

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered within the hourglass. The text is overlaid on the hourglass.

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*THE SEPARATION OF POWERS DOCTRINE: AN
OVERVIEW OF ITS RATIONALE AND APPLICATION*

T.J. Halstead, American Law Division

Updated June 23, 1999

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The Separation of Powers Doctrine: An Overview of its Rationale and Application

June 23, 1999

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ABSTRACT

This report discusses the philosophical underpinnings, constitutional provisions, and judicial application of the separation of powers doctrine. In the United States, the doctrine has evolved to entail the identification and division of three distinct governmental functions, which are to be exercised by separate branches of government, classified as legislative, executive, and judicial. The goal of this separation is to promote governmental efficiency and prevent the excessive accumulation of power by any single branch. This has been accomplished through a hybrid doctrine comprised of the separation of powers principle and the notion of checks and balances. This structure results in a governmental system which is independent in certain respects and interdependent in others.

The Separation of Powers Doctrine: An Overview of its Rationale and Application

Summary

As delineated in the Constitution, the separation of powers doctrine represents the belief that government consists of three basic and distinct functions, each of which must be exercised by a different branch of government, so as to avoid the arbitrary exercise of power by any single ruling body. This concept was directly espoused in the writings of Montesquieu, who declared that “when the executive and the legislature are united in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”¹ The Framers of the Constitution shared this view, with James Madison stating that “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 elective, may justly be pronounced the very definition of tyranny.”²

To alleviate the dangers inherent in centralized power, the Constitution establishes three separate branches of government, the legislative, the executive, and the judiciary. Through this structure, the Framers sought to create an efficient governmental system which would limit the power vested in any one branch. Realizing that mere textual separation would be insufficient to guard against aggrandizement by the respective branches, however, a system of checks and balances was developed, by which the three arms of government could resist against encroachment. Through this system, the various branches of government share certain interdependent characteristics which enable efficient governance, while other functions are staunchly protected, so as to prevent the accumulation of excessive power by any single branch.

¹Montesquieu, *The Spirit of the Laws*, 157 (Anne M. Cohler et al. eds., 1989).

²The *Federalist Papers*, No. 48, at 301 (J. Madison) (C. Rossiter ed. 1961).

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The Separation of Powers Doctrine: An Overview of its Rationale and Application

Framework of the Doctrine

The Constitution of the United States establishes the framework by which the federal government exercises power. A cornerstone of this structure is the doctrine of separation of powers, which stands for the proposition that certain political functions must be allocated amongst various governmental branches, so as to avoid domination by any one entity. Although the separation of powers concept plays a key role in the American political process, the Constitution does not expressly delineate the scope and effect of the doctrine. Rather, the doctrine manifests itself in the Constitution's distribution of federal power among the legislative, executive, and judicial branches. Specifically, Article I of the Constitution provides that "all

legislative powers herein granted shall be vested in a Congress.”³ Article II establishes that “the executive power shall be vested in a President.”⁴ Finally, Article III provides that “the judicial power of the United States shall be vested in one Supreme Court.”⁵

The main reason for this division of governmental functions stems from the desire of the Framers to prevent the concentration of power in the hands of any one entity.⁶ As an outgrowth of this concern, the Framers departed from a pure separation of powers model, and established a system of checks and balances in the Constitution, giving each branch a measure of power over the other.⁷ The effect of this system is to limit the power of each branch, encouraging competition in an effort to maintain a relative balance of power.⁸

Aims of the Doctrine: Origin and Evolution

The origin of the doctrine of separation of powers is often traced to ancient Greece and the writings of Aristotle. Aristotle maintained that the political process was characterized by distinct functions, which he identified as deliberative, magisterial, and judicial. This notion of the distinct character of various governmental actions did not contemplate, however, that such functions should be entrusted to, and exclusively exercised by, specific groups of people. Rather, these functions were seen as a method “to attain a balance between the various classes of society,” and to enable them to play a role in governmental functions.⁹ Such a dynamic is evidenced by the mixed governmental structure which existed in Classical Greece, as opposed to a clear separation of powers model.

The modern separation of powers concept began to develop in England in the middle of the 17th century, during a period of significant conflict between the monarchy and Parliament.¹⁰ As the concept of mixed government fell out of favor, scholars and statesmen recognized the need to place limits on the power of both the King and Parliament.¹¹ Furthermore, the English civil war served to draw attention to the need for a government consisting of bodies restrained to the exercise of specific and appropriate functions.¹² With the eventual resurgence of the monarchy, however, a pure separation of powers model could not exist. Ultimately, a refined model of the

³U.S. Const. art. I, § 1.

⁴U.S. Const. art. II, § 1.

⁵U.S. Const. art. III, § 1.

⁶The Federalist Papers, No. 48, at 301 (J. Madison) (C. Rossiter ed. 1961).

⁷The Federalist Papers, No. 48, at 308-309 (J. Madison).

⁸*Id.*

⁹M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 25 (2nd ed. 1998).

¹⁰Vile, *supra* note 9, at 43.

¹¹*Id.* at 49.

¹²*Id.* at 49.

concept emerged in the “balanced constitution” of England.¹³ Specifically, the concept manifested itself in an “amalgam of mixed government, legislative supremacy, and the separation of powers.”¹⁴

While English experience with the doctrine undoubtedly influenced the Framers, it is clear that fundamental differences between the English governmental structure and the republican aims of the newly formed United States prevented substantial reliance upon the English concept of separated powers.¹⁵ As was noted by the Supreme Court early in the nineteenth century, the distribution of political power in the United States differs significantly from the authority and sovereignty exercised by the monarchy in the English system.¹⁶

Ultimately, the Framers relied more upon philosophical and scholarly considerations of the separation of powers concept than the actual English experience.¹⁷ Indeed, the writings of Montesquieu and John Locke are largely credited with assisting in the development of the theory of separation of powers as expressed in the Constitution. Locke, for instance, expanded upon the notion that governmental functions should be dispersed for the sake of efficiency, by maintaining that the centralization of ruling authority would lead to oppressive authoritarianism and the loss of liberty.¹⁸ Illustrating this contention, Locke explained that no person should be permitted to act as both judge and executioner or as both lawmaker and judge, as individuals with such authority would inevitably develop and apply self serving standards and laws.¹⁹

Similarly, Montesquieu perceived man as having a tendency towards evil and a desire for power.²⁰ This perception of human nature gave rise to a concern on the part of Montesquieu regarding the arbitrary exercise of political power, leading to the exposition that liberty is destroyed in a government of unseparated powers.²¹ Building upon earlier works regarding the doctrine, Montesquieu envisioned a governmental structure in which power would be dispersed among three branches, with a system of checks and balances. In Montesquieu’s view, this arrangement was superior to a pure separation of powers structure, in that a checks and balances system would allow each part of a government to veto or circumscribe the actions of the other. Such a division of power, according to Montesquieu, would enable an arm of a government to act efficiently without usurping the powers of another.

¹³*Id.* at 58.

¹⁴*Id.* at 81.

¹⁵Louis Fisher, *Conflicts Between Congress and the President*, 6 (4th ed. 1997).

¹⁶Fisher, *supra* note 10, at 7 (discussing *Fleming v. Page*, 50 U.S. (9 How.) 602, 618 (1850)).

¹⁷The Federalist Papers, No. 47, at 324-326 (J. Madison).

¹⁸Eric Greenberg, *Falsification as Functionalism: Creating a New Model of Separation of Powers*, 4 Seton Hall Const. L.J. 467, 494 (1994).

¹⁹*Id.* at n.133.

²⁰Vile, *supra* note 9, at 85.

²¹*Id.* at 80, 85.

The early development and acceptance of the separation of powers doctrine by the founding fathers was heavily influenced by these perspectives. Indeed, the Framers were strong proponents of the doctrine, possessing a similar distrusting view of the human desire for power. Such a concern was evidenced by James Madison, who warned that “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 elective, may justly be pronounced the very definition of tyranny.”²² In refining the doctrine as it was to apply to the new union, the Framers, following the ideas of Locke and Montesquieu, forsook the pure separation of powers concept in favor of a hybrid doctrine designed to check and balance governmental powers.²³ Madison served as the most eloquent proponent of this refined doctrine, maintaining that separate branches of government cannot remain independent if their supposedly distinct powers are based merely upon definitional boundaries. This theory led to Madison’s argument that the members of a respective branch of government would continually seek to aggrandize the power exercised by that branch. Accordingly, Madison explained that “ambition must be made to counteract ambition,” through the use of checks to thwart power struggles inherent in the political system. As a result of these concerns, the Framers divided power among the executive, legislative, and judicial branches to assure their existence as independent and co-equal entities, with no branch possessing “directly or indirectly, an overruling influence over the others, in the administration of their powers.”²⁴

From this emphasis on a checks and balances model, it is evident that the Framers recognized the need for interplay among the branches. Such an appreciation is manifested in the Constitution, which “by no means contemplates a total separation of each of [the] three essential branches of government.”²⁵ As was noted by the Supreme Court, this fact illuminates the role of the Framers as pragmatic politicians who saw the separation of powers doctrine as an essential tool against tyranny, while at the same time realizing that “a hermetic sealing off of the three branches of government from one another would preclude establishment of a nation capable of governing itself effectively.”²⁶ This model is based, in part, upon Montesquieu’s notion of implementing positive, as well as negative checks.²⁷ The effect of such an allocation, according to the theory, would be to allocate specific and independent functions, while creating a level of interdependence to prevent a particular branch from abusing the power of its core functions. This maxim has manifested itself in separation of powers jurisprudence, with Justice Jackson’s statement that “while the Constitution diffuses power the better to secure liberty, it also contemplates that

²²The Federalist Papers, No. 48, at 301 (J. Madison).

²³Vile, *supra* note 9, at 153-160.

²⁴The Federalist Papers, No. 48, at 308 (J. Madison).

²⁵*Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

²⁶*Id.*

²⁷Vile, *supra* note 9, at 93.

practice will integrate the dispersed powers into a whole government. It enjoins upon its branches separateness, but interdependence, autonomy but reciprocity.”²⁸

With this view of the doctrine, the Framers of the Constitution developed a separation of powers model which avoided imposing rigid barriers between the arms of government, leading to a system which would allow for efficient and effective governance. The independence and interdependence created by this system can be appreciated by analyzing the interaction among the three branches of government.

Separation and Branch Independence

Building upon the notion that certain governmental functions should be under the exclusive control of a particular branch, the Constitution establishes, explicitly and implicitly, the independence and separation of the branches. This is seen in the speech or debate clause, which provides for the “independence and integrity of the legislature,” and also “reinforce[s] the separation of powers...”²⁹ The purpose of the clause was to “prevent intimidation by the executive and accountability before a possibly hostile judiciary.”³⁰ There are other specific grants of pure legislative authority, such as Art. I, § 5, which mandates that each House judge the election, returns, and qualifications of its members, to make rules governing its own proceedings, and to maintain the confidentiality of such proceedings. To further assure the separation of the branches, Art. I, § 2, prohibits any individual from holding an executive office while also serving in Congress.

Similar autonomy may also be found in the executive branch, where the Supreme Court has recognized absolute presidential immunity from civil liability for official acts, as well as a qualified executive privilege to maintain the “confidentiality of presidential communications [which] derives from the supremacy of the executive branch within its assigned area of constitutional responsibilities.”³¹ This independence is further illustrated by the constitutional precept that the President may only be removed from office through impeachment.³²

The judiciary also exercises certain powers outside the purview of the other branches, with the Court recognizing “clear institutional protections” contained in the Constitution guaranteeing judicial independence.³³ Among these protections is the right of judges under Art. III, § 1, to “hold their offices during good behavior,” and to “receive for their services a compensation, which shall not be diminished during their continuance in office.”

²⁸*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

²⁹*United States v. Johnson*, 383 U.S. 169, 178 (1966).

³⁰*Id.* at 181.

³¹See *Nixon v. Fitzgerald*, 457 U.S. 731 (1983); *Nixon v. Administrator of General Services*, 433 U.S. 425, 447 (1977).

³²U.S. Const. art. II, sec. 4.

³³*Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982).

Branch Interdependence: Checks and Balances

While the aforementioned provisions identify core protections under the doctrine, it again must be stressed that the Constitution “by no means contemplates total separation of each of these three essential branches of government.”³⁴ Rather, as was noted by Justice Story, while power is diffused under the doctrine in order to protect liberty, the Constitution contemplates that practice will integrate the dispersed powers into a workable government.³⁵ It is through this structure of checks and balances that the Constitution prevents the aggrandizement of a particular branch, namely by giving each arm of government “a degree of overlapping responsibility, a duty of interdependence as well as independence.”³⁶

Employing this maxim, the Constitution contains express provisions establishing such interaction among the branches. For example, laws passed by Congress are subject to veto by the President, which may be overruled by a supermajority vote of both Houses.³⁷ The Vice President serves as President of the Senate and possesses the power to break ties in that body.³⁸ This quasi-symbiotic relationship is also apparent in the impeachment context. Specifically, Congress possesses the power to remove the President, Vice President, and civil officers of the United States.³⁹ However, while the House has the sole power of impeachment, and the Senate has the sole power to try and convict in impeachment proceedings, the Chief Justice presides over trial of the President.⁴⁰ The independence of the judiciary is maintained in the same fashion, as judges are removable only upon impeachment, and their salaries may be increased, but not diminished, by an act of Congress, subject to presidential veto.⁴¹ Furthermore, while the President possesses authority to make treaties and appoint officers, including independent judicial officials, this power is contingent upon the advice and consent of the Senate.⁴² Additionally, the President, as Commander in Chief, possesses the authority to commit troops, while Congress alone has the power to declare war and raise and support the armed forces.⁴³ Finally, while the House and Senate may set their own rules and time of adjournment, the President has the power to convene either or both houses “on extraordinary occasions,” and in the event that

³⁴*Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

³⁵*Youngstown*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

³⁶*Mistretta v. United States*, 488 U.S. 361, 381 (1989).

³⁷U.S. Const. art. I, § 7, cl. 2.

³⁸U.S. Const. art. I, § 3, cl. 4.

³⁹U.S. Const. art. II, § 4.

⁴⁰U.S. Const. art. I, § 2; § 3, cl. 5.

⁴¹U.S. Const. art. II, § 2; art. III, § 1.

⁴²U.S. Const. art. II, § 2.

⁴³U.S. Const. art. I, § 8; art. II, § 2.

the House and Senate disagree on the proper time of adjournment, the President may “adjourn them to such time as he shall think proper.”⁴⁴

Interpretation of the Doctrine

From the above examples, it is evident that the separation of powers doctrine fashioned in the Constitution assigns clear rights and duties to the three branches of government, providing a framework for their exercise of power. However, it is also apparent that the express language of the Constitution does not provide a definitive exposition of the doctrine’s principles. While the first three articles of the Constitution define the branches of government and delineate their respective functions, the full scope and effect of the provisions are not explained.⁴⁵ Furthermore, while the provisions discussed above are useful in illustrating the general doctrine and the checks and balances dynamic, it has become evident that there are numerous issues implicating the separation of powers doctrine which fall outside the definitional boundaries contained in the Constitution.

Because of the nebulous parameters of the separation of powers doctrine, the Supreme Court has often been called upon to clarify its scope, a task which has become more and more common with the increase in the administrative nature of governmental activity.⁴⁶ In attempting to determine whether the separation of powers doctrine has been violated in a particular case, the Court has developed two main analytical frameworks by which it scrutinizes the allocation of power among the branches. Referred to as functionalism and formalism, these approaches share a common concern regarding the allocation of power and branch aggrandizement, but differ greatly in their views regarding the scope of the doctrine and the extent to which governmental functions may be intermingled.⁴⁷

A formalist approach to the consideration of separation of powers issues focuses upon the text of the Constitution in an effort to ascertain to what degree branch powers and functions may be intermingled. Specifically, the crux of formalism is that the power delegated to a branch should be exercised exclusively by that branch, as “the Constitution sought to divide the delegated powers of the new federal government into three defined categories: Legislative, Executive, and Judicial.”⁴⁸ Accordingly, formalism mandates a textual analysis of the Constitution as a sort of bright line test to identify action which unconstitutionally encroaches upon or aggrandizes the power of a particular branch.⁴⁹ The effect of this approach is to ascertain whether the activity in question is judicial, executive, or legislative in nature,

⁴⁴U.S. Const. art. I, § 3, cl. 4; art. I, § 5, cl. 1, cl. 4.

⁴⁵*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992).

⁴⁶See Jonathan L. Entin, Congress, the President and the Separation of Powers: Rethinking the Value of Litigation, 42 Admin. L. Rev. 31 (1991).

⁴⁷Peter R. Strauss, Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency? 72 Cornell L. Rev. 488, 489 (1987).

⁴⁸*INS v. Chadha*, 462 U.S. 919, 951 (1983).

⁴⁹See *Myers v. United States*, 272 U.S. 52 (1926); *INS v. Chadha*, 462 U.S. 919 (1983).

and to circumscribe power which extends beyond the constitutionally assigned functions of a particular branch. Stated differently, the Court looks to see if there is a clear and explicit textual commitment of a power or function to one branch.

Contrary to formalism's textual focus, a functionalist approach to separation of powers issues centers on the notion that precise definitional boundaries cannot serve as a basis for the resolution of separation of powers issues. This premise was explained by Justice Jackson, who stated that "the actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."⁵⁰ Thus, a functionalist approach permits the sharing of power between branches, concerning itself mainly with the preservation of the core function of a particular branch where there has been no exclusive textual commitment to a particular branch.⁵¹

This notion of a core function derives from the functionalist theory that the Constitution ascribes a unique and essential power to each branch of government, which must be protected from usurpation by the competing branches. This concept of a core function is more flexible than the definitional boundaries imposed by the formalist approach. Branches may exercise the powers of another, so long as the ability of the original branch to exercise such power is not impaired.⁵² Essentially, the functionalist approach does not hinge on textual commitments, focusing instead on the actual effect of the exercise of power and the determination of whether such action impinges upon a core function of a coordinate branch.⁵³

Application of the Doctrine

In addition to the independent powers and checks and balances discussed above, the separation of powers doctrine also plays a significant part in defining the roles of the respective branches in the legislative process. This aspect of the doctrine manifests itself in the executive branch through the authority to advocate a legislative agenda which is deemed "necessary and expedient," as well as in the ability of the President to exercise veto power over bills passed by both Houses.⁵⁴ The Court has expounded upon the importance of the presidential veto power, noting that this ability serves as a prophylactic against legislation which runs contrary to the public good and allows the President to preserve the authority and power of the executive branch from legislative aggrandizement.⁵⁵

In keeping with the aims of the doctrine, however, the presidential veto power is not absolute and cannot serve as a method by which the executive branch may

⁵⁰*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring).

⁵¹See *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

⁵²See *Morrison v. Olson*, 487 U.S. 654 (1988).

⁵³Strauss, *supra* note 45, at 489.

⁵⁴U.S. Const. art. I, sec. 7, cl. 2; art. II, sec. 3.

⁵⁵*INS v. Chadha*, 462 U.S. at 947-948; *Pocket Veto Case*, 279 U.S. 655, 678 (1929).

summarily block bills passed by Congress. Specifically, the Constitution imbues the legislative branch with the power to override a presidential veto with a two-thirds majority. Illustrating the effect of the checks and balances structure, though, is the accompanying restriction that Congress may not circumvent the veto power by passing legislation objectionable to the executive branch and adjourning before the President has an opportunity to reject the bill. Specifically, the President possesses the authority to exercise a “pocket veto” in the event that congressional adjournment precludes the possibility of returning a measure to Congress.⁵⁶ Similarly, the Court has not allowed Congress to abdicate its lawmaking power by expanding the President’s veto power.⁵⁷

A. Limitations on Executive Power.

From the aforementioned provisions, it is evident that the Constitution protects the interests of the executive branch by bestowing upon the President the ability to intervene in the legislative process. It is important to note, however, that presidential ability to impact upon legislative functions is limited. It is well established, for instance, that the President may not encroach upon the lawmaking powers of the legislative branch through the issuance of executive orders. This issue was addressed in *Youngstown Sheet & Tube Co. v. Sawyer*, where the Supreme Court was faced with an attempt by the executive branch to usurp the legislative power of Congress.⁵⁸ In *Youngstown*, the Court dealt with President Truman’s executive order directing the seizure of steel mills, in an effort to avert the effects of a workers’ strike during the Korean War. Invalidating this action, the majority held that under the Constitution, “the President’s power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁵⁹ Specifically, Justice Black maintained that Presidential authority to issue such an order “must stem either from an act of Congress or from the Constitution itself.”⁶⁰ Applying this formalist reasoning, Justice Black’s opinion for the Court determined that as no statute or Constitutional provision authorized such presidential action, the seizure order was in essence a legislative act. The Court further noted that Congress had rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act.⁶¹ Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation of powers doctrine, explaining “the founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.”⁶²

⁵⁶U.S. Const. art. I, sec. 7, cl. 2. *See also, Burke v. Barnes*, 479 U.S. 361, 362 (1987).

⁵⁷See note 73, *infra*.

⁵⁸343 U.S. 579 (1952).

⁵⁹*Id.* at 587.

⁶⁰*Id.* at 585.

⁶¹*Id.* at 586.

⁶²*Id.* at 589. Most recently, the United States Court of Appeals for the District of Columbia invalidated an executive order issued by President Clinton on the grounds that the order conflicted with the National Labor Relations Act (NLRA). *Chamber of Commerce v. Reich*, 74 F.3d 1322 (1996). Specifically, the order at issue prohibited federal agencies from
(continued...)

While Justice Black's majority opinion in *Youngstown* seems to refute the notion that the President possesses implied constitutional powers, it is important to note that there were five concurrences in the case, four of which maintained that implied presidential authority adheres in certain contexts.⁶³ Of these concurrences, Justice Jackson's has proven to be the most influential, even surpassing the impact of Justice Black's majority opinion. Specifically, Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.⁶⁴

Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."⁶⁵ Secondly, Justice Jackson maintained that, in situations where Congress has neither granted or denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁶⁶ In the third and final category, Justice Jackson stated that in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum, and any such action may be supported pursuant to only the President's "own constitutional powers minus any constitutional powers of Congress over the matter."⁶⁷ In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject."⁶⁸

Applying this scheme to the case at hand, Justice Jackson determined that analysis under the first category was inappropriate, due to the fact that President Truman's seizure of the steel mills had not been authorized by Congress, either implicitly or explicitly.⁶⁹ Justice Jackson also determined that the second category was "clearly eliminated," in that Congress had addressed the issue of seizure, through

⁶²(...continued)

contracting with employers that permanently replaced striking employees. *Id.* at 1324. Upon determining that the order conflicted with a provision of the NLRA guaranteeing the right to hire permanent replacements during strikes, the court of appeals held that the statute preempted the executive order, stripping it of any effect. *Id.* at 1339.

⁶³*Id.* at 659 (Burton, J., concurring); *Id.* at 661 (Clark, J., concurring in result only); *Id.* at 610 (Frankfurter, J., concurring); *Id.* at 635 (Jackson, J., concurring).

⁶⁴*Id.* at 635-638.

⁶⁵*Id.* at 635, 637.

⁶⁶*Id.* at 637.

⁶⁷*Id.* at 637.

⁶⁸*Id.* at 637-638.

⁶⁹*Id.* at 638.

statutory policies conflicting with the President's actions.⁷⁰ Employing the third category, Justice Jackson noted that President Truman's actions could only be sustained by determining that the seizure was "within his domain and beyond control by Congress."⁷¹ Justice Jackson established that such matters were not outside the scope of congressional power, reinforcing his declaration that permitting the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."⁷²

Further proscriptions of Presidential power may be found in the Court's consideration of the constitutionality of the line item veto. In *Clinton v. City of New York*, the Court addressed the question of whether the provisions of the Line Item Veto Act conflicted with the separation of powers doctrine by violating the Presentment Clause of the Constitution.⁷³ Specifically, the Act imbued the President with the power to cancel provisions of certain spending laws, such as specific dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits. The President could cancel such provisions within five days of having signed them into law, if he determined that such cancellation would serve to reduce the budget deficit, not impair essential government functions, and not harm the national interest.⁷⁴

Addressing these provisions, the Court noted that the practical effect of the Act was to give the President the power to repeal legislation enacted by Congress.⁷⁵ This power conflicted with the Constitution, according to the Court, as the President does not possess the authority to amend or repeal legislation. Rather, as the Court explained, the Presentment Clause dictates that upon being passed by both Houses of Congress, a bill becomes a law only when approved and signed by the President.⁷⁶ The Court stressed that constitutional silence regarding presidential repeals functioned as an express prohibition on such activity. Clarifying this statement, the Court explained that the Article I procedure for statutory enactment resulted from the "great debates and compromises that produced the Constitution itself."⁷⁷ Accordingly, the Court emphasized that the enactment power could only "be exercised with a single, finely wrought and exhaustively considered, procedure."⁷⁸ Given this maxim, the Court determined that the Act authorized the President to essentially create a law which had not been voted upon by either House or presented to the President for approval and

⁷⁰*Id.* at 639.

⁷¹*Id.* at 640.

⁷²*Id.* at 638, 640-645.

⁷³118 S.Ct. 2091, 2102 (1998).

⁷⁴*Id.* at 2102.

⁷⁵*Id.* at 2103.

⁷⁶*Id.* at 2103.

⁷⁷*Id.* at 2103.

⁷⁸*Id.* at 2104, quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983).

signature. As such, the Court ruled that the Act violated the Presentment Clause of Article I, and could not stand.⁷⁹

The Supreme Court has also ruled that the separation of powers doctrine does not preclude private legal action against the President. In *Clinton v. Jones*, the Court addressed the question of whether the federal courts were constitutionally required to stay all private actions against the President until his vacation of office. Acknowledging the “unique importance of the Presidency in the constitutional scheme,” the Court nonetheless determined that the doctrine would not be implicated by allowing a private action to proceed. The Court explained that the proscriptions of the doctrine serve as a “safeguard against the encroachment or aggrandizement of one of three equal branches of Government at the expense of another.”⁸⁰

Specifically, the Court noted that there was no evidence or suggestion that the federal judiciary would be exercising, let alone encroaching upon, any executive functions. Rather, the Court declared that the judiciary’s decision to allow the procession of private legal action would merely be an exercise of the Court’s Article III jurisdiction to decide cases and controversies. Accordingly, no likelihood of executive curtailment could be said to exist. The Court dismissed arguments that permitting such private actions would place unacceptable burdens on the President’s ability to perform his official duties, noting that there was no historical or evidentiary foundation for such a concern. Furthermore, the Court explained that the Judiciary’s power to review the legality of Presidential conduct would outweigh any such concern.⁸¹ Because of these factors, the Supreme Court concluded its analysis, holding that “it must follow that the federal courts have power to determine the legality of the President’s unofficial conduct.”

B. Legislative Delegation, Bicameralism/Presentment and Appointment and Removal Requirements.

The Supreme Court has also dealt with constitutional limits upon the power of Congress in the exercise of its legislative duties, focusing primarily on the Bicameralism and Presentment Clause and the Appointments Clause, as well as the non-delegation doctrine.

⁷⁹118 S.Ct. at 2107. Having determined that the Act was violative of the Presentment Clause, the Supreme Court declared that there was no need to consider its legitimacy on delegation grounds. *Id.* at 2094. However, the United States District Court for the District of Columbia had previously noted that, in addition to violating the Presentment Clause, the Act also implicated the separation of powers doctrine by bestowing excessive rulemaking authority upon the President. *City of New York v. Clinton*, 985 F.Supp. 168, 181 (D.D.C. 1998). Specifically, the district court explained that by allowing the President to strike provisions of an enacted law, the Act gave the President the power to “permanently shape laws and package legislation” *Id.* Noting that the exercise of such an “inherently legislative function” would be in fundamental conflict with the President’s duty to faithfully execute the laws, the district court declared that the Act was unconstitutional. *Id.*

⁸⁰520 U.S. 681, 682 (1997), citing *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

⁸¹520 U.S. at 682. The Court also pointed to the Judiciary’s authority to direct appropriate process to the President. *Id.* at 682, citing *United States v. Nixon*, 418 U.S. 683 (1974).

The non-delegation doctrine establishes that, in order to assure the "integrity and maintenance of the system of government ordained by the Constitution," Congress may not make a general delegation of its legislative power to another Branch.⁸² Because of the need for assistance from the coordinate Branches, however, the Court has allowed legislative delegation where Congress lays down "by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform..."⁸³

Because of the pragmatic necessities of government, the Court has granted broad power to Congress to delegate legislative authority to the coordinate branches.⁸⁴ Indeed, the Court has invalidated such grants of authority only in two instances, where it was determined that Congress had improperly delegated its Article I legislative power to the executive branch by imbuing it with the ability to make unfettered law and policy decisions.⁸⁵ Based upon "Congress' ability to delegate power under broad standards," concern over such legislative grants of authority does not center on the mere act of delegation, but rather on congressional abdication of core legislative functions.⁸⁶ As such, the practical effect of the intelligible principle maxim is to require that Congress, not the delegee, render the underlying policy decision and delineate reasonable legal standards for its enforcement, so as to avoid separation of powers conflicts.⁸⁷

Regarding bicameralism and presentment, while express provisions in the Constitution establish identifiable parameters for the satisfaction of the clause, the increasingly delegated quality of governmental activity has raised questions regarding the extent to which legislative and executive functions may be intermingled. Specifically, the procedural requirements of Article I dictate that "every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States."⁸⁸ The Supreme Court addressed the clause as it relates to the separation of powers doctrine in *INS v. Chadha*.

In *Chadha*, the Court analyzed the Immigration and Nationality Act, which granted to Congress the power to exercise a legislative veto over decisions made by the Attorney General under the Act. Specifically, the Act enabled Congress to

⁸²*Field v. Clark*, 143 U.S. 649, 692 (1892). See also, *Mistretta v. United States*, 488 U.S. 361, 371-372 (1988).

⁸³*J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁸⁴*Id.* at 373.

⁸⁵See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁸⁶*Panama Refining Co.*, 293 U.S. at 415.

⁸⁷See *Mistretta v. United States*, 488 U.S. at 371-375. The Court has recognized the ability of a delegee agency to formulate the necessary intelligible principle, or guiding, confining, standard if Congress has not done so itself in the enabling legislation. See, e.g., *Lichter v. United States*, 334 U.S. 742 (1948).

⁸⁸U.S. Const. art. I, sec. 7, cl. 2.

overrule deportation decisions by the passage of an appropriate resolution by one House of Congress.⁸⁹ The Court noted that a legislative veto constituted an exercise of legislative power, as its use has “the purpose and effect of altering the legal rights, duties, and relations of persons...outside the legislative branch.”⁹⁰ As such, the Court concluded that a legislative veto could only be exercised in comportment with the bicameralism and presentment requirements of Article I.⁹¹ Given that the statute permitted either House of Congress to execute a legislative veto, the Court determined that the provision was an unconstitutional violation of the separation of powers doctrine.⁹²

With its decision in *Chadha*, the Supreme Court established that Congress may exercise its legislative authority only “in accord with a single, finely wrought and exhaustively considered procedure,” namely bicameral passage and presentation.⁹³ This formal stance by the Court evidences the traditional concern regarding the potential aggrandizement of the legislative branch. As was noted by the Court in *Chadha*, the Constitution places specific limits on Congress as a result of “the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.”⁹⁴ Accordingly, the judiciary’s concern with preventing legislative aggrandizement has led to its review of other cases where Congress has departed from the express practices delineated in the Constitution. In this context, particular attention has been paid to congressional encroachment upon the President’s removal and appointment powers, as well as legislative attempts to enforce the laws.

In *Myers v. United States*, for instance, the Supreme Court addressed the President’s summary dismissal of a postmaster from office, in contravention of a statute requiring that the President obtain the advice and consent of the Senate prior to removal.⁹⁵ In its disposition of the case, the Court ruled that the President possesses plenary authority to remove presidentially appointed executive officers who have been confirmed by the Senate.⁹⁶ The Court went on to explain that the President has plenary removal power over other executive officers, so long as Congress does not expressly provide otherwise.⁹⁷ The Court further clarified the scope of the appointment power, noting that while Congress can imbue cabinet officers with the

⁸⁹*INS v. Chadha*, 462 U.S. 919, 923 (1983).

⁹⁰*Id.* at 952.

⁹¹*Id.* at 954-955.

⁹²*Id.* at 954-955.

⁹³*Id.* at 951.

⁹⁴*Id.* at 947.

⁹⁵272 U.S. 52, 106-107 (1926).

⁹⁶*Id.* at 175-176.

⁹⁷*Id.* at 161.

power to appoint inferior officers and place restrictions upon their removal, it may not involve itself directly in the removal process.⁹⁸

While the decision in *Myers* seemed to establish clear limitations on the ability of Congress to interfere with the President's appointment and removal power, the Supreme Court, in *Humphrey's Executor v. United States*, employing functionalist analysis, unanimously upheld a law proscribing the President's ability to remove an agency official.⁹⁹ Specifically, the Court addressed a provision of the Federal Trade Commission Act which provided that the President could remove an FTC commissioner only on the basis of inefficiency, neglect of duty, or malfeasance in office.¹⁰⁰ Distinguishing the case at hand, the Court held that *Myers* was limited to "purely executive officers," and could not include officers not in the executive department and those who exercised "no part of the executive power vested by the Constitution in the President."¹⁰¹ Explaining that the FTC was not an executive body, but rather functioned as a "quasi-legislative or quasi-judicial" agency, the Court ruled that Congress possessed the authority to control the terms of removal for such officers.¹⁰²

This functional approach to removal questions was extended in *Morrison v. Olson*, where the Supreme Court clarified that the proper inquiry regarding removal power questions should focus not on an officer's status as either "purely" executive, "quasi-legislative," or "quasi-judicial," but, rather, on whether a removal restriction interferes with the ability of the President to exercise executive power and to perform his constitutional duty.¹⁰³ Applying this maxim to the independent counsel statute, which placed removal power in the Attorney General, the Court found that, while imbued with the power to perform law enforcement functions, the independent counsel lacked significant policymaking or administrative authority. As such, the Court determined that removal power over the independent counsel was not essential to the President's successful completion of his constitutional duties.¹⁰⁴

In *Buckley v. Valeo*, the Court analyzed provisions of the Federal Election Campaign Act of 1971, which established a six member Federal Election Commission

⁹⁸*Id.* at 161.

⁹⁹295 U.S. 602 (1935).

¹⁰⁰*Id.* at 619-620.

¹⁰¹*Id.* at 627-628.

¹⁰²*Id.* at 628-629. The duties of the commission included conducting investigations and making pertinent reports to Congress, as well as acting as "a master in chancery under rules prescribed by the court." *Id.* Accordingly, the Supreme Court ruled that the legislative and judicial functions envisioned by the statute necessarily placed the FTC outside the scope of complete executive control. *Id.*

¹⁰³487 U.S. 654 (1988). *See also, The Constitution of the United States of America, Analysis and Interpretation*, S.Doc. 103-6, 103rd Cong., 1st Sess., 530-531 (1996). For a more detailed discussion of this case, see note 121 and accompanying text, *infra*.

¹⁰⁴*Id.* at 531.

to oversee federal elections.¹⁰⁵ Specifically at issue was the congressionally mandated composition of the Commission, which was to consist of six voting members. Under the statute as passed by Congress, two members would be appointed by the Speaker of the House, two by the president pro tempore of the Senate, and two by the President, subject to confirmation by both Houses of Congress.¹⁰⁶ Chief among the duties of the Commission was the imposition of penalties upon individuals or organizations that violated provisions of the Act.¹⁰⁷ Given the substantial duties assigned by law to the Commission, the Court determined that it was an executive body. Noting that it is “to the President and not to the Congress, that the Constitution entrusts the responsibility to ‘take care that the laws be faithfully executed,’” the Court explained that the statute violated the Appointments Clause, which requires appointment of “Officers of the United States” by the President, contingent upon confirmation by the Senate.¹⁰⁸ Thus, as it did in *Chadha*, the Court in *Buckley* employed a formalistic approach to the Separation of Powers doctrine. Whereas *Chadha* established that Congress could not circumvent the bicameralism and presentment requirements of Article I through the use of a legislative veto, *Buckley* limited Congress’ ability to direct the composition of executive bodies in contravention of the express provisions of the Appointment Clause.

In addition to limiting the ability of Congress to depart from the strictures of its legislative function or to exercise power beyond the scope of the appointments clause, the Constitution also limits the ability of the legislative branch to encroach upon the core functions of the other branches. In keeping with this principle, the Court has carefully proscribed legislative attempts to extend its power into the executive branch. In *Bowsher v. Synar*, for instance, the Court interpreted the Separation of Powers doctrine as it applied to the Gramm-Rudman Deficit Reduction Act.¹⁰⁹ Under the Act, the Comptroller General was empowered to review deficit estimates from the Office of Management and Budget and the Congressional Budget Office, and to mandate spending reductions to meet a specified deficit level. This report by the Comptroller General would then be forwarded to the President who was required to issue an order enforcing the spending reductions. The order would become effective unless Congress passed legislation which reduced spending to meet deficit estimates. Furthermore, the Comptroller General could only be removed by Congress, via a joint resolution.¹¹⁰

The Supreme Court found that the Act imbued the Comptroller General, an official appointed by the President, but removable by Congress, with the power to interpret provisions of the Act, and to dictate the means by which the executive branch implemented budget reduction measures.¹¹¹ Accordingly, the Court determined that the Comptroller General, a legislative branch officer, was, in essence, performing

¹⁰⁵424 U.S. 1 (1976).

¹⁰⁶*Id.* at 113.

¹⁰⁷*Id.* at 111-112.

¹⁰⁸*Id.* at 140-141.

¹⁰⁹478 U.S. 714 (1986).

¹¹⁰*Id.* at 728.

¹¹¹*Id.* at 728.

the functions of an executive officer in executing a law passed by Congress, a duty constitutionally committed to an officer of the executive branch.¹¹² This dynamic rendered the Act unconstitutional, as the Court explained, because of the maxim that “once Congress makes its choice in enacting legislation, its participation ends.”¹¹³ Subsequent to enactment, Congress may “control the execution of its enactment only indirectly...by passing new legislation.”¹¹⁴ The Court determined that by placing the authority to implement the Act in an officer subject only to congressional removal, Congress in effect “retained control over the execution of the Act” and unconstitutionally “intruded into the executive function.”¹¹⁵

Through its decisions in cases such as *Myers*, *Buckley* and *Chadha*, the Supreme Court relied upon a formal textual interpretation of the Constitution in determining that Congress violates the separation of powers doctrine when it attempts to directly or indirectly enforce the laws, or exercise appointment or removal power over officers charged with executing the law. It is important to note, however, that concern regarding legislative aggrandizement extends beyond congressional activity which implicates explicit provisions in the Constitution. Specifically, the Supreme Court has been careful to proscribe congressional activity which would influence interbranch relations contrary to the doctrine.

In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, the Court reviewed the congressional establishment of a Board of Review over the Metropolitan Washington Airports Authority, a compact between the District of Columbia and Virginia. The Authority selected its own members, but was bound by congressional mandate to select members of Congress to serve on the review board.¹¹⁶ Specifically, the statute in question subjected the Airports Authority “to the veto power of” the Board of Review, and stated that Members of Congress served “in their individual capacities.”¹¹⁷ The Court determined that irrespective of the statute’s claim that Members did not act in their official capacities, the Board of Review in fact acted as an agent of Congress, giving the legislative branch de facto control over the operations of the Airports Authority. As such, the Court concluded that the veto power was an unconstitutional aggrandizement of legislative power.¹¹⁸

This focus on limiting congressional ability to exercise power beyond the traditional scope of the legislative branch was further illustrated in *Hechinger v. Metropolitan Washington Airports Authority*.¹¹⁹ In *Hechinger*, the Court of Appeals for the District of Columbia addressed continued congressional attempts to exert influence over the Airports Authority. Specifically, Congress, subsequent to the

¹¹²*Id.* at 733.

¹¹³*Id.* at 733.

¹¹⁴*Id.* at 734.

¹¹⁵*Id.* at 734.

¹¹⁶501 U.S. 252, 268-269 (1991).

¹¹⁷*Id.* at 270.

¹¹⁸*Id.* at 275-277.

¹¹⁹36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

Supreme Court’s rejection of the review board scheme in the original case, created another board of review which possessed only the power to delay the Airports Authority’s decision making and implementation process. Such a distinction from the veto power of the original case was deemed irrelevant, as the court determined that the purpose of the board was to influence the Authority’s decision making process. Accordingly, the court held the statute unconstitutional, as such an extension of legislative power was an impermissible aggrandizement under the doctrine.¹²⁰

However, in keeping with the Framers’ belief that a flexible doctrine was necessary to allow for effective governance, the Supreme Court has departed from a formal interpretation of the separation of powers principle in circumstances where legislative power is not extended to the detriment of the other branches. In *Morrison v. Olson*, for instance, the Court addressed the constitutionality of the independent counsel statute. Specifically, Congress provided for the appointment of an independent counsel, charged with the investigation of government officials suspected of illegal activity, as well as for their subsequent prosecution.¹²¹ As passed by Congress, the statute further provided that an independent counsel “may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.”¹²²

It was argued that the removal provision violated the separation of powers doctrine by interfering with the President’s removal power. In its disposition of the issue, the Court distinguished *Morrison* from *Bowsher v. Synar*, explaining that whereas Congress had usurped executive branch authority in *Bowsher* by retaining control over the removal of the Comptroller General, the independent counsel statute belied no such congressional intent and, in fact, placed “removal power squarely in the hands of the Executive Branch.”¹²³ This was significant in that while the statute impinged upon the free exercise of executive power, such limitation was necessary to ensure the independence of the office of the independent counsel, so as to avoid what Congress perceived as possible conflicts of interest in Department of Justice

¹²⁰The Court of Appeals for the District of Columbia had, shortly prior to *Hechinger*, addressed a similar question regarding impermissible congressional influence outside of the legislative branch. In *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 115 S.Ct. 537 (1994), the court deemed unconstitutional a provision of the Federal Election Campaign Act, which mandated that two Members of Congress were to serve on the Federal Election Commission “ex officio and without the right to vote.” In rejecting arguments that the membership requirement was permissible in that it provided for an advisory and informational role, the court explained that the purpose of the membership requirement was to influence the Commission by placing congressional agents “beyond the legislative sphere,” in violation of the separation of powers doctrine.

¹²¹487 U.S. 654, 660 (1988).

¹²²*Id.* at 663.

¹²³*Id.* at 686.

enforcement policy.¹²⁴ Accordingly, the Court determined that the doctrine had not been violated, as the statute did not usurp the removal power of the executive branch. Rather, the statute protected the independence of the office while imbuing the Attorney General with sufficient authority to protect the “President’s ability to perform his constitutional duty.”¹²⁵

From these decisions, it is apparent that the doctrine was carefully crafted to confine Congress to its legislative role. As has been shown, the separation of powers principle, as delineated in the Constitution, prevents congressional attempts to enforce the laws which it enacts, and prohibits interference with the President’s power of appointment or removal.¹²⁶ This dynamic is further evidenced in the judiciary’s refusal to grant standing to individual Members of Congress wishing to pursue declaratory or injunctive relief for alleged executive branch failings in enforcing laws pursuant to legislative intent.¹²⁷ However, either House of Congress, as well as individual Members, may have standing to challenge executive encroachment upon the legislative functions of Congress.¹²⁸ Further illustrating the doctrine’s focus on checks and balances, these limitations are also offset by the ability of Congress to investigate

¹²⁴*Id.* at 693.

¹²⁵*Id.* at 691. In cases employing such functional reasoning, the Court utilizes the balancing test formulated in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). There, the Court explained that in determining whether a particular Act “disrupts the proper balance between the coordinate branches,” the inquiry should focus on the extent to which it impinges upon a core function of a branch, interfering with accomplishment of a constitutionally assigned function. *Id.* at 443. It is only upon ascertaining the potential for such infringement that the Court will then weigh the impact of the disruption to determine whether it is justified by an “overriding need to promote objectives within the constitutional authority of Congress.” *Id.* at 443.

¹²⁶See note 89 and accompanying text, *supra*.

¹²⁷See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997); *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); *Harrington v. Bush* 553 F.2d 190 (D.C. Cir. 1977).

¹²⁸See *Barnes v. Kline*, 479 U.S. 361 (1987). In *Barnes*, the Supreme Court declared that the issue of whether particular Members of Congress had standing to challenge a presidential pocket veto was moot, as the bill had expired by its own terms. *Id.* at 364-365. However, Justice Stevens and Justice White dissented, arguing that the Members of Congress possessed the same interest in obtaining a ruling on the merits as they did prior to the bill’s expiration. *Id.* at 365. Specifically, the dissenters argued that there was a significant possibility that Members of Congress did possess standing in such a situation. *Id.* The issue of standing was revisited in *Raines v. Byrd*, 521 U.S. 811 (1997) where individual Members of Congress who had voted against the Line Item Veto Act brought suit alleging that the Act expanded the power of the President in violation of the separation of powers doctrine. See *Supra*, note 71, and accompanying text (discussing Line Item Veto Act). The Court denied the Members standing, explaining that they had “alleged no injury to themselves as individuals,” and that the supposed institutional injury caused by the Act was “wholly abstract and widely dispersed.” *Raines*, 521 U.S. at 821. Justice Stevens, echoing his dissent in *Barnes*, maintained, along with Justice Breyer, that the Members did indeed possess standing. *Id.* at 829.

and oversee execution of the laws by the executive.¹²⁹ In turn, congressional oversight power is circumscribed in certain instances by the executive privilege doctrine, which allows the executive branch to maintain the confidentiality of records and documents under certain circumstances.¹³⁰

C. Judicial Infringement and Aggrandizement.

In addition to delineating the scope of congressional and executive power, the Constitution also protects and prescribes the functions of the judicial branch in relation to the executive and legislative bodies. Indeed, the constitutional separation of powers serves both to protect the core functions of the judiciary, and to prevent judicial review of matters outside its purview.

Regarding matters of jurisdiction, the separation of powers doctrine has served to provide Congress with a degree of control over the Judicial Branch, while preventing the exercise of excessive power over the federal courts. In *Ex Parte McCardle*, for instance, the Supreme Court had exercised jurisdiction over a habeas corpus proceeding pursuant to an Act passed in 1867.¹³¹ While the case was pending, Congress amended the Act, repealing the provision which allowed for an appeal from the judgment of a circuit court to the Supreme Court, and further repealed the jurisdiction of the Supreme Court to hear any such cases.¹³² Pursuant to the congressional amendment, the Supreme Court dismissed the appeal, declaring that there was no question that the repealing of the Act had stripped it of jurisdiction, prohibiting further consideration of the case. Specifically, the Court explained that "jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."¹³³

Tempering this congressional authority, however, is the maxim that Congress may not require "the federal courts to exercise 'the judicial power of the United States,' in a manner repugnant to the text, structure, and traditions of Article III."¹³⁴ As such, in *United States v. Klein*, the Supreme Court struck down a reconstruction statute mandating that no presidential pardon could be introduced or considered in evidence to support a claim for the return of confiscated property.¹³⁵ The statute in question also established that proof of loyalty was to be determined by congressional enactment, and ordered the Supreme Court to dismiss on appeal, for want of jurisdiction, cases which employed other criteria. Finally, the statute declared that a presidential pardon was to be treated as conclusive evidence that a claimant had aided

¹²⁹See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178, 187 (1957).

¹³⁰See, e.g., *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

¹³¹74 U.S. 506 (1868).

¹³²*Id.* at 508.

¹³³*Id.* at 514.

¹³⁴*Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting U.S. Const. art. III, § 1).

¹³⁵*United States v. Klein*, 80 U.S. 128 (1872).

the rebellion, and that any cases predicated upon such a pardon were to be dismissed for lack of jurisdiction.

In its consideration of the statute, the Supreme Court acknowledged Congress' authority over the creation and jurisdiction of inferior federal courts, as well as its power to make exceptions to the appellate jurisdiction of the Supreme Court.¹³⁶ However, the Court determined that the statute withheld appellate jurisdiction only "as a means to an end."¹³⁷ Determining that the statute essentially "prescribe[d] a rule for the decision of a cause in a particular way," the Supreme Court struck down the provisions. In particular, the Court explained that mandating the effect of evidence in a case was outside the scope of congressional authority to "make exceptions and prescribe regulations to the appellate power." By enacting such a statute, according to the Court, Congress had "inadvertently passed the limit which separates the legislative from the judicial power."¹³⁸

The separation of powers doctrine was again employed by the Supreme Court in *Plaut v. Spendthrift Farm, Inc.*, to strike down a statute which encroached upon the power of the judiciary under Article III.¹³⁹ Specifically at issue was §27A(b) of the Securities Exchange Act of 1934, which required federal courts to reopen final judgments in private civil actions under §10(b) of the Act.¹⁴⁰ Noting that "Article III establishes a 'judicial department' with the 'province and duty...to say what the law is' in particular cases and controversies," the Court determined that the Judicial Branch possesses authority under the Constitution to rule on cases "subject to review only by superior courts in the Article III hierarchy."¹⁴¹ Central to this authority, according to the Court, is the understanding that a decision resolves a case conclusively, as an inherent aspect of judicial power is the ability to render dispositive judgments. Upon noting this principle, the Court determined that Congress had violated the separation of powers doctrine "by retroactively commanding the federal courts to reopen final judgments."¹⁴²

In addition to protecting the rights of the legislative and judicial branches in the jurisdictional context, the separation of powers doctrine has also been integral in establishing the extent to which judicial and legislative authority may be intermingled. In *Mistretta v. United States*, for instance, the Court addressed the constitutionality of the United States Sentencing Commission and its congressionally delegated power to issue sentencing guidelines.¹⁴³ The Commission was comprised of seven presidentially appointed members, three of whom were to be sitting federal judges,

¹³⁶*Id.* at 145.

¹³⁷*Id.* at 145.

¹³⁸*Id.* at 146.

¹³⁹514 U.S. 211 (1995).

¹⁴⁰*Id.* at 213.

¹⁴¹*Id.* at 218-219.

¹⁴²*Id.* at 219.

¹⁴³488 U.S. 361, 397 (1989).

chosen from a list submitted by the Judicial Conference.¹⁴⁴ A key issue centered on whether Congress was fostering judicial encroachment upon the executive branch by delegating to a Commission, comprised in part by sitting federal judges, the power to establish sentencing guidelines.¹⁴⁵ Acknowledging that executive or administrative duties may not generally be imposed on the Judicial Branch, the Court clarified this rule, noting that nonadjudicatory responsibilities may be assumed by the Judiciary in certain instances.¹⁴⁶ Specifically, the Court explained that rulemaking is not a "function exclusively committed to the Executive Branch," and may be assigned to the Judicial Branch when "appropriate to the central mission of the Judiciary."¹⁴⁷

Having explained the basis for judicial rulemaking, the Court found "that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling acts."¹⁴⁸ The import of this observation was that the Commission's functions were roughly analogous to the pre-existing role of the judiciary in creating procedural rules. The Court further found that the function of the commission was intimately related to the traditional duty and power of judges to hand down appropriate sentences in individual cases and to "determine the sentencing factors to be applied in any given case."¹⁴⁹ Accordingly, the Court held that the Commission's activities were characteristic of the "acknowledged mission of the Judicial Branch," and did not dilute the power of the executive or legislative branches.¹⁵⁰ As such, the Court determined that the dynamics of the Commission were not violative of the separation of powers doctrine.

Conversely, this pragmatic approach has also been used to justify activity which could be construed as legislative encroachment upon the judicial sphere. In *Commodity Futures Trading Commission v. Schor*, the Court addressed provisions in the Commodity Exchange Act which gave the Commodity Futures Trading Commission the power to exercise judicial authority. Specifically, Congress, in establishing the Commission, gave it broad authority to implement the Act. Accordingly, in an effort to ensure efficient resolution of disputes, the Commission established regulations imbuing it with the power to rule on counterclaims arising from state law claims.¹⁵¹ Explaining that the proper inquiry should center on whether the regulations usurped "essential attributes of judicial power," as well as the factors which led Congress to authorize such a delegation, the Court ruled that the Commission's ability to adjudicate counterclaims did not constitute a sufficient encroachment so as to violate the separation of powers doctrine. Vital to this

¹⁴⁴*Id.* at 368, 383-384.

¹⁴⁵*Id.* at 368.

¹⁴⁶*Id.* at 385-386.

¹⁴⁷*Id.* at 388.

¹⁴⁸*Id.* at 391.

¹⁴⁹*Id.* at 390.

¹⁵⁰*Id.* at 391.

¹⁵¹478 U.S. 833, 857 (1986).

conclusion was the fact that the Commission’s jurisdiction was limited, in that it respected the boundaries of core judicial functions, and allowed for jurisdiction by a federal district court.¹⁵²

While the aforementioned cases illustrate an expansive approach to effective and pragmatic interaction between the judicial and legislative branches, the Supreme Court has acknowledged limitations upon the power of the judiciary to review certain congressional and executive acts. In *Marbury v. Madison*, the Court first originated the political question doctrine, noting that “questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.”¹⁵³ The modern concept of the doctrine was delineated in *Baker v. Carr*, where the Court explained that a political question adheres when an issue is demonstrably committed to a political body by the text of the Constitution, where effective judicial standards are absent, where a non-judicial policy determination is necessary for disposition, where the Court’s decision of an issue would impinge upon the respect owed to the other branches, where unique circumstances call for adherence to a previously made political decision, or, finally, where differing opinions from various departments could lead to confusion and embarrassment.¹⁵⁴

Applying these principles to a case involving an appeal by an impeached federal judge, the Supreme Court elaborated upon the parameters of judicial review. Specifically, in *Nixon v. United States*, the Court was asked to consider whether it was constitutional for the Senate to employ a special trial committee in impeachment proceedings, as opposed to conducting a full trial before the entire Senate.¹⁵⁵ The argument before the Court was that the Senate rule authorizing the use of trial committees was in violation of the Article I requirement that the full Senate “try” impeachments.¹⁵⁶ The Court determined that the term “try” did not constitute an “implied limitation on the method by which the Senate might proceed in trying impeachments,” and, furthermore, lacked “sufficient precision to afford any judicially manageable standard of review of the Senate’s actions.”¹⁵⁷ This was especially so in light of the express limitations of the Impeachment Trial Clause requiring that Members act under oath, that the Chief Justice preside over trials of the President, and that conviction rest upon a two-thirds vote.¹⁵⁸

With this understanding of the clause, the Court stated that judicial review would be inappropriate, as it would conflict with the Framers’ intent to vest impeachment trial power in the Senate. Furthermore, the Court explained that judicial review would upset the checks and balances dynamic, which, in the form of impeachment, serves as

¹⁵²*Id.* at 853.

¹⁵³5 U.S. 137, 170 (1803).

¹⁵⁴369 U.S. 186, 217 (1962).

¹⁵⁵*Nixon v. United States*, 506 U.S. 224, 228 (1993).

¹⁵⁶U.S. Const. art. I, § 3, cl. 6.

¹⁵⁷*Nixon*, 506 U.S. at 230.

¹⁵⁸*Id.*

the only legislative check on the judiciary.¹⁵⁹ Finally, the Court deemed such a question non-justiciable, as review thereof would result in a “lack of finality and a difficulty in fashioning relief.”¹⁶⁰

The checks and balances concept is further illustrated in *United States v. Munoz-Flores*, where the Court determined that the judicial branch possesses authority under the constitutional separation of powers doctrine to review Origination Clause issues.¹⁶¹ In *Munoz-Flores*, the Court addressed the argument that the order of a federal magistrate requiring the respondent, convicted of two misdemeanor offenses, to pay an assessment to the Crime Victims Fund as established by the Victims of Crime Act of 1984 violated the Origination Clause of the Constitution. Specifically, the argument centered on the assertion that as the assessment provision had originated in the Senate, it violated the Origination Clause requirement that “all Bills for raising revenue shall originate in the House of Representatives.”¹⁶²

Prior to addressing the merits of the argument, the Court responded to assertions that the separation of powers doctrine precluded judicial review of Origination Clause conflicts. The government argued that the question was outside the scope of review, as the House possessed the ability to protect its institutional interests by refusing to pass a bill which it felt infringed upon the Origination Clause. The government also maintained that review was inappropriate, as compliance with the assessment provision would not significantly affect individual rights.¹⁶³ Noting that neither of these arguments was sufficient to trigger application of the political question doctrine, the Court first addressed the government’s argument regarding the asserted preclusive effect of House inaction.¹⁶⁴ Explaining that many separation of powers cases deal with circumstances where the branch whose power has been appropriated “has both the incentive to protect its prerogatives and institutional mechanisms,” the Court stated that the House’s ability to refuse to pass a bill does not deprive the Court of the power, or absolve it of its responsibility, to review the constitutionality of congressional enactments.¹⁶⁵ Accordingly, the Court held that “the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the judiciary

¹⁵⁹*Id.* at 234-235.

¹⁶⁰*Id.* at 236.

¹⁶¹*United States v. Munoz-Flores*, 495 U.S. 385 (1990).

¹⁶²*Id.* at 388; U.S. Const. art. I, § 7.

¹⁶³495 U.S. at 392.

¹⁶⁴*Id.* Specifically, the Court explained that neither argument met the factors delineated in *Baker v. Carr*, 369 U.S. 186 (1962), necessary for application of the political question doctrine. The Court noted that the government’s argument essentially hinged on the proposition that judicial resolution of Origination Clause challenges would “entail a substantial lack of respect for the House,” a factor irrelevant under the political question doctrine. As such, the Court dismissed calls for its application. *Id.*

¹⁶⁵*Id.* at 392., discussing *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983).

remove itself from the controversy by labeling the issue a political question.”¹⁶⁶ Turning to the individual rights argument, the Court stated that the political question doctrine was not implicated, as the identity of a litigant was irrelevant to its focus on restraining the judiciary from interfering in the business of the other branches.¹⁶⁷ Furthermore, the Court explained that the government’s assertion that Origination Clause compliance was irrelevant to ensure individual rights was incorrect. Specifically, the Court explained that the separation of powers doctrine was designed to secure liberty, regardless of whether the activity in question related to interbranch activity or activity within the legislative branch itself.¹⁶⁸ Accordingly, the Court determined that it possessed constitutional authority to review the Origination Clause issue.¹⁶⁹

D. Judicial Apprehension in Relation to Interbranch Conflicts.

Potential separation of powers conflicts often adhere to statutes enacted by Congress, particularly in the executive-legislative relations context. The effect of such legislation is readily apparent in cases such as *Buckley v. Valeo* and *Bowsher v. Synar*, discussed above. Given that a wide body of statutory enactments raise potentially serious separation of powers issues, the Supreme Court has traditionally engaged in a practice of statutory interpretation which avoids constitutional conflicts to as great a degree as possible.

Specifically, the Court has explained that “when the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”¹⁷⁰ Furthermore, the Court has deemed this approach applicable so long as such construction would not be “plainly contrary to the intent of Congress.”¹⁷¹ The Court has explained that such an approach appreciates the congressional, as well as the judicial, responsibility to uphold the Constitution.¹⁷² Finally, the Court has declared this principle to carry special weight in the separation of powers context.¹⁷³

¹⁶⁶*Munoz-Flores*, 495 U.S. 385 at 393.

¹⁶⁷*Id.* at 394.

¹⁶⁸*Id.* at 394-396.

¹⁶⁹*Id.* at 396. The Court, nonetheless, concluded that the assessment was constitutional, as revenue bills, for Origination Clause purposes, were “those that levy taxes in the strictest sense of the word,” and not those, like the assessment, which incidentally create revenue. *Id.* at 397, citing *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (citing 1 J. Story, Commentaries on the Constitution §880, pp. 610-611 (3d ed. 1858)).

¹⁷⁰*Crowell v. Benson*, 285 U.S. 22, 62 (1932).

¹⁷¹*Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

¹⁷²*Id.*

¹⁷³*Public Citizen v. United States Department of Justice et al.*, 491 U.S. 440, 466 (1989) (discussing *American Foreign Service Assn. v. Garfinkel*, 490 U.S. 153, 161 (1989) (per (continued...))

The Court applied this principle in *Public Citizen v. United States Dep't of Justice*, dealing with the Federal Advisory Committee Act (FACA). FACA was created to minimize the use of federal advisory committees, to ensure that they be created only when necessary, and to provide for their rapid termination upon completion of their goals.¹⁷⁴ To this end, FACA provides for the establishment of administrative guidelines and controls over advisory committees, as well as for the public disclosure of committee meetings and records.¹⁷⁵ At issue was whether FACA applied to the use of the American Bar Association's Standing Committee on Federal Judiciary for advice regarding potential nominees for federal judgeships. If applicable, it was argued, FACA would conflict with the President's appointment power, raising significant doubts as to the constitutionality of the Act under the separation of powers doctrine.¹⁷⁶

Noting the importance of the "cardinal principle" of statutory construction, the Court cautioned that it could not "press statutory construction 'to the point of disingenuous evasion,' even to avoid a Constitutional question."¹⁷⁷ Following this proviso, the Court determined that the prior regulatory scheme and the legislative history of the Act revealed the "Congress probably did not intend to subject the ABA Committee to FACA's requirements when the ABA Committee offers potential advice regarding presidential appointments to the federal bench."¹⁷⁸ Given this analysis, the Court held that as FACA did not show a clear congressional intent to include the ABA Committee, "sound sense" counseled deference to the "rule of caution."¹⁷⁹ Accordingly, the Court ultimately held that FACA was inapplicable, avoiding a separation of powers conflict.

The Court applied the same approach in *Franklin v. Massachusetts*.¹⁸⁰ At issue were provisions of the Administrative Procedure Act authorizing the review of determinative agency actions. The separation of powers inquiry focused on whether the Act authorized review of presidential action for abuse of discretion.¹⁸¹ While the Act specifically exempted Congress, the courts, territories of the United States, and the District of Columbia from review, no express provisions removed the President from its ambit. Despite the negative implication that presidential actions are covered under the Act arising from the express exemption of the other bodies, the Court ruled that the scope of the statute did not include presidential action. Specifically, the Court

¹⁷³(...continued)
curiam).

¹⁷⁴491 U.S. 440, 446 (1989).

¹⁷⁵*Id.*

¹⁷⁶*Id.* at 443.

¹⁷⁷*Id.* at 467, quoting *United States v. Locke*, 471 U.S. 84, 96 (1985) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

¹⁷⁸491 U.S. 440 at 467.

¹⁷⁹*Id.* at 467.

¹⁸⁰505 U.S. 788 (1992).

¹⁸¹*Id.* at 800-801.

explained that “out of respect for the separation of powers and the unique constitutional position of the President,” it “would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.”¹⁸² Since the Act did not expressly provide for review of the President’s actions, the Court held that it must presume such actions were not subject to its requirements.¹⁸³

Judicial reticence in ruling on direct conflicts of constitutional authority between the legislative and executive branches is also evident in the executive privilege context. In *United States v. American Telephone & Telegraph Co.*, for instance, a subcommittee of the House Interstate and Foreign Commerce Committee subpoenaed documents from AT&T in an effort to ascertain whether legislation was needed to curb alleged abuses of power in the authorization of warrantless wiretaps conducted for “asserted national security purposes.”¹⁸⁴ The Executive Branch argued that the requested documents contained sensitive intelligence information, the disclosure of which could compromise national security. When negotiations between the Justice Department and Subcommittee Chairman John Moss proved unsuccessful, the Justice Department sued to enjoin AT&T from complying with the subpoena, and the Subcommittee Chairman intervened as a defendant.¹⁸⁵

In its initial consideration of the case, the Court of Appeals for the District of Columbia held that it was appropriate to direct the parties to continue settlement negotiations, rather than to decide the “nerve-center constitutional questions” raised by the conflict between the right of the Executive Branch to protect national security information and the authority of the Legislative Branch to investigate and acquire information by subpoena.¹⁸⁶ When further negotiation was not successful, the court of appeals again considered the issue, and again refrained from “a decision upholding either of the claims of absolute authority.”¹⁸⁷ Instead, the court mandated an information sharing procedure tailored to the concerns of both branches, eventually leading to the settlement of the conflict.¹⁸⁸

Judicial Branch refusal to resolve such direct conflicts was again displayed in *United States v. House of Representatives*. There, the United States District Court for the District of Columbia was faced with a suit brought by the Department of Justice to determine whether the head of the Environmental Protection Agency (EPA) was

¹⁸²*Id.* at 800-801.

¹⁸³*Id.* at 801.

¹⁸⁴*United States v. American Telephone & Telegraph*, 567 F.2d 121, 123 (D.C. Cir. 1977).

¹⁸⁵*Id.*

¹⁸⁶*United States v. American Telephone & Telegraph*, 551 F.2d 384, 394-395 (D.C. Cir. 1976).

¹⁸⁷*United States v. American Telephone & Telegraph*, 567 F.2d at 123.

¹⁸⁸*Id.* at 133.

justified in withholding certain documents under a claim of executive privilege.¹⁸⁹ Noting its “duty to avoid unnecessarily deciding constitutional issues,” the district court determined that resolution of the executive privilege claim was not necessary, as the EPA Administrator was not a defendant in any legal action by Congress.¹⁹⁰ Accordingly, the district court sought to “maintain the delicate balance of powers among the powers established by the Constitution” by prevailing upon the parties to settle the conflict without further judicial involvement.¹⁹¹

Conclusion

From the above analysis, it is evident that the separation of powers doctrine has played an extremely significant role in defining the scope of legislative, judicial, and executive power and responsibility. The Framers' desire for an efficient governmental structure, which would serve to secure liberty and prevent the tyrannical exercise of power, led to the development of a tripartite structure which bestows power upon the separate branches of government according to their constitutionally defined roles. While this principle has served to invalidate and block action by the respective branches which impinges upon a core function of the other, the hybrid doctrine crafted by the Framers avoids the problems inherent in mere “parchment barriers.”¹⁹² As noted by Madison, a “more adequate defense is indispensably necessary” to guard against branch encroachment and enable efficient governance.¹⁹³ Accordingly, the

Supreme Court, in adhering to this maxim, has adopted both formalist and functional approaches in dealing with separation of powers issues, without adopting either as an exclusive analytical rubric. Rather, while the Court has often taken a formalist stance in situations where an essential constitutional function of a branch is impinged, it has also employed functionalist analysis in recognizing the need for efficient and effective government, as achieved through a sharing of tasks among the branches. This checks and balances structure, as formulated by the Framers and enforced by the courts, has served to protect the independence and equality of the three branches, while permitting certain functions to remain interdependent, ensuring a workable government.

¹⁸⁹*United States v. House of Representatives*, 556 F.Supp. 150, 152 (D.D.C. 1983).

¹⁹⁰*Id.* at 152-153, citing *United States v. Rumely*, 345 U.S. 41 (1952).

¹⁹¹*United States v. House of Representatives*, 556 F.Supp. at 152-153.

¹⁹²The Federalist Papers, No. 48, at 308-309 (J. Madison).

¹⁹³*Id.*