

The Separation of Powers

One of the great challenges of setting up a government is controlling and channeling the ambition for power that is part of human nature. Leaders entrusted with government power might be tempted to use that power for their own purposes and to exercise it arbitrarily. When that happens, the government becomes oppressive, and the people lose their liberties. So a government must have enough power to be effective, and yet it must not have power that can be abused easily by leaders.

During the Revolutionary Era, the Founders struggled to find a good balance of powers among branches of government. It took many years before the Founders conceived of the separation of powers as they are enshrined in the U.S. Constitution.

In 1748, the Enlightenment thinker Montesquieu wrote in his book *The Spirit of the Laws* that liberty is endangered when one branch of the government exercises some combination or all the powers of the legislative, executive, and judicial branches. “There would be an end of everything were the same man, or the same body . . . to exercise those three powers that of enacting laws, that of executing the [laws], and that of judging crimes,” he wrote.

The American revolutionaries experienced the injustice that came with combining the powers of government in one branch under the British. Most of the thirteen colonies were presided over by a royal governor appointed by the king. Many royal governors suspended colonial legislatures elected by the colonists. In addition, the governors acted as judges by having their council preside over criminal trials. Such actions took away the colonists’ powers of self-government. The lack of a separation of powers, as the king and his governors took over the powers of all three branches of government, seemed to point to tyranny.

The Declaration of Independence included a list of grievances that justified separation from Great Britain. Among the charges against the king, the colonists claimed that he had “dissolved their Representative Houses repeatedly.” Meanwhile, Parliament passed oppressive laws even though the colonists had no representation in that body. The colonists also claimed that the king had “made Judges dependent on his Will alone.”

Once they had declared independence, and even as they fought the American Revolution, the American people and their representatives created state constitutions. Even where these constitutions had a separation of powers among three independent branches, the colonists' fear of tyranny led them to create systems in which state executives were too weak. Therefore, most states lacked a good balance of powers, and state legislatures were able to pass unjust laws that failed to protect the people's liberties.

In 1781, the states ratified the first collective framework of American government: the Articles of Confederation. It was more of a "league of friendship" among sovereign states than a strong national union. The Articles had many problems, including a weak national government that could not govern effectively. The Articles also did not reflect the principle of separation of powers. The Confederation Congress was a one-house (unicameral) legislature with equal representation of the states. Since there was no independent national executive or national court system, the nation was governed by a weak national legislature alone. The power held by the states allowed them to routinely frustrate any actions of the national government. This prevented the national government from addressing crises and revolts, such as Shays' Rebellion.

When the delegates to the Constitutional Convention met to revise the Articles, they knew they needed to increase the power of the national government. Doing so, though, would increase the potential threat that government posed to the liberty of the people. The need to restrain a more powerful national government within constitutional limits led the delegates to focus on the separation of powers. Both the proposed Virginia Plan and New Jersey Plan provided for three independent branches of government. The delegates spent four months creating the three branches and the relationships between them. They wanted to preserve the independence of each branch but also to provide checks and balances to prevent any one branch from gaining too much power.

During the ratification debate, the Federalists and Anti-Federalists continued to agree on the importance of separation of powers. But the Anti-Federalists wanted a much stricter application of this principle than the Federalists. The Anti-Federalists feared that the president and the executive

branch would have too much power and govern in their own interests, as the British king and ministry had done.

The Federalists were more concerned about remedying the problems of the Articles and believed that they had built an adequate system that separated and checked the branches of government. In *Federalist* #47, James Madison appealed to Montesquieu to explain the significance of the principle of separation of powers. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” Madison explained that in the constitutional system, each branch would have powers that would check the power of the other branches.

Indeed, the Constitution contains many provisions for the separation of powers. For example, the Congress passes bills, but the president can sign those bills into law or veto them. If the President does veto a bill, the Congress can override a veto by a two-thirds majority. The president appoints Supreme Court justices, but those justices must be confirmed by the Senate. The president can make treaties, but those treaties must be submitted to the Senate for ratification. The House can impeach the president, and the Senate can then hold a trial to remove a president for office—though the Chief Justice of the Supreme Court must preside over that trial.

The principle of separation of powers in the Constitution protects the independent power of each of the three branches of government. At the same time, the Framers put many checks into the Constitution to ensure that the exercise of that power would be restrained. This system of checks and balances creates a dynamic tension between the branches that is a characteristic of American constitutional government.