

Defects of the Articles of Confederation, Part 4

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Synopsis: This is the fourth in a series on the weaknesses of the Articles of Confederation. Congress was the only institution under the Articles, which led to some problems.

James Madison mentions in *The Federalist Papers* #38 that putting all government powers in the hands of a few is inherently risky. He is referring to the fact that Congress was the only institution under the Articles of Confederation, a purely federal union organized under emergency conditions at the beginning of the Revolutionary War. He writes:

Is it improper and unsafe to intermix the different powers of government in the same body of men? Congress, a single body of men, are the sole depositary of all the federal powers.

The issues that arose specifically from this feature are due partly to the nature of deliberative legislative bodies, and partly to the concentration of such a wide variety of powers in a few hands. (The lack of adequate powers will be the subject of other editions of this series.) When an issue of importance came up, there was no mechanism within the Congress to address it, other than to debate or send to a committee for consideration, whereupon some resolution would be passed or defeated. It ended up being tasked with every type of problem, but was not ideally suited for those that required immediate attention or a definite determination. It had a nominal judicial function to render certain types of findings in disputes between the states, but no regular judicial function. It was also charged with managing the war effort and foreign relations, which sometimes require quick action.

But the larger risk was that all of these powers were lodged in one place. It was common knowledge among the leaders in the founding generation, from their knowledge of history and the observations of the great political theorists, that the best structure for both efficiency and protection of liberties was an inherent division of power within the government. Certain structures are inherently more efficient for certain objectives; but efficiency in government, carried too far, leads to a grasping for more powers to do more things efficiently; which in turn leads to a reduction in liberty as the government wields greater power. The best solution was to divide the government into branches with narrowly-defined powers, and let the mutual ambitions of each cancel each other out. While each branch has its legitimate sphere of power, the jealousy of the other branches keeps it within its proper limits.

One of the political theorists familiar to the founding generation was Charles de Montesquieu, who laid out his observations on divided government in his book *The Spirit of Laws* (1748). In Book IX, he points out the one nation on earth in which political liberty was the main objective of its constitution, that is to say, England. He proceeds to dissect the characteristics of the English system and how it promoted liberty in a general sense, writing in part:

"6. Of the Constitution of England. In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to things that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end to everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole people. But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves."

The desirability of a system of functional branches was so evident to the delegates to the federal convention, that the first set of resolutions on a new plan, offered by Edmund Randolph on 29 May 1787, called for separate legislative, executive, and judicial departments. On the same day (the fourth of the convention), Charles Pinckney put forward a draft of a constitution; it also called for the same three separate branches. The next day, Nathaniel Gorham proposed, and his motion was carried, to postpone the discussion of Randolph's first proposition about the general enlargement of the Articles of Confederation, and consider directly a general revision of the government, in these words [1]:

1. That a union of the states merely federal will not accomplish the objects proposed by the Articles of Confederation – namely, common defense, security of liberty, and general welfare.
2. That no treaty of treaties among the whole or part of the states, as individual sovereignties, would be sufficient.
3. That a national government ought to be established, consisting of a supreme legislative, executive, and judiciary.

The story of the Convention is how the delegates conducted the debate about the exact character of the government; whether it should be entirely national or entirely federal, or a mix; how the members thereof should be chosen, and what the duration of their offices would be; but from this point forward, there was little debate about the necessity and utility of a government with the three familiar branches, instead of Congress alone.

[1] Jonathan Elliot, *Debates on the Adoption of the Federal Constitution, in the Convention Held at Philadelphia in 1787, With a Diary of the Debates in the Congress of the Confederation, as Reported by James Madison*, Philadelphia; J. B. Lippincott & Co., 1881, Vol. 5, pp. 126-134