The William B. Lockhart Lecture*

Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House

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This is the Bicentennial Year of the Constitution and thus a good time for back to the beginning thoughts. In the District of Columbia Circuit, it is the year of separation of powers, as indeed it was last year and probably will be next year. By separation of powers I mean the enduring debate over what is, or should be, the role of the courts in relation to the executive and the legislature on vital issues of the day. This question not only infuses most of our big decisions these days, but also turns up in the most unlikely places, like discussions of standing,[1] or how to construe statutes,[2] or whether Medicare patients should be able to go to court for claims under $1000.[3] I wonder if our Founding Fathers knew what a hot topic separation of powers would become. Indeed, Judge Posner has defined that current paragon of jurisprudential virtue, a judicially "self-restrained" judge, in separation of powers terms as one who "sets as an important goal of his decisionmaking the cutting back of the power of his court system in relation to—as a check on—other

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** Chief Judge, United States Court of Appeals for the District of Columbia. I wish to thank my former law clerk Edward Foley, J.D., Columbia Law School, 1986, for his thoughtful assistance in the preparation of this speech.

1. *See, e.g.*, Haitian Refugee Center v. Gracey, 809 F.2d 794, 801-07 (D.C. Cir. 1987).

2. *See, e.g.*, Abourezk v. Reagan, 785 F.2d 1043, 1053 (D.C. Cir.), *cert. granted*, 107 S. Ct. 666 (1986).

3. Bartlett *ex rel.* Neuman v. Bowen, 816 F.2d 695, 703-13 (D.C. Cir. 1987).

government institutions."[4]

Critics of the courts accuse judges of violating the separation of powers principle in far less temperate terms. According to those critics, the federal courts commit daily such atrocities as restructuring state and local government through reapportionment rulings, radically transforming criminal procedures, improvising extraconstitutional rights to privacy, protecting hard core pornography, and subverting the nation's internal security. Indeed, one recent litany of our transgressions ends with the Shakespearean entreaty: "Now, in the names of all the gods at once, Upon what meat do these our Caesars feed, that they have grown so great?"[5] As a newly minted Chief Judge, I find all this pretty ironic, especially when the General Services Administration threatens to close the only cafeteria within miles of the courthouse; when I am unable to find a messenger to deliver a package to the Administrative Office; when I have to take the subway to a Judicial Conference meeting at the Supreme Court; and when my pleas for heat on the weekends and hot water or towels in the washrooms are cruelly rejected.

Situated as the D.C. Circuit is, however, it is not surprising that separation of powers dominates our current deliberations. We get the lion's share of the "political" cases. In our circuit, the federal government is a litigant in well over eighty percent of all cases. When individual legislators or the leadership in the two Houses decide to enter the judicial arena, they find it an easy walk or subway ride to our courthouse. We have sent *Buckley v. Valeo*,[6] the *Pentagon Papers*,[7] and the Gramm/Rudman/Hollings[8] separation of powers challenges to the Supreme Court. We are currently entertaining a challenge to the constitutionality of the Independent Counsel.[9] Moreover, our members include three ex-Senators or Representatives and seven others who previously held senior executive

4. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 11-12 (1983).

5. Stanmeyer, *Judicial Supremacy*, in THE NEW RIGHT PAPERS (R. Whitaker ed. 1982) 147 ("slight paraphrase" of W. Shakespeare, Julius Caesar, act I, sc. 2, lines 149-50).

6. 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

7. United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir.), *aff'd sub nom.* New York Times Co. v. United States, 403 U.S. 713 (1971).

8. Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (per curiam), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

9. *In re* Sealed Cases, No. 87-5261 *et seq.* (D.C. Cir. Aug. 24, 1987).

branch positions. A stint in one of the other branches seems almost a prerequisite to service on our court. The president and Congress seem extraordinarily interested in us; as a rule our appointments draw more attention than those of other courts. We are exquisitely aware of the separate powers of government.

The judges in our circuit have widely divergent ideologies, and separation of powers has become the battleground for fighting out many of our basic differences about what courts can legitimately decide. The frequency and variety of contexts in which the doctrine is invoked nowadays, however, suggest that the Bicentennial may be a blessing in ceremonial disguise if it forces us to rethink what that fundamental concept meant to the Founding Fathers two hundred years ago and whether they might praise or condemn what we are doing with it these days.

I would like to describe today a few not-so-easy pieces of the separation of powers puzzle in our circuit. If you sense a reference to the classic Jack Nicholson movie of similar name, you may remember the great scene: "Give me a BLT, forget the bacon, drop the mayo," and so on.[10] Actually, it's not such a bad analogy to the way separation of powers is handled in some of our cases. We invoke the concept, but leave out many of its vital ingredients.

The first piece of the separation of powers puzzle concerns just how strictly the Founding Fathers meant to separate the three powers—executive, legislative, and judicial—into untouchable sectors. Some recent Supreme Court decisions such as *INS v. Chadha*,[11] wiping out the legislative veto, and *Bowsher v. Synar*,[12] invalidating the comptroller general's role in Gramm/Rudman/Hollings budget slicing, do read as though there is something definable and identifiable as executive power, which can be exercised only by executive branch employees, something quite different called legislative power, exercisable only by legislators, and something called judicial power, exercisable only by article III judges. To quote former Chief Justice Burger in *United States v. Nixon*,[13] "the 'judicial Power of the United States' . . . can no more be shared with the Executive Branch than the Chief Executive . . . can share with

10. *Five Easy Pieces* (Columbia 1970).
11. 462 U.S. 919 (1983).
12. 106 S. Ct. 3181 (1986).
13. 418 U.S. 683 (1974).

the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."[14] Notwithstanding what Professor Strauss labels "certainty's siren call,"[15] most constitutional scholars know it's just not so.

Our proof, of course, is the administrative agency that so dominates the Washington scene, combining all three functions—executive, legislative, and judicial—in one body, a phenomenon which the Supreme Court has not yet conceptualized in any coherent manner. These alphabet agencies operate in open defiance of a rigid separation of powers theory. Indeed, a few creative post-*Synar* lawyers have argued in our court that the agencies themselves are unconstitutional, but so far the court has avoided the issue.[16]

Many authorities believe that the Founding Fathers did not intend the branches to operate in splendid isolation from one another, but rather that they should enter freely into mutually beneficial arrangements so long as the checks and balances inherent within the system assured that disproportionate power did not aggregate in one branch uncontrolled by the others. Thus, the more appropriate inquiry in separation of powers cases might be not whether there has been some spillage of pure executive power into the legislature or pure legislative power into the executive, but whether in performing an essential function one branch is unnecessarily inhibited or disrupted by another or whether so much power vests in one branch that it subordinates the others.

The Supreme Court sometimes seems to recognize this need for flexibility and sometimes not. In *Commodities Futures Trading Commission v. Schor*,[17] Justice O'Connor, correctly I believe, reversed an opinion of our court that held Congress could not administratively give the Commission the power to resolve private state law setoff claims against the main brokerage accounts it regulated because such private state law claims could only be heard in an article III court.[18] The Court skirted gingerly around the *Marathon*[19] precedent and

14. *Id.* at 704 (internal quotation omitted).

15. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 626 (1984).

16. Ticor Title Ins. Co. v. Federal Trade Comm'n, 814 F.2d 731 (D.C. Cir. 1987).

17. 106 S. Ct. 3245 (1986).

18. *Id.* at 3257-61.

19. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (Brennan, J., plurality opinion) ("The Federal Judiciary was

ultimately called the agency neither an executive nor a legislative tribunal, but rather a neutral "non-Article III tribunal."[20] Upholding the agency's statutory scheme, the Court thus bowed to the practicalities of commerce and a coherent adjudication system, warning that "formalistic and unbending rules [in the area of separation of powers may] . . . unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."[21] The result was eminently sensible, even if the reconciliation with Supreme Court precedent was a trifle fuzzy. Earlier, Justice White, dissenting in *Chadha*, had emphasized as well that the "history of the separation-of-powers doctrine is also a history of accommodation and practicality."[22]

What is interesting to a first-time reader of the Constitution is that the phrase "separation of powers" appears nowhere in the document. Article I says that all legislative powers shall vest in Congress;[23] article II says that the executive power shall vest in a president;[24] and article III says that the judicial power shall vest in one Supreme Court and in such inferior courts as the Congress may ordain or establish.[25] The Framers, however, did not attempt to define precisely the scope of these three powers and left the operational lines between the branches to be worked out by events, evolution, and history. They did, of course, set out specific instances where exclusive power was delegated to one branch, such as the presidential veto[26] or its override by Congress,[27] or the nomination of judges by the president and their confirmation by the Senate.[28] At the same time, however, the Framers provided for a vast reservoir of implied powers through the "necessary and proper" clause of article I, section 8, thus effectively undermining notions that the Constitution's enumeration of specific examples of the several powers was meant to be exclusive and that no power was ever to be shared. Indeed, in many instances, the Constitution itself contemplates the branches sharing power. For example, the president shares legislative power through his veto authority,

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therefore designed by the Framers to stand independent of the Executive and Legislature . . . .").

20. 106 S. Ct. at 3256-58.
21. *Id.* at 3258.
22. INS v. Chadha, 462 U.S. 919, 999 (1983).
23. U.S. CONST. art. I, § 1.
24. U.S. CONST. art. II, § 1.
25. U.S. CONST. art. III, § 1.
26. U.S. CONST. art. I, § 7.
27. *Id.*
28. U.S. CONST. art. II, § 2.

and the House and Senate share judicial power through their authority to impeach and try article III judges.[29]

From what little we can tell, the Framers worried most about checking undue concentrations of power in any one branch. The separation of powers was more a means to that end than an end in itself. In *The Federalist* Number 47, Madison defined the evil that separation of powers was intended to avoid: "[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[30]

Interestingly, Madison says "the accumulation of *all* powers . . . in the same hands."[31] That, of course, is a far cry from *some* powers crossing bounds in *some* situations. Madison made this point clearly in discussing Montesquieu's often misinterpreted statement: " 'There can be no liberty where the legislative and executive powers are united in the same person. . . .' "[32] Madison explained that Montesquieu "did not mean that these departments ought to have no *partial agency* in, or no control over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[33] In a separate *Federalist* paper, Madison emphasized further that "the powers of government should be . . . divided and balanced among several bodies . . . [so] that no one could transcend their legal limits without being effectually checked and restrained by the others."[34]

In *The Federalist* Number 51, his most important pronouncement on separation of powers, Madison asserted that the greatest security against a concentration of the several powers in the same department consisted in giving those who administered each department the constitutional means and personal motives to resist the encroachments of the others: "Ambition must be made to counteract ambition."[35] Pragmatically, the

29. U.S. CONST. art. I, § 3.
30. THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961).
31. *Id.* (emphasis added).
32. *Id.* at 302 (citing 1 C. MONTESQUIEU, THE SPIRIT OF LAWS 222 (1766)).
33. *Id.* (emphasis in original).
34. THE FEDERALIST No. 48, at 311 (J. Madison) (C. Rossiter ed. 1961).
35. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

Framers envisioned a kind of "permanent guerrilla warfare" between the branches.[36] Citizens' liberty would be protected against an overpowering government through fragmentation and competition among its branches, continuously checking and balancing each other.

Over the past few years our court has wrestled with the conflict between rigid and more flexible separation of powers notions in, of all things, standing cases. Old, prosaic standing doctrine, while always rooted in the case or controversy requirement of article III, has taken on a distinct separation of powers sheen lately. It is no longer enough, for some judges at least, that a plaintiff show a concrete injury that the court can redress, fall within the congressional zone of interest, and demonstrate a "fairly traceable" causation between the injury and the governmental action challenged. The putative plaintiff also may now have to pass an additional separation of powers test that takes ever new and exotic forms.

Judge Bork's dissenting opinion in *Barnes v. Kline*[37] is exemplar. In that case, the Senate and House, along with thirty-three individual House members, challenged President Reagan's veto of a bill requiring human rights certification of countries receiving foreign aid. The President pocket vetoed it between two sessions of Congress. The legal issue centered on the pocket veto provision of the Constitution, which applies only when "the Congress by their Adjournment prevent [the bill's] Return,"[38] and whether an adjournment prevented the return of the bill where Congress had designated an agent to receive presidential communications between sessions. The executive said the pocket veto was valid while the Congress said it was not. The panel majority agreed with the Congress.

Judge Bork, however, filed a wide-ranging, sixty-three page dissent[39] propounding the view that the courts should not have decided the case at all because neither the individual members of Congress nor the two Houses of Congress could challenge the veto in court under article III. Article III, he asserted, barred any government official or body from pursuing in federal court any claim, the gravamen of which was that an-

36. Strauss, *supra* note 15, at 604 (quoting Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976)).

37. 759 F.2d 21, 41-71 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 107 S. Ct. 734 (1987).

38. U.S. CONST. art. I, § 7, cl. 2.

39. Judge Bork's dissent ran 63 pages in the slip opinion and 30 pages in the West Reporter. *See* 759 F.2d at 41-71.

other governmental official or body had unlawfully infringed its official prerogatives or powers.[40] Judge Bork argued that our prior precedents permitting suits by members of Congress in some circumstances need not be followed because they did not give proper scope to the separation of powers underpinning of standing.[41] He went on to demand that the circuit "renounce outright the whole notion of congressional standing."[42] He wrote:

> Questions of jurisdiction are questions of power . . . over . . . other branches of government. . . . [J]udges can determine the extent of their own power within American government by how they define cases and controversies. . . . [T]he proper definition of those terms is crucial to the maintenance of the separation of powers that is central to our constitutional structure. . . .
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> . . . A federal judiciary that is available on demand to lay down the rules of the powers and duties of other branches and of federal and state governments will quickly become the single, dominant power in our governmental arrangements. . . . A majority of Supreme Court Justices will have something very like the power to govern the nation by continuously allocating powers and inhibitions to every other governmental institution.[43]

Judge Bork seems to be saying that members of the executive branch or of the Congress cannot seek the aid of the judiciary in enforcing their authority under the Constitution. Under his view, if the courts agree to decide such disputes at the behest of one of the quarreling branches, they will become so powerful as to violate the spirit of separation of powers.

The panel majority, on the other hand, saw the issue in traditional terms. Judge McGowan wrote that "when a proper dispute arises concerning the respective constitutional functions of the various branches . . ., '[i]t is emphatically the province and duty of the judicial department to say what the law is.' "[44] The pocket veto dispute presented a "constitutional impasse"[45] between the executive and the legislature and thus the court was not being asked to provide relief to legislators who had failed to gain their ends in the legislative arena. On the contrary, the legislature's fight was exclusively with the executive, and it could do nothing to resolve that dispute within its own

40. 759 F.2d at 43-47.
41. *Id.* at 67-71.
42. *Id.* at 41.
43. *Id.* at 43-44, 54.
44. *Id.* at 26-27 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
45. Goldwater v. Carter, 444 U.S. 996, 997 (Powell, J., concurring).

chambers. The court was not being asked for an advisory opinion on a hypothetical question, but rather for a declaration about the validity of a particular veto. Congress had suffered a specific and concrete harm to its powers under article I, and the court would decide it.

The issue posed by Judge Bork remains inchoate. *Barnes* was accepted for certiorari in the Supreme Court but later vacated as moot because the appropriation legislation that gave rise to it had by its own terms run out in the interim.[46]

There are two interesting by-products of *Barnes*. One is the reappearance in a separation of powers guise of the supposedly fading political question doctrine, whereby courts eschew cases whose resolution is either committed by the Constitution's text to another branch, has no manageable standards by which the courts can judge, or is likely to produce divisive public repercussions or to bring disrepute on the courts or the country. The doctrine has always troubled legal scholars because it deviates from the *Marbury v. Madison* mandate to courts to say what the law is and because its contours are so indistinct.[47]

Lately, the political question doctrine has seemed out of vogue at the Supreme Court, which has bypassed several opportunities to give it new life. For example, in 1979 Justice Powell refused to provide a fifth vote when the doctrine was invoked regarding whether the president needed to go to the Senate or the House to revoke the Taiwan Treaty.[48] And just last term, in *Japan Whaling Association v. American Cetacean Society*, the Court refused the government's invitation to back away from the alleged "political question" of whether the Secretary of Commerce had to certify to the president a Japanese violation of whale hunting restrictions:[49] "It is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.' . . . [U]nder the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."[50]

In our own circuit we have wavered on the political ques-

46. *See* Burke v. Barnes, 107 S. Ct. 734, 736-37 (1987).

47. *See, e.g.*, Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 600-01 (1976).

48. 444 U.S. at 998-1001.

49. 106 S. Ct. 2860, 2866 (1986).

50. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 211 (1961)).

tion doctrine. In one case we rejected it as an excuse not to adjudicate the right of an American citizen who owned land in Honduras to recover for seizure of that land by American-backed Honduran military forces. "The political question doctrine," Judge Wilkey said, "is a tempting refuge from the adjudication of difficult constitutional claims. . . . [But t]he Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive carte blanche to trample the most fundamental liberty and property rights of this country's citizenry."[51] In another case we said that the Director of the Agency for International Development's interpretation of a restriction on appropriations to countries whose population policies promoted abortion was not immune from judicial review under the political question doctrine.[52] Despite these cases, we have dismissed as nonjusticiable two suits brought by members of Congress challenging, under the War Powers Act, the United States support of the Contras in Nicaragua[53] and the rendering of military assistance to the government of El Salvador.[54]

Reflecting on these decisions, it is, quite candidly, hard to articulate the reasons why we should not decide the respective powers of Congress and the president under the War Powers Act but should decide their powers under the Constitution's pocket veto clause or under an international whaling agreement. That has always been the volatility of the political question doctrine—it requires each time an ad hoc judgment of the courts whether to decide legal issues because of the political consequences. Now, if Judge Bork's views prevail, it appears that a straight invocation of separation of powers will accomplish the same end by allowing the court to use an equally amorphous standard to decide whether the matter presents a "case or controversy" in the first place.

The second by-product of the *Barnes* decision worth noting is that it implicitly extends the bar against courts deciding *in-*

51. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514-15 (D.C. Cir. 1984) (emphasis omitted), *vacated on other grounds*, 471 U.S. 1113 (1985).

52. DKT Memorial Fund, Ltd. v. Agency for Int'l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987); *see also* Population Inst. v. McPherson, 797 F.2d 1062, 1068-70 (D.C. Cir. 1986) (holding decision by AID's administrator to prohibit funding earmarked by Congress for the United Nations Fund for Population Activities presented justiciable political question).

53. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985).

54. Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

*tra*branch disputes to a bar against deciding *inter*branch disputes as well. There have, of course, always been cases involving disputes within the other branches that courts have declined to hear. However, even these can involve close questions. For example, our court refused to decide a suit by Indiana Republicans seeking to compel the House of Representatives to seat their candidate because the election had been miscertified.[55] We called it a classic political question, citing the constitutional provision: "Each House shall be the judge of the . . . Qualifications of its own Members."[56] In another case, involving the immunity of the legislative branch under the speech and debate clause from a suit challenging the firing of a reporter for a House committee, we again refused to intervene because her duties were "directly related to the due functioning of the legislative process"[57] despite an earlier decision that the dismissal of the Senate cafeteria's manager had no such immunity.[58] We also refused to decide a suit challenging the accuracy of the Congressional Record.[59] These were all suits the court stayed out of in deference to the right of the other branches to run their own shops. In Thomas Jefferson's words:

> In order to give to the will of the people the influence it ought to have, . . . it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive.[60]

Barnes, however, sails into unchartered waters in refusing to countenance members of one branch invoking the assistance of another branch to assert their constitutional powers. Assuming the *Barnes* position has merit, such a per se ban would seem to consign each branch to the vagaries of politics to determine its rights. It is far from clear, however, that the Constitution places such a hermetic seal on each branch or that the separation of powers doctrine places such inelastic restraints on

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55. Morgan v. United States, 801 F.2d 445, 447-50 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1359 (1987).

56. U.S. CONST. art. I, § 5 (cited in *Morgan*, 801 F.2d at 445-46).

57. Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923, 929 (D.C. Cir.) (emphasis omitted), *cert. denied*, 107 S. Ct. 601 (1986).

58. Walker v. Jones, 733 F.2d 923, 928-31 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984).

59. Gregg v. Barrett, 771 F.2d 539, 542-43 (D.C. Cir. 1985).

60. 8 WORKS OF THOMAS JEFFERSON 322-23 (P. Ford ed. 1904), *quoted in Browning*, 789 F.2d at 927 n.8.

access to the courts for declarations regarding how the Constitution was meant to operate.

The second piece of the separation of powers puzzle roiling the calm of our circuit is its historically close, but frequently forgotten, tie to individual freedom and the Bill of Rights. The Founders saw the dual bulwarks of separation of powers and the Bill of Rights as supporting and supplementing each other to protect citizens from the tyranny of their governors.[61] Madison thought originally that separation of powers by itself assured sufficient protection; he was eventually convinced by Jefferson of the need for a bill of rights as well.[62] In selling the Bill of Rights to Madison, Jefferson's strongest argument was that it would be enforceable by the judiciary who would have the authority to invalidate acts of Congress or the executive that violated those rights. One of the great virtues of the Bill of Rights, Jefferson said, was "the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity."[63]

Indeed, when Madison introduced his proposed Bill of Rights on the floor of the House of Representatives on June 8, 1789, he repeated the argument:

> It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. . . . [Y]et . . . [i]f they are incorporated into the Constitution, independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[64]

The Founders' view of the judiciary must be seen in the context of that time. They were not drawing a compact for a pure democracy; they were giving birth to a republic. When the Constitution was adopted, only the House of Representatives was to be elected by the people.[65] The Senate was chosen by the state legislatures and the president by the electoral college. The great chasm that scholars and some judges now see between the popularly elected branches and the unelected judi-

61. *See generally* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 31, 114-15 (1976).

62. L. LEVY, CONSTITUTIONAL OPINIONS 117-20, 143 (1986).

63. Letter from Thomas Jefferson to James Madison (March 15, 1789), *reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 620 (1971).

64. 1 ANNALS OF CONG. 437-39 (1789).

65. At the time, suffrage was confined to white, male property owners.

ciary simply did not exist at the beginning of the Republic. The so-called "counter-majoritarian difficulty" with judicial review is, as Professor Alex Bickel notes, a product of the ensuing two centuries of democratic reforms.[66]

Thus, when we encounter present-day separation of powers rhetoric about the "properly limited . . . role of the court in a democratic society"[67] or "the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government,"[68] we must place it in historical perspective. Usurpation of power by the judiciary or the power's undemocratic origins were not major concerns of the Framers. They looked to the judiciary as the branch primarily entrusted with protecting the liberties of citizens from the excesses of the other two branches.[69]

This is not to diminish the great democratic transformations that have occurred in our country over the past two hundred years. On the contrary, the "political branches" should serve and be accountable to the will of the majority. At the same time, however, we must not lose sight of the need to protect the rights of individuals and minorities. Madison and Jefferson understood the dangers to liberty posed by a tyranny of the majority as well as those posed by a hereditary monarch, and both expressly recognized the judiciary as the people's guardian against those threats.

Some of my colleagues on the circuit have, however, discovered in the separation of powers doctrine a new rationale for restricting judicial review of executive or congressional action that violates the Bill of Rights. Two recent cases in the circuit are illustrative. In *Bartlett ex rel. Neuman v. Bowen*,[70] a Medicare patient challenged the constitutionality of a law bar-

66. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

67. Warth v. Seldin, 422 U.S. 490, 498 (1975).

68. Barnes v. Kline, 759 F.2d 21, 44 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom.* Burke v. Barnes, 107 S. Ct. 734 (1987).

69. *See* THE FEDERALIST No. 78 (A. Hamilton) (C. Rossiter ed. 1961):

> The complete independence of the courts . . . is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id. at 466.

70. 816 F.2d 695 (D.C. Cir. 1987).

ring receipt of benefits for treatment in a nursing facility unaffiliated with Christian Science by anyone who, during the same spell of illness, received benefits for treatment in a Christian Science-affiliated facility. The district court had dismissed the plaintiff's claim, grounded in the free exercise clause, because of a provision of the Medicare law that barred judicial review of claims below $1000. The majority, Judges Edwards and Wright, held that the separation of powers doctrine required the court to construe the no-review provision as inapplicable to constitutional claims because: "A statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right."[71] They thus remanded the basic constitutional challenge to the district court for trial.

Judge Bork disagreed with the majority. He felt that no constitutional problem existed in the bar on judicial review because the age-old doctrine of sovereign immunity precluded *any* suit against the government for money, whether or not constitutional claims were involved, unless Congress had explicitly waived the sovereign's immunity.[72] Congress had not done so here.

The suggestion of broad congressional authority to limit judicial review implicit in the *Bartlett* dissent was reinforced by Judge Bork's position—this time in the majority—in another recent case, *Haitian Refugee Center v. Gracey*.[73] In that case he asserted that separation of powers required the judiciary to show extreme restraint in exercising its power to decide cases and controversies, even those involving individual liberties.[74] Judge Bork rejected, for lack of standing, a constitutional challenge by a group advocating the rights of Haitian refugees to an executive branch program of interdicting Haitian refugees on the high seas. After first acknowledging that the group had shown an injury to its rights of association and that under traditional causation rules the injury was traceable to the interdiction decree, he still found its showing insufficient for standing. Judge Bork made that finding on the basis of an independent requirement, which he said "follow[s] directly from

71. *Id.* at 703 (emphasis in original).
72. *Id.* at 713 (Bork, J., dissenting).
73. 809 F.2d 794, 804-07 (D.C. Cir. 1987).
74. *Id.*

the separation of powers principle,"[75] that an organization claiming interference with its relationship to third parties must show that the *purpose*, not just the *effect*, of the challenged governmental action was to disrupt that relationship. Judge Bork elaborated: " '[C]ausation' . . . is something of a term of art, taking into account not merely an estimate of effects but also considerations related to the constitutional separation of powers as that concept defines the proper role of courts in the American governmental structure."[76] The purpose requirement, said Judge Bork, "implements separation of powers because it is necessary to prevent the virtually limitless spread of judicial authority."[77] His two fellow panel members declined to follow this aggressive lead. Judge Buckley came to the same result applying established standing criteria[78] while Judge Edwards dissented.[79] Subsequently, the Supreme Court indicated in a different case that it would not apply such a test either.[80]

These two cases illustrate the extremes in the way judges of a single circuit regard the separation of powers mandate. Judge Edwards views it as a mandate to courts to enforce the Bill of Rights and other constitutional guarantees of individuals and to assure that power is not aggregated disproportionately in any one branch of government. Judge Bork views it as a control the judiciary should impose upon itself to prevent enlarge-

75. *Id.* at 807-11.

76. *Id.* at 801.

77. *Id.* at 805.

78. *Id.* at 818-20 (Buckley, J., concurring).

79. *Id.* at 826-27 (Edwards, J., concurring and dissenting).

80. In Meese v. Keene, 107 S. Ct. 1862, 1864 (1987), a California Senator challenged the constitutionality of a federal statute pursuant to which the Attorney General labeled three films about acid rain and nuclear war "political propaganda." The Senator wished to exhibit these films to viewers but alleged that the "political propaganda" label affected his relationship with his constituents, thereby lessening his chance for reelection and otherwise damaging his reputation in his community. *Id.* Plaintiff did not allege, and could not have shown, that the purpose of the Attorney General's decision to label the films as "political propaganda" was to injure his relationship with his constituents. *Id.* at 1867. Nevertheless, the Supreme Court held that plaintiff had standing to bring the constitutional challenge. *Id.* at 1869. The Supreme Court applied the traditional causation inquiry: whether plaintiff's injury is fairly traceable to defendant's allegedly unlawful conduct. *See id.*

Moreover, the Supreme Court cited with approval a decision of this circuit holding that a film distributor whose "potential customers declined to take the film because of the classification," had standing to raise the same constitutional challenge to the labeling. *Id.* at 4589 n.9 (citing Block v. Meese, 793 F.2d 1303, 1308 (D.C. Cir. 1986)). By indicating that the film distributor had standing, the Supreme Court appeared to reject the Bork purpose requirement.

ment of its own powers but should be slow to impose upon the other two branches when they are allegedly enlarging their powers. The Founding Fathers, I think, would have been stunned by this. Their premise was that each branch would from time to time seek to expand its own powers but that these acts would be contained by the checks and balances inhering in the other branches. I doubt the Founding Fathers envisioned that the judiciary would focus so intently on limiting its own power at the same time it conceded the other branches large doses of unreviewable power. Were it so, what has historically been considered a paramount function of the judiciary—to enforce the Bill of Rights on behalf of all citizens against the infringements of the political branches—would be ominously at risk.

Still another unsettled piece of the separation of powers puzzle is whether the principle of separation of powers can survive in a country increasingly dominated by national security concerns. The Framers worried originally about an all-powerful legislature, but Jefferson accurately predicted that "[t]he tyranny . . . of the executive will come in it's [sic] turn."[81]

There can be little doubt that the executive branch is now in the ascendancy. The executive controls the bureaucracy and the military, spends the money, and has access to the expertise and information that defines power. In particular, the mounting threat of aggression or subversion from abroad, as a practical matter, results in the exercise by the executive of more and more unreviewable power. In the words of Arthur Schlesinger,

> Confronted by presidential initiatives at home, Congress and the courts—the countervailing branches . . . under the separation of powers—have robust confidence in their own information and judgment. But confronted by presidential initiatives abroad, Congress and the courts, along with the press and the citizenry, generally lack confidence. . . . Consequently, in foreign policy the disposition has been to hand over power and responsibility to the president. . . . The imperial presidency, once a transient wartime phenomenon, has become . . . institutionalized.[82]

While the judiciary has shown considerable independence in resisting the inroads on judicial review of the political question doctrine, the mere mention of national security often causes courts to turn tail and run. National security is the real

81. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 621 (1971).

82. Schlesinger, *The Imperial Temptation*, NEW REPUBLIC, Mar. 16, 1987, at 17.

reason, I believe, why we will decide a *Japanese Whaling* case but not a War Powers case. This tendency to retreat in the wake of national security claims is troubling in an age where virtually every executive action can legitimately claim some national security component. And even on those occasions where courts *do* entertain a case in the field of foreign affairs, they often avoid searching review.

Yet not long ago the Supreme Court in the *Pentagon Papers* case insisted on judging for itself whether the national security risks outranked the constitutional right of press freedom.[83] Justice Brennan emphasized that "no prior judicial restraints of the press [may be] predicated upon surmise or conjecture that untoward consequences may result."[84] Justice Black added, "I can imagine no greater perversion of history" than that "the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights."[85] Justice Marshall concluded: "It would . . . be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."[86] Even Justice Stewart, who believed that the "Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, [and] the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully,"[87] ultimately decided for himself that the danger of revealing the papers' contents did not outweigh the values of permitting their publication.[88]

Regrettably, the spirit of the *Pentagon Papers* case may be spent. Later cases, such as *Regan v. Wald*,[89] have fostered a doctrine of executive infallibility in the field of foreign relations and national security. In *Regan* the Supreme Court held

83. New York Times v. United States, 403 U.S. 713, 725-26 (1971) (per curiam) (refusing to enjoin newspapers from publishing the contents of the Pentagon Papers).

84. *Id.* (concurring) (footnote omitted).

85. *Id.* at 716 (concurring).

86. *Id.* at 742 (concurring).

87. *Id.* at 728-29 (concurring).

88. *Id.* at 730. Justice Stewart concluded: "I cannot say that disclosure of any of [the Pentagon Papers] will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us." *Id.*

89. 468 U.S. 222, *reh'g denied*, 469 U.S. 912 (1984).

that "[m]atters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[90]

In our own circuit, the separation of powers concept has been invoked repeatedly in deference to the executive in cases with national security overtones. Three cases illustrate the point. *Abourezk v. Reagan*[91] involved the government's right to deny temporary visas to visiting aliens based on its belief that their membership in Communist organizations would threaten the nation's foreign policy objectives. One subsection of the Immigration and Naturalization Act of 1952 requires the secretary of state to certify that admission of such aliens would be "contrary to the security interests of the United States."[92] Given that specific provision, the majority found that another more general subsection directing exclusion if the attorney general has reason to believe that the alien "seek[s] to enter the United States . . . to engage in activities which would be prejudicial to the public interest,"[93] an easier standard, could not be used to justify exclusions based on membership in a Communist organi-

90. *Id.* at 242 (internal quotation omitted). It is also interesting to compare the *Pentagon Papers* case with another, more recent Supreme Court decision involving a confrontation between the Pentagon and a first amendment claimant. In Goldman v. Weinberger, 106 S. Ct. 1310, 1311 (1986), an Air Force captain who was an Orthodox Jew claimed that an Air Force regulation forbidding him to wear his yarmulke while in uniform violated his rights under the free exercise clause of the first amendment. The majority of the Court rejected this claim, deferring to the "considered professional judgment" of the military officials that allowing yarmulkes to be worn would harm the military's interest in discipline and esprit de corps. *Id.* at 1313-14. In contrast to the *Pentagon Papers* Court, the *Goldman* Court did not articulate *how much* harm to the military's legitimate interests yarmulke-wearing would have to cause in order to justify its prohibition. Similarly, the Court did not itself undertake (or order a lower court to undertake) *any* independent inquiry on the issue of how likely it is that yarmulke-wearing would cause harm to legitimate military interests. Thus, Justice Brennan, with Justice Marshall concurring, dissented vigorously from the Court's decision:

> Simcha Goldman invokes this Court's protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God. The Court's response to Goldman's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity.

Id. at 1316. Justices Blackmun and O'Connor also thought that the Court went too far in deferring to the Pentagon in this case. *See id.* 1324-26.

91. 785 F.2d 1043 (D.C. Cir.), *cert. granted*, 107 S. Ct. 666 (1986).

92. 22 U.S.C. § 2691(a) (1982).

93. *Id.* § 1182(a) (27).

zation alone.[94]

Judge Bork dissented in *Abourezk* on the ground that normal principles of statutory construction did not apply to foreign affairs and the *Chevron*[95] principle of deference to an agency's construction of a statute applied with "special force" where the case involved a "delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs."[96] He viewed the majority's adherence to normal principles of statutory interpretation as initiating "a process of judicial incursion into the United States' conduct of its foreign affairs."[97]

The second case, *Halperin v. Kissinger*,[98] was part of a national security trilogy authored by then Judge, now Justice, Scalia. The case involved a suit for damages resulting from twenty-one months of a warrantless wiretap on a private telephone. It was the first case in our circuit to decide what criteria determine the liability of officials who violate constitutional rights in the name of national security. In an earlier Supreme Court decision, *Harlow v. Fitzgerald*,[99] the Supreme Court had set up an *objective* test for ordinary government officials that shields them from civil liability insofar as their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[100] Lower courts had held, however, that *Harlow*'s reasonable person test—a proscription against considering subjective intent—applied only with respect to the actor's knowledge of the relevant law, and not to other questions of intent.[101] For example, if the government agent undertook the challenged conduct out of racial animus, the conduct would be unlawful, and *Harlow* did not preclude judicial inquiry into the actor's subjective intent for this purpose. In the area of government wiretaps, a warrantless wiretap is lawful under both the relevant federal statute[102] and the fourth amendment if undertaken for reasons of national security. The wiretap subject in *Halperin* argued

94. 785 F.2d at 1057.
95. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
96. 785 F.2d at 1063 (Bork, J., dissenting).
97. *Id.* at 1076.
98. 807 F.2d 180 (D.C. Cir. 1986).
99. 457 U.S. 800 (1982).
100. *Id.* at 818.
101. *See, e.g.*, Kenyatta v. Moore, 744 F.2d 1179, 1183-84 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).
102. 18 U.S.C. § 2511 (1968).

that only an actual national security motivation should immunize an official from liability for constitutional wrongdoing.[103] Rejecting this argument, the court instead held that a government official purporting to act on the basis of national security need only show that his purported motive would have been reasonable under the circumstances, not that he actually believed that what he was doing was in aid of national security.

In effect, *Halperin* created a special immunity doctrine for national security cases as opposed to all other cases, a departure Judge Scalia justified on separation of powers grounds. Proclaiming that "[t]he separation-of-powers concerns that underlay *Harlow* are especially prominent in the national security field . . . [a]nd the harm produced by 'dampen[ing] the ardor of [public officials] in the . . . discharge of their duties' is particularly severe in the national security field,"[104] the panel pronounced a much broader rule for immunity in national security cases than in other constitutional violation cases. Admitting that a comparable expansion of *Harlow* in such cases would create a "massive expansion of official immunity,"[105] Judge Scalia limited it to national security cases only.

Finally, the third case, *Finzer v. Barry*,[106] involved a District of Columbia statute which banned "display[ing] any flag, banner, placard, or device designed . . . to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization" in front of an embassy.[107] In short, it permitted signs in front of an embassy only if they were supportive of the foreign country. Judge Bork's majority opinion upheld the statute, counseling superdeference to the political branches even in the area of content-based restrictions on speech: "[T]here are," he said, "certain classes of decisions which courts are institutionally less suited to make"[108] and these encompass even first amendment cases if they involve "the conduct of American foreign policy" including "defining and enforcing the United States' obligations under international law."[109] Incidentally, *Finzer* did not rest on national security grounds, but rather on the need to pre-

103. 807 F.2d at 183.
104. *Id.* at 187 (citations and internal quotation omitted).
105. *Id.* at 186.
106. 798 F.2d 1450 (D.C. Cir. 1986), *cert. granted sub nom.* Boos v. Barry, 107 S. Ct. 1282 (1987).
107. D.C. Code Ann. § 22-1115 (1981).
108. *Finzer*, 798 F.2d at 1459 (footnote omitted).
109. *Id.* at 1458.

serve the *dignity* of the embassy: "[A] court cannot lightly dispute a determination by the political branches that the statute meets important international obligations," the panel decision held.[110]

I hasten here to note that I dissented in *Finzer*. My concern was that the majority was "too willing . . . to sacrifice first amendment freedoms to the generality of political decision making in the area of foreign affairs without carefully inquiring whether international obligations and national security concerns are really implicated at all, and if they are, whether the statute fulfills those interests with the least amount of intrusion into cherished constitutional rights."[111] The Supreme Court will decide.[112]

These cases may reflect a spreading pattern of withdrawal by the courts in monitoring individual rights when national security is invoked. Terrorism, nuclear dangers, and subversion all presage more frequent assertions by the executive—and sometimes by the Congress—that overriding national security concerns disarm the courts in passing on the conflicts between government and individuals which, ironically, are likely to arise increasingly in the foreign affairs and national security context. Once again the judiciary's paramount function under the separation of powers doctrine to enforce the rights of individuals against the government may be in jeopardy.

Our circuit has undergone many changes in the past few years. I know of no swifter shift in the balance of a court of appeals in this century. It is hard to predict the future direction of separation of powers at this time. Will it be used by those determined to reinforce the judiciary's role as the protector of individual rights or by those who would erect it as a barrier to judicial oversight of the actions of the other branches? Chief Justice Marshall, almost two hundred years ago, declared in *Marbury v. Madison* that the function of the judiciary was to declare what the law is; to declare the rights of individuals against the democratic majority under a Constitution which constrains that majority by a Bill of Rights; to decide the meaning of power-conferring clauses in the Constitution; and to interpret acts of Congress. Today, many believe there is as much danger in a retreat by judges from that constitutional responsi-

110. *Id.* at 1459.

111. *Id.* at 1478 (Wald, J., dissenting) (emphasis omitted).

112. *See* Boos v. Barry, 107 S. Ct. 1282 (1987) (petition for certiorari granted).

bility through unyielding deference to an extreme view of separation of powers, as there is in the possibility that they will assume, by some as yet undefinable means, tyrannical power over government.

In this Bicentennial Year, the D.C. Circuit reflects all the tensions of this latest and perhaps gravest confrontation over the rightful place of separation of powers under our Constitution. For two hundred years the doctrine has served the Republic well by preventing the assumption of power by a single branch. More than ever, we must today be wary of revisionist constitutional theories that would threaten the historic balance among the three branches of government.

Throughout our history, events have tested the durability of separation of powers. Jefferson, the eloquent spokesperson for judicial oversight of the Bill of Rights in 1789, scarcely a decade later as President assailed the integrity and loyalty of the federal courts that sought to insure due process in the trial of Aaron Burr, calling them protectors of traitors.[113] The ideal of judicial independence and separation of powers endured, however, beyond the lifetimes and occasional changes of heart of its constitutional authors. Now, two hundred years later, in the shadow of the Capitol and the White House, the eleven judges of the D.C. Circuit, and judges everywhere in the Nation, debate the meaning and application of separation of powers to questions of individual liberties and national security unimagined by the Founders. The outcome of the debate may shape the Republic for a long time to come.

113. *See* L. LEVY, *supra* note 62, at 178.