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Stanley M. Brand

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# BATTLE AMONG THE BRANCHES: THE TWO HUNDRED YEAR WAR

STANLEY M. BRAND†

Perhaps the most pervasive and well-known doctrine of American constitutional law is the so-called separation of powers. American school children learn at an early age the division of our government into three great departments. If there is one concept for which our constitutional system is known in other countries, and which distinguishes it from other constitutional or parliamentary democracies, it is the “checks and balances” which reinforce the concept of separation of powers—indeed it produces intentional “inevitable friction”<sup>1</sup> among the branches from which flows sober and balanced decisionmaking. Indeed, the experience of the Framers led them to seek mechanisms that would limit or control sources of governmental power and abuse and the separation of powers is the reflection of the deeply held belief that where the people censor the government, power must be diffuse “the better to secure liberty.”<sup>2</sup>

The separation of powers cannot be found in so many words in the Constitution; rather, as Professors Miller and Knapp have remarked, it is more a political theory concerning a system of allocated governmental powers that emanates from both the parts and the whole of the document.<sup>3</sup> The conventional wisdom often mistakenly overemphasizes the “separation” element of the doctrine; in truth the safeguards against abusive government action so brilliantly crafted in 1787 result from the “partial agency,” as Madison put it in Federalist No. 46,<sup>4</sup> which the branches have in each other that reinforces, indeed, forms the essence of the doctrine.

It seems apt in this bicentennial year to closely examine this central doctrine and see how it has worked and whether it still serves the important purposes intended by the Framers. Unlike so many more localized constitutional doctrines—concepts neatly housed in a section, clause, or even amendment to the Constitution—the separation of powers spills over and runs throughout and could not be easily modified without rendering askew interrelated parts, and thereby the whole. My examination today, therefore, will focus more on the developments of the doctrine in our time and how they have effected shifts in power among the branches and what likely lies ahead. Our view of the constitutional separation of powers often reflects shifts in our political institutions as

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† Partner at Brand & Lowell, Washington, D.C. B.A. 1970, Franklin & Marshall College; J.D. 1974, Georgetown University.

1. *Myers v. United States*, 272 U.S. 52, 93 (1926) (Brandeis, J., dissenting).

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. Miller & Knapp, *The Congressional Veto: Preserving The Constitutional Framework*, 52 IND. L.J. 367, 384-85 (1977).

4. THE FEDERALIST NO. 46, at 336 (J. Madison) (Dawson ed. 1865).

well which, in my view, is appropriate given the Framers' reliance on a popularly elected legislature, and less frequently elected President, as the primary residuums of what I would call active constitutional power. Trends in separation of powers, unlike many other areas of constitutional interpretation, are not confined to Court watching and reviews of the terms of the Supreme Court, for as the Court itself has remarked, each branch is initially required to evaluate issues of constitutionality incident to the performance of its assigned duties;<sup>5</sup> indeed, some separation of powers confrontations of the greatest and most lasting proportions, like rejected or failed judicial nominations or claims of executive privilege with which I am most familiar,<sup>6</sup> never reach the courts.

The post-Watergate period has seen some of the most dramatic shifts in separation of powers; it is not an exaggeration to suggest that more has happened on the separation of powers front in the nearly thirteen year period since the Nixon tapes case than in the previous seventy-five years of constitutional law. Indeed, in two recent terms the Court made more far-reaching separation of powers law in the *Chadha* (legislative veto)<sup>7</sup> and *Bowsher* (constitutionality of Gramm-Rudman)<sup>8</sup> cases than any time since *Myers*<sup>9</sup> and *Humphrey's Executor*.<sup>10</sup> Only eight years ago, the Court paused long before declining to decide whether the President may terminate a treaty under the Constitution without congressional approval. In declining judicial intervention in what it termed a "Legislative and Executive dispute," four concurring Justices explained the rationale for abstaining: "we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum."<sup>11</sup>

One other Justice concurring explained that prudential concerns counseled hesitation "until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system."<sup>12</sup>

In the area of presidential congressional war making powers, Congress passed and Presidents have both resisted and bent to the War Powers Resolution.<sup>13</sup> The President has, in this same period, in an unprecedented and high handed fashion, instructed officers of the government to ignore a law duly passed by Congress, which he signed into law, before any court had construed its con-

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5. See *Nixon v. United States*, 418 U.S. 683, 703 (1974).

6. See Brand & Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U.L. REV. 71 (1986).

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

8. *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

9. *Myers v. United States*, 272 U.S. 52 (1926).

10. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

11. *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (mem.) (Burger, C.J., Rehnquist, Stewart, and Stevens, J.J., concurring).

12. *Id.* at 997 (Powell, J., concurring).

13. See War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (Supp. 1987)).

stitutionality.<sup>14</sup> In advising agencies to ignore provisions of the Competition-in-Contracting Act which he signed into law, the President added a new chapter to the already overblown claims made under the Take Care Clause to ignore the duty to uphold the laws which that provision imposes on the President. And the courts have entered new fields of political questions where previously judges feared to tread, asserting jurisdiction over suits involving congressional committee ratios,<sup>15</sup> House and Senate chaplains<sup>16</sup> and blithely ignoring the standing doctrine to reach interbranch issues previously thought to be nonjusticiable.<sup>17</sup> The separation of powers has also, on occasion, been the refuge, or battle cry, for scurrilous and ill-founded legal attacks by the branches on one another. Nothing exposes more quickly the weakness of a coordinate branch's legal position in a constitutional confrontation than the filiopietistic incantation of "separation of powers" concerns without explicit and precise textual support. Despite the fact that the separation of powers is a structural doctrine, as opposed to a purely localized textually based notion, one must begin any separation analysis with reference to the specific textual provisions which are at issue. Generalized claims of separation of powers conflicts are suspect and as the Court has defined the test in *Nixon v. Administrator of General Services*: "in determining whether [an Act of Congress] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the executive Branch from accomplishing its constitutionally assigned functions."<sup>18</sup> Too often, separation of powers concerns are not undergirded by specific textual provisions.

The 200 Year War between the branches has, in my view, in this decade become more strident, even shrill, in tone and substance. And, often in the latest skirmishes, the casual observer cannot tell the players without a scorecard. For example, the recent *modus operandi* of the executive branch, acting through the Department of Justice, has been to refuse to defend duly enacted laws of the sovereign which are not to its constitutional liking and to rely on the Congress to defend statutes under attack by litigants.<sup>19</sup> I do not want to suggest that the doctrine is subject to pure empirical analysis, but to give you an idea of the rapid escalation of executive branch legal defaults, between 1787 and 1974 the executive branch failed to defend only four times.<sup>20</sup> Since 1974, it has failed to defend, or attacked, congressional enactments or actions seven times—almost

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14. H.R. REP. NO. 99-138, 99th Cong., 1st Sess. (1985).

15. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982).

16. *Murray v. Morton*, 505 F. Supp. 144 (D.D.C. 1981) *appeal dismissed and judgment vacated sub. nom.*, *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (en banc), *vacating*, 674 F.2d 14 (D.C. Cir. 1982).

17. *See Consumers Union of the United States, Inc. v. FTC*, 691 F.2d 575, 577 & n.9 (D.C. Cir. 1982) (en banc).

18. 433 U.S. 424, 443 (1977).

19. *E.g.*, *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 888-889 (3d Cir. 1986).

20. *See United States v. Lovett*, 328 U.S. 303 (1946); *Myers v. United States*, 272 U.S. 52 (1926); *Senate Select Comm. v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963).

twice as many times as during the first 187 years of the Republic.<sup>21</sup> This failure to defend skews traditional notions of adverseness and puts the Legislature in the uncomfortable position of becoming a party litigant. What confuses the casual observer is that despite abandoning its role of defender of the laws of the United States under a perverse reading of the Take Care Clause,<sup>22</sup> it nevertheless lays claim to the mantle "United States." The Court has tolerated, even compounded this perversion, by holding that the Congress, merely speaking by court invitation as a non-party *amicus curiae*, can supply the adverseness necessary to decide a case or controversy,<sup>23</sup> a revolutionary concept in our jurisprudence. The Congress is not without culpability in creating confusion and uncertainty in this realm, because while professing to disapprove of the practice, it has passed statutes inviting, even seemingly authorizing, the courts to decide cases without a hard look at case or controversy requirements of standing, adverseness, and ripeness.<sup>24</sup> In the Gramm-Rudman statute itself, the Congress enacted a provision which on its face purported to confer standing on individual Congressmen to sue to litigate the constitutionality of the Gramm-Rudman deficit reduction law.<sup>25</sup>

The issue of which branch is entitled to the mantle of the United States is more than a matter of trivial nomenclature: it reveals deep-seated and fundamental views about the proper role of each branch. Of course, each branch as part of "the government" is entitled to the label, and acts as the United States when it discharges its prescribed duties; conversely, when it eschews acting on behalf "of the government as a whole" it may not come into court as the United States absent a statutory authorization to sue and an articulated injury to an interest of the federal government as a whole. When the Attorney General seeks to assert the interest of the President in defending his view of the Constitution, the "United States" is not present, only one branch is. If the United States has independent standing, it is not through the Executive when that branch defaults on its "take care" obligation.

When the Department of Justice brought an unprecedented and ill-fated suit against the House of Representatives to enjoin and declare illegal a House contempt citation against the EPA administrator for refusal to produce documents, it presumptuously and with no statutory authority sued in the name of the United States.<sup>26</sup>

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21. See *Synar v. Bowsher*, 106 S. Ct. 3181 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875 (3d Cir. 1986); *Deaver v. Seymour*, Civ. Action No. 87-0477 (D.D.C. 1987); *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); *Pacific Legal Found. v. Watt*, 529 F. Supp. 982 (D. Mont. 1981); *League of Women Voters v. FCC*, 489 F. Supp. 517 (C.D. Calif. 1980).

22. U.S. CONST. art. II, § 3.

23. *Chadha*, 462 U.S. at 939.

24. E.g., 15 U.S.C. § 47a(e)(1)(A) (1982) ("any interested person (including a consumer or consumer organization)" may file a petition for judicial review of an FTC rule).

25. *Balanced Budget and Emergency Deficit Control Act of 1985*, Pub. L. No. 99-177, § 274(a)(1)(3), 99 Stat. 1037, 1099 (codified at 2 U.S.C. § 922 (Supp. 1987)).

26. See *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

In *Clark v. Valeo*,<sup>27</sup> a suit involving the constitutionality of the federal election law, the Department sought to litigate the interest of the President in his prerogatives and on behalf of the United States as well. And as in *Clark*, during the Department's conduct of a declaratory suit challenging the congressional contempt of the Administrator of EPA, it sought to litigate the issue of Presidential privilege in the name of the United States.<sup>28</sup>

Most recently, the Department of Justice refused to defend the constitutionality of the appointment of independent counsel under the Ethics-in-Government Act in challenges brought by Oliver North and Michael Deaver. Under the newly encouraged regime of judicial laxity on what the Court has repeatedly stated are bedrock constitutional requirements for the exercise of judicial power,<sup>29</sup> it falls to the legislative branch, not the Executive, to defend the statute.

The contradiction in stating, as the Department has, that the purely executive function to enforce the law, and by implication the duty to conduct litigation arising from enforcement,<sup>30</sup> on the one hand renders judicial appointment of independent counsels suspect, and on the other hand to refuse to defend litigation brought to determine constitutionality seems both apparent and consummately arrogant. What the executive seeks is arrogation of *all* power in itself to determine constitutionality.

If the Executive can instruct agencies to ignore duly enacted law prior to judicial review, as it did in the Competition-in-Contracting Act, and also refuse to defend at the point a genuine case or controversy arises, then it obliterates *pro tanto* the legislative and judicial function in one fell swoop—precisely what Madison decried in Federalist No. 46 when he warned against the “accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands . . . .”<sup>31</sup> These separation of powers dramas are not fully played out yet and so it is too early to tell how they will affect the balance of power.

As we learned, perhaps too painfully in the Watergate episode, the most strident constitutional arguments, however well-founded, can founder and sink when the institution asserting them is weakened and badly perceived by the public.

These Executive positions have brought equally strident legislative responses and so far the courts have provided little comfort to the Executive position.

As one who participated along with Professor Gene Gressman in the new posture of the legislature as litigant in the post-Watergate era, I have neverthe-

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27. 559 F.2d 642, 653-57 (D.C. Cir. 1977) (en banc) (Bazelon, C.J., Tamm, Wright, J.J., concurring).

28. See *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

29. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

30. *Representation of Congress and Congressional Interests in Court*, Hearings Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary, 94th Cong., 2d Sess. 91 (1976) (litigation is basically an executive function) (statement of Assistant Attorney General Rex Lee).

31. THE FEDERALIST NO. 46, *supra* note 3, at 334.

less questioned the strategic value, if not the wisdom, of depositing these controversies upon the judicial doorstep. In view of the vast legislative power to rein in the Executive through constitutional, but non-justiciable means, Congress would be wise to use these armaments to block actions of the Executive it deems unconstitutional. Executive power is itself, with the sole exception of the Presidency and Vice-Presidency, a creation of Congress. The "vast array of departments which the President oversees" are but "creatures of the Congress" and indeed "owe their very existence to the Legislative Branch."<sup>32</sup> For example, the best means for Congress to enforce document demands met with claims of Executive privilege may be to withhold exercise of its legislative power. During the recent controversy involving the Department's refusal to divulge documents relevant to the nomination of William Rehnquist as Chief Justice,<sup>33</sup> the ultimate remedy would have been refusal to recommend or consider the nomination unless and until the President divulged the materials. This is precisely what Senator Sam Ervin did in 1973, when as Chairman of the Judiciary Committee, he held hostage the nomination of Richard Klienendienst as Attorney General until the President allowed Peter Flanagan, a White House assistant, to testify.<sup>34</sup> These kinds of separation of powers showdowns do not involve the judiciary and force the political branches to resolve their differences or live with the consequences. It is these kinds of resolutions that most accurately represent the "accommodation" which is inherent in our system of divided powers.

Of course, the separation of powers is often used by the branches as a rationale to deal not with interbranch but intra-branch disputes. In the course of litigating the legislative veto cases, there were significant elements within Congress distrustful of the device, who actually looked longingly to the Court to strike down the vetoes. Indeed a Rules Committee report issued in the middle of litigation extolled the Solicitor General's position and triumphantly predicted a Supreme Court decision striking down the legislative veto.<sup>35</sup> Centers of power within the legislative domain loved to brandish the veto but despised its decentralizing impact on the real locus of activity in Congress—the committee system. Such dissension in the congressional ranks could hardly go unnoticed in the courts and may have had no demonstrable impact, but surely sent a conflicting message on the unanimity of our position. This kind of intra-branch separation problem is less likely in the unified and more centralized executive branch but it certainly serves to emphasize the almost limitless possibilities of the doctrine.

The Iranian controversy provides, in my view, a fertile breeding ground for cataclysmic separation of powers disputes. With the exception of the private suits attacking the independent counsel statute initiated by Oliver North and Michael Deaver, the battleground has been uncharacteristically quiet, no claims of executive privilege and with the Tower Commission and the negotiated access

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32. *Nixon*, 433 U.S. at 508 (Burger, C.J., dissenting).

33. *E.g., Reagan Uses Executive Privilege To Keep Rehnquist Memos Secret*, Wash. Post, Aug. 1, 1986, at 1, col. 3.

34. Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. ON LEGIS. 621, 648-49 (1973).

35. H.R. REP. NO. 97-809, 97th Cong., 2d Sess., pt. 1 (1982).

by the congressional committees and the independent counsel to Presidential diaries there appears little likelihood of any confrontation on that score. The controversy does, however, forbode major disputes over the respective roles of the President and Congress in covert activity with constitutional showdowns likely over congressional review of so-called national security decisions reminiscent of the Church and Pike Committees in the early 1970s.

Despite the stridency and confusion spawned in the last decade over separation of powers, I believe the doctrine is alive and well, thriving in a manner the Framers could not envision, but would surely approve.

In closing, I think it is well to remember that the doctrine of separation of powers will, and should, be an evolving construct. Answers to questions posed will come from political theory and policy considerations, as well as the text of the Constitution itself.

I, for one, look forward to the battles that lie ahead in the war among the branches.



