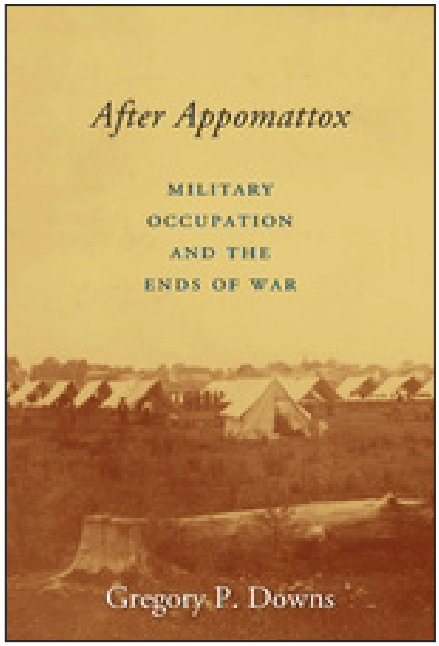


After Appomattox: Military Occupation and the Ends of War

By Gregory P. Downs

Harvard University Press, Cambridge, MA, 2015.

342 pages, $32.95.

Reviewed by Henry S. Cohn

History professor Gregory P. Downs' excellent book, *After Appomattox*, adds a dimension to a well-studied topic: the period of Reconstruction, from 1865 to 1876. Downs argues that the civil rights achievements of Reconstruction may be attributed mostly to the presence of the Union army in the former Confederate states.

From Downs' point of view, the meeting of Ulysses S. Grant and Robert E. Lee in Wilmer McLean's parlor, near the courthouse at Appomattox, Va., and the purported peace that followed, are surrounded in myth—the stuff of Hollywood movies and children's books. According to the myth, the Confederates left the parlor assured by Grant that the federal government was "paroling" Lee's men. They and the South itself would face no further consequences upon surrendering. Grant later debunked the legends that grew up about the meeting: "It is the purest romance. Wars produce many stories of fiction, some of which are told until they are believed to be true."

In fact, the years that followed were not bucolic ones for the South. A state of war continued between North and South, at least until 1871, even though no combat occurred. Union troop levels remained high throughout the South. Downs sets forth the troop levels and their locations both in his book and at the website, mappingoccupation.org.

Especially in the rural South, the efforts of freed blacks to leave traditional plantation life and to participate in civic activity were met with violent reaction from whites. Many former slaves were murdered, and the Union army was dispatched to quell the threat of violence. The commanders of the army divisions at the scene became the actual governing authority, often overruling decisions of local elected officials.

Although President Andrew Johnson initially supported the Union army's efforts to stem the threats to black citizens, he began to side with the local whites. But Congress rejected a declaration of peace that Johnson issued in 1866, and the troops continued to keep order through their occupation. The military presence provided greater safety for the black population, especially in urban areas, and led to increased black voting.

By 1871, as more Southern states were accepted back into the Union, Congress split into factions over the continued occupation. Some Republicans agreed with Sen. Henry Wilson, who urged expansion of the use of soldiers. "I reverence the Constitution, but man is more than constitutions."

By contrast, "Peace Republicans" and Democrats supported a declaration that the war had officially ended. They prevailed, and an exit of troops began. Although the standard history is that the election of Rutherford B. Hayes led to a compromise ending occupation, Downs claims that the compromise of 1876 was only a part of an ongoing period of withdrawal.

After Appomattox ends on an unhappy note as the troops leave. The years following were marked by the rise of the Ku Klux Klan and the racial segregation that the Supreme Court ratified in *Plessy v. Ferguson* in 1896. As current events demonstrate, the United States today has not resolved many of the issues that surfaced when Lee and his men returned to their homes in 1865. One hopes that these challenges may be resolved without the strong hand of the federal government that led to the temporary success of Reconstruction. Downs, however, concludes: "Government, despite its many sins, remains the only instrument that can make our freedom real." ⊙

Henry S. Cohn is a Connecticut judge trial referee.

Equity Management: The Art and Science of Modern Quantitative Investing (2d ed.)

By Bruce I. Jacobs and Kenneth N. Levy

McGraw Hill Education, New York, NY, 2017.

848 pages, $75.

Reviewed by Christopher C. Faille

Bruce Jacobs and Kenneth Levy are both practitioners and scholars of what the subtitle of this book calls "modern quantitative investing."

Seventeen years ago, they brought out the first edition of *Equity Management*. It consisted of 15 articles they had written singly or together on a variety of issues facing both investors and asset managers. This year, they offer the world a much-enlarged second edition. The original 15 articles have become 39.

The article that will likely most interest readers of *The Federal Lawyer* is one of the new additions to this edition, and one with the wonderfully scriptural title "Tumbling Tower of Babel: Subprime Securitization and the Credit Crisis." Jacobs originally wrote it for *Financial Analysts Journal* in 2009. It discusses the causes of the then-ongoing global financial crisis.

World stock markets hit their bottoms and began recovery (though it was for some time thereafter still a quite uncertain recovery) around the time the article was published.

The Central Bank and the Overblown Edifice

The crisis in question resulted in the creation of a lot of new regulations, in the United States and in the European Union especially, and even some new regulatory agencies. Yet it isn't widely believed that the legislative response either helped recovery or is likely to prevent a recurrence.

In the Babel article, Jacobs made two key points about the crisis. First, "low interest rates set by the [Federal Reserve] following the tech stock bubble of the late 1990s and the events of Sept. 11, 2001, prepared the foundation for hundreds of billions of dollars in untenable loans." Second, this "overblown edifice" of loans "was built on structured finance products that seemed to be reducing the risks of lending and investing while actually multiplying those risks and spreading them throughout the global financial system."

For the non-cognoscenti, I'll insert here that "structured finance" is a term of art that includes a wide range of instruments whose value is derived from other underlying assets or indexes, as well as instruments that package and redistribute debt, often in innovative ways. Structured finance is, for the most part, finance between institution that is designed to meet specific and complicated financial needs different from those of the off-the-rack retail financial products.

This reviewer is the author of a book on the causes of the 2007-09 crisis. Not to make too fine a point of it, I agree with the first of the above quoted observations of Jacobs', but not so much with the second. Yet Jacobs' article and its notes offer a very valuable brief introduction to the subject and the literature, with much straightforward explanation, even of the alphabet-soup of the crisis. If you want to know who were the intended markets for Ren Min Bis, why those purchasers included Structured Investment Vehicles, what this has to do with collateral debt obligations, you will find all that out here.

The article also includes an intelligent discussion of the role of the credit rating agencies in the buildup to the crisis.

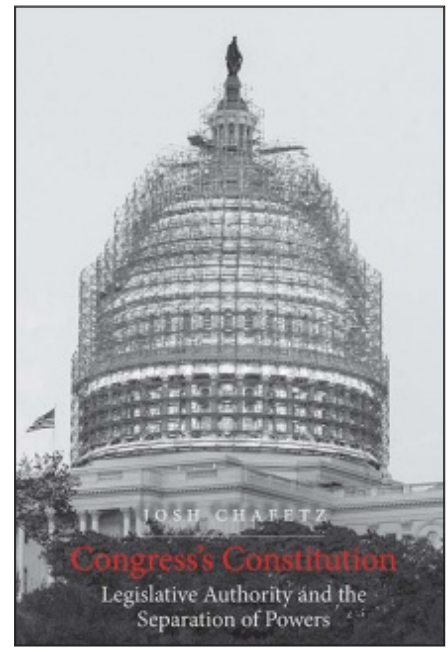
A Blessing From the Master

Scholarly lawyers who practice in the fields of corporate and securities law will find much more to admire in this volume, including even the two forewords by Harry M. Markowitz.

Markowitz is a founding father of quantitative investing. One might even call him *the* founding father. In the 1950s, he was working to give quantitative form to the ancient insight that it is best to have several ships at sea, because any one ship can sink. Quantifying the value of diversification gave rise to other insights, such as that return variance can serve as a proxy for risk, and that there exists an "efficiency frontier," a set of the best possible trade-offs between risk and return. By 1959, Markowitz was associated with the "general mean-variance portfolio selection model." This is the work for which he received a Nobel Prize in 1990.

In the 1950s, this selection model was an academic theory. Actual asset managers didn't yet see its value. But they have warmed to it over time, and the Jacobs/Levy team sped that process. So it is fitting that this book begins with two forewords from the master. ⊙

Christopher C. Faille, a member of the Connecticut bar, is the author of Gambling with Borrowed Chips, *a heretical account of the global financial crisis of 2007-09. He regularly writes for* AllAboutAlpha, *a website devoted to the analysis of alternative investment vehicles, and for* InsidetheNation.com, *part of the OneQube network.*



Congress's Constitution: Legislative Authority and the Separation of Powers

By Josh Chafetz

Yale University Press, New Haven, Conn.

439 pages, $45.

Reviewed by Louis Fisher

When scholars and the press discuss constitutional issues, they are apt to limit their remarks to decisions by the Supreme Court and presidential initiatives. They are either unaware or uninterested in the role that Congress has traditionally played and continues to perform in enforcing the Constitution. In a thoughtful, insightful, and welcome analysis, Josh Chafetz carefully explores not only the part that Congress is structured to perform but its many contributions to constitutional government. In the introduction, however, he notes that the contemporary "gridlock and dysfunction" of Congress has opened the door to "an increasingly imperial executive and an increasingly activist judiciary." Under these conditions, what remains of our fundamental values of self-government, separation of powers, and checks and balances? With so much power concentrated in the executive and judicial branches, how can we with a straight face call our political system a democracy?

Chafetz points to scholars who claim that presidents "will always enjoy an advantage in engagements in the public sphere because of their ability to speak with a unified voice." According to this model, "presidents are

inevitably better at communicating their position because they speak for the only branch that can be said to have a single will." This generalization overlooks how often presidents throughout history have chosen to lie and deceive. Think of President George W. Bush's offering six reasons why President Saddam Hussein possessed weapons of mass destruction, with all six claims found to be empty.

Recall how President Barack Obama during his first three years regularly explained why he could not make immigration policy by himself. At a town hall meeting on March 28, 2011, he emphasized why he could not act unilaterally: "America is a nation of laws, which means I, as the president, am obligated to enforce the law." Urged to act alone, he denied he possessed any such authority: "With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed." To simply through an executive order "ignore those congressional mandates would not conform with my appropriate role as president." In remarks on April 29, 2011, he said he understood that "some here wish that I could just bypass Congress and change the law myself. But that's now how democracy works." He repeated the same position on July 25, 2011, when he told an audience he could not act unilaterally on immigration reform: "That's not how our democracy functions. That's not how our Constitution is written."

By April 30, 2012, he now claimed that under the Constitution he possessed independent authority to make immigration policy: "So where Congress won't act, I will." On June 15, 2012, he announced his policy of Deferred Action for Childhood Arrivals (DACA), under which the Department of Homeland Security would not deport certain undocumented immigrants who came to the United States as children (the so-called "Dreamers"). That was followed by his unilateral action in November 2014 with Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), protecting undocumented immigrants with children who are U.S. citizens. Straight, unified talk by Obama? Hardly. In court, the Justice Department denied that DAPA was covered by the Administrative Procedure Act, which would have required the administration to issue DAPA for public notice and comment. Instead, the Justice Department called DAPA a mere "guidance" that could be withdrawn at any time. Undocumented immigrants, told to come out of the shadows to receive various benefits good for up to three years, were now told that the program could be canceled whenever Homeland Security chose to. Obama lost in district court and in the Fifth Circuit. On two occasions, the Fifth Circuit noted that Obama publicly explained that Congress' failure to enact immigration legislation prompted him to "change the law."

One need only read memoirs by top officials in the executive branch to see the kind of infighting, enmity, and divisions that are standard fare. Still, the Supreme Court asserted in *Zivotofsky v. Kerry* (2015) that the president is singularly capable of providing "unity" for the nation: "Between the two political branches, only the executive has the characteristic of unity at all times." The Court offered no evidence to support its claim, nor could it. As Chafetz observes, "executive communication is not so unitary as many commentators make it out to be."

In discussing the role of Congress in constitutional government, Chafetz begins with chapters on what he calls hard powers: the power of the purse, power over executive personnel, and the power to hold public and private individuals in contempt. He follows that with chapters on soft powers: freedom of speech or debate, internal discipline, and rules within the House and the Senate. Throughout the book he provides a detailed background on English practices from the 1680s forward, when Parliament pressed back against monarchical powers.

The chapter on power of the purse points out that during the Obama administration Congress withheld funds for a number of White House "czars." Those individuals held powerful positions without being confirmed by the Senate. Note 250 for that chapter points to a signing statement by President Obama that objected that a bill presented to him eliminating certain White House czars might unconstitutionally infringe his Article II powers. Whatever Article II powers he was referring to, Obama did not get these czars. Through its constitutional powers, Congress had denied funds for those positions. Obama's signing statement lacked any constitutional grounds.

During his presidential campaign, Obama pledged to close Guantánamo. Instead of following the Constitution by working jointly with members of Congress to develop a plan to do that, on his second full day in office he issued an executive order to close the facility within one year. His unilateral action greatly alienated Congress—Democrats as well as Republicans. Obama and his advisers should have understood that, under the Constitution, Guantánamo could be closed only by obtaining funds from Congress to build a facility in the United States to hold the detainees. Congress never provided those funds and the facility remains open.

In the chapter on speech or debate, Chafetz has a section on "state secrets" that discusses the dispute over the Pentagon Papers and the Supreme Court's decision in *New York Times v. United States* that protected the freedom of the press to publish the document. This was certainly an important judicial check on presidential power. Chafetz does not discuss the state secrets privilege, supported by the Court in *United States v. Reynolds* (1953). The district court and the Third Circuit understood the principle of judicial independence, insisting that the district judge must receive, for *in camera* inspection, the accident report of a B-29 that crashed and killed several crew members and four of the five civilian engineers on board. Through that constitutional process the courts would protect the rights of three wives of the civilian engineers who sued under the Federal Tort Claims Act.

The Supreme Court, without looking at the accident report, held for the administration. Unlike the lower courts, the Supreme Court decided to defer to executive claims without exercising any judicial independence. The report was declassified in 1995, and the three families gained access to it five years later. They and their attorneys discovered that the report contained no state secrets but had abundant evidence that the plane was so defective that it should never have been allowed to fly. The three widows returned to court under a *coram nobis*, charging that the executive branch had committed fraud on the judiciary. They received zero support from a district court, the Third Circuit, or the Supreme Court. Once again, executive claims—not evidence—sufficed.

After the terrorist attacks of Sept. 11, 2001, the Bush administration relied heavily on the state secrets privilege to defend various actions, including sending suspects abroad for abuse and torture (i.e., extraordinary rendition). Those subject to this abuse by the executive branch included

Maher Arar (a Canadian citizen sent to Syria for 10 months for beatings and other physical abuse) and Khaled El-Masri (a German flown by the CIA from Macedonia to Afghanistan for months of abuse). Upon their release, both men filed lawsuits, but the Bush administration invoked the state secrets privilege, and federal courts bowed to that claim. When those cases proceeded into the Obama administration, it continued to assert the state secrets defense.

Fortunately, Canada had the integrity to create a commission to conduct an independent investigation. It concluded that Canadian officials had passed false warnings about Arar to the United States. In 2007, Prime Minister Stephen Harper released a public apology. Arar and his family received $10.5 million in compensation. In 2012, the European Court of Human Rights ruled that El-Masri was an innocent victim of torture and abuse and held Macedonia responsible for his mistreatment and transfer to U.S. authorities. After the European Court ordered Macedonia to pay about $78,000 in damages to El-Masri, Macedonia said it would comply. The United States, far more responsible for the abuse, is not subject to the European Court's jurisdiction. Executive officials in the United States seem incapable of admitting errors and issuing an apology.

Congress, recognizing that the Bush administration after Sept. 11 had misused the state secrets privilege to inflict harm on innocent individuals, held a number of hearings in both chambers to strengthen judicial independence in reviewing executive claims of state secrets. The House and Senate Judiciary Committees reported legislation, but no action was taken on the floor. Misuse of the state secrets privilege continued throughout the Obama administration, even though Obama held early in his first year that the privilege had become "overbroad" and was "overused" by the Bush administration. The current Congress should revisit this issue and pass legislation to limit executive abuse of the state secrets privilege.

At the end of the chapter on speech or debate, Chafetz discusses the Supreme Court's 1936 decision in *Curtiss-Wright*, which in dicta claimed that the president is "the sole organ of the federal government in the field of international relations." Chafetz regards this claim as "nonsensical as a descriptive matter," which is evident simply from reading the text of Articles I and II. Remarkably, this dicta continued in force decade after decade to expand presidential power in external affairs, even though scholars repeatedly pointed out that the Court had wholly misrepresented a speech delivered by John Marshall in 1800. This erroneous dicta was cited regularly by the executive branch and federal courts for 79 years until finally jettisoned by the Supreme Court in the 2015 *Zivotofsky* decision.

In the concluding chapter, Chafetz points out that Congress "has a powerful suite of tools at its disposal." Those constitutional powers "can not only be effective in getting Congress what it wants in the moment, they can also increase congressional power vis-á-vis the other branches in the long run." The record fully supports that judgment. Moreover, there are no grounds to rely on either the president or the Supreme Court to consistently safeguard individual rights and the constitutional system. Chafetz objects to various claims that are used to persuade Congress not to use the tools at its disposal. These include, as Chafetz writes, "that the Senate should consider only 'qualifications,' not 'ideology' in confirmation battles.… [T]his reduces to a claim that appointee ideology should be unilaterally determined by the president."

To Chafetz, Congress has used "its tools effectively in a number of instances across American history, ranging from pulling on the purse strings to bring some administrative agencies into line, to using the appointments process to force substantive concessions from the executive, to changing institutional rules in order to enhance its capacity to oversee and confront the other branches." To the extent that we care about "collective self-government, these powers, and their judicious use, are something to be celebrated."

Well said, but we need to ask if institutional changes in Congress over the past few decades have limited its capacity to engage in self-government. I worked for Congress from 1970 to 2010, most of that time with the Congressional Research Service. The last five years were with the Law Library of Congress. For the first two decades, I worked closely with lawmakers and congressional staff who believed strongly in congressional prerogatives and the system of checks and balances. Many staffers were careerists, well versed in political and legal techniques needed to protect self-government and hold executive agencies in check. Lawmakers and staff were proud of their institution and committed to preserving its independent role.

By the mid-1990s, however, I saw the House shift power from committees to the speaker's office, greatly reducing the capacity of Congress to perform its constitutional duties. Instead of committee chairs serving institutional interests, they were directed to support the personal and partisan interests of the speaker. Over the years, the number of professional staff in committees and subcommittees began to decline, as did the number of careerists. After the Supreme Court's 2010 decision in *Citizens United*, holding that corporations are "persons" under the First Amendment and thus entitled to spend unlimited amounts of money in political campaigns as part of their "free speech," the growth in spending further weakened the institutional capacity of Congress. Lawmakers now spend more time raising money not just for their own races but for their political party. Individuals chosen to chair committees are not those best equipped by expertise and leadership but rather lawmakers good at raising money for their party. Under these pressures, members of Congress are in town fewer days to attend to institutional and constitutional duties.

One step in returning Congress to its former capacity is to pass legislation limiting corporate spending in campaigns. Such legislation would be challenged and eventually brought to the Supreme Court, which would have a choice: insisting that its decision in 2010 was proper and could not be overturned by Congress, or realizing that its conclusion that corporate spending would not lead to political corruption cannot be defended in the light of evidence. ⊙

Louis Fisher is scholar in residence at the Constitution Project and visiting scholar at the William and Mary Law School. From 1970 to 2010, he served at the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and specialist in constitutional law at the Law Library of Congress. He is the author of 25 books, including Supreme Court Expansion of Presidential Power: Unconstitutional Leanings *(University of Kansas Press, 2017). For more information, see* http://loufisher.org.