Separation of Powers: Ambition Against Ambition

The body of the Constitution consists of seven sections or “articles.” The first three set up the three branches of our national government: Congress, the presidency, and the Supreme Court. Unlike most constitutional systems in the world today, ours is based on the principle of separation of powers. The three branches are elected or appointed in different ways, from different constituencies, and at different times. They also do different things. The framers wanted to be sure that all three powers—legislative, executive, and judicial—did not end up in the same hands. That, as Madison argued, would be “the very definition of tyranny.”

There it is!! Very simple!! Except we do not have complete separation of powers!! What we have are separate branches of government sharing power. Madison, in the famous Federalist #51, explained why the overlap of powers is essential to liberty. If each branch of government could go its own way without any outside interference, there would be no check on its powers. The American people could end up being ruled by three tyrannies. Thus the three branches are designed to meddle and interfere with one another. And so, “ambition must be made to counteract ambition,” said Madison. By ambition Madison meant the politicians lust for power. Our system is deliberately set up to encourage those lusts to counteract themselves. Again, in Madison’s words, “you must first enable the government to control the governed: and in the next place oblige it to control itself.”

Keep the following points and issues in mind:

1. The Framers of the Constitution believed in separation of powers, but they also believed that there should be some overlap of powers.
2. Executive privilege --- the practice, not the term – goes back to the Washington administration. However, presidents’ reasons for withholding documents and information have varied with administrations.
3. Not until the late 1940s was executive privilege asserted as a general principle. That was when Congress began investigating charges that the administration harbored Communist agents.
4. During the Communist investigations, the New York Times and other major media asserted that Congress had no right to demand records of conversations within the executive branch. Twenty years later, during the Watergate investigations, they reversed their position.
5. Executive privilege in relation to Congress (i.e. the president’s assertion of the right to withhold material from congressional investigators) has never successfully been challenged in court. However, in United States v. Nixon (1974), the Supreme Court held that executive privilege is not an absolute right and ordered the president to turn over materials to a special prosecutor.
6. *United States v. Nixon* qualified executive privilege but also gave it judicial recognition. The Court said that records of the president’s conversations have “presumptive privilege,” meaning that anyone seeking access to them must convince the Court that an exception must be made. In the *Nixon* case the Court considered it important that the tapes were relevant to pending criminal trials.

7. Most players in the system of checks and balances would like to avoid legal showdowns on the issue of executive privilege. The politicians would rather rely on the press and public opinion and negotiation among officials. Why?

8. Congress has the authority to delegate powers to the executive branch and the authority to oversee and investigate the executive’s use of those delegated powers.

9. In order to combine speed and flexibility with legislative control, Congress invented the *legislative veto* in the 1940s. By this method, Congress delegated broad powers to the president but reserved the right to veto any of his decisions by passing a resolution in one or both houses.

10. In the *INS v. Chadha* (1983), the Court declared the legislative veto unconstitutional on the grounds that it violated Article 1 of the Constitution.

11. Since the veto had been written into 126 laws, the effects of the *Chadha* decision has been far-reaching.

**Topics Central to Separation of Powers/Checks and Balances:**

*Stewardship theory of presidential powers*

*Inherent powers*

*Executive agreements*

*Twilight zone of executive power*

*Emergency powers*

*Executive privilege*

*Delegation of power*

*Oversight*

*Legislative veto*