



## **Separation of Powers: Background**

*What is Separation of Powers?*

What do we mean by separation of powers? At the simplest level, it is the idea that a government functions best when its powers are not concentrated in a single authority but are divided along different groups or branches. The United States was the first nation that used a written constitution to formally adopt separation of powers as the framework for its government.

*Separation of Powers and the U.S. Constitution*

The idea of separation of powers developed during the period known as the European Enlightenment. The Enlightenment began in the seventeenth century and lasted until shortly before the beginning of the American Revolution. Enlightenment thinkers identified three main powers that were inherent in government:

- Legislative power: the power to make law;
- Executive power: the power to enforce law; and
- Judicial power: the power to interpret the law.

The writings of Enlightenment thinkers were well-known to the framers of the United States Constitution. The framers had the advantage of a political “blank slate” when they wrote the Constitution. Unlike the nations of Europe, the new United States had no centuries- old monarchy or aristocracy to make claims on government power.

In the first three articles of the Constitution, the framers defined the three branches of government that continue to share power in the United States government today.

*Legislative Power: The Congress*

Article I places legislative power in the United States Congress. Congress is made up of two bodies: the House of Representatives and the Senate. Representatives tend to be linked more closely to the interests of the local districts they represent. Senators represent the interests of the entire state. The bodies must both agree to pass a law for a bill to become law.

The Constitution gives Congress power over the government’s budget, including powers to raise taxes, borrow money, and spend money. It also gives Congress the power to declare war and to raise and support military forces; to regulate commerce between the states and between the United States and other countries. Finally, Congress has the power to establish federal courts below the United States Supreme Court. The Constitution also provides that Congress has the power to pass laws that are “necessary and proper” to give effect to its powers.

Congress's power is limited in several ways. These limits are part of the system of "checks and balances" that the framers wrote into the Constitution. The President is able to check Congress's power by exercising the presidential veto. If the President vetoes a proposed law (called a bill), that bill will not become a law unless two-thirds of the members of both the House and the Senate agree to override the President's veto. The Constitution also created an independent judiciary, headed by the U.S. Supreme Court. The judiciary has the power to hear all "cases and controversies" arising under the constitution. The federal judiciary has used this power to declare laws enacted by Congress unconstitutional. The federal courts will refuse to recognize a law that has been declared unconstitutional.

### *Executive Power: The President*

Article II defines the powers of the executive branch, headed by the President. The executive powers of the President include oversight of the federal agencies that implement laws passed by Congress (today, those agencies employ more than 4 million people). The President is commander in chief of the nation's armed forces. He has the power, subject to the advice and consent of the Senate, to make treaties, nominate judges to the federal judiciary, and appoint officers of the government. The President also has the power to pardon individuals convicted of federal crimes. And he is charged to "take care that the laws be faithfully executed."

Checks and balances on the executive's power include a number of provisions that give Congress and the federal judiciary oversight of executive actions. For example, the House of Representatives can indict the President on charges of impeachment (defined in the Constitution as "bribery, treason, or other high crimes or misdemeanors"). The Senate then tries the President for impeachment and can remove him from office if he is found guilty. The Senate also has the power to reject treaties negotiated by the President and to reject his nominees to the federal judiciary and other government offices. Finally, the federal judiciary has the power to declare executive actions unconstitutional if those actions are challenged in court.

### *Judicial Power: The Supreme Court and the Federal Judiciary*

Article III of the Constitution establishes a Supreme Court of the United States and "such inferior courts as the Congress may from time to time ordain and establish." Today, those "inferior courts" include district courts throughout the United States, in which most federal cases are tried; circuit courts of appeal, which review the decisions of the district courts, and the Supreme Court, which has the final word within the federal judiciary on questions of federal law and the Constitution.

The Constitution protects the judiciary's independence from Congress and the President by providing that federal judges are secure in their positions "during good behavior." It also provides that their salaries cannot be diminished during their time in office. It gives the judiciary the power to hear all "cases and controversies" arising under the Constitution, federal law, and treaties with other nations. It also gives the federal judiciary power over other specialized cases, such as controversies between two or more states.

Both the Congress and the President have powers that serve to check and balance power of the judiciary. Although it cannot reduce the salary of a federal judge, Congress does have control over the judiciary's overall budget. Congress can also act to amend the Constitution if it disagrees with the Supreme Court's interpretation of the document. This is a difficult process, requiring a two-thirds majority in both houses of Congress and the approval of three-fourths of the states. Nonetheless, it has been used several times in U.S. history to invalidate a Supreme Court decision. This happened in 1971 when the Twenty-Sixth Amendment gave the right to vote to all citizens age 18 or older. Finally, Congress has the power to impeach and try federal judges for misconduct in office.

The President's power to nominate all federal judges gives the executive branch control over which individuals are named to the federal courts. This power is shared with the Senate, which has the constitutional right of advice and consent in the nomination process. A majority of the Senate must consent to the President's judicial nominations.

There are additional checks on the judiciary's power. Judges can only decide the cases that are brought to them. They cannot declare a law or government action unconstitutional unless they are asked to do so by a party affected by the law or action. Moreover, the appellate review process in the federal judicial system ensures that virtually all decisions of individual judges are subject to review by other judges. Even at the Supreme Court, a justice must convince a majority of his or her colleagues to agree to a decision.

### *How Separate Should the Powers of Government Be?*

In 1788, the citizens of the United States were engaged in debate over whether the Constitution should be ratified. Supporters of the Constitution were faced with the charge that the powers distributed among the three branches of government were so blended that the doctrine of separation of power had been destroyed.

The Federalist Papers were written to persuade the people of New York to ratify the Constitution. These papers – written by Alexander Hamilton, James Madison, and John Jay- had a realistic view of power. "Power is of an encroaching nature," James Madison wrote in *Federalist Paper No. 48*. Clearly defined lines of power in a written constitution are little more than a "parchment barrier" without something more than words to keep each branch's power in check. In *Federalist Paper No.51*, Madison explained how the Constitution gives the separate branches means for "keeping each other in their proper places," while ensuring that each branch has certain core powers and responsibilities. The means supplied in the Constitution are the "checks and balances" discussed above. These checks and balances serve as restraints on each branch's efforts to try to extend power beyond its constitutional limits.

By blending as well as separating powers, the framers were well aware that they were creating points of conflict. The Federalists Paper's authors used words such as "defense" and attack" in describing the probable state of affairs between the branches. Some battles between the branches were fought and decided long ago. Few people today, for example, would question whether Congress had the power to establish the Federal Reserve System. But the establishment of a

national bank was a bitterly contested issue early in the nineteenth century. Throughout U.S. history, new conflicts among the branches have arisen, and that remains the case today.

*Separation of Powers & Contemporary Issues*

Contemporary issues dealing with conflicts between branches of government are often covered in the news. Workshop leaders should feel free to raise these as exemplars to demonstrate that conflicts do arise and our system of government handles them in a relatively orderly process.