Nova Law Review

Volume 18, *Issue* 3 1994 *Article* 6

The Ambiguous Legacy of Watergate for Separation of Powers Theory: Why Separation of Powers Law is Not "Richard Nixon" Law

Mark Tushnet*

*

The Ambiguous Legacy of Watergate for Separation of Powers Theory: Why Separation of Powers Law is Not "Richard Nixon" Law

Mark Tushnet*

TABLE OF CONTENTS

I. INTRODUCTION

For many years it was easy to succumb to the temptation to teach separation of powers theory as "Richard Nixon" law. The leading cases about executive privilege arose out of Watergate, and controversies over impoundment, war powers, and impeachment were directly connected to the Watergate experience. In this essay, I want to suggest that treating separation of powers law as "Richard Nixon" law is descriptively accurate and distorted at the same time, and normatively misleading. It is descriptively accurate because the modern law of separation of powers has been shaped by the legacy of Watergate, which includes a substantial period of divided government. It is descriptively distorted because important separation of powers controversies cannot easily be linked to Watergate. It is normatively misleading because the political context—the sense that contemporary separation of powers controversies are indeed the legacy of Watergate—has obscured the fact that separation of powers controversies now arise because of the transformation of modern government into a complex bureaucratic state. This transformation has torn separation of powers theory away from its traditional base, described by the metaphor of "checks and balances," and has left separation of powers theory without a new base.

* Professor of Law, Georgetown University Law Center. The Author would like to thank L. Michael Seidman for his comments on this Essay.

II. SEPARATION OF POWERS AS "RICHARD NIXON" LAW

A list of Watergate-connected cases establishes the importance of Watergate for separation of powers theory.[1] First there are the executive privilege cases. *United States v. Nixon*,[2] the leading case raising questions of privilege in criminal prosecutions, was obviously part of Watergate. Cases that claimed damages from high executive officials including the President, who then raised claims of privilege, gained credibility because Watergate had discredited Nixon.[3] The independent counsel case dealt with the statute adopted to avoid future "Saturday Night massacres."[4] *Buckley v. Valeo*[5] disposed of a challenge to the means of selecting the Federal Election Commission.[6] It arose out of campaign finance reforms adopted to eliminate one type of abuse that, it was felt, contributed to Watergate. Finally, there is the Walter Nixon case in which the Court held that judicial review of impeachment processes was barred by the political question doctrine.[7] The Chief Justice's opinion was more than typically confused, but its motivation appears to have been concern over the possibility that the courts might be called upon to review a presidential impeachment, a concern triggered in part by the Watergate experience.

Beyond the cases directly connected to Watergate, other separation of powers controversies seem part of its legacy. The War Powers Resolution, for example, a perennial source of issues for classroom discussion, resulted from the inter-branch suspicion that, on the President's side, led to Watergate. Even the legislative veto decision might be understood as part of Watergate's legacy.[8] Congress had been using legislative vetoes for a generation, and presidents had been interposing mild objections for as long.

---

1. I examined the chapters on separation of powers in several leading constitutional law casebooks to determine what proportion of their pages was devoted to cases closely linked to Watergate. WILLIAM COHEN & JONATHAN VARAT, CONSTITUTIONAL LAW (9th ed. 1993), had the smallest proportion (16%), followed by GEOFFREY STONE ET AL., CONSTITUTIONAL LAW (2d ed. 1991), with 23%, and GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991), with 26%. Taking account of the fact that casebooks tend to be dominated by recent cases, these proportions seem high enough to be noteworthy.

2. 418 U.S. 683 (1974).

3. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

4. Morrison v. Olsen, 487 U.S. 654, 663 (1988).

5. 424 U.S. 1 (1976).

6. *Id.* *Buckley* is more widely known, of course, for its holding that free speech principles limit Congress' power to regulate campaign finance.

7. Nixon v. United States, 113 S. Ct. 732 (1993).

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

It might be argued, however, that the issue came to a head because Watergate exacerbated tensions between the departments.

The standard account of Watergate's legacy for separation of powers theory is directly normative. On this account, Watergate demonstrated the dangers of concentrated governmental power. To put it perhaps overdramatically, the New Deal, the Warren Court, the New Frontier, and the Great Society had lulled Americans into believing that a powerful national government was always a benign force for progress; Richard Nixon and Watergate showed that it was not. Before Watergate, constitutional theory and decisional law concentrated on the individual rights provisions of the Constitution. These were seen as the primary mechanisms, enforced by the courts, by which the Constitution protected individual rights. Watergate directed scholarly and judicial attention back to the indirect protections of individual rights in the Constitution, that is, to separation of powers.

There are other, and in my view more important, connections between Watergate and modern separation of powers controversies. Those controversies arise when Congress and the President are at odds, which is most likely to occur when the departments are controlled by different political parties. Accordingly, the most significant political phenomenon of the past generation was the permanently divided government, with Congress controlled by Democrats and the presidency by Republicans. Until 1993, the only period of unified government, the Carter presidency, was itself a direct consequence of Watergate.

In an important way, though, divided government may well have resulted from Watergate too. In 1968, it seemed to some that the New Deal coalition had crumbled and was about to be replaced by a new national Republican coalition, which would control both the presidency and Congress.[9] Watergate interrupted that process. The public, wary of concentrated power as a result of Watergate, appears to have concluded that divided government is attractive.

Divided government, however, produces separation of powers controversies. Policy differences between the departments generate legislative proposals and executive initiatives to which the other department takes exception. Ordinarily, these controversies are resolved by political negotiation during which the departments reach compromises acceptable to each. But over an extended period, divided government produces separation of powers *cases* as well, because it affects bargaining strategies. Specifically, after an extended period in which one party controls the presidency, the

9. *See* KEVIN PHILLIPS, THE EMERGING REPUBLICAN MAJORITY (1969).

President will be more reluctant to compromise with Congress. For predictable political reasons, a sustained period of divided government will lead to a judiciary dominated by appointees of the President's party; the Senate cannot resist more than sporadically the transformation of the federal courts that the President's power to initiate appointments allows. As a result, litigators may think that the courts have become allies of one side in separation of powers controversies. Partisans of the President may think that the possibility of prevailing in litigation is great enough to allow them to stiffen their positions in political negotiations. Therefore, controversies that might have ended through negotiation instead turn into court cases.

These are structural characteristics that lead to more separation of powers cases after a sustained period of divided government. The particular form division took in the past generation contributed to the proliferation of such cases as well. The competing parties had different views about the importance of strong presidential authority. Republicans desired a strong presidency in foreign affairs and a weak national government in domestic affairs, whereas Democrats wanted a weak presidency in foreign affairs and a strong national government in domestic affairs.

Thus, in foreign affairs, the parties were directly opposed on questions of presidential power, and the Democrats, in control of Congress, were in a position to transform this opposition into separation of powers controversies. Watergate itself arose from President Nixon's concern about opposition to his conduct of foreign policy. The repeated controversies about war powers and the Iran-contra affair are similar in structure.

The impoundment issue,[10] which briefly flared up during the Nixon presidency, typifies separation of powers controversies in the domestic arena. Though not new,[11] the issue recurred during the Nixon Administration when President Nixon "transformed an occasional practice into a special test of wills with Congress."[12] Impoundment became an issue because Democrats wanted a strong national government, and found the President thwarting their desires. To no one's surprise, Democrats tried to develop

10. Impoundment occurs when the President or other U.S. government officers take action, or fail to take action, that precludes the obligation or expenditure of Congress' budget authority. BLACK'S LAW DICTIONARY 756 (6th ed. 1990).

11. For historical development of the impoundment issue, see STANLEY I. KUTLER, THE WARS OF WATERGATE 133-34 (1990).

12. *Id.* at 133. During a press conference on January 31, 1973, President Nixon stated that "the Constitutional right for the President of the United States to impound funds [,] and that is not to spend money, when the spending of money would mean . . . increasing prices or increasing taxes for all the people, that right is absolutely clear." *Id.*

ways to accomplish their goals without the President's participation, and Republican Presidents tried to develop ways to reduce the domestic role of the national government.[13]

The normative and political accounts of Watergate's legacy are connected, as a matter of constitutional theory. "Checks and balances" is one of the central images of separation of powers theory, or, as James Madison put it, separation of powers protects liberty by setting ambition to counteract ambition.[14] Politicians are ambitious, in the Madisonian sense, when they seek to protect the prerogatives of their offices against intrusions by occupants of other offices. Following this logic, divided government epitomizes how separation of powers serves liberty.

The foregoing account of Watergate's legacy for separation of powers theory is surely correct, in one sense. Watergate did heighten concern for concentrated power, and it did contribute to the development of divided government. As I argue next, however, viewing modern separation of powers law as "Richard Nixon" law has distorted that law and, more importantly, has obscured deeper sources of modern separation of powers problems.

III. GOVERNMENTAL INNOVATIONS AND SEPARATION OF POWERS

Intensification of partisan conflict, caused by a divided government and principled concern for controlling concentrated power, has heightened the stakes in separation of powers controversies. One result, ironically, has been to mislead scholars about the nature of those controversies. This is the underside of seeing separation of powers law as "Richard Nixon" law. Rather than expressing deep conflict between a Republican president and a Democratic Congress, the conflicts arise because of the modernization of the national government.

Viewing the modern law of separation of powers as the legacy of Watergate induces scholars to consider the implications of divided government and partisan conflict. The Madisonian emphasis on ambition counteracting ambition seems to address those questions as well. Yet, unless we place Madison's concerns into a modern context, that emphasis is likely to be normatively misleading and descriptively distorted. Unfortunately, adjusting those concerns to take account of modern conditions proves quite

13. This is a formula for repeated clashes, some of which will end up in court.

14. THE FEDERALIST No. 51, at 356 (James Madison) (Benjamin F. Wright ed., 1974).

difficult, and may partially explain why the image of Watergate continues to dominate separation of powers thinking; we have nothing to put in its place.

The standard account I have given is descriptively distorted because it fails to explain some of the most important characteristics of modern separation of powers law. Although "Richard Nixon" law makes *United States v. Nixon*[15] the paradigmatic case, a better paradigm is the Sentencing Commission decision, *Mistretta v. United States*.[16] *Mistretta* does not easily fit into the standard account, yet it exemplifies modern separation of powers problems in several ways.

First, the Sentencing Commission was clearly a technical adaptation to deal with what national law-makers saw as a modern problem: sentencing disparity resulting from the proliferation of federal crimes and the expansion of the federal bench.[17] Second, the decision adopted what has come to be called a "functional" analysis of separation of powers issues. According to proponents of functional analysis, courts should assess innovations in government structure by considering whether the innovation is a sensible attempt to deal with a difficult modern problem in a way that does not threaten to undermine fundamental constitutional values.[18] Functional analysis almost inevitably leads the Court to uphold governmental innovations against separation of powers challenges.

The Court's functional analysis is not a well-suited tool for dealing with sharp partisan conflicts between the President and Congress. The Court has sometimes used a more formal analysis,[19] particularly in the legislative veto decision. Most commentators, however, believe that the Court's formalistic decisions are deviations from a more consistent commitment to functionalism.[20] *Mistretta* and the independent counsel decision are more typical of the functionalist pattern: Despite occasional invalidations, as a general matter the Court has rejected separation of power

---

15. 418 U.S. 683 (1974).

16. 488 U.S. 361 (1989) (constitutionality of Sentencing Commission challenged on several grounds including separation of powers).

17. *Id.* at 363-65.

18. For my analysis of this issue, see Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581 (1992).

19. *See id.*

20. One reason for the belief that separation of powers controversies are more serious and more contentious than they were in the past may be that Justice Scalia, the newspapers' and scholars' favorite justice, is an articulate proponent of a formalism that the Court, in fact, has by and large rejected.

challenges to federal statutes. The Court's implicit judgment in preferring functionalism appears to be that most separation of powers controversies are not the product of sharp partisan conflict in which they are called upon to side with either the President who appointed them or the Senate that confirmed them.[21]

The standard account relies on the Madisonian vision. For Madison, the President's ambition counteracted Congress's. Direct political confrontations were the mechanism by which separation of powers protected liberty, as each side sought to advance its own interests and found itself checked by the other. Equally important, the disputes were personalized, as the term *ambition* suggests. That is, political interests led particular people to fight other people over competing agendas. One small indication of what can be called the personalization of ambition is the Framers' choice of a unitary over a plural executive. By placing the executive power in the hands of a single person, the Framers believed that they could promote both energy and responsibility in the Executive, and individual responsibility would be enforced by impeachment to remove "the" wrong-doer from office.

The Madisonian perspective leads to a positivist account of separation of powers law. On this view, the Constitution does not prescribe any particular outcome in separation of powers controversies. Rather, it establishes a framework for political contention, and validates whatever results from that contention.[22]

This positivism, however, is hard to sustain under modern conditions. Although strongly originalist contemporary discussions of the separation of powers continue to speak in personalized terms,[23] they are difficult to employ in connection with a modern, bureaucratic government. We can *say* that the legislative veto is a mechanism by which Congress (seen as a unit) attempts to control the President (seen as an individual). The reality, however, is that the veto is an attempt by congressional committees and their staffs to exercise some continuing supervision over the behavior of lower-level bureaucrats. In *Chadha*, for example, "Congress" was not concerned that "the President" had adopted too generous a standard for determining when to waive deportation in hardship cases; rather, the chair

21. Note, however, that a more careful phrasing of the proposition about the Court's role is that the perception among partisans, that the Court will be an ally, can generate litigation in cases that otherwise might be negotiated to a solution. Eventually, however, a perception that experience proves to be inaccurate presumably disappears.

22. For some qualifications and elaborations, see Tushnet, *supra* note 18, at 582.

23. *See, e.g.*, Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

of the House subcommittee with jurisdiction over the Immigration and Naturalization Service was concerned that the bureaucrats in charge of making hardship decisions were using too generous a standard.[24]

Similarly, when Justice Scalia criticized the innovation of the independent counsel statute in *Morrison v. Olson*,[25] his description of the Commission as an effort to aggrandize one "department" at the expense of another did not capture the more complex reality. Noting, as the Watergate legacy suggests, the immediate partisan context of contemporary disputes, Justice Scalia saw the independent counsel statute as "Congress's" attempt to reduce "the President's" power by allowing it to compel investigations that the President would not otherwise allow to go forward.[26] If we move back a bit from the immediate context of divided government, though, we might see the independent counsel statute as an effort to deal with problems that arise precisely when we can no longer personalize the presidency because the President has so many subordinates over whom he has little direct control. Because the executive is in fact no longer unitary, it is misleading to insist on "the President's" responsibility for all that happens in the executive departments.

Once we abandon the personalization of ambition, the Madisonian positivist perspective cannot be sustained, for it relied on counterbalancing forces of political ambition, which can no longer be located anywhere in the complex bureaucracies of the modern state. Ambition, of course, remains: members of the House of Representatives want to run for the Senate, senators want to run for the presidency, presidents (and members of Congress) want to be reelected. These ambitions, though, are not rooted in the *institutions* themselves. Ambitious politicians look out for themselves, not for the prerogatives of the departments in which they find themselves.

Other originalist perspectives are equally flawed, for more familiar reasons. Suppose, contrary to Madison, that the Framers did embed in the Constitution a particular vision of the proper relation between "the executive" and "Congress." As critics of originalism have shown, the transformation of government means precisely that the Framers' vision cannot resolve contemporary controversies.

More generally, the complexity of governing in the contemporary world—the problems of a national economy's integration into an international system and the problems of establishing or maintaining a just and orderly society in an ethnically and socially pluralist nation—means that new

24. *Chadha*, 462 U.S. at 926.

25. 487 U.S. 654, 701-03 (1988) (Scalia, J., dissenting).

26. *Id.* at 703.

instruments of government are likely to be developed. We have become accustomed to one such innovation: the administrative agency. Separation of powers purists suggested that such agencies are unconstitutional,[27] but the Court, in *Bowsher v. Synar*,[28] went out of its way to indicate its disapproval of that position.[29] It is only because we had not adjusted to other innovations, such as the independent counsel or the Sentencing Commission, that constitutional challenges seemed credible.

In this sense, the novel methods of government that have generated separation of powers cases are not the legacy of Watergate. They are, instead, the products of modern life. As such, however, analyzing them with constitutional concepts predicated upon images of a government such as existed in 1789 is not likely to be helpful. If neither the presidency nor Congress is unitary, for example, the personalization associated with the Madisonian idea of ambition counteracting ambition simply does not speak to the institutions of government we now have. Analyses that pursue that idea, or indeed any other predicated on an understanding of the constitutional order of older institutions, may be faithful to the Constitution in an originalist sense yet unfaithful to the constitutional project.

That project is to assure that the institutions we actually have be regulated by law, and that all who exercise public power are governed by the rule of law. The question then becomes whether it is possible to develop an approach to separation of powers analysis that is both descriptively accurate—that captures the fundamentals of modern government—and normatively acceptable—that ensures the rule of law. The difficulty is particularly acute in connection with separation of powers disputes. In the constitutional scheme, the separation of powers might be called a "transsubstantive" method of protecting liberty and promoting effective government.[30] Separation of powers controversies ought to be resolved, according to this method, without regard to the underlying political issue provoking the controversy. So, for example, whether the Constitution has room for a special counsel must be decided without regard to the actions of

---

27. *See, e.g.*, Synar v. United States, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986); Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 71.

28. 478 U.S. 714 (1986).

29. *Id.* at 725 n.4.

30. I adopt the term from discussions of the Federal Rules of Civil Procedure. *See, e.g.*, Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

Richard Nixon or Ronald Reagan, except to the extent that those actions reveal something systemic about how the modern presidency operates.

To decide these questions trans-substantively, courts must ask whether, taking the way the modern government operates into account, liberty and efficiency will be better promoted by allowing some governmental innovation or by barring it. The functionalist approach now prevailing on the Court is problematic because it so often amounts to a rubber-stamp for institutional innovations: If Congress believed that the innovations serve useful functions without threatening the balance of power that promotes liberty, the courts are not well-positioned to disagree. The Court's functionalism, thus, may simply be how it expresses its resigned acceptance of what the Justices understand to be the inevitable modernization of the national government. If in this view modernization might not be a transcendentally good thing, but it is going to happen no matter what, then why bother to pretend that there are constitutional barriers to modernization?

Understood in this way, functionalism may satisfy the demand for a descriptively accurate approach to separation of powers problems. It hardly seems to satisfy the demand for a normatively attractive one. The view that such problems are the legacy of Watergate may stand in the way of developing a more satisfactory approach. Somehow, judges and scholars have to figure out a way to identify which of the innovations modern life is likely to bring forward ought to be rejected as unconstitutional. Treating the problems as the legacy of Watergate does not seem likely to help in that endeavor.