



INTERNAL SEPARATION OF POWERS ("Internal Checks on Executive Power")

WEEK TEN
Asynchronous Presentation
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INTERNAL CHECKS – What are They?

- Civil Service employees (with experience and protection)
- Dissent Mechanisms
- Government lawyers (with professional norms)
- Internal Watchdogs (Inspector Generals & Offices of Goodness)
 - Two other items have "watchdog"-like status: independent agency structure & APA
- Overlapping admin agency jurisdictions & conflict

INTERNAL CHECK – Civil Service

- **Civil service** is the employee workforce within all of the administrative agencies.
 - Key is the protection from removal offered via "civil service acts"
- **Executive Branch civil service** of 3 types:
 - (1) "competitive service" positions filled via competitive, merit-based testing
 - (2) "excepted service" positions in national security & intelligence mainly, but also attorneys
 - (3) Senior Executive Service (SES) positions in top level management & professional positions (mix of career employees & appointees).

INTERNAL CHECK – Dissent Mechanisms to 'Out' Concerns

- Admin agency civil servants may have connections to and relationships with:
 - Congress members/Committee oversight members
 - Society or industry groups
 - Regulated businesses
 - State & local officials
- Statutory protections for internal whistleblowers to designated agency officials or to Congressional oversight committees (also Office of Special Counsel to protect them from retaliation)
- Authorized "Dissent Channels" (well-known one at Department of State)
- Leaks to the press are frequent despite criminalization & Presidential approbation (and some are even tolerated . . .)



INTERNAL CHECK – Government Lawyers

- The government employs MANY lawyers – many are in the Executive Branch.
 - Thousands of lawyers in General Counsel Offices in each admin agency
 - Thousands of lawyers in Dept. of Justice & in the White House
- Lawyers bring "professional norms" (legal, ethical, moral) to both "check" & motivate behavior inside admin agencies
- Office of Legal Counsel (OLC) in Dept. of Justice (traditionally) treated as providing authoritative & binding legal advice inside Executive Branch
 - OLC to provide legal advice based on "best understanding of what the law requires"
 - Not advocate's promotion of position proposed by admin agency or Presidential administration
 - On issues of first impression unlikely to be addressed by court, OLC can be "final word"

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**A Public Service
Message:**

**Legal Jobs?
Yes!**

Something to consider . . .

INTERNAL CHECK – Internal Watchdogs



Offices of Goodness



- Offices within admin agencies that help the agency function.
- These offices have their own missions: to promote values
 - Civil rights & civil liberties
 - Consumer welfare
 - Ethics & lawful behavior
 - Good fiscal practices
- Advisory; operate by persuasion & coercion
- Good & promote good example to public

Inspector Generals

- Created by Inspector General Act of 1978 to prevent/detect fraud *inside* admin agencies
- Enjoy statutory protections & possess investigatory powers so they can do their job without interference
- Dual reporting role: to their admin agency & to Congress
- Conduct audits, access documents across agencies

INTERNAL CHECK – Internal Watchdogs



- Two other items with “watchdog like” status:
 - APA (with its procedural constraints)
 - “Independent” agency structures built by Congress
 - Lots of these: CIA, FCC, FERC, NRC, etc.

INTERNAL CHECK – Overlapping Admin. Jurisdiction & Conflict

- Admin. agencies are often given overlapping jurisdiction & seemingly conflicting missions.
- Overlap traditionally seen as creating problems and inefficiencies when admin agencies clash & impede each other.
- Can be seen as method of fostering conflict that leads to discussion & exchange of ideas that ultimately foster better decision-making.
- May be even more useful at times when Congress & President at logger-heads.

INTERNAL CHECK (or Problem?)

- Agency structure (in terms of how work gets done thru a hierarchy) impacts prioritization of work and certain perspectives.
- Agency structure often fosters *sub-delegation* of decision-making, especially through “signature authority.”
 - Authority to affix signature/sign-off on admin agency decision without actual supervisory oversight.
- Perhaps problematic because impacts direct line of accountability.
- Everyone inside an agency is *human* (own preferences & bias) – may facilitate rather than buffer political agenda.

INTERNAL CHECKS – Do They Work?

Check Power?

- Admin actors operate in the “**thick political surround**” influencing Congress & courts to look hard at Presidential activity
- “Second Best” in the sense that even if Congress & Judiciary weakening, this is still *some* layer of “check.”
- Cacophony of activity inside admin agencies at least airs issues and spurs discussion.

Enhance Power?

- Presidents can manipulate overlapping admin agency jurisdictions by selecting one to use to perform directed tasks
- “[G]rowing reliance on a more policy and politics-infused legal apparatus.”
- “President today looks to executive branch legal review to forge pathways to policy and political compromise in highly-contested consequential and increasingly legalistic terrain.”

GOVERNMENT LEGAL REPRESENTATION AND THE NATURE OF A CLIENT?



