

CONCLUSIONS

The general drift of authority and responsibility toward the President over the past two centuries is unmistakable. More threatening than this trend is executive activity cut loose from legislative moorings and constitutional restrictions—presidential action no longer tethered by law. The record of recent decades is disturbing to those who see a pattern of executive abuses: Watergate during the Nixon administration; revelations of CIA abuses in the 1970s; the Iran-Contra scandal during the Reagan administration; unilateral military initiatives by President Clinton in Haiti, Bosnia, and Kosovo; the assertion of “inherent” executive power by President Bush after 9/11; and the claim by President Obama that he possessed independent constitutional authority to order military attacks against Libya and Syria.

The Supreme Court offers limited help in resolving the basic disputes of separation of powers. Over the last four decades it has bounced back and forth, sometimes embracing a functional, pragmatic approach, and at other times adopting a doctrinaire, formalistic model. The functional approach was used in 1974 when the Court rejected President Nixon’s claim of an absolute power to determine the limits of executive privilege. Instead, the Court emphasized checks and balances and the need for a “workable” government.¹ Separation of powers entered the Court’s equation only in the sense of preserving “the essential functions” of each branch.² No effort was made to establish rigid boundaries or to disallow the slightest encroachment.

Three years later, in another case involving Nixon’s papers, the Court again viewed separation of powers in practical terms. It rejected the Court’s view in 1935 that the three branches of government must remain “entirely free from the control or coercive influence, direct or indirect, of either of the others,”³ deciding to support the “more pragmatic, flexible approach” of James Madison and Justice Story.⁴ Judges should inquire into the extent to which a statute prevented the executive branch from accomplishing “its constitutionally assigned functions . . . [and] whether that impact is justified by an overriding

1. *United States v. Nixon*, 418 U.S. 683, 707 (1974).

2. *Id.*

3. *Nixon v. Administrator of General Services*, 433 U.S. 425, 441–42 (1977), quoting from *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935).

4. *Nixon v. Administrator of General Services*, 433 U.S. at 442.

need to promote objectives within the constitutional authority of Congress.”⁵ The Court thus permitted some sharing and overlapping of power, as indeed was anticipated by the framers.

However, in a series of rulings from 1982 to 1986, the Court advanced a doctrinaire notion of separated powers. In 1982 it upheld an absolute immunity for the President in civil cases, treating immunity as “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”⁶ The Court expressed concern about the “dangers of intrusion on the authority and functions of the Executive Branch.”⁷ The Court relaxed that doctrine in 1997 when it allowed a private party to sue the President for unofficial acts while he was still in office.⁸

Concerns about intrusion appeared in another decision in 1982 striking down a statute that allowed bankruptcy judges to exercise judicial powers without the protection of life tenure and irreducible salaries guaranteed to Article III judges. The plurality opinion reasoned that Congress’s attempt to establish bankruptcy courts under Article I “threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of ‘specialized’ legislative courts.”⁹ The Court seemed to go out of its way to present a worst-case scenario of one branch invading another. Nothing in the legislative history of the Bankruptcy Act suggested that Congress was positioning itself to take over the federal judiciary.

In *INS v. Chadha* (1983), the Court continued to endorse a highly formalistic model of separated powers. In striking down the legislative veto, the Court dismissed as irrelevant its usefulness for settling executive-legislative disagreements: “Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”¹⁰ The Court cited the framers’ fear of despotism and the possibility of encroachments by one branch on another.¹¹ Although the Court denied that the branches are “hermetically sealed from one another, it insisted that the Constitution divided government into “three defined categories, Legislative, Executive, and Judicial,” and that the Court was compelled to resist the “hydraulic pressures inherent within each of the separate Branches to exceed the outer limits of its power.”¹²

5. *Id.* at 443.

6. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

7. *Id.* at 754.

8. *Clinton v. Jones*, 520 U.S. 681 (1997).

9. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982).

10. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

11. *Id.* at 946–51.

12. *Id.* at 951.

It was simplistic to believe that the legislative veto was merely a device by which Congress hoped to dominate the executive branch. The history of the legislative veto clearly shows that it originated as a desire by the executive branch to exercise a much greater degree of legislative power. The framers did not object to a sharing or partial intermixture of powers. They were not doctrinaire advocates of a pure separation between branches. They knew that the "danger of tyranny or injustice lurks in unchecked power, not in blended power."¹³ To the extent that the Supreme Court adopts unrealistic and impractical concepts of separated powers, its decisions will be largely ignored or circumvented, as has been the case with the continuation of committee vetoes after *Chadha*.

The Court persisted with a doctrinaire view of separated powers in *Bowsher v. Synar* (1986). In rejecting the assignment of executive duties to the Comptroller General because that officer is subject to removal by a joint resolution of Congress, the Court claimed that the framers provided for "a separate and wholly independent Executive Branch."¹⁴ Wholly independent? What does that do to checks and balances and congressional oversight? The Court argued that except for impeachment proceedings, the President was responsible not to Congress "but to the people."¹⁵ Anyone who follows government knows that the President is very much responsible to Congress. That responsibility results from a number of congressional powers and practical realities that have nothing to do with impeachment.

Nevertheless, the Court pushed ahead with its doctrine by agreeing with language in a 1935 decision that enshrined separation of powers at the cost of checks and balances: "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."¹⁶ That dictum was fantastic for many reasons, but particularly because Congress obviously was not "entirely free" from the control or coercive influence of the Court when it declared the legislative veto and the Gramm-Rudman-Hollings Act unconstitutional.

As a final gesture to the cause of pure separation, the Court announced that once Congress "makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."¹⁷ No one who reads newspapers or

13. Kenneth Culp Davis, *Administrative Law and Government* 54 (1960).

14. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

15. *Id.*

16. *Id.* at 725, quoting from *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).

17. *Id.* at 733-34.

watches C-SPAN can believe that. The Court itself has acknowledged the power of Congress to investigate, issue subpoenas, and hold executive officials in contempt. Continued participation by Congress does not require the passage of public laws.

Oddly, on the same day that the Court released this unrealistic opinion, it resorted to pragmatism in upholding the power of the Commodity Futures Trading Commission to handle state law counterclaims in reparations proceedings before the agency. Litigants had argued that executive agencies could not adjudicate, but the Court turned aside their demand for sharp boundaries between the branches. In determining the extent to which a congressional decision to authorize adjudication by executive agencies "impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules."¹⁸ The Court weighed a number of factors "with an eye to the practical effect" that congressional actions would have on the judiciary.¹⁹

A few years later, the Court jettisoned the rigid doctrines of *Chadha* and *Bowsher* and returned to a pragmatic reading of separation of powers. In *Morrison v. Olson* (1988), the Court upheld the power of Congress to authorize federal judges to appoint an independent counsel to prosecute high-ranking officials in the executive branch. Whereas in the bankruptcy court case (*Marathon*) the Court had seemed alarmed at the slightest interference by Congress in the judicial power, in *Morrison* it upheld the decision of Congress to permit the Attorney General to remove the independent counsel only for "good cause." The Court concluded that the good-cause standard did not "unduly trammel" executive authority; the President's need to control the independent counsel was not "so central" to the functioning of the executive branch as to require that the independent counsel serve at the pleasure of the President.²⁰ Furthermore, the Court stated that "we have never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'"²¹ The experiment with an independent counsel ended in 1999 because of legislative and executive—not judicial—objections.

In 1989 the Court again embraced a pragmatic, functional attitude toward separation of powers, noting that the framers "did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct."²² Madison, the Court noted, recognized that the Constitution

18. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

19. Id.

20. Morrison v. Olson, 487 U.S. 654, 691 (1988).

21. Id. at 693–94, quoting from United States v. Nixon 418 U.S. 693, 707 (1974).

22. Mistretta v. United States, 488 U.S. 361, 380 (1989).

imposed on the branches "a degree of overlapping responsibility, a duty of interdependence as well as independence."²³ The Court explicitly adopted a "flexible understanding" of separation of powers.²⁴

Given the Court's failure to develop a consistent and coherent theory of separated powers, as well as its record of avoiding many of the disputes between Congress and the President, it is not surprising that the meaning of separation of powers has, for the most part, developed outside the courts. The substance of various clauses and provisions in the Constitution are the result of compromises and accommodations worked out by legislative and executive officials.²⁵

In extraordinary situations the President may have to act promptly without clear constitutional or statutory support. Quick action is not a quality or purpose of a legislative assembly. Congress is essentially a deliberative body. Under extreme conditions it is better to let the President invoke emergency powers without claiming the slightest shred of legal support, perhaps even admitting that the action violates the law. That is what Lincoln did at the start of the Civil War. The burden is then on the President to justify the decision and present the case to Congress and the public. Both would be free, after careful examination of the evidence and the circumstances, to render a verdict of exoneration or condemnation.

The precise jurisdictions and fields of operation for Congress and the President will always elude us. Fortunately, the political process has a self-correcting mechanism, although it sometimes comes late and after heavy costs. Ambiguities in the Constitution permit one branch to infringe upon another. Generally this encroachment consists of brief raids in and out of the neutral zone. But at some point, after passing beyond a threshold of common sense and prudence, aggressive actions become counterproductive. They trigger revolts, leading to the recapture of ground taken not only in the most recent assault but in earlier offenses as well. It is not true that "let one occupant of the presidency exercise an additional power, and the advantage thus acquired is never abandoned."²⁶ Consider what happened with impoundment, the pocket veto, and executive privilege. Power distorted the judgment of the wielder. The moth circled too near the flame.

To call for "comity" and "consultation" is not enough. The record suggests that this is often an illusion. Representative Paul Findley remarked in 1976 that he had been in Congress for sixteen years, most of that time serving on

23. *Id.* at 381.

24. *Id.*

25. Louis Fisher, "Separation of Powers: Interpretation Outside the Courts," 18 *Pepperdine L. Rev.* 57 (1990).

26. Norman J. Small, *Some Presidential Interpretations of the Presidency* 198 (1932).

the House Committee on Foreign Affairs. The chairman of that committee, Clement Zablocki, had been in Congress for twenty-eight years. Throughout that period—which spanned Democratic as well as Republican administrations—Zablocki had tried to encourage consultation by the executive branch, but Findley was hard put to think of any cases in which consultation actually occurred *in advance* of an executive decision. It was out of this “rather dismal experience,” Findley said, that many members of Congress decided to advocate statutory remedies for executive agreements, the war power, and other conflicts with the executive branch.²⁷

If Congress has strong misgivings about an issue, it should resolve the matter by relying on language in a public law, not by informal understandings with executive officials. In 1977 members of the House were worried about being inundated by reorganization plans submitted by President Carter. OMB Director Bert Lance assured the House Committee on Government Operations that the administration appreciated this concern and would adhere to a reasonable timetable. Congress correctly insisted on specific language in the reorganization act to prohibit more than three plans from being before Congress at one time.²⁸ When in doubt, legislative policy belongs in the law.

This is a policy of prudence, not paranoia. We need to distinguish between objectives and the means used to attain them. Justice Jackson reminded us of our tendency to ignore the fundamentals of government: “The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages and stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.”²⁹ Theodore Sorensen, reflecting on his views of presidential power during and after his service with the Kennedy administration, warned against shortsighted reactions to immediate events and the failure to take into account the longer view: “I understand this error, having committed it myself a decade ago.”³⁰

The literature on the presidency, after emphasizing for many years such vague qualities as “vigor,” “energy,” and “persuasion,” is somewhat more cau-

27. “Congressional Review of International Agreements,” hearings before the House Committee on International Relations, 94th Cong., 2d Sess. 150 (1976).

28. 91 Stat. 30, sec. 903(b) (1977); “Providing Reorganization Authority to the President,” hearings before the House Committee on Government Operations, 95th Cong., 1st Sess. 43–44 (1977).

29. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

30. Theodore C. Sorensen, *Watchmen in the Night* xvi (1975).

tious about the ends to which power may be put and the legal boundaries needed for presidential action. Still, studies continue to attribute to the President imaginary and idealistic qualities that have scarcely any relationship to the actual conduct of those who occupy the Oval Office. These theories weaken the constitutional system of separation of powers and checks and balances.³¹ Commentators need to take into account not merely the exercise of power, directed for whatever purpose the President chooses, but also the source of authority and the rights secured under the Constitution.³² Too often in the past the legal basis for action has been ignored in the eagerness for results and prompt measures.

Constitutional values are important even when they cannot be entirely satisfied. There is no need for dismay because we aim high and fall short. Machiavelli, often portrayed as the father of political expediency, encouraged us to set high standards:

A prudent man will always choose to take paths beaten by great men and to imitate those who have been especially admirable, in order that if his ability does not reach theirs, at least it may offer some suggestion of it; and he will act like prudent archers, who, seeing that the mark they plan to hit is too far away and knowing what space can be covered by the power of their bows, take an aim much higher than their mark, not in order to reach with their arrows so great a height, but to be able, with the aid of so high an aim, to attain their purpose.³³

The framers of the Constitution settled on a single executive in order to foster unity, responsibility, dispatch, expertise, and a national perspective. To an impressive extent, the office of the presidency has alleviated many of the defects experienced by the Continental Congress. Yet the qualities originally anticipated of the executive have undergone profound transformations. Surely it is arbitrary to highlight the unifying quality of the President. Just as easily we can look at the fragmentation of the executive branch and the many groups within it competing for control. Special interests seek representation within the administration just as they do within Congress. In ways similar to a legislature, these groups barter with one another and conduct their own form of logrolling. With heartless accuracy, Alfred de Grazia reminded us

31. Louis Fisher, "Teaching the Presidency: Idealizing a Constitutional Office," 45 PS: Political Science & Politics 17 (2010).

32. John Hart, "Presidential Power Revisited," 25 Pol. Stud. 48 (1977); Louis Fisher, *The Law of the Executive Branch: Presidential Power* (2014).

33. Allan Gilbert, trans., Machiavelli: *The Chief Works and Others*, 1, 24–25 (1965), from *The Prince*, ch. 6.

some time ago that the President is "a Congress with a skin thrown over him."³⁴ We need to pierce the skin and comprehend the forces underneath.

The President remains responsible for the operation of the executive branch, but often only in a technical and formal sense. Vast areas are sub-delegated to remote sectors of the executive branch (and even to the private sector). Presidents and staff assistants with unusual diligence and energy find themselves overwhelmed by the task. Joseph Califano, who served as an assistant to President Lyndon Johnson in the area of domestic affairs, doubted that he ever met, "much less consulted or helped guide, more than one-third of these noncabinet agency and commission heads. Hyperactive as he was, President Johnson met even fewer of them."³⁵ Congress is frequently advised to confine its activities to "broad policy" questions and leave "day-to-day" matters to the executive branch. A similar division of labor takes place within the administration. The President is advised to concentrate on broad policy while delegating details to departments and agencies. Political power generally comes with details, not with broad frameworks.

Executive officials are often so absorbed by operations, tactics, and short-run goals that they lose sight of national objectives, other than the raising of campaign contributions and securing the President's reelection. The 1972 campaign was conspicuous for its bartering of the public interest. The Internal Revenue Service, the Federal Bureau of Investigation, the Central Intelligence Agency, and other agencies were used by the White House to violate the constitutional rights of citizens. Raised to high visibility were the administration's relationships with such special interests as International Telephone and Telegraph, milk producers' cooperatives, and grain exporters.³⁶

Constitutional government was placed at risk in 2010 as a result of the Supreme Court's decision in *Citizens United*, attributing to corporations the status as "persons" entitled to spend unlimited amounts in political campaigns, with money defined as "speech" protected by the First Amendment.³⁷ Because voters cannot compete with this level of corporate power and influence, the nature of representative government is threatened. Members of Congress may seek to satisfy not their constituents but those who finance their elections.

We have come to expect the worst of legislators and at the same time believe in high virtues of the President and his entourage. Recent decades reveal conspicuous examples of Presidents and executive officials releasing false

34. Alfred de Grazia, *Republic in Crisis* 72 (1965).

35. Joseph A. Califano Jr., *A Presidential Nation* 23 (1975).

36. "The Final Report of the Select Committee on Presidential Campaign Activities," S. Rept. No. 981, 93d Cong., 2d Sess. (June 1974).

37. *Citizens United v. FEC*, 558 U.S. 310 (2010).

claims and presenting as fact what is mere assertion on tenuous, suspect, and fabricated grounds. Agency officials, even when they have their facts correct, find it difficult to place them in perspective or part company with long-held assumptions and predilections. White House officials, by necessity generalists, may ignore agency expertise when it fails to dovetail with the political needs of the President.

The strength of Congress is its capacity for diversity and openness (relative to the executive branch)—the opportunity it provides for the expression of different sentiments, opinions, and values. It is a disorderly operation and disappointing to those who want firm direction and quick action. But this free play of ideas, as well as the freedom not to move until the time is right, is essential to democratic government. What is needed from Congress is the daily grind of overseeing administration policies, passing judgment on them, and behaving with confidence as a coequal branch. That takes courage and an understanding of constitutional responsibilities.

Congress may stand against the President or it may stand behind him, but it should not stand aside as it did year after year during the Vietnam War and more recently the second Iraq War, looking the other way and occasionally complaining about executive usurpation. There, the crucial ingredient is will-power, not constitutional power. Congressional influence depends on more than access to information, additional staff, or a revamping of procedure and organization. Congress must be willing to participate actively in questions of national policy, challenging Presidents and contesting their actions. Issues need the thorough exploration and ventilation that only Congress can provide. We must learn, especially when the temptation is great, to resist legal shortcuts because "the cause is good" or it is "the right thing to do." The door is then left open for capricious acts we may later deplore.