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### Presentation, After the Independent Counsel Decision: Is Separation of Powers Dead?

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## PRESENTATION BY PROFESSOR PAUL M. BATOR\*

Well, it is old advice to take with a grain of salt the arguments of a lawyer who has just lost a case. I think it is additional good advice to take it, particularly, with a grain of salt if he starts off by saying that he is not about to reargue his case.

I guess my view of the bottom line question is that the doctrine of separation of powers is not dead, although the version of it that was put forward, for instance, in Justice Scalia's dissenting opinion in *Morrison v. Olson*,<sup>1</sup> hasn't died either because it was never alive. That was never the law. It was never the true meaning of the federal Constitution, although it was maybe of the Massachusetts Constitution.

Having taught in this field for thirty years, I can't take quite seriously the topography that Charles Fried gives us here, that separation of powers was an unserious law until 1977 or 1978. It took on this wonderful life for a dozen years and now has again bit the dust. That is a funny account. There is a lot of very complicated and serious doctrine out there which has been winding its way in a whole lot of fields.

In the field of the removal power there is an incredibly complicated and elaborate doctrinal history, beginning way back with *Marbury v. Madison*.<sup>2</sup> The question most recently revisited in *Commodity Futures Trading Commission v. Schor*<sup>3</sup>—the power of Congress to create such adjudicating institutions as administrative adjudicators and legislative courts—has an immensely complex background.

You have to be a little bit careful here, also, because there is a lot of separation of powers law that is hidden inside due process law. I think of the great case, *Wong Wing v. United States*,<sup>4</sup> that Professor Hart celebrated in the dialogue in the federal courts case book.<sup>5</sup> That case held that the Congress may not authorize the executive to impose infamous punishment on persons without court trial. That was a due process case, but basically it was grounded on separation of powers principles of the most fundamental importance. And how can you think about separation of powers and not even mention the steel seizure case?<sup>6</sup>

I think the way to start with this subject is, as Charles did, to go back and try to think about our Constitution and its language and its structure. How is the doctrine of separation of powers enacted in our Constitution? And as Mr. Fried acknowledged, there is very little in the text. There is very little specification of how powers are supposed to remain separate. It is the case that the

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1. 108 S. Ct. 2597 (1988).

2. 5 U.S. (1 Cranch) 137 (1803).

3. 478 U.S. 833 (1986).

4. 163 U.S. 228 (1896).

5. P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 412-19 (3d ed. 1988).

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Constitution implicitly recognizes that there will be three branches and allocates to each a central mission. But beyond that, the specification to be drawn about separateness in the Constitution is very little.

The Constitution makes all kinds of very specific and detailed allocations of power in certain fields: the appointments issue; the presentment clauses. There are, however, very many specific details as to which the Constitution is completely silent, for instance, how officials shall be removed rather than appointed.

There are many decisions about allocation of powers in the Constitution that, from a viewpoint of separation of powers, seem contingent or even arbitrary. Why is it that the power to declare war belongs to Congress rather than the President? The English precedent, which would have made that power, I think, a royal prerogative, could have pointed either way.

Furthermore, when the Constitution does specify, it frequently specifies mixing rather than separation of powers. You all know the conventional examples of this: the President's veto power; the Senate's power to prevent appointments of the President's advisors. But there are more subtle and less conventional instances of mixing which seem to be very characteristic of the document.

For instance, it is an oddity, from the viewpoint of the pure, or Scalia, or Massachusetts version of separation of powers, that the question of what structure the departments of government should have, and indeed what departments of government should exist (which, after all, is a surrogate for the question of what advisors the President should have), is left not to the President's decision, but to the power of the legislature to define.

If the judicial power were to be completely independent, you would have thought the Constitution would have allowed the court system, in a way, to define its own jurisdiction and to have power over its own structure. But the court system is a complete servant of the legislature, both with respect to its jurisdiction and with respect to its structure and organization.

So, our Constitution, as it actually exists, is really almost the opposite of what might be called the heroic version of separation of powers, which is explicitly spelled out in the Massachusetts Constitution in language that does not appear in the federal Constitution. When Madison tried in the new Bill of Rights to include a provision that would have sounded ideologically like the Massachusetts provision, that suggestion was defeated in the Senate.

Let's look for a second at the intellectual background within which all of this happened. If one looks at contemporary thought, I think one discovers that the silence of the Constitution on how the ideals of separation of powers are to be exemplified in an actual organization of government accurately reflects the state of opinion at the time. That is, if one looks at how the separation of powers was viewed in the intellectual thought of the late eighteenth century, we have very firm and important statements about the ideal of separation as an ideal and its importance to liberty. But, there existed at the time no consensus, no body of doctrine, no body of positive law that defined what system of government organization was necessary in order to satisfy the doc-

trine. In other words, there was no positive law or organizational content to the doctrine of separation of powers at the time.

The fact that there was no consensus and no doctrine explains two interesting phenomena. First, the state constitutions, which were undergoing creation and revision at the time, adopted hugely divergent versions of governmental organization. There was in fact a wide disarray of practice on how to create an organization that would satisfy separation of powers. The second interesting fact is that many of the most important specific decisions about separation of powers made in the constitutional convention were much disputed and were not resolved until the final moments of the convention. They were totally up for grabs. There was no received body of opinion or a consensus on how the President should be elected. It was a very close call whether the legislature would elect the President. And the appointments issue, too, was not settled until the last moment.

Furthermore, even at the ideological and rhetorical level, the claim that separation of powers was important to liberty was in tension with an equally serious claim that had important roots in the political theory of the time. This was the claim that no pure system could prevent tyranny, that what you needed was a system of government that mixes all kinds of forms, that mixes the aristocratic, the monarchical, the democratic in all kinds of complex ways. That led, of course, to the emergence of the dominant checks and balances theme in the structure of our Constitution.

So, my submission is that the Constitution does not enact an overarching practical system of governmental organization. The Constitution has some very specific textual arrangements. Accounts of background structure beyond these specific textual arrangements are highly uncertain and highly contingent. That explains the fact that when you now look at the Supreme Court's jurisprudence built on this Constitution, it has not eventuated in the heroic or what might be called puritanical version of separation of powers—the version exemplified in the paragraph Mr. Fried read from the Massachusetts Constitution.

What are the principle features of the Supreme Court topography as it has made law of separation of powers? It seems to me it consists of three parts. First of all, there are the cases where the Court encounters specific textual command and where the document, in its fair interpretation, demands that powers be allocated or divided or structured in a certain way. The Court has been quite consistent in insisting that those commands be obeyed. This seems to me to be the simple explanation of *Buckley v. Valeo*<sup>7</sup> which ran squarely up against the specific commands of the appointments clause. It certainly explains the decision in *Chadha*.<sup>8</sup>

In a sense, it is that tradition in the Court's jurisprudence that Mr. Fried ran up against in *Morrison*, when he failed to overcome the specific suggestion of the text that the judges, too, may properly be given the power to appoint officers of the United States.

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7. 424 U.S. 1 (1976).

8. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

I think the Court, throughout its history, has come to the serious and doctrinal conclusion that where the text doesn't specify one, there is no systematic or overarching strong form of separation of powers doctrine that the Constitution demands. That is to say, the Court has resisted the claim that there are here three bundles of power, that they are separate, and that each branch has a monopoly over that bundle which is within its sphere.

I read that system of jurisprudence not as Mr. Fried does as a failure to enforce norms that are there, but rather as a refusal to invent a strong system of norms that are not there. And, of course, we all know the famous (I suppose most people in this audience would say, infamous) examples of how the Court has failed to find in the Constitution watertight systems of monopoly power and instead has allowed important sharings of power. The most important of these is one that the celebrators of presidential power find nonproblematic. In many ways, however, from a separation of powers viewpoint, it is the most problematic; that is the 150 year old tremendous tradition allowing the legislative branch to delegate its legislative powers to the executive departments and agencies.

Another major example is the two hundred year tradition which allows the Congress, notwithstanding in this case the fairly strong textual push of article III, to create adjudicating institutions which do not satisfy the requirements of article III. Really this has allowed the whole administrative adjudication system.

The third great example, of course, as we all know, is the Court's willingness to allow Congress to create centers of policy making power independent of the President—its rejection of the unitary executive. The intellectual roots of that also reach well back into the nineteenth century. Many centers of executive powers existed in de facto and informal ways long before there were formal independent agencies. But, of course, the formal ratification of the doctrine of Congress' power to create centers of policy making power independent of the presidency came about in this century.

So, these are two parts of my topography. The textual commands are obeyed. And there is to be no overarching, strong doctrine of three powers with a monopoly power of the three branches in each. The third feature of the topography I see as occasional attempts, mostly by individual justices, usually in dissents, but occasionally surfacing in plurality opinions, and occasionally even in a majority opinion—for example, in *Myers v. United States*<sup>9</sup>—to go the other way. These justices attempt to find in the interstices of the Constitution a strong version of a unitary legislature, a unitary executive, or a judicial power that has a monopoly of what is the judicial power.

Here, again, there are examples of this relating to each of the branches. The attempt in the 1930's to recreate the doctrine of delegation was an attempt to find in the Constitution a strong version of separation of powers vis-à-vis the legislature. Justice Brennan's plurality opinion in the *Marathon Pipe*

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9. 272 U.S. 52 (1926).

*Line*<sup>10</sup> case has intellectual roots in previous attempts by other justices, including Justice Sutherland in *Williams v. United States*,<sup>11</sup> to create a strong rule against Congress allowing anybody other than article III Courts to adjudicate cases.

But the most serious and the most persistent effort to go the other way has been, of course, the attempt by some of the justices and the occasional acceptance by the Court of a theory of a unitary presidency. That issue has mostly fought itself out in the issues surrounding the removal of officers, as in *Myers*. It is the most recent burst—I won't say last burst—of this attempt to create a strong general theory, which we see in Justice Scalia's dissent in *Morrison*.

The presidential or executive branch version of what I call this counterrevolutionary tradition is the most persistent. The reason it is most persistent is because, unlike the nondelegation or the article III issue, it has a persistent, natural advocate in the Department of Justice, and not just in conservative administrations. *Humphrey's Executor*<sup>12</sup> was a huge defeat for President Roosevelt, not for a conservative administration.

But I see these cases as forays against the dominant tradition. It seems to me that history tells us that these counter-forays have been largely unsuccessful. Why have they been unsuccessful? They have been unsuccessful because they are insufficiently rooted in the document, its structure, and its intellectual history. As Justice Holmes said in his dissent in *Myers*,

[t]he arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States . . . to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spider's webs inadequate to control the dominant facts.<sup>13</sup>

They have been unsuccessful as well, I think, because of some fundamental, conceptual and epistemological problems in defining these powers and creating a logical system for confining them.

The great question is what effect this system of jurisprudence has had on liberty? If this account of mine is a reasonable account of what the Court has done, has it had an adverse effect on our liberties? That was the issue to which the rhetorical expressions of strict separation of powers were in the late eighteenth century.

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10. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

11. 289 U.S. 553 (1933).

12. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

13. *Myers v. United States*, 272 U.S. 52, at 177 (Holmes, J., dissenting).