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SEPARATION OF POWERS DOCTRINE: HISTORICAL SOURCES

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It is a great pleasure to be here with you distinguished gentlemen representing the States of our Union as Chief Justices. It is an honor to have been asked by our President, Chief Justice Duckworth of Georgia, to be one of the speakers today. The portion of the subject to be discussed which has been assigned to me is The Historical Sources of the Doctrine of the Separation of Powers. I have not discussed States' Rights as it seems to me to be outside the subject to be presented. This subject is as important today as it was at any time in recorded history. Man's solution of fundamental problems of government affecting both the rule and the ruled has resulted in practice in the doctrine of checks and balances or of a mixed constitution or, as I shall refer to it, of the separation of the powers of government.

This was worked out in ancient days in a manner attributed to the wisdom of Lycurgus for Sparta, as to other empires or nations, as a result of experience through trial and error, and again, as in our nation, by definite plan embodied in a written constitution.

Philosophers have written upon our subject down through the ages. In the brief time I now have, I can do little more than mention four by name. Plato in his *Laws*, Book III, makes what is probably his first written reference to the subject. In that book he refers to the agreement among the three States of Argos, Messene and Lacedaemon (Sparta) and writes, "each of the three royal houses, and the cities under their sway, swore to one another, according to the

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laws, binding alike on ruler and subject, which they had made,—the rulers, that as time went on and the nation advanced, they would refrain from making their rule more severe; the subjects, that so long as the rulers kept fast to their promise, they would never upset the monarchy themselves, nor would they allow others to do so; and they swore that the Kings should aid both kings and peoples when wronged, and the peoples aid both peoples and kings.”

Polybius, who was born at Megalopolis about 208 B.C., thought that the best constitution was a combination of kingship, aristocracy and democracy and that Lycurgus had drawn up such a constitution for Sparta on that principle by a process of reasoning “untaught by adversity,” while the Romans had arrived at the same final result “by the discipline of many struggles and troubles,” “For,” said he as to Rome, “if one fixed one’s eyes on the power of the consuls, the constitution seemed completely monarchical and royal; if on that of the senate, it seemed again to be aristocratic; and when one looked at the power of the masses, it seemed clearly to be a democracy.”¹ Polybius’ relief in a mixed constitution affected those who drafted our federal constitution, and they also determined that liberty of the individual came through government limited by checks and balances and separation of powers.

There were many who followed who wrote to the same effect, but I shall refer briefly only to John Locke of England and to Charles-Louis de Montesquieu of France, philosophers who also had very great influence on those who drafted our constitution.

By adopting intellectually the theories of government of Locke, among which were the necessity of a limited government,² the English provided the arguments for our forefathers in bringing about our American Revolution. The Declaration of Independence is of the texture of Locke’s writings and limited government was one of his tenets and doctrines. Moreover, Locke’s writings had a powerful effect on the thoughts and writings of Montesquieu, as indeed they did on all of France in the Eighteenth Century. The most important work of Montesquieu was his *Spirit of the Laws* published in 1748. One of the foundation stones of his theory of sound and proper government was a balanced constitution, in other words a separation of

¹ 3 POLYBIUS, *THE HISTORIES*, Translated by W. R. Paton, in Loeb Classical Library 299; 301; 303 (London and New York 1923).

² TWO *TREATISES OF GOVERNMENT* (London 1690).

days of his life: that he may learn to fear the Lord his God, to keep all the words of this law and these statutes, to do them:

"That his heart be not lifted up above his brethren," (not his subjects, you will note) and that he never depart from the law.

That could have been the source of Bracton's maxim: "The King is below no man but he is below God and the law"⁴ and the similar phrasing of Sir Edward Coke to King James I.

The office of king was an elective one as provided in Deuteronomy⁵ from which I have partially quoted.

There is no provision for any legislative body in the government. The reason is evident since the Pentateuch contained the law for all future time and, since that law was Divine Revelation, it was immutable for Israel. The books of Exodus, Leviticus, Numbers and Deuteronomy contain almost-innumerable repetitions of the words: "These are the laws, judgments and commandments that the Lord your God has given you," in one form or another. Thus the legislative work had been done and the legislature was not needed.

On the other hand, the creation of an independent judicial system is specifically provided for in Deuteronomy.⁶ I shall read but one verse: "Thou shalt appoint judges and magistrates in all thy gates, which the Lord thy God shall give thee, in all thy tribes, that they may judge the people with just judgment."⁷

The general code of ethics of judges is outlined there in verses nineteen and twenty as well as in Leviticus;⁸ in Exodus⁹ and in Deuteronomy.¹⁰

The exclusive jurisdiction of the judiciary, created under Deuteronomy,¹¹ of which I have already quoted verse eighteen, is established in the next chapter of Deuteronomy.¹² Indeed, in Exodus¹³ there was envisioned and created the first system of judicial administration. You will notice from Deuteronomy,¹⁴ which I have quoted,

⁴ BRACTON, DE LEGIBUS AND CONSUEUDINIBUS ANGLIAE; in *Maitland, Selections from Bracton and Azo*, 8 SELDON SOCIETY PUBLICATIONS 65 (1895).

⁵ C. 17, Verses 14-20.

⁶ C. 16, Verses 18-21.

⁷ Number 18.

⁸ C. 19, Verses 15-35.

⁹ C. 18, Verse 21; c. 23, Verse 8.

¹⁰ C. 1, Verses 13-17.

¹¹ C. 16, Verses 18-20.

¹² C. 17, Verses 8-13.

¹³ C. 18, Verses 13-26.

¹⁴ C. 16, Verse 18.

the powers of government. May I quote three paragraphs from *The Spirit of the Laws*:

“We must have continually present in our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit; and if a citizen could do what they forbid, he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.

“Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these, it is not always found. It is there only when there is no abuse of power; but constant experience shows us, that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say, that virtue itself has need of limits?

“To prevent this abuse, it is necessary from the very nature of things, power should be a check to power.”

He said, further: “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 be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”

Having traced the existence and the demonstrated necessity, if a state or nation is to fulfill the basic needs of its people, of the Separation of Powers of Government back to the writings of Plato and down to the foundation of our republic, I should like now to go back again to ancient days—to the Old Testament and to Divine Revelation contained therein—which is accepted as such by all of us here assembled. The Pentateuch, the five books of Moses, was the Divine Teaching given to Israel. This clearly provides for a separation of powers—for an elected king, for statutes which must be obeyed and for a judiciary.

The monarchy, the executive branch, is specifically provided for in Deuteronomy.³ The monarch or king was there made subject and subordinate to the law. Indeed, he is directed in verse 18 “when he sitteth upon the throne of his kingdom, that he shall write him a copy of this law in a book” and in verses nineteen and twenty that “it [the book] shall be with him, and he shall read therein all the

³ C. 17, Verses 14-20.

that the judicial administration of the law is not within the province of the king but separate and distinct provision for it is made.

Generally speaking the power and influence of the judge varied with the extent of his recognition by the people. Thus, Samuel was early recognized by the people as a fearless and impartial judge. His influence and authority extended throughout the land and he became the first "circuit judge" in recorded history.¹⁵

Samuel, and this is important to bear in mind, belonged to the one other class or calling which furnished many of the leading Judges in ancient Israel—the prophets. Beginning with Moses, the first and foremost of the prophets, and continuing throughout the period of the existence of the prophets and prophecy, in many instances, and especially so in the earlier centuries, the prophet acted also as judge and was accepted as such by King and people. Moses acted as Chief Judge and organized the judicial system, according to Exodus.¹⁶ "Difficult matters" were referred to Moses by the inferior judges; simpler matters were decided by the latter—and the judges were to be available at all times. The judiciary was independent and its power separate and independent from that of the lay administrative officials.

The general conclusion must be drawn from all of the foregoing that the theory of separation of powers existed in the most ancient days of Israel and that from the very earliest days even the king was "below God and the law" and the powers of the judge were separate and independent and free from any restraint except that imposed by the law itself and the judicial ethics laid down therein as supplied by Divine Revelation.

In conclusion may I quote from an address made by Woodrow Wilson, when Governor of New Jersey, before the Kentucky Bar Association in 1911 which places proper emphasis upon our general examination of this phase of government. It is as follows:

"The notable, I had almost said fundamental, circumstance of our political life is that our courts are, under our constitutional system, the means of our political development. Every change in our law, every modification of political practice, must sooner or later pass under their scrutiny."

So my brother Chief Justices, we may learn both from Divine

¹⁵ Samuel (Kings) Book I, c. 7, Verses 15-17.

¹⁶ C. .18, Verses 18-26.

Revelation and recorded history that the liberty and dignity of the individual are best safeguarded by a separation of the powers of government *so that power shall be a check to power*. Checks and balances in government were no more important to Israel, Greece and Rome than they are to us today. The historic heritage which is ours must be nurtured and carefully preserved by us so that future generations may say of us, as we today refer to those ancient civilizations, that we gave new impetus and strength to the historic doctrine.