

## Book Review

**SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD.** By Gerhard Casper.<sup>1</sup> Harvard University Press. 1997. Hardcover, 202 pages. \$27.00.

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This little book is offered as a group of “essays and claim[s] to be no more.” (p. 6) It consists of a series of chapters outlining the evolution of the concept of separation of powers before and during the period of the Constitution’s framing, and describing the practical problems that Congress and the Executive encountered during the Washington and Jefferson Administrations in applying it. The book’s main finding is that there was no “coherent and generally shared idea of separation of powers . . . . No consensus existed as to the precise institutional arrangements that would satisfy the requirements of the doctrine. The only matter on which agreement existed was what it meant not to have separation of powers: it meant tyranny.” (p. 18; 22) It is fair to say that the author makes out a convincing case for that (rather modest) claim.

The central and most useful chapters guide us through earlier efforts to work out an acceptable understanding of the proper roles and functions of the Federal branches. Some of these episodes involved conflict between the branches (as in the House of Representatives’ investigation of the defeat of General St. Clair’s army in an Indian campaign in 1791, which gave rise to the claim of “executive privilege”; (pp. 28-32)) in other episodes, the branches arrived at an agreed distribution of powers with a minimum of difficulty (as in the First Congress’s decision to place the Departments of Foreign Affairs and War squarely within the Executive branch (p. 42)). The process reveals the branches experimenting with particular arrangements, discard-

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ing them for reasons of doctrine, efficiency, or partisanship, and then returning to them again—as in the struggle between Federalists and Republicans over whether appropriations should be made in lump sums (and thus delegate broad discretion to the Executive), or with specificity (so as to ensure legislative supremacy). (pp. 79-93) Interestingly, the branches occasionally reached understandings that differ sharply from those now prevalent: for example, it seemed unproblematic to Washington that the Senate, and even in some cases the House, should play a role in advising the President about the negotiation of treaties. (pp. 51-55)

Engaging and informative as these essays often are, one is left to wonder what, in the end, Casper has taught us. Holmes insisted long ago that in separating powers, the Constitution “do[es] not establish and divide fields of black and white.”<sup>3</sup> More recently, Philip Kurland,<sup>4</sup> in an article that Casper acknowledges, probed and developed Holmes’s insight, finding it anticipated by Madison. Casper provides corroboration and detail for this idea. But his book lacks the range, power and bleak pessimism of Kurland’s magnificent article. Read Casper for the early history of separation of powers. But read Kurland for the causes, and likely consequences, of its decay.

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3. *Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

4. Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 Mich. L. Rev. 592 (1986).