

## Ichabod: Addendum: Constitutional Filters: Madison's Separation of Powers; Amendment 17: States Lose Power to Check; Restraining the Supreme Court

### V. Addendum: Constitutional Filters:

- 1- Our Client Nation's federal government is designed to supply a balance of power among its three branches and function under a principle called "separation of powers."
- 2- A brief summary of how the Founding Fathers decided upon the form of our tripartite government and how its offices were to be filled are important to our study.
- 3- The Founders were a group of well-read, highly educated men who studiously and earnestly examined the best minds of history's eminent figures in the field of human government.
- 4- Their deliberations in Philadelphia lasted almost three months – June 25 through September 17, 1787. Fifty-five men gathered there to frame a document that, when ratified, would create a new government. Their objective is expressed in their Preamble to the Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

- 5- The 54 days they met in Congress were filled with spirited debate that probed with great intensity and scrutiny the thinking of America's greatest minds who had studied the writings of the prominent thinkers of antiquity.
- 6- The leading thinker behind the Constitution was James Madison. It will be helpful in this portion of our study to have a general idea of what Madison hoped to, and eventually did, accomplish at Philadelphia. This overview is taken from *Decision in Philadelphia* by Christopher and James Collier:

Like many eighteenth-century thinkers, Madison ... accepted the idea ... that nations and their governments were constructed on social contracts. The basic theory of the social contract was that power initially belonged to the people by innate, natural right. They could dispose of this power as they liked. To form a state they would contract among themselves to join together in a union. Then they would make a second contract with their rulers which would delegate certain powers but reserve all other authority to the people.

Madison believed ... a group of people could sit down and devise a contract by which they would be governed. Second, Madison accepted the fact that human beings were by nature neither altogether good nor altogether evil but a little bit good and a little more evil. "Human beings," he maintained, "are generally governed by rather base and selfish motives, by suspicion, jealousy, desire for self-aggrandizement, and disinclination to do more than is required by convenience or self-interest, or exacted of them by force." (p. 47)

Above all, James Madison was intent on controlling power. Summing up, he said, "If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." (p. 48)

Embedded in this statement, which comes from *Federalist* No. 51, is the belief that government must be powerful enough to be effective and to control unruly factions in the society, but not so powerful as to be able to interfere with the legitimate liberties of the citizens. It was the great conundrum: how do you give government enough power without giving it too much? This was the central issue that would face the men at Philadelphia: it was what the Constitutional Convention, at bottom, was all about.

As a corollary, it was also widely believed that only a homogeneous nation with common ethics and attitudes could operate as a republic. A republic was a commonwealth, a nation that was organized to promote the welfare of all, and in which government was structured to reflect the will of the people, if small enough, otherwise through representatives. (p. 49)

A second virtue of the extended republic, Madison believed, was that it would certainly require the indirect election of most national office-holders, placing them a step or two away from the voters, and thus insulating them from the temporary passions of the mob. (p. 50)

The distinction between the American system and most others grew out of the recognition that the states would have to play a considerable role in the national government. The people would insist on it.

Madison meant to lodge as much power as he reasonably could in the national government. He justified this desire from the theoretical principle that power ultimately was lodged in the people, and only they could distribute it. From this concept flowed several other ideas. One was that ...the legislature should be proportional to the population of the states. (p. 51)

Proportional representation became for Madison a sine qua non of any new government. This line of thought led Madison to another conclusion that seemed to follow logically. If the people alone could delegate power, any new scheme of government that came out of the Philadelphia meetings would have to be ratified by them, not simply approved by state government. Madison therefore decided that if the Convention should write a new Constitution, it should be approved by state ratifying conventions. Madison's view was that the properly convened people could distribute their power as they liked. (pp. 52-53)

Madison wanted a strong national government based on proportional representation in order to curb the power of the states; he wanted the separation of powers with its checks and balances, in order to curb the power of the national government. Everything in Madison's plan was meant to curtail, contain, constrain power wherever it might lie.<sup>1</sup> (p. 53)

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<sup>1</sup> Christopher Collier and James Lincoln Collier, "Madison Plans a Government," chap. 5 in *Decision in Philadelphia: The Constitutional Convention in 1787* (New York: Random House, 1986), 47-53.

- 7- After eight weeks of debate, deliberation, and compromise the Framers decided upon the system established in the seven articles of the Constitution. Its dispersion of power, which in every case received its delegation from the people, was extremely close to what Madison envisioned. Here is an excellent synopsis of the Constitution's "separation of powers" in Clarence Carson's *The Beginning of the Republic* :

To prevent the domination of one branch by another and enable them to check one another effectively, the Founders came to believe that each branch should have a separate and distinct source of power. Only thus could they be sufficiently independent of one another. What they hit upon was this. The House of Representatives would be chosen by the people generally; the Senate by the state legislatures, thus representing the state governments; the president by an electoral college, chosen for the purpose and in a manner directed by state legislatures. To complete the system, members of the Supreme Court were to be appointed by the president with the advice and consent of the Senate. By these devices they provided for a mixed government. (p. 98)

The powers of government are *dispersed* in the United States. This system extends the check-and-balance idea to coordinate governments, each exercising the power of government over the citizens. The national government checks the states by exercising certain powers itself, and the Constitution prohibits the states to exercise specified powers. The states check the central government both by the central government's dependence upon the states (for elections) and by having powers reserved to them alone.

The most important check of the states upon the central government was supposed to be that the state legislatures elected the members of the Senate and that each of the states was represented by an equal number of senators. The idea was that the state governments would be represented in the Senate ... a means for the states to defend themselves from and check the national government.<sup>2</sup> (p. 99)

- 1) It is instructive to note that the check and balance of senators elected by the duly elected legislatures of the separate states was changed in 1913 by the Seventeenth Amendment:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.

*The Constitution*  
Amendment XVII

- 2) The Seventeenth Amendment changed two words in article I, section 3 of the Constitution:

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one Vote.

<sup>2</sup> Clarence B. Carson, "The Making of the Constitution," chap. 5 in *The Beginning of the Republic: 1775-1825*, vol. 2 of *A Basic History of the United States*. (Greenville: American Textbook Committee, 1984), 98-99.

- 3) Under article I, section 3, each State was represented in the national Senate by two men *chosen* by its *Legislature*. The Seventeenth Amendment transferred power away from the state government over to an *election* by the *people* thus removing what Madison considered a very important “filter” within his system that stressed separation of powers. Dr. Carson elaborates on this subject:

A republic is “a state in which the supreme power rests in the body of the citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them.” (p. 100)

For a government to be republican in character, it must be based on popular consent from the governed. But above all what the Founders wanted was to establish a good government. And to do that they generally believed it was necessary to bring to bear upon governing the best ideas, the best minds, and men of the highest capabilities and motives. Madison called the process by which this was to be done “the policy of refining the popular appointments by successive filtrations.”

Therefore, in the plan they devised they provided not only for representation but also a filtering of the popular will through successive electoral and appointive checks. For example, the members of the Senate were to be chosen by state legislatures. The state legislatures themselves were chosen by popular vote. Thus, a filtering could be expected to take place. The filtering to arrive at judicial appointments was even more extensive. The president, who appointed judges, was to be elected by an electoral college, whose members might be appointed by state legislatures, themselves chosen by popular vote. [The judicial] appointment would go through further straining by the advice and consent of the Senate which was necessary to its completion. This filtration and straining was an essential part of republican government, as conceived by the Founders.<sup>3</sup> (pp. 101-102)

- 8- The Framers were confident that this “filtered” government would insure a balance of power among the three branches of government. The oldest delegate at Philadelphia was skeptical but supportive.
- 9- On the day the document was signed, September 17, 1787, Benjamin Franklin, 81 years of age and infirmed, asked fellow Pennsylvania delegate, James Mason, to read for him the text of his prepared speech. It said in part:

Mr. President, I confess that there are several parts of this constitution which I do not approve, but I am not sure that I shall never approve them. For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. I doubt too whether any other convention we can obtain may be able to make a better constitution. It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies. Thus I consent, Sir, to this constitution because I expect no better, and because I am not sure that it is not the best.<sup>4</sup>

<sup>3</sup> Carson, *The Beginning of the Republic*, 100-101.

<sup>4</sup> Collier and Collier, “George Mason and the Rights of Man,” chap. 22 in *Decision in Philadelphia*, 255.

- 10- Unfortunately, the Constitution, written by men, was not perfect, although nearly so. Yet the belief that “filtering” would somehow prevent lifetime-appointed Supreme Court justices from arrogating to themselves power was not considered a major concern.
- 11- It was not long before such arrogance began to capture the minds of the justices. The problem has continued to mount until today it has reached the point of judicial tyranny and outright rebellion against the Founding Fathers.
- 12- This opinion is among the concluding comments contained in the final chapter of the Collier’s *Decision in Philadelphia*:

The delegates to the Constitutional Convention, clearly, made some very wise and rather sophisticated decisions on some very basic questions. It was one of the most extraordinary intellectual adventures ever undertaken by a group of human beings.

But they were human beings, and it seems to us that in [several] areas they failed to think their way through to the best solution. (p. 268)

It is our belief that the Convention failed adequately to deal with the question of judicial review **[the power of the Supreme Court to invalidate the acts of government officials as disallowed by the Constitution]**. The delegates recognized that somebody would have to decide when laws were in conflict with the Constitution. They assumed it would be the courts. But the idea of specifically giving any one body the last word troubled a good many of them, and in the end they deliberately left the matter vague.

The result was that the Supreme Court arrogated these functions to itself. In general, this was a good thing. If the Convention had dealt with the problem of judicial review, it would almost certainly have limited the power of the Court to interpret the Constitution as broadly as it has done.

The power of the Supreme Court to interpret the Constitution is what has given the document the flexibility necessary to deal with changing conditions. Yet it is certain that the delegates would have been horrified to see how broadly the Court has used its interpreting power. They believed, at bottom, that if final power had to lie anywhere, it ought to be in the legislature, which they saw as the primary voice of the people. They certainly did not expect the judiciary to be dealing with day-to-day details of school systems, prisons, and fire departments as they do today. (p. 269)

We are inclined to agree. It seems to us that the Supreme Court is setting national policy on a wide variety of issues that ought properly to be decided by Congress. A president who by chance is able to make a number of appointments to the Court may well leave a Court with a social philosophy which a decade later may be wholly out of tune with the wishes of the people. (The Congress, of course, has constitutional authority to take back control in most of these areas, but without a wide popular mandate it is unlikely to make the effort.)<sup>5</sup> (pp. 269-70)

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<sup>5</sup> Collier and Collier, “The Most Remarkable Work,” chap. 23 in *Decision in Philadelphia*, 268-70.

- 13- Whatever do you think the gentlemen Collier had in mind? How is it possible for Congress to stem the power of the Supreme Court? Could Congress, should it so desire, rescind the aberrant emanations of conjured constitutional penumbra if it so desired? Certainly we need to be informed of this magical source of our temporal salvation.
- 14- An excellent article on this solution is the subject of the July 29, 2002, cover story in *National Review* by Ramesh Ponnuru:

Judicial errors are so hard to correct-and the potential remedies are now so weakened-because we have come to hold an inflated view of judicial authority. We think it natural that judges should have the last word on constitutional matters. We habitually treat the Constitution as though it were whatever the Supreme Court says it is. We assume that the Court has the job of determining the limits of everyone else's powers, which means, of course, that it has more power than everyone else. Such power, effectively unchecked, is bound to be abused.

#### HOW TO CHECK THE COURT

There is, however, a way to start changing these assumptions. The Constitution grants Congress the power to limit the jurisdiction of the federal courts. **Article III, section 2**, explicitly gives Congress the power to limit the appellate jurisdiction of the Supreme Court ( "... **the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.**"). The power of Congress to limit the jurisdiction of the lower federal courts is implied. **Article III, section 1**, grants Congress the power to create the "inferior Courts," which has to include the power to establish the scope and limits of their jurisdiction. (The Constitution spells out Congress's ability to limit the jurisdiction of the Supreme Court because the Constitution, rather than Congress, establishes that court.)

A simple majority of Congress and a presidential signature can regulate, or establish exceptions to, the jurisdiction of the federal courts. A constitutional amendment is not required. Such a bill would reduce the power of the judiciary-rather than merely recall a few judges (as impeachment would) or make an impotent gesture of defiance to the courts (as the congressional flag-burning statute did). In addition, the effort to pass a bill would be educational even if it failed to pass, since it would challenge prevailing misconceptions about the proper division of interpretive power over the Constitution.<sup>6</sup>

- 15- When Amendment XVII repealed article 1, section 3, stipulating that senators were to be chosen by popular vote rather than by an act of state legislatures; when the restraint of the Bill of Rights placed on the Federal government by the states was reversed by section 1 of Amendment XIV so this same restraint was also imposed on the states by the Federal government; and when there is serious debate currently underway about amending the Constitution so that the Electoral College is replaced by popular vote for president, then we find that the Constitution's filtering process, designed for the suppression of power among the three branches of government, is being gradually slackened and as a result the power of government has become more and more concentrated in Washington rather than being disbursed throughout the fifty states.

<sup>6</sup> Ramesh Ponnuru, "One Branch among Three," *National Review*, July 29, 2002, 31-33.

- 16- This is a trend toward totalitarianism and away from freedom. And as in all cases of historical downtrends in client nations, the duty of restoring order is placed on believers where doctrine resident in their souls becomes the sine qua non for recovery.
- 8- Paul issues four mandates to Christian soldiers in times of testing:
- Προς Κορινθίους Α 16.13-** Γρηγορείτε, στήκετε ἐν τῇ πίστει, ἀνδρίζεσθε, κραταιοῦσθε [ *Grēgoreite, stēkete en tēi pistei, andrizesthe, krataiousthe!* ]!
- 1 Corinthians 16:13 -** Be on the alert [ *Grēgoreite: anticipate an attack* ]! Stand fast in the faith [ *stēkete en tēi pistei: maintain integrity under pressure* ]! Display courage [ *andrizesthe: display the courage of a spiritual adult, i.e., πρόμαχος, promachos: a front ranker* ]! Be strong [ *krataiousthe: be empowered by the Holy Spirit and Bible doctrine* ]!
- 9- If we, and others like us, fail in our obligation to keep these commandments, then Operation Ichabod is the certain destiny of this client nation.
- 10- In conclusion, here is a Latin summary of the situation:
- Sic transit gloria mundi* (Thus passes away the glory of the world). *Gaudet tentamine virtus* (Virtue rejoices in being tested). *Illegitimi non carborundum* (Don't let the bastards grind you down).

(End 2008 Veterans' Day Special: *Ichabod: The Glory Is Gone.*)