SUPREME COURT OF THE UNITED STATES

No. 97–1374

WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES, ET AL., APPELLANTS *v.* CITY OF NEW YORK ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[June 25, 1998]

JUSTICE KENNEDY, concurring.

A nation cannot plunder its own treasury without putting its Constitution and its survival in peril. The statute before us, then, is of first importance, for it seems undeniable the Act will tend to restrain persistent excessive spending. Nevertheless, for the reasons given by JUSTICE STEVENS in the opinion for the Court, the statute must be found invalid. Failure of political will does not justify unconstitutional remedies.

I write to respond to my colleague JUSTICE BREYER, who observes that the statute does not threaten the liberties of individual citizens, a point on which I disagree. See *post*, at 29. The argument is related to his earlier suggestion that our role is lessened here because the two political branches are adjusting their own powers between themselves. *Post*, at 4, 14–15. To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. See *Metropolitan Washington Airports Authority* v. *Citizens for*

Abatement of Aircraft Noise, Inc., 501 U. S. 252, 276–277 (1991); *Bowsher* v. *Synar*, 478 U. S. 714, 736 (1986); *INS* v. *Chadha*, 462 U. S. 919, 944–945, 958–959 (1983); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 73–74 (1982). The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed., 1961). So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. The Federalist No. 84, pp. 513, 515; G. Wood, The Creation of the American Republic 1776–1787, pp. 536–543 (1969). It was at Madison's insistence that the First Congress enacted the Bill of Rights. R. Goldwin, From Parchment to Power 75–153 (1997). It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance. See Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1132 (1991).

In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central

authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions. Quoting Montesquieu, the Federalist Papers made the point in the following manner:

> "'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'" The Federalist No. 47, *supra*, at 303.

It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

The principal object of the statute, it is true, was not to enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, to favor one State and ignore another. Yet these are its undeniable effects. The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line item veto and enhances the President's powers beyond what the Framers

would have endorsed.

It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. See *Freytag* v. *Commissioner,* 501 U. S. 868, 880 (1991); cf. *Chadha, supra,* at 942, n. 13. Abdication of responsibility is not part of the constitutional design.

Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised. The citizen has a vital interest in the regularity of the exercise of governmental power. If this point was not clear before *Chadha,* it should have been so afterwards. Though *Chadha* involved the deportation of a person, while the case before us involves the expenditure of money or the grant of a tax exemption, this circumstance does not mean that the vertical operation of the separation of powers is irrelevant here. By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.

The Constitution is not bereft of controls over improvident spending. Federalism is one safeguard, for political accountability is easier to enforce within the States than nationwide. The other principal mechanism, of course, is control of the political branches by an informed and re-

sponsible electorate. Whether or not federalism and control by the electorate are adequate for the problem at hand, they are two of the structures the Framers designed for the problem the statute strives to confront. The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge. The fact that these mechanisms, plus the proper functioning of the separation of powers itself, are not employed, or that they prove insufficient, cannot validate an otherwise unconstitutional device. With these observations, I join the opinion of the Court.