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EARLY VERSIONS AND PRACTICES OF SEPARATION OF POWERS: A COMMENT

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It is an honor to be asked to comment on Dean Casper's interesting and thoughtful essay. More needs to be said, however, about the historical context of separation of powers. This comment has three parts. The first section is methodological. The second section involves a brief discussion of several aspects of Massachusetts constitutional history and its Constitution of 1780. The third section discusses the peculiar problems of drawing any conclusion, even an oblique one, about separation of powers from an early episode involving a foreign relations or war powers issue.

I.

No one needs to be reminded of the difficulties inherent in using selected episodes in constitutional history as a basis for reaching a major conclusion about the meaning of the text of the federal Constitution of 1787. Casper is, therefore, appropriately cautious about the significance of his essay. Nevertheless, because we are charmed and interested by his fascinating stories, we run the risk of being influenced too much by the message that separation of powers ideas were indistinct and relatively insignificant. In the aggregate, the events Casper presents overly deemphasize separation of powers notions. To support this point, I will focus specifically on the context of the early constitutional period.

The period after the adoption of the federal Constitution of 1787, from which most of Casper's examples are drawn, was a period dominated by the politically anesthetizing presence and influence of George Washington. While Washington magisterially presided over the newly formed government, the civil order was not totally secure or immune from fears of foreign or domestic chal-

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lenges and disruptions. Indeed, as Casper notes,[1] many believed that the British were behind the Algerine pirates.

The dominance of the "Father of the Country," the fear of foreign threats, and the natural human desire to work together cooperatively in the early phase of any human endeavor explain a fair amount of what Casper describes. These episodes do not likely shed much light on the unspecified doctrines of separated and shared powers set out or implicitly adopted in the Constitution of 1787. My methodological point, therefore, is that an analysis of separation of powers that is based on early practice after the adoption of the Constitution is particularly difficult because of the unique political situation at that time.

II.

Conversely, a similarly sensitive look at the episodes and practice of separation of powers in the colonies and states prior to the adoption of the Constitution of 1787 might provide more reliable historical information. Specifically, an examination of both Massachusetts history before the adoption of its Constitution of 1780 and the text of that Constitution provides a useful counterweight to the episodes Casper describes. Limiting one's focus to Massachusetts has, however, two unavoidable risks. First, Massachusetts may be unrepresentative, particularly on a single issue, such as the significance of the doctrine of separation of powers. The high degree of similarity between the Massachusetts Constitution of 1780 and the federal Constitution of 1787 reduces this risk, however. Second, the Massachusetts Constitution may not offer direct comparison to doctrines implied in the federal Constitution. Although this difficulty exists, it does not vitiate the comparison, because not only was Massachusetts a very important state, but the timing of and the individuals involved in the design of its Constitution were significant.

A detailed knowledge of Massachusetts legal and political history from 1691 until the outbreak of the Revolution suggests that political thinkers would have preferred and intended to adopt a fairly strict and formal view of a notion of separated powers in the

1. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 253 (1989).

Constitution of 1780. The period from 1691 is the Provincial Period—the period of the second charter of the Massachusetts Bay Colony.[2] The Charter, in bold brush, provided for a royal governor, an executive council, a popularly elected general court or assembly,[3] and courts. The Charter was a "mixed" constitution, combining royal, aristocratical, and popular elements, and it made no explicit reference to separation of powers.

The Provincial Period was characterized by tension and conflict between the royal governors and the general court. This pervasive tension does not shed direct light on the extent of Massachusetts' attraction to notions of separated powers. A number of particular incidents during this period, however, shed indirect light on the separation of powers aspects of the Constitution of 1780 and perhaps on the larger American attitude toward separation issues. Two episodes are illustrative: the dispute over the salaries of the judiciary in the 1770s and the dispute over whether the Governor could refuse to accept an executive councilor elected by the General Court. The episode involving judicial salary has been treated thoroughly by Dean Barbara Aronstein Black of Columbia.[4] In sum, the Provincial Charter, consistent with contemporary English practice, did not provide a life term, a guaranteed salary, or even theoretical independence for judges. Judges were appointed by the governor with the advice and consent of the council.[5] Their salaries were appropriated by the legislature, which frequently was slow to pay agreed salaries.

From roughly 1770 until 1774, a serious dispute existed between the royal governor and the "popular" local faction that controlled the house of representatives. The respective combatants were at times unhappy with the judges, their rulings, their independence, and royal appointees. In the midst of this ongoing dispute, however, a consensus developed that judges should be appointed for

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2. *See* 3 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1870 (1909). The colonists referred to the Massachusetts Bay Colony as the Province of Massachusetts Bay.

3. The Charter of Massachusetts of 1691, *reprinted in id.* at 1878.

4. Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 LAW & HIST. REV. 101 (1985).

5. The Charter of Massachusetts of 1691, *reprinted in* 3 F. THORPE, *supra* note 2, at 1879.

good behavior, that their salaries should not be politically vulnerable, and that they should not be easily subjected to control by government officials.[6] In particular, the legislature strongly resisted the effort of the Crown to control such salaries. The original version of article XXX of the Declaration of Rights portion of the Constitution of 1780, which was revised to endorse fully the idea of separated powers, provided: "The judicial department of the state ought to be separate from, and independent of, the legislative and executive powers."[7] Article I of chapter III of the Frame of Government portion of the Constitution of 1780 provided also that "[a]ll judicial officers, . . . shall hold their offices during good behavior."[8] Yet such judges could be removed by an address, a mechanism that generally did not require the commission of a high crime or misdemeanor.[9]

A second episode of pre-Revolutionary history that helps illuminate separation of powers concepts involved the appointment of governor's councilors and house speakers. Although fitting executive or governor's councils into a tripartite approach to separated powers is difficult today, the Massachusetts Constitution of 1780 provided for such a council[10] for several reasons. First, Massachusetts had a successful experience with a council during the Provincial Period. The council provided the general court some continuing power over the executive, namely, the royal governor, when the general court was not in session. The council also gave the general court a role in appointments powers that the Charter conferred on the governor. Second, the council's existence formalized a pattern of requiring the governor to confer with a group of senior officials before acting.

The Charter of 1691 provided that the members of the council had to be elected by the general court.[11] On one occasion, the General Court elected a Boston physician, John Clark, who was identi-

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6. Black, *supra* note 4, at 159-62.

7. J. ADAMS, *Observations on the Reconstruction of Government in Massachusetts during the Revolution*, in 4 THE WORKS OF JOHN ADAMS 230 (1851).

8. Constitution or Form of Government for the Commonwealth of Massachusetts of 1780, *reprinted in* 3 F. THORPE, *supra* note 2, at 1905.

9. *Id.*

10. *Id.* at 1879.

11. *Id.* at 1882.

fied with the "popular" or anti-royalist party. The Royal Governor refused to "accept" him as a member of the council.[12] Immediately thereafter, the General Court elected Clark as its Speaker. The Royal Governor, Samuel Shute, sent the following message to the House upon receiving notification of Clark's election: "I Accept the Choice of John Clarke . . . ." The House, in turn, replied icily that it had informed the Governor "for Information only, and not Approbation."[13] The Charter was later amended to require the Governor's approbation as to the election of a speaker.[14]

The struggle over judicial independence and the election of John Clark might demonstrate only the existence of ongoing royal-colonial tension. Yet both episodes shed light on the Constitution of 1780 and its generalizations about the separation of powers. Like the federal Constitution, the Massachusetts Constitution assigned each branch a denominate function, "executive," "legislative," or "judicial," but the final version of article XXX of the Declaration of Rights concluded:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[15]

This more explicit article replaced the original formulation of the idea of separation of powers in the Constitution that had been limited to the judiciary.[16]

III.

An early incident involving the foreign relations and war powers, such as the Algerine pirates episode, is unlikely to be a reliable indication of the meaning to be ascribed to the generalities of the

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12. *See* Osgood, *John Clark, Esq., Justice of the Peace, 1667-1728*, in LAW IN COLONIAL MASSACHUSETTS 1630-1800, at 110 (D. Coquillette ed. 1984).

13. *Id.*

14. *Id.*

15. Constitution or Form of Government for the Commonwealth of Massachusetts of 1780, *reprinted in* 3 F. THORPE, *supra* note 2, at 1893.

16. *See supra* note 7 and accompanying text.

doctrine of separation of powers. The primary reason for its unreliability was the fragile situation in which the former colonists felt themselves in the immediate post-Revolutionary period. Fear of Britain continued, distrust and later horror at France were not uncommon, and fear of internal fracture ran deep. It was a lonely and frightening world for *all* of the leaders of the new Republic. That Washington and Jefferson proceeded very cautiously and with full congressional involvement regarding the blackmail undertaken by the Ottoman satraps operating on the Algerian coast should come as no surprise.

There is a second reason why an incident involving the war powers is unlikely to be representative of the true meaning of separation of powers. Again, a look at the Massachusetts Constitution of 1780 is helpful. In a now repealed article VII of chapter II describing executive power, the governor was made "commander-in-chief of the army and navy" with power to "assemble in martial array, and put in warlike posture, the inhabitants" of the Commonwealth and "to kill, slay, and destroy, . . . by all fitting ways, enterprises, and means whatsoever, all and every" enemy.[17] Except for this provision and one requiring that the general court confirm the existence of any rebellion, the Constitution of 1780 was silent on war matters. This silence is improved only slightly in the federal Constitution of 1787—and that document's vagueness has led to a series of vexing and seemingly insoluble questions in recent years about the power of the President vis-a-vis the Congress to direct foreign relations in a situation short of a declared war.

That the text of the federal Constitution is vague should not be puzzling. First, although the former colonists had just fought a war, the major disputes between the royal governors and the colonies in the immediately preceding seventy years generally did not revolve around war and peace issues because the Crown was needed to protect the colonists militarily. Certain aspects of making war concerned the colonists and usually were incorporated in provisions of constitutional documents, such as the grant of all-inclusive power to the legislature to initiate and enact appropria-

17. Constitution or Form of Government for the Commonwealth of Massachusetts of 1780, *reprinted in* 3 F. THORPE, *supra* note 2, at 1901.

tion and taxing measures.[18] Also, soldiers could not be quartered forcibly except in wartime pursuant to law or by consent of the home owner.[19]

A second reason why the division or sharing of the war and foreign relations powers was not specified in the text of the Constitution was the absence of any particularly strong episode in which the Crown abused these powers during the seventeenth century. The perceived abuses of Charles I were: (i) refusing to call a parliament, (ii) trying to levy taxes without authorizing legislation, (iii) operating a set of courts that noxiously attempted to enforce conformity to the Anglican religious settlement, which was not universally popular, and (iv) surrounding himself with autocrats like Archbishop Laud and sycophants like Buckingham.[20] Charles I and Charles II, and James I and II for that matter, were not identified with abusing the war or foreign relations power. As a result, the Constitution of 1787 did not address the separation aspects of the war and foreign relations powers except through the generalities of functional separation and the specific rules about sharing powers such as the executive veto.

The crucial question, therefore, is whether much can be read into the leanness of the text on war powers. In *United States v. Curtiss-Wright Export Corp.*,[21] Justice Sutherland suggested that the President is really the successor of the British Crown. Casper's essay implies that early practice suggests that full sharing and equal participation occurred even in the foreign relations and war powers areas. I am sure Dean Casper reflects early practice accurately, but I am unsure that this practice is a more convincing key to the meaning of the text than Justice Sutherland's recourse to first principles.

IV.

In summary, even if the facts Casper recounts are accurate and complete, they do not elucidate separation of powers issues much. The Constitution of 1787 represents a serious commitment to sepa-

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18. *Id.* at 1892.
19. *Id.*
20. *See generally* 1, 2 C. HILL, REFORMATION TO INDUSTRIAL REVOLUTION (1967).
21. 299 U.S. 304, 316-29 (1936).

rated powers while also specifying some obvious examples of sharing of powers. This commitment was not an abstraction but a function of the history and memory of the former colonists. As we struggle with the questions of the validity of legislative vetoes, the budget balancing act, and appointment of special prosecutors, we must confront and continue to recognize this commitment.