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?
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
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.
BRANCHES OF GOVERNMENT

Article I
Legislative Branch—Congress
Makes Laws

Article II
Executive Branch—President
Executes Laws

Article III
Judicial Branch—Supreme Court
Interprets Laws

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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.
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
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—healed 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.
THEORY OF SEPARATION OF POWERS

BARON VON MONTEESQUIEU

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“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*
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*
“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
CONSTITUTIONAL CONVENTION
May to September 1787, Philadelphia, PA
CONSTITUTIONAL CONVENTION

RUFUS KING

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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
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
THE VIRGINIA PLAN

Worried about the rise of “executive tyranny.”

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

JAMES WILSON
DEBATES OVER JUDICIARY

President to appoint judges.

Presidential appointment with the “advice and consent of the Senate.”
SUPPORT FOR SEPARATION OF POWERS

JAMES MADISON IN THE FEDERALIST PAPERS

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ARGUMENTS AGAINST SEPARATION OF POWERS

Brutus

Letters from Brutus.

Letter I.

To Lieut. General B******.

SIR,

Every Moralist has told us, that there are certain situations which try the conduct of men, which afford a criterion to judge of the strength of their understandings, and the goodness of their hearts. Of these the most unfavourable is supposed to be Prosperity, which not only endangers the propriety of our conduct, but awakens that envy by which our conduct will be criticized. Misfortune, on the other hand, while it lessens our propensity to many vices and follies, produces in others that compassion from which lighter vices and follies find pardon and indulgence.

It has been your peculiar ill fortune, Sir, to have lived in a period and of mortifying circumstances, which have improved your mind, and taught you the use of reflection for its weakness. Your own...
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
“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.”
MARBURY V MADISON (1803)

JOHN ADAMS

JOHN MARBURY

JAMES MADISON

THOMAS JEFFERSON

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

CHIEF JUSTICE JOHN MARSHALL
ANDREW JACKSON AND THE BANK WAR

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

PRESIDENT ANDREW JACKSON
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MCCULLOCH V. MARYLAND (1819)

THE SECOND BANK OF THE UNITED STATES
KING ANDREW I
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CHIEF JUSTICE JOHN MARSHALL

CHIEF JUSTICE ROGER TANEY
“SICK CHICKENS CASE”
“SICK CHICKENS CASE”

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

CHARLES EVANS HUGHES
“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.”
“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.”

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.”

Justice Hugo Black
• 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.”
MORRISON V. OLSON (1988)

INDEPENDENT COUNSEL ACT
“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.”
MORRISON V. OLSON (1988)

THE COURT, 8-1, FOUND THAT THE INDEPENDENT COUNSEL WAS CONSTITUTIONAL.
MORRISON V. OLSON (1988)

JUSTICE ANTONIN SCALIA, DISSENTED
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.

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.”

JUSTICE ANTONIN SCALIA, DISSENTED

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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.
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.”
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.
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).
TRUMP V. MAZARS (2020)

MCGRAIN V. DAUGHERTY (1927)

UNITED STATES V. NIXON (1974)

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TRUMP V. MAZARS (2020)

• “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.

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 intrabranch rivalries.
TRUMP V. SIERRA CLUB

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Can the President decide to 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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