CONSTITUTIONAL DYSFUNCTION ON TRIAL: CONGRESSIONAL LAWSUITS AND THE SEPARATION OF POWERS

lpbr.net/2020/09/constitutional-disfunction-on-trial.html

CONSTITUTIONAL DYSFUNCTION ON TRIAL

CONGRESSIONAL LAWSUITS AND THE SEPARATION OF POWERS

JASMINE FARRIER

Vol. 30 No. 8 (September 2020) pp. 128 - 131

CONSTITUTIONAL DYSFUNCTION ON TRIAL: CONGRESSIONAL LAWSUITS AND THE SEPARATION OF POWERS, by Jasmine Farrier. Ithaca: Cornell University Press, 2019. 188pp. Hardcover: $115.00. ISBN: 1-501-702505. Paper $29.95. ISBN: 1-501-74710-X.

Reviewed by Ellen M. Key, Department of Government and Justice Studies, Appalachian State University. Email: keyem@appstate.edu.

What is the proper role of the judiciary in settling executive/legislative separation of powers disputes? That is the important question Jasmine Farrier tackles in CONSTITUTIONAL DYSFUNCTION ON TRIAL: CONGRESSIONAL LAWSUITS AND THE SEPARATION OF POWERS. Specifically, Farrier contrasts the disposition of private litigation with the treatment of member suits to see if the Court is willing to be used as a vehicle through which Congress can curtail executive power, and sometimes even reign in Congress itself.

In a system designed to let ambition counter ambition, each branch has an incentive to expand their power and institutional tools to defend itself from encroachment from other branches. Whether those tools are used, however, is left to the discretion of those who occupy political office. Frequently, members of Congress turn to the judiciary to resolve separation of powers disputes rather than use the legislative options at their disposal. Farrier argues, the existence of these member suits is a symptom of an unbalanced institutional system. Moreover, the choice to seek relief from the judicial branch rather than Congress itself is unwise. While the courts can offer short-term relief, they are ill-suited to provide long-term solutions to separation of powers issues.

Farrier bases her argument on both practical and theoretical grounds. Practically speaking courts have several options when faced with member suits: dismiss the case on standing or justiciability grounds, grant the case and side with the nonmember party, or grant the case and side with the member. As Farrier argues in the introduction, concern with maintaining their own institutional legitimacy makes the first option very attractive to judges and justices. Relative to private litigants, members have a difficult time demonstrating standing. Even if they are found to have standing, cases may still be dismissed as political questions better addressed by another branch of government. If a question is found to be justiciable, the doctrine of equitable abstention may still be used to keep a case from being heard if parties have not exhausted all other avenues for relief. Even if they are able to successfully cross all those hurdles and get a case granted, it does not mean the member-litigant will prevail.

These practical concerns intersect with the theoretical argument about the proper role of the judiciary in settling separation of powers disputes. Turning to the judiciary is

frequently the only avenue for redress available to private litigants, but the same is not true for Congress. Members should, Farrier explains, work within their institution to vigorously defend their power rather than enlisting the courts to fight the battle in their stead. Pushing issues to the courts rather than resolving them "in house" leads to an imbalance of power and an outsized role for the judiciary, further exacerbating the power imbalance. [*129]

The book is organized into three substantive areas (war powers, the legislative process, and unilateral executive action), with two chapters per section comparing and contrasting first private litigation and then congressional litigation on the respective topics. Although the general structure is to discuss private litigation and member suits in separate chapters, this separation is not always maintained. For instance, the first ever member suit, MITCHELL V. LAIRD (1973), and the subsequence case of HOLTZMAN V. SCHLESINGER (1973) are discussed alongside private litigation in Chapter 1. This comingling makes it more difficult for the reader to identify patterns in the courts' jurisprudence regarding private and congressional litigation, but Farrier provides enough summary points to help clarify the argument.

The analyses consist of cases studies of institutional rhetoric and action along with supplementary interviews provided in the member litigation chapters. The case studies are the meat of each chapter, with the twelve interviews of member-litigants, attorneys of record, and a legislative director speaking on behalf of a member providing context and insight into litigation strategy. These interviews are quite a useful supplement, and I found myself wishing more were included for the unique perspective they provide.

Beginning with war powers, Chapter 1 traces the changing role of the judiciary in private litigation. Prior to Vietnam, there was more judicial engagement with war powers questions. After the War Powers Resolution (WPR), the courts receded from view, embracing both the equitable abstention and political question doctrines as means of avoiding engaging in war powers cases. Prior to the WPR, the key to war powers jurisprudence was congressional approval of executive action. Post-WPR, the courts focus on congressional disapproval.

Member suits regarding war powers are explored more fully in Chapter 2. What emerges is a pattern of jurisprudential restraint. Unlike private litigants with limited ability to influence the president's exercise of war powers, the courts expect Congress to use the host of direct war controls available to the legislative branch.

Farrier shows that while presidents are skilled at harnessing ambition to increase the executive branch's power, Congress defends its authority tepidly if at all. This is particularly evident in the next two sections. Turning to suits about the legislative process, Chapter 3 follows the jurisprudence around Congress's institutionalization of supermajorities and delegation of authority to the executive branch. The chapter

demonstrates the tension between the non-delegation doctrine's active role for the judiciary and the courts' spectator role in the political question doctrine. The legal system wants to maintain a degree of control over delegation and the legislative process but preserve the ability to step aside when politically prudent to do so.

Chapter 4 highlights particularly well the difference in jurisprudence between self-imposed limits on Congressional authority and allegations of executive overreach. Unlike with war powers, there is a voluntary component to these legislative process member suits. This leads to the perception that member litigants are sore losers looking to achieve judicially what they failed to work for legislatively. In the rare [*130] case that member litigants prevail, Congress frequently enacts new legislative processes similar in effect to the ones overturned by the courts. This is a good example of Farrier's argument that courts provide poor long-term solutions to separation of powers imbalances. What is needed, she argues, is not judicial intervention but for members of Congress to stop giving away their own power at the start.
In the last section of the book, Farrier surveys court decisions regarding other forms of unilateral executive action, including executive orders, withdrawal from treaties, detainee treatment, and dismissal of high-ranking officials. This section spotlights the tension between the limited constitutional and the more expansive stewardship, or general grant, theories of presidential power. Unlike Congress, presidents are consistent in their efforts to expand executive authority regardless of party. As with war powers, courts look expressions of congressional (dis)approval; presidents are likely to win if courts find a congressional delegation of power to the executive. Courts are unlikely to side with the plaintiff absent decisive evidence of congressional disapproval.

Private litigants have an easier time establishing standing in these executive action cases, leading them to be more successful than member-litigants. As Chapter 6 shows, members have two avenues for standing: proving either individual member injuries or institutional injuries. Members, however, are not equally likely to allege these injuries regardless of what party occupies the White House. Rather, members are more likely to bring suit when the presidency is held by a member of the opposite party, making such suits appear politically motivated and diluting the power of the plaintiff's claim. This partisanship makes the suits less attractive to the courts and hurts members' chances for judicial resolution.

The judicial reasoning discussed in Chapters 1-6 lead Farrier to conclude that while member suits can highlight problems, these suits are also a symptom of a branch that has chosen to not fully explore all the legislative means for resolving these issues. If, she argues, Congress chooses to not fully utilize their power, the courts are not obligated to intervene. Additionally, these suits are risky for members of Congress as they might lose, further

reinforcing–rather than diminishing—the power of the executive. For these reasons and others, members would be better served by pulling the levers of power within their own branch instead of turning to the judiciary.

While Farrier does an excellent job tracing the judicial rulings and explaining the legal reasoning used in member suits, at times it feels as if the court decisions and the arguments drawn from them are unrealistic. For instance, in discussing INS V. CHADHA (1983), Farrier notes the criticism the decision received for failing to take into account the realities of governance. The same critique could be levied against this book. The argument advanced throughout about the appropriateness of seeking legislative remedies to separation of powers issues fails to consider the intense partisan competition and polarization that characterizes Congress in the twenty-first century. In other words, the proposed solution to separation of powers questions is to use "regular politics" rather than judicial remedies in order to obtain long-term solutions. But if polarization and high levels of party unity prevent "regular politics" from being a good avenue to address issues—hence members resorting to lawsuits—the odds are not good that problems can be solved using [*131] legislative means. While shifting the burden back to Congress to exercise its own power may help keep the judiciary from becoming overly entangled in separation of powers disputes, it also ignores the reality that such legislative action may not be practically possible. The imperfect short-term solutions offered by the judiciary may be important stopgap measures until elections alter the distribution of preferences in Congress.

In all, this book makes an important contribution to the literature on separation of powers jurisprudence. What emerges is a picture of a judicial branch whose own institutional ambition shapes its willingness to intervene in battles between the other two branches. In many ways, the judiciary is modeling the behavior it wishes to see from Congress. By utilizing the variety of legal tools at their disposal, the courts avoid excessive involvement in these disputes while maintaining legitimacy. Congress would be well-served to take a page out of the judiciary's playbook and put institutional maintenance above partisan goals, however unlikely that is to happen in reality.

CASES:

INS V. CHADHA, 462 U.S. 919 (1983).

HOLTZMAN V. SCHLESINGER, 414 U.S. 1304 (1973).

MITCHELL V. LAIRD, 159 U.S. App. D.C. 344 (1973).

© Copyright 2020 by the author, Ellen M. Key.