Does the U.S. Constitution outline a national government with three parts?

Background Information

The U.S. Constitution outlines the structure of the American national government, dividing it into three main branches with particular powers or responsibilities. The Framers of the Constitution established a system of government based on separation of powers to foster political freedom so that no single branch has total control. In Federalist #48, James Madison wrote about the separation of powers in relation to the new nation's government:

The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny.

In the United States, while each branch has its own responsibilities, the branches must work together for the government to function well.

The U.S. Constitution assigns different roles to each of these branches, but the branches do not exist in isolation from one another. The Framers instituted a system of checks and balances allowing each branch to use its delegated powers to monitor the actions of the other two with the intention that each branch holds the other branches accountable under the law. This system was designed to prevent one branch from becoming tyrannical or retaining excessive power over the other branches or the people of the United States.

A discussion on this topic might look at historical writings about divided government or checks and balances, or take a comparative look at other governments around the world. Are there other ways that power could be divided among the branches of the federal government? What are the advantages and disadvantages to dividing power in a different way? When observed through the lens of the 21st Century, does it appear that we still have three main branches of government, or are there other sources of power that play ongoing roles in how our government functions?

Supporting Questions and Discussion Topics

Please review these questions before beginning the conversation, and use the one(s) you think will lead to the most interesting conversation with your group.

1. What can happen if power is too centralized with one person or one branch? What can happen if power is extended over too many branches/individuals?
2. How does the system of checks and balances shape our federal government?
3. Are there other ways that governmental power might be divided to defend liberty, help governments run more efficiently, or meet other goals?
4. If the Constitution outlines a national government of three branches, is this how you see government working today? What other sources of power play influential roles in our democracy? For example, what is the role of the media, advocacy groups, and voters?
5. Does the structure of our national government create a framework for freedom?

Suggested Resources and Examples

- Three Branches of Government, History Channel. These three short videos provide a brief overview on the role of each branch of government
- Free Press in a Democracy, Facing History and Ourselves short audio
- Constitution Hall Pass: Separation of Powers, National Constitution Center. In this episode of Constitution Hall Pass explores, the system of separation of powers is explored through the lens of the American system of government.
- The Fourth Branch of Government, CSPAN Video, Jack Trammell, co-author of The Fourth Branch of Government: We the People, talks about the public's participation in government.
- Constitution Check: Is the government too big for checks and balances? National Constitution Center
- Political Cartoon
- Compare constitutions from around the world
Are the three branches of the national government equal in their powers?

Background Information

Conversations about American government often focus on the president—who it is, his or her characteristics and personality. Despite what the Constitution might outline as three branches of government, for many, the president symbolizes America and American policy. However, at the time of ratification, James Madison wrote in Federalist No. 48: The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The Executive Branch is the largest of the three branches. The practical implications of an explosion of technology, communications, and population size since the 18th century are some of the reasons that explain the executive branch’s current size. The executive branch oversees a federal bureaucracy, including cabinet offices, as well as a mammoth web of federal agencies, commissions, and contractors, often referred to as the “administrative state.”

In addition to the sheer size of the Executive Branch, the President wields significant power, with some of it outlined in the U.S. Constitution, and some of it dictated by historical norms. The Constitution outlines presidential powers to veto Congressional legislation, issue pardons, appoint federal officials, command the military, and oversee foreign relations, to cite a few examples. But much of the rest of the job of the president has been shaped by changing circumstances from George Washington to Abraham Lincoln to Franklin Roosevelt to today. Many presidential actions evolve into customs that are then followed by future presidents. The ability to issue executive orders, right to keep certain information confidential under “executive privilege,” and the authority to act in times of national emergency are areas where the Constitution is generally silent, and presidents have only traditions and norms to inform their actions.

Of course, there are checks on executive power within the American governmental system of checks and balances. Congress can override a presidential veto, circumvent an executive order with legislation, confirm or deny federal appointments, and launch investigations into executive matters, including initiating impeachment proceedings. Congress also manages the federal budget. The judicial branch exercises judicial review over executive actions, in some cases, striking them down.

A discussion on this topic will likely focus on whether or not the executive branch has grown too large to be effectively managed, or overpowers the other two branches of government. The tension between the need to have a government that can respond quickly and effectively to its citizens needs and an executive branch that is not too powerful to be checked can be explored. How could the other branches be reshaped to more equally distribute powers? Are reforms to redistribute power necessary?

Supporting Questions and Discussion Topics

Please review these questions before beginning the conversation, and use the one(s) you think will lead to the most interesting conversation with your group.

1. Is the executive branch too large? Does its size give it too much power?
2. What is the relationship between the executive branch and the other two branches of government? Does the Constitution effectively limit the power of each branch?
3. What non-Constitutional checks exist to limit the powers of the each branch? What roles do voters and the media play in checking executive power? Are voters and journalists strong enough to be effective?
4. How does the current allocation of powers between the various branches create a framework for freedom?

Suggested Resources and Examples

- Org chart of U.S. Government
- Cartoon of the tree-executive branch
- Case Study of Youngstown Sheet and Tube Co. v. Sawyer
- Chart showing growth of administrative state over time
What role does the administrative state play in American government, especially in relation to the legislative, executive, and judicial branches?

Background Information

The term “administrative state” may not be a household phrase, but most Americans encounter it on a regular basis. The “administrative state” is an informal term used to describe the network of federal agencies that manage federal programs and oversee implementation of federal policies and regulations.

These entities and their employees fall under the Executive Branch, overseen by one of the Cabinet departments. Currently, there are 15 Cabinet departments, such as the U.S. Department of Justice, U.S. Department of Labor, and U.S. Department of State. Each department is directed by a secretary, who is nominated by the President and confirmed by the U.S. Senate. Each of these departments direct numerous entities with names that include words such as “administration,” “agency,” “commission,” “board,” and even “corporation.”

The administrative state has grown large enough that some people call it “the fourth branch.” The size of the administrative state is due in large part to the fact that each agency and department deals with an increasingly specialized area of policy concern—for example, environment, communications, and consumer protections. Each agency employs trained experts in these areas and each agency is relatively self-contained. In fact, almost every entity that might be considered part of the administrative state has elements resembling all three branches of government—they issue rules on specific topics, which function much like legislation enacted by Congress; have protocols in place to enforce their rules, much like the Executive branch does with laws; and have adjudication bodies to quickly resolve disputes, which resemble courtrooms, complete with a judge.

A discussion on this topic may focus on what aspects of the government might be considered part of the “administrative state,” the size of the administrative state, and what practical challenges and issues arise with managing something of its size. Debate may arise over the functions of the administrative state, including how its rulemaking and adjudication work as well as whether these functions should more properly fall to the legislative and judicial branches. Whether the system is effective or efficient might also be considered.

Supporting Questions and Discussion Topics

Please review these questions before beginning the conversation, and use the one(s) you think will lead to the most interesting conversation with your group.

1. Is the administrative state too large to be included under the umbrella of the Executive Branch? Is it, indeed, a “Fourth Branch?”
2. Do the workings of the administrative state blur the traditional separation of powers model of government? Do you think this is a problem? Why?
3. Does an administrative state help the government run more smoothly and efficiently by allowing experts (compared to Congress) to make rules, and allowing administrative law judges (compared to federal courts) to resolve disputes?
4. How does the administrative state help or hinder the government’s structure as a framework for freedom?

Suggested Resources and Examples

- [Org chart of U.S. Government](#)
- [Cartoon of the tree-executive branch](#)
- [U.S. Supreme Court Case Summary Chevron USA, Inc. v. Natural Resources Defense Council, Inc.](#)
- [Chart showing growth of administrative state over time](#)
- “[The Immunity Doctrine],” by Julia Harte, Harper’s Magazine, June 2017
- “[De-separation of Powers],” by Cole Taratoot, Insights on Law & Society, Fall 2017
- [The Case for Big Government, National Constitution Center Town Hall Live Stream (March 21, 2018)](#) Jon Michaels, law professor and author of Constitutional Coup: Privatization’s Threat to the American Republic, presents a case for the federal administrative state that will engage its defenders and critics alike.
Can Courts Enforce Their Rulings?

Background Information

Most of us can cite a few famous Supreme Court rulings (Brown v. Board of Ed – holding that racial segregation in schools causes inequality in education; Miranda v. Arizona – requiring police to inform suspects in custody of their basic constitutional rights; or Obergefell v. Hodges – holding that laws preventing same-sex marriage were unconstitutional, just to name a few). However, after these landmark cases are no longer in the public discourse, what happens next? How are these rulings enforced? In our governmental system, courts may only rule on the cases before them, and after issuing their rulings, the work of the courts is essentially over. It falls to the legislative and executive branches to enforce court orders, or in turn, to rewrite the laws to pass constitutional muster. Although courts have powers to issue injunctions or contempt citations in order to attempt to force compliance with their orders, these powers are certainly not as forceful as the other branches.

A discussion on this topic will likely focus on the limits on the power of the courts. Although courts have sweeping authority to rule on laws and actions of government officials, courts do have limited power to carry out their own rulings. Litigants (individual citizens or government officials) must bring issues before the courts. Finally, in the federal court system, judges and justices are nominated by the president, with the advice and consent of the Senate; without the approval of the other branches, judges would not have their jobs. Justices and judges then hold appointments for life, unless they are impeached. The legislative branch also has the power to manage impeachment proceedings, with the House of Representatives holding a trial, and the Senate voting to convict. A conversation on the enforcement of court rulings will likely involve a look at the tension between the independence of our courts, but their reliance on the two other branches.

Supporting Questions and Discussion Topics

Please review these questions before beginning the conversation, and use the one(s) you think will lead to the most interesting conversation with your group.

1. Who controls the court’s budgets? How does this relate to the notion of the “power of the purse”? What would happen if the legislature cut funding to the courts?
2. If the court issues a ruling the executive or legislature disagree with, what actions can either branch take in response?
3. How do the nomination and confirmation processes affect the power of the court? What about the impeachment process? Does it limit or restrict the court in anyway?
4. Do judges have more power due to life-tenure during “good behavior”? What might happen if Congress impeached and removed a Supreme Court Justice who overturns laws it enacted?
5. How do the limits on the courts’ enforcement powers protect our framework for freedom?

Suggested Resources and Examples

- Cartoon of the tree-executive branch
- Video Backgrounder
- Debates Over Court Funding
  - Commentary for Director of Administrative Offices of the US Courts on funding and appropriations (2016)
  - Op-Ed on court funding crisis (2012)
- Marbury v. Madison – Landmark Supreme Court case creating the notion of judicial review.
  - Case summary
  - Quimbee online video recap
Do Political Parties Support or Undermine the Separation of Powers and Checks and Balances?

Background Information
The Constitution does not mention political parties and the Founders viewed parties with some trepidation and concern. In 1796, George Washington noted:

“However [political parties] may now and then answer popular ends, they are likely in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.”

Nevertheless, the Founders, themselves, quickly fell into two opposing political groups, the Federalists and Democratic-Republicans, following ratification. Since the Civil War, two major parties have dominated American politics, Democrats and Republicans, with the occasional third party attempting to gain footing. During this time, the legislative and executive branches have sometimes been controlled by the same party, and sometimes they have been controlled by opposing parties, leading to what some people call “divided government.” Commentators debate whether government is more effective when branches are controlled by the same parties. As constitutional law scholar and former U.S. Solicitor General Walter Dellinger noted in 2004: “The ideological purification of our parties—a relatively new and unfortunate development—may have created an identity of partisan interest so strong that separate branches, when controlled by the same party, provide no check at all.”

A discussion on this topic may look at the degree to which political parties provide a “check” on each other and whether this could replace, or supplement, structural checks and balances. Is the judicial branch involved in the political party dichotomy? Individual judges certainly have their own judicial philosophies when they come to the bench, but they are not active party members in the same way as the president or members of Congress.

Supporting Questions and Discussion Topics
Please review these questions before beginning the conversation, and use the one(s) you think will lead to the most interesting conversation with your group.

1. What checks exist to prevent political parties from obtaining so much power that, in the words of George Washington, they “subvert the power of the people?”
2. Most parliamentary governments feature more than two parties. Do you see any advantage to multiple parties within the U.S. governmental structure? Any disadvantages?
3. What would happen to the American governmental system if political parties did not exist?
4. What happens if the legislative and executive branches are controlled by the same party? Does the separation of powers outlined in the U.S. Constitution provide the necessary check on a single branch obtaining too much power? What about a single party obtaining too much power?
5. Do political parties support a framework for freedom?

Suggested Resources and Examples
- Video Clip “We the Voters – American Party Animals”
- Listings of registered political parties in various countries
  - Australia
  - Canada
  - United Kingdom
- Federal No. 10
- Political cartoon (would have to pay small fee for rights)
Could the Chief Justice Serve Simultaneously as Secretary of State?

Background Information

Surprisingly, the short answer to this question is “yes,” at least if the answer includes examples in our nation’s past. Both our nation’s first Chief Justice, John Jay, and our longest serving Chief Justice, John Marshall, served concurrently as Chief Justice while remaining, at least for a few months, as Secretary of State during the early years of government under the Constitution.

It seems hard to believe that an official could serve in both the executive and judicial branches at the same time without violating the separation of powers. However, there is simply no specific prohibition in the Constitution on an otherwise qualified citizen serving in the executive department and the federal judiciary, such as simultaneously as Secretary of State and Chief Justice of the United States. Nevertheless, Article I, Section 6, Clause 2 of the Constitution, commonly called the Incompatibility or Ineligibility Clause, prohibits members of Congress from holding any other federal “civil office,” whether executive or judicial:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Commenting on this clause in Federalist No. 76, Alexander Hamilton noted that “The Constitution has provided some important guards against the danger of executive influence upon the legislative body.” The Incompatibility Clause was meant to combat possible corruption of legislators who might personally benefit from officeholding, for example, from what we might call “double dipping.” Moreover, by precluding legislators from also serving as executive officials, the Founders were ensuring that American “presidential” government would be differentiated from the British parliamentary model (where the prime minister and other cabinet officers are members of Parliament).

However, no similar constitutional clauses separate personnel who might serve at the same time in executive and judicial capacities. President Washington nominated John Jay, while in his fifth year as sitting Chief Justice, to be a special envoy to negotiate a treaty with Great Britain. Although confirmed by the Senate, his service was controversial. Then-New York Senator Aaron Burr called his executive nomination while on the bench “mischievous and impolitic” and even “contrary to the spirit of the Constitution.”

A discussion on this topic may include imagining how someone would serve simultaneously as a federal judge and as a cabinet officer or other executive official. Could the President also be Chief Justice? Why not? Would it be unconstitutional?

Supporting Questions and Discussion Topics

Please review these questions before beginning the conversation, and use the one(s) you think will lead to the most interesting conversation with your group.

1. Could you imagine someone serving today simultaneously as a federal judge and executive official? Why or why not? Is such an arrangement realistic? Why or why not?
2. Would you agree that serving simultaneously in federal executive and judicial roles is “contrary to the spirit of the Constitution”? Does that make it “unconstitutional”?
3. Why did the Framers originally prohibit dual office holding by members of Congress and the other two branches, but not that between the executive and judicial? Does this suggest a difference between government then compared to today?
4. Could a federal officeholder also serve as a state official—such as a federal judge being a governor? (The U.S. Constitution does not specifically prohibit this form of dual officeholding, but such practices are largely prohibited under state constitutional laws.)
5. Is separating personnel from federal dual office holding (whether legislative-executive, legislative-judicial or executive-judicial) essential to the principle of separation of powers? Essential to creating a framework of freedom?

Suggested Resources and Examples

- “When the chief justice serves as secretary of state: Saikrishna Prakash on separation of personnel in the U.S. Constitution” by Andrew Hamm
- Incompatibility Clause by Joan Larson, Heritage Foundation
- Federalist No. 76 by Alexander Hamilton on the Incompatibility Clause
- Luther Martin in The Founders’ Constitution (from The Complete Anti-Federalist, ed. Herbert J. Storing)