American Federal Government

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6. Checks and Balances on Federal Power

Chapter Roadmap

In this chapter we will look at the theory behind the idea of separation of powers, how the Constitutional Convention settled on the idea of separating political power by separating the branches of the federal government, the checks and balances they gave each branch to constrain each other in a structure that set ambition against ambition, examples of how those checks and balances have played out through U.S. history, and contemporary concerns that checks and balances are today failing to constrain the presidency.

6.1 The Theory of Separation of Powers

Separation of powers is one of the most significant features of the U.S. Government, which is just one of a few countries in the world that have a strong system of separation of powers. The basic structure of powers in the U.S. Government is that the legislative branch (Congress), the executive branch (the President and the federal bureaucracy), and the judicial branch (the Supreme Court and the lower federal courts) are separate branches, each independent of each of the others, and each with its own powers that–theoretically–neither of the others can exercise or interfere with. Congress has the power to pass laws (legislative power), the President (and the federal bureaucracy under his direction) have the power to fulfill and enforce the laws (executive power), and the Supreme Court (and lower federal courts) have the judicial power (the power to judge the application and constitutional legitimacy of the law).

The idea behind separation of powers is that it is necessary to prevent tyranny, an idea generally traced back to the French political theorist Montesquieu (formally, Charles-Louis de Secondat, Baron de

Montesquieu), with whose ideas the Framers of the American Constitution were familiar.

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. . .
>
> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor..

This argument, explicitly referencing Montesquieu, was repeated by James Madison in the Federalist Papers (a series of essays urging the public of New York to support the Constitution when it was proposed).

> 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.

Montesquieu and Madison both had in mind the British system, with the King as the chief executive, the Parliament as an independent legislature, and a judiciary that was largely independent of the control of either King or Parliament. Oddly enough, at the time of his writing the Prime Minister of Parliament was growing in influence and would eventually become the real chief executive, with the monarch becoming largely ceremonial and having no real political authority, destroying that pure separation of powers. And yet the people of Great Britain do not see themselves as any less free today, nor by the measurements of the non-governmental organization Freedom House are other parliamentary democracies lacking in freedom. Some have higher freedom scores than the United States. But what mattered in drafting the Constitution of the United States was how the men at the Constitutional Convention saw the

world, and their view was generally favorable to the British system (minus the King) and Montesquieu's separation of powers interpretation of it.

6.2 The Origin of Separation of Powers in the U.S. Constitution

The idea of separation of powers is so deeply ingrained in American political theory, and Madison's defense of it in the Federalist Papers is such an important touchstone for that political theory, that it comes as something of a surprise that it was not part of the original plan, and almost did not get approved. James Madison's original proposal for a new constitution – the Virginia Plan – would have let Congress select presidents, similarly to how a parliamentary system selects a prime minister, which would have limited president's ability to act independently and act as a check on Congress.

> Resolved, That a national executive be instituted, to be chosen by the national legislature for the term of _____ years. (Madison left the number of years for a presidential term blank.)

Madison's proposal did not make clear whether the executive would be allowed to be a member of the legislature (like a parliament's prime minister), or would be someone from outside, and more separate from, the legislature, so it is not clear whether his idea would have produced no separation of powers, or a weak form of it. This idea was supported by many of the delegates to the convention, but was immediately challenged by a few others, most notably by Pennsylvania delegates James Wilson and Gouverneur Morris. Morris argued that with legislative selection

> He will be the mere creature of the Legisl[ature]: if appointed & impeachable by that body. He ought to be elected by the people at large, by the freeholders of the Country... If the Legislature elect, it will be the work of intrigue, of cabal, and of faction. . .
>
> If the Executive be chosen by the Natl. Legislature, he will not be independent o[f] it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence.

Note that Morris did not rely just on arguments about tyranny resulting if powers were not separated, but also stressed the danger of political intrigue and corruption in the selection process. Like any good political debater, Morris was using any argument he thought would be persuasive to some of the delegates. They didn't need to all oppose legislative selection of the executive for the same reason, as long as he could persuade them to oppose it for some reason. He was also appealing to the other delegates' awareness of the weakness of the governors of some states, who were dominated by their legislatures, and unable to effectively execute the laws because of it. This sense of excessive democracy through legislatures was a primary concern for some of the delegates, and one of the reasons they were favorable toward a stronger central government.

However Morris's proposal for popular election of the executive was defeated overwhelmingly, by a vote of 9-1 against (each state had one vote, but Rhode Island did not attend; most of New York's delegates left early and the other, Alexander Hamilton, was often absent; and sometimes states abstained from voting because their delegates were in disagreement with each other). But Morris had won an important ally, persuading Madison to renounce his original proposal and support greater separation of the legislative and executive powers.

> If it be essential to the preservation of liberty that the Legisl[ative] Execut[ive] & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other. The Executive could not be independent of the Legislure, if dependent on the pleasure of that branch for a reappointment.

However, winning Madison over was not enough to win the battle against legislative selection of the executive. The idea of election by the people was a non-starter for many of the delegates. Virginia's George Mason thought that

> it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.

Opponents of congressional selection of the president had to give up on popular election and settle for the idea of special electors (what we now know as the electoral college, discussed in another chapter). This brought several small population states on board because they saw it as giving them an advantage, since the small states would have a number of electors proportionally greater than their population–therefore electors would increase their influence compared to popular election (today this is still one of the stumbling blocks to amending the Constitution to elect the President by popular vote). Two days after the motion for popular election was defeated, the motion for selection by electors passed 6-3, and then a motion to have the electors selected by the state legislatures passed 8-2.

But the battle did not end there, as supporters of congressional selection fought back. A week later, following arguments that it would be hard to find good men to be the electors, especially from the states that would be farthest from the capital with the longest journey to get there to cast their votes, a proposal to revert back to Madison's original proposal of congressional selection of the president won, 7-4. (Apparently Morris was not the only one capable of looking or any argument that might change someone's mind!) This position stood for the next month, until the delegates were reviewing the full draft of the document they had produced to date. After fierce debate and several close votes on variant forms of legislative selection, they finally agreed to postpone discussion of the issue and refer it to a special committee. The committee turned out to be stacked in favor of those opposed to legislative selection and produced a proposal for the electoral college to select the president. After more political maneuvering, and a final, failed, attempt to restore legislative selection, separation of the legislative and executive powers was accomplished, three months after the convention began, and only a few weeks before it ended.

The delegates at the Convention were trying to solve a difficult problem, and without the experience of other countries to draw on they were making it up as they went along. They liked the British model and wanted to emulate it, except for the part about the King. But they knew they needed a chief executive to oversee the execution of the policies enacted by the legislature, so they created the President as a King substitute, wanted to keep him separate from Congress as the King was separate from Parliament, but were not sure how to select one while keeping them separate - Kings were hereditary, and theoretically selected

by God, so the British system did not give them a model for selecting the King. If a couple more generations had passed before American independence, by which time the Prime Minister of the British Parliament had become the de facto Chief Executive, the delegates might have been less Montesquieuan and created a parliamentary system for the United States.

Americans today view separation of powers as such a fundamental part of our political system that they have a tendency to assume the Framers of the Constitution had that vision all along, but as we have seen, the story is more complex than that. Americans also tend to have so much reverence their Constitution and the men who wrote it that they tend to overlook the extent to which it was not a product of wise men sitting down together and objectively discerning an ideal political system, but a product of men who had competing visions, competing understandings about political dynamics, and very pragmatic concerns about protecting the interests of their own states and so were intent on devising a government that they intended to be very limited in scope and somewhat weak in its ability to exercise power.

6.3 Checks and Balances: Internal Constraints on Government Power

Not only did the delegates to the Constitution want to limit the power of the federal government, and therefore its capacity to exercise tyranny, by first delegating only a limited amount of authority (the powers enumerated in Article 1, section 8) and then separating the powers of the Federal Government into three branches, but they also gave each branch the ability to check each of the others if any one branch began to exercise too much power or tried to consolidate power within one branch. 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).

Figure 6.1 provides a good visual overview of the Checks and Balances between the branches, but stated briefly, they are as follows:

The Legislature (Congress)

- 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.

The Executive (the President)

- 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 (all Federal Courts, but especially the Supreme Court)

- 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.

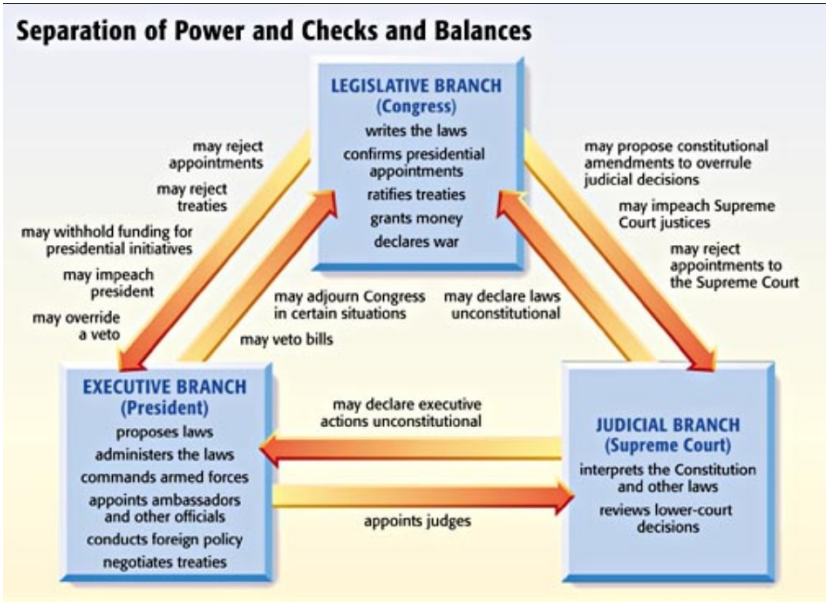

Figure 6.1. Image source kminot.com/art/charts/branches.jpg

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 leading American presidential scholar Richard Neustadt 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].

While it is unlikely that this view – of separated institutions sharing powers, rather than the branches of the American Government having a full 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.

6.4 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.

1. 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.

2. 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.

3. Congress Tries to Check the President, Who Checks Congress, Which re-Checks the President: The War Powers Act

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.

4. The President Checks Congress: More than 2500 Successful Vetoes

Over more than two 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 figure 6.2 shows, vetoes were rare in the early days of the American republic, but

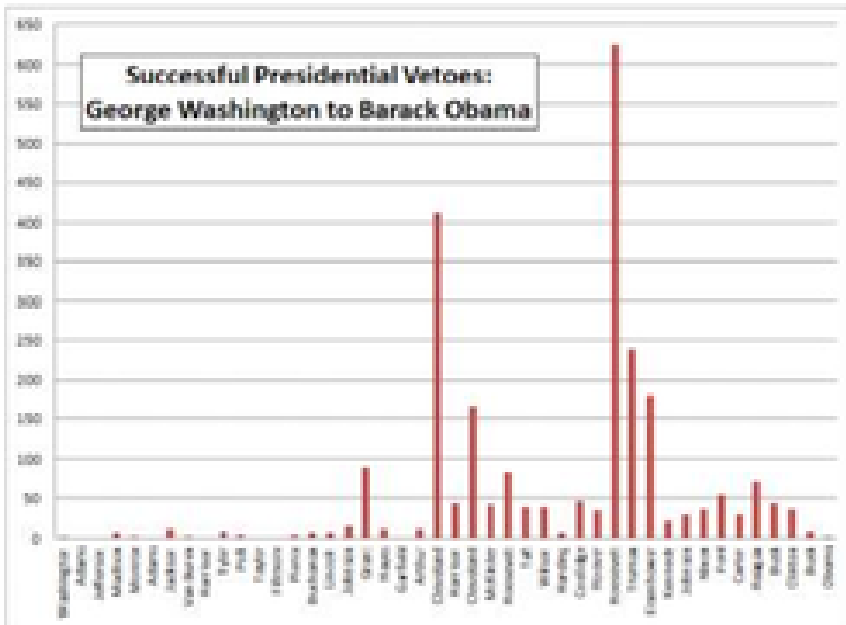

Figure 6.2

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.

5. 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, restricting extreme matters like child pornography but not ordinary pornography involving adults), the Court used its power of judicial review – the power to review laws to see if they are compatible with the Constitution – to strike 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.

6. 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.

6.5 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.[1]

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 use of force after the President has already begun military action, but frequently they have done so even though 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. While Harvard Law Professor Jack Goldsmith has argued in his book *Power and Constraint: The Accountable Presidency after 9/11* that journalists and lawyers (via the court system) have kept presidents accountable, political scientists Steven Levitsky and Daniel Ziblatt argue in *How Democracies Die* that the guardrails of democracy are being eroded, and that presidents are increasingly behaving in the way that leaders of other countries have on their way to destroying democracy and becoming authoritarian tyrants. They warn in their closing chapter that there is "nothing in our Constitution or our culture to immunize us against democratic breakdown" (p.204).

But Levitsky and Ziblatt also note that we have faced potential political catastrophe before in the United States, particularly during the Civil War

and the Great Depression. The Framers of the Constitution never indicated that they believed the Constitution would eliminate conflict, just that it would – they hoped – constrain it to reasonable levels that allowed a continued political union. The Civil War would have broken their hearts, and the Great Depression would have terrified them. They did not anticipate that their word would last more than two centuries, and it is impossible to know what they would think if they came back today. They might be proud that the Constitution they so contentiously and carefully debated and drafted is still the guiding document of the world's most powerful country, or perhaps they would chide us for not having updated it more to better constrain the growth of the federal government's power. But we can be sure they would encourage us to remain vigilant to abuses of power and encourage constitutional means of keeping each branch in check.

What to Take Away from this Chapter
(what you might get tested on)

1. From which political theorist did the Framers of the Constitution get the idea of checks and balances?
2. What did that theorist say was the problem of letting powers be combined in the hands of one or a few people?
3. What political system was the basic model for the U.S. Constitution?
4. Did James Madison's Virginia Plan clearly provide for separation of powers?
5. How did the electoral college help ensure separation of powers?
6. What are the checks and balances of each branch against each other branch?
7. What is the concern about checks and balances against the presidency in our era?

Questions to Discuss and Ponder

1. Consider parliamentary democracies without separation of the executive and legislature (where the Prime Minister is the chief executive). Are they all suffering from tyranny, as Montesquieu suggested would happen?

2. The Framers of the Constitution worked before the era of modern parliamentary systems. If they had followed the English model a few decades later they might have chosen a parliamentary system. If the United States was to have a constitutional convention today, do you think there's any chance we might shift to a parliamentary system? If such a change was proposed, would you support or oppose it? Why?
3. Is the presidency becoming unchecked? Do we need such a strong presidency, or is it a threat to democracy? What, if anything, should be done?

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[1] (Crenson, Mathew, and Benjamin Ginsberg. 2007. Presidential Power: Unchecked and Unbalanced. New York: W. W. Norton. p.354.)