CONSTITUTIONAL LAW AND DEMOCRACY

КОНСТИТУЦИОННОЕ ПРАВО И ДЕМОКРАТИЯ

DREPTUL CONSTITUȚIONAL ȘI DEMOCRAȚIA

CHIȘINĂU

Conference on Security and Cooperation in Europe
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This book contains the reports presented at the "Constitutional Law" seminar by Andrew W.Lester, Professor of Constitutional Law at the Law School of Oklahoma City University USA.

Translation in Romanian
Rodica Druc

Translation into Russian
Yurii Vasiliev

Editor
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COMMENTS ON CONSTITUTIONAL LAW SEMINAR HELD IN CHIŞINĂU

The following are comments of Professor Andrew Lester on the Constitutional Law Seminar held in Chişinău, July 5th - 16th, 1993. Professor Lester was the director of the seminar. He is a professor of constitutional law at the Law School of Oklahoma City University and a partner in the law firm of Lester, Bryant, Solano, Pilgrim and Ganz in Oklahoma City, Oklahoma, USA. Other participants were Mr. Frederick Quinn, Director, Rule of Law Program, of the Conference on Security and Cooperation in Europe, Office of Democratic Institution and Human Rights (CSCE/ODIHR), Warsaw, and Ms. Gael Graham, Associate Professor of Law, Central European University, Budapest. The seminar was organized by the Central and East European Legal Initiative (Chişinău), The Soros Foundation (Chişinău) and the CSCE Mission to Moldova. The seminar was attended by a number of government officials from different ministries, parliamentary deputies from different parties, law professors, businessmen, and representatives of the country's minority groups and different regions.

Topics included:

1. The Constitution - a Fundamental Law
2. The sources of Governmental Power
3. A Short History of Federalism
4. The Separation of Powers - The Great Protection against Tyranny
5. Electoral Choices in a Democratic Society
6. Individual Rights - Liberty at Work
7. Constitutionalism, Democracy and the Rule of Law

Several other issues were discussed, including defining the various powers of the state, the relationship of international law to the constitution, ratification and amendment of the constitution, and miscellaneous other issues.

Each topic attracted some controversy. A couple of issues, however, attracted especial attention. Use of the word "federalism" seemed to be particularly troubling to some of the participants. Despite numerous and forceful attempts to define federalism as a non-political term which simply refers to a method of organization of

governmental powers, many of those in attendance wanted to equate the word with separatism. Interestingly there was a realization that some sort of decentralization of governmental powers would be necessary. Several people, including at least one parliamentarian, stated that there would be no solution without the approval of the Russian 14th army. There is a realization that a de facto devolution of power already exists. The word "federalism," however, remained anathema.

Indeed, federalism ended up taking several days to discuss. Originally, we had planned to devote the first Wednesday to discussing the federal and unitary options. Thursday, however, many of the participants seemed intent on debating against federalism. Some of the comments included rather harsh demands that the seminar sponsors no longer ever mention the concept. They included comments by one parliamentary deputy that we had spent too much time on federalism. Another parliamentarian averred that their was no reason that the unitary form of government could not find a place for national minorities. A third member of parliament tried to compare the standing of the Russian minority with that of the French in Algeria. He even referred to the Russians as a "forced minority," apparently attempting to prove that Russians have no right to remain in Moldova.

One of the interesting aspects of the entire debate on federalism is that the seminar participants equated federalism with minority rights. Although we emphasized federalism as a means of dealing with the nationalities issue, this is not the primary purpose of federalism. Instead, federalism, as we emphasized later in the symposium, is simply another type of separation of powers. It is a vertical separation of powers, a sharing of powers between the central authority and the local and regional governments.

There were some who confused federalism within a democratic framework with the misnamed federalism of the former Soviet system. Of course, as we discussed at the seminar, the two are wholly unrelated. The so-called federalism in the Soviet Union did not exist in reality, except at the moment of collapse. In my opinion, those who tried to confuse the issue by comparing American, Canadian, Swiss and German federalism with the Soviet system were doing so on purpose, with an eye towards scoring political points with their constituencies.

The organizers of the seminar would have spent no more than perhaps one and a half sessions on federalism. But many of the participants seemed intent on proving that federalism could not work in Moldova. Thus, we ended up spending most of Thursday, the

fist one-fourth of Friday, and part of the following Monday, discussing audience concerns related to federalism.

Other themes resounded throughout the seminar. The opening topic, the sources of governmental power, continued to provoke thought. Although the seminar participants were virtually unanimous in agreeing that the people should be the source of all power, there will need to be much work to ensure that residual power resides in the people. This became clear during some of the discussion of the individual rights sessions.

There appears to be widespread agreement that a strong statement of rights is necessary. But, there was significant debate on the questions of individual as opposed to collective rights, and, apparently little understanding of how a scheme of individual rights works within a constitutional framework.

In a system where the people retain residual power, a scheme of individual rights is especially powerful, because each person becomes a protector for the rights of all. In a system residual power belongs to the center, on the other hand, the statement of rights becomes even more vital, for otherwise the government can withdraw rights.

One participant stated that the people are not prepared for a system of individual rights. According to this person, the people do not understand that they can enforce their rights through a judicial system. This is so in part because the people do not believe that they can obtain justice.

The answer is education and the creation of a strong and independent judiciary. free from corruption. International organizations can help establish local non-governmental organizations which can act as watchdogs on the government. This, in the end, is precisely what Madison meant when he described the ideal political system as one in which there were so many interests that no one faction could control the mechanism of the government.

We also discussed electoral systems, and had a spirited debate on the matter. One parliamentarian strongly stated the need for a proportional system, asserting that no political party currently commands more than 7% popularity. He suggested that perhaps Moldova needed to have a proportional system for a transitional period, and later could switch to a majoritarian system. One professor countered that a majoritarian system was the only way to engender stability. He stated that if Moldova were to accept a proportional system, it should do so with eyes open to the fact that there would be continued and substantial government instability.

One of the last topics discussed was how a constitution should be ratified. Participants were interested in the ratification process both

"juridically" and "philosophically." Virtually all agreed that the constitution would not survive if it did not have strong popular legitimacy.

At the final regular session of the seminar, there was much discussion about possibly convening a constitutional convention with three constitutional experts from the international community present as consultants. A couple of the suggestions called for a French constitutional expert, a German constitutional expert, and even the director of the seminar to participate, perhaps in the late summer or early autumn of 1993. One Parliamentarian noted that right now the constitution was in the hands of the parliament. We indicated our belief that international organizations were more than willing to provide whatever assistance they could to respond to a Moldovan initiative. We reminded the participants of one of the overriding themes of the seminar, that a constitution is unique to each country, that it reflects the culture, traditions, and aspirations of the society, and therefore is a document for the country itself to prepare.

The seminar was a highly worthwhile endeavor. It had its difficult moments. But is was an experiment in Moldovan democracy which worked. It gave the participants some food for thought. With the publication of the articles presented to the seminar, the seminar will also do the same for the country as a whole.

THE CONSTITUTION - A FUNDAMENTAL LAW

By: Andrew W. Lester
Constitutional Law Specialist
Central & East European Law Initiative (CEELI)
American Bar Association
Address in USA:
119 N. Robinson, Suite 820
Oklahoma City, OK 73102

After an unequivocal experience of the inefficacy of the subsisting government, you are called upon to deliberate on a new Constitution for Moldova. The subject speaks for its own importance; comprehending in its consequences nothing less than the existence of Moldova, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

These words, with minor modifications, were written in 1787, by Alexander Hamilton, one of the Founding Fathers of the United States of America, about the crisis then facing America. These were the introductory words of the greatest political tract ever written by American hands, to support approval of the American Constitution. Yet, they apply not only to the United States of America of 1787, but to the Moldova of today.

The similarities between Moldova of 1993, and America of 1787, are significant: They had similar populations. The peoples of the newly independent Moldova and America, though once united, were deeply divided. Both had formerly been parts of a great empire. Both faced difficult, and seemingly incurable, economic problems.

Both entered into a process of trying to solve their problems. Now, Moldova has the opportunity to prove again that "societies of men are really capable of establishing good government from reflection and choice, and not to depend upon accident and force." The foundation-

a constitution, based on the rule of law, with a place for all the people of Moldova.

A prerequisite for discussing a constitution is to determine the source of governmental power. Where does the government get its power? There are two, and only two, possibilities. Either power comes from the state itself, or it comes from the people. In a modern, democratic society, only one choice is legitimate: Power emanates from the people.

Louis XIV of France stated, "L'etat, c'est moi." Where that statement is true, a constitution serves an extremely limited purpose. It does no good other than to make the people feel like the government is somewhat accountable, when in actuality it is not. If, on the other hand, power originates in the people, the constitution becomes the document by which the people freely decide to govern themselves. The government thereby has legitimacy not merely with the rulers, but with all the people, for whom the supposed rulers are, actually, mere servants.

The constitution sets the basic rules for the people to govern themselves. Actually, it is a compromise between two extremes. On the one hand, the people realize the need for government, to enhance their lives by providing the basic rules for social and economic activities. On the other hand, the people recognize that an overly powerful government is the major threat to liberty. Thus, a successful constitution is usually a short document, which confronts the fundamentals, the most basic issues facing the people.

A true constitution serves two purposes: It establishes a government; and it limits the powers of the government. It is a fundamental document. Nothing less. Nothing more. It should be long enough to accomplish its two functions, and no longer. It establishes the ground rules. Nothing less. Nothing more.

What are, or should be, the powers of government? If we remember that government is established to serve the interests of the people (and that means the interests of all the people, not just of one class or another), then we can begin to list the powers we want the government to have. Of course, one must always remember that the government will have only those powers which the people freely give to it. Thus, instead of assuming that government has power to do whatever it wants, except as limited by the constitution (the Louis XIV model), we start from the premise that government can do nothing, except that which the people specifically empower it to do.

Government should encourage and facilitate commerce, both domestically and internationally. Government is a means through which the people provide for a common defense and ensure domestic

peace. Through government, the people set norms by which they interact with one another. They set standards of conduct of what is and is not acceptable to society at large; with the aim that the people can safely lead their lives, and go about their day to day business.

This does not mean that government should grant all sorts of guarantees. Such guarantees are often hollow. More importantly, such guarantees come not from a government of limited powers, but from an all powerful government, which condescends to give the people some limited right (again, the Louis XIV model).

For example, review Article 18 of the 1977 Constitution of the Soviet Union. It reads:

In the interests of the present and future generations, the necessary steps are taken in the USSR to protect and make scientific, rational use of the land and its mineral and water resources, and the plant and animal kingdoms, to preserve the purity of air and water, ensure reproduction of natural wealth, and improve the human environment.

Is there any doubt that this Article 18 is a hollow promise from an all powerful government, as opposed to a limitation on the powers of government? And to what end? Did Article 18 stop Chernobyl? Or Tomsk 7?

Article 33 of the 1991 Romanian Constitution states that "the right to the protection of health is guaranteed." These words are nice. But what good are they? Are the health facilities of any country adequate to ensure such a right?

Even western democracies have fallen into the trap of granting hollow rights. What good is the provision of the current French Constitution, which guarantees to every citizen "the right to obtain a job"? For, despite this section, there are millions of unemployed French citizens.

Instead of talking about governmental guarantees, a constitution which properly seeks to promote liberty, and to inhibit tyranny, talks in terms of limited grants of power from the people, and in terms of restrictions even on those limited grants. Which provision provides for greater liberty, the one in which the government guarantees the right to free expression, or the one in which the people withhold from the government the very power to restrict free expression? That the answer is the latter is self-evident.

The Republic of Moldova is attempting to establish a government based upon the rule of law. This is the self-same concept as that originally theorized by Montesquieu and Locke, namely the separation of powers. Modern democracies recognize the centrality of keeping the various branches of government distinct from one another. Since

Locke and Montesquieu, the separation of powers has been considered the key protection against tyranny.

Almost 200 years ago, Thomas Jefferson, the author of the American Declaration of Independence and my country's third President, wrote that "the natural progress of things is for liberty to yield and government to gain ground." He also stated that it is "an axiom of eternal truth in politics, that whatever power in any is independent, is absolute also...." His point-while we must have government, we must also be aware that government is the greatest threat to liberty.

Although the concept of the separation of powers sacrifices a certain amount of governmental efficiency, it also provides the single greatest protection against tyranny. Interestingly, it ultimately promotes societal efficiency, by enabling a market economy to flourish, without undue governmental interference.

In stating that government poses the greatest threat to liberty, we must remember that government in a democratic society ultimately emanates from the will of the majority. Thus, a corollary to limiting the powers of the government and providing for the separation of powers is that the constitution should do so with an eye towards respecting the rights of minorities.

The majority needs little protection. The majority constitutes its own protection. But the minority, be it a large minority, a small minority, or a minority of one, can always suffer at the hands of the majority, and therefore deserves protection. Whether we use the term "human rights" or "individual liberty", a modern constitution must demonstrate to the various minorities, be they racial, ethnic, religious, political, economic, or otherwise, that they too have an equal place in society which the majority cannot simply withdraw on a whim.

This is what is right, and good, and just. It is also practical. For time has a way of turning minorities into majorities, and majorities into minorities. With the proper constitution, such a development is of little significance, other than in providing data for a census.

Should Moldova have a parliamentary or a presidential system? There are advantages and disadvantages to each. What is the best method for conducting elections? What is the relationship between a constitution and international law? How should the constitution provide for its own ratification and amendment? These are the issues the people must consider in preparing a constitution.

A constitution, however, should not merely be a document which lists rights. It is, as both Burke and Disraeli argued, more than the formal procedures of elections and the relationship among the various branches of power. A constitution is a reflection of the practices, instincts, legal systems and political culture of the people who make

up a society. It embodies the hopes and aspirations a society has for itself.

The Constitutional Law Seminar will focus attention on the need for a constitution to support a system based upon the rule of law. Participants, representing a cross-section of Moldovans, will take part in lectures, discussions, exchanges of ideas, and workshops designed not for speeches by partisans with an agenda, but to elicit ideas about the best possible provisions for a constitution for the Republic of Moldova.

The Republic of Moldova has the opportunity to design its own future. It is both an exciting and foreboding task, and yet a necessary task as well. The sponsors of the seminar hope that the seminar will provide a forum for facilitating that task.

Thank you.

THE SOURCES OF GOVERNMENTAL POWER

Government is the method by which a society regulates itself. Through government, the people establish the basic rules by which they live with one another, do business with one another, defend themselves, and engage in commerce with others. The purpose of government in a just society is to make the lives of the people easier, to enable them to interact with one another in a just and fair way.

There are two possible sources of power. Either power comes from the center, or it comes from the people. Of course, power ends up in the same hands regardless of its source. Nevertheless, identifying and comprehending the source of power is crucial, for that determination defines where ultimate power resides.

If power resides in the state, then a bill of rights is absolutely vital. For without a statement of rights, the people have no rights whatsoever, except by the grace of the government. Thus, the good offices of the government are all important. For without governmental grace, the people have no rights.

If, on the other hand, power emanates from the people, the powers of the government are limited, and the powers of the people are innumerable. In that situation, the government cannot act unless the people have specifically empowered the government to do so. The need for a statement of rights, though quite important, becomes less critical (although every modern democratic constitution contains such a statement).

Under the 1977 Constitution of the Soviet Union, the source of power was quite clear-power came from the center. According to Article 2:

The people exercise state power through Soviets of People's Deputies, which constitute the political foundation of the USSR.

Article 3 also stated:

The Soviet state is organized and functions on the principle of democratic centralism....

A review of Part II., Chapters 6 & 7, of the Soviet constitution, provides further clarification. Article 42 is good example. After stating that Soviet citizens have the right to health protection, the constitution provides how the state will ensure the right. In other words, without the guarantee of the state, no right exists.

Other constitutions contain similar language. Article 33 of the Romanian Constitution of 1991, for example, also states that "the right to the protection of health is guaranteed."

Instead of creating guarantees, a constitution which properly seeks to promote liberty, and to inhibit tyranny, contains limited grants of power from the people, and restrictions even on those limited grants. The question is: Who has ultimate power? If power begins in the state, the state can do as it pleases, except as it determines to limit itself. But what type of limitation does Article 42 of the Soviet Constitution provide? Or Article 33 of the Romanian Constitution?

I suggest that they are no limitation at all. They provide, in reality, no protection of rights whatsoever. They are empty promises, promises which the government will keep if it pleases, promises which the government will forget when it is convenient.

Such promises have no place in a democratic constitution for a state based upon the rule of law. They serve no purpose. They are, if I may borrow the metaphor, opiates. They give the people something to point to, to say that they have rights. But ultimately they are unenforceable.

Why are these so-called rights, in the end, not rights at all, but merely hollow promises? The problem is not necessarily bad intentions on the part of the governing elite (although such bad intentions indeed often present additional obstacles). The problem is that these rights come from an all powerful government which ultimately has no limitations at all.

Compare this situation with the constitution which assumes that ultimate power resides in the people. Such a constitution starts with the assumption that the people grant power to the government, but that they grant only so much power as they desire. In a democracy, in which power is not based upon military strength, terror, secret services, and the like, the people renew their grant of power each time they vote.

Every time an election is held, the people enable a new set of rulers to govern. But even this grant of power is limited. The new rulers can govern only for a short period of time. No other rulers are legitimate. Only those who have obtained the approval of the people have a mandate to govern, but only for a limited time. Thus, a constitution which limits the powers of government, and which provides for democratic elections, is a document which automatically renews itself with each election. The government gains legitimacy at the moment of ratification of the constitution, and regains legitimacy at each election.

That is the point of a democracy. Furthermore, that is the reason that, in a democracy, a constitution must protect the rights of minorities.

The majority needs no protection. The majority protects itself at

each election. But, the minority, be it racial, national, ethnic, political, language, social, economic or otherwise, and be it a minority of many, of few, or of one, cannot so easily protect its own rights. To assure that the minorities have an equal place in society, to ensure that bloodshed does not settle disputes with minorities, the people, in ceding power to the government, limit the powers of government generally, and then limit the powers of government so that the state cannot discriminate against minorities.

This is not merely just. It is also practical. Majorities do not always stay majorities. Time has a way of turning minorities into majorities, and majorities into minorities. With the proper constitution, such a development is inconsequential.

We will discuss these issues more fully in other sections of the seminar. We will, for example, see the interrelationship between the derivation of the powers of the government and civil and political rights, and national and federal systems.

For this evening, however, the point is this: Creating a government of limited powers provides the best means for allowing government to do the jobs it is supposed to do, while still assuring that government always remains the servant of the people, instead of the people being the servants of the government.

A SHORT HISTORY OF FEDERALISM

Under the present state of affairs in the Republic of Moldova, several terms, including "federalism", "nation", and "unitary", have come to mean things that are not inherent in the words themselves. They have taken on political meanings, even though the words merely represent different forms of governance for a country. Let us begin this evening's discussion by removing from these words any negative meanings or hidden agenda.

Federalism is a concept of governance under which regional governments retain some degree of autonomy from the central government, and yet remain a constituent part of the country as a whole. A federal state is to be distinguished from a unitary state, in which the central government retains all power, and does not provide for local self-governance.

Federalism is not, in and of itself, a bad word. It is a neutral word. It carries no values, no ideals, other than the simple concept it portrays of a system of governance in which state power is diffused among various related governments.

The word "federalism", as used in this context, does not mean secession. In fact, the concept of federalism implies that the various states are integral parts of the country as a whole. In this important respect, a federal state differs from a confederation. In a confederation, various independent states join together for a limited purpose, although each state retains virtually all attributes of sovereignty, of independence. Federalism, on the other hand, implies power sharing between a central government and the various regional and local governments which make up the country.

Federalism is, essentially, another type of separation of powers. In studying separation of powers, we think in terms of a horizontal sharing of power. The various branches of the central government exercise different aspects of the powers of the central government. Federalism is a vertical separation of powers. Regional and local governments share power with the central government. They exercise regional and local power, while the central government exercise power over countrywide issues.

Today, one thinks of Canada, Switzerland, the Federal Republic of Germany, and the United States of America, when using the word federalism in the context of a democracy. There are, of course, other federal democracies. What the four listed countries share in common, besides a commitment to a strong republican form of government,

is that they each, to varying degrees, allow for regional governments to make decisions which primarily effect those localities.

Some governmental tasks are local by nature. The maintenance and construction of streets primarily affect the people who live near the streets. The development of an industrial or economic base within a city or region, although it certainly has some effect on an entire nation, has its main impact on nearby residents. They will be the persons who work for the business, whose day to day lives are affected by the business, for better or for worse. For example, the residents of Chernobyl suffered far more seriously from the effects of the disaster which occurred there a few years ago than did residents of Vladivostock, although all felt the impact to some extent.

Proponents of federalism believe that the federal concept provides an additional, and often necessary, measure of security for liberty for individuals and minorities. In an official publication, the government of the Federal Republic of Germany stated the point as follows:

But the main purpose of federalism is to safeguard the nation's freedom.... The federal structure also enhances the democratic principle. It enables the citizen to engage in the political process in his own region. This gives democracy greater vitality.

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The federal system leaves room for experiments on a smaller scale and for competition.... For instance, a single state may try out innovative methods in, say, education which may later serve as a model for reform throughout the country.

Facts About Germany, Societaets-Verlag: Frankfurt am Main, 1993, at 133-134. In explaining the purpose of the federal plan of the then-newly proposed American Constitution, James Madison, the great Constitutional expositor, wrote:

The society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights sconsistsî in the multiplicity of interests....

J. Madison, The Federalist, No. 51.

The American federal form of government, with independent, sovereign states supporting it, has been central to the constitutional system. The method of its implementation balances two distinct political systems. The first, a confederation of absolutely sovereign states banding together to protect common interests, represents one

extreme. At the other end of the spectrum is the provincial model, in which the separate states or regions are mere vassals of the omnipotent central government. Local governments exist in that system only for efficient implementation of the orders of the ruling authority.

The American federal system recognizes the inherent dangers of either extreme. In fact, the American Constitution resulted from the failure of the previous confederation. The drafters of the Constitution specifically rejected the concept of a confederation, foreseeing the need for a strong central government. On the other hand, they also saw the wisdom of allowing the states to retain significant local and regional powers. Thus, the Constitution set up a system of checks and balances, not only among the three branches of government, but also between it as a unit and the several states.

Opponents of federalism tend to fear the division of a country into several parts. Some fear that federalism is identical with secession, that in a federal system, the various constituent parts will tend to try to break away from the central government. It cannot be denied that this is a possibility. All Moldovans know this to be true.

A true federal system, in a democratic society, however, tends to remove pressure from the center. Federalism, when properly constructed in a democracy, promotes freedom and diversity, while simultaneously protecting unity. In a democratic society, federalism acts as an additional, and in some cases even a necessary, check on the power of the state to govern at the expense of the minority.

As we have stated earlier, in a democracy, the majority has the right to exercise power. Because the greatest threat to liberty is the power the state, and in a democracy that power is exercised by the majority, the minority deserves protection. In the properly constructed federal system, each region has the right to govern itself on local issues while still submitting to the national authority on issues of national concern.

Perhaps the German federal system is the model which would be most comparable to Moldova. From 1933-1945, Germany had a unitary system of governance. National Socialist rule came from the center, and allowed for no regional governance. After the collapse of the Third Reich, the Federal Republic established a system in which three types of law-making powers exist: exclusive, concurrent and framework legislation.

Areas of exclusive competency of the national government in Germany include foreign affairs, defense, monetary matters, railroads, air traffic and some types of taxation. Areas of concurrent legislation, in which the states may adopt laws not covered by federal law, and

the national government may legislate only where a uniform law is necessary, include commercial law, nuclear energy, labor, property law, housing, shipping, roads, waste disposal, pollution and noise abatement. Framework legislation, over which the states have significant powers, include matters relating to education, conservation, water management and regional planning.

German states can also fill gaps in federal legislation. Such areas include cultural matters, local government law and police matters. As a part of local or municipal law, cities, through the states, generally may provide for local transportation, road construction, electricity, water, gas, local land use, schools, theaters, museums, hospitals, sports and various other matters. To support their programs, local governments raise their own taxes. They also receive additional funds from the national tax revenues, to enhance their own tax collections.

We have stated that a constitution is a reflection of the practices, instincts, legal systems and political culture of the people who make up a society. It embodies the hopes and aspirations a society has for itself. It is more than simply a written document. A constitution both emanates from and creates a political and social culture of the people who make up the society as a whole. Thus, it is not surprising to learn that federal systems, although similar to each other, differ from country to country.

Each country which has a federal system has its own peculiar history which originally supported the system. In the United States, for example, each of the original thirteen states had governed itself separately from the other states during the English colonial period. They banded together during the revolution, and remained related during the first years of independence. They found that they could do better together than separately. Alexander Hamilton showed that one of the main reasons for unity was national defense:

Peace or war will not always be left to our option;...however moderate or unambitious we may be, we cannot count upon the moderation, or hope to extinguish the ambition of others.... To model our political system upon speculations of lasting tranquility would be to calculate on the weaker springs of the human character.

Thus, the states maintained their unity, despite immense pressure towards separation.

In Germany, post-World War II federalism developed against the backdrop of the weak Weimar Republic and the subsequent Nazi period. German federalism has contributed to the success of a highly stable western democratic society. In Canada and Switzerland, federal systems have contributed to unity in the face of significant difficulties because of language and national minorities.

Moldova is facing difficult decisions in determining how to deal with issues relating to minorities. Essentially, there are three ways of dealing with such issues. One is to settle them peacefully. The second is to settle them by force. The third is to ignore the problems. I submit that the second and third choices are really no choices at all. The second is not right, is incompatible with a democratic system and society, and does not comport with international law. The third is merely an attempt to postpone the day of reckoning, and usually results in a worse an even more terrible version of the second option.

Only a peaceful solution to minority issues is acceptable in a democratic society. Federalism offers a peaceful method of dealing with such issues. It allows each part of the country to deal with day-to-day matters as each part best sees fit, and yet preserves the unity of the country. If we depoliticize the word "federalism", and think of it not in terms of what some have wanted it to mean, but rather in terms of what federalism actually is, it is apparent that the federal concept is worth studying and considering as providing, perhaps, the most likely settlement of the questions relating to minorities in Moldova. I urge your consideration of and deliberations over the subject.

SEPARATION OF POWERS- THE GREAT PROTECTION AGAINST TYRANNY

I. INTRODUCTION-SEPARATION OF POWERS AS THE RULE OF LAW

The relationship between the separation of powers and the rule of law is close. In reality, they are the same concept. Without the one, the other cannot exist.

The concept of separation of powers is one of the central features of a constitution based on the rule of law. The proud boast of modern democracies is that they have "a government of laws and not of men." That is, they are nations where the rule of law prevails.

The phrase, "a government of laws and not of men," comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780. The full text is as follows:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

The Massachusetts Constitution predated the American Constitution by seven years. The Framers of the American Constitution were quite aware of the Massachusetts Constitution, as they were of the various other constitutions of the original thirteen states. Indeed, as their writings demonstrate, they were also quite aware of the intellectual history underpinning the concept of the separation of powers.

The modern concept of separation of powers has its genesis in traditional, seventeenth and eighteenth century English and European legal and intellectual thought. Both Locke and Montesquieu wrote extensively about the virtues of the separation of powers. See, e.g., Locke, Second Treatise of Government; Montesquieu, The Spirit of the Laws. The drafters of the American Constitution, cognizant of the development of intellectual thought concerning the separation of powers, believed that the principle of separation of powers provided the central guarantee of a just government, a government of a state with the rule of law. But they took the concept one step further. They created the three branches of the American national government,

delineating their functions, and providing for checks and balances among the various branches.

II. THE AMERICAN CONSTITUTIONAL CONCEPT

The American Constitution sets up three distinct branches of government-the Legislative, the Executive, and the Judicial branches. Each branch has its own, distinct functions. On the other hand, some overlap among these branches occurs.

The American concept was to divide the functions among the various branches, so that none would have too much power. Thereby, the framers of the Constitution drafted a document which for more than 200 years has inhibited any branch of government from arrogating too much power to itself at the expense of one or both of the other two branches. The constitutional drafters viewed this important function as one of the primary protections against tyranny.

In The Federalist, No. 47, James Madison, who is generally considered to be the greatest expositor among the Founding Fathers on the American Constitutional system, wrote:

The accumulation of all powers, legislative, executive, 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.... The preservation of liberty requires that the three great departments of power should be separate and distinct.

Similarly, Madison later wrote in The Federalist, No. 51:

Separate and distinct exercise of the different powers of government... is essential to the preservation of liberty....

Madison quoted Montesquieu to support the Constitutional framework of the separation of powers:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging 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 all the violence of an oppressor." Some of these reasons are more fully explained in other passages; but briefly stated as they are here they sufficiently establish the meaning which we have put of this celebrated maxim of this celebrated author.

The Federalist, No. 47 (emphasis in the original).

There have been periods of various ascendencies of one or the other branches of the national government. During the 1960's, for example, critics of the then-sitting Supreme Court referred to the "imperial judiciary". It was not uncommon during the Johnson and Nixon administrations to hear references to the "imperial presidency". Many thought Congress had arrogated too much power to itself during the mid-1970's by, for example, adopting the War Powers Resolution, requiring the President to seek Congressional approval before committing American troops to long term action abroad.

These ascendencies, nonetheless, have been neither disproportionate nor extended. No branch of the American government has been able to maintain too much power at the expense of the other two. The Constitution has thereby provided a workable check on the power of the state to interfere with the liberty of the citizens of the United States.

To demonstrate the importance of notions of separation of powers within the Constitutional framework, it is worth noting that such concepts are built into the very first section of each of the first three Articles:

All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives. Art. I, sec. 1.

The executive Power shall be vested in a President of the United States of America. Art. II, sec. 1, cl. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. Art. III, sec. 1.

The Framers also recognized, however, that each branch could not have equal power. Madison wrote:

In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches.... As the weight of legislative authority requires that it should thus be divided, the weakness of the executive requires, on the other hand, that it should be strengthened.

Madison, The Federalist, No. 51. To provide the proper balance between legislative and executives, the framers of the Constitution rejected proposals for a council of advisors, and gave a limited veto power to the President. Art. I, sec. 2, cl. 7.

III. SEPARATION OF POWERS AS INTERPRETED BY THE UNITED STATES SUPREME COURT

Yet, the doctrine of separation of powers has not been a precise legal doctrine, given to precise legal delineation. One influential law review article, co-authored by a future Supreme Court justice, referring to the doctrine of separation of powers, stated:

As a principle of statesmanship the practical demands of government preclude its doctrinaire application.... In a word, we are dealing with ... a "political doctrine" and not a technical rule of law.

Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts-A Study in Separation of Powers, 37 Harv.L.Rev. 1010, 1012-1014 (1924).

Nonetheless, several relatively recent decisions of the United States Supreme Court have construed the Constitutional concept of separation of powers. In Morrison v. Olson, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1989), the Court had before it a challenge to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. secs. 49, 591 et seq. The question was whether a provision of the Act which allowed for court appointment of a special prosecutor violated the concepts of separation of powers contained in the Constitution. Allegedly, it deprived the executive branch of effective control over an executive official. In upholding the law, the Court emphasized the fact that the Attorney General, a Presidential appointee, retained the power to remove the special prosecutor, albeit only "for cause".

The Court reaffirmed the centrality of notions of separation of powers within the Constitutional framework. It described the power of a federal court under Article III of the Constitution as being limited only to the decision of actual cases and controversies. It mentioned that "one purpose of the broad prohibition upon the courts' exercise of 'executive or administrative duties of a nonjudicial nature,' ... is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." 487 U.S. at 680-681, 108 S.Ct. at 2613. Similarly, the Court reaffirmed that Congress cannot remove an official of the executive branch, except as provided by the Constitution. See U.S. Const. Art. I, sec. 3, cl. 6 (Impeachment Clause).

The opinion also reaffirmed that "the system of separated powers

and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" 487 U.S. at 693, 108 S.Ct. at 2620. On the other hand, the executive, legislative and judicial branches do not operate with absolute independence. 487 U.S. at 693-694, 108 S.Ct. at 2620, quoting U.S. v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Quoting former Supreme Court Justice Robert Jackson, the Court again held:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. V. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed.2d 1153 (1952) (concurring opinion). Because the facts of Morrison v. Olson did not pose a serious danger of Congressional usurpation of Executive branch powers, the Court had no trouble upholding the statute against the separation of powers challenge. See also Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977).

In another recent decision, Mistretta v. U.S., 488 U.S. 366, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), the Court reviewed provisions of the Sentencing Reform Act of 1984, 18 U.S.C. secs. 3551 et seq., and 28 U.S.C. secs. 991-998, which creates a body known as the United States Sentencing Commission. The purpose of the Commission, which by law must have at least three of its seven members come from among currently sitting federal judges, is to promulgate essentially mandatory guidelines for federal courts to follow when sentencing convicted criminal defendants. The aim of the Act is to make sentencing across the country more uniform.

Mr. Mistretta had pleaded guilty to a charge of conspiracy to distribute cocaine. However, he challenged the authority of the Sentencing Commission to set strict guidelines as to the length of his term of imprisonment. Essentially, he argued that Congress had improperly delegated its legislative power to another branch of the national government.

In rejecting his challenge, the Court stated:

"The integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch.... We also have recognized, however, that the separation-of-powers principle, and the

non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.

488 U.S. at 371-372, 109 S.Ct. at 654, quoting Field v. Clark, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892). So long as Congress provides a sufficiently specific, intelligible principle to which the coordinate branch or branches of government must conform, there is nothing inherently improper with a limited delegation of authority.

Then, the Court dealt directly with the separation of powers issue. First, the opinion reaffirmed that "within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." 480 U.S. at 380, 109 S.Ct. at 659. On the other hand, the Court also noted that the Constitution "imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively." 488 U.S. at 381, 109 S.Ct. at 659 (emphasis added), quoting Buckley v. Valeo, 424 U.S. 1, 121, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976). The Court then quoted James Madison from The Federalist, No. 51:

"The greatest security," wrote Madison, "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 encroachment of the others."

488 U.S. at 381, 109 S.Ct. at 660 (emphasis added).

Next, the Court further clarified the purposes behind the Article III requirement that the Judiciary be concerned with actual cases and controversies. For example, the Court noted that it has "refused to issue advisory opinions or to resolve disputes that are not justiciable." 488 U.S. at 385, 109 S.Ct. at 662.

These doctrines help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes "traditionally thought to be capable of resolution through the judicial process."

Id., quoting Flast v. Cohen, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). Thus, although "'neither of the Branches ought to possess directly or indirectly, an overruling influence over

the others in the administration of their respective powers," 488 U.S. at 409, 109 S.Ct. at 674, quoting Madison, The Federalist, No. 48; see also Nixon v. U.S., ___ U.S. ___, 113 S.Ct. 732 (1993) (Court will not intervene in challenge by impeached federal judge over the conduct of impeachment proceedings by the United States Senate), the Court concluded that the ability of the President to appoint and remove members of the Sentencing Commission, including currently serving federal judges, did not afford the Executive branch undue sway over the functions or members of the Judicial branch.

The important point of the Mistretta decision is one made 100 years ago by Justice Harlan:

The true distinction...is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892). The concept of separation of powers does not mean that absolutely no sharing of power may occur. See also Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). But there are limits. For, as former President and later Chief Justice Taft wrote nearly two-thirds of a century ago:

It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive or judicial power.

J. W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed.2d 624 (1928).

Thus, the issue is one of degree. Some delegations of authority to a coordinate branch of government are permissible. Others are not. Although the branches are separate, they are not so separate that they cannot function in a somewhat coordinated manner. The question, then, is how coordinated they can be. In other words, the issue is not whether a delegation of authority can take place, but rather the extent of a permissible delegation.

In Mistretta, the Court held that "the separation-of-powers principle, and the non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." 488 U.S. at 372, 109 S.Ct. at 654 (emphasis added). This is true, the Court stated, because in an increasingly complex society, "Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. at 372, 109 S.Ct. at 655.

In Mistretta, the Court had no difficulty upholding the delegation of authority to the Sentencing Commission because it was sufficiently specific and detailed to pass constitutional muster. Congress had directed the Commission to consider seven factors when determining the grade of offense, and eleven factors when determining the category of defendant. The standard for specificity is whether "there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed...." 488 U.S. at 379, 109 S.Ct. at 658, quoting Yakus v. U.S., 321 U.S. 414, 425-426, 64 S.Ct. 660, 667-668, 88 L.Ed. 834 (1944).

The lone dissenter in Mistretta, Justice Scalia, stated the point curtly:

The whole theory of lawful congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine-up to a point-how small or how large that degree shall be.

488 U.S. at 417, 109 S.Ct. at 678 (Scalia, J., dissenting). His point-and the point of the majority-delegate, but narrowly, only with specific standards, and only for a limited purpose.

Thus, it is possible for the legislature to delegate a measure of its authority to the executive. But it may do so only in the proper way. The delegation must have strict, narrow standards. And the executive must follow the standards within the confines of otherwise exercising executive power.

The executive cannot be allowed to usurp legislative power. As Justice Black wrote in Youngstown Sheet & Tube Co. V. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed.2d 1153 (1952):

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.

The check against executive tyranny is that the executive cannot make laws. The check against legislative tyranny is that the legislature cannot enforce the laws. Thus, any delegation of legislative power to the executive must be accomplished in such a way that the legislature is not abdicating its role to make law. That is what it is, presumably, elected to do.

The American Constitution is an attempt at reaching a balance between effective government and the protection of liberty. Thomas Jefferson, the author of the Declaration of Independence and the third President of the United States, wrote that "the natural progress of things is for liberty to yield and government to gain ground." E. Dumbauld, ed., The Political Writings of Thomas Jefferson, New York: The Liberal Arts Press, 1955, at 138. He also stated that "it should be remembered, as an axiom of eternal truth in politics, that whatever power in any is independent, is absolute also...." F. Irwin, ed., Letters of Thomas Jefferson, Tilton, NH: Sanbornton Bridge Press, 1975, at 215. His point-while we must have government, we must also be aware that government is the greatest threat to liberty.

Although the concept of the separation of powers sacrifices a certain amount of governmental efficiency, it also provides the single greatest protection against tyranny. Interestingly, it ultimately promotes societal efficiency, by enabling a market economy to flourish, without undue governmental interference.

IV. CONCLUSION

Separation of powers and checks and balances are the fundamental constitutional protection in the American system of governance against tyranny. The concept of the rule of law absolutely requires recognition and acceptance of a scheme of separation of powers that involves creating, as Madison put it, "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." Madison, The Federalist, No. 51.

The ingenuity of the Constitutional framework is that it does not rely upon the mere words of the document itself. For the Framers recognized "the insufficiency of a mere parchment delineation of the boundaries' to achieve the separation of powers." Morrison v. Olson, 487 U.S. at 698, 108 S.Ct. at 2623 (Scalia, J., dissenting), quoting A. Hamilton, The Federalist, No. 73. The policy of supplying "opposite and rival interests...that the private interest of every individual may be a sentinel over the public rights", provides the necessary protection against excessive concentration of power in any one person or body, and thus protects the liberty of all. J. Madison, The Federalist, No. 51.

ELECTORAL CHOICES IN A DEMOCRATIC SOCIETY

INTRODUCTION

There are two types of plans for electing a democratic government. They are called the majoritarian and proportional electoral systems. Although either system is acceptable in a democratic society, there are major distinctions between the two plans. There has been significant debate within the West over the last several years on this very issue.

VARIOUS WESTERN MODELS: GERMANY AND THE UNITED KINGDOM

Germany has a relatively successful proportional system, with a requirement of a minimum vote of 5% before a party qualifies for seats in the Bundestag, the German Parliament. There are two major parties (counting the Christian Democratic Union and the Christian Social Union as one party). The third party, the Free Democrats, regularly serves as the junior coalition partner. On occasion, a fourth party obtains sufficient votes to qualify for seats.

The Israeli proportional plan, however, has caused significant instability. And, over the years, there have been several calls for, and recently action on, reform of the Italian system. The French also frequently eye the British majoritarian system as one to envy.

The United Kingdom, on the other hand, has a relatively successful majoritarian system. Like Germany, it, too, has two major parties, and a third party which polls a significant number of votes. Unlike Germany, however, a coalition government in the United Kingdom is usually unnecessary.

In both Germany and the United Kingdom, the governing parties regularly obtain fewer than 50% of the votes. The difference lies in how the governments obtain power. In Germany, half of the representatives are elected directly by their constituents. Additionally, the parties provide lists of candidates by which the other half of the representatives are elected. The candidates win their seats based upon the percentage of votes the party as a whole obtains. Thus, for example, if one party wins 50% of the seats, the top part of its list of candidates is elected. If no party controls 50% of the representatives

(Abgeordnete), two parties must form a coalition. Traditionally, the Free Democratic Party has been the junior member of the CDU/CSU government. During a large part of the 1970's, the Social Democrats (SPD) controlled the coalition.

In the United Kingdom, by contrast, parties select candidates to stand for election in each district, or borough. The candidate who wins the most votes is elected to Parliament. Although one party may obtain, for example, only 45% of the votes nationwide, the fact that the party won a majority of the individual seats in Parliament means that it controls the government.

THE BASIC DEBATE

There have been calls in various proportional electoral system nations to adopt a majoritarian system. The problem is instability. Italy provides a classic example. Since World War II, Italy has had 50 governments, nearly all of them dominated by the Christian Democrats, nearly all of them fragile. Mario Segni, a leading Italian Christian Democrat, recently summarized his opinions on the issue:

We must pass from a proportional system to a majoritarian system, in other words from indirect democracy to direct democracy, which allows the voter to make a genuine choice.

A system of proportional representation encourages multiple parties. It is usually all but impossible for any one party to obtain a ruling majority without a coalition. Coalitions often collapse, especially where there is a need for more than two parties. The German 5% requirement has been a relatively successful modification of the proportional system, that, for the most part, has provided the necessary stability.

On the other hand, even the German proportional representation plan has its drawbacks. As is true in other countries with the proportional system, the German plan has magnified the importance of the junior coalition partner, the Free Democrats. Although the FDP generally receives less than 10% of the votes, it wields considerable strength. Its votes in the Bundestag are necessary for the senior coalition partner to form a government.

Another criticism of proportional representation is that it tends to disintegrate the bonds between the citizens and their representatives. Because candidates receive their mandate through their placement on party lists, the person elected to parliament owes allegiance much more strongly to the political party than to the constituents. Not only do safe seats exist, but also do safe political careers.

Last year, the president of the Institut pour le Democratie argued that France should adopt the British parliamentary system. The article, which appeared in Le Monde, stated:

The removal of the second round of elections would complete our reform and our evolution towards a two-party system, which is the distinctive feature of mature democracies.

There have been calls in the United Kingdom for adopting the proportional system, although the issue has been raised only by the Liberal Party, the third party in Britain. While the majoritarian system provides stability, it also provides a significant limit on pure democracy. The number of deputies a party has in parliament does not necessarily reflect the percentage of votes that party received in the election. Thus, for example, the ruling Tories in Britain have not received 50% of the votes since they took over the government nearly a 1 1/2 decades ago. The majority does not necessarily govern. To the contrary, practice has shown otherwise. Rarely in recent years has the government obtained the votes of a majority of the electorate.

THE AMERICAN HYBRID

In drafting the American Constitution, the Founding Fathers recognized the problems inherent in both systems, and conceived a compromise. James Madison, the great expositor of the American Constitutional system, while defending the Constitution from attack during the ratification process, wrote that "the government ought to be founded on a mixture of the principles of proportional and equal representation." Madison, The Federalist Papers, No. 62.

Because the United States does not have a parliamentarian system, it is somewhat difficult to compare its electoral plan with those of the United Kingdom and Germany. Nevertheless, the United States, while rejecting a proportional system, has also provided for significant checks on a purely majoritarian system.

The American Constitution calls for three different types of elections on the national level (furthermore, the Constitution also guarantees that each state shall have the republican form of government. See Art. IV, sec. 4.). Congressmen, Senators and the President face election every second, sixth and fourth year, respectively, and each on different terms from the other. Article I, section 2, states, in pertinent part:

The House of Representatives shall be composed of Members

chosen every second Year by the People of the several States.

According to 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....

To understand how the President is selected, one must look at two different provisions. Article II, section 1, states:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State maybe entitled in the Congress....

Then, Amendment XII provides, in pertinent part:

The Electors shall meet in their respective states and vote by ballot for President.... The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

These are the Constitutional provisions regarding election of federal officials. The Constitution leaves much leeway to the states to determine the qualifications of voters (although the XXVIth Amendment sets a standard of 18 years, above which the states cannot interfere with the right to vote on account of age) and the qualifications of their own elected officials. In the latter regard, there are many widely divergent disparities.

THE LEGISLATIVE BRANCH

There even are differences among the states on how to elect Congressmen and Senators. Whereas most states provide that where no candidate wins a majority of the votes, the largest vote getter in a Senatorial election is the new Senator, the state of Georgia recently held a Senatorial run-off election. There, the incumbent Democrat

and the Republican challenger each received approximately 49% of the votes. A third party candidate, running under the Libertarian standard, received most of the remaining votes. In the run-off, held last November approximately three weeks after the general election, the Republican challenger emerged victorious.

Thus, the legislature easily can consist of a majority of members elected by a minority of voters. Indeed, the United States Senate, often considered the upper house of the bicameral federal legislature, was specifically organized so as not to represent necessarily a majority of the American voters.

As already noted, the first clause of the XVIIth Amendment provides that each state shall have two senators. The United States being composed of 50 states, the Senate has 100 members. Thus, a state with a population in the several millions, such as California, New York or Texas, has no more representation in the Senate than has a state with only a couple hundred thousand citizens, such as Alaska, North Dakota or Wyoming. And, considering the important functions left exclusively to the Senate, such as the confirmation of cabinet officers, federal judges and ambassadors, Art. II, sec. 2, cl 2, the ratification of treaties, id., and the trial of impeachment cases, Art. I, sec.3, cl. 6, this is an important check on proportional power.

The two chambers were to have separate purposes. One was to represent the people. The other was to represent the states. The Senate was to be that chamber of the legislature which would represent the states.

Thus, the members of one of the legislative houses are specifically selected by a non-proportional measure. The members of the other branch of the legislature may also be selected by a plurality, and also are selected ultimately by election in their specific district, not on a national basis, and certainly not on a proportional basis. In any event, both houses of the national legislature select members from the individual districts and states. The national vote is wholly irrelevant-the legislature does not face a national election.

THE EXECUTIVE BRANCH-THE ELECTORAL COLLEGE

The only national election held in the United States of America is the quadrennial presidential election. The method for determining the president combines the various features of the legislative elections. Technically, an individual voter does not vote for president, although the ballots invariably state the name of the presidential candidates,

and the voter ticks the box next to the candidate of choice. Actually, the individual voter elects electors, who in turn will vote for the president. The number of electors for whom an individual votes depends upon the size of the state in which the individual is a citizen.

A small state, which by population qualifies for only one Representative, for example, has three electoral votes-one for the Representative, and two for the state's Senators. A large state qualifies for more, so that a state with, for example, 45 Representatives has 47 electoral votes, including the two for the Senators.

Traditionally, most states have a winner-take-all system, whereby the winner of the popular vote, even by a narrow margin, wins all of the state's electoral votes. That is not necessarily the rule, however. Maine, for example, divides its electoral votes, based on the winner of each of its two Congressional districts. Most states, although not all, require by law that the electors vote for the candidate for whom they are elected. Occasionally, an elector will stray, and vote for a different candidate; but that has never proved significant. It is unusual, in any event, because usually the electors are committed party functionaries.

There are 538 electoral votes. There are 435 Congressmen, and 100 Senators. Although it has no Congressmen or Senators, the District of Columbia has three electoral votes, according to XXIIIrd Amendment and its population. To win, a candidate must receive a majority, or 270, of the electoral votes.

Critics of the American Electoral College system have maintained that it is anti-democratic. It is conceivable that a candidate could win a majority of the electoral votes, while losing the popular vote. Indeed, this has happenned once, in the 1870's. Every so often, a movement arises to abolish the Electoral College.

Furthermore, the electoral system skews the vote. Therefore, there is opportunity to misconstrue the mandate of the voters. For example, President Clinton received approximately two-thirds of the electoral votes, but only 43% of the popular votes. Ross Perot, who won almost 20% of the votes, received no electoral votes-he did not win a plurality in any state.

Critics also complain that the Electoral College gives an unfair advantage to the two major parties, the Republicans and the Democrats. Looking at the 1992 presidential election can demonstrate this. Because the two parties are well organized, a third party has to fight to get on the ballot in each state. Ross Perot was able to do this in large part because he had the necessary financing, as well as significant grass roots support. But then, the third party candidate

must face the challenge of persuading the voters that he has a realistic opportunity of winning 270 electoral votes. Otherwise, the argument is made by either or both of the two major parties that a vote for the third candidate is wasted. With so few votes needed actually to win the election, the argument usually seems strong to a large percentage of the electorate.

Third party movements have rarely succeeded in America. They usually end up proving to be a spoiler for one or the other of the two parties. The last successful third party won an election in 1860. That was the Republican Party, under the leadership of Abraham Lincoln.

On the other hand, the electoral system has provided two extremely important benefits-stability and certainty. Although one can argue that the electoral system discourages diversity, it also discourages extremes. In 1964, for example, the Republican presidential candidate was viewed as being on the extreme right, and won few electoral votes. In 1972, 1984 and 1988, the Democratic candidates were seen as coming from the extreme left of their party, and likewise received few electoral votes (in 1972 and 1984, the Democratic candidates each won only one state and the District of Columbia). Thus, the Democratic Party of 1992 perceived a need to present a more moderate picture of its candidate in the most recent election. Interestingly, the Democratic candidates of 1988 and 1992, Messrs. Dukakis and Clinton, each received only 43% of the votes. One lost in a landslide, the other is now President.

The certainty comes from the fact that there are only 270 votes needed each time to win an election. In an extremely close election, such as the Kennedy-Nixon race of 1960, it did not take long to determine the winner of the Electoral College, even though it took weeks to determine who had received more popular votes (actually, neither of them received 50% of the popular vote). Although President Clinton received only 43% of the votes, the country knew within a few hours of the close of the polling places that it had elected a new president. And, even though pundits and politicians will debate for the next four years precisely what type of mandate the president has when he received only 43% of the votes, none questioned the legitimacy of his victory.

A SHORT DEFENSE OF THE TWO PARTY SYSTEM

The advantage of the two party system is that it tends to force the parties towards the center. For it is voters whose politics somewhere

between the two parties who decide elections. And a two party system affords voters a clear choice. They support the incumbent, or they vote for the opposition. This is the point of democratic elections- to determine if the electorate is pleased with the government, or if it wants a change.

ELECTORAL SYSTEM BY LEGISLATION OR CONSTITUTION

Many countries have electoral laws, but do not have a constitutional provision regarding elections. It seems that the better practice is to adopt a provision within the framework of the constitution. That way, the method of selecting a government is known by all, and cannot be changed by one party when it fears that it is about to lose power.

This very thing happenned only a few years ago in Greece. Just before the group aligned with Andreas Papandreou was about to be defeated in its bid for reelection, Greece adopted a new electoral law, essentially calling for the Israeli proportional method. Although the opposition continually defeated the former government at the polls, it had troubles forming a working coalition. Placing the election rules in the constitution wold eliminate the possibility that one party could change the rules so easily. This would ensure continued fair elections.

INDIVIDUAL RIGHTS - LIBERTY AT WORK

The central theme of the modern democratic society is the protection of liberty through a scheme of individual rights. Through individual rights, we comprehend the notion that government is meant to enhance the freedom and ability of the individual, and thereby of the society as a whole, to live with dignity. This leads ultimately to creativity and prosperity, and, interestingly, to the preservation of freedom itself.

This was the argument of Ludwig von Mises, that great Austrian economist. According to Mises, liberty, that is, the maintenance of individual rights, requires minimal interference by the state. Thus, when the people cede power to the democratic state, they limit the power of the state to interfere with their liberty, both by providing for the separation of powers, and by adopting a statement of rights.

What are the rights of modern democracies? Most democracies provide for free speech, free political expression, and free press and media. The people prohibit the government from interfering with their right to assemble and to associate. The people reserve to themselves the right to practice their religion freely, without state interference.

Individuals in modern democracies usually have the right to life. They have the right to personal and bodily integrity. Furthermore, they have a right to protect the integrity of their homes. The people usually have the right not to be arrested or searched except upon some type of independent judicial determination or in case of some type of emergency, in which case the independent judicial determination must occur shortly thereafter.

In the democratic world, persons accused of crimes are presumed innocent until there has been an independent judicial determination of guilt. Once persons are taken into custody, they have a right not to be subjected to inhumane treatment or to torture.

Especially in the English speaking world, the right to obtain a writ of habeas corpus is considered central to democracy. This writ is a document which a person can obtain from a court to challenge the ability of the state to arrest and confine him. An independent judge issues the writ, and directs the government to release the confined person immediately.

Another important right of the people is not to be charged with a crime that was not a crime at the time of the act. Related to this

right is the right not to be subjected to a harsher penalty for a crime than was in effect when the criminal act was committed. In the United States of America, the people each have the right not to be subjected to legislation which applies only to that person.

Many democracies provide that a citizen cannot be extradited from the country to another country. Furthermore, many western democracies also make provisions concerning the right of a citizen to maintain citizenship, especially those who are citizens by fact of birth.

Many countries have some type of right to privacy. Some countries provide for cultural rights, including the right of ethnic minorities to develop their own culture and traditions unimpeded by the central government.

Some states provide for welfare rights. These tend to be unenforceable, except when the government can afford them. The more modern trend has been away from the concept of affirmative rights, and towards an older school of thought which emphasizes negative rights. The essential difference is this. A positive right is one which the government must perform on behalf of the citizens. A negative right is one in which the government is prohibited from acting.

Thus, for example, a provision which requires the government to provide welfare benefits to citizens is a positive right. It places a requirement on the government to act affirmatively. A provision which prohibits the government from discriminating based upon national origin is a negative right. It prohibits the government from acting.

Given the trend towards decentralization, the negative rights approach ultimately makes more sense. The emphasis is on the individual, and the place each person has within the society as a whole. This approach, its proponents argue, is the better way of protecting liberty. Separate the powers of the state, and limit the powers that the people grant to the state, and thereby promote freedom.

In a free market society, the right to use and to dispose of property is paramount. In such democratic countries, the government usually does not have the right to confiscate property except upon payment of appropriate compensation. Related to this is the right to enter into contracts freely.

Most western countries provide for some type of fair procedures to protect against arbitrary governmental action. In America, for example, this right is known as the Due Process Clause, which provides that no person may be deprived of various rights without due process.

Perhaps the cornerstone of modern democracies in a multinational

country is the provision which calls for the equal protection of the laws. Such an article states that all persons must be treated equally before the law. This type of clause protects those who are in the minority, and therefore may have no other access to power, from governmental discrimination against them.

In multinational states, the difficulty is to allow national minorities, who do not hold a ruling position, to feel like they have a stake in the country. They are bound to feel like "political pariahs who have no say when matters concerning them are being debated." "A minority is politically collaborating in the true sense of the word only if its voice is heard because it has prospects of coming to the helm some time. For a national minority, however, that is ruled out." Therefore, given that with human nature it is impossible to remove such conflict, the only reasonable solution is to limit the size of government.

Mises wrote:

The greater the scope the state claims in the life of the individual and the more important politics becomes for him, the more areas of friction are thereby created in territories with mixed population. Limiting state power to a minimum, as liberalism sought, would considerably soften the antagonism between different nations that live side by side in the same territory. The only true national autonomy is the freedom of the individual against the state and society.

In The Road to Serfdom, Friedrich Hayek, winner of the 1974 Nobel Prize for economics, took the Mises concept a step further. He wrote of the anti-democratic nature of collectivism:

It may indeed by questioned whether anyone can realistically conceive of a collectivist program other than in the service of a limited group, whether collectivism can exist in any form other than that of some kind of particularism, be it nationalism, racialism, or classism.

In a constitutional system with the proper reservation of rights by the people, the rights and place of all people within the society can be secured, so that the people can live harmoniously with one another, and pursue their individual and societal interests. This is the goal of the modern democratic society. Thus, the drafters of a constitution must strongly consider how best to preserve the rights of each person within the boundaries of the country.

CONSTITUTIONALISM, DEMOCRACY AND THE RULE OF LAW

Today, the Republic of Moldova has the opportunity to create its own future. The peoples of Moldova can decide what type of country they want to live in, how their society should function, whether they should have a growing economy, what their political system should look like. These are matters which will affect not only this generation, but coming generations as well.

A constitution is the fundamental document of a country. It is the foundation upon which the country is built. The country drafts a document which embodies its just dreams for itself and its children. For a country based upon the rule of law, the dreams are not utopian dreams. They are realistic dreams. They take into account human nature. Therefore, the framers of the constitution try to establish a state which will promote liberty and to establish justice.

Over the past two weeks, we have discussed the various constituent parts of a constitution in a free democratic society. Some of our discussions have been difficult. We have found many places of agreement, and not a small number of areas of disagreement. Sometimes the disagreements were contentious. But, by speaking freely, we have satisfied one of the requirements of a free society. We proved again, as Alexander Hamilton wrote over two hundred years ago, that "societies of men are really capable of establishing good government from reflection and choice, and not to depend upon accident and force." We thereby further entrenched the principles of freedom of speech, freedom of thought, and freedom of expression.

Only a few years ago, such discussions and debates would have been unthinkable. Now, it is unthinkable that such discussions and debates would not take place. Yet, because of human nature, we must always be vigilant, lest liberty yield and tyranny gain ground.

We opened this seminar with the fundamental consideration for the fundamental document: What is the source of governmental power? There are, as we said, two choices. Power comes either from the center, or it comes from the people. In a democratic society, the only legitimate choice is that power originates in the people. The people must always maintain control over the powers of the state. The state possesses only those powers which the people freely give it. The state can do nothing, other than that which the people specifically empower it to do.

What are the powers of the state? Of course, the state may do only what the people tell it to do. Nothing less. And certainly nothing

more. In a state based on the rule of law, in a state of limited powers, we see not a state which presumes to take care of all aspects of a person's life. Instead, we see a state which respects the dignity of each person, and the ability of each individual to decide how best to order his or her own life. This is the liberal concept upon which modern democracies must be based.

In a modern democracy, the state exists to better enable the people to engage in commerce. The state facilitates the society's enactment of norms of conduct, thereby enhancing the daily lives of all. The government even enhances the ability of society to protect itself.

The constitution, as the fundamental document of the society, makes all of this possible. But it does so, not by granting all sorts of rights, which cannot be enforced. Instead, it provides the basic framework, the legal structure, of the society. The constitution is not the house, but the foundation upon which the house is built. Thus, the constitution should be a short document. It should do two, and only two, things. It establishes the government, and it limits the scope of the government.

We reviewed examples of hollow rights from several constitutions. We could, of course, look at more. Article 40 of the 1977 Soviet Constitution, for example, claimed to ensure a right to work "by the socialist economic system, steady growth of the productive forces," and so forth. Other constitutions try to do similar things. Such a right, however, ultimately is no right at all. It is merely an empty promise by an all powerful government, which occasionally decides to be beneficent to the masses of its subjects. This is the Marie Antoinette brand of government, the "Let them eat cake" model.

The concept of limited government, on the other hand, looks not to so-called positive rights, which a governing elite will provide to the masses, but to real rights, rights which the people reserve to themselves. If the government is not empowered to act in a specific area, it can do nothing at all. For example, a constitution which prohibits the state from interfering with free speech is much stronger, much more protective, than one in which the state supposedly guarantees the right to free speech. Under the first approach, the state has no ability to take away the rights of the people. In this regard, we saw the need for a strong and independent judiciary.

The judicial system in a democratic society is of central importance. Through the non-political branch, so-called because judges do not take partisan political positions, the people can enforce their rights against encroachments by the state. Courts exercise judgment. They do not legislate. They do not execute the laws. They simply declare the meaning of the laws in specific cases. And they declare the

constitutionality of the acts of the other two branches of government.

In this regard, we even looked at the role of the prokuratura, an institution invented by socialist law, wholly unknown in, wholly foreign to western democracies. We talked about how the powers of the prokuratura should be limited. We even discussed how the prokuratura should be kept separate from the judiciary, so as to ensure the strength and independence of the judiciary.

Instead of the governing elite granting guarantees, a constitution which secures liberty speaks in terms of limited powers of the state. In the western democratic tradition, a constitution based on the rule of law is one in which the powers of the state are kept separate.

The separation of powers is perhaps the single greatest protection against tyranny. If the powers of the state are separate, no single person, no single governmental organ, can control the mechanisms of state power.

The former Soviet system did not recognize the separation of powers. To the contrary, the 1977 Soviet Constitution emphasized that the powers of the state were subordinate to the Soviets of People's Deputies (Article 2), and, ultimately, to the Communist Party of the Soviet Union (Article 6). This was an expression of tyranny at its purest. The fact that all sectors of society within the borders of the Republic of Moldova now seek to establish a government based on the rule of law shows that the people chosen freedom and rejected tyranny. With the separation of state powers as the foundation, the Republic of Moldova can assure that tyranny will not reign here again.

We discussed the horizontal separation of state powers, that is, separation of powers among the legislative, executive and judicial branches of the central government. We also reviewed the vertical separation of powers, that is, a sharing of power between the center and the various regions and localities of a country. By providing for substantial local and regional powers, the people can assure that their local and regional needs are met by a government which is close to them, by elected officials from their own locality and region. Thereby, each area can take care of its local needs in areas such as education, cultural development, roads, sewers, electricity, economic development, and so forth.

We saw the need for a statement of individual rights. These rights included limits on the power of the state to interfere with free speech, free press and media, free expression, free religious practice. They included protections against arrest and torture. In a market economy, they include the right to freely use and dispose of property, free of the threat of state confiscation.

By adopting a statement of rights as a part of the fundamental document of the society, and by establishing a strong and independent judiciary, we empower every citizen of the country to enforce the constitution. They do so not only for themselves, but also for society as a whole. Each citizen becomes the protector of the rights of all.

Perhaps the most necessary right in a modern society, especially one in which people of different national origin live side by side, is a provision calling for the equal protection of the laws. This means that the state cannot treat citizens differently from each other simply based upon race, nationality, language, religion, or other reasons which should not be factors. The goal is to judge people on the content of their character, not on the color of their skin, the language they speak, or the nationality of their origin. This is the cornerstone of a just society in the world of today.

In a democracy, the majority exercises power. The minority, on the other hand, needs assurance that its place in society is no different than that of the majority. To make sure that peace rules the land, the majority must assure that the minority has a stake in the country. All minorities, and especially national minorities, are, as Ludwig von Mises wrote, bound to feel like "political pariahs who have no say when matters concerning them are being debated." The best remedy? Limit the size and scope of government. Keep government from interfering with the rights of any. Thereby, protect all.

We discussed electoral systems. We discussed ways to ratify and to amend a constitution. We discussed how a constitution relates to international law. Indeed, we discussed a large number of issues. And we emerged from the process, I hope, convinced of the importance of drafting a strong constitution to ensure the liberty of all.

Which of the worlds democratic constitutions provides the best model for the Republic of Moldova? That is difficult to say. There are many excellent choices. We discussed the relative merits and demerits of several constitutions. Ultimately, however, we realized that a constitution must be a reflection of the instincts, culture, history, and aspirations of all the people who make up a society. Thus, it is for the peoples of Moldova to decide what their constitution shall look like.

Nevertheless, we looked at principles of universal application. Power comes from the people. Residual power remains in the people. The people create government not for the benefit of those who govern, but for the benefit of the people. The rulers are, in actuality, not so much rulers, but mere servants of the public. The people create

a limited government, with limited and separated powers, and then restrict the government from interfering with their rights.

The Republic of Moldova has the opportunity to create its own future. This is both a difficult and exciting task. The sponsors of the seminar hope they have provided the participants with some thought provoking discussions of these troublesome but timely issues.

The people of Moldova have received me warmly. I especially thank the seminar participants, who have allowed me to speak some difficult words, and yet have treated me at all times with kindness, decency, dignity and hospitality. I will always treasure the weeks I have spent as a guest in Moldova. Moldova, and all the people within the boundaries of Moldova, hold a special place in my heart.

These times are difficult. But, with the necessary will, and the help of God, the Republic of Moldova will prosper. That is my fervent hope and prayer.

Thank you, good night, and may God bless all the people of Moldova.

This excerpt is the introduction to a book, The Federalist Papers Reader, (Seven hocks Press, Washington, D.C., 1991; used with permission). The author is Dr. Frederick Quinn of CSCE/ODIHR, who heads the Rule of Law programs for the CSCE office in Warsaw and teaches the history of American constitutional thought at Warsaw University.

INTRODUCTION

The long coast line was fair prey for foreign invaders. Roads were few, muddy when it rained, dusty otherwise. Transportation was slow and irregular, most dependable by water. The potentially prosperous, primarily agrarian economy was stagnant, owing to the recent eight-year war, and entrepreneurial people were not sure how it would improve. Scattered insurrections flared, and the prospect of angry mobs or unschooled peasants taking the law into their hands threatened whatever form of government the newly independent states selected. The central government was powerless, lacking authority to raise funds or an army, or to administer justice. Politicians debated at length whether the existing government should be patched up, or if there should be a strong president, a president and council with shared powers, or a legislature with most powers vested in it; but the discussions went nowhere.

The confederation's thirteen isolated states were in infrequent contact with one another, except for commerce along the maritime arteries. Spanish, French, English, and other metallic coins still circulated long after the war; the Continental Congress's money was valueless. "Not worth a continental" was a popular expression. The wartime military leader, George Washington, wrote state governors in 1783 that he feared "the union cannot be of long duration, and everything must very rapidly tend to anarchy and confusion." Thomas Jefferson, then Minister to France, said, "We are the lowest and most obscure of the whole diplomatic tribe." A British cleric said Americans were "a disunited people till the end of time, suspicious and distrustful to each other, they will be divided and subdivided into little commonwealth, or principalities."

These conditions, which America faced two centuries ago, are applicable to many modern nations. The Federalist Papers, first published in 1787-88 in the middle of intense debates over what form the new government should take, explain how the authors of the U.S. Constitution arrived at that document. There is a congruence between basic issues of governance raised then in Philadelphia and now in Warsaw, Conarky, Brasilia, and Moscow. The questions are not rhetorical or theoretical, but are fundamental to the formation of a national government to which all citizens can subscribe, and that will indure.

If the American Revolution was a time of political upheaval, the writing and ratification of the U.S. Constitution was no less revolutionary. The Constitution's framers boldly exceeded their mandate to suggest ways of patching up the Articles of Confederation.

The ratification debates required the people to decide whether they would adopt an untried form of government or hold on to an ineffectual one that was sure to result in the balkanization of the new nation. The temptation to maintain individual state sovereignity was strong, even though many conceded the necessity of regional defence treaties. If the Anti-Federalists had prevailed, the sketch in Federalist No.2 of the potentially prosperous nation would have remained an exercise in mapmaking. Far from defending the status quo, The Federalist Papers, in measured argument, seek support for a revolutionary form of government, unknown in world history to that date.

Fortunately, the Federalist authors - Alexander Hamilton, John Jay, and James Madison - wrote their work at a propitious moment in American history. A few years earlier, in the shadow of the war and the British crown, a proposal for a strong central government would have found acceptance. Nor could such a concept have succeeded during the Age of Jackson, just around the corner. Its republican features, which kept the people somewhat distant from the reins of power, would have been voted down. The Federalist Papers thus explain a revolutionary document that faced a hotly contested ratification battle for the political soul of a nation at a critical turning point in its history.

The Federalist Papers reflect the end of an era in America, a chapter that began with the Mayflower Compact of 1620 and the various covenants, declarations, and state constitutions that followed, and culminated in the Declaration of Independence and Constitution. During that period of more than a century and a half, American political thought was formulated and tried, and arguments were rehearsed and refined in press, pulpit, and legislative chamber, often to express opposition to the British crown, but also to give an expanding country a workable government. It was against such a background that The Federalist Papers emerged, combining the traits Robert A. Ferguson ascribes to the Constitution: "generic strength, manipulative brilliance, cunning restraint, and practical eloquence."

Despite their length, the papers are remarcably concise - long enough to establish their argument and answer opponents, but free of invective, extraneous commentary, or florid embellishment. The Federalist Papers' grounding in eighteenth-century philosophy and economic theory is only tantalizingly suggested in brief sections seeded throughout the essays. We wish for an additional hour of tavern talk with Madison or Hamilton, or a public television interview program tying up loose ends on the origins of their ideas; but the information

is not forthcoming. The authors were primarily practitioners rather than theorists, and The Federalist Papers were written for a specific purpose: to convince delegates to New York's ratification convention of the value of a particular course of action.

As such, the essays are radical, revolutionary statement of well-reasoned political thought, carefully moving beyond the central ideas raised by theorists like Hume, Locke, or Montesquieu. Instead of dramatically overthrowing the old order of theory and practice, the Constitution writers, with careful study, took its best features and gave new meaning to them. As works of theory and guides for practice, the essays are more lasting than anything written by Marx, Lenin, Mao, Castro, or Metternich.

The Federalist Papers represent the most long-lived contributions of the golden age of pamphlet literature. It was a time when public service, most leaders believed, was a responsibility mandated by the Deity, and public documents often reflected a literary quality comparable to contemporary sermons or works of science, history, or political or moral thought. Simultaneously, there were improvements in the technology and availability of printing presses; the growth of a relatively affluent, lettered audience; and the emergence of urgent and revolutionary issues, like the coming of age of republican political thought and the question of assembling a machinery of government for the polities that had just defeated the British forces and now must govern themselves.

THE ARTICLES OF CONFEDERATION

Had the Articles of Confederation not failed, there would have been no Constitution and no Federalist Papers. Two centuries later, it is difficult to imagine the chaotic state of America in the postrevolutionary period. A war had been won, but the eastern seabord lay vulnerable to potential invaders. The economy was plagued by multiple currencies and tariffs; state governments were bankrupt and ineffectual; and the central government was central in name only. From 1776 to 1787 America was a loose alliance of states governed by the Articles, whose fatal flaw was that power remained with individual states. The central government could neither raise revenues nor enact legislation binding on individual states. The votes of nine of the thirteen states were required to pass laws, and a unanimous vote was necessary to effect any fundamental change in the Articles.

The central government's weakness was intentional; the American settlers had bitterly resented the British crown's power to control

commerce and collect taxes. The legislative body created under the Articles was powerless, and there was no executive or judicial branch. Moreover, the thirteen states each had separate political and commercial interests, and the temporary unity forged from a decade of active hostility toward Great Britain failed to produce a national identity. Nine states had navies; seven printed their own currency; most had tariff and customs laws. New York charged duties on ships moving firewood or farm produce to and from neighboring New Jersey and Connecticut. When soldiers remarked, "New Jersey is our country," they echoed the widespread sentiment of other states.

Also contributing to the political chaos in the 1780s were the insolvent state governments. Hamilton, in a stinging attack on the Articles, remarked in Federalist No.9 that they encouraged "little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord." Madison had the bankrupt state governments in mind in Federalist No.10 when he described the need to "secure the national councils against any danger from...a rage for paper money, for an abolition of debts, for an equal devision of property, or for any other improper or wicked project." Madison wrote on October 24, 1787, to Jefferson in France that the unstable state legislatures "contributed more to that uneasiness which produced the convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the confedeation to its immediate objects."

THE AUTHORS

Alexander Hamilton (1757-1804) was born on the island of Nevis in the West Indies of a Scottish merchant father and a mother of Huguenot descent. His family origins gave rise to romantic speculation; John Adams, his avowed opponent, called him the "bastard brat of a Scotch peddler." Hamilton entered Columbia University, then called King's College, at age sixteen. During the American Revolution he rose to officer rank and became George Washington's aide-de-camp and private secretary for four years. After the war, Hamilton studied law and practiced successfully in New York, entering Congress in 1782. In addition to originating The Federalist Papers, Hamilton was an energetic author to other subjects, having written in support of the Boston patriots and later founding a newspaper in New York. Handsome, intense, aggressive, and self-

assured to the point of arrogance, Hamilton married the socially prominent daughter of a rich New York merchant. Hamilton was not an original thinker, but possessed a well-disciplined legal mind, skills in public debate, and an ability to lay issues before the public in a compelling manner. In Washington's cabinet, Hamilton served as secretary of the treasury until 1795, when he resigned to return to the practice of law, remaining a close advisor to Washington until the latter's death. Hamilton was a leader in the Federalist Party and in later years was often in conflict with his coauthor Madison. A proponent of nationalism but not direct democracy, Hamilton once said, "Men are reasoning rather than reasonable animals." This dashing figure, filled with promise, was killed in a dual with Aaron Burr in Weehawken, New Jersey, in 1804.

Hamilton and Madison (1751-1836) were a study in contrasts. Scion of an established Virginia family, Madison was a deliberate, rather than a dramatic public figure, who counted on his careful preparation, an instinct for politics, and meticulously crafted arguments to carry the day. Ralf Ketchum, biographer of Madison, calls his subject "an ardent revolutionist, resourceful framer of government, clever political strategist, cautious, sometimes ineffectual leader." Madison was raised on a four-thousand-acre tidewater plantation. He later studied at Princeton, where he stayed to tutor in political thought with John Witherspoon, the Scottish pastor, intellectual, and the University's president. Madison was well-read in classical and modern writers on politics and history, had thought long and carefully about the relationship of Protestant Christianity to the state, and knew Latin, Greek, Hebrew, and French. He served in the Continental Congress from 1779 to 1783 and in the House of Representatives from 1789 to 1797. He was Jefferson's secretary of state from 1801 to 1808, and president from 1808 to 1816, after which he retired to his Orange Country, Virginia, estate, living there until his death in 1836. He is most remembered in history as principal drafter of the Constitution and the Bill of Rights, although he had argued originally a Bill of Rights was not needed, reasoning that the state and federal constitutions guaranteed individual rights sufficiently.

John Jay (1745-1829) was born in an established New York merchant family. His contribution to The Federalist Papers was minimal. Severe rheumatism limited him to writing essays Nos.2 through 5, and No. 64 on the Senate. Like Hamilton, Jay was a successful lawyer and graduate of King's College. An author of the new York State Constitution, he served as president of the Continental Congress in 1778, as ambassador to Spain, and as secretary for foreign affairs from 1784 to 1789. In 1781 he participated in negotiating the

treaty that ended hostilities with Great Britain. Jay became the first chief justice of the United States in 1789, and in 1795 he began the first of the two terms as governor of New York. At age fifty-six, he retired from active political life to his Westchester Country, New York, estate. Jay was a landowner who believed "the people who own the country ought to govern it."

NATIONAL SECURITY: THE PREEMINENT ISSUE

There were several issues in the "great national discussion" of 1787 to which The Federalist Papers spoke. But the authors began with the threat of external and internal danger, the "safety" of the young republic. With memories of the recent war with Britain fresh and the weakness of the Continental Congress apparent, no issue was more important to the Constitution writers than national security. The Federalists believed only a strong central government could defend the country's borders and promote commerce. Hamilton wrote in No.34, "Let us recollect that peace or war will not always be left to our option; that however moderate or unambitious we may be, we cannot count upon the moderation, or hope to extinguish the ambition of others." Hamilton spoke in No.34 of the "fiery and destructive passions of war," which are more prevalent than "the mild beneficent sentiments of peace." He urged a strong national government to provide defenses the republic lacked, and observed, "To model our political systems upon speculations of lasting tranquility would be to calculate on the weaker springs of the human character."

DEMOCRATIC VERSUS REPUBLCAN GOVERNMENT

Certain key words recur in The Federalist Papers. Their use is deceptively simple. At first glance, they appear to be common adjectives and nouns; in reality, they carefully move republican political thought of the time decisively ahead, from episodic theoretical insights to a bold but yet untried plan for governing a new nation. Madison recognized the challenge. His explanation of the inadequacies of political language in No.37 is more than a philosophical aside:

Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. When the

Almighty himself condescends to address mankind in their own language, his meaning, luminous as it may be, is rendered dim and doubtful by the cloudy medium through which is communicated.

Here are the essential words. The authors wanted a robust, energetic, and vigorous government; they regarded faction as a great enemy of the constitutional government; the dangers of uncontrolled popular government had to be filtered and refined through republicanism. This was done through "framing a government," Madison wrote in Federalist No.51. Framing meant not only defining government's outer limits or parameters, but giving government internal form and cohesion as well.

In the worldview of The Federalist Papers' authors, the domains of politics, science, and religion were interwoven, and a graduate of one of the handful of eastern universities would be as conversant about the ideas of reformed Protestantism in politics as about developments in Newtonian physics. Sphere, body, and orbit are words lifted from eighteenth-century natural science; The Federalist Papers' writers move them directly into political literature, suggesting the order the new Constitution will provide.

There is a carefully planned use of political space in The Federalist Papers. The compact land described by Jay in No.2, reminiscent of scenes depicted by early American landscape artists, extends gradually as the Confederation's limited confines are pushed back. By the time a defense of the new Constitution is introduced by Hamilton in No.23, geografic and conceptual horisons are expanded. Hamilton, less the philosopher and more the power broker than Madison, wants ample authority, ample power, the extension of authority, and resists the idea that "we ought to contract our views." Amplitude as an idea in science, and with it the broadening of conceptual horisons, fit Hamilton's political goal of fashioning a political system to govern "so large an empire".

For the task of constructing a system of government, the Founders drew on Newton's understanding of a universe "moving according to mathematical laws in space and time, under the influence of definite and dependable forces." This concept was illustrated by David Rittenhouse, a Philadelphia scientist-politician and Pennsylvania treasurer, whose orery diplays the motion of solar bodies through the rotation of metal balls moved by wheelworks.

How can there be effective government that is truely representative of the people and that works in a "robust", "vigorous", "energetic" way? The focal point of the question was the clear devision over republican government, with access to power separated and checked at various points in the political system, versus a broadly based popular

democracy. Instead of votes under the village tree or in town meetings, with larger councils setting national policy, the Constitution writers were architects of an intricate machine whose structural components included such concepts as separation of powers, checks and balances, federalism, and an independent judiciary with the power of judicial review over the acts of legislative and executive bodies.

There were further barriers to a quick or sustained seisure of power: a bicameral legislature, indirect elections, the presidential veto, legislative control of the budget, and limitations on who was eligible to vote. It was almost impossible for a zealous movement to sweep like wildfire through the structures of government and seize control. Likewise, because the safeguards engineered into the system were so elaborate, almost like mechanical safety devices, it was unlikely a tyrant could seize and hold the government for long. Madison used the words refine and filter to explain how the process differed from direct democracy. In Federalist No.10 he said republican government would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best descern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." Here Madison deftly appropriated the word republican for a specific use, as had been the case with Federalist. Madison's republic was not a popular democracy; in it power was not left directly in the hands of the people but with elected officials, thus providing a protective barrier from impulsive or unwise mob governance.

Jay believed the filtering process produced more enlighted, able candidates for national than for state office. In Federalist No.3 he argued that once an efficient national government was established, "the best men in the country...will generally be appointed to manage it." The national government "will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States." Wisdom, regularity, coolness, temperate, reasonable, and deliberate were words the three authors used to describe the leadership the national government would attract through its filtered and refined selection process. This protected the country against impulsive decisions by ununiformed mobs who would put self-interest first, the sort of persons Pennsylvania's Gouverneur Morris described in 1774:

I stood on the balcony and on my right hand were ranged all the people of property, with some few poor dependents, and on the other the tradesmen, etc., who thought it worth their while to leave daily labour for the good of the country... The mob began to think and reason. Poor reptiles! It is with them a vernal morning: they are

struggling to cast off their winter slough. They bask in the sunshine, and ere noon they will bite, depend on it.

Opponents like Patrick Henry and Richard Henry Lee rejected such views as elitist republican rhetoric. Lee wrote, "Every man of reflection must see that the change now proposed is a transfer of power from the many to the few."

The Anti-Federalists favored town meetings, public assemblies, frequent elections, and large legislative bodies - the larger the body, the more representative it was of the general will, an idea borrowed from Rousseau. In such a view, government mirrors, rather than filters, popular interest. Hamilton's opponent, Melancton Smith, articulated this position at the New York ratification convention. Smith believed officials were elected to defend the interests of their constituents; he pleaded for "a sameness...between the representative and his constituents." He feared "the middling class of life" would be barred from political participation in the system Madison, Hamilton, and Jay proposed. Madison was no supporter of frequent elections. He used the words energy and stability to describe government's ideal characteristics; and such government required wise, dispassionate leaders having both distance from constituencies and duration of appointment to represent a national, rather than a local, interest.

The Federalist writers, in short, were explicit about the difference between a pure democracy, in which liberty prevails and the people decide all questions, and a republican government, in which powers are carefully delineated and devided among the government's different parts. The shift from liberty to order reflected a transformation from ideas prevalent in America in 1776 to those current in 1787. The Pennsylvania Packet in September 1787 wrote, "The year 1776 is celebrated for a revolution in favour of liberty. The year 1787 it is expected will be celebrated with equal joy for a revolution in favour of government." It reflected Alexander Hamilton's argument that in 1776 "zeal for liberty became predominant and excessive," and in 1787 the issue was "strength and stability in the organization of our government, and vigor in its operations."

Hamilton, Madison, and Jay knew the national and state governments' weaknesses. States were debtors, so were individuals. Moreover, the revolutionary period's small circle of educated, purposeful national leaders had been replaced in state legislatures by less able figures. Madison in 1788 said the state governing bodies were filled with "men without reading, experience, or principle." Jay worried about states being governed by people whom wisdom would have left in obscurity."

Although the Federalists won and the Constitution was accepted, the debate never completely ended; the issues remain two centuries later in appeals to populism or republicanism, state and local rights versus national responsibility.

WHO PARTICIPATES IN THE POLITICAL PROCESS?

The analysis of political society Hamilton sketched favored "landholders, merchants, and men of the learned professions." In No.35 he argued, "We must therefore consider merchants as the natural representatives of all these classes of the community." Mechanics and manufacturers "will always be inclined...to give votes to merchants in preference to persons of their own professions or trades" because "they know that the merchant is their natural patron and friend." Learned professions "truly form no distinct interest in society." Hamilton acknowledged that his portrait of society was limited to a small circle of land-owning leaders. He deftly sidestepped the issue of popular democracy. "If it should be objected that we have seen other descriptions of men in the local legislatures," he wrote in No.36, "I answer that it is admitted there are exceptions to the rule, but not in sufficient number to influence the general complexion or character of the government."

Still, the door to upward political, economic, and social mobility was not closed. Hamilton's words were autobiographical: "There are strong minds in every walk of life that will rise superior to the disadvantages of situation and will command the tribute due their merit, not only from the classes to which they particularly belong, but from the society in general."

He concluded, "for the credit of human nature...we should see examples of such vigorous plants flourishing in the soil of federal as well as of state legislation," but these will be exceptions.

American constitutional history can be charted by the continuing expansion of the voting franchise. The elimination of property requirements, the Fifteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth amendments, and the Voting Rights Act are all aspects of the growth of suffrage rights.

Parenthetically, the Constitution was not ratified by plebiscite; property requirements for voting eliminated many small farmers and artisans who opposed the document. If the Constitution had been submitted directly to the people for a vote, it probably would not have

passed. State constitutional convention delegates were elected on the same basis as delegates to state legislatures, which favored established tidewater interests. Nevertheless, in 1788 the voting franchise was broader than it had been when either the Declaration of Independence or the Articles of Confederation was adopted, and New York expanded its electoral rolls and recognized universal manhood suffrage for the election of delegates to its state ratification convention.

FACTION

No question of governance received more of Madison's attention than how to have a vigorous, energetic, effective government without allowing a single majority or minority faction, or combination of interests, to seize control of it. Madison weighed both the aftermath of Shays's Rebellion in the north and the trouble hundreds of southern landowners, farmers, artisans, merchants, debtors, and failed property owners would make if allowed into the political arena as equals. He described the problem in Federalist No.10:

The most common and durable sourse of factions has been the various and unequal distribution of property. Those who hold and those who are without property have never formed distinct interests in society....creditors...debtors.... A landed interest, a manufacuring interest, a mercantile interest, a moneyed interest.... The regulation of these various and interfering interests forms the principal task of modern legislation.

Madison believed "all civilized societies" were "devided into different sects, fashions, and interests, as they happened to consist of rich and poor, debtors and creditors, the landed, the manufacturing, the commercial interests, the inhabitants of this district or that district." Enlarge the circle of political participants, he argued, while deviding the community into numerous interests and parties, and it will be increasingly difficult for a special interest group to consolidate power and dominate the country or ignore a minority within the nation.

In discussing faction, Madison foresaw not only a vociferous, intransigent minority, but the dangers a majority, bent on working its will, could wreak on society. It was the great mass of restless, propertyless people and small farmers that the Constitution writers both sought to include in a democracy and control in a republic.

Although Federalist No.10 provides an encompassing statement of Madison's idea of faction, he elaborated on the concept elsewhere.

In an October 24, 1787, letter to Jefferson he wrote, "Divide et imperia,the reprobated axiom of tiranny, is, under certain qualifications the only policy by which a republic can be administered on just principles." Four months earlier, in a speech to the Constitutional Convention, he described his ideas in greater detail. The problem: to have a working republican government yet protect minority interests. This can only be done if government is to enlarge the sphere and thereby divide the community into so great a number of interests and parties, that in the first place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the second place, that in case they should have such an interest, they may not be apt to unite in persuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale and in such a form as will control all the evils which have been experienced.

Madison, in short, faced a balancing act; and a misformulation could tilt the new government, so full of hope and promise, into the hands of an authoritarian president, or worse, a tyrant, or an equally oppressive legislative body. In Madison's view, government was a framework, a mechanical structure to keep political currents within acceptable limits, as a carefully engineered watercourse contains raging streams. Madison was much like Locke in this regard and saw government as a neutral agent brokering competing interests, an umpire among contending forces, an agent to protect property rights, on which the well-being of the fragile new nation rested.

SEPARATION OF POWERS

After the Revolution, Americans understandably opposed conferring political power on a strong ruler. The memory of George III was fresh, and a much more attractive prospect was a strong legislature. The Constitution failed to award such concentrated power to the legislature.Instead, it created a strong presidency, but power was shared among the executive, legislative, and judicial branches; within the legislative branch, it was further partitioned between two houses. Madison believed the new political system could be wrecked easily by an imbalance in the distribution of power or its concentration in one place, especially in the legislature. In Federalist No.47 he wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced in the very definition of tyranny."

The only reason such a powerful presidency was approved was because everyone knew George Washington would be the first president and would set a clear precedent for how the office should be conducted. Congress, too, would be a strong institution, every bit as capable of despotic rule as the presidency. Madison wrote of the legislature's tendency to draw everything into its vortex; Jefferson earlier had said 173 legislators could be as dictatorial as 1. A strong counterweight in the presidency was important for that reason as well.

Thus the raw confrontation of power against power, ambition against ambition, was counteracted, not through any assumption of goodwill on the participants' part, but through a clear process of separation of powers, distinct checks and balances, and an independent judiciary with the power of judicial review (the right to initiate review of the constitutionality of any act undertaken by the legislative or executive branches, as well as state laws). Judges could face impeachment proceedings in Congress and, while appointed by the president, would be subject to confirmation hearings and sometimes rejection by the Congress.

Madison wrote, in one of the most often-quoted passages from the eighty-five essays, "What is government itself, but the greatest of all reflections of human nature? If men were angels no governent would be necessary." Thus, "ambition must be made to counteract ambition"; the government must establish "a policy of supplying by opposite and rival interests, the defect of better motives." Madison's intent was clear: to create a governmental structure in which interests would vigorously contend but not obliterate one another. Elsewhere in No.51 he stated, "Comprehending in the society so many separate distinctions of citizens...will render an unjust combination of a majority of the whole very improbable, if not impracticable."