UDK — 342.4 (73)

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THE SEPARATION OF POWER IN AMERICAN CONSTITUTIONAL LAW — PERSPECTIVES AND RECENT TRENDS

The text of the Constitution of the United States has remained largely unchanged from the late Eighteenth Century to the present(1). The longevity of the document affords a remarkable example of continuity; it also yields considerable difficulties when the text is applied in social, economic, and political circumstances not only unknown to, but also unimagined by, its authors. In some instances, for example, the courts have had to decide whether rights contained in the Bill of Rights should be interpreted to restrict methods of governmental intrusion that were unknown to the framers(2). In other cases, the courts have been urged to recognize individual rights that are not specified in the original document but have become socially important in the intervening years(3). In yet another context, courts have found that the integration of the national market and profound changes in industrial organization now justify federal control over matters that were once assumed to be internal concerns of the states(4).

In no area, however, has the ambiguity of the Eighteenth Century text led to greater uncertainty than in questions relating to the allocation of power between the legislative and executive branches. The framers followed Montesquieu in separating the departments of government by function, rather than according to social or economic class; this novel technique distinguishes the separation of powers of modern theory from the „mixed government" of the ancients. Adding a further measure of complexity, the framers provided that, in certain circumstances, one branch might check another in

(1) After the addition of the first ten amendments (Bill of Rights) in 1791, the other major addition to the Constitution was the adoption of the thirteenth, fourteenth and fifteenth amendments in the aftermath of the Civil War.

(2) Katz V. United States. 389 U.S. 347 (1967) (electronic surveillance).

(3) Roe v. Wade, 410 U.S. 113 (1973) (abortion rights); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education).

(4) Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).

the performance of its assigned functions. The general purpose of this elaborate structure was to avoid an undue concentration of governmental power, the political danger most feared by the revolutionary generation.

Although the general purpose of the structure is clear enough, the spareness of the Eighteenth Century language produces ambiguity in practice because the dividing line between the powers of the legislative and executive branches cannot be clearly determined from the text. „All legislative Powers" granted by the Constitution, for example, are confided to Congress. Yet the president must „take Care that the Laws be faithfully executed" — an authority that may also imply a measure of policy-making power. Con gress is authorized „to declare War", but the president is the „Commander in Chief" of the armed forces. Where the declaratory power of Congress ends and the „Commander's" power begins has been a prolific source of debate from Washington's administration to the present.

Indeed, precisely how power should be allocated between president and Congress in a number of disparate areas has evoked vigorous disagreement from the earliest days of the republic. In the subjects raised and the nature of the positions taken, this debate continues in modern times much as it has in the past. Yet the forum in which the debate is carried on has shifted in a significant manner in recent years. The last two decades have seen a notable increase in the willingness of the judiciary to intervene in the great questions of the allocation of political power between the Congress and the president. The emergence of a more active judicial role in separation of powers disputes — following the increasing activity of courts in many other areas — has important implications which have yet to be fully understood.

Of course, from the early days of the nation the federal judiciary has devoted some attention to the allocation of power between president and Congress. Yet, in the main, previous consideration of these questions has been sporadic. For example, during the undeclared war with France in the late 1790s, the Court incidentally considered questions of congressional and executive war power in the course of deciding certain cases relating to the capture of ships at sea(5). In contrast, perhaps the greatest foreign policy issue of the early Federalist period, President Washington's issuance of a statement of neutrality in the wars between England and France, was not considered by the Supreme Court(6). The crisis surrounding the War of 1812 yielded some disparate holdings on the scope of presidental power under congressional delegations(7). Thereafter, the Mexican-American War of the 1840s evoked incidental adjudications on the reach of executive po-

(5) Bas v. Tingy, 4 Dall. (4 U.S.) 4 U.S.) 37 (1800); Talbot v. Seeman, 1 Cranch (5 U.S.) 1 (1801); Little v. Barreme, 2 Cranch (6 U.S.) 170 (1804). These cases indicated that Congress has the power to authorize a „partial" or „limited" war without specific declaration, and emphasized congressional control over the scope of limited war.

(6) See: A. Sofaer, *War, foreign affairs and constitutional power: the origins*, pp. 103—116 (1976).

(7) Brig Aurora v. United States, 7 Cranch (11 U.S.) 382 (1813) (sustaining delegation of authority to president to prohibit trade with any foreign nation that violates rights of neutral commerce); Brown v. United States, 8 Cranch (12 U.S.) 110 (1814) (general declaration of war does not authorize executive to seize enemy property present in the U.S. when war is declared). See also Martin v. Mott, 12 Wheat. (25 U.S.) 19 (1827) (president authorized to decide when danger of invasion is sufficiently exigent to justify calling forth militia).

wer (8), and President Lincoln's executive blockade of southern ports at the beginning of the Civil War was upheld in the Supreme Court(9). Yet as significant Supreme Court adjudications on the separation of powers in the mid-Nineteenth Century, these decisions remain relatively isolated. In general, the late Nineteenth Century was a period of modest presidental claims and congressional dominance. Adjudication of separation of powers issues during this period was rare, although industrial unrest did evoke one influential opinion upholding executive policymaking in terms that furnished support for later extensive executive claims(10).

The rise of the modern presidency was foreshadowed at the turn of the Twentieth Century when the United States entered the world stage as an imperial power. As the authors of the Federalist Papers foresaw, vigorous exercise of the war power tended to aggrandize executive authority; thus, for example, President Theodore Roosevelt, in his famous „stewardship theory", asserted very broad power to act in instances in which Congress has not specifically prohibited the action(11). The actual creation of the modern presidency, however, was a product of the Great Depression of the 1930s, followed by the nation's entry into World War II. Broad executive power appeared indispensable in confronting the grave economic problems of the 1930s, and Congress therefore confided vast grants of discretionary authority to the president and other executive officials. Congress also created important new administrative agencies which exercised powers of economic control and combined elements of the legislative, executive and judicial functions. In the shadow of World War II — but before the war itself — the Supreme Court recognized greater independent presidential power over foreign affairs than it previously had acknowledged(12). With the coming of the war the roles of the president as executor of Congress's laws, and as commander-in-chief in his own right, tended to merge(13). When the war ended the new domestic apparatus of economic regulation remained largely intact, and the United States entered a period of „cold war" which many viewed as an extension of the crisis of the world war era. As such, it continued to evoke strong claims of unilateral power by the executive branch. Most notable were the president's dispatch of troops to Korea in 1950 and, later, the deepening American military venture in Indochina — also primarily an executive enterprise. It was also during this post-War period, however, that the Supreme Court, in what was then a rare intervention in separation of powers matters, invalidated President Truman's seizure of the nation's steel mills and reminded the executive that in domestic affairs, at least, Congress was the chief policy maker(14). Although

(8) Fleming v. Page, 9 How. (50 U.S.) 603 (1850) (additions to United States territory may be made by Congress or by treaty but not by executive decisions following conquest by military commander); Mitchell v. Harmony, 13 How. (54 U.S.) 115 (1851) (limitations on power of military commander to take private property in time of war).

(9) Prize Cases, 2 Black (67 U.S.) 635 (1862). Cf. The Protector, 12 Wall. (79 U.S.) 700 (1871) (Civil War commenced with executive's proclamation of blockade). For a case of the same period suggesting limits on the president's amenability to judicial process, see Mississippi v. Johnson, 4 Wall. (71 U.S.) 475 (1867).

(10) In re Debs, 158 U.S. 564 (1895); see also In re Neagle, 135 U.S. 1 (1890).

(11) T. Roosevelt, *Autobiography* (1916 ed.), 479—91, quoted in Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 688 (1952) (Vinson, C.J., dissenting).

(12) United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) (extra-constitutional foreign affairs power); United States v. Belmont, 301 U.S. 324 (1937) (international executive agreements).

(13) C. Rossiter, *Constitutional dictatorship* (1948).

(14) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

this warning may have had some cautionary effect, executive claims and executive power remained generally strong in this period.

In many ways the extension of executive power in the post-War era reached its high point in the early 1970s during the administration of Richard Nixon. In this period executive claims of broad policymaking authority both in domestic and foreign affairs were extensive and in some instances unprecedented. It was also during this period, however, that courts began to move somewhat more vigorously to limit the claimed extent of executive power. Thus lower federal courts found that the executive's refusal to spend certain funds appropriated by Congress was an illegal attempt to exercise legislative authority. Moreover, the Supreme Court held that the executive was not empowered to undertake „domestic national security" searches without satisfying the warrant requirements of the Fourth Amendment (15). The Court also found that the executive could not call upon the federal courts to prohibit publications of the „Pentagon Papers" without appropriate legislative authority(16). Perhaps most notably, in a decision that led to President Nixon's resignation, the Supreme Court held that the president does not possess and absolute privilege of confidentiality that would allow him to withhold tape recordings of his conversations from a court in a criminal case — althought the Court did recognize a presidential privilege to withhold information under certain circumstances(17). On the other hand, however, the Supreme Court assiduously avoided considering whether the American participation in hostilities in Indochina, without an explicit congressional declaration of war, lay beyond presidential authority.

At the same time that courts were acting to curtail certain claims of executive authority, Congress was taking similar measures. In the War Powers Act of 1973, for example, Congress sought to limit claims of presidential war-making authority and reassert its own constitutional power „to declare War". In the Congressional Budget and Impoundment Control Act of 1974, Congress sought to coordinate its control over budgetary matters and expenditures by establishing a mechanism for the unitary congressional review of the budget and an institutional method by which the president could be required to spend appropriated funds. At the same time Congress sought to narrow the power previously delegated to the president over certain foreign assets in time of national emergency, and the president's statutory power to declare emergencies was subjected to procedural and other constraints(18). In the Sovereign Immunities Act of 1976, Congress enacted rules for determining the immunity of foreign governments from suit in United States courts; these rules replaced a system of ad hoc executive determinations that some claimed had been made on an unprincipled basis. Moreover, Congress imposed specific limitations on certain executive actions in foreign affairs(19), and forms of the so-called „legislative veto" were inserted in numerous statutes for the purpose of limiting executive authority undertaken under broad delegations of power or otherwise(20). Finally,

(15) United States v. United States District Court, 407 U.S. 297 (1972).
(16) New York Times Co. v. United States, 403 U.S. 713 (1971).
(17) United States v. Nixon, 418 U.S. 683 (1974). See discussion *infra*.
(18) International Emergency Economic Powers Act (1977); National Emergencies Act (1976).
(19) T. Franck & E. Weisband, *Foreign policy by Congress*, Ch. 2 (1979).
(20) For discussion of the legislative veto, see *infra*.

statutory and other limitations were imposed on the executive's control over the intelligence agencies.

Congressional attempts to restrain executive power have continued (albeit fitfully) from the mid-1970s into the present. Recently, for example, Congress has endeavored to regulate executive action in Central America and the Middle East. In contrast, however, there are significant indications that the *judicial* movement toward limitation of executive power has largely spent its force. In recent Supreme Court decisions considering presidential power, the executive's position has generally prevailed. In certain of these cases the Court has expanded its view of „implied" presidential powers while, in contrast, it has taken a rather circumscribed view of congressional authority under the „necessary and proper clause" when the allocation of power between the executive and Congress is at issue. In 1976 the Court held that a statute empowering officers of Congress to appoint certain members of a federal commission violated Article II, § 2, cl.2 of the Constitution, which grants primary appointment power to the president(21). More recently, the Court upheld a presidential claims settlement agreement with Iran even though the agreement was not specifically authorized by statute and was not submitted to the Senate for confirmation as a treaty(22). The Court has also recently interpreted laconic or ambiguous statutes in a manner that recognizes extensive power in the executive, even when the assertion of that power threatens individual constitutional rights(23). Moreover, in the case of President Carter's termination of the Mutual Defense Treaty with Taiwan — a treaty approved by the Senate — the Court found the dispute non-justiciable, thus allowing the president's unilateral action to stand(24).

Two recent cases illustrate with particular clarity the Supreme Court's renewed deference to presidential power. In the first of these, the court held that the president possesses absolute immunity from civil liability for unconstitutional or otherwise illegal actions(25). This case is the latest in a line of decisions involving former President Nixon that have required judicial reconsideration of the personal role of the president in the structure of American government. Viewed as a group, these cases suggest the slightly anomalous nature of the presidential office — in some ways a monarchical vestige in the scheme of republican government. In 1974, in a case that led to the resignation of President Nixon, the Supreme Court found that a sitting president was not absolutely immune from judicial process(26). According to the opinion, however, a president does possess a „constitutionally based" privilege covering confidential communications with his advisors, but this implied privilege must be balanced against the governmental or other interests favoring disclosure(27). In 1977, the Court followed the principles of the first Nixon decision and held that Congress had acted constitutionally in extending federal custody over all of Nixon's presidential pa-

(21) Buckley v. Valeo, 424 U.S. 1 (1976).
(22) Dames & Moore v. Regan, 453 U.S. 654 (1981).
(23) Snepp v. United States, 444 U.S. 507 (1980); Haig v. Agee, 453 U.S. 280 (1981).
(24) Goldwater v. Carter, 444 U.S. 996 (1979).
(25) Nixon v. Fitzgerald, 457 U.S. 731 (1982).
(26) United States v. Nixon, 418 U.S. 683 (1974). See n. 17 *supra*.
(27) The court went on to hold that the privilege did not prevail in the specific case, and President Nixon was required to transmit certain damaging tape recordings to the judiciary for possible use as evidence in a criminal trial.

pers; the government's interest in possession of the documents was found to outweigh the force of the president's privilege(28). In these cases, the subjection of the president to the ordinary processes of law was affirmed in opinions that conceded (without holding) that a special provision might be made for the president in some circumstances. The most recent *Nixon* case, however, reverses the general trend of those decisions by actually holding in a related area that the special role of the president prevails over what would otherwise be general legal obligations. In *Nixon* v. *Fitzgerald,* the Court found that the president is absolutely immune from tort liability for unconstitutional or otherwise unlawful acts undertaken within the „outer perimeter" of his authority(29). Thus if the president orders an unconstitutional search and seizure or intentionally violates the first amendment rights of a critic, he is immune from liability for damages, although he remains subject to political retribution (including impeachment) and eventual criminal prosecution in extreme cases. Yet, as a practical matter, there may be no effective substitute for civil damage liability for such actions, and some argue that the result of the most recent *Nixon* case is to „(place) the President above the law. It is reversion to the old notion that the King can do no wrong"(30). As one isolated decision this case may not have important practical consequences. Nevertheless, it may portend a renewed emphasis on the personal privileges of the presidential office that could revise and weaken the general doctrine of the earlier *Nixon* decisions. Increasing insulation of the president as an individual from the ordinary requirements of law can have the effect of furthering unrestrained presidential policy-making through secrecy and lack of accountability.

A second recent case, *INS* v. *Chadha,* greatly favors presidential policy-making power in its continuing collisions with congressional authority(31). In an attempt to curb presidential and administrative power in the 1970s, Congress made extensive use of a device known as the „legislative veto" — a type of statutory provision that subjects proposed executive action to the approval or disapproval of one or both houses of Congress or, in some cases, certain congressional committees. The main purpose of these provisions was to limit what the executive could do under broad delegations of authority and to allow Congress to respond to executive initiatives without being subject to the onerous burden of overriding a presidential veto. In a broad-ranging opinion, the Supreme Court declared the use of this device unconstitutional — apparently in all of its forms — on the ground that it was an attempt to legislate without affording an opportunity for a presidential veto and without observing the other procedural requirements of Article I, § 7 of the Constitution. The Court in this opinion adopted a mechanical or formalistic interpretation of certain provisions of Article I, and gave a narrow reading to Congress's power under the „necessary and proper clause."

The effects of this decision will unquestionably be farreaching because a large number of important statutes contain legislative veto provi-

(28) Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

(29) In contrast, other executive officers possess a lesser „qualified" immunity only. See Butz v. Economou, 438 U.S. 478 (1978).

(30) 457 U.S. at 766 (White, J., dissenting).

(31) 103 S. Ct. 2764 (1983). See also Process Gas Consumers Group v. Consumer Energy Council of America, 103 S.Ct. 3556 (1983); United States Senate v. F.T.C., 103 S.Ct. 3556 (1983).

sions. One immediate practical question is the extent to which the decision invalidates actions previously taken under statutes containing legislative veto provisions — either where no legislative veto was exercised or where a new executive regulation was issued after a prior regulation was vetoed. Another immediate question is whether the Supreme Court's opinion indeed extends — as its language suggests — to the legislative veto in all of its forms.

Questions relating to the long-range effects of this opinion are even more profound. One possibility is that, from fear of executive power unchecked by the legislative veto, Congress will begin to withdraw broad delegations and thus contract the scope of federal power in general. Another possibility is that Congress will find itself forced to delegate broad power to the president without the correlative ability to restrain executive policy-making. It is also possible, however, that Congress may be able to devise new arrangements that do not run afoul of the *Chadha* decision and yet generally re-create the effects previously produced by the legislative veto. Whatever the result, we see in the *Chadha* case that the judiciary has not only retreated from its tendency to impose judicial limitations on executive power, but has actually taken a significant step toward undoing *congressional* limitations on that power.

In retrospect, what appeared as a resurgence of congressional power in the mid-1970s now seems to have abated, to some extent, in the face of renewed executive claims and judicial decisons. Shifts in the relative ascendency of presidential or congressional power are not unusual; indeed they are typical of American history. What is new, however, is the greater willingness of courts to engage in decisions allocating policymaking authority between the president and Congress and otherwise passing on separation of powers issues. The effect of this new factor is as yet difficult to evaluate. What began as an apparent willingness of the court to reinforce limitations on the executive branch in the early 1970s — a move widely heralded during and after the constitutional crisis of the Nixon period — now begins to take a rather different coloring as the court, still intervening in an active manner, has begun to favor executive claims and actually to undo congressional limitations on executive power. It is noteworthy, for example, that many of the statutes enacted in the 1970s for the purpose of restricting the president contain provisions for the legislative veto in one or another of its forms — provisions whose validity is now subject to grave doubt. The *Chadha* decision may consequently foretell the dismantling of these statutory limitations on executive authority. On the other hand, the court might avoid such a result by limiting the reach of the *Chadha* decision or by exercising other techniques of non-intervention. What is particularly interesting is that, to a greater extent than before in American constitutional history, the fate of the separation of powers between the president and Congress lies in the hands of the judiciary rather than in the hands of the political branches themselves.

This development raises particular problems in light of the spareness and indeterminacy of the Eighteenth Century constitutional text. Where the judiciary invokes such a document as a source of law, it is inevitable that the courts's own judgment of what is an appropriate political structure will play an important role. It is noteworthy, for example, that a finding of

absolute presidential tort immunity is not based on specific constitutional language, but rather on the Court's judgment that the immunity is necessary for the effective operation of the executive branch. Likewise, the invalidity of the legislative veto is not clearly determined by the text but rather represents the Court's rethinking of what in the main have been a series of majoritarian political compromises.

As many have noted, where minority rights are threatened it may be justifiable for the judiciary to give specific meaning to an indeterminate text in order to protect those whose political power is not sufficient to protect themselves(32). But where constitutional adjudication involves the allocation of power between branches equally representative of the majority, this new trend in constitutional adjudication risks discarding solutions achieved by majoritarian political compromise and replacing them with quite different solutions found suitable by the judiciary without specific textual justification. The extent to wich active judicial intervention of this sort can legitimately exist within a democratic framework — one of the great questions of judicial review — is thus raised renewed urgency and force by these recent separation of powers cases.

РЕЗИМЕ

ПОДЕЛА ВЛАСТИ У АМЕРИЧКОМ УСТАВНОМ ПРАВУ — ПЕРСПЕКТИВЕ И СКОРАШЊЕ ТЕНДЕНЦИЈЕ

Подела власти у САД је често изазивала велике уставне расправе, јер разграничење између законодавне и извршне власти није јасно. У највећем делу тока америчке историје, судство је интервенисало само спорадично у разграничењу власти између председника и Конгреса, према Уставу. Међутим, почев од 1970. г., Врховни суд је нешто чешће доносио пресуде у споровима о подели власти. Иако су мишљења Суда у почетку овог периода ограничавала власт председника, његове новије одлуке показују тенденцију да фаворизују извршну власт, и један значајан низ случајева имао је за последицу слабљење законодавних ограничења извршне власти. После кратког историјског прегледа аутор разматра ове скорашње правце развоја у пракси Врховног суда.

RÉSUMÉ

LA SÉPARATION DES POUVOIRS EN DROIT CONSTITUTIONNEL AMÉRICAIN — LES PERSPECTIVES ET LES TENDANCES RÉCENTES

La séparation du pouvoir aux Etats-Unis a fréquemment provoqué de grands discussions constitutionnelles, parce que les lignes de démarcation entre les autorités législative et exécutive ne sont pas claires. Pour la plupart de l'histoire américaine, la judicature intervenait seulement sporadiquement dans la délimitation du pouvoir entre le président et le Congrès, d'après la Constitution. Cependant, depuis 1970, la Cour suprême adjugait les conflits de sáparation des pouvoirs un peut plus fréquemment. Bien que les opinions de la Cour au début de cette période limitassent l'autorité présidentielle, ses décisions plus récentes tendaient à favoriser l'exécutive, et une rangée importante des cas échéants avait comme effet l'affaiblissement des restrictions législatives du pouvoir exécutif. Après un bref aperçu historique, l'auteur considère ces tendances récents du développement dans l'adjudication de la Cour suprême.

(32) See, e.g. J. Ely, *Democracy and distrust* (1980).