

Scholar Exchange: Battles of the Branches (Separation of Powers)

Briefing Document

INTRODUCTION

Big 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 do 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?

Goals

- Founding Story: Show how the framers took the idea of "separation of powers" and "checks and balances" from Enlightenment political theory, but devised a new system in which the branches were meant to compete with each other to ensure no one branch became too powerful.
- The Jackson Bank Veto: Show how the fight of the National Bank was a battle of the branches over which branch decided whether federal acts were constitutional.
- Modern battle of the branches: Show how modern fights over agencies, the spending power, and investigations of the president tell us about how the constitutional system of "separation of powers" and "checks and balances" works today.

THE CONSTITUTION'S TEXT & INTRODUCTION TO SEPARATION OF POWERS, CHECKS AND BALANCES

The battles in the constitutional system between the branches are part of the system of separation of powers and check and balances.

Separation of Powers

- Definition: 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.
- Basic structure of Constitution: Article I vests "all legislative powers herein granted" in Congress, Article II vests "the executive power" of the government in the president, and Article III vests "the judicial power" of the United States in a Supreme Court and in the inferior courts Congress establishes.

Remember the basic breakdown of the branches: Congress writes the laws, the Executive carries them out or "executes" them, and the judiciary reviews and interprets the laws to make sure they are constitutional. Thus, most modern cases come out of two sources: (1) administrative law and the actions of agencies and (2) disputes that arise from competition between branches.

For instance, administrative law includes when the Environmental Protection Agency (EPA) issues rules about the dumping of environmentally harmful chemicals on public lands and waterways. A dispute between branches would look like the example we'll talk about later—Andrew Jackson and "The Bank War."

Separation of powers is designed to ensure each branch will check and balance the others, but this separation is not absolute since the Constitution recognizes that branches will work in coordination and have roles that "mix" powers (like the presidential veto or the Senate's powers over judicial nominations).

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.

- Examples: 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.

Concept of "mixed government" from Enlightenment political theory goes back to the Romans and Greeks (Aristotle's theory of monarchy, aristocracy, and democracy), notion of "mixed government" is a blending of these three concepts.

- In Rome, this was democracy (the people), the Senate (aristocracy), and monarchy (the concepts).
- Under our Constitution, "mixed government" looks like the presidency (monarchy), the judiciary and Senate (aristocracy, under the original Constitution before the 17th Amendment), and the House (democracy).

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.

FOUNDING STORY AND THE CONSTITUTIONAL CONVENTION

Historic background of the idea of "separation of powers"

Montesquieu learned from the 17th century English experience both of the "Long Parliament" and the "Glorious Revolution." In response to royalist reliance on mixed government during the conflict of the 1640s, supporters of Parliament first sketched out a theory of separation of powers, thinking the most important was to limit the prerogative power which allowed the king to govern without Parliament, veto legislation, and suspend or dispense with legislatively enacted statutes.

Yet the reign of the "Long Parliament" under the Protectorate of Oliver Cromwell also convinced many that they held excessive powers and had governed the country by committee—the lesson being that the Parliament's function was to enact general laws, while the executive should do the daily activity of governing subject to legislative review.

John Locke drafted his Two Treatises of Government around 1680, during the reign of James II and before the "Glorious Revolution." He added a third branch to the legislative and executive power—the "federative" power concerning relations "with all Persons and Communities without the Commonwealth." Locke understood the federative power and executive power to often be mixed and it was "impracticable" to deposit them in different hands, while affirming that both powers were subordinate to the legislative power.

Montesquieu restated Locke's definitions, adding the judiciary as third power instead of the federative. He believed that in a republic, civic virtue requires property, otherwise there could be no independence, and had a preference for "mixed government." His discussion of Republican governments was considered the authoritative summary of these views, especially as to the optimal size of republics—history showed republican governments were prone to decay into authoritative rule and thus needed to be small and homogeneous to have civic virtue).

- Checks and balances: "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."

- "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it 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 violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

John Locke described three forms of power: legislative, ministerial or executive and federative or foreign affairs, judicial power part of executive power, Montesquieu introduces concept of judiciary as third distinct department.

First state constitutions followed Montesquieu strictly, so did Anti-Federalists.
John Adams's 1776 *Thoughts on Government.* Separation of powers prevents: passionate partiality, absurd judgments, avaricious and ambitious self-serving behavior by governors, and the inefficient performance of function of each branch.

Separation of powers had failed under the state constitutions and Articles, legislatures had "run away with the governments," failed to keep the different departments adequately separation.

Early state constitutions and bills of rights often directly referenced or protected separation of powers.

- Example: Vermont Constitution, 1777, "The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." (We see similar examples in Maryland and Virginia.)
    - Thomas Jefferson's draft Virginia constitution went so far as to deny the governor the "prerogative power," leaving executive power as merely the authority to carry out the legislative will.

- Gordon Wood says that when Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of "insolating the judiciary and particularly the legislature from executive manipulation," not of subjecting legislators to external checks other than the people.

Yet, it is important to understand that as Richard Beeman states, under state constitutions, concerns about checks and balance and separation of powers were less important than limiting executive power and thus outside of Massachusetts' 1780 Constitution, these state constitutions were heavily weighted toward legislative power. (New York did allow for the governor to be elected by popular vote for a three-year term, but also adopted a council of revision.)

Jack Rakove adds that the Americans paid "homage to Montesquieu's principle of separation" while ignoring Locke and Montesquieu's defense of the executive prerogative in eviscerating executive power in state constitutions. The state legislatures under the state constitutions were written with the colonial councils, which claimed to exercise all three forms of power in violation of separation of powers, by dispersing the multiple powers of the old councils in new institutions—the Senate, councils of state as advisory boards for the executive, and new high courts of appeal as part of a new judiciary.

Debates over "separation of powers" at the Constitutional Convention

At the Convention, the founders discussed the adequacy and proper degree of the separation of powers in terms of the ends to be achieved: John Dickinson focused on stability, several, including Elbridge Gerry, James Madison, and Gouverneur Morris noted its importance to defense, Rufus King thought it was necessary for independence, and Gerry believed proper functioning government only occurred with separation of powers.

Thus, the framers certainly disagreed about how the principle of separation of powers should be embedded into the Constitution's structure and where it was most necessary, but they agreed that the Constitution must contained separation of powers to ensure republican government.

What we see is that the delegates were broadly worried about any concentration of power in the hands of one individual, branch, or agency of government, but were uncertain about how to construct a government with sufficient separation of powers.

Benjamin Franklin expressed that it was no less worrisome, however, was whether the means available to the several branches of government to defend themselves against the others might not be excessive. Thus, for some framers, there was concern about making checks too excessive. That is, for Federalists in particular who wanted a stronger and more energetic national government, excessive checks or too stringent separation of powers might limit effective government

Madison's Virginia Plan

Far more national, rests on five propositions: 1) national gov't 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.

The Virginia Plan also included a pet idea of Madison's, the Council of Revision, to be composed of the president and a "convenient number of the national judiciary," which he thought would have authority to examine any legislative acts, federal or state, and would hold a constitutional veto.

The Virginia Plan also proposed congressional selection of the president, as we discussed in the Article II class. An objection to this was that because it would make the presidency dependent on the Congress, it was a clear separation of powers issue. Thus, the president needed to be independent and, according to Morris and James Wilson, invested in a single person.

Constitutional historian Richard Beeman argues that one way to see the argument is between those who saw the new government as following the parliamentary system and separation of powers against a "presidential model of government," with supporters of legislative selection of the president like Edmund Randolph worried about the rise of "executive tyranny."

James Wilson, on the other hand, was concerned that the Virginia Plan created a system in which the executive and judicial branches were too dependent on Congress and felt that the only way to create real separation of powers was to render Congress and the president independent of one another and rest their legitimacy on the people themselves—popular sovereignty—not another branch. Thus, Wilson wanted direct popular election of the House, Senate, and presidency. You can also see how separation of powers and popular sovereignty are related.

The presidency was one of the more obvious examples of this tension among the delegates. If Congress had been given power to elect the president, many would have saw the system as being anti-democratic and removing completely the choice from the people and it may have undermined separation of powers. Thus, the Electoral College is an example of compromise not just about federalism, but about maintaining adequate separation of powers and ensuring the president had the necessary independence.

- This is also why the length of term and the possibility of re-election were key issues in constructing the presidency. The president needed independence and energy, but the framers did not want the president to amass too much power for an extended period of time.

The judiciary is another example of where the delegates struggled to construct the branch and maintain separation of powers. Selection there was a big issue too.

- Wilson, fitting with his vision of a strong executive, wanted the president to appoint judges. (Franklin thought the nation's best lawyers should get together to make "the best choice." Can you imagine?)
- Madison and Wilson had gotten three states to endorse their plan for a council of revision, which would have power to review laws passed by Congress and state legislatures—trying to revive Madison's earlier proposal from the Virginia Plan. This failed too. Instead, Nathaniel Gorham's middle-ground language of presidential appointment with the "advice and consent of the Senate."

As Richard Beeman points out, all these debates also signal to us that the framers struggled with filling out what separation of powers, along with checks and balances, meant and he says the difficulty in the summer was figuring out the "still-fuzzy conception" of the relationship between separation of powers and checks and balances.

Examples of separation of powers in the Constitution's structure:

- Although the executive is a separate branch, it properly partakes in a legislative function—the veto.

Federalist Papers

Federalist #47

- Madison tries to neutralize Montesquieu's dictum about separation of powers, does not adhere to rigid division, for anti-Federalists, Federalists were proponents of dangerous political innovation. Madison is revising Montesquieu, looking at empirical evidence and experience, thinking about his time in the Virginia legislature and believes some mixing of powers is necessary.
- What is the underlying concern of separation of powers? That the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Federalist #48

- Madison, based on Montesquieu, separation of powers as essential precaution in favor of liberty, because the accumulation of all powers in the same hands is "very definition of tyranny" and therefore, there could be no liberty if the legislative and executive power were held by the same person or body of persons.

Federalist #51

- Constitution strengthens national government over Articles, alters federalism, aligning concepts of checks and balances and separation of powers.
- President now enforces law, commands military.
- Congress can levy taxes, borrow money, regulate commerce, declare war, promote "general welfare" (elastic clause).
- Key phrase here is "ambition counteracts ambition," reprises the themes of Federalist #10 that in a large republic, factionalism will be naturally combated and controlled.

Anti-Federalist Responses

Argument about inevitability of consolidation rests on three propositions: 1) "imperium in imperio," two sovereignties could not co-exist, 2) Montesquieu observed that a stable republic could only safely operate over a "contracted territory" of citizens with similar customs and interests, Constitution permits abuse of power which would be exploited, 3) features of Constitution most likely to be manipulated (aristocracy of Senate, lack of Bill of Rights, lack of sufficient separation of powers under known principles).

Thus, for Anti-Federalists, the Constitution dangerously blended the functions of the legislative and executive branches, particularly in the sharing of power between the Senate and executive in treaty making, appointment, and impeachments. They also believed that the absence of adequate separation of powers would lead to collusion between the branches and would lead the government to cease being accountable to the people.

Brutus, Constitution approaches so near to a consolidation that it "must, if executed, certainly and infallibly terminate in it."

- For Brutus, recalled that by consolidation, he meant the unlimited power of Congress, the extensive jurisdiction of national courts, the potential expansion of power through the Necessary and Proper clause, and the unlimited taxing power of the new national government.

- Connected to the overt danger of standing armies, armed tyranny—greatest source of tyranny is judiciary.

Report of the Pennsylvania Minority, 1788 (This was the report of the Anti-Federalists at the Pennsylvania Ratifying Convention giving their reasons for dissent.)

- The report attacked the Constitution for insufficiently separating powers, noting the "undue and dangerous mixture of the powers of government: the same body possessing legislative, executive, and judicial powers." Notably, the Senate held both judicial power (during impeachment trials) and "various and great executive powers," notably their role in appointments and treaty making which might aim to concentrate federal power.
- President was "dangerously" connected to the Senate, executive should have had a small council, instead, "his coincidence with the views of the ruling junto in that body, is made essential to his weight and importance in the government, which will destroy all independency and purity in the executive department."
- Thus, the "Dissent" showed the fear of Anti-Federalists that the lack of separation of powers in the structure of the new government would lead to collusion, especially with regards to the Senate's advise-and-consent function in treaties and appointments. They called for a council of advisers to the executive to remedy this.

Madison, Bill of Rights

As shown by the early state constitutions, the founders knew how to write in a textual guarantee of separation of powers. So why isn't there one in the Constitution? In fact, Madison did propose an amendment that did just that: "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."

But this was among the 17 proposed amendments Madison sent to the Senate in September 1789 which they outright rejected and was thus not even sent to the states as part of the 12 proposed amendments, 10 of which became the original Bill of Rights.

Why did Madison seemingly use language that was similar to Montesquieu demanding a more rigorous separation of powers? Was this an olive branch to Anti-Federalists which the Senate rejected?

EARLY DEBATES AND THE SIGNIFICANCE OF MARBURY V. MADISON

Marbury v. Madison (1803)

Here is a case we will discuss more when we get to Article III, since it lays the foundations for what we call "judicial review," the power of the Supreme Court to review acts of Congress (and later state legislatures) to ensure they are constitutional.

Judicial Review is part of the system of "checks and balances" within the Constitution's structure. "Judicial supremacy" is the idea that under Article III, the Supreme Court is the final arbiter in determining the constitutionality of legislative acts. Thomas Jefferson and other Jeffersonian Republicans strongly disliked the idea of judicial supremacy because they believed under both "separation of powers" and "checks and balances," each branch had an independent obligation to consider the constitutionality of government acts.

How is judicial review related to "separation of powers?"

- Part of the Anti-Federalist criticism of the Constitution was fear that Article III gave too much power to the federal judiciary and in particular, that it would lead to the consolidation of power in the federal government because branches would collude together to build up the powers of the national government and take away power from the states.
- John Marshall, like Alexander Hamilton in *Federalist* #78, looked to Article III and the establishment of independent federal courts as being a key part of the Constitution's structure of "separation of powers." That neither the legislative nor executive branch could control the federal courts was essential to the new Constitution.
- Additionally, "judicial review" was a part of "checks and balances," ensuring that the other two branches did not overstep their powers and exceed constitutional limitations. Thus, Marshall emphasized that any law repugnant to the Constitution was void and, "It is emphatically the province and duty of the judicial department to say what the law is."

Thomas Jefferson's idea of "departmentalism" in action.

- "Departmentalism" simply means that each branch has a duty to review federal acts to see whether or not they comply with the Constitution's limitations and requirements.

Jackson, like Jefferson and James Madison before him, thought the Bank of the United States was unconstitutional. President of the Second National Bank, Nicholas Biddle of Philadelphia, was his opponent in this public constitutional battle.

- Pushed his allies in Congress to pass a bill to extend the charter of the Second National Bank, which would end in 1836 (it was a 20-year charter), make it an election year issue. Jackson took the bait and vetoed the bill in July 1832, with months to go before the 1832 election.

Jackson's Veto Message, July 10, 1832

Jackson's essential message to Americans is two-fold: one, the Bank of the U.S. is unconstitutional because no such power is given in Article I and two, the president is the representative of the people and the bank is against their interests and thus he must fight to destroy this threat to the rights of the people and their states.

Jackson begins his message by saying he understood the usefulness of a national bank to the people—he called it **"convenient"**—but Jackson thought it was **"unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people, I felt it my duty at an early period of my Administration to call the attention of Congress to the practicability of organizing an institution combining all its advantages and obviating these objections."**

Jackson then attacked the bank on egalitarian terms, seeing it as conferring a monopoly and privileges upon certain people at the expense of the American people. To Jackson, the bank was a corrupt institution that did not act to benefit the people. As far as Jackson was concerned, the new Bill did nothing to change the existing "odious" features of the bank.

Jackson also clearly rejected "judicial supremacy," believing that both Congress and the president had a duty to consider independently the constitutionality of the bank:

- "It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled."

Jackson noted that Congress accepted the bank in 1791 with a significant debate, rejected re-chartering it in 1811 and 1815 and then did recharter it in 1816. He claimed that if one looked to the states, they would see that by a 4-1 margin, the opinions of the three branches expressed opinions against the bank. Thus, Jackson concluded there was nothing "in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me."

Jackson then outlined "departmentalism:" "If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities."

From there, Jackson moves to criticize the Supreme Court's decision in *McCulloch v. Maryland*, written by Chief Justice John Marshall which upheld the constitutionality of the bank. Jackson noted that Marshall relied on an interpretation of the "necessary and proper clause" by which necessity meant "essential" or "needful" and thus was to be determined solely by the legislature.

Jackson concluded that McCulloch meant that, "it is the exclusive province of Congress and the president to decide whether the particular features of this act are necessary and proper in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or unnecessary and improper, and therefore unconstitutional."

Further, Jackson returned to the problem of federal chartering of monopolies and exclusive privileges and concluded that it could do so only in the area of copyright and patents. Otherwise, such delegation of power was "equivalent to a legislative amendment of the Constitution, and palpably unconstitutional."

Jackson won re-election, but in the wake of his re-election and other contemporary issues (notably, the South Carolina Nullification Controversy), the Whig Party became to emerge as the opposition party to the Jacksonians and their criticism of the expansion of executive power under Jackson was part of it.

- One popular criticism was Jackson as "King Andrew I," like a tyrannical King.

Both Webster and Clay objected in the Senate that Jackson had "perverted" the veto power by overriding the significant majorities that had passed the re-charter Bill, claiming that the veto power was never meant to strike down popularly passed bills as unconstitutional.

Jackson fired his treasury secretary soon after the election when Jackson pushed a plan to remove all the deposits of the National Bank into five state "pet" banks in order to destroy the bank. Roger Taney, upon becoming the new treasury secretary, went through with Jackson's plan. As a reward, Jackson nominated him to replace John Marshall as chief justice when Marshall died in 1835.

Long term, not only did it contribute to the rise of the Whig Party with different constitutional principles, but soon after VP Martin Van Buren became the next president, economic disaster came with the Panic of 1837 and many blamed the Bank War and Jackson's "specie circular" of 1836.

Question: What about battles between Congress and the Executive Branch? How can Congress check the president? How can the president fight back under his Article II powers? Finally, how much power can Congress give the president to shape policy. In the modern age, we see this in the form of government agencies, so how has the Supreme Court addressed the question of Congress's power to create such agencies under "separation of powers?"

We should start with the basic issue at the heart of those last two questions—delegation. To what extent can Congress delegate its powers to either the executive branch or an independent agency? Those battles really started in the 1930s during the New Deal, so let's start with most important case: the "Sick Chickens" case of Schechter Poultry.

A.L.A. Schechter Poultry Corp. v. U.S. (1935)

Lawsuits concerning the constitutionality of the National Industrial Recovery Act of 1933 (NIRA), part of the early New Deal legislation of FDR.

NIRA, section III is struck down under both "separation of powers" and for exceeding the limitations of the "commerce clause" in Article I and infringing upon the reserved powers of the states (10th Amendment. NIRA included price and wage fixing mechanisms, requirements concerning the sale of whole chickens including sick ones (this became known as the "Sick Chicken" case), as well as maximum hours limitations and protection for the right to unionize.

The president, under Section III, was given power to create "codes of fair competition," which the Court struck down as an unconstitutional delegation of the legislative power to the executive branch.

- The approved code in 1934 did, among other things, regulate hours, wages, issue trade and labor provisions, and laid down rules for administration (code advisors and an industrial advisory committee).
- President approved the Code by an executive order in which he found that the application for his approval had been duly made in accordance with the provisions of Title I of the National Industrial Recovery Act, that there had been due notice and hearings, that the Code constituted "a code of fair competition" as contemplated by the Act.
- The government argued that the conditions of the New Deal were a national emergency which required extraordinary action, Chief Justice Hughes and the Court responded that, "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power" (citing the 10th Amendment).

Congress is not permitted by the Constitution to abdicate, or to transfer to others, the essential legislative functions with which it is vested. Here, the Court looked to another 1935 case, *Panama Refining Co. v. Ryan*:

- Case came as the result of a July 11, 1933, executive order based on Title I, Section VI(c) of the National Industrial Recovery Act, an order prohibiting the "transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder."
- The Court struck Section VI down under "separation of powers," ruling that such "codes of fair competition" were essentially legislative. Chief Justice Hughes wrote that while Congress needed flexibility to deal with conditions

like the Great Depression, "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

- Congress cannot delegate legislative power to the president to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. Thus, the Court would not grant unlimited power to delegate to the Executive branch.

Youngstown Sheet & Tube Co. v. Sawyer (1952)

This is the "Steel Seizure" case we discussed in the "presidency" class we did.

In 1950, the United States became involved in the Korean War when North Korean forces invaded the Republic of Korea. President Truman, without a Congressional declaration of war, sent troops to South Korea on June 24 as part of a "police action." In doing so, President Truman involved the United States in a major war without specific authorization from Congress—first since John Adams and the "Quasi War."

President Truman was concerned with the output of the nation's steel mills, as he believed that a strike would cause severe problems for the war effort and the country's economy. Rather than utilize price controls as had been done by Franklin Delano Roosevelt during World War II, Truman opted to create a Wage Stabilization Board in order to keep down inflation of consumer prices and wages.

At the time, the United Steelworkers of America were seeking a new contract that would increase wages for its members. The steel companies were determined not to increase wages, especially in light of the stabilized prices set by the government. The Wage Stabilization Board attempted to have the workers and the industry agree on a compromise. It did not succeed. On April 4, 1952, the union announced that the strike was on, and the steel companies began to shut down their mills. President Truman decided that he needed to force the still mills to stay open, in a similar fashion to how President Roosevelt had seized the aviation industry during World War II. He announced his decision in a radio address to the nation at 10:30 p.m. on April 8, 1952.

In his executive order seizing the steel mills, President Truman warned that "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." Truman did not cite his authority under the 1947 Taft-Hartley Act to prevent the union from striking during a national emergency—an act Truman vetoed—Truman claimed that the inherent powers of the presidency allowed him to take necessary action during an emergency.

Justice Hugo Black delivered the majority opinion for the Court. Although it was the decision of the majority, it was clear that the justices were split on a number of issues, as there five concurring opinions entered as well.

- Justice Black's decision found for the steel industry, declaring that "[t]he 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."
- By the text of Article II, the president has power to "take care that the laws be faithfully executed" and as "Commander in Chief of the Army and Navy of the United States," but these powers did not allow him to take possession of private property to keep labor disputes from stopping production, a job of Congress.
- Black, concerned with maintaining separation of powers, also found that "[i]n 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."

Amongst the concurring opinions, and even compared to the majority opinion, Justice Robert Jackson's stands out as the most illuminating in assessing the extent of executive power.

- Justice Jackson rejected strict boundaries between Congressional and presidential power that Black's majority opinion advanced ("presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress") and instead divided presidential authority into three categories of legitimacy:
- First, and most legitimate, were cases in which "[t]he president acts pursuant to an express or implied authorization of Congress."
- Second, is when Congress has been silent on the issue and when president is relying solely on his Article II powers—the "zone of twilight in which he and Congress may have concurrent authority . . . ."
- And finally, "[w]hen the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."
- However, the existence of "war powers" or emergency and implied powers in Article II did not mean that the president had power to, as "commander in chief," seize steel mills, as the president already held "largely uncontrolled" powers in foreign affairs, this power would "vastly enlarge his mastery over the internal affairs of the country" through the nation's armed forces
- Jackson articulated the potential dangers of enlarged emergency powers, as such power without statutory authority had no beginning or end and thus subject to no legal restraint. Jackson was "not alarmed that it would plunge us straightway into dictatorship," as had happened in Germany once President Von Hindenberg suspended all individual rights on the basis of public safety and order when persuaded by Hitler, but such power would be a "set in that wrong direction."
- The Executive, except for the recommendation of legislation and the veto power, had no legislative power.

Chief Justice Fred Vinson dissented, joined by Reed and Vinson, argued that past practice showed that there is no reason to fear executive tyranny when the president was carrying out the laws of Congress under the duty to "faithfully execute" the laws.

Let's talk briefly about a series of cases from 1988 and 1989 in which Justice Scalia laid out a vision of "separation of powers" which he thought adhered to the original constitutional structure in limiting delegation of authority.

The Court dealt with two issues in this period: the "Independent Counsel Act" and the United States Sentencing Commission. Thus, this is a major example of the battle between the Executive branch and Congress over what makes a proper agency and who controls.

Morrison v. Olson (1988)

Here, the Supreme Court dealt with something called the "Independent Counsel Act," question of whether Congress circumvented the "appointments clause" provisions of Article I by creating an independent counsel.

- Under the act, certain members of Congress could request that the attorney general to apply for the appointment of an independent counsel, this was later replaced by the "Special Counsel" provision familiar today (what allowed for Robert Mueller's investigation).
- This was part of the Ethics in Government Act of 1978 following the scandals of the 1970s politics. (Watergate, etc.)
- The act also created a special court called the "Special Division," appoints an independent counsel to investigate violations of federal law by other officers of the government, here an official in the Justice Department.

- Attorney general ultimately had power to remove the independent counsel, so the separation of powers issue had to with the appointment of the independent counsel by the special division, not the Executive.

Separation of powers question was whether Congress could create "inferior officers" or "interbranch officers" with prosecutorial authority, or executive power, outside the executive branch's control.

Recall the language of 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."

The Court, 8-1, found that the Independent Counsel was constitutional.

Justice Scalia dissented, wrote about the "absolutely central" principle of separation of powers to the framers.

- Morrison was not an inferior officer under Article II, so the president had power to appoint and fire the independent counsel.
- Under separation of powers, Scalia contended that Article II gave all executive power to the president (known as the "unitary executive theory") and thus, Congress could not structure the "independent counsel" the way it had.

Mistretta v. U.S. (1989)

Case concerning the constitutionality of the Sentencing Guidelines passed by the United States Sentencing Commission, under the Sentencing Reform Act of 1984.

The Commission was established as an "independent commission in the judicial branch of the United States" with seven voting members, one being the Chairman, appointed by the president with the advice and consent of the Senate, with at least three being federal judges selected from a list of six recommended by the Judicial Conference of the United States and no more than four can be of the same political party. The Chairman and other members were removable by the president "for cause" only.

Argument before the court was that by delegating power to promulgate sentencing guidelines for every federal criminal offense to an independent commission, Congress granted the body "excessive legislative discretion" violating the "non-delegation doctrine."

Non-delegation doctrine: Goes back to at least 19th century, Court recognized it in *Schechter Poultry, Field v. Clark* (1892) (Schechter was the first act struck down on such grounds).

- Doctrine was "rooted in the principle of separation of powers" underlying the Constitution and system of government by vesting the legislative power in the Congress, thus Congress could not generally delegate its legislative power to another branch
- But Congress can obtain assistance of its coordinate branches, Chief Justice Taft in *J.W. Hampton Jr. & Co. v. U.S.* (1928) wrote that so long as Congress laid down by their legislative act an "intelligible principle to which the person or body authorized to (exercise the delegated power) is direct to conform, such legislative action is not a forbidden delegation of legislative power."

Majority upheld the commission under "intelligible principle" standard, Congress gave enough goals and purposes to the Commission to carry out its mandate.

Scalia, dissenting:

- Guidelines have the force and effect of laws that prescribe the sentences criminal defendants receive, not just "guidelines," Scalia writes that 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."
- 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.
- Commission determined when probation was permissible, had free reign to determine whether statutorily authorized fines should be imposed and what amounts, determined which of the Congressional factors and characteristics of offenses and offenders were to be applied.
- Commingling of powers was accepted to the framers, quoting from Madison in *Federalist* #47, constitution's structure allows for a body not Congress with no government powers beyond the making of rules. Thus, 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."

RECENT SUPREME COURT DECISIONS CONCERNING SEPARATION OF POWERS

Trump v. Mazars (2020)

Big question in this case is how much power Congress has 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.

Case comes out of the legislative subpoenas issued by the House of Representatives for information about the president and his family's finances. The president contended that these subpoenas were a violation of separation of powers because there was no "legislative purpose" behind them.

Two House Committees were involved—one, the House Committee on Financial Services submitted subpoenas to Deutsche Bank. The other, the Committee on Oversight and Reform issued one to the president's personal accounting firm, Mazars Inc.

The Supreme Court, in the majority opinion by Chief Justice Roberts, 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)
- Under earlier caselaw, the legislative branches have the power to secure "needed information" and this power was "indispensable" to wise and effective legislation. However, the subpoena must also be "related to, and in furtherance of, a legitimate task of the Congress" and serve a "valid legislative purpose." It cannot otherwise violate the Constitution or privileges of the other branches.
    - McGrain v. Daugherty (1927)
        - Justice Van Devanter, unanimous court, Congress has auxiliary powers to carry out its duties, this includes the power to compel witnesses to appear and provide testimony.
        - Case came out of the failure of Attorney General Harry Daugherty's to investigate the Teapot Dome Scandal (bribery scandal 1921-23 involving the Harding administration's Secretary of the

Interior, leasing of oil reserves in Wyoming) looks to past practice, included British practice, colonial legislatures, power was asserted early in the American Republic by the House in 1792 when James Madison and his associates supported an inquiry into the St. Clair expedition.

Thus, one purpose that it cannot serve is that of law enforcement. Subpoenas for law enforcement is an executive purpose and thus violates separation of powers.

The Court decided that the precedents from the Nixon presidency and investigations (*United States v. Nixon*), which required Congress to show a "demonstrated, specific need" and that the subpoenas were "demonstrable critical" to a legislative purpose. However, those cases were about communications between the president and close advisers that Congress wanted access to and President Nixon asserted what is known as "executive privilege."

"Executive Privilege" should not apply to this case. Chief Justice Roberts concluded that this protection "should not be transplanted root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations."

At the same time, the Court did not support unlimited congressional power to subpoena the president's personal records. Such unlimited subpoena power would "transform the established practice of the political branches and allow Congress to aggrandize itself at the president's expense. These separation of powers concerns are unmistakably implicated by the subpoenas here, which represent not a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved."

Thus, the Court concluded in these cases, 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 (upcoming case)

This case will deal with the question of using funds from Congress appropriated for other means or reasons to pay for building the border wall.

Thus, 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?

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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