

## Talking Points

### Separation of Powers

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

- A basic definition of separation of powers is the idea that a government functions best when its powers are not concentrated in a single authority but are instead divided among different branches.
- The United States was the first nation to formalize separation of powers among the branches in a written constitution.
- Lawyers and philosophers in the seventeenth and eighteenth centuries defined the three branches of government and their respective powers:
  - The **legislative** branch has the power to **make the law**.
  - The **executive** branch has the power to **enforce the law**.
  - The **judicial** branch has the power to **interpret the law**.
- The first three articles of the Constitution define the powers given to the three branches. Article I defines the Congress, Article II defines the executive branch, and Article III defines the judiciary.
- The Founders created a system that both separated and blended powers so that each branch serves as a check and balance on the powers of the others. For example, the executive can veto legislation passed by Congress, and the judiciary can review the constitutionality of legislation if it is challenged in court.

#### **Separation of Powers—and the Federal Judiciary**

- In *The Federalist Papers*, Alexander Hamilton described the judiciary as the least powerful branch. The judiciary's independence from political interference by the legislature or the executive branch is protected in the Constitution by life tenure during good behavior and a guaranteed salary.
- The judiciary's power to review the constitutionality of executive actions or laws passed by Congress is called judicial review. This power was first used by the Supreme Court in *Marbury v. Madison* (1803). The judiciary's power is limited to the "cases and controversies" brought before the court.
- There are numerous constraints within the judiciary on the power of individual judges:
  - Judges must explain their decisions in written opinions.
  - Judges most follow the precedents established by the decisions of higher courts.
  - Judges' decisions are subject to review by courts of appeals.

- The executive and legislative branches each have powers that check and balance the judiciary.
  - The federal courts are staffed by judges nominated by the President.
  - The courts rely upon the executive branch for enforcement of their decisions.
  - Congress has control over the judiciary’s budget (although it cannot reduce a judge’s salary).
  - Congress has the power to impeach federal judges who misbehave in office.
  - Congress may begin the process of amending the Constitution if it disagrees with the judiciary’s interpretation of the Constitution.

### **Separation of Powers—and Congress**

- The Constitution gives Congress numerous powers, including
  - Power over the budget, including the authority to raise taxes, borrow money, and spend money
  - Power to declare war and to raise and support military forces
  - Power to regulate immigration, the mail, patents and copyrights, and commerce between the states and with foreign countries
  - Power to establish federal courts below the United States Supreme Court
- In addition, the Constitution also provides that Congress has the power to pass any laws that are “necessary and proper” to give effect to its named powers.
- The Constitution divides legislative power in the Congress between the House of Representatives and the Senate. Both Houses must agree on proposed legislation before it becomes law.
- Checks and balances on the powers of Congress include
  - The President’s veto power on proposed legislation (A two-thirds majority of both the House and Senate is required to override a veto.)
  - The Supreme Court’s power to review the constitutionality of a law if it is challenged in a case brought before the Court

### **Separation of Powers—and the Executive**

- Constitutional powers granted to the executive branch include
  - Oversight of federal agencies that implement laws passed by Congress (these agencies employ more than 4 million people).
  - Power as Commander in Chief of the armed forces
  - Power to make treaties, nominate judges to the federal judiciary, and appoint officers of the government, subject to the advice and consent of the Senate
  - Power to pardon individuals convicted of federal crimes
- The President was the equivalent of the monarchs who ruled as heads of state for most European countries at the time the Constitution was drafted. Unlike those monarchs, however, the President is elected to office and serves only for a limited term.

- Among the checks and balances on executive power are
  - The Senate’s power to ratify treaties the President has signed and to consent to the President’s nominees for federal judgeships and other government positions
  - The power of Congress to impeach and convict the President for “treason, bribery, or other high crimes and misdemeanors”
  - The federal judiciary’s power to declare executive actions unconstitutional if they are challenged in court

### **Separation of Powers—in Other Systems**

- Separation of powers is a hallmark of most democratic governments, but the balance of powers among branches can differ in different political systems.
- The United Kingdom’s parliamentary system, for example, has much greater overlap between the executive and the legislative branches. The party who wins a majority of seats in Parliament, the United Kingdom’s legislative body, chooses a member of its party to serve as prime minister, the head of the executive branch.
- Members of Parliament can dissolve a prime minister’s government and force new elections with a vote of no confidence. This is an important check on executive power in a parliamentary system. In forcing new elections, however, the majority party risks losing power in Parliament to another party.
- In all systems, an independent judiciary is a crucial element in ensuring that the political branches (the executive and the legislative) do not exceed constitutional limits on their power.
- Other institutions outside government also serve as checks and balances on the powers of the executive, the legislature, and the judiciary. These include a free press that can investigate and report on government actions, non-governmental organizations that advocate for different interests, and the power of the people in whom government authority ultimately rests.