Checks and Balances: Internal Constraints on Government Power

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****Draft****

This chapter lists the Checks and Balances in the American Constitutional system, gives examples of Checks and Balances in practice, and considers whether the system is breaking down as the presidency becomes increasingly unchecked.

Overview of Checks and Balances in the American Political System

Many Americans confuse Separation of Powers and Checks and Balances, or mistakenly think they are the same thing. But while they are closely related, they are not the same.

1. Separation of Powers is the division of political power into the separate branches of government, legislative, executive and judicial, so that each is independent of each of the other branches.

2. Checks and Balances is the giving of each of those branches some power to act as a check on the actions of each of the others, constraining the independence of each to some degree.

The Framers of the Constitution separated the powers of government into the different branches to prevent any person or small group of people from holding all power in their own hands. But they worried that one branch might manage to invade the area of another branch and effectively take over its power, so they also created the checks that allow the branches to push back against other branches' efforts to consolidate power. As explained by James Madison in Federalist 51, the whole structure is based on the inherent jealousy of others' power, so that–in theory, at least–the members of one branch could be relied upon to push back against power grabs by another branch *not* as a matter of principle, but as a matter of self-interest, to protect their own power.

> [T]he great security against a gradual concentration of the several powers in the same [branch] consists in giving to those who administer each [branch] the necessary constitutional means and personal motives to resist encroachments of the others… Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the [office]. James Madison, Federalist 51:

The diagram below provides a good visual overview of the Checks and Balances between the branches, but stated briefly, they are as follows:

<u>Congress</u>

- Congress can check the President by: 1) rejecting treaties the President has negotiated; 2) rejecting presidential appointments of federal judges, ambassadors, and other appointments to the executive branch (such as Secretary of State, Secretary of Treasury, lower-level appointees to the executive branch agencies, etc.); 3) not authorizing funds for a presidential initiative; 4) overriding a president's veto of legislation; and impeaching a president.

- Congress can check the Judiciary by: 1) rejecting presidential appointments to the federal judiciary; 2) proposing constitutional amendments to overrule judicial decisions; 3) impeaching federal judges (including Supreme Court justices), 4) making exceptions to the judiciary's appellate jurisdiction.

<u>The President</u>

- The President can check Congress by: 1) vetoing legislation; 2) requiring Congress to adjourn (if they cannot decide on an adjournment time); 3) by requiring them to convene (if they are not meeting and important issues arise which the president wants them to address).

- The President can check the judiciary through: 1) the appointment of federal judges; 2) issuing pardons to convicted persons whose judicial appeals have failed.

The Judiciary

- The federal judiciary can check Congress by: 1) declaring laws unconstitutional, and therefore void and not in effect.

- The federal judiciary can check the President by: 1) declaring actions of the executive branch unconstitutional, and therefore void and not in effect.

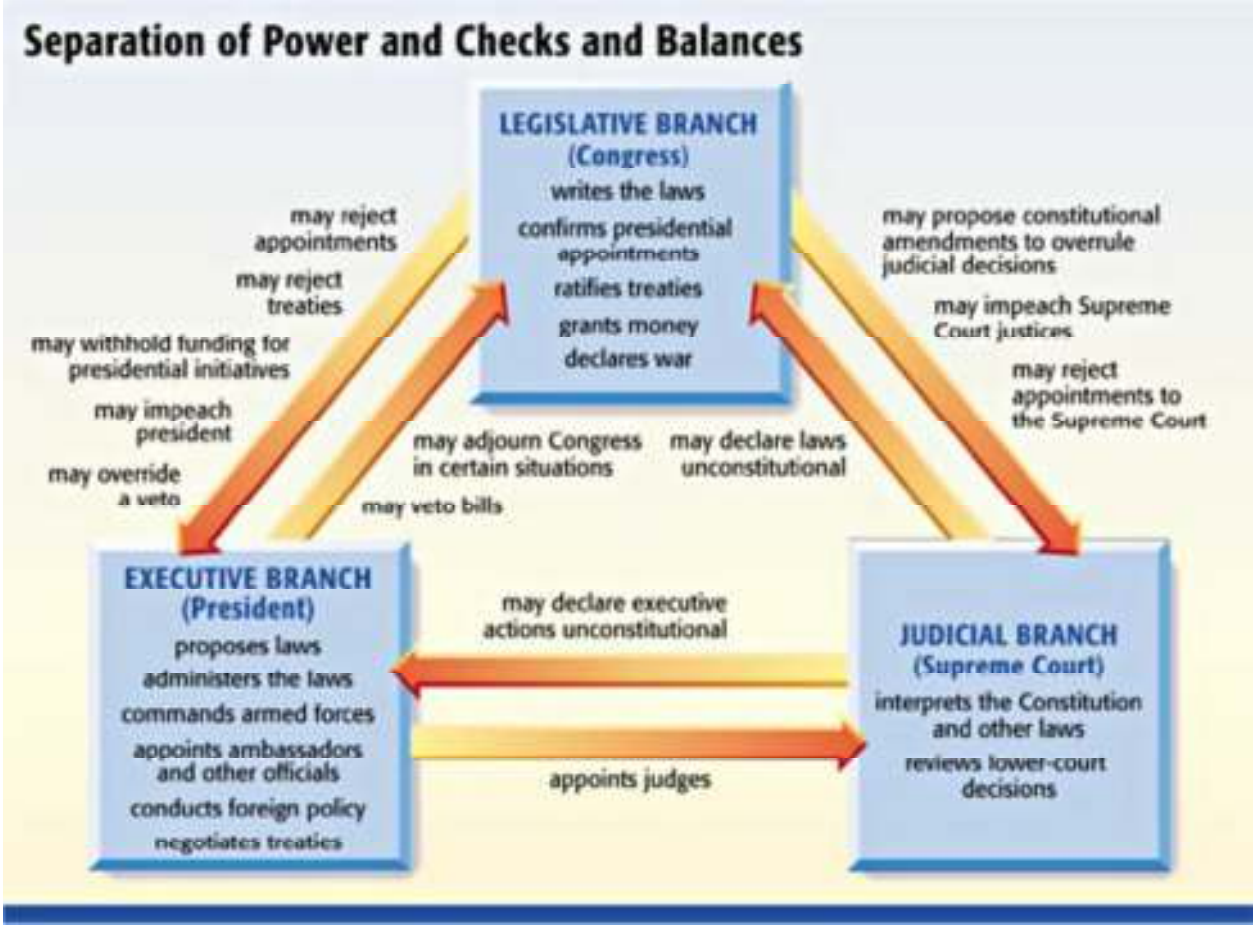


Image source: http://www.kminot.com/art/charts/branches.jpg

The traditional view that the Founders separated powers still dominates American political thought, but the links between the branches created by the checks and balances led one prominent American political scientist to argue for a different way of looking at our system.

> The Constitutional Convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers. 'I am part of the legislative process,' Eisenhower often said in 1959 as a reminder of his veto [power]. (Richard Neustadt. 1990. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York: The Free Press. p.29.

While it is unlikely that this view–of separated institutions sharing powers, rather than an actual separation of powers–will ever become the dominant understanding of the American public, it has had significant influence in the way political scientists understand the American political system.

Examples of Checks and Balances in Action

The best way to understand Checks and Balances is to look at some examples of the branches exercising them over each other. A real-world example of each type of check would be a long tedious read, but a handful of brief case studies provides valuable insight into the way the American political system functions.

Congress Checks the President: The Senate Rejects President Wilson's League of Nations Treaty

In 1916 President Woodrow Wilson won re-election on the slogan, "He kept us out of the war," referring to World War I, but shortly after re-election he reversed course and got the U.S. into the war, becoming the force that ended a stalemate between the two sides and brought the war to a close in 1918. With over 16 million civilians and soldiers from the combatant countries dead and another 20 million wounded, it was the most devastating war in world history–hoped (in vain) by some at the time to be "the war to end all wars." Wilson, along with British and French political leaders, believed in the necessity of creating a League of Nations to help prevent future wars, and together they and other nations negotiated a treaty to create the League. In the United States, however, both the public and many legislators objected to U.S. Participation in the League. Until that point in time, the U.S. had

been *isolationist*, most often trying to avoid getting involved in other countries' conflicts, a position that went back to George Washington's warning in his farewell address (upon his retirement from the presidency in 1796), in which he encouraged his country to avoid "entangl[ing] our peace and prosperity in the toils of European ambition [and] rivalship." After our brief engagement in European war, most Americans wanted to retreat back across the ocean again, and leave Europe to settle its own problems. Wilson campaigned valiantly to build public support for the League of Nations treaty, but in the end the Senate defeated him and the treaty was not ratified, and the U.S. never joined the League of Nations.

Congress Checks the President and the Judiciary: The Failed Judicial Appointment of Robert Bork

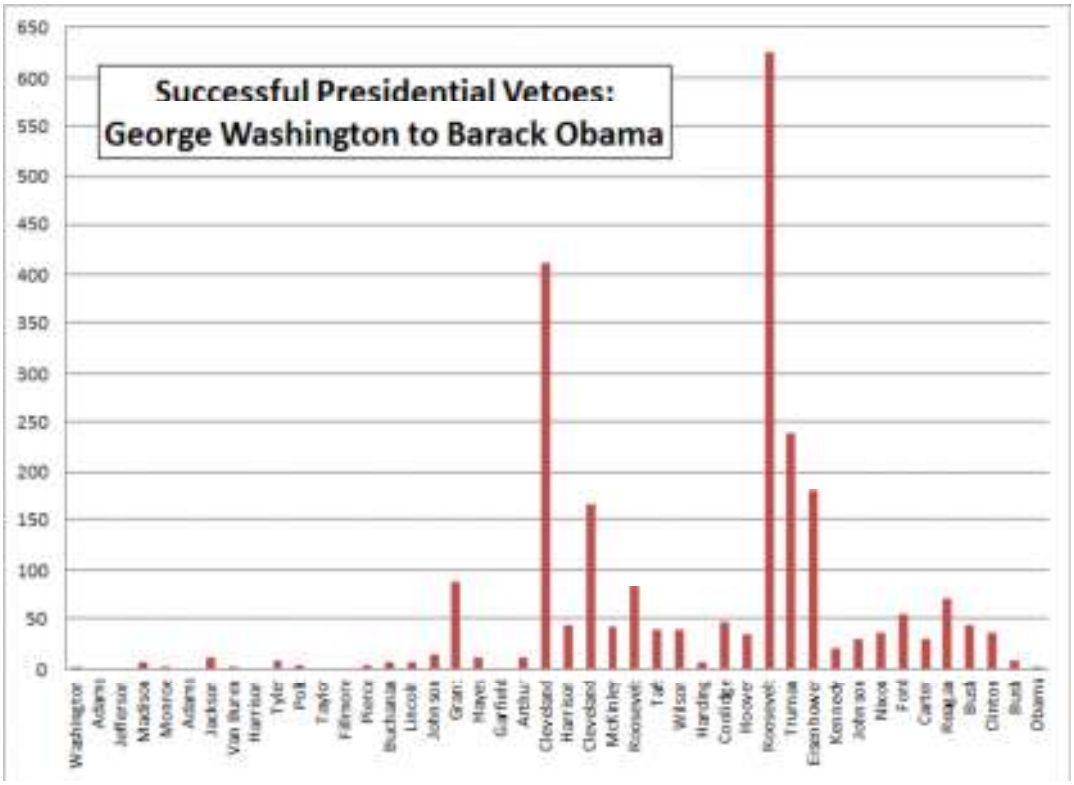
In 1987 Supreme Court Justice Lewis Powell retired, giving President Ronald Reagan the opportunity to appoint a replacement. Reagan nominated Robert Bork, a U.S. Circuit Court of Appeals Judge and former United States Solicitor General, to replace Powell. The appointment of Bork was a risky strategic choice, and Democrats, who had a majority in the Senate, exercised their constitutional authority of "advice and consent" on judicial nominations to refuse their consent, rejecting Bork's nomination by the largest margin in history for a Supreme Court nominee. Much of the Democratic opposition to Bork rested on the fact that he was a very conservative judge, who was being nominated to replace a much more moderate one (Bork had stated that he wanted to reverse some of the Supreme Court's rulings protecting civil rights), and on the role he had played in the Watergate scandal 14 years before, when at the orders of President Nixon he had fired the special prosecutor investigating the Watergate crimes. Two other members of Nixon's administration had resigned rather than follow that order, and many people believed (and still do) that the honorable action would have been for Bork to do likewise. But in addition to the Democrats' dislike of Bork, they were also striking a blow against President Reagan, who was then embroiled in a scandal of his own, the Iran-Contra affair, which involved the illegal sales of missiles to Iran and the illegal misdirection of the proceeds from the sale to fund insurgent groups in Nicaragua (the Contras), even though Reagan had signed into law a Congressional bill banning any funding for them.

Congress Tries to Check the President, Who Checks Congress, Which Checks the President: The War Powers Resolution

Under the U.S. Constitution, while the President is the Commander-in-Chief of the Armed Forces, only Congress has the authority to declare war. Since the 1950s, presidents have interpreted their powers as Commander-in-Chief as an authorization to send the military into combat, with or without an actual declaration of war by Congress. In 1973, in an attempt to regain control over the warmaking power, Congress passed the War Powers Resolution, which requires the President to notify Congress within 48 hours of committing American forces to military action, and forbids them from remaining in a conflict for more than 60 days without congressional authorization. This was itself a *statutory* effort to check the President's growing control over the warmaking power. In response, President Nixon vetoed the resolution, exercising his constitutional check on Congress. And in response to that Congress passed the resolution over Nixon's veto, exercising their own constitutional check on the President.

The President Checks the Congress: More than 2500 Successful Vetoes

Over 2¼ centuries Presidents have cast over 2500 vetoes. Only about 4% of these vetoes have been overridden. An important part of presidents' 96% success rate is that they can count–if they can see that there are enough votes for a bill to override their veto, they normally will not cast it. The fact that they do sometimes get overridden means that either they have made a strategic mistake in casting the veto or that they sometimes find it worthwhile taking a stand on principle, even if they know they are going to lose. Two presidents, Franklin Pierce and Andrew Johnson, have had more than half their vetoes overridden, which suggests they were locked in fierce political struggles with Congress (Johnson, in fact, was impeached by the House, although the Senate did not convict him). Both of those presidents were in the mid-19th century, but the president with the third highest percentage of vetoes overridden–33%–was the first president of the 21st century, George W. Bush. As the chart below shows, vetoes were rare in the early days of the American republic, but became more commonly used after the Civil War, and although more recent presidents have not used them as often as some past presidents, they are still an important presidential tool. However the total number of vetoes does not fully reveal its importance as a presidential tool for checking Congress. The mere threat of a veto can cause Congress to modify a bill to make it satisfactory to the President, or can even cause them to abandon a bill.



The Judiciary Checks Congress: Striking Down Unconstitutional Laws (Judicial Review)

Congress responds to public demands, because each member of Congress worries about keeping his/her constituency happy enough to re-elect him/her. Sometimes this means enacting laws that are of questionable constitutionality, because the public supports the law. One example is the 1996 Communications Decency Act. In 1996 the Internet was still new, and something of a mystery to most people, but already it was a conduit for large amounts of pornography. Congress responded to public concern by passing an act outlawing the transmission via the Internet of any obscene or indecent message to a person under 18. The American Civil Liberties Union, among others, filed suit, challenging the law as a violation of the First Amendment. While obscenity has been determined by the Supreme Court to not be protected by the First Amendment (although their definition of what is obscene is very restrictive), the Court used its power of judicial review–the power to review laws to see if they are compatible with the Constitution–struck down that part of the law because the concept of "indecent" materials was too broad, and banned communication of many things that are protected by the First Amendment.

The Judiciary Checks the President: Even Suspected Terrorists Get Their Day in Court

Following the 9/11 terrorist attacks, President Bush declared that the executive branch had the power to detain "illegal enemy combatants" (a newly invented term, created to avoid classifying them as prisoners of war, which would have required the U.S. to follow its treaty obligations under the Geneva Conventions) indefinitely, without trial. Yaser Hamdi, an American citizen, was captured in Afghanistan and held in a military prison. Hamdi's father challenged his son's imprisonment, arguing that his son had gone to Afghanistan to do charitable work and was not an enemy against the United States. The Supreme Court ruled that the executive branch did not have the authority to hold a U.S. Citizen indefinitely without allowing them to challenge their status as an illegal enemy combatant in the courts.

The Decline of Checks and Balances on the Presidency?

One lesson makes itself clear from the examples discussed above. The Framers of the Constitution were correct to believe that there would be a continual struggle between the branches for political dominance, especially between the legislative and the executive. But many presidential scholars today argue that Congress's ability to check the President has declined, so that the presidency is increasingly able to operate without effective checks.

> [In the 1800s] presidents faced a powerful legislative branch whose leaders jealously guarded its prerogatives and were quick to rein in presidents who overstepped their bounds. But today's Congress is weak… because [of the] decay of political parties… Congress was a more vigorous institution when political party leadership gave it an organizational backbone. [Then] the leaders of the House and Senate were willing and able to fight for their institutional interests and to check presidential encroachment upon their powers. In the absence of party discipline, Congress usually lacks the organizational coherence to slug it out with the imperial president on policy issues. (Crenson, Mathew, and Benjamin Ginsberg. 2007. *Presidential Power: Unchecked and Unbalanced*. New York: W. W. Norton. p.354.)

Congressional efforts such as the War Powers Resolution give the appearance that checks on

the President are still effective, but in fact the War Powers Resolution has done nothing to constrain presidential warmaking. The United States has not declared war since World War II, but since then has been involved in military in Korea, Vietnam, Cambodia, Grenada, Panama, Iraq, Yugoslavia, Afghanistan, Pakistan, Libya, and Syria. Most often Congress has "authorized" the sue of force after the President has already begun military action, but frequently they have done so even thought the President has denied that he requires any such authorization to act. In 1999, Bill Clinton became the first president to use military force–sending troops into the Yugoslavian Civil War–despite an outright refusal of Congress to authorize him to do so (Adler, David Gray. 2000. "The Law: The Clinton Theory of the War Power." Presidential Studies Quarterly. 30 (1). pp155-168).

More recently, George W. Bush declared that he had the authority to wiretap and surveil Americans' phone conversations without a warrant from the executive branch, and to prevent citizens from challenging the executive branch's actions in Court by invoking a "state secrets privilege," unilaterally determining that allowing them to be heard in court would reveal state secrets. In both of these ways the President claimed authority that is rightfully within the domain of the judicial branch. As a candidate for the presidency, Barack Obama criticized Bush's actions, but as President he has also claimed both powers.

To avoid having to fight for treaty passage through the Senate, presidents have resorted to the use of executive agreements–direct agreements with the heads of other countries–that do not have to be approved by the Senate because technically they are not treaties. Some of these agreements are secret agreements, about which not even the Senate Intelligence Committee has knowledge. Presidents claim that they have "inherent powers" to make such agreements that commit the U.S. to certain courses of action without any congressional oversight.

Increasingly presidential scholars worry about an "imperial presidency," that accumulates legislative and executive powers into the hands of the executive branch. It may be that the demands of the modern world require a stronger and more powerful presidency. Or it may be that the American system of checks and balances is, after two centuries, on the verge of collapsing, and the tyranny the Founders feared may become a real danger.