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An administration double standard

If there is fault to be found — and there is, after a fashion — with Attorney General William French Smith's $684,000-plus trip abroad, it is not with the brute, bottom-line figure.

Just to mention the total is virtually to guarantee that taxpayers will come unglued in spasms of impotent outrage. But beware the easy anger.

Certainly the reported figure is large, and even that is short of the mark. The report does not include hotel bills for the 10 Justice Department officials and 11 FBI agents who made a 23-day trip abroad with Smith in 1982 to work at developing more effective mechanisms against international drug traffic.

Look at the ledger once again, however: $595,000 of the total is what the Air Force charged to provide a military Boeing 707 for the group. That is more a bookkeeping move than an actual expense. The plane would have been maintained and the crew paid in any event. For the rest, the cost per person daily was about $180, plus hotel. Not all that high, really, for an important, official state tour

Maybe the trip was longer than was absolutely necessary, or maybe not quite so many persons were needed, though the breathless press accounts of the tab raise no questions on those scores. Even if so, the issue of the cost — if you wish to see it as an issue — would be reduced to petty haggling.

Where fault legitimately can be found in the enterprise is with the double standard in this administration's attitudes about government spending. Smith's expenses are defensible, but it is clear that the attorney general and his party were not making do with cut-rate motels and Arby's coupons. They traveled well and in good style on the public's charge account.

We should want no less for our officials. But it would behoove an administration that goes first class to be just a wee bit hesitant in inciting public dudgeon over a *rumor* that someone bought a bottle of vodka with food stamps. It might even be seemly for such an administration to give the disabled the benefit of the doubt, rather than the liability of the doubt, when deciding whether their benefits should be cut off.

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Department of Justice

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE STATE BAR OF CALIFORNIA

1:00 P.M. PDT (4:00 P.M. EDT)
MONDAY, SEPTEMBER 12, 1983
MARINA BALLROOM
DISNEYLAND HOTEL
ANAHEIM, CALIFORNIA

Thank you, Mr. Murray. It gives me great pleasure to be here today in the company of colleagues, of friends, of fellow members of the State Bar of California.

In May, I began a series of speeches on the Constitution. This is the third speech in the series, and I hope that they will stimulate reflection on the origins of the nation's fundamental law. I believe that with the Bicentennial of the Constitutional Convention just four years away, it is especially appropriate that we as a nation recall the original purposes of our operating charter.

Today the subject of my speech is separation of powers. In a moment, I will comment on several contemporary issues that involve this principle. But first, I will focus on the American founding. And to begin with, I will draw the larger picture of politics and society -- the same one the Framers drew -- in order to locate where their unique concept of separation of powers fits in.

According to the Declaration of Independence, governments are instituted among men in order to secure the great goal of liberty. But as Americans learned in the years after 1776, designing a government capable of securing liberty was a most difficult task.

It was plain enough to the founding generation that the government must be popular -- that power had to derive from the people, and the people alone. Nonetheless, the founders worried, on the basis of what they knew about republics historically, that the people could be their own worst enemy, that a tyrannical majority might rise up and control a popularly-based government, invading private rights and damaging the common good.

The founders solved the dilemma through what Alexander Hamilton called the "new science of politics." This science included, among other elements, the familiar principle of representation: The government would be assembled and administered not by all of the citizens but by representatives whom the citizens chose to elect. Thus would political views be refined and enlarged and popular prejudice be tempered -- to the benefit of private rights and the common good.

Liberty also would be protected through the dispersal of power. Power would be divided between the national government and the states -- thus the principle of federalism came into play. And the power allocated to the national government would itself be separated into the three branches -- the legislative, the executive, and the judicial.

This is where separation of powers fit into the Framers' thinking. This new science of politics also included one other very important idea -- that of an extended, or large, commercial republic.

The leaders of the Constitutional Convention believed that liberty would be protected only in a large nation populated by a large number of people. And ideally these people would be engaged primarily in such practical pursuits as farming, merchandising, and manufacturing. Such a people would be given less to philosophical pursuits and zealous crusades and more to commerce and trade. They would be less likely to organize themselves into a majority that would threaten the rights of others.

The idea of an extended commercial republic was a novel development in the history of political theory. So, too, was the

Americans' principle of separation of powers. No other government had ever been fashioned on this concept, and yet to the Framers of the Constitution, it was unthinkable that any other concept should serve as the basic blueprint of the national government -- every plan tendered at the Convention contained a tripartite division of power. Today the work of the Framers, which we take so much for granted, influences peoples abroad: Nations attempting to become democracies routinely separate power into the three branches in order to secure liberty.

The Framers of our Constitution were influenced to a degree by the writings of Aristotle and Locke and Montesquieu, through whom the intellectual history of separation of powers can be traced. But what chiefly motivated the Framers to design a national government according to this principle was their own immediate political experience.

Under British rule, the Americans had seen first-hand the abuse of unchecked executive power exercised by an hereditary monarch. They had had enough of King George III and the royal governors.

In the decade preceding the Constitutional Convention, Americans had designed state governments that minimized the role of the executive and concentrated most power in elected legislatures. These were supposed to be the true guardians of liberty, but some fell far short of that goal. In some states, the legislatures, among other things, confiscated property, erected paper money schemes, and suspended the ordinary means of collecting debts.

These political experiences drove home a lesson that was perhaps best stated by Madison, who wrote:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny . . . The preservation of liberty requires that the three great departments of power should be separate and distinct."

As we all know, Madison and his colleagues allocated legislative power to Congress, executive power to the president, and judicial power to the Supreme Court and any lower courts Congress might create. And they separated the power allocated to the Congress into the House of Representatives and the Senate. The Framers envisioned the Senate as checking the power of the more popularly-based House of Representatives.

Having separated power, the Framers also provided certain checks and balances on the respective functions of government. These are quite familiar to us today, and include such checks on the Congress as the presidential veto and judicial review of legislation; such checks on the presidency as the impeachment power of Congress and judicial review of executive decisions; and such checks on the judiciary as the congressional authority over the court's jurisdiction and the executive power to appoint judicial officers.

In thus separating powers, however, the Framers did not intend their strict separation. As Justice Holmes once observed, "the great ordinances of the Constitution do not establish and divide fields in black and white" and "we do not and cannot ... divide the branches into water-tight compartments." Instead, the Framers envisioned, at various points, some sharing of powers by

the branches. The Constitution requires, for example that the president "from time to time give to the Congress Information on the State of the Union," and "recommend . . . such Measures as he shall judge necessary and expedient." The president thus is given a certain legislative role.

While it is important to understand that the Framers did not intend a strict separation of powers, it is equally important to see that they did not intend for one branch of government to assume the power central to another branch. The Constitution assigns the branches primary responsibilities, and each branch is expected to carry out its function.

This, then, in brief outline, is how the Framers separated powers and then checked and balanced them in the interest of liberty. But this explanation fails to do justice to the work of the Framers unless more is said. Several points are in order.

First is that the Framers were most concerned about restraining the legislative branch. True, they separated powers in part to restrain the executive. And while they were not as concerned with abuses of power by what Hamilton called "the least dangerous branch," the judiciary, they understood that any part of a government was fully capable of oppression.

Still, the legislative branch was their main concern. The Framers intended it to be the most powerful part of the government because they believed the branch closest to the people should predominate. And they agreed with John Locke, who said that to govern is primarily to legislate. But the Framers also knew that where the most power resides in government, there lies the possibility for its worst abuses. The people might elect representatives who, forming a majority in the legislature, would

oppress those citizens in the minority. Majorities in the legislature also might make the national government itself an instrument of oppression against all citizens. Congress, that is, might become the new source of tyrannical government. Madison wrote that "the legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." And he advised that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."

In retrospect it is clear that the Framers, if they did not exhaust all their precautions, instituted a fair number of safeguards. They divided Congress into two houses, thus hoping to slow the impulses of the people and their representatives. And they created an independent executive and an independent judiciary, in part to provide a means of at least temporarily blocking the will of tyrannical majorities as they might be expressed through submissive or demagogic legislatures. Pertinent here are the checks and balances represented by the presidential veto of legislation and the power of judicial review of congressional enactments.

The second point regarding separation of powers is twofold, and specifically concerns human nature. The Framers recognized that man was driven by self-interest. They believed that one branch of government would resist encroachment by another not only because each had the "necessary constitutional means" for doing so -- such as the presidential veto -- but also because each had the "personal motives" for invoking those means. In the famous sentences of Madison, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights

of the place." The Framers believed that the branches would check each other and thus secure liberty in part because man could be expected to act according to self-interest.

One reads the Founding Fathers too crudely, however, if it is thought that their estimate of human nature was wholly negative. In the Framers' view, ambition and self-interest would help secure a balance of powers and thus protect liberty, but they did not intend to establish, as one writer has said, "permanent guerrilla warfare" among the branches. The Framers did not intend that the three branches would constantly obstruct one another.

Rather, they hoped that ordinarily the three branches would collaborate, checking and balancing the other branches only as the occasion required. In their vision, the proper working of the national government requires a certain amount of what Madison called the "other qualities in human nature" -- the ones that "justify a certain portion of esteem and confidence" about the human prospect. Madison in fact said that "republican government presupposes the existence of these qualities in a higher degree than any other form." These qualities include good will, civility, honesty, and decency. They include a willingness to give and take on issues that don't involve basic principle.

The third and final point about separation of powers is that by distributing them the Framers hoped not only to secure liberty but also to strengthen government in general and ensure a substantial degree of coherence and effectiveness in its operations. Here the role of the executive branch is critical. The Framers believed in the primacy of the legislative branch, but they also believed the legislative branch might tend to be

sluggish in its deliberations, producing inefficient government. To provide government with qualities the legislative branch could not ordinarily provide, the Framers designed the executive branch. "Energy in the executive," said Hamilton, "is a leading character in the definition of good government." The executive could give the national government the energy it often would need. It could provide direction. It could, in the Framers' reckoning, stabilize government and make it more effective.

This, then, was what the Framers hoped to achieve through separation of powers and checks and balances. They hoped to slow and retard the actions of majorities acting, as they primarily thought majorities would act, through the legislative branch. They hoped, that is, to prevent the legislature from acting tyrannically. More generally, they hoped to prevent any department of the national government from acting oppressively. At the same time that they hoped to protect liberty by separating and balancing powers, however, they also hoped to empower government, to make it strong enough to discharge its fundamental duties. As Justice Jackson once observed, "while the Constitution diffuses power the better to secure liberty, it also contemplates that [this] practice will integrate the dispersed powers into a workable government."

The Framers' scheme of separation of powers and checks and balances has served us well for most of our history. Occasionally there have been abuses of power, on the part of each branch of government, and always there have been tensions between branches. But the Framers probably would be satisfied to see that for nearly 200 years now the American people have lived under a national

government that has secured freedom and also been strong enough to serve compelling needs.

Every period of our history, however, offers particular challenges to the fundamental organization of our national government and thus to the delicate balance of liberty and authority that separation of powers is designed to achieve. Not too long ago there was talk of the imperial presidency -- a concern that the executive branch had become too powerful. Today, I believe, the challenge arises principally from the judicial and legislative branches.

The judiciary has turned increasingly from deciding cases and interpreting laws to making law, supervising the manner in which laws are executed, and how appropriated funds should be spent. To borrow Madison's language about the legislature, the judiciary seems to be "everywhere extending the sphere of its activity." Meanwhile, the legislative branch has taken an increasing interest in overseeing the enforcement of the laws it has passed. Capitol Hill fairly teems with oversight committees.

As the judiciary has moved away from its more traditional role, it meanwhile has handed down badly divided and fragmented decisions, creating unstable precedents that invite more litigation. As the legislative branch more aggressively has sought to enforce the law, it meanwhile has, on many occasions, failed to do its legislative duties. Matters that Congress should decide have had to be resolved by others. And some of the laws Congress has enacted were not well considered; they do not reflect the degree of deliberation the Framers of the Constitution expected of the legislative branch.

With the judicial and legislative branches frequently attempting to exercise the chief responsibility entrusted to the executive branch -- that of enforcing the law -- the executive branch has every right to complain. Yet my complaint is only partly that the other branches should let the executive branch tend to its central constitutional responsibility of administering the law.

Rather, the burden of my complaint is that, as the Framers of the Constitution would well understand, the present proclivities of the judiciary and the legislature are upsetting the fine balance of powers that must exist in our national government if liberty is to be protected and if government is to be capable of effective action. An activist judiciary and an oversight-minded Congress can only weaken the executive branch and thus debilitate the entire national government.

Perhaps no principle of constitutional government is in greater need of maintenance than that of separation of powers. And I mean this in the most fundamental sense. The various branches of government need to concentrate their energies on the tasks to which they are constitutionally assigned.

In this context, a most hopeful event -- indeed, a splendid demonstration of the continuing relevance of the principle of separation of powers -- was the decision by the Supreme Court this past June, in the case involving the legislative veto.

For six decades Congress has placed legislative vetoes in a wide variety of legislative enactments -- some 200 in all. In its basic form, Congress attaches to the exercise of statutory or constitutional authority by the president, an executive branch

department, or one of the "independent" regulatory agencies a procedure pursuant to which a decision may be reversed by a disapproval resolution adopted by one house of Congress, both houses, or even a congressional committee or a combination of committees. Congress has placed these devices on virtually every type of executive branch and regulatory agency action -- to decisions that are primarily administrative in nature, to those that basically are of a rulemaking variety, and to such matters as the reprogramming of appropriated funds. Legislative vetoes are not forwarded to the President for his approval or veto; they are the final legally significant action.

They are also not authorized by the Constitution. Neither can authorization be inferred from any constitutional principle. Indeed, legislative vetoes violate the general principle of separation of powers. And they violate the specific requirement under Article I of the Constitution that legislation be presented to the president for signature. Legislative vetoes eliminate the president's constitutionally assigned role from the legislative process. They do not permit him to oppose oppressive measures, or to ensure that the legislation in question includes a national perspective, or even to defend the executive branch from legislative encroachments. Legislative vetoes, among other devices, work to thwart the energy and initiative found in the executive and so necessary to effective national government.

In conclusively rejecting the legislative veto, the Supreme Court performed the duty of judicial review implied by the separation of powers. And in performing its duty, the Supreme Court helped maintain that very same principle. Henceforth,

Congress will be unable to intrude, through the device of a legislative veto, on the jurisdiction of the executive branch. And Congress also will have to work harder, and deliberate longer, in order to achieve consensus. The Court's decision promises to make government run more effectively as the legislative and executive branches focus on their core responsibilities.

In Federalist 51, Madison wrote that "a dependence on the people is . . . the primary control on government." Lincoln recognized that whoever is able to change public opinion, is also able to change the government. As President Roosevelt said, "the whole fate of what government is trying to do ... depends ... on ... the people." Although I have concentrated my remarks today on the powers in Washington, I believe that the opinion of the American people is the most critical variable in the operation of those powers.

And that is why I hope that all Americans will take an active interest in political affairs. For only through the participation of our citizens in political life can we hope to keep the powers in Washington in proper balance. And only by maintaining that proper balance can we hope to preserve the liberties that our Founding Fathers sought to protect through their new science of politics, a science that included the novel but vital principle of separation of powers.