

Administrative Law
Fall 2001
Professor Levy

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Topic(s) – Introduction to Separation of Powers

Problems –None

I. Basic Concepts –

A. *Separation of Powers* – The division of governmental authority among three branches.

1. *Historical* – This concept has its historical origins in the evolution of constitutional democracies and focused primarily on the separation of legislative and executive power (i.e., the independence of parliament). Framers borrowed from this history, and also increased the stature of the judiciary as a coequal branch.
2. *Rule of Law* – Separation of powers is essential to the rule of law. Under the rule of law government actors are bound by the legal hierarchy; legislation must comply with the Constitution, Executive and Judicial Branch officials are bound by valid legislative acts, etc. Legislative and executive power must be separated if executive officials are to be constrained in any real sense by law. The judiciary plays a critical role as an independent interpreter of the law.
3. *Constitutional Provisions* – Articles I, II, and III, vest the legislative, executive, and judicial powers in Congress, the President (and executive officers), and Supreme Court (and lower federal courts), respectively.

B. *Checks and Balances* – Equipping each branch with the means to check the others.

1. *Historical* – This was to some extent an innovation of the Framers. Indeed, opponents of the Constitution criticized it on the grounds that it violated separation of powers, an argument that Madison rebutted in Federalist No. 47.
2. *Dynamic Tension* – Checks and balances rely on the natural tendency of each branch to protect and expand its power to check the similar tendencies of other branches, achieving a kind of equilibrium. This idea ties in more broadly with Madison's theory of faction, which also influenced the development of federalism. See Federalist No. 10.
3. *Constitutional Provisions* – Presidential Veto, Senate consent on appointments and treaties, impeachment.

II. **Implementation** – Each power is vested in a branch that is designed to fit the nature of that power (see the Separation of Powers Chart posted to the syllabus).

A. *Legislative power*

1. *Preeminent Power* – The power to make laws is the preeminent government authority encompassing the power to make and enforce public policy through binding rules that government officials and private parties must obey.
2. *Representative and Deliberative* – It is vested in the most politically accountable branch of government, Congress, whose legislative processes are structure to require deliberation and make passage of legislation difficult.

B. *Executive Power*

1. *Derivative Power* – The power to implement laws is derivative in the sense that executive authority derives from and is limited by statutory provisions conferring that authority.
2. *Unitary Executive* – Nonetheless, executive power involves considerable discretion and the Framers wanted a unitary executive, with the President at its apex, capable of prompt coordinated action from a national perspective.

C. *Judicial Power* –

1. *Judicial Review* – The power to resolve cases or controversies entails the interpretation and application of the law to, which under *Marbury v. Madison* affords the judiciary the power to review legislative and executive action for compliance with the law.
2. *Independence* – To enable them to fulfill their role free from bias and political pressure, federal judges have “life tenure” and salary protections that protect them against political retribution.

III. Separation of Powers and the Modern Administrative State

A. *Growth of Regulation and Administrative Agencies* –

1. *Use of Agencies* – From the end of the 19th Century through the Great Depression, there were increasing demands for activist government, both to regulate private conduct and to provide various public benefits. For many of these programs, administrative agencies were the preferred means of implementation. (Recall the advantages of agencies).
2. *Accommodation* – Aside from some cases during the pre-New Deal period, the Supreme Court has by and large accepted the use of administrative agencies, within some outer limits.

B. *Legitimacy of Agencies*

1. *Formalist Argument* – Agencies promulgate “legislative rules” with binding effects that look and act like laws. Agencies engage in formal adjudications in which they interpret and apply laws to a particular case. Even when agencies are clearly within the executive branch and exercise executive authority, they may be “independent” of Presidential control. To compound these objections, many agency combine all three functions of government (e.g., the NLRB promulgates rules, prosecutes violations, and adjudicates those violations).
2. *Functional Response* – The Framers expected that contours of government would need to be worked out in practice and did not specify strict separation. Agencies are checked by all three branches through a variety of means and the basic balance of government powers has been maintained.

C. *Relevance*

1. *Outer Limits* – Although the Supreme Court has accommodated the administrative state, separation of powers principles do place some outer limits on how agencies may be structured. We will explore those limits in this Chapter.
2. *Foundational principles* – Administrative law is all about the relationships between Congress, the President, the courts and, of course, the agencies. The analysis of these relations proceeds from basic separation of powers conceptions about the functions of each branch and is shaped by arguments about how particular issues affect those functions.