

How Our System is Set up

I got the highest grade in my Federal Courts class, so I probably know what I'm talking about here. Of course, there were only six students in the class, and I tied for first, but I studied really hard. Keep in mind that many of these rules have exceptions that I won't be discussing. After you spend so much time reading this essay, you'll thank me that I didn't hit you with anything else.

The Separation of Powers

Our system separates different governmental powers into three different branches: Legislative, Executive, and Judicial. At the federal level, these are represented by Congress, the President, and the judges throughout the court system. In short, the Legislative branch makes the law, the Executive branch enforces the law, and the Judicial branch administers and interprets the law. The point is to keep the branches limited in power so that no one branch has the political power to take over. It also assures a sort of specialization. That is, for example, those who are best suited to make the law will have that responsibility.

Let's now take a quick look at how the branches interact. First, the legislature organizes committees, develops and interprets scientific studies, and otherwise performs fact-finding that determines what the best laws will be for our society. That may seem to be elitist, but remember that they answer to the people through elections. You can always vote them out. (Easier said than done, I know.) Then, someone breaks the law, and the Executive branch comes along and throws them behind bars.^[1] Whether or not he stays behind bars depends on the interaction between the Executive branch (the prosecutor) and the Judicial branch (the judge and jury).

The judicial process starts with a trial. The "trial" actually includes many hearings in addition to the actual trial itself where evidence is presented. For example, before you can have a trial, you have to resolve any motions *in limine* filed by either party. If an item of evidence will certainly result in a conviction, the defense will want to exclude it. Objecting to it during a trial may not be good enough, because once the jury sees it, the damage may have been done. If they've already seen the gruesome picture of the crime scene, sustaining the objection and keeping it out of evidence won't do any good if the jurors are emotionally impacted by it. A motion *in limine* may keep the jury from ever seeing the picture. Trials act as fact-finding missions. Who was where and at what time? What happened? Why did it happen? What were the parties' intents?

Assuming the accused is found guilty, the next step is to appeal the decision, which is almost always available, although the form it takes is very different from state to state. We have this second level to resolve, for the most part, legal questions. That is, the fact finding of the lower court is generally assumed to be correct, so the appellate court resolves questions of law. Did the trial court judge correctly interpret the evidence statute when he chose to allow the evidence at trial? Did the trial court instruct the jury properly on how it was to make its decision? The law of evidence might say that "prejudicial" materials may not be admitted into evidence, but *any* evidence that the other side offers is "prejudicial" in that it cuts against their case. What the law actually seeks to exclude is *unfairly* prejudicial evidence, and drawing the

line between what is fair and unfair is a question that requires an understanding and interpretation of the law itself.

The appellate court may affirm, reverse, or remand. If it affirms, the findings and judgment of the lower court stands. If it reverses, the judgment is thrown out, and a new trial is ordered. If it remands, then the judgment pretty much stands, but the trial court got something wrong, which it needs to fix. The trial court should make the fix and then recalculate the outcome of the case. In some cases, this could lead to a new trial anyway.

The final step is the Supreme Court. No one is entitled to an appeal to the Supreme Court unless that Court says so. Therefore, if the accused lost at the appellate level, the accused must petition for a *writ of certiorari*. Don't let this Latin scare you. It just means that the accused is asking the Court to hear the case. If the Court says yes, then another appeal occurs. This time, the outcome is final within that jurisdiction. If the Court says no, then the decision of the appellate court stands.

This process can take place in either the courts of a state or the federal courts. If this was a state case, there are narrow circumstances in which the accused could appeal beyond the State Supreme Court and take the case to the Federal Supreme Court. In order to do that, the question must be (or become) one of federal law. The US Supreme Court may not decide questions of state law. The next part of this essay will explain the separation between the state and Federal governments in greater detail.

Lastly, you should note that there are a series of *checks and balances* that further limit the power that any one branch has, even within its own area of specialization. For example, if the legislature passes a law, the chief executive (the President or the state governor) may veto it. That invalidates the law unless the legislature can come back and pass the law again with a super-majority, which is a majority of legislators greater than 50%. In the United States Senate, there are 100 members, 2 from each state. If a particular action requires a simple majority vote, then 51 Senators must vote for it for that action to be approved. On the other hand, for the Federal government, overriding a presidential veto requires a two-thirds majority, which requires 67 votes.

In case you're interested, the following table lists some of the checks in the Federal system, a brief description of the checks, against which branch the check applies, and who has the power to use that check. This avoids taking the time to learn the details, but also gives you a starting point if you're interested in learning more. Also, some of these checks are self-explanatory, so you'll pretty much understand them anyway.

Checks and Balances in the Federal Government

Check	What Is It?	Who Gets Checked?	Who Does Checking?
Bicameralism	Division of Legislature into two houses (the Senate and the House of Representatives)	The Legislature	Inherent in the set-up.
Independent Election of the President	President chosen by vote of the citizens, rather than vote of Legislature.	The Legislature	Inherent in the set-up.
Presidential Veto	President may reject a bill before it becomes law.	The Legislature	The Executive
Veto Override	Congress may override Presidential veto.	The Executive	The Legislature
Senate Confirmation of Appointments	Legislature may reject Presidential appointments.	The Executive	The Legislature
Senate Approval of Treaties	Legislature may reject treaties with foreign governments.	The Executive	The Legislature
Declaration of War	President commands military, but only Legislature may declare war.	The Executive	The Legislature
Impeachment and Conviction	Throwing Executive out of office by trial mediated by Judiciary.	The Executive	The Legislature; the Judiciary
Prohibition of Dual Office Holding	Member of Legislature may not be member of Executive branch at the same time.	The Executive	Inherent in the set-up.
Appointment of Judges	President appoints judges, and the Senate confirms.	The Judiciary	The Executive; the Legislature
Constitutional Amendment	Changing the Constitution	The Judiciary	The Legislature

Federalism

The US Constitution defines the Federal government as one of limited powers, and the state governments as governments of general powers. This means that in order for a federal government to have a power, it almost always must be granted that power by the plain text of the US Constitution. On the other hand, a state government can do whatever it wants unless its state constitution directly forbids it. There's a catch, though. The US Constitution also has within it a Supremacy Clause. This means that Federal law trumps state law. Where the federal law and state law contradict one another, the federal law wins, and the state law is said to be *preempted*. The net effect is that the Federal government has very few areas in which it can act, but when it

can act, its authority overrules the states' authority. Keep in mind that the US Constitution is federal law, so when a state statute contradicts the US Constitution, it is struck down as unconstitutional even if the state statute doesn't directly contradict a federal statute.

The result of this set up is that we have 51 separate sovereign governments, each of the 50 states and the federal government. Although the state governments eventually bend to the will of the federal government, the separation described above gives the states plenty of breathing room. For example, matters of family law, including child custody and wills, are traditionally left to the states. Each of these 51 governments have their own legislative branch making laws, their own executive branch executing those laws, and their own judiciary administering and interpreting those laws. In a state government, the chief executive is the Governor, and the state court system is set up, in some cases, just like in the Federal government: a trial court, an appellate court, and a state supreme court to which one must petition to be heard.

Some states, however, don't have a "court of appeals" in this sense. For example, in Delaware, both the Court of Common Pleas and the Superior Court can act as trial courts. If you have your trial in the Superior Court, you're only appeal will be to the Supreme Court, and the Supreme Court may deny that petition. If you have a trial in the Court of Common Pleas, the Superior Court acts as the appellate court, but you'll still be able to ask permission of the Supreme Court of Delaware for a second appeal. On the other hand, in Virginia, there are two trial courts, the General District Court and the Circuit Court, the Court of Appeals of Virginia, and the Virginia Supreme Court, potentially giving you two trials and two appeals for a single case. Your states may have completely different systems as well.

There are many other important legal entities (for example, administrative bodies), but for our purposes, we'll stay away from that.

Rob's Soapbox

I'm a strong supporter of states' rights, which is helped out quite a bit by the design of federalism. I like a system that allows me to move to a state that, for example, allows for the consumption of alcohol, but at the same time allows you to move to a state that doesn't, assuming that you don't like alcohol. The philosophy behind that should be obvious: local governments are better able to handle local problems. Immigration is a national problem, so the Federal government has exclusive jurisdiction over our immigration system (unless, of course, it willingly delegates authority to the states), but the Federal government lacks the ability to effectively deal with local matters, such as whether one should be able to build a commercial building in an otherwise residential neighborhood.

I also like the separation of powers because it keeps government necessarily inefficient, which keeps us safe from anything resembling a dictatorship spring up from within the system itself. On the other hand, we all hate how inefficient government can be, but it's a tremendous waste of money only because of the fact that the federal government is no longer as limited as it was intended to be. (Thanks a lot, FDR.) More theoretically speaking, I find the line item veto to be a great idea at loosening up the binds of inefficiency where appropriate, but unfortunately it

appears to be unconstitutional, and the US Supreme Court agrees. You just can't get it to agree with the concept of separation of powers. Overall, I can live with that. Too bad, though.

Footnotes

[1] I'm using a criminal case as my example because it's easier to make all of my points. In a criminal trial, the government acts as "plaintiff," and the accused is the "defendant." The victim is essentially the state, because the accused has allegedly disrupted society as a whole by breaking its laws. For a civil trial, both the plaintiff and defendant are either a citizen or a legal entity such as a corporation. Civil cases address private wrongs, so the plaintiff is the victim (or an agent of the victim, such as a parent of a child-victim). Committing a criminal offense is a crime; committing a civil offense is a tort.