

## THE VIRTUES OF PRESIDENTIAL WEAKNESS: A COMMENT ON FITTS

ERNEST A. YOUNG

It is strange to be asked to comment on the “lessons of Watergate” given that my only distinct memory of Watergate is being upset that the Flintstones cartoon program was canceled for an entire summer so that the networks could show those awful hearings on TV. Perhaps, however, I can offer the perspective of youth and ignorance on the issues at hand.

### I. THE RELEVANCE AND IRRELEVANCE OF THE CURRENT MESS

Allow me to start with a caution about drawing broad general conclusions on the state of the presidency as an institution from the current political mess in Washington. In fairness, Professor Fitts’ argument largely avoids reliance on President Clinton’s present troubles.<sup>1</sup> But we are not gathered here today simply because 25 years have passed since Watergate; we are here because that anniversary coincides with the gravest domestic political crisis since President Nixon’s resignation—the second impeachment of a president in our history. In that context our focus on *institutional* and *systemic* factors is the product of two quite understandable impulses: a sense that as law professors we ought to be engaged in thinking about the causes and implications of this crisis, and at the same time a wish to turn away from the sordid facts that lie at the heart of it. Better to focus on the *institution* of the Presidency—or the Independent Counsel—than on who touched whom where.

That, I think, is why Professor Fitts frames his central question abstractly: “Why can’t the president and his staff withstand the legal and political scrutiny if in fact they are doing their duties?”<sup>2</sup> It is a worthwhile question, and I mean

---

<sup>\*</sup> Assistant Professor of Law, University of Texas School of Law. B.A., Dartmouth College, 1990, J.D., Harvard Law School, 1993. This paper was presented while the author was Visiting Assistant Professor of Law at Villanova University School of Law. I would like to thank Joel Goldstein for inviting me to the conference, John Gotanda and Louis Sirico for comments on this paper, Cara Leheny for valuable research assistance, and Michael Fitts for his graciousness toward a much junior colleague.

1. See, e.g., Michael A. Fitts, *The Legalization of the Presidency: A 25 Year Watergate Retrospective*, 43 ST. LOUIS U. L.J. 725, 738 (1999)(recognizing that the current mess in many ways “fall[s] outside the current analysis”).

2. *Id.* at 739.

to address it—if somewhat obliquely—in the second part of this comment. But the fact is that the *current* crisis does not arise out of the President's performance of his duties, and the difficult question is the extent to which the President ought to be subject to scrutiny for his unofficial activities. This scandal will tell us very little, I think, about whether enhanced legal and political scrutiny of the Presidency will make it impossible for the President to undertake policy initiatives that involve necessary changes of position or skate close to the legal line.

Likewise, there is undoubtedly merit to Professor Fitts' point that where the President is subject to litigation, the President may have to behave like a litigant—and this may make him look bad. But again, I think President Clinton's handling of *his* litigation problems would be a poor point from which to generalize. Perjury is not an acceptable tactic in even the most cutthroat litigation.<sup>3</sup> Nor does participation in litigation force a strategy of stonewalling discovery—I have participated in cases with hundreds of millions of dollars at stake in which our entire litigation strategy was built around building our client's credibility by producing everything voluntarily and ahead of schedule.

Every prominent client—public or private—is constrained by the political ramifications of its litigation conduct. I can not tell you how many times a client has told me that we have to take my favorite argument out of a brief “for business reasons”—which invariably means that the argument might make the client look bad in the marketplace. Nothing about the President's need to succeed in litigation *requires* him to adopt tactics that will subject him to public disapproval. The fact is that litigation tactics primarily reflect character, rather than shape it.<sup>4</sup>

My caution about generalizing from Monicagate is not meant to imply, however, that the present crisis can teach us nothing. In that spirit I think it is worth noting three current indications of the Presidency's continuing strength. First, singularity still counts for a lot. Perhaps only Bill Clinton could have pulled off a State of the Union address in the midst of his own impeachment trial, yet pull it off he did—and early indications are that the President's ability

---

3. See 18 U.S.C. § 1621 (1998) (criminalizing perjury).

4. A similar caution is in order regarding criticism by other participants in this Symposium of the Court's decision in *Clinton v. Jones*, 520 U.S. 681 (1997). The Court is frequently accused of having badly underestimated the institutional costs of allowing the Jones suit to go forward. But the cost that the Court was worried about was the potential for a flood of *frivolous* litigation designed simply to interfere with the President's political program. See *Id.* at 708. We have not seen that. The problem is that Paula Jones's suit was *factually plausible* enough—in terms of the consistency of her allegations with the President's conduct towards other women—to lead to the present mess. The President did not, of course, frame his plea for a temporary immunity from suit in terms of the political cost of bringing reprehensible conduct to light through civil discovery—for the simple reason that such an argument would have been (and *should* have been) doomed from the start.

to command the Nation's attention and identify his own political survival with the national interest remains a powerful, and possibly decisive, political weapon.<sup>5</sup>

Second, the death of political parties may be exaggerated.<sup>6</sup> When push has come to shove, both in the House and the Senate, Democratic lawmakers who remain highly suspicious of this President have lined up shoulder to shoulder in his defense, simply because the *party* cannot afford to lose him.<sup>7</sup> And third, the President's foreign affairs power remains a potent tool for changing the national subject even with the loss of a communist menace to rally the nation against.<sup>8</sup> In fact, the comparative chaos of the post-Cold War world seems to offer innumerable opportunities to broker peace agreements between regional rivals<sup>9</sup> or engage in limited military interventions<sup>10</sup>—both of which tend to impress constituents back home with the indispensability of presidential leadership.<sup>11</sup>

The irony is that these continuing indicators of Presidential strength only seem to go so far. We may have the worst of all possible worlds—a Presidency which, for all the reasons Professor Fitts gives, is too weak to accomplish anything affirmatively, but too strong defensively to permit removal. I question in the next section whether the Presidency's weakness in undertaking

---

5. See, e.g., Nancy Gibbs, *The Last Campaign*, TIME, Feb. 1, 1999, at 24 (noting that, following the State of the Union speech, "Republican lawmakers conceded there was no longer a chance of finding the 67 votes needed to convict" in the Senate); *The President on Trial, Impeachment Notebook: Approval Ratings Jump in Polls*, ATLANTA CONST. Jan. 21, 1999, at A18 (stating that almost 4 out of 5 viewers approved of most the State of the Union proposals and the "majority of the public" opposes Clinton's removal from office).

6. See Fitts, *supra* note 1, at 732-33.

7. See, e.g., Lawrence M. O'Rourke, *Senate Faces Key Decision on Witnesses*, SACRAMENTO BEE, Feb. 4, 1999, at A1 (describing Senate Democrats as united against calling witnesses at the impeachment trial); Lawrence M. O'Rourke, *Clinton Impeached*, SACRAMENTO BEE, Dec. 20, 1998, at A1 (describing House votes on censure and impeachment as "largely along party lines"); Gibbs, *supra* note 5, at 25-26 ("Democrats knew . . . that [their] survival depended on getting past both their disdain for [Clinton] and their history of mutual backstabbing").

8. See Fitts, *supra* note 1, at 733.

9. See, e.g., *Oh Lucky Man*, THE ECONOMIST, Nov. 7, 1998, at 15 (describing how Clinton triumphed following mid-term elections in part due to foreign policy initiatives such as brokering Mid-East peace talks).

10. See, e.g., Steven Komarow, *Clinton Pledges U.S. Troops to Kosovo*, USA TODAY, Feb. 5, 1999, at A13; Steven Lee Myers, *Attack On Iraq: The Objective; Pentagon is Sticking to Timetable and Targets*, N.Y. TIMES, Dec. 19, 1998, at A1. During the Cold War, of course, such interventions were far more risky. See, e.g., Francis Fukuyama, *Escalation in the Middle East and Persian Gulf*, in HAWKS, DOVES, AND OWLS 115-47 (Graham T. Allison et al. eds., 1985) (describing the risks).

11. One need not think that the President's activities at Wye River Accords or in Iraq were motivated by his domestic political difficulties to conclude that those activities nonetheless helped insulate him from political attack on other issues.

policy initiatives is always such a bad thing. Nonetheless, my conclusion is that the President's current weakness may be the wrong *kind*.

## II. THE POSSIBLE VIRTUES OF PRESIDENTIAL WEAKNESS

Turning (gratefully) from President Clinton's particular travails, I would like to address Professor Fitts' argument on the more general ground that *he* has chosen. That argument, as I see it, could be paraphrased as follows: The New Deal vastly expanded the powers and concerns of the federal government, and created a need for coordination and innovation that could only be satisfied by shifting the primary responsibility for policymaking from Congress to the President. This grand expansion of presidential power created a potential weakness, however, by focusing expectations and responsibility for most of what government does in a single place. The Watergate reforms made that potential weakness real, by dramatically increasing the level of scrutiny of presidential activity and undermining the informal political support upon which the President's power depends.

It is important to step back for a moment to underline how important this shift in policymaking is to the separation of powers. We might begin by drawing an analogy to Madison's version in Federalist 46 of the "political safeguards of federalism."<sup>12</sup> There is no need to worry about the States, Madison told the Anti-federalists, because they will always retain the ultimate loyalty of the People.<sup>13</sup> That is because it is *state* governments that exercise law-making authority over the bread-and-butter concerns of the People's lives. As long as the States do that job well, the People's informal political support for the States will protect them from federal encroachments.<sup>14</sup>

So too, I think, with the struggle for power among the branches of the federal government.<sup>15</sup> As Professor Fitts recognizes, the key to the relative power of Congress and the President is informal political support. And the basis for

---

12. See THE FEDERALIST No. 46 at 294-95 (Madison) (Clinton Rossiter ed., 1961). I draw the phrase "political safeguards of federalism" from Professor Wechsler's seminal article, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). This idea now dominates our federalism jurisprudence. See generally, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

13. FEDERALIST NO. 46, *supra* note 13, at 294.

14. *Id.* at 294-95. I have developed my characterization of this argument at greater length in *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 333-35 (1999).

15. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 260-379 (1980) (arguing that the "political safeguards" idea should be extended to separation of powers jurisprudence as an alternative to judicial review). One does not have to agree with Professor Choper that "political safeguards" should be the *only* protection for separation of powers principles to accept that they are probably the most important such protection.

the President's preeminence is his perceived primary responsibility for the well-being of the People in their daily lives. To cite only the most obvious example, the current President may well thwart all Congressional efforts to punish him simply because the public at large draws a direct connection between his performance and the healthy state of their pocketbooks.

All this now seems commonplace, but putting it in Madisonian terms helps when we remember Madison's—and the Constitution's—commitment to *divided* power. And power was divided, as Professor Fitts also recognizes,<sup>16</sup> not simply through checks and balances but in the sheer practical constraints of time and energy that limit the ability of the federal government generally—as well as the particular branches of that government—to get very much done. Seen in this light, the original Constitution's scheme of checks and balances themselves were designed not only to prevent aggrandizement of one branch over another, but also simply to slow down the pace of governmental activity.<sup>17</sup> These constraints retain their importance. For instance, in a world where there may well be *no* areas of exclusive state authority, the primary safeguard for state lawmaking is the federal government's simple inability to preempt everything.<sup>18</sup>

The history of the modern administrative state has largely been both an effort to avoid these constraints on Congressional time and energy and a product of recognized limitations on Congressional expertise in particular fields.<sup>19</sup> Advocates of the New Deal reformation of American government saw the constitutional separation of powers as “a faction-driven obstacle to social change in the public interest.”<sup>20</sup> Once the Supreme Court gave up enforcing formal limitations on non-Congressional lawmaking through the delegation doctrine,<sup>21</sup> the way was clear to replace the cumbersome lawmaking process of Article I with streamlined administrative procedures run by “experts.” Such a rise in the administrative state is ultimately justified by the President's personal claim to informal political support.<sup>22</sup>

---

16. See Fitts, *supra* note 1, at 728.

17. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1261 (1996) (noting that “[t]he founders . . . establish[ed] a federal government, comprised of distinct branches exercising separate powers, and subject to numerous checks and balances . . . in order to make the exercise of governmental authority . . . more difficult.”); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 15-16 (1990).

18. See Young, *supra* note 14, at 337.

19. See SUNSTEIN, *supra* note 17, at 22-23.

20. *Id.* at 23.

21. See, e.g., *Yakus v. United States*, 321 U.S. 414, 426-27 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943); GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 426 (3d ed. 1996) (“Under current doctrine, there are very few, if any, constitutional restraints on Congress's power to delegate.”).

22. Cf. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-

The result, of course, was a shift in power to the Executive Branch not only at the expense of Congress, but also to the detriment of state governments, courts, and private ordering.<sup>23</sup> If Madison's insight that informal political support generally *follows* lawmaking authority is correct,<sup>24</sup> then one would expect this trend to be self-reinforcing over time. This is not the place, of course, to argue the virtues and demerits of federalism or deregulation; for present purposes, it is enough to suggest that those issues are difficult and may tend to play out differently in different contexts. If one thinks the answer to these institutional questions is complicated, however, one ought to worry about a general and undifferentiated erosion in the idea of divided and mutually limiting governmental powers.

So my basic reaction to Professor Fitts is to question whether the limitations imposed on the President's policy-making initiative by the political climate arising out of Watergate are such a bad thing. When Professor Fitts says that "intense scrutiny in today's environment" means that "the president's exercise of power [and] articulation of public positions . . . can tend to undermine public support and confidence,"<sup>25</sup> what I hear is that the president's political capital is limited, and it does not go as far as it used to. To the extent that this forces us to look to other actors in the system—to Congress, and even to the States—for lawmaking initiatives, it serves the Framers' ideal of divided lawmaking authority and divided popular allegiance is. Professor Fitts may have shown that the post-New Deal expansion in presidential authority is self-limiting, and this strikes me as a very good thing.

Of course, as Justice Jackson pointed out in the *Steel Seizure Case*, nothing can save Congress' authority if it fails to exercise it responsibly.<sup>26</sup> And that may be the most disheartening aspect of the current political crisis. I am convinced that one reason popular opinion has not left the President is that it has nowhere else to go: despite early, isolated, and unrepeated acts of statesmanship by a Joe Lieberman or a Daniel Moynihan, no one in Congress seems willing or able to exercise the kind of leadership that would give public opinion an alternative point around which to coalesce. There was a time when a Henry Clay, a Daniel Webster, or a John C. Calhoun had the stature to challenge a President's monopoly of public support, but those days seem gone. And it strikes me that when a politically involved public has no one besides a morally discredited president around whom to mobilize, popular support in-

---

66 (1984) (basing argument for deference to agency interpretations of statutes on the President's political accountability).

23. See SUNSTEIN, *supra* note 17, at 15-16, 23.

24. See *supra* note 11 and accompanying text.

25. Fitts, *supra* note 1, at 734.

26. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

stead simply dribbles away into a generalized disenchantment with politics.<sup>27</sup>

In the end, of course, Professor Fitts does not advocate decreasing the level of public scrutiny to restore the presidency's ability to function as an engine for innovation and leadership.<sup>28</sup> While I agree that some reform of the independent counsel statute seems likely, it is also hard to imagine broad public support for solutions that rely on trust in the President's wisdom and propriety.<sup>29</sup> But perhaps what Professor Fitts' observations ought to prompt is a reexamination of the limits of governance based almost solely on informal political support. In that sort of world, the only way to check a President's power is to make him look *bad*—a situation that may well be to blame for the well-remarked nastiness and superficiality of our present politics.

Although the checks on Presidential power imposed by the Watergate reforms thus fill a dangerous void, it is still possible to argue that that they may be the wrong *kind* of checks. By revitalizing some of the *institutional* safeguards that once preserved a lawmaking role for other public institutions—such as doctrines of federalism and nondelegation<sup>30</sup>—we would both ease some of the pressures that Professor Fitts identifies and create ways of opposing a President that would not require frontal assaults on his political credibil-

---

27. In light of the strong performance of the economy during the same period that the Nation's elected policymakers have been almost totally preoccupied by the Monica Lewinsky scandal, the public might understandably conclude that the country is basically capable of running itself. See, e.g., Edward M. Kerschner & Thomas M. Doerflinger, *Clinton Exits? Little, If Any, Sustained Stock Market Impact*, Paine Webber Investment Policy Paper, Dec. 13, 1998 (concluding that the current scandal is likely to have little long-term impact on the economy). Personally, I think it more likely that we have been lucky, and that any conclusion that serious politics is somehow unnecessary would be an exceptionally dangerous lesson to draw.

28. See, e.g., Fitts, *supra* note 1, at 738 (emphasizing that he is not calling for the repeal of most post-Watergate reforms).

29. Given the Attorney General's recent refusals to open independent investigations of the campaign fundraising allegations against President Clinton and Vice-President Gore—in the teeth of advice by her head investigator and the head of the FBI that the Justice Department could not continue to pursue the investigation itself without a conflict of interest—it seems equally unlikely that solutions relying on the integrity of the Justice Department will garner much support. See, e.g., *Ms. Reno Undermines Justice*, N.Y. TIMES, Dec. 8, 1998, at A26 (concluding that “Ms. Reno is too compromised, and perhaps too hostile to the independent counsel statute, to look at the President's behavior objectively”). Whether Professor Merrill's proposal for an independent division within Main Justice guarantees sufficient autonomy to avoid this problem remains to be seen. See Thomas Merrill, *Beyond The Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L. J. 1047 (1999).

30. On nondelegation, see, e.g., David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?* 83 MICH. L. REV. 1223 (1984). The delegation doctrine showed signs of life in *Loving v. United States*, 517 U.S. 748 (1996) (acknowledging continued validity of constitutional limits on delegation, but rejecting delegation challenge under President's Commander in Chief power), and that doctrine arguably provides the only plausible explanation of the Court's decision striking down the line-item veto, see *Clinton v. City of New York*, 524 U.S. 417 (1998). Such a proposal is, of course, rather far afield from the focus of this Symposium.

ity. Of course the sovereign People remain supreme in our system, but they have shown themselves capable before of supporting institutional allocations of authority even in the face of their own substantive policy preferences: The strong popular support for the Supreme Court against Roosevelt's Court-Packing plan, for example, shows that.

Our present political landscape has become so dreary that virtually any proposal for improvement seems unrealistic, and my own prescription is surely more vague and aspirational than most. It would probably be a mistake, however, to assume that the present death of good faith in Washington will last forever, and when it ends—however it ends—those of us who care about constitutional law will have a significant responsibility to participate in the hard work of institutional repair that awaits. No one who accepts that challenge can afford to ignore what Professor Fitts' fine paper has to say.