory played a role, but it was always circumscribed and tested by experience.”³ Professor Casper reveals to us the same practical, nondoctrinaire men operating the new governmental institutions. Politics and concern for efficiency were far more important in determining governmental procedures in the Washington administration than theories of government. In Casper’s words, “[s]eparation of powers notions played a supportive role, but the views expressed were not doctrinaire; in part because there was no clear doctrine.”⁴

This latter point is especially important and is the subject of my comment. From the time when the idea of separation of powers

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1. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989).

2. See L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* (1972).

3. *Id.* at 4-5.

4. Casper, *supra* note 1, at 261. Maeva Marcus’s Comment on Casper’s essay comes to much the same conclusion about the Justices of the Supreme Court at this time. Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269 (1989).

first became popular in North America, much disagreement prevailed as to what institutional arrangements would satisfy the doctrine. The first state constitutions were said to incorporate a proper separation but were attacked immediately for not doing so. Both the Articles of Confederation and the Constitution were criticized for not satisfying the doctrine, although it was not long before the latter was being extolled as the definitive manifestation of the separation of powers. This absence of agreement about the institutional arrangements required by the doctrine probably encouraged its use as a rhetorical weapon with which to belabor political opponents or legitimize one's own constitutional preferences, rather than as a clear guide for the construction of a safe and effective system of government. Such absence of agreement was not confined to the United States, for it occurred also in seventeenth-century England when the doctrine was first articulated and continues in our own century with respect to forms of government different from our own.⁵ Disagreement about the doctrine is probably inherent because, as stated in *The Federalist No. 47*,⁶ a large variety of institutional arrangements can satisfy the separation of powers norm. The most extreme embodiment is not necessarily the best, for it might reduce the achievement of other values.

Most late eighteenth-century American accounts of the separation of powers doctrine were very superficial. Rarely does one find an explanation for why such a separation is desirable beyond vague references to its necessity in achieving "liberty" and avoiding "tyranny,"⁷ two highly emotive words dear to eighteenth-century Anglo-American rhetoric. In contrast, the seventeenth-century Englishmen who first urged a separation of legislative and executive power had fairly clear objectives in mind: to limit government officials by legal rules (the "rule of law"), to provide for the accountability of government officials, to eliminate a powerful group bias (that of government officials) from the legislature, to allow for governmental checks and balances, and to promote government effi-

5. See W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 37-65 (1965); Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in *SEPARATION OF POWERS—DOES IT STILL WORK?* 65 (R. Goldwin & A. Kaufman eds. 1986).

6. *THE FEDERALIST* No. 47 (J. Madison).

7. See Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, *supra* note 5, at 66.

ciency.⁸ As public statements during the late eighteenth century indicate, Americans often lost sight of these reasons for not allowing the same people to exercise legislative, executive, and judicial powers.

Professor Casper limits his essay to a historical narrative of aspects of American government in the age of the framers relevant to separation of powers issues. In his own words, he makes no attempt "to question modern constitutional law and its interpretations from a historical vantage point."⁹ I wish he had, for surely the events he describes have important implications for American lawyers and judges when applying the separation of powers doctrine today. Let me suggest two implications, the first briefly, the second at somewhat greater length.

First, the absence of a clear articulation of the separation of powers doctrine leads modern courts to apply the doctrine without understanding its purposes. As in the days of the framers and possibly in part as a result of the superficiality of thinking about the separation of powers at that time, lawyers and judges today continue to invoke the doctrine without indicating either the intended goals of the separation or the range of institutional arrangements that might satisfy the doctrine. Without an idea of the values to be maximized by separating the exercise of legislative, executive, and judicial powers, intelligent discussion about the institutional means for achieving the values is impossible. Ironically, a doctrine conceived originally to minimize partiality in government and to assure the accountability of executive officials was used recently to frustrate efforts to attain those objectives through the use of special prosecutors appointed by the judiciary, rather than by the branch of government suspected of breaking the law.¹⁰

Second, from the time of the framers, the distinction between legislative, executive, and judicial powers has been inexact and highly misleading. Professor Casper reminds us that the doctrine of the separation of powers is not stated explicitly in the Constitution,¹¹ and that the Senate defeated later efforts to include it in

8. *See id.* at 68-70.

9. Casper, *supra* note 1, at 212.

10. *See Morrison v. Olson*, 108 S. Ct. 2597 (1988) (challenge to the constitutionality of the Ethics in Government Act).

11. Casper, *supra* note 1, at 221.

the Bill of Rights.¹² Nevertheless, commentators frequently maintain that the doctrine is implied in the first three articles, in which Congress is given "[a]ll legislative powers" granted in the Constitution,¹³ the "executive power" is vested in the President,¹⁴ and the "judicial power of the United States" is vested in the Supreme Court and inferior courts created by Congress.¹⁵ What the Constitution does not tell us is the meaning of the terms "legislative," "executive," and "judicial power."

The framers clearly were not functioning as political theorists, carefully distinguishing each type of power. Nor were they relying solely on the traditional British understanding of governmental activities considered legislative or executive.¹⁶ Yet the framers and their English forbearers did share the view that legislative power involved much more than simply enacting general legal rules and that executive power involved immensely more than executing those rules. Indeed, during the seventeenth century, the term "executive power" usually included what has been labeled "judicial power" since the eighteenth century.¹⁷ Furthermore, the terms "legislative power" and "executive power," which date in English only from the seventeenth century, were coined to refer, not to single governmental functions, but to the variety of functions exercised by the two houses of Parliament on the one hand and those exercised by the monarch, his officials, and his advisers, on the other hand. Executive power was then, as it remains today, particularly multifunctional. As Herman Finer observed, the executive is the "residuary legatee in government after other claimants like Parliament and the law courts have taken their share."¹⁸ Finer's

12. *Id.* at 222. Had it been adopted, Madison's proposed amendment would not have helped contemporary courts interpret the Constitution in terms of the separation of powers, for it in effect merely said that each branch of government could exercise only those powers granted to it by the Constitution. *See id.* at 221.

13. U.S. CONST. art. I, § 1.

14. *Id.* art. II, § 1.

15. *Id.* art. III, § 1.

16. For example, the framers gave to Congress as part of its legislative function powers such as declaring war and coining money, which in England were part of the King's executive prerogatives.

17. *See* W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS*, *supra* note 5, at 5.

18. H. FINER, *THEORY AND PRACTICE OF MODERN GOVERNMENT* 575 (1949). For a perceptive discussion of the problems of defining "executive" which concludes by taking Finer's approach, see King, *Executives*, in 5 *HANDBOOK OF POLITICAL SCIENCE* 173 (1975).

point was that the monarch originally held all governmental power. Over the years, autonomous institutions, including the houses of Parliament and the law courts, took over certain of his powers. Everything that remained, including some authority to make laws, came to be termed "executive power." The residuary character of this term would not, in itself, have caused problems of definitional indeterminacy had "legislative" and "judicial" powers been defined in terms of single governmental functions. The concept of legislative powers that we inherited from England, however, was itself multifunctional, and, in addition to making laws, included taxation, appropriation of public funds, and impeachment and trial of officials accused of abusing their authority. Additionally, as we have seen, the framers further expanded the scope of legislative powers and at times, as in the case of the appointing power, were extremely uncertain as to which branch to assign a particular governmental function.¹⁹

The framers and their predecessors perceived legislative powers as appropriate for a deliberative elected assembly of equal members and viewed executive power as appropriate for a hierarchically organized institution with a single person or small council at the apex. However, a consensus has never existed as to which government actions belong to each type of organization. In some cases, whether a function is given either to the legislative or to the executive branch probably has no bearing on the quality of government. In other cases, however, the allocation of an activity to one branch of government rather than to another could be critical to maintaining the rule of law, the accountability of officials, and the efficiency of government. Concern for the achievement of such objectives led to demands for the separation of powers. One would hope that if our courts employ that doctrine at all—and it would probably be no loss if they did not—they do so in the same manner as its seventeenth-century authors rather than with the formalism that President Verkuil deplors in his contribution to this symposium.²⁰ Given the indeterminate scope of legislative, executive, and judicial

19. See Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1061-70 (1987).

20. See Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

powers that has existed historically, judges should have little confidence in their ability to assign various governmental activities to one or another of these three categories.