

Firewalls for Freedom

As the power of fire must be harnessed with care, so the might of government must be constrained by constitutional “firewalls” to prevent our freedom from going up in smoke.



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Limiting government: The Constitution created by the Founding Fathers gave us something extraordinary: a government of law rather than a government of men.

This article originally appeared in the November 20, 2000 issue of THE NEW AMERICAN. The firewalls described herein are now far more threatened by the conflagration of Big Government than was the case two decades ago, yet those walls still exist and can still be manned by constitutional firefighters at all levels of government to extinguish the threat.

by Gary Benoit

In today’s “enlightened” times, the federal government is supposed to accomplish as much as it can for the American people by churning out as much

legislation as possible, as quickly as possible. According to this dangerous view of government, the system is working well so long as the president and Congress can agree on a legislative agenda, and the Congress can expeditiously pass that agenda and submit it to the president for his signature. This is particularly the case when the legislation addresses whatever the most important issues of the day might be, as determined by public opinion polls: health care, education, campaign finance reform, etc. On the other hand, according to this view, the system is operating poorly when the legislation becomes bogged down in gridlock or is rejected outright.

But much of what is now called “gridlock” used to be known as “checks and

balances.” Granted, those checks and balances made government less efficient, but they also made it far more difficult for government to exceed its delegated powers. If efficiency in government were the ideal, the Founding Fathers would have established a dictatorship — the most efficient form of government of all. They limited the powers of government, divided those limited powers among various branches, and then provided each branch with means to check unconstitutional usurpations by other branches, because they were far more interested in preserving freedom than they were in making government efficient. They recognized that man has a sinful nature, and that without such safeguards government offi-

Legislative Branch



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Walls of separation: The Founding Fathers intended to create a government that could not easily encroach upon the liberties of the people. They therefore separated the limited powers of government into three branches: Congress, the Legislative Branch (**above**); the Executive Branch (**page 38**); and the Judiciary (**page 39**). The powers the states did not cede through their adoption of the Constitution are “reserved to the states respectively, or to the people,” further protecting against central government usurpation.

cialists would eventually abuse and exceed the specified powers of their office.

“If men were angels, no government would be necessary,” James Madison noted in *The Federalist*, No. 51. “If angels were to govern men, neither external nor internal controls on 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.”

Because of the nature of man, freedom cannot exist without government, just as it cannot coexist with total government. Some government is necessary to protect basic rights; too much government results in the loss of all rights. George Washington is reputed to have compared the potentially destructive power of government to that of fire: “Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master.”* Although we’ve been unable to find this familiar quotation in Washington’s actual writings, the statement, regardless of whether or not he actually said it, accurately reflects the prevailing sentiment

* In another common version of this quote, the word “dangerous” appears in place of “troublesome.”

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of the Founding Fathers. Like fire, government is necessary. But like fire, government can be a detriment as well as a benefit to mankind. A fire that is intended to heat a home can end up burning down the home if adequate precautions are not taken to contain it within the fireplace. Throughout history, because of a lack of adequate precautions, government has all too often consumed the liberty it is supposed to protect. The Founding Fathers, recognizing this fact, built firewalls into the Constitution to contain the force of government and insure that it performs a useful service.

Enumerated Powers

One such firewall is the enumeration of the specific powers that the federal gov-

ernment may exercise. Those powers, as Madison noted in *The Federalist*, No. 45, “are few and defined” and “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.” Federal jurisdiction, he explained in *The Federalist*, No. 14, “is limited to certain enumerated objects, which concern all the members of the republic [that is, the states], but which are not to be attained by the separate provisions of any.” All other powers are to be retained by the states or the people. This principle was well understood and was reaffirmed by the 10th Amendment, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Executive Branch



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Under the Constitution, the federal government may not impose any law it chooses. Demagogues may whine about the “will of the majority,” but the Constitution created a government of law, not of men, a republic and not a democracy.† Laws must be constitutional; they must be based on a specific enumerated power.

Separation of Powers

The Founding Fathers, though, did much more than create a government of law that specified and limited the powers of the federal government. They also divided those few specific powers among three branches: the Legislative; the Executive; and the Judiciary. And they further subdivided the Legislative branch (Congress) into two chambers: The House of Representatives and the Senate.

Madison believed so strongly in the necessity of these firewalls that he warned, in *The Federalist*, No. 47: “The accumulation of all powers, legislative, executive,

† For more information about the fundamental differences between a republic and a democracy, see “*A Republic, If You Can Keep It*” by John F. McManus. It is available online at thenewamerican.com/a-republic-if-you-can-keep-it/

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.” Moreover, the Founders fortified these firewalls by giving each branch special powers so that it would have a natural tendency to jealously guard against, as well as means to check, usurpations on the part of other branches. In *The Federalist*, No. 51, Madison expressed the intent thusly:

The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

Madison continued: “It may be a reflection on human nature that such devices should be necessary to control the abuses

of government. But what is government itself but the greatest of all reflections on human nature?”

Under our constitutional system, the Congress is the most powerful of the three branches of government, since it is vested with “all legislative Powers herein granted” (Article I, Section 1). Neither the president nor the Judiciary can make laws, except by usurpations tolerated by Congress.

The president is required to execute the laws passed by Congress. He does possess the power to veto legislation, but this check on congressional power can be overridden by a two-thirds majority vote of both houses. The president is also the commander-in-chief of the military forces, but this power is limited by the fact that only Congress can declare war and only Congress can raise armies.

In order for a bill to be sent to the president’s desk for his signature, it must be passed by both houses of Congress. But each house possesses specialized powers the other does not have. All bills for raising revenues must originate in the House of Representatives. But only the Senate can approve treaties, Cabinet-level appointments, and appointments to the Supreme Court. The process associated with impeachment — a particularly powerful check on the abuse of power — entails two steps: Only the House can impeach federal officials, but only the Senate can try impeached federal officials and throw them out of office.

The Congress can levy taxes and borrow money, but whatever money it appropriates must be for constitutional purposes.

The Supreme Court has the power to try cases pertaining to U.S. laws and treaties. But that body possesses original jurisdiction only in cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party” (Article III, Section 2). In all other cases, the High Court possesses “appellate Jurisdiction ... with such Exceptions, and under such Regulations as the Congress shall make.” The Congress could nullify judicial usurpations such as the infamous 1973 *Roe v. Wade* (abortion) decision simply by exercising this enumerated power. The Congress could even go so far as to abolish all federal courts with the exemption of the Supreme

Court, since it established those lower federal courts in the first place.

Federalism

The American system of government contains additional firewalls against encroachments on liberty by virtue of the fact that ours is not a single republic but a compound republic. Just as the federal government must abide by the U.S. Constitution, the state governments must abide by their respective state constitutions. This division of powers between the national and state governments is known as federalism.

In *The Federalist*, No. 51, Madison explained how this federalist approach provides “a double security ... to the rights of the people”:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments,

“In questions of power then let no more be heard of confidence in man; but bind him down from mischief by the chains of the Constitution.”

— Thomas Jefferson

and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The state governments, Alexander Hamilton explained in *The Federalist*, No. 32, “clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.” How different this approach is from that of other countries where the “states” or provinces do not possess sovereignty at all but are nothing more than regional, administrative subdivisions of the central government.

As already indicated, the powers delegated to the federal government “are few and defined.” Madison also stated in *The Federalist*, No. 45, that the powers retained by the state governments “are numerous and indefinite.” The latter powers, he elaborated, “extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” In *The Federalist*, No. 14, Madison wrote that the state governments “can extend their care to all those ... objects which can be separately provided for.” The Founders’ intent was to retain at the state level whatever powers could realistically be executed at that level, and to delegate to the federal government only those powers that could not be adequately handled separately.

The American federal system of government not only keeps most governmental powers closer to home where the people can keep a more watchful eye on officials entrusted with the exercise of those powers, it also makes possible experimentation in varying amounts of government without endangering the liberties of the nation as a whole. Just because the federal government does not possess a particular power does not necessarily mean that a state government may not exercise that power. It depends, in a few cases, on the federal Constitution, and in all other cases on the state constitution.

Admittedly, state governments can misuse and exceed their broad powers just as the federal government can (and has) exceeded its limited powers. Yet, as Georgia Congressman Larry McDonald reasoned in his book *We Hold These Truths* (1976):

Since the states were bound together in union by a Constitution which gave their citizens a common national citizenship, and which would

Judicial Branch

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not let states interfere with the liberty of citizens to travel and trade freely across state lines, there would be a restraining and corrective force on such misuse of power by the states.

If a state government went too far (or not far enough) in the use of its undefined powers, it would lose productive citizens and important businesses and other private organizations to other states. Experience and competition among the states would eventually force correction of the worst abuses and excesses by state governments.

Because the states were viewed as autonomous entities within their own spheres, they were given a significant voice in the federal government in the form of direct representation in the U.S. Senate. Each state has two senators, and prior to the adoption of the 17th Amendment in 1913 those senators were elected by the state legislature. This provided still another check on federal power since, as Madison explained in *The Federalist*, No. 62, “No law or resolution can now be passed without the concurrence, first, of a majority of the people [the House of Representatives], and then of a majority of the States [the Senate].” But this important firewall against the accumulation of governmental powers in Washington at the expense of the states has long since been eliminated. U.S. senators are now elected directly by the people, just as House members are.

The Founders’ Achievement

By defining the specific powers of the new federal government, the Founders were able to limit that body to its proper role of protecting God-given rights. By dividing governmental powers among various branches of government, and between the national and state governments, and by incorporating into the system important checks and balances, the Founders were able to deny the federal government means to overstep its intended purpose and become tyrannical.

The Constitution that the Founders so carefully crafted gave us something extraordinary: A government of law and not of men. The sovereign and immutable God-given rights of individuals may not



State powers are many and undefined, but as former Congressman Larry McDonald (D-Ga.) pointed out, “If a state government went too far (or not far enough) in the use of its undefined powers, it would lose productive citizens and important businesses ... to other states” because the federal government gives citizens a common national citizenship and does not let the states interfere in travel and trade across state lines. This is another important safeguard of liberty bequeathed to us by the Founding Fathers.

be violated by such a government, no matter how compelling the reason to do so may seem. Neither may the majority do so, acting through their government for some supposed “greater good.”

The Founders recognized that the people should have a direct voice in government, and for that reason they created a House of Representatives whose members are elected by the people and who are subject to frequent election (once every two years). But the Founders also recognized that total confidence in the people would be a mistake and so designed a government wherein even the popular branch of government — the House — would be restrained by the Constitution. Warning against such confidence, Thomas Jefferson wrote in the *Kentucky Resolutions*: “Confidence is everywhere the parent of despotism.... In questions of power then let no more be heard of confidence in

man; but bind him down from mischief by the chains of the Constitution.”

This the Founders did. And in so doing, they created the most nearly perfect form of government yet devised by man. The system is not perfect. But the Founders, recognizing this, incorporated amendment processes into the Constitution (Article V). On the other hand, they made those processes difficult so that the Constitution would not be altered based on the passions of the moment.

If the Founders were alive today, they would undoubtedly be horrified at the extent to which the Constitution is ignored, misinterpreted, and circumvented. But the problem is not the system itself, rather the perversion of the system. All that is necessary to restore good government is to abide by the Constitution — the very document that every member of Congress, every president, and every Supreme Court justice pledges to uphold. ■