

1.6

Principles of American Government

Explain the constitutional principles of separation of powers and “checks and balances.”

Fortuitously “cautious revolutionaries” wrote the United States Constitution. Both history and theory instructed our Founding Fathers to be weary of consolidating the functions of government. Sovereign authority in one place only invited abuse. Therefore, a tripartite government was established. The U.S. Constitution vests three branches of government with certain specialized power and authority. The legislative branch writes laws. The executive branch enforces laws and the judicial branch interprets laws.

The doctrine of the separation of powers was not an abstract principle but an integral expectation of how our government was to function. This is clearly evident when looking at the text of the constitution. The enumerated powers given to the Legislative Branch are expressed in Article 1; to the Executive Branch in Article 2; and to the Judicial Branch in Article 3. Each was given varying institutional characteristics and different sets of constituencies. James Madison, in the essay Federalist 51, stated most clearly the rationale for this essential principle:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The constitutional separation of powers was designed to protect liberty by dividing power and preventing both majority and minority tyranny. **The Constitution creates a complex competitive policy-making process to ensure the people’s will is represented and that freedom is preserved.**

Notwithstanding the separation of powers, the Founders still feared potential abuses. The three branches seemingly invited corruption via the multiple access points. It was for this reason that an intricate system of checks and balances was also built into our founding document. As some have noted these checks were to be a “control mechanism.” It was thought that the best way to protect the people from an abusive government was to prevent any one branch from acting with unilateral power and authority. Democratic accountability and conformity with the rule of law was best safeguarded by a system of checks and balances. Here is a short list of examples:

The Legislative Branch can impeach [or remove] a President – the House impeaches and the Senate holds the impeachment trial; The Legislative Branch can override a Presidential veto; The Legislative Branch declares war; The Senate approves presidential appointments and treaties; The Legislative Branch can change the size and jurisdiction of federal courts.

The Executive Branch through the President can veto acts of Congress; The Vice President serves as the President of the Senate; The President is the Commander-in-Chief; The President can pardon; The President appoints federal judges.

The Judicial Branch through the federal courts practices judicial review – this power enables the courts to rule on the constitutionality of both Congressional and Presidential activity.

The equilibrium of power in our government is its most essential characteristic. Through the separation of powers and checks and balances our constitution intended to protect representative democracy. It provided for “the absolute central guarantee of a just government.” For this reason, citizens of the republic grow wary when any one branch appears to overstep its authority. It would appear that Madison’s “auxiliary precautions” ultimately require us to become the final check and balance to our central government.

“The very definition of tyranny,” at the time of our Founding, was the concentration of sovereign power in one place or in one person. Separation of powers and checks and balances became part of our essential political DNA. Elihu Root called the separation of powers “one of the great underlying principles of our Constitution.” Creating a constitutional system defined by the separation of powers and characterized by checks and balances was not merely a simple choice of governance, but considered at the time an essential strategy of national security. Without such mechanisms our fundamental freedoms, rights and liberties faced certain attack from imperious forces. It should be remembered, however, that ideas have consequences. The separations of powers and checks and balances have distinct and measurable implications for our political system.

First and foremost, the separation of powers means distinct functions have been given to our three branches of government. The legislative branch is empowered to make laws. The executive branch is empowered to enforce laws. And the judicial branch is empowered to interpret laws. No one branch was given the unilateral power to make

public policy without the aid and support of the other branches. In doing so, the U.S. Constitution built a bulwark against man's tendency toward the abuse of power. Government would be unable to violate the public trust or renege its constitutional prerogative to protect individual liberties.

Increasingly common in our political arena, related to the separation of powers, is the separation of parties. The separation of powers often results in an entrenched political impasse. With an expectation of providing functional responses to real problems, constitutional governments today are characterized by partisanship, polarization and gridlock. Divided government is a common feature. When operating within a system like ours, citizens have many doorways to influence public policy. Multiple access points for stakeholders and institutions to influence public policy flows from the separation of powers and checks and balances. Today the federal government employs well over two million civilian workers. Each are empowered in some way or another to legitimately carry out public policy. The separation of powers and checks and balances once considered as a bulwark against corruption now appears to be more vulnerable to the abuse of government power. Our ship of state can no longer prevent hazardous leaks from occurring. It can only hope that seepage due to corrupt behavior is on a scale too small to sink the entire ship.

It should not be assumed that the separation of powers and checks and balances makes a government immune from both the misuse and abuse of power. The warning of Lord Acton still applies to all – "Power tends to corrupt and absolute power corrupts absolutely." Corruption is an endemic problem. Presciently our Founding Fathers included in our original constitution the means by which rotten apples can be removed from holding office. Impeachment, removal, and other legal actions taken against public officials deemed to have abused their power reflect the purpose of checks and balances.

Article One of the U.S. Constitution grants the House of Representatives with "the sole power of impeachment." The Senate was given "the sole power to try all impeachments." Charging and removing unfit government agents, according to our constitution, found merit in cases of "treason, bribery, or other high crimes and misdemeanors." Impeachment was seen as a blunt weapon against entrusted civil servants who engaged in political malpractice and neglect of their delegated duties. It was to be used as a last resort and not subject to the whims of mere partisan differences.

Ordinarily federal officials are protected from being sued. Under the doctrine of sovereign immunity, you could not bring legal suit against the king. Yet in 1946 the Federal Tort Claims Act was passed into law. This statute allowed private parties to sue the United States in federal court. The law holds "the United States liable...in the same manner and to the same extent as a private individual under like circumstances, but [is not] liable for interest prior to judgment or for punitive damages." Individuals who are injured or whose property a federal employee damaged due to wrongful or negligent acts can make claims against the government of the United States.

The separation of powers is more than a mere type of government. There are implications when governed under such a system. For example, as we have seen here, “we the people” have greater access points to interact and interface with our government. Often this causes our government to be less efficient. We have also seen that checks and balances include more than simple oversight between branches of government. Checks and balances can result in impeachment, removal and even legal actions against public officials. In no small way our representative democracy is rooted in a constitution that promises to deliver what it inherently was created to do – provide for good government.