ARTICLES

Introduction: The Duty of Keeping Political Power Separated

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The proper separation of the powers of the federal government is an inherently amorphous topic. Once it is granted that these powers ought to be controlled by vesting each branch with an array of checks on the powers of the other branches, rather than by an attempt to seal hermetically the powers of each branch,[1] the debate becomes, in essence, a prudential argument about the wisdom of the extent of the mutually overlapping encroachments. Even if the more formalist inquiry is preferred, the sorting of governmental functions into executive, legislative, and judicial categories is uncertain, arbitrary, and inevitably partakes more of sheer assertion than reasoned analysis. It is thus unsurprising that the constitutional doctrine pertaining to separation of powers is so muddled.

It may be that doctrinal equilibrium will never be achieved. Given the propensity, indeed, the structural desirability, of governmental branches to meddle in each other's bailiwick, there is a never-ceasing tension between the arms of government. Courts are uneasy and imperfect mediators of that tension, if only because they are also participants in the turf war they are asked to umpire. That fact not only renders doctrine more uncertain than usual, but lends it an air of suspect legitimacy that is less present in other areas of constitutional adjudication. It should not be surprising that cases posing separation of powers issues

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1. This is the position taken by James Madison in Federalist No. 47, in which he declared that separation of powers does "not mean that these departments ought to have no partial agency in, or no control over, the acts of each other." Rather, Madison espoused the view that separation of powers meant that "where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted . . . ." THE FEDERALIST No. 47 (James Madison) (Clinton Rossiter ed.).

frequently tend to be resolved on threshold issues of justiciability. Thus, it is with extreme caution that I venture a few normative observations about the nature of the enterprise.

It is a mistake to suppose that we can safely rely upon the judiciary alone to define the proper relationship among the branches of government. While the bare outline of many of these relationships is constitutionally contemplated, their substance is the product of tradition, political realities of any given moment, or other non-constitutional sources.

For example, in one of the papers that follows, Terri Jennings Peretti notes that while the requirement of Senate confirmation for United States Supreme Court appointments is a constitutional mandate, the effective meaning of that requirement has shifted over time. Professor Peretti contends that in the twentieth century the Senate has become ever more the President's compliant servant. The result is that the institutional check of senatorial consent to presidential Court appointments has been badly eroded. There is nothing the judiciary can do to redress this situation. Rather, the most obvious solution lies within the Senate itself. The constitutional imperative of separating powers by checking the powers exercised by each branch works in this case only if the Senate is willing to acknowledge and accept its duty as an actor independent of and equal to the President.

Similarly, Americo Cinquegrana argues that although Congress possesses the constitutional authority to specify the line of presidential succession below the Vice President, the existing presidential succession statute produces bizarre anomalies that are sharply at odds with the foundational premises of a government of separated powers. Although Cinquegrana suggests that the constitutional validity of the presidential succession statute might be brought before the Court, he acknowledges the considerable justiciability obstacles to such a judicial determination. The better alternative is for Congress to admit the infirmity of its own creation and write a statute which avoids the peculiar possibilities for legislative interference with the executive that the present statute permits. A Congress that treated seriously its obligation to conform to the Constitution would respond to Cinquegrana's appeal and reform the present statute of dubious validity.

Both Peretti's and Cinquegrana's papers suggest that in order to activate fully our constitutional principle of separated powers it is necessary for each of the branches voluntarily to arrest its own potential abuses as well as to monitor and check the abusive tendencies of the other governmental institutions. The slow erosion of this impulse and

the corresponding tendency to let the Court decide all these issues has created a dangerous constitutional lacuna.

It would be error, however, to think that a reinvigorated sense of constitutional duty on the part of the executive and legislative branches would solve all problems of power distribution among the branches. Indeed, such a reinvigoration might well lead to increased interbranch conflict. Precisely this problem is raised by Paul Gumina's paper. Gumina notes that Title VI of the Intelligence Authorization Act, Fiscal Year 1991, requires the President to notify Congress in a timely fashion whenever the United States has commenced covert actions, actions designed secretly to influence political, economic, or military conditions abroad.

From the congressional perspective this legislation is an attempt to curb the making of unrestricted, undeclared war by the executive and is thus an example of a revived sense of congressional obligation to check executive abuse of power. From President Bush's perspective, the act was an unwarranted and unconstitutional attempt on the part of Congress to interfere with the executive's power to conduct the nation's foreign policy. Such an intractable interbranch conflict is the type of dispute which the Court is ultimately required to resolve since it necessarily implicates the frontier between executive and legislative authority. As Justice Robert Jackson put it, "[w]hen the President takes measures incompatible with the expressed . . . will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[2] The obligation which the Court must not shirk in such cases is the obligation to decide. Rather than evading or obscuring the grounds of decision by declaring such cases to be nonjusticiable, the Court should, absent the most compelling reasons for invoking one of the justiciability doctrines, decide the case squarely on the merits of the proper distribution of power. To be sure, such a resolution may inevitably be tinged with consideration of prudential factors, but that fact is not reason enough to evade the necessity of decision.

Problems of power separation are not entirely matters of interbranch conflict. Some of the more troublesome issues occur when conflict erupts within a single branch. Professor Eric Freedman's paper addresses one manifestation of the problem: the case of criminal misconduct by the President. Freedman examines the issue of whether im-

2. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 n.3 (1952) (Jackson, J., concurring).

peachment is the sole remedy for such misconduct, or whether a President may be indicted, tried, convicted, and sentenced while continuing to hold office. Impeachment, together with the more recent removal provisions of the Twenty-fifth Amendment, constitute the remedies provided by the Constitution for presidential malfeasance, but the Constitution provides no answer to the question of whether those remedies are exclusive and operate to displace the ordinary processes of criminal law.

Two forms of conflict are presented by the specter of criminal proceedings against the President. The first is an issue of allocation of authority between the states and the federal government. *In re Neagle*[3] established the principle that any federal official is immune from criminal prosecution for acts taken in connection with her federal responsibilities. Accordingly, except in the rare circumstance of presidential criminality falling wholly outside the scope of presidential duties, there is no warrant for state prosecutions, even assuming that impeachment is not the sole constitutional remedy. The second and more knotty problem is the question of whether a federal criminal prosecution can be brought against an incumbent President. Given the latter-day invention of the independent counsel and the Supreme Court's determination of its constitutional validity[4] the possibility of such proceedings is undoubtedly enhanced. Through the independent counsel device, Congress and the courts have created an executive official who is endowed with unique characteristics of independence from the executive master. The independent counsel is perhaps well-suited to the task of controlling executive lawlessness, but raises the troubling question of whether such presidential misconduct is best controlled by criminal prosecution or by the more political process of presidential removal. Professor Freedman advocates the use of criminal prosecutions despite the likelihood that indictment of an incumbent President by an independent counsel is about as politically explosive an act as could be imagined. Freedman's thought-provoking article raises the question of whether the obligation to keep political power separated carries with it a correlative obligation to defer to the constitutionally defined mechanisms for controlling abuse of power.

The issues raised by the following papers suggest once again that the resolution of power distribution problems within the federal government is never easy, but the problem is made even more difficult when the relevant political actors fail to discharge their constitutional duty to monitor the exercises of power of each branch, *including their own*, and to check assertions of power that are honestly regarded as illegitimate. Congress

3. 135 U.S. 1, 75 (1890).

4. Morrison v. Olson, 487 U.S. 654 (1988).

has failed to do this with respect to the presidential succession statute. Even when one branch exercises power legitimately, as the President does by nominating a person for the Supreme Court, separation of powers principles are not truly alive unless the Senate asserts in some meaningful fashion its power both to advise the President and to withhold its consent. In addition, the Court must act to resolve the politically irreconcilable differences between branches. Finally, intrabranch attempts to check power are fraught with uniquely difficult problems of power separation. These themes are more fully explored by the papers that follow.