

U.C. HASTINGS COLLEGE OF THE LAW  
CONSTITUTIONAL LAW

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HANDOUT # 2

TOPIC THREE - DISTRIBUTION OF FEDERAL POWERS  
SEPARATION OF POWERS (CHAPTER 3)

Here we are concerned with **horizontal** separation of powers issues - the relationship among the branches of the national government. We've encountered some already; e.g., Marbury, Ex Parte McCordle, United States v. Nixon. Notice that while Articles I, II and III address "legislative," "executive," and "judicial" power, they do not define these terms.

Recall the earlier discussion of the policies or purposes served by separating the powers of government into several parts; national versus state (and local), and organizing the national government into the separate branches. One purpose might be to make government **more efficient**, by dividing the labor of government among branches in order to take advantage of different strengths and expertise, and ultimately operate more effectively. Another might be to make government **more inefficient and cumbersome**, with complicated checks and balances in order to avoid concentrations of power and, in the end, provide for more individual freedom, by making it harder for government to do bad things, while at the same time also making it harder to do good things, which was a tradeoff the founders might have been willing to make.

Section 1 -- Presidential Action Affecting "Congressional" Powers

I. Internal Matters: Domestic Lawmaking

Take a look at the Constitution's Article II, section 1, ¶ 1, and sections 2-4. Compare those provisions with Article I's outline of congressional powers.

Article I, section 6, cl. 2, says that "no Person holding any Office under the United States [meaning, in the Executive Branch] shall be a Member of either House [of Congress] during his Continuance in Office." This prevents the United States from adopting the "parliamentary" system. Under this kind of system, control of the legislative branch automatically carries with it control of the executive branch, with the Prime Minister and the other executive branch ministers simultaneously also being elected members of the legislative branch.

The Steel Seizure Case (176)

1. Could Congress have seized the steel mills? Under what power?
2. Notice one part of the Taft-Hartley Act, a federal statute, did authorize the President to seek

an injunction against a strike in these circumstances (fn a, p. 177), but the President didn't take this route. Try to guess why.

3. Could the President's seizure have been justified as an exercise of the President's power as Commander in Chief? The Korean War was ongoing at this time. In fact, the President attempted to justify his action on that basis, among others.

There is no equivalent in Article II (Executive) of the "necessary and proper" clause found in Article I. If the constitution had contained such a clause, might the President have won?

4. Does the President have "inherent" power to act when there is a compelling national need? (See also q. 1, p. 182.) Is the argument for inherent power stronger when the "need" relates to national defense, foreign affairs, or war, as opposed to domestic policy? Which category was the Steel Seizure case? Compare and contrast with Dames & Moore, p. 184.

5. In Steel Seizure, suppose only five steel mills (out of 500 nationally) were producing indispensable war materials. Might a Presidential Order seizing only those plants have been upheld?

6. FDR issued executive orders rounding up Japanese-American citizens on the west coast in the aftermath of Pearl Harbor, and interning them in camps for most of the war. What was the source of the President's authority to do that? Take a quick look at Korematsu v. United States, and the notes following, in pp. 1324-32 of the text. The main issue the Court addressed in that case was not the power of the President to order the action, but its consistency with the due process clause of the fifth amendment (which incorporates the equal protection clause of the fourteenth amendment).

7. In **Dames & Moore** (184), distinguish between two aspects of the President's Executive Order:

The first nullified federal court-ordered attachments of Iranian assets. This was in exercise of a power Congress had specifically given the President in the IEEPA (see fn b, p. 184).

The second "suspended" federal court action on claims then pending before these courts; in effect, it withdrew the jurisdiction of the federal courts to decide such claims. Does that raise an Ex Parte McCardle issue, with a twist (because here, unlike McCardle, Congress had not expressly given the President that power)? Would congressional supporters of stripping the Court of jurisdiction over school prayer and abortion cases find the Court's decision here supportive of their efforts?.

8. Should the Court have ducked both Steel Seizure and Dames & Moore by invoking the "political question" doctrine? If the Supreme Court had decided it would not hear the Steel Seizure case on political question grounds, what might have happened if the steel companies had refused to turn over the keys to the steel mills to the Secretary of Commerce?

9. Justice Jackson’s concurring opinion in Steel Seizure has proved quite influential in framing most subsequent discussions of these issues, in judicial opinions and other discussions, so it’s analytical framework is worth considering. Notice that a key question in the framework is whether Congress has “impliedly” authorized the President to take the action in question, or “impliedly” denied the President that power. How does a Court go about figuring out the “implied will of Congress,” when it may control the result? Would the Court have upheld the President’s seizure if the Congress had not, five years earlier, debated whether to give the President such express power in the Taft-Hartley Act, and failed to include such a provision in the Act? (See third full paragraph, p. 177.)

In the Steel Seizure case, Justice Frankfurter would have found that Congress had acted by silence or inaction; i.e., by not approving the proposed amendment to the Taft Hartley legislation that would have given the President authority to act. (See third full paragraph of his concurrence.) Is it fair to infer from a failure by Congress to approve a proposal before it that Congress has made a decision to reject the proposal on the merits? Might there be other reasons for not acting? For example, might Congress’s silence have reflected a judgment by the Congress, or by some members of Congress, that the President already has the authority to take action in these situations? See Tribe’s comments excerpted in section 2(e), p. 186.

Note also that Jackson’s framework does not specifically address the question whether the Constitution reserves a particular subject exclusively to Congress. For example, the Constitution gives the Congress the express power to “declare War.” (Art. I, § 8, cl. 11). We will take up more of these questions further below, in connection with the Foreign Affairs and War Powers in Section 3, including whether Congress can delegate war powers to the President, how much “inherent” power the President has, and the scope of the President’s Commander-in-Chief power with respect to individual rights.

10. In Medellin v. Texas, p. 185, notice the difference between self-executing and non-self-executing treaties, and the president’s power under executive agreements. The materials expand on them further below. Notice also how the Court there applies the “executive practice as creating congressional approval” prong of Dames & Moore.

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**Some general thoughts on the issues in this chapter**

1. Notice how Professor Charles Black describes the constitutional arrangement of power between the President and the Congress, and their relative institutional capacities; para. # 5, pp. 187-88.

2. The “formalism and functionalism” on pp. 188-89. This is a useful way to think about a lot of the Court opinions we’ll be reading in this chapter.

For example, would a formalistic approach to the President’s constitutional obligation to

“faithfully execute” the laws adopted by Congress reduce the President to nothing more than, as dissenting Chief Justice Vinson said in the Steel Seizure case, a “messenger-boy”?

3. Because the Constitution does not define the terms “legislative,” “executive,” or “judicial” power, how should they be defined? By reference to the contemporary understanding at the time the Constitution was drafted? How might that be determined?

4. Consider the extent to which the (horizontal) “separation of powers” in the Constitution is complete. Does each branch possess powers and responsibilities wholly distinct from the others (i.e., - “hermetically sealed”)? Or do some or all of the powers of each branch overlap with the powers of other branches, so that the lines between them are blurry? Does the very idea of checks and balances imply some blending or overlap of powers?

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In connection with the brief discussion of “impoundment” of funds in para. # 7 on p. 189, consider the following:

When Congress appropriates money and directs that it shall be spent for a particular purpose, most observers believe the President lacks the power to refuse to spend it, because the Constitution commands the President to “take Care that the Laws be faithfully executed” (see Article II, section 3).

But suppose that a Congress dominated by “hawkish” conservatives appropriates \$50 billion to be spent on a “star wars” space shield. The liberal President firmly believes that building the system would seriously destabilize international relations, intensify a global nuclear arms race, and endanger national security.

Or, to take an example from the other end of the political spectrum, suppose a Congress dominated by “bleeding heart” liberals appropriates \$50 billion to be spent on emergency aid to the homeless. The conservative President firmly believes that spending this money will just foster homeless dependency, and postpone addressing the root causes of the problem.

In either case, can the President constitutionally refuse to spend the money?

Consider the opposite problem from the President impounding money Congress has appropriated; namely can the President spend money that Congress has *not* appropriated? Look at the so-called “appropriations clause” of the Constitution: Article I, § 9, cl. 7: “**No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.**” This means, in simple terms, that payment of money from the Treasury must be authorized by statute (“by Law”). Every year Congress must enact appropriation bills that authorize each executive branch agency of government (as well as the Congress itself and the courts) to spend a specific amount of money for purposes Congress identifies.

The Court has said that “[a]ny exercise of a power granted by the Constitution to one of the other Branches of Government is limited by a *valid* reservation of congressional control over funds in the Treasury.” OPM v. Richmond, 496 U.S. 414 (1990) (emphasis added). Does the limiting word “valid” suggest that the Court might deem some reservations of congressional control over expenditures constitutionally invalid? That the Court would find that Congress has no power, for example, to shut down the Supreme Court by refusing to authorize the payment of the Court’s heat and light or paper bills? In his concurring opinion in OPM v. Richmond, Justice White expressed grave doubt that Congress could “impair the President’s pardon power by denying him appropriations for pen and paper.”

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## **II. External Matters: Foreign Affairs and War (190)**

**Curtiss-Wright**: Notice Justice Sutherland’s opinion addresses both horizontal (President versus Congress) and vertical (national versus state government) issues. Reminder: We are here concerned with *horizontal* separation issues. Justice Sutherland was one of the conservatives who strongly supported states’ rights and opposed broad delegations to the Executive (prior to the constitutional “revolution” of 1937).

1. Is the Court here interpreting the Constitution to mean that the concept of enumerated powers just does not apply to the national government in foreign affairs? That the President can do just about anything he wants in the foreign affairs area (so long as the Senate is involved in ratifying treaties), short of formally declaring war?

Does the Court disregard the congressional power to “regulate Commerce with foreign nations ...”?

2. To the extent the President has authority unilaterally to enter into executive agreements on a wide range of subjects, does that shrink the reach of the Senate’s power to ratify treaties?

Note that, despite the fact that there are sixteen times as many executive agreements as treaties, 86% of those agreements were ratified by statute. See fns. c and d, p. 192. Is there an argument that executive agreements actually should be constitutionally preferred, when ratified by Congress, because they lead to more democratic accountability (because the House gets cut in on the action)?

2. Is Curtiss-Wright consistent with the Steel Seizure Case opinion?

**Campbell v. Clinton** (194). (Note who the plaintiffs were. We’ll discuss much later the “standing” issue which was the basis for the outcome.) Do the courts have any special expertise to offer in this area? Are the issues raised straightforward questions of constitutional interpretation like those the courts deal with all the time? Who wins this debate between Judges Silberman and Tatel?

There was substantial debate over whether the U.S. should engage in military action in

Iraq, or Libya, or Vietnam, or Afghanistan. Can the courts (and specifically, the U.S. Supreme Court) contribute meaningfully to that debate? To its outcome? Do the courts have any expertise to bear on the question of what a “war” is?

More broadly, can the President order the bombing of terrorist bases in Afghanistan, or Saddam Hussein’s compound in Baghdad, without the concurrence of Congress? Without a formal declaration of war? Same answer if the President sends in ground troops?

Does congressional acquiescence in past uses of military forces ordered by the President create a practice or pattern of behavior that resolves (or at least should heavily influence) the constitutional issue?