The Oxford Commentaries on American Law

THE LAW OF THE EXECUTIVE BRANCH

PRESIDENTIAL POWER

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Series Editor

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THE LAW OF THE EXECUTIVE BRANCH

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The Oxford Commentaries on American Law:

An Introduction to the Series

Welcome to *The Oxford Commentaries on American Law*. In this series, Oxford University Press promotes the revival of the art of the American legal treatise by publishing careful, scholarly books that refine the laws of the United States, synthesizing them for the bench, for the bar, for the student, and for the citizen–while providing a foundation for future scholarship and refinement.

The treatise, sometimes called the commentary or, in its elementary form, the hornbook, is the most traditional of law books. Written for use by lawyers, judges, teachers, and students, the treatise is a source of law in itself. From the Roman *Institutes* of Gaius and for Justinian, through the great volumes on English law called the Glanville and Bracton, to the *Institutes* of Sir Edward Coke and the *Commentaries* of Sir William Blackstone, and even to their criticisms in the manuals and codes of Jeremy Bentham, treatises were – along with case reports and statutory collections – both a repository and a source of the law.

This was true in the United States throughout the nineteenth and the twentieth centuries, when the treatise was the dominant law book for the mastery of any given field. Great lawyers–the likes of Joseph Story, James Kent, Oliver Wendell Holmes, John Henry Wigmore, William Prosser, and Allan Farnsworth–wrote elegant books that surveyed the law from a unique perspective and that were read and quoted by judges, lawyers, and scholars. These books were studied by generations of students, who consulted them anew throughout their legal careers. They remain essential to understanding American law. Yet in the last decades of the 1900s, as the law book marketplace changed, treatises became less fashionable in the U.S.

Treatises remain significant to the legal systems of Europe, Asia, and South America, as well as in some specific fields of U.S. law. However, the general need for new ideas in U.S. law to incorporate changes and answer new questions has hardly grown less. Thus, the need persists for clarification in the law by careful analysts seeking to define the most useful and balanced approaches to legal rules as applied to specific situations. The purpose of such analysis is to organize, explain, and apply the most significant sources in a field of closely related laws, rather than to account for every single decision or variation in it.

The treatise is therefore a tool to describe rules and principles in the law and to organize them for applications to specific situations, in answer to questions in the law that are likely to arise. These principles and rules are derived sometimes from the statements and texts of legislators and regulators, sometimes from the practices of judges, lawyers, and officials, sometimes from the context of older legal customs, and sometimes from the logic and justice that bind the law, as understood by the author of the treatise. Treatise authors work within a tradition to create a new source of law, like Sir Edward Coke said, bringing new corn from old fields.

It is my great pleasure to work not only with the authors of these books but also with a world-class staff of professionals in the English and North American offices of the Oxford University Press, and with an outstanding editorial board. I am grateful to each of you for your care and persistence in developing this grand initiative.

Stephen M. Sheppard
Series Editor

Other Works by Louis Fisher

- *American Constitutional Law* (with Katy J. Harriger, 10th ed., 2013)
- *On the Supreme Court: Without Illusion and Idolatry* (2013)
- *Presidential War Power* (3d ed. revised, 2013)
- *Defending Congress and the Constitution* (2011)
- *Political Dynamics of Constitutional Law* (with Neal Devins, 5th ed., 2011)
- *On Appreciating Congress: The People's Branch* (2010)
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- *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (2003)
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- *Congressional Abdication on War and Spending* (2000)
- *The Politics of Shared Power: Congress and the Executive* (4th ed., 1998)
- *Encyclopedia of the American Presidency* (with Leonard W. Levy, 4 vols., 1994)
- *Constitutional Dialogues: Interpretation as Political Process* (1988)
- *The Constitution Between Friends: Congress, the President, and the Law* (1978)
- *Presidential Spending Power* (1975)
- *President and Congress* (1972)

To the William and Mary Law School

Preface

THE PRINCIPAL PURPOSE OF THIS TREATISE IS TO EXPLORE THE SOURCES and limits of presidential power. How should we determine which powers are legitimate? Do we treat judicial rulings, including those by the Supreme Court, as legitimate sources of law? We do, but what if a decision rests on a plain misconception about presidential power, often because the Court fails to properly understand historical precedents? No matter how frequently a decision is cited by courts and scholars, this treatise does not regard a judicial error as a valid source of law. Instead, the treatise has been prepared to encourage courts and scholars to revisit misconceptions and correct them.

Judicial and scholarly errors are apt to draw from secondary sources. This treatise relies on original sources and explains why and when the Court and scholarly studies misrepresent a precedent. Links are provided to original sources to permit readers to independently form their own judgment. The treatise has a second purpose. Disputes about legal and constitutional powers of the executive branch are often discussed as wholly detached categories, with one power cleanly separated from another. Issues range from the war power to federal appointments to executive privilege. An objective of the treatise is to keep seemingly distinct and autonomous categories connected to a larger framework of overarching principles and values. To do that, Chapter 1 identifies twelve fundamental concepts to provide general guidance.

A treatise on "the law" of the executive branch, with a special focus on the presidency, is somewhat misleading. Law is generally regarded as fixed, clear, and binding. Much of the law on executive and presidential power is fluid and subject to change. Moreover, few legal and constitutional powers of the President are exercised in an exclusive fashion. Most are shared with other branches, in large part or small, depending on how those branches assert their own powers. Other constraints and encouragements come from scholars, the public, and outside pressures. In the Steel Seizure Case of 1952, Justice Jackson said that presidential powers "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[1]

The scope of presidential authority has been the center of constitutional disputes since the Framing, with increased scrutiny and complexity after World War II. The breadth of presidential

[1] Youngstown Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

appointment and removal powers, the natural competition with Congress and the judiciary, control over military and foreign policy, and the capacity of the President to discharge multiple duties in a legal and constitutional manner have all been the subject of intense controversy. That power reaches to the White House, executive departments and agencies, independent commissions, and the judiciary through the appointment process.

This treatise analyzes the law of the executive branch in the context of constitutional language, the Framers' intent, and more than two centuries of practice. The result is shaped partly by litigation but also by presidential initiatives, congressional responses, and public and international pressures. Each provision in the Constitution is evaluated to determine the contemporary meaning and application of presidential power. Judicial misinterpretations are sometimes in dicta, but they can nevertheless greatly influence the perception and reality of presidential powers. The "sole organ" doctrine of *Curtiss-Wright* (1936) is one example, but there are others. This treatise identifies legal and constitutional errors and explains, when possible, why they occur. Often it is a court taking something out of context or accepting, without independent verification, executive branch assertions.

I participated in a number of issues covered in this treatise. After writing an article on constitutional issues of Presidents who impound funds, published in the October 1969 issue of the *George Washington Law Review*, the Senate Committees on Government Operations and the Judiciary asked me to assist in the drafting and eventual passage of the Impoundment Control Act of 1974. I sat behind Senator Sam Ervin at committee hearings to provide counsel, set next to him at committee markup to offer my thoughts on amendments to the bill, wrote the impoundment section of the conference report, and prepared a floor dialogue between Senator Ervin and Senator Hubert Humphrey to explain the objectives of the legislation. I received a letter and signing pen from President Nixon.

My work was not limited to defending legislative interests. At times I urged protection for the President and the judiciary. In 1985, I appeared before the House Committee on Government Operations, testifying that the Gramm-Rudman-Hollings deficit control bill encroached on presidential power. I regarded the bill as unconstitutional because it gave executive duties to legislative officers (the Comptroller General and the Director of the Congressional Budget Office). In testifying against an item-veto bill, I objected to empowering the President to cancel funds for the judiciary. I said the executive branch, in court more than any other party, should not have control over the judicial budget. I received a letter from the executive director of the Administrative Office of the U.S. Courts, thanking me for defending judicial independence. On four occasions I testified in support of legislation to give federal judges greater authority to review executive branch claims of the state secrets privilege.

In 1987, I served as research director of the House Iran-Contra Committee and wrote the sections of the final report dealing with constitutional and institutional issues. In these and other experiences, I worked on a nonpartisan basis with Democrats and Republicans and had the opportunity to meet with lawmakers, their staff, executive officials, White House and Justice Department experts, and federal judges. Participation in public conferences helped me gain a better understanding of political and legal issues. In 1994, after publishing numerous studies on secret spending, I was asked by the House Permanent Select Committee on Intelligence to testify on the confidential budget of the Intelligence Community. It was my judgment that the Constitution required the aggregate budget to be made public. In 1998, I testified three times in support of the CIA Whistleblower Act and worked with both the House and Senate Intelligence Committees on a bill that became law that year.

Over a period of more than four decades, I testified repeatedly on such issues as the item veto, the pocket veto, legislative vetoes, presidential reorganization authority, presidential removal power, executive privilege, executive lobbying, biennial budgeting, the balanced budget amendment, recess appointments, whistleblower protection, war powers, Congress and the Constitution, restoring the rule of law, and NSA warrantless surveillance. With regard to the claim that the President possesses "inherent" authority to create military tribunals, I filed three amicus briefs in the *Hamdan* litigation stating why the President lacks that authority. I filed amicus briefs on a number of other issues that arose after 9/11. After retiring in August 2010, I testified on the "Fast and Furious" issue of gunrunning, budget reform proposals, and the constitutionality of President Obama's military operations in Libya.

Acknowledgments

PRESIDENTIAL POWER HAS BEEN A PREOCCUPATION SINCE MY DAYS AS a graduate student in the 1960s, leading to my first book, *President and Congress* (1972).That interest continued during four decades at the Library of Congress from 1970 to 2010, where I served as Senior Specialist in Separation of Powers with Congressional Research Service and as Specialist in Constitutional Law with the Law Library. Over that period of time I published 20 books, almost 500 articles, and hundreds of reports at the Library of Congress. I testified 50 times before congressional committees on a range of constitutional disputes, explained in the preface. Upon my retirement in August 2010, I continue to work with congressional offices and committees. Many of my articles, books, and congressional testimony are available on my personal webpage: http://loufisher.org.

After leaving the Library of Congress it was my good fortune to join the Constitution Project as Scholar in Residence. I had been active with the Project over the preceding decade on a number of research projects, including war powers and the state secrets privilege. Shortly before my retirement, Professor Stephen Sheppard of the Arkansas Law School asked about my interest in writing a treatise on "The Law of the Executive Branch." It was an opportunity to build on what I had done and deepen my understanding. Steve guided me through the steps needed to submit a proposal for this Oxford series. Three outside reviewers offered a number of excellent suggestions to my initial outline. After finishing the manuscript, I received many thoughtful evaluations from six reviewers.

I am very pleased to dedicate this book to the William and Mary Law School. While at the Library of Congress, I taught a number of courses at the law school over a period of two decades and continue to teach there after retirement. With a close friend and member of the faculty, Neal Devins, I have coauthored two books, *Political Dynamics of Constitutional Law*, now in its fifth edition, and *The Democratic Constitution*, about to be issued in a second edition. In the course of preparing this manuscript, I had the luxury of using online sources at the law school, including HeinOnline and JSTOR, and I had access to various presidential, congressional, and judicial documents. Extra time available during retirement allowed me to carefully read and reread thousands of books and articles devoted to constitutional government. These scholarly works helped clarify and sharpen my understanding. I could not possibly identify every author, but my citations will bear witness to how much I benefited from their individual labors and insights.

Many colleagues helped me identify the issues that required analysis. Three read the entire manuscript: Reb Brownell, Mort Rosenberg, and Mitch Sollenberger. Chris Edelson read Chapters 7, 8, 9, and the Conclusions. Henry Cohen read Chapter 9 and the Conclusions. A number of colleagues read particular portions of the manuscript: Dave Adler, Curtis Copeland, Jeff Crouch, Neal Devins, Jenny Elsea, Jasmine Farrier, Mike Glennon, Joel Goldstein, Bob Havel, Henry Hogue, Chris Kelley, Mike Koempel, Harold Krent, Jack Maskell, Walter Oleszek, Dick Pious, Mark Rozell, Mike Shenkman, Bob Spitzer, Charles Tiefer, Bill Weaver, and Don Wolfensberger. They joined with others who commented on my draft table of contents, which changed on a regular basis to accommodate new topics: Moe Davis, George Edwards, Herb Fenster, Sharon Franklin, Katy Harriger, Nancy Kassop, Jim Pfiffner, Harold Relyea, and Jim Thurber. My deep gratitude to all. I greatly appreciate the exceptionally thoughtful and careful copyediting by Michele Bowman.

Note on Citations

ALL COURT CITATIONS REFER TO PUBLISHED VOLUMES WHENEVER AVAILABLE: *United States Reports* (U.S.) for Supreme Court decisions, *Federal Reporter* (F.2d or F.3d) for appellate decisions, and *Federal Supplement* (F. Supp. or F. Supp. 2d) for district court decisions. There are also citations to *Opinions of the Attorney General* (Op. Att'y Gen.), *Opinions of the Office of Legal Counsel* (Op. O.L.C.) in the Justice Department, and opinions by the Comptroller General (Comp. Gen.) of the Government Accountability Office, formerly the General Accounting Office. When citing a court ruling, I do not use the lengthy name that appears on the first page. I use the shortened version placed at the top of pages. For example, instead of McConnell, United States Senator, et al. v. Federal Election Commission, et al., I use McConnell v. Federal Election Comm'n. Second, I use the name of a case as reported and do not change the name of a position to a particular occupant. If the name of a reported case is Zivotofsky v. Secretary of State, I use that and do not change it to Zivotofsky v. Clinton. Several standard reference works are abbreviated in the footnotes by using the following system:

Elliot	The Debates in the Several State Conventions, on the Adoption of the Federal Constitution (5 vols., Jonathan Elliot, ed., Washington, DC, 1836–1845).
Farrand	The Records of the Federal Convention of 1787 (4 vols., Max Farrand, ed., New Haven, Conn.: Yale University Press, 1937).
The Federalist	The Federalist, Benjamin F. Wright, ed. (New York: Metro Books, 2002).
Goldsmith	The Growth of Presidential Power: A Documented History, William M. Goldsmith (3 vols., New York: Chelsea House Publishers, 1974).
Landmark Briefs	Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (Philip B. Kurland and Gerhard Casper, eds., Washington, DC: University Publications of America, 1978–2013).
Richardson	A Compilation of the Messages and Papers of the Presidents (20 vols., James D. Richardson, ed., New York: Bureau of National Literature, 1916).

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