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Separation of Powers: Interpretation Outside the Courts

Louis Fisher*

Law reviews carry hundreds of articles that examine with microscopic precision the various judicial rulings on separation of powers. The net result is a mixture of inconsistent and incoherent theories, ranging from functional and pragmatic approaches to those that attempt a doctrinaire and purist formulation. The conscientious (and weary) reader of these rulings and articles is left with vague notions of what the framers intended and what is legally required for contemporary times.

How does the federal government function in the face of this doctrinal confusion? The answer is that government does fairly well, thank you, because most of the principal disputes involving separation of powers are resolved outside the courts. The majority of these collisions never reach the courts or, if they do, are quickly pushed back to the executive and legislative branches for nonjudicial treatment. These accommodations and informal agreements are crucial in understanding separation of powers, but law reviews provide scant attention on the ground that the resolutions are "political" rather than "constitutional" interpretations. In fact, they are both, and the student of separation of powers should be sensitive to the complex and delicate arrangements that are fashioned regularly outside the courtroom.

I. SEPARATION DOCTRINES BY THE SUPREME COURT

Under the best of conditions, the Supreme Court offers limited help in resolving the basic disputes of separation of power. There are simply too many conflicts over issues that are not easily addressed in

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court. Moreover, during the last two decades the Court has slipped back and forth in its search for principles, sometimes embracing a functional and pragmatic approach and switching later to a doctrinaire, formalistic model. With this confusion, the executive and legislative branches operate under unusual pressure to fend for themselves.

The functional approach was used by the Supreme Court in 1974 when it rejected President Nixon's claim of an absolute power to determine the limits of executive privilege.¹ Instead, the Court emphasized checks and balances and the need for "a workable government."² Separation of powers entered the Court's equation only in the sense of preserving "the essential functions of each branch."³ There was no effort to establish rigid boundaries and disallow the slightest intrusion.⁴

Three years later, in another case involving Nixon's papers, the Court again viewed separation of powers in practical terms.⁵ It rejected the rigid view of the Court 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"⁶ and endorsed the "more pragmatic, flexible approach" of James Madison and Justice Story.⁷ The Court limited itself to an inquiry into "the extent to which [a] statute prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . [and] whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."⁸ Through this analysis the Court permitted some sharing and overlapping of power.

However, in a series of rulings from 1982 to 1986, the Court advanced a doctrinal 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."⁹ The Court expressed concern about the "dangers of intrusion on the authority and functions of the Executive Branch."¹⁰ Thus the Court prohibited any overlapping and instead selected a fixed boundary.

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

2. *Id.* at 707.

3. *Id.*

4. *Id.* at 707-13.

5. *See Nixon v. Administration of Gen. Serv.*, 433 U.S. 425 (1977).

6. *Id.* at 441-42 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

7. *Id.* at 442.

8. *Id.* at 443.

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

10. *Id.* at 754.

The Court's concern for intrusion appears in another decision in 1982, in which it struck down a statute permitting bankruptcy judges to exercise judicial powers without the protections of life tenure and irreducible salaries guaranteed to Article III judges.¹¹ The plurality opinion reasoned that the effort of Congress 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."¹² The Court seemed to go out of its way to present a worst-case scenario of one branch invading another. However, nothing in the legislative history of the Bankruptcy Act suggested that Congress was positioning itself to take over the federal judiciary.

The Court continued to endorse a highly formalistic model of separated powers in *INS v. Chadha*.¹³ In striking down the legislative veto, the Court dismissed as irrelevant the utility of this instrument for settling executive-legislative disagreements: "Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . ." ¹⁴ The Court cited the framers' fear of despotism and the possibility of encroachments by one branch on another.¹⁵ 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 it was a duty of the Court to resist the "hydraulic pressures inherent within each of the separate Branches to exceed the outer limits of its power."¹⁶

It was simplistic to describe the legislative veto as a device merely by which Congress hoped to dominate the executive branch. The history of the legislative veto clearly demonstrates that it originated as a desire by the executive branch to exercise a greater share of the legislative power.¹⁷ 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

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

12. *Id.* at 73.

13. 462 U.S. 919 (1983).

14. *Id.* at 944.

15. *Id.* at 946-51.

16. *Id.* at 951.

17. L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 164-66 (1985).

power.”¹⁸

When the Supreme Court announces unrealistic and impractical concepts of separated powers, its decisions may be largely ignored or circumvented. That is what happened with the legislative veto. Despite the Court’s rulings in *Chadha*, Congress continues to put legislative vetoes in bills and Presidents continue to sign those bills into law. The number of legislative vetoes enacted into law after *Chadha* is approximately two hundred, generally vesting congressional control in its committees and subcommittees.¹⁹

The Court persisted with doctrinaire formulations in *Bowsher v. Synar*.²⁰ In rejecting the assignment in the Gramm-Rudman-Hollings Act of executive duties to the Comptroller General because he 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.”²¹ “Subject only to impeachment proceedings,” the Court argued that the President was “responsible not to the Congress but to the people.”²² Anyone who follows government knows that the President is very much responsible to Congress. That responsiveness results from a number of congressional powers and practical realities that have nothing to do with impeachment or the threat of 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.”²³ That dictum is fantastic for many reasons, but one will do. Obviously Congress 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.”²⁴ No one reading newspapers for a week could believe that. The Court itself has acknowledged the power of Congress to investigate, issue

18. K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 54 (1960).

19. See *infra* Section III.E.

20. 478 U.S. 714 (1986).

21. *Id.* at 722.

22. *Id.*

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

24. *Id.* at 733-34. See also *INS v. Chadha*, 462 U.S. 919, 958 (1983).

subpoenas, and hold executive officials in contempt.²⁵ 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.²⁶ Litigants had argued that executive agencies could not adjudicate, but the Court turned aside this demand for crisp boundaries between the branches. In determining the extent to which a given 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".²⁷ The Court weighed a number of factors "with an eye to the practical effect" that congressional actions have on the judiciary.²⁸

A few years later the Court jettisoned the rigid doctrines of *Chadha* and *Bowsher*. In 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.²⁹ Whereas in the bankruptcy court case the Court seemed alarmed about the slightest congressional interference of the judicial power, in *Morrison v. Olson* it upheld the decision of Congress to permit the Attorney General to remove the independent counsel only for "good cause."³⁰ The Court concluded that the good cause standard did not "unduly trammel" executive authority.³¹ The President's need to control the independent counsel was not "so central to the functioning of the Executive Branch" to require that the independent counsel serve at the pleasure of the President.³² Furthermore, the Court stated that "we have never held that the Constitution requires that the three Branches of Government 'operate with absolute

25. The congressional power to investigate is implied in the power to legislate wisely. *McGrain v. Daugherty*, 273 U.S. 135 (1927). Congress has the power to issue subpoenas. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975). Congress also has the power to punish contempt. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821).

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

27. *Id.* at 851 (citing *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 590 (1985)).

28. *Id.*

29. See *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

30. *Id.* at 692.

31. *Id.* at 691.

32. *Id.*

independence.’ ”³³

A year later, 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.”³⁴ Madison, the Court noted, recognized that the Constitution imposed upon the branches “a degree of overlapping responsibility, a duty of interdependence as well as independence.”³⁵ The Court explicitly adopted a “flexible understanding of separation of powers.”³⁶

Given the Court’s failure to develop a consistent and coherent theory of separated powers, and its record of avoiding many of the disputes between Congress and the President, it is not surprising that the meaning of separation of powers is developed for the most part outside the courts. The actual substance of various clauses and provisions in the Constitution are the result of compromises and accommodations reached between legislators and executive officials.

II. THE THEORY OF COORDINATE CONSTRUCTION

The authority of Congress and the executive branch to engage in “coordinate construction” by resolving constitutional issues, especially those involving separation of powers, is reflected in the debate in 1789 on the President’s power to remove executive officials. Some members of the First Congress thought that the Senate should have a role in removals because it participates in appointments. At the end of this lengthy and informed debate, however, Congress decided to recognize the President’s power to remove departmental heads, even though such power is not expressly provided for in the Constitution.³⁷

When legislators said it was improper for Congress to resolve the issue by statute instead of submitting it to the courts, Madison denied that it was necessary to defer to the judiciary on this constitutional question. He dismissed the argument that “it would be officious in this branch of the Legislature to expound the Constitution, so far as it relates to the division of power between the President and the Senate.”³⁸

Madison told his colleagues that it was “incontrovertibly of as much importance to this branch of the Government as to any other, that the Constitution should be preserved entire. It is our duty, so far as it depends upon us, to take care that the powers of the Constitution be preserved entire to every depart-

33. *Id.* at 693-94 (quoting *United States v. Nixon*, 418 U.S. 693, 707 (1974)).

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

35. *Id.* at 381.

36. *Id.*

37. L. FISHER, *supra* note 17, at 61-66.

38. 1 ANNALS OF CONG. 500 (J. Gales ed. 1789).

ment of Government"³⁹

The "Father of the Constitution" harbored no doubts about the authority and competence of Congress to decide the constitutional question:

But the great objection drawn from the source to which the last arguments would lead us is, that the Legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.⁴⁰

Just as the Constitution omits the President's power of removal, so is it silent on the power of Congress to investigate the executive branch. When the House of Representatives in 1792 learned that the troops of Major General St. Clair had suffered heavy losses during an Indian attack, it first considered a resolution to request the President to institute an inquiry. That resolution was defeated 35 to 21.⁴¹ The House then passed a resolution to empower a committee to inquire into the causes of the military failure, and "to call for such persons, papers, and records, as may be necessary to assist their inquiries."⁴² According to the account of Thomas Jefferson, at that time serving as Secretary of State, President Washington convened his Cabinet to consider the extent to which the House could call for papers. The Cabinet debated the issue and agreed:

First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.⁴³

The Cabinet concluded that there was not a paper "which might

39. *Id.*

40. *Id.*

41. 3 ANNALS OF CONG. 490-93 (1792).

42. *Id.* at 493.

43. 1 THE WRITINGS OF THOMAS JEFFERSON 304 (Memorial ed. 1903).

not be properly produced.”⁴⁴ The committee examined papers furnished by the executive branch, papers and accounts furnished by the Treasury and the War departments, and listened to explanations from the heads of those Departments and from other witnesses. General St. Clair supplied the committee with written remarks on the expedition.⁴⁵ The Cabinet’s advice that the House could call on the heads of departments only through the President was an artificial formality, long since abandoned.

Congress exercised the investigative power on many occasions after 1792, but it was not until 1927 that the Supreme Court acknowledged the constitutional power of Congress to investigate activities in the executive branch.⁴⁶ The Court had no alternative. It could not at that time, or even earlier, deny that such power existed. It could merely give its blessing to a power already recognized as legitimate by Congress and the President.

Another early illustration of coordinate construction was the dispute over the power of Congress to create the Bank of the United States. Congress created the Bank in 1791, but voted against it in 1811 and 1815. It revived the Bank in 1816 and, in 1819, the Supreme Court upheld its constitutionality in *McCulloch v. Maryland*.⁴⁷ When Congress chose to recharter the Bank in 1832, many considered the constitutional dispute closed. However, President Andrew Jackson read his constitutional powers differently by insisting that nothing done by previous Congresses, Presidents, or Court decisions could restrict, in any way, his personal judgment of constitutionality. In vetoing the bill, he gave these reasons:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.⁴⁸

Jackson’s final remark resembles an observation by Chief Justice Taney. In a dissenting opinion in 1849, he said that the Court’s opin-

44. *Id.* at 305.

45. 3 ANNALS OF CONG. at 1106.

46. *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927).

47. 17 U.S. (4 Wheat.) 316, 425 (1819).

48. 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1145 (J. Richardson ed. 1897).

ion "upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."⁴⁹

III. SEPARATION OF POWERS DISPUTES

This section examines a number of constitutional questions on separation of powers that are largely, if not exclusively, decided by Congress and the President. The courts enter some of these discussions, but often as the junior partner. The specific disputes analyzed in this section include the veto power, the pocket veto, recess appointments, the incompatibility and ineligibility clauses, the legislative veto, war power and covert operations.

A. *The Veto Power*

The President's power to exercise the veto precipitated a number of constitutional clashes between the executive and legislative branches. Some of those issues have been resolved by the courts, but the disputes are addressed first by the political branches and largely resolved there.

For example, the Constitution states that if the President vetoes a bill he must return it "with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it."⁵⁰ Must Congress *immediately* "proceed" to reconsider a veto? That was the practice under the early Presidents when vetoes were rare. President Washington exercised the first veto on April 5, 1792. The House of Representatives resolved that the bill be reconsidered the next day.⁵¹ The House sustained the veto on April 6, 1792.⁵² Washington's second veto, on February 28, 1797, was sustained a day later, on March 1.⁵³

There were no vetoes by Presidents John Adams or Thomas Jefferson. When President Madison vetoed a bill on February 21, 1811, members of the House of Representatives debated at great length over the propriety of referring the veto message to a select committee. Some believed that the Constitution required immediate recon-

49. *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

50. U.S. CONST., art. I, § 7, cl. 2.

51. 3 ANNALS OF CONG. 539 (1792).

52. *Id.* at 541.

53. 6 ANNALS OF CONG. 2326-32 (1797).

sideration.⁵⁴ Others insisted that each house had a right to refer a vetoed bill to a select committee for closer study.⁵⁵ The override effort took place two days later, with the House sustaining the veto.⁵⁶

Madison's second veto occurred on February 28, 1811. The House agreed to reconsider the bill the following day, but no action was taken and no one questioned the right of the House to postpone a scheduled reconsideration.⁵⁷ The House sustained the veto on March 2.⁵⁸ Madison's third veto came on Friday, April 3, 1812. The House of Representatives ordered that reconsideration occur "tomorrow."⁵⁹ Later in the day, the House considered an issue that required secrecy and the clearing of the galleries. Secret deliberations continued on Saturday, April 4, with no action on the vetoed bill. Reconsideration did not occur until Wednesday, April 8, when the override effort failed.⁶⁰

President Jackson's fourth regular veto set the precedent for no action at all by Congress: the veto was unchallenged. The Senate considered the constitutional requirement of "proceed to reconsider" satisfied by laying a veto message on the table without moving to either a debate or a vote.⁶¹ Jackson's last regular veto was sent to the Senate on Friday, June 10, 1836, and the unsuccessful effort to override it did not occur until fourteen days later (Sundays excluded).⁶²

On August 10, 1842, the House adopted a resolution to refer one of President Tyler's veto messages to a select committee for review. Although objections were raised that the delay violated the constitutional command to reconsider a bill, the resolution passed and the override vote occurred after the committee issued its report.⁶³

Greater delays developed with subsequent vetoes. President Pierce vetoed a bill on May 3, 1854, and the override vote did not occur until more than two months later on July 6, 1854.⁶⁴ Congress took more than two months to schedule an override of President Pierce's veto of May 19, 1856.⁶⁵ The Senate overrode the veto on July 7, 1856, and the House overrode the veto a day later.⁶⁶ No recess or adjournment interrupted this period.

54. 22 ANNALS OF CONG. 984 (1811) (statement of Mr. Smilie).

55. *Id.* (statements of Mr. Bassett and Mr. Pitkin).

56. *Id.* at 997-98.

57. *Id.* at 1097-98, 1101.

58. *Id.* at 1103-05.

59. 24 ANNALS OF CONG. 1252 (1812).

60. *Id.* at 1277-78.

61. CONG. GLOBE, 23d Cong., 1st-2d Sess. 326 (1835).

62. CONG. GLOBE, 24th Cong., 1st Sess. 435, 469 (1836).

63. CONG. GLOBE, 27th Cong., 2d Sess. 873-75, 877, 882-83, 894-902 (1842).

64. PRESIDENTIAL VETOS, 1789-1976 22 (1978).

65. *Id.* at 23.

66. *Id.*

On January 11, 1870, President Grant vetoed a private relief bill.⁶⁷ The Senate overrode the veto on May 31, 1870, a delay of more than four and a half months, while the House sustained the veto on June 22, 1870. Both Houses were in session throughout that period. Today it is established that if the President vetoes a bill, Congress may schedule an override vote at any time during the two years of a Congress. This constitutional question has been left to the rules and procedures of the two houses of Congress.

What is meant by "two thirds of that House" for an override vote? Does it mean two-thirds of the total membership of each House, or merely two-thirds of a majority present? The House of Representatives early decided that the requirement was two-thirds of the members present, provided they formed a quorum.⁶⁸ That ruling was liberalized in 1912 when Speaker of the House Clark announced that an override required two-thirds of the members present *and voting*.⁶⁹ The dispute involved an override attempt in which there were 174 yeas and 80 nays, with ten voting present. Although the 174 fell short of two-thirds of the 264 present, it did constitute two-thirds of the 254 voting. The override therefore carried.⁷⁰

In 1919, the Supreme Court referred to these precedents established by Congress and decided that two-thirds of a quorum sufficed for an override.⁷¹ Two-thirds of "that House" meant a House organized and entitled to exert legislative power (a quorum).⁷² The practice of Congress has been to accept two-thirds of the members present and voting.

Another veto issue largely resolved outside the courts involves the question of whether a President can sign a bill after Congress has recessed. The theory was that presidential approval of a bill was not strictly an executive function. Instead, the function was legislative in nature and must occur only when both houses were actually sitting. The Court in 1899 refused to accept that construction, reasoning that if a President decides to sign a bill, no further action by Congress is required, thus eliminating the need for Congress to be in session.⁷³

That decision of the court triggered a related issue: may a Presi-

67. *Id.* at 37.

68. 4 A. HINDS, HINDS' PRECEDENTS § 3537-38 n.2 (1907).

69. 7 C. CANNON, CANNON'S PRECEDENTS § 1111 (1935).

70. *Id.*

71. *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276, 280-81 (1919).

72. *Id.*

73. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 453-54 (1899).

dent sign a bill after the final adjournment of a Congress? For much of our history, Presidents believed that they were a constituent part of Congress with respect to the lawmaking process and therefore could sign legislation only while Congress remained in session. Consistent with that belief, Presidents would come to a special room in the Capitol and sign hundreds of bills in the final days of a Congress. President Cleveland challenged that practice and refused to go to the Capitol, but relented a year later upon the advice of his Attorney General.⁷⁴ In 1920 and again in 1931, two Attorneys General argued that the President had constitutional authority to sign a bill after the final adjournment of Congress.⁷⁵ In 1932, the Supreme Court agreed with that assessment.⁷⁶

B. *The Pocket Veto*

The Constitution provides that any bill returned by the President "within ten Days (Sundays excepted)" shall become law "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."⁷⁷ Other than an adjournment at the end of a Congress, what other adjournments "prevent" the return of a bill to Congress? The Supreme Court has provided two guidelines. In 1929, it held that a five-month adjournment at the end of a first session prevented a bill's return and justified the President's pocket veto.⁷⁸ A decade later, the Court decided that a recess by the Senate for three days was so short that the Senate could act with "reasonable promptitude" on a return veto.⁷⁹ As a way of underscoring the fact that the President was not prevented from returning a bill, the Senate authorized the Secretary of the Senate to receive bills during the recess.⁸⁰

Other judicial guidance has come from the lower courts. During a Christmas adjournment in 1970, the Senate was absent for four days and the House for five. Despite the brief interval and the Senate's designation of an officer to receive messages from the President, President Nixon pocket-vetoed a bill. Unlike the 1929 action, Nixon's action involved a short adjournment *during* a session rather than a lengthy adjournment at the end of a session. A district court held that the adjournment had not prevented Nixon from returning the

74. Renick, *The Power of the President to Sign Bills After the Adjournment of Congress*, 32 AM. U.L. REV. 208 (1898).

75. 32 Op. Att'y Gen. 225 (1920); 36 Op. Att'y Gen. 403, 406 (1931).

76. *Edwards v. United States*, 286 U.S. 482 (1932).

77. U.S. CONST. art. I, § 7, cl. 2.

78. *The Pocket Veto Case*, 279 U.S. 655 (1929).

79. *Wright v. United States*, 302 U.S. 583, 590 (1938).

80. *Id.* at 589-90.

bill to Congress as a regular veto.⁸¹ When that decision was upheld a year later by an appellate court, it appeared that pocket vetoes during any intrasession adjournment, no matter how long, would be unconstitutional, provided that Congress made appropriate arrangements for the receipt of presidential messages during the adjournment.⁸²

The Nixon administration decided that it would not appeal this decision to the Supreme Court.⁸³ Under the pressure of a possibly adverse decision from the courts, the Ford administration agreed to a political accommodation. It was announced that the pocket veto would not be used during a session.⁸⁴ When Senator Edward Kennedy renewed the issue in court, the Ford administration agreed in 1976 that it would eliminate the pocket veto during both intrasession and intersession adjournments.⁸⁵ Thus, the pocket veto would be available only at the end of a Congress.

President Carter honored the accommodation reached during the Ford administration. However, President Reagan provoked another court test by using the pocket veto between the first and second sessions. A district judge upheld his action,⁸⁶ but that decision was overturned by an appellate court because the House and the Senate had designated an agent to receive veto messages from the President.⁸⁷ According to the appellate court, "it is difficult to understand how Congress could be said to have prevented return of H.R. 4042 simply by adjourning. Rather, by appointing agents for receipt of veto messages, Congress affirmatively *facilitated* return of the bill in the eventuality that the President would disapprove it."⁸⁸

With this case headed to the Supreme Court, it appeared that the constitutional issue over the pocket veto would finally be settled. However, in 1987 the Court held that the dispute between Congress and President Reagan was moot because the bill had expired by its

81. *Kennedy v. Sampson*, 364 F. Supp. 1075, 1086-87 (D.D.C. 1973), *aff'd*, 511 F.2d 430 (D.C. Cir. 1974).

82. *Kennedy v. Sampson*, 511 F.2d 430, 442 (D.C. Cir. 1974).

83. Keefe & Jorgenson, *Solicitor General Pocket Vetoes the Pocket Veto*, 61 A.B.A.J. 755 (1975).

84. 121 CONG. REC. 41,884 (1975) (statement of Representative Rhodes).

85. 122 CONG. REC. 11,202 (1976); *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976).

86. *Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984), *rev'd sub nom. Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985).

87. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985).

88. *Id.* at 30 (emphasis in original).

own terms.⁸⁹ The Court might have used the mootness argument to duck an even more troublesome issue: whether members of Congress have standing to sue in court.⁹⁰

In any event, the mootness claim tossed the issue back to the two political branches for possible resolution. In 1990, the House Rules Committee reported legislation to restrict the pocket veto to the end of a Congress (adjournment sine die).⁹¹ The bill was referred to the House Judiciary Committee, which also reported the bill favorably.⁹² The House did not act on the reported bill during the 101st Congress.

C. Recess Appointments

Congressional recesses and adjournments invite another separation of power dispute: the power of the President to make recess appointments. The framers realized that the Senate would not always be in session to give its advice and consent to presidential nominations. To cover those periods of absence, the President "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."⁹³ A determination by the President to exploit this power to the fullest would undermine the Senate's constitutional power over confirmations.

The reach of the power to make recess appointments has been defined primarily by the legislative and executive branches. An early issue involved the meaning of "happen." Does that mean only the vacancies that "happen to take place" during a recess, or any vacancy that may "happen to exist" at the time of a recess? A long list of opinions by Attorneys General favors the latter, and broader, interpretation.⁹⁴ These opinions opened the door to substantial leeway for the President, requiring Congress to intervene with statutory restrictions.

In a report issued in 1863, the Senate Judiciary Committee rejected the opinions of Attorneys General that a recess appointee can fill a vacancy that occurs during a session. Interpreting the constitutional language "may happen during the Recess of the Senate" to include

89. *Burke v. Barnes*, 479 U.S. 361, 363 (1987).

90. *Id.* at 366 (Stevens, J., dissenting).

91. H.R. REP. NO. 417, pt. 1 101st Cong., 2d Sess., (1990).

92. H.R. REP. NO. 417, pt. 2 101st Cong., 2d Sess., (1990).

93. U.S. CONST. art. II, § 2, cl. 3.

94. 1 Op. Att'y Gen. 631 (1823); 2 Op. Att'y Gen. 525 (1832); 4 Op. Att'y Gen. 523 (1846); 10 Op. Att'y Gen. 356 (1862); 12 Op. Att'y Gen. 32, 38 (1866); 12 Op. Att'y Gen. 455, 457 (1868); 16 Op. Att'y Gen. 522, 524 (1880); 18 Op. Att'y Gen. 29 (1884); 19 Op. Att'y Gen. 261, 262 (1889); 30 Op. Att'y Gen. 314, 315 (1914); 33 Op. Att'y Gen. 20, 23 (1921); 41 Op. Att'y Gen. 463, 465-66 (1960). See also *In Re Farrow*, 3 F. 112, 113-15 (C.C.N.D. Ga. 1880) (concurring with the Attorneys' General opinions from 1823 to 1880).

what happened before the recess seemed to the committee "a perversion of language."⁹⁵ Such reasoning tilted the balance of power toward the President and placed inordinate weight on the need to fill a vacancy, all at the cost of excluding the Senate. Unless Congress placed some constraint on the power to make recess appointments, an "ambitious, corrupt, or tyrannical executive" could nullify the Senate's constitutional role.⁹⁶

To protect the prerogatives of the Senate, Congress decided to invoke its power of the purse. Legislation enacted in 1863 prohibited the use of funds to pay the salary of anyone appointed during a Senate recess to fill a vacancy that existed "while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate."⁹⁷ Subsequent opinions by Attorneys General recognized the restrictive effect of this statute.⁹⁸ In fact, the statute was far too rigid. An officer covered by this statute would have to serve without pay (relying on savings and loans) until the Senate consented to the nomination. At times, Congress had to pass a special statute to compensate people who served for long periods as a recess appointee and were not entitled to a salary.⁹⁹

The Senate Committee on the Judiciary reported legislation in 1939 to eliminate some of the harsh effects of the existing law on recess appointments. Three exceptions would be allowed, permitting payment of salaries, (1) if the vacancy arose within thirty days prior to a Senate adjournment; (2) if, at the time of adjournment, a nomination was pending before the Senate (other than a nomination for someone appointed during the preceding recess of the Senate); and (3) if a nomination was rejected by the Senate within thirty days prior to an adjournment and a person (other than the one rejected) receives a recess commission.¹⁰⁰ The Committee's report also recommended that a nomination to fill a vacancy under the three exceptions should be submitted to the Senate not later than forty days after the next succeeding session of the senate.¹⁰¹ The Justice De-

95. S. REP. NO. 80, 37th Cong., 3d Sess. 5 (1863).

96. *Id.* at 6.

97. Act of Feb. 9, 1863, ch. 25, 82, 12 Stat. 642, 646.

98. 16 Op. Att'y Gen. 522, 531 (1880); 26 Op. Att'y Gen. 234, 235-36 (1907); 32 Op. Att'y Gen. 271, 272 (1920); 41 Op. Att'y Gen. 463, 473-74 (1960).

99. *See, e.g.*, Act of Sept. 8, 1916, Pub. L. No. 272, 39 Stat. 801.

100. S. REP. NO. 1079, 76th Cong., 1st Sess. 1 (1939).

101. *Id.* at 2.

partment supported the legislation.¹⁰² Almost a year later, the House Committee on Expenditures in the Executive Departments reported the bill without amendment and recommended its passage.¹⁰³ The bill was enacted in 1940.¹⁰⁴

The constitutionality of this provision has never been tested in the courts. In dicta in a 1979 decision, a federal judge remarked: "It might be noted that if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. § 5503 . . . might also be invalid. That question, however, is not before the court in this case."¹⁰⁵

The current law on recess appointments is not self-executing, as is the case with many other statutes. Moments before a recess, the President could submit a name, even after allowing the position to remain empty for months, and still be covered by the second exception. For instance, President Carter allowed over six months to go by following a vacancy in the office of the OMB Deputy Director on March 24, 1978 before forwarding the name of John White on October 7. Thus, reappointment was "pending" when the Senate adjourned. Carter then resubmitted the name within the forty day time limit following the recess, which avoided Senate "interference" with the appointment. Carter violated the spirit of the statutory requirement for confirmation yet, legally, complied with the strict letter of the law. The Senate did not give its advice and consent until April 10, 1979.¹⁰⁶

There is no specific agreement between Congress and the President on the precise number of days of adjournment that would trigger the President's recess appointment power. The general rule of the Justice Department is that a temporary recess of the Senate, "protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations," permits the President to make recess appointments.¹⁰⁷ The Senate's adjournment from July 3 to August 8, 1960, constituted a "Recess of the Senate" as interpreted by the Justice Department.¹⁰⁸ On the other hand, short adjournments "for 5 or even 10 days" do not constitute the recess intended by the Constitution, according to another Attorney General opinion.¹⁰⁹

102. *Id.* at 2-3.

103. H.R. REP. NO. 2646, 76th Cong., 3d Sess. 2 (1940).

104. Act of July 11, 1940, Pub. L. No. 738, § 1761, 54 Stat. 751, (current version at 5 U.S.C. § 5503 (1988)).

105. *Staebler v. Carter*, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

106. L. FISHER, *supra* note 17, at 51.

107. 41 Op. Att'y Gen. 463, 466 (1960).

108. *Id.*

109. 33 Op. Att'y Gen. 20, 25 (1921). *See also* 3 Op. Off. Legal Counsel 311, 315 (1979).

These guidelines have not resolved specific disputes, where the instrument for settlement is not careful parsing of constitutional provisions but the exercise of political muscle. In 1984, President Reagan angered the Senate by giving a recess appointment to Martha Seger, placing her on the Federal Reserve Board a few days after Congress began a three-week recess. The Senate Banking Committee had approved her nomination narrowly, 10-8, and anticipated a close vote on the floor. That prospect vanished because of Reagan's action. The Senate Majority Leader, Robert C. Byrd, introduced a Senate resolution stating that it was the sense of the Senate that the power to make recess appointments should be confined to a formal termination of a session of the Senate or where the Senate will be in recess for longer than thirty days.¹¹⁰ The resolution, which was never put to a vote, would not have been legally binding. However, it sent a very strong message to the executive branch that it had overstepped its recess appointment power.

A year later, the Senate passed another resolution expressing the sense of the Senate that recess appointments should not be made to the Federal Reserve Board except under unusual circumstances and only for the purpose of fulfilling "a demonstrable and urgent need" in the administration of the Board's activities.¹¹¹ When President Reagan continued to make liberal use of his recess appointment authority, Senator Byrd retaliated late in 1985 by convincing fellow Democrats to delay any further action on virtually all presidential nominations.¹¹² Such confrontations forced a new distribution of power, now requiring the executive branch to limit its reliance on recess appointments if it wants legislative support for other nominations.

The use of recess appointments to place men and women on the federal courts is especially sensitive, for these individuals remain on the bench for a year or more and must face confirmation after their recess appointment ends. In the 1950s, after President Eisenhower placed Earl Warren, William J. Brennan, Jr., and Potter Stewart on the Supreme Court as recess appointees, the House Judiciary Committee prepared a report that was highly critical of this practice and

110. 130 CONG. REC. 23,234-36, 23,341 (1984).

111. 131 CONG. REC. 17,622-24 (1985).

112. *Recess Appointments Raise Senators' Anger; Democrats Delay Nominations in Protest*, Wash. Post, Sept. 26, 1985, at A23; PUB. PAPERS 1985 (II), at 1209 (1985); *Whitehouse Asks End to Appointee "Backlog,"* Wash. Post, Oct. 9, 1985, at A17.

the damage it inflicts on the independence of the courts.¹¹³

In 1960, the Senate passed a resolution that challenged this practice. The Senate did not want to confirm a recess appointee who had already sat on the bench and issued decisions. Should Senators take into account those decisions? Would a judge issue decisions with an eye toward the President's later nomination, confirmation hearings, and Senate vote? Were litigants given short change in court by pleading their case before an unconfirmed judge? The Senate resolution, which passed 48 to 37 along party lines, first detailed the disadvantages of making recess appointments to the Supreme Court and then provided:

Resolved, That it is the sense of the Senate that the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business.¹¹⁴

Although legally nonbinding, no President since Eisenhower has made a recess appointment to the Supreme Court. The power exists, technically, but a President who defied the resolution would risk having the nominee, after serving as a federal judge, rejected decisively by the Senate in order to protect its institutional prerogatives.

The President's authority to make recess appointments to the federal courts was upheld by the Second Circuit in 1962,¹¹⁵ and again in 1985 by the Ninth Circuit.¹¹⁶ The latter case involved a recess appointment by President Carter to a district court. The fact that the federal courts have sanctioned the use of judicial recess appointments does not require the political branches to accept the practice as constitutionally correct. The executive and legislative branches appear to understand that judicial recess appointments pose a substantial risk to the independence of the judiciary and to the constitutional rights of litigants. The decisions of the two appellate courts operate more like advisory opinions: it is constitutional if you want to do it. The final word on whether it will be done lies exclusively with the President and the Senate.

113. STAFF OF HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., RECESS APPOINTMENTS OF FEDERAL JUDGES (Comm. Print 1959). See also Note, *Recess Appointments to the Supreme Court — Constitutional But Unwise?*, 10 STAN. L. REV. 124 (1957).

114. 106 CONG. REC. 18,145 (1960) (emphasis in original).

115. *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).

116. *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986).

D. Incompatibility and Ineligibility Clauses

Although the framers did not intend a pure separation of powers, they added to the Constitution two provisions to keep the executive and legislative branches at a certain distance. The Constitution prohibits members of either house from holding any other civil office (the incompatibility clause)¹¹⁷ and prohibits members of Congress from being appointed to any federal position whose salary has been increased during their term of office (the ineligibility clause).¹¹⁸ The meaning of these two clauses has been developed almost entirely by the executive and legislative branches.

The framers included the incompatibility and ineligibility clauses to prevent the Executive from using the appointment power to corrupt legislators.¹¹⁹ They knew that the English Crown had used appointments to undermine the independence of Parliament.¹²⁰ The incompatibility clause has existed for two centuries without any definition or application by federal courts. When the clause reached a district court in 1971, in a case involving the right of members of Congress to hold a commission in the armed forces reserves, the judge remarked that the "meaning and effect of this constitutional provision have never before been determined by a court."¹²¹ Three years later, the Supreme Court held that the plaintiffs lacked standing to bring the case.¹²² In response to the objection that if courts fail to resolve the issue of the incompatibility clause, as a practical matter no one can, the Court replied: "Our system of government leaves many crucial decisions to the political processes."¹²³ In 1977, when the Justice Department examined the issue whether members of Congress may hold commissions as officers in the armed forces reserves, it concluded that the "exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress."¹²⁴

With regard to the ineligibility clause, interpretations by Congress

117. U.S. CONST., art. I, § 6, cl. 2.

118. *Id.*

119. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 379-82, 386-90; 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 283-84, 489-92.

120. *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833, 835-37 (D.D.C. 1971), *aff'd mem.*, 495 F.2d 1075 (D.C. Cir. 1972), *rev'd*, 418 U.S. 208 (1974).

121. *Id.* at 834.

122. *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208-209 (1974) (respondents do not have standing to sue as citizens or taxpayers).

123. *Id.* at 227.

124. 1 Op. Off. Legal Counsel 242 (1977).

and the executive branch have far outweighed contributions from the courts. Opinions by Attorneys General from 1882 to 1895 held that certain members of Congress were ineligible under the Constitution to accept appointment to an executive position.¹²⁵ However, there were two instances in which the executive branch showed a willingness to reach a settlement with Congress to nominate a member of Congress who was ineligible under a literal reading of the Constitution.

President William Howard Taft wanted Senator Philander Knox to serve as Secretary of State, even though the salary for that office had been increased during Knox's term. As a way of removing part of the constitutional problem, legislation passed the Senate to reduce the compensation of the Secretary of State to the previous level.¹²⁶ That did not satisfy the literal meaning of the ineligibility clause, but it appeared to take away the appearance of gain and corruption. Although the bill passed the Senate without debate and without a recorded vote, substantial opposition developed in the House. Congressman Henry D. Clayton reasoned that Taft would nominate Knox and the Senate would confirm him: "That great body is fully capable of interpreting any provision of the Constitution."¹²⁷ But Congressman James B. Clark, who would serve as Speaker from 1911 to 1919, strongly objected:

we all know that this bill is an attempt to make a man eligible as Secretary of State who is ineligible under the Constitution of the United States. [Applause.] This bill is simply an effort to override the Constitution by statute. We are asked to stultify ourselves, for that is exactly what it amounts to, for fear that we will be personae non gratae at the White House. [Applause.] . . . It is a question of the construction of the Constitution. It is a question of understanding plain English . . .¹²⁸

Congressman Oscar W. Gillespie agreed, insisting that the provisions of the Constitution in question "are plain, they are emphatic, they are unequivocal. The salary of the Secretary of State has been increased."¹²⁹ Congressman Edwin Y. Yates reinforced that point: "Mr. Speaker, it is clear to even a layman as to what the clause in the Constitution says and means. No technical language is used. No words of doubtful meanings are there. No ambiguous or uncertain thought is expressed."¹³⁰ Nevertheless, the House passed the bill by the vote of 173 to 116, largely on the ground that the President has a right to select who he wants for the Cabinet and that the bill satisfied

125. 17 Op. Att'y Gen. 365 (1882); 17 Op. Att'y Gen. 522 (1883); 21 Op. Att'y Gen. 211 (1895).

126. 43 CONG. REC. 2205 (1909).

127. *Id.* at 2392.

128. *Id.*

129. *Id.*

130. *Id.* at 2397.

the spirit of the ineligibility clause.¹³¹ The bill was enacted on February 17, 1909, providing for the repeal of the increase in salary for the Secretary of State.¹³²

A similar situation occurred in 1973, when President Nixon wanted to nominate Senator William Saxbe to be Attorney General, even though the salary for that office had been increased during Saxbe's term as Senator. The Justice Department concluded that Saxbe would be eligible if Congress passed legislation setting his salary for Attorney General at the level established before the increase: "Neither the public, the Executive branch, nor the Legislative branch is well-served by a prohibition so broad that it overcorrects and needlessly deprives members of Congress of opportunities for public service in appointive civil offices."¹³³ After lengthy debate, the bill passed the Senate, 75 to 16.¹³⁴ With less debate, the House passed the bill 261 to 129 and it became law.¹³⁵

The courts have done little to clarify the meaning or boundaries of the ineligibility clause. Senator Hugo Black was nominated to the Supreme Court in 1937, although a retirement system for the judiciary had been enacted that year while Black served in the Senate. The Court avoided the constitutional issue by holding that the plaintiff lacked standing to bring the suit.¹³⁶ More recently, the nomination of Congressman Abner Mikva to the D.C. Circuit was challenged because the salaries of federal judges had been increased during Mikva's term in Congress. Once again, the suit was tossed out because of lack of standing.¹³⁷ The court said that Mikva's opponents had an opportunity to defeat the nomination, but that Senators on the losing side could not then ask the judiciary to reverse the Senate's action.¹³⁸ The Justice Department had held that Mikva's appointment to the D.C. Circuit was not barred by the ineligibility clause, reasoning that the scheduled salary increase had not taken effect at the time of Mikva's nomination, and that if it had he could be given the same statutory relief as Senators Knox and Saxbe.¹³⁹

131. *Id.* at 2415.

132. Act of Feb. 17, 1909, ch. 137, 35 stat. 626.

133. 119 CONG. REC. 37,689 (1973) (Statement of Robert G. Dixon, Assistant Attorney General, Office of Legal Counsel).

134. *Id.* at 38,315-48.

135. *Id.* at 39,234-45; Act of Dec. 10, 1975, Pub. L. No. 93-178, 87 Stat. 697.

136. *Ex parte Levitt*, 302 U.S. 633 (1937).

137. *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981), *aff'd sub nom.* *McClure v. Reagan*, 454 U.S. 1025 (1981).

138. *Id.* at 270.

139. 3 Op. Off. Legal Counsel 298 (1979).

E. *The Legislative Veto*

In the prominent case of *INS v. Chadha*,¹⁴⁰ the Supreme Court held that "legislative vetoes" are an invalid form of congressional control over the executive branch.¹⁴¹ Not only did the Court strike down the one-house veto in the immigration law being challenged, but the broad principles announced by the Court nullified all existing legislative vetoes placed in laws covering such diverse areas as executive reorganization, rule making, impoundment, foreign trade, and national emergencies. Justice White noted in his dissent that the Court in "one fell swoop" struck down provisions in more laws enacted by Congress than the Court had cumulatively invalidated in its entire history.¹⁴²

Nevertheless, from the moment of the *Chadha* decision on June 23, 1983, to the end of the 101st session, Congress continued to rely on the legislative veto to control agency actions. Over that period of time, Congress created approximately two hundred *new* legislative vetoes and Presidents Reagan and Bush signed them into law. Instead of acting through the full legislative process required by *Chadha* (action by both houses and presentment of a bill to the President), these new statutes enable Congress to rely on controls short of a public law. The usual method is to require committee or subcommittee approval of agency proposals.

What accounts for this gap between what the Court said and what the two political branches continue to do? Why has there been so little compliance with this "epic" decision on separation of powers? Is it a matter of congressional contempt for the judicial process? I think a better explanation is that the Court reached too far and failed to understand the practical needs that led Congress and the executive branch to adopt the legislative veto in the first place. Those needs existed before *Chadha* and they continue after the Court's decision.

The Court in *Chadha* stated the obvious: the making of a public law requires action by both houses of Congress and presentment of a bill to the President for his signature or veto.¹⁴³ But what if a public law, duly passed by both houses and signed by the President, authorized the use of a simple (one-house) or concurrent (two-house) resolution? Would the latter be legally binding and available to control executive officials? In an opinion in 1854, Attorney General Cushing concluded that a President, by signing the enabling statute, would in

140. 462 U.S. 919 (1983).

141. *Id.* at 959.

142. *Id.* at 1002.

143. *Id.* at 946-47.

effect consent to the coerciveness of these resolutions.¹⁴⁴ Thus, in 1905 Congress passed legislation giving itself the power by concurrent resolution to direct the Secretary of War to make investigations of rivers and harbors.¹⁴⁵ Congress even resorted to simple resolutions to direct the Secretary of Commerce to make investigations and to issue reports.¹⁴⁶

Legislative vetoes expanded in the 1930s as a result of presidential proposals. In 1929, President Hoover asked Congress to delegate to him broad authority to reorganize the executive branch, subject to some form of congressional approval or disapproval. He suggested that the President be allowed to act "upon approval of a joint committee of Congress."¹⁴⁷ Hoover was willing to swallow the legislative veto because the regular legislative process for reorganizing government contained several uncertainties: congressional inaction or unwanted amendments. Hoover received reorganization authority in 1932, subject to a one-house legislative veto.¹⁴⁸ This accommodation did not sit well with Attorney General Mitchell, however, who a year later challenged the constitutionality of the one-house veto.¹⁴⁹

In 1938, President Franklin D. Roosevelt asked Congress to renew the authority to reorganize the executive branch but insisted that any congressional action short of a bill or joint resolution would merely represent "an expression of congressional sentiment" without legally binding effect.¹⁵⁰ Members of the House of Representatives balked at this request, because disapproval by bill or joint resolution would mean that Congress would need a two-thirds majority in each house to override the expected veto. Realizing that Congress would never grant him reorganization authority without reserving to itself a control short of a public law, Roosevelt reversed course within a matter of days and supported an amendment that allowed Congress to reject his reorganization plans by a concurrent resolution.¹⁵¹ The reorganization bill passed in 1939, with the two-house veto, and Roosevelt signed it into law.¹⁵² When Congress extended the President's reorganization authority in 1949, it tightened legislative control by resort-

144. 6 Op. Att'y Gen. 680 (1854).

145. Act of Mar. 3, 1905, ch. 1482, § 2, 33 Stat. 1117, 1147.

146. Act of Feb. 14, 1903, ch. 552, § 8, 32 Stat. 825, 829.

147. PUB. PAPERS 1929, at 432.

148. Act of June 30, 1932, ch. 314, §§ 401-08, 47 Stat. 382, 413-15.

149. 37 Op. Att'y Gen. 56, 63-64 (1933).

150. 83 CONG. REC. 4487 (1938).

151. *Id.* at 5003-5004.

152. Reorganization Act of 1934, Pub. L. No. 19, § 5, 53 Stat. 561, 562-63.

ing to a one-house veto.¹⁵³

Whatever constitutional objections Presidents had about the legislative veto, they acquiesced because they preferred additional authority with the legislative veto over a constitutional fight that might jeopardize such authority. For example, President Roosevelt signed the Lend Lease Act in 1941, which permitted Congress to terminate the President's emergency authority by concurrent resolution.¹⁵⁴ Roosevelt withheld his misgivings because he wanted the authority and feared that publicizing the constitutional issue would delight his opponents and alienate his friends.¹⁵⁵

The legislative veto continued to spread to other areas. Legislation in 1940 authorized the Attorney General to suspend deportation of an alien, subject to a two-house veto (later changed to a one-house veto).¹⁵⁶ This procedure appealed to both Congress and the President, for otherwise they could grant relief to aliens in hardship cases only through the passage of hundreds of private bills.¹⁵⁷ Similarly, during the emergency conditions of World War II, it was impracticable to expect Congress to authorize each defense installation or public works project. Beginning with an informal system in 1942, all proposals for acquisitions of land and leases were submitted in advance to the Naval Affairs Committees for their approval. That understanding was formalized in a public law in 1944, requiring the Secretary of the Navy to "come into agreement" with the Naval Affairs Committees with respect to the terms of prospective acquisitions or disposals of land.¹⁵⁸ Congress enacted other coming-into-agreement provisions in 1949 and 1951, requiring the Armed Services Committees to approve the acquisition of land and real estate transactions.¹⁵⁹

President Truman objected to the use of committee vetoes in a veto message in 1952, questioning the "propriety and wisdom of giving Committees veto power over executive functions authorized by the Congress to be carried out by executive agencies."¹⁶⁰ In an effort to stop the proliferation of committee vetoes, Attorney General Brownell issued an opinion in 1955 that characterized the legislative veto as

153. Reorganization Act of 1949, Pub. L. No. 109, § 202, 63 Stat. 203, 207.

154. Lend-Lease Act of 1941, Pub. L. No. 11, § 3, 55 Stat. 31, 32.

155. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1356-57 (1953).

156. Alien Registration Act, Pub. L. No. 670, § 20(c) 54 Stat. 670, 672 (1940). Immigration and Nationality Act, Pub. L. No. 414, § 244(b), 66 Stat. 162, 216 (1952).

157. Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 PUB. ADMIN. REV. 281 (1941).

158. Act of Apr. 4, 1944, Pub. L. No. 289, § 1, 58 Stat. 189, 190.

159. Act of May 11, 1949, Pub. L. No. 60, § 2, 63 Stat. 66, 66; Act of Sept. 28, 1951, Pub. L. No. 155, § 601, 65 Stat. 336, 365.

160. PUB. PAPERS, 1952, at 488.

an unconstitutional infringement on executive duties.¹⁶¹ Congress, however, was equal to the challenge. It could easily create substitutes that gave committees the same level of control without raising constitutional issues. Legislation was drafted to prohibit appropriations for certain real estate transactions unless the Public Works Committees first approved the contracts.¹⁶² The "committee veto" thus operated within the halls of Congress rather than against executive agencies. Eisenhower signed the bill after Brownell assured him that this new procedure was constitutional because it was based on the power of Congress to control its authorization and appropriation procedures.¹⁶³ The form changed; the substance of the committee veto remained in force.

Executive-legislative relations experienced new strains in the 1970s when Congress decided to extend the legislative veto to such areas as the war power, national emergencies, impoundment, presidential papers, federal salaries, and selected agency regulations. By the late 1970s, Congress even considered applying the legislative veto to control regulations issued by every agency of government.

Although the Carter administration agreed to challenge the constitutionality of the legislative veto, it conceded ground on several fronts. An opinion by Attorney General Bell in 1977 attempted to undermine the legality of legislative vetoes while at the same time defending the one-house veto in the reorganization statute.¹⁶⁴ This strained analysis made it clear that the administration would carve out whatever exceptions were necessary to secure authority the President wanted. The following year, President Carter released a strong critique of the legislative veto. He warned that the legislative vetoes already enacted into law would be treated merely as "report-and-wait" provisions.¹⁶⁵ Any congressional disapproval by committee action, simple resolution, or concurrent resolution would be given "serious consideration" by executive officials but would not be regarded as legally binding.¹⁶⁶ Despite the confrontation and hard line taken in the President's message, administration officials were willing to yield in selected areas for the sake of comity between the executive and legislative branches.

161. 41 Op. Att'y Gen. 230, 231 (1955).

162. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 230-31 (1964).

163. *Id.*

164. 43 Op. Att'y Gen. 10 (1977).

165. PUB. PAPERS, 1978 (II), at 1149.

166. *Id.*

For example, on the same day that Carter issued his statement, Attorney General Bell and White House aide Stuart Eizenstat backpedaled from Carter's broad threat. When a reporter asked whether the administration would have felt itself legally bound if Congress passed, pursuant to the statutory procedure, a concurrent resolution disapproving an arms sale to the Mideast, Bell replied:

He would not be bound in our view, but we have to have comity between the branches of government, just as we have between nations. And under a spirit of comity, we could abide by it, and there would be nothing wrong with abiding by it. We don't have to have a confrontation every time we can.¹⁶⁷

Eizenstat added:

I think the point the Judge is making is that we don't concede the constitutionality of any of them yet, but that as a matter of comity with certain of these issues where we think the Congress has a legitimate interest, such as the War Powers Act, as a matter of comity, we are willing to forego the specific legal challenge and abide by that judgment because we think it is such an overriding issue.¹⁶⁸

The Carter and Reagan administrations supported a legal test on the constitutionality of the legislative vetoes, resulting in notable victories in an immigration case in the Ninth Circuit¹⁶⁹ and two rule making cases in the D.C. Circuit.¹⁷⁰ The latter two decisions were so broad that they threatened to invalidate every type of legislative veto. After the D.C. Circuit in another case held a committee veto unconstitutional, Judges Patricia Wald and Abner Mikva supported a motion for a rehearing en banc

because vitally important issues of executive-legislative relations are articulated too broadly and explored inadequately in the panel opinion. We are especially concerned that the panel's opinion lumps together for automatic rejection under the rubric of "legislative vetoes" several different kinds of statutory provisions, each entailing a distinct accommodation between the executive and legislative branches. Such black-and-white treatment of these statutes ignores a largely gray area that has existed for 200 years in our constitutional scheme.¹⁷¹

Judge Wald, having served as a top official in the Justice Department, and Judge Mikva, a former member of Congress, were both sensitive to the politically complex relations between the branches, relations not easily compartmentalized into judicially constructed cat-

167. Office of the White House Press Secretary, Briefing by Attorney General Griffin B. Bell, Stuart Eizenstat, Assistant to the President for Domestic Affairs and Policy, and John Harmon, Office of Legal Counsel 9 (June 21, 1978) (available in the office of the Pepperdine Law Review).

168. *Id.*

169. *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980) *aff'd*, 462 U.S. 919 (1983).

170. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (en banc), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983); *Consumers Union of United States, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

171. *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 308 (D.C. Cir. 1982).

egories. They feared that the broad language adopted by the D.C. Circuit would "foreclose careful consideration of . . . historical experience, practical working relationships, and the deference due Congress when it established its own procedures under the Constitution."¹⁷²

Also in 1982, I published an article entitled "Congress Can't Lose On Its Veto Power."¹⁷³ The article predicted that if the courts insisted on taking from Congress its legislative veto, "no one should underestimate its ingenuity in inventing other devices that will be more cumbersome for the president and just as satisfactory to Congress."¹⁷⁴ With or without the legislative veto, Congress would remain "knee-deep in administrative decisions, and it is inconceivable that any court or any president can prevent this. Call it supervision, intervention, or plain meddling, Congress will find a way."¹⁷⁵

When the Supreme Court decided *Chadha* in 1983, it followed the same broad principles used by the D.C. Circuit. Any action of Congress that had the effect of "altering the legal rights, duties, and relations" of persons outside the legislative branch must conform to two procedural requirements: action by both houses (to satisfy bicameralism) and presentment of a bill or joint resolution to the President for his signature or veto.¹⁷⁶

Following the Court's ruling, Congress amended a number of statutes by deleting legislative vetoes and replacing them with joint resolutions. The statutes changed to comply with *Chadha* include the D.C. Home Rule Act, executive reorganization, national emergencies, export administration, and federal pay.¹⁷⁷ In the case of executive reorganization, the President was actually worse off than before. Instead of relying on the one-house veto, Congress inserted a joint resolution of *approval*. That satisfied the two requirements of *Chadha* — bicameralism and presentment — but the President now had to obtain the approval of both houses within a fixed number of days. In

172. *Id.*

173. Fisher, *Congress Can't Lose on Its Veto Power*, Wash. Post, Feb. 21, 1982, at D1.

174. *Id.* at D5.

175. *Id.*

176. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

177. Department of Transportation and Related Agencies Appropriation (D.C. Home Rule) Act, Pub. L. No. 98-473, § 131, 98 Stat. 1945, 1974 (1984); Reorganization Act Amendments of 1984, Pub. L. No. 98-614, § 3, 98 Stat. 3192, 3193 (executive organization); Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801, 99 Stat. 448, 448 (1985) (national emergencies); Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 301(b), 99 Stat. 120, 160 (1985) (export administration); Act of Dec. 19, 1985, Pub. L. No. 99-190, § 135(e), 99 Stat. 1185, 1322 (federal pay).

effect, Congress had a negative one-house veto. The refusal of one House to approve spelled defeat for a reorganization plan.

Congress continued to put legislative vetoes in bills and Presidents continued to sign them into law. From the date of the Court's decision in *Chadha* to the end of the 101st Congress, Congress enacted approximately two hundred new legislative vetoes. Most of these require the executive branch to obtain the approval of specified committees. Congress no longer attempts to use one-house or two-house resolutions to control agency actions. The effect of *Chadha* had been to drive legislative vetoes underground, operating at the committee and subcommittee level.

Even if Congress complied fully with *Chadha* by removing these committee vetoes from public laws, some form of committee control would continue. For example, a conflict arose in 1984 when President Reagan signed an appropriations bill for the Department of Housing and Urban Development and independent agencies.¹⁷⁸ He objected to the presence of several provisions that required executive agencies to seek the prior approval of the Appropriations Committees.¹⁷⁹ His signing statement implied that the committee-veto provisions would be regarded by the administration as legally nonbinding.¹⁸⁰ After notifying the committees, agencies could do as they liked without obtaining the committees' approval.¹⁸¹

The House Appropriations Committee responded quickly to this challenge. It reviewed a procedure that had worked well with the National Aeronautics and Space Administration for about four years. Statutory ceilings ("caps") were placed on various NASA programs, usually at the level requested in the President's budget. NASA could exceed those caps only if it received permission from the Appropriations Committees. Because the administration now threatened to ignore the committee controls, the House Appropriations Committee said that it would repeal both the committee veto *and* NASA's authority to exceed the caps. If NASA wanted to spend beyond the caps, it would have to do what the Court mandated in *Chadha*: pass a bill through both houses and present it to the President.¹⁸²

Because of the dispute between the President and Congress, NASA was about to lose precious flexibility. It did not want to seek new public laws to make mid-year adjustments. To avoid that kind of administrative rigidity, NASA Administrator James M. Beggs wrote to the Appropriations Committees and suggested a compromise. Instead of putting the caps in a public law, he recommended that they be

178. PUB. PAPERS, 1984 (II), at 1056-57.

179. *Id.*

180. *Id.*

181. *Id.*

182. H.R. REP. NO. 916, 98th Cong., 2d Sess. 48 (1984).

placed in the conference report accompanying the bill.¹⁸³ He then pledged that NASA would not exceed any ceiling identified in the conference report without first obtaining the prior approval of the Appropriations Committees.¹⁸⁴ What had been done directly by statute would now be done indirectly by informal agreements. *Chadha* does not affect these nonstatutory legislative vetoes.

A similar dispute erupted in 1987. The Director of the Office of Management and Budget ("OMB"), James C. Miller, III, objected to a statutory provision that required the administration to obtain "written prior approval" from the Appropriations Committees before transferring foreign assistance funds from one account to another.¹⁸⁵ The provision, he said, violated *Chadha*. The House Appropriations Committee advised him that Congress would repeal the committee veto and, at the same time, repeal the transfer authority.¹⁸⁶ Realizing that the dispute had veered in a perilous direction for the executive branch, OMB backed down and the committee veto remained in the bill.¹⁸⁷

When Miller again challenged the provision the next year, Congress followed through on its threat and deleted both the committee veto and the transfer authority. The two branches reached a compromise in 1989 when Congress removed the legislative veto from the public law, but required the administration to follow "the regular notification procedures of the Committees on Appropriations" before transferring funds.¹⁸⁸ While not spelled out in the public law, those procedures require the administration to notify the Committees of each transfer. If no objection is raised during a 15-day review period, the administration may exercise its authority. If the Committees object, however, the administration proceeds at peril. By ignoring committee objections, the executive branch will most likely lose its transfer authority.

A third example of an informal legislative veto developed in 1989

183. Letter from James M. Beggs, NASA Administrator, to the House and Senate Appropriations Committees (Aug. 9, 1984) (available at the office of the Pepperdine Law Review).

184. Letter from James M. Beggs, NASA Administrator, to the House and Senate Appropriations Committees (Aug. 9, 1984) (available in Pepperdine Law School Library).

185. *OMB Objection Raises House Panel's Hackles: Administration May Lose Foreign-Aid Option*, Wash. Post, Aug. 13, 1987, at D1.

186. *Id.*

187. Act of Dec. 22, 1987, Pub. L. No. 100-202, § 514, 101 Stat. 1329-155.

188. Act of Nov. 21, 1989, Pub. L. No. 101-167, § 514, 103 Stat. 1219.

during the early months of the Bush administration. Secretary of State James A. Baker, III, decided to give four committees of Congress a veto power over the fractious issue of funding the Nicaraguan contras. In return for receiving \$50 million for humanitarian aid to the contras, he agreed that a portion of the funds could be released only with the approval of the two Appropriations Committees, the House Foreign Affairs Committee, and the Senate Foreign Relations Committees, as well as key party leaders. White House counsel C. Boyden Gray objected to this level of involvement by Congress in foreign policy, especially through what appeared to be a legislative veto.¹⁸⁹ Former federal judge Robert H. Bork regarded the Baker Accord as "even more objectionable" than the legislative veto struck down in *Chadha* because it permitted control by committee action, or inaction, instead of the one-house veto.¹⁹⁰ However, Baker entered into the "side agreement" with Congress on the ground that it was informal and nonstatutory and, therefore, not covered by *Chadha*.¹⁹¹ Four members of the House of Representatives challenged the Baker Accord as unconstitutional, but their suit was dismissed by a federal district court.¹⁹²

There is nothing unconstitutional about informal, nonstatutory controls. Under our system of separation of powers, they are often necessary techniques for making government function more effectively. Executive agencies may decide that it is in their best interest to defer to the wishes of congressional committees. As a federal appellate court noted in 1984 after rejecting a challenge that a committee-review procedure constituted a forbidden legislative veto, committee chairmen and members of Congress "naturally develop interest and expertise in the subjects entrusted to their continuing surveillance."¹⁹³ Executive officials take these committees "into account and keep them informed, respond to their inquiries, and, it may be, flatter and please them when necessary."¹⁹⁴ Because of these informal associations, committees develop "enormous influence" over executive branch activities.¹⁹⁵ The appeals court found nothing unconstitutional about these relations: "indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary

189. *Bush Counsel Contests Contra Aid Plan, Gray Feels Pact with Congress May Infringe on Presidential Power*, Wash. Post, Mar. 26, 1989, at A5.

190. 135 CONG. REC. 3885 (daily ed. Apr. 13, 1989) (statement of Sen. Helms).

191. Letter from Secretary of State Baker to House Speaker Jim Wright (Apr. 28, 1989) (available in Pepperdine Law School Library).

192. *Burton v. Baker*, 723 F. Supp. 1550 (D.D.C. 1989).

193. *City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984).

194. *Id.*

195. *Id.*

government."¹⁹⁶

To minimize the risk of self-inflicted wounds, the Supreme Court usually follows the sensible guideline in *Ashwander v. TVA*¹⁹⁷ that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."¹⁹⁸ The Court failed to follow that policy in *Chadha* by issuing a decision that not only reached beyond the necessities of the case but exceeded the Court's understanding of executive-legislative relations. Through an endless variety of formal and informal agreements, congressional committees will continue to exercise control over administration decisions.

F. War Power and Covert Operations

The Court cautioned in 1962 that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁹⁹ There are indeed foreign policy disputes that are adjudicated in the courts. When a President enters into an executive agreement that conflicts with a statute passed by Congress pursuant to its constitutional power over foreign commerce, the courts have declared the executive agreement invalid.²⁰⁰ The courts have invalidated other executive agreements because they violate the just compensation clause²⁰¹ or deprive an accused of trial by jury.²⁰² President Truman's seizure of steel mills in 1952, in order to prosecute the war in Korea, was struck down by the Court.²⁰³ The effort by the Nixon administration to invoke "national security" to enjoin newspapers from publishing the Pentagon Papers found no support in the courts.²⁰⁴ Similarly, the theory by the Nixon administration

196. *Id.*

197. 297 U.S. 288 (1936).

198. *Id.* at 347 (Brandeis, J., concurring) (quoting *Liverpool v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)).

199. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

200. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953) ("It is clear that the executive may not through entering into such an agreement avoid complying with regulation prescribed by Congress.") *aff'd on other grounds*, 348 U.S. 296 (1955).

201. *Seery v. United States*, 127 F. Supp. 601, 606 (Ct. Cl. 1955) ("[W]e think that there can be no doubt that an executive agreement . . . cannot impair Constitutional Rights.").

202. *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

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

204. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

that it possessed constitutional power to make warrantless national security surveillances of domestic organizations was rejected by the Court.²⁰⁵

These are unusual decisions for the Court. Questions of the permissible scope of the war power or covert operations are left almost exclusively to Congress and the President. The War Powers Resolution of 1973²⁰⁶ represents an effort by the two branches to establish broad principles to promote the "collective judgment" of both branches. The President is granted discretion to dispatch U.S. troops into hostilities or imminent hostilities for short periods (60 to 90 days), while congressional authorization is required for longer periods.²⁰⁷

Members of Congress have gone to court to contest military initiatives by the President, but those efforts are regularly turned aside by federal judges on the ground that the determination of what constitutes hostilities or imminent hostilities is essentially a fact-finding matter reserved to Congress, not the courts.²⁰⁸ Courts are leery in adjudicating disputes when one group of members of Congress claim that the President has violated the War Powers Resolution while another group of members of Congress claim that he has not.²⁰⁹ Federal judges are apt to see this type of case as an intramural dispute that should be resolved entirely within the halls of Congress. The message to Congress is quite clear: "If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes."²¹⁰ To present a case appropriate for judicial resolution, Congress would have to invoke its constitutional powers and the President would have to disregard them, thereby creating a constitutional impasse ripe for the courts.²¹¹ Otherwise, the dispute is nonjusticiable and remains solely within the political arena.

205. *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 321 (1972) ("[W]e conclude that the government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search of surveillance.").

206. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (current version at 50 U.S.C. §§ 1541-8 (1978)).

207. L. FISHER, *War Powers: The Need for Collective Judgment*, in *DIVIDED DEMOCRACY* (J. Thurber ed. 1990).

208. *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

209. *Id.* at 894-95 (twenty-nine members of the House of Representatives claimed that President Reagan violated the War Powers Resolution by supplying military equipment and aid to the government of El Salvador, while sixteen Senators and twelve Representatives said that no violation occurred).

210. *Id.* at 899.

211. *Id.*

The same result occurred when members of Congress contested President Reagan's actions in Nicaragua, Grenada, and the Persian Gulf. In the Nicaragua case, a federal judge concluded that "the covert activities of CIA operatives in Nicaragua and Honduras are perforce even less judicially discoverable than the level of participation by U.S. military personnel in hostilities in El Salvador."²¹² Courts refuse to adjudicate such disputes because of "the impossibility of our undertaking independent resolution without expressing a lack of the respect due coordinate branches of government."²¹³ When litigants sue for damage remedies claiming that presidential military actions violate the rights of foreign citizens, courts take the position that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."²¹⁴

After President Reagan used military force against Grenada, eleven members of Congress brought an action in federal court contending that the invasion was unconstitutional. A district judge gave this response: "Certainly when plaintiff legislators can avail themselves of institutional remedies that are afforded to Congress, the Court, under its broad equitable powers, should decline to exercise its jurisdiction."²¹⁵ Similarly, President Reagan's use of military force in the Persian Gulf triggered a legal challenge by members of Congress, who petitioned a federal district court to declare that Reagan was required by the War Powers Resolution to file specific reports on the use of U.S. armed forces in that region.²¹⁶ The court refused to decide whether the President was required to submit specific reports under the War Powers Resolution, concluding "that the exercise of federal jurisdiction in these circumstances would be both inappropriate and imprudent."²¹⁷

Congress and the President have spent the past decade searching

212. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

213. *Id.* at 600. The court referred to the differing views held by President Reagan and members of Congress stating it was "up to Congress and the President to try to resolve their differences." *Id.*

214. *Sanchez-Espinoza*, 770 F.2d at 209.

215. *Conyers v. Reagan*, 578 F. Supp. 324, 326 (D.D.C. 1984), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985) (the end of the Grenada invasion made moot the claim for injunctive relief).

216. *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

217. *Id.* at 337. The court dismissed the case based on "prudential considerations" and the political question doctrine. *Id.* The court declined to render an opinion that

for reasonable reporting requirements for covert operations. The Intelligence Oversight Act of 1980²¹⁸ required the Director of Central Intelligence and the heads of all other agencies involved in intelligence activities to keep the House and Senate Intelligence Committees "fully and currently informed" of all intelligence activities.²¹⁹ The statute also authorized the President, in "extraordinary circumstances affecting vital interests of the United States," to notify only eight members of Congress: the chairman and ranking minority members of the Intelligence Committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate.²²⁰ If notice was not given to Congress, or these eight members, the President was required to "fully inform" the Intelligence Committees "in a timely fashion" and to explain the failure to provide notice.²²¹

This procedure worked fairly well over the years and accommodated the constitutional prerogatives of each branch. However, the Reagan administration sold arms to Iran and failed to notify Congress at all. Congress learned of the sale ten months later, after the story leaked in a November 1986 Beirut magazine.²²² In November 1987, the House and Senate Iran-Contra Committees proposed an amendment to the 1980 statute requiring that "Congress be notified prior to the commencement of a covert action except in certain rare instances and in no event later than 48 hours after a presidential Finding is approved."²²³

Legislation was introduced to eliminate such vague phrases as "timely fashion" and to adopt, as a substitute, the specific requirement that the President notify Congress of a covert operation no later than 48 hours after its initiation.²²⁴ The administration testified against the bill, claiming that the 48-hour requirement "could seriously impair the President's ability to discharge his important constitutional responsibilities in the field of foreign relations."²²⁵ Although the administration agreed that it was important to work cooperatively with Congress on covert operations, it stated that

would impose a consensus on Congress, but did not preclude judicial review of the constitutionality of the War Powers Resolution in other circumstances. *Id.* at 339.

218. Act of Oct. 14, 1980, Pub. L. No. 96-450, § 501, 94 Stat. 1981-82 (codified at 15 U.S.C. § 413 (1988)).

219. *Id.*

220. *Id.*

221. *Id.*

222. IRAN-CONTRA AFFAIR, H.R. REP. NO. 433 and S. REP. NO. 216, 100th Cong., 1st Sess. 163-262, 561 (1987).

223. *Id.* at 423.

224. H.R. 3822, 100th Cong., 1st Sess. (1987); S. 1721, 100th Cong., 1st Sess. (1987).

225. *Oversight Legislation, 1987: Hearings Before the Senate Select Comm. on Intelligence*, 100th Cong., 2d Sess. 88 (1987) (testimony of Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel).

there may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President, under *any and all circumstances*, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President.²²⁶

The Senate Intelligence Committee disagreed with that assessment and reported legislation in 1988 that incorporated the 48-hour limit.²²⁷ The Committee did not agree that a statutory requirement to notify Congress of covert actions would frustrate the President's ability to discharge his constitutional duties.²²⁸ The Committee rejected the theory that covert actions represent "an area of independent or exclusive presidential power under the Constitution."²²⁹ Although the Committee conceded that the President might have sole responsibility for carrying out covert actions, they also reiterated that Congress was responsible for appropriating money for such actions.²³⁰ The Senate passed the bill by the comfortable margin of 71-19.²³¹

The bill failed to move forward on the House side. After President Bush was elected, there was renewed pressure for some kind of accommodation between the two branches. The Senate Intelligence Committee persisted with its 48-hour rule; no such provision appeared in House legislation.²³² Finally, the Senate committee dropped the 48-hour requirement in return for a pledge by President Bush that in "almost all instances" he would notify the Intelligence Committee in advance of a covert action, with the understanding that in "rare instances" he might delay notification a "few days."²³³ Any withholding beyond that period would be based on the President's assertion of authorities granted by the Constitution.²³⁴ An effort by Congress to further clarify reporting requirements by adopting new statutory language failed when President Bush vetoed the bill.²³⁵

226. *Id.* at 90. (emphasis in original).

227. S. REP. NO. 276, 100th Cong., 2d Sess. 5 (1988).

228. *Id.* at 20 ("Indeed, refusal to communicate such information to the Congress affectively precludes it from discharging its own duties under the Constitution.").

229. *Id.*

230. *Id.*

231. 134 CONG. REC. S2249 (daily ed. Mar. 15, 1988).

232. *Impasse Over Intelligence Legislation*, Wash. Post, Oct. 25, 1989, at A4.

233. *Panel Drops Covert-Acts Notification*, Wash. Post, Oct. 27, 1989, at A1.

234. Letter from President George Bush to Senator David L. Boren (Oct. 30, 1989) (available at the office of the Pepperdine Law Review). See *Panel Drops Covert-Acts Notification*, *supra* note 229, at A1.

235. 26 WKLY. COMP. PRES. DOC. 1958 (Nov. 30, 1990).

IV. CONCLUSION

These examples merely illustrate the degree to which the meaning of the Constitution depends on nonjudicial interpretations by the executive and legislative branches. Other examples come readily to mind. The President's power to exercise executive privilege and thereby withhold documents and information from Congress is rarely litigated. The Watergate Tapes Case²³⁶ is the leading example, but it raises more constitutional questions than it resolves.²³⁷ Collisions between Congress and the President over access to executive branch information are typically handled through political means, not litigation. If Congress wants information and the President refuses to yield, generally it is sufficient for Congress to bring out its big guns — subpoenas and the power to hold executive officials in contempt — to satisfy legislative needs.²³⁸

The President's power to "reinterpret" the ABM treaty provoked a major constitutional battle during the Reagan years, but the dispute was resolved solely through political confrontations and accommodations.²³⁹ Secret spending by the Intelligence Community calls into question the application of the statement and account clause,²⁴⁰ but in 1974 the Court declined an opportunity to decide the meaning of this constitutional provision.²⁴¹ In a dissent, Justice Douglas expressed surprise that the Court would refuse to adjudicate the case and toss it back to the political branches: "Congress of course has discretion; but to say that it has the power to read the clause out of the Constitution when it comes to one or two or three agencies is astounding."²⁴² As a result, the meaning of the statement and account

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

237. See, e.g., Henkin, *Executive Privilege: Mr. Nixon Loses But the Presidency Largely Prevails*, 22 UCLA L. REV. 40 (1974).

238. L. FISHER, *supra* note 17, at 208-13.

239. See, e.g., Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1366-75 (1989). This edition is focused on "Arms Control Treaty Reinterpretation." Other commentaries of interest include: Sofaer, *Treaty Interpretation: A Comment*, 137 U. PA. L. REV. 1437; (1989) Rostow, *The Reinterpretation Debate and Constitutional Law*, 137 U. PA. L. REV. 1451 (1989); Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists*, 137 U. PA. L. REV. 1461 (1989); Block Casey & Rivkin, *The Senates Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481 (1989); Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (1989); Nunn, *A Common-Sense Definition of "Common Understanding?"*, 137 U. PA. L. REV. 1523; Biden & Ritch, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PA. L. REV. 1529 (1989).

240. In pertinent part the statement and account clause reads: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

241. In *United States v. Richardson*, 418 U.S. 166 (1974), the Court found the taxpayer had only "generalized grievances" and lacked standing to challenge the CIA's reporting procedures. *Id.* at 175.

242. *Id.* at 200-01.

clause depends on whatever the executive and legislative branches decide.²⁴³

Many of the major separation of powers disputes are resolved nonjudicially through tradeoffs and compromises reached by the President and Congress, which is true also for many other constitutional issues.²⁴⁴ The rough and tumble character of political debate lacks some of the amenities and dignity of the judicial process, but executive officials and legislators are well-informed and generally take their responsibilities seriously. It is important to recognize their contributions and understand separation of powers in a larger context than caselaw.

243. L. FISHER, PRESIDENTIAL SPENDING POWER 203-23 (1975).

244. L. FISHER, CONSTITUTIONAL DIALOGUES 231-79 (1988).

