

SEPARATION OF POWERS

When do the actions of one branch of the federal government unconstitutionally intrude upon the powers of another branch?

Introduction

The Constitution contains no provision explicitly declaring that the powers of the three branches of the federal government shall be separated. James Madison, in his original draft of what would become the Bill of Rights, included a proposed amendment that would make the separation of powers explicit, but his proposal was rejected, largely because his fellow members of Congress thought the separation of powers principle to be implicit in the structure of government under the Constitution. Madison's proposed amendment, they concluded, would be a redundancy.

The first article of the Constitution says "All legislative powers...shall be vested in a Congress." The second article vests "the executive power...in a President." The third article places the "judicial power of the United States in one Supreme Court" and "in such inferior Courts as the Congress...may establish."

Separation of powers serves several goals. Separation prevents concentration of power (seen as the root of tyranny) and provides each branch with weapons to fight off encroachment by the other two branches. As James Madison argued in the Federalist Papers (No. 51), "Ambition must be made to counteract ambition." Clearly, our system of separated powers is not designed to maximize efficiency; it is designed to maximize freedom.

Separation of Powers Provisions in the Constitution

Article I, Section. 1:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article II, Section. 1:

The executive Power shall be vested in a President of the United States of America.

Article III, Section. 1:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article I, Section. 7:

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall,

before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law....If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Executive Encroachments

Two very different views of executive power have been articulated by past presidents. One view, the “strong president” view, favored by presidents such as Theodore Roosevelt essentially held that presidents may do anything not specifically prohibited by the Constitution. The other, “weak president” view, favored by presidents such as Howard Taft, held that presidents may only exercise powers specifically granted by the Constitution or delegated to the president by Congress under one of its enumerated powers.

Two prominent cases deal with the breadth of executive power.

Youngstown Sheet & Tube Co. v Sawyer (1952) arose when President Harry Truman, responding to labor unrest at the nation’s steel mills during the Korean War, seized control of the mills. Although a six-member majority of the Court concluded that Truman’s action exceeded his authority under the Constitution, seven justices indicated that the power of the

President is not limited to those powers expressly granted in Article II. Had Congress not impliedly or expressly disapproved of Truman’s seizure of the mills, the action would have been upheld.



President Harry Truman
announcing the seizure of
steel mills on April 8, 1952



Inland Steel president
Clarence Randall responds to
steel mill seizure

Dames and Moore v Regan (1981) considered the constitutionality of executive orders issued by President Jimmy Carter directing claims by Americans against Iran to a specially-created tribunal. The Court, using a pragmatic rather than literalist approach, found the executive orders to be a constitutional exercise of the President’s Article II powers. The Court noted that similar restrictions on claims against foreign

governments had been made at various times by prior presidents and the Congress had never in those incidents, or the present one, indicated its objection to the practice.¹

Congressional Encroachments

In *INS v Chadha* (1983), the Court considered the constitutionality of “the legislative veto,” a commonly-used practice authorized in 196 different statutes at the time. Legislative veto provisions authorized Congress to nullify by resolution a disapproved-of action by an agency of the executive branch. Chadha contended that congressional action overturning an Immigration and Naturalization Service (INS) decision suspending his deportation constituted legislative action that failed to comply with the requirements for legislation spelled out in Article I, Section 7 of the Constitution. The Court agreed.



Jadish Rai Chadha and family

In *Bowsher v Synar* (1986), the Court invalidated a provision of the Balanced Budget Act that authorized Charles Bowsher, as Comptroller General of the U.S., to order the impoundment of funds appropriated for domestic or military use when he determined the federal budget was in a deficit situation. The Court concluded that allowing the exercise of this executive power by the Comptroller General, an officer--in the Court's view--in the legislative branch, would be “in essence, to permit a legislative veto.”

Morrison v Olson considered the constitutionality of the “Independent Counsel” (or “special prosecutor”) provisions in the Ethics in Government Act. The Court had considerable difficulty in identifying in which of the three branches of government the independent counsel belonged. Justice Rehnquist’s opinion for the Court in *Morrison* took a pragmatic view of government, upholding the independent counsel provisions. Rehnquist noted that the creation of the independent counsel position did not represent an attempt by any branch to increase its own powers at the expense of another branch, and that the executive branch maintained “meaningful” controls over the counsel's exercise of his or her authority. In an angry dissent, Justice Scalia called the Court's opinion “a revolution in constitutional law” and said “without separation of powers, the Bill of Rights is worthless.” Justice Scalia dissented again in *Mistretta v U. S.* (1989), a decision upholding legislation which delegated to the seven-member United States

¹ Justice Rehnquist wrote the opinion in this “highly complex and historic case” in eight days. This decision has been criticized for taking “an exceptionally deferential view of executive power,” particularly by relying on inferences from statutes that do not directly deal with certain subjects at hand and especially on legislative acquiescence in executive activity.

Sentencing Commission (a commission which included three federal judges) the power to promulgate sentencing guidelines.

Executive Privilege and Immunities

Executive privilege, the right of the President to withhold certain information sought by another branch of government, was first claimed by President Jefferson in response to a subpoena from John Marshall in the famous treason trial of Aaron Burr. The Supreme Court's first major pronouncement on the issue, however, did not come until 1974 in *United States v Richard Nixon*. The case involved the refusal of President Nixon to turn over to Watergate Special Prosecutor Leon Jaworski several hours of Oval Office tapes believed to concern the Watergate break-in and subsequent cover-up.



President Nixon's attorney, James St. Clair, arguing the Watergate tapes case before the U. S. Supreme Court

Although the Court unanimously concluded that the Constitution does indeed contain an executive privilege, the Court said the privilege was “presumptive” and not absolute. Balancing the interests in the Nixon case, the Court found the privilege not to extend to the requested Watergate tapes.

Treason Trial of Aaron Burr

In 1807, Chief Justice John Marshall sat as the trial judge in the treason trial of former Vice President Aaron Burr. Burr, who was accused of working with Spain to start a war in the Southern territories and Texas (with the suggestion that he would become the leader of a newly-created western empire), requested that the court subpoena certain letters of Thomas Jefferson that might demonstrate that his arrest was politically motivated. Marshall issued the subpoena stating, “Courts should issue subpoenas based on the character of the information sought, not the character of the person who holds it.” In letters to John Marshall, Thomas Jefferson respectfully disagreed, but turned over the letters anyway, thus avoiding a constitutional showdown.

Finally, in *Clinton v Jones* (1997), the Court rejected President Clinton's argument that the Constitution immunizes him from suits for money damages for acts committed before assuming the presidency. The case arose when Paula Jones filed a suit alleging sexual harassment by Clinton in an Arkansas hotel room in 1991 while Clinton served as Governor of Arkansas.

The impeachment saga of President Clinton has its origins in a sexual harassment lawsuit brought in Arkansas in May, 1994 by Paula Jones, a former Arkansas state employee. In her suit, Jones alleged that on May 8, 1991, while she helped to staff a state-sponsored management conference at the Excelsior Hotel in Little Rock, a state trooper and member of Governor Clinton's security detail, Danny Ferguson, approached her and told her that the Governor would like to meet her in his hotel suite. Minutes later, Jones, seeing this as an opportunity to advance her career, took the elevator to Clinton's suite. There, according to her disputed account, Clinton made a series of increasingly aggressive moves, culminating in a request for oral sex. Jones claimed that she stood and told the Governor, "I'm not that kind of girl." As she left, Clinton allegedly stopped her by the door and said, "You're a smart girl, let's keep this between ourselves." (There is reason to question Jones's story, as Clinton's security guard reported that Jones seemed pleased when she left the hotel room--and that anything that happened inside appeared to be consensual.)



Paula Jones

Lawyers for Clinton argued that the Jones suit would distract him from the important tasks of his office and should not be allowed to go forward while he occupied the White House. Clinton's immunity claim eventually reached the United States Supreme Court. The Court ruled unanimously in May, 1997 against the President, and allowed discovery in the case to proceed. As Federal Appeals Court Judge (and Reagan appointee) Richard A. Posner noted in *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*, the Court's "inept," "unpragmatic," and "backward-looking" decision in *Clinton v Jones*, and an earlier decision by the Court upholding the constitutionality of the act authorizing the appointment of independent counsels, had major consequences:

"Clinton's affair with Monica Lewinsky, an affair intrinsically devoid of significance to anyone except Lewinsky, would have remained a secret from the public. The public would not have been worse for not knowing about it. There would have been no impeachment inquiry, no impeachment, no concerns about the motives behind the President's military actions against terrorists and rogue states in the summer and fall of 1998, no spectacle of the United States Senate play-acting at adjudication. The Supreme Court's decisions created a situation that led the President and his defenders into the pattern of cornered-rat behavior that engendered a constitutional storm and that may have embittered American politics, weakened the Presidency, distracted the federal government from essential business, and undermined the rule of law."

As a result of the Supreme Court's action, Judge Susan Weber Wright allowed discovery to proceed in the Paula Jones lawsuit. Judge Wright ruled that lawyers for

Jones, in order to help prove her sexual harassment claim, could inquire into any sexual relationships that Clinton might have with subordinates either as Governor of Arkansas or as President of the United States. A critical moment in the cascade of events that would eventually lead to impeachment came on 5 December 1997 when Jones's lawyers submitted a list of women that they would like to depose. Included on the list is the name of Monica Lewinsky. The *Clinton v Jones* litigation settled in 1999 for \$850,000.

Congressional Immunity Under the Speech and Debate Clause

The framers sought in various ways to guarantee the independence of each of the three branches. The President was protected against criminal prosecutions while in office, answerable only in an impeachment trial with a super-majority required to convict. Members of the federal judiciary were given lifetime tenure, with a guarantee that their compensation would not be reduced. To ensure free discussion of controversial issues in Congress, the framers immunized members of Congress from liability for statements made in House or Senate debate: for their "speech or debate" they "shall not be questioned in any other place."

In 1979, in *Hutchinson v Proxmire*, the Court considered whether the immunity for Senate and House debate extended beyond the floor to cover press releases and statements made to the media. The Court concluded that the Speech and Debate Clause protected only official congressional business, not statements for public consumption.

Congressional Encroachment on Judicial Powers

Art. III, Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority....

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, **with such Exceptions, and under such Regulations as the Congress shall make.**

In *Ex Parte McCordle* (1868) the Court decided it lacked jurisdiction to consider the habeas corpus petition of William McCordle, a Vicksburg, Mississippi newspaper editor arrested by military official for writing incendiary editorials about the federal officers then in control of Mississippi during Reconstruction. Although McCordle made his petition under the 1867 Habeas Corpus Act, Congress repealed the provision authorizing McCordle's petition *after* the Court had heard arguments in his appeal. Although it was obvious that Congress repealed the provision in an attempt to specifically deprive McCordle of the opportunity to gain release from military custody,

the Court nonetheless upheld the validity of the Act and found itself without jurisdiction. Many subsequent commentators, including conservative judge Robert Bork, have criticized the Court's decision in *McCardle* and have predicted that it would not be followed today.

Background on *Ex Parte McCardle*

An Example of one of McCardle's editorials in the Vicksburg Times (Nov. 6, 1867): "There is not a single shade of difference between Schofield, Sickles, Sheridan, Pope and Ord [generals in charge of Reconstruction]:...They are all infamous, cowardly, and abandoned villains who, instead of wearing shoulder straps and ruling millions of people should have their heads shaved, their ears cropped, their foreheads branded, and their persons lodged in a penitentiary."

President Johnson's message in vetoing the Repeal Act (Johnson's Veto was subsequently overridden.): "I cannot give my assent to a measure which proposes to deprive any person restrained of his or her liberty in violation of the Constitution...the right of appeal to the highest judicial authority known to our government....The Supreme Court combines judicial wisdom and impartiality to a higher degree than any authority known to the Constitution; any act which may be construed into or mistaken for an attempt to prevent or evade its decision on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences."

McCardle's attorney on the Supreme Court decision against his client: "The Court stood still to be ravished and did not even hallo while the thing was getting done...The whole government is so rotten and dishonest that I can only protest. It is drunk with blood and vomits crime incessantly."

Discussion questions

1. What are some of the weapons each branch is given by the Constitution to fend off encroachment by other branches?
2. Which view of presidential power under the Constitution makes the most sense to you--the "strong" view or the "weak" view? Why? Which view has the Court come closer to adopting?
3. How should a history of congressional inaction in response to an assertion of presidential power be interpreted?
4. Did the Constitution empower President Lincoln to issue his famous Emancipation Proclamation?

5. It is not obvious that the Court has the power to review presidential assertions of power. What do you think about the suggestion that the Court should refrain from reviewing these exercises of power under "the political question" doctrine?
6. Why do you think Congress came to rely so heavily on "legislative veto" provisions? What are the alternatives?
7. Among the many ways of evaluating justices, one is to measure their willingness to accept as constitutional "pragmatic" solutions to the problems of modern governance. On such a scale, with respect to recent justices, might Justice White be called the "most pragmatic" and Justice Scalia the "least pragmatic" justice?
8. The Court seems to view the power of removal as key to placing an official in one or another branch of government. Why is the power of removal so important?
9. Have special prosecutors made a positive or a negative contribution to public life?
10. Do you accept Justice Rehnquist's argument that the Court should be concerned when one branch seems intent on increasing its power at the expense of other branches, but much less so when that is not the intent of an alleged separation of powers violation?
11. Is Justice Scalia right in suggesting, after Morrison, we now have a "standardless judicial allocation of powers"?
12. What do you think about the guidelines of the U. S. Sentencing Commission? Have they served to provide more uniform sentencing? Have they taken too much sentencing discretion away from trial judges and juries?
13. Could it be argued that the Federal Rules of Civil Procedure violate constitutional separation of powers principles?
14. Could Congress delegate all of its law-making power to a super agency and take a long vacation? Why would such a broad delegation violate the Constitution? How far can Congress go in delegating its law-making powers? When are standards for the exercise of administrative discretion sufficient for constitutional purposes?
15. What is the best argument for recognizing constitutional protection for claims of executive privilege?

16. What would happen if the President were to ignore a direct order from the Supreme Court to respond to a legislative or judicial branch request for information? President Nixon promised to obey "a definitive opinion of the Supreme Court." What do you think he meant by "definitive opinion"?
17. Should the doctrine of executive privilege apply differently in impeachment proceedings?
18. What's the case for making the President immune from suits for damages while in office?