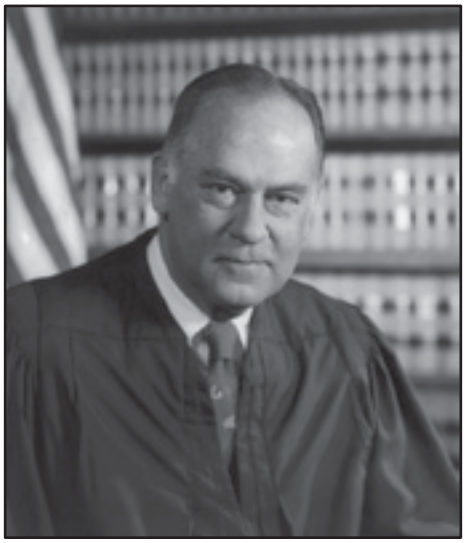
CHAPTER 9

INTERPRETING GOVERNMENT PRACTICES

America's Institutional Constitution



POTTER STEWART (1976).

Named to the Supreme Court by President Eisenhower during a Senate recess in 1958, Potter Stewart was one of a long line of recess appointees to the federal bench. The practice of judicial recess appointments began under President Washington and has continued into the twenty-first century. Since Stewart, the recess appointment process—in which an appointee provisionally takes office prior to Senate confirmation—has not been used to fill a vacancy on the Supreme Court, but has repeatedly been used for inferior-federal-court appointments.

At bottom, "constitutional law" is about how government is constituted. Specifically, how many and what sorts of government institutions exist? How are these institutions configured, and how do they interact with each other? How are various members of these government institutions selected and removed? What is the scope of a given institution's authority? What internal deliberation protocols and voting procedures operate within a particular institution?

Having just considered how America's presidency has functioned over the centuries, thanks in part to George Washington's clarifying precedents, we shall now survey the size, shape, and structure of the other major permanent institutions of federal governance: Congress, the Supreme Court, and administrative agencies. In this wide-ranging survey, we shall discover two abiding truths. First, institutional practice routinely goes beyond the written Constitution. Second, institutional practice rarely goes against the canonical document. Typically, the foundational text significantly constrains even if it does not exclusively control.

In general, the underspecified text and the more specific institutional practices cohere to form a single system of daily governance in which the practices gloss and clarify the text, inducing interpreters to read the otherwise indeterminate text in a highly determinate way. On a broad set of topics concerning the interactions and internal operations of government entities, post-1789 institutional practice thus furnishes a powerful lens through which to read the 1789 blueprint.[1]

"Each House may…punish its Members"

In a system famous for its detailed enumeration of congressional powers, Congress in fact enjoys some remarkable powers that are not clearly enumerated. These powers can easily be read into the Constitution—but only if its text is viewed through the prism of practice.

Today, each house of Congress can investigate virtually any subject of legitimate public interest. At times, each house can also act as policeman,

prosecutor, judge, jury, and jailor all-in-one. For example, each house on its own motion can incarcerate an uncooperative witness, whether a public official or a private citizen, to prompt his compliance or punish disobedience that occurred earlier in the session. Each house can also adjudicate and punish other contempts against itself, such as the attempted bribery of its members. Each house has its own enforcement official, known as a sergeant at arms, and is free to use its own building as a jail so long as it is in session.

Even if the federal judiciary disagrees with a particular House or Senate contempt judgment, federal judges have only limited power to free a house detainee or otherwise reverse the house. The question for ordinary courts is not whether they concur with the substance of a particular house ruling, but whether the house in a given case acted within proper (albeit unwritten) jurisdictional bounds—by punishing only matters that may appropriately be viewed as contempts against core house functions, by following adequate adjudicatory procedures, by imposing no punishment except detention, by releasing all detainees when the house session ends, and by honoring applicable rights, such as Americans' general freedom to criticize Congress.[2]

Arguments from the Constitution's original meaning can be made both for and against these sweeping powers of inquest and punishment. On a broad reading, the Article I, section 5, clause empowering each house to "determine the Rules of its Proceedings" implicitly authorized each house to protect its core functions against outside interference or defiance. On a narrow reading, the text invited precisely the opposite conclusion. Immediately after the word "Proceedings," section 5 authorized each house to "punish its Members for disorderly Behaviour." By negative implication, each house lacked inquisitorial and punishment power over nonmembers (except in the impeachment process, outlined elsewhere in the Constitution). Of course, arguments from negative implication do not always hold true. Perhaps the power to punish nonmembers directly obstructing the basic function of a house (say, by refusing to provide the house with vital information or by trying to bribe house members) simply went without saying as an implicit element of "legislative Power."

Both the British Parliament and American state legislatures circa 1787 enjoyed broad inquisitorial and contempt powers. At least one prominent

state chamber, the Virginia House of Delegates, had claimed power to punish nonmembers for contempt even though it could point to nothing in its state constitution more specific than a generic authority to "settle its own rules of proceeding." But Parliament and state legislatures were not governed by the enumerated-powers principle underlying the federal Constitution. Also, separation-of-powers limits on lawmakers were looser in England (where Parliament, sitting as an impeachment court, could try public officers and private persons alike and impose ordinary criminal sanctions) and in most states (where legislatures tended to dominate the other branches). The claim that each house of Congress had certain inherent judicial powers to punish ordinary citizens stood in tension with the federal Constitution's stricter version of separation of powers.[3]

During the Constitution's ratification process, debaters and pamphleteers paid little attention to the existence or nonexistence of these unwritten congressional powers. On the one hand, Federalists did not make clear that federal lawmakers would enjoy the same powers as those traditionally wielded by state legislators to subpoena nonmembers and to try ordinary citizens for contempt. On the other hand, Federalists did not routinely boast that the document withheld these traditional and potentially oppressive powers from Congress.[4]

On these issues, the most compelling conclusions about the meaning of America's Constitution come not from the unvarnished text as understood during the ratification process or from purely logical deductions from the document's general schema. Rather, the text was glossed almost immediately after it went into effect, and this gloss now defines how modern Americans properly read the text.

The glossing process started in the first Congress when Senator Robert Morris in 1790 requested an official congressional inquest into his own conduct as a financier during the Revolutionary War. Various accusations of financial impropriety had begun to surface against Morris, and he hoped that a formal inquest might clear his name. The House took up the matter, even though arguably the Senate would have been a fitter forum to probe the conduct and character of a sitting senator, and even though Morris lay outside the impeachment process (which covered only executive and judicial "Officers" as distinct from representatives and senators).[5]

Voicing support for a House inquest, Representative Madison articu-

lated an expansive view of House investigatory authority: "[T]he House should possess itself of the fullest information in order to do[] justice to the country and to public officers." Although Madison did not elaborate, he could have rebutted anyone who doubted that the investigation's subject lay within the scope of Congress's Article I zones of authority by noting that Congress also had sweeping Article V power to propose constitutional amendments on virtually any subject, and that this power sensibly subsumed authority to conduct preliminary investigations of any topic of true public interest.[6]

Two years after the Morris investigation, the House launched another important inquest, backed by subpoena power, to review a failed 1791 military expedition led by General Arthur St. Clair. Supported by a unanimous cabinet, President Washington instructed his subordinates to cooperate with this inquest by supplying the investigators with relevant nonconfidential papers. In 1798, Congress passed and the president signed a federal statute regularizing oath-taking for congressional witnesses. From this era to the present day, both houses have exercised broad powers of investigation and oversight.[7]

The judiciary has endorsed this vision and in doing so has emphasized the importance of early and continuous practice. In 1927, a case came before the Supreme Court involving the Senate's arrest of a witness who had refused to appear before a Senate investigation of the Teapot Dome scandal. The Court sided with the Senate and its arresting officers in a unanimous decision, *McGrain v. Daugherty*, proclaiming that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." Although the Court waved briefly in the direction of pre-1789 state legislative practice to support this unenumerated congressional power, the justices' main argument derived from postratification federal practice: "[Ea]rly in their history," both houses took a broad view of the unenumerated power of legislative inquiry, "and both houses have employed the power accordingly up to the present time. The act[] of 1798… [was] intended to recognize the existence of this power in both houses and to enable them to employ it 'more effectually' than before."

All this post-1789 institutional practice, said the Court, "should be taken as fixing the meaning of [the written Constitution's] provisions, if otherwise doubtful."

POST-1789 INSTITUTIONAL PRACTICE has also refracted the 1789 text on the right of each house to punish certain private persons in situations far removed from Congress's general powers of inquest and investigation.

In 1795, several members of the House reported that a nonmember, Robert Randall, had tried to bribe them. The House promptly ordered its sergeant at arms to arrest Randall; gave the accused a three-day trial in the House; convicted him of attempted corruption, by a vote of 78–17; and incarcerated him for the next week. The Senate claimed comparable power as early as 1800. In the 1821 case of *Anderson v. Dunn*, the Marshall Court unanimously upheld the power of each house to punish nonmembers for contempts such as bribery of its members. The houses of Congress have never renounced their authority to exercise this self-help remedy even though most contempts of Congress are nowadays processed by regular Article III court proceedings. *Anderson v. Dunn* remains good law for modern judges and justices; the relevant twentieth-century opinions unanimously reaffirming *Anderson* have explicitly emphasized early practice such as the 1795 Randall matter; and the president's Office of Legal Counsel also supports this inherent contempt power of each house.[8]

The Morris, St. Clair, and Randall precedents stand in the same relation to house power as the Decision of 1789 and early presidential practices stand in relation to executive power. In both contexts, the textually uncertain scope of institutional power was clarified by early usage—in one context in favor of congressional power and in the other context in favor of presidential power. The symmetry of these examples confirms that early institutional practice is not a Trojan horse to smuggle in additional power for one or another favorite branch, but a neutral guidepost to proper constitutional interpretation. Further symmetry may be found in a long line of cases asserting the implied power of federal judges, acting on their own initiative and without direct involvement of the executive branch, to punish misconduct and contempts occurring within the litigation process—a line of cases nearly parallel to those upholding the inherent contempt powers of each congressional house.[9]

Here is yet another element of symmetry: Just as George Washington's attempt to create federal crimes by executive decree was later judicially denounced, because this aspect of his Neutrality Proclamation had plainly misread the written Constitution's letter and spirit, so, too, early

congressional practices have been subsequently repudiated insofar as these practices clearly strayed from the terse text. Recall the words of the 1927 *McGrain* Court: Early practice can "fix" (that is, conclusively determine) the meaning of the written Constitution where the issue is "otherwise doubtful"—not where the practice violates the document's plain meaning or deep structure.

For example, the now-infamous Sedition Act of 1798, which criminalized the expression of antiadministration political opinion, has failed the test of time. In the twentieth century, this act was emphatically rejected by judges, lawmakers, and scholars across the political spectrum. This modern consensus is easy to defend precisely because the 1798 act did indeed flout the written Constitution's plain meaning and core principles—whether we attend to the document's explicit text (in the First Amendment's guarantee of freedom of speech), or ponder its implicit structure (founded upon popular sovereignty and the closely related principle that citizens must be free to exchange political views among themselves and to chastise their public servants), or heed the enactment process by which the document sprang to life (via an extraordinary outburst of free speech). In an adjudication infected by the same appalling judgment that had brought forth the Sedition Act, the Senate in 1800 punished publisher William Duane for contempt, merely because he had criticized the upper house in print. Like the Sedition Act itself, the Duane precedent has now been repudiated by both modern Supreme Court precedent and modern Senate practice.[10]

IF THE HOUSE, THE SENATE, AND THE FEDERAL JUDICIARY can claim certain inherent powers, so can the president, of course, as we saw in our earlier survey of presidential powers crystallized by the practices of George Washington. One more Washingtonian assertion of implied executive power deserves mention at this point, as it exists in tension with the congressional inquest power that we have just examined.

Although the written Constitution does not give the president any explicit "executive privilege" to protect confidential conversations with aides or to shield sensitive diplomatic communications, most modern lawyers and judges agree that some such privilege exists. Support for this view may be found in no less canonical a case than *Marbury v. Madison*—in an oral