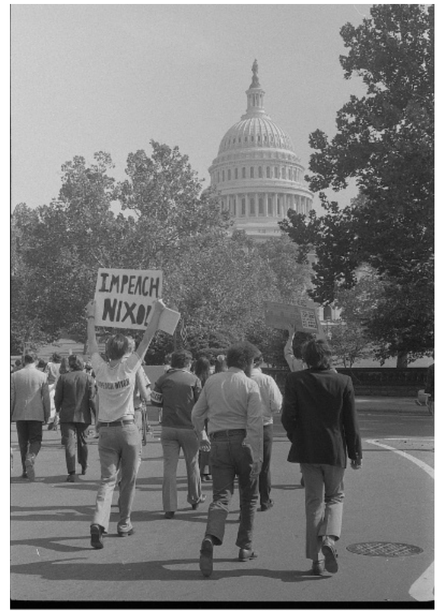
Checks & Balances Case Studies

Impeachment: Watergate



Demonstrators with "Impeach Nixon" signs near Capitol

As president, Richard Nixon and members of his administration engaged in several criminal activities and then tried to cover them up to avoid prosecution for wrongdoing. The legislative and judicial branches of government tried to use their powers to restrain the president and punish him for abusing the powers of his office. Impeachment is a constitutional process that supports the principle of checks and balances to preserve the rule of law and prevent abuses of power by government officials.

In June 1972, members of the Committee to Reelect the President (CRP) were arrested while breaking into the Democratic National Committee headquarters at the Watergate hotel and office complex. They planned to plant wiretaps and take photographs of party documents in order to help President Nixon in his re-election campaign. The White House paid hush money from campaign slush funds to some of the perpetrators.

White House counsel John Dean, who was in charge of covering up the operation, initially lied to the FBI when asked about the break-in, thereby obstructing justice. The White House also tried to pressure the *Washington Post* to drop a story about the operation. However, the participants in the break-in pleaded guilty to burglary and wiretapping, and a few were sentenced. The Senate subsequently created a special Watergate committee to investigate the matter and held hearings in the spring of 1973.

After the attorney general broke with the administration over the cover-up and resigned, President Nixon named Secretary of Defense Elliot Richardson to the post. Richardson then appointed a special prosecutor, Archibald Cox, to investigate the case. When the Senate Watergate committee discovered that Nixon had tape-recorded his conversations in his White House office, the Senate and Cox both subpoenaed the tapes, but the president refused to comply with the subpoenas, claiming he had the constitutional right (or "executive privilege") to withhold them.

When Cox refused to drop his demand for the tapes, Nixon ordered Attorney General Richardson to fire him. Richardson resigned instead, as did his deputy. Finally, another official in the Justice Department, Solicitor General Robert Bork, did the president's bidding and fired Cox in the "Saturday Night Massacre." The episode provoked a firestorm of outrage that the administration was covering up illegal activities and running roughshod over the Constitution. The firings also prodded Congress to step up its investigations.

In December of 1973, a panel of investigators discovered that a tape had an 18.5-minute gap. Investigators believed that the gap included erased evidence of the president's knowledge of the Watergate break-in. In April 1974, the administration, which still refused to turn over the tapes to the House Judiciary Committee on the basis of "executive privilege," released more than 1,200 pages of transcripts of taped conversations to the Committee. The Committee, however, demanded the tapes themselves, and the case went to the Supreme Court.

In *U.S. v. Nixon* (1974), the Court unanimously ruled in late July that executive privilege only applied to confidential conversations in the public interest, not to efforts to cover up wrongdoing. The Court ordered Nixon to turn over the tapes.

A few days later, the House Judiciary Committee passed the first of three articles of impeachment against the president for obstruction of justice. These would then be sent to the full House for consideration. If the House approved any of them (by a majority vote), the Senate would then hold a trial, presided over by the chief justice of the Supreme Court, and could convict the president—removing him from office—with a two-thirds vote.

Nixon did not want to face the indignity of being the second president to be impeached and the first to be removed from office in history, given the strong likelihood that Congress would do so. Therefore, President Nixon resigned on August 8, 1974. In the Watergate case, Congress and the Supreme Court diligently pursued justice and the constitutional rule of law to prevent a president from acting without restraint in an unlimited manner.

The Power to Declare War

The power to declare war is one of the most serious powers the government has. The Framers of the Constitution knew this and believed war should not be declared lightly. They reserved that power for the collective and prudent judgement of Congress. The president was given the authority to conduct war. The power to declare and conduct war would not be trusted to the will of a single individual but shared between the elected branches.

Congress is the representative and deliberative body that can debate and forge a consensus about going to war. It has the power to declare war, raise an army and navy, and fund military action. The president acts as commander-in-chief to conduct war. This role allows the president to act decisively and defend the nation against attacks with energy and vigor. Dividing the power to declare and manage war is an important part of the constitutional principles of separation of powers and checks and balances. Moreover, the two branches together ensure civilian control over the military, preserving republican government and protecting the liberties of the people.

Problems can arise when one branch or the other tries to take a greater share of the war powers. They can also be created when the boundaries of constitutional authority are blurred or broken. Another problem occurs when one branch of government simply defers to the other branch of government and surrenders its rightful constitutional authority.

The last time that the United States declared war was on December 8, 1941, during World War II. But the United States has fought in several major wars since then in Korea, Vietnam, the Persian Gulf, Kosovo, Afghanistan, and Iraq, to name a few. Congress has at times authorized the use of military force short of declaring war, but presidents have also sent American troops into harm's way with authorization from international bodies, such as the United Nations and NATO, and not from Congress.

Going to war without formal constitutional authorization from Congress is deeply troubling. The United States surrenders sovereign control when it defers to international organizations on the question of going to war. Moreover, the president acquires too much power when one person alone decides whether to go to war. The American people lose their voice when the nation goes to war without the careful deliberation and debate among their representatives.

The difficulty is that Congress has allowed presidents to act without its authorization and collective deliberation between the branches. Congress has deferred to the executive branch several times on the question of whether to go to war. In the troubling aftermath of the Vietnam War, Congress tried to rein in the executive branch. The U.S. fought in Vietnam on the broad authorization contained in the Gulf of Tonkin Resolution (1964), which was requested by President Lyndon Johnson.

As a result, in 1973, Congress passed the War Powers Resolution by a two-thirds majority in each house, overriding President Nixon's veto. It placed some restrictions on presidents sending troops into harm's way. However, since it allowed the president to go to war for 90 days without authority from Congress, the War Powers Resolution did little to limit the presidency or reserve solely to Congress the constitutional power to declare war.

In the wake of the horrific terrorist attacks that killed approximately 3,000 Americans on September 11, 2001, Congress passed an Authorization for Use of Military Force after three days of discussion. The Senate voted 98–0 and the House voted 420–1 for the bill, suggesting that there was relatively little discussion about the War on Terror. The quick vote was taken in a moment of crisis and perhaps without fully deliberating about the consequences of fighting a war on terror rather than a foreign country.

The administrations of George W. Bush, Barack Obama, Donald Trump, and Joe Biden all appealed to the Authorization for Use of Military Force to support various military interventions and actions around the globe. These presidents have used it to hunt down terrorists, use "enhanced interrogation techniques," try enemy combatants by military tribunals, launch drone strikes, attempt to spread democracy in the Middle East, and fight ISIS, among other major initiatives.

Through the Authorization for Use of Military Force and minimally restrictive War Powers Resolution, Congress has essentially given recent presidents a blank check for unilateral military action. Critics suggest that these actions have disrupted the separation of powers and checks and balances because these principles are only used effectively when each branch vigorously defends its constitutional powers. Many fear that when these powers are out of balance, the result may be the president acting unilaterally without the consent of the people and their representatives.

Congress and the Commerce Clause

The Constitution does not explicitly give the Supreme Court the power of judicial review, which includes the power to overturn laws and executive actions. However, *Marbury v. Madison* (1803) established the principle of judicial review that provided strength to the system of constitutional checks and balances. In deciding cases, the Court can rule whether a law is constitutional. Judicial review supports the principle of checks and balances.

This has been of particular importance for Congress's power to regulate commerce. Article I, Section 8, of the Constitution includes the Commerce Clause, which gives to Congress the power to "regulate commerce with foreign nations, and among the several states." Congress thus has the constitutional authority to regulate commercial activities between the states. The interpretation of the Commerce Clause by the Supreme Court has a long and varied history.

During the early republic, the Marshall Court (so named after then Chief Justice John Marshall) sought to encourage national expansion and confirmed vigorous constitutional powers in the national government. Later, during the first part of the twentieth century and rise of industrialization, Congress passed several laws regulating the economy, and the number of executive branch agencies greatly expanded. The Court generally resisted this expansion with a strict reading of the Commerce Clause.

During the New Deal era, the Court resisted attempts by the federal government through the actions of President Franklin Roosevelt and Congress to regulate the economy during the Great Depression. The Court unanimously decided that the National Industrial Recovery Act was unconstitutional in *Schechter v. U.S.* (1935) because Congress regulated intrastate commerce (commerce that did not cross state lines) and delegated its regulatory power to the executive branch. As a result, Roosevelt attempted to "pack the Court" by adding new justices to the Court. The Court responded by shifting its reading of the Commerce Clause. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), the Court ruled the right of workers to join a union was protected under the Commerce Clause.

For nearly 60 years, the Supreme Court did not invalidate a congressional law under the Commerce Clause. Then, in 1990, Congress passed the Gun-Free School Zones Act, making it illegal to possess a firearm within 1,000 feet of a school. Congress based its authority to pass the law on the Commerce Clause.

In 1992, Alfonso Lopez, Jr. was a senior in a San Antonio, Texas, high school. He was arrested for carrying a .38-caliber handgun and bullets at school. He was sentenced to six months in prison and appealed his case to the Supreme Court.

In *U.S. v. Lopez* (1995), the Court decided that the Gun-Free School Zones Act was unconstitutional. The Court ruled in a 5–4 decision that banning guns near schools was not related to Congress's authority to regulate interstate commerce. In the majority opinion, Chief Justice William Rehnquist expressed the Court's concern that Congress was stretching the bounds of the Commerce Clause and effectively exercising unlimited power. Rehnquist wrote, "If we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."

The question of congressional exercise of the power to regulate interstate commerce has changed over many decades and involved all the branches. Congress made laws adapting to changing economic conditions, while the president decided whether to sign the proposed legislation, and the Court altered its interpretation over time. Throughout this period, however, the branches interacted in a way to determine the scale and scope of the national government, the extent of congressional authority, and how to preserve liberty.