Separation of Powers

The Separation of Powers Today

Investigating the Executive Branch

Deseparation of Powers?

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A magazine for teachers of civics, government, history & law
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by Jean Galbraith
While the Constitution outlines a variety of checks and balances on each branch of government, there are additional checks, including the press, the public, and state and local governments.

Investigating the Executive Branch
by Doug Kriner
Congress has considerable power to launch investigations, even when it cannot legislate. Sometimes investigations achieve policy changes in similar ways.

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Welcome to the first digital issue of *Insights on Law & Society*. From the beginning, *Insights* was always designed to be a ready resource providing in-depth content for its readers, harnessing expertise and resources in digestible, dynamic ways. So, in 2018, almost two decades after the first issue of *Insights* appeared in 2000, we’re anxious to see how a magazine freed from the borders of 32 printed pages might offer new opportunities for content, teaching resources, and usability in this 21st century. We’re excited to bridge the gap between the printed page and website, www.insightsmagazine.org, in new ways in order to continue bringing you the quality resource that you’ve come to expect with each issue of *Insights*.

As you might expect, planning for such a transition does not happen overnight, nor is it completed even once it has begun. *Insights* will continue to evolve over the coming months, and the coming year, as we learn more about how you use it, what features and content you want to see, and how we can make it available to you. Please consider this first digital issue the start of an ongoing conversation with you and your colleagues, in the same spirit that *Insights* has always been an ongoing dialogue between us and those who use it in their classrooms for law-related education.

The theme of this issue is “Separation of Powers,” which was inspired by the 2018 Law Day theme, “Separation of Powers: Framework for Freedom.” (Law Day is recognized annually on May 1.) The U.S. Constitution sets out a government with three distinct departments: legislative, executive, and judicial, with each one retaining specific powers designed to check and balance the other two departments. *Insights* explores this framework, and how it affects life in our democracy and our communities. The issue raises questions about this framework, and illustrates how the day-to-day operations of the federal government have evolved into something far more complex than the framers might have envisioned. At the end of the day, how separate are the three branches, is the constitutional system of checks and balances sufficiently meeting our modern needs, and what is the role of citizens in sustaining the Constitution?

The Teaching Legal Docs feature in this issue looks at presidential veto statements, which are mandated by the Constitution, but largely developed out of historical custom after George Washington issued the first one. There are three Learning Gateways activities to help students explore some of the concepts discussed in this issue. An expanded resources page at the end of the issue, formerly What’s Online, now Explore More, points to additional teaching supports, articles, and Law Day materials for your use.

As *Insights* grows into its new digital format, please feel free to send a note about what works, what you’d like to see more of or new, or how you use any of the resources in the issue. We value your input and look forward to your comments.

Best wishes for an inspiring 2018,

Tiffany Middleton
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n the early 1980s, the Chinese leader Deng Xiaoping indignantly complained to the U.S. secretary of state about a federal court decision involving a Chinese aircraft. He asked the secretary of state to tell the judge to change his ruling. The secretary of state declined, explaining that this would violate the separation of powers. “Well, what is the separation of powers?” asked Deng Xiaoping. The secretary of state responded: “I’ll send my lawyer to explain it.”

What is the separation of powers? Unlike Deng Xiaoping, we all know the traditional American answer. The framers of the Constitution divided power between three branches of the federal government: Congress to make the laws, the president to execute the laws, and the courts to pass judgment. Each branch is supposed to keep a watchful eye on the other two. As James Madison wrote in *The Federalist,* “the greatest security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others.”

In the 230 years since the Constitution’s drafting, this three-branch system of checks and balances has aged, and not altogether gracefully. Congress is often dysfunctional, and the courts self-consciously limit their own reach. By contrast, the executive branch has accrued more and more power over time. Concerns about unbridled presidential power abound. These concerns are all the greater when we have doubts about the character of the men—so far, all men—who hold the office of the Presidency.

Yet for those worried about presidential overreach, there is good news as well, for other checks on presidential power have developed in the meantime. One powerful check is public opinion, which in turn owes much to the freedom of the press. But there are other checks too, ones embodied in institutions that wield legal as well as political power. With regard to foreign affairs, other nations and international organizations have tools for checking the power of the U.S. president. On the domestic front, states, cities, and counties can push back against executive branch action. And even within the executive branch itself, administrative law and bureaucratic structure place limits on what the president can accomplish. These checks are not all ones that the framers foresaw, but they further James Madison’s vision of disaggregated authority. Any conversation about the separation of powers is incomplete without them.

The Imperial Presidency?
The rise of presidential power owes much to congressional action—and inaction. Because the framers failed to foresee the party system, they did not realize how it might hinder Congress’s ability to act as a check on the
president. Where they share a party affiliation, members of Congress will typically view the president as an ally and may therefore be unwilling to curtail his or her power. As for members of Congress who do not share a party affiliation with the president, they will find it difficult to pass any legislation, let alone legislation that restricts presidential power. Because of the president’s veto power, Congress needs two-thirds majorities in both houses to pass any legislation to which the president objects. Such supermajorities require bipartisanship. This can sometimes be obtained: Congress’s recent bill bringing new sanctions to bear on Russia, Iran, and North Korea had such strong bipartisan support that President Trump reluctantly signed it into law, thus avoiding a veto override. Yet major legislation that meaningfully restricts presidential power is very hard to pass.

Not only does Congress usually fail to check presidential power, but it often acts to enhance it. As recent years have shown vividly, Congress has difficulty passing major legislation. When such legislation does get passed, it typically delegates a great deal of authority to the president and other executive branch officials. By way of example, the Clean Air Act and the Clean Water Act instruct the Environmental Protection Agency (EPA) to pass regulations that protect our air and water, but these statutes leave the EPA with considerable discretion to determine what it will regulate and when it will do so. Such delegations are appealing to Congress for several reasons. As a matter of process, they enable Congress to capitalize on ambiguity, avoiding difficult decisions that might otherwise make the legislation impossible to pass. As a matter of substance, they provide flexibility that is functionally needed for governance. And once passed, these statutes will linger for years, as their revision or repeal proves hard to obtain.

Over time, presidents have come to fill the void left by Congress. Some presidents have done this with enthusiasm, some with seeming reluctance, but the end result is one of greater presidential power. And the more presidents wield asserted power, the more precedents exist to justify presidential action as a matter of law. The Constitution gives Congress the power to “declare war,” yet presidents have ordered military action in Korea, Vietnam, Grenada, Kosovo, Libya and many other places without explicit congressional authorization. The Constitution instructs the president to obtain the advice and consent of two-thirds of the Senate for president. Where they share a party affiliation, members of Congress will typically view the president as an ally and may therefore be unwilling to curtail his or her power. As for members of Congress who do not share a party affiliation with the president, they will find it difficult to pass any legislation, let alone legislation that restricts presidential power. Because of the president’s veto power, Congress needs two-thirds majorities in both houses to pass any legislation to which the president objects. Such supermajorities require bipartisanship. This can sometimes be obtained: Congress’s recent bill bringing new sanctions to bear on Russia, Iran, and North Korea had such strong bipartisan support that President Trump reluctantly signed it into law, thus avoiding a veto override. Yet major legislation that meaningfully restricts presidential power is very hard to pass.

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treaties, yet major international agreements like the Paris Agreement on climate are now made without legislative approval. With respect to immigration, President Obama and President Trump have pursued very different policies—but both have at times interpreted immigration statutes in ways that maximize their authority and flexibility.

The rise in presidential power vis-à-vis Congress has grown largely unchecked by the courts. Not all actions that enhance presidential power are challenged in court. And for those challenges that do exist, success is only occasional. A court may dismiss such challenges without resolving them, as where it concludes that the plaintiff lacks standing, the case is unripe, or the issue is a non-justiciable “political question.” And when a court does adjudicate a challenge to presidential power, quite often the president will win. There are real advantages to presidential power, especially since the alternative can be ineffective governance or no governance at all.

That Congress and the courts have tolerated the rise of presidential power does not mean that they are entirely without means of resisting it. Congress can act in extreme circumstances. In the wake of Watergate, the threat of impeachment led President Nixon to resign, and Congress also passed several important laws aimed at limiting presidential power. In addition, congressional committees exercise considerable soft power through their ability to investigate executive branch action and publicize their findings. The courts similarly have considerable power at their disposal, should they choose to exercise it. Perhaps the most famous Supreme Court opinion on the separation of powers, *Youngstown Sheet & Tube Co. v. Sawyer*, denied President Truman the power to seize the steel mills from their owners in order to prevent a strike that might have hindered the war effort in Korea. In his separate opinion, Justice Robert Jackson wrote that “I cannot be brought to believe this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress. But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems.”

Checks and Balances beyond the Three Branches

The president’s power has grown beyond what the framers envisioned. But so have other checks on presidential power—checks that are distinct from Congress and the courts. The complexity of the modern world has given rise to institutions that the framers did not foresee, like the international legal super-structure and the federal bureaucracy. These institutions enhance the reach of presidential power, yet at the same time they restrain or channel this power through their foundational laws. Other institutions that existed at the time of the framing, such as states, cities, and counties, have developed new means of resistance to presidential power. Collectively, these institutions serve as checks on presidential power. Aside from states, their roles are not directly provided for in the Constitution, but they are now deeply embedded in the practice of governance. These institutions will not entirely prevent all abuses of presidential power; indeed the potential for abuse can never be fully eradicated from a system whose effectiveness depends on a large degree on presidential power. But these institutions can nonetheless limit the scope and effects of presidential power.

On the international stage, the United States and other major world powers are bound together through an alphabet soup of institutions, including the United Nations, the World Trade Organization, the International Monetary Fund and regional arrangements like the North Atlantic Treaty Organization. If a President wants to pursue strong collective action, then he or she will need buy-in according to the legal rules that underlie these organizations. The need for cooperation thus limits the scope of what the president can do. President Obama joined the United States to the Paris Agreement without getting the approval of Congress or the Senate—but only after years spent crafting an agreement that was acceptable to almost every nation in the world. Of course, there are foreign policies that the president can pursue that do not involve international cooperation, such as unilateral uses of force and withdrawals from international
agreements. But such policies may make international cooperation harder to obtain on other fronts.

Within the executive branch, the federal bureaucracy carries out the president’s orders, but it can also shape the content of these orders or resist their implementation. To give a recent example, the military initially declined to implement President Trump’s tweet announcing a ban on military service by transgendered persons, emphasizing that such a step needed to be formally communicated through the chain of command. When this formal communication took place, it left space for the prospect of less sweeping measures than suggested by the original tweet—a change that may well have owed something to internal pushback by the military. And even where political appointees identify closely with the views of the president, they may be limited in what they can do. President Trump’s EPA director may wish to modify or repeal many regulations regarding environmental protection, but administrative law requires that he do so through a public notice-and-comment process and in a way that is neither arbitrary, capricious, nor inconsistent with the underlying laws. His ability to do this successfully will depend in turn on the work done by career civil servants, who can potentially stall the process or conclude that what they are asked to do is not within the scope of existing environmental laws.

States, cities, and counties also have institutional power that can amplify presidential power or counter it. The framers of course recognized the importance of state governments, but they did so primarily by seeking to limit what kinds of issues the federal government could address. But as the lines between what is of local interest and what is of national interest have blurred, the executive branch frequently finds itself dealing with issues that are also of interest to state and local governments. Where states, cities, and counties disagree with executive branch actions, they can voice their objections and often engage in substantial resistance as well. When President Trump announced the future withdrawal of the United States from the Paris Agreement, several states and numerous cities immediately pledged to continue abiding by it.

These different institutions can reinforce each other, and Congress and the courts, in checking presidential power. For an example, consider President Trump’s initial travel ban on non-citizens coming from seven Muslim-majority countries. It generated immediate resistance from within the federal bureaucracy, including one high-profile resignation. Following inter-agency consultation, its scope was soon announced to be narrower than it sounded, such that it did not exclude lawful permanent residents from entering the country. Several U.S. states then took the lead in challenging this ban in the courts. In ordering the travel ban to be suspended, federal courts took note of the initial breadth of the order and the lack of evidence justifying it. The Trump Administration then issued a revised, narrower executive order. This order was similarly been challenged in court by U.S. states, and the Supreme Court scheduled argument on the issue in the fall. This argument has since been postponed, as the second travel ban has been at least largely superseded by a third travel ban, which itself will doubtless face court challenge. Whatever the ultimate result of this case, it demonstrates how actors within the executive branch, states, and courts can all push back against presidential policy decisions.

As this discussion suggests, the separation of powers today spreads out well beyond the traditional three branches. The resulting network is not a perfectly satisfactory shield against presidential overreach. Most notably, it protects only weakly against abuses of the most important power of them all—the power to use force abroad. Here neither Congress nor the courts currently serve as strong checks, the international legal order is fragile, the federal bureaucracy is especially deferential to the commander-in-chief power, and sub-national governments have little role to play. But outside of this important context, a diffuse web of checks and balances places substantial limits on the power of the president.

1. This incident is recounted in Michael P. Schmaef & Paul R. Williams, Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser 44 (2010). The State Department’s lead lawyer was indeed sent to brief Chinese government officials on the U.S. separation of powers. Id.
The textbook view of separation of powers is abidingly simple: Congress enacts the laws while presidents faithfully execute them. However, reality is not so straightforward. Presidents have long chafed against constitutional limits on their power; and in perhaps the most direct challenge to cherished notions of checks and balances, presidents since the dawn of the Republic have claimed the power to effect policy change unilaterally. From Washington’s Proclamation of Neutrality to Donald Trump’s travel ban, presidents have repeatedly ordered major changes in policy without seeking any prior congressional approval.

Congress has considerable constitutional tools to combat presidential power grabs. It can enact new legislation overturning executive actions. The legislature also retains the power of the purse on which virtually all presidential initiatives ultimately depend. However, when trying to rein in a wayward president, a fragmented Congress often proves no match for the unity and energy of the executive. The inherent difficulty of collective action coupled with a legislative process riddled with procedural hurdles and super-majoritarian requirements place Congress at a distinct institutional disadvantage vis-à-vis the executive. These deficits are only magnified in an era of intense partisan polarization in which partisan loyalties routinely overwhelm institutional ones. Congress’ repeated failures to check presidential overreach legislatively have fueled jeremiads lamenting the rise (or return) of an “imperial presidency.”

While the pendulum of power has undoubtedly swung from one end of Pennsylvania Avenue to the other, Congress is not powerless to push back against presidential aggrandizement. However, Congress routinely relies on its ability to check the president through more informal means. Central among these non-legislative powers is Congress’ ability to investigate alleged misconduct by the executive branch. Investigations are a particularly valuable tool precisely because Congress can often investigate even when it cannot legislate. Commencing an investigation does not require administration critics to assemble majorities, and often supermajorities, across two chambers of Congress to pass legislation that must then survive a presidential veto. Rather, even individual members, if suitably motivated, can provide the impetus for a high profile investigation.

Of course, investigations in and of themselves cannot compel presidents to change course. However, from
McCarthy and the Red Scare to the Fulbright hearings, from Watergate to Russiagate, congressional investigations of the executive branch have produced some of the most dramatic and consequential moments in American political history. By shining a light on alleged executive misconduct and battling the administration in the court of public opinion, investigators can bring popular pressure to bear on the White House in ways that materially affect politics and policy.

Three Pathways of Investigative Influence

Over the past century, congressional investigators have held more than 10,000 days of hearings into alleged misconduct by actors within the executive branch. These investigations span the gamut from sensational probes that rattled the very foundations of presidential administrations—for example, Watergate, Iran-Contra, and the Whitewater/Lewinsky scandal—to more targeted investigations focused on allegations of misconduct in more narrow policy areas—such as conflicts of interest in government contracting or improper influence over regulatory agencies. Many congressional investigations are consciously designed to play to the TV cameras and generate headlines. But are most investigations mere political theater? Or do investigations routinely produce significant changes in policy outcomes?

Although investigations by themselves cannot compel presidents to change their behavior, there are three pathways through which investigations routinely prompt significant change. The first two pathways illustrate how investigations can produce significant policy change in the policy area targeted by investigators. The final pathway is more indirect and describes how investigations can have broad consequences for policymaking in areas unconnected to the inquest itself because they shape presidents’ calculation of the costs they stand to incur should they push policy too far from congressional preferences.

Spurring Legislation

One way in which investigations can produce tangible changes in public policy is by spurring the passage of
While 1974 may be best remembered for the culmination of the Watergate scandal and the resignation of President Nixon, it also yielded sensational headlines alleging systematic abuses by American intelligence agencies.

legislation that would never have passed in the absence of the political pressure generated by the congressional probe. Congress faces a number of institutional barriers when trying to enact legislation checking presidential overreach. First, for many legislators partisan loyalties trump institutional ones. As a result, the president’s co-partisans often act aggressively to block any effort to push back against their party leader in the White House. Second, the cumbersome legislative process with its many veto points makes it difficult for administration opponents to pass legislation checking the president even when there is majority support for doing so. And ultimately, any successful legislation must confront a president wielding the veto pen.

In normal conditions, these barriers all but preclude effective legislative redress. However, a high profile investigation can transform the political environment in ways that make it much easier for administration opponents to move legislation through the process. Perhaps most importantly, investigations can significantly erode public support for the administration and stoke popular demands for legislative action to rein in the executive branch. In so doing, investigations can change the strategic calculations in play for many members of Congress. For example, many of the president’s co-partisans, who previously judged that their electoral interests were best served by standing behind their party leader in the White House, may come to conclude that they are better off distancing themselves from the president and supporting legislative reform. The public scrutiny and political pressure generated by a successful investigation may also affect the president’s decision of whether or not to veto any legislation that successfully passes both chambers of Congress. Vetoing legislation that enjoys significant public support is politically costly. As a result, an
investigation may encourage presidents to reluctantly sign legislation that they oppose—even if the veto would almost certainly be sustained—because the political costs of vetoking it are simply too high.

Consider the legislative legacy of the Church Committee’s investigation into the intelligence apparatus. While 1974 may be best remembered for the culmination of the Watergate scandal and the resignation of President Nixon, it also yielded sensational headlines alleging systematic abuses by American intelligence agencies. In response, the Senate created a special committee headed by Idaho Democrat Frank Church to investigate. Over the next year and a half, the Church Committee delved into a dark world of CIA-sponsored assassinations, poisoned dart guns, and domestic spying on American citizens, including Martin Luther King Jr.

The committee’s work did not win universal plaudits. Many on the right accused Church and colleagues of endangering national security by publicly airing the CIA’s dirty laundry. However, the high profile hearings and public outrage they produced transformed the political climate and spurred legislative action to rein in future abuses. Most directly, the investigation led to the creation of permanent select intelligence committees in both chambers charged with exerting greater oversight over the intelligence apparatus—a move to bolster Congress’ institutional capacity that was first proposed and defeated more than twenty years prior. But the political pressure generated by the investigation also contributed to the passage of other legislation including the Foreign Intelligence and Surveillance Act (FISA) of 1978, which placed clear statutory limits on domestic electronic surveillance. FISA’s influence was both immediate and long-lasting as President George W. Bush’s later authorization of warrantless wiretaps on electronic communications involving American citizens during the war on terror proved controversial precisely because it violated provisions of the 1978 act.

**Preemptive Presidential Action**

Leading to the passage of new legislation is not the only way in which investigations can produce important changes in public policy. Rather, investigations may also prompt presidents to make policy concessions on their own initiative. Presidents may make unilateral concessions for at least two reasons. First, presidents may anticipate that the public pressure for action generated by an investigation will make legislation more likely. With Congress poised to enact dramatic shifts in policy, presidents can act unilaterally to make concessions in the hopes of sapping energy for more sweeping legislative changes. This is precisely what happened in President Ford’s initial response to the Church Committee investigation. Sensing the momentum building on Capitol Hill for major change, Ford acted swiftly in February 1976, issuing an executive order, dubbed “a preemptive end-run on the Congress” by the press—making concrete, but somewhat limited changes by reorganizing the intelligence agencies and banning political assassinations. Ford’s gambit mollified many Republican critics and sapped support for more robust legislation on this front.

Investigations may also encourage preemptive action by the White House even when new legislation on Capitol Hill is unlikely. Rather than seeking to preempt legislation, presidents may make unilateral policy concessions in the hopes of shielding the administration from further political costs. Investigations of alleged misconduct cast the administration in a bad light. Lengthy investigations can seriously erode public support for the president and diminish the administration’s stock of political capital. As a result, presidents may determine that their interests are best served by making policy concessions or changing course in the hope of forestalling additional hearings and minimizing the political fallout from an investigation.

In the early 1980s, congressional investigators began to explore the Reagan administration’s lax enforcement of environmental regulations, particularly those relating to Superfund toxic waste sites, and its cozy relationships with industrial polluters. In addition to documenting the snail’s pace of cleanup activity, investigators also brought to light multiple allegations of cronyism, conflicts of interest, perjury, obstruction of justice, and abuse of power. Opinion surveys showed the tide of public opinion turning against the White House on the issue, and a letter from House Republicans to the president warned that the scandal—
The Russia investigation, an omnipresent sword of Damocles hovering over Trump’s head, has also significantly weakened the president’s political position. Within his first 100 days in office, President Trump earned the dubious distinction of becoming the most unpopular president in history at such an early stage of his presidency.

which some in the press had started calling “sewergate”—could cause significant damage to the party brand name if allowed to fester. To staunch the bleeding, President Reagan executed a quick about-face. He fired the EPA administrator and assistant administrator in charge of the Superfund program, and tapped William Ruckelshaus, who was the agency’s first administrator and enjoyed much stronger pro-environment credentials, to take the helm. With the president’s blessing, Ruckelshaus oversaw a quick surge in environmental enforcement, reversing the lax policies of his predecessor.

Indirect Influence
There is a third, indirect pathway through which investigations in one policy area may affect politics and policy more broadly. Investigations may not simply affect presidential calculations in the policy venue of the investigation itself. Rather, they may also affect presidential behavior more broadly in policy areas unrelated to the immediate focus of an investigation. Presidents who have paid the political costs of a high profile investigation are keen to avoid incurring them again in the future. This may encourage presidents not to stray too far from congressional preferences lest they risk provoking a new bout of investigative fervor on Capitol Hill. Moreover, by weakening the president politically an investigation may embolden his political opponents in Congress and elsewhere, thus reducing the president’s prospects of securing favorable action on other policy priorities.

For example, the direct legislative legacy of the Iran-Contra investigation was exceedingly modest. However, the investigation significantly weakened Reagan’s political position and contributed to a series of important defeats. Most immediately, as the hearings unfolded, Reagan lost two key veto battles over the Clean Water Act and a highway reauthorization bill, and the Senate rejected one of Reagan’s Supreme Court nominees and forced another to withdraw. Without the cloud of Iran-Contra hanging over his head, Reagan may have prevailed in some or even all of these contests with Congress. Instead, the investigation energized administration opponents and
undermined Reagan’s efforts to rally congressional support.

Similarly, the years-long inquest into the Obama administration’s culpability for the fiasco in Benghazi accomplished precious little in legislative terms. However, its political consequences, particularly for Secretary of State Hillary Clinton, were almost incalculable. Not only did investigators insure that Benghazi continued to hover over Clinton throughout her campaign for the presidency, but it also led to a discovery of little relevance to the investigation itself but one that ultimately sunk Clinton’s presidential fortunes: the secretary’s use of a private email server during her tenure at the State Department.

Investigations in the Age of Trump

To the surprise of pollsters and much of the political elite, in 2016 the political neophyte Donald J. Trump pulled off one of the most unexpected wins since the 1948 election of “Dewey Defeats Truman” fame. However, the new president immediately found himself under siege as reports of Russian interference in the election—and possible collusion by some on the Trump team with the Russians—threatened to undermine the legitimacy of his presidency before it began. While Republican committee chairs largely resisted early calls to investigate myriad allegations of conflicts of interest and other improprieties, the demand for an investigation into the Russia matter proved impossible to resist. Matters turned from bad to worse for the president when on May 9, 2017 he fired FBI Director James Comey, who was then-overseeing the Bureau’s own inquiry into Russian interference. Congressional investigators lambasted the move and promised to expand their inquiries into the motives behind Comey’s firing. The intense pressure from congressional investigators played a key role in convincing Deputy Attorney General Rod Rosenstein (the Attorney General Jeff Sessions was forced to recuse himself from all matters relating to Russia because he had failed to disclose meetings with Russian officials during the campaign) to appoint former FBI Director Robert Mueller as Special Counsel to oversee the investigation into Russian influence begun by the FBI.

The end result of both Mueller’s and Congress’ own investigations are impossible to predict. However, the investigation has already precipitated one direct defeat for the president. In a surprising rebuke to a co-partisan president, the Republican controlled House and Senate passed legislation imposing new sanctions on Russia and barring the president from lifting them unilaterally. Trump’s defeat is even more ironic given that this remains one of the few major legislative accomplishments of the 114th Congress thus far.

The Russia investigation, an omnipresent sword of Damocles hovering over Trump’s head, has also significantly weakened the president’s political position. Within his first 100 days in office, President Trump earned the dubious distinction of becoming the most unpopular president in history at such an early stage of his presidency. With his poll numbers in the doldrums, President Trump has found it increasingly difficult to cajole other actors to move forward on key priorities from repealing and replacing the Affordable Care Act to building his long-promised wall along the Mexican border. It is impossible to quantify exactly how much of Trump’s frustrations to date are attributable to the political damage caused by the Russian investigation; nevertheless, it has undoubtedly played a complicating factor.

Throughout American history investigations have been an important tool through which administration opponents in Congress have pushed back against an ascendant executive. Investigations afford an admittedly imperfect and conditional check on presidential overreach; they are far from a panacea for an inter-institutional balance of power that often seems dangerously tilted toward the president. However, they do provide the president’s opponents with a tool that is available when other constitutional mechanisms, such as the power of the purse or the power to enact new legislation, are not.

Discussion Questions

1. How is Congress’s power to investigate a check on the other branches of government?
2. In what ways might an investigation effect policy change outside of Congressional legislation?
3. Do you think that Congressional investigations result in change? Or are they “mere political theater?” Or are they both?

Suggested Resources


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Youngstown Sheet and Tube Co. v. Sawyer
Primary Source Jigsaw

In this activity, students study five primary sources related to the 1952 U.S. Supreme Court case, Youngstown Sheet and Tube Co. v. Sawyer. The landmark decision articulated limits to presidential power and outlined standards for analyzing presidential executive orders that are still in use by courts today.

Materials

- Youngstown Sheet and Tube Co. v. Sawyer PowerPoint Presentation
- Youngstown Sheet and Tube Co. v. Sawyer Background Handout
- Executive Order 10340—Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies, April 8, 1952
- Special Message to Congress on the Situation in the Steel Industry, April 9, 1952
- "Iron-Fisted Breach" cartoon from Knickerbocker News, April 23, 1952
- Excerpts from decision in Youngstown Sheet and Tube Co. v. Sawyer, decided June 2, 1952
- Excerpts from Special Message to Congress on the Steel Strike, June 10, 1952

Background: President Truman’s Executive Order 10340 & Youngstown Sheet & Tube Co. v. Sawyer

On December 18, 1951, collective bargaining between steel companies in the United States and their employees broke down and led to an announcement that the employees would strike on December 31, 1951. In an attempt to reach an agreement between the parties, the Federal Mediation and Conciliation Service intervened. Its efforts were unsuccessful and on April 4, 1952 the steel mill employees’ union gave notice of its intent to strike on April 9, 1952.

President Truman believed that a strike of any length would interfere with defense contractors and the domestic economy while the country was involved in the Korean War. Unable to mediate the differences between the union and the industry, President Truman issued an executive order on April 8, 1952 authorizing the U.S. Secretary of Commerce Charles Sawyer to take possession of and operate most of the nation’s privately owned steel mills. President Truman immediately informed Congress of his action and stated his intention to abide by the legislative will. However, Congress took no action.

The Steelworkers praised President Truman and postponed their strike while steel companies and most newspaper editorials opposed the steel mill seizures. The steel companies brought suit in federal court. A U.S. district court issued an injunction barring the government from continuing to hold the steel plants it had seized, which the U.S. court of Appeals stayed. Both the government and the steel companies petitioned the U.S. Supreme Court for certiorari. The Court heard the case and issued a decision on June 2, 1952.
Activity Procedure

1. Ask students to watch the first 2:03 minutes of the Youngstown Sheet and Tube v. Sawyer Quimbee video and read the background handout.

2. Divide students into small groups and distribute one of the five primary source documents to each group. Ask each group to review their primary source and discuss the following questions:
   - What is your document?
   - What are the main points in your document?
   - How does your document relate to specific powers of branches of government, especially in relation to Truman's executive order?

Selected questions specific to each primary source:

Executive Order 10340, April 8, 1952 (Primary Source 1)

- What is the main reason President Truman provides for why the government is taking control of the steel mills?
- According to President Truman, where does his authority to seize the steel mills come from?

Special Message to Congress, April 9, 1952 (Primary Source 2)

- What is the tone of President Truman in this message to Congress?
- What is the goal of Truman’s message to Congress? What action does he want Congress to take?

“Iron Fisted Breach,” the Knickerbocker News, April 23, 1952 (Primary Source 3)

- What is being depicted in this political cartoon?
- What do you think the cartoonist is trying to say about President Truman’s seizure of the steel mills?

Excerpts from Youngstown Sheet & Tube Co. et Al. v. Sawyer, decided June 2, 1952 (Primary Source 4)

- According to the opinion of the Court delivered by Justice Black, where must the President’s power to issue this executive order come from?
- According to the opinion of the Court, how has President Truman overstepped in his use of executive power?
- How does the Court describe the role of Congress in comparison to the role of the president?

Justice Jackson’s 3-Tiered Test

Standards for Presidential Authority

- Order supported by Congressional authority
- Congress is silent; rely only on Presidential authority
- Order contradicts Congressional authority

Excerpts from Special Message to Congress, June 10, 1952 (Primary Source 5)

- What is the tone of President Truman in this message to Congress?
- What action is President Truman asking Congress to take?
- What other avenues has President Truman pursued to reach his goals in settling the issue with the steel mills?

3. After groups have had time to review their respective primary sources, ask them to share their source with the rest of the class. Through this share out students should begin to see the back and forth that President Truman goes through as he attempts to exert his presidential power and it is checked by Congress, the Supreme Court, and Congress again.

4. After the discussion it might be useful to ask the class to view the rest of the Youngstown Sheet and Tube v. Sawyer Quimbee video, which covers an analysis of the Court’s ruling and Justice Jackson’s concurring opinion. The concurrence outlined a framework for how the Court determines the limits of presidential powers.
In 1985, President Ronald Reagan told the American Business Conference, “I have my veto pen drawn and ready for any tax increase that Congress might even think of sending up. And I have only one thing to say to the tax increasers. Go ahead—make my day.” This pithy borrowing of Clint Eastwood’s famous line in “Dirty Harry” frames the president’s veto power as a power, indeed, and highlights the role that Congress plays in facilitating the exercise of that power.

Article I, Section 7 of the U.S. Constitution outlines requirements for federal legislation, including the role of the president to veto bills, very much in terms of a legislative process, and not a power of the Executive. In fact, the word “veto,” Latin for “I forbid,” does not appear:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes 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 the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

Pursuant to this constitutional mandate to return “Objections” to Congress, U.S. presidents have issued veto statements when they veto bills. Here, Teaching Legal Docs looks at the veto statement as a primary source and legal document, unpacking its format and typical content, and discussing the protocols surrounding their creation.

When are Veto Statements Issued?
When discussing presidential vetoes, it is important to distinguish between what is known as a regular, or “qualified veto,” and a “pocket veto.” Qualified vetoes are the traditional vetoes that come to mind—when a president actively refuses to sign a piece of legislation and returns it to Congress within ten days. Pocket vetoes are more passive, in that a president allows an unsigned bill to languish, putting it aside, or “in a pocket,” until the Congressional term ends, at which point there is no Congress in session to receive the vetoed legislation, thus the bill never becomes law. Presidential veto statements are issued with qualified vetoes only, not with pocket vetoes.

The Constitution mandates that regular vetoes be issued within ten days of a president receiving a bill. So, if a president chooses to veto the legislation, the bill is returned to the issuing house in Congress, along with a veto statement explaining the reason(s) for the veto. The statements are generally presented in writing. President Franklin Roosevelt also chose to deliver at least one of his veto statements in person, however, in 1935. He addressed the House of Representatives, objecting to the Bonus Bill. Both a written statement and video of him reading the statement exist in archives.

It follows, then, that the frequency of veto statements depends on the number of vetoes that a president issues. Since 1792, there have been 2,974 vetoes of Congressional bills. George Washington issued the first presidential veto, related to an appropriations bill, and the first veto statement, on April 5, 1792. Franklin Roosevelt issued the most vetoes across a presidency (1933-1945; 635), but Grover Cleveland issued the most vetoes in one term (1885-1889; 414). Presidents Thomas Jefferson (1801-1809), John Quincy Adams (1825-1829), and, so far, Donald Trump (2017), issued no vetoes, or veto statements.

What Is in a Veto Statement?
Presidential veto messages are considered among the “Presidential Memoranda” that a president might issue, alongside other memoranda, which typically issue directives about administration
of the federal government. The format of presidential veto statements is very similar to that of other presidential memoranda in that there is a standard heading at the beginning of the document, and presidential signature at the end.

The heading typically includes the date that the statement is issued, and a heading, “Veto Message from the President,” followed by a notation indicating the legislation. In the example pictured, it’s “S.2040,” or Senate bill 2040. This was the Justice Against Sponsors of Terrorism Act (JASTA), which President Barack Obama vetoed on September 23, 2016. The statement is then addressed to the appropriate house in Congress: “To the Senate of the United States,” for example.

The body of the presidential veto statement includes an explanation of why the president is vetoing the legislation. It might also include some context for the president’s perspective, or other personal remarks relevant to the explanation. The explanation could cite one or more concerns or conflicts with constitutional principles, existing federal statutes, or Supreme Court precedent. Statements vary in their length and complexity.

In the example here, the explanation spans several paragraphs of text. President Obama offers three reasons for the veto, citing U.S. law under a Congressional statute, the Foreign Sovereign Immunities Act; concerns of constitutional and international law about sovereignty and sovereign immunity; and foreign policy customs.

Presidential veto statements include at least one sentence explicitly objecting to or vetoing the proposed legislation. In the example here, it appears at the end: “For these reasons, I must veto the bill.” In the case of George Washington’s first veto, he did not use the word “veto” at all, but clarifies “objections” in the opening paragraph. Other presidents discuss “withholding approval of the bill.” Use of the term “veto” in presidential veto statements appears to be a late twentieth century development, but certainly the effects and intentions have appeared across American history.

Regardless of how the president expresses objections to the proposed legislation in the document, the veto statement is, lastly, signed and dated.

**What Happens after the Presidential Veto?**

Once the president issues a veto statement, it is sent to Congress with the vetoed bill. The veto statement also
beneath becomes public record, like other documents issued during a presidency. Veto statements are archived, including online, by the White House, the National Archives, and special archives, such as the American Presidency Project at the University of California Santa Barbara.

Constitutional protocols then take effect. Congress might override the veto with a vote, which the Congressional Research Service estimated in 2016 has happened to just 4% of Presidential vetoes in U.S. history. The first President to experience Congressional override of a veto was John Tyler (1841-1845), on March 3, 1845. Andrew Johnson has the distinction of being the “most overridden” president (1865-1869), with 15 of his 21 vetoes overturned by Congressional votes. If Congress does not override the veto, then the proposed legislation simply dies, although Congress might introduce new or revised legislation.

What Can We Learn?

Presidential veto statements provide primary source windows into U.S. history, government, and the rule of law under the U.S. Constitution. They function very practically as intended, and provide explanations for a president’s veto in historical moments.

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## Twelve Presidential Vetoes in U.S. History

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 5, 1792</td>
<td>George Washington issues the first presidential veto, of an appropriations act.</td>
</tr>
<tr>
<td>July 10, 1832</td>
<td>Andrew Jackson vetoes a bill rechartering the Second Bank of the United States. His veto statement offers a broader justification of his objections, compared to prior presidential veto statements, so it is widely regarded as a significant assertion of executive power.</td>
</tr>
<tr>
<td>March 3, 1845</td>
<td>Congress overrides a presidential veto for the first time after John Tyler vetoes a bill prohibiting him from allowing the building of Revenue Marine Service (Coast Guard) ships without congressionally approved funding. The House of Representatives votes 126-31 to override the veto.</td>
</tr>
<tr>
<td>May 3, 1854</td>
<td>Franklin Pierce vetoes the Bill for the Benefit of the Indigent Insane, which would have set aside 12 million acres of federal land to create asylums for the mentally ill. Championed by Dorothea Dix, it was the first major social welfare legislation in the United States. The next bill to address mental health was not signed into law until 1946, with the National Mental Health Act.</td>
</tr>
<tr>
<td>June 22, 1860</td>
<td>James Buchanan vetoes a version of the Homestead Act. Abraham Lincoln would sign a different version of the bill into law in 1862.</td>
</tr>
<tr>
<td>March 2, 1867</td>
<td>Andrew Johnson vetoes the Tenure of Office Act. Congress overrides the veto and the bill becomes law. It prohibits the president from firing people when Congress is not in session. Johnson attempts to fire Secretary of War Edwin Stanton, and it leads to his impeachment.</td>
</tr>
<tr>
<td>June 22, 1947</td>
<td>Harry Truman vetoes the Taft-Hartley Act, which restricts activities of labor unions. Congress overrides the veto.</td>
</tr>
<tr>
<td>September 26, 1986</td>
<td>Ronald Reagan vetoes the Comprehensive Anti-Apartheid Act, which imposes sanctions on South Africa and sets conditions for ending the Apartheid system. Congress overrides the veto.</td>
</tr>
<tr>
<td>April 10, 1996</td>
<td>Bill Clinton vetoes a bill prohibiting “partial birth” abortions. It inspires a national discussion about abortion rights.</td>
</tr>
<tr>
<td>February 24, 2015</td>
<td>Barack Obama vetoes the Keystone Pipeline Approval Act amid protests along the proposed pipeline route.</td>
</tr>
</tbody>
</table>
The idea of separation of powers is something that is often learned in grade school and, in theory, is the means by which the U.S. federal government is intended to operate. However, this traditional way of thinking often ignores the role of the federal bureaucracy in modern governance and how it may disrupt the separation of powers. This article will demonstrate how the bureaucracy is possessed of all three governmental powers, raise questions as to whether the modern bureaucracy distorts traditional notions of separation of powers, and address other issues concerning bureaucratic governance in a technologically complex society.

The Federal Bureaucracy and the Bureaucrat

The experience of the colonists with the British crown led the framers of the Constitution to be skeptical of a strong centralized government. This skepticism is what led the framers to create mechanisms by which they could create a centralized national government, but one that was limited in the use of the powers it could exercise. One of these mechanisms, borrowed from the works of Montesquieu, was the use of separation of powers, or the idea that governmental power should be divided up among three branches of government: the legislature, the executive, and the judiciary. The division of governmental power would, in turn, provide limits on the use of governmental power by designing a system that was intended to be inefficient by requiring coordination of multiple branches.

The federal bureaucracy is hardly mentioned in the United States Constitution. Article II, Section 2 states, “he [the president] may require the opinion, in writing of the principal officer of each of the executive departments, upon any subject relating to the duties of their respective offices...” and Article II, Section 3 states, “he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.” In spite of these rare mentions, these references make it clear that the framers realized there would be a federal bureaucracy that would provide advice, support, and expertise to the president of the United States. In 1789, the administration
of George Washington would already include the Departments of Treasury, War, and State. Since this time, the federal bureaucracy has grown tremendously in size to include 15 cabinet-level departments, over thirty independent agencies, and roughly 3,000,000 civil servants. Why was there such a tremendous growth in the size of the federal bureaucracy over time and what does it mean for modern governance in the United States?

In early American history, the United States was largely an agrarian society and, as such, the need for detailed technical expertise was not a required skill for those working in government. Most received their positions through election, nepotism, or reward for political support of elected officials. The industrial revolution in the 19th century in the United States would change all of that as the growth in technology would lead to a need for governmental expertise to understand and regulate these new technologies in a society that was becoming increasingly complex. The problem was that legislators often did not possess the level of expertise necessary to understand the detailed intricacies of these technologies. The result was that legislators could not fully deal with many of the policy issues facing the nation. Inevitably, this would lead to the need for Congress to delegate authority to newly formed federal agencies filled with expert bureaucrats to create more detailed policies surrounding new technologies.

**Delegation of Power**

The issue of delegation of power from Congress to the bureaucracy has been a contentious issue since the very early history of the United States. In his Second Treatise (§141), John Locke said, “The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others.” This idea, known as *delegate potestas non potest delegare* or “a delegated power cannot itself be delegated” would later become known as the rule of nondelegation. In short, the question becomes whether Congress can delegate a legislative power that has been delegated by the Constitution to Congress to the federal bureaucracy. Does this delegation inherently violate the separation of powers created in the Constitution? The Supreme Court first addressed this issue in 1825 in the case of *Wayman v. Southard* (23 U.S. 10). Here, Congress vested the courts with the ability to “make and establish all necessary laws” for the conduct of judicial business in the Judiciary Act of 1789. Chief Justice Marshall would establish a standard whereby Congress could delegate authority so long as it provided the general purposes and provisions of the law that could be filled in by bureaucratic bodies. This principle would be later reaffirmed in *J.W. Hampton & Company v. United States* (1928) by Chief Justice Taft stating that Congress could delegate legislative power...
power so long as Congress established an “intelligible principle” to guide the body in which such power was vested. But the issue of delegation and separation of powers was far from settled.

In *Panama Refining Co., et al. v. Ryan et al.* (293 U.S. 388, 1935) and *A.L.A. Schechter Poultry Corporation v. United States* (295 U.S. 495, 1935), the Supreme Court would strike down New Deal programs of President Roosevelt as unconstitutional delegations of power by Congress to the president. Many scholars believe these decisions represented aberrations that were motivated by anti-New Deal justices, as this would mark the last time the Court would strike down delegations of power by Congress as a violation of the separation of powers. While this would pave the way for continued delegation of legislative power to bureaucracy, the issue of the limits of such delegations as potential violations of the separation of powers still continues to arise in more recent cases such as *Mistretta v. United States* (488 U.S. 361, 1989) and *Whitman v. American Trucking Associations* (531 U.S. 457, 2001). In the latter case, the Court decided that the authority to create standards for determining air quality that had been delegated by Congress to the director of the Environmental Protection Agency did not violate the separation of powers under the Constitution. Here the Court relied on the “intelligible principle” standard and again reinforced the idea that delegation was considered acceptable.

While the Court seems to continue to reinforce the idea that delegation is acceptable even in light of separation of powers, the issue of delegation certainly raises interesting questions. Does delegation interrupt the separation of powers intended by the framers of the Constitution? Is delegation a necessary component of a complex society in which generalist legislators do not possess the expertise necessary to create detailed rules and regulations? Does the slow pace and fragmentation along party lines in Congress make reliance on bureaucrats to create policy inevitable? Regardless of one’s answer to these questions, the clear result is that the federal bureaucracy is now vested with a quasi-legislative power whereby federal agencies now become policymaking entities.

**Policy-Making and Adjudication**

The formalization and recognition of this quasi-legislative power possessed by the bureaucracy would occur with the passage of the Administrative Procedure Act of 1946 (PL 79-404). The policy-making function of agencies would come to be known as rulemaking. The Administrative Procedure Act (APA) defines a rule as “an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy...” (§551). One can see a clear recognition of a policy-making function of agencies as described in the definition. In fact, each year, agencies pass thousands of rules that become codified in the Code of Federal Regulations (CFR) under the rulemaking procedures prescribed in the APA. Rules cover a wide variety of policy areas, from requirements of food manufacturers to provide nutritional information for consumers to regulation of the exact candlepower of the headlights of locomotives. While these rules have the power of law, none have to follow constitutional procedures of how a bill becomes a law. This raises questions about unelected bureaucrats making policy in a democracy. To help alleviate this concern, the APA requires agencies to provide notice of proposed rules and to allow for a minimum of 30 days for the public to comment on proposed rules. Members of the public can send comments to agencies noting objections, agreement, or other concerns. The government has even set up a website, www.regulations.gov, where the public can submit comments electronically on rules proposed by federal agencies. This increases the ability of the public to participate in this policy-making process, thereby making it more democratic. But should the American public still have concerns about policies being made by unelected government officials? This question continues to be debated, as it again pits the need for expert bureaucrats who rely on technical information to inform decision-making against the need for accountability in a democratic society. Ultimately, it returns to the question of delegation in a system based on separation of powers.

The rulemaking, or quasi-legislative, function of federal agencies is not the only governmental power that has been delegated to the federal bureaucracy. The federal bureaucracy has also been vested with a quasi-judicial...
In short, the question becomes whether Congress can delegate a legislative power that has been delegated by the Constitution to Congress to the federal bureaucracy. Does this delegation inherently violate the separation of power created in the Constitution?

In the case of Londoner v. Denver (210 U.S. 373, 1908), a small group of residents in the City of Denver were assessed a tax to cover the cost of repaving a street on which the group of residents resided. The taxing body, the State Board of Equalization, provided these residents no type of hearing, whether formal or informal, in order to present their views regarding the assessment of the special tax. These residents were only afforded the opportunity to send in written comments noting their objections to assessment. The Supreme Court stated that the procedures of agency were inadequate and ordered that residents be provided some type of hearing in front of the agency in order to express their views orally. In the case of Bi-Metallic Investment Company v. State Board of Equalization (239 U.S. 441, 1915), the City of Denver’s State Board of Equalization increased the valuation of all taxable property by 40% in order to bring property values in line with current valuation. In this case the tax was assessed on all property owners in Denver. Bi-Metallic argued that they should be afforded a hearing, as was the case in Londoner, in order to note objections orally, but the Court rejected this argument. Why, in light of what was decided in Londoner, a case with seemingly similar facts, would the Court decide differently?

The Court explained that the facts in Londoner represented a judicial action of an agency because only a small group of residents was affected...
By the agency action (i.e., “exceptionally affected”), whereas in Bi-Metallic all residents were equally affected (i.e., the rule had “general applicability”) thereby representing a legislative action of agency. For the Court, it is “impractical” to give every resident affected by a general legislative action the opportunity to be heard, as it would prevent government from ever passing any type of legislation. Thus, in these two cases the Court delineated the difference between legislative actions of agencies and judicial actions of agencies and the procedures that were necessary for each of these two types of actions. This would provide the basis for the APA, which also distinguishes between these two types of actions: rulemaking and adjudication. So what do judicial actions of agencies look like in the modern context?

Some federal agencies, like the National Labor Relations Board (NLRB), rely very heavily on adjudication, as opposed to rulemaking, as a means of agency decision-making. While adjudication can range from very informal to formal, the most formal adjudication is almost indistinguishable from procedures and characteristics of other federal courts. Thus, many federal agencies have their own courts and impartial referees by which to resolve disputes or enforce rules created by the agency. These courts are just like any other court in that they involve adversarial legal style, burdens of proof, presentation of evidence, testimony from witnesses, an impartial decision-maker, and the creation of a factual record on which a decision is made. In short, formal adjudication by agencies most heavily resembles a non-jury civil trial presided over by a single judge. These courts have often been referred to as “the hidden judiciary” as most of the American public is unaware of the existence of such courts or judges.

**Administrative Law Judges**

Previously referred to as hearing officers or trial examiners, the position of administrative law judge (ALJ) was created by the APA in 1946 to act as an impartial referee during the adjudication process. The ALJ represents a unique actor in that they are both bureaucrat and judge at the same time. Unlike Article III judges who are nominated by the president and confirmed by the Senate, ALJs are hired and placed by the Office of Personnel Management (OPM) as merit employees through specifically designed, competitive examinations as is the case with other federal merit employees (bureaucrats). But the ALJ also plays the role of judge, as ALJs possess many of the same roles and functions as other federal judges. They can administer oaths and affirmations, issue subpoenas, determine the admissibility of evidence, develop a record of evidence, and make findings of facts. Thus, the role of the ALJ is one of both bureaucrat and judge.

Currently, there are over 30 federal agencies that employ nearly 2,000 administrative law judges. This number represents over twice the number of judges in the federal court system.
The vast majority (1,500) of these judges are employed by the Social Security Administration (SSA), but collectively ALJs issue tens of thousands of decisions across a wide variety of policy issues every year. These policy areas include environmental policy, labor disputes, disability benefits, licensing of television and radio stations, consumer protection, anti-trust, and many, many other policy areas. It is often said that the average U.S. resident is more likely to have a case in front of an administrative law judge than any Article III federal court. This demonstrates that this largely-ignored actor plays a tremendous role in the daily operation of the government.

Because of the importance of the role of the ALJ, ensuring impartiality is crucial to the function of the ALJ. The APA provides great independence to ALJs in order to ensure impartiality in their decision-making. The pay of ALJs is not determined by the agency by which they are employed, rather the Office of Personnel Management (OPM), the agency responsible for all hiring in the federal government, is charged with setting pay rates for ALJs. This ensure that agencies cannot force ALJs to render more favorable decisions by reducing their pay. In addition, ALJs cannot be removed from office unless they have first been afforded a hearing in front of the Merit Systems Protection Board, a federal agency responsible for monitoring federal merit employees. ALJs are thus given a great deal of independence to ensure impartiality in their decision-making. In short, this is an important judicial actor, vested with a great deal of decisional independence, responsible for making thousands of decisions across a wide variety of policy areas.

Big Questions for the Future

Perhaps for these reasons, the position and hiring procedures of ALJs have recently gained attention and generated heated debate in the federal courts.

The 10th Circuit Court of Appeals recently ruled that the hiring process of the Securities and Exchange Commission for ALJs was unconstitutional (see Bandimere v. SEC, 844 F. 3d 1168, 2016). However, the D.C. Circuit of Appeals ruled that the SEC’s hiring practices were constitutional (see Lucia v. SEC, 832 F. 3d 277, 2016). The general debate surrounds whether ALJs are inferior officers of the United States and thus require that they be appointed by the president. On a larger scale, this means that the position of ALJ itself may be unconstitutional in its current form. Because of the inter-circuit conflict of outcomes, this question is likely to be addressed by the United States Supreme Court. If the position were to be declared unconstitutional, this would raise questions as to how tens of thousands of cases decided by federal agencies would be handled. Would this burden be placed on the federal court system? Would this lead to a larger federal judiciary?

At this point, it should be clear that the federal bureaucracy is possessed of all three powers of government. It possesses a legislative power through its rulemaking function, a judicial power through adjudication, and, by default as an executive actor, the executive power. The question over whether this represents a violation of the separation of powers persists, but few answers are to be found in the Constitution and the Supreme Court seems to have accepted the realities and necessities of delegation in a technologically complex society. Even the framers realized the need for bureaucracy as even the earliest administrations relied on bureaucratic actors. However, questions surrounding the separation of powers, delegation, and the role of the bureaucratic actors such as the ALJ demonstrate that these issues will persist for many years to come. These issues represent the struggle and seemingly paradoxical desire to maintain values of democracy while realizing the need for bureaucratic expertise.

Discussion Questions

1. Do you think that “rulemaking” by executive branch agencies is comparable to legislation passed by Congress? How are they similar? Different?
2. How is “adjudication” different from rulemaking? How does adjudication allow federal agencies to work more efficiently?
3. Do you think that the use of rulemaking and adjudication signifies delegations of power from both the legislative and executive branches of government? Do you think the delegations are necessary? Appropriate?

Suggested Resources


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Separate Powers: Comparing Constitutions

In this activity, students will analyze historical readings about the system of separated powers, or checks and balances, outlined in the U.S. Constitution. They may then use the database of the Comparative Constitutions Project to locate constitutions from around the world to explore other countries’ systems of checks and balances.

Materials
- Separated Powers Readings Handout
- Copy of the U.S. Constitution
- Internet access to access the Comparative Constitutions Project database

Historical Readings on Separated Powers, and Checks and Balances

Excerpt from “The Histories, Book 6” by Polybius (264-146 B.C.E.)

Such being the power that each part has of hampering the others or co-operating with them, their union is adequate to all emergencies, so that it is impossible to find a better political system than this. For whenever the menace of some common danger from abroad compels them to act in concord and support each other, so great does the strength of the state become … For when one part having grown out of proportion to the others aims at supremacy and tends to become too predominant, it is evident that, as for the reasons above given none of the three is absolute, but the purpose of the one can be counterworked and thwarted by the others, none of them will excessively outgrow the others or treat them with contempt.


When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Excerpt from “Federalist Papers: No. 48, These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other,” by James Madison (1788)

… It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and
completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

What this security ought to be, is the great problem to be solved. Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?

Activity Procedure

1. Ask students to read the historical texts, either in class, or in advance of the activity, and discuss the following questions:
   - What do each of the texts suggest about power, or structuring government powers?
   - How do the government powers check or balance one another in these examples?
   - When was each of the texts written? Do you think that the earlier ones might have influenced the later ones?

2. Next, direct students’ attention to the U.S. Constitution. Ask students to discuss what they know about the structure of the U.S. Constitution and the U.S. government according to the Constitution. If needed, offer guidance about the organization of the U.S. Constitution, and what is contained in each article. Review Articles 1-3, in particular, which discuss the legislative, executive, and judicial branches of the federal government.

3. Ask students to discuss the U.S. Constitution and organization of the federal government:
   - What are the benefits of having a government with separated powers and a system of checks and balances?
   - What challenges arise with the same system?
   - Considering the readings, how does the system outlined in the U.S. Constitution draw on historical ideas?

4. Invite students to look at constitutions from other countries around the world using the Comparative Constitutions Project database. Working individually, or with a partner, allow students time to search for and compare world constitutions. It might be appropriate to offer students some guidance on how to navigate the site and use its features to look at constitutions, literally, side by side.

5. Ask students to identify one other national constitution, not from the United States, that exhibits some form of government structure. Explain to students that they may need to read through several constitutions to find an example that they want to use for this activity. Students should compare their selected constitution to the U.S. Constitution:
   - What country is the constitution from? Where is the country located?
   - How is the constitution organized?
   - What kind of national government does the constitution outline?
   - What types of power does the constitution discuss, and how is it distributed among government leaders?
   - How is the government described in the constitution similar to or different from the government outlined in the U.S. Constitution? How might these similarities or differences affect a system of checks and balances in the country?
   - Are there other observations about the constitution that stand out to you?

6. To wrap up this activity, ask students to sketch diagrams, or basic organizational charts, of the government outlined by their non-U.S. Constitution.

Notes on Adapting this Activity

If students participating in this activity are unfamiliar with the organization of the U.S. Constitution, or the concepts of separated powers or checks and balances, this activity offers an opportunity to delve more deeply into these concepts before proceeding with a comparison of other world constitutions. Simply focusing on the text of the U.S. Constitution, as in Step 3 of the activity, might be valuable.

Looking at the state constitution of your state, and organization of state government, might also be appropriate. Students could compare and contrast their state government with the federal model.
After a 2016 Supreme Court term that at times seemed nearly at a standstill waiting for the late Justice Antonin Scalia’s spot to be filled, the October 2017 term was expected to start in high-gear, and will likely remain there for most of the year. Moreover, the presence of Justice Neil Gorsuch on the bench has the potential to energize the Court’s more conservative wing and heighten the written debate between justices. The October oral argument session, which began on October 2, will no doubt place the Supreme Court in the media spotlight, and possibly the president’s twitter-feed focus. The upcoming term allows the justices to dive deeply into the fundamental structures of American democracy, particularly as they relate to elections and immigration.

Voting and Elections
Gill v. Whitford (Docket No. 16-1161) presents the Court with the issue of partisan gerrymandering, a topic that has been bubbling up from the lower courts for decades. Gill involves a challenge to the redistricting map drawn by Wisconsin Republicans following the 2010 Census on the basis that the drawing of the new map was politically motivated. The trial court ordered Wisconsin to redraw the map (although that order has been on hold while the case is before the Supreme Court). The specific questions before the Court go beyond the simple issue of drawing electoral districts, and get at the heart of voting rights and political power. The state claims that challenges to electoral maps must be brought on a district-by-district basis; challengers cannot point to an entire electoral map to show partisan gerrymandering. The parties also disagree on the necessary factors and evidence required to prove gerrymandering. In addition, Wisconsin refutes the challengers’ claim that this issue even rises to the level of partisan gerrymandering, since the state followed traditional redistricting practices. And perhaps most importantly, the state questions whether such gerrymandering claims are even justiciable. If the Court decides to tackle this last issue, its ruling might clarify which branch of the government has the final say in voting disputes, an obviously important topic going into the 2018 election cycle.

Marriage Equality and Religious Freedom
Same-sex marriage will once again be before the justices, although in a more narrow and nuanced way than in recent terms. The current case, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission (Docket No. 16-111), sits at the intersection of marriage equality and freedom of religion and expression. The cake shop gained media attention when, in 2012, the shop owner, Jack Philips, refused to bake a cake for Charlie Craig and David Mullins, a same-sex couple married in Massachusetts who planned a celebration in Colorado. Craig and Mullins filed a complaint with the Colorado Civil Rights Commission, citing the state’s public accommodations law, the Colorado Anti-Discrimination Act, which prohibits businesses open to the public from discriminating against customers on the basis of race, religion, gender, or sexual orientation. The complaint led to a lawsuit, which the couple won. The cake shop was ordered to provide cakes to same-sex customers, change its policies to prevent future discrimination, and submit regular reports to the Colorado Civil Rights Commission about any customers it turns away. Masterpiece Cakeshop appealed the decision, and ultimately chose to leave the cake business. Phillips, in appealing the decision, argued that being forced to bake cakes, or “create expression,” violates his sincerely held religious beliefs about marriage. The Colorado Supreme Court upheld the decision, and ruled that making a custom cake, despite its artistic nature, constituted expected conduct in Phillips’ business, not free expression or freedom of religious expression.
Masterpiece Cakeshop looks to refine and define the broad sweeping statements made by the court in Obergefell v. Hodges, 576 U.S. (2015), guaranteeing all couples the “constellation of benefits the state has linked to marriage.” In the initial commentary after the Obergefell decision, many legal experts noted that lower courts may struggle with balancing the religious beliefs of small business owners and the rights of same-sex couples in accessing marriage-related services. Masterpiece Cakeshop puts the issue squarely before the Court by asking whether Colorado’s public accommodations law, which requires business owners to provide services to all customers, is unconstitutional. Masterpiece Cakeshop presents the Court with two First Amendment arguments to find in the petitioner’s favor: free speech and free exercise. The petitioner argues that the state law compels them to create expression that violates their religious beliefs, thereby violating both their rights to free speech and free exercise of their religion.

Technology and Privacy
Carpenter v. U.S. (Docket No. 16-402) represents the next step in the Court’s evolving doctrine as it relates to cell phones and emerging technologies (sometimes with mixed results). Carpenter centers on the FBI’s accessing “cell site” information related to phone numbers dialed from a cell phone without obtaining a search warrant. Cell site information includes the date and time of any phone calls, as well as the general location of the phone when calls began and ended based on its cell tower connections.

Timothy Carpenter, the plaintiff in this case, was convicted at trial, following an investigation of armed robberies in Detroit in 2011. During the investigation, the FBI obtained several months of data related to Carpenter’s cell phone usage, all from cell site information records, and without a warrant. The records revealed 12,898 separate points of location data, averaging approximately 101 locations per day. Carpenter appealed the conviction, arguing that the search of his cell site information without a warrant violated his Fourth Amendment rights.

The Court has now been asked to make this exact determination: whether such warrantless searches and seizures of cell site information violate the Fourth Amendment. Given the ubiquitous nature of cell phones and their ability to collect vast amounts of...
personal data, the Court’s decision in Carpenter could have wide-ranging implications for police practices and the way we interact with our mobile devices. The crux of the Court’s decision may center around whether cell phone users have “voluntarily” turned over this data to a third party (the cell phone service provider).

**Patent Law**

The last few terms have seen the justices take up a number of patent law cases, and the 2017 term looks to further this trend. Oil States Energy Services, LLC v. Greene’s Energy Group, LLC (Docket No. 16-0712) gives the Court the opportunity to develop its patent law jurisprudence by asking whether inter partes review (IPR), an extremely popular adversarial process used by the U.S. Patent and Trademark Office to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury. During an IPR, a third party, not the U.S. Patent and Trademark Office or the original owner of a patent, can challenge an existing patent under certain circumstances. If the review concludes that a patent is not valid, the patent, or the property of the inventor, is revoked, without any court proceedings. The argument that this practice is unconstitutional goes back, in part, to a Supreme Court decision from 1898, McCormick Harvesting Machine Company v. Aultman & Co., which held that once a patent is granted it “is not subject to be revoked or canceled by the president, or any other officer of the Government” because “[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property.” The right to property is then protected by the Fifth Amendment to the U.S. Constitution.

Although this seems like a fairly technical issue, a decision holding that IPR trials are unconstitutional could put our current patent system in chaos. Since its creation in 2012, the IPR system has processed over 7,000 invalidity petitions; if the Court finds the system unconstitutional, all such future challenges will need to be brought in district court, a more costly and time-intensive proposition. In addition, such a ruling could spark retroactive battles over patents the IPR previously deemed invalid.

**Tax Law**

In another business-oriented case, Marinello v. U.S. (Docket No. 16-1144), the Court could be poised to create major shake-ups in the IRS and tax law schemes. Marinello asks the Court to review the constitutionality of the federal statute that makes it a felony to obstruct or impede the due administration of the tax law. According to the petitioner, who was charged with failing to file tax returns for his business and himself, the relevant statute applies only if he acted with knowledge of the IRS’s pending investigation. The petitioner admits to sloppy bookkeeping and destroying records, but claims that such acts are not enough to rise to the level of federal prosecution. In the petitioner’s view, the lower court’s interruption of the statute criminalizes substantially more conduct than Congress intended.

**Immigration**

Of course, the most high-profile case going into the term is the one that has had the quickest lower court development: Trump v. International Refugee Assistance Project and Trump v. Hawaii. Of course, the most high-profile case going into the term is the one that has had the quickest lower court development: Trump v. International Refugee Assistance Project and Trump v. Hawaii. These cases involve challenges to President Trump’s Executive Order No. 13780, which altered practices concerning the entry of foreign nationals into the United States by, among other things, suspending entry of nationals from six countries for 90 days. Respondents challenged the order and obtained preliminary injunctions barring enforcement of several provisions. In late June, the Supreme Court lifted portions of the preliminary injunctions and agreed to hear the challenges and set argument for October. In September, the Court removed the case from the argument calendar following President Trump’s issuance of a proclamation pursuant to Executive Order No. 13780. The proclamation detailed revised travel restrictions, and the Court directed the parties to re-evaluate their arguments in light of the new restrictions, and submit new briefs in the case by October 5. The case could be rescheduled pending further review of the Court. If the case proceeds, it would put the normally bland issue of legal standing alongside the contentious topics of presidential powers and immigration law before the Court under the heat of the media spotlight.
The two other immigration cases to be argued in October, Sessions v. Dimaya (Docket No. 15-1498) and Jennings v. Rodriguez (Docket No. 15-1204), have had significantly longer life-cycles before the Court: both were fully briefed and argued during the 2016 Term. The justices, however, held their decisions in both and have asked the parties for reargument during the 2017 Term (many believe this action is due in part to the Court’s desire to avoid 4-4 splits in the area of immigration law). Dimaya asks the Court to determine whether 18 U.S.C. § 16(b) of the Immigration and Nationality Act governing deportations is constitutionally vague. Section 16(b) allows certain state crimes, in this case burglary, to qualify as “crimes of violence,” making defendants eligible for removal from the United States. The Dimaya petitioners argue § 16(b) should be overturned as being unconstitutionally vague (a claim usually referred to as “void-for-vagueness”). As it currently stands, § 16(b) gives immigration officials a great deal of latitude to begin deportation proceedings against immigrants lawfully in the country who have subsequently been convicted of a wide-range of state crimes. Jennings deals with the appropriate safeguards and procedures that should be in place for aliens detained at the border. In many of these cases, these immigrants are held for long periods of time without any due-process hearings. The level of safeguards the Court determines to be constitutionally mandated will be of particular importance if the Court upholds President Trump’s travel ban. Together, all three of these cases have the potential to either increase the federal government’s power over immigration matters, or in the alternative, to safeguard vital rights and protections for immigrants both in the country and trying to enter the country.

When Justice Neil Gorsuch took his seat on the bench in early April 2017, he was only present for one oral argument session, and as a more traditionally conservative justice, his vote did little to fundamentally shake up long-standing voting alliances. However, even in his limited time on the bench during the 2017 term, Justice Gorsuch’s presence was certainly felt. Even before arriving at the Court, Justice Gorsuch changed the pace at which the Court scheduled and heard cases; a number of cases that had floated on the Court’s docket for months without being scheduled were quickly assigned March and April argument dates. And the new justice’s presence did more than increase the pace with which the Court disposed of cases. Justice Gorsuch seemed to enliven the written opinions coming from the bench, particularly from its conservative wing. By writing separate opinions (either in concurrence or dissent) in a number of cases, Justice Gorsuch quickly carved out his place as a strong conservative jurist with a witty, sharp writing sense. His concurrence in Trinity Lutheran v. Comer seems to exemplify his vibrant writing style while also demonstrating his concern about the Court tipping the balance of powers:

[T]he Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. ... Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and commissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him).

Of course, the new term opens up a great deal of potential for Justice Gorsuch to expand his leadership role; it remains to be seen whether he will spend the term waiting in the wings or expand on the early indications that show him as being a strong and vibrant voice on the Court.

As the new term gets underway, it is sure to garner much attention from court-watchers, the media, and President Trump. However, like many Supreme Court terms, the less discussed cases may end up being as important to our everyday lives.

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The U.S. Constitution sets out a system of government with distinct and independent branches—Congress, the Presidency, and a Supreme Court. It also defines legislative, executive, and judicial powers and outlines how they interact. These three separate branches share power, and each branch serves as a check on the power of the others. They provide a framework for freedom. Yet, this framework is not self-executing. We the people must continually act to ensure that our constitutional democracy endures, preserving our liberties and advancing our rights. The Law Day 2018 theme enables us to reflect on the separation of powers as fundamental to our constitutional purpose and to consider how our governmental system is working for ourselves and our posterity.

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Independent Prosecutors, the Trump-Russia Connection, and the Separation of Powers

In this latest “Lessons on the Law” article in Social Education, law professor Steven Schwinn discusses protocols in place, historically and today, for conducting investigations of the President of the United States.
Separation of Powers:  
Weigh the Evidence

In this activity, students will identify and draw conclusions about the relationship between the legislative, executive and judicial branches by critically analyzing primary sources.

Separation of Powers in Action:  
U.S. v. Alvarez

Under our system of checks and balances, there is an interplay of power among the three branches. Each branch has its own authority, but also must depend on the authority of the other branches for the government to function. *U.S. v. Alvarez* is an excellent example of how the three branches each exercise their authority.

Pictograph

We the People:  
Constitutional Accountability and Outsourcing Government

The outsourcing of federal functions to private contractors raises the most fundamental of constitutional questions: What institutions and actors comprise the “federal government” itself? The American populace seems vaguely aware that, when it comes to ensuring accountability for errors and abuses of power, contractors occupy a special space. The fact is that structural and procedural means for holding traditional government actors accountable do not apply to private contractors.

Stuck: A History of Gridlock

In this podcast from Backstory, the “History Guys,” Peter, Ed, and Brian, explore moments in U.S. history when the system of checks and balances devolved into open warfare between political factions and branches of government.

iCivics

Separation of Powers:  
What’s for Lunch?

Through the process of creating a healthy school lunch menu, students role-play each branch’s responsibility in the law-making process. They then compare the simulation activity to a real-life example of a bill that became law.

Exploring Constitutional Conflicts:  
Separation of Powers

When do the actions of one branch of the federal government unconstitutionally intrude upon the powers of another branch? Case examples, primary sources, and analysis fill this page from the “Famous Trials” creator, Doug Linder, at the University of Missouri—Kansas City School of Law.

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Coming in the next issues

**Law and Psychology**

*Insights* will explore historical efforts to incorporate psychology into legal procedures and criminal codes, and contemporary ways that technology might be reshaping how we might consider certain legal concepts and what we believe about the rule of law.

**Environmental Law Around the World**

As debates about climate change and appropriate policy to manage it dominate media headlines, *Insights* takes a look at some of the legal efforts to protect the environment around the world, from international treaties to local policies in the United States.