



UNLOCKING
THE
FEDERALIST PAPERS

Edited by
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We attempt in this volume to accomplish what the subtitle suggests: unlock the full wisdom, thought and power of the *Federalist Papers* to countless generations of young Americans.

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Distributing the Mass of Power among its Constituent Parts

Separation of Powers in the *Federalist Papers*

by John Shu

Federalist Papers referenced in essay: #47, 48, 51

A. The authors of the *Federalist Papers* supported dividing the national government's power amongst three separate, co-equal branches of government: the legislature, the executive, and the judiciary. The proposed constitution further separated the legislature into two sub-branches, the House of Representatives and the Senate, in order to guarantee the legislature did not become too powerful, and minimize the possibility of tyranny by majority.

B. In the *Federalist Papers*, we encounter specific mention of “checks and balances” as a way to restrict government power and prevent government from consolidating and/or abusing its power. The proposed constitution essentially organized the governmental system so each branch of government had its own distinctive powers and was able to block certain acts of the other two branches, and yet simultaneously be co-dependent on the other two branches to operate.

C. In No. 47, Madison examines “*the particular structure of this government, and the distribution of this mass of power among its constituent parts.*” His goal was to explain the proposed U.S. Constitution's separation of powers among the executive,

legislative, and judicial branches of government. The genius of separating power and duties among three different branches of government is that in doing so it simultaneously accommodates and takes advantage of man's natural tendencies to act out of self-interest.

D. Many influential people worried, with respect to separation of powers, the proposed U.S. Constitution did not go *far enough* in separating powers amongst the different branches of government. Many of the former colonists still had all-too fresh and painful memories, earned in blood and sacrifice, of the Revolutionary War. The last thing the former colonists wanted was to create something that could become another form of tyrannical government. The *Federalist Papers* attempted to calm those fears and rally support to ratify the proposed constitution.

E. In No. 47, Madison directly reached out to those concerned that the proposed constitution did not go sufficiently far in separating the powers amongst the executive, legislative, and judicial branches. Madison began by affirming his genuine belief in the vital importance of separating powers, and the principle of separation of powers was uncontroversial and inviolate. Madison wrote “*accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.*”

F. Another commonly expressed concern was the proposed constitution did not contain specific language clearly separating government powers amongst the three branches of government. Madison's key response was a specific constitutional declaration of the separation of powers was neither necessary nor a reliable safeguard against tyranny. Madison further argued that complete separation among the branches was neither necessary nor feasible. He acknowledged the proposed constitution *intentionally*

intertwined the three branches and simultaneously made them separate and co-dependent on each other.

G. Madison asserted this structure did not violate the principle of separation of powers. He cited Montesquieu, a French philosopher, who argued tyranny results when one branch of government simultaneously holds the powers of another branch. Madison, however, argues that Montesquieu “*did not mean that these departments ought to have no PARTIAL AGENCY in, or CONTROL over, the acts of each other* (No. 47).” The most important elements of separation of powers are (1) no branch exercises all the powers of another; (2) there be security of each branch against the others; and (3) the proposed constitution contained those elements. Completely separating the branches of government such that they have no interaction with each other is a practical impossibility.

H. Madison analyzed the individual constitutions of several states to enlist support for ratification and to bolster his argument that absolute separation of powers was not ideal and impractical. Madison wrote even though certain states had specific “separation of powers” language in their constitutions, “*there is not a single instance in which the several departments of power have been kept absolutely separate and distinct* (No. 47).” Many states had constitutions which contained language clearly separating the executive, legislative, and judicial branches. Madison notes, however, “*the legislative, executive, and judiciary departments have not been kept totally separate and distinct*” and in fact were intertwined. Madison’s point was if the several states did not think their own constitutions did not violate the principle of separation of powers, then neither did the proposed U.S. Constitution.

I. Madison continues his separation of powers discussion in No. 48 where he again reaches out to critics and skeptics of the

proposed constitution. Many were concerned that too much power might reside in the legislative branch, and it would be too easy for the legislature to assume executive and judiciary powers without effective opposition from those branches. One could reasonably argue that the legislature is the branch which is most likely to abuse power because the proposed constitution granted it a degree of greater power compared to the other two branches, such as the power of the purse, the power to declare war, and the power to regulate commerce amongst the states.

J. The arguments in No. 48 demonstrate Madison's sensitivity to potential legislative tyranny, and shows the proposed constitution would prevent it. Madison was wise enough to realize that writing down each branch's power boundaries is insufficient. He noted,

the conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands. (No. 48)

K. Madison explained the structural differences amongst the legislature's, executive's and judiciary's powers. The proposed constitution intentionally provided structural overlap in the defined powers assigned to each of the three government branches.

L. In No. 51, Madison first uses the specific term "checks and balances," a common term today. The *Papers* largely deal with the allocation of national power, preventing any one branch of government from becoming too powerful, and protecting individual citizens from abuses of power. *Federalist* No. 51 shows the Framers of the proposed constitution intentionally designed a

government that (1) would protect the citizens from tyranny, (2) would most likely succeed at their long-term goals for the young republic, (3) would be intentionally inefficient at times, and (4) would do this while taking advantage of, instead of fighting against, man's inherent selfish and self-protective nature. Madison again stresses his belief that each branch should be largely independent from the other while also arguing absolute separation of the branches was not only impossible, but harmful.

M. Madison argued the proposed constitution would protect the people from oppression of the majority and also oppression of the minority. Madison supported dividing the national government in a way such that each branch in and of itself would be a type of safeguard against tyranny. Because each branch of government was simultaneously separate and interdependent, it had to work together with the other branches in order to achieve the goals of national government. Moreover, to reign in the power of the legislature, the Framers separated the legislature into two sub-parts, independent and interdependent on each other; they bolstered the executive's power by giving veto power over legislation; and they provided the legislature a counterweight to override the veto through a supermajority.

N. The constitutional structures that are an important part of checks and balances and conducive to a just government are as follows:

Legislative Branch (Article I)

- Checks the Executive Branch through
 - impeachment power (House of Representatives)
 - trial of impeachments (Senate)
 - selection of President (House) and Vice President (Senate) if no majority of electoral votes

- override of presidential veto
- advice and consent on executive appointments (Senate)
- power to tax and spend
- power to raise armies
- power to declare war
- the president must, from time to time, give Congress information about the state of the union
- Checks the Judicial Branch through
 - advice and consent of judicial nominees (Senate)
 - impeachment power (House)
 - trial of impeachments (Senate)
 - power to start constitutional amendment process
 - power to set courts inferior to the Supreme Court
 - power to set jurisdiction of courts
 - power to set the size of the Supreme Court

Executive Branch (Article II)

- Checks the Legislature through
 - veto power
 - Vice President serves as president of the Senate and provides tie-breaking vote
 - executive is commander in chief of the military
 - may provide recess appointments
 - may call one or both houses of the Legislature into session, in case of emergency
 - may force adjournment when both houses cannot agree on adjournment

- executive's compensation may not be diminished
- Checks the Judiciary through
 - power to appoint federal judges
 - pardon power

Judicial Branch (Article III)

- Checks the Legislature through
 - judicial review of laws
 - lifetime appointment of judges assuming “good behavior”
 - judges' compensation may not be diminished by Congress
- Checks the Executive through
 - judicial review
 - chief justice of the United States presides over a Senate trial regarding presidential impeachment

O. Madison believed the Constitution, in both its explicit structure and its implicit assumptions about human nature, would ensure the ultimate goal of government: justice. *“It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit (No. 51).”*