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## SYMPOSIUM

### THE PRESIDENCY AND CONGRESS: CONSTITUTIONALLY SEPARATED AND SHARED POWERS

*The doctrine of separation of powers is a basic tenet of American jurisprudence. This Symposium probes into its ongoing vitality in shaping contemporary legal and public policy issues. The following is a documentation of the Federalist Society Conference entitled "The Presidency and Congress: Constitutionally Separated and Shared Powers" held on January 19 and 20, 1990 at the Mayflower Hotel in Washington, D.C.*

## OPENING ADDRESS

### THE SEPARATION OF POWERS: AN EXEMPLAR OF THE RULE OF LAW

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In the fall of 1989, I had the unique opportunity, as Attorney General of the United States, to undertake an historic dialogue on the rule of law and human rights with those leaders in the Soviet Union charged with responsibility for law enforcement and the administration of justice. Our week-long visit to Moscow, at the invitation of the Soviet Minister of Justice, afforded us the chance to range over a wide variety of subjects

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central to what makes our democracy work: our Bill of Rights, our federal system, our two-party political process, and, most important, the principle of separation of powers embodied in our Constitution.

It was, perhaps, this last—the concept of the separation of powers—that most confounded our Soviet hosts. It seemed to be a distraction from their apparently sincere effort to fashion what President Mikhail Gorbachev has described as his ultimate aspiration, a law-based state. To the Russian officials, judges, law professors, and students with whom we exchanged views, the concept of purposely “building in” a constructive tension between separate branches of government, i.e. our concept of checks and balances, was, at the least, puzzling and, at most, incomprehensible.<sup>1</sup>

Accustomed to their own monolithic system, they would surely have to struggle to understand Justice Brandeis’ observation that we adopted the separation of powers in 1787 “not to avoid friction, but, by means of the inevitable friction incident to the distribution of government powers among the [branches], to save the people from autocracy.”<sup>2</sup>

We in this nation, on the other hand, too often take for granted those principles which are truly at the heart of our democratic process. So this conference’s focus on “The Presidency and Congress: Constitutionally Separated and Shared Powers” serves the dual purpose of sharpening our own focus on these principles and, at the same time, highlighting some unique aspects of our system that might yet be emulated by the new democracies in Eastern Europe and, hopefully, in the Soviet Union itself. Let me then offer a brief present-day lawyer’s view on separation of powers here in the United States.

As lawyers, we have been educated and trained in the value of process. As much as we may be committed to the idea of preserving individual liberties, we know the only bulwark that will truly protect those precious liberties is process. The rights and freedoms of all citizens are only as secure as the system established to protect them is strong.

For instance, even the Soviet Union has a document that purports to establish rights for its citizens, like our own Bill of Rights. The fact that the document obviously has not done so, that the Soviets are turning to us for legal advice on how to make any such guarantee of rights work,

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1. R. Thornburgh, *The Soviet Union and the Rule of Law*, FOREIGN AFFAIRS 27 (Spring 1990).

2. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

should tell us something. What I believe it tells us is that separation of powers, just as Montesquieu, and Locke, and Madison argued, is the surest protection for individual liberties, in a system of secured democracy.

However, today, I fear that system is a little less secure, a little less strong than it once was and ought to be. The principle of separation of powers is being threatened. The danger is not yet such that there is an imminent risk either to our liberties or our security. We may not yet have reached the point which Madison envisioned where "The Legislative Department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex,"<sup>3</sup> but I do believe it is appropriate to note that, if Congress' increasing tendency to encroach upon the power of the executive branch continues, it ultimately could threaten our liberties and our security. One must recall the prescient fear of legislative usurpation of power expressed in *The Federalist*: "[i]t is against the enterprising ambition of this department that the people ought to indulge all of their jealousy and exhaust all their precaution."<sup>4</sup> Furthermore, even if there are not as yet serious problems, Congress' increasing tendency to interfere with executive power has, in itself, made it much harder for the Executive to fulfill its responsibilities. Before providing some examples of how and where I believe the Congress has encroached on the President's constitutional power, I would like to make a couple of general observations about my personal philosophy regarding the separation of powers.

I am not one who believes that there is no room for coordination and consultation between the executive and legislative branches. Nor am I one who believes that it is always clear where the lines of power should be drawn between the two branches. In fact, I tend to believe that it may be a good thing that we do not know precisely where those lines fall.

Because there is not always certainty as to how far the executive and legislative branches may operate and still remain within their proper spheres, there is a strong incentive for the branches to work together to compromise their differences. Neither branch is enthusiastic about litigating the scope of its powers when defeat, either way, can represent a much greater loss of power than would any compromise.

Nevertheless, there is a strong tendency in each branch—"ambition confronting ambition," as Madison proposed<sup>5</sup>—to try to garner as much

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3. THE FEDERALIST NO. 48, 333 (J. Madison)(J. Cooke ed. 1961).

4. *Id.* at 333-34.

5. THE FEDERALIST NO. 51, 349 (J. Madison)(J. Cooke ed. 1961).

power for itself as the other branches will allow. Relations between the executive and legislative branches often resemble a game of constitutional brinkmanship. At the very brink, rather than resort to the courts, both branches rely principally on the checks and balances established two hundred years ago. Those structural mechanisms, however, do not always suffice to resolve a modern controversy, which can linger on in unwanted legislation, lawfully passed by Congress, but lastingly opposed by the Executive.

I am particularly concerned that today's legislative process has rendered the Presidential veto a less effective check on congressional encroachments than was envisioned two centuries ago. It is often very difficult for the President to veto legislation that contains sometimes blatantly unconstitutional provisions.

For example, Congress has become fond of inserting substantive provisions in appropriations bills. This is what they call making a provision "veto-proof." The President is put in the virtually impossible position of having to veto an important appropriations bill that may allocate desperately needed funds. It is no exaggeration to say that in these cases, Congress often gives the President the distasteful option of approving an unconstitutional provision buried in an appropriation or vetoing the whole bill and shutting the entire government down. This has been particularly troublesome in recent years because of Congress' difficulty in passing funding measures until the last minutes of a session.

The net result is that the President's veto, arguably the most powerful weapon in his arsenal to preserve and protect his executive authority, is rendered inoperative. This legislative finagling around the President's veto also indirectly undermines our own liberties. Constitutionally, the President is accountable to all the people—the chief reason the framers made the executive unitary—but how can he account for himself fully to the people when his power is so circumvented by Congress that he may not veto provisions threatening his power or our liberties?

Congress is also increasingly attempting to micromanage the executive branch on matters such as foreign affairs, routine executive branch operations, and even internal deliberations, that are solely within the province of the Executive. For example, the President last year had to veto a joint resolution that would have prohibited the export of certain technology and services in connection with the codevelopment and coproduction of

the FSX aircraft with Japan.<sup>6</sup> This resolution contained a number of constitutional wrongs. There was, however, one thread that united them: each sought to hamstring the President's constitutional authority to negotiate with a foreign power.

First, the resolution would have infringed upon the President's constitutional authority to define the scope and nature of negotiations with a foreign state. In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. Under article II, that voice must be the President's. Nonetheless, Congress added insult to infringement by language that would have required that the Defense Department consult the Commerce Department on negotiations, and that the Secretary of Commerce make recommendations to the President. Congress, in effect, tried to force the President to renegotiate the FSX by requiring him to heed what his own Secretary of Commerce said to do about the deal.

After the surrender of the dictator Manuel Noriega to American forces, the President's flexibility to act with dispatch to help our friends in Panama was hampered and delayed by similar congressional caveats. They were impetuously passed to stop any foreign aid, or military support, or tariff relief from ever going to General Noriega. Noriega was incarcerated in a Miami jail, because of prompt executive action, but these laws were still on the books, and blocked early help to Panama, in some cases, for forty-five days.

Such provisions constitute clearly inappropriate intrusions by Congress into executive branch management. But they also encroach on the President's authority with respect to internal deliberations incident to the exercise of executive power. The Constitution's vesting of executive power in the President requires that the President exercise supervisory authority and control over the internal deliberations of the executive branch. Essentially, this means that the President must be free to structure the executive branch's decision-making processes as he sees fit.

However, the lengths to which Congress will sometimes go to intrude on executive decision-making were never more evident than in this provision in last year's appropriation for Interior: "None of the funds available under this title may be used to prepare reports on contacts between employees of the Department of Interior and Members and Committees of

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6. S.J. Res. 113, 101st Cong., 1st Sess. (1989).

Congress and their staff.”<sup>7</sup> In other words, the Secretary of Interior could not keep track of what his own employees may have said to congressional staffers, let alone make report of such contacts that might show up, for example, in a probe into undue influence by interested congressmen on executive decisions.

Consequently, at one and the same time, Congress seeks to regulate contacts between executive branch agencies (between Commerce and Defense, re: the FSX) while attempting to prohibit the executive branch from regulating its contacts with the legislative branch (between Interior and Congress, re: any matter). Such actions clearly erode the President’s constitutional responsibility to supervise the affairs of the executive branch as he sees fit. While the Constitution gives Congress a free hand in determining what laws the President will enforce, I do not believe that Congress has unfettered discretion in determining *how* the executive branch should execute those laws.

Let me speak from sad experience. Congressional efforts to prohibit executive agencies from reorganizing or consolidating offices or to prohibit agencies from expending funds on activities that are clearly a part of the agency’s mission constitute a particularly indefensible interference with the day-to-day management of executive departments. Last year, Congress inserted a provision in a Justice Department appropriations bill, designed to prevent the FBI from changing the character of a field office in Butte, Montana.<sup>8</sup> But the legislation escalated to sheer overkill! The rider to the bill set forth that no funds could be spent “to relocate, reorganize, or consolidate any office, agency, function, facility, station, activity or any other entity falling under the jurisdiction of the Department of Justice.” To be sure, the status quo was maintained at the Butte office for a few more months. But the language cited also delayed the implementation of a recommendation to me from our U.S. Attorneys and the head of the Criminal Division to enhance our effort against organized crime by merging the separate strike force operations into the U.S. Attorneys’ offices. It also prevented the creation of a much needed office of International Affairs for our Department.<sup>9</sup>

Such provisions obviously represent petty politics at their most base. Even worse, they prevent the American people from receiving the improvement in services they rightfully demand of their government. If we

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7. H.R. 2788, 101st Cong., 1st Sess. (1989).

8. H.R. 2991, 101st Cong., 1st Sess. (1989).

9. *Id.*

are going to ask Americans to give large portions of their paychecks to Uncle Sam, the very least we can do is to provide them benefits and services in the most cost-effective manner available.

Congress obviously justifies these and other restrictions on executive branch actions on the ground that they are directly pursuant to the legislative branch's appropriations powers. I have grave doubts, however, that the power of the purse was ever intended to include the power to define our foreign relations, to manage and structure the executive branch decision-making process, to regulate contacts by agencies such as OMB with other agencies, to prohibit the President from requiring that he be notified when a subordinate communicates in his official capacity with a member of Congress, and to require that Congress be notified of all covert activities within forty-eight hours, even if doing so could threaten American lives.

Yet Congress has attempted all of these usurpations, marking a trend that ultimately poses a grave threat to separation of powers as a protection of our very liberties. If Congress can prevent me from restructuring my own Department through its control of the purse, then Congress could, at the extreme, conceivably prevent me from prosecuting the friend of a member of Congress or even of a member himself—and that, my friends, should give us all pause.

Yet another area of concern is Congress' growing penchant for delegating executive power to persons not controlled by the President, another trend that is particularly dangerous to individual liberties. The President is elected by the citizens of all the states, and, to restate the point, is accountable to them in a way no other elected official is. Indeed, if the President fails to uphold the laws, if he acts unfaithfully, the American people can, and do, hold him responsible. Therefore, congressional attempts to delegate elsewhere the executive branch's responsibility of the President that is central to the successful operation of our constitutional system for executing the laws undermines the direct accountability. Not only does the President lose power, but the American people may lose protections for their freedoms.

Let me illustrate by reference to the Office of the Independent Counsel, an institution, I am well aware, given constitutional sanction by the Supreme Court in *Morrison v. Olson*.<sup>10</sup> Nonetheless, I suggest that the office does raise legitimate concerns over separation of powers, particu-

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10. 487 U.S. 654 (1988) (Scalia, J., dissenting).

larly as the Independent Counsel's unfettered prosecutorial powers touch upon individual liberties.

We are all aware of the compelling arguments for good government—indeed, the felt need for some modern proscription against executive tyranny—that helped create the Independent Counsel. But let me recall to you another form of tyranny that can also arise unsuspected, and that comes from the very choices a prosecutor must necessarily make in bringing cases. Robert Jackson, as Franklin D. Roosevelt's Attorney General, warned that this is where “the greatest danger of abuse of the prosecuting power lies,” (a warning Justice Scalia repeated, at length and almost verbatim, in his dissent in *Morrison v. Olson*).<sup>11</sup> “If the prosecutor is obligated to choose his case, it follows that he can choose his defendants,” Jackson warned. “Therein is the most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than cases that need to be prosecuted.”<sup>12</sup>

An Attorney General must be acutely sensitive to this danger, so that, as Jackson warned, the crime he prosecutes does not become that of “being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.”<sup>13</sup> If so, how much more sensitive must an Independent Counsel be since the Ethics in Government Act automatically focuses his or her prosecutorial actions upon specific members of the executive branch? Indeed, do not the initiating procedures under the Act all but pick the defendant for the Independent Counsel?

I broach this subject briefly not to impugn any past or present Independent Counsel, but to point out, forthrightly, present difficulties and potential dangers that arise, even from the best of intentions, when the separation of powers is ignored, or, as in this case, is legislatively “gotten round.” These dangers clearly derive from the parcelling out of executive power by the Congress, among the judiciary and the legislature itself, to create an office such as the Independent Counsel. In the process, accountability has been confused, the unitary executive further fragmented, and the rights of individuals put in jeopardy by the built-in “targeting” of prosecutive efforts not upon prospective offenses, but upon putative offenders.

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11. Address delivered at the second Annual Conference of United States Attorneys, April 1, 1940, cited in *Morrison*, 487 U.S. at 727-28 (Scalia, J., dissenting).

12. *Id.* at 728.

13. *Id.*

In isolation, many of the incidents I have cited today may not seem overly threatening. But together they represent a trend that, if continued, could endanger our very system of government. That system has relied on process to help ensure that individual liberties are preserved—in the main, upon the separation of powers, writ large over two centuries ago by the Constitution's framers to minimize the likelihood that individual liberties would be sacrificed to an increasingly powerful government.

As stated, today's overstepping by the legislative branch does not yet threaten individual liberty. But it does unnecessarily challenge this Administration's commitment to a less adversarial relationship between the co-equal branches of government. And it is also compromising the government's ability to provide services with the care and dispatch our tax-paying citizens expect.

As students of the law and history, we have long understood the importance of separation of powers. We are now poised to share our national experience in developing institutions for implementing the rule of law and defending human rights with those nations in Eastern Europe awakening from their Soviet-imposed comatose state. Yet we can, by right, only pass on what we can effectively defend and preserve here at home. There is no better place to begin than by protecting and preserving the principle of separation of powers, so that it continues as a safeguard of our individual liberties, and an exemplar of democracy under the rule of law, the world over.

