

BALANCE OF FORCES

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*Separation of Powers Law in
the Administrative State*

Harold H. Bruff

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*for
Sherry and Annie
who are everything
to me*

The government of the United States was ... a sort of unconscious copy of the Newtonian theory of the universe.... Every sun, every planet, every free body in the spaces of the heavens, the world itself, is kept in its place and reined to its course by the attraction of bodies that swing with equal order and precision about it, themselves governed by the nice poise and balance of forces which give the whole system of the universe its symmetry and perfect adjustment.

—Professor Woodrow Wilson

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

—Justice Robert Jackson

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PREFACE

Although Woodrow Wilson (in his professorial incarnation) may have been the first American to detect the resemblance of our constitutional system to Newtonian physics, he certainly was not the last.¹ I have borrowed his phrase “balance of forces” for the title of this book, because it captures the primary strategy that the framers of our Constitution employed as they invented a new structure of government. It is easy—but erroneous—to read Wilson’s description (and Newton’s system from which it is drawn) as automatic and self-correcting, a machine never in need of repair.² Newton himself stressed that the balances he identified were temporary and contingent, always vulnerable to the stray comet wandering in from deep space.³ Similarly, Wilson stressed the need to understand the Constitution’s balance of forces as the evolving product of our behavior and our history, and not the result of some mechanistic, ineluctable process:

[G]overnment is not a machine, but a living thing.... It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life.... Fortunately, the definitions and prescriptions of our constitutional law ... are sufficiently broad and elastic to allow for the play of life and circumstance.... [T]he men who framed the federal Constitution ... have given us a thoroughly workable model. If it had in fact been a machine governed by mechanically automatic balances, it would have had no history; but it was not, and its history has been rich with the influences and personalities of the men who have conducted it and made it a living reality. The government of the United States has had a vital and normal organic growth and has

1. Count me among them. Harold H. Bruff, *The Federalist Papers: The Framers Construct an Orrery*, 16 Harv. J. L. & Pub. Pol’y 9 (1993).

2. I. Bernard Cohen, *Science and the Founding Fathers* ch. 5 & 308–13 (1995).

3. James Gleick, *Isaac Newton* 136–37 (2003).

proved itself eminently adapted to express the changing temper and purposes of the American people from age to age.⁴

Wilson's analysis implies the central challenge that our Constitution has faced and (so far) surmounted. Confronted by human frailties, how can any constitution endure? The difficulty, of course, is to give the document life by ensuring that it does not state empty promises that an operating government can disregard at will. The survival of the American Constitution for over two centuries is wonderful in the eighteenth century sense of the term—generative of a sense of wonder. The archaic cadences of its text provide few clues to its durability. Today, the document is so interwoven with our history and our culture that we can no longer separate cause and effect in our relationship with it. Has the Constitution made us what we are, or have we made it what it is?⁵

These imponderables of ten lie near the surface in this book, which analyzes the law that governs the structure of the federal government. Our system of separated and balanced powers is so linked to our politics that it is often difficult to tell where politics ends and law begins. Indeed, one of my primary tasks is to sketch the boundary between them. Hence a book about law must often discuss the practical operations of the government that is ruled by this body of law.

The framers of our Constitution quite consciously created a unique new structure of government.⁶ One of its distinguishing features was the formation of separate branches of government having distinct functions. This idea was about a century old in 1787. The American innovation was to combine separation of powers with checks and balances that were designed to stabilize the entire edifice.⁷ (The other American contribution, federalism, interacts with the system of separated and checked powers. It has a vast literature of its own and will play only a minor role here.)

The framers were acutely aware that previous republics had led short, unhappy lives. (Modern Americans can add many more examples to their list.)

4. Constitutional Government in the United States 56–57 (1908).

5. For some ruminations on this topic, see Michael Kammen, *A Machine That Would Go Of Itself, The Constitution in American Culture* (1986).

6. Some good introductory treatments of separation of powers are: Louis Fisher, *Constitutional Conflicts Between Congress and the President* (4th ed. 1997); William B. Gwyn, *The Meaning of the Separation of Powers* (1965); M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967); Arthur T. Vanderbilt, *The Doctrine of the Separation of Powers and Its Present-Day Significance* (1953).

7. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1969); see also Forum, *The Creation of the American Republic*, 44 *William & Mary Q.* 550 (1987).

Hence the framers could only hope that their experiment satisfied Montesquieu's maxim that a nation's laws must match the spirit of its people to endure.⁸ Evidently that has been the case, for we have altered the original structure only in detail. Yet the paucity of formal constitutional amendments affecting the internal organization of the federal government is misleading, for two centuries of life and controversy have added a rich gloss to our spare constitutional text.

This book focuses on the constitutional structure of the federal government in the formation and execution of domestic policy. Conducting foreign policy and waging war raise constitutional issues that are fundamentally different from those of the domestic sphere, due to the imperatives of effective national action and the presence of the President's independent constitutional powers in those realms. Moreover, these "external" activities of our government are comparatively free of legal constraints—although no one should think that they are entirely unguided by law.⁹ I also confine my analysis mostly to administration of civil not criminal law. Separation of powers analysis should be responsive to its context, as the unique bodies of law concerning war and foreign policy demonstrate. Criminal law involves its own set of specific constitutional provisions, including the protections of individual rights set forth in the Bill of Rights. Its relation to separation of powers law, now of heightened interest in the wake of terrorist attacks on the United States, is in flux and merits its own extended treatment, which is now occurring in many places. I touch on it here, as it relates to my main themes.

Federal constitutional and administrative law can no longer be practiced by lawyers or understood by citizens without a grasp of separation of powers principles. The Supreme Court decided a series of landmark separation of powers cases in the last three decades of the twentieth century. Notwithstanding the Court's activity—or perhaps because of it—debate still surrounds many fundamental questions. Although there are clear answers to

8. This principle was so important to Montesquieu that it accounts for the title of his masterpiece, *The Spirit of the Laws* (1748). The standard modern translation is edited by Anne M. Cohler, Basia C. Miller, and Harold S. Stone (1989). Montesquieu thought the "spirit" of the laws was "a mixture of intentional human designs and of the deep circumstances which condition all the rules of a society." Judith Shklar, *Montesquieu* 69 (1987).

9. The classic discussion of the law of foreign affairs is Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996). See also H. Jefferson Powell, *The President's Authority over Foreign Affairs* (2002). For the relation of law to war, see Louis Fisher, *Presidential War Power* (1995); John Hart Ely, *War and Responsibility* (1993). For constitutional history, see Abraham Sofaer, *War, Foreign Affairs, and Constitutional Powers: The Origins* (1976).

some questions, much room remains for spirited controversy as a polity more than two centuries old continues to define itself. Today, lawyers inhabiting all three branches of the federal government (and in the private sector as well) encounter these issues regularly. Also, because state governments incorporate separation of powers principles, state constitutional law often borrows concepts from federal doctrine.¹⁰

Our federal bureaucracy has grown so large, and affects so many aspects of our daily life, that lawyers commonly refer to it as the “administrative state.” Yet no such term occurs anywhere in the Constitution, which discusses the three branches of government in some detail but says little to foreshadow today’s thicket of federal agencies. Indeed, the term “administrative *state*” has vaguely Soviet overtones of a consolidated, remote, and arbitrary government rather than a constitutional democracy. Such a notion would not, however, accurately describe our government, which is bounded by law on every side and linked to the elected officials in whom we repose temporary trust.

In over twenty years of teaching and writing about the separation of powers, I have found that the subject is a mystery to many persons who are otherwise sophisticated about American government. Too many of us retain a wooden conception, drawn from the numbing civics courses of our youth, of three grand branches exercising wholly different powers. To others, separation of powers seems a set of abstractions that, however dear to our bewigged forbears, have lost their relevance to modern American life. I hope to show that neither of these caricatures is accurate, and that separation of powers ideas are both intrinsic to our liberties and central to the operative nature of our government.

The first part of this book introduces the reader to three pervasive themes: the constitutional history of our system, the structure and nature of the federal government, and the available modes of legal analysis of separation of powers issues. Part Two introduces the central role of the courts in maintaining the rule of law by forcing the executive to obey statutory limits on its power. I then examine related issues concerning whether “inherent” executive power exists, how statutes both constrain and empower the executive, and how Presidents engage in lawmaking of their own. Part Three turns to controls on the courts that flow from congressional definition of their jurisdiction, presidential selection of their judges, and traditional doctrines that urge the courts to exercise self-restraint.

10. Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 Tex. L. Rev. 1337 (1990).

Having outlined the core relationships of the three branches, I canvass the matters of detail that furnish our system much of its richness. Part Four considers the two most important checks and balances: the President's veto and Congress's power of the purse. These devices create a stabilizing mutual dependency between the two branches. Part Five explores the autonomy of each of the branches. Congress holds substantial power to control its own membership. Officers of all three branches possess important but limited immunities from civil damages for their actions. Part Six moves to the delicate trade-offs between autonomy and accountability of government officers. I examine how Congress exercises the ultimate impeachment power over members of the other two branches, how information about government activities promotes accountability, and how doctrines such as executive privilege shield some activities from our scrutiny.

Part Seven reviews the role of the elected branches in overseeing the bureaucracy. The President appoints and removes those who execute the law, but Congress sometimes restricts presidential powers of removal to form an independent agency. Both branches engage in vigorous oversight of policy formation in the bureaucracy, as they compete to control the administrative state. The concluding part begins by examining the role of constitutional amendments in altering the original design. Although few changes have occurred, the potential for amendment always looms in the background. Again, fundamental questions abound: for example, who should decide whether a proposed amendment has achieved ratification?

I finish by reviewing the state of the Union as it has evolved. I advocate no large changes in the Constitution, and only marginal changes in the legal doctrines that gloss it. It is important to distinguish transitory problems with our government, which can be corrected by legislation or by changes in our practices, from the more enduring problems we face. The latter, in my judgment, have more to do with the content of our character than that of our Constitution.

