Non Sequitur:

How The Federal Government Has Departed From Madisonian

Ideals

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Abstract

In the almost 250 years since the founding of the American Republic, the federal government has gone through major changes in its size and scope. Unfortunately, many of these changes have eroded essential checks and balances instilled by the Founding Fathers during the creation of the government. This paper will detail how changes made by all three branches of government have contributed to a decline in the separation of powers and federalist principles. This paper will draw from the writings of Montesquieu, James Madison, Alexander Hamilton, and others to detail how changes made by the government do not reflect the values and structure of the government at the time of the founding. For each branch of government outlined in this paper, specific examples of changes will be detailed and compared with primary sources from the time of the founding, or sources from where they drew inspiration, to analyze the degree and the significance of the difference.

Key Terms: Separation of Powers, Federalist, Federalism, Checks and Balances

Madison's Vision

On May 25, 1787, fifty-five delegates from nearly every state gathered in a crowded room in the Philadelphia State House, seeking to abandon the Articles of Confederation and, perhaps, draft a new Constitution. Among those fifty-five was a 5'4", 100-pound, 36-year-old Virginia delegate – James Madison. By all accounts, Madison was civil, well-informed, and a frequent debate participant. Georgia Delegate Robert Pierce described Madison as a "[g]entleman of great modesty—with a remarkable sweet temper. He is easy and unreserved among his acquaintances, and has a most agreeable style of conversation." (Brant, n.d.). James Madison was a former member of the Virginia State Legislature, famously known for blocking Patrick Henry's bill that would allow state funding for "teachers of the Christian religion." (Brant, n.d.). Madison would carry that vigor with him in each of the 109 days that the convention lasted.

The Virginia Plan, authored by James Madison and introduced at the convention, was pivotal in guiding the framework for the structure of the American government. It outlined that a strong federal government would be divided into three branches – legislative, executive, and judicial – each providing oversight over the others. Furthermore, powers would be separated again between the state and federal governments – a term known as federalism. Madison saw federalism and the separation of powers as necessary for the republic's preservation, drawing from Montesquieunian principles, "There is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." (Montesquieu, 1748, pg. 221).

Contrary to popular belief, America is not a democracy; although Madison had strong convictions of a government by, for, and of the people. Madison feared the tyranny of majority rule, and the potential chaos that a pure democracy entailed, necessitating the checks and balances he put forth in the Virginia Plan. In Federalist No. 55, Madison humorously claimed, "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." (Federalist Papers, 1788). Madison was profoundly concerned with protecting the rights of the minority, claiming the tyranny of the majority – especially in the form of factions – was its greatest enemy. Madison highlights this issue in Federalist No. 10, "A pure democracy…can admit of no cure for the mischiefs of faction" (Federalist Papers, 1788). Madison thought that, if the American experiment was to succeed, it could not be a pure democracy. If not a democracy, what kind of government exists? A question similar to this was asked of Benjamin Franklin after stepping outside the halls of the Constitutional Convention in 1787, he famously quipped, "A republic, if you can keep it" (Gorsuch, 2019). On that, Madison very much agreed with Franklin.

There lie slight but significant differences between a democracy and a republic. Most importantly, Madison felt that republics could better fend off the tyranny of factions, stating in Federalist 45 that, "[a]mong the numerous advantages…none deserves to be more accurately developed than its tendency to break and control the violence of faction" (Federalist Papers, 1788). Madison believed this for several reasons, not the least of which was the structure and stability inherent in a tripartite government – the separation of powers. In Athenian democracy, it is simply a majority rule; however, a republic features checks and balances that sufficiently check that majority. For example, if the Athenians in ancient Greece were to vote on a proposed rule, all they would have needed was a simple majority –

50 percent plus 1 – for a law to be enacted. Conversely, if a republican legislature wanted to pass a bill, it would need to garner a majority in *both* houses of Congress, get the approval of the President, and then, if necessary, withstand the scrutiny of an impartial judiciary. The sheer amount of checks and balances, even within the legislative branch itself, is what Madison claims contributes to making "[t]he happy Union of these States [a] wonder; their Constitution a miracle [and] their example the hope of Liberty throughout the world." (Madison, 1829).

As a result of his work at the Constitutional Convention, in the Federalist Papers, and the Bill of Rights, many dubbed Madison the "father of the Constitution." In his writings, Madison outlined his ideals for the federal government. He wanted it to be limited in power and scope, minimally affecting the day-to-day lives of Americans. He wanted accountability at all levels of government, checking those lawmakers who go against their constituents. He wanted state governments to be the predominant governing bodies, emphasizing in Federalist 45 that "[t]he operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security" (Federalist Papers, 1788). In essence, Madison wanted the federal government to be limited; he acknowledged the wisdom of the masses regarding day-to-day governance. However, the contemporary federal government has deviated from the ideals that Madison advocated. This paper details how the federal government has abandoned these key Madisonian principles.

Article I – The Legislative Branch

According to Madison in Federalist 51, "[i]In republican government, the legislative authority necessarily predominates." (Federalist Papers, 1788). As outlined in Article I of the U.S. Constitution, the legislative branch was seen by the founders as the most powerful

branch; by extension, it was also seen as the most dangerous (Federalist Papers, 1788). After risking their lives in the Revolutionary War, many of the founders worried about a strong, and potentially tyrannical, central government – the very reason for their revolt. (Declaration of Independence, 1776). To quash some of these fears, legislative power was divided into two chambers: the House of Representatives and the Senate. While Congress, as a whole, has distinct powers – regulation of interstate commerce, coin money, etc. – each chamber also has distinct powers. For example, budget bills must originate in the House of Representatives, while the ratification of foreign treaties can only occur in the Senate.

The legislative branch also serves as a watchdog over the executive and judicial branches. The Senate must approve all appointments made by the Chief Executive, many of which are for judicial branch officials, such as judges. Congress can also alter the Supreme Court's jurisdiction and determine its budget. Over time, Congress has removed some of the essential checks and balances that constrain its power. This section will detail three historical examples of Congress deviating from the original roles and structures the founders had for the legislative branch: the 17th Amendment, the Administrative Procedure Act of 1946, and the War Powers Act of 1973.

17th Amendment

The purpose of the Senate

Not only were the two chambers' responsibilities different, but their methods of selection were different as well. Prior to the 17th Amendment, Senators were appointed by state legislatures, rather than by popular vote like House members. As illustrated in Federalist 62, states having such a substantial role in Congress "[gave] to the State governments such an agency in the formation of the federal government as must secure the

authority of the former, and may form a convenient link between the two systems" (Federalist Papers, 1788). However, the 17th Amendment, ratified in 1913, altered the selection method of senators from appointment by state legislatures to a statewide popular vote.

This may seem like an insignificant change, but it fundamentally altered the nature of the Senate. Prior to the 17th Amendment, senators voted in the interest of the states and their governments. Deciding whether or not to ratify a treaty or confirm a Supreme Court Justice was driven by how it would impact the state's ability to govern and their general financial and practical interests. However, after the 17th Amendment, those same decisions are seen through the lens of pleasing the general public because senators now need to worry about winning statewide popular elections. Senators are no longer motivated to vote in the interest of the state as an institution of government; now, they only need to worry about voting to please 51 percent of their state's constituents.

To further illustrate this phenomenon, suppose there is a bill being proposed to the Senate, after being approved in the House, that calls for the repaving of all state X's roads. The people of state X love that idea, but it would ultimately be harmful and impractical for the government of state X to implement it. Prior to the 17th Amendment, the senators of state X would have vetoed this bill because their interests lie with the state government and institutions. Their mindset would be one of practicality, a check on the mandate of the popularly elected House of Representatives. However, after the 17th Amendment, the senators of state X would vote to approve the bill because they, supposedly, want to get re-elected. If a senator wants to remain in power, why would they vote against the will of

their voters? Why would they put their job on the line for a state government to whom they owe nothing?

A Check on a Tyrannical Majority

Many think the bicameral nature of the legislature was a compromise between the big and small states for representation, and they would be partially correct (Brant, n.d.). However, the method of selection also alludes to their differing purposes. House members are elected every two years and are supposed to be the part of the government that is most in touch with the people due to their frequency of change. This is partially the reason why only the House of Representatives can introduce bills pertaining to the budget, because they are the most in touch with the will of the people; conversely, the Senate is supposed to be more detached and rational. After the 17th Amendment, Senators seemingly had a much bigger policy initiative because they had the same mandate as House members: their constituents. So, the 17th Amendment has radically altered the mindset and motivations of senators, removing an essential check on the legislature's Article I powers.

Furthermore, having state legislatures appoint Senators also helps insulate the Senate from potential corruption, as stated in Federalist 63:

> [b]efore such a revolution can be effected, the Senate, it is to be observed, must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the State legislatures, it cannot prosecute the attempt, because the periodical change of

> members would otherwise regenerate the whole body (Federalist Papers, 1788).

If it were true that the popularly elected House of Representatives was corrupted, due to a corrupt constituency, insulating Senators from that majority would help prevent its corruption. But now that Senators are subject to majority rule, what would prevent them from bending the knee to a corrupt majority? By departing from this check of a potential tyrannical majority, Congress has diminished the Senate's role in both looking out for states' interests and checking the mandate of a popularly elected House of Representatives.

A Check on Executive Power

One of the biggest jobs of the Senate is to advise and consent to presidential nominations. Of the two chambers of Congress, many of the founders determined that the Senate would be the more appropriate body to wield this power. Federalist 65 states that:

> [t]he convention, it appears, thought the Senate the most fit depositary of this important trust. Those who can best discern the intrinsic difficulty of the thing, will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it. (Federalist Papers, 1788).

This quote by Hamilton speaks directly to the benefit of the differing mindsets between members of the House and Senate. The Federalist Papers argue that the Senate's detached perspective provides an essential check on the executive branch that, similar to the House of Representatives, has its job determined by the electorate. One of the Founders' major fears was the tyranny of the majority (Federalist Papers, 1788). Many thought the Senate being removed from direct public influence would provide a check against a tyrannical majority.

The 17th Amendment diminishes this detachment that the framers thought was vitally important for the duties of the Senate.

The Non-Delegation Doctrine

James Madison thought that keeping the other branches from exercising power given to any other was essential to prevent the centralization of power (Federalist Papers, 1788). It was so important that, in 1789, Madison proposed the "Non-Delegation Amendment" to be added to the Constitution:

> The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial; nor the Executive exercise the powers vested in the Legislative or Judicial; nor the Judicial exercise the powers vested in the Legislative or Executive Departments (Wurman, 2021).

Preventing coordinate branches from exercising the power of another branch is the overarching idea of what is known as "non-delegation." However, when referring to the non-delegation doctrine, the courts have generally referred to the legislative branch; that is, the legislature's attempt to delegate its own powers.

Though the term "non-delegation" seems unambiguous, the Supreme Court has supported legislative delegations of power. In *Wayman v. Southard* (1825), Chief Justice Marshall stated that, while Congress could not delegate powers that were "strictly and exclusively legislative," it could delegate "powers which [the legislature] may rightfully exercise themselves" (p. 23). As such, administrative agencies are allowed to make rules – agency regulations that have the force of law. While it is true that the non-delegation doctrine

is not in the text of the Constitution, there is a litany of primary sources from the founding era that showed a great many of the founders, including James Madison, supported the idea of non-delegation (Wurman, 2021). The Treasury Department, for example, was created in 1789 to aid with maintaining the economy; the concept of delegating legislative authority was not necessarily taboo, but it was only to be done in certain instances. The modern-day federal government has abandoned the Founders' conception of non-delegation.

The Administrative Procedure Act of 1946

In 1946, Congress passed the Administrative Procedure Act, commonly known as the APA. The APA outlines many areas of agency conduct: formal and informal rulemaking, formal and informal adjudication, and the general scope of agency conduct. The purpose of administrative agencies is to put complicated phenomena into the hands of experts because they are better equipped to make decisions about them. However, Congress has greatly increased the number of administrative agencies since the APA. Prior to the Civil War, there were only 11 administrative agencies (Attorney General's Committee on Administrative Procedure, 1941). Between then and 1941, when the report was published, 41 agencies were created (Attorney General's Committee on Administrative Procedure, 1941). However, between 1946 and 1995, at least 425 agencies were created (Howell & Lewis, 2002). Furthermore, the number of pages in the federal register has increased from approximately 10,000 to over 185,000 since 1950 (GW Regulatory Studies Center, n.d.).

Many critics have attributed this rise to the increasing complexity of modern-day life; however, in Federalist 62, James Madison asserted that laws are useless "if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that

no man, who knows what the law is to-day, can guess what it will be to-morrow" (Federalist Papers, 1788). There are now so many federal criminal laws that there is no accurate number as to how many there actually are (Gorsuch & Nitze, 2024). As the Supreme Court recently ruled in *Loper Bright Enterprises v. Raimondo* and *West Virginia v. EPA* (2024), Congress cannot delegate "major questions" – those issues that are nationally significant – to administrative agencies. In those cases, SCOTUS examined written records during the founding and determined that there were strong non-delegation principles woven into the Constitution and that the modern-day Congress had over-delegated its authority.

Not only have agencies grown in the number and scope of their authority, but they have also grown in the ways they interact with people on a daily basis. Federal agencies have produced hundreds of laws every year about vital topics in everyday life for many Americans: education, taxes, transportation, food, drugs, etc. In the founding area, citizens predominately concerned themselves with comparatively simple state laws and regulations, because the state laws dominated the regulation of everyday life – as Madison and many of the founders intended (Federalist Papers, 1788). Laws used to be about common sense and intuition; however, many laws today are very specific and are often confusing and, occasionally, conflict with other existing federal laws. If Congress held the predominant law-making authority, as many of the founders wanted, there would be much more consistency within the federal code, not only in content but in organization. Section 18 of the US Code is meant to hold all of the criminal offenses at the federal level. However, agency rules that contain criminal laws are often not put into that section and are instead simply a sub-category of the agency rule itself.

While it is true that administrative agencies have suffered major losses in the Supreme Court in the 2023 term in *Loper Bright Enterprises v. Raimondo* (2024) and *SEC v. Jarkesy* (2024), administrative agencies still wield significant law-making power. In *Mistretta v. United States* (1989), the Supreme Court said that administrative agencies are allowed to "help" pass legally enforceable rules for Congress, so long as there is an "intelligible" directive given by Congress to the agency. While it may sound like a reasonable doctrine in theory, in practice, this amounts to Congress being able to delegate rule-making authority over any issue. As previously mentioned, there were only two administrative agencies at the founding – Departments of State and Treasury, controlling two very important issues – foreign affairs and the economy, respectively. Even concerning phenomena like the economy, it is no longer just covered by the Treasury Department, there are now several more agencies involved: The Economics and Statistics Administration (ECSA), Bureau of Economic Analysis (BEA), Economic Development Administration (EDA), Department of Commerce, Office of the Under Secretary for Economic Affairs (OUS/EA), Minority Business Development Agency (MBDA), and many more (Federal Register, n.d.). All of these agencies regulate the economy in certain ways. With more than 7 agencies regulating the economy in various ways, it becomes easy to get tangled in numerous regulations on the same topic, as well as bureaucratic red tape.

As stated previously, some experts say that the rise of agencies can be attributed to the increasing complexity of everyday life, and that may have some merit. After all, nobody can deny that life today is more complex than it was in 1789. Perhaps a rise in agencies is reasonable, but the key question is whether the rise has necessarily been proportional. Has life gotten so complex that it was necessary to create 400 new agencies in the last 80 years?

Has life gotten so complex that the pages in the federal register are 18X what they were in 1950? When looking at Madison's and the founders's wishes for the structure of the legislative branch, it was clear that only a few topics were left to the discretion of the executive branch because while the executive can act quickly, it is dubious to leave such important decisions in the hands of one person – the president (Federalist Papers, 1788). Such a system where too much power was in the hands of one individual – the president – would too closely resemble the English monarchy the founders fought the revolution to get rid of. By Congress delegating important legislative authority to the executive branch and fundamentally changing the way that Congress operates, they have abandoned many key checks and balances instituted by Madison and the founders.

Article II – The Executive Branch

According to the Federalist 70, "[t]he ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers. The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility" (Federalist Papers, 1788). Does the Constitution embody these "ingredients?" Is it reflective of Madison's ideas about how the executive branch exercises its powers?

As outlined in Article II of the Constitution, the executive branch of government, led by the President, was created to enforce the laws of the United States. At the time of the founding, the President's primary task was dealing with US relations with foreign countries, most notably, England and France. However, the President still had an active role in enforcing federal law, as evidenced by then-President George Washington's handling of the Whiskey Rebellion. After Congress passed a new excise tax on spirit production in 1791,

farmers on the western frontier of the United States became outraged. For the tax, and many additional reasons, farmers in western Pennsylvania refused to pay the taxes and violently attacked the federal tax collectors. President Washington was given the power to call up a militia to stop the rebellion via the Militia Act of 1792:

> Sec. 2. And it be further enacted, That whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combination too powerful to be suppressed by the ordinary course of judicial proceedings…it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. (George Washington's Mount Vernon, n.d.)

After leading his 13,000 troops into western Pennsylvania, Washington was able to quell the rebellion without bloodshed. While the modern-day executive branch still performs these duties of enforcing the law, the executive branch is much larger and more powerful than ever before. This section will detail how the Executive branch has deviated from the structure the founders set for it.

Habeas Corpus Suspension Act of 1863

One of the most famous displays of executive power in American history, Abraham Lincoln's suspension of habeas corpus during the Civil War, was controversial at the time of implementation. As written in Article I, Section IX of the Constitution, the powers to suspend habeas corpus are limited to "cases of rebellion or invasion the public safety may require it." While the Civil War unquestionably satisfied that requirement, the power to suspend habeas corpus was explicitly given to the legislative branch, not the executive branch. Lincoln's suspension of habeas corpus began in 1861, closing railroads from

Pennsylvania to Washington, D.C. President Lincoln's arguments for the suspension of habeas corpus might have met the requirements specified in Article I, had Congress been the one to suspend habeas corpus. Lincoln argued that his suspension was necessary to quell a rebellion within the Union to protect the Union military and citizenry (Britannica, n.d.). On May 25th of that same year, Maryland legislator John Merryman was arrested on accusations of allying with the Confederates. Merryman challenged his detention with a writ of habeas corpus, which Chief Justice of the United States, Roger Taney, issued in his capacity as circuit court judge – during the time when Justices rode circuit (Britannica, n.d). However, General George Calawader, who was in charge of Fort Henry at the time, refused to recognize the writ on the grounds that President Lincoln had suspended habeas corpus. In his opinion in *Ex Parte Merryman* (1861), Chief Justice Taney criticized President Lincoln's suspension of habeas corpus as executive overreach, claiming that only Congress has the power to suspend habeas corpus. Lincoln chose to ignore this decision and suspended habeas corpus nationwide in 1862. One year later, Congress passed the Habeas Corpus Suspension Act of 1863, giving the President the power to suspend habeas corpus.

The Supreme Court had a chance to review the Habeas Corpus Suspension Act of 1863 in *Ex Parte Milligan* (1866). The Habeas Corpus Suspension Act of 1863 drastically blurred the strong lines that the Founding Fathers set for the three branches of government. The concept of enumerated powers is that the powers listed in the Constitution belong to the respective branch they are assigned to. Madison stated in Federalist No. 48 that, "the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time" (Federalist Papers, 1788). Madison and the founders

understood the power that the executive branch holds. Though the executive does not have as many enumerated powers as the legislative branch since the executive branch is only led by one person – as opposed to hundreds in the legislative branch – its power is more easily abused. President Lincoln's unilateral exercise of habeas corpus suspension goes directly against what Madison outlined in the Federalist Papers and what many founders envisioned for the executive branch: strong, but extremely limited without Congressional consent or supervision. Even so, as evidenced in *Ex Parte Milligan* (1866), the Supreme Court has assented to Congress's expansion of executive power by not addressing the Habeas Corpus Suspension Act of 1863.

Tariff Act of 1922

The Fordney-McCumber Tariff Act of 1922 gave the President the power to alter tariffs by as much as 50 percent, which was meant to appease the American farming industry by raising tariffs set in 1913 (Office of the Historian, n.d.). In Article I, Section VIII, of the US Constitution, Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In this legislation, Congress delegated its authority to levy tariffs on foreign nations to the executive branch. Referring back to Madison in Federalist No. 48, "the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time" (Federalist Papers, 1788). While it is true that the President handles United States affairs with foreign nations daily and is their primary duty, "[t]he direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority" (Federalist Papers, 1788). The reason that presidential control of tariffs is

problematic, with respect to the founders' vision for the executive branch, is that the administration of tariffs can have a wide-reaching effect on the global economy.

Tariffs are extremely political due to their rippling effect on the country they are being levied against and the US economy as a whole. According to Rodney Sullivan, executive director of the Mayo Center of Asset Management at the University of Virginia's Darden School of Business, "[t]ariffs directly affect the price of imported goods, which can lead to higher consumer prices and can alter trade dynamics and international relations. The costs of tariffs will ultimately be paid by some combination of American consumers, businesses, and the exporting companies" (McKenzie, 2025). The executive branch is supposed to "zealously" enforce the laws of the United States, whether it be from Congress or the courts. The Tariff Act of 1922 grants the executive branch considerable discretion regarding tariffs. A 50 percent discretion is such a wide variance that allowing the president to unilaterally create tariffs and change existing ones to such an extent is akin to the executive branch creating laws.

The Founding Fathers put the law-making power in the hands of the legislature for many reasons: there are many voices and opinions to be heard, the legislative branch is most in tune with the desires of the public, and the Senate and House can check each other – or at least did so more effectively prior to the 17th Amendment – and more (Federalist Papers, 1788). The first two elements listed go hand in hand. The members of the legislative branch live with their constituents and in their communities; thus, they are more in tune with what their constituents want. They use this knowledge to debate proposed laws and vote in a way that reflects their constituents. However, the President has no such intricate ties to the millions of Americans across the country, making it difficult to make sweeping policy

changes, such as tariffs. This is a crucial reason the founders delegated the ability to levy tariffs to the legislative branch. Since tariffs have such sweeping economic effects across the country, the best branch to decide this would be the branch with the closest ties to the community. The President can, and often does, use tariffs for political leverage and bargaining with foreign nations. While Congress can change these tariffs, the nature of the legislative body means that this process will take time. As such, these tariffs can have massive implications across the country without any effective check on the president's decision. Putting such a consequential power in the hands of the President ignores key reasons why such a power was delegated to the legislative branch.

Wartime Powers since the Civil War

In the Constitution, the President is deemed the commander-in-chief of the armed forces and has considerable flexibility when commanding troops. However, there has not been extensive litigation on the President's authority during wars on American soil. In cases like *Youngstown Sheet and Tube Co. v. Sawyer* (1952) and *US v. Nixon* (1971), the President's powers have been limited when suspending individual rights, even during war or war-adjacent activities. Lincoln's suspension of habeas corpus is significant because it both blurs the line between enumerated and implied powers, as well as the authority of the President during wartime. In *Youngstown*, President Truman's seizure of steel mills to keep supplies flowing for the Korean conflict was ruled unconstitutional. Additionally, in *Nixon*, Nixon's prior restraint arguments preventing the publication of documents about U.S. involvement in the Vietnam conflict ("Pentagon Papers") did not sway the Supreme Court, which ruled prior restraint in this instance was unconstitutional. In both cases, it was found that

individual rights could not be trampled by executive power because the US was at war or to further the war cause.

That being said, the Supreme Court has allowed executive actions to override individual liberties during wartime, such as *Korematsu v. US* (1944). In this case, President Franklin Roosevelt imposed Executive Order 9066 in February 1942, 10 weeks after the bombing of Pearl Harbor. This order enabled the physical removal of Japanese-Americans into relocation camps after the bombing of Pearl Harbor. This order was codified by Congress one month later. The Supreme Court ruled this was a military necessity due to national security. The policies in *Korematsu* are no longer considered good law, and a key difference between this case and Lincoln's suspension of habeas corpus is the executive exercise of expressly delegated legislative power. It is essential to remember that the actual suspension of habeas corpus is not the issue, but rather that President Lincoln did so without prior congressional approval. However, it should be noted that, in both cases, Congress essentially retroactively allowed the executive to engage in these powers, and the Supreme Court, either directly (in *Korematsu*) or indirectly (in *Milligan*), has allowed this to occur.

The Rise of Executive Orders

According to the American Bar Association (2021), an executive order is a "signed, written, and published directive from the President of the United States that manages operations of the federal government." Executive orders have existed since the founding; however, they have become much more prevalent since the Civil War, especially since the 1900s. Prior to President Theodore Roosevelt, most presidents issued fewer than 50 executive orders. After President Roosevelt, no President issued fewer than 160, with

Presidents Woodrow Wilson and Franklin Roosevelt issuing as many as 1803 and 3721, respectively (The American Presidency Project, 2019). In President Trump's first term, he issued 220 executive orders, with President Biden subsequently issuing 162. The increase in the use of executive orders is worrying, considering the breadth of power the executive branch enjoys with the infusion of administrative agencies. In addition, the scope of these executive orders has grown exponentially. While Madison and many of the Founders favored a strong executive, they did not wish for the president to have such power and control major policy initiatives unilaterally. In many ways, this makes the President akin to the English Monarchy, which they fought a revolution to break ties with.

EOs as a Usurpation of Congressional Authority

As previously mentioned, administrative agencies have grown in size and scope since the 1900s and certainly since the founding. Some may argue that the rise in executive orders necessarily follows the growth in the number of administrative agencies. At their core, executive orders guide agency actions and provide mandates for agencies and agency heads. However, with the ever-growing size and scope of agencies, the president often uses executive orders to instate broad political change without congressional authority. For example, Executive Order 14110: Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence was signed on October 30, 2023. President Biden used EO 14110 to issue broad mandates concerning the use and development of artificial intelligence: ordering agencies to instate a "chief AI officer," ordering the Department of Homeland Security (DHS) to create regulations about the development of AI, taking measures to ensure that workers's privacy was protected from AI intrusion, etc.(Harris & Jaikaran, 2023) Artificial intelligence has taken the world by storm over the past few years and has massive

implications for many industrial sectors. Intuitively, it would make sense that the branch best equipped to deal with such a monumental task as regulating AI would come from the branch with the closest ties to the constituents that would be affected – the legislative branch. After all, the legislative branch has been trusted with the power to create laws specifically because it is the most adept to do so. The Supreme Court recognized this principle in *Utility Air Regulatory Group v. EPA* (2014), where Justice Scalia outlined the major questions doctrine:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," …we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance (pg. 19).

Article I, Section I, states that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The Supreme Court has deemed that administrative agencies do not have their own legislative power in their function as executive agencies; rather, they borrow from a well of legislative authority (this will be discussed in further detail in a later section). Congress has seemed willing to give the executive branch major legislative initiatives in various prominent sectors: the environment, businesses, the economy, infrastructure, etc. Even with Chief Justice Roberts subsequently strengthening the major questions doctrine in *West Virginia v. EPA* (2022), it seems that the executive branch will continue to use this

acquired power to further install their political agendas outside the typical law-making process.

Additionally,with the rise of executive orders, executive administrations have implied that executive orders are superior to statues, even suggesting that EOs should be followed instead. However, is no support for this view in the constitution. In fact, there is no mention of executive orders in the constitution *at all*. Treating executive orders as law that supercedes statutory authority directly contradict the spirit of law making envisioned by Madison and the framers. Several key checks and balances were placed into the legislative branch to make law making difficult, or nearly impossible, without debate and compromise. This prevents radical laws from being passed, as well as laws changing frequently. Executive orders are not decrees by tyrannical monarchs, the executive cannot simply say something and make it so. Madison and the framers heavily restricted the executive branch so that it could not have such boundless power as to unilaterally create sweeping policy. However, modern presidents have withered that important boundary.

Informal Rule-Making: The Executive Legislating

Administrative agencies can engage in two primary types of rule-making: formal and informal. Formal rule-making involves the agency conducting a hearing before an administrative law judge (ALJ) about the proposed rule (Justia, 2018). In this hearing, representatives from the agency, as well as those who have a stake in the proposed rule, may appear and make comments about the rule. The ALJ will then decide on the proposed rule; that is, whether it will go into effect. However, their decisions are appealable to higher federal courts (Justia, 2018). Formal rule-making is usually required only in certain circumstances outlined in an agency's organic legislation. Anytime formal rulemaking is not

required, agencies are usually permitted to engage in informal rule-making. Informal rule-making is, by its nature, less procedurally burdensome to the agency than formal rule-making. It only consists of a notice-and-comment period after publishing a proposed rule (Legal Information Institute LII, n.d.). Agencies must give interested parties 30 days to submit any written comments about the proposed rule; this is meant to give guidance to the agency in potentially amending the proposed rule before it is finalized (Legal Information Institute LII, n.d.). Since agencies are only required to use formal rule-making when stated in their organic legislation, informal rulemaking comprises a large majority of agency rules (Sommer, n.d.). Due to the aforementioned increase in the size and scope of federal agencies, informal rulemaking allows the executive branch to have unprecedented authority to legislate major policy areas without the necessary checks instilled in the legislative branch.

In additon to the power of federal agencies creating new rules, the Trump administration has shown a willingness to disregard properly promulgated agency regulations. On January 20, 2025, the Trump administration issued Executive Order No. 14,171 § 4. This directed the Office of Personnel Management to disregard a valid agency rule that gave federal employees an option to remain in classifications that gave them protected tenure. The Administrative Procedures Act requires that modifications, or even repealing a rule, must go through the same notice and comment procedures that are required for newly proposed rules. Though the rise of agency rules may not be the most pure ideal of a Madisonian republic, neither is disregarding legitimately made law via unilateral executive action; two wrongs do not make a right. There is no constitutional basis for the executive branch having such a major hand in legislating policy changes to the extend that recent executives have done. Whether the country is better for having a strong executive cut through

congressional gridlock is beyond the point. In fact, the gridlock is what helps ensure that laws being passed are just, and that the law does not change on a dime just because the president disagrees with major policy.

In 2019, the United States Governmental Accountability Office conducted a report on the number of economically significant agency rules, focusing on "transition periods" – approximately the last 120 days of a president's final term. For the purposes of this report, "economically significant" rules are defined as those that have a likely annual effect of 100 million dollars or more (GAO, 2023). There are two key takeaways that are observed from this study: the number of economically significant rules passed by agencies and the dramatic increase in economically significant rules during transition periods. This study begins with President Bill Clinton. The number of economically significant rules during each President's transition period is as follows: Clinton, 94; Bush, 112; Obama, 135; Trump (1st term), 131 (GAO, 2023). In effect, this means that Presidents, via their power over executive agencies, are passing rules that have billions of dollars in their regulatory capacity. President Trump's 1st term, for example, would have passed rules with regulatory economic effects of *at least 13.1 billion dollars*. This is just accounting for transition periods, excluding any rules passed outside the outlined 120 days (GAO, 2023). In principle, Madison and the founders thought it was wise for the executive to lead the way in areas that demanded haste (Federalist Papers, 1788). However, even with a "strong executive" favored by Madison and the Federalists, it was certainly not expected that the President would have such an extraordinary ability to lead policy changes. Again, one of the fears of a powerful executive was the potential to inflict tyranny among the citizens, similar to that of the English monarchs. Even King George III was limited in his powers to legislate after the Glorious Revolution in 1688. The legislative

abilities of the current president could not possibly have been aligned with the "strong executive" that even the Federalists hoped for. Why would the Madison and Federalists want an executive branch that was stronger than the king they claimed was dictatorial and abusive?

Article III – The Judicial Branch

The last of the three branches to be outlined in the Constitution, the Judicial branch, has the least amount of explicit power. Interestingly, the judiciary's "main" power – judicial review – is not explicitly in the constitution. Rather, it was granted to the Supreme Court by itself in *Marbury v. Madison* (1801). The Supreme Court is the only federal court that is constitutionally required, with the establishment of lower courts being left to Congress. The Judicial branch stands as an essential check on both the legislative and executive branches of government, though it holds neither the "sword" nor "purse" of government, as Hamilton once said in Federalist 78 (Federalist Papers, 1788). This section will outline how decisions made by the Court have fundamentally altered the powers of the coordinate branches and/or blurred the lines between them.

J. W. Hampton, Jr. & Co. v. United States (1928)

In this case, *Hampton* challenged Title III of the Tariff Act of 1922, allowing the President discretion to make changes in tariff rates. *Hampton* challenged this provision in the Tariff Act as an unconstitutional delegation of legislative authority to the executive branch. Article I of the Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Tariffs, by their nature, would then be within Congressional jurisdiction. Additionally, there is nothing in Article II that gives the executive branch any authority to regulate tariffs. Despite this, the Court upheld the congressional delegation of tariff-setting authority to the executive branch.

In the opinion of the Court, Chief Justice Taft, drawing from past cases, outlined the difference between giving legislative authority to the executive branch and allowing the executive branch to have discretion in enforcing the pursuant to its true purpose:

> [T]he true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made. (p. 276).

Chief Justice Taft draws from the fact that the Tariff Act was meant to give the President the authority to adjust tariffs to make the prices foreign goods could be bought to match domestic cost-production prices. Taft argues that the President's increasing tariffs pursuant to this mandate is not a *new law* or the creation of a new law; rather, it is merely the *carrying out* or the *execution of* the Tariff Act. Through that reasoning, the executive branch is simply *enforcing the law*. In other words, Executive discretion is ancillary to the enforcement of laws – this idea will be discussed later. Further, the Tariff Commission, which was established in the Tariff Act of 1922, must submit a report for recommended changes to Tariffs before the President can make any changes. As such, it was argued that there was sufficient congressional oversight, and the discretion left to the executive was minimal, within the necessary "range" of executive discretion required to enforce the law. Chief Justice Taft also argues that practical consideration necessitates that Congress may form such a commission and give the President such authority:

> [O]ne of the great functions conferred on Congress by the federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate

> carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that, in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory. (p. 276).

The decision in *J.W. Hampton Jr. & Co. v. US* opened the door for an increase in delegation and an increase in agencies, as mentioned previously in this paper. However, such considerable delegation of power to the President is incongruent with many of the founders' ideals, even for those who supported a strong executive, such as Madison and Hamilton. One of the many reasons that Madison and the Federalists favored a strong executive was so that laws could be enforced quickly, decisive actions could be taken during times of emergency, and to ensure that the legislative and judicial branches could be properly checked (Staff, n.d.). Under Chief Justice Taft's reasoning, this is an example of enforcing the law. However, there is a meaningful difference between the discretion necessary to enforce a law and the amount of discretion used in this case. Looking back to Washington's handling of the Whiskey Rebellion, as Chief Justice Taft correctly alludes to, there was *some* level of executive discretion necessary in executing federal law – The Militia Act of 1792: how many troops to bring, which states to draw troops/resources from, which route to take to get to Western Pennsylvania, etc. On the other hand, President Coolidge's discretion in changing tariffs could have been as high as a 50 percent change, per the test of the Tariff Act of 1922.

The key distinction between these instances is that Washington's discretion did not affect major policy and did not have the potential to cause major economic changes. Important policy initiatives, especially those with major economic impacts, were traditionally left to Congress because of the checks and balances within the legislative branch.

The Commerce Clause

The Commerce Clause is outlined in Article I, Section VIII of the US Constitution. The primary purpose of the Commerce Clause is to give Congress the ability to make uniform laws within the United States pertaining to commerce and the flow of money, an area that the founders recognized was a significant weakness of the Articles of Confederation. In Federalist No. 11, Hamilton argued that a Commerce Clause would be essential to promote free trade and preserve a free market economy:

> An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. (Federalist Papers, 1788).

Subsequently, Madison in Federalist No. 42, deemed that "[t]his class of powers forms an obvious and essential branch of the federal administration." (Federalist Papers, 1788). While regulating interstate commerce was viewed as an essential component of federal power by the founders, many have debated the scope of the Commerce Clause. Can Congress regulate intrastate commerce because of its implication on interstate markets?

To what extent can they do that? How did the framers view the Commerce Clause's power and scope?

Wickard v. Filburn (1942)

Mr. Filburn was a wheat farmer in Ohio who was accused of violating the Agricultural Adjustment Act of 1938. The purpose of the Act was to prevent prices of crops, such as wheat and corn, from falling too low. This was FDR's way of subsidizing and financially supporting farmers during and after the Great Depression. Under the Act, farmers were only allotted a certain amount of land to harvest wheat; Filburn was accused of using 12 acres above his allotment. Filburn argued that since this excess wheat was for personal use, and, since it never entered the market, it had no impact on interstate commerce. However, the Supreme Court thought otherwise.

In a unanimous decision, authored by Justice Robert Jackson, the Supreme Court ruled that growing excess wheat for personal use impacted interstate commerce, and was regulable by Congress *(Wickard v. Filburn*, 1942). The Agricultural Adjustment Act expanded what qualified as a "market:" "to dispose of by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Due to this definition within the Agricultural Adjustment Act, the Court reasoned that the restrictions imposed by the federal government were valid. The Court determined that the wheat was "available for marketing," whether it would ever see the market or not:

> Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat, either within or without the quota, is *sold*

> *or intended to be sold.* The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture. (emphasis added) (p. 317).

Additionally, the Court reasoned that permitting farmers to keep a portion of wheat for themselves could be problematic. Even if Mr. Filburn's keeping of excess wheat would not have a big impact on interstate commerce, if every farmer were to act similarly, that would have a substantial effect. This is what German philosopher Emmanuel Kant would describe as the "categorical imperative" – an objective, rationally necessary, and unconditional principle that must be followed despite any natural desires to the contrary (Johnson & Cureton, 2022). In fact, according to the Court, an activity may not need to be considered *interstate* or *commerce* for Congress to be able to regulate it via the Commerce Clause: "But even if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect." (*Wickard v. Filburn,* 1942*,* p.317). Under *Wickard v. Filburn*, Congress has the power to prevent farmers, or anyone for that matter, from keeping the products of their own labor for personal use. That seems wholly inconsistent with Hamilton's theory of the Commerce Clause being used to promote free markets and regulate *interstate* trade (Federalist Papers, 1788). The Court's ruling in this case opens the door for Congress to regulate any activities within the state, given that Chief

Justice Taft stated that an activity need only be related to commerce to be regulable. Madison and many of the framers envisioned a limited federal government with minimal intrusion into day-to-day governance at the state and local levels (Federalist Papers, 1788). *Wickard v. Filburn* abuses the power of the Commerce Clause and unfaithfully applies the intentions the founders had for its scope.

Katzenbach v. McClung (1964)

Ollie McClung was the owner of "Ollie's BBQ," a restaurant located in Birmingham, Alabama. Under the newly passed Civil Rights Act of 1964, Congress tried to prevent places like restaurants from discriminating against African Americans via Title II:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin…Each of the following establishments is a place of public accommodation within this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:...any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station. (Civil Rights Division, 2015).

McClung claimed that, since his restaurant was local and did not have a substantial impact on interstate commerce, Congress could not regulate his restaurant activities under the Commerce Clause. However, the Supreme Court ruled that Congress has the power to

regulate the activities of restaurants that either substantially affect interstate commerce or sell substantial amounts of goods that were obtained via interstate commerce:

> Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, §§ 201(b)(2) and (c), Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, *i.e.,* those, like the McClungs', serving food that has come from out of the State. We think, in so doing, that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce. (p. 379).

In this case, SCOTUS found that, since Ollie's BBQ sourced approximately 46 percent of its food from out-of-state, was 11 blocks from a major interstate, and served a considerable amount of out-of-state customers, it was sufficiently engaged in interstate commerce. Therefore, Congress could enforce Title II of the Civil Rights Act of 1964 via the Commerce Clause.

Regulating the activities of private businesses for engaging only tangentially in interstate commerce is antithetical to the founders' intention for the Commerce Clause. The area of Commerce that Congress sought to regulate via Title II was not interstate commerce itself. Ollie's BBQ, for example, sold food items locally; that is, *intra*state. If they were to regulate the discriminatory practices of interstate food distributors, for example, that would

be interstate commerce because the sale of goods necessarily involves goods being bought and sold interstate. But in this case, SCOTUS relied on the fact that the products that Ollie's BBQ sold were acquired via interstate commerce. Therefore, it appears that the commerce Congress was regulating via Title II in this case was *intrastate* commerce. This conduct of Ollie's BBQ, though regrettable, does not fit any of the reasons why many of the founders thought it was necessary to have a federal commerce clause – previously articulated by Hamilton in Federalist No. 11. In fact, Madison and Hamilton often spoke of foreign commerce gains when detailing the benefits and purposes of the commerce clause, suggesting that foreign commerce was its primary goal. Furthermore, Madison and Hamilton articulate "interstate commerce" only as the moving of goods between states/foreign countries and the actions pursuant thereof (Federalist Papers, 1788). No mention was made of regulating intrastate business activities from those businesses that engage in interstate commerce. In other words, since in *Katzenbach v. McClung*, the commerce being regulated was not itself interstate, there is no historical evidence suggesting that the Commerce Clause applies. The same rationale can be applied to transactions between Ollie's BBQ and out-of-state customers. There is no such mention of those sort of transactions being labeled as interstate commerce. The Supreme Court's expansion of the Commerce Clause to encompass local business conduct and transactions has significantly altered the historical purposes of the Commerce Clause and weakened the line between federal and state powers.

Mistretta v. United States (1989)

Mistretta v. United States addresses the constitutionality of the congressional delegation of power to the United States Sentencing Commission. More specifically, whether the legislative delegation of power violated the non-delegation doctrine. In an 8-1 decision,

the US Supreme Court ruled that the delegation of power to the Sentencing Commission was viable under the non-delegation doctrine. The Court reasoned that, while Congress cannot generally delegate its legislative authority to the other branches, it is still allowed to obtain assistance from them:

> The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," …and we long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch…We also have recognized, however, that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach to such cooperative ventures: "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination." (p. 488).

Since life has gotten more complex, it only seems natural that Congress be able to get assistance from the executive branch. However, the US Sentencing Commission differs from most agencies in that it has no executive or judicial functions. That is, they only create laws. For example, the Securities and Exchange Commission, like most agencies, serves in a legislative capacity – making rules and regulations – an executive capacity – investigating rulebreakers and sanctioning them – and a judicial capacity – adjudicating rule infractions via

the agency's own administrative courts. Meanwhile, the US Sentencing Commission only has the capacity to pass rules pertaining to the US sentencing guidelines. For Justice Scalia, the author of the dissenting opinion in this case, and presumably many of the founders, this is a key distinction.

One of the major points from advocates of administrative agencies is that Congress simply cannot do it all without the help of the executive branch and, to a lesser extent, the judicial branch. However, the US Sentencing Commission is, in effect, simply legislating about sentencing guidelines. The agency provides no other assistance to Congress that would normally justify the creation of an executive agency: enforcement or adjudication. This distinction prompted Justice Scalia to deem the Commission a "Junior Varsity Congress:"

> it seems to me far from a marginal question whether our constitutional structure allows for a body which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws. I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior varsity Congress. It may well be that, in some circumstances, such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And, in the long run, the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous. (*Mistretta v. US,* 1989, p. 488).

Indeed, Justice Scalia drew from the early concepts of separation of powers principles from Madison and Montesquieu to determine this case was decided in error. Scalia criticises the majority for failing to see how substantially different this case is to many of the other cases the Court deals with – typically dealing with matters of degree, rather than the forming of a "new branch". These matters of degree were very important to Madison and the founders because of the potential for abuse that government could obtain by exercising the powers of multiple branches. Madison articulated this difference in Federalist No. 47:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. (Federalist Papers, 1788).

Looking back to Madison and the Federalists' views of Congressional delegation, it has been established that delegation was favored *because* the executive can act with haste and effectiveness when dealing with certain things. The crucial detail in this case is the US Sentencing Commission's inability to exercise any executive function, thus eliminating the

initial justification for delegation. In creating the Commission, Congress essentially established an executive agency with the authority to formulate legally binding rules governing federal sentencing guidelines. The Commission does not exercise any of the "necessary discretion" articulated in *J.W. Hampton Jr. & Co. v. US* because it has no enforcement capabilities, nor does the Commission provide anything other than what Congress could do for itself. In effect, the US Sentencing Commission is a sort of miniature Congress because its only job is to legislate. This very principle of preventing coordinate branches from exercising the power of another AND from preventing Congress from delegating its "well of legislative power" detail the eroding of the line between legislative and executive power.

Conclusion

During the Constitutional Convention in Philadelphia, 1787, James Madison and the Founders sought to create a tripartite system of government, three branches that would work together to protect the public – both from themselves and other enemies. However, throughout the history of the American republic, some of the essential checks and balances have been eroded by government action in all three branches: Legislative, Executive, and Judicial. Each of these three branches has caused this erosion either onto itself or for its coordinate branches. The legislative branch has weakened checks on the executive branch via the 17th Amendment by both transforming the nature of the Senate and disempowering the states from having a more direct say in the affairs of the federal government. The Legislative branch also significantly shifted the balance of power among the three branches through the Administrative Procedure Act of 1946. Congress has since delegated a vast amount of legislative authority to the executive branch, effectively creating a 4th branch of government:

the administrative state. The executive branch has also undergone major changes by conferring powers initially delegated to the legislative branch by the founders: setting tariffs and revoking habeas corpus. While Congress passed laws approving this delegation, whether prior to (Tariff Act of 1922) or ex post facto (Habeas Corpus Suspension Act of 1863), the Supreme Court later sanctioned these delegations as lawful under the Constitution. Additionally, the Supreme Court has expanded the scope of the Commerce Clause far beyond the ideals of the founders and has assisted Congress in enabling the growth of administrative agencies. In *Wickard v. Filburn* (1942), the Supreme Court construed the Commerce Clause to prevent farmers from using their own crops for personal use, and, in *Katzenbach v. McClung*, the Court expanded the Commerce Clause to allow Congress to regulate intrastate activity that had no bearing on interstate commerce. In both cases, the Court strayed from the initial purpose of the Commerce Clause: regulating commerce from foreign nations and business between the states themselves. Each of these examples, along with many more not mentioned in this paper, is why the federal government has departed from Madisonian ideals.

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