

Symposium *Bowsher v. Synar*

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SYMPOSIUM: *BOWSHER v. SYNAR*

INTRODUCTION

Alfred C. Aman, Jr. †

The papers in this symposium examine constitutionally significant separation-of-powers themes that were particularly controversial in Franklin Roosevelt's administrations and once again command our attention. The Supreme Court's decision in cases such as *Immigration & Naturalization Services v. Chadha*¹ and *Bowsher v. Synar*² have helped to resurrect questions that have been ignored, if not resolved, since the 1930s. This symposium focuses on the contemporary debate that these issues have generated, and it provides us with an array of approaches to and perspectives on that debate. As this Introduction emphasizes, that these issues have arisen before is significant, both legally and historically. The reemergence of these issues and themes invites a reassessment of many of the decisions of the Roosevelt Era and, more urgently, perhaps, it challenges us to distinguish our contemporary problems and political solutions from those of the past. It is toward this end that this Introduction sketches at least some of the parallels between the issues presented during the New Deal and those we face today.

I

BLACK MONDAY—MAY 27, 1935

1935 was not a good year for the Roosevelt Administration. The Supreme Court struck down as unconstitutional virtually all of the New Deal legislation that came before it that year.³ May 27, 1935—"Black Monday" according to Justice Jackson—was a particularly bad day. In his book, *The Struggle for Judicial Supremacy*, Justice

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¹ 462 U.S. 919 (1983).

² 106 S. Ct. 3181 (1986).

³ See, e.g., *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (Frazier-Lemke Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (section 3 of National Industrial Recovery Act); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935) (Railroad Retirement Act); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (section 9 of National Industrial Recovery Act). But see *Perry v. United States*, 294 U.S. 330 (1935) (sustaining validity of Joint Resolution of June 5, 1933, which declared gold payment contracts illegal); *Nortz v. United States*, 294 U.S. 317 (1935) (same); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935) (same).

Jackson noted that “[u]p to this time the blows delivered by the Court had come at intervals—short, to be sure, but nevertheless with breathing spaces. At the close of the Court’s term, however, on May 27, the Court struck three times.”⁴

In *Louisville Joint Stock Land Bank v. Radford*,⁵ the Court set aside bankruptcy law amendments designed to help farm owners in distress. Specifically, Congress enacted the Frazier-Lemke Act,⁶ which provided mortgagors with a modicum of relief, arguably at the expense of certain mortgagees. In declaring the Act unconstitutional as applied, a unanimous Court, in an opinion written by Justice Brandeis, held that “the Fifth Amendment commands that, however great the Nation’s need, private property shall not be thus taken even for a wholly public use without just compensation.”⁷

Of apparently even greater significance to the long-run future of the New Deal was the Court’s second decision that fateful day. *A.L.A. Schechter Poultry Corp. v. United States*⁸ involved a challenge to the constitutionality of the National Industrial Recovery Act.⁹ This was, perhaps, among the most experimental and important legislative programs devised by the Roosevelt Administration up to that point. President Roosevelt initiated the Act in a message to Congress in which he asked “for the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week and to prevent unfair competition and disastrous overproduction.”¹⁰ Congress complied, passing an Act that, among other things, gave the President broad authority to approve fair codes of competition for certain trades and industries.

The Supreme Court had already reviewed a portion of this Act earlier in the year. In *Panama Refining Co. v. Ryan*¹¹ it struck down section 9 of the Act as violative of the nondelegation doctrine. *Schechter* challenged the validity of section 3 of the Act, which delegated to the President the authority to set fair codes of competition for various trades and industries. The Court noted that “[e]xtraordinary conditions may call for extraordinary remedies,”¹² but continued, “[e]xtraordinary conditions do not create or enlarge

⁴ R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 106 (1949).

⁵ 295 U.S. 555 (1935).

⁶ Pub. L. No. 73-486, 48 Stat. 1289 (1934).

⁷ 295 U.S. at 602.

⁸ 295 U.S. 495 (1935).

⁹ Pub. L. No. 73-67, 48 Stat. 195 (1933).

¹⁰ H.R. Doc. No. 37, 73d Cong., 1st Sess. 1 (1933), *quoted in* R. JACKSON, *supra* note 4, at 110-11.

¹¹ 293 U.S. 388 (1935).

¹² 295 U.S. at 528.

constitutional power.”¹³ The Court held that section 3 of the Act unconstitutionally delegated legislative power to the Executive, stating, “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested.”¹⁴ The delegation of legislative power was so broad and seemed to involve so many private groups that even Justice Cardozo, who had dissented¹⁵ from the majority’s rather rigid application of the delegation doctrine in *Panama Refining*, concurred¹⁶ in the majority’s conclusion in *Schechter*. Indeed, for him, this Act represented “an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.”¹⁷

The shock waves generated by *Schechter* constituted a significant but not a wholly unexpected setback for the Roosevelt Administration. The Court’s opinion in *Humphrey’s Executor v. United States*,¹⁸ however, was both significant and surprising. In that case, the Court refused to allow President Roosevelt to remove William E. Humphrey, a Federal Trade Commissioner appointed by President Hoover. Roosevelt had become convinced that, for the Trade Commission to function properly, personnel changes were badly needed, and Humphrey, as the most reactionary and obstructive of its members, simply had to go. Humphrey would not go quietly, however; he declined to resign. In removing him, Roosevelt did not want to attack Humphrey directly. He thus based the removal on grounds that did not reflect on the Commissioner personally, but highlighted the disagreement that existed between Humphrey’s policies and those that the Administration wished to carry out.

This should have sufficed, given the state of the law at that time.¹⁹ *Myers v. United States*²⁰ seemed to grant virtually total discretion to the President when it came to removing government officials, even commissioners like Humphrey. As Chief Justice Taft explained in *Myers*:

[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence

13 *Id.*

14 *Id.* at 529.

15 293 U.S. at 433.

16 295 U.S. at 551.

17 *Id.*

18 295 U.S. 602 (1935).

19 See R. JACKSON, *supra* note 4, at 107-08.

20 272 U.S. 52 (1926).

or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.²¹

It is not surprising that this passage was written by a former President. *Myers* certainly regards the problems of "recalcitrant commissioners" from a presidential viewpoint, emphasizing that it is the President's article II duty to faithfully execute the laws. It was, however, surprising to President Roosevelt when the Court in *Humphrey's Executor* rebuffed his attempt to exert this same kind of control. Justice Jackson characterized the decision in this way:

What the Court had before declared to be a constitutional duty of the President had become in Mr. Roosevelt a constitutional offense. Small wonder that the decision became a political instrument. Those who saw executive dictatorship just round the corner had their fears confirmed: the President could be restrained only by the Court. Those who thought the ghost of dictatorship wore judicial robes had their fears, too, confirmed: the Court was applying to President Roosevelt rules different from those it had applied to his predecessors.²²

In retrospect, one might now add that *Humphrey's Executor* justified the fears of those who foresaw a dramatic expansion of the administrative state. The decision set forth an approach to separation-of-powers analysis that arguably made the "headless fourth branch" constitutionally possible. Ironically, no less an opponent of the New Deal than Justice Sutherland wrote the opinion for the Court. For Justice Sutherland, this case did not deal with purely executive officers—Federal Trade Commissioners occupy "no place in the executive department" and they exercise "no part of the executive power vested by the Constitution in the President."²³ Though recognizing the Federal Trade Commissioners could investigate and report antitrust violations, the Court rather conveniently concluded that, to the extent that an officer "exercises any executive function—as distinguished from executive power in the constitutional sense—[the officer] does so in the discharge and effectuation of . . . quasi-legislative or quasi-judicial powers, or as [an officer of] an agency of the legislative or judicial departments of the government."²⁴

Such an approach to separation of powers, though a seeming

²¹ *Id.* at 135.

²² R. JACKSON, *supra* note 4, at 109.

²³ 295 U.S. at 628.

²⁴ *Id.*

rebuke to President Roosevelt at the time the case was decided, in fact helped establish the constitutional foundation for the pragmatic approach to separation-of-powers analysis that so typified the New Deal. Writing in 1938, James Landis, one of the New Deal's foremost architects, set forth his views on separation-of-powers questions by emphasizing what he called "intelligent realism." In comparing corporate organization with the way he believed governments must be structured if they are to carry out their functions effectively, Landis wrote:

If in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu's lines. As yet no organization in private industry either has been conceived along those triadic contours, nor would its normal development, if so conceived, have tended to conform to them. Yet the problems of operating a private industry resemble to a great degree those entailed by its regulation. . . .

The significance of this comparison is not that it may point to a need for an expanding concept of the province of governmental regulation, but rather that it points to the form which governmental action tends to take. As the governance of industry, bent upon the shaping of adequate policies and the development of means for their execution, vests powers to this end without regard to the creation of agencies theoretically independent of each other, so when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization.²⁵

Humphrey's Executor provided the constitutional flexibility necessary for such an approach to governance to work.

In retrospect, Black Monday was not nearly as bad as it seemed at the time. The takings clause approach of *Louisville Joint Stock Land Bank v. Radford* never developed into a serious constitutional impediment to governmental regulation in general or the New Deal in particular.²⁶ The nondelegation doctrine, as it turns out, peaked on May 27, 1935. Though *Panama* and *Schechter* technically continue to be good law, the Court has never again struck down an act of Congress as violative of the nondelegation doctrine. And *Humphrey's Ex-*

²⁵ J. LANDIS, THE ADMINISTRATIVE PROCESS 10-12 (1938).

²⁶ See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (land use regulations upheld as reasonable); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (restrictions on landowner's ability to excavate upheld). But see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

ecutor, as we have seen, turned out to be genuinely helpful by bestowing constitutional legitimacy on independent commissions.

II

BLACK MONDAY RETURNS?

The issues raised in the cases decided on Black Monday were not decided in so authoritative and clear a manner as to justify or explain why they became, essentially, non-issues. Yet, for nearly 50 years, these questions have sparked little more than sporadic academic interest and have had little practical effect at the federal level. *Humphrey's Executor* seemed immune from serious judicial reexamination. Occasionally, a court might evoke the ghosts of *Panama* or *Schechter*,²⁷ usually in dissent, and every now and then, a significant takings clause challenge would reappear.²⁸ Justice (now Chief Justice) Rehnquist's concurrence in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*²⁹ and his dissent in *American Textile Manufacturers Institute v. Donovan*,³⁰ however, have rekindled a serious interest in the delegation doctrine. Indeed, an important distinction between Justice Rehnquist's opinions and the sporadic evocation of the ghosts of *Panama* and *Schechter* in the past is the way in which these opinions now resonate with recent Supreme Court majority opinions.

In *Immigration & Naturalization Services v. Chadha*,³¹ the Court struck down the legislative veto as unconstitutional and violative of fundamental separation-of-powers principles. In so doing, Chief Justice Burger's majority opinion took a very formalistic, distinctly non-New Deal approach to the separation-of-powers questions this case presented. Its emphasis on the distinct and separate powers of the legislative, executive, and judicial branches of government nicely complements the formalistic constitutional approach to the delegation doctrine taken by Justice Rehnquist.

Similarly, another relatively recent Supreme Court majority opinion lends credence to the separation-of-powers fundamentalism

²⁷ See, e.g., *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

²⁸ See, e.g., *United States v. Causby*, 328 U.S. 256 (1946) (U.S. warplanes, in following Civil Aeronautics Authority-approved flightpath, flew only 83 feet above Causby's farm; constituted taking notwithstanding congressional determination that navigable airspace is in public domain).

²⁹ 448 U.S. 607, 671-88 (1980). In addition to Justice Rehnquist's concurrence, it is important to note that Justice Stevens, writing for the plurality, also cited *Panama* and *Schechter* and concluded that the statute in the present case should be construed to avoid giving the agency so much discretion as to raise the constitutional issue of delegation. *Id.* at 646.

³⁰ 452 U.S. 490, 543-48 (1981).

³¹ 462 U.S. 919 (1983).

that seems to typify recent Supreme Court approaches. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³² the Court struck down Congress's attempt to establish article I courts to deal with bankruptcy claims. The Court found an unconstitutional delegation of article III adjudicatory power and in the process resurrected yet another administrative law ghost, *Crowell v. Benson*.³³

Finally, and perhaps even more significantly, the separation-of-powers fundamentalism underlying *Chadha* was given further and even deeper expression in *Bowsher v. Synar*.³⁴ In so doing, the Court opened to question *Humphrey's Executor* and, more fundamentally, the constitutional basis for regulatory commissions, particularly independent commissions. Indeed, pending cases seek to extend the reasoning in *Bowsher* by asking the Court to declare, for example, the Federal Trade Commission Act of 1913 unconstitutional.³⁵ The fundamentalist position challenges not only independent agencies, but also underlies attacks on other, delicate political balancing acts, such as the ability of courts to select a special prosecutor under the Ethics in Government Act of 1978.³⁶

There can be little doubt that these issues are of fundamental importance, and that the courts in years past have never really dealt with them in an analytically compelling and convincing manner. That these questions are again up for grabs has not been lost on the present Attorney General. In distinct contrast to James Landis, who was struggling with the question of how best to regulate businesses at the federal level, Attorney General Edwin Meese III sees a very different problem:

By federalizing so many issues we have shifted the forum of dispute resolution away from our communities, away from our local governments and courts, to Washington. By creating an immense federal beauracracy [sic] to regulate, promulgate—and, too often, obfuscate—with regard to federal legal matters, we have lost an ability to affix responsibility; and that is an ability central to

³² 458 U.S. 50 (1982). *But see* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (Justice O'Connor's majority opinion undercuts "public"/"private" rights distinction resurrected by plurality opinion in *Northern Pipeline*); *see also* *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986).

³³ 285 U.S. 22, 56 (1932) (Congress may not "substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend.").

³⁴ 106 S. Ct. 3181 (1986).

³⁵ *See, e.g.*, *Federal Trade Comm'n v. American Nat'l Cellular, Inc.*, 810 F.2d 1511 (9th Cir. 1987) (upholding FTC enforcement power by relying on *Humphrey's Executor* and *Bowsher*).

³⁶ 28 U.S.C. §§ 591-598 (1982 & Supp. III 1985); *see* *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987); *Deaver v. Seymour*, 656 F. Supp. 900 (D.D.C. 1987), *aff'd*, No. 87-5056 (D.C. Cir. Mar. 17, 1987).

the health and success of our democratic government.³⁷

For the solution, Attorney General Meese turns to the Founding Fathers:

The men who wrote the Constitution were keenly concerned with accountability. They were too familiar with the dangers of despotic authority and the weaknesses of an unwritten constitution to leave the spelling out of authority and the accumulation of power to chance. The Founding Fathers could not anticipate all the problems with which government would eventually grapple, but they could do at least two things: they could count and they could divide. They created a federal government of *three* well-defined branches. And they carefully enumerated the powers and responsibilities of each. With a few exceptions, such as the veto and impeachment powers, they vested the legislative power *solely* in the Congress, the executive power *solely* in the President, and the judicial power *solely* in the courts.³⁸

Such an approach has very definite implications for both the structure and status of administrative agencies today. As the following articles in this symposium make clear, however, the issues involved are far more complex. For Professor Sargentich, the issues reflect to a large extent basic normative tensions and conflicts within our political system, conflicts that do not lend themselves to any simple resolution, especially one based on an appeal to some pre-existing constitutional formula. Professor Sargentich's analysis highlights how various normative views, in fact, inform and color various separation-of-powers theories. Professor Strauss pursues the traditional formalistic and functionalist approaches inherent in the case law, and seeks to reconcile the Court's recent cases on a doctrinal level. In so doing, he strives to elucidate a "contemporary shape" to separation-of-powers principles. Professor Levinson focuses on the Gramm-Rudman-Hollings legislation and the *Bowsher* decision, placing the issues that this litigation raises in their current context. He laments the fact that the Court may have missed a golden opportunity to provide the President and Congress with guidance concerning the important budgetary questions inherent in the *Bowsher* litigation. Finally, Professor Osgood steps back and takes a

³⁷ Address by Attorney General Edwin Meese III, The Federal Bar Association 2-3 (Sept. 13, 1985) (on file at *Cornell Law Review*).

³⁸ *Id.* at 3. He elaborates his position further:

In other words, federal agencies performing executive functions are themselves properly agents of the executive. They are not "quasi" this, or "independent" that. In the tripartite scheme of government a body with enforcement powers is part of the executive branch of government. Power granted by Congress should be properly understood as power granted to the Executive.

Id. at 10.

historical perspective on constitutional issues and approaches, in general, and separation-of-powers questions in particular. He suggests that the constitutional issues generated by these issues are closely related to the underlying social order of the times in which they arise.

This symposium is timely indeed. The ghosts of *Panama*, *Schechter*, and *Crowell* are loose once again and the continued existence of *Humphrey's Executor* may be in doubt. The issues before us reverberate beyond the concerns of just a few judges or academics. Resolving these issues may have a profound effect on how our government structure responds to the future. As we grapple with these perennial separation-of-powers themes and attempt to resolve them once again, one cannot help but wonder whether we will be any more successful now than in the past.