

The constitution and checks and balances

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



The United States Constitution divides the powers of government with respect to laws into three nominally equal parts, and grants one part only to each of the legislative, executive and judicial branches. The legislative branch is responsible for making the laws, the executive branch for enforcing them, and the judicial branch is to interpret them. The primary reason for this arrangement was a reaction to the failure of the previous US Constitution, the Articles of Confederation, and to the previous oppression of the British government.

The drafters of the US Constitution were determined that power not be concentrated with an individual or a small group within the Government, lest they inadvertently recreate the Monarchy, or an elitist oligarchy. The use of the three branches to separate the powers of government was designed to create a system of checks and balances between the three groups. There are several provisions within the Constitution that reflect these checks and balances. One example is the process of impeachment of the President for “High Crimes or Misdemeanors”. (Madison, et al. 1789) The process begins in the legislative branch with the House of Representatives passing a bill of impeachment. (Madison, et al. 1789)

The Trial is then conducted in the senate, the other part of the legislative branch, and presided over by the head of the judicial branch, the Chief Justice. (Madison, et al. 1789) This enables the other two branches to limit the actions of the Chief Executive. Another manner by which the legislative branch can check the Executive branch is by something called the “power of the purse.” The constitution states that all appropriations (spending) bills must originate in the House of Representatives. (Madison, et al. 1789) In a <https://assignbuster.com/the-constitution-and-checks-and-balances/>

similar vein, only Congress can declare war upon another nation. (Madison, et al. 1789) On the other hand, the executive holds significant power over the other branches as well. He has the power to veto any law passed by Congress, (Madison, et al. 1789) and he is charged with appointing the members of the federal court system. (Madison, et al. 1789)

As commander of the armed forces, he can order them into emergency action and maintain them there for a limited time without the consent of congress. (Madison, et al. 1789) This means that the Chief Executive can choose to use the military and other enforcement agencies as he wishes, but in order to fund any venture, he needs approval from congress. Additionally, the executive branch has the responsibility to enforce the laws of Congress. (Madison, et al. 1789) In so doing, they can exercise control over the extent, scope, and range of the enforcement. If the executive disagrees with the intent of a given law, it can enforce the law in the narrowest manner possible. (Madison, et al. 1789) Also, executive regulatory agencies are often responsible for setting penalties for legal violations, and these too can reflect the extent to which the executive agrees with the spirit of the law. (Madison, et al. 1789)

The veto can be countered by Congress with a 2/3 majority in both houses, (Madison, et al. 1789) creating a balance between the two branches on law making. With respect to the Judiciary, the executive has the power of actually selecting the Justices to serve in the federal courts. (Madison, et al. 1789) To balance this privilege, the executive cannot fire or remove any

Justice; only the legislative branch can do so through the process of impeachment. (Madison, et al. 1789)

The federal courts have the power to interpret the meaning of laws passed by Congress, and the Supreme Court can nullify any law that they deem in violation of the constitution. (Marbury v. Madison, 1803) This system of checks and balances was intended to allow legal and orderly measure for redressing disagreements between the branches of government, and to allow the other branches to mitigate any one branch that seems to be overreaching with its prerogatives.

However, despite this carefully designed system of checks and balances, certain unforeseen factors have rendered the system relatively ineffective. The primary unforeseen factor was the development and dominance of the two-party political system and this system's impact of checks and balances. Impeachment, on the only two occasions in History that it was used, was a partisan political ploy that stretched the reasonable definitions of " High Crimes and Misdemeanors" and failed to produce convictions in either case. (The Impeachment History, n. d.

Politics also has prevented Congress from limiting the power of the President to wage war using the " power of the purse. " (Kelly, n. d.) As the group in government most directly answerable to the people, the House Of Representatives has never been able to get away with failing to fund a military effort, as such a ploy would be considered politically undesirable. (Kelly, n. d.)

Thus, the President has historically engaged in military conflicts, in some cases vastly unpopular ones, without the consent of Congress. The necessity of a war declaration has also fallen by the wayside. Kelly, n. d.) The United States has been involved in numerous significant military endeavors without a declaration from Congress. Again, though Congress may voice protests or disagreement, they are politically unable to withhold funding to support troops already in harm's way. (Kelly, n. d.) Such has been the case in the Korea, Vietnam, Grenada, Panama, and Iraq. (Kelly, n. d.) Another aspect of checks and balances that failed historically was the Supreme Court's power of Judicial Review. Most notably, Andrew Jackson sent the military to South Carolina over the objections of the Court.

Though no violence resulted, the incident, known as the Nullification Crisis, illustrated the impotence of the Court in the face of a determined executive. (Bancroft, 1913) The Supreme Court also fails often to redress Constitutional issues until after the fact. In two notable historical cases, *Schenk v. United States*, (1919) and *Korimatsu v. United States*, (1944) the Supreme Court did not rule until significant time has passed, and, in the case of *Korimatsu*, the ruling did not come in time to redress the grievance. (The fact that the plaintiffs lost in these cases is irrelevant, since they theoretically could have won.

In another example, a number Roosevelt's New Deal programs were deemed unconstitutional by the Supreme Court, but only after having functioned for a number of years. For good or ill, illegal government programs were allowed to continue while the Court deliberated. Yet another example of the failure of

checks and balances is the historical use of executive orders. These orders have the power of law within the executive branch, including the military, and even though they are technically subject to court scrutiny, the time it takes to render a decision on issues. (Kelly, n. d. Thus, presidents such as Lincoln, Franklin Roosevelt, and George Bush, Jr. have been able to violate the bill of rights (part of the Constitution), and did not face scrutiny until well after the acts occurred. (Kelly, n. d.)

Historically, the power of the three branches has never been particularly balanced, though at various times, each of the branches gained certain ascendancy. In the early days of the Republic, Congress was dominant in shaping early infrastructure policy, approving of wars, and handling financial policy. In times of war in particular, the Executive became dominant.

If a clear danger to the Republic was present, the Legislative and Judicial branches seemed content to allow the Executive to take the lead. For a brief period in the 1950s and 1960s, it was the Supreme Court that took over the responsibility for civil rights legislation from a reluctant Congress and an indifferent executive. In modern times, the Congress has been largely impotent in limiting the power of the Executive, albeit for political reasons. The perception of the public of the President as a lawmaker, incorrect as it is, makes it politically difficult for congress to check his desires.

An example of this occurred in 1996, when a Republican Congress squared off with Democratic president Clinton over the federal budget. A stalemate ensued, shutting the government down, and the public blamed congress, seriously inhibiting the ability of congress to impose its will. Another balance

attempted by the framers of the Constitution was the balance of Federal versus State powers. (Kelly, n. d.) As originally conceived, this balance was about whether day-to-day policy ought to be dictated by a “ far-off” central government, or by the local politicians. (Kelly, n. d. The Constitution was very explicit in enumerating the powers of congress as well as indicating what congress was not allowed to do.

The States were also denied certain powers, but under the 10th amendment, retained most of the governing power. When ‘ push came to shove” in a conflict between State and Federal will in the 1830s, the States got the short end. (Kelly, n. d.) This issue was ultimately resolved by the Civil war, some 30 years later when the federal government forcibly exercised its will on reluctant southern states. In the modern era, the Federal versus State power dynamic has shifted more toward social policy. Kelly, n. d.) While the Federal government no longer enforces its decrees upon the states with the military, (with a couple of notable exceptions in the 1950s) they often use federal funding as a “ carrot” for the States, threatening less money from the government for schools or infrastructure if federal regulations are not observed. (Kelly, n. d.) The term for this, coined during the Nixon presidency, is “ New Federalism”. (Kelly, n. d.) Nowadays, advocates of state and local government are in favor of “ less government” in terms of regulation.

In one particular constitutional area, the attempt to balance the State and Federal authority in the Constitution has been corrupted by the bi-partisan political climate. (Kelly, n. d.) State legislatures, who bear the responsibility

of regulating federal elections and district-drawing, have abused these privileges on a partisan basis. (Kelly, n. d.) They have rigged district borders, and manipulated registration policies to exclude one or the others' parties. To this day, numerous redistricting maps in US states illustrate partisan division.

This process, called, gerrymandering, is illegal, but loosely interpreted, and rarely enforced. Kelly, n. d.) Despite these shortcomings with respect to balance of power in the Constitution, very little would have to be changed in order to redress the problems. Since most of the difficulties are based in circumstances unforeseen by the founders, the fixes would lie in relatively modern practices that are “ extra-constitutional”. Examples of this are the changing of Congressional procedures that skew power to political minorities, in the face of public will, and limiting the over-use of executive privilege to circumvent congressional oversight.

Congress has a number of internal policies and traditions that are not ordained in the constitution yet have significant impact on the movement of legislation. An example of this is the filibuster, which can be utilized in the senate by a political minority to prevent a straight-up vote on legislation that has popular support. Another such ploy is the use of committees and subcommittees to regulate which bills are voted upon, and which “ never see the light of day”. Elimination of such measures would require Congress, and the President to be more receptive to the peoples' will and less likely to usurp their constitutional privileges.

In the case of executive order, the current policy is to allow interpretation of what constitutes emergency circumstances that necessitate the use of executive order. By allowing the executive to both issue these order, which have the force of law, and determine the conditions under which they might be ordered, the system gives the president almost unlimited power, and gives truth the Nixon's famous utterance " The Constitution means what the President says it means. " (Kelly, n. d.)