“conservatives” formed the majority in Seminole Tribe, even as they insisted in other contexts that the Constitution should be interpreted strictly according to its text.

SEE ALSO Eleventh Amendment; Fourteenth Amendment; State Sovereign Immunity

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Larry Yackle

SENTENCING GUIDELINES
SEE Judicial Fact-Finding at Sentencing.

SEPARATION OF CHURCH AND STATE
SEE Establishment Clause; Free Exercise of Religion.

SEPARATION OF POWERS
Although the U.S. Constitution does not specifically mention the term, it embodies the doctrine of separation of powers by providing in its first three articles for separate legislative, executive, and judicial branches, each with its own designated powers. Under the previous government of the Articles of Confederation, Congress had been the only effective branch of government, so the new division marked a distinct change. However, the founders did not intend for the separation to be complete; rather, they blended functions to create a system of checks and balances. Although the modern administrative state has created a multiplicity of agencies that do not easily fit into the three divisions that the founders created, separation of powers remains a vital part of today’s system, and the U.S. Supreme Court has based numerous decisions on this doctrine. Separation of powers is often compared to federalism, with the former dividing powers horizontally among the three branches and the latter dividing power vertically between the national government and the states.

ORIGINS
Separation of powers is grounded in the idea that governmental functions can be divided into three distinct functions, each of which should be exercised by a different branch of government. In the United States, this has meant that Congress has the power to adopt laws, exercise the “power of the purse,” and declare war; the president has the responsibility for enforcing the laws, waging war, and directing other key aspects of American foreign policy (often called the “power of the sword”); and the courts have the power of interpreting the laws, applying them fairly in individual cases, and seeing that they are constitutional. Although assigning proper tasks to appropriate branches should promote efficiency, advocates of separation more typically praise the doctrine for promoting liberty, and critics, who often tout the benefits of parliamentary systems that mix powers, frequently fault separation of powers for impeding legislation and making governments less accountable to the people by dividing responsibility among the three branches.

Prior to the development of separation of powers, the key theory for promoting liberty was that of mixed government, which attempted to balance differing classes within society. English theorists described such governments as a mixture of the three good classical forms of government—monarchy, aristocracy, and democracy. The king, or monarch, embodied the idea of government by one, the upper house of parliament embodied government by the aristocratic few, and the lower house of parliament embodied government by the many.

Although early colonial governments attempted in part to mirror such distinctions, this proved difficult to do in America, which largely lacked the hereditary distinctions of Europe. The form of government departments thus followed their functions. After Thomas Paine (1737–1809) published Common Sense in January 1776 and Congress declared independence in July 1776, Americans renounced both monarchical and aristocratic power, and state constitutions began proclaiming their adherence to the doctrine of separation of powers. Although the colonists had rejected the doctrine of parliamentary sovereignty, early state constitutions, which state legislatures often designed, generally elevated the legislature above the other branches. Most early state constitutions stripped governors of most of the prerogatives of the English kings and limited them to short terms, and many state judiciaries lacked independence.

The Constitutional Convention of 1787 responded both to the weaknesses of such state governments and those of the Articles of Confederation. Boldly sidestepping instructions to revise the Articles, the delegates followed the lead of the Virginia delegation, and especially James Madison, in considering a new plan of government. Although delegates subjected this plan to numerous emendations and compromises, the delegates retained the Virginia Plan’s provisions for a new national government divided into legislative, executive, and judicial branches.
The English philosopher John Locke (1632–1704) and the French philosopher Montesquieu (1689–1755) both influenced the framers, but neither had proposed this precise division. Locke divided the functions of government into the legislative, executive, and judiciary, the latter of which dealt with foreign policymaking. Similarly, in The Spirit of the Laws, Montesquieu divided the powers of government into “the legislative; the executive in regard to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law” (1749 [1758], vol. 1, pp. 151–152). In a 1994 essay titled “The Two Executives: The President and the Supreme Court,” Robert Scigliano observed that the framers may well have anticipated that judges would actively participate in the execution of the laws. He observed that the framers did not specifically exclude members of the judiciary, as they did members of Congress, from serving in the executive branch and that they probably expected that the judges would often ally with the president to “form a limited defensive alliance against an encroaching Congress” (1994, pp. 285–286). James Madison observed in Federalist No. 47 that judges “are shoots from the executive stock” (Madison et al. 1961 [1787–1788], p. 303).

DEFENSE AND EXPLANATION
Madison defended the Constitution in Federalist No. 47, not for embodying separation of powers but against criticism that it did not do so completely enough. Pronouncing “the accumulation of all powers, legislative, executive, and judiciary, in the same hands” to be “the very definition of tyranny” (Madison et al. 1961 [1787–1788], p. 301), Madison interpreted Montesquieu not to “mean that these departments ought to have no partial agency in, or no control over, the acts of each other,” but to preclude “the whole power of one department” to be “exercised by the same hands, which possess the whole power of another department” (pp. 302–303). In Federalist No. 48, Madison argued that “unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained” (p. 308). Pointing to the “encroaching nature” of power, Madison tied separation of powers to checks and balances by arguing that mere “parchment barriers,” would be inadequate, especially in light of the encroaching nature of the legislative department, which he described as “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex” (p. 309).

In Federalist No. 51, Madison argued that the only effective way to maintain the “partition of power among the several departments as laid down in the Constitution” was to contrive “the interior structure of the government as that its several constituent parts may, by their mutual

In Baker v. Carr, 369 U.S. 186 (1962), the U.S. Supreme Court reviewed Tennessee’s failure to apportion its legislature since 1901. The Court had to decide whether to follow its plurality opinion in Colegrove v. Green, 328 U.S. 549 (1946) and treat state legislative apportionment as a “political question,” for the two elected, or political, branches of the national government (which had failed to do anything) to solve, or whether to review state legislative apportionment under the equal protection clause of the Fourteenth Amendment. Justice William J. Brennan Jr.’s majority opinion in Baker linked political questions to six criteria:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various department on one question.

These criteria largely confined political questions to issues involving relations among the three branches of the national government (separation of powers) rather than relations between the national government and the states (federalism). The Court subsequently applied the “one-person, one-vote” standard, requiring approximate equality among districts, to state legislative apportionment.

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its own,” and constituting each so that “the members of each should have as little agency as possible in the appointment of the members of the others” (p. 321). He exempted the judiciary from this requirement because its members required “peculiar qualifications,” and the “permanent tenure” of the judges would “soon destroy all sense of dependence on the authority conferring them” (p. 321). Madison argued that the members of each department needed to have “the necessary constitutional means and personal motives to resist encroachments of the others” (pp. 322–323). Grounding this argument on human imperfection, Madison cited separation of powers as one of the “auxiliary precautions” that would supplement legislative “dependence on the people.”

THE CONSTITUTIONAL DESIGN

Article I of the Constitution vests “all legislative powers herein granted” in a bicameral Congress, enumerates a long list of such powers, and delineates the process of adopting laws. Article II vests “the executive power,” including the power to enforce laws and serve as commander in chief of the armed forces, in the U.S. president. Article III vests “the judicial power” in the U.S. Supreme Court and such lower courts as Congress chose to establish. Separation of powers is reflected throughout each of these articles.

Congress is bicameral. The people elect members of the House of Representatives to two-year terms, and senators, whom state legislatures chose until ratification of the Seventeenth Amendment (1913), to six-year terms. Article I privileges members of both houses against civil arrest on their way to or from Congress and for anything they say in Congress. By prohibiting bills of attainder (legislative punishments without trials), Article I, Section 9 also limits congressional attempts to play the role of judge and jury. Similarly, the Supreme Court has recognized that Congress has the right to conduct investigations that might result in legislation, but in cases such as Watkins v. United States, 354 U.S. 178 (1957), the Court has also limited such investigations, recognizing that they can also become a type of public trial.

The president is both head of government and head of state. An independent electoral college chooses the president for a four-year term, thus freeing the presidency from direct dependency on Congress—the Supreme Court’s decision relative to vote counting in Florida in the case of Bush v. Gore, 531 U.S. 98 (2000), which assured George W. Bush’s (1946–) election, marked the first occasion in which the Court was directly involved in such a contest. Article II of the Constitution further secures presidential independence by preventing Congress from changing the president’s salary during the president’s term.

Because different constituencies select the president and members of Congress at only somewhat overlapping times, the system permits “divided government,” under which a president is from one political party and a majority of one or both houses of Congress are from another. Whereas prime ministers in parliamentary systems often select members of their cabinet from the legislature, where they continue to serve, Article I, Section 6 specifically provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

Presidents appoint judges, like most other nonelected officials, with the advice and consent of the Senate, almost assuring that political considerations will be taken into account, but judicial service “during good behavior” secures their independence. Whereas members of the two elected branches play key roles in proposing legislation, judges must wait for cases and controversies to come to them. The Constitution does not specify the number of justices who will serve on the Supreme Court, and Congress has sometimes made adjustments to clip its power. Similarly, Congress may alter the Court’s appellate jurisdiction. The president’s power to pardon in all cases other than impeachment may also rectify judicial errors or mitigate undesirable political consequences.

Although Article I vests legislative powers in Congress, Article II grants a qualified veto to the president, which a two-thirds vote of both houses of Congress can override. The Constitution, in turn, grants the House of Representatives the power to impeach the president and judges for bribery, treason, and “other high crimes and misdemeanors.” It takes a two-thirds vote of the Senate sitting as a jury to convict and remove from office. Presidents negotiate treaties, but two-thirds of the Senate must approve them.

Judges serve “during good behavior,” and Article III prohibits Congress from lowering judges’ pay during their tenure. They hear cases arising under the U.S. Constitution, laws, and treaties. American courts have successfully asserted not only the power of statutory interpretation to interpret laws, but also the power of judicial review to examine executive actions and legislation in cases that come before the courts and to strike them down when they believe they are unconstitutional. In first asserting the Court’s power of judicial review over national legislation in Marbury v. Madison, 5 U.S. 137 (1803), Chief Justice John Marshall explained that in so acting, the Court was not exercising its own judgment but was enforcing the will of the people as embodied in the written Constitution. Accordingly, the Court has to defer in cases where Congress and the states adopt constitutional amendments to overturn its judgments.

THE ROLE OF THE JUDICIARY

In many respects, the framers designed the Constitution to be “a machine that would go of itself.” They intended
to prevent the fusion of powers that Madison identified as the essence of tyranny by assigning different powers to the three branches, giving them different terms, and making them answerable to different constituencies. Political parties, which the founders do not appear fully to have anticipated, can exaggerate or mitigate such effects.

The judiciary has assumed a major role in resolving constitutional ambiguities and in policing the boundary lines among the branches. Judicial review enables the courts not only to protect their own constitutional powers but also to guard the prerogatives of the other branches. Judicial exercises of its powers have increased with the complexity of government. In its early years, the Supreme Court often furthered nationalist objectives. Significantly, two of the Court’s most important early nineteenth-century opinions affirmed congressional powers, and two others from the second half of the century were overturned by amendment. Thus, McCulloch v. Maryland, 17 U.S. 316 (1819) affirmed Congress’s implied power to establish a national bank, while Gibbons v. Ogden, 22 U.S. 1 (1824) affirmed that congressional laws relative to interstate commerce would prevail over conflicting state laws. By contrast, the Fourteenth Amendment (1868) reversed the Court’s notorious decision in Dred Scott v. Sandford, 60 U.S. 393 (1857), which had declared that Congress had no power to forbid slavery in the territories and that blacks were not, and could never be, U.S. citizens. Similarly, the Sixteenth Amendment (1913) revived the national income tax, which the Court had voided in Pollock v. Farmers’ Loan & Trust Co., 158 U.S. 601 (1895).

The Court has been much more aggressive in voiding both state and federal legislation since the Civil War (1861–1865). The judiciary gained increased powers over the states by using the Fourteenth Amendment to apply the provisions in the first ten amendments, known as the Bill of Rights, which originally limited only the national government, to the states as well. From about 1890 to 1937, the Court frequently exercised its power of judicial review to strike down both state and federal legislation over economic matters, eventually prompting President Franklin D. Roosevelt to propose adding members to the Supreme Court. Since then, the Court has focused on other rights. Throughout its history the Court has defined the powers of each branch of government and policed the boundaries among them.

LAWMAKING AND OTHER LEGISLATIVE PROCEDURES

Lawmaking is the core of what Congress does, and the Supreme Court has policed this function in a number of ways. One of the Court’s concerns has centered on its fear that Congress will attempt improperly to delegate this authority to others. In J. W. Hampton, Jr., and Co. v. United States, 276 U.S. 394 (1928), the Court upheld a congressional law granting the president the power to raise and lower tariffs under the guidance of what it considered to be “an intelligible principle.” The Court took a similar position in United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936) in upholding a congressional joint resolution that delegated power to the president to forbid the sale of munitions in an area of conflict in South America. In a very expansive interpretation of presidential powers, which presidents have often subsequently used to justify their preeminence in foreign affairs, Justice George Sutherland proclaimed that the president was the “sole organ of American foreign policy.” He stressed the unity of the presidential office, the dispatch with which the president could act, and his access to secret information to justify broad discretion.

The Court took a different tack in three contemporary domestic cases. In Panama Refining Company v. A. D. Ryan, 293 U.S. 388 (1935), it voided a provision of the 1933 National Industrial Recovery Act (NIRA) because it decided that Congress had not provided adequate guidelines when it delegated to the president the right to regulate oil produced in excess of assigned state quotas. In Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the Court ruled that Congress could not delegate power to the president under the NIRA to approve codes of fair competition that industries drew up for themselves. Similarly, in Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court overturned a provision of the Bituminous Coal Conservation Act of 1935 that allowed producers and miners to fix hours and wages.

The Court has further limited lawmaking procedures. In Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), it examined the legislative veto. Through this mechanism, Congress delegated powers to the president subject to congressional reversal, sometimes by a single house. In Chadha, the House of Representatives had sought to overturn a decision by the Board of Immigration Appeals granting an immigrant with an expired visa permission to stay within the United States. Acknowledging that the veto was popular, Chief Justice Warren E. Burger observed that:

The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency.

Burger further argued that the law violated the presentment (veto) clause because the president had no opportunity to void the congressional action, and the
bicameralism requirement, since it permitted a single house to make the decision. Burger opined that:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

The Court arrived at a similar conclusion in *Clinton v. City of New York*, 524 U.S. 417 (1998) when it voided the Line Item Veto Act of 1992, which granted the president power to veto individual appropriations within a larger bill. Significantly, the Court previously denied standing to members of Congress who had opposed the law in *Raines v. Byrd*, 521 U.S. 811 (1997), refusing to rule on the matter until the president actually exercised an item veto. Writing for the Court in the *Clinton* case, Justice John Paul Stevens observed that “there is no provision in the Constitution that authorizes the President to enact, to amend or to repeal statutes.” The item veto interfered with the “finely wrought” procedure that the Framers designed” by occurring not “before the bill becomes law” but “after the bill becomes law.” Stevens thus concluded that “if the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature.”

This item veto case is reminiscent of controversies that occurred when President Richard Nixon impounded funds, in some cases refusing to spend monies on programs that Congress had adopted over his veto. In *Train v. City of New York*, 420 U.S. 35 (1975), the Court construed a statute to limit this power. Congress later adopted the Budget and Impoundment Control Act of 1974, which enabled presidents to defer or delay some spending without giving them authority to circumvent congressional intent.

Presidential critics sometimes assail the manner in which executive agencies choose to carry out congressional laws, but courts often defer to agency interpretations. This does not mean that presidents have carte blanche. In *Kendall v. United States*, 37 U.S. 524 (1838), the Court thus observed that “to contend that the obligation imposed on the President to see the laws faithfully executed, implied a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”

Presidential signing statements have emerged as an issue with implications for separation of powers that is likely to prompt eventual judicial clarification. Although presidents have often used such statements to express their views, recent presidents seem to have become more aggressive with them, sometimes attempting to put their gloss on laws, or even questioning the constitutionality of parts of the bills they are signing.

**PRESIDENTIAL APPOINTMENTS, REMOVALS, AND IMMUNITIES**

Although the Constitution grants the president power to appoint most government officials with the advice and consent of the Senate, the document does not specify who has the power to dismiss those without life terms. A clash between President Andrew Johnson (1808–1875) and Congress over such a dismissal was a catalyst that led to Johnson’s impeachment. In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court upheld the presidential removal of a first-class postmaster without congressional approval. Chief Justice William H. Taft based his decision both on the position that the framers had taken in early congressional debates on the subject and on sound principles of administration. Since presidents were responsible for administering the laws, Taft thought presidents needed the ability to terminate individuals in whom they had lost faith. Subsequently, the decision in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) limited the application of this decision in the cases of individuals who were serving in quasi-legislative or quasi-judicial bodies, and the *Wiener v. U.S.*, 357 U.S. 349 (1958) decision imposed similar limits on the removal of a member of a war claims commission, but the principle that Taft established remains otherwise in place.

Other decisions have limited the functions that Congress can assign to individuals under its control. In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court thus invalidated the section of the Balanced Budget and Emergency Deficit Control Act of 1985 that entrusted the comptroller general with the responsibility for telling the president when he needed to impose mandated across-the-board budget cuts. Citing principles of separation of powers, Chief Justice Warren Burger argued that the comptroller was not independent enough to carry out this job, since Congress could replace the comptroller through a joint resolution.

By contrast, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld the establishment of an independent prosecutor under the Ethics in Government Act of 1978. The Court decided that the prosecutor was an “inferior” rather than a “principal” officer who could therefore be appropriately appointed by a court of law; that the president and the attorney general maintained power to fire the prosecutor; and that the law did not violate separation of powers. Antonin Scalia authored a passionate dissent arguing that the law improperly
undermined presidential unaccountability for decisions relative to law enforcement.

A number of cases have touched directly or indirectly on the power of impeachment, by which Congress may hold either members of the executive or judicial branches accountable. In United States v. Nixon, 418 U.S. 683 (1974), the Court rejected President Nixon’s claim of executive privilege for tapes of conversations with his subordinates that eventually produced evidence of his wrongdoing, leading to the introduction of impeachment charges against him. Acknowledging that such conversations would ordinarily be privileged, the Court thought that the need for evidence in pending prosecutions outweighed this privilege in the case at hand. Similarly, although the Court extended protection to the president against civil suits for actions that he had taken in his official capacity as president in Nixon v. Fitzgerald, 457 U.S. 731 (1982), it helped uncover evidence that contributed to the impeachment of another president when it ruled in Clinton v. Jones, 520 U.S. 681 (1997) that the president did not have immunity for actions, in this case alleged sexual harassment, which he took prior to assuming office.

The chief justice presides over the Senate during presidential impeachment trials, but the Court has otherwise granted Congress great discretion. Thus in Mississippi v. Johnson, 71 U.S. 475 (1867), the Court refused to accept Mississippi’s plea to enjoin the president from carrying out a congressional law. It observed that had it tried to do so, Congress might (as it eventually chose to do for other reasons) impeach the president. Similarly, in Nixon v. United States, 506 U.S. 224 (1993), the Court decided under the political questions doctrine that the clause vesting the Senate with the “sole” power of impeachment left the Senate and it alone with the power to decide whether to use a subcommittee to gather evidence against a sitting federal judge.

Although the Court more commonly applies the concept to foreign than to domestic affairs, it has recognized that the president has some inherent powers in domestic affairs. In re Neagle, 135 U.S. 1 (1890) is a case in which the Supreme Court ruled that the president could appoint a U.S. marshal to protect a justice, even though the law did not specifically provide for him to do so.

TREATIES AND EXECUTIVE AGREEMENTS

Article VI specifies that “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” In a classic decision in Missouri v. Holland, 252 U.S. 416 (1920), the Supreme Court raised the possibility that the Senate and president might have authority to enact some policies, in this case a law protecting migratory birds, through treaties that Congress could not enact through laws. The Court’s increased solicitude for individual rights since this decision has eased fears that the Court might allow the president and the Senate to bargain away rights through treaties.

There is a fine line between congressional laws and executive orders. Although the latter often deal with military issues, presidents have also used such orders in the area of civil rights and domestic terrorism. In Jenkins v. Collard, 145 U.S. 546 (1891), the Supreme Court ruled that such orders have “the force of public law,” although Justice Hugo Black expressed reservations about such an order in Peters v. Hobby, 349 US 331 (1955) when he observed that “these orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of congress,” and opined that “the Constitution does not confer lawmaking power on the President.”

POWERS DURING WARTIME

Whereas Article I vests Congress with the power to declare war and to appropriate money for it, Article II designates the president as commander in chief. At times, the Court has issued pronouncements that recognize that the president is the leader in foreign affairs, and at other times the Court has left the two elected branches to work out differences of policy between themselves.

The Court often avoids intervening in such matters by evoking the “political questions” doctrine. The Court outlined cases where it would avoid intervention in Baker v. Carr, 369 U.S. 186 (1962), where the Court reversed an earlier decision and ruled that this doctrine did not prevent it from accepting jurisdiction over an issue of state legislative apportionment. Justice William J. Brennan Jr. outlined six criteria that identified political questions. These were:

[1] A textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clear for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

A number of these criteria limit judicial intervention in matters relative to foreign policy.

Although the Constitution vests power in the president to negotiate treaties and power in the Senate to ratify them, it does not specify who has power to
terminate them. In *Goldwater v. Carter*, 444 U.S. 996 (1979), four justices cited the political questions doctrine to avoid (on a matter that other justices sidestepped in other ways) deciding whether President Jimmy Carter (1924–) had the right to abrogate a treaty with Taiwan when he recognized the People’s Republic of China. In part because both sides are reluctant to push the issue, the Supreme Court has never directly ruled on the constitutionality of the War Powers Resolution of 1973, which subjected presidential decisions to commit or increase the number of troops in war situations without congressional authorization to a number of restraints—including reporting, justifying, and limiting the time of such commitments. In 2007, congressional Democrats tried to tie money for troop reauthorizations in Iraq to timetables for withdrawal but ultimately lacked the votes to overcome a presidential veto. There are no cases in which the Court has declared an ongoing war to be “unconstitutional.”

**WAR POWERS DIRECTED INWARD**

The Court has patrolled the boundaries of congressional and presidential powers that have been directed inward, especially in times of war. In the *Prize Cases*, 67 U.S. 635 (1863), the Court examined the constitutionality of President Abraham Lincoln’s embargo of southern ports. A majority decided that the president had the authority to repel attack and that the embargo was consistent with this authority, but some justices said that the president should have waited until he received congressional authorization for such a measure. At the end of the Civil War, in *Ex parte Milligan*, 71 U.S. 2 (1866), the Court voided a conviction of an Indiana civilian that a military court had tried and convicted for conspiracy to seize federal weapons and free Confederate prisoners. The Court stressed that Milligan was not a member of the military and that civilian courts were open at the time of the trial. The justices split as to whether Congress had the power to create a military court to try civilians in such circumstances, but the majority clearly ruled that the president had no such lawmaker authority.

*Ex parte Quirin*, 317 U.S. 1 (1942) upheld the conviction of eight German saboteurs by a military court, largely on the basis that they were enemy combatants. A number of decisions, most notably *Korematsu v. United States*, 323 U.S. 214 (1944), upheld an executive order that declared California to be a military zone and that ultimately resulted in the detainment of Japanese Americans in detention camps, but Congress did not oppose the move, which was stirred by fears of Japanese invasion and by racism.

The Supreme Court cited separation of powers to strike down the seizure of steel mills in the case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). President Harry S Truman (1884–1972) had taken over the steel mills to avoid a threatened strike in the industry that he thought would jeopardize the production of materials needed to support American troops in Korea. Justice Hugo Black wrote the lead opinion in this case, in which he argued that “the President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.” Black observed that Congress had made no provision for the seizure of private industries. Because the activity did not occur within the “theater of war,” it did not fall under the president’s power as commander in chief. Moreover, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”

Justice Robert Jackson’s concurring opinion in this case divided presidential exercises into three categories. Thus, “when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” By contrast, “when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” Finally, “when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Because Congress had specifically rejected legislation granting seizure powers to the president, Jackson agreed that this case fell into the third category.

**POWERS SINCE 9/11**

Events since the terrorist attacks of September 11, 2001 have also raised issues of both congressional and presidential powers. Congress has provided authority, in the USA Patriot Act (2001) and elsewhere, for most exercises of presidential powers, which are directed in part against individuals with foreign allegiances, but advocates of the “unitary executive,” such as John Yoo (1967–), have also argued for broad presidential powers, independent of Congress, albeit subject to congressional funding and implementing restraints. In cases after this authority was provided, the Court indicated that it will patrol the boundaries of such powers.

(2006), the Court established limits on the role of a military court in trying a Yemeni national. A U.S. district court subsequently issued a declaratory judgment in *American Civil Liberties Union v. National Security Agency*, 06-CV-10204 (Eastern District of Michigan, Southern Division), August 17, 2006, Memorandum Opinion, against executive authorization of warrantless wiretaps of conversations between U.S. citizens and foreign nationals. The judge in this case specifically cited the precedents in *Ex parte Milligan* and the Steel Seizure Cases. The Court will likely encounter similar issues as the war on terrorism continues.

**SEE ALSO** Administrative Agencies; Departmentalism; Federalism; Federalist Papers; Judicial Independence; Nondelegation Doctrine; Unitary Executive

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**SERIATIM OPINIONS**

The practice in English appellate courts is for all of the participating judges to write, and deliver orally, individual opinions explaining their views on a case. This process is known as *seriatim* opinion writing, and it originated in the jury-charge practice of common-law courts. (*Seriatim* is Latin for " severally" or "in series.") *Seriatim* opinion writing was also the practice employed by early American appellate courts—the U.S. Supreme Court included—before John Marshall became chief justice in 1801.

Marshall put an end to the practice of *seriatim* opinion writing because he believed that the Supreme Court's power and prestige would be enhanced if it spoke with a single voice. He established the practice of a single "opinion of the Court" that would reflect the views of the Court as an institution and be recorded and reported to the public. As with any collaborative product, however, this new practice meant that differences among the justices were adjusted internally and, consequently, hidden from public view. Although this was plainly Marshall's intention, the end of *seriatim* opinion writing meant that the contributions of individual justices were difficult, if not impossible, to discern.

The Court long ago abandoned the practice of *seriatim* opinion writing, largely because individual justices refused to remain silent in print with cases that mattered to them. Many court watchers are concerned. For example, political scientist David M. O'Brien maintains in his prize-winning book, *Storm Center: The Supreme Court in American Politics*, that "less agreement and more numerous and longer opinions invite uncertainty and confusion about the Court's rulings, interpretation of law, and policy-making" (1996, p. 336). And, as Justice Byron White emphasized upon his retirement in 1993, this uncertainty and confusion about what the Court is saying—or better yet, about what the Court is trying to say—is not without practical significance for American politics: It adversely affects implementation of and compliance with high court decisions. Put simply, the argument goes, how can the lower courts—let alone...