NAVIGATING
SEPARATION OF POWERS

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Carl Reynolds & Patti Tobias
Separation of powers is basic civics.

“the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another.”

“to prevent the concentration of power and provide for checks and balances.”

NCSL, Separation of Powers – An Overview
Separation of powers operates at all levels in our system of federalism.

<table>
<thead>
<tr>
<th>Level</th>
<th>Legislative Branch</th>
<th>Executive Branch</th>
<th>Judicial Branch</th>
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<tr>
<td>National</td>
<td>Congress</td>
<td>President etc.</td>
<td>SCOTUS</td>
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<tr>
<td>State</td>
<td>Legislative Assembly</td>
<td>Governor etc.</td>
<td>State Supreme Court</td>
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<tr>
<td>County</td>
<td>Commissioners</td>
<td>Sheriff etc.</td>
<td>Trial Court</td>
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Separation of powers is explicit in 40 states’ constitutions but not the U.S. Constitution.

E.g., Texas:

ARTICLE 2. THE POWERS OF GOVERNMENT

Sec. 1. DIVISION OF POWERS; THREE SEPARATE DEPARTMENTS; EXERCISE OF POWER PROPERLY ATTACHED TO OTHER DEPARTMENTS. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.
The SCOTUS enforces separation of powers.

“[W]ithin our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty. . . .

Madison, in writing about the principle of separated powers, said: ‘No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.’ The Federalist No. 47”

*Mistretta v. United States* (1989) (citations omitted)
Traditional roles of the three branches are (deceptively) simple.

**Legislative Branch**
Enacting the laws and appropriating the money necessary to operate government

**Executive Branch**
Implementing the public policy enacted and funded by the legislative branch

**Judicial Branch**
Interpreting the constitution and laws within controversies brought before it
Criminal justice illustrates the Branches’ separate roles.

- **Legislative Branch**
  - Funding
  - Criminal Procedure
  - Offenses
  - Punishments

- **Executive Branch**
  - Arrest
  - Prosecution
  - Confinement
  - Clemency

- **Judicial Branch**
  - Bail
  - Adjudication
  - Sentencing
  - Compliance
There are common tensions between Branches in the criminal justice arena.
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**Legislative Branch**
- Funding
- Statutory Procedure
- Offenses

**Executive Branch**
- Arrest
- Confinement

**Judicial Branch**
- Detention
- Sentencing
  - Executive clemency power v. Judicial power to suspend sentence

Legislative amelioration of harsh laws v. Executive clemency and Judicial finality
There are common tensions between Branches in the criminal justice arena.

**Legislative Branch**
- Statutory Procedure
- Offenses
- Legislative mandatory punishments

**Executive Branch**
- Prosecution
- Confinement
- Clemency

**Judicial Branch**
- Adjudication
- Sentencing
- Inherent Judicial power to sentence

Legislative v. Executive v. Judicial governance of problem-solving courts
There are common tensions between state and local level in the Judicial Branch - - right?

Level

State

County

Judicial Branch

State Supreme Court

Trial Court
Judicial Branch Traditional Characteristics

- Judges
- Decisions by reference to precedent
- Focus on controlling docket
- More restricted by ethical constraints
- Robes and formal, open proceedings
Legislative Branch Characteristics

Legislators

- Open committee hearings
- Anecdotes & log-rolling
- Elaborate rules & routine waivers
- Leadership power
Executive Branch Actors in Criminal Justice

- Officers
- Police
- Prosecution/Defense*
- Corrections
- Parole
How do separation of powers tensions manifest at the local level?

- Level: County
- Legislative Branch: Commission
- Executive Branch: Sheriff, Prosecutor
- Judicial Branch: Trial Court
Navigating Separation of Powers

- Understanding the contours
- Respecting different perspectives
- Collaborating systemically
- Maintaining appropriate distance in individual cases
Navigating Separation of Powers

Carl Reynolds
creynolds@csg.org

Patti Tobias
ptobias@ncsc.org