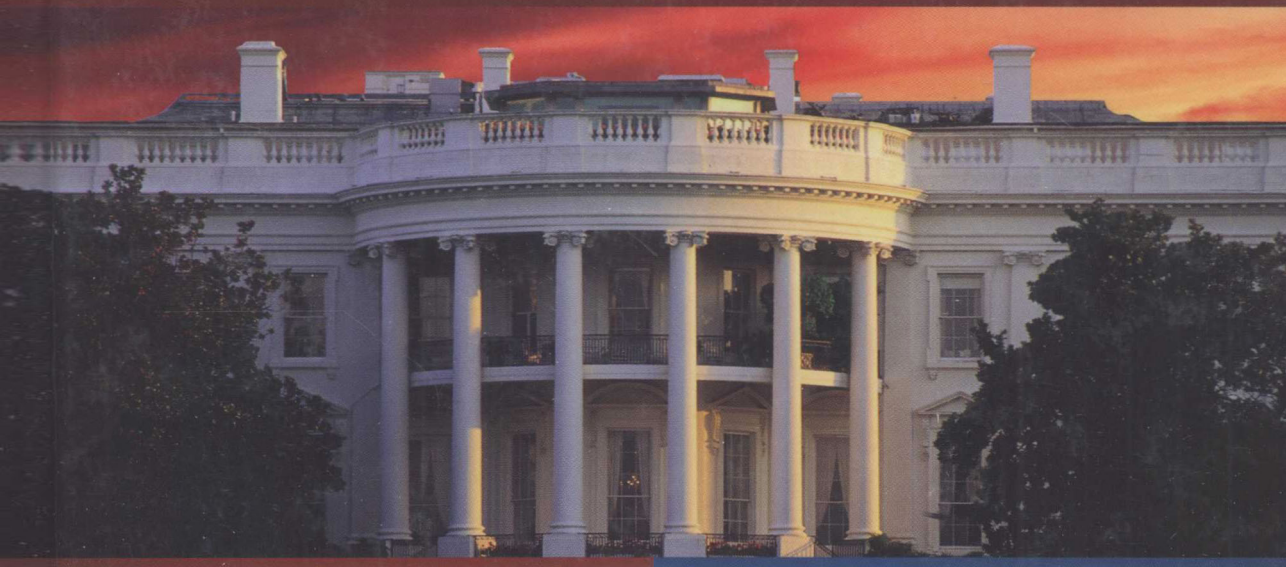
THE SUPREME COURT'S POWER IN AMERICAN POLITICS



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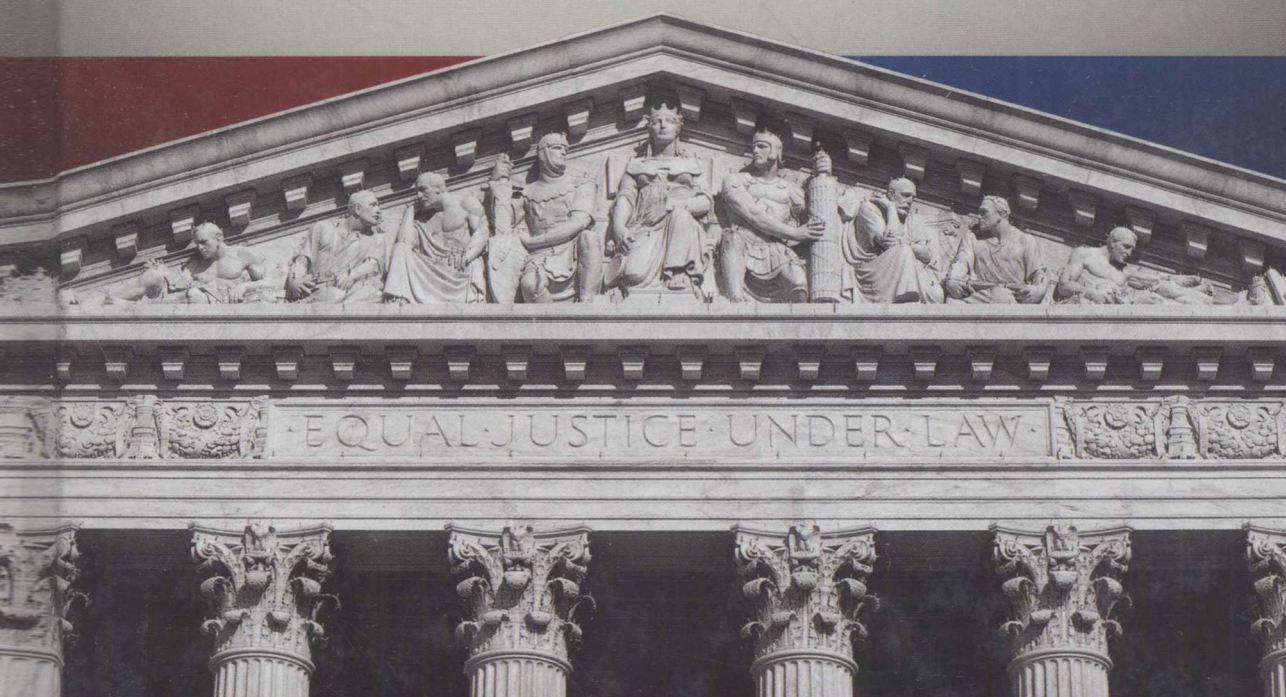
STRUGGLES FOR SUPREMACY



JULIE NOVKOV

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THE SUPREME COURT AND THE PRESIDENCY

Series Editor

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Foreword

Scholars of the Supreme Court have long known that while a particular opinion may contain powerful and even eloquent language, the words themselves mean nothing until translated into action. Chief Justice Earl Warren declared in *Brown v. Board of Education* (1954) that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal," but it took more than two decades of congressional and executive action before legalized segregation disappeared from the states. In *Gideon v. Wainwright* (1963), the Court expanded the right of counsel, but the ruling meant nothing until the states actually implemented it.

Most studies of the Court are doctrinal: they view the decisions of the Court in a particular area to see how they have developed, what rules have been created, what arguments and precedents are established. This analysis is legitimate; in fact, it is primarily what is done in law schools. Historians and political scientists, however, also look at the impact that Court decisions have had on different groups and agencies. They want to know how the Court's decisions affected the actions of the states, the president, Congress, and other parts of government and of the society—that is, how words translated into action.

The books in this series—The Supreme Court's Power in American Politics—do not ignore doctrinal issues, but focus primarily on how Court decisions are translated into practice. What does it mean, for example, in actual police work when a court says that officers must follow certain rules in gathering evidence or making arrests? What does it mean to a state legislature when the high court holds current schemes of apportionment to be unconstitutional? How does an administrative agency respond when courts hold that it has overstepped its authority?

In some areas the responses have been simple if not always straightforward. Despite all the furor raised by critics of the ruling in *Miranda v. Arizona* (1966), within a relatively short time police departments made the Miranda warning part of the routine for an arrest. On the other hand, decisions regarding school prayer and abortion have met with opposition, and the responses of state and local governments have been anything but simple and straightforward.

Judges, like the president and members of Congress, take an oath to preserve, protect, and defend the Constitution. Though the Constitution is quite explicit in some areas (such as the length of a term of office), the framers deliberately wrote other provisions in broad strokes, so the document could grow and adapt to the needs of future ages. Determining what specific meanings should be attached to various constitutional clauses is a task that falls not only on the courts but on the other branches of government as well. The meaning of the Constitution in our times is the result of the interaction of the three branches of the U.S. government.

At the 1787 Constitutional Convention in Philadelphia, the framers paid a great deal of attention to Article I, spelling out in detail the powers and limitations of the legislative branch, because they knew a great deal about state assemblies; in fact, many of them had been members of colonial legislatures. They wrote a far shorter Article III, since everyone seemed to know what courts should do. But they had no experience with the executive; colonial governors had been royal appointees, and there had been no executive during the time the country was governed under the Articles of Confederation. Of the articles defining the three branches of government, that dealing with the presidency is by far the vaguest. Historians believe that the framers assumed George Washington would be the first president, and they wanted to leave him as much flexibility as possible in creating both the Office of the President and the executive branch.

Washington did in fact delineate the basic outlines of the executive branch, and many of his decisions are still visible in how the president governs. But the apparent broad grants of authority—"The executive power shall be vested in a President of the United States . . . [He] shall be Commander in Chief of the Army and Navy of the United States . . . [and] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."—left many questions unanswered. Could the president issue executive orders that had the force of law, or was all law-making authority vested in the Congress? When Congress made a law and delegated the details of implementation to the president, how much discretion did he have in choosing to implement certain provisions? What exactly did it mean to be "commander in chief," and what powers did a president assume under that authority?

Prior to the Civil War, such questions rarely showed up on the Supreme Court's docket. Government was smaller in those days, and it exercised few of the powers we are so accustomed to in our day. Abraham Lincoln was the first president to test the limits of authority granted to the chief executive in Article II, and he did so in the highly unusual circumstances of a civil war. Things quieted down in the latter part of the nineteenth century, but wars and economic crises since the early twentieth century have led presidents to expand what they see as the inherent powers of their office, often running into a Court that says they have gone too far. Almost every president since Franklin Roosevelt has had one or more of their policies challenged in the courts, and presidents have often been told that they have exceeded their constitutional authority. The onset of the war against terror following the attacks of September 11, 2001, has led presidents to claim wide powers under the Commander in Chief Clause, and those powers, especially in regard to the detention of enemy aliens, have been delineated in a series of court cases. President Barack Obama found the signature piece of his program, the Affordable Care Act, challenged and limited in the Court.

Julie Novkov's examination of the often tense relationship among the Judiciary, Congress, and the Executive not only looks at these conflicts but also sets them in a broader historical context. Her clear discussion of the cases and the policies that led to them will help the reader to understand the nuances as well as the broad strokes of the Supreme Court's power in American politics.

Melvin I. Urofsky
October 2012

Preface

In 1958, the United States Supreme Court considered the case of *Cooper v. Aaron,* 358 U.S. 1, four years after the Court had declared state-mandated racial segregation in the public elementary schools to be unconstitutional in *Brown v. Board of Education,* 347 U.S. 483. In Little Rock, Arkansas, the school board desegregated the all-white Central High School by ordering nine black children to attend the school during the 1957–1958 school year. In response to *Brown,* the state of Arkansas had amended its constitution in 1956 to command the General Assembly to resist the *Brown* decree "in every Constitutional manner." The General Assembly dutifully passed laws condemning desegregation and relieving Arkansas's children from any duty to go along with desegregation plans.[1]

The day before the school year began, the state's governor, Orval Faubus, ordered the Arkansas National Guard to deploy at Central High School to keep it "off limits" to all black students. The next day, the National Guard prevented the nine black children from entering the school. As the controversy grew and the angry white mobs assembling at Central High School each day became increasingly threatening, President Dwight Eisenhower acted. Federal troops were sent to Little Rock, and eight of the nine black children completed their school year at Central High while attending school under armed guard. The school board petitioned to revoke the desegregation plan for the following year in light of the threats and disruption, and the district court granted this relief.[2]

The black plaintiffs resisting segregation, however, refused to give up. They appealed this ruling, and the case reached the U.S. Supreme Court in the summer of 1958. The Court reversed the district court's ruling and mandated the continued desegregation of the Little Rock schools. In issuing its ruling, the Court had strong words for the state officials who thought that they had the authority to challenge the justices' interpretation of what the Fourteenth Amendment commanded. In a decision signed by every justice, the Court announced:

> . . . the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.

They, and they alone, had the right and authority to determine as a final matter what the Constitution meant.[3]

This outcome and the Court's portrayal of its own role fit within the Constitution's supremacy clause, which presents the Constitution as the supreme law of the land and can readily be understood to guarantee the primacy of the federal government over the states.

Yet consider also a later set of lawsuits: those brought on behalf of prisoners captured in the global conflicts concerning terrorism who were imprisoned by the U.S. military at Guantánamo Bay. As Chapter 8 shows, in the rulings the Court issued, the justices continued to press the idea that they had the ultimate authority to interpret the Constitution's clause protecting even these prisoners' rights to habeas corpus. They also ruled that Congress could not grant the president unlimited authority to deal with enemies not classified as prisoners of war, and importantly for our purposes they continued to insist that they, as the justices of the Supreme Court, had the final authority to determine where the boundaries between Congress and the presidency were drawn and what powers Congress could and could not delegate.[4]

For many individuals who have grown up under American law, the Supreme Court's presentation of itself as the ultimate and final interpreter of U.S. laws and the Constitution is not surprising or controversial. However, the Court's ruling in *Cooper v. Aaron* does not reflect the authority that the U.S. Supreme Court has held over the course of American history.

Consider, for instance, the political turmoil in the early republic and how it affected the relationship between the executive and judiciary. When Thomas Jefferson became president in a controversial election ultimately settled in the House of Representatives, his Democratic-Republican Party worked politically to try to limit remaining Federalist influences in American government, particularly focusing on the courts. The Federalists had loaded up the bench with trusted political believers prior to leaving the executive branch and turning over a majority in Congress to Jefferson's party. Jefferson and his allies argued that the Supreme Court's interpretations of the Constitution were binding only on the parties to the case they were deciding, or at most were binding on the judicial branch. The Democratic-Republican dominated Congress went so far as to cancel the Supreme Court's 1802 term entirely, preventing it from hearing or ruling on any of the political controversies that were brewing. They also impeached Federalist Justice Samuel Chase because of his political activities, though the Democratic-Republican Senate declined to remove him from office.[5] While Chief Justice John Marshall ultimately used his position to define a clear and independent role for the federal courts, under his leadership the courts only rarely issued direct challenges to either Congress or the president, recognizing that in such confrontations, the courts had a low probability of ultimate success.

One interesting exercise for students of the Constitution is to look at the document itself. Many Americans can readily name the three branches of government that the Constitution creates, and can recognize this structure in the states they inhabit. But what does the Constitution tell us in its own structure and words about the importance of each branch? As an authorizing document, the Constitution gives power to the national government. Any power not listed is presumed not to be held by the national government (within some limits that will be discussed extensively in this volume). Significantly, the Constitution begins Article I with the branch of government the authors thought would be the most influential—the Congress. Article I's ten sections explain how members of the House and Senate are to be elected and, generally, how they are to perform their legislative duties, but sections 8, 9, and 10 explain in very

specific terms the various powers that Congress has, list what Congress cannot do, and draw the boundaries of state power to prevent it from encroaching on national authority. Article II, dealing with the executive branch, is shorter and does not provide such a lengthy list of powers for the president, though it does clarify that the president's civilian authority must take precedence over military leadership. Article III, addressing the judiciary, contains only three sections. The only court that the Constitution establishes is the U.S. Supreme Court. Congress is directed to establish other courts as it sees fit, and even the number of justices and lower federal judges is left to Congress to decide.

What can we conclude when we place this early history alongside how we currently observe the three branches of government and their relationships with each other? First, changes over the course of American history have led to a much stronger and more independent federal court system than the authors of the Constitution likely envisioned. And the executive branch has also become the constitutional home for a vast, powerful, and complex bureaucracy that touches on practically every facet of American life, from the water we drink, to the air we breathe, to the ways we work and learn. Considering executive-judicial relations helps to illuminate how the bare structure laid out in constitutional text became the framework for the robust and powerful institutions that operate in today's world. In learning about these transformations, we must attend carefully to how the United States ended up with three relatively equal and powerful branches of government with large spheres of responsibility and influence. Why not instead a strong and primary legislative branch that relied upon a somewhat weaker executive to implement its policies and a limited court system to interpret disputes concerning these policies? Both history and structure have produced these outcomes.

The Structure of Executive-Judicial Relations in the United States

To understand the relationship between the presidency and the courts, most analysts turn first to the text of the Constitution itself. The Constitution lays out the specific and general powers granted to each branch. With but a few exceptions, it *authorizes* the powers held by the national government. Implied in this structure is the idea that the national government does not have powers or authority that the Constitution does not outline for it. This structure is different from that of state constitutions. These constitutions operate under the classic concept of the social contract, according to which people give up some of their individual liberty to establish a government with the power to provide for their health, safety, and welfare. State constitutions rest upon a reservoir of police power, and the documents themselves generally express *limits* on what the state may do with this police power.

The following table presents the powers and obligations that the Constitution allocates to the executive branch and the judiciary. As is evident, the Constitution is far more specific when it explains executive power.

Table 1 Textual Allocation of Powers to the Executive Branch and the Judiciary

EXECUTIVE BRANCH (ARTICLE II, Sections 2 and 3)	*JUDICIAL BRANCH (ARTICLE III, Section 2)*
Act as Commander in Chief	Decide cases in law and equity arising under the Constitution, the laws of Congress, and treaties
May require opinions from officers in executive department (implies the power to create a cabinet)	Decide all cases affecting ambassadors, public ministers, and consuls
Issue pardons	Decide all cases of admiralty and maritime jurisdiction
Make treaties (with advice and consent of the Senate)	Decide controversies to which the United States is a party
Nominate and appoint officials	Decide controversies between two or more states
Fill vacancies during congressional recesses	Decide controversies between a state and citizens of another state
Obliged to report to Congress on the state of the union	Decide cases between citizens of different states
May recommend legislation to Congress	Decide controversies between citizens of the same state claiming lands under grants of different states
May convene Congress	Decide controversies between a state or its citizens and foreign states, citizens, or subjects
May adjourn Congress	
Receive ambassadors and public ministers	
Take care that the laws be faithfully executed	
Commission officers	

The Constitution's text clearly separates executive from judicial functions and allocates these functions specifically to each branch. Yet it also textually provides means for the executive and judiciary to check each other. The president appoints all Article III judges (albeit with the advice and consent of the Senate) and is to "take care that the laws be

faithfully executed." The Faithful Execution Clause does not state whose definition of "faithful" should prevail, but the president clearly has the first opportunity to articulate a vision of what the law means, since the courts do not have the power to review laws in the abstract but must wait for a case or controversy. The president can also override some judicial functions through her or his exercise of the power to pardon those convicted of federal crimes.

The Constitution does not provide as many clear judicially based checks on the executive branch, but the judges and justices appointed have life terms during good behavior. Neither the president nor the Congress can remove them even if the nation undergoes drastic political change during a particular election cycle. Federal judges also have the power to adjudicate disputes involving the exercise of executive authority by ministers, consuls, and ambassadors. The Constitution makes it clear that the courts may decide any disputes in which the United States itself is a party, even if the dispute arises from some form of executive action. In the event of an impeachment of the president leading to a trial in the Senate, the chief justice of the United States presides over the trial.

Another way to think about the place of the executive branch and the judiciary in American politics is to compare this system to other democratic systems. In parliamentary systems, the legislature is clearly the foremost branch of government. The principal executive officer, rather than an independent actor, is often the prime minister, who comes from the dominant party in the parliament. A prime minister is thus responsible both for advancing her or his party's legislative agenda and ensuring that this agenda is executed through her cabinet officers' actions. Some parliamentary systems, such as India's, do have a president who serves as the chief of state, but the parliament still retains significant control over major policy decisions.

Parliamentary systems may, however, be compatible with strong courts. In Canada, for instance, with the adoption of the Charter of Rights and Freedoms in 1982, cases adjudicated by the high court produced what scholar Charles Epp describes as a "dramatic rights revolution."[6] And in Europe, most national governments must also operate under the scrutiny of the international Court of Justice of the European Union and the European Court of Human Rights. One factor in the strength and independence of courts is how the judges are selected and whether they have limited terms, but as the example of Canada shows, even when a parliament appoints judges, a court may achieve significant independence and authority.[7]

This discussion suggests that how governments work on the ground depends upon more than the text of the governing document (or, in some cases, the shared set of unwritten assumptions and agreements that contributed to the founding of a government). Rather, the balance of power and range of independence of branches of government exist within some broad parameters set through the founding. In turn, the operation of limits and boundaries between branches depends upon how the branches interact practically in the political and legal spheres over time, as well as in response to the unique sequence of challenges and opportunities that each nation faces over the life of a governmental system.

Spheres of Presidential Authority

Returning to the balance as it works in the United States, the informal and formal allocation of authority to execute the law to the presidency and authority to interpret the

law to the courts has contributed to the dynamic development not only of the relationship between the presidency and the courts but also of the United States as a nation. In very simple terms, the executive's power to act and the courts' power to interpret and adjudicate set up numerous opportunities for the branches to encounter each other. Most of these encounters have occurred around three main spheres of presidential authority.

Sovereignty

The executive branch is the most significant face of national sovereign power. The Constitution establishes the federal government as supreme within the sphere of the powers it allocates, but when the federal government is actually exercising these powers, the executive branch frequently provides the motive force. Congress may pass a law mandating a particular set of safety standards in the workplace, but the standards themselves will be enforced by the Occupational Safety and Health Administration, which falls within the executive branch's Department of Labor. If the Supreme Court orders the states to stop doing something because the Court views it as unconstitutional, the executive branch decides how aggressively to enforce the order. For example, after the Court had invalidated all state laws against interracial marriage in 1967, the Nixon Administration joined a lawsuit brought by a black man and his white fiancée in Alabama to force the local justice of the peace to provide them with a marriage license.[8] Most notably, though, the executive branch, and the president in particular, articulate and implement U.S. national interests and policies in visible and concrete ways.

Emergency Power

This role is even more evident in the second sphere of presidential authority, that of emergency power. Because the executive branch is unified in the person of the president, executive authority incorporates the capacity to respond to any emergency that requires some rapid action or change of policy. Congress must meet to pass statutes or resolutions, and the courts must hear evidence in trial cases or review appellate records. While Congress or the courts can expedite these actions (which has occurred frequently in American history), they still take some time. The president can act immediately by issuing an executive order (if consultation with an executive agency is unnecessary) or a directive (if such consultation is necessary). For instance, after the attacks on the United States occurring on September 11, 2001, President George W. Bush issued Proclamation 7463, declaring a national emergency, and Executive Order 13223, readying the United States' military forces on September 14. Congress passed its own broad and fairly simple authorization for the use of military force against the perpetrators and their supporters four days later, on September 18, 2001.

Expressed and Implied Powers

The third sphere consists of the president's express and implied powers. Article II identifies several powers that the president holds either exclusively or with some need for collaboration with Congress. Table I summarizes these powers. Most of these powers are expressed in Article II, section 2: serving as commander in chief, granting pardons, making treaties, appointing ambassadors, ministers, consuls, federal judges, and other officers, and making recess appointments. Article II, section 3, also grants the president the

power to convene sessions of Congress and to adjourn them when the two houses disagree, to receive ambassadors and ministers, and to commission officers of the United States. Article I expressly grants the president the power to veto laws, but allows Congress to override vetoes.

Implied powers arise primarily from the president's obligation in Article II, section 3, to ensure that the laws of the United States are "faithfully executed." Under this general command, the executive branch has gradually accumulated broad authority for a breathtaking array of administrative functions managed through cabinet-level departments and other administrative agencies established by Congress. These responsibilities continue to grow, as witnessed by the recent establishment of the Consumer Financial Protection Bureau. Presidents have argued over the years that their powers as commander in chief and as the principal negotiator of treaties, as well as their responsibilities in times of emergency, imply additional authority to determine the course of American foreign relations. Presidents have also traditionally presented a budget to Congress, though Congress has not felt bound by presidents' budgets when exercising its own constitutional responsibilities. As this book will detail, the scope and extent of implied powers are often a point of significant disagreement between the president and the Congress, at times requiring resolution by Supreme Court.

Outline of the Book

The chapters of this book explore the facets of the executive-judicial relationship, both in the course of garden variety concerns about the organization and implementation of domestic politics and through controversies over executive management of emergency situations. Chapter 1 introduces the subject briefly through a discussion of major structural issues. Chapter 2 addresses executive prerogative, or the power of the president and her or his agents to act autonomously, and the Court's management of this power. Chapter 3 discusses the president's power to appoint and remove officers. Chapter 4 traces the historical process of institutionalization within the executive branch, showing how executive powers were routinized and bureaucratized. Chapter 5 also deals with the institutionalization of the executive branch but tells the story from the congressional side, showing how Congress has ceded significant authority to the executive branch to direct the administration of policy. Chapter 6 traces the rise of the administrative state directed by the executive branch and the corresponding decline in legislative direction and management. Chapter 7 takes up the relationship between Congress and the executive branch in negotiating government budgets and spending.

The book then turns from routine domestic management to the management of crisis, war, and foreign relations. Chapter 8, the longest chapter, outlines the executive's power in times of emergency, exploring the debates over the extent to which emergency situations justify a broader scope for executive autonomy. Chapter 9 explores the president's power to manage relations with other nations and international governance organizations, highlighting the tensions between the executive branch and Congress over the direction of foreign policy. Chapter 10 explains how the three branches of government collaborate and at times struggle over war making and outlines the scope of the president's authority as the commander in chief of the armed forces.

From these subjects, the book transitions to an exploration of more direct tensions between the courts and the president, and finally to the direct rebuke of impeachment. Chapter 11 explores executive claims about the necessity of secrecy, and outlines how the courts have developed criteria through which to adjudicate claims of executive privilege. This chapter also addresses the executive's power to pardon, thereby relieving individuals of the consequences of adverse legal outcomes. Finally, Chapter 12 addresses the executive branch's claims of immunity from the legal process, and outlines the alternative legislative checks of censure and impeachment.

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Julie Novkov

NOTES

1. *Cooper v. Aaron,* 358 U.S. 1 (1958).
2. *Cooper v. Aaron.*
3. *Cooper v. Aaron.*
4. See *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006); *Boumediene v. Bush,* 553 U.S. 723 (2008).
5. As the Constitution dictates, removing a federal official from office through impeachment is a two-step process similar to indictment and conviction in ordinary criminal trials. First, the House must vote to impeach the person on at least one count. Once this has occurred, the person is tried in the Senate, which votes on whether to remove her or him from office.
6. Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).
7. Epp, *The Rights Revolution.*
8. *U.S. v. Brittain,* 319 F.Supp. 1098 (N.D. Ala. 1970).

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