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This book analyzes the extent to which the Supreme Court has expanded presidential authority beyond constitutional boundaries. On some issues, such as the decision in 2014 against recess appointments by President Obama, the Court not only checks executive power but does so unanimously. Where judicial support for independent presidential authority has been particularly noticeable is in the field of external affairs, including the war power, treaty negotiation and termination, the state secrets privilege, the power to recognize foreign governments, and the broad area of national security policy.

The Court’s advocacy of independent presidential power in external affairs rests not on the constitutional text and the Framers’ intent but on plainly erroneous dicta and personal views by Justices that American safety is enhanced by trusting in presidential actions abroad. The record offers no evidence to support that confidence. The Court’s record in support of presidential power has been especially strong from 1936 to the present time. No such preferential pattern exists for judicial rulings favoring congressional authority. As a result, the Court weakens the constitutional system of checks and balances and puts at risk the rights of individuals and groups affected by presidential initiatives.

This pattern of judicial rulings has been recognized by scholars for a number of decades. A book by Harold Koh in 1990 concluded that after the Vietnam War, the Supreme Court “has intervened consistently across the spectrum of United States foreign policy interests to tip the balance of foreign-policy-making power in favor of the president.”1 In an article published in 1996, David Gray Adler correctly noted that the “constitutional blueprint assigns to Congress senior status in a partnership with the president for the purpose of conducting foreign policy,” but presidential power in foreign relations had grown substantially as a result of “judicial decisions that are doubtful and fragile.”2 Writing in 2016, David Rudenstine charges that decisions by the Supreme Court in the field of national security have denied a remedy to injured individuals, insulated unlawful conduct, needlessly reinforced a

secrecy system, undermined the possibility of transparency, and eroded democratic values.\textsuperscript{3} Through its decisions, the Court “has effectively elevated the executive in national security cases above the law.”\textsuperscript{4}

My book studies the judicial record from 1789 to the present. For nearly a century and a half, the Supreme Court did not indicate a preference for which of the two elected branches should dominate in the field of external affairs. However, from the 1936 decision in \textit{Curtiss-Wright} forward, the pattern is quite clear that the Court regularly offers support for independent presidential power in times of “emergency,” or what the Court generally calls issues of national security. The damage this has done to democracy and constitutional government is profound and requires close analysis.

To fully appreciate the Court’s understanding of presidential power, it is necessary to study not merely cases that specifically address external affairs. Attention is also needed on issues of domestic policy, including impoundment of funds, legislative vetoes, item-veto authority, the issue of presidential immunity in the Paula Jones case, recess appointments, and immigration initiatives by the Obama administration. In these cases, federal courts have often pushed back against claims of independent presidential power.

I have written about these issues for many decades, including articles explaining the judicial error included in \textit{Curtiss-Wright} about the “sole organ” doctrine. After noticing that the D.C. Circuit in 2013 relied five times on that doctrine in upholding presidential power in \textit{Zivotofsky v. Secretary of State}, I filed an amicus brief with the Supreme Court on July 17, 2014, setting forth in detail why the doctrine is a plain misconception and asking the Court to correct the error. The Court did so a year later, in \textit{Zivotofsky v. Kerry}, but chose to uphold presidential power by reiterating other erroneous dicta from \textit{Curtiss-Wright} and creating a new judicial model that is close cousin to the sole-organ doctrine. Those issues are addressed in Chapter 14 of this book.

Chuck Myers of the University Press of Kansas provided excellent guidance on the general theme of the book and individual chapters. I benefited from two outside reviewers who read the book closely: Mitchel Sollenberger of the University of Michigan at Dearborn, and Richard Pious, professor emeritus at Barnard College. A number of colleagues and friends offered important suggestions, including the particular cases that have defined and enlarged presidential power from 1936 to the present time. My thanks for valued and insightful recommendations by Dave Adler, Reb Brownell, Henry Cohen, Jeff Crouch, John Denvir, Neal Devins, Mary Dudziak, Chris Edelson, John

\textsuperscript{3} David Rudenstine, \textit{The Age of Deference: The Supreme Court, National Security, and the Constitutional Order} 316 (2016).

\textsuperscript{4} Id., 7.
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.) and Opinions of the Office of Legal Counsel (Op. O.L.C.) in the Justice Department. Several standard reference works are abbreviated as follows:


SUPREME COURT EXPANSION
OF PRESIDENTIAL POWER
From their study of history, the Framers understood that the decision to initiate military actions against foreign nations should not be left to single executives. They knew that war is the nurse of executive aggrandizement and a threat to individual liberty. John Jay’s expertise in foreign affairs might have made him sympathetic to unilateral executive actions, but he bluntly warned in Federalist No. 4: “It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it.” Absolute monarchs, he said, “will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Those and other motives, “which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”

Was Jay speaking purely of attitudes and understandings of the eighteenth century, with no relevance to contemporary conditions of the twenty-first century? No. He was talking about fundamental human nature. Has it changed? Are we better able today to support unilateral decisions by single executives to take the country to war and play a dominant role in foreign affairs? An informed judgment comes not from theoretical models but by studying how Presidents actually function in office, particularly after World War II.

Consider the record from 1950 to the present: Harry Truman as the first President to go to war (against North Korea) without coming to Congress for either authorization or declaration; Dwight D. Eisenhower agreeing to use covert action to topple a democratically elected prime minister in Iran, Mohammad Mossadegh, contributing to Muslim fundamentalism and anti-Americanism; John Kennedy’s miscalculations with the Bay of Pigs; Lyndon Johnson using lies and deception to escalate the war in Southeast Asia; Richard Nixon’s secret bombing of Cambodia and the Watergate scandal leading to his resignation; Ronald Reagan’s Iran-Contra scandal, requiring an independent counsel to investigate and prosecute; Bill Clinton’s impeachment for perjury and obstruction of justice (he admitted to perjury as he left office); George W. Bush going to war against Iraq on the basis of six empty claims;

Barack Obama unilaterally using military force against Libya, producing a failed state and a breeding ground for terrorism. Details on those precedents are explored in subsequent chapters.

The cost to the nation from presidential errors, misjudgments, and deceptions has been heavy, both in material terms and the constitutional values of self-government and checks and balances. The examples above are not isolated illustrations. They form a pattern that carries forth from one President to the next. Peter Shane has pointed out that “time and time again, it has become evident that Presidents, left relatively unchecked by dialogue with and accountability to the other two branches, behave disastrously. The new unilateral presidency is thus not appealing either as constitutional interpretation or as good institutional design. To put the point another way, the Framers got this right.”2 On the basis of this record, on what rational ground would we (and the Supreme Court) express confidence in vesting largely unchecked power in the President, whether in external affairs or domestic policy? As noted in a study by Harold Bruff on how Presidents interpret their constitutional powers: “Even in ordinary times, our system has recently become similar enough to a permanent constitutional dictatorship to give deep pause.”3

Supreme Court Misconceptions

Initially, the Court interpreted constitutional disputes between the elected branches without favoring presidential power over Congress. In Little v. Barreme (1804), it recognized that when a presidential proclamation in time of war conflicts with congressional policy expressed in a statute, the legislative position establishes national policy.4 Opinions from that time to the Curtiss-Wright decision in 1936 were generally careful in analyzing the relative powers of the President and Congress. For more than eight decades, however, the Supreme Court has used its decisions—including erroneous and misleading dicta—to promote presidential authority.

The distinction between a judicial holding—guided by briefs and oral argument—and extraneous dicta simply tossed in goes back to the beginning. After authoring Marbury v. Madison in 1803, Chief Justice John Marshall expressed concern in Cohens v. Virginia (1821) about the degree to which litigants were reading Marbury carelessly, failing to separate its core holding from “some

4. 6 U.S. (2 Cr.) 169 (1804).
dicta of the Court.” When it became evident that attorneys were rummaging around Marbury to find nuggets favorable to their cause, he insisted that the “single question” before the Court was whether Congress could give the Court original jurisdiction in a case in which the Constitution had not granted it. That was the core holding. Everything else amounted to dicta. It was a mystery to Justice Benjamin Cardozo how judges, “of all persons in the world, should put their faith in dicta.” There was a constant need to separate “the accidental and the non-essential from the essential and inherent.” That understanding is regularly ignored by the judiciary, both lower courts and the Supreme Court.

The custom is to cite whatever appears in a decision. Supreme Court support for independent presidential power is drawn from both judicial rulings and dicta carelessly added to holdings. Dicta can be demonstrably false, as with the sole-organ doctrine that found its way into the Curtiss-Wright decision, analyzed in Chapter 4. Scholars immediately saw the error and wrote about it decade after decade, correctly pointing out that it was being exploited by the executive branch and courts to promote inherent, independent, and unchecked presidential power. Nevertheless, the error remained firmly in place. As explained in Chapter 14, not until 2015 did the Supreme Court acknowledge this error. In doing so, it left in place other erroneous dicta from Curtiss-Wright that favor presidential power. I am unaware of Supreme Court decisions that, through error and misconception, advanced congressional power beyond constitutional limits.

The risk of judicial misconceptions about historical precedents should be well known. An article by Justice Robert Jackson in 1945 observed: “Judges often are not thorough or objective historians.” In his study of judicial dependence on history, Charles Miller warned that the Supreme Court “as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth as a criterion for communication in public affairs.” Writing in 1965, Alfred Kelly described the Court’s role as constitutional historian as “if not a naked king, no better than a very ragged one. From a professional point of view, most, if not all, of its recent historical essays are very poor indeed.” Too often Justices “reach conclusions that are plainly erroneous.” Matters have not improved with time. In an article on originalism in 1989,
Justice Antonin Scalia remarked that the judicial system “does not present the ideal environment for entirely accurate historical inquiry.”13 Justice John Paul Stevens, in a book published in 2011, wrote that “judges are merely amateur historians” whose interpretations of past events, “like their interpretations of legislative history, are often debatable and sometimes simply wrong.”14 Judge J. Harvie Wilkinson underscores judicial limitations in understanding matters of history. He explains that historians spend years studying a period of time “and investigating its nuances,” while judges have only months to decide each case “and even that time has to be divided among all the cases on the docket.”15 History professors, he points out, have the benefit of research assistants trained in the tools of historical research. Judges have their law clerks, “and although these newly minted lawyers are intelligent and capable, they are typically unversed in the historian’s methods.”16

Academic Failings

What has happened over the last eight decades to explain support for independent presidential actions that are not subject to legal and constitutional limits? Some insight comes from changes in the political science profession. From the 1930s to the 1950s, it began to break with its traditional commitment to public law, turning instead largely to behavioral studies. Instead of respecting the constitutional framework emphasized in the work of Edward Corwin, political scientists began to promote the need for presidential energy, action, and decisiveness without any legal constraints.17 This shift influences the way the presidency is taught in the classroom and discussed in newspapers and the media. Scholarly and public misconceptions easily enter the courtroom to find expression in judicial rulings.

Woodrow Wilson was one of the first to elevate the American President to a superior position to the other branches. In an early foray into scholarship, *Congressional Government* (1885), he argued that the President “is no greater than his prerogative of veto makes him; he is, in other words, powerful rather as a branch of the legislature than as the titular head of the Executive.”18 That

16. Id., 51.
modest portrayal was cast aside in *Constitutional Government in the United States* (1908), where Wilson now proclaimed about the President: “Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him.” Reaching even higher: “If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.”

Still higher: “The President is at liberty, both in law and conscience, to be as big a man as he can.” To Wilson, the President was particularly dominant in external affairs: “One of the greatest of the President’s powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation.”

It was not until World War II that we first see American scholars trumpeting the need for bold and unchecked presidential leadership. Arthur M. Schlesinger, Jr., ironically credited with exposing “the imperial presidency” (the title of his 1973 book), played a major part in manufacturing a larger-than-life U.S. President. His book *The Age of Jackson* (1945) looked to Andrew Jackson as a model for preserving democracy under the 1940s threat of world fascism. He praised Theodore Roosevelt for “ushering in a period of energetic government” and paid tribute to Woodrow Wilson for understanding the need for executive vigor and government action. His three books on *The Age of Roosevelt* praised the activism and leadership of Franklin D. Roosevelt.

Schlesinger’s *The Crisis of Confidence* (1969) continued to advocate a strong presidency. He noted that the President did not have in internal affairs “the same constitutional authority he has in foreign policy,” citing the Supreme Court decision in *Curtiss-Wright* and its reference to the President “as the sole organ of the federal government in the field of international relations.” As a historian, Schlesinger should have read John Marshall’s sole-organ speech in 1800 to see if it promoted plenary and exclusive power for the President in the field of external affairs, which clearly it did not, as explained in Chapter 4.

By 1973, Schlesinger decided it was time to issue a personal apology. He explained that especially in the twentieth century, “the circumstances of an increasingly perilous world as well as of an increasingly interdependent economy and society seemed to compel a larger concentration of authority in the

20. Id., 69.
21. Id., 70.
22. Id., 77.
23. Arthur M. Schlesinger, Jr., The Age of Jackson 188 (1949 ed.).
Presidency.” Seemed to compel? No choice? Clearly that was an overstatement. All scholars do not feel compelled to sacrifice constitutional government to independent presidential initiatives. He continued: “It must be said that historians and political scientists, this writer among them, contributed to the rise of the presidential mystique. But the imperial Presidency received its decisive impetus, I believe, from foreign policy; above all, from the capture by the Presidency of the most vital of national decisions, the decision to go to war.” The cost to the nation, individual Presidents, and the system of checks and balances should have been obvious from President Truman’s decision to take the country to war in 1950 against North Korea without ever seeking congressional authority as required by the U.N. Participation Act, followed by the escalation of the Vietnam War by President Johnson. Those issues are explored in detail in Chapters 6 and 8.

Schlesinger made it clear that his choice in promoting independent presidential power was not “compelled.” It was a personal choice: “American historians and political scientists, this writer among them, labored to give the expansive theory of the Presidency historical sanction.” Why labor for that purpose? What good would come from it, either to a particular scholar or the country? Did scholars take into account that concentrating power in the President would weaken Congress, self-government, and the system of checks and balances? All presidential scholars did not march to the same drum. As Schlesinger noted, Edward Corwin did not push the Constitution aside. Instead, Corwin denounced Schlesinger and other scholars as “high-flying prerogative men” who ascribed to the President “a truly royal prerogative in the field of foreign relations” without appreciating any legal or constitutional constraints.

Beginning in the 1950s and carrying forward for decades, other scholars who specialized in the presidency (including Clinton Rossiter, Richard Neustadt, Henry Steele Commager, and James McGregor Burns) championed independent executive initiatives unchecked by legal limits. They constructed idealized models of the presidency, supposedly designed to protect the nation from outside threats and to deal effectively with domestic crises. In the years before World War II, there was little effort by social scientists or the public to lionize the American President and manufacture heroic properties. In subsequent years, scholars began to attribute to the presidency highly romantic qualities of integrity, honesty, and competence rarely seen by those who sit in the Oval Office.

27. Id., ix.
28. Id., 124.
29. Id., 139.
Several scholars pushed back against this idealized presidency. In a paper delivered at the 1970 American Political Science Association annual meeting, Thomas Cronin poked holes in visionary models of the President. Entitled “The Textbook Presidency and Political Science,” he criticized scholars for promoting “inflated and unrealistic interpretations of presidential competence and beneficence.” Infatuation with the presidency necessarily diminished the role of Congress, the Constitution, checks and balances, separation of power, and democratic processes.31

Five years later, Cronin developed these themes in a book chapter called “The Cult of the Presidency: A Halo for the Chief.” He described the writings of Rossiter as “one of the most lucid venerations of the American presidency” and objected to Neustadt’s suggestion that if a President “lacks a consuming hunger for the office and a penchant for manipulating people, then he or she is unfit for office.”32 The final chapter of the book has a title that would have been inconceivable to Rossiter, Neustadt, Schlesinger, and Burns: “Making the Presidency Safe for Democracy.”

After the heavy costs of escalating the war in Vietnam and criminal actions in Watergate, it was unclear whether scholars would begin to reevaluate and repudiate the prevailing model of a strong and independent presidency. As explained by John Hart in 1977, there was a tendency to interpret the two crises merely as temporary aberrations by a particular President rather than something fundamentally wrong with the office.33 By the 1980s, several critiques of presidential power appeared. Larry Berman analyzed the miscalculations and deceit of President Lyndon Johnson in escalating the war in Vietnam. Manipulations of information helped discredit Johnson and his advisers, leading Johnson not to campaign for another term.34

In a 1989 study, John Burke and Fred Greenstein demonstrated how Johnson’s style of leadership compared unfavorably with Eisenhower, who better understood the reality, feasibility, and constitutionality of U.S. national security policy.35 H. R. McMaster, an Air Force major, published a scathing critique in 1998 about how the Johnson administration contributed to the failures of Vietnam because of partisan motivations, lies and deceptions, miscalculations, and timidity among the Joint Chiefs in presenting Johnson with realistic opinions.36

Richard Pious, in a 2002 article called “Why Do Presidents Fail?”—later expanded to a book in 2008—suggested that it was time to revisit many of Neustadt’s formulations, such as his distinction between the “amateur” President (Eisenhower) who first thinks of the public interest and the “professional” (Franklin D. Roosevelt) who defines the public interest in terms of his political achievements. Pious also joined with Christopher Pyle to publish a study in 1984, reissued in a new edition in 2011, that places the presidency within the constitutional framework of separation of powers and checks and balances, analyzing not merely presidential power but also legal limits.

James Pfiffner turned his attention (and ours) to presidential lies, big and small. An article published in 2004 examines statements by the Bush II administration after the terrorist attacks of September 11, 2001, designed to promote the war against Iraq. Pfiffner followed with a book published the same year looking specifically at presidential character and the propensity to deliberately deceive. In a study four years later, he repudiated the political model that permits a President to act militarily, on his own, cut free from the system of checks and balances.

How much did those studies undercut the heroic model of the President in foreign policy? Not by much. In a 2005 article, David Gray Adler analyzed introductory textbooks on American government to see how they describe the allocation of foreign affairs and the war-making power between the President and Congress. For the most part, these texts continued to teach that American foreign policy is dominated by the President and his advisers and gave little attention to close constitutional analysis or presidential failings. Public opinion and classroom teaching are unlikely to change significantly unless those who write and speak about foreign policy can highlight some basics: strong Presidents are not always good Presidents, decisiveness is not the same as sound judgment and constructive public policy, the exercise of military force can undermine the national interest, and opposition to misguided, unjustified, and unconstitutional presidential actions in national security is a high form of patriotism.

Andrew Rudalevige, in a study published in 2005, analyzed the impact on presidential power in the years after the Watergate scandal, resulting in Richard Nixon’s resignation in disgrace on August 9, 1974. Political cycles seen in previous periods returned: a resurgent Congress followed by efforts within the executive branch to reassert independent presidential power. Out of this struggle came the Iran-Contra Affair under President Reagan, with executive officials and their defendants once again insisting on presidential power in external affairs that were not subject to statutory limits, such as the Boland Amendment that denied all funds to the Contra rebels in Nicaragua.\footnote{Andrew Rudalevige, The New Imperial Presidency: Renewing Presidential Power after Watergate (2005).} Independent Counsel Lawrence Walsh devoted years to prosecute individuals for their criminal involvement (Chapter 11).\footnote{Lawrence E. Walsh, Firewall: The Iran-Contra Conspiracy and Cover-up (1997).}

In 2007, Charlie Savage analyzed how a faction of Republican loyalists in the 1970s and 1980s, concerned about challenges to presidential power after Watergate and the Vietnam War, took steps to revive unchecked executive authority. Their efforts took shape in the eight years of the Bush II administration, with Dick Cheney serving as Vice President. Determined to expand presidential power, Cheney “wanted to reduce the authority of Congress and the courts and to expand the ability of the Commander in Chief and his top advisers to govern with maximum flexibility and minimum oversight.”\footnote{Charlie Savage, Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy 8 (2007).} To achieve that goal, Cheney and his constitutional advisers relied heavily on two beliefs: the existence of “inherent” powers for the President and the notion of a “Unitary Executive.”\footnote{Id., 48, 54, 56–58, 61–62.} Those sources of presidential power rest on serious misconceptions that are examined later in this chapter.

In a book published in 2008, Gene Healy punctured the inflated hopes and dreams of an all-wise, informed, and well-intentioned President. His analysis explains why the fundamentally flawed conception of executive power makes us less safe, less free, and less constitutional. Although Healy recognizes some progress in taking leave of the age of the heroic presidency, he cautioned that “we have farther still to go before we free ourselves of our atavistic tendency to see the chief magistrate as our national father or mother—responsible for our economic well-being, our physical safety, and even our sense of belonging.”\footnote{Gene Healy, The Cult of the Presidency: America’s Dangerous Devotion to Executive Power 298 (2008).}

Presidential wars from World War II forward are analyzed by Stephen Griffin in a work published in 2013. He challenges the widespread belief that Pres-
idents and executive officials are uniquely trained and gifted to make reliable judgments in the field of foreign affairs. Yet President Kennedy’s “obsession with controlling Cuba led to a cascading series of executive blunders resulting in the most dangerous foreign policy crisis of the entire Cold War.”

President Johnson’s war in Southeast Asia was marred in part by “the truncated and inadequate policymaking within the executive branch that resulted from concealment.” Vietnam and the Iraq war in 2003 “were similar in terms of exhibiting the inherent deficiencies of executive branch decisionmaking.”

For a recent book by two law professors who promote independent presidential power, unchecked by legal or constitutional limits, one can turn to a publication in 2010 by Eric A. Posner and Adrian Vermeule. Instead of relying on Madison’s model of separation of powers and checks and balances, fortified by statutory and legal limits, they dismiss “liberal legalism.” They put their trust not in the Constitution and law but solely in public opinion and political constraints, including some kind of self-checking by the President. The authors adopt two entirely different methods of analysis. First they look realistically and concretely at the deficiencies of Congress and the judiciary and conclude that neither branch can be entrusted with national security policy. When they discuss the executive branch, particularly the President, they promote a model highly idealistic and imaginary, paying no attention to presidential errors and costly miscalculations.

Conservatives Turn to Executive Power

From the 1940s to the 1960s, those who consistently critiqued presidential power and defended Congress and self-government tended to be conservatives, including Friedrich Hayek, James Burnham, Willmoore Kendall, and Alfred de Grazia. Hayek warned that reliance on central planning by executive agencies during World War II threatened individual freedom and legislative control. To Burnham, if Congress ceased to function actively as a political institution, liberty in the United States would come to an end. De Grazia reached the same conclusion in his book published in 1967. An article by Kendall in 1960 reviewed some prevailing stereotypes, with intellectuals often

50. Id., 131.
51. Id., 246.
believing that the executive reflected “enlightened opinion” while Congress represented low principle, reaction, and unintelligence.57

By the 1970s, those conservative voices would be replaced by conservatives and neocons who vigorously championed presidential power, especially in the field of national security. Some of the early voices were Irving Kristol, Jeffrey Hart, Norman Podhoretz, and Charles Krauthammer.58 L. Gordon Crovitz, Jeremy A. Rabkin, and Terry Eastland also pressed the case for executive power as essential to combat Soviet communism.59 Among conservative scholars, however, Joseph Bessette expressed thoughtful consideration of constitutional issues and expressed appreciation for the deliberative process of Congress.60 In a volume edited with Jeffrey Tulis in 1981, Bessette placed presidential power within a constitutional framework.61 They issued a new edition in 2009 featuring many new authors.62

Mickey Edwards, who served for many years in Congress as a Republican member from Oklahoma, is another conservative who continues to defend the system of checks and balances and separation of powers. His book published in 2008 deplored House and Senate Republicans for functioning as “just another executive branch agency, waiting for orders from the president and his staff.”63 He criticized the Bush II administration for its “arrogance of power” and “an unusually high degree of incompetence.”64 From his perspective, he viewed conservatism as “inherently protective of individual rights and resistant to concentrated power, wherever it might be found.”65

Careless, Erroneous Dicta

What impact do federal court decisions have on presidential power? In reviewing more than two centuries of judicial rulings, one notices that Supreme

64. Id., 95.
65. Id., 111.
Court Justices from the 1930s forward began to interpret presidential authority not in strictly constitutional and legal terms but often by expressing personal sympathy and respect for the President. Thus, even when the Court struck down President Truman’s seizure of steel mills in 1952, analyzed in Chapter 6, concurring Justices indicated their support for possible unilateral actions by the President in future emergencies. In his concurrence, Justice Douglas distinguished between two types of Presidents: those who seized steel mills to oppress labor versus “a kindly President” (Truman) who uses seizure “to effect a wage increase and to keep the steel furnaces in production.” Why add such personal judgments in the midst of constitutional analysis? Subsequent chapters offer many examples of this growing practice.

Another pattern that emerges from the judicial record is how often a lower court, particularly a district judge, will write a coherent, disciplined decision that exerts a clear check on presidential power. But by the time the dispute reaches the Supreme Court, the constitutional issue identified and crystallized by the district judge disappears in a decision that is delivered not only by a divided Court but by a majority that consists of one concurrence after another, as with the Steel Seizure Case. If the majority opinion happens to be against the administration, one can still find in the concurring opinions language about “emergency power” and “national security” that favors independent presidential power. Technically the President may lose, but dicta in those concurrences, discussed later in the book, will be cited to promote executive power.

The Framers hoped that separation-of-power disputes would be generally resolved by the elected branches through the system of checks and balances instead of pushing controversies to the courts. On numerous occasions, executive and legislative officials fail to perform their fundamental role of respecting constitutional boundaries and principles. When Congress in 1985 passed the Gramm–Rudman deficit control bill, it authorized its Comptroller General to exercise functions that should have been left to the executive branch. As explained in Chapter 11, I testified against the legislation, pointing out that it unconstitutionally attempted to allow a legislative officer to discharge duties that were executive in nature. Yet the bill passed and entered the courts; a year later the Supreme Court in *Bowsher v. Synar* struck it down because Congress had placed executive duties with a legislative officer.

**Political Questions**

On some occasions, federal judges decide that an issue brought before them should be left to the elected branches because the dispute presents a “political