

# Free critical thinking on checks and balances

[Law](#), [Constitution](#)



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## **Question one**

The theory of checks and balances is a theory seeking to limit the power of the branches of government by way of accountability as against each other. This theory is premised on the footing that if power vested in an individual or a branch of government is left unchecked, it is bound to be abused. Checks and balances are described as the sharing of power. In essence, it is not entirely true. Rather, checks and balances refers to a system of accountability whereby each arm of government that is the executive, the judiciary, and the Legislature serve as watchmen or better still, watchdog to each other. An instance of this is where a Supreme Court which is part of the Judiciary declares an Act passed by the Congress unconstitutional. In a similar way, the Congress can impeach and remove a President from office with the necessary backing of members envisaged by the law. Further, the president of the United States can veto legislation though he can be subsequently overruled over the move by two thirds of the two Houses of Congress. A significant principle and indeed a way in which this theory of checks and balances is effected, is through separation of powers. Separation of powers entails an independent oversight on the part of those who make

laws, its implementers and those who enforce or interpret the laws. In the United States both houses of Congress act as a check on each other. This is a clearly a good illustration of checks and balances and the doctrine of separation of powers. The theory of checks and balances now finds its expression in the United States constitution. It is a concept propounded by its founders such as Baron Montesquieu, Polybius and James Madison. James Madison is credited in the United States for applying this significant concept to the Republic and including it in the United States constitution once stated that no other political truth is of greater intrinsic value.

The renowned philosophical thinker Baron De Montesquieu is considered the originator of the doctrine of separation of powers and checks and balances. James Madison cites Montesquieu's book *The Spirit of the Laws* as the authority for the concept of checks and balances. He also reckons that Montesquieu is the oracle who is always consulted and celebrated on this theory of checks and balances. Nonetheless, it is also put forward by this paper that while Montesquieu must have put forward the modern incarnation of this noble concept, he borrows a significant deal from the works of Polybius as well as the ancient history of mixed constitution. In evidence of this, it is an undeniable fact that several thinkers that came before Montesquieu touted the efficacy and efficiency of the principle of separation of powers as is posited by eminent jurists such as William Blackstone and John Locke. Indeed, James Madison is credited with insisting that checks and balances were critical for any functioning democracy and helping in protecting liberty in a Republic. His highly convoluted and sophisticated expression of checks and balances encompassed in the United States

constitution is a testament of Madison's handiwork.

The reason for checks and balances and why the founders found it necessary to be in place and further entrenched it in the constitution can best be known by examining their works. One of the founders, James Madison, who later went on to become the President of the United States stated that it is against enterprising ambition of the Legislature that people ought to indulge all their jealousy and exhaust all their precautions. Montesquieu in his works Spirit of laws further extrapolates the reason by stating that power concentrated on one organ or individual is bound to be abused. Therefore, checks and balances are necessary to ensure that power is not abused thereby compromising the liberties enjoyed by individuals. It is inadvisable and incredible if one organ or individual were to be allowed to make laws, enforce and yet implement them.

As already stated, the theory of checks and balances is best illustrated by division of powers among the three arms of government. The three branches of government include the Legislature, the Executive, and the Judiciary. In the United States, the executive consists of the president and his cabinet and administrative organs that are charged with implementing the law. Another branch of government is the legislature which consists of the Congress, Senate and the House of Representatives charged with the enactment of laws. Next is the judiciary which is the court system charged with the interpretation and enforcement of laws. In tandem with the doctrine of separation or division of powers, powers are diffused so as to prevent one branch of the government from being too powerful. For example, the president has the power to assent to the bills passed by the legislature so as

to give them the force of law. On the other hand, the Supreme Court which is part of the judiciary had the power to strike down a law passed by the legislature for its unconstitutionality. In this way, laws that run afoul of the will of the people expressed through the constitution are deemed to be of no legal effect.

Outside the Constitution and the rights delineated therein, there also exists several mechanisms that aid in this essential role of checks and balances in a bid to prevent the branches of government from running amok. Of significant relevance here is the media which has now emerged as an essential component of a functioning democracy. Media can be used for selfish agendas as well as it can be used to advance noble ideals. A free press is a sine qua non for a fully-fledged democracy which exposes and reports truthfully. A free press will criticize and publicize any attempts by any branch of government to abuse power and in this way, aid in checking the arms of the government. Conversely, a corrupt and opaque media will perpetrate corruption and result in democracy being undermined. This is because failure to expose and publicize instances of malpractice on the part of the violators will only serve to enable them continuing their malpractices. Another essential example of extraordinary check on power is not enumerated in the constitution is the use of executive orders. An executive order refers to a decree by a president of the United States which has the effect of directing and helping agencies and officers of the executive arm of government manage the operations of government. Such orders have the same force of law as Acts passed by Congress and assented to, by the President. These executive orders are a check on power in the sense that

they can act to provide for legislation where the Legislature is unwilling, is lethargic or cannot convene within a particular time to pass such law. However, these executive orders have been the subject of abuse by some Presidents in a similar fashion to the abuse of discretion in delegated legislation exercised in other common law jurisdictions. Executive orders are not backed by any constitutional provision as there is no express provision permitting the same. Rather, what is there is a slight hint of such power in Article 1 Section 1 Clause I of the United States constitution which is to the effect that the President has the executive power to take care that the laws be faithfully executed.

Another example of a device operating to check on governmental power and not provided for in the constitution is the use of staggered terms. Staggering terms basically involves scheduling terms of office so as to ensure that members of a particular body are not selected at the same time. The same has the impact of enabling relative stability in government. This method is applied in the election of members of the Congress viz Senate and the House of Representatives in the sense that in every two years, nearly a third of the Senate members are usually running in elections. Staggered terms also find expression in the presidency and they have the effect of checking against tyranny of the majority in the Houses which could lead to possible abuse of power. In addition, political mobilization plays an essential role in vouchsafing citizens' rights against arbitrary exercise of power by government. Political mobilization embodies the practice by activists and social organizations to develop a relationship with persons in the power structure so as to benefit the less privileged or masses within the society.

The call by masses has the effect of instilling discipline and good governance on the part of those in power as they are well aware that the ultimate power vests in the people.

A good illustration of a recent example of checks and balances in the news is the issue of military intervention into Syria and whether the president needed approval from Congress. A person in support of military intervention into Syria would probably be of the view that the president requires no approval from Congress while one opposed to it would hold the exact opposite. However, through the doctrine of separation of powers, approval from Congress by the president is essential before launching military intervention. This serves to check against abuse of power or discretion on the part of the president. For the United States military force to play a role in Syria, it would appear that the Congress has a role to play in vetoing the same. As by the afternoon of 28th August 2013, a letter with 116 signatures of Congress members had been presented in the White House approving military intervention.

In my personal opinion, the concept of checks and balances is critical as it is propounded by its founders, that its lack of existence and operation renders individual liberties a pipedream. As demonstrated by political power and indeed any other power that is unfettered, the power wielders occasionally abuse it willingly or innocently. This is bad for democracy and cannot be allowed. It is the case that a system of checks and balances has the effect of ensuring good governance and enabling a viable democracy in the United States for the simple reason that it instills discipline in government.

## Question two

The 10th amendment to the United States constitution provides for the architecture of the United States government which consists of a government at the federal level and at the state level. This provision of the constitution states the principle of federalism and goes further to enunciate powers granted to the federal government and the state government. It also has a provision to the effect that any power not granted to the federal government and not prohibited on the part of the state reposes in the state or the people. The constitution provides that only the legislature at the federal level can declare war while only the state government can conduct elections. A similarity in responsibilities is that both the federal government and the state government can levy and collect taxes and rates from businesses and individuals. Other duties and powers of the national government include printing of money, regulation of trade between states, conducting foreign policy, providing army and navy, and establishment of post offices. Some of the duties of the state government include the issuance of licenses, establishment of local governments, providing for public health and safety, regulating businesses as between states, and ratifying amendments to the Constitution.

The American interpretation of federalism has been constantly changing throughout history. Two significant concepts concerning federalism have evolved in history namely dual federalism and cooperative federalism. The concept of dual federalism holds that both the federal government and the state government are sovereign and co-equal and thus must both be given preeminence. Further, constitutional provisions are interpreted pedantically.



On the other hand, cooperative federalism dictates that the national or federal government reigns and is supreme over the state government.

Proponents of this interpretation give a broad meaning to the provisions of the Constitution such as the Necessary and Proper Clause. Changes in the interpretation of federalism in America are evident in various decisions of the Supreme Court over time. It is noticeable that during periods of crisis such as the Great Depression, the Civil War, and the Cold War as well as in the World War, recourse by the court was made to cooperative federalism.

The concept of States Rights refers to the doctrine in which the rights of individual states in the United States are protected from being impinged by the federal or national government. It recognizes that the individual states have rights that must not be encroached on. Conflict over the roles and powers as between the federal government has characterized the history of the United States. In the 1950's, issues concerning States Rights resurfaced thereby renewing the issue of the power of the state during the Civil Rights Movement. The concept of States Rights is related to Federalism to the extent that it seeks to delimit and put a cap on the power of the federal government and demands non-interference from the federal government.

A classic example of a struggle between the federal or national government and the state government is the legalization of marijuana for medical purposes. The legalization of marijuana for medical purposes in the United States has been the subject of contention and conflict as between the federal government and the state government. Currently, the States are charged with the enactment of laws legalizing the use of marijuana which has been found to provide medical relief to patients suffering from cancer

and HIV/AIDS. At the moment, a total of 20 states have legalized medical marijuana and thereby allowed its use as well as operation of marijuana dispensaries. Despite this position, a number of people have been prosecuted by the federal government for violating federal law by way of dealing with medical marijuana. The government at the federal level still considers the use of marijuana for whatever purposes, as illegal. However, the recent pronouncement by the United States Department of Justice to the effect that it will not interfere with the decision by the States of Colorado and Washington to legalize the use of marijuana for recreational purposes raises the issue as to who should regulate the use of medical marijuana. The 10th Amendment to the Constitution lays the basis for federalism and provides that powers not granted to the federal government are availed to the States or the people.

The apparent disconnect between the state and federal government raises the essential question as to what level of government should regulate the trade. Further, it puts the spotlight on the rights of individual States in the United States. Article IV of the United States Constitution provides for matters and powers relating to States. Section 1 of the Article provides that all state must respect the laws of other states. This provision is fundamental in the sense that nearly 30 states are yet to legalize the use of medical marijuana while around 20 states have allowed it. The interesting aspect of this is what treatment should be offered to an individual from a state that has legalized marijuana that moves into one that is yet to legalize. Some of the powers afforded to the state government include providing for public health and safety. To this end, it would appear that the state has a

constitutional right to regulate the use of marijuana for medical purposes as it is of much benefit in the medical world.

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