

# III. The Federalist Papers, The Constitution, and Separation of Powers

## The Federalist Papers, the Constitution, and Separation of Powers

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The design of the American Constitution directly reflects the framers' decision that power should not be permitted to be centralized. After their colonial experiences under the rule of George III, the framers well understood the necessity of designing a governmental scheme that would so fragment power as to make it difficult for one person or group to rule. Their definition of tyranny was the holding of all governmental power in one set of hands and they were determined to structure their new government in ways that would make it difficult, but not impossible, for a tyranny to arise.

For the framers, democracy implied majority rule, but they were as worried about a tyranny of a majority and its potential abuse of minority rights as they were of creating a system of government that would itself promote liberties. They were firmly convinced that "vigor of government is essential to the security of liberty,"<sup>14</sup> so their task was to create a government with power adequately limited in ways that would minimize (but not prevent) the likelihood of a tyranny.

Their solution can only be termed ingenious. The framers created a system that did promote liberty while restraining governmental power and one that has endured in spite of enormous domestic and international strains. It is a system which has been widely admired and copied. Its fundamental characteristic is its separation of power among the branches of the government and between the levels of government. This separation of powers with its checks and balances and division of powers between the national and state governments – federalism – constitute the unique American contributions to political thought and practice.

### The Theory of the Constitution

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<sup>14</sup> Hamilton, Madison, and Jay, The Federalist (New York: The Modern Library Edition, n.d.) #1, p.5.

The call to convention in 1787 was issued in order to amend the Articles of Confederation. It was clear to most that the Confederation had not worked and the convention was intended to remedy its defects; however, at the outset virtually all delegates agreed that a new start was in order and that the Articles should be scrapped. With that agreement the framers started the task of creating and establishing a new system of government that would meet the needs of the people and the nation.

The primary task confronting the framers was to develop a new government to which citizens could adhere in faith and unity while knowing their best interests would continually be protected. The task was to create a system which would provide stability and harmony among the governed and between the people and their government. The government has to be one that would be enduring and recognized as legitimate.

One possibility which was immediately dismissed from consideration was a despotic or one ruler form of government. The Revolution had not been fought to rid Americans of the hardships under the colonial rule of George III only to consider a similar system in the birth of their nation. As a result, debate centered on the merits of (pure) democratic and (representative) republican rule.

The framers necessarily focused their inquiry and reasoning upon their view of the purposes of government. At least for some, this in turn led to analysis of the nature of man and how the government might best serve and protect the individual. Only if man were understood did they feel that the sort of government appropriate for him could be devised. Thus, a description of the basis of the system of governance necessarily starts with the theoretical foundations on which it is premised – the governed, or man.

The single best source for that analysis is The Federalist by Hamilton, Madison and Jay. Leaders at the Convention, they subsequently published 85 newspaper articles in defense of the new Constitution. The articles were intended to convince the voters of the state of New York to ratify the Constitution and certainly they informed their readers in ways that contributed to that ratification. Today they remain the best explanation of the reasons for the design of the Constitution.

The framers started from the premise that man is by nature frequently a power-seeking, nasty fellow. They believed that one could “not always [be] sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question.”<sup>15</sup>

Man does have reason, but “the reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it

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15 Ibid., #1, pp. 4-5.

is associated.”<sup>16</sup> Thus, men could form a government, a process requiring “firmness and confidence,” through reason, but reason conditioned by the group to which they belonged.

The problem would be to restrain the irrational and maximize the rational in the face of man’s drive to join others of like interest in order to further personal gain. Placing enormous faith on man who, though selfish, could create a government which would guarantee life, liberty, and property, the framers concluded that a system of governance could be created to meet the society’s needs. To do this at least some men would have to place the interest of the country above that of self and use their reason to further the interest of all.

They believed that the basic problem centered in the fact that factions existed. A faction is

a majority or minority of the whole who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community. <sup>17</sup>

Man, timid and alone, in order to further himself joins factions whose interests by definition are contrary to the public interest. This creates a serious problem of governance, for in a democracy a faction might easily become a majority and deprive the minority of its freedoms. Factions are natural and inevitable and if allowed to flourish in a free society would ultimately destroy the very freedom which allowed them to arise.

Factions could be obliterated by eliminating the freedom which generated them; this, however, would be counterproductive. As Madison noted, “liberty is to faction what air is to fire, ...but it could not be less folly to abolish liberty...because it nourished faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”<sup>18</sup> Alternatively, a society could so control public opinion as to insure that all had the same opinions, thus eliminating diversity and factions. The problem here was that “the protection of [man’s] faculties is the first object of government.”<sup>19</sup> It would defeat the very purpose of government if it sought to overcome the propensity to faction by defaulting on its basic obligation to protect the diversity of faculties among its citizens. Thus, the framers confronted the reality that factions would always be present in a free society, that they could not be controlled without removing the very liberty the society was seeking to further.

The problem seemed insuperable. The differing faculties of man result in mutual animosities that inevitably result in conflicts. Indeed, these differing faculties only lead to severe class conflict, for some would always gain economic advantages over others by using their

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16 Ibid., #49, p. 329.

17 Ibid., #10, p. 54.

18 Ibid., p. 55.

19 Ibid., p. 54

greater capacities. Conflicts would arise among those who had property and those who did not, and among those with differing sorts of property, so that “the regulation of these various and interfering interests forms the principal task of modern legislation.”<sup>20</sup>

The solution lay in controlling the effects of factions. In other words, in order to protect the freedom deemed fundamental to life, liberty, and happiness, the framers concluded that factions must be allowed to exist and flourish, but their effects must be controlled.

The framers recognized that in a democracy if a faction were a minority it would not be able to exert its will upon the majority. It might make things difficult, but not be able to execute its insidious goals. What, though, if it were a majority? “[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”<sup>21</sup> That could mean a tyranny by the majority which would be just as dangerous and distasteful as that experienced under indiscriminate rule of one man. Thus, reliance upon the majority principle would not be suitable, suggesting that a pure democracy could readily result in majority tyranny.

Instead of a pure democracy, “a society consisting of a small number of citizens, who assemble and administer the government in person,”<sup>22</sup> the framers proposed a republic. Such a form of government, involving representatives selected by the body politic, would remedy the difficulties encountered by the pure democratic form. Representatives would present the views of their constituents in refined ways, having filtered the good and the bad. Their wisdom would enable them to “discern the true interest of their country and [their]... patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>23</sup> While sounding good, this remedy simply did not square with the premise of man’s nasty nature. The fact of the matter is that “enlightened statesmen will not always be at the helm.”<sup>24</sup> “Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people.”<sup>25</sup> The new nation must take measures to insure that its aims would be met no matter who was in office.

One protection would emerge from the large size and concomitant large population of the country. The framers assumed that the proportion of citizens who would be qualified for office would be the same in a large and a small population. In the United States the fact of a large population worked to the advantage of the republican principle, for the people would in absolute terms have a larger number of qualified office seekers from among whom to choose. Further,

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20 Ibid., p. 56.

21 Ibid., p. 54.

22 Ibid., p. 58.

23 Ibid., p. 59.

24 Ibid., p. 57.

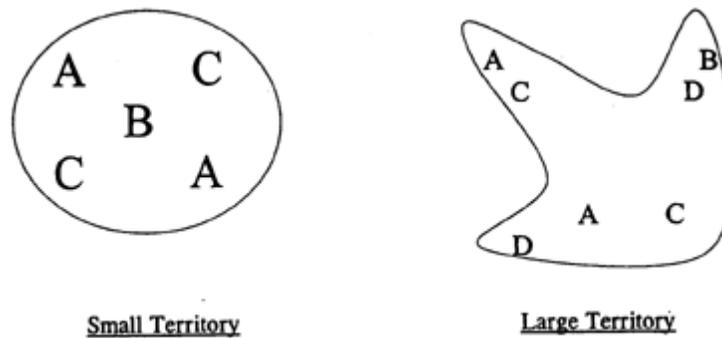
25 Ibid., p. 59.

in the large territory a representative would have great difficulty in rigging the election process, so the people would be more free to elect their representatives on merit.

Perhaps the strongest argument in favor of a republic was premised on the existence of factions. The framers understood that a pure democracy would plainly be impractical in the large territory with the large population; historically, however, a large territory had implied tyrannical rule as in the Roman Empire. Contrary to historical precedent, they concluded a republic would preserve the democratic character they sought without tyrannical rule. The large territory would work to promote the democratic republic, for the reality was the larger the area the greater the difficulty of like factions uniting. Whereas in a small territory, with, say, four significant factions, it would be easy to overcome geographic distance among those of like interest and unite to become a majority: in a large area it would be significantly more difficult. As Figure 1 suggests, in the small area members of faction A could be much more easily joined with one another than in the large area. Though there may be more members of a given faction in the larger territory with a larger population, they nevertheless would have a more difficult time in identifying their shared interests and joining to fulfill them. “The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”<sup>26</sup>

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Figure 1: Factions in a Small and a Large Territory



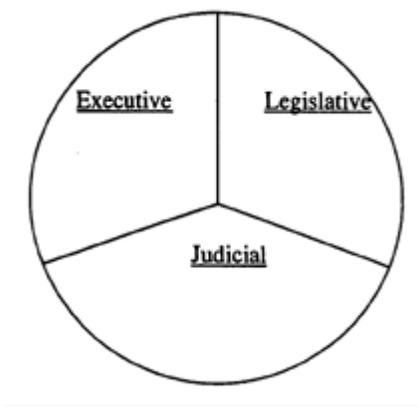
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Thus, the first significant decision was made – the new government would be a republic, with some ruling for and on behalf of the others. It would be a government to which powers would be delegated to a small number of citizens. In turn that small number would be constituted of good men (which assumed the election of the good even by the bad). The large union, with its large, heterogeneous population, combined with the republican principle would be

able to absorb and take into account the propensity of man to factions. They would render “factious combinations less to be dreaded”<sup>27</sup>

With that decision, the problem then confronting the framers was how to guarantee the freedom the system was designed to promote. First, the new government would be limited to the powers that were delegated to it. More, the new government itself would be structured in ways that would make it difficult for a faction to obtain tyrannical power. Statesmen, however good, possessed the same human frailties as all others and even without attempting it could work to the disadvantage of the body politic. The framers therefore concluded that they should so divide power as to make its accumulation in one set of hands an arduous task that could only be achieved over a long period of time. It should be emphasized that, in the interest of freedom and liberty, restrictions upon the possibility of gaining tyrannical control over the government were not imposed; rather, that possibility was made very remote by the very structure of the government. The concept of a separation of powers, of three co-equal branches of government providing checks and balances on the powers and defined interests of each other, and of federalism, the federal and state governments’ working within their defined spheres (“the powers proposed to be lodged in the federal government are...little formidable to those reserved to the individual States”<sup>28</sup>), were consequently woven into the Constitution. Power would be divided into its executive, legislative, and judicial parts.

Figure2: Power Separated  
All Government Power



Relying heavily upon Montesquieu, Madison assumed the distinction among legislative, executive, and judicial powers, and assigned to each the powers necessary for co-equality. Power was separated according to kinds, but essential to understanding the American system of government is the realization that the separation of each branch from the others was intentionally incomplete. The power of each was deliberately blended with the others in order to preserve the power of each. This curious design was premised on the judgment that power is of an

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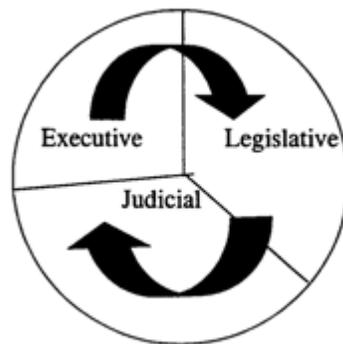
27 Ibid., p. 60.

28 Ibid., #46, p. 312.

encroaching nature and that the best way to protect the power of one branch is to introduce another into its sphere. That deliberate threat of encroachment would induce resistance, a check and balance. Thus, the separation was blurred and in practice the boundaries would always be changing. Powers perhaps best assigned to one branch were intentionally assigned to another. A creative tension was structured into the system.

The creative tension was premised on man's nature and truly represents and characterizes the brilliance of the creation. The government was designed to control the effects of factions which would arise naturally because of man's nature. By definition men and factions would seek to promote their self-interest to the detriment of the public interest, yet considerations of freedom and the purpose of government mandated that no restrictions be placed that would prevent their evil and selfish ends' being pursued. To protect freedom, therefore, the framers sought to use man's propensity to power to guard the assignments of power to each of the three branches and to the federal and state governments. They did this by assigning to each sphere some of the power of the others. That in turn would lead to strong efforts to resist the encroachments and to encroach, thus in the push and shove protecting the integrity of each.

Figure 3: Power Separated and Shared:  
The Overlapping nature of the Separation



1. Some Judicial Functions of the Executive
  - Nomination of candidates
  - Enforcement of decisions
  - Litigation (Justice Dept.)
2. Administration of legislation
  1. Some Legislative Functions of the Executive
    - Proposes legislation/budget
    - State of the Union
    - Veto

3. Some Judicial Functions of the Legislature
    - Creation of lower courts
    - Approval of nominations
    - Control of appellate jurisdiction
    - Impeachment of judges
  4. Some Executive Functions of
    - Impeachment of President
    - Appropriations
    - Legislation/budget
    - Treaty review
  5. Some Executive Functions of the Judiciary
    - Judicial review of alleged *ultra vires* and/or unconstitutional action
  6. Some Legislative Functions of the Judiciary
    - Judicial review of alleged unconstitutional action
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The power of each department would be reduced and diminished by the incursions of the others at any given moment. Subsequently, though, over time it would be expanded at the expense of the others by the fact of its own incursions into the power of the others. “Ambition must be made to counter ambition,” so the framers structured their system to take advantage of the nature they feared. Their goal was “to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights.” They well understood that “if men were angels, no government would be necessary.”<sup>29</sup> But men are not angels, and the effects of their free actions must be controlled.

The flexible nature of the separation meant that the tri-partite division might have little symmetry at any given time. It might assume awkward configurations under the stresses of the conflicts among the branches that were structured into their separateness. The implicit assumption was that in times of peace and tranquility the tensions would not be severe and attempts at encroachment would continue in ways that would redress any serious imbalances that might have occurred. Thus, from a relatively even distribution at any given moment a thoroughly uneven distribution might eventuate, as for example during war when the President with his power as commander-in-chief might become pre-eminent. Figure 4 suggests how the balance might shift.

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Figure 4: Separation of Power

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<sup>29</sup> Ibid., #51, p. 337.

In Time of Peace



In Time of War



The recent increase of presidential power has been achieved while the nation has been experiencing exceptional domestic and international stress. Under the pressures of the Depression, three wars, and the Cold War, the executive was not only permitted, but also encouraged, to enlarge its scope. Nearly all viewed that expansion as essential to the national interest, for only the executive had the necessary unity to achieve desired goals with speed.

The trend came to an end with the tranquility of the 1970's and the exposure of the Johnson-Nixon presidential excesses. The legislature reasserted itself on the grounds that the public interest demanded it, that the executive (albeit with legislative support!) had so distorted the system of separation of powers as to endanger it. Redress was in order. Thus we saw Congress seeking data the executive deemed solely its and the judiciary siding with the legislature (e.g. U.S. v. Nixon, 418 U.S. 683 (1974)). Congress sought intelligence data as against a Presidential claim that the distribution, classification, and control over such data were executive determinations. All was done within the very context the framers intended and created.

It appears anomalous today to note that the framers believed that the legislatures would necessarily be the strongest of the three branches of government. Though the Revolution had been against a monarch, George III, leading many to conclude that the real danger to freedom would arise from the executive branch, the reality was that the nature of the republic suggested that the legislature would be the strongest. It would present the greatest dangers to the freedoms all were striving to implement and institutionalize. The reasons were clear:

...in a representative republic, where the executive...is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribed; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.<sup>30</sup>

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30 Ibid., #48, pp. 322-23.

The legislature, whose powers included the power of the purse, was the least constrained of the three branches. Its powers were broad and undefined as compared with the others. It could most easily overextend its bounds.

Precautions had to be taken. “The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will permit.”<sup>31</sup> As with any concentration of power, the solution to potential abuse lay in dividing the power. And as the broad, diffuse powers of the legislature required that its power be divided, so the nature of the executive grant, with its narrow and precise limits, required that it remain unified. The judiciary, having only the power of judgment and dependent upon the executive for enforcement of its decisions and the legislature for its appellate jurisdiction, was not deemed dangerous to the other two. Indeed,

...the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment.<sup>32</sup>

The executive and the judiciary, then, were not the chief threats to freedom or undue encroachment. It was the legislative assumption of power that had to be guarded, and bicameralism was the answer.

In case that these divisions might prove inadequate, federalism would further diffuse power. The fact of two separate levels of government, each with its own separation of powers and checks and balances, should achieve the desired check upon abuses of power, for:

The powers delegated...to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which

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31 Ibid., #51, p. 338.

32 Ibid., #78, p. 504.

last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvements, and prosperity of the State.<sup>33</sup>

The State governments, closest to the people and therefore most under their scrutiny, would regulate that which was most likely to intrude upon freedom, the internal affairs of the nation. The federal government would provide for the common defense and commercial regulation. Yet while the state governments were excluded from external regulations, the federal government was not proscribed from much internal activity. As with the separation of the branches, this division of power between the federal and state governments intentionally provided an overlap of power or an invitation to encroachment. While the state governments were viewed as having the principal domestic role, the framers understood that events could change and with that necessarily the role and power of the states.

If...the people should in future (sic.) become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.<sup>34</sup>

As with the creative tension within the national government that would mean shifting powers among the three branches, so the federal system would have its creative tension with correlative shifts in power. It was a system that was intended to grow with the times and adapt itself to the circumstances of human affairs.

The unique virtue of the system was that it was structured on totally realistic terms. The architects were experienced in governance and created a government that directly took into account those experiences. They believed they understood man and what motivated him and created a government that would both further his goals and protect his freedom to achieve them. For that, the government would have to have power, but not too much lest the ambition of office-holders overcome the boundaries that were established. Over time a determined faction could gain control over the government. It could elect a President and a majority of the lower house in one election; with a second election, holding the strength already gained, it could gain control over the second house. And with that strength, if held, over time it could gain a majority of the appointments to the judiciary. The likelihood of achieving all of that, however, was and is extraordinarily remote. The framers did their work well. They took a realistic look at power and dealt accordingly with it. They shrewdly conceived a system that would make achieving tyrannical rule difficult, while preserving the fundamental characteristics of a democracy. They sought above all to protect minority rights and for that used the natural resources of the nation – its large, heterogeneous population and large territory. Equally, with sober insight and courage they so splintered power as to make its assimilation in one set of hands, whether of one, few, or

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33 Ibid., #45, p. 303.

34 Ibid., #46, p. 306.

the many, difficult. With that splintering they well understood that efficiency would inevitably be diminished, but viewed that loss insignificant in comparison to the gain, protected liberty. That gain would be furthered only by insuring that any changes would come but slowly; it would not be furthered if it were potentially susceptible to the action of passionate, transient majorities who by definition would only be interested in their own selfish ends. And slow, deliberate change would itself come by the fact of having separated power into three decision-making organs of government. All three would ultimately have to agree on the proposed change, virtually a guarantee that proposals would have to be in the interests of all.

### The Constitution

The Constitution embodies the aims of its drafters. It was created in four months in 1787 in Philadelphia by the fifty-five delegates who represented twelve of the thirteen colonies (Rhode Island declined to send a representative). In accord with the constitutional prescription of Article VII, it was ratified by the necessary nine states on June 21, 1788. It directly reflects the assumption that democracy will follow a government with sufficient power and vigor to meet its obligations and responsibilities while itself limited in ways that make governmental usurpation of liberty difficult.

Articles I, II, and III deal respectively with the legislative, executive, and judicial branches of the federal government. Each Article assigns and limits power in varying degrees of specificity. Understanding the system of separation of powers necessarily includes understanding of their formal expression in these Articles.

While they do fix responsibilities and limits, at the same time each Article also poses nearly as many ambiguities as it resolves. It is within the context of those ambiguities that the Constitution has grown and adapted to the times, for differing interpretations of what the meaning of each provision of each Article actually is have kept the Constitution abreast of felt needs. For example, Article I, Section 8 assigns Congress the power of regulating commerce among the states. By 1942, that power was interpreted by the Court to include regulation of agricultural goods that were grown solely for home consumption on the ground that local consumption had an effect on interstate commerce.<sup>35</sup> Indeed, by 1964, it was used as the constitutional basis among other things to regulate the integration of places of public accommodation.<sup>36</sup> The framers doubtless never conceived such congressional power within the meaning of the clause, but the larger point is that they probably did conceive that the Constitution would need to be adapted to the times. It is in fact by changing and expanding interpretations that a document written in very different times and circumstances has been maintained in the spirit the framers sought. It is a living Constitution, one intended to endure for the ages. In the course of its being adapted to the times each branch of government has

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<sup>35</sup> Wickard v. Filburn, 317 U.S. 111 (1942)

<sup>36</sup> Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)

expanded its powers and in turn had those powers contracted in the push and shove of separation of powers. The system works remarkably in tune with the intent of its creators.

## Article I: The Congress

All legislative powers of the United States government are vested in the Congress of the United States in Article I, Section I of the Constitution. In addition to the legislative powers, which are subsequently defined in the Article, Section 2 gives Congress a judicial function by assigning the House of Representatives the sole power of impeachment and (in Section 3) giving the Senate the authority to try impeachments. Section 4 provides that the state legislatures shall regulate the election of members of Congress (altered by Amendment XVII which provides for direct election of Senators) and provides that Congress may by law change these regulations. Section 5 deals with the actual operation of each house while Section 6 fixes salaries and establishes the free speech rights of members of Congress (“for any speech...they shall not be questioned in any other place.”)

Section 7 prescribes that revenue bills shall originate in the House and delineates the processes by which law must be made. This delineation characterizes the entire system of separation of powers, for each house is constitutionally obliged to concur in a proposal and the President must sign it before it may become law. In addition this Section provides that a President may decline to sign a bill. This is called a veto, or the return of the unsigned measure to the house of Congress where it originated with a statement of objections. Alternatively, the President may allow a bill to become law without his signature by doing nothing with it for ten days at the end of which it automatically becomes a law. If Congress were to adjourn before the end of such a ten day period, it would prevent the President from being able to return it and that would effectively kill the measure. This procedure – holding an enactment for something less than ten days in the face of a prospective adjournment – is called a pocket veto. In any case the House and the Senate may override a Presidential veto by a two-thirds vote.

It is in Section 8 of Article I that the principal powers of the legislative branch are established. Those powers may be divided into three general categories: (1) authority over money and matters of finance; (2) provision for the general security of the United States; and (3) general regulations.

Under the first category Congress is assigned power to lay and collect taxes, pay debts of and borrow money for the United States, regulate commerce among the states and with other nations and the Indian tribes, establish rules of bankruptcy, coin and regulate money, and provide punishments for counterfeiting. In the second, national security category Congress is charged with defining and punishing piracies, felonies committed on the high seas, and offenses against international law. In addition, it is given power to declare war and regulate the disposition of captures on water and land, to raise and support an army and a navy, to make rules for the government of the armed forces, to provide for the calling forth of the militia, and to organize, arm, and discipline the militia.

The third, general set of powers ranges widely. Congress is given power to establish rules for naturalization, to fix standards of weights and measures, to establish post offices and roads, to provide for patents, and to create inferior (to the Supreme Court) federal courts. Finally,

it is authorized to make “all laws which shall be necessary and proper for carrying into execution” its powers. This necessary and proper clause represents the broadest possible grant and has repeatedly been used by the Congress and the Court to justify legislation.

Article I, Section 8 contains 18 clauses, the first seventeen of which are specific, the last the necessary and proper clause. That clause was designed to insure that Congress had appropriate authority to implement the specific grants, but was immediately interpreted as meaning that Congress had implied powers beyond those specifically granted. For example, although Congress was given no authorization in the Constitution to create a bank, under the power given it by the necessary and proper clause in 1816 it incorporated the Bank of the United States. In one of its most famous cases the Supreme Court applied the definitive interpretation of the clause:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are Constitutional.<sup>37</sup>

Holding that the Congress had the power to incorporate the bank, the Court ruled that Congress was not restricted to exercising only those powers specifically assigned it, that it had inherent and implied powers extending beyond the specific grants. Congress has fully agreed! With all of the ambition appropriate to countering that of the other branches, it has eagerly sought to expand its powers, and more specifically those of the federal government vis a vis the states.

Two examples illustrate how Congressional power has extended beyond enumerated grants in the Constitution. One concerns a specific allocation of power, that of regulating commerce. The other is not specified in the Constitution and is an implied power, that of conducting investigations. Each has grown over time to dimensions probably never envisioned by the framers.

Article I, Section 8, clause 3 specifies that Congress may “regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.” The absence of such authority to regulate commerce represented one of the conspicuous failures of government under the Articles of Confederation. The new Constitution was intended among other things to remedy this. It assigned Congress a power that it has used to the utmost. Especially with reference to regulation of commerce among the states, Congress has generated prolific amounts of legislation.

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<sup>37</sup> McCulloch v. Maryland, 4 Wheat 316, 421 (1819).

The central question concerning this power is what constitutes commerce. “The determinative test of the exercise of power by the Congress under the Commerce Clause is



tes than one' and has a real and substantial relation to the national interest."<sup>38</sup> Thus, any activity or policy conducted by any person or group which can be viewed as influencing commerce between the states can come under the scrutiny and regulation of Commerce. The scope of this power has been used to control the growth and sale of crops,<sup>39</sup> to assert navigation rights,<sup>40</sup> to inhibit the spread of gambling through the sale of lottery tickets,<sup>41</sup> and to insure equitable railroad fare rates.<sup>42</sup>

At the same time the clause has been extended far beyond mere commercial regulation. For example, it has been used to support various enactments which appear primarily to be concerned with the protection of rights of individuals rather than regulation of interstate commerce. The fact, however, "that Congress was legislating against moral wrongs in many of these areas [has] rendered its enactments no less valid."<sup>43</sup> Thus, under this authority Congress enacted the Civil Rights Act of 1964 which in part sought to protect blacks from discrimination by motels<sup>44</sup> and restaurants.<sup>45</sup> Similarly, a legislative act designed to protect children from harmful labor prohibited the transportation in interstate commerce of products manufactured by child labor.<sup>46</sup> Reasonable wage and hour standards for workers<sup>47</sup> and prohibitions against discrimination by employers in their hiring and retaining members of labor unions have been held to fall within the scope of the commerce power.

Perhaps the most litigated clause of the Constitution because of the all - pervasive use to which Congress has put it, the commerce power has grown steadily throughout the history of the nation. With Court approval that Congress has implied powers beyond those specifically granted it, it was not a far step to conclude that those implied powers would only be defined and ascertained on a case by case basis over time. By that rationale the powers of Congress (and the federal government) have been extended to virtually every facet of life.<sup>48</sup> The scope or extent of the power has never been defined with specificity, one consequence of which will be continuing

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38 Heart of Atlanta Motel v. United States, 379 U.S. 241, 255 (1964).

39 Wickard v. Filburn, 317 U.S. 111 (1942).

40 Gibbons v. Ogden, 9 Wheat. 1 (1824).

41 Champion v. Ames, 188 U.S. 321 (1903).

42 Shreveport Rate Case, 234 U.S. 342 (1914).

43 Heart of Atlanta Motel v. United States, 379 U.S. at 257 (1964).

44 Ibid.

45 Katzenbach v. McClung, 379 U.S. 294 (1964).

46 United States v. Darby, 312 U.S. 100 (1941).

47 NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).

48 Since the New Deal, the growth of Federal power under the Commerce Clause has accelerated. The Supreme Court has consistently upheld the expansion with the exception of the imposition of the federal minimum wage on state employees, later over-ruled, the federal prohibition against carrying a handgun with a 100 feet of a schoolyard, and the Federal requirement under the Brady Bill that local law enforcement conduct background investigations of applicants for a Federal firearm permit. U.S. v. Lopez, 514 U.S. 549 (1995) shows the deep division on the Court regarding the reach of the Commerce Clause.

use of it to justify regulation hitherto deemed private and/or subject only to state control. It is certain to be the subject and object of continuing controversy.

As the commerce power illustrates how Congress has used a specific grant to justify many of its actions, so the power of investigation illustrates how it has developed an implied power. Nowhere in the Constitution is the power of investigation mentioned, yet Congress exercises it virtually every day. It emanates from the Congressional charge as the nation's law-maker and rests on the assumption that as making law is the most significant power of the federal government it may only be exercised responsibly with proper means for acquiring information. Those means may extend to review of existing legislation to ascertain its adequacy and usefulness as well as its actual implementation and administration, and to inquiry of future needs. The power is as broad as the congressional power of legislation. It is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."<sup>49</sup> It is "an essential and appropriate auxiliary to the legislative function."<sup>50</sup>

The power is primarily exercised through committees of each house of Congress. Necessarily, because of the magnitude of the workload, each house has divided its responsibilities among its committees which are essentially given total autonomy for their assigned areas. In turn, each committee has delegated its responsibilities to sub-committees of which there are now hundreds. Most are absolutely responsible. Some are not. All possess so much autonomy that they are almost totally free to do anything or nothing. For example, in the early and mid-1950's Senator Joseph McCarthy, as ranking Republican on the Senate permanent investigations subcommittee, with impunity undertook a demagogic crusade against alleged Communists in government. Though ultimately censored by his colleagues, for years he was able to extend far beyond the boundaries of decency and propriety because of the customs of the Senate as respects its committees and subcommittees.

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49 Barenblatt v. United States, 360 U.S. 109, 111 (1959)

50 McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

Just as the excesses of subcommittees go unregulated, so does inactivity of a subcommittee. The Senate subcommittee on Immigration and Naturalization failed to meet from



period. The chairman of the subcommittee, also the chairman of the parent Committee of the Judiciary, had a long record of opposition to change in the nation's immigration laws. Indeed, it appeared that the chairman had been so opposed to enforcement of existing laws as to intervene to prevent border patrol agents from identifying and removing from the nation illegal aliens. Before that intervention, however, seventeen Mexicans who were illegally employed at a cotton gin were arrested. The arrests were made at the place of employment, fifty miles from the chairman's home.<sup>51</sup> More recently, the Chairman of the Senate Foreign Affairs Committee simply refused, in his opposition to the appointment of William Weld to be the Ambassador to Mexico, to hold a confirmation hearing. That refusal, after a very rancorous, public debate, finally obliged Mr. Weld to withdraw his name from consideration.

Each house has its own committee system and shares the conclusion that the business of legislating is so broad that decentralization and delegation to its committees is essential. The committees gather information through staff research and holding hearings that will aid each house in its deliberations and law-making.

As the power to legislate is admittedly and necessarily broad, so is the power of investigation. At the same time the power is not unlimited. The system of separation of powers does not intend that any governmental authority be totally without bounds. Thus, though the power of congressional inquiry be extensive, it operates within the context of the system of separation of powers.

There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress.... Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.<sup>52</sup>

While broad, any doctrine of implied power cannot justify intrusion into the direct sphere of power of another branch of government. Equally, the fact of specific grants of power such as the regulation of commerce does not carry with it implicit power to intrude upon the jurisdiction of another branch, but does include all necessary and proper power to implement the grant.

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<sup>51</sup> New York Times, September 29, 1975, p. 1. The counterpart House subcommittee met an average of 25 times a year throughout the decade.

<sup>52</sup> Watkins v. United States, 354 U.S., 178, 187 (1957).

## Article II: The Executive

Article II, though primarily an expression of the authority of the executive branch of the federal government, contains provisions concerning the legislature. It stipulates that the Senate is to advise and consent on all treaties made and that a two-thirds vote of concurrence of all senators present is necessary for a treaty to be valid. The Senate is also mandated to provide advice and consent on the appointment of ambassadors, public ministers and counsels, Supreme Court justices, and all other officers of the United States whose manner of appointment is not otherwise prescribed in the Constitution. Congress is additionally given the responsibility of formulating laws regarding the procedure of appointment of those other officers.

The thrust of Article II, however, concerns the executive. Section 1 assigns the nation's executive power to the President and fixes his term at four years. It creates the office of Vice President and provides the means for electing the President and Vice President.<sup>53</sup> It creates the Electoral College<sup>54</sup> and establishes the qualifications for the office. Finally, it establishes the mode of presidential succession and compensation and prescribes his oath of office.

No provision of the Constitution had historically proved to be so inadequate to its tasks as Article II, Section 1. It repeatedly has been formally amended, with Amendments XII, XX, XXII, and XXV all directed at improving the original. Providing for the country's only nationally elected leaders, the President and Vice President, has proved to be particularly troublesome.

Section 2 enumerates the substantive powers of the President. In it the President is designated as the Commander-in-Chief of the army and navy and of the state militias when they are in the service of the United States. The President is given power to grant pardons and

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<sup>53</sup> Amendment XXII limits a President to two, four-year terms and limits one who succeeds to the presidency for more than two years to one term. By its terms, Lyndon B. Johnson, who served less than two years of John F. Kennedy's presidency and who ran and was elected in his own right in 1964, could have again run in 1968. Gerald R. Ford, however, who assumed office for more than two years of the period for which Richard M. Nixon had been elected, could only run in his own right in 1976.

<sup>54</sup> In 1800, Jefferson and Burr each had the same number of electoral votes because Article II did not provide for separate balloting for President and Vice President. Congress quickly proposed Amendment XII which provides for separate means of electing the two. It was adopted in 1804.

reprieves for federal crimes<sup>55</sup> except in the case of impeachment. He is assigned the primary treaty-making authority and the responsibility for appointing ambassadors, other public ministers and counsels, judges of the Supreme Court and other officers of the United States. If a vacancy occurs in a post during a Senate recess, the President may grant a new commission which is to expire at the end of the next session of the Senate.<sup>56</sup>

Under Section 3 the President is mandated periodically to give to Congress information of the State of the Union and to propose legislation. He may convene both or either house of Congress in special circumstances and may provide for their adjournment if both houses cannot agree on a time. The President is charged with receiving ambassadors and other public ministers and with commissioning all officers of the United States. Finally, beyond the specific grants, and paralleling the Article I format for Congress, the President is assigned broad authority to meet his executive obligations by the provision that he shall “take care that the laws be faithfully executed.”

Section 4 is the final portion of Article II. It specifies the grounds for removing executive and civil officers of the United States. They “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>57</sup>

The actual exercise of Presidential power under Article II has rarely been restricted by the other two branches. Particularly since the 1930's under the rationale that the nation needed unified and efficient leadership that the Congress could not provide, the executive has accumulated more and more power. Yet much of that accumulation has not come at the expense of the other two branches. In the face of broadening governmental powers generally, it is the executive that has been given the major tasks of their administration. Under their Constitutional authority faithfully to execute the laws, the Presidents of the twentieth century have expanded the office far beyond the dreams of the framers, yet within the boundaries that they established among the branches. When the boundaries were threatened or breached, the other branches responded.

Two examples illustrate how perceived presidential encroachments have been resisted, one concerning his power of removal of executive appointments and the second concerning his

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<sup>55</sup> It was under the authority of this provision that President Ford pardoned ex-President Nixon for all crimes he may have committed while in office. Similarly, President Bush pardoned several Iran-Contra affair officials, to include Oliver North and Secretary of Defense Casper Weinberger.

<sup>56</sup> Using only recess appointments, it would theoretically be possible for a President to appoint many officials without Senate approval. He could make an appointment while the Senate was not in session which would expire at the end of the next Senate session, and at that time again make an appointment.

<sup>57</sup> The 1974 and 1995 impeachment proceedings against Richard M. Nixon and William J. Clinton generated considerable interest in this provision. Two thoughtful, and somewhat differing, opinions on its meaning are presented in Berger, Raoul, Impeachment: The Constitutional Problems (Cambridge: Harvard University Press, 1973) and Black, Charles L. Jr., Impeachment: A Handbook (New Haven: Yale University Press, 1974).

power as Commander-in-Chief. With reference to removals, the executive has asserted that the power is fundamentally an executive prerogative, though appointments constitutionally necessitate Senate consent, removals do not. In Myers v. United States<sup>58</sup> the Supreme Court held that a legislative provision asserting that certain postmasters could not be removed by the President alone without consent of the Senate was an unconstitutional restriction on the Executive's control over public officials within his own branch.

As the character and size of the executive branch expanded, the importance of the appointment and removal power of executive subordinates became more apparent. Presidents asserted that they may responsibly perform their duties only with loyal employees who are in agreement with presidential goals. The Court has tended to agree that proper functioning of the executive branch implies control over staff. At the same time the Court has recognized a legislative role in matters involving personnel not directly under executive supervision. Thus, in Humphrey's Executor v. United States,<sup>59</sup> involving the removal of a Federal Trade Commissioner by the President for reasons other than those stipulated in the Federal Trade Commission Act, the Court held that due to the quasi-legislative, quasi-judicial character of the Commission the Congress could limit the President's power of removal.

The Myers and Humphrey cases leave a significant gray area of doubt of the extent of the Presidential removal power. Myers held that the President could essentially remove those whom he appointed. Humphrey affirmed that holding, but noted that among those whom he appointed were quasi-legislative and quasi-judicial officials whom he could not remove except for cause. The Court was not able to clarify its position:

To the extent that, between the decisions in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt. We leave such cases as may fall within it for future consideration and determination as they may arise.<sup>60</sup>

The larger point is that as against an executive assertion of an unrestricted right of removal as a concomitant of the appointment power, the Congress and the Court have resisted. The extent of power will only be determined on a case by case basis.

Similarly, the authority requisite to conducting foreign affairs rests primarily in the executive branch. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak and listen as a representative of the nation. The President is the sole organ of the nation in its external relations and its sole representative with foreign nations."<sup>61</sup> And the President's designation as Commander-in-Chief provides the principal, albeit last, means for implementing the nation's foreign affairs.

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58 72 U.S. 52 (1926).

59 295 U.S. 602 (1935).

60 Id., at 632.

61 United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319 (1936).

However, the war-making and the war-waging powers are definitely shared between the President and the Congress.

The powers of the military in the theater of war are clearly under the control of the Executive. Policy matters with regard to war, however, are the responsibility of both branches. Congress is charged by the Constitution with the power to declare war. It is also obliged to finance and regulate the armed forces. The Constitution intends that both branches have a part in the implementation of war.

The determination of which branch is responsible for what is virtually in direct proportion to the perceived imminence of the danger to the United States and the type of procedure needed to avoid the threat. Legislative deliberations are slow compared to the speed with which an executive order can be implemented, yet there are times when those deliberations are far more preferable, and constitutional, than executive assertions of power.

Thus, the government's seizure of steel mills threatened by a strike and whose production of war materials was deemed necessary to national defense during the Korean War was deemed unconstitutional by the Supreme Court. A majority of the Court concluded that the President had exceeded his constitutional power as Commander-in-Chief. Essentially the Court held that if seizures were to occur under existing circumstances Congress was the appropriate branch.<sup>62</sup> Yet if the threat to the nation had been more immediate, few doubt that the Court would uphold presidential seizures. It is a matter of time and circumstance.

With an imminent threat to the security of the nation, the Court will grant the President virtually unrestrained authority. Indeed, if the Court does actually object to Presidential action, it will express itself when the threat has been removed;<sup>63</sup> the greater likelihood is that it will not object. For example, the forced removal from their homes and subsequent military encampment of Japanese Americans residing on the West Coast during the early stages of World War II was held a proper exercise of the President's war power. The Court concluded that the President was justified in taking this extraordinary action because he may have concluded that the threat of invasion was imminent and that some of the Japanese Americans may have been disloyal.<sup>64</sup> Such a decision in highest probability would be patently unconstitutional in time of peace.

The era of the most unpopular war in the history of the nation, the Vietnam War, produced the strongest efforts by the other branches to limit what they perceived to be Presidential excesses. Ultimately at issue was the power of Congress to involve itself in the war (under its power to declare war and appropriate funds necessary for implementing military activity) and the President's assertion that as Commander-in-Chief he had final authority. As Congress never did declare war, many argued that the President had no constitutional authority

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<sup>62</sup> Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952).

<sup>63</sup> Ex parte Milligan, 4 Wall. 2 (1866) and Duncan v. Kahanamoku, 327 U.S. 304 (1946) both limited the power of the President to have civilians tried in military courts during war time, after the war was done.

<sup>64</sup> Korematsu v. United States, 323 U.S. 214 (1944).

to wage war. (A similar argument was made regarding wars in Korea, Panama, Granada, and Iraq.)

Congress did, however, appear to support the President by passing the so-called Gulf of Tonkin Resolution. After North Vietnamese gun boats had attacked American naval vessels in the Gulf of Tonkin, it was:

Resolved by the Senate and House of Representatives of the United States in Congress assembled, That the Congress approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. ...[T]he United States is...prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United States or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.<sup>65</sup>

This August 10, 1964, resolution did not constitute a declaration of war, but on its face gave congressional approval to presidentially ordered military activity.

With seeming unity between the political branches, opponents turned to the courts. Their attempts to test the constitutionality of the war were, however, unsuccessful,<sup>66</sup> so they turned to the political process. Public pressures and dissatisfactions were focused on the Vietnam War and were clearly prime considerations in President Johnson's decision not to seek another term in office in 1968. It cannot have been pleasant for him to have to seek the shelter of safe refuges such as army bases in order to make public speeches, but in the face of public vituperation he concluded he had no choice but to do so.

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<sup>65</sup> Southeast Asia (Tonkin Bay) Resolution, H.J. Res. 1145, 73 Stat. 384 (1964).

<sup>66</sup> See, for example, Mora v. McNamara, 389 U.S. 934 (1967), McArthur v. Clifford, 393 U.S. 1102 (1968), Hart v. United States, 391 U.S. 956 (1968), Holmes v. United States, 391 U.S. 936 (1968) and Symposium, "Legality of United States Participation in the Vietnam Conflict," 75 Yale L.J. 1084 (1966).

President Nixon assumed office and continued the policies of his predecessors to the growing disenchantment of the American public. The Congressional response was slow in coming, but in January 1971, as an amendment to the Foreign Military Sales Act, Congress repealed the Gulf of Tonkin Resolution. The President now had no formal congressional support for his action, yet continued to order a war fought. He was relying solely on his power as Commander-in-Chief. Congress, under its authority to declare war and make the appropriations necessary to fight one, increasingly was moving in opposition to the President. The blending of the war power between the two branches was creating the check and balance the framers intended. Ambition, if not good sense and right reason, was countering ambition.

In 1973, both houses formally disapproved of the President's decision to bomb in Cambodia and in June 1973, agreed that no appropriations might be spend to support combat activity in Laos and Cambodia. The President vetoed the measure, but acquiesced immediately to a more moderate position. He soon signed into law a measure which fixed August 15 as the appropriations cut-off which obliged the President to seek prior legislative approval for any subsequent military activity in Indochina.

Controlling appropriations and requiring advance approval of action in Indochina constituted one significant Congressional check on the President beyond the virtually constant criticisms of his policies that were ringing on Capitol Hill. Congress, however, was determined to move further. On November 7, 1973, over the veto of the President who argued that the action unconstitutionally took from his office powers granted in the Commander-in-Chief clause, the Congress passed the War Powers Act (PL 93-148). It stipulated that:

The constitutional powers of the President as Commander-in-Chief to introduce United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories, or possessions, or its armed forces.

It urged that consultation occur between the President and the Congress before American forces were introduced "into hostilities," but should that not be possible the President

shall submit within 48 hours a report, in writing, [to Congress] setting forth (a) the circumstances necessitating the introduction of United States armed forces; (b) the constitutional and legislative authority under which such introduction took place; and ( c ) the estimated scope and duration of the hostilities or involvement.

By those terms the Act significantly limited the President in ways that hitherto had never been done. It also raised profound constitutional questions, precisely in line with what the framers intended. In the final analysis the courts will have to resolve the boundaries of the extent of the war powers of each branch. When they do, all three branches of the federal government

will have been involved in the push and shove that remains at the heart of the system of separation of powers.

These two examples of the exercise of presidential power suggest how fluid the boundary delineations among the branches are. At the same time, they show that though the presidential powers of removal and war are great, they are in fact subject to the restrictions of the separation of powers. The control over executive personnel and the conduct of war in most systems of government would appear to be exclusively within the province of the executive. That they are not in the United States is solely attributable to the framers' determination to make ambition counter ambition.

### Article III: The Judiciary

The judicial power of the United States is vested in the Supreme Court and such other inferior courts as Congress may establish. That power is extended to cases and controversies arising under the Constitution, laws and treaties of the United States and is divided into those cases which the Court may hear in its original and appellate jurisdiction. Original jurisdiction may be exercised over cases concerning Ambassadors, other public ministers and counsuls, and those in which a state is a party. Thus, if a suit were brought by one state against a second, the case could be heard by the Supreme Court. In all other cases over which the Court has jurisdiction, which Article III defines precisely, the Court has appellate jurisdiction. Such cases will have first been heard by a lower court and a decision reached. Then, if the Court chooses to accept it, appeal may be taken to it for a review of the lower court decision.

A final grant of authority to the Supreme Court is contained in Article I, Section 3. By its terms the Chief Justice shall preside over the Senate trial, following the impeachment by the House, of a President of the United States.

No broad summary grant of power is given to the Courts as it is to the Congress and the President. That, however, has not in the least inhibited the Court from assuming that it had implied powers in the same way that the other two branches have. The central power which it has assumed is that of judicial review of the actions of the other branches of the government and of the states. Judicial review consists of the power to declare unconstitutional certain actions and represents the final step in the law making process. If the Court were to find legislation unconstitutional, it would mean that it was null and void, as though it had never existed. In spite of the fact that the representatives of the people in both houses of Congress and in the presidency had agreed of the wisdom and/or need of the legislation, the Court's determination would be final. Some argue that this is the most undemocratic feature of the American system of government.

Though not explicit in the Constitution, the power of judicial review, if not its scope, was understood by the framers. Hamilton made the case in Federalist Paper #78 when he asserted it was the duty of the courts "to declare all acts contrary to the manifest tenor of the Constitution

void.” Indeed, “No legislative act...contrary to the Constitution can be valid,” and “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.” He concluded:

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.<sup>67</sup>

As the Constitution, laws, and treaties of the United States are made the supreme law of the land by Article VI and as the courts are charged with the fundamental responsibility of holding invalid any law contrary to the Constitution, it follows that the judiciary is the ultimate interpreter both of law and of the Constitution.

It was Chief Justice John Marshall who gave formal expression to Hamilton’s position on the role of the judiciary. In the famous case of Marbury v. Madison, Marshall declared:

if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.<sup>68</sup>

Thus, Marshall declared that the judiciary’s primary role was to judge the constitutionality of governmental action. It had the final authority of judgment of the activities of the other two branches.

Clearly this is a broad power which the Court claimed for itself. Applied to its broadest extent, it allows the judiciary the power of final decision-making on every challenged activity of government that falls within the jurisdictional and case requirements of Article III. Some would argue that this power makes the judiciary not the co-equal branch of government, but the senior, superior partner.

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<sup>67</sup> Hamilton, Madison, and Jay, op. cit., #78, pp. 505-06.

<sup>68</sup> Marbury v. Madison, 1 Cranch 137, 177-78 (1803).

The Court, however, has not chosen to develop its powers in ways that could be deemed dominating of the other branches. Judicial review has not become a vehicle that has been used to overstep the authority of the other two branches; rather, it has been used to maintain the viability of the system of separation of powers and of federalism. The Court has become the umpire of boundary disputes among parts of the entire governmental system, and it has done so by imposing self-limitations upon the broad grant of authority it assigned itself.

The Court has developed a set of rules by which it decides whether to pass on a question. First, it looks to Article III to ascertain that it actually has jurisdiction over the matter. Section 2 specifies eleven sorts of cases over which the Court may exercise jurisdiction and any issue that arises which does not fall within those eleven categories is not within the jurisdiction of the Court. Second, that must actually be a case. It must be a real, not a hypothetical, adversary proceeding capable of final judicial determination.<sup>69</sup> In addition a case must be justiciable. “Justiciability is...not a legal concept with a fixed content or susceptible of scientific verification.”<sup>70</sup> Rather, it is a process by which courts decide whether a case meets its standards for decision.

Embodied in the words “cases” and “controversies” are two complementary but somewhat different limitations upon the power of judicial review. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression of this dual limitation placed upon federal courts by the case-and-controversy doctrine.<sup>71</sup>

Justiciability is a procedural technique created by the courts to limit themselves to issues they are capable of resolving. Judicial doctrines such as standing, ripeness, and mootness are expressions of this concern with the justiciability of an issue. They have been developed to insure that “federal judicial power is exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action,”<sup>72</sup> and to insure that the issue is one appropriately decided by the court. In this light, for example, the Court will not decide a question that is presented in a friendly, non-adversary proceeding in which there is no immediate harm to a party to the dispute. Equally, it will decline to render an advisory opinion as there would not be adversaries (to argue both sides of the issue and thus present relevant information for decision) or actual harm. Issues raised in either manner would be judged nonjusticiable.

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69 Nashville, C. and St. L. Ry v. Wallace.

70 Poe v. Ullman, 367 U.S. 497, 508 (1961).

71 Flast v. Cohen, 392 U.S. 83, 95 (1968).

72 Poe v. Ullman, 367 U.S. 497, 504 (1961).

The Court also limits its willingness to examine constitutional questions, for “it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”<sup>73</sup> The Court presumes the constitutionality of legislation or executive action and only reluctantly examines it. When the validity of a statute is called into question, the Court will presume its constitutionality and uphold it if at all possible. And if the question must be addressed, the Court will decide it on the narrowest possible grounds. By this doctrine of avoiding constitutional questions if at all possible, the Court diminishes conflict with the other branches. It also residually obtains credibility in those instances when it concludes it must conflict with them.

A final self-containment of judicial authority is embodied in the Court’s doctrine of political questions. “[I]t is the relationship between the judiciary and the coordinate branches of Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’” “The nonjusticiability of a political question is primarily a function of the separation of powers.”<sup>74</sup> When the Court concludes that an issue could more properly be handled by one of the other branches, it will decline to enter the political thicket. “The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.” It “...has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, in the people in exercising their political rights.”<sup>75</sup> This reasoning was used by the Court in dismissing a complaint alleging that state law apportioning congressional districts was unconstitutional because some districts were substantially larger than others, thus diluting the vote in the more populous ones. The Court appeared to believe that as it was congressional districts that were involved, the issue was better suited for decision by the political branches.<sup>76</sup> Sixteen years later, however, in a very similar case the Court changed its mind. Here, a state apportionment statute concerning state legislative districts was challenged on the same grounds, and the Court decided that federal courts could hear the case. There was no political question, for neither of the other two branches of government was involved.<sup>77</sup>

An example of how the doctrine of political questions may or may not be used occurred in 1969. The Court was asked to set aside a judgment of the House of Representatives that Adam Clayton Powell, the duly elected representative of New York’s 23<sup>rd</sup> District, was not qualified to sit. Article I, Section 5 of the Constitution provides that the House shall be the judge of the qualifications of its own members and that by a two-thirds vote it may expel any member deemed unqualified. Had this in fact occurred, the Court explained, it would have viewed the case as presenting a political issue; however, in point of fact this is not what happened. Rather, the House refused to allow the Congressman to take his seat. The Court concluded that the

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73 Burton v. United States, 196 U.S. 283, 295 (1904).

74 Baker v. Carr, 369 U.S. 186, 210 (1962).

75 Colegrove v. Green, 328 U.S. 549, 556 (1946).

76 Ibid.

77 Baker v. Carr, op. cit.

House had excluded Mr. Powell rather than expelled him. It therefore had violated the Constitution.<sup>78</sup> By that reasoning the issue was not a political question and was justiciable. The Court intervened into the sphere of another branch of government by finding a delicate difference between its doctrine of political questions and what had been done to the Congressman. In considerable degree the case suggested that when the Court wanted to deal with an issue it would find the appropriate rationale; when it did not, it could invoke its doctrine of self-limitation.

The larger point is that the Court does limit itself. In the face of having asserted that it was the final arbiter of the Constitution, and recognizing that in spite of that claim it was particularly vulnerable to assertions of power of the other two branches, the Court has proceeded with a sensitivity appropriate to its weak position. In effect, to survive in the face of the power of the other two branches, the judiciary has understood that it must maintain the integrity of the very system that could so easily displace it. Its ambition is curtailed by the fact of the dominating power of the other branches, the legislature with its power to regulate the appellate jurisdiction of the Court and the executive with its power to enforce, or not to enforce, its decisions. The Court's self-limitations are uniquely illustrative of ambition's countering ambition, for they demonstrate judicial awareness that if too much power were attempted, the response could be fatal to the very system the judiciary umpires. Sensitive to the delicate balance it must observe and enforce among the three units of government, the judiciary operates precisely within the constitutional constraints that are imposed in Article III.

### The Vertical Separation of Powers: Federalism

The theory of separation of powers is not confined to dividing only federal authority. In addition, the framers distinguished federal from state power and sought to unify the several states under a governmental structure that would be separate from them. The framers well understood that much centralization of power was needed to meet the problems of the nation, but also realized that the states would never relinquish all of their power to a national government. The framers were in effect confronted with the monumental task of carving areas of national authority from the hitherto essentially autonomous state governments. Their job was not so much one of protecting the sovereignties of the states from being overwhelmed by the new national government as it was with establishing a truly viable national government that would meet the needs of the nation. In particular, those needs centered on national defense, external relations, and commercial regulation.

The solution was the creation of "federalism," the division of power between two relatively autonomous jurisdictions. As with the separation among the branches, this separation is blurred. Power is overlapping and shared, though some activities are exclusively the province

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<sup>78</sup> Powell v. McCormack, 395 U.S. 486 (1969).

of one jurisdiction (as the power to make war or treaties is specifically assigned to the national government). In matters of formal conflict, the federal level would be supreme.

Federalism, as opposed to the unitary system of Great Britain, implies the existence of separate systems of governance. In the United States these separate systems are comprised of one national government and fifty relatively autonomous states. Though that is the basic division, state power is fragmented and decentralized among thousands of sub-systems, ranging from school districts to county governments, from special districts for specific governance tasks to city or town governments.

Federalism, then, is “a joining of partially or wholly separate political units with one another by a compact under which each preserves its corporate personality with certain duties and powers while becoming a part of a comprehensive new political system to which duties and powers...[are] also allocated.”<sup>79</sup> Each of the levels of government is relatively autonomous within its sphere and is constrained in that sphere by the existence of the other operating within its area of influence. Each level has its own system of governance and citizens who simultaneously have citizenship in the other.<sup>80</sup>

For years it was common to view the American system as one in which the national and state governments were totally distinct entities, each with separate power of a sort that often brought jurisdictional disputes. Though supreme within its sphere in cases of conflict with the states, the Federal government was to be restricted to the exercise of those powers delegated to it in the Constitution. All other powers were reserved to the states. This division of power is expressed in Amendment Ten of the Constitution which stipulates that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

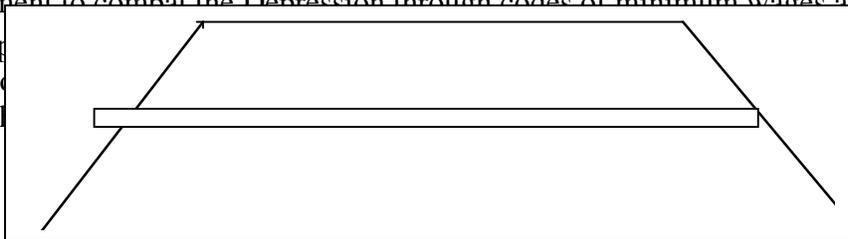
Under the Articles of Confederation the word “expressly” had been used to qualify the delegation to the central government (“The powers not expressly delegated”). In the Tenth Amendment, though, it was deliberately dropped and that omission became the central consideration on which the Supreme Court’s great interpretation of the Amendment turned. In McCulloch v. Maryland Chief Justice Marshall seized the omission and concluded that the federal government was not restricted to the specific delegation, that it had implied and inherent powers. On the basis of the Court’s blessings in McCulloch, the federal government has used its implied powers in varying degrees throughout history.

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<sup>79</sup> John M. Gaus, “Agriculture Policy and Administration in the American Federal System,” in Arthur W. MacMahon (ed.), Federalism, Mature and Emergent (Garden City, NY: Doubleday & Co., Inc., 1955), p. 281.

<sup>80</sup> Edward S. Corwin (ed.), The Constitution of the United States of America: Analysis and Interpretation (Washington, DC: United States Government Printing Office, 1953), p. xi.

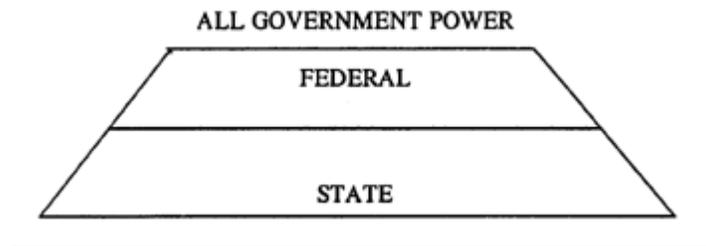
As the federal and state governments enlarged their scopes with the growth of the nation, the American system became characterized as one of dual federalism. The national and state governments were seen as distinct entities, each with separate powers of a sort that often brought jurisdictional disputes that the Court had to resolve. The Tenth Amendment was the Constitutional focus and was interpreted by the Court to resolve disputes, whether concerning taxation of state government officials' salaries by the federal government<sup>81</sup> or an attempt by the federal government to combat the Depression through codes of minimum wages and regulation of unfair labor practices and other decisions the Court had to resolve. The Tenth Amendment's delegation of power, that the states reserved to the states.



The Civil War stands as a prime example of dual federalism in action. It was precipitated by one level of government on the ground that the other was usurping power unconstitutionally. The southern states were perceived by the northern states and the national government as violating the Constitution by asserting they had the right to leave the union. Over a half million people died in that war to establish in practice what the Constitution directed in Article VI, that in conflict between the two jurisdictions, it is the national that is supreme.

Figure 5 depicts this view of federalism. It illustrates “the union of ...autonomous political entities...for common purposes.”<sup>83</sup> The two levels are distinct, with each responsible for its separate concerns.

Figure 5: The Vertical Separation



In this way the federal system may best be viewed as a layer cake with two separable layers that have been placed on top of one another.<sup>84</sup> All of the other sub-divisions of the states

<sup>81</sup> Collector v. Day, 11 Wallace 113 (1871), overruled by Graves v. O’Keefe, 306 U.S. 466 (1939).

<sup>82</sup> Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935).

<sup>83</sup> Ibid.

are totally subject to state requirements and are not created by the national constitution. Though today absolutely integral to federalism as it operates, strictly speaking they are creatures of the states and not of the national government or constitution.

The layer cake view of federalism implied considerable tension between the two levels of government. Rather than cooperating to achieve common goals, the federal and state governments were perceived in conflict with one another. Two separate governments, with separate goals, were the hallmark of this view.

The difficulty of that analysis was that it rested on the assumption that the creative tension of federalism would only mean conflict. It assumed jealous guarding of power and prerogative. It did not perceive federalism as constituting one system of government with sometimes cooperating and sometimes conflicting systems all of which were striving for common governance.

The reality is that as the separation of power among the branches resulted in considerable degrees of cooperation (and conflict) to overcome the built-in obstacles to efficiency, so the nature of the federal system has resulted in similar outcomes. Much cooperation, and conflict, exists between the levels. No matter what the activity, the evidence suggests that each level of government is actively involved in the affairs of the other and no governmental agency is immune to the influence exercised by the other level. That influence ranges from fiscal participation to lobbying on behalf of a desired goal. It may, for example, involve the entire governmental apparatus of the state and city of New York seeking federal assistance to prevent bankruptcy of the City by actively influencing the federal bureaucracy or it may involve federal use of funds to influence school integration.

Close examination and empirical evidence suggests that:

In fact, the American system of government as it operates is not a layer cake at all. It is not three layers of government...Operationally, it is a marble cake, or what the British call a rainbow cake. No important activity of government...is the exclusive province of one of the levels<sup>85</sup>

No matter what the activity each level of government is actively involved. Instead of the *de jure* separate levels, the *de facto* reality is that an extraordinary amount of interaction exists between the levels, making any attempt at depicting real separation impossible.

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<sup>84</sup> The analogy is Morton Grodzins', who led the contemporary resurgence of interest in federalism. Under Grodzins, the bakery became the indispensable tool for understanding federalism.

<sup>85</sup> Morton Grodzins, The American System: A New View of Government in the United States Daniel J. Elazar, (ed.) (Chicago: Rand McNally & Co., 1966), p. 8.



federalism and the involvement of each level in the affairs of the others. It is in line with the basic tenets of federalism.

Today, nearly all governmental activities are shared by all levels. The role of each level is broader and more extensive than the framers could have predicted. It is agreed by most that the complexities of life in contemporary America require input and administration from many centers. The result is a federal system that developed from a basic premise that much governmental authority should be retained by the states, through an emerging awareness and acceptance of the leadership in many domestic affairs by the national government, to recognition of the intermingling of all levels of government in programs and activities which touch and shape the lives of every American.

Both the vertical and horizontal schemes of separation of power incorporated in the American form of republicanism express unique concepts of governance. They are intended to protect the individual and his liberty. They take into account the dangers of unchecked power, of majority tyranny. They reflect a belief in partnerships among those whose power was splintered and in man's ability to govern himself. It is a design that has endured and adapted through two centuries and now confronts the reality of continued adaptation to meet the exigencies of the future.