THINKING ABOUT THE SEPARATION OF POWERS IN NEW HAMPSHIRE

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My responsibility today is to provide a broader context for thinking about those separation-of-powers issues that have so bedeviled New Hampshire in recent years. The first thing to say is that conflicts over the separation of powers--and even conflicts between the legislative and judicial branches--are hardly unique to New Hampshire. My colleagues at this morning's session will focus on separation-of-powers conflicts in other New England states, but such controversies have in recent years arisen across the nation. And not just in recent years: separation-of-powers conflicts have been an endemic feature of state politics, although historically the conflicts have usually pitted the executive and legislative branches against each other. A second point is that the same issues that have led to interbranch tensions in New Hampshire have also arisen in other states. For example, the New Hampshire Supreme Court's rulings on public school finance have excited controversy in New Hampshire, but over the last three decades 31 state supreme courts have ruled on the constitutionality of the systems of school finance in their states, with 16 courts striking down the existing systems and requiring that they be replaced by new systems. A final preliminary point: in a few states controversial judicial rulings have prompted retaliatory action against the courts, but in most states, efforts have been made to ensure that disagreements and tensions did not undermine institutional cooperation.

Perhaps a good way to understand the separation of powers is by looking at what the New Hampshire Constitution has to say about the topic. Section 37 of the New Hampshire Constitution's Bill of Rights reads as follows: "In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." This is really quite a striking provision. There is nothing at all like it in the Federal Constitution. Even if one looks at other state constitutions, many of which expressly mandate a separation of powers, New Hampshire's language is distinctive. What could the drafters of the New Hampshire Constitution have had in mind?

One clue about their intentions is provided by noting where they placed the separation-of-powers provision: they put it in the constitution's Bill of Rights. Placing the provision there was, I suspect, neither an oversight nor a mistake; rather, those who drafted the provision knew exactly what they were doing. They were concerned, as they said, with establishing a "free government," and they understood a free government as one in which the rights of the people are secure. Of course, one way to secure those rights is to afford people a remedy when their rights are violated, and the constitution's framers did that in section 14 of the Bill of Rights. However, even more important than remedying violations of rights is preventing them from occurring in the first place. New Hampshire's founders knew that a properly designed government would be less likely to

violate rights. They also understood that an effective separation of powers was a crucial element in a properly constructed government. Hence, they included the separation of powers as a way of forestalling government oppression. In doing so, they anticipated James Madison, who would write in The Federalist Papers four years later that "the accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one or a few or many . . . may justly be pronounced the very definition of tyranny."

Like Madison, then, the drafters of the New Hampshire Constitution were aware that an excessive concentration of power endangers liberty--put all power in the same hands, and you are at the mercy of the one who holds the power. But in fact it is a mistake to say "*the one*" who holds the power. Madison himself noted that the concentration of power in the same hands--"whether of one or a few or many"--leads to tyranny. So having a number of people wield power is not enough--as Thomas Jefferson complained, "173 despots would surely be as oppressive as one." What is necessary rather is that power be distributed in such a way that those exercising the legislative or the executive or the judicial power are separate from those exercising the powers of the other branches. Even that is not enough. If the executive is separate from the legislative branch, but the legislature can control or intimidate the executive, a true separation of powers does not exist. The drafters of the New Hampshire Constitution got it exactly right: "as separate from *and independent of* each other, as the nature of a free government will admit." Separation of powers thus requires not only separation but independence. Each branch must be free to act within its sphere of authority

free from control or intimidation by another branch. Take a look at the Declaration of Independence, and you realize how seriously we Americans take this. Several of the charges that justified the American Revolution involved violations of the separation of powers, accusations that King George III had invaded legislative authority and had subverted the administration of justice.

But forestalling governmental tyranny is the only reason for having a separation of powers. Another reason is effective government. The legislative, executive, and judicial branches not only have distinct functions; they also have distinct structures. This is not coincidental; the separation of powers allows each branch to be structured in such a way as will enable it to meet its responsibilities most effectively. The executive must have the ability to act swiftly and decisively for the common good; therefore, in most states the executive power is entrusted to a single set of hands. In contrast, the legislature should reflect the diversity of opinion within the state and be able to deliberate about what measures are likely to advance the public good. These responsibilities require that the legislature be a numerous body. And because the judiciary must say what the law is and must administer justice, its members must have professional training in the law and be provided with the independence necessary for an impartial resolution of disputes in accordance with the law. What happens if a branch exercises powers that it is not structured to perform? Quite simply, you get bad government.

Two factors complicate this picture. First, the responsibilities assigned to each branch are not hermetically sealed off from those assigned to the other branches. As in other states, New Hampshire's government is one of separate

institutions sharing powers. The legislature may have primary responsibility for enacting laws, but the governor plays a role in legislation through the veto power, and state courts have historically had a law-making role through their responsibility to elaborate the common law. (Over a century ago, a famous justice of the New Hampshire Supreme Court, Charles Doe, was asked if judges make law. He reputedly replied: "Of course they do, made some myself.") The governor has primary responsibility for carrying out the laws, but the legislature determines what funds will be available for carrying out that responsibility. The judiciary has ultimate responsibility for resolving cases and saying what the law is, but the legislature determines the funds available to the courts for carrying out that responsibility, and it may propose constitutional amendments to change the law enunciated by the courts. Thus, in the American states an absolute separation of powers is sometimes sacrificed in order to ensure that proposed actions have the support of more than one branch. These sorts of checks and balances can lead to interbranch conflict and recrimination, but they need not do so. They can also--as they have in many states--encourage interbranch cooperation and comity in the pursuit of good public policy.

The second complication arises from the difficulty in allocating powers and responsibilities among the various branches of government. Typically, interbranch disputes flare because of disagreements about whether a branch is merely exercising its constitutional powers or whether it is exceeding its authority and invading the powers of a coordinate branch. More than two centuries ago, James Madison explained why such disputes arise--and have always arisen. He

noted that "no skill in the science of government has yet been able to discriminate and define with sufficient certainty its three great provinces--the legislative, executive, and judicial." Given this difficulty, it is not surprising that disputes over the scope of legislative, executive, and judicial powers periodically occur. But given this difficulty, it is also important to recognize that those on both sides of these disputes are typically acting in good faith, that they are seeking to safeguard or exercise what they view as their constitutionally assigned powers.

The quotation from Madison emphasizes the difficulty of defining the responsibilities of each of the three branches of government. Yet it is important not to overstate that difficulty. Disagreements over the allocation of powers among the branches tend to occur on the margins; there is little dispute about the core of each branch's powers.

What then does a proper separation of powers entail? First of all, each branch must have control over its core functions. For the executive, that means the power to execute the law; for the legislature, the powers to enact laws and to appropriate funds; for the judiciary, the power to decide cases and to say what the law is. This is what the constitution requires. It is also in the interest of the people of New Hampshire--or those in any other state. The separation of powers exists not to benefit the institutions of government but rather to safeguard the rights of the people of the state and promote good government.

In addition, the separation of powers requires that each branch have control over its own internal operations, that is, each branch must have the authority to govern and manage its own affairs, free from undue interference by

other branches of government (although not free, of course, from the scrutiny of those branches or of the general public). This is part of the "independence" of which the New Hampshire Constitution speaks. In some instances the Constitution expressly recognizes the importance of this institutional autonomy. For example, Article 22 expressly authorizes the House of Representatives to choose its own officers and to establish its own rules of operation, and Article 37 does the same for the Senate. Even in the absence of such provisions, however, such institutional independence or autonomy follows quite naturally from the status of each branch as a coequal partner in state government. It also flows from the idea that the responsibility to perform one's core function carries with it the authority to determine how best to perform that function.

In conclusion, let me return once more to the separation-of-powers provision of the New Hampshire Constitution. Under the separation of powers, each branch of government has it within its power to frustrate the other branches in their efforts to carry out their constitutional responsibilities. But using one's power in that fashion is certainly contrary to the design and intent of New Hampshire's framers. They sought a separation of powers that was "consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." It is that "bond of union and amity" that New Hampshire is seeking to repair, and today's conference is an important initial step on that path.