The State of the Union under a failed Constitution

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Rebuttal to the legal profession's arguments against exclusion from elective office in the legislative and executive branches of government. Part 3 (Outline of the formal argument before a Court of Law.)

Federalist 87 and 88 provided conclusive evidence[1] confirming the assertion that: Members of the legal profession unconstitutionally control all government. The evidence was drawn from the Federalist Papers and the Constitution. Some individual members of the legal profession agree with this position.[2] However seeking a resolution of this issue through the Courts means appealing to the very members of the legal profession who sit as judges,[3] to find 'against' their own colleagues and their entire profession.

It is therefore necessary, before making a case before a Court of Law, to establish the most complete, persuasive and technically sound legal evidence and arguments possible. Such a case will require the forging of a steel chain of connective legal links between the control of government by the members of the legal profession and the constitutional prohibition of doing so. That is what this article will endeavor to do in outline form.

An overview of the legal system.

The US Constitution is the supreme law of the land. The Judiciary Branch of Government, (the Supreme Court) bears the responsibility for *interpreting*the Constitution. In that capacity the Judiciary Branch has the power to overrule both other branches. Nine Justices sit on the Supreme Court. Decisions are made by majority vote. Five votes constitute a majority. Thus the Constitution means, *at any particular point in time*, whatever a majority of the Court says it means. Consistency in decision making is important to the Court's activities. However, Justices serve on the Court for a period of time and then pass away or otherwise leave the bench. New Justices who may have different interpretations of the Constitution are appointed. The passage of time sometimes causes the political and social climate of the land to change dramatically. Justices may develop different perspectives that lead to different legal interpretations of the Constitution. Decisions once thought accurate constitutional interpretations may later be reversed.[4] That is the nature and manner in which the Constitution is interpreted.

The Supreme Court accepts only a tiny number of the 'discretionary'[5] cases submitted. Thus the probability of accessing the Supreme Court at all is very slight at best. The chances are even less on this issue. That is because this issue

constitutes a very real threat to the enormous power wielded by the 'same hands' group, of which the judges themselves are an integral part.[6]

1. <u>The Issue:</u> Does the Constitution contain an implied constitutional provision concerning the principle of separation of powers that prohibits members of the legal profession[7] from effectively controlling government?

<u>The main issue submitted contains the following sub-issues:</u>

1.1 Does the Constitution contain an implied principle of separation of powers?

1.2 If so, would the effective control by members of the legal profession constitute a violation of that principle?

1.3 If so, are members of the legal profession in effective control of government?

1.4 If so, does this court have the duty and power to act on an implied, not express constitutional provision?

1.5 If so, is the remedy of prohibiting all members of the legal profession from elective office outside the judiciary a proper and appropriate remedy?

(The sub- issue raised in 1.3 is one of fact. All other sub-issues are issues of law.)

<u>Argument by sub-issues.</u>[8]

1.1 *<u>Argument on Constitutional inclusion of implied separation of power principle</u>*.

Black's law dictionary distinguishes *'implied'* from *'express'* as follows: *'where the intention with respect to the subject matter is not manifested by explicit and direct words, but is gathered by **<u>implication or necessary deduction from the circumstances</u>**, the general language or the conduct of the parties.'* Thus the first legal requirement before us is to show that the **<u>intention</u>** of the writers of the Constitution was to prohibit ***any single 'same hands'*** group from acquiring control of government.

The Constitution was written in 1787 to grant the government of the day sufficient power to govern because it was without such power. It lacked power because the nation feared that **<u>any 'same hands' group</u>**, even elected by the people, would become corrupt[9] and use its power to oppress the people. Therefore the Constitution was written and structured to make certain that *<u>no single 'same hands' group</u>* could ever succeed in controlling all government.***<u>The cornerstone of that structure and thus implicit in it, is the principle of the separation of powers that separates the powers of government at three levels</u>***.[10] It was recognized that such separation would result in a loss of both government accountability and efficiency. That is because divided power diminishes responsibility for results and speed of action. That trade-off was

deemed acceptable and considered the only way to gain constitutional ratification.

Madison was seemingly convinced that the separation of powers structure provided by the Constitution would make it impossible for any *'same hands'*group to ever acquire control. Thus he did not deem it necessary to explicitly provide a constitutional clause addressing the matter. Not so most of the individual States, 40 of which address it explicitly in their own State Constitutions.[11] Some States, presumably for maximum emphasis, include it as part of their *'Declaration of Rights.'* That is the State equivalent of the US Constitution's Bill of Rights.

The language of the separation of powers clause differs somewhat from one state constitution to another. The principle and intent as expressed by Madison in the Federalist Papers are however, clear in all. For example the Texas Constitution addresses the point as follows: Under Article 2, Section 1, under the heading: ***'THE POWERS OF GOVERNMENT'***

The Powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person or collection of persons, being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[12]

Thus it is very clear that the Constitution does contain an implied provision concerning the principle of the Separation of Powers.

1.2 *Argument on effective control by lawyers constituting a violation of the principle of separation of powers*.

Effective control of all government by any 'single same hands' group is what Madison characterized as *'the very definition of tyranny.'*[13] Madison defined a 'same hands group' or 'faction' as: *'a number of citizens ... who are united and actuated by some common ... interest, adverse to the rights of other citizens.'*[14] Every professional association as well as every trade and business association represents just such a single 'same hands' group or 'faction'. For the members of that group unite for the purpose of advancing their own common interests first and foremost, some of which are necessarily adverse to the rights of other citizens.[15]

Thus it is very clear that control of government by the members of the legal profession violates the implied principle of separation of powers of the Constitution.

1.3 *Argument on proposition that members of the legal profession do effectively control government*.

At the present time the federal judiciary is controlled virtually 100% by

members of the legal profession. President Clinton and Vice President Gore, of the executive branch as well as 14 of 18 members of the cabinet (at last count) are lawyers. In the legislative branch some 50% of the US Senate and almost 40% of the House are lawyers.[16] No other 'same hands' group has better than a very small proportion of those numbers. All elected non lawyers***combined*** would constitute a voice only in the legislative branch. The same numbers, to a greater or lesser degree, prevail everywhere in the individual States and have for some 30 years at least. These numbers prove that members of the legal profession do have effective control of government.
Thus it is very clear that members of the legal profession do effectively control government.

1.4 *Argument on the question of whether the Court has the Power to act on an implied not express constitutional provision*.

On constitutional issues ***the US Supreme Court has the absolute power to decide what it has the power to decide***. It's justices have life tenure. It answers to no-one. It is bound by no rules that it cannot change as it sees fit. It is not bound by the principle of *'stare decisis'*.[17] It is not even bound by its own previous rulings on the very *same question it has before it*. Certainly it attempts to be generally consistent in its rulings. However it does not have to be. It can be said with the greatest respect, that the Supreme Court can be described as the only American real life equivalent of the Queen of Hearts out of Alice in Wonderland.[18] Like her it is free to have anything mean: ***'whatever a majority of the members of the Court say it means.'***

Nevertheless legal precedent exists if the Court has need of it. In *McCulloch v. Maryland* (17 US (4Wheat.) 316, 4 L.Ed. 579(1819) Chief Justice Marshall concerning a similar issue on implied versus express power, stated: *'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist (sic) with the letter and spirit of the Constitution, are constitutional.'*

It is thus clear that the Court not only has the power absent precedent, to decide on the issue of implied versus express constitutional provisions, but has precedent to rely on as well.

1.5 *Argument on the remedy proposed of prohibiting members of the legal profession from elective office outside the judiciary*.

The best and most effective remedy is the one sought. It would still allow one third of one percent of the population, (or 1 in 300 people), to control one third of all government. That represents 100 times the level of proportional representation the Constitution sought to provide. It is therefore proportionately***one hundred times more than fair to the legal profession***. It is therefore necessarily that much less than fair to all others. However it will at

least remove the tyranny from government immediately. No other remedy appears capable of such a result.

Thus, clearly removing lawyers from elective office outside the judiciary is the best and only appropriate remedy.

PUBLIUS II
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About the author: *This writer is a constitutional scholar. He has written Federalist numbers 86, 87 & 88 in defense of the Constitution. He is like Madison, a non lawyer who loves the law, and like Hamilton an immigrant and naturalized American.*

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1. More than one conclusive affirmative answer was provided. Arguably, only one is needed.
2. Perhaps the greatest benefit to the profession that will result, will be a restoration of a much higher level of integrity than presently exists. As power is reduced, corruption diminishes.
3. The issue of having to appear before any judge on a matter in which every judge can reasonably be regarded as having a vested interest in denying relief, is itself a major problem. A judge is a particularly honored member of the very system whose constitutionality would be under attack. To rule in favor of the position taken by these Federalist articles would require a test of character to which perhaps no person should be subjected. The judge would need to overcome a conflict of interest, the problem of cognitive dissonance, and the fear of the potential wrath of many of his colleagues. In addition the judge's decision might result in limiting any career advancements on the Bench. Every judge would also in a very real way be: *'a judge in his own cause'*. A state of affairs that Madison feared and against which he warned.
4. The *Brown v Board of Education (1954)* outlawing segregated schools is an example.
5. cases it must accept as a matter of law. This case as most cases, it does not.
6. It is important to remember that the members of the legal profession in taking over unconstitutional control of all government, did no more than any other group might have done, if given the opportunity. Such is the regrettable nature of man. Furthermore since *eternal vigilance is the price of liberty*, we must **all share in the blame**, for allowing it to happen.
7. While the issue raised here only addresses the members of the legal profession, the question is valid as to the members of any profession, or Madisonian 'faction', or 'same hands' group.
8. The Argument is to the issue presented to the Court. However the reader may not be aware of the following established law, all of which is a pre-requisite to a favorable review and finding of the court: **1**. The Constitution is the supreme law of the land. *United States v Butler et al*, 297 US 1, **2**. The Supreme Court is the only branch of government that has the right and duty to interpret the Constitution. *Marbury v Madison*, 1 Cr. 137; 2 L.Ed. 60 (1803). **3**. In interpreting the Constitution it is right and proper to examine the purpose and intent of the writers. That purpose and intent are found in the Federalist papers. **4**. The Constitution as written includes by implication, whatever powers are needed to implement any legitimate end within its scope. *McCulloch v The State of Maryland et al*, (1819).
9. Power tends to *corrupt, and absolute power tends to corrupt absolutely'*. Lord Acton.
10. Beteen each State and the Federal government. By splitting government entities into three branches and by splitting the legislative branch into two chambers, the House and the Senate.
11. The10 that address it by implication are: Alaska, Delaware, Hawaii, Kansas, Michigan, New York, North Dakota, Ohio, Pennsylvania and Washington.
12. Some argue that lawyers, being '*officers of the court*', are part of the judiciary and therefore automatically prohibited under the separation of powers concept, from elective office outside it. While this argument has merit, opponents could easily work around it by simply changing the designation '*officer of the court*' to something else. Furthermore the US Constitution does not require any member of the Judiciary to be a lawyer. Thus were members of the legal profession

not in *de facto* total control of the judiciary branches of government, the designation of '*officer of the court*' would not have the same significance in terms of the separation of powers principle.

13. Federralist 51, (1788) by James Madison
14. Federralist 10, (1787) by James Madison
15. Federalist 88, May 1995 by this author
16. The numbers fluctuate from time to time, but never sufficiently in the last 30 years at least, to make any material difference to the effective control at issue.
17. *Stare decisis*: Lat. To abide by, or adhere to, decided cases. Black's Law Dictionary.
18. The example is not meant to be in any way disrespectful of the Court. It is simply the best way this author knows of making clear to lay people what the Court is empowered to do.