

Contents

Table of Cases	xix
Preface	xxix
Chapter 1 • Introduction	3
A. Constitutional History	3
1. Atlantic Legacy	4
2. Government in Colonial America	5
3. Revolutionary State Governments	6
4. The Articles of Confederation	8
5. The Constitutional Convention	9
6. Expounding and Ratifying the Constitution	12
B. Approaches to Separation of Powers Analysis	14
1. Textual	14
2. Original Intent	15
3. Structural/Functional	16
4. Institutional Competence	17
5. Historical Practice	17
6. Values	17
C. The Ambiguities of Executive Power: Competing Theories of the Presidency	18
1. Washington	19
2. Jefferson	21
3. Jackson	22
4. Buchanan	23
5. Lincoln	24
6. Wilson on the Post-Civil War Presidency	25
7. Theodore Roosevelt and Taft	25
8. Franklin Roosevelt	27
9. Truman through Carter	28
10. Reagan and George H.W. Bush	29
11. Clinton	30
12. George W. Bush	30
13. Obama	31
14. Trump	31

D. An Institutional Overview	32
1. Congress	33
2. The Executive	35
3. The Judiciary	40
Chapter 2 · Framework: The Separation and Confluence of Powers	43
A. Analytic Framework: The Rule of Law and the Realm of Politics	43
1. The Executive and the Judiciary	43
<i>Marbury v. Madison</i>	46
Note on Obtaining Judicial Review of Executive Actions	56
2. The Executive and Congress (as Mediated by the Courts)	60
Introductory Note on Executive Orders	64
<i>United States v. Midwest Oil Co.</i>	65
<i>Youngstown Sheet & Tube Co. v. Sawyer</i>	73
Note on Private Enforcement of Executive Orders	95
3. Congress and the Judiciary: Statutory Control of Federal Jurisdiction	97
<i>Ex Parte McCordle</i>	100
<i>United States v. Klein</i>	102
4. Judicial Self-Restraint	107
B. Combining Powers in the Executive	115
1. Delegation of Legislative Powers	116
Note: Finding an “Intelligible Principle” in Vague Statutory Text	126
2. Allocating Adjudicative Power Outside the Judiciary	131
C. Fundamental Checks and Balances	139
1. Veto Powers	140
a. The President’s Veto	140
Memorandum for the Heads of Executive Departments and Agencies On Presidential Signing Statements	151
b. Pocket Vetoes	153
c. “Legislative Vetoes”	157
<i>Immigration and Naturalization Service v. Chadha</i>	159
2. Congress’s “Power of the Purse”	178
a. Overview of Budget and Spending Processes	178
b. Congressional Control of Spending	184
<i>Brown v. Califano</i>	188
c. Executive Control of Spending	193
<i>Lincoln v. Vigil</i>	195
Note on Impoundment of Funds	197
d. The Item Veto	202
<i>Clinton v. City of New York</i>	202
3. Amending the Constitution	215
<i>Coleman v. Miller</i>	217

Chapter 3 · Autonomy and Mutual Accountability among the Branches	225
A. Congressional Power over the Membership of the Branches	225
1. Impeachment	225
a. "High Crimes and Misdemeanors"	225
Constitutional Grounds for Presidential Impeachment	227
Impeachment of Richard M. Nixon, President of the United States	233
H. Res. 611, 105th Congress, 2d Session, Report No. 105-830 (1998)	238
Trial Memorandum of the United States House of Representatives	241
Answer of President William Jefferson Clinton to the Articles of Impeachment	245
b. A Judicial Role?	254
<i>Nixon v. United States</i>	254
2. Membership in Congress	261
a. Exclusion and Expulsion	261
<i>Powell v. McCormack</i>	261
b. Term Limits	267
B. Immunities of Government Officers	268
1. Congressional Immunity	268
<i>Gravel v. United States</i>	270
2. Immunities of Executive Officers from Civil Liability	279
a. The President	279
<i>Nixon v. Fitzgerald</i>	279
<i>Clinton v. Jones</i>	289
b. Other Executive Officers	300
<i>Harlow & Butterfield v. Fitzgerald</i>	300
<i>Mitchell v. Forsyth</i>	306
3. Judicial Immunities	311
C. Information and Accountability	312
1. Confidentiality in Congress and the Judiciary	312
2. Executive Privilege	314
a. Courts v. The Executive	315
<i>United States v. Nixon</i>	315
The State Secrets Privilege	329
<i>Mohamed v. Jeppesen Dataplan, Inc.</i>	330
b. Congress v. The Executive	354
1.) Executive Branch Procedure for Invoking Executive Privilege	357
Memorandum for the Heads of Executive Departments and Agencies	357
2.) A Constitutional Requirement of Compromise?	359
3.) Litigating Executive Responses to Congressional Subpoenas	361

<i>Committee on the Judiciary, U.S. House of Representatives v. Miers</i>	361
D. Congressional Power to Regulate Accountability	385
1. Regulating the Executive	385
a. Control of Presidential Documents	385
<i>Nixon v. Administrator of General Services</i>	385
b. The Administrative Procedure Act	392
c. Freedom of Information Act	400
<i>Kissinger v. Reporters Committee for Freedom of the Press</i>	400
d. Federal Advisory Committee Act	405
<i>Ass'n of American Physicians and Surgeons v. Clinton</i>	407
<i>Cheney v. United States District Court for the District of Columbia</i>	414
e. Other Statutory Restrictions	422
f. Subjecting Presidential Advisers to Advice and Consent	423
g. The Foreign Emoluments Clause	429
2. Regulating the Judiciary	431
<i>Mistretta v. United States</i>	431
3. Congressional Self-Regulation	437
Chapter 4 • Control of Administration by the Elected Branches	443
A. Personnel	443
1. The Appointments Clause	443
<i>Buckley v. Valeo</i>	443
2. Alternatives to the Appointments Clause	454
<i>National Labor Relations Bd. v. Noel Canning</i>	457
3. Appointment of Judges	469
a. Appointments to the Supreme Court	470
Note on Supreme Court Appointments	470
The Coming Crisis in Recovery and What Can Be Done About It	477
Reorganization of the Federal Judiciary	480
b. Appointments to the Courts of Appeals and District Courts	482
c. Recess Appointments of Judges	484
4. Removals (Herein of Independent Agencies)	488
a. Separation of Powers	488
<i>Myers v. United States</i>	490
<i>Humphrey's Executor v. United States</i>	499
<i>Bowsher v. Synar</i>	505
B. Modern Syntheses of Appointment and Removal Powers	518
<i>Morrison v. Olson</i>	518
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i>	541
C. Supervision and Coordination of Policymaking	564

1. The President's Power to Manage Administration	564
a. Formative Years: Groping for Principles	564
The Jewels of the Princess of Orange	565
b. The President's Statutory Powers to Manage the Executive Branch	571
c. Participation in Administrative Rulemaking	572
<i>Sierra Club v. Costle</i>	572
d. Coordinating the Regulatory Process	582
Regulatory Organization	584
Memorandum for Honorable David Stockman, Director, Office of Management and Budget	592
Note: Post-Reagan Presidential Regulatory Oversight	596
2. Congressional Oversight	599
3. A Unitary or Plural Executive? The Special Status of the Independent Agencies Revisited	604
D. The Faithful Execution of the Laws	611
1. Faithful Execution: Duty or Authority?	611
2. Faithful Nonexecution?	614
a. Unconstitutional Statutes	615
Presidential Authority to Decline to Execute Unconstitutional Statutes	617
b. Nonexecution and Administrative Discretion	620
Faithful Nonexecution	620
Case Study: Obama Administration Deferred Action Policies for Undocumented Immigrants	635
The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others	638
c. Prosecutorial Discretion and Criminal Law Enforcement	664
Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege	664
3. Faithful Execution and the Courts	677
a. A Duty to Defend Congress?	677
Representation of Congress and Congressional Interests in Court	678
Letter from Attorney General Eric H. Holder to Congress on Litigation Involving the Defense of Marriage Act	681
Note: <i>Raines v. Byrd</i> and Congressional Standing	687
b. The Conduct of Civil Litigation	690
c. Obedience to Judgments	695
4. Pardons and Reprieves	698
Chapter 5 • Foreign Policy and National Security	709
A. Analytic Framework: Sorting the Elected Branches' Claims to Power	710

Letters of Pacificus, No. I (A. Hamilton)	711
Note: The History of Foreign Affairs and National Security Powers	717
<i>United States v. Curtiss-Wright Corp.</i>	723
Note: The Logan Act and the Federal Government's Monopoly in Foreign Policy	732
<i>Youngstown Sheet & Tube Co. v. Sawyer</i>	734
<i>Zivotofsky v. Kerry</i>	735
Note: Statutory Interpretation in the Context of the President's Foreign Policy and National Security Powers	747
B. Executive Claims to Inherent and Exclusive Powers	748
1. The President's Power of Recognition and Role as "Sole Organ" of Foreign Affairs	748
Bill to Relocate United States Embassy from Tel Aviv to Jerusalem	749
Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act	752
2. Treaty Processes	758
a. Overview of Treaty Powers	758
b. Presidential Treaty Implementation	766
<i>Medellín v. Texas</i>	766
c. Presidential Treaty Termination	779
<i>Goldwater v. Carter</i>	779
2. Executive Agreements	785
Note: International Non-Treaty Agreements	785
Memorandum Opinion for the United States Trade Representative: Whether Uruguay Round Agreements Required Ratification as a Treaty	786
<i>United States v. Pink</i>	794
<i>Dames & Moore v. Regan</i>	803
Note: The Iran Nuclear Agreement of 2015	820
3. Control of Sensitive Information	823
<i>New York Times Co. v. United States</i>	825
Problem: Applying <i>New York Times</i> After September 11	838
Note on Classification and Protection of Government Documents	840
4. Power to Conduct Investigations (Herein, of Foreign Intelligence Surveillance)	845
a. Electronic Surveillance, Executive Power, and the Fourth Amendment Prior to FISA	845
Foreign Intelligence Surveillance Act of 1977	846
<i>United States v. United States District Court (Keith)</i>	848
b. The Foreign Intelligence Surveillance Act, 1978–2001	856
C. Congress's Role in Regulating Foreign Policy	864

1.	Direct Regulation of Foreign Affairs and National Security Policy	864
a.	Presidential and Congressional Oversight of CIA and FBI Intelligence Gathering	864
	Samuel J. Rascoff, Domesticating Intelligence	872
b.	The Iran-Contra Affair	885
c.	Iran-Contra and Congressional Oversight of Covert Operations	893
	Title 50, Chapter One — National Security Subchapter III — Accountability for Intelligence Activities	894
2.	Foreign Policy and Foreign Commerce	904
a.	The International Emergency Economic Powers Act	904
b.	Trade Expansion Act	906
	<i>Independent Gasoline Marketers Council v. Duncan</i>	906
3.	Immigration and Foreign Policy	911
	<i>United States ex rel. Knauff v. Shaughnessy</i>	912
	Note: The Trump Executive Orders on Immigration	916
4.	Regulatory Programs Affecting Foreign Policy	925
	<i>Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission</i>	925
D.	Judicial Review and Foreign Policy	932
	<i>Haig v. Agee</i>	934
	Chapter 6 • War Powers	951
A.	Power to Commit Troops — From the Founding to Vietnam	953
1.	Scope of the Commander in Chief Clause: Early Views	953
	The Federalist, No. 69 (Hamilton)	953
	<i>Little v. Barreme</i>	954
	<i>The Prize Cases</i>	956
	Note: The 2001 Authorization to Use Military Force	966
2.	The Vietnam Watershed	966
a.	Debating Executive Claims to Power	967
	Meeker, The Legality of United States Participation in the Defense of Viet-Nam	967
	National Commitments	973
	Notes and Questions on Vietnam	989
b.	Congress's Efforts to Limit the President's Authority to Commit Troops: The War Powers Resolution	992
	War Powers Resolution	992
	President Nixon's Veto of the War Powers Resolution	995
	War Powers: A Test of Compliance — Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident	998
	Explanation by Senator Jacob Javits of the Conference Report	999
	Questions on the War Powers Resolution	999

Note: Covert Warmaking and the Neutrality Act	1002
Note: War Powers and Impeachment	1003
B. Unilateral Presidential Initiative After the War Powers Resolution	1006
1. Presidential War-making in the Post-Vietnam Era	1006
a. Rescuing Americans	1009
President Carter's Report to Speaker O'Neill Concerning the Abortive Rescue Attempt in Iran	1009
Legal Opinion by Lloyd Cutler, President's Counsel, on War Powers Consultation Relative to the Iran Rescue Mission (May 9, 1980)	1011
b. Stabilizing Other Governments in Furtherance of American Foreign Policy	1012
c. Retaliation for Attacks on United States Persons	1016
d. Protecting U.S. Persons and Property	1016
e. Humanitarian Intervention	1018
f. Antiterrorism Operations	1019
g. International Peacekeeping	1020
Memorandum for the Attorney General Re: Authorization for Continuing Hostilities in Kosovo	1025
Case Study: The Libya No-Fly Zone	1033
Authority to Use Military Force in Libya	1033
Harold Hongju Koh, U.S. Department of State, Washington, D.C.	1042
2. Judicial Review of Presidential War-Making	1047
<i>Mora v. McNamara</i>	1047
<i>Campbell v. Clinton</i>	1051
3. Reform of the War Powers Resolution	1069
Robert F. Grimmett, The War Powers Resolution: After Thirty-Six Years	1069
C. Congressionally Authorized Wars After Vietnam: The Persian Gulf and Iraq Wars	1077
1. The Persian Gulf War: A New Watershed?	1077
a. Managing the Crisis Under Presidential Authority Alone	1077
Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Armed Forces to Saudi Arabia and the Middle East	1077
Letter to the Speaker of the House and the President Pro Tempore of the Senate on Additional Economic Measures Taken with Respect to Iraq and Kuwait	1078
b. The United Nations Authorizes Force	1080
United Nations Security Council Resolution 678	1080
Authorization for Use of Military Force Against Iraq Resolution	1082

Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq	1083
2. The Iraq Invasion of 2003	1085
a. From the Persian Gulf War to the 2003 Invasion	1087
b. Constitutional War Powers and International Law	1091
David Ackerman, International Law and the Preemptive Use of Force Against Iraq	1091
Mary Ellen O'Connell, UN Resolution 1441: Compelling Saddam, Restraining Bush	1092
c. The Necessity and Scope of Congressional Authorization	1096
Authorization for Use of Military Force Against Iraq Resolution of 2002	1096
<i>Doe v. Bush</i>	1101
d. Interbranch Accountability for Preemptive War-Making and the Separation of Powers	1110
Note: Congressional Authority to Regulate How the President Makes War	1118
Scholars' Letter to Congressional Leaders on the Proposed Iraq Troop Surge	1119
D. Presidential Wartime Powers Off the Battlefield	1123
1. Civil Liberties	1123
<i>Ex Parte Milligan</i>	1125
<i>Korematsu v. United States</i>	1132
Notes and Questions on Japanese Internment and Its Aftermath	1147
2. Mobilization and Regulation of the Economy	1151
Note: Presidential Economic Controls During World War II	1151
Powers of the President under the War Labor Disputes Act to Seize Properties Affected by Strikes	1155
Chapter 7 • The "Long War" and the Separation of Powers	1159
A. Wartime Powers During the "War" on Terror	1160
1. The Treatment of Enemy Combatants	1160
Stephen J. Shapiro, et al., Report of the Bar of the City of New York	1161
Notice, Detention Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism	1161
<i>Hamdi v. Rumsfeld</i>	1168
Harold H. Bruff, Bad Advice: Bush's Lawyers in the War on Terror	1195
<i>Hamdan v. Rumsfeld</i>	1204
<i>Boumediene v. Bush</i>	1221
Notes and Questions on the Guantanamo Detainee Cases	1237
Note: Government Lawyering, September 11 and the Iraq War	1250

Harold H. Bruff, <i>Bad Advice: Bush's Lawyers in the War on Terror</i>	1252
2. Targeted Killing	1274
<i>Al-Aulaqi v. Obama</i>	1276
White House Report on the Legal and Policy Frameworks Guiding The United States' Use of Military Force and Related National Security Operations	1288
B. Congressional War-Making Authority and the "Long War"	1303
White House Report on the Legal and Policy Frameworks Guiding The United States' Use of Military Force and Related National Security Operations	1304
Note: Competing Proposals for an AUMF Regarding the Islamic State	1311
Obama Administration Proposed AUMF Against ISIL (2015)	1312
Consolidated Authorization for Use of Military Force Resolution of 2017	1314
C. Foreign Intelligence Surveillance After 9/11	1318
1. FISA After September 11 and the Wall of Separation Problem	1318
2. Warrantless Surveillance Under George W. Bush, 2001–2007	1325
a. Targeted Surveillance of Telephone and Internet Communications	1325
b. Telephone Metadata	1327
c. Internet Metadata	1328
3. The FISC and Congressional Responses: The 702 Programs	1328
4. The Administration's Legal Defense for Ignoring FISA	1332
Unclassified Report on the President's Surveillance Program	1332
Letter from William E. Moschella, Assistant Attorney General in charge of the Office of Legislative Affairs, U.S. Department of Justice, to Hon. Pat Roberts, Chairman, Senate Select Committee on Intelligence, et al.	1335
January 9, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Letter of December 22, 2005	1338
5. Evaluating the Justice Department as Legal Advisor	1344
6. Litigation and Accountability	1347
<i>Clapper v. Amnesty International USA</i>	1348
Chapter 8 • Power and Institutional Design: The Case of the Presidency	1369
A. Presidential Elections	1370
1. The Role of States in Presidential Selection	1370
a. The Mechanics of the Electoral College: A Primer	1370
1. The Constitutional Basics	1370
2. The Statutory Framework	1371

3. The Nature of the Elector's Office	1372
b. The Merits of the Electoral College: A Debate	1373
Direct Popular Election of the President and Vice President of the United States	1373
J. A. Best, Prepared Statement on "The Case for the Electoral College"	1382
2. <i>Bush v. Gore</i> and the Constitutional Law of Presidential Elections	1391
Peter M. Shane, Disappearing Democracy: How <i>Bush v. Gore</i> Undermined the Federal Right to Vote for Presidential Electors	1392
<i>Bush v. Palm Beach County Canvassing Board</i>	1398
<i>Bush v. Gore [I]</i>	1404
<i>Bush v. Gore (II)</i>	1407
B. Presidential and Vice-Presidential Succession	1445
R. Celada, Presidential Continuity and Vice Presidential Vacancy Amendment	1446
Note: Reagan-Bush Temporary Power Transfer	1451
C. Redesigning the President's Political Role	1452
1. Diagnosis One: Presidents Can Accomplish Too Little	1453
Lloyd N. Cutler, To Form a Government	1453
2. Diagnosis Two: "The Most Dangerous Branch"	1457
Sanford Levinson and Jack M. Balkin, Constitutional Dictatorship: Its Dangers and Its Design	1458
3. Diagnosis 3: The Patient Is Healthy	1464
4. Diagnosis 4: Something Is Rotten . . . and Not in Denmark	1464
5. A Model Redraft of Article II	1465
Garrett Epps, The Ill-Made Prince: A Modest Proposal for a New Article II	1465
Appendix	1473
Constitution of the United States	1473
Authorization for the Use of Force (2001)	1489
Proclamation of January 1, 1863 (Emancipation Proclamation)	1490
Exec. Order No. 12866, Regulatory Planning and Review	1491
Index	1505