

The Fourth Branch: A Theory Concerning the Existence of a “Fourth Control” Branch Within the U.S. Government

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Disclaimer: All findings and conclusions are the author's own and do not necessarily represent the official view of the Law Library of Congress, American University, or the Fulbright program.

Bipartite and Tripartite Systems

- Greek Historian Polybius—“The Histories” Rise of the Roman Republic (264-146 BCE) Senate, Consuls, and Assemblies—the latter was involved in trying judicial cases
- John Calvin—*Bipartite system*, democracy and aristocracy (mixed government), implemented by Pilgrim Fathers in 1620 in present day Massachusetts
- Baron de Montesquieu—Current tripartite system proposed by several thinkers

Modern Separation of Powers in the US

- Constitution designates Legislative, Executive and Judicial branches
- Power derived from the Constitution to allow all three branches to assume cross control over another one
- Control interpreted as an authority and responsibility granted to and exercised by each branch, internally and externally

International Experience

Ratification—No International Treaty has been ratified by national parliaments concerning Government Control.

Authorities—INTOSAI, EUROSAI, ASOSAI work on international and regional level and produce advisory documents.

Accountability—European Court of Auditors and Taiwanese Control Yuan (chapter 9); Japanese Board of Audit (art 90); and German Federal Court of Audit (art. 114) are examples of a Fourth Branch, and are constitutionally independent.

What Is a Fourth Branch?

- What agencies are responsible for Elections ?
- What agencies are responsible for bureaucracy or administrative civil servants?
- What agencies are responsible for implementing laws?
- What agencies are responsible for regulating?
- What agencies are responsible for the accountability of the Military and Intelligence community?
- What is the role of the Press, Interest Groups, NGOs and the general public?

US System Answers The Questions

“...if the laws are made and executed by the same person, most probably the person should exempt himself from obedience, and suit the law to his interests, both in making and executing...” –John Locke

- Existence of a Control Branch is guaranteed by the Constitutional requirement of Checks and Balances—since none of the branches exercises absolute power.

Statutory Existence

- 1921 Budget and Accountability established an Independent General Accounting Office
- President required to submit its budget proposal to Congress
- Functions transferred from the Comptroller of the Treasury to GAO
- No provisions designate that GAO is under Congress, except “Power of purse”

Powers of GAO*

- **Auditing**—May effectuate auditing the operations of federal agencies to determine efficient and effective spending—excludes Supreme Court;
- **Investigating**—May perform investigation on allegations of illegal and improper activities;
- **Reporting**—May report on performance efficiency of government programs and policies, and whether these are meeting their objectives;
- **Analyzing**—May execute policy analysis and outline options for congressional consideration; and
- **Regulating/Oversight**—May issue legal decisions and opinions, such as bid protest rulings and reports on agency rules

*No binding requirement for issued documents, which is understood as a guarantee of Independence

Standards Developed by GAO

- **Yellow Book**—The Generally Accepted Government Auditing Standards;
- **Green Book**—Internal control containing the plans, methods, policies, and procedures an organization employs;
- **Blue Books**—GAO's reports, which are its primary products; and
- **Red Book**—The *Principles of Federal Appropriations Law*

Inspector General System*

- **1789**—President George Washington appointed Baron von Steuben, to serve as the first Inspector General for the Continental Army and it became statutory in 1982;
- **1952**—Non statutory OIG at CIA;
- **1978**—OIG became Statutory and resulted in passing Inspector General Act and establishing 12 OIG;
- **1981**—On the day of his inauguration, Reagan removes all IGs from office; and
- **1981**—Reagan establishes President's Council on Integrity and Efficiency

*Currently there are 72 statutory OIGs in Federal Government

CIGIE - Council of Inspector General on Integrity and Efficiency (2008)

- Quality Standards for Investigations
- Quality Standards for Inspection and Evaluation
- Quality Standards for Federal Offices of Inspector General
- Quality Standards for Digital Forensics

Presidential Removal Power

- **1867—*Tenure of Office Act*** was vetoed by President Johnson for which he was subsequently almost impeached.
- **1926—*Myers v. United States***, Supreme Court ruled that provisions of “Tenure of Office Act” limiting president's removal power are unconstitutional.
- **1935—*Humphrey's Executor v. United States***, Supreme Court ruled that the President may not remove any appointee to an independent regulatory agency except for reasons Congress has provided by law.
- **1958—*Wiener v. United States***, Supreme Court ruled that the President cannot remove appointees confirmed by the Senate at will.
- **1988—*Morrison v. Olson***, case by which Presidential removal power was further limited, upholding that independent General Counsel could not be removed.
- **2008—*Amendment of IG Act***, Congress put more limits on Presidential removal power over IG, requiring 30-day notice.

Characteristics of “Fourth Branch” Independence, Legality v. Constitutionality

- Non Partisan;
- Limitations on removal from office power;
- Reports to Congress and head of the agency, but not supervised by either;
- Power to decide activities and their openness;
- Zero engagement in operations of the agency;
- Non-binding recommendations; and
- Power to investigate criminal cases

Weaknesses & Limitations

- No IG for Executive Office of the President and Judiciary Branch;
- Executive Orders compulsory *only* for the IGs in Executive Branch;
- Audit standards for IGs developed externally by GAO; and
- Vulnerable to politically motivated interference from the Executive Branch

THANK YOU!

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