

## Legal Sidebar

# Separating Power: Friction

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Many have blamed partisan gridlock for the possibility that the 113th Congress will be deemed the least “[productive](#)” Congresses ever. Setting aside what constitutes productivity and how productivity should be measured, the President too has repeatedly [cited](#) congressional inaction in defending a series of unilateral executive actions that have only deepened existing divides between the two branches. Thus a situation has developed in which the President criticizes what he considers to be a “Do Nothing” Congress, while some Members of the House and Senate, in turn, condemn what they consider to be an “[Imperial Presidency](#).” Although it admittedly can be difficult to distinguish institutional conflicts from political ones, the result, some would argue, has nevertheless been legislative stagnation.

Was it meant to be this way?

The Supreme Court has suggested that, yes, in many ways the Framers instituted the nation’s system of checks and balances and the separation of powers with the very idea of creating “friction” among the branches. Where ambition is made to counteract ambition, things are not necessarily intended to run swiftly and smoothly.

Writing for the majority in [Ex Parte Grossman](#), Supreme Court Justice William Howard Taft, who, as a former President, had personal experience with the difficult relationship between the President and Congress, recognized that the House, the Senate, and the Presidency all have powers at their disposal to “defeat” the actions of the others and essentially bring the government to a grinding halt. Taft listed the many barricades each branch could erect to impede the others:

By affirmative action through the veto power, the Executive and one more than one-third of either House may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the Judiciary. The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. Negatively, one House of Congress can withhold all appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.

As a result, Taft concluded that each branch is “dependent on the other two, that government may go on.”

In [Myers v. U.S.](#), Justice Louis Brandeis was unequivocal about the motivation behind the American governmental design, writing that:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Although issued in dissent, the Supreme Court has repeatedly cited Brandeis’s proposition that the separation of powers intentionally creates conflict to protect individual liberty. “Convenience and



efficiency,” the Court has [said](#) “are not the primary objectives—or the hallmarks—of democratic government...”

The Court again highlighted the inherent barriers associated with the system of separation of powers and checks and balances in [Youngstown Sheet and Tube Co. v. Sawyer](#). This time it was Justice Felix Frankfurter, a former Franklin Roosevelt advisor, who noted that:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.

The Supreme Court yet again suggested that “friction” is simply part of the U.S. system in [NLRB v. Noel Canning](#), the recent decision limiting the President’s recess appointment power. In that case, which involved a fundamental conflict between the President’s recess appointment authority and the Senate’s role in advice and consent, the government argued in its brief that to permit the Senate to determine whether it was in a recess would clothe that body with the power to prevent the President from ever exercising his recess appointment power, and thus “disrupt the proper balance between the coordinate branches by preventing the executive branch from accomplishing its constitutionally assigned functions.” If the President cannot fill vacant positions, the argument continued, the executive branch cannot execute the law and government cannot function.

The Court was not swayed by the argument, holding that the Recess Appointment power “was not designed to overcome serious institutional friction” that the Court identified as an “inevitable consequence of our constitutional structure.”

While the Court acknowledged that “friction” is all but certain, it did not suggest that nothing can be done about it, concluding that our constitutional “structure foresees resolution not only through judicial interpretation and compromises among the branches but also by the ballot box.”

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