



**MILLER CENTER OF PUBLIC AFFAIRS**

U N I V E R S I T Y   O F   V I R G I N I A

**The Separation of Powers:  
The Roles of Independent Counsels,  
Inspectors General, Executive Privilege  
and Executive Orders**

**Final Report of the National Commission  
on the Separation of Powers**

**December 7, 1998**

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Founded in 1975, The Miller Center of Public Affairs at the University of Virginia is a nonpartisan research institute that supports scholarship on the national and international policies of the United States. Miller Center programs emphasize both the substance and the process of national policymaking, with a special emphasis on the American presidency and the executive branch of government. Philip Zelikow, White Burkett Miller Professor of History, is Director of the Miller Center.

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# NATIONAL COMMISSION ON THE SEPARATION OF POWERS

## FINAL REPORT

December 7, 1998

### INTRODUCTION

The separation of governmental powers is one of the hallmarks of the American Constitutional system. In Britain and in the many other countries that follow the Westminster model, the executive, legislative and judicial functions are all handled, wholly or in important measure, by the single entity known as parliament. In the United States, however, each of these functions is carried out by a separate branch of government, namely the Presidency, the Congress and the Judiciary.

The three are interrelated, not only in the way they derive their power but also in the way they exercise it. The President, senators and representatives are directly elected; judges and justices are appointed by the President with the consent of the Senate. Congress can remove a President from office by impeachment for “high crimes and misdemeanors.” All three branches can be involved in the formulation of laws; Congress must pass them, the President must sign or veto them and the courts are frequently called upon to adjudge their constitutionality and meaning. This arrangement of separated and overlapping functions creates a system of checks and balances that is another hallmark of the American system.

Some of this is set out in the Constitution. Some is codified in the decisions of the Supreme Court, such as *Marbury v. Madison*, which established the right of the Court to rule on the constitutionality of acts of Congress. Many gray areas remain, however, where the delineation of powers is not so clear and where, in fact, the branches of government, usually the legislative and executive, grapple from time to time for dominance. Often these struggles take place deep within the bureaucracy, but sometimes, as in the extensive investigation of a sitting President by an independent counsel and the resulting consideration by Congress of his report, they become the stuff of national preoccupation.

One important struggle was recently decided by the Supreme Court when it declared unconstitutional the line-item veto statute passed by Congress after years of agitation for a Federal law giving Presidents the right, already enjoyed by many governors, to approve some parts and disapprove other parts of legislation. President Clinton signed the bill and used its powers on several occasions, but the Court subsequently found that it ceded to the President Congressional powers that Congress was not empowered to cede in the absence of a Constitutional amendment.

The Miller Center Commission on the Separation of Powers is the eighth such commission established by the Center to study aspects of the Federal government, in a series dating back to 1980. Like the others, it is independent of party and faction. Over the last two and one-half years, it has conducted a methodical and scholarly survey, examining a number of areas where the separation of powers is unclear and selecting five of them for detailed consideration. These are: **The office of independent counsel, the uses of inspectors general throughout the government, the doctrine of executive privilege, the issuance of executive orders and the War Powers Resolution passed in 1973.** All are related in some way to the contentious debates that arose out of the Vietnam War and the Watergate scandal. The Commission makes specific recommendations on each.

## INDEPENDENT COUNSEL

Doubtless the most topical of these recommendations relates to the functioning of independent counsels, who operate under a law first passed in 1978 for a five-year period and renewed and amended several times since. This is a role born of the distrust in government created by Watergate. When the holders of specified high offices, 49 in all, are alleged to have committed crimes, the authority of the Attorney General himself to investigate the matter is severely limited, and the Attorney General must consider requesting the judicial appointment of an independent counsel.

If such a counsel is deemed to be necessary, the duty to faithfully execute the laws, which is vested in the President by the Constitution, and normally exercised through the Department of Justice with respect to criminal law, is in effect transferred in cases where the President might have

a conflict of interest. From November, 1979, to May, 1998, no fewer than 21 independent counsels have been named.

The Commission concludes that the law is seriously flawed. It finds that the Attorney General is unduly restricted in deciding the need for independent counsel. The Attorney General can remove the counsel, but only for cause, and that can be contested in the courts. In the practical world, no counsel is likely to be removed by an Attorney General. There are no realistic fiscal or time constraints on the counsel. In effect the law creates miniature departments of justice, independent of the Attorney General, to prosecute particular persons.

Driven by the fact that the independent counsel statute will expire next year unless Congress acts to revise or extend it, the Commission considered a number of ways in which the statute establishing the independent counsel could be reformed. It concludes that there is no way of correcting the inherent absence of fairness from the procedure itself --- chiefly the isolation of the putative defendant from the safeguards afforded to all other subjects of Federal criminal investigations.

A paper discussing the law was prepared for the Commission by former Attorney General Griffin B. Bell, its co-chairman. The paper states, quoting from a 1988 brief that he wrote with two other former attorneys general: "The inherent checks and balances the system supplies heighten the occupational hazards of a prosecutor: taking too narrow a focus, a possible loss of perspective and a single-minded pursuit of alleged suspects seeking evidence of some misconduct. This search for a crime to fit the publicly identified suspect is generally unknown or should be unknown to our criminal justice system." Judge Bell also criticized the provision of the statute requiring independent counsels to issue final reports. In some though not all cases, such as the Iran-contra investigation, he said, these can suggest guilt even though there is no indictment in the case.

Gerhard Casper, the president of Stanford University, who is a nationally recognized authority on the separation of powers, said recently that he doubted that the office of independent counsel could be eliminated because, he argued, once established, such institutions are hard to uproot.

**The Commission urges that the independent counsel statute be permitted to expire next year under the five-year “sunset” provision. But the Commission recognizes that the possibility of conflicts of interest in investigations of high officials is far from imaginary. The difficulty lies in striking a balance between holding such officials accountable and protecting their inherent right to fair treatment. The Commission suggests that when the President, the Vice President or the Attorney General is involved in a criminal investigation, the Attorney General should be required under a new statute to recuse himself or herself from the case. The Attorney General, though recused, could appoint either outside counsel or a Justice Department official who was not disqualified. The Attorney General would remain accountable as the responsible official, entitled to dismiss the counsel or Justice Department official for cause.**

## INSPECTORS GENERAL

After the Watergate scandal, Congress took a second step to check abuse in the executive branch, passing the Inspector General Act of 1978. The act, as amended, currently empowers the President to appoint inspectors general in each of 28 Federal agencies, and prohibits senior officials within those agencies from obstructing any audit or investigation by an IG or blocking the issuance of any subpoena by an IG during the course of an audit or investigation. A President may remove an IG, but only after reporting his reasons to Congress, which raises separation of powers concerns. (We note, however, that in practice the reasons can be perfunctory, as when President Reagan told Congress that he was removing all the IGs because he needed to have the “fullest confidence in the ability, integrity and commitment” of each.)

IGs must also report to Congress twice a year, which means they are subject to two masters, in that they serve as members of the Executive Branch yet report to Congress about the internal workings of their agencies. They serve, in other words, within executive agencies as Congressional ferrets of dubious constitutionality, though the issue has not been raised in court. While the system creates conflict, it is also useful in the detection and prevention of fraud and abuse within the Executive Branch. Once again, as with the independent counsel, it is a question of balance.

As one vivid demonstration of how the system operates, the Commission cites the role of the IG in the Justice Department, which attenuates the Attorney General's authority. The IG can always threaten the Attorney General with a "seven-day letter." That is to say, whenever the IG has serious concerns about the way things are being handled within the Justice Department, he can report his concerns at once to the Attorney General, who then has seven days to send the report to Congress.

It has even been suggested that inspectors general be permitted to prosecute certain kinds of cases. Currently, when an IG uncovers evidence of criminal conduct, the prosecutions are conducted by United States Attorneys and the Department of Justice. Judge Bell, who also reported to the Commission on this subject, said that any grant of prosecutorial authority would represent an unacceptable widening of the IG's authority. **The Commission opposes any further moves in that direction.** The fundamental problem is that no one watches the watchdogs. There is no central agency that collects information about what each inspector general is doing, which varies widely from agency to agency. The IGs, born independent by design, are now so independent that some have begun to run amok. They constantly seek more authority, and when it is not expressly granted, some take it anyway. No one is there to check their power. **The Commission endorses the suggestion recently made by Senator Susan Collins that the General Accounting Office or some other neutral agency periodically review the inspector generals' operations to insure consistency and to rein in IGs who exceed their statutory mandate.**

## EXECUTIVE PRIVILEGE

Whenever Congress exercises its power to "check and balance" the actions of the executive through investigation and corrective legislation, one of the President's main defenses has been invoking executive privilege. That is the President's right to withhold documents and testimony concerning the content of communications with his top-level staff and other executive branch officials relating to official business. It is strongest where national security is concerned, weakest where Congress is investigating allegedly illegal or unethical actions by executive branch officials.



Many Presidents --- from Jackson in 1833, who refused to comply with a Senate request for a document relating to the Bank of the United States, to Reagan in 1982 --- who ordered an aide not to reply to a House committee's subpoena, have cited the doctrine of executive privilege. Perhaps surprisingly, such assertions have been subjected to court proceedings only twice to test their constitutionality.

In the case of President Nixon's Watergate tapes, an appellate court rejected a claim of absolute privilege but declined to enforce a subpoena issued by the Senate Watergate Committee, absent a showing of a specific need for the tapes. In the case of President Reagan's Environmental Protection Agency administrator, whom Congress cited for contempt, the President sued for a declaratory judgment that his claim was well taken. The judge ruled that suit premature, pending any criminal action to enforce the citation, but pregnantly observed that the difficulties of the case "should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties."

Executive privilege is much more difficult to sustain against the demands of criminal juries for information relevant to a criminal indictment or trial. Even though the lower courts had previously refused to enforce the Senate Watergate subpoena for the Nixon tapes, the Supreme Court upheld a subpoena for the same tapes issued by the judge presiding over the criminal trial of the principal Watergate defendants. In response to the President's claim that some of the tapes referred to national security matters, the Supreme Court authorized the trial judge to examine the tapes *in camera* and to provide the prosecutor with those, including the so-called "smoking gun" tapes, which did not raise national security concerns. As to executive claims outside the national security area, the Court instructed the trial judge to balance the jury's need for each document against the President's assertion of the right to withhold it.

The Watergate case profoundly affected executive privilege, as it affected so many things. Lloyd N. Cutler, twice a Presidential counsel, argued in a study for the Commission: "While the President still holds a strong legal hand when he asserts executive privilege vis-à-vis the Congress, his political power and will to do so have been greatly weakened by

Watergate and its aftermath. Watergate seriously impaired the moral status of the Presidency, and substantially enhanced the moral status of Congressional investigations. Since Watergate, incumbent Presidents have been reluctant to assert executive privilege whenever they or their closest advisors or family members have been accused of illegal or unethical misconduct. This reluctance is induced by a well-founded concern that their political opponents and a portion of the media will react by charging 'cover-up,' and that odious comparisons will be drawn to Watergate."

In the Commission's view, the waivers of executive privilege by modern Presidents, including Bill Clinton, are doing serious long-term damage to the ability of Presidents to perform their duties. When Presidents dare not seek confidential advice for fear it will not remain confidential, when Presidential aides and cabinet members are reluctant to offer advice for the same reason, when all top executive branch officials are loath to write memoranda or make records of their consultations with one another, Presidents are ill-equipped to exercise their full executive power. Moreover, historians and biographers will lose their most important source materials. **The Commission therefore recommends that Congress reduce its demands on the Presidency concerning its internal deliberations, and that Presidents invoke executive privilege to resist unreasonably invasive demands from Congress.** The Presidency cannot function with a Congressional TV surveillance camera at the White House.

## EXECUTIVE ORDERS: THE WAR POWERS ACT

The use of executive orders is almost as old as the republic. The first, issued by Thomas Jefferson, led to the Marbury v. Madison decision, which established the Supreme Court's power to decide the constitutionality of acts of Congress but left untouched another highly significant issue --- the power of the President alone, by executive order, to take binding actions not expressly authorized by the legislature. It is a critical issue for the separation of powers, and although more than 13,000 executive orders have now been published, the issue has not been resolved to this day.

When Congress passes and the President signs legislation expressly delegating some legislative power to the President, such as the power to make environmental or safety regulations, the courts have generally sustained the delegations. (But, as noted above, the Supreme Court overturned a more sweeping delegation, the Line Item Veto Act.) The separation of powers question arises in its most difficult form when Congress has delegated nothing, and the President relies on his own explicit or implicit powers. Two examples are President Truman's seizure of the steel mills during the Korean War and President Carter's suspension of court actions by U. S. nationals against the government of Iran; a third, the standoff over the War Powers Resolution, is treated separately below.

In the steel case, the Supreme Court ruled against President Truman, noting that Congress had voted down a bill that would have delegated seizure power to him. In the Iranian case, the court upheld President Carter's order as a legitimate exercise of his foreign-policy powers. The issues created in these and other cases have been managed without significant damage to the principle of checks and balances. **But the commission believes the War Powers Resolution creates a serious risk of such damage and that further steps should be taken to limit that risk.**

Born of American involvement in Vietnam, the War Powers Resolution reflects the legislature's desire to reassert its prerogatives in foreign affairs, which had been eroded by the Executive Branch over a long period. It is intended to deal with the modern reality that armed conflicts involving American troops abroad have become more commonplace and declarations of war have become rarer. The resolution requires the President "in every possible instance" to consult with Congress before committing armed forces to hostilities and keep consulting until they are no longer involved in hostilities or have been removed from the war zone.

Although widely derided as unwise, unconstitutional or both, the resolution has never been subject to definitive Constitutional review. Presidents have ignored it when using force for short-term operations and sought approval for major operations such as the Gulf War without conceding that they need it. Congress has skirted confrontation as well. In any event, modern technology makes it impractical to apply the War Powers Resolution to the most important war decision of all, responding to a nuclear attack. Here the need for speed, not Presidential usurpation, has removed

Congress from the equation. Similarly, the need for secrecy has made it impossible to consult large numbers of members of Congress in cases of hostage-rescue missions.

Nevertheless, it remains true that Presidents cannot effectively exercise their shared powers to make foreign policy and to wage war without the cooperation of Congress, and in achieving such cooperation, as George Shultz said, “trust is the coin of the realm.” **To build that trust, the next President and Congress would be well advised, before deploying armed forces, to consult the majority and minority leaders and the relevant committee leaders of both houses. Another possibility, the Commission believes, would be an agreement to amend the resolution to remove the generalized requirement to consult Congress, limiting the duty to consult to designated leaders, while at the same time repealing the probably unconstitutional requirement to withdraw American forces if Congress has not concurred within 60 days.** In the complex world we inhabit today, no greater degree of Congressional consultation and involvement seems feasible.

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## COMMISSION MEMBERSHIP

**Howard H. Baker, Jr., co-chair**, was United States senator from Tennessee from 1967 to 1985, and chief of staff in the Reagan administration. He practices law in the Knoxville, Tennessee firm of Baker, Donelson, Bearman & Caldwell, with offices in Washington, D.C.

**Griffin B. Bell, co-chair**, was Attorney General of the United States from 1977 to 1979. He is a senior partner in the law firm of King & Spalding in Atlanta.

**R.W. Apple, Jr.** is chief correspondent of the *New York Times*. He has reported for the New York Times since 1963, writing from more than 100 countries.

**Lloyd N. Cutler** is Senior Counsel to the Washington law firm of Wilmer, Cutler & Pickering. He served as White House counsel for Presidents Carter and Clinton and was special counsel to President Carter on the ratification of the SALT II Treaty.

**William P. Barr** served as Attorney General in the Bush Administration. He is Executive Vice-President and General Counsel of GTE Corporation.

**Andrew H. Card, Jr.** is the president and chief executive officer of the American Automobile Manufacturers Association. He served in President Bush's cabinet as Secretary of Transportation.

**Lawrence S. Eagleburger** was Secretary of State from 1992 until 1993. He served in the Foreign Service for 27 years. In 1993, he joined the law firm of Baker, Worthington, Crossley, Stansberry and Woolf as Senior Foreign Policy Advisor.

**William Frenzel** is a guest scholar at the Brookings Institution in Washington D.C. During his 20 year tenure in the House of Representatives (R-Minn.), he served as ranking minority member of the House Budget Committee and was a member of the Ways and Means Committee and its trade subcommittee.

**Paul D. Gewirtz** is the Potter Stewart Professor of Constitutional Law at Yale University.

**Juanita Kreps** is James B. Duke Professor of Economics and Vice President Emeritus, Duke University. She served as Secretary of Commerce in the Carter Administration.

**Daniel J. Meador** is the James Monroe Professor of Law Emeritus at the University of Virginia. He served as Assistant Attorney General, Office for Improvements in the Administration of Justice, U.S. Department of Justice, from 1977 to 1979.

**Joshua I. Smith** is the chairman and chief executive officer of MAXIMA Corp, a computer systems and management information products and services firm. He served as Chairman of the U.S. Commission on Minority business Development under the Bush Administration and was a member of the Executive Committee of the 1990 Economic Summit of Industrialized Nations.

**Sander Vanocur** was a television journalist and commentator. He is presently host of “Movies in Time” on the History Channel.

**William Webster** is a senior partner with Milbank, Tweed, Hadley & McCloy, in Washington, D.C. He served as the director of the FBI from 1978 until 1987 and of the CIA from 1987 until 1991. From 1973 until 1978, he served as judge, U.S. Court of Appeals.

**Kenneth Thompson**, the Commonwealth Professor of Government and Foreign Affairs at the University of Virginia, served as Commission coordinator. During his tenure as Director of the Miller Center from 1979 to 1998, he established the National Commissions program as a way to fulfill a key Miller Center mission: to examine and improve the American presidency. He is currently Resident Scholar at the Miller Center.