First PRINCIPLES SERIES

No. 2
January 6, 2011

Constitutional Guidance for Lawmakers

Legislative Powers: Not Yours to Give Away

Although the Constitution contains no explicit prohibition against Congress delegating its legislative powers (to the President or an administrative agency, for example), the principle of non-delegation is fundamental to the idea of a limited government accountable to the people. Indeed, the people, in whom sovereignty ultimately resides, carefully assign certain powers to each branch of government. The delegated powers are defined as placed in distinct branches of government for the "accumulation of all powers, legislative, executive, and judiciary, in the same hands," writes James Madison in Federalist *No. 47, "may justly be pronounced the very definition of tyranny." While the executive must exercise some discretion in the application of law, lawmaking remains the prerogative of Congress. Since the New Deal, the Supreme Court has unfortunately sanctioned ever greater delegations of legislative power to administrative agencies. That the courts have flouted this principle does not mean that Congress can or should ignore this element of constitutional construction. This essay is adapted from* The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
— Article I, Section 1

Articles I, II, and III of the Constitution respectively vest the legislative, executive, and judicial powers each in a separate department of the federal government. This separation of powers, which draws upon ideas advanced by John Locke, Baron de Montesquieu, and Sir William Blackstone, reflects the Framers' intention that undue power not be combined in any one department lest, being unchecked, it become tyrannical. The separation, by which each department may exercise only its own constitutional powers, is fundamental to the idea of a limited government accountable to the people. The principle is particularly noteworthy in regard to the Congress. The Constitution declares that the Congress may exercise only those legislative powers "herein granted." That the power assigned to each branch must remain with that branch, and may be expressed only by that branch, is central to the theory.

This basic principle is enforced by the Constitution's scheme of enumerated powers. The President and the federal courts are vested with the executive and judi-

Published by The Heritage Foundation LEADERSHIP FOR AMERICA

214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

cial powers, respectively. Neither power includes a general power of lawmaking. Nor can the Congress confer such a lawmaking power by statute, for the simple reason that the Congress has no enumerated power to create lawmakers. (The exceptions are in the Enclave Clause and the Property Clause, where the Congress has essentially plenary powers, and in foreign affairs, where, in light of the President's inherent executive powers, delegation is of little concern. *United States v. Curtiss-Wright Export Corp.* (1936).)

The executive necessarily has a range of discretion in the manner of effectuating a law. But some decisions are legislative by nature; otherwise, the distinction among legislative, executive, and judicial powers that is fundamental to the Constitution's structure would be meaningless. Accordingly, the question arises whether and when laws that confer discretion upon the executive call for the executive to exercise legislative power.

The Supreme Court has wrestled with that difficult question from early in the history of the Republic to the present day. In the 1825 case of *Wayman v. Southard*, the Court acknowledged that "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to [others] to fill up the details." In another early case the Court held that a conditional exercise of the legislative power—by enactment of a statute with a provision that takes effect only upon the President's making a certain factual finding—does not unlawfully delegate that power. *Cargo of the Brig Aurora v. United States* (1813).

In 1928, the Court upheld a statute delegating to the President the power to adjust tariffs to any rate, within a wide range, he found necessary to "equalize the...differences in costs of production in the United States and the principal competing country." *J.W. Hampton, Jr. & Co. v. United States.* In that case, the Court for the first time set out what remains the governing standard: a "legislative action is not a forbidden delegation of legislative power" if the "Congress shall lay down by legislative act an intelligible principle to which the person or body [to whom power is delegated] is directed to conform."

The Constitution declares that the Congress may exercise only those legislative powers "herein granted."

Twice in 1935 the Court held that a statute delegating sweeping regulatory power to the President violated this standard. In *Panama Refining Co. v. Ryan* (1935), the Court held unconstitutional a section of the National Industrial Recovery Act that permitted the President broadly to ban interstate transportation of quantities of oil in excess of state law production limitations: "[T]he Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." Four months later in *A.L.A. Schechter Poultry Corp. v. United States* (1935), the Court unanimously struck down a section of the same act that gave the President virtually unbridled power to regulate the economy by approving so-called codes of fair competition for industry. Justice Benjamin N. Cardozo, the lone dissenter in the prior case, described the code system at issue in *Schechter Poultry* as "delegation running riot" because the statutory provision delegated to the President "anything that Congress may do within the limits of the commerce clause for the betterment of business."

Schechter Poultry marks the last time the Court held a statute unconstitutional under Article I, Section 1. In 1980, however, then-Justice William H. Rehnquist expressed his doubts about the lengths to which the Congress had gone in delegating its authority to the Occupational Safety and Health Administration in the Department of Labor. The Court in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (1980), known as *The Benzene Case*, vacated an OSHA regulation limiting the amount of benzene to which

an employer may expose its employees, on the ground that the regulation was not authorized by the statute. Justice Rehnquist, in a concurring opinion, expressed the view that the statute—which authorized the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible" that no employee would suffer material harm from exposure—was itself standardless and therefore an unconstitutional delegation of legislative power.

The Court has since moved toward an entirely hands-off approach to delegation. In 1989 it upheld the Congress's delegation to the United States Sentencing Commission of authority to issue "guidelines" prescribing the range of sentences for every federal crime. *Mistretta v. United States* (1989). Justice Antonin Scalia, the lone dissenter, considered the statute an impermissible delegation because the standards given to the Commission were not "related to the exercise of executive or judicial powers; they [were], plainly and simply, standards for further legislation." He criticized the Court's emphasis upon whether the statute contained an intelligible principle, arguing that a court cannot practically police the uncertain boundary between proper and improper delegations. In its most recent delegation decision, *Whitman v. American Trucking Ass'ns, Inc.* (2001), the Court as a matter of form continued to apply the requirement of an intelligible principle, but it seems in substance to have joined Justice Scalia in abandoning any serious effort to police the boundary between proper and improper delegations. The Court found in *Whitman v. American Trucking Ass'ns, Inc.* an intelligible principle in Congress's directive to the Environmental Protection Agency to promulgate air quality standards "requisite to protect the public health" with "an adequate margin of safety." Because no standard could eliminate all significant adverse effects to health, the statute effectively delegated to an unelected and unaccountable agency the decision how far our society should go and how many billions of dollars should be spent to reduce the adverse health effects of industrial pollution, a decision that seems quintessentially legislative, but undoubtedly one for which legislators would prefer to avoid responsibility. In that case, Justice Clarence Thomas suggested that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' "

The Supreme Court, by failing to prevent delegations of legislative authority, forgoes a significant opportunity to maintain the structure of government prescribed by the Constitution. As a result, legislators may and do delegate difficult and divisive legislative issues to agencies in the executive and judicial branches far removed from political accountability.

The Honorable Douglas Ginsburg is a Judge on the U. S. Court of Appeals for the District of Columbia Circuit.