AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Separation of Powers

The Presidential Appointment Power in the Age of Congressional Government

The Constitution gives the power to appoint executive offices to the president with the advice and consent of the Senate. The Constitution does not say how executive branch officials are to be removed from office, but early practice dating from the debates in the First Congress had established that presidents could unilaterally remove them. The issue of appointments and removals remained politically and constitutionally complicated throughout the nineteenth century, however. Once patronage (the use of government offices to reward political supporters) became a central feature of how political parties worked and a key lever of political power, senators demanded near complete control over who received federal appointments within their states. Andrew Johnson was impeached, in part, for challenging Senate control over the appointment and removal of executive officers, and the Tenure of Office Act of 1867 was passed during his presidency to bar the president from removing without the approval of the Senate any official who required Senate confirmation. After Reconstruction, presidents increasingly chaffed under the demands placed upon them by the senators of their own party. Presidents worked to "take back" the appointment power from the senators and regain some control over the appointment and removal of executive branch officials.

The stormy relationship between the Senate and President Rutherford Hayes was made evident even before his inauguration as president in 1877. When selecting the members of his Cabinet, Hayes ignored the recommendations of powerful New York Senator Roscoe Conkling (leader of the "stalwart" faction who would unsuccessfully seek a nomination for a third presidential term for Ulysses Grant in the 1880 Republican convention) and Pennsylvania Senator Simon Cameron; instead he reached across party and factional lines, including civil service reformer Carl Schurz, President Andrew Johnson's Attorney General William Evarts, and Democratic Senator David Key. Contrary to custom, his Cabinet nominations did not receive an immediate vote but instead were referred to committees. A storm of public protest and support from southern senators, however, forced action, and the committees were hastily organized and forwarded the nominees to the floor, where they were confirmed.

Hayes was soon entangled in fights with the Senate over his efforts to introduce civil service reform. Hayes highlighted civil service reform in his inaugural address and his first message to Congress.

Rutherford B. Hayes, First Annual Message (1877)[1]

My experience in the executive duties has strongly confirmed the belief in the great advantage the country would find in observing strictly the plan of the Constitution, which imposes upon the Executive the sole duty and responsibility of the selection of those Federal officers who by law are appointed, not elected, and which in like manner assigns to the Senate the complete right to advise and consent to or to reject the nominations so made, whilst the House of Representatives stands as the public censor of the performance of official duties, with the prerogative of investigation and prosecution in all cases of dereliction. The blemishes and imperfections in the civil service may, as I think, be traced in most cases to a practical confusion of the duties assigned to the several Departments of the Government. My purpose in this respect has been to return to the system established by the fundamental law, and to do this with the heartiest cooperation and most cordial understanding with the Senate and House of Representatives.

[1] Excerpt taken from *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson, vol. 9 (New York: Bureau of National Literature, 1897), 4417.

The practical difficulties in the selection of numerous officers for posts of widely varying responsibilities and duties are acknowledged to be very great. No system can be expected to secure absolute freedom from mistakes, and the beginning of any attempted change of custom is quite likely to be more embarrassed in this respect than any subsequent period. It is here that the Constitution seems to me to prove its claim to the great wisdom accorded to it. It gives to the Executive the assistance of the knowledge and experience of the Senate, which, when acting upon nominations as to which they may be disinterested and impartial judges, secures as strong a guaranty of freedom from errors of importance as is perhaps possible in human affairs.

Rutherford B. Hayes, *Diary and Letters of Rutherford B. Hayes* (1878)[2]

Saturday, 6 A.M., April 13, 1878. – The Republican Congressmen held a caucus early this week for organization. The feature of the affair was the failure of Senator Sargent to procure the passage of a resolution condemning the civil service order of the President which forbids office-holders from managing the party politics of the country.

. . . . This question of senatorial patronage is the salient point in the improvement of the civil service. It is the interest of the country that its business shall be well done and that the area of patronage shall be limited. But if the office-holders are to look after party politics, to make nominations, and to win party victories, they will be appointed, not for fitness to discharge the legitimate duties of their offices, but for skill in wirepulling.

. . . . Office-holders must attend to the public business and not become organized political machines. The appointing power may be regulated by law to the end that honesty, efficiency, and economy may be promoted, but it must not be transferred to the Senate. It must be left where the Constitution placed it.

[In the fall of 1877, Hayes asked for the resignations for corruption of the two customhouse officials who were members of Conkling's machine, but they refused. He then nominated replacements for those officials, but the Senate narrowly refused to confirm. Once the Senate recessed, Hayes suspended the officials and promoted two reformers within the customhouse to their positions. When the Senate returned, and after an extended debate in executive session, it confirmed the new appointments over Conkling's objections.]

July 14, 1880. – The end I have chiefly aimed at has been to break down congressional patronage, and especially Senatorial patronage. The contest has been a bitter one. It has exposed me to attack, opposition, misconstruction, and the actual hatred of powerful men. But I have had great success. No member of either house now attempts even to dictate appointments. My sole right to make appointments is tacitly conceded. It has seemed to me that as Executive I could advance the reform of the civil service in no way so effectively as by rescuing the power of appointing to office from the congressional leaders. I began with selecting a Cabinet in opposition to their wishes, and I have gone on in that path steadily until now I am filling the important places of collector of the port and postmaster at Philadelphia almost without a suggestion even from Senators or Representatives! Is not this a good measure of success for the Executive to accomplish almost absolutely unaided by Congress?

Rutherford B. Hayes, Fourth Annual Message (1880)[3]

The most serious obstacle, however, to an improvement of the civil service, and especially to a reform in the method of appointment and removal, has been found to be the practice, under what is known as the spoils system, by which the appointing power has been so largely encroached upon by members of Congress. The first step in the reform of the civil service must be a complete divorce between Congress and the Executive in the matter of appointments. The corrupting doctrine that "to the victors

[2] *Diary and Letters of Rutherford Birchard Hayes*, ed. Charles Richard Williams, vol. 3 (Columbus: Ohio State Archeological and Historical Society, 1924), 476–479, 612–613.

[3] Excerpt taken from *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson, vol. 9 (New York: Bureau of National Literature, 1897), 4557.

belong the spoils" is inseparable from Congressional patronage as the established rule and practice of parties in power. It comes to be understood by applicants for office and by the people generally that Representatives and Senators are entitled to disburse the patronage of their respective districts and States. It is not necessary to recite at length the evils resulting from this invasion of the Executive functions. . . .

Under the Constitution the President and heads of Departments are to make nominations for office. The Senate is to advise and consent to appointments, and the House of Representatives is to accuse and prosecute faithless officers. The best interest of the public service demands that these distinctions be respected; that Senators and Representatives, who may be judges and accusers, should not dictate appointments to office.

James Garfield had already identified himself with Hayes's position. As a member of the House of Representatives, he had supported efforts at civil service reform.

James Garfield, Speech in House of Representatives (1872)[4]

. . . . [F]rom the days of the fathers down nearly to the present time, it has been the golden rule of this government that the three great departments should be separate, independent of each other, coequal, coordinate, and that the rights of neither should be encroached upon by the others. …

Now I affirm, Mr. Speaker, that during the last forty years the spirit and meaning of that rule have been repeatedly violated in the mode in which our civil service has been administered. It cannot be said with even a show of truth that the Executive of this government does now exercise his constitutional function of nomination to office even, without the constant and increasing pressure of the legislative department. And for many years the Presidents of the United States have been crying out in their agony to be relieved of this unconstitutional, crushing, irresistible pressure brought to bear upon them by the entire body of that party in the legislative department which elected them to power. Individual members of this Congress are no longer wholly responsible for this state of things, for they are also pressed by their political friends for help, which is understood that they are able to render. . . .

As president Garfield continued the fight with Conkling, nominating William H. Robertson, a Garfield supporter but Conkling antagonist, to be the customs collector for the port of New York in 1881. He explained the move in a letter to longtime friend and Hiram College president Burke Hinsdale:

It is very natural that you should think that I have prematurely precipitated a contest with the New York Senator. This is my philosophy of the case. President Grant surrendered New York patronage to Mr. Conkling – defeat in the state was the result. President Hayes gave the majority of the patronage to his [i.e., Conkling's] opposers and the result was not so disastrous but it widened the breach between the opposing wings of the Republican party and made a constant petty warfare between himself and Mr. Conkling in with both sides became unduly irritated. After a careful survey of the whole field I thought that both Presidents had made a mistake by enlisting their influence on one side or the other. I determined therefore to recognize Mr. Conkling very generously and fully. This I did by appointing from the list of his friends the Postmaster General, the Postmaster of New York, the minister to France and filling nine vacancies in the State with persons whom he recommended. To have stopped there would have been regarded as not only a surrender to him but as putting to the sword all those Independent Republicans who followed me at Chicago in resisting the unit rule and advocating the right of individual delegates to the free exercise of their judgment in the Convention. Therefore I determined to recognize the other side in a conspicuous manner. . . . This brings me on the contest at once and will settle the question whether the President is registering clerk of the Senate or the Executive of the United States. It is probable that the contest will be sharp and bitter but I prefer to have the fight ended now and the Collectorship of New York settled for the term. Summed up in a single sentence this is the question: shall the principal port of entry in which more than 90% of all our customs duties are collected be under the

[4] *Congressional Globe*, 42nd Congress, 2nd session (April 19, 1872), 2583.

control of the administration or under the local control of a factional senator. I think I win this contest and having won, the ground will be cleared around me and Senators will understand my attitude as well as theirs.[5]

When the Senate appeared prepared to confirm all the other New York nominations and adjourn without taking up the collectorship, Garfield withdrew all his other nominees until the Robertson appointment had an up-or-down vote. It soon became clear that Conkling did not have the votes to defeat the nomination, and though most senators wished to avoid a vote if possible, the president's actions had forced the issue. In a surprise move, both New York senators, Conkling and Thomas Platt, resigned on May 14. On May 18, the Senate confirmed Robertson by voice vote, and Garfield released the rest of the New York appointments. Neither Conkling nor Platt was returned to the Senate by the New York legislature. In July, Garfield was fatally shot by a disappointed office-seeker and self-proclaimed "stalwart."

When Grover Cleveland entered the White House in 1885 as the first Democratic president since the Civil War, he gave a stern message to the only half-Democratic Congress.

Grover Cleveland, First Annual Message (1885)[6]

. . . it is not fair to hold public officials in charge of important trusts responsible for the best results in the performance of their duties, and yet insist that they shall rely in confidential and important places upon the work of those not only opposed to them in political affiliation, but so steeped in partisan prejudice and rancor that they have no loyalty to their chiefs and no desire for their success. Civil-service reform does not exact this, nor does it require that those in subordinate positions who fail in yielding their best service or who are incompetent should be retained simply because they are in place. The whining of a clerk discharged for indolence or incompetency, who, though he gained his place by the worst possible operation of the spoils system, suddenly discovers that he is entitled to protection under the sanction of civil-service reform, represents an idea no less absurd than the clamor of the applicant who claims the vacant position as his compensation for the most questionable party work.

The civil-service law does not prevent the discharge of the indolent or incompetent clerk, but it does prevent supplying his place with the unfit party worker. Thus in both these phases is seen benefit to the public service. . . .

He soon tested the Republican Senate's resolve by—in keeping with the terms of the modified Tenure of Office Act—sending a list of several hundred individuals whom he had suspended from office and nominees to replace them. The Senate refused to act on his proposed replacements. The matter came to a head when the Senate came back into session in December 1885. The chair of the Judiciary Committee, George Edmunds, requested that the administration provide all papers relating to the conduct of the U.S. attorney's office for the southern district of Alabama, where in July the president had suspended George Duskin and named John Burnett as his replacement. The administration refused to comply. When the Senate passed a resolution directing the attorney general to supply the papers, he responded that the president had concluded that providing the documents would not be in "the public interest" and had directed him not to comply.

Senate Judiciary Committee, "Relations between Senate and Executive Departments" (1886)[7]

. . . . Your committee is unable to discover, either in the original act of 1789 creating the office of the Attorney General, or in the act of 1870 creating the Department of Justice, any provision which makes

[5] "To Burke Hinsdale, April 4, 1881," in Theodore Clarke Smith, *The Life and Letters of James Abram Garfield*, vol. 2 (New Haven, Conn.: Yale University Press, 1925), 1108–1109.

[6] Excerpt taken from *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson, vol. 10 (New York: Bureau of National Literature, 1897), 4949.

[7] Senate Judiciary Committee, "Relations between Senate and Executive Departments," S.Rept. 135, 49th Congress, 1st session (1886).

the Attorney General of the United States in any sense the servant of or controlled by the Executive in the performance of the duties imputed to him by law or the nature of his office.

. . . . The important question, then is, whether it is within the constitutional competence of either house of Congress to have access to the official papers and documents in the various public offices of the United States created by laws enacted by themselves. . . . [T]he committee believes it to be very clear that from the very nature of the powers entrusted by the Constitution to the two houses of Congress, it is a necessary incident that either house must have at all times the right to know all that officially exists or takes place in any of the Departments of the Government. . . .

. . . . It is believed that there is no instance of civilized governments having bodies representative to the people or of states in which the right and power of those representative bodies to obtain in one form or another complete information as to every paper and transaction in any of the executive departments thereof does not exist, even though such papers might relate to what is ordinarily an executive function, if that function impinged upon any duty or function of the representative bodies.

A qualification of this general right may under our Constitution exist in case of calls by the House of Representatives for papers relating to treaties, &c., under consideration and not yet disposed of by the President and the Senate.

. . . .

The instances of requests to the President, and commands to the heads of Departments, by each house of Congress, from those days until now, for papers and information on every conceivable subject of public affairs are almost innumerable, for it appears to have been thought by all the Presidents who have carried on the Government now for almost a century, that, even in respect of requests to them, an independent and co-ordinate branch of the Government, they were under a constitutional duty and obligation to furnish to either house the papers called for – unless, as has happened in very rare instances when the request was coupled with an appeal to the discretion of the President in respect of the danger of publicity, to send the papers if, in his judgment, it should not be incompatible with the public welfare.

. . . .

. . . . [I]t would seem needless to array further precedents out of the vast mass that exists in the journals of both houses covering probably every year of the existence of the Government. The practical construction of the Constitution in these respects by all branches of the Government for so long a period would seem upon acknowledged principles to settle what are the rights and powers of the two houses of Congress in the exercise of their respective duties covering every branch of the operations of the Government; and it is submitted with confidence that such rights and powers are indispensable to the discharge of their duties, and do not infringe any right of the Executive, and that it does not belong to either heads of Departments or to the President himself to take into consideration any supposed motives or purposes that either house may have in calling for such papers, or whether their possession or knowledge of their contents could be applied by either house to useful purposes.

Grover Cleveland, To the Senate of the United States (1886)[8]

Ever since the beginning of the present session of the Senate the different heads of the Departments attached to the executive branch of the Government have been plied with various requests and demands from the committees of the Senate, from the members of such committees, and at last from the Senate itself, requiring the transmission of reasons for the suspension of certain officials during the recess of that body, or for the papers touching the conduct of such officials, or for all papers and documents relating to such suspensions . . . .

. . . .

. . . . Against the transmission of such papers and documents [of a private and unofficial nature] I have interposed my advice and direction. This has not been done . . . upon the assumption on my part that the Attorney-General or any other head of a Department 'is the servant of the President, and is to give or withhold copies of documents in his office according to the will of the Executive and not

[8] Excerpt taken from *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson, vol. 10 (New York: Bureau of National Literature, 1897), 4962.

otherwise,' but because I regard the papers and documents withheld and addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. I consider them in no proper sense as upon the files of the Department, but as deposited there for my convenience, remaining still completely under my control.

. . . . While, therefore, I am constrained to deny the right of the Senate to the papers and documents described, so far as the right to the same is based upon the claim that they are in any view of the subject official, I am also led unequivocally to dispute the right of the Senate by the aid of any documents whatever, or in any way save through the judicial process of trial on impeachment, to review or reverse the acts of the Executive in the suspension, during the recess of the Senate, of Federal officials.

I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that 'the executive power shall be vested in a President of the United States of America,' and that 'he shall take care that the laws be faithfully executed.'

The Senate belongs to the legislative branch of the Government. When the Constitution by express provision superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in itself a departure from the general plan of our Government, should be held, under the familiar maxim of construction, to exclude every other right of interference with Executive functions.

….

. . . . The requests and demands which by the score have for nearly three months been presented to the different Departments of the Government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands.

The Senate responded by passing, on party line votes, resolutions to adopt the Judiciary Committee's report and to condemn the attorney general for withholding the papers. A resolution to refuse to confirm the president's replacements for the suspended officials passed more narrowly. Confirmation of the president's nominees was further delayed, but over the course of several months almost all were eventually confirmed. In 1887, the Senate finally repealed the modified Tenure of Office Act.

Senate Debate on Repeal of the Tenure of Office Act (1886)[9]

Mr. HOAR (Republican, Massachusetts). Mr. President . . . . It did not seem to me quite becoming to ask the Senate to deal with this general question while the question which arose between the President and the Senate as to the proper interpretation and administration of the existing law was pending. . . . That question has subsided and is past, and it seems to me now proper to ask the Senate to vote upon the question of whether it will return to the ancient policy of the Government, to the rule of public conduct which existed from 1789 until 1867, and which has practically existed, notwithstanding the condition of the statute-book, since the accession to power of President Grant on the 4th of March, 1869.

. . . . [T]he only thing left of the law of 1867 is the power on the part of the Senate to force back upon an unwilling Executive an officer once by him suspended, with the power on the part of the President to immediately repeat the process of suspension in the next vacation, as he sees fit.

. . . . It seems to me . . . that it is totally inconsistent with the constitutional theory of our Government that a President who is responsible for the faithful execution of the laws, and in whom the executive power is expressly lodged by the Constitution, should be compelled to answer to that responsibility when the instruments with whom it is impossible for him to act are forced upon him

[9] *Congressional Record*, 49th Congress, 2nd session (December 14, 1886), 140–141.

against his will, and are instruments in whom he has no confidence. The effect of this legislation is to destroy executive responsibility, so far as it has any effect at all.

. . . . I do not believe there is a single person in this country, in Congress or out of Congress, with the exception of the Senator from Vermont [EDMUNDS], who has studied the methods of accomplishing this reform in the civil service, who has not been led to the belief that the first step in this direction must be to impose the responsibility of the civil service upon the Executive. Taking from the President of the United States the total control of this subject has been the policy under which the abuses that have grown up of late in the civil service have obtained. . . . I believe it will be difficult to find anywhere a serious and thoughtful discussion of this subject in which the person who is engaged in it does not demand as the first step for a reform and purification of the civil service the total overthrow of the claim of individual Senators to keep the obnoxious officials in office against the will of the Executive.