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Separation of Powers Law

Cases and Materials

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For Martha and Beth
p.m.s.

For Sherry and Annie
h.h.b.

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Preface

When we published our 1988 text, The Law of Presidential Power: Cases and Materials, which has since morphed into what are now three editions of Separation of Powers Law: Cases and Materials, it is safe to say we had no idea of what the next decades would witness in our particular research and teaching domain. "Far-fetched" does not begin to capture how we would have described the ideas that Congress might impeach a President for lying about a sexual affair, that the Supreme Court would intercede in a state vote recount in a way that would effectively decide a presidential election, or that the executive branch would claim inherent authority to hold U.S. citizens indefinitely, and without counsel or hearing, as "enemy combatants." Neither could we have imagined the horrific events of September 11, 2001, whose impact on the nation's constitutional thinking is still unfolding, even as we approach the attacks' tenth anniversary. Each of these events has now become part of the separation of powers landscape. The apparent willingness of each branch to test the limits of its authority beyond what had been conventional boundaries has certainly led us to rethink earlier assumptions and conclusions.

That having been said, we have been satisfied — as have colleagues using the book at other institutions — that our structure and source selection is well designed to permit lawyers, law students and political scientists a comprehensive review of the issues involved in the application of law to the allocation of power among President, Congress, and judiciary. To our 1988 book, we added enough additional material in 1996 on the congressional perspective and on judicial power to make the book a true survey of separation of powers issues. The major structural innovations over the years have occurred within Chapter Six, on war powers, and Chapter Seven, on presidential election and succession. The latter were occasioned, of course, by *Bush v. Gore*. The former were necessitated in part by the events of September 11, 2001 and by our invasion of Iraq, but more generally by the sheer number of occasions on which the United States has deployed military force abroad since the Vietnam War. An entirely chronological approach became impossible; a more thematic framework was required.

We continue to regard this work as innovative for law schools because its subject matter is not well covered by the mainstream curriculum. We regard it as innovative for undergraduate and graduate courses on the Presidency and Congress because of its emphasis on primary materials at the expense of discursive secondary text.

As law teachers, we have found the value of this project for our students to be at least twofold. First, despite the ever-increasing importance of all aspects of public law in our national life, legal curricula tend to focus predominantly on the operation of the courts. These materials, we hope, afford readers a clearer picture of how the elected branches of government operate and of how complex are the processes of national policymaking and execution of the laws. Although bits and pieces of the overall picture may appear in courses on constitutional law, administrative law, international law, and legislation, we

find that a systematic overview of the elected branches better highlights and puts into context such processes as law enforcement, program administration, budgeting and accounting, and the implementation of foreign and military policy.

Second, as the ever-increasing number of legal cases involving separation of powers attests, the subject of this work has become and is likely to remain a central national concern. The Nixon Presidency precipitated a major shift in legal attitude towards judicial oversight of the separation of powers. The nearly four decades since have by no means seen any contrary trend. The burden that the executive branch shoulders for solving domestic and foreign problems requires citizens to concern themselves ever more with the issues surrounding executive effectiveness and accountability. Persistent political and institutional competition between President and Congress — plus the public's increasingly strident distrust of government generally — likewise require citizens to focus on complex issues surrounding the scope and implementation of Congress's proper roles. These materials help to prepare students of law and political science to participate in these debates more knowledgeably.

Teachers who prefer in their courses a continued stress on Presidential issues will find that this volume still permits that approach. Indeed, a thorough exploration of the applicability of law to either Congress's or the President's functions has an additional advantage. It highlights the crucial non-litigative role of legal counsel that, in all fields, legal curricula tend to underemphasize. Perhaps because most discussion materials in law school classes consist of reported cases, the impression is created that law is determined primarily in the courtroom and that arguing cases is what "real lawyers" do. Most hard legal questions facing Congress or the President must be decided, at least in the first instance, within each respective branch and on the basis of relatively little prior judicial guidance. In exploring each branch's view of things, the following materials rely substantially on sources other than judicial opinions to which the presidential or congressional lawyers would resort in order to solve a difficult problem. We have also tried to raise on a number of occasions what we take to be critical ethical questions that face public lawyers who engage in the counseling function. The most ambitious of these is a section on the "torture memos" that appears in Chapter Six.

Three final notes on style: First, although we try to avoid using a masculine generic to describe all people, we continue to use "he" as an occasional pronoun for "the President" because of the historical circumstance that this country has not yet elected a woman to the Presidency. Second, although we have marked textual deletions in the excerpted materials, we often omit, without any printed signal, footnote material and citations to cases or other authorities that may appear in the excerpts. Third, in citing relevant secondary literature, we use forms of citation that are conventional among legal academics, but which may be unusual for political scientists and their students.

This work has owed a great deal over the years to many research and production assistants. We are especially indebted, for the current volume, to Ashley Carter '12, Yasmine Harik '12, and Benjamin Wilhelm '11, all of the Moritz College of Law at The Ohio State University. We are also grateful to three faithful "adopters," who have graciously shared with us their suggestions and reactions over a period of many years — Marshall Breger, at Catholic University; David Martin, at the University of Virginia; and William Marshall, at the University of North Carolina-Chapel Hill. We are thankful for their friendship and insights.

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