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The Separation of Powers

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My task this afternoon is a large one: to describe the lessons of the United States' experience with the separation of powers and suggest what relevance those lessons might have to the shaping of a South African government. This is not a project that will produce a short, simple set of answers. The fact is that scholars and citizens in this country continue to debate the value of our system of separation of powers, and so many of the lessons one observer may draw will be considered errors by another. Even more important, our constitutional structure works, or doesn't work, as part of our nation--a particular country, with its particular history and culture, none of it identical by any means to South Africa's--and so the question of what you can learn from us is inevitably a debatable one. Finally, just as we debate the value of our own system of government, and disagree in part because we have differing political perspectives on what we want our government to do, so the lessons you may draw from our experience will no doubt depend on the priorities you hold in designing your new nation. Yet none of this should discourage us completely: the framers of the United States constitution, like you, acted in a quasi-revolutionary context; acted with imperfect knowledge; and acted with good intentions, sober reasoning, and political priorities and even prejudices--yet what they wrought has lasted 200 years. I wish you equal good fortune, and I am very pleased to have the opportunity to assist you with my perception of the lessons of American experience.

Let me begin with a lesson that in this conference may scarcely need repeating: <u>structure is important</u>. Those who framed our constitution believed that liberty could be adequately guaranteed against the possible depredations of

the federal government by structure alone, by specifying the government's powers, and properly shaping the processes by which it could exercise them. The people of the new United States thought differently, and their insistence on a Bill of Rights led to its speedy adoption in the first years of the constitution's life. But the idea that the separation of powers, and its close but by no means identical relation, checks and balances, could protect liberty has remained an important hope of American constitutionalism. It has never been our constitutional strategy to protect liberty simply by relying on a Bill of Rights and an independent judiciary to block the wrongdoing of the politicians.

Our experience offers good reason to believe in the importance of judicial enforcement of a Bill of Rights, but it confirms the framers' belief that structural restraints are also needed. Lawmakers even in a constitutional state have tremendous discretion. Our Bill of Rights is largely a negative one, forbidding certain government actions while requiring few and authorizing many--but the point would be essentially the same, I think, even if South Africa were to adopt the kinds of affirmative socioeconomic rights that the ANC's draft bill of rights proposes. How the government acts within the immense zone of the "permissible but not required" is extremely important--and important to human liberty broadly understood--and lawmakers who escape the perils of judicial statutory interpretation (almost as startlingly innovative in this country as in yours) are free to act in this zone without constitutional constraint. In this country, for example, Congress is free to decide that welfare benefits will not be increased in proportion to the increasing number of children in a family receiving these benefits--or to decide the opposite. Which it decides makes a great difference to the families receiving those benefits, and perhaps to other people as well, but the constitution as currently read will not prescribe an

answer.

In addition, the dimensions of what is or isn't unconstitutional will not be subject to wholly apolitical adjudication. No can one read the decisions of the United States Supreme Court--or of South Africa's Appellate Division--without perceiving the impact of the judges' own extra-legal world-views on their decisionmaking. This is not to disparage the ideal of an impartial judiciary, but to recognize the limits on its attainability. Moreover, we must recognize limits on its desirability as well. No one would select as a judge a lawyer, however well-qualified, who fundamentally disagreed with the basic premises of the state he or she was to serve. (The Weimar republic in Germany provides a grim example of the consequences of ignoring this rule.) Even if South Africa adheres to a substantially depoliticized system of judicial appointments, judges' own politics and perspectives will matter. In addition, the more the system of appointments becomes responsive to political criteria--as has happened widely in this country and to a significant extent in yours--the more the meaning of the constitution will tend to resemble the preferences of the party holding the appointment power.

What our constitution prescribes to guide the resolution of questions not governed by the Bill of Rights is a structure. The structure isn't by any means completely spelled out in the constitution, and has in fact changed over time. Nonetheless the system shaped by the framers continues, I believe, to profoundly influence our politics and our governmental decisions. As a result, perhaps unlike my panel colleague Professor Kurland, I believe the separation of powers continues to play a role in protecting liberty in America. It is not a precision tool for this purpose, for it prevents bad governmental action not by identifying it as such but by impeding all governmental action, and in the process it undoubtedly impedes governmental action that would be desirable, that might

enhance liberty, as well. But with all its imprecisions and costs, it is still a supplement to the Bill of Rights as a limit on the danger of tyranny.

What I've just said is an argument for imposing limits on power that go beyond those generated by judicial enforcement of a bill of rights. The next lesson, however, is that power can be too limited, or too compromised. Our history provides painful examples of the consequences of unwise restraints on governmental authority. The constitution itself is a product of the failure--or so the Framers saw it--of the Articles of Confederation, under which our nation was governed for the first years of its existence. The Articles bound the former colonies, now states, together, but by no means very tightly. It was difficult for the national government to act, for it had very little coercive authority over its constituent states, and the Articles established no separate executive branch. The constitution we have was the result of the conviction that the Articles did not work.

But the constitution we have didn't work either, and in a fundamental way. You are all probably aware of its failure, though perhaps not under this name: the constitution foundered on the issue of slavery. The constitution was a compromise between the slave states and the free, or freer, states, and this compromise proved untenable. The nation could not hold together while the institution of slavery divided it, and the resolution of this issue led the nation through secession and civil war to a revised constitution which enshrined the abolition of slavery and the national power to enforce the states' obligation to provide to their people, black and white alike, the equal protection of the law. I don't mention this piece of history in order to attribute our Civil War to particular defects in the allocation of power, though I suspect the elements of our separation of powers did play their part in shaping the politics of the

ante-bellum years. Rather, my point is a larger one: a society with intolerable injustices enshrined or protected by its constitution will not survive. Put more bluntly, unless a new South African government has the constitutional power to right the wrongs of apartheid, there will be little reason for optimism about South African stability or freedom.

These are very broad lessons indeed--that checks on power besides a Bill of Rights are needed, and that ineffectual or unjust government must be avoided. But they do have concrete relevance to South Africa. They counsel against a system of government in which the only constraints on majority will are those of the bill of rights as interpreted by the courts. They also counsel against a government so hamstrung by the need for consensus among people of sharply different views that it is unable to respond to the problems South Africa faces. Put more concretely still, they counsel against both pure majoritarianism and thoroughgoing consociationalism. What they counsel in favor of, broadly, is splitting the difference, so as to enable the government to govern but prevent it from riding roughshod over opposing views and opposing citizens. How to split this difference remains a matter of debate, here and elsewhere, and this is a debate to which South Africa will I hope contribute its own answers. But the American answer, which I believe contains some part of the truth on this score, lies in good measure in our system of separation of powers and checks and balances. Let us look more closely at what American experience argues against, and argues for, by examining four more specific points: first, the structure of the legislature; second; the separation of the executive and legislative branches; third, the structure of the executive branch; and, fourth, the challenges of preserving in practice whatever system you agree upon on paper.

1. <u>The Structure of the Legislature</u>: I want to focus here on two aspects

of congressional structure. The first is bicameralism; the second is the decision to give the states equal representation in the Senate, while making representation in the House proportional to population. These two decisions were integrally linked when they were made by the Framers, but they are not necessarily interconnected at all. All but one of the American states (each of which has its own legislature) have bicameral legislatures, but in these legislatures, admittedly probably more as a result of modern Supreme Court decisions than of any deliberate decisions by the states, both houses are selected by methods that make representation proportionate to population.

The National Party has endorsed bicameralism, while the ANC is plainly open to the idea. What are the reasons for having bicameralism by itself? There are several. First, it can encourage greater reflection on governmental action. The sheer fact that two houses, rather than one, must consider each piece of legislation can generate greater reflection. Second, it can modestly increase the barriers to governmental action of any sort. If the consent of both houses is required for legislative action to become effective (as it is in almost all contexts in the United States), then the possibility always exists that for whatever reason a majority in one house will not be accompanied by a majority in the other. Third, it can give citizens greater access to the lawmaking process. This is not simply, or even primarily, because it multiplies the number of legislators, and so the number of interactions that citizens can have with their legislators. If, as in the United States Congress, representatives are elected every two years, while senators are elected for six-year terms and only one-third of them at a time, the result is that the two houses will hear public opinions at different moments. If, as is also the case in the U.S. Congress, senators are elected state-wide while representatives are elected from districts within the

states, the result is that the two houses will reflect different bodies of voters as well. The chance that an individual voter's opinions will be taken seriously goes up when that voter gets to vote for more than one legislator, and does so at more than one time and with more than one set of fellow voters.

These, it seems to me, are useful functions. Yet it might be argued that the result of this multiplication of voices, and opportunities for reflection and delay and dissensus, is to undermine the government's ability to carry out its program. I don't want to ignore that point, but I want to postpone it until I take up the issue of the separation of the legislature and the executive, a context in which this danger of hamstringing the government is even more squarely posed.

Instead, let us turn from mere bicameralism to the particular bicameralism of the United States constitution--in which one house, the Senate, gives every state the same number of Senators (two), and in which, as a consequence, small states enjoy a level of representation wildly out of proportion to their populations. It must be said at once that this system is a form of minority protection. Half the population of the United States lives in the nine largest states, represented by 18 senators out of the total of 100. Meanwhile, the seventeen smallest states, in which well under a tenth of the population lives, are represented by 34 senators--mathematically enough to control the outcome of any vote in which a two-thirds majority is required. On some issues, such as the ratification of treaties, only the Senate and not the House of Representatives is entitled to participate, and so the blow to the voice of the citizens of the larger states is all the greater. Yet this feature of our system does not generate public outcry, and although it surely does give disproportionate power to some citizens as against others it would be hard to say that as a result the

United States was not a democracy. There is at least some room for unequal representation in democracy, for the protection of relatively smaller interests--here, the smaller states--against the will of the whole, and for the protection of subdivisions of the government--the states, large or small--against the central, national government.

It is important, however, not to romanticize this system. It was not inevitable. In fact, James Madison, sometimes called the Father of our constitution, vigorously opposed it, as did others at the constitutional convention. Madison even resisted compromise proposals, which would have resulted in some, but less, disproportionality. The states have two senators each because the delegates from the small states at the convention dug in their heels, and forced a compromise on this point. Moreover, this compromise has had its costs. The extraordinary power of Southern Senators, who tended to serve many terms and accumulate seniority--and who were deeply opposed to equal rights for blacks--contributed to the slow response of the political branches of the national government to the civil rights revolution of the 1950s and thereafter. Equal representation for the states in the Senate is not integral to bicameralism, nor to the idea of checks and balances as James Madison first envisaged it; it is, rather, the result of sheer political conflict--and of course in South Africa the prices of compromise, for any side, may be similar departures from cherished principles.

Finally, it is important not to confuse this system with the system proposed by the National Party last September in its pamphlet, Constitutional Rule in a Participatory Democracy. This proposal envisaged a bicameral parliament, in which each region would have equal representation in the upper house. But it also envisaged that "[e]ach political party which ... gained a

specified amount of support in the election in the region's legislative body will be allocated an equal number of the seats for that region" in this House. (11-12) This rule does not empower states but rather parties within states. Depending on where the threshold is set, the disproportionate empowerment of minority parties could be dramatic. American government sets the winners of elections in various jurisdictions and at various moments against each other; it does not, characteristically, give seats to the losers. Our government, as distrustful as it is of unchecked majority power, is much less distrustful than this proposal, which is, I take it, not modeled on American separation of powers but on the theories of consociationalism.

2. The Separation of the Executive and Legislative Branches: It is a central claim of American constitutionalism that preventing tyranny requires a substantial separation of powers. Madison wrote that the very essence of tyranny consisted in a single branch of government gathering to itself all forms of governmental power. In particular, therefore, the framers were at pains to separate the legislative and executive branches. This separation was not absolute, for each branch has various powers over the other. But these powers over each other are meant not to merge the two branches but to give each the means of defense against each other--to set ambition against ambition and so preserve the balance of the whole.

The CODESA (Convention for a Democratic South Africa) Declaration of Intent expresses its signatories' agreement "[t]hat there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances." (¶ 5(d)) But this broad endorsement leaves much room for argument about the details--as our framers' attachment to separation of powers ideas left much room for argument here. The ANC leaves open the question of whether the

President should be directly elected by the people or "elected by and answerable to Parliament." (Constitutional Principles, ¶ 3.2). The National Party proposes to make the Presidency "consist of the leaders of the three largest parties" in the lower, more representative, house of Parliament (National Party proposals, 13), and would empower Parliament to pass a motion of no confidence which would presumably bring down the Presidency. (13) The structure we have firmly endorses more separation than that; to understand our structure, and the possibilities it offers for South Africa, it will be helpful first to contrast a very different form of government, British parliamentary government, with the system we have adopted.

As you know, the British prime minister is the leader of the majority party in the House of Commons. A member of that House himself (or herself), the Prime Minister appoints the rest of the Cabinet from the ranks of the other M.P.'s or occasionally from the House of Lords. Armed with tremendous authority to insist on the voting support of the backbench M.P.'s, the Prime Minister is in a position to enact his or her program into law--more or less without regard to what the opposition may have to say about it. If the Prime Minister ceases to be able to do this, in particular if he or she loses a vote of no confidence, then executive and legislative branches are likely both to fall at once, and a new executive will emerge from the new Parliament subsequently elected. This is the British system; at least until 1983, South Africa too had a Westminster system; and even now the National Party and the State President are constitutionally capable of wielding comparably decisive governmental authority. So far as this description goes, this is a formula for effective, but also unchecked, majority rule.

In contrast, the American President is not normally elected by Congress or

by the majority party in Congress. (Cabinet officials also are not members of Congress; such dual office-holding is explicitly forbidden by the constitution.) Nor does the President share a term with Congress; Representatives are elected for two-year terms, and so must face re-election in the middle of the President's four-year term, while Senators are elected for staggered six-year terms, so that only one-third of them would face election campaigns in any Presidential election year. Thus the President's electoral fortunes are quite independent of those of the legislators, and in fact during the past 25 years the White House has almost always been in the hands of the Republicans, while at least one, and usually both, houses of Congress have had Democratic Party majorities. The President has no authority to dissolve a Congress dominated by the other party, nor does Congress have any authority to remove the President from office on the basis of a vote of "no confidence." Yet while Congress and the President are so plainly capable of having very different perspectives on public policy, the passage of legislation generally requires the two branches to concur, for if the President vetoes a bill passed by Congress it will not become law unless a two-thirds majority votes to override the veto. This system is <u>meant</u> to prevent government action--not all government action, to be sure, but that action which is the product of what Madison called "faction," of segments of the community, even majority segments of the community, acting in a way that is unjust or unwise for the community as a whole.

There have been powerful criticisms of the American system from respected observers of and participants in our government. You will hear from one of these critics, Lloyd Cutler, tomorrow. He can speak for himself, and from a wealth of experience, but let me outline part of his critique in order to pursue my own argument here. Cutler has argued that the upshot of our system of divided and

mutually resistant authority is that the President cannot, in his words, "form a government" and enact a legislative program. He has written admiringly of Parliamentary systems, in which a slim majority can work its will, subject of course to the ultimate test of the voters' approval or disapproval at the next elections. (To Form a Government, 14) He maintains that on many issues of our day, consensus is unattainable, and effective government therefore requires that action not await consensus. (17) By contrast, our system puts a premium on consensus. Even when the President's party holds a congressional majority, consensus on the President's proposals is far from automatic. In essence, Cutler maintains that the framers succeeded too well. At least in our day, the system they designed may avoid the dominance of faction only by weakening the government at a time when we need--as perhaps the framers did not--to have the government in action.

Whether this critique is correct continues to be debated. For myself, I remain agnostic about how much of the weakness of American politics should be attributed to our governmental structure, and how much to the genuine complexity of our problems and the failure of our people and our politicians to face them frankly and seriously. And I continue to think, as a person whose support for liberal Democrats has been rather out of fashion lately, that it is a good thing that the Republicans haven't been able to write all of the policies of earlier Democratic eras out of the statute books--in short, that there is value in inertia and in the requirement of considerable consensus as a basis for legislation in this country.

But it is surely correct that the separation of executive and legislative powers makes governmental action harder; the only debatable issue is how much harder. What is clear as well is that governmental action is not as hard under

the American system as it would be under a consociational system that gave extra representation to minority political parties and imposed heightened majority requirements as a predicate for the passage of legislation affecting the relations among groups in South Africa--as the National Party has proposed. To set the barriers to government action as high as this is a risky step indeed, for it is entirely possible, as Donald Horowitz has argued, that the necessary strong consensus simply will not be achieved. In this light, I think the American system has much to recommend it for South Africa, not because it gives a Parliamentary majority as much power as the British system, but because it gives considerable effective authority to a President who is backed by a Parliamentary majority--as the first post-apartheid South African President may be--while still offering minority parties a distinct capacity to resist policies that they dislike. This does not make it perfect, I imagine, for either those who share the views of the National Party or those who share the views of the ANC--but it may make it a useful compromise. And, of course, the details of the American system need not be your blueprint; it is open to the parties in South Africa--as some Americans urge we should do here at home--to modulate the separation of powers, if you accept it at all, with a view to somewhat enhancing the power of government to act. No doubt you have already begun looking at the various solutions that other countries, from Germany to Namibia, have devised to address these concerns.

3. <u>The Structure of the Executive Branch</u>: One of the central doctrinal points of American separation of powers law is that our constitution provides for a "single executive." There is one President, and one only, and he or she is vested with the executive power. This decision, a fundamental choice made by the Framers, rests on the belief that vesting power in a single executive will make government both more effective and more accountable than would a more diffuse

system of executing the laws. This decision is frankly inconsistent with the National Party proposal "that the office of head of state and of government should be vested in a collective body known as the Presidency," to "consist of the leaders of the three largest parties" in the lower house of Parliament, making decisions "by consensus," with the chairmanship of this collective entity or the actual office of "State President" changing hands on a rotating basis. (13) This proposal is dangerously likely to impede effective executive action, and to dissipate executive accountability--since no one member of the Presidency will be able to control its decisions. It will also deprive South Africa of the symbol of national unity, and source of national leadership, that a single executive can provide--as we have seen in this country, and as you have seen, not least under F.W. de Klerk, in yours.

But American experience by no means counsels that each and every element of the execution and administration of the law must be under the control of a single person. This may seem paradoxical, given what I've just said about the Framers' decision in favor of a single executive. Whether or not it is paradoxical, it is certainly somewhat controversial; recent years have seen both court opinions and scholarly commentary focused on explicating just how powerful the President must be. I will touch on certain parts of this controversy, but I am much less concerned to try to resolve this point of American law than to try to explicate the possibilities for South Africa that American law presents. Let me just add before I do so that South Africans are already investigating related possibilities. The ANC, for example, has called for "an independent electoral commission to oversee every aspect of elections from the printing of ballot papers to the adoption of regulations for access by parties to the public media and fairness to all political parties by the public media"--a vesting of

executive authority outside the central executive that would be very substantial indeed. (¶ 6). Both the ANC and the National Party want to create an independent Ombud or Ombudsman. (¶ 14; National Party at 7) The National Party wants greater autonomy as well for the Auditor-General, the Public Service Commission and the Reserve Bank." (7) Let us look, therefore, at the methods American constitutional law suggests for establishing such quasi-independent executive agencies.

The beginning of wisdom in this sphere is surely the recognition that even if the President is the head of government, almost all of what government does will be done by subordinate officials. The exact extent of the President's power therefore depends on the extent of his or her power to hire, fire, and direct those subordinates.

Limiting the President's power to hire officials is one way of constraining his or her authority. As our constitution is currently read, Congress itself cannot appoint executive branch officials. But the constitution requires senatorial advice and consent for all appointments of "principal officers," and permits Congress to require this for all "officers of the United States"--a wide category of officials. Congress may also be able to require the President to appoint from, or at least consider, lists of nominees prepared by others, or to require that those appointed have particular credentials (such as political party membership). Congress can also decide to vest the appointment of at least some "inferior officers"--who including even officials as powerful as independent prosecutors appointed to prosecute government wrongdoing--in the hands of the courts. Moreover, Congress presumably can provide that other government employees, those not wielding enough authority to count as "officers of the United States," be hired through civil service procedures over which the President has limited control.

Similarly, limiting the President's power to fire officials also constrains Presidential authority. Again, our constitution is currently understood to deny Congress itself authority to fire executive officials except through the very rarely used mechanism of formal impeachment. But that doesn't mean that the President has unchallenged power in this sphere. At one time the Supreme Court seemingly held the view that the President was constitutionally entitled to fire a wide range of officials at will; subsequent cases, however, including one very recently, have decidedly circumscribed this notion. If the President cannot fire "at will" but only for "cause," Presidential power is reduced; and--an undecided question--if he or she cannot treat as "cause" a subordinate's refusal to comply with Presidential policy preferences, then the Chief Executive's power is much further diminished.

So, too, vesting particular elements of executive responsibility in named subordinate offices, rather than in the President, can constrain the President's power. Suppose, for example, that the Attorney-General is assigned by statute the responsibility to decide whether to bring a prosecution or not. Can the President take this decision out of the Attorney-General's hands in a particular case in which the President is intent on prosecution, but the Attorney-General believes none is merited? My colleague Peter Strauss argues that the American constitution would require the President to find an Attorney-General who would do his bidding, and although the President might well find such a person, the process of doing so would--and on occasion in fact has--exacted a political cost.

By channeling or limiting the President's appointment and removal powers, and by vesting particular duties in specified subordinate officials, legislation in this country has been able to place important elements of executive power to some degree outside the President's control. Perhaps more important for South

African purposes, such legislation has often attempted to place particular areas of government policy to some extent beyond partisan control either by Congress or by the President. By specifying that commissioners of an agency hold office for periods extending beyond a single Presidential term, for example, a statute can provide some measure of insulation from Presidential control. So, too, a statute that divides seats on an agency between the Democratic and Republican parties can limit, to some extent, the degree to which that agency will become merely a creature of the President's, let alone either party's, will. If the South African constitution that is now being written is to limit executive power, such steps as these might provide such limits. So, for example, a Judicial Service Commission might be required to have representation from each of the major parties, and the President required to pick judges from nominees submitted by the Commission. Such steps as these could restrain the power of the single executive--without the drastic inroads on governmental efficacy that the consociational model risks.

(4) Preserving in practice what you set out on paper: Benjamin Franklin, already a venerable statesman when he served as a member of the constitutional convention, supposedly was asked after the convention what kind of government the framers had shaped for the American people. He answered, "A republic, if you can keep it." Keeping your republic, or democracy, must be as great a concern for you as it was, and is, for Americans. The record of African states on this score is not good--and South Africa itself has a dreary record of oppression of human rights. Yet designing a system that will hold up over time is by no means easy.

United States history demonstrates this proposition--if any proof is needed. The Framers of our constitution are revered as unusually far-sighted and wise, but they evidently failed to predict that so fundamental an institution as

the political party would become an important feature of the new United States. It was only a few years before many of them were busily forming the political party system which has been a critical part of our polity ever since. Similarly, many of the framers viewed the greatest danger to republican liberty as coming from the legislature; today, many Americans are convinced that the executive branch has long since overmatched the Congress in the struggle for power. So, too, the Framers apparently anticipated a rather straightforward, and modest, role for the courts; modern Americans live in a world in which concern about judicial power undermining democratic self-government is a recurrent theme. And, as you have already heard, the framers anticipated a relatively small central government, carrying out relatively confined functions--and the reality of modern American life is far removed from this. Not only does the federal government do vastly more, the states relatively less, but the federal government characteristically acts through administrative agencies in which the functions of law-making, law-enforcing, and law-adjudicating--so carefully separated in the text of the constitution--are actually melded together.

Yet in the midst of this the structural provisions of our constitution remain almost unamended after 200 years. As much as the country and the government have changed, moreover, much of the structure of our polity would be recognizable to the framers as being their handiwork--and much else would plainly reveal that its ancestry lay in what they had wrought. To a great extent, moreover, this continuity cannot be attributed to judicial enforcement of the provisions of the separation of powers, for until quite recently the courts in fact rarely did adjudicate questions concerning the relative powers of, in particular, the executive and legislative branches of the federal government. Instead, this continuity has to be attributed to the framers' success in shaping

a fairly clear and fairly workable design; to their insuring in this design that the political branches of government did have the resources to challenge each other's pretensions as well as the capacity, at least sometimes, to work effectively together; to the country's growing constitutional faith--and, ironically, to the facility Americans have shown for improvising on the boundaries of the constitutional text structures and principles that the framers themselves scarcely dreamt of. For a constitution to last it must work; but part of its working must be its flexibility--whether intended by the drafters or insinuated by those who come after them.

How should courts respond to this simultaneous, and almost paradoxical, need for both structural strength and flexibility? Our experience on this score has not been a terribly happy one. Sometimes our Supreme Court has tried to fashion bright-line rules to resolve separation of powers questions, but these rules have often had an arbitrary, even illogical, flavor to them. On other occasions the court has self-consciously tried to be flexible, or, as we sometimes say, functional--to avoid bright-line rules in favor of a much more wide-ranging assessment of whether particular structural innovations do or do not fit with the broad concerns of the constitutional design. This approach avoids rigidity, but perhaps only to approach the other extreme at which, as Justice Scalia has complained in dissent, there are no lines at all.

One might respond, as Jesse Choper of the next panel has, by urging that courts stay out of the business of regulating the separation of powers altogether. I don't make that response, however, because I think that courts' monitoring of the separation of powers, awkward and imperfect as it will be, is still likely to help affirm the importance of fidelity to the constitution's structure, especially in a new nation whose structural design is untested. But

if you accept that the desirable structure is one that is both firm and flexible, and if you look to courts to help you achieve and maintain that structure, then you will be vesting in the courts a very challenging role indeed. Rather than simply parsing text, courts concerned with the separation of powers will need some quantity of the expertise of political scientists or even politicians. Just as courts will acquire something of the role of national conscience as they enforce the bill of rights, they will play something of the role of national political engineer as they monitor the separation of powers.

I do not think, however, that the courts can be relied on to make the government work. They can refine some decisions, overrule certain others, but the stability and success of this government will ultimately depend on the government itself, and the people themselves. That, again, is why structure is important. South Africa faces profound challenges of correcting past injustice, achieving economic development, and embracing a very diverse population in a single nation. The task of shaping a government that can effectively address these problems, both by acting on behalf of the majority and by honoring the concerns of minorities, is your task. I hope this dip into American experience helps you in your work.