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Shared Power under the Constitution: The Independent Counsel

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SHARED POWER UNDER THE CONSTITUTION: THE INDEPENDENT COUNSEL

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As we gather to celebrate the bicentennial of the Constitution, we have the opportunity to reaffirm a document that stands at the cornerstone of the American legal system and in the forefront of all writings of Western political history. And what a truly remarkable document it is. Conceived in the pressure of a great crisis in human events, the Constitution has endured and evolved over the course of generations. Its legacy is that it continues to live and breathe even as we confront problems that the Framers could not have anticipated.

As a United States Senator, of course, I spend each and every day of my life implementing the structure of the Constitution. But the impact of the Constitution is not limited to government officials; it affects each of us as citizens of this Republic. In fact, not a day goes by in which the living reality of the Constitution does not affect the life of this entire nation and each of its people. You need look no further than the front page of your daily newspaper to confirm that fact.

My remarks today will focus on a topic that confirms the continued vitality of our Constitution. That topic is customarily referred to as the separation of powers. Addressed in detail by the Framers, its doctrinal significance to the development of constitutional law is well known and universally accepted. Yet the frequency and ease with which the doctrine has been invoked belies the practical difficulties that often confound its application.

My purpose in selecting this topic is twofold: first, it illustrates the ability of this 200-year old document to meet today's governmental crises; second, I want to suggest that the very name of the doctrine—"separation of powers"—is in fact a misnomer and that a proper understanding of our history and our Constitution shows that we in fact have a government of "shared powers," not "separated powers."

The separation of powers doctrine finds its way into the newspapers in the current debates over the ABM Treaty and the constitutionality of the Special Prosecutor, more properly referred to as the Independent Counsel. Separation of powers has been invoked as the call to arms by Michael Deaver and Oliver North's lawyers as they attempt to defeat the investigations of their alleged misdeeds. These constitutional challenges raise broad questions about the proper role of the Attorney General and the Department of Justice in our government.

My search for a resolution to these issues leads to different highways. Some are paved with principles of law, others with principles of public policy. Each begins with the illumination of history, and each is guided by the constitutional beacon called the separation of powers.

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What was meant, we must first ask, by the concept of "separation of powers"? The Constitution provides separately for each of three Branches, and vests each of the Branches with one of the three functions of legislating, executing, and judging. But the Constitution nowhere mandates that these three functions must be kept wholly separate and independent. Indeed, while each function is assigned primarily to one branch, each is also shared with the others. The phrase "separation of powers" emphasizes differences between the three branches; the more accurate description of our government as one of "checks and balances" emphasizes the sharing of governmental powers and responsibilities. In the increasingly contentious and diverse American society, we must constantly seek avenues of consensus, not contests based on narrow and divisive assertions of power.

There is no better place to begin an inquiry into the formation of the Constitution than with the Federalist Papers, that stirring collection of eighty-five letters that is rightly counted as one of the classics of political theory. James Madison, often called the "Father of the Constitution," noted that even the "oracle" of the separation doctrine, the celebrated Montesquieu, did not mean for these legislative, executive, and judicial departments "to have no practical agency in, or no control over, the acts of each other."

In designing the Constitution Madison considered the constitutions of the thirteen states. At the time, North Carolina's constitution declared that "the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other." Madison chose not to adopt the North Carolina model, with its rigidly compartmentalized scheme, and—as he reported in Federalist No. 47—concluded instead that the three departments should "by no means" be "totally separate and distinct from each other."

The Federalist Papers thus tell us that the Framers did not intend for the three branches of government to be wholly unconnected. They did not intend for the separation of powers to be like the wall of separation between church and state built by the first amendment. Their vision was for a doctrine of shared powers that would ebb and flow with the tides of the day; a doctrine that is pragmatic and flexible, and not unyielding. The Framers viewed the separation principle as a vital check against tyranny, but likewise saw, in the words of the Supreme Court in *Buckley v. Valeo*, that a "hermetic sealing off of the three branches of government would preclude the establishment of a Nation capable of governing itself effectively."

The scholar in whose name this grand day proceeds, Distinguished Professor of Law Eugene Gressman, has recognized and embraced this central meaning of the separation doctrine. Professor Gressman, as many of you know, was counsel for the House of Representatives in *INS v. Chadha*,[1] a landmark separation of powers decision. Professor Gressman based his argument on the constitutionality of the legislative veto on what he cogently identified as the "subtle language" of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube*

1. 462 U.S. 919 (1983).

Co. v. Sawyer:[2] "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."[3]

One cannot talk about the shared-powers concept without recalling the wisdom and the dancing eyebrows of the late distinguished Senator from the State of North Carolina who set the standards of leadership for the Committee I now chair, Sam Ervin. For it was Senator Sam who in 1967 sponsored a resolution to create a Separation of Powers Subcommittee. Never before, in fact, had a Senate Subcommittee been created by resolution and I believe we have never had one since. The Separation of Powers Subcommittee occupies a special place in the annals of Congress, because before its creation a generation of Americans had grown up believing and accepting that the heart and soul of constitutional power was the Executive. The hearings conducted by Senator Ervin's Subcommittee became the force that swung the pendulum of power to a more equal balance, and they laid the indispensable groundwork for such significant legislation as the War Powers Act and the Ethics in Government Act, which includes the independent counsel provisions.

What I would like to discuss today is the concept of the separation of powers as framed in 1787 but as applied in 1987 in the debate over the constitutionality of the independent counsel. The historical significance of the concept of shared powers is at the forefront of that debate, since it relates directly to the proper role of the Attorney General in our government. Understanding that role is so important that before entering the independent counsel fray we must again look to history—this time the history of the office of the Attorney General and the original manner in which criminal prosecutions were conducted.

The Judiciary Act of 1789 created the office of Attorney General, but did not create a Department of Justice. While our structure at that time recognized the role of lawyers for the government, the supervision of United States district attorneys came not from the Attorney General but from the Secretary of State, and it remained there throughout the Federalist period. The Attorney General was regarded as the legal advisor to the President and the Cabinet, and as an agent from whom Congress might on occasion seek advice. He was paid half of the salary of department heads. His job was part-time, with the government merely one of his clients, and he was expected to pursue private legal work. Perhaps our 18th Attorney General, John Young Mason, who graduated from the University of North Carolina in 1816, represented clients here in Chapel Hill while serving as Attorney General.

History shows us that contacts between the Attorney General and United States District Attorneys were largely fortuitous, and that District Attorneys operated largely on their own responsibility as a matter would develop in their particular district. It was not until 1861 that the "general superintendence and

2. 343 U.S. 579, 635 (1952).

3. *Id.* at 635 (Jackson, J., concurring).

direction" of District Attorneys was placed with the Attorney General, and not until 1870 that the Department of Justice was even created.

The Attorney General, then, has not always controlled federal criminal prosecutions. Nor have prosecutions always been a public monopoly. At the beginning of the nineteenth century, prosecutions were private as well as public matters. The victim could bring a criminal charge against a defendant and hire a lawyer to represent him just as he could bring a civil action. Clearly, prosecution was not an exclusively governmental function, much less an inherently executive one. When the Constitution was ratified, in fact, most public prosecutions were probably undertaken by justices of the peace, who were judicial and not executive officials.

Also of historical significance is the unquestioned power of a federal district court to appoint interim United States Attorneys. Since 1863, in fact, the courts have been authorized by statute to fill temporary vacancies in the office of United States Attorneys and that power has been found by the courts to be constitutional. It has also been affirmed on two occasions by the Department of Justice: first, in an 1880 Opinion of the Attorney General; and second, in a 1979 Opinion of the Office of Legal Counsel.

With our historical groundwork now laid, we can turn to the ongoing debate over the constitutionality of the independent counsel statute. Originally enacted by the Congress in 1978 as part of the Ethics in Government Act, the statute provides for the appointment of independent counsel to investigate and prosecute two categories of persons: first, approximately seventy specifically designated high-ranking government officials; and second, a broad class of other persons, if the Attorney General concludes that their investigation by the Department of Justice might result in a conflict of interest. The statute itself recognizes a role for the executive, judicial, and legislative branches. The Attorney General applies to a special division of the Court of Appeals for the District of Columbia for appointment of an independent counsel. The Senate Judiciary Committee is also explicitly entitled to initiate the appointment of an independent counsel, and has on three occasions requested that the Attorney General apply for such an appointment

The independent counsels today find themselves under increasing attack. Both Oliver North and Michael Deaver have fired their salvos against the statute. Their counsel, in the zeal that characterizes our profession, have mustered a host of arguments in a frontal attack on the statute's constitutionality. Simultaneously the Reagan Administration has launched a series of collateral maneuvers to undermine the independent counsel. Most recently, the Justice Department notified the independent counsels investigating Reagan Administration figures that neither they nor their staffs can represent private clients who are under federal investigation in any criminal probe or civil matter. This directive, which constitutes a complete about-face of the position taken by the Justice Department shortly after passage of the 1978 law, reportedly prompted one of the special prosecutors and some assistant prosecutors to resign.

The Justice Department has also offered a new interpretation of the stat-

ute's provision for "good cause" removal of an independent counsel. The Department, apparently responding to the furor resulting from its directive, announced the day before yesterday that it would apply the new policy only to future independent counsels. At hearings before the Senate Subcommittee on Oversight of Government Management, which is charged with reauthorization and possible amendment of the statute, the Department's representative indicated that he believed the President could fire any independent counsel who refused to comply with a presidential order. No distinction was made for presidential orders which may affect the very independence of the independent counsel. That position is frighteningly reminiscent of Richard Nixon's Saturday Night Massacre, a mistake which fueled the controversy that led to the brink of impeachment, the Constitution's ultimate check on excessive assertions of power by the Executive.

To me, these are just two of several available examples of the Administration's attempt to accomplish by indirect means a result—the undermining of the independent counsel statute—that it could not attempt, for obvious political reasons, by direct means. But these indirect attacks pose no less of a threat to the statute.

At the center of the debate on the statute's constitutionality is the separation of powers doctrine. The legal briefs that have been filed urge that the doctrine be strictly construed and argue that the statute encroaches on the exclusive powers of the executive branch. The function of prosecuting offenses against the United States, as this argument goes, rests exclusively with the Executive and his delegate, the Attorney General.

History proves that those who would strike down the independent counsel statute as unconstitutional base their claim on a flawed factual premise. History teaches that prosecutions have not always been controlled by the Attorney General, and that they have not always been public.

In my view, the independent counsel statute can and should withstand constitutional scrutiny. I believe the independent counsel is an executive branch official. I am aware of nothing in either the text of the Constitution or in well-accepted principles of jurisprudence that requires the appointment of an executive branch official to be made in every case by the President. The Appointments Clause of the Constitution, in fact, expressly vests in the "Courts of Law" the power to appoint inferior officers. History teaches that federal prosecutors have functioned—at least in the constitutional sense of the term—as "inferior officers." The Department of Justice itself recognized that truth in its 1979 formal opinion.

While the Supreme Court has not quite yet been asked to resolve this issue, it has recently been addressed by the special three-judge panel that appoints the independent counsels. That panel, headed by Senior Circuit Judge George E. MacKinnon, only a week ago upheld the validity of the office of the independent counsel.

To state that the independent counsel statute is constitutional, of course, does not end our journey. I, as Chairman of the Senate Judiciary Committee,

and you, as concerned citizens, must be satisfied not only that the statute is constitutional but also that it is sound policy. For reasons that cut to the very heart of our citizenry's faith in the integrity of our government, I believe this statute is sound policy.

History again sets the stage for our analysis. The need for a special counsel who is to some extent independent of the Attorney General and free of the conflicts of interest that exist when an Administration investigates alleged wrongdoing of its own officials has unfortunately been demonstrated several times in this century.

During the Teapot Dome scandal of the Harding Administration, the usual federal prosecutorial authority was found to be flawed because the Attorney General, Harry Daugherty, had himself been implicated in the fraud. As a result, Congress passed an act enabling the President to appoint a special counsel subject to the advice and consent of the Senate. Senator Atlee Pomerene of Ohio became the special counsel and Owen Roberts, then a private attorney, was subsequently appointed by President Coolidge and confirmed by the Senate as his assistant. Together, Pomerene and Roberts, who was later rewarded for his service by an appointment to the Supreme Court, conducted the investigation, including the criminal prosecution of the former Secretary of the Interior.

During the Truman Administration, Attorney General J. Howard McGrath appointed a highly respected New York lawyer, Newbold Morris, as "Special Assistant to the Attorney General" to lead an investigation of corruption in the handling of tax-evasion cases. McGrath changed his mind and fired Morris shortly after Morris sent McGrath a questionnaire on his personal finances and requested access to McGrath's official files. Truman then fired McGrath. While no one was appointed to succeed Morris and continue the investigation, the Justice Department in the Eisenhower Administration subsequently prosecuted and obtained several convictions.

The Watergate scandal, of course, needs no detailed discourse. All of us here remember with painful clarity the tragic events which culminated in the firing of Archibald Cox by then Solicitor General Robert Bork, who carried out Richard Nixon's orders after the Attorney General and Deputy Attorney General refused to do so.

The history of this nation thus demonstrates the need for an independent investigative arm in the federal government. There are certain extraordinary moments of crisis when the people's faith in the integrity and independence of their elected officials is caused to waiver. These scandals tarnish the view that the Attorney General is an independent executive official who can be trusted to enforce the criminal law in the high offices of the government. To restore the utmost public confidence in the investigation of criminal wrongdoing by high-ranking government officials, the appointment of a special prosecutor then becomes necessary.

I believe, therefore, that Senator Levin's Subcommittee on Oversight of Government Management should favorably report reauthorization of the statute, subject to those minor adjustments the Subcommittee deems necessary as a

result of its hearings, and that the full Senate should vote in favor of reauthorization.

The current controversy over the independent counsel statute demonstrates, beyond the shadow of a doubt, the continued vitality and vigor of the Constitution, devised for us two hundred years ago, in barely more than three short months. The delegates in Philadelphia knew, with astonishing confidence, that they were devising a work for the ages—and that they were not only establishing a framework for preserving representative government in the United States of America, but also setting a great precedent, a "beacon to mankind," which would encourage those who sought freedom anywhere in the world.

A core element of that framework is the separation-of-powers doctrine, or as I would prefer to see it described, the "sharing of powers" doctrine. It was central to Madison's thoughts as he embarked on his rendezvous with constitutional destiny, and it is central to constitutional doctrine today. After reading Professor Gressman's briefs and listening to his arguments, the Supreme Court—on its way to invalidating the legislative veto—recognized the "hydraulic pressures inherent within each of the separate branches to exceed the outer limits of its power" and stressed that the pressure "even to accomplish desirable objectives, must be resisted."

That pressure must be resisted not only by the legislative branch, but by the executive branch as well, for each may be tempted to circumvent the Constitution. We must not allow the cry of "separation of powers" to become a sword that cuts away the independent counsel. To do so would send us back to that point in history when faith in the integrity of our elected officials was at its nadir. We must remember, as Madison told the newborn republic, that "Justice is the end of government. It is the end of civil society."

The 200th anniversary of the Constitution coincides with a modern demographic phenomenon. We find ourselves today at one of those moments in the cycle of history when a new generation of Americans is about to make its own "rendezvous with destiny."

Many of you share with me the distinction of being part of the post-war generation that is the largest in our history. In our youth, we changed America, not by our votes but by our ideas and our ideals. When we marched, we did not march for a fourteen-point program and a white paper. We marched to change attitudes. Whether it was civil rights or women's rights, preserving the environment or ending the nuclear-arms race, we profoundly altered the face of this nation.

Now, in the season of our maturity, our generation has a unique chance to redeem the character and the future of America, for in 1988 more than half the voters will come from our generation. And fate has not only cast 1988 as an election about the future; it has also woven into its fabric an important coincidence, for 1988 will not only be a year about the future; it will also be a year of anniversary and remembrance. In 1988, we mark the twenty-fifth anniversary of the assassination of President John F. Kennedy, and so for us 1988 will be a special year—the closing of a circle, as our past meets our future.

The cynics believe that my generation has forgotten. They believe that the ideals and compassion and conviction and courage to change the world that marked our youth are now nothing but the long-faded wisps of our adolescence. They believe that having reached the conservative age of mortgage payments, pediatricians' bills, and concern for our children's education, we have forgotten who we are and what we believe. But they have misjudged us. We know very well who we are and what we believe; and we are ready to play our part in the life of this nation.

We are prepared to meet our responsibilities as citizens and as leaders, and we understand that one ultimate responsibility to future generations here and everywhere on earth is to sustain and defend the continued vitality of our living Constitution, against every threat that may arise beyond our borders; against the subtler and more insidious perversions of its language and its spirit that may make their way—often with the best of intentions if not with the highest respect for its enduring capacity to moderate our excesses and preserve our liberties—into the policies and programs of government; and, most of all, against the invisible but most damaging erosions suffered from our own individual neglect of our rights and responsibilities as free American citizens.

I believe this generation of Americans is prepared to meet that challenge. I believe we will find the new generation of leadership to make the tough decisions that we face.

I believe our Constitution lives, and that the great tradition of freedom and opportunity to which it has given life will lead us into an even greater future for America and for Americans—for as long as the Constitution survives, that dream that has inspired every generation of Americans cannot perish. It is time for us to renew that dream. It is time for us to reclaim the future. It is time to redeem the promise of America. Our time has come, and, together, under our still-living Constitution, we will meet its challenges.