



CONSTITUTIONAL BATTLES OF THE BRANCHES

SCHOLAR EXCHANGE



FRAMING QUESTIONS

- How and why do we see a battle between the branches
- Did the Constitution set-up this battle on purpose and if so why?
- What is “separation of powers?”
- How does separation of powers limit the three branches of government today?
- What are “checks and balances,” and how are they different than (or how to they work together with) “separation of powers” in our constitutional system?
- What are the most pressing questions about separation of powers and checks and balances in 2020?



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CLASS OVERVIEW

- **Part I:** Definition of
 - Separation of Powers
 - Checks and Balances
- **Part II:** Founding Story
- **Part III:** The Jackson Bank Veto
- **Part IV:** Modern Battles of the Branches



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SEPARATION OF POWERS:

Division of power between the three branches of the federal or national government, principle that no branch should improperly take power from another branch.

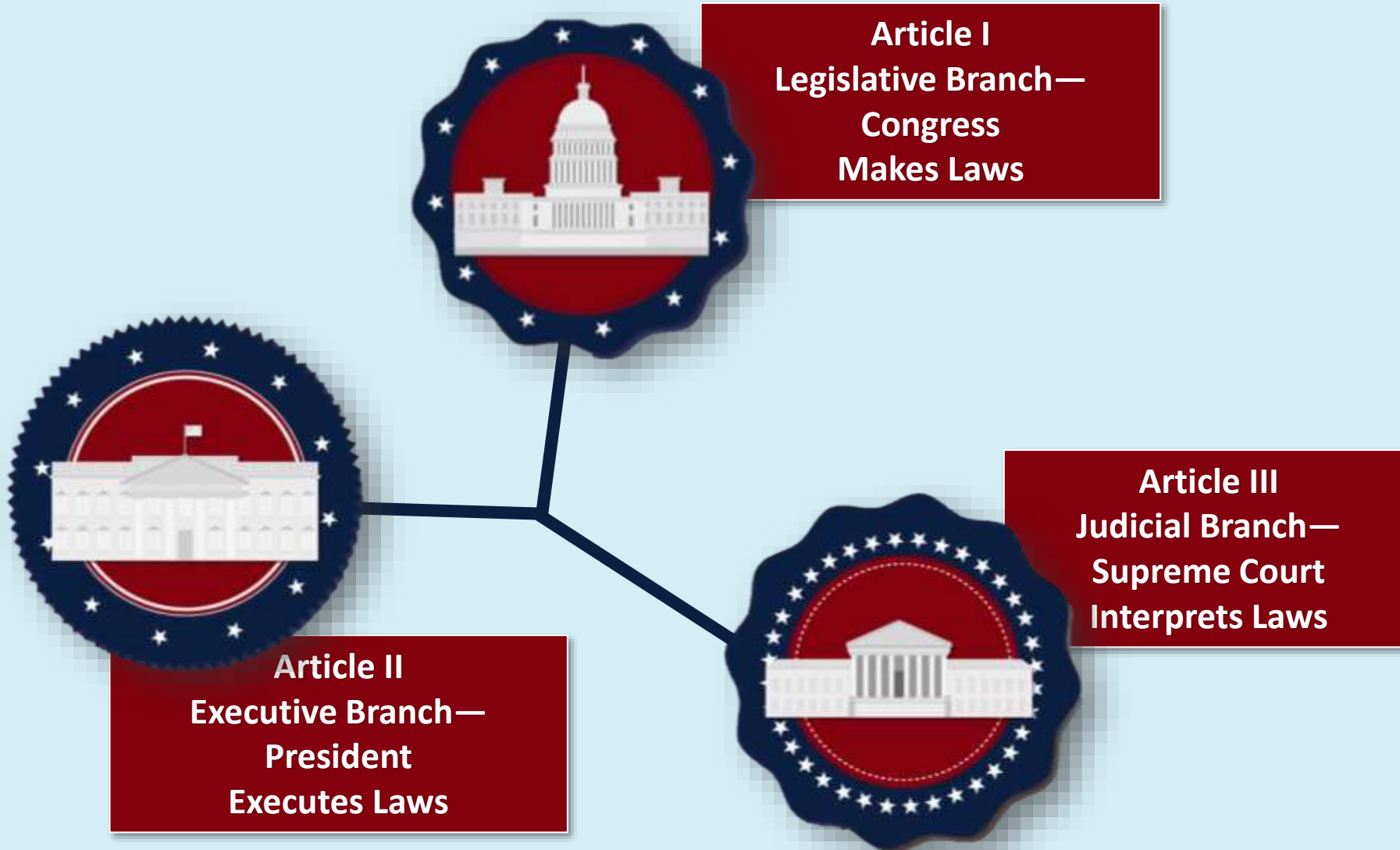


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BRANCHES OF GOVERNMENT



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CHECKS AND BALANCES:

Checks and Balances, broadly defined, is the mixing of powers such that one branch can check the others from getting too powerful and centralizing authority in a single branch.



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CHECKS AND BALANCES IN ACTION

- Congress passes laws, but the President holds the veto power (Congress can override the veto with a 2/3 majority in each house)
- Senate gets a role in treaty making and executive and judicial appointments,
- The House initiates impeachment proceedings while the Senate alone conducts the trial should the President or other officers be impeached

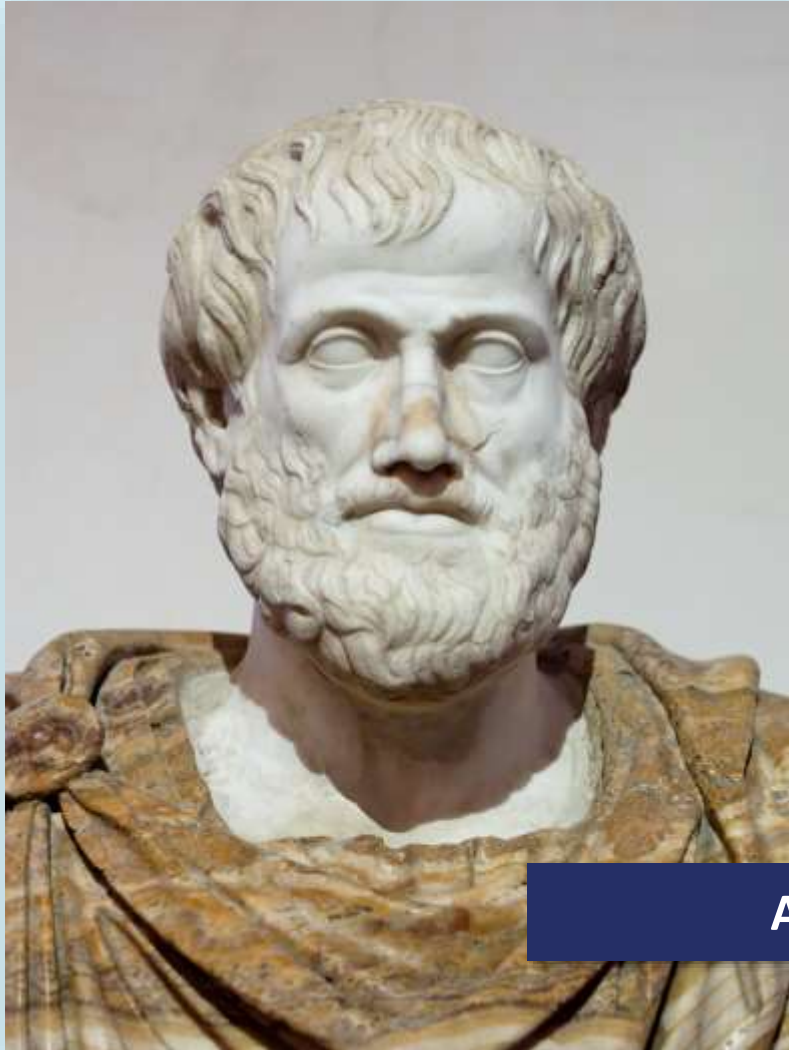


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MIXED GOVERNMENT



ARISTOTLE



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BIG IDEA

The Constitution distributes political power between three branches of government. The legislative branch—Congress—makes the laws. The executive branch—led by the President—enforces the laws. And the judicial branch—headed by the Supreme Court—interprets the laws. Furthermore, through its system of checks and balances, the Constitution grants each branch of government powers to check abuses by the other branches.



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THEORY OF SEPARATION OF POWERS



BARON VON MONTESQUIEU



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THEORY OF SEPARATION OF POWERS



JOHN LOCKE

“The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.”

Two Treatises of Government



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THEORY OF SEPARATION OF POWERS



JOHN ADAMS

Separation of powers prevents:

- Passionate partiality
- Absurd judgments
- Avaricious and ambitious self-serving behavior by governors
- The inefficient performance of function of each branch.

Thoughts on Government, 1776

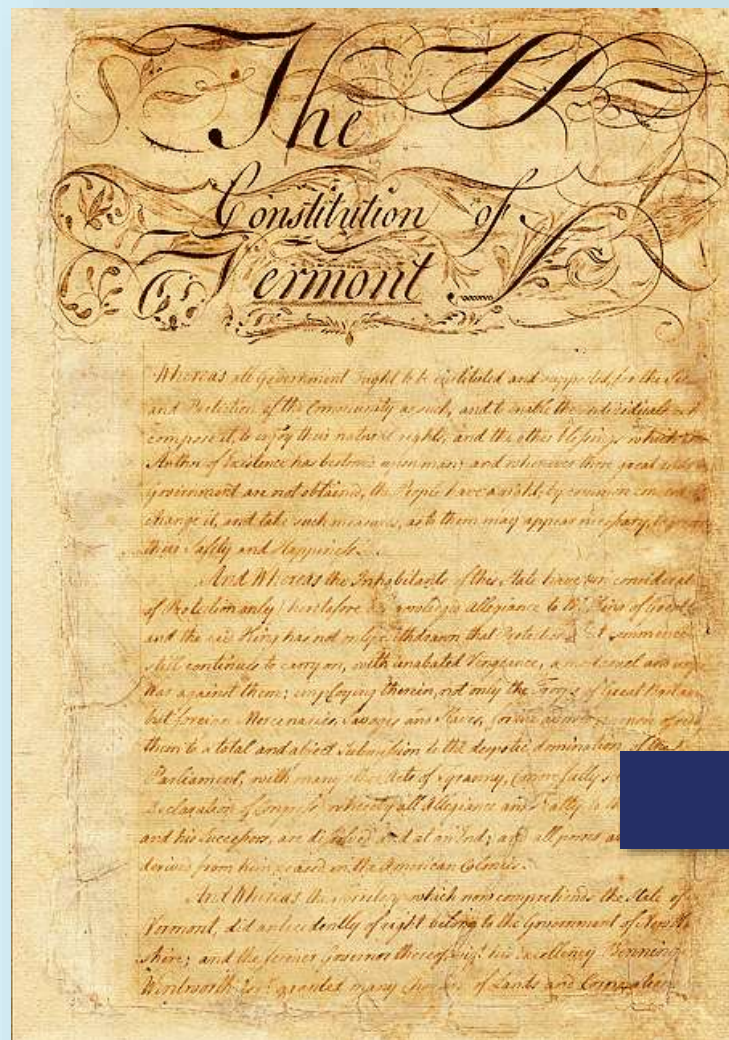


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SEPARATION OF POWERS IN EARLY STATE CONSTITUTIONS



“The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”

VERMONT CONSTITUTION, 1777



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CONSTITUTIONAL CONVENTION

May to September 1787, Philadelphia, PA



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CONSTITUTIONAL CONVENTION



JOHN DICKINSON



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CONSTITUTIONAL CONVENTION



JAMES MADISON



ELBRIDGE GERRY



GOVERNEUR MORRIS



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CONSTITUTIONAL CONVENTION

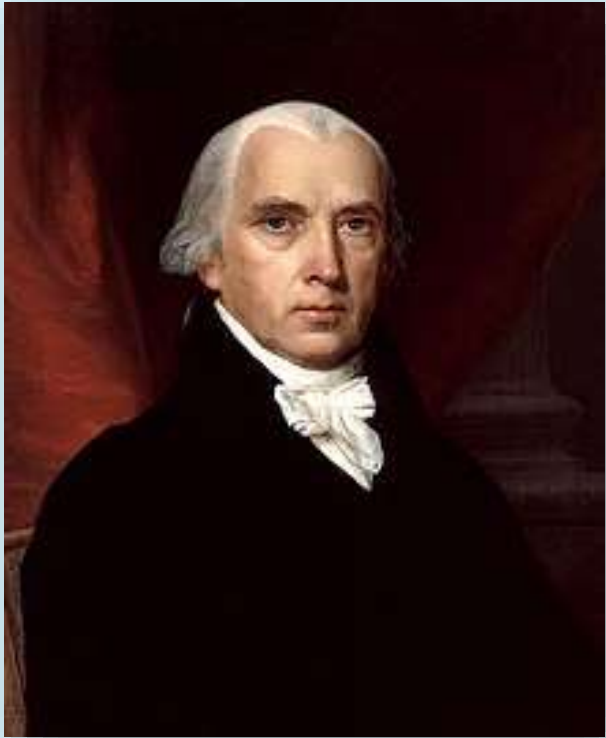


RUFUS KING



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THE VIRGINIA PLAN



JAMES MADISON

Five Propositions:

- 1) National government acts directly on people
- 2) Measures framed broadly towards public good
- 3) Need for unenumerated powers
- 4) Need a negative on state laws to protect from interference
- 5) Regulation of daily life falls to states

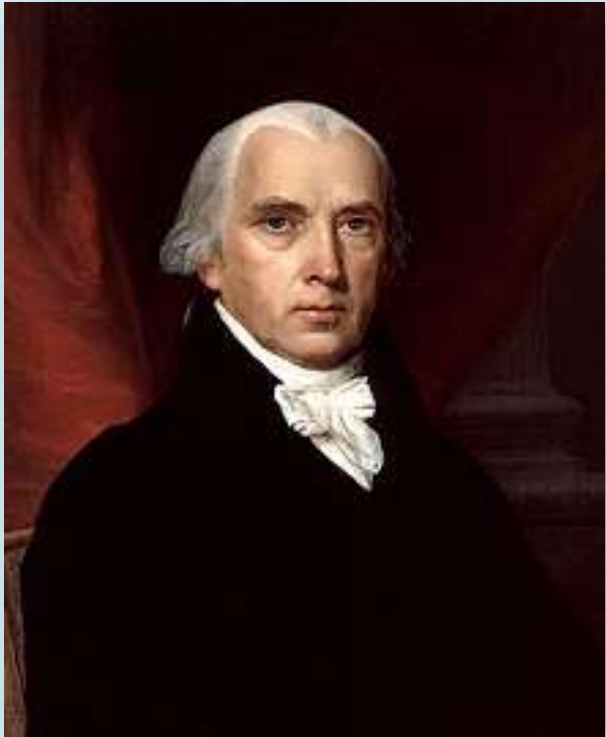


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THE VIRGINIA PLAN



JAMES MADISON

Also Included:

- The Council of Revision— could examine any legislative acts, federal or state, and would hold a constitutional veto
- Congressional selection of the President



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THE VIRGINIA PLAN



Worried about the rise
of “executive tyranny.”

EDMUND RANDOLPH



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THE VIRGINIA PLAN



Concerned the executive and judicial branches were too dependent on Congress—wanted direct popular election of the House, Senate, and Presidency.

JAMES WILSON



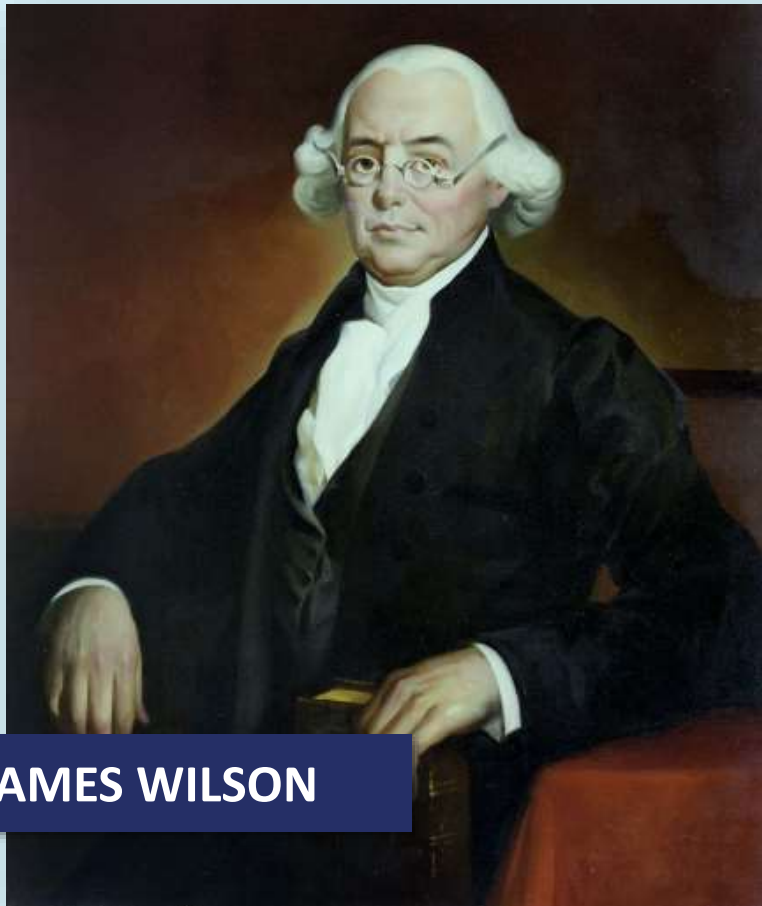
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DEBATES OVER JUDICIARY

President to appoint judges.



JAMES WILSON

Presidential appointment with the
“advice and consent of the Senate.”



NATHANIEL GORHAM



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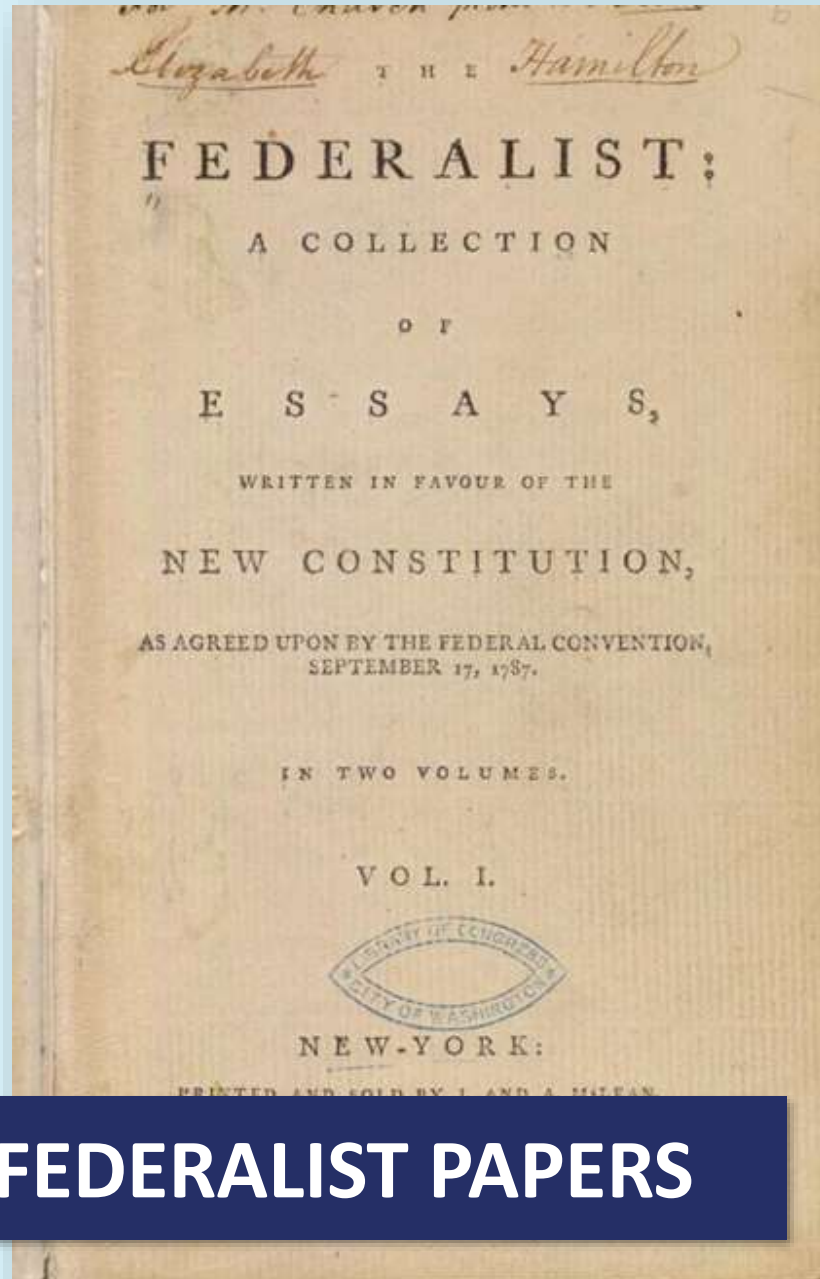
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SUPPORT FOR SEPARATION OF POWERS



JAMES MADISON IN THE FEDERALIST PAPERS



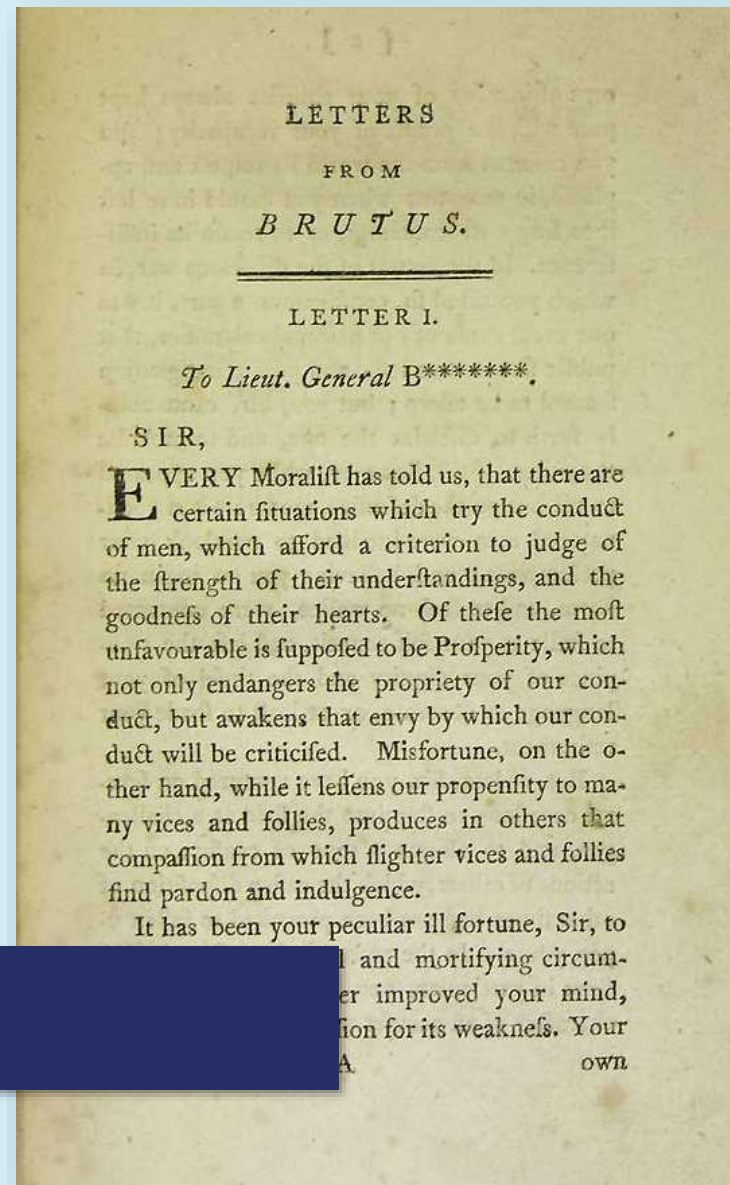
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ARGUMENTS AGAINST SEPARATION OF POWERS

BRUTUS



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ARGUMENTS AGAINST SEPARATION OF POWERS

“undue and dangerous mixture of the powers of government: the same body possessing legislative, executive, and judicial powers.”

REPORT OF THE PENNSYLVANIA MINORITY, 1788



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PROPOSED BILL OF RIGHTS

“The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.”



JAMES MADISON



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MARBURY V MADISON (1803)

JOHN ADAMS



**THOMAS
JEFFERSON**



JOHN MARBURY



JAMES MADISON

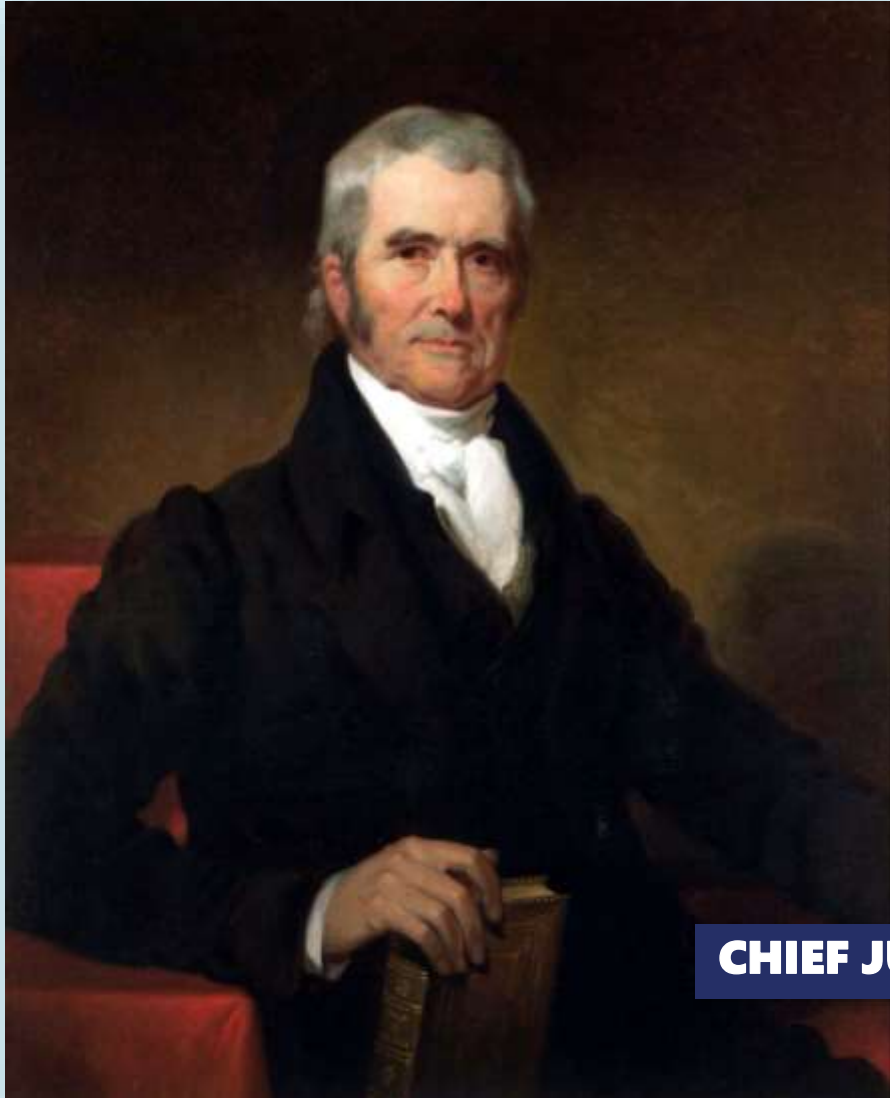


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MARBURY V MADISON (1803)



CHIEF JUSTICE JOHN MARSHALL

“It is emphatically the province and duty of the judicial department to say what the law is.”



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ANDREW JACKSON AND THE BANK WAR



PRESIDENT ANDREW JACKSON

National Bank is
“unauthorized by the
Constitution,
subversive of the
rights of the States,
and dangerous to the
liberties of the
people”



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MCCULLOCH V. MARYLAND (1819)



THE SECOND BANK OF THE UNITED STATES



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BORN TO COMMAND.



OF VETO MEMORY.

HAD I BEEN CONSULTED.

KING ANDREW THE FIRST.

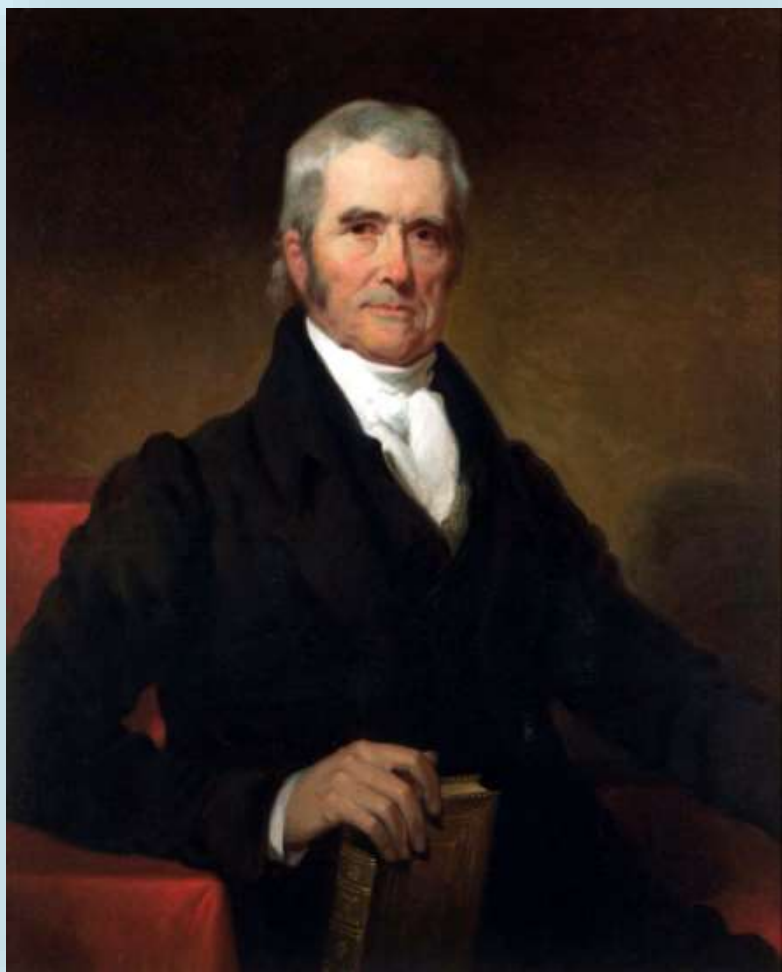
KING ANDREW I



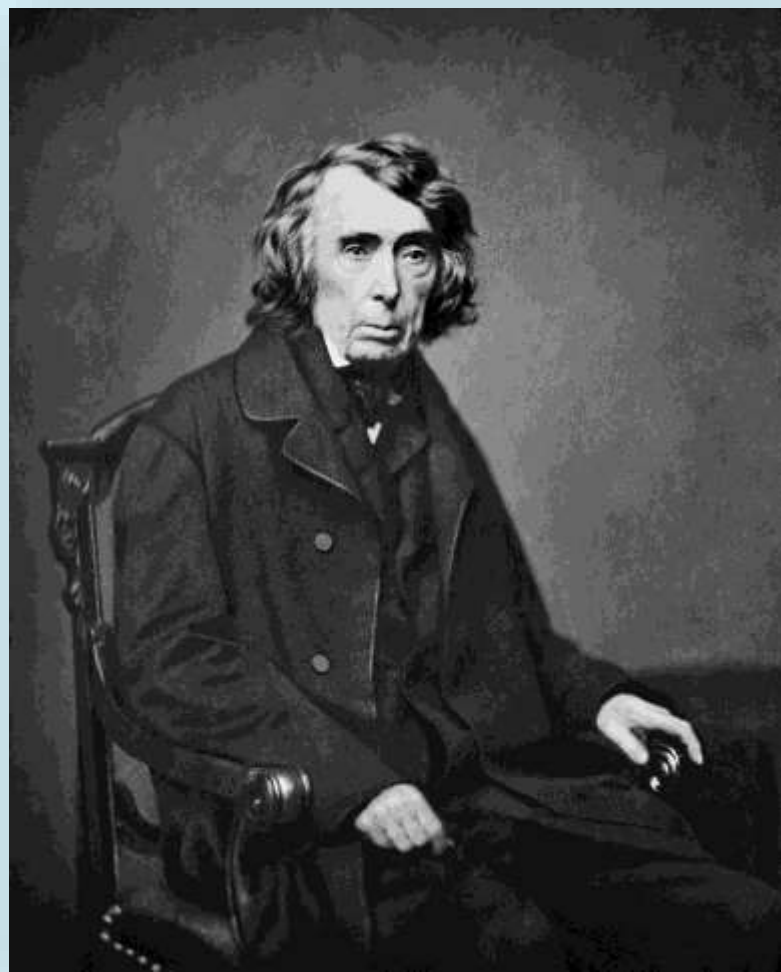
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CHIEF JUSTICE JOHN MARSHALL



CHIEF JUSTICE ROGER TANEY



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**A.L.A. SCHECHTER POULTRY CORP. V.
U.S. (1935)
"SICK CHICKENS CASE"**

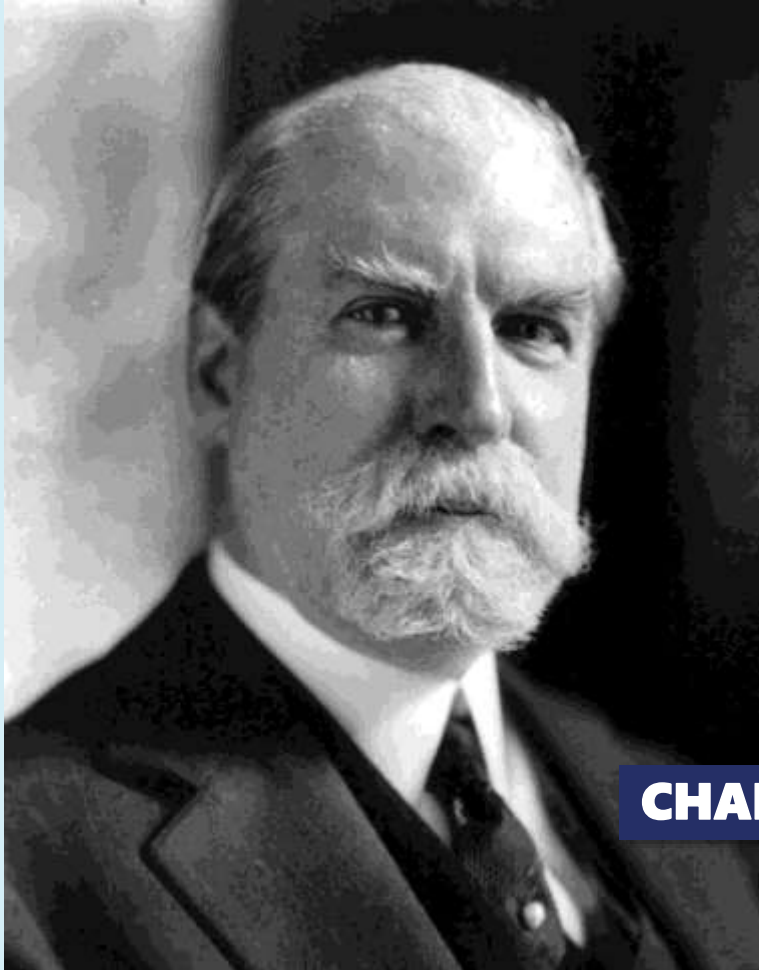


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A.L.A. SCHECHTER POULTRY CORP. V. U.S. (1935) “SICK CHICKENS CASE”



CHARLES EVANS HUGHES

“Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”



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YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952)



PRESIDENT HARRY TRUMAN

“American fighting men and fighting men of the United Nations are now engaged in deadly combat with the forces of aggression in Korea,” and that the materials needed for the war effort “are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and material.”



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YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952)



JUSTICE HUGO BLACK

“The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress...from which such a power can be fairly implied.”



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YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952)



JUSTICE HUGO BLACK

“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”



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YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952)



JUSTICE ROBERT JACKSON

- Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress”)
- “The President acts pursuant to an express or implied authorization of Congress.”
- “zone of twilight in which he and Congress may have concurrent authority”
- “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”



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MORRISON V. OLSON (1988)



INDEPENDENT COUNSEL ACT



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ARTICLE II, THE "APPOINTMENTS CLAUSE"

“the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”



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MORRISON V. OLSON (1988)



**THE COURT, 8-1,
FOUND THAT
THE
INDEPENDENT
COUNSEL WAS
CONSTITUTIONAL.**



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MORRISON V. OLSON (1988)



**JUSTICE ANTONIN SCALIA,
DISSENTED**



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MISTRETTA V. U.S. (1989)



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MISTRETTA V. U.S. (1989)

Majority upheld the United States Sentencing Commission, established under the Sentencing Reform Act of 1984 was constitutional under the “intelligible principle” standard (*J.W. Hampton Jr. & Co. V. U.S.*) as Congress gave enough goals and purposes to the Commission to carry out its mandate.



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MISTRETTA V. U.S. (1989)



**JUSTICE ANTONIN SCALIA,
DISSENTED**

There is “no place within our constitutional system from an agency created by Congress to exercise no governmental power other than the making of laws.”



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MISTRETTA V. U.S. (1989)



**JUSTICE ANTONIN SCALIA,
DISSENTED**

Can be “no doubt” that the commission has established “significant, legally binding prescriptions governing application of governmental power against private individuals,” the “ultimate governmental power” outside of capital punishment.



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MISTRETTA V. U.S. (1989)



**JUSTICE ANTONIN SCALIA,
DISSENTED**

The separation of powers issue is not about the “degree of commingling” but the “creation of a new branch altogether” or a “sort of junior varsity Congress.”

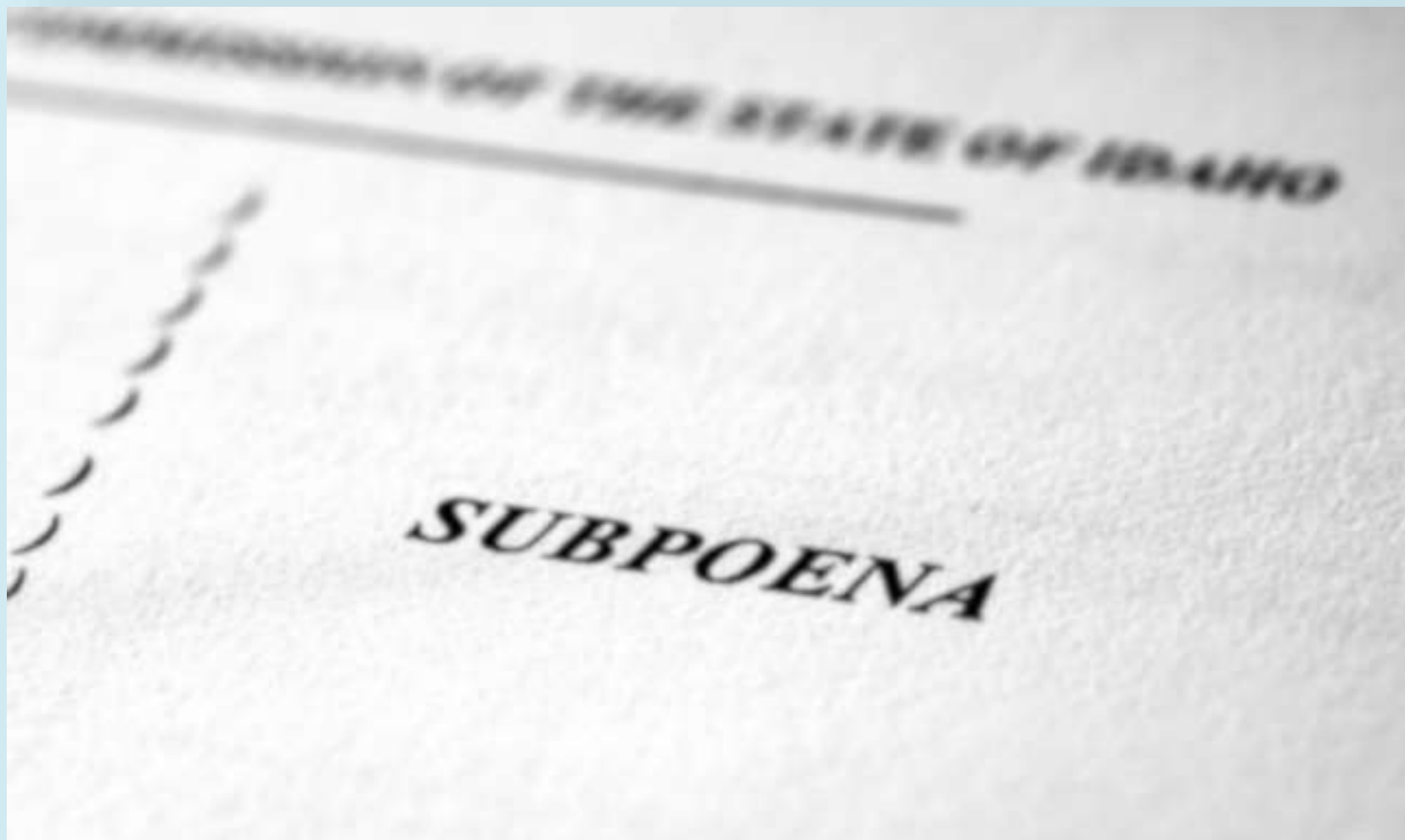


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TRUMP V. MAZARS (2020)



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TRUMP V. MAZARS (2020)

Big question in this case:

How much power does Congress have to investigate the President's private finances and history.

Congress's power to investigate comes typically through the use of the subpoena power—when Congress asks the President or the executive branch for information about a subject necessary to the legislative branch.



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TRUMP V. MAZARS (2020)



CHIEF JUSTICE JOHN ROBERTS

The Supreme Court held that the lower courts did not take “adequate account of the significance” of the separation of powers concerns in the case.

Roberts noted that normally, over the course of two centuries, these sorts of disputes between the branches (the executive and legislative) were resolved by the two branches, not the Supreme Court (thus, these were “political” cases)



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TRUMP V. MAZARS (2020)

MCGRAIN V. DAUGHERTY (1927)



UNITED STATES V. NIXON (1974)



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TRUMP V. MAZARS (2020)



CHIEF JUSTICE JOHN ROBERTS

- “Executive Privilege” should not apply to this case
- At the same time, the Court did not support unlimited congressional power to subpoena the President’s personal records.



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TRUMP V. MAZARS (2020)



CHIEF JUSTICE JOHN ROBERTS

Thus, the Court concluded in these cases:

- (1) Courts should “carefully” assess the legislative purpose given for the presidential records
- (2) Courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective,
- (3) Courts should treat more “detailed” and attentive evidence of a valid legislative purpose as better, and (
- (4) Courts should assess the burden placed upon the President by such subpoenas as part of intrabranh rivalries.



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TRUMP V. SIERRA CLUB



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TRUMP V. SIERRA CLUB

Can the President decide to the use funds for reasons other than the ones Congress gave? (Or in the situation in which Congress has denied the appropriation of such funds) If the President does so, is this an improper use of the legislative power by the executive power? (Thus, did the action violated the appropriations clause of Article I?)

Previous cases had held that no funds could be paid out of the treasury unless it had been appropriated by an act of Congress. How does that apply to the diverting of funds to pay for the border wall?



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BIG IDEA

The Constitution distributes political power between three branches of government. The legislative branch—Congress—makes the laws. The executive branch—led by the President—enforces the laws. And the judicial branch—headed by the Supreme Court—interprets the laws. Furthermore, through its system of checks and balances, the Constitution grants each branch of government powers to check abuses by the other branches.



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