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Separation of Powers: An Overview

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Summary

Congress's role and operation in national politics is fundamentally shaped by the design and structure of the governing institution in the Constitution. One of the key principles of the Constitution is separation of powers. The doctrine is rooted in a political philosophy that aims to keep power from consolidating in any single person or entity, and a key goal of the framers of the Constitution was to establish a governing system that diffused and divided power. These objectives were achieved institutionally through the design of the Constitution. The legislative, executive, and judicial branches of the government were assigned distinct and limited roles under the Constitution, and required to be comprised of different political actors. The constitutional structure does not, however, insulate the branches from each other. While the design of the Constitution aims, through separation, to prevent the centralization of power, it also seeks the same objective through diffusion. Thus, most powers granted under the Constitution are not unilateral for any one branch; instead they overlap.

The constitutional structure of separation of powers invites conflict between the branches, particularly between Congress and the President. The electoral structure of the federal government provides not only separate bases of authority, but also *different* bases of authority for political actors, as well as different time horizons. Likewise, the assignment of powers under the Constitution is not only overlapping, but also somewhat vague, creating inter-branch contests for power across many key functions of the government. Finally, numerous questions of authority are not even addressed by the Constitution.

Although each branch has strong incentives to protect its prerogatives, in many cases individual political actors have incentives that run counter to their institutional affiliation. In particular, political actors will often, quite reasonably, place the short-term achievement of substantive policy goals ahead of the long-term preservation of institutional power for their branch of government. Likewise, partisan or ideological affiliations will at times place political actors at cross purposes, where they will be forced to choose between those affiliations and their branch affiliation. Such anti-branch incentives are important contours to consider for political actors seeking to increase the power of their own branch.

The problem of institutional power coming into conflict with other goals is particularly acute for Congress, especially in relation to the executive branch. As individual members of a large body, Representatives and Senators may not believe they have the responsibility or the capacity to defend the institution. Those who may feel such responsibility, such as party and chamber leaders, will often find themselves in situations in which policy or party goals, either their own personal ones or those of their caucus, come into direct conflict with institutional goals. Even when Congress does choose to institutionally defend itself, it often finds itself speaking with less than a unified voice, as only the most vital institutional powers have the ability to unify Congress.

This report provides an overview of separation of powers. It first reviews the philosophical and political origins of the doctrine. Then it surveys the structure of separation of power in the Constitution. It next discusses the consequences of the system, for both the institutions and for individual political actors. Finally, there is a discussion of separation of powers in the context of contemporary politics.

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Introduction

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These objectives were achieved institutionally through the constitutional separation of powers. The legislative, executive, and judicial branches of the government were assigned distinct and limited roles under the Constitution, and required to be comprised of different political actors. The elected branches have separate, independent bases of authority, and specific safeguards prevent any of the branches from gaining undue influence over another.

The constitutional structure does not, however, insulate the branches from each other. While the design of the Constitution aims to prevent the centralization of power through separation, it also seeks the same objective through diffusion. Thus, most powers granted under the Constitution are not unilateral for any one branch; instead they overlap. The President has the power to veto legislation; the Senate must approve executive and judicial nominations made by the President; the judiciary has the power to review actions of Congress or the President; and Congress may, by supermajority, remove judges or the President from power.

This report provides an overview of separation of powers. It first reviews the philosophical and political origins of the doctrine. Then it surveys the structure of separation of power in the Constitution. It next discusses the consequences of the system, for both the institutions and for individual political actors. Finally, there is a discussion of separation of powers in the context of contemporary politics.

The American System in Global Context

The American system of separation of powers is not the most common arrangement of democratic institutions in the modern world. Most modern democracies are parliamentary systems, in which the legislative branch is sovereign, and the executive has no independent constitutional base of authority, instead being chosen by the legislature.[2] Indeed, even when the United States has participated in the construction of democratic governments in the 20th and 21st centuries—in Germany and Japan after World War II; in Iraq in the first decade of the 21st century—the chosen structure has been parliamentary, not an American system of separated powers.

[1] James Madison, "The Federalist No. 47," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter, ed.) (New York: Penguin, 1961), p. 301.

[2] Arthur, Gunlicks, *Comparing Liberal Democracies* (Bloomington, IN: iUniverse, 2011), p. 26. For further discussion of parliamentary systems in comparison with separation of powers systems, see Arend Lijphart, *Parliamentary Versus Presidential Government* (London: Oxford University Press, 1992); Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (New York: Cambridge University Press, 1992); Terry M. Moe and Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems," *Journal of Institutional and Theoretical Economics*, vol. 57, no. 2 (1994); Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review*, vol. 113, no. 3 (2000).

This is perhaps, in part, because experience has suggested mass democracy and legislative supremacy—two (at the time) untested concepts that concerned the framers of the U.S. Constitution in the 18th century—to be satisfactory arrangements for stable democratic governing. There is also a widely held contemporary belief that modern democracy is inherently based on political parties and that parliamentary systems produce stronger parties.[3] Neither of those prospects would have sat well with the framers of the American Constitution, who were skeptical of political parties.

Finally, parliamentary systems are often encouraged for fledgling democracies because they tend to produce unified governments that can relatively easily legislate and implement policy without difficulty, allowing for smoother government functioning during the dangerous and unstable early stages of a new national governing system.[4] At their core, parliamentary systems are based on contested elections followed by unified party control of the powers of government. This is quite emphatically not the case with the American system. Our constitutional system is based on contested elections followed by separated control of the powers of governing. The system, by design, produces conflict.

Conflict by Design

The constitutional structure of separation of powers invites conflict between the branches, particularly between Congress and the President.[5] The electoral structure of the federal government provides not only separate bases of authority, but also *different* bases of authority for political actors, as well as different time horizons. Likewise, the assignment of powers under the Constitution is not only overlapping, but also somewhat vague, creating inter-branch contests for power across many key functions of the government. Finally, numerous questions of authority are not even addressed by the Constitution.

Although each branch has strong incentives to protect its prerogatives, in many cases individual political actors have incentives that run counter to their institutional affiliation. In particular, political actors will often, quite reasonably, place the short-term achievement of substantive policy goals ahead of the long-term preservation of institutional power for their branch of government. Likewise, partisan or ideological affiliations will place political actors at cross purposes, where they will be forced to choose between those affiliations and their branch affiliation. Such anti-branch incentives are important contours to consider for political actors seeking to increase the power of their own branch.

Separation of Powers: Origins

In order to fully illuminate the contemporary implications of our separation of powers system, it is helpful to understand its origins. The structure of the Constitution reflects the collective preferences of the state delegates who drafted it in 1787. These preferences were chiefly shaped by two things: the political philosophy of the colonial Americans, and their actual political

[3] E.E. Schattschnieder, *Party Government* (New York: Farrar and Rinehart, 1942), p. 1; John Gerring, Strom C. Thacker, and Carola Moreno, "Are Parliamentary Systems Better?" Comparative Political Studies, vol. 42, no. 3 (March 2009), p. 330; Matthew Soberg Shugart, "The Inverse Relationship Between Party Strength and Executive Strength: A Theory of Politicians' Constitutional Choices," *British Journal of Political Science*, vol. 28, no. 1 (1998).

[4] Gerring, Thacker, and Moreno, "Are Parliamentary Systems Better?" p. 334; Juan Jose Linz, "The Perils of Presidentialism," *Journal of Democracy*, vol. 1., no. 1 (1990).

[5] Linz, "Perils of Presidentialism," p. 258.

experiences as English colonists. The fingerprints of both can be found throughout the legislative debate at the constitutional convention, the arguments for and against the Constitution during the ratification debate in the states, and, of course, in the text of the Constitution itself. Undoubtedly, the colonists' philosophy also shaped how they understood their colonial interactions with London, and vice versa, making it difficult if not impossible to untangle the degree to which either had primacy in shaping the Constitution. What is clear, however, is that by 1787, the philosophy and the experiences of the framers had created something of a consensus among them about how an optimal government should be structured.[6]

Philosophical Roots

The political theory underlying the constitutional separation of powers goes back thousands of years, and traces its development through many eminent philosophers, among them Aristotle, Aquinas, Machiavelli, Locke, and Montesquieu. Virtually all of these philosophers were living under non-democratic systems of government, or systems of very limited democracy that did not feature separation of powers. Therefore, much of their writing is either normative—what should such a system look like?—or applied to non-democratic governing structures. As a result, much of the development of the philosophy ignored the practical problems of establishing a separation of powers democracy, and by the time of the American Revolution, left the framers long on theory but short on practical advice.

Functions of Government

The conceptual roots of separation of powers are usually attributed to ancient Greek and Roman writers. Aristotle is typically credited with articulating the first conception of government as divided into three basic functions or "powers," which he labeled "deliberative," "magisterial," and "judicial," and which roughly correspond to the contemporary notions of legislative, executive, and judicial roles of government.[7] The ancient philosophers, however, did not conceptualize the possibility of (or benefit of) separating these functions among different officials or institutions. In both Athens and Rome, the various functions were often taken on by single entities.[8]

Later philosophers tied this concept of functions to the idea of a "mixed government," in which the interests of society would be balanced through the use of multiple forms of government.[9] This formed the basis of pre-modern English government for centuries: a hereditary monarchy, limited in its authority by a legislature consisting of elements of aristocracy (House of Lords) and democracy (House of Commons). While the "mixed government" system did not separate functions by institution, it did promote the idea that liberty for all could be enhanced by blocking any individual or entity from dominating government. Since these classes of society were rigid,

[6] This is not to say that a similar public consensus existed. Indeed, as the ratification process proceeded in 1787 and 1788, organized opposition to the new Constitution arose in most states.

[7] Aristotle, Benjamin Jowett, and H. W. Carless Davis (translators), *Aristotle's Politics* (Oxford: Clarendon Press, 1920), pp. 84-87; Thomas L. Pangle, *Aristotle's Teaching in the "Politics"* (Chicago: The University of Chicago Press, 2013), pp. 195-197.

[8] Robert Niven Gilchrist, *Principles of Political Science* (New York: Longmans, Green, and Co., 1921), p. 289.

[9] These philosophers include Polybius in *The Histories*, Cicero in *The Republic*, Aquinas in *Summa Theologica*, and Machiavelli in *Discourses*. Polybius,W. R. Paton, F. W.Walbank, and Christian Habicht, *The Histories, Volume I-VI* (Cambridge: Harvard University Press , 2011); Thomas Aquinas, *The Summa Theologica* (Westminster, MD: Christian Classics, 1981); Marcus Tullius Cicero, J.G.F. Powell, and J.A. North, *Cicero's Republic* (London: Institute of Classical Studies, 2001); Nicollo Machiavelli, Ninian Hill Thomspon, *Discourses* (New York: BN Publishing, 2005).

their interest were perpetual and often in conflict. By combining them in the various forms into the government, none would gain the power necessary to dominate the others.

Enlightenment Thought

The modern conception of separation of powers developed largely among 17th and 18th century Enlightenment thinkers. Although many writers were active in this area, John Locke and Montesquieu are usually given credit for articulating the philosophy. In the *Second Treatise on Government*, Locke argues that a division between the legislative and executive powers is fundamentally necessary to secure the liberty of the people. If the two functions are fused into a single person or entity, the likely result is tyranny. Locke also explains the concept of a "mixed government," in which multiple forms of governing—monarchy, oligarchy, democracy—are simultaneously used.[10]

The fully formed conception of separation of powers as understood by the framers of the Constitution is credited to Montesquieu. In *The Spirit of Laws*, Montesquieu identifies three powers of the government: legislative, executive, and judiciary. He then argues for their placement in the hands of different people or entities:

> When the legislative and executive power are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the 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 then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of every thing, were the same man, or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[11]

Montesquieu also provides the basis for the concept of checks and balances, writing that the executive power and legislative power should be "restrained" by each other.[12] For Montesquieu, the critical executive restraint on the legislature is the veto; the "power of rejecting" legislation. The critical restraint of the legislature is the annual power of the purse, for if "the executive power [were] to determine the raising of public money … liberty would be at an end."[13]

At the heart of the theory is a simple proposition about human nature: as noted by James Madison, men are not angels, and left unrestrained they will tend to abuse power.[14] To leave one man as both lawmaker and judge, for Locke, was to invite tyranny. Drawing on the Aristotelian description of the various "functions" of government, Montesquieu envisioned a government structure that would preclude the tyrannical combinations, by isolating what he saw as the three prime functions: making laws, executing laws, and trying alleged lawbreakers.[15]

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[10] John Locke and Peter Laslett, *Two Treatises of Government* (New York: Mentor Books, 1965).

[11] Charles de Secondat, Baron de Montesquieu, and Thomas Nugent, *Sprit of Laws* (New York: The Colonial Press, 1899), p. 151.

[12] Ibid., p. 160.

[13] Ibid., p. 160.

[14] James Madison, "The Federalist No. 51," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter, ed.) (New York: Penguin, 1961), p. 322.

[15] *Spirit of Laws*, pp. 151-159.

Colonial Experiences

It is unclear to what degree these philosophies influenced colonial thinking in the late 18th century. What is not unclear is how the structure of colonial governance provided ample reason for the colonists to become wary of the consolidation of power. Experience with the consolidated power of King George III had led them to believe that "the accumulation of legislative, executive, and judicial powers in the same hands … [was] the very definition of tyranny."[16] Experience with the royal governors of the colonies led them to distrust institutions that had mixed government functions. And experience with legislative democracy in the fledgling states during the 1780's had reinforced their concerns about the potential for "elective despotism."[17]

Colonial Government

The majority of the colonies in North America were run by "mixed governments," much like the central British government.[18] Eligible colonists were allowed to elect representatives to the lower chamber of an assembly, but the governor was appointed by the crown, and in addition to the executive duties, had significant influence across the other functions of government. The royal governor typically had absolute veto over colonial statutes, appointment authority for the upper chamber of the legislature (called the "governor's council"), and the power to dissolve the assembly.[19] The governor's council also typically served as the highest court in the colony. The assembly did have some checks on the governor—most notably control over his salary and authority over taxation.[20]

This arrangement served the colonists fairly well during most of the 18th century. The indifference of parliament and the crown toward the administration of government in the colonies resulted in a political culture that was much more democratic in character than the culture in England proper.[21] Having developed a norm of self-government during the first half of the 18th century, the tighter control over colonial government exhibited by parliament and the crown after the conclusion of the French and Indian War caused significant tension between the colonists and British government.[22] When the colonists sought to address these problems, they found that the institutions of the colonial governments were not well-suited to successfully challenging the crown once the crown was intent on an active approach to colonial administration.[23]

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[16] James Madison, "The Federalist No. 47," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter, ed.) (New York: Penguin, 1961), p. 301.

[17] Ibid., p. 311.

[18] Richard C. Simmons, *The American Colonies: From Settlement to Independence* (London: Longman, 1976), pp. 245-258. See also Alison G. Olson, "Eighteenth Century Colonial Legislatures and Their Constituents," The Journal of American History, vol. 79, no. 2 (September 1992); Jack P. Greene, "The Role of the Lower Houses of Assembly in Eighteenth Century Politics," Journal of Southern History, vol. 27, no. 4 (November 1961).

[19] John A. Fairlie, "The Veto Power of the State Governor," The American Political Science Review, vol. 11, no. 3 (August 1917), pp. 473-474.

[20] Simmons, *The American Colonies*, p. 256.

[21] Bernard, Bailyn, *The Origins of American Politics* (New York: Vintage, 1968); Wesley Frank Craven, The Colonies in Transition, 1660-1713 (New York: Harper and Row: 1968).

[22] Charles McLean Andrews, *The Colonial Background of the American Revolution* (New Haven: Yale University Press, 1924).

[23] Ibid.

Revolutionary Grievances

Once the crown took a greater interest in the administration of colonial government, the democratic character of the colonial governments receded and the power of the governors, and the direct power of the crown, under the system became apparent.[24] In common thought about the American Revolution, much is made about the lack of representation of the colonies in the English parliament.[25] Even a cursory reading of the Declaration of Independence, however, reveals that most of the particular grievances of the colonists revolved around the administration of government within the colonies, and that many of those grievances were framed as problems with the fusion of government functions under the crown.

For example, the list of facts provided in the Declaration includes the following charges against the king:

- He has dissolved Representative Houses repeatedly;
- He has refused for a long time, after such dissolutions, to cause others to be elected;
- He has called together legislative bodies at places unusual, uncomfortable, and distant;
- He has refused to Assent to laws ... for the public good; and
- He has made Judges dependent on his Will alone, for their tenure and …salaries.

These specific grievances suggest a developing colonial belief that the separation of powers was a prerequisite for a government that sought to preserve liberty, and that the centralization of such powers would necessarily lead to oppression and tyranny.

Early American Challenges

Following independence, the newly independent states began to pursue governmental structures more closely aligned with our modern view of the separation of powers. Between 1776 and 1780, all 13 original states drafted new state constitutions. The colonial and revolutionary experience, however, also took on a strong anti-executive character. The colonial assemblies, after all, had been the branch of government controlled by the colonists and their principal source of governmental power. The dissatisfaction with the king and the colonial governors led many colonists in the 1770s to believe that strong legislatures were the key feature of optimal governments.[26]

Early on, in 1776 and 1777, many of the new states adopted new systems of government with weak and dependent executive branches.[27] In Delaware, Virginia, and New Jersey, the governor would be appointed by the legislature and had no veto or appointment authority.[28] In Pennsylvania, there would be no single executive; a council chosen by the legislature would take

[24] Ibid.

[25] Ibid.

[26] Gordon Wood, *The Creation of the American Republic, 1776-1787* (New York: Norton and Co.: 1969), pp. 127-160.

[27] Willi Adams, *The First American Constitutions: Republican Ideology and the meaning of the State Constitutions* (Lanham, MD: Rowman and Littlefield: 2001); Lawrence M. Friedman, "State Constitutions in Historical Perspective," *Annals of the American Academy of Political and Social Science*, vol. 496, no. 1 (March 1988), pp. 33-42.

[28] Virginia Constitution (1776), § 6; Delaware Constitution (1776) § 7; New Jersey Constitution (1776) § 7.

on the role.[29] Likewise, the national government under the Articles of Confederation contained no independent executive or judicial branch, instead leaving the creation of those functions up to the national legislature.[30]

Other states, however, adopted constitutions featuring separation of powers more in line with the future federal Constitution. The New York constitution of 1776 provided for an independent, elected governor with a three-year term, veto power, and appointment authority.[31] The Massachusetts constitution (1780) required that "the legislative department shall never exercise the executive and judicial powers... the executive shall never exercise the legislative and judicial powers ... the judicial shall never exercise the legislative and executive powers ... "[32]

By the early 1780s, many began to rethink investing so much power in the legislatures. Both Thomas Jefferson and John Adams were early opponents of the legislative-dominated state constitutions.[33] The experiences of Pennsylvania and other states with weak executives proved to be disappointing.[34] The failure of the Articles of Confederation as a national governing document further eroded belief in government by legislature alone.[35]

The Framers in Context

By the time the framers met to amend the Articles of Confederation, public opinion in the colonies had followed a meandering path, largely rejecting both the tyranny of an unchecked executive and the tyranny of an unchecked legislature. The proper arrangement of government for the enhancement of liberty is thus, they believed, one in which no one can gain unilateral power, and no power goes unchecked. As Madison argued in the *Federalist Papers*, the objective of the framers was to preclude a "faction" from gaining monopoly control of the government.[36]

The framers viewed human nature as inherently bad, and suspected that the natural inclination of men is to abuse power. Tyranny, to them, was "the accumulation of all powers, legislative, executive, and judiciary, in the same hands."[37] To separate the functions of government into independent branches was necessary but not sufficient. Each branch would also need the ability to stand as a check against the others. No branch, however, would possess an overruling influence over the others, and each would be provided with the necessary means to resist encroachment from the others.[38]

[29] Pennsylvania Constitution (1776) § 3.

[30] Articles of Confederation (1781) § IX.

[31] New Yok Constitution (1776) § XVII.

[32] Massachusetts Constitution (1780) § XXX.

[33] Wood, *The Creation of the American Republic*, p. 161.

[34] Ibid., pp. 393-467.

[35] Jack Rakove, "The Legacy of the Articles of Confederation," *Publius*, vol. 12, no. 4 (Autumn 1982), pp. 45-66.

[36] James Madison, "The Federalist No. 10," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter, ed.) (New York: Penguin, 1961), pp. 77-83.

[37] James Madison, "The Federalist No. 47," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter, ed.) (New York: Penguin, 1961), p. 301.

[38] In addition, the Framers also set up a federal system in which the states maintained certain sovereign functions and the central government had limited powers. A full discussion of federalism, however, is beyond the scope of this report. For a general discussion of federalism, see CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

Separation of Powers: Structure

Translating the collective political philosophy of the founders and their constituents into a government required the construction of institutional structures that reflected and, hopefully, sustained their preferences. Institutional design of the new Constitution, therefore, required careful consideration. The legislative, executive, and judicial branches of the government were assigned distinct and limited roles under the Constitution, and political actors are restricted from serving simultaneously in the legislature and another branch. The elected branches have separate, independent bases of authority, and specific safeguards were designed to prevent any of the branches from gaining undue influence over another. Although not constitutionally guaranteed, longstanding norms also now exist that provide each branch with its own independent resources for staffing, research, and advice.

The following section discusses four key aspects of the constitutional separation of powers: separate roles and authorities; separate personnel; independent electoral bases; and separate institutional supports. It then discusses the checks and balances placed with the various separate institutions.

Separate Institutions

The legislative, executive, and judicial branches of the government are each given separate constitutional bases of power. The executive and legislative branches are populated by leaders who are drawn from different constituencies on different electoral timetables. And judicial branch actors, while not elected, are insulated by tenure provisions that require supermajorities to remove them from office.

Distinct Roles and Authority

The Constitution divides the federal government according to its core functions—legislative, executive, and judicial—and places each function primarily in a separate institution. The three institutions are given their distinct authority of their function, made plain by the first sentences of each of the first three Articles. Article I begins, "All legislative power herein granted, shall be vested in a Congress of the United states."[39] Article II begins, "The executive power shall be vested in a President of the United States of America."[40] Article III begins, "The Judicial power shall be vested in one supreme Court[.]"[41] This is separation of powers, as understood by the founders, in the most basic sense: the President is authorized to execute the law; the Congress is authorized to make the law; and the Court is authorized to judge the law.

Separate Personnel

The Constitution specifically prohibits individuals from serving in Congress and another branch of the federal government. Article I, Section 6 states that "[N]o Person holding any Office under the United States shall be a Member of either House [of Congress] during his Continuance in Office."[42] While this guarantees that no one will simultaneously hold position in Congress and

[39] United States Constitution, Article I §1

[40] United States Constitution, Article II §1

[41] United States Constitution, Article III §1

[42] United States Constitution, Article I §6, clause 2.

one of the two other branches, the Constitution places a further prohibition on Members of Congress serving in any office which was created during the period for which they were elected, or for which the salary was increased.[43]

Independent Electoral Bases

The elected officials of the legislative and executive branches—the President, Vice President, Senators, and Representatives—are all drawn from constituencies that do not normally involve the other branches. The President and Vice President are chosen by electors from the states, all of whom are themselves currently chosen by popular vote in the states, but are by law picked in the manner each state legislature directs.[44] Members of Congress are specifically barred from being electors, guaranteeing that they have no direct influence in the election of the President or Vice President.[45] Members of the House and Senate are chosen by direct election in their districts and states, respectively, with no input from the other branches of the federal government.[46]

While the federal judiciary is not filled in an independent manner—judges are nominated by the President and confirmed for office by the Senate—the Constitution mitigates legislative or executive branch intrusion into the judiciary by providing federal judges with tenure "during good Behavior," which in practice amounts to life tenure.[47]

Independent Resources and Support

Each branch of the federal government has developed its own support structure of professional staff. Although not guaranteed in the Constitution to any branch—Congress has authorized and continues to fund the support structures and can, in theory, remove them—strong norms exist among both political actors and citizens that each branch of government should have the resources to fulfill its duties under the Constitution. The resources provide information and advice, conduct research and analysis, investigate problems, organize activities, and carry out other assignments for their principals.

Members of Congress have personal staff, as well as committee staff and chamber-wide and branch-wide support organizations to call on for support in the development of legislation.[48] The President has several thousand staff in the Executive Office of the President, and can draw on Cabinet officials or agency heads, who can in turn call on resources within the executive departments themselves.[49] The federal judiciary has both chamber staff to assist them as well as centralized staff in the Administrative Office of the United States Courts and several branch-wide support organizations.[50]

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[43] Ibid.

[44] United States Constitution, Article II §1, clause 2.

[45] Ibid. Under the Constitution, Congress does have a role in the election of the President and Vice President if no candidate receives a majority of the electoral votes. See United States Constitution, Article II §1, clause 3.

[46] United States Constitution, Article I §2, clause 1; Amendment XVII, clause 1.

[47] United States Constitution, Article III §1.

[48] For an overview of the legislative branch and its organizations, see CRS Report R44029, *Legislative Branch: FY2016 Appropriations*, by Ida A. Brudnick.

[49] For an overview of the President's available resources in the Executive Office of the President, see CRS Report 98-606, *The Executive Office of the President: An Historical Overview*, by Barbara L. Schwemle, available upon request.

[50] For an overview of the judiciary's resources, see CRS Report R44078, *Judiciary Appropriations FY2016*, by Matthew E. Glassman.

The Constitution prevents Congress from specifically reducing salaries of the executive and judicial branch. Article II prohibits the adjustment of the President's salary during his current term of office.[51] Likewise, Article III prohibits the reduction of compensation of federal judges during their service.[52]

Checks and Balances

While the Constitution provides separate institutions and bases of power, the structure does not insulate the branches from each other. While the design of the Constitution aims to prevent the centralization of power through separation, it also seeks the same objective through diffusion. Thus, most powers granted under the Constitution are not unilateral for any one branch; instead they overlap. The President has the power to veto legislation; Senate approval is required for executive and judicial nominations made by the President; the judiciary has the power to review actions of Congress or the President; and Congress may, through impeachment, remove the President, Vice President, and other "civil Officers of the United States." As political scientist Richard Neustadt has observed, what the Constitution created was "separate institutions sharing each other's power."[53]

Overlapping Responsibility

Although each branch is the primary actor in the function that corresponds to its institution, no branch has unilateral control over its core function. Congress is vested with the legislative power, but the President may veto legislation—ensuring him/her a bargaining position on legislation in most cases—and has the power to call the Congress into session.[54] The Supreme Court, through the implied power of judicial review, may declare acts of Congress and executive actions unconstitutional.[55] The President is vested with the executive power, but Congress has legislative control over the bureaucratic design of the executive branch and the amount of financial resources the departments of the executive branch receive.[56] Finally, while the Supreme Court has the judicial authority, Congress has the authority to create the inferior federal Courts and prescribe their jurisdiction and regulations, as well as to refine legislation in response to judicial decisions.[57]

Appointment and Removal Authority

The constitutional system for filling both the offices of the executive branch and most of the federal judiciary requires the cooperation of both the executive and legislative branches. Principal officers of the United States, including federal judges and high-ranking executive officials are nominated exclusively by the President, but require confirmation by the Senate.[58] Under the 25th

[51] United States Constitution, Article II §1, clause 7.

[52] United States Constitution, Article III §1.

[53] Richard Neustadt, *Presidential Power and the Modern Presidents* (New York: The Free Press: 1990), p. *x.*

[54] United States Constitution, Article I §7, clause 2; Article II § 2, clause 2.

[55] United States Constitution, Article III §2.

[56] United States Constitution, Article I §9, clause 7.

[57] United States Constitution, Article III §1.

[58] United States Constitution, Article II §2, clause 2.

amendment, vacancies in the Vice Presidency are also filled through nomination by the President and confirmation by both the House and Senate.[59]

Although the President retains general removal authority over most executive branch officials, Congress has the authority to remove the President, Vice President, and "civil officers of the United States" (including federal judges) for treason, bribery, and other high crimes and misdemeanors.[60] The power, however, is divided between the House of Representatives, which has the power to impeach, and the Senate, which is responsible for trying those impeached by the House. This power is exclusive to Congress; there is no corresponding mechanism in the other branches for the removal of Representatives or Senators, which reveals the primacy of Congress under the Constitution. The House and Senate may expel their own Members, but no outside power, save elections, can otherwise remove them, reflecting the Framer's concept of the sovereignty of the people.

Investigations

Both the executive and legislative branches have investigatory authority over each other. The executive branch, subject to certain constitutional limitations,[61] investigates criminal conduct by Members of the House and Senate, and legislators suspected of violating the law can be prosecuted in federal court.[62] Congress has the authority to investigate activities in the executive and judicial branches, and these investigations can be the basis for either future criminal prosecutions or impeachment proceedings. In addition, Congress has the authority to conduct routine oversight of executive departments to inform future legislation and resource decisions.[63]

War and Foreign Policy

The Constitution specifically divides matters of war and foreign policy between the branches. The President is commander in chief of the armed forces under Article II,[64] but Congress is granted the authority to declare war, raise and support an army and navy, and make rules governing the armed forces.[65] Congress also has authority over appropriations, including funding for any war effort.[66] The courts have the authority to declare actions of Congress or the President in relation to war unconstitutional.

General intercourse with other nations is also a shared responsibility. The President has many of the responsibilities of head of state, but the Senate provides its advice and consent to treaties, and Congress controls the appropriations and legislation needed to implement them.[67] In other cases,

[59] United States Constitution, Amendment 25, §2.

[60] United States Constitution, Article II §4; Article I § 2, clause 5; §3, clause 6.

[61] The Speech or Debate Clause places significant limitations on the ability of the executive branch to both investigate and prosecute Members of Congress for violations of the law. For an overview of the Speech or Debate Clause see CRS Report R42648, *The Speech or Debate Clause: Constitutional Background and Recent Developments*, by Alissa M. Dolan and Todd Garvey.

[62] Representatives have very limited immunity from certain laws. See CRS Legal Sidebar WSLG154, *Are Members of Congress Above the Law?*, by Jack Maskell.

[63] For a brief overview, see CRS In Focus IF10015, *Congressional Oversight and Investigations*, by Alissa M. Dolan, Todd Garvey, and Walter J. Oleszek.

[64] United States Constitution, Article II §2.

[65] United States Constitution, Article I §8.

[66] United States Constitution, Article I §9, clause 7.

[67] United States Constitution, Article II §3, Article II §2, clause 2.

Congress or the President may often find ways to reach agreements without a treaty, either through bilateral agreements of the executive branch, or, in the case of Congress, through public law.[68]

Separation of Powers: Consequences

The constitutional structure of separation of powers is directly consequential for the practice of American politics. It incentivizes specific strategies and behaviors of both individual political actors and the branches of the federal government as a whole. This section discusses three broad consequences of the separation of powers: the inevitability of conflict in the American political system; the desire of each of the branches, in aggregate, to increase its relative institutional power; and the cross-pressures faced by individual political actors as they balance the accumulation and maintenance of power for their institution with policy or other goals that are often at cross purpose with such accumulation.

Conflict

The constitutional structure of separation of powers generates strong political conflict. With political actors in each branch having preferences over public policy but not the capacity to unilaterally realize those preferences, it is inevitable that disagreement will be constant and political actors will seek to expand the power and influence of their respective branches. Far from a defect of the system, this conflict is the very essence of the framers' goal: arrange the federal government such that no faction can accumulate enough power to singularly dominate.[69]

The source of conflict in the constitutional structure, however, goes beyond the basic separation of power. If the only structural differences between the branches were the authorities assigned to them and the preferences of the political actors, American politics would likely have much less conflict than it has traditionally exhibited. The Constitution, however, provides several other mechanisms that enhance conflict and limit the ability of any faction from gaining coordinated control of the functions of government.

Separate Bases of Authority, but Also *Different* Bases of Authority

While the elected branches of the federal government have independent electoral bases (i.e., neither branch has a primary role in choosing the members of the other branch), they also have *structurally different* electoral bases. Representatives are elected every two years, from districts drawn to be approximately the same size.[70] Senators are elected every six years on staggered terms, from statewide votes.[71] The President is elected every four years, from a national vote

[68] Charles Stewart III, "Congress and the Constitutional System," In Paul J. Quirk and Sarah A. Binder, Institutions of American Democracy: The Legislative Branch (New York: Oxford University Press, 2005), p. 23. For further information on congressional-executive agreements and treaties, see CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties*, by Jane M. Smith, Daniel T. Shedd, and Brandon J. Murrill.

[69] This stands in sharp contrast to the traditional parliamentary model of republican government, which generally produces unified governments. See Gerring, Thacker, and Moreno, "Are Parliamentary Systems Better?" p. 334; Juan Jose Linz, "The Perils of Presidentialism," *Journal of Democracy*, vol. 1., no. 1 (1990).

[70] United States Constitution, Article I §2. See also CRS Report R42831, *Congressional Redistricting: An Overview*, by Royce Crocker.

[71] United States Constitution, Article I §3; Amendment XVII.

aggregated through state elections to an electoral college.[72] At any given point in time, the House, Senate, and presidency will be filled with elected political actors drawn from different constituencies at different points in time. No single federal election in the United States can completely alter the political composition of the government; conversely, the composition of the government never completely reflects the preferences of the voters at any single point in time.

Consequently, the preferences of individual political actors, and the aggregate preferences of the elected branches of government, will never be perfectly aligned, and often will be in sharp conflict. Every election features important recent events, fresh issues, and new ideas that shift the preferences of voters and alter the electoral choices they make. All Americans are represented in the House, the Senate, and the presidency, but the differing aggregation systems—House districts, states in the Senate, and an indirect national vote for the presidency—create three bodies that, even if wholly elected at the exact same time, would sum to different preferences over policy.

Likewise, the varying length of terms for each of the elected branches creates different incentives and structures the political preferences of the actors. As the framers surmised, the shorter terms of Representatives would likely make them more responsive to rapid shifts in public opinion among their constituents, while the longer terms of Senators would insulate them against being aroused by quickly extinguished passions of public opinion.[73] In addition to these regular time horizons for elections, the presidency now has a fixed time horizon;[74] with a maximum of eight years in office, Presidents have strong incentives to move quickly to achieve their policy goals. Representatives and Senators, without such existential term limits, may often see less need for hurried action.[75]

Vague Powers

The vagueness of much of the Constitution also creates political conflict between the branches. The Constitution, by global standards, is very brief.[76] And while some of the authorities it assigns are uncontestable directives or rules, much of it is open to a variety of interpretations. Not surprisingly, political actors in the different branches are likely to interpret its dictates in ways that enhance or expand their own authority. This is especially true in areas where there are clearly shared responsibilities, such as war powers. The President is commander in chief of the armed forces under Article II,[77] but Congress is granted the authority to declare war, raise and support an army and navy, and make rules governing the armed forces.[78]

[72] United States Constitution, Article II §1; Amendment XII.

[73] James Madison, "The Federalist No. 62," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter, ed.) (New York: Penguin, 1961), pp. 376-390.

[74] United States Constitution, Amendment XXII.

[75] Douglas L. Kriner and Andrew Reeves, *The Particularistic President: Executive Branch Politics and Political Inequality* (New York: Cambridge University Press, 2015), pp. 16; William G. Howell, *Thinking About the Presidency: The Primacy of Power* (Princeton: Princeton University Press, 2013).

[76] The U.S. Constitution is less than 4400 words, making it one of the shortest Constitutions. See Christopher W. Hammons, "Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions," *The American Political Science Review*, Vol. 93, No. 4 (December, 1999), pp. 837-849.

[77] United States Constitution, Article II §2.

[78] United States Constitution, Article I §8.

Unconsidered Questions

The political branches of the federal government also routinely come into conflict over questions that the Constitution never contemplates. No 18th century document could have foreseen the developments of a nation over centuries, and conflicts between the President and Congress often involve issues that would have never even occurred to the framers as important. Even powers that are seemingly firmly entrenched with one branch or another can generate conflict over their application. For example, only Congress has the power to appropriate funds for an activity of the federal government. But does the President have the discretion to not spend funds appropriated by Congress?[79]

Institutional Power

It is not surprising that the branches of government will seek to enhance their power within the federal government. Since such enhancements of power largely come at the expense of one of the other branches of the government, each branch also has strong incentives to defend its own power from encroachment by the other branches.[80] Such attempts at enhancement and defenses against the encroachments of the other branches can take many forms. Discussed here are three general aspects of the strategies used by the branches.

Asserting and Guarding Power

The most basic institutional strategy for enhancing power is to simply assert it in the course of executing policy preferences, or suggest new powers via legislative proposals. The President may decide that military action is needed and choose not to consult with Congress.[81] The President may decide Senate confirmation of a nominee is taking too long and make a recess appointment while the Senate is in recess for just a few hours.[82] Congress may decide that an investigation of perceived wrongdoing at the White House or in the executive branch is necessary, and subpoena documents and records that may be protected by executive privilege.[83] Congress may design a regulatory agency whose principal officials are not nominated by the President.[84] Left unchallenged by the other branch, these actions will not only take effect, but they will potentially set historical precedent for similar future actions, normalize the action in the mind of the public, or lay the groundwork for further enhancements of power in the same vein.

Therefore, it is common for each branch to strongly guard its power and challenge attempts by the other branches to assert new or enhanced power. Such guarding of power takes many forms. Often, it is simply public repudiation. If one branch asserts a power and another publicly condemns it, public opinion may quickly force the asserting branch to back down. In 1937 President Roosevelt made legislative proposals to expand the Supreme Court and to reorganize the executive branch.[85] Many in Congress saw these bills as attempts to increase executive power

[79] *Train v.* City of *New York*, 420 U.S. 35 (1975).

[80] David Mayhew, *The Electoral Connection* (New Haven: Yale University Press, 1973); Richard Fenno, *Homestyle: House Members in Their Districts* (New York: Pearson, 2002).

[81] Louis Fisher, *Presidential War Power* (Lawrence, KS: University of Kansas Press, 1995).

[82] See CRS Report R42323, *President Obama's January 4, 2012, Recess Appointments: Legal Issues*, by David H. Carpenter et al.

[83] CRS Legal Sidebar WSLG86, *Presidential Claims of Executive Privilege*, by Todd Garvey.

[84] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[85] Burt Solomon, *FDR v. The Constitution: The Court-Packing Fight and the Triumph of Democracy* (New York: (continued...)

over the courts and public policy, and opponents of the measures came to label them "court-packing" and the "dictator bill."[86] Both measures failed, and Roosevelt was widely repudiated for the attempted power grab. Absent mobilized public opinion, the branches also have the ability to guard their power through lawsuit in the federal courts. Conflicts between the executive and legislative branches may result in one party making a legal claim that the other has exceeded its constitutional authority.[87] In other cases, private citizens may bring federal claims against one of the branches asserting an action exceeded the authority of the branch.[88]

Public Prestige

Because public opinion shapes the actions of political actors and thus policy outcomes, the maintenance and enhancement of the power of the branches can be augmented by increasing the public prestige of the institution. If voters believe that one branch of government is more or less capable of dealing with public policy problems or other political issues, power is likely to flow toward that branch of government and away from the other branches. In effect, the institutional reputation of the branches at any given moment affects their relative political power and shapes outcomes, particularly in conflicts that arise between the branches. Many things can affect the public prestige of the branches: perceptions about competence, scandal, attacks from the other branches, etc.[89]

In many respects, the legislative branch has the most difficulty maintaining its public prestige. The President has the advantage of unity of voice, and relatively rarely does the executive branch appear to be in-fighting.[90] In recent times, the Supreme Court has enjoyed strong public opinion support, and enjoys an apolitical reputation that it closely guards.[91] Congress, however, has neither of these advantages. Disagreement is natural in a legislature, and it is rare for Congress to work either quickly or in a completely united fashion.[92] While these features are often beneficial, they work against Congress as a prestigious institution, particularly in situations where the President can project a single solution or plan while simultaneously portraying Congress as deadlocked and chaotic.[93]

Political Capacity

The three branches of the federal government can also work to enhance their political capacity, by seeking to augment the resources available to them for public political confrontations. Effecting

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Walker, 2009); Stephen Skowronek, *The Politics Presidents Make* (Cambridge, MA: Belknap Press, 1993).

[86] Gregory A. Caldeira, "Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan," *The American Political Science Review*, vol. 81, no. 4 (December 1987), pp. 1139-1153; Barry D. Karl, "Executive Reorganization and Presidential Power," *The Supreme Court Review*, vol. 1977 (1977), pp. 1-37.

[87] See CRS Legal Sidebar WSLG172, *House Committee Files Suit to Compel Production of Fast and Furious Documents*, by Todd Garvey.

[88] CRS Legal Sidebar WSLG566, *Supreme Court to Hear Appointments Case*, by David H. Carpenter.

[89] For example, see James Sundquist, *The Decline and Resurgence of Congress* (Washington: The Brookings Institution, 1981).

[90] Charles Hardin, "The Crisis and Its Cure," in William Lasser, *Perspectives on American Politics* (Boston; Wadsworth, 2012), p. 299.

[91] See http://www.gallup.com/poll/4732/supreme-court.aspx.

[92] *Fenno*, Homestyle, p. 194.

[93] Michael Foley and John E. Owens, *Congress and the Presidency: Institutional Politics in a Separated System* (Manchester, UK: Manchester University Press, 1996), pp. 405-407.

outcomes in public policy debates often requires the ability to gather and analyze information, research and develop arguments, and package and reach a public audience with the information. In a public policy fight between two entities, the one with the greater resources that can be mobilized will often have an advantage.[94]

Therefore, the branches of the government can seek to enhance their own power through the enlargement of their own political capacity. This can take the form of greater staffing, such as the expansion of congressional staff under the 1946 Legislative Reorganization Act.[95] Or it can take the form of the creation of entirely new branch-wide entities, such as the creation of the Executive Office of the President or the Congressional Budget Office or the Federal Judicial Center.[96] In many cases, increases in one branch's capacity is acquiesced to by the other branches; Congress routinely passes legislation increasing executive capacity, and the President often consents to increased legislative capacity by refraining from vetoing such legislation.

Consequences for Individual Political Actors

While the three branches of government themselves have strong incentives to maintain and enhance their power, individual political actors within the branches may often find themselves placed at cross-purposes, where the goal of enhancing power for their institution may come into conflict with other political goals they are seeking to achieve.

Cross-Purposes

Generally, three types of goals may create cross-purpose conflicts for political actors seeking to maintain the institutional power of their branch. First, long-term institutional power may come into conflict with personal policy positions. For example, an individual Justice's belief may favor an outcome of a Supreme Court case that may decrease the prestige of the Court; an individual Member of Congress may believe that foreign policy actions taken by the executive branch without the input, or against the majority wishes, of Congress may be the correct decisions; and the President may be unwilling to veto legislation that achieves policy outcomes he prefers despite doing so in a way that reduces executive branch capacity.

A second cross-purpose conflict is one that brings institutional power into conflict with partisan affiliation. Members of a political party generally do not to want to embarrass co-partisans or damage the reputation of their party; instead, they seek to enhance the reputation and brand-name of their party in the hopes of accumulating party power and gaining greater control over public policy.[97] It thus often becomes the case that individuals must choose between helping their political party and enhancing the power of their institution. For example, Representatives may refrain from criticizing the actions of a President from their own party, even when such actions are to the detriment of Congress as an institution. The Representative may judge that the benefit to their constituents, party, or ideological policy preferences outweigh the diminishment of power to the institution.[98]

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[94] For example, see Matthew Glassman, "Congressional Leadership: A Resource Perspective," in Jacob Straus, *Party and Procedure in the United States Congress* (New York: Rowan and Littlefield, 2011).

[95] 60 Stat. 812, August 2, 1946.

[96] 53 Stat. 561, April 3, 1939; 88 Stat. 297, July 12, 1974; 81 Stat. 664, December 20, 1967.

[97] David Mayhew, *Divided We Govern* (New Haven: Yale University Press, 1991), p. 3; Morris S. Ogul, *Congress Overseas the Bureaucracy* (Pittsburgh: University of Pittsburg Press, 1976), p. 18.

[98] Charles Stewart III, "Congress and the Constitutional System," In Paul J. Quirk and Sarah A. Binder, *Institutions of*
(continued...)

A third cross-purpose conflict is when electoral goals conflict with institutional power. This can happen when candidates for office believe that attacking or maligning the power of the institution they are seeking to join will be an effective campaign strategy. Candidates for Congress commonly describe Congress as "broken" or "dysfunctional."[99] Nominees for the Supreme Court often warn in Senate hearings about the need to limit the scope or authority of the Court;[100] and candidates for President routinely attack their predecessors for actions that they believe are overreaches of executive power.[101]

A Particularly Congressional Problem

The problem of institutional power coming into conflict with other goals is particularly acute for Congress, especially in relation to the executive branch. As individual members of a large body, Representatives and Senators may not believe they have the responsibility or the capacity to defend the institution.[102] Those who may feel such responsibility, such as party and chamber leaders, will often find themselves in situations in which policy or party goals, either their own personal ones or those of their caucus, come into direct conflict with institutional goals. Even when Congress does choose to institutionally defend itself, it often finds itself speaking with less than a unified voice, as only the most vital institutional powers have the ability to unanimously unify Congress.[103]

These problems of collective action—the responsibility/capacity to defend the institution, the ability to speak with a unified voice, and the conflict with party or policy goals—rarely if ever occur in the executive branch. The unitary nature of the presidency ensures that the executive branch will ultimately always speak with one voice, and past presidents have often expressed—both in office and after retirement—a deep feeling of responsibility for the maintenance of the powers of the presidency.[104] Finally, it is more unusual for party or policy goals to be directly at odds with executive branch power than congressional power, simply because the President in modern times exerts significant control over both his party's politics and the general public policy agenda. His proposals, therefore, tend to set the agenda and, not surprisingly, they are typically very consonant with executive branch power.

Lessons for Those Seeking to Increase Institutional Power

While the cross-purposes that place political actors in conflicted situations with respect to institutional power can seem daunting, they also suggest structural situations in which those seeking to enhance institutional power can harness these cross-purposes and use them for the

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American Democracy: The Legislative Branch (New York: Oxford University Press, 2005), p. 23.

[99] Fenno, *Homestyle*, p. 197.

[100] For example, see "Transcript: Day One of the Roberts Hearings," *The Washington Post*, September 13, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html.

[101] For example, then-Senator Obama routinely criticized then-President George W. Bush for expanding executive power, resulting in short video clips from the 2008 campaign (such as https://www.youtube.com/watch?v=a3IWq3CXHyc) that were later used as political attacks against him as President.

[102] Mayhew, *The Electoral Connection*.

[103] Stewart, "Congress and the Constitutional System," p. 23.

[104] For example, see the discussion of President Nixon's desire to protect the presidency in Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (Baltimore: John Hopkins University Press, 1994), pp. 77-79.

benefit of the institution. In some cases, the partisan or ideological or electoral goals of political actors align with the institutional goals of the branch. It is in these situations that those seeking greater institutional power, particularly in Congress, can most effectively achieve their goals.

The arrangement of parties, ideologies, and institutions has many variations. Imagine a stylized America with a liberal and conservative political party, whose core principles tended to either favor executive power or legislative power, but varied over time. In this arrangement, with two institutions (Presidency, Congress), two parties (Party A, Party B), and two philosophies about governance (executive-centered, Congress-centered), eight possible arrangements of government are possible. Some of these arrangements are unlikely to be hospitable to the promotion of congressional power. For instance, when one party controls both institutions and has an executive-centered governing philosophy, enhancing congressional power will be quite difficult. On the other hand, when Party A controls the presidency and Party B controls Congress, if Party B has a Congress-centered philosophy for governing, the most hospitable alignment has been achieved.

Those seeking to enhance congressional power will likely achieve their best results in situations of divided government, when the control of Congress is in the hands of a party that naturally is more wary of executive power. In these situations, the partisan, ideological, and institutional incentives all favor an increase of congressional power. There are fewer cross-pressures to conflict members; enhancing congressional power will serve the interests of the institution, the party, and the ideological goals of many members.

Contemporary Issues

Clashes between the branches over the proper division of constitutional power and authority have arisen routinely in recent Congresses, as they have throughout American history. Recent issues include the following:

- **War Powers**. The 2011 U.S. military operations in Libya raised concerns among some in Congress that the President lacked authority to engage in such operations without congressional approval. What limits can Congress place on Presidential military action?[105]
- **Policy implementation**. In 2014, the House of Representatives voted to authorize the Speaker to initiate legal action against the executive branch for implementing aspects of the Affordable Care Act in a manner contrary to the statutory language. What implementation latitude does the administration have under law, and can Congress seek legal enforcement against administration implementation decisions?[106]
- **Congressional organization of the judiciary**. In 2015, the Supreme Court examined the question of whether Congress could charge non Article-III courts

[105] For background on Member use of litigation in regard to war powers disputes, see CRS Report R41989, *Congressional Authority to Limit Military Operations*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola; CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia.

[106] H.Res. 676, 113th Congress. For background on the Affordable Care Act provisions in question, see CRS Legal Sidebar WSLG582, *Obama Administration Delays Implementation of ACA's Employer Responsibility Requirements: A Brief Legal Overview*, by Jennifer A. Staman, Daniel T. Shedd, and Edward C. Liu.

with certain adjudication tasks. What types of courts can Congress create that do not provide Article III protections to their judges? [107]

- **Recess Appointments**. In 2011, President Obama made several recess appointments while the Senate was in pro-forma session, which led to a lawsuit and ultimately a Supreme Court decision invalidating the appointments. Under what conditions can the President make a recess appointment?[108]
- **Recognition of foreign governments**. Does Congress have a role in foreign policy that gives it the authority to recognize foreign governments for some purposes, or does the sole power of recognition lie with the President?[109]
- **Congressional Oversight and Contempt Power**. After the Department of Justice refused to provide subpoenaed documents to the House Oversight and Government Reform Committee, the committee voted to cite the Attorney General for contempt, and the Administration invoked executive privilege as the justification for withholding the documents. To what extent does Congress have a right to executive branch documents? Can Congress force a criminal contempt prosecution to be opened?[110]

Concluding Observations

Two general observations warrant mentioning. First, the contemporary balance of power between the President, Congress, and the courts is not the same as it was in 1789, and is perhaps not the balance intended or expected by the framers of the Constitution. A myriad of changes, developments, and specific events in the United States—ranging from amendments to the Constitution to development in technology to the continuing evolution of American political culture—have continually influenced public opinion, political norms, and the behavior of political actors in ways that have rearranged the relative powers of the institutions.

Second, the relative power of the President, Congress, and the courts is not on any specific trajectory. At various times since the ratification of the Constitution, the power of each institution has been at times ascendant and at other times on the decline. While specific events and developments may predictably lead to an increase or decrease in relative power for one of the branches, predicting the actual future direction of power shifts between the branches is an inherently difficult task. Many events that alter the power balance are either contingent or otherwise rely on the individual actions of political actors.

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[107] For more information, see CRS Legal Sidebar WSLG1274, *Function Over Form: The Role of Consent and the Supreme Court's Latest Separation of Powers Decision in Wellness Int'l v. Sharif*, by Andrew Nolan.

[108] See CRS Report R42323, *President Obama's January 4, 2012, Recess Appointments: Legal Issues*, by David H. Carpenter et al.; CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter.

[109] CRS Report R43773, *Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers*, by Jennifer K. Elsea; CRS Legal Sidebar WSLG1287, *Has Congress Lost its Voice on Jerusalem? (Zivotofsky Part I)*, by Jennifer K. Elsea; CRS Legal Sidebar WSLG1288, *Youngstown Revisited (Zivotofsky Part II)*, by Jennifer K. Elsea.

[110] See CRS Legal Sidebar WSLG81, *A Holder Contempt Citation: Legally Enforceable?*, by Todd Garvey; CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey and Alissa M. Dolan; CRS Recorded Event WRE00052, *The Holder Contempt: A Case Study in Congress's Authority to Enforce Subpoenas*, by Todd Garvey and Alissa M. Dolan.

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