

2.1 CONGRESS: The Senate and the House of Representatives



ESSENTIALS

1. The Senate is designed to represent states equally, while the House is designed to represent the population.
2. Different chamber sizes and constituencies influence formality of debate.
3. Coalitions in Congress are affected by term-length differences.
4. The enumerated and implied powers in the Constitution allow the creation of public policy by Congress, which includes:
 - Passing a federal budget, raising revenue, and coining money
 - Declaring war and maintaining the armed forces
 - Enacting legislation that addresses a wide range of economic, environmental, and social issues based on the Necessary and Proper Clause

1. What is the underlying idea of this cartoon? [Write your response like a claim statement]
2. What are the advantages of a bicameral legislature? What are the disadvantages of a bicameral legislature?

Cup and Saucer

Our bicameral legislature was divided for reasons other than compromising between big states and small states. Each house represents the people, yet they also possess remarkably different responsibilities. The House, modeled on the British House of Commons, represents the passions of the people. The Senate, modeled on the British House of Lords, responds to these passions with reason. James Madison saw the Senate as an “anchor,” a “necessary fence” against the “fickleness and passion” of the people. The Senate is to “cool” House legislation just as a saucer was used to cool hot tea. Thomas Jefferson once expressed his doubts about the usefulness of the Senate. “Why did you pour that coffee into your saucer?” George Washington asked. “To cool it,” Jefferson replied. “Even so,” Washington declared, “we pour legislation into the senatorial saucer to cool it.”

Today, with the advent of directly elected Senators and the 24/7 televised news cycle, it is more difficult to discern between the passions of the House and the Senate. By not fulfilling their proper roles, our cups run over. Who is going to clean up the mess?

Time for a new metaphor:

Make a list of three (3) metaphors that could be used to describe our current Congress.

Cite critical differences (consider number, terms, constituencies, leadership...)

US CONGRESS

HOUSE

SENATE

REVIEW: What is the difference between **enumerated** and **implied** powers? Using Congressional powers, list examples:

Assessing TODAY'S CONGRESS

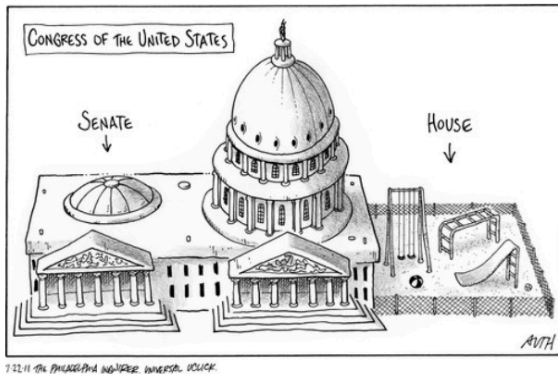
1. Write a claim statement about recent HOUSE and SENATE activity with respect to the BUDGET. Provide data to substantiate your claim.
2. Write a claim statement about recent HOUSE and SENATE activity with respect to FOREIGN POLICY. Provide data to substantiate your claim.
3. Write a claim statement about recent HOUSE and SENATE activity with respect to a SOCIAL ISSUE. Provide data to substantiate your claim.

CONCEPT APPLICATION

There is a reason the necessary and proper clause has been dubbed the elastic clause. This constitutional provision has allowed the Congress and subsequently the government of the United States to expand far beyond what the Founders had envisioned. These implied powers allow Congress to fulfill their enumerated powers. They were never intended to write a blank check for Congress to do whatever it wants. In all fairness, however, the Founders never could have imagined what our world would be like today. It was for this reason they wrote into law a provision that would allow the Constitution to be a living letter. Some argue it lives too gregariously. It is necessary and proper for "we the people" to decide whether or not the Congress abuses its authority.

- A. Referencing the scenario, describe the intent of the Constitution's necessary and proper clause.
- B. In the context of this scenario, explain an action of Congress that exemplifies the intent described in part A.
- C. Explain which of our two primary political parties would advocate for a broader use of the Constitution's necessary and proper clause.

2.2 Structures, Powers, and Functions of Congress



ESSENTIALS

5. The Senate is designed to represent states equally, while the House is designed to represent the population.
6. Different chamber sizes and constituencies influence formality of debate.
7. Coalitions in Congress are affected by term-length differences.
8. The enumerated and implied powers in the Constitution allow the creation of public policy by Congress, which includes:
 - Passing a federal budget, raising revenue, and coining money
 - Declaring war and maintaining the armed forces
 - Enacting legislation that addresses a wide range of economic, environmental, and social issues based on the Necessary and Proper Clause

1. What is the underlying idea of this cartoon?
2. Did our Founding Fathers design Congress to be inefficient? Are we overly critical of an institution that is merely operating the way it was intended? What reforms would you like to see implemented to improve how Congress operates?

List the **formal** powers of Congress as found in Article 1, Section of the U.S. Constitution:

How many total committees are there in our Congress? Describe the two (2) most important committees in the House and the two (2) most important committees in the Senate. What are their functions? Who is the chairman of each? What role do the political parties play in committee membership?

**Assess procedural rules in both the House and the Senate (note differences).
Consider the following – provide contemporary examples:**

Role of Speaker of the House

Role of Majority Leader

Filibuster/cloture

House Rules Committee

Holds

Discharge petition

Advise and consent (Senate)

Pork barrel legislation

Logrolling

CONCEPT APPLICATION

The democratic principle of majority rule does not apply in the United States Senate. Majority rule has been replaced by rule by the minority. Rule [22] of the Standing Rules of the U.S. Senate currently gives a minority of ...senators, who may be elected from states that contain as little as eleven percent of the nation's population,' the power to prevent the Senate from debating or voting on bills, resolutions, or presidential appointments by filibustering or acquiescing in a filibuster. It also magnifies the ability of an individual senator to obstruct the business of the Senate and, therefore, of Congress-an ability he or she would not have if the Senate operated under a strict version of the principle of majority rule.

A filibuster is an intentional abuse of the privilege of unlimited debate. It is not used to inform or persuade, but rather to obstruct the proceedings of the Senate by preventing the majority from taking action opposed by a minority of senators. Filibusters in the Senate are a profoundly undemocratic result of a mistake made in 1806 when the Senate accepted the advice of Aaron Burr and eliminated the "previous question" motion from its rules.

Before that change, the previous question motion had been a "non-debatable motion that, if favored by the majority, close[d] debate and force[d] an immediate vote on a matter." As such, filibusters as a parliamentary tactic were unknown at the time the Constitution was adopted, and the members of the English Parliament had no right to obstruct the proceedings by engaging in unlimited debate over the objections of the majority. The rules of the Second Continental Congress, and rules adopted by the first Senate in April 1789, immediately after the Constitution was ratified, allowed for a motion for the previous question as a procedural method of empowering the majority to end debate.'

By contrast, the current rules of the Senate do not permit debate on a bill to even begin without a unanimous consent agreement or the adoption of a motion to proceed. Under Rule 8, a motion to proceed is a debatable motion and can therefore be filibustered.' A filibuster of a motion to proceed can only be defeated by the adoption of a motion for cloture under Rule 22, which requires the support of three-fifths of the Senate (currently sixty senators), rather than a vote of a simple majority (currently fifty-one senators).'

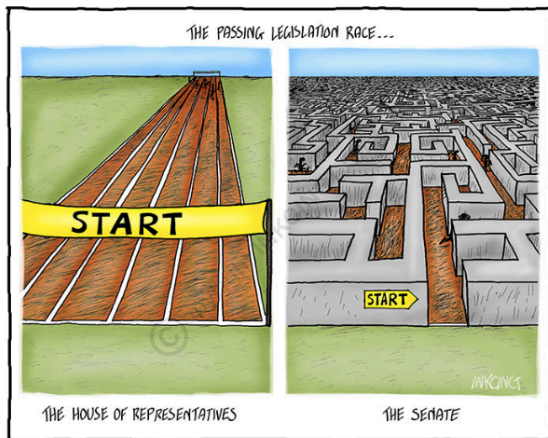
Source: Emmet J. Bondurant, "The Senate Filibuster: The Politics of Obstruction," Harvard Journal on Legislation, Summer 2011.

- A. Referencing the scenario, describe the function of a Senate filibuster.
- B. Explain how a majority party can affect the process described in part A.
- C. Explain why Senate leadership is reluctant to change filibuster rules.

Unit 2 INTERACTIONS AMONG BRANCHES OF GOVERNMENT

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2.3 Congressional Behavior



ESSENTIALS

1. Congressional behavior and governing effectiveness are influenced by: Ideological divisions within Congress that can lead to gridlock or create the need for negotiation and compromise
2. Gerrymandering, redistricting, and unequal representation of constituencies that have increased partisanship and decreased accountability, partially addressed by such Court decisions as *Baker v. Carr* (1961) and *Shaw v. Reno* (1993)
3. Elections that have led to a “divided government,” including partisan votes against presidential initiative and congressional refusal to confirm appointments of “lame-duck” presidents of the opposite party.
4. Differing role conceptions of “trustee,” “delegate,” “partisan” and “politico” as related to constituent accountability in each chamber

1. What is the underlying idea of this cartoon?
2. What constitutional reasons and institutional rules make the legislative process difficult in the House and even more difficult in the Senate?

DEFINE **Gerrymandering** (differentiate between reapportionment and redistricting):

Find/List **three** egregious examples of gerrymandered Congressional districts (draw one):

Record the vote and primary opinion of the following Supreme Court cases dealing with gerrymandering

Baker v. Carr (1961)	Shaw v. Reno (1993)	Gill v. Whitford (2018)
		Benisek v. Lamone (2018)

DEBATE: Investigate how Senate Republicans blocked the Supreme Court nomination of Merrick Garland in 2016. Write down the essential facts. *Did Senate Republicans have the right to block Merrick Garland? Write a claim statement followed by three substantiating facts.*

Define and assess each of the following Congressional role conceptions:

Trustee	Delegate	Partisan
Examples	Examples	Examples

What role would you prefer if serving in the Congress? What is a **Politico**

SCOTUS COMPARISON

The basic premise of the political question doctrine is that the political branches of government are better equipped to handle and resolve certain types of questions than the federal courts. The doctrine's origins trace back to *Marbury v. Madison*, but the seminal case in which the Court articulated and applied the doctrine was decided almost fifty years later in *Luther v. Borden*. *Luther* arose out of an altercation in Rhode Island in 1841 due to resentment over the state's voting laws (which many believed to be too restrictive). After failing to achieve legislative reform, the supporters of wider suffrage held their own convention, ratified a new constitution, and declared that constitution to be the highest law of Rhode Island. When the leaders of the old charter government declared that all acts performed by the new government were illegal, supporters of the new government organized an armed rebellion. In the midst of this disturbance, the defendant, an officer of the charter government, broke into the home of the plaintiff, a supporter of the new government. The plaintiff sued for trespass, arguing that the creation of a new government in 1841 annulled the charter government and hence the defendant (who argued that the authority of the charter government justified his actions) acted without legitimate governmental authority. The case therefore presented the question of which government—the charter one or the new one—was the legal government at the time of the trespass.

The Court rebuffed the plaintiffs argument that it could decide that the new government annulled the old one, refusing to rule on the legitimacy of the competing governments. Chief Justice Taney pointed to Article IV of the Constitution (the Guarantee Clause) as authority for this position. Insofar as the Constitution allowed the federal government to "interfere in the domestic concerns of a State," Chief Justice Taney argued that it "treated the subject as political in its nature, and placed the power in the hands of [Congress]." Article IV therefore gave Congress the power of deciding "what government is the established one in a State," and only Congress could decide the proper means for fulfilling the terms of the Guarantee Clause. Once Congress decided on the legitimacy of a state government (for example, by admitting its representatives and senators), that decision bound "every other department of the government, and could not be questioned in a judicial tribunal."

Source: Franklin Sacha, "Excising Federalism: The Consequences of *Baker v. Carr* Beyond the Electoral Arena," *Virginia Law Review*, December 2015

Based on the information above, respond to the following questions.

- Identify a common constitutional principle used to make a ruling in both *Baker v. Carr* (1962) and *Luther v. Borden* (1849).
- Explain how the difference in facts led to a different decision in both *Baker v. Carr* (1962) and *Luther v. Borden* (1849).
- Explain how the outcome in *Luther v. Borden* (1849) demonstrates how public policy regarding political questions is affected by judicial review in the United States.

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2.4 Roles and Powers of the President



ESSENTIALS

Presidents use powers and functions of the office to accomplish a policy agenda.

Formal and informal powers of the president are represented by:

- Vetoes and pocket vetoes—Formal powers that enable the president to check Congress
- Treaties and executive agreements—
- Bargaining and persuasion—Informal power that enables the president to secure congressional action
- Executive orders—Implied from the president's vested "executive power"
- Signing statements—Informal power that informs Congress and the public of the president's interpretation of laws passed by Congress and signed by the president

1. What is the underlying idea of this cartoon?
2. Investigate the etymology of the term BULLY PULPIT? How has the original meaning changed over time?

DEFINE **policy agenda**. How does a bully pulpit give presidents the advantage when setting agendas?

CLASSIC TEXT: ***Presidential Power and the Modern Presidents***, Richard E. Neustadt

Google this classic work of political science and find three (3) critical observations about the power of modern presidents made by Neustadt.

1	2	3

Apply these critical observations to our current president. List examples.

REVIEW: What is the difference between **FORMAL** (expressed) and **INFORMAL** powers?

Define each of the following. Include a critical piece of data for each. Find a contemporary example:

Executive Agreement	Executive Order	Signing Statement
Examples	Examples	Examples

Why do Presidents resort to using these informal power with greater frequency?

DEBATE: Is the president of the United States the most powerful person in the world or a pitiful helpless giant. *Write a claim statement followed by three substantiating facts.*

1. PRACTICE: ARGUMENTATION ESSAY

Presidents use powers and functions of the office to accomplish a policy agenda. Assess the informal powers of the president and present an argument for why they are more effective to accomplish a policy agenda.

In your essay, you must:

- Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning.
- Support your claim with at least TWO pieces of accurate and relevant information. At least ONE piece of evidence must be from one of the following foundational documents – Federalist 51, Federalist 70, U.S. Constitution
- Use a second piece of evidence from another foundational document from the list or from your study of the electoral process
- Use reasoning to explain why your evidence supports your claim/thesis
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal

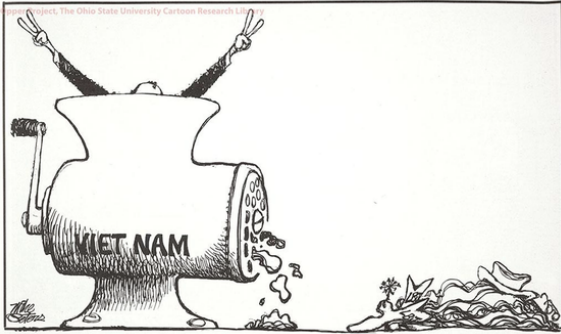
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2.5 Checks on the President



ESSENTIALS

1. The potential for conflict with the Senate depends upon the type of executive branch appointments, including: Cabinet members, Ambassadors, White House Staff
2. Senate confirmation is an important check on appointment powers, but the president's longest lasting influence lies in judicial life tenured appointments.
3. Term-of-office and constitutional-power restrictions, including the passage of the 22nd Amendment, demonstrate changing presidential roles.

1. What is the underlying idea of this cartoon? [Write your response like a claim statement]
2. How do both the 22nd Amendment and foreign policy issues severely limit a president's agenda?
3. What current events have limited what our president wants to get accomplished?

What is the *advise and consent* power of the U.S. Senate?

For each of the following find recent examples of presidential appointments and the conflict in the Senate over confirmation. Look for differences in qualifications for each. Do White House Staff employees need to be confirmed? Include names, responsibilities, and confirmation details...

Cabinet members	Ambassadors	White House Staff

Assess recent presidents attempts to PACK the court with like-minded Supreme Court Justices. How many Supreme Court appointments did they have? How many were approved? Rejected? Voting record? Provide names, etc...

George W. Bush	Barack Obama	Donald Trump

What president saw the most confirmed justices during his presidency?

What president saw the most rejected justices during his presidency?

*Write a brief memoir for the **22nd Amendment**. When was it passed? Explain the context for the passage of the 22nd Amendment. Include at least two (2) authoritative voices/expert opinions regarding its advantages and disadvantages.*

CONCEPT APPLICATION

In both 1940 and 1944, the Republican party platform called for a constitutional amendment to limit a president to two terms. The Republicans, however, were unable to defeat the incumbent FDR at the polls. Then, in 1946, for the first time in almost two decades, they gained control of Congress. Only once during the next forty years would both Houses of Congress belong to the Republicans. One of the Republicans' first priorities in 1946 was a constitutional amendment to prevent any future president from gaining a Roosevelt-type hold on the White House. The ensuing controversy renewed a debate which began in the Constitutional Convention of 1787 and in the subsequent state ratifying conventions. At the Constitutional Convention, the question of presidential tenure occupied extensive time and severely tried the patience of many of the Founding Fathers. Congress began its own struggle with the question in 1803, when the first proposal to limit presidential tenure was introduced. The idea of changing the length of the presidential term appeared in 1808. Resolutions proposing a variety of limitations followed, seeking to gain approval for a single one, four, five, six, seven, and eight-year term. In 1824 and again in 1826, the Senate approved resolutions calling for a two-term limit, but they died in the House. At the outset of the Civil War, the Congress of the Confederate States of America adopted a constitution limiting the president of the Confederacy to a single six-year term.

Source: Stephen W. Stathis, "The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?" *Constitutional Commentary*, Vol. 7

- Referencing the scenario, describe the foundations of the idea for a two-term president.
- Explain how partisan differences affected the evolution of the idea described in Part A.
- In the context of the scenario, explain how presidents are checked through informal means.

2.6 Expansion of Presidential Power



ESSENTIALS

4. A powerful president was foreshadowed in Federalist #70. Hamilton argued for an “energetic president.” Energetic presidents would be allowed to unilaterally respond to crises and emergencies. Certain events should not be subject to democratic deliberation.
5. Presidents fulfill a number of formal and informal roles. There is little agreement as to which roles are most important.

1. What is the main idea of this cartoon? [Write your response as a claim statement. Include a “because” statement]
2. Why did the Founding Fathers decide to put the power of the military in the hands of a civilian? Had their intent worked? Explain.

Federalist #70 (1788)

In Federalist #70 Hamilton turns to address the disputes targeting the U.S. President. Isn't an energetic president inconsistent with a republic? Hamilton postulated that we all could agree that a poorly executed government is a poor government. Therefore, creating a weak president would in fact be creating a weak government. An energetic president would be essential to the protection of the community against foreign attacks; for the steady administration of the laws; for the protection of property; for securing our liberty against the assaults of personal ambition. But what are the ingredients of an energetic president? In this essay Hamilton emphasizes the unity of the office. The U.S. presidency cannot be shared. To be truly energetic it must be held by one person. Later Hamilton would unpack the president's length of term, the adequate provisions of power and expected set of prerequisite skills. Under the Articles of Confederation there was no independent executive branch. The young government had little power to enforce its policies. The new constitution was written, in part, to address this weakness. In Federalist #70 Hamilton argues forthrightly that a king, perhaps, was too strong but a president just right.

Explain in your own words why a single president, the unity of the office, was important to our Founding Fathers? Would you still advocate for this today?

PRESIDENTIAL ROLES

Role CHIEF EXECUTIVE	Examples from two presidents
Role CHIEF LEGISLATOR	Examples from two presidents
Role CHIEF DIPLOMAT	Examples from two presidents
Role CHIEF of PARTY	Examples from two presidents
Role CHIEF of STATE	Examples from two presidents
Role COMMANDER-IN-CHIEF	Examples from two presidents

Rank the role #1 - #6. Most import #1, least important #6. Explain your rationale.

ARGUMENTATION ESSAY

Despite their fear of tyranny and the ills inherent to an autocratic monarch, the Founding Fathers created a president with unity of command. Assess the energetic presidency as created in our constitution and present an argument for why it should or should not be feared.

In your essay, you must:

- Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning.
- Support your claim with at least TWO pieces of accurate and relevant information. At least ONE piece of evidence must be from one of the following foundational documents – U.S. Constitution, Federalist 70, Federalist 78
- Use a second piece of evidence from another foundational document from the list or from your study of the electoral process
- Use reasoning to explain why your evidence supports your claim/thesis
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal

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2.7 Presidential Communication



ESSENTIALS

The communication impact of the presidency can be demonstrated through such factors as:

- Modern technology, social media, and rapid response to political issues
- Nationally broadcast State of the Union messages, and the president's "bully pulpit" used as tools for agenda setting

1. What is the underlying idea of this cartoon? [Write your response as a thesis using a "because" statement]

2. The Constitution mandates a State of the Union Address. Is it still necessary?

The communication impact of the presidency can be demonstrated through such factors as:

- Modern technology, social media, and rapid response to political issues
- Nationally broadcast State of the Union messages, and the president's "bully pulpit" used as tools for agenda setting

Give George Washington and Abraham Lincoln our modern technology, social media and rapid response to political issues and replay a significant moment in their presidency.

Washington	Lincoln

Is the American presidency better off with modern technology, social media and rapid response to political issues? Provide examples.

Compare and contrast a 19th century State of the Union (SOTU) with one from the 21st century. Is there any evidence that these annual speeches make any difference?

SOTU from 1800s	SOTU from 2000s

CONCEPT APPLICATION

To adequately situate the presidency in these changing times, a new paradigm is necessary. This new paradigm must integrate the president's need to fulfill public expectations of communicative governance. The interaction of political officials with particular media formats and practices engenders subsequent expectations about public communication - expectations that can become deeply ritualized within the presidency. The ubiquitous presidency paradigm integrates such expectations by arguing that the president creates a nearly constant and highly visible communicative presence in political and nonpolitical arenas of American life through the use of mass as well as targeted media. This shift is born of a necessity to compensate for changes to the public, the media, rhetorical goals, and political content. The paradigm assumes that a fragmented media environment privileges targeted presidential communications over mass ones, meaning institutional resources are increasingly devoted to targeted appeals. Second, as a strategic communication actor, the president will seek ways to identify with an increasingly diverse, segmented, and disinterested set of audiences. Third, with multiple audiences for every presidential message, adaptation and identification should take place both within each communication and through the media platforms selected. Finally, the ability of audiences to influence content leads to the co-construction of political messages between the president and individuals.

Based on these assumptions, we argue that the ubiquitous presidency is accessible, personal, and pluralistic. We discuss each characteristic separately, but should note that in the actual practice and public experience of politics, these characteristics buttress and overlap with one another.

Source: Joshua M Scacco and Kevin Coe, "The Ubiquitous Presidency: Toward a New Paradigm for Studying Presidential Communication," *International Journal of Communication*, April 2016.

After reading the passage, respond to A, B, and C below.

- Referencing the scenario, describe a new presidential communication paradigm.
- In the context of this passage, explain how the paradigm described in A is a result of new political realities.
- In this context of this passage, explain the effects of this new paradigm on the relationship of the president with the other branches.

2.8 The Judicial Branch



ESSENTIALS

The foundation for powers of the judicial branch and how its independence checks the power of other institutions and state governments are set forth in:

- Article III of the Constitution
- Federalist 78
- Marbury v. Madison (1803)

Judicial review, the supremacy clause and the principle of legal standing demonstrate how the judiciary checks the power of other institutions and state governments.

1. What is the underlying idea of this cartoon? [Write your response as a thesis using a “because” statement]

2. Why is it important to have an *independent* judiciary? Should justice be blind? How can we confidently protect our courts from becoming overtly political?

Explain how each of the following empower the judicial branch of the United States

Article III of the US Constitution	Federalist 78	Marbury v. Madison (1803)

Explain how each of the following empower the courts to check the power of other institutions

Judicial review	The supremacy clause	Principle of legal standing

How often has the U.S. Supreme Court used its power of judicial review? [Check for data]

What does it mean to have an INDEPENDENT JUDICIARY? What evidence is there that the U.S. Supreme Court has maintained its “independence”?

INVESTIGATE: Find two (2) nations that have an independent judiciary. Find two (2) nations that DO NOT have an independent judiciary. *Compare and contrast.*

SCOTUS COMPARISON

Margaret Gilleo placed a 24-by-36-inch sign calling for peace in the Persian Gulf on her front lawn. The original sign disappeared and a subsequent sign was knocked down. She reported these incidents to the police who advised her that such signs were prohibited in Ladue. She sued the city and the District Court ordered a preliminary injunction. Ladue repealed the law and replaced it with a new one which also banned window signs. Gilleo then placed another anti-war sign in her second-story window and amended her complaint to challenge the new ordinance.

Justice Stevens delivered the opinion of the Court:

...While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists...and pose other problems that legitimately call for regulation...However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs...

Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages...

Our decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs...

Excerpted from Oyez – from the case *City of Ladue v. Gilleo* (1994)

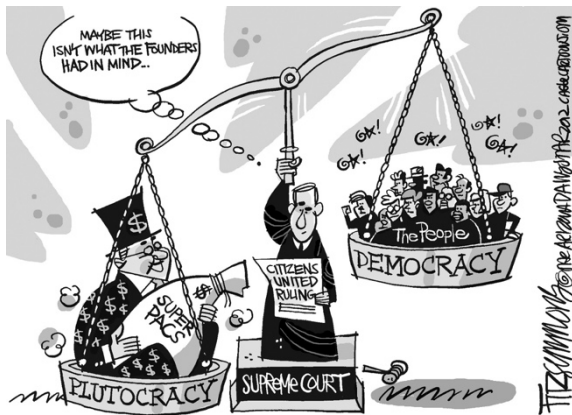
Based on the information above, respond to the following questions.

- A. Identify a common constitutional principle used to make a ruling in both *Marbury v. Madison* (1803) and *City of Ladue v. Gilleo* (1994).
- B. Explain how the facts of *Marbury v. Madison* (1803) and the facts of *City of Ladue v. Gilleo* (1994) led to a similar holding in both cases.
- C. Explain how the ruling in *City of Ladue v. Gilleo* (1994) was affected by selective incorporation.

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2.9 Legitimacy of the Judicial Branch



ESSENTIALS

1. Precedents (stare decisis) play an important role in judicial decision-making.
2. Ideological changes in the composition of the Supreme Court due to presidential appointments have led to the Court's establishing new or rejecting existing precedents.
3. Controversial or unpopular court decisions can lead to challenges of the Court's legitimacy and power which Congress and the president can address only through future appointments, legislation changing the Court's jurisdiction, or refusing to implement decisions.

3. What is the underlying idea of this cartoon? [Write your response as a thesis using a "because" statement]

4. Who enforces Supreme Court decisions? What happens if they are not enforced?

Define PRECEDENT. Why does our court system depend upon precedent (stare decisis)?

List the nine (9) justices of the current U.S. Supreme Court. List the president that appointed them. List the senate confirmation vote (was the Senate a majority Democrat or Republican?) Determine if their decisions lean "conservative" or "liberal."

Name	President who appointed	Senate vote	Partisan bloc – provide evidence
1. Chief Justice			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			

Find three (3) examples of the President choosing NOT TO ENFORCE a Supreme Court decision.

The Court defines LEGITIMACY. How did they do?

“...The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation...”

Source: Opinion in *Planned Parenthood v. Casey* (1992), Justice O'Connor

Summarize Justice O'Connor's discussion in your own words. What are the ultimate roots of the Court's legitimacy? Do you agree? Any dangers of this definition? Do the ideals of our founding agree? Explain.

CONCEPT APPLICATION

Legitimacy is a complex and puzzling concept. But in legal discourse, we have an intuitive sense that illegitimate means something more than erroneous or incorrect. The term signifies something absolutely without foundation and perhaps *ultra vires*. So, when a government institution or organization lacks legitimacy, it may no longer be worthy of respect or obedience.

Given this intuition, it is striking how many commentators — including prominent constitutional scholars, a former Attorney General, and current members of Congress — have recently questioned the legitimacy of the United States Supreme Court. Indeed, some critics suggest that the situation is so bad as to warrant extreme measures: it may be time to rethink life tenure, take away broad swaths of federal jurisdiction, impeach Justices, disobey Supreme Court decisions, or — most commonly — “pack” the Court with additional members.

For those who study the federal judiciary, this onslaught is jarring. Although the Supreme Court has been subject to attacks in the past, recent decades have been a period of relative calm. Indeed, many court curbing measures — including court packing and disobeying court orders — have been off the table since the mid-twentieth century.

...To understand the tension between sociological and legal legitimacy, we need a better grasp of the former. Why does the Supreme Court's external legitimacy even matter? Political scientists agree: The judiciary has no army; it must rely on others to obey its decrees. Government officials and the general public are more likely to comply if they view the Court as “legitimate” — that is, as an institution that does and should have the power to affect legal rights and obligations. It is particularly crucial that those who disagree with a given decision view the Court as legitimate; such disappointed individuals will respect the adverse ruling if they view the institution itself as authoritative. Thus, political scientists have a refrain: “Legitimacy is for losers.”

Source: Tara Leigh Grove, “The Supreme Court's Legitimacy Dilemma,” *Harvard Law Review*, 2019

- A. Describe evidence that today's Supreme Court has a legitimacy problem, according to this scenario.
- B. In the context of the scenario, explain how the response in part A can be addressed by the Court.
- C. In the context of the scenario, explain how Congress can respond to the Court's “legitimacy problem.”

2.10 The Courts in Action



ESSENTIALS

Political discussion about the Supreme Court's power is illustrated by the ongoing debate over judicial activism versus judicial restraint.

Activists tend to be liberal, and hope the Court corrects wrongs.

Those practicing restraint tend to be conservative, and hope the court sticks to ruling on what is legal.

1. What is the underlying idea of this cartoon? [Write your response as a thesis using a "because" statement]
2. Should the U.S. Constitution guide our judicial decisions or should we trust judges to make decisions in our best interests? Should judges rule on what is legal or what is right?

List arguments with evidence for JUDICIAL ACTIVISM and JUDICIAL RESTRAINT

Activism	Restraint

If you were a judge – would you practice activism or restraint?

Investigate the case *Marbury v. Madison* (1803). Is this case an example of **activism** or **restraint**? Explain.

Investigate the case *Citizens United v. FEC* (2010). Is this case an example of **activism** or **restraint**? Explain.

QUANTITATIVE ANALYSIS

US Supreme Court voting stats: Voting agreement in all cases – October Term 2018-2019

Justice Agreement in full, in part, or in judgment

	CT	RBG	SGB	SAA	SMS	EK	NMG	BK
JGR	75%	20%	20%	80%	15%	15%	50%	83%
CT		15%	15%	85%	10%	10%	65%	83%
RBG			80%	10%	90%	95%	35%	11%
SGB				20%	85%	85%	30%	22%
SAA					5%	5%	60%	94%
SMS						100%	35%	6%
EK							35%	6%
NMG								56%
BK								

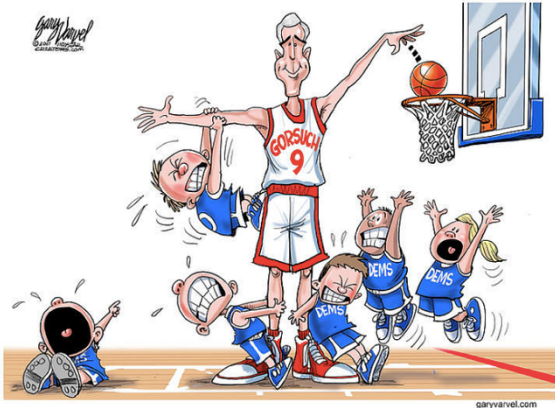
Key

JGR = John Roberts
 CT = Clarence Thomas
 RBG = Ruth Ginsberg
 SGB = Stephen Breyer
 SAA = Samuel Alito
 SMS = Sonia Sotomayor
 EK = Elena Kagan
 NMG = Neil Gorsuch
 BK = Bret Kavanaugh

Source: SCOTUS.org

Use the chart above to answer the following questions.

- Identify the Associate justice who agreed the most with Chief Justice Roberts in 2018.
- Describe a similarity or difference, according to the data, between conservative leaning justices and liberal leaning justices and state a conclusion.
- Explain how the data in the chart might be used by the media during confirmation hearings.
- Explain how the data in the chart could affect policy making interactions between the president and Congress.

2.11 Checks on the Judicial Branch**ESSENTIALS**

Checks on the Supreme Court are represented by:

- Congressional legislation to modify the impact of prior Supreme Court decisions
- Constitutional amendments
- Judicial appointments and confirmations
- The president and states evading or ignoring Supreme Court decisions
- Legislation impacting court jurisdiction

3. What is the underlying idea of this cartoon? [Write your response as a thesis using a “because” statement]
4. Why are appointments to the Supreme Court fought with such partisan fury? Should we make confirmation easier or more difficult? Explain.

How many total amendments have there been to our U.S. Constitution? How do constitutional amendments limit the Supreme Court’s power? How effective has this check been?

STORYTELLING: Find a Supreme Court nominee who was either rejected by the Senate or withdrew consideration. Explain what happened. How significant of a check is this?

Look for at least two (2) examples of occasions where the president and/or states chose to ignore Supreme Court decisions:

President ignores:	States ignore:
--------------------	----------------

DEFINE: JURISDICTION. Trace the history of jurisdiction rules in the U.S. judiciary. When is the last time Congress legislated changes to the court's jurisdiction?

CONCEPT APPLICATION

In the myriad of checks and balances that each branch of the government maintains over the others, Congress possesses the power to strip jurisdiction from the courts, thereby preventing courts from hearing certain legal disputes. Jurisdiction stripping occurs when Congress classifies specific legislative or administrative actions as unreviewable by the courts. Congress's power to remove jurisdiction from the courts has various implications, some of which are potentially troubling. Removing jurisdiction may be viewed as a way for Congress to limit and restrict judicial power. Additionally, when certain governmental actions are removed from judicial review, citizens cannot access the courts and petition for redress against the government. Recent research suggests that jurisdiction stripping is designed by Congress to do just that—limit litigation against the government. This study seeks to further examine the factors that might cause Congress to remove judicial review. This study concludes that the amount of litigation against the federal government strongly corresponds with congressional jurisdiction-stripping activity.

Much of the prior scholarship addressing jurisdiction stripping focuses on political ideology as the motivating factor behind instances of Congress removing court jurisdiction. Proponents of this view argue that jurisdiction stripping is a tool used by Congress to help ensure that its political goals are met. The theory is that when Congress and the courts share similar politics, ideology, or preferences, court decisions comport with Congress's goals and aims. However, if the courts and Congress differ ideologically, court decisions may undermine and contradict Congress's agenda. Consequently, when the courts and Congress differ ideologically, Congress may strategically strip courts' jurisdiction to prevent them from undercutting Congress's legislative objectives.

Recent empirical studies of jurisdiction stripping, however, emphasize practical concerns—like the administrative burdens created by litigation against the government—as the motivating forces behind jurisdiction stripping. Over the past few decades, litigation against the federal government has steadily increased. This increase in litigation has not been matched by a similar increase in the number of federal judges. Consequently, federal judges face increased caseload pressures. Litigation also typically involves a consequential drain on government resources, both in terms of time and money. Finally, litigation—even unsuccessful litigation—can frustrate policy implementation by imposing delays. Congressional concern with the resource drain and policy delays imposed by litigation may help explain why jurisdiction stripping is used to limit litigation against the government.

SOURCE: Nicole A. Heise, "Stripped: Congress and Jurisdiction Stripping," *Faulkner Law Review*, Fall 2011

- Describe what it means for Congress to strip jurisdiction according to this scenario.
- In the context of the scenario, explain how the response in part A is affected by political considerations.
- In the context of the scenario, explain how another branch of government apart from Congress can affect the power and jurisdiction of the Supreme Court.

Unit 2 INTERACTIONS AMONG BRANCHES OF GOVERNMENT

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2.12 The Bureaucracy



ESSENTIALS

Tasks performed by departments, agencies, commissions, and government corporations are represented by:

- Writing and enforcing regulations
- Issuing fines
- Testifying before Congress
- Issue networks and “iron triangles”

Political patronage, civil service, and merit system reforms all impact the effectiveness of the bureaucracy by promoting professionalism, specialization, and neutrality.

5. What is the underlying idea of this cartoon? [Write your response as a thesis using a “because” statement]

6. What bureaucratic agencies are represented in this cartoon? Is this cartoon critical of Wall Street or critical of the government bureaucracy? Explain.

Fill in the chart below by providing current examples. For each example provide name, number of federal employees, budget and primary responsibility.

Executive Departments

Independent Agencies

Gov’t Commissions

Gov’t Corporations

1			
2			

Today we read about “the administrative state.” This implies a “deep state,” one that operates outside of the view of most citizens. “The Administrative state” utilizes the functions of all three branches – often unchecked. **Choose one example from above in each category and fill in the chart below:**

Executive Department

Independent Agency

Gov’t Corporations

Example of			
1. Writing and enforcing regulations [Legislative function]			
2. Enforcing regulations [Executive function]			
3. Issuing fines [Judicial function]			

DEFINE: IRON TRIANGLE
Find a contemporary example

DEFINE: ISSUE NETWORK
Find a contemporary example

How do IRON TRIANGLES and ISSUE NETWORKS help to explain how public policy is made?

What was the significance of the Pendleton Civil Service Act (1883)?

QUANTITATIVE ANALYSIS

Americans' Ratings of Job: Key Federal Departments and Agencies

How would you rate the job being done by...Would you say it is doing an excellent, good, only fair or poor job?

	Excellent Good %	Only Fair %	Poor %
The U.S. Postal Service	74	18	8
The Secret Service	69	19	8
The Centers for Disease Control	64	22	12
The Central Intelligence Service	60	25	12
NASA, the U.S. Space Agency	60	26	5
The Federal Bureau of Investigation	57	23	19
The Department of Homeland Security	55	26	17
The Federal Emergency Management Agency	52	29	16
The Internal Revenue Service	50	30	19
The Federal Reserve Board	48	34	14
The Food and Drug Administration	44	33	22
The Environmental Protection Agency	43	30	26
The Veterans Administration	39	31	28

Gallop April 17-30, 2019

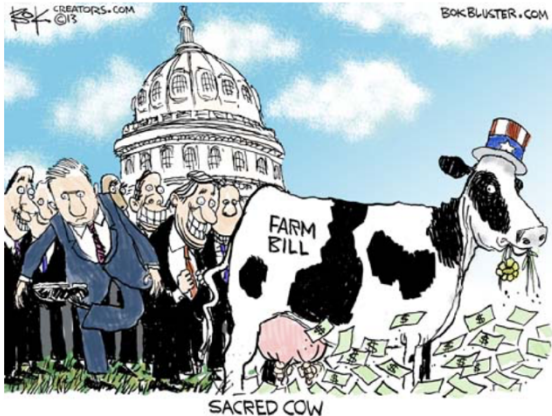
Use the chart above to answer the following questions.

- Identify the Federal Department or Agency with the highest and lowest approval ratings.
- Describe a difference between the departments or agencies mentioned in your response A that might explain the variance in approval ratings.
- Explain how the data in the chart might be used by a candidate running for president.
- Explain how the data in the chart could affect policy making interactions between the president and Congress.

Unit 2 INTERACTIONS AMONG BRANCHES OF GOVERNMENT

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2.13 The Bureaucracy: Discretionary and Rule-Making Authority



ESSENTIALS

Discretionary and rule-making authority to implement policy are given to bureaucratic agencies such as:

- U.S. Department of Agriculture
- U.S. Department of Defense
- U.S. Department of Homeland Security
- U.S. Department of Education

7. What is the underlying idea of this cartoon? [Write your response as a thesis using a “because” statement]

8. Explore the latest “FARM BILL.” Create an IRON TRIANGLE. Provide details. What is meant by the phrase, “sacred cow”?

CASE STUDY

U.S. Department of _____

	<i>Congress</i>	<i>President</i>	<i>Courts</i>
Interactions with...			
Acts like...			
Checked by...			

Secretary:

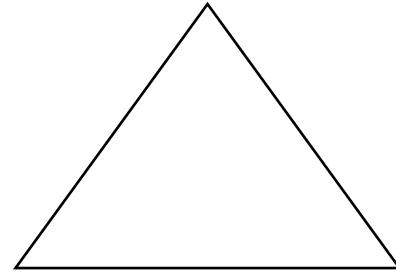
Explain appointment process

Budget:

of Employees:

Critical contemporary issues:

Public Opinion



Example of an IRON TRIANGLE

CONCEPT APPLICATION

[Years ago], the Supreme Court issued its opinion in the case of *Chevron, U.S.A., Inc. v. NRDC* (1984), which announced the principle that the courts will accept an agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers. Dealing with the question whether the Environmental Protection Agency could permissibly adopt the "bubble concept"-that is, a plantwide definition of "stationary source"-under the Clean Air Act, Justice Stevens for a unanimous Court adopted an analytical approach that deals with the problem of judicial deference to agency interpretations of law in two steps:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Failing an affirmative response to the first inquiry, the Chevron analysis moves to step two:

If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron has proven a highly important decision-perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC* (1978). In the first three and a half years after its announcement-up to the beginning of 1988-Chevron was cited by lower federal courts over 600 times...

...I tend to think, however, that in the long run Chevron will endure and be given its full scope-not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.

Excerpted from "Judicial Deference to Administrative Interpretations of Law," Scalia, Antonin, *Duke Law Journal*,

After reading the scenario, respond to A, B, and C below:

- A. According to the scenario above, describe the precedent set in the Chevron case.
- B. In the context of the scenario, explain how the precedent described in part A would affect the legislative process.
- C. In the context of the scenario, explain how Court decisions impact the separation of powers.

Unit 2 INTERACTIONS AMONG BRANCHES OF GOVERNMENT

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2.14 Holding the Bureaucracy Accountable



ESSENTIALS

1. Oversight and methods used by Congress to ensure that legislation is implemented as intended are represented by:
Committee hearings
Power of the purse
2. As a means to curtail the use of presidential power, "congressional oversight" serves as a check of executive authorization and appropriation.
3. Presidential ideology, authority, and influence affect how executive branch agencies carry out the goals of the administration.
4. Compliance monitoring can pose a challenge to policy implementation

9. What is the underlying idea of this cartoon? [Write your response as a thesis using a "because" statement]

10. What makes the Congressional "purse" so powerful? Why might the Congress be reluctant to use their "purse"?

Investigate three (3) Congressional committee hearings that are going on right now. Complete the chart below:

Name of Committee	Name of Committee	Name of Committee
Purpose of hearing	Purpose of hearing	Purpose of hearing
Chairman's name/party	Chairman's name/party	Chairman's name/party
# of Democrats/Republicans on committee	# of Democrats/Republicans on committee	# of Democrats/Republicans on committee
Recent action taken by committee	Recent action taken by committee	Recent action taken by committee

Investigate three (3) of the following Presidential scenarios. Complete the chart below:

LBJ Ex. Order 11246	Reagan EPA Superfund	Trump State Department
Goal of the President	Goal of the President	Goal of the President
Goal of the agency	Goal of the agency	Goal of the agency
Outcome	Outcome	Outcome

From what you have learned above write a **claim statement** about president's ideology, authority and influence over executive branch agencies:

Investigate enforcement of marijuana policy in the United States.

What has the U.S. Supreme Court said?

How did President Obama respond?

How did President Trump respond?

What does this say about law enforcement in the United States?

ARGUMENTATIVE ESSAY

The Founding Fathers enabled three branches with specific enumerated powers. The Constitution says little about a federal bureaucracy. Assess the power of the federal bureaucracy and present an argument for how best to control it.

In your essay, you must:

- Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning.
- Support your claim with at least TWO pieces of accurate and relevant information. At least ONE piece of evidence must be from one of the following foundational documents – U.S. Constitution, Federalist 70, Federalist 78
- Use a second piece of evidence from another foundational document from the list or from your study of the electoral process
- Use reasoning to explain why your evidence supports your claim/thesis
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal

2.15 Policy and the Branches of Government



ESSENTIALS

Formal and informal powers of Congress, the president, and the courts over the bureaucracy are used to maintain accountability.

11. What is the underlying idea of this cartoon? [Write your response as a thesis using a “because” statement]

12. How important is government transparency? Who is best able to hold our government accountable?

Investigate how our three (3) branches of government both formally and informally hold our federal bureaucracy accountable. Complete the chart below:

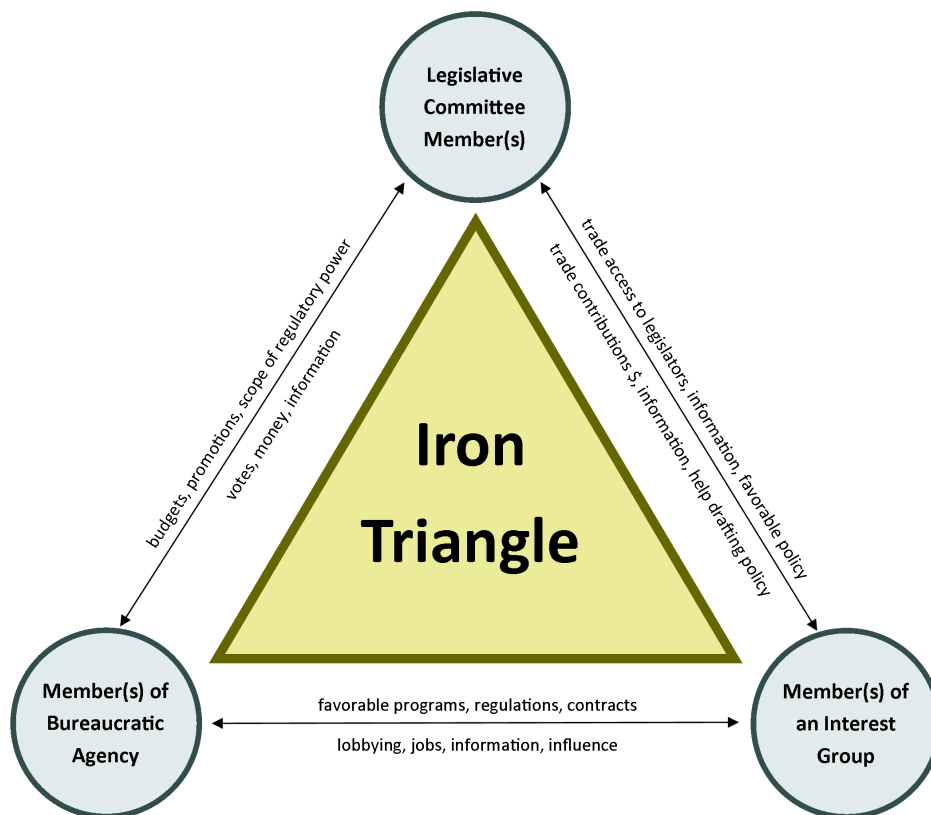
CONGRESS	PRESIDENT	SUPREME COURT
Example of formal oversight of bureaucracy.	Example of formal oversight of bureaucracy.	Example of formal oversight of bureaucracy.
Example of informal oversight of bureaucracy.	Example of informal oversight of bureaucracy.	Example of informal oversight of bureaucracy.

Grade Congress' ability to hold our federal bureaucracy accountable. Explain.	Grade the President's ability to hold our federal bureaucracy accountable. Explain.	Grade the Supreme Court's ability to hold our federal bureaucracy accountable. Explain.
---	---	---

Investigate the **Whistleblower Protection Act of 1789**. What was its intent? Has it been effective?

Look for a federal agency that acts with little accountability. Explain.

The questions that follow refer to the info-graphic below:



Use the info-graphic above to answer the questions.

- Identify the three (3) points of an iron triangle.
- Describe a similarity or difference in the functions of legislative committees and bureaucratic agencies, as illustrated in the information graphic, and draw a conclusion about that similarity or difference.
- Explain how the Supreme Court might provide judicial review over iron triangles.