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What Kind of Government Did the Constitution Create?

Visitors to the U.S. Capitol often expect to find the President's office there. They assume—incorrectly—that the entire government leadership must work under the Capitol's recognizable dome. There is a President's Room in the Capitol, but it is simply a ceremonial room that was set aside a century ago. Back when the President's term ended on the same day as the Congress, on March 4, Presidents would use the room to sign or veto the last bills enacted at the end of a session. After 1933, when the Twentieth Amendment set different dates for the end of Presidential and congressional terms, Presidents rarely used the President's Room. Instead, the President works across town, in the West Wing of the White House. The Supreme Court did once occupy a chamber in the Capitol Building, until 1935 when the separate Supreme Court building was opened across the street from the Capitol. The three branches come together now only occasionally, for an inauguration or a State of the Union message. Otherwise, they operate out of separate buildings in largely separate spheres.

Monarchs ruled the nations of the world when the U.S. Constitution was written in 1787. Some monarchies, such as the one that ruled Great Britain, also had parliaments in which the people and the aristocracy were represented. As parliamentary systems developed, they combined legislative and executive functions, with the prime minister and other cabinet members serving as members of Parliament. This differs sharply from the separation of powers established in our Constitution.

The delegates to the Constitutional Convention often referred to the English philosopher John Locke's *Two Treatises on Government*, written in 1690 just after England's Glorious Revolution of 1688 had strengthened Parliament's hand against the king. Locke argued that all people were born with certain "natural rights" to life, liberty, and property, which governments existed to protect. Locke believed that a government should be seen as the agent of the people, not their ruler, and therefore should operate under some restraints. An equally influential book was *The Spirit of the Laws*, written in 1748 by the French philosopher the Baron de Montesquieu. Writing while France was still under the rule of an all-powerful monarchy, Montesquieu admired the British system that separated the powers of the monarch, the parliament, and the judiciary. In Britain, the king served as the head of state, performing ceremonial functions and commanding the military, while the prime minister functioned as the head of government, providing political and legislative leadership. Because the Americans had rebelled against Great Britain, the delegates modi-

fied Montesquieu's political theories into something that differed from the British parliamentary system. They created entirely separate executive, legislative, and judicial branches of government, making sure that no single branch would hold exclusive power, but each would check and balance the others. With power so divided, the independent branches must reach some common agreement for the federal government to act harmoniously.

Under the system of government the framers of the Constitution created, the President of the United States combines the monarch's role as head of state with the prime minister's role as head of government. The President serves as chief executive and commander in chief of the military. The President appoints the heads of the executive offices of the government and, with the officers he appoints, is responsible for administering the laws of the land. The President proposes legislation, and vetoes or approves bills that Congress enacts, but depends entirely on the legislature for all the funds necessary for operating the government. While the American Presidency has grown steadily more powerful, particularly in matters of diplomacy and military policy, the Constitution's division of powers has caused Presidents to contend with Congresses that have often disagreed with their policies and attempted to steer a different course.

As the only federal official elected by the entire population, Presidents feel they have a mandate from the people to lead in the manner they see fit and to establish the policies on which they campaigned. Presidents are elected separately from members of Congress. Their administrations do not fall if their party loses the legislative majority, unlike a prime minister whose party loses a working majority in Parliament. Often, American Presidents have had to cope with opposition party majorities in one or both houses of Congress. Democrats, for instance, lost their majorities in Congress two years into Bill Clinton's Presidency, in 1994, and for the next six years he faced Republican majorities in both the House and Senate. When Presidents are on the ballot, their "coattails" may help some fellow party members win election, which will encourage them to support the President's legislative agenda. The President's party leaders also do their best to ensure legislative victories.

Nonetheless, members of Congress feel that they are elected to represent the people of their states and districts. They often campaign on different issues than the President, even when they are members of the same party, and they often serve through several Presidential administrations. Members of Congress therefore resist being a "rubber stamp" for the President and act according to their own principles, and in the interests of their own constituents. Personal ambition plays a role as well, as some members of Congress may see themselves as candidates for the Presidency in future elections.

The different perspectives of the White House and the Capitol often create tensions between the branches. Presidents have the constitutional right to name cabinet officers, agency heads, diplomats, and federal judges, but these nominations must be confirmed by the U.S. Senate. Over the past two centuries, the Senate has confirmed all but a very small percentage of the executive branch nominations—on the assumption that Presidents deserve to work with people of their own choosing. But the statistics change dramatically for judicial nominations—on the grounds that the judiciary is an independent branch of the government, and that all federal judges hold lifetime appointments. Since the administration of George Washington, the Senate has blocked a third of all Supreme Court nominations. Senators also point out that the Constitution refers to Presi-

dents seeking the "advice and consent" of the Senate, and note that Presidents are much more likely to seek their consent than their advice. Senators therefore insist on scrutinizing all nominations and rejecting those they consider unfit.

Foreign policy has provided another major arena for struggle between the executive and legislative branches. Presidents conduct the foreign policy of the United States, but Congress appropriates the necessary funds and senators hold hearings in which they interrogate State Department officials about policy developments. The Senate also has the constitutional power to reject or approve by a two-thirds margin treaties that the President's administration has negotiated. In the late nineteenth century, the Senate rejected a number of significant treaties, causing Secretary of State John Hay to compare a treaty entering the Senate to a bull entering the ring. "One thing is certain," said Hay, "neither will leave alive."

The most tragic confrontation between a President and the Senate took place after the First World War, when President Woodrow Wilson went to Paris to negotiate the Treaty of Versailles that ended the war and created a League of Nations to preserve the peace. Republicans by then had won the majority in the Senate, but Wilson took no Republican senators with him on that mission. Suspicious of the Democratic President's treaty, and unwilling to see the United States enter the League, Republican senators sought to amend the treaty. But Wilson fought any changes and refused to authorize Democratic senators to reach a compromise with the Republicans. Wilson took his case directly to the American people, warning that without the League of Nations the world would face another war within a generation. On his national speaking tour, Wilson suffered a paralytic stroke and could offer no further leadership. The Senate then rejected the Treaty of Versailles and the United States never joined the League of Nations. A generation later, after the world had plunged into the Second World War, President Franklin D. Roosevelt learned from Wilson's mistakes and made sure that prominent senators of both parties were involved in negotiating the treaty that created the United Nations, which the Senate overwhelmingly approved.

Although the Constitution gives Congress the sole power to declare war, Congress has not passed a declaration of war since World War II. Subsequent military missions overseas were authorized by congressional resolutions, some in support of United Nations efforts. In 1964, following a confrontation between American and North Vietnamese naval vessels in the Gulf of Tonkin, President Lyndon B. Johnson asked Congress to enact a resolution authorizing him to use military force in response to North Vietnamese military action. The Senate and House passed the Gulf of Tonkin Resolution with only two dissenting votes. Members of Congress saw their vote as an act of solidarity with the President at a critical moment, but none anticipated that he would use it as the equivalent of a declaration of war. Yet that was exactly how Johnson used the resolution when he sent large numbers of American combat troops to fight in Vietnam. Congress later repealed the Gulf of Tonkin Resolution, but it had no effect on American military policy. Johnson's successor as President, Richard Nixon, insisted that the Gulf of Tonkin Resolution had not been necessary and that his powers as commander in chief were enough to continue the war effort.

As a result of the Vietnam War, Congress passed the War Powers Resolution in 1973, over President Nixon's veto. The resolution required Presidents to notify Congress within set time periods when they sent American troops into

combat, and it permitted Congress to vote to withdraw troops from combat. The War Powers Resolution has proved difficult to implement, however, and neither Presidents nor Congress invoked it when the United States became involved in the Persian Gulf War in 1991 or the Iraq War in 2002.

The Constitution requires the President to give Congress a periodic report on the state of the union. Presidents have used the State of the Union message as a vehicle for recommending legislation to be enacted, and have therefore become the chief legislator as well as the chief executive. Presidents George Washington and John Adams delivered their State of Union addresses in person. Thomas Jefferson thought this practice too closely resembled the pomp of the monarch's messages to the British Parliament. Jefferson chose to send his message to be read aloud by clerks in the Senate and House. Other Presidents followed Jefferson's lead until 1913, when Woodrow Wilson revived the practice of delivering the message in person.

Throughout each session of Congress, Presidents meet regularly with the legislative leaders of the major parties, and will often contact individual legislators to win their support on key measures. The modern White House also maintains a congressional liaison staff that shepherds nominees through the Senate confirmation process and works with the leadership of the President's party to develop legislative strategies.

Presidents have complained that Congress attempts to "micromanage" the executive branch by specifically instructing agencies how to administer the laws. Congress has objected when Presidents have withheld documents it sought (a practice known as executive privilege), and when agencies have administered the laws in a different manner than the legislation specified. Congressional committees therefore hold oversight hearings, calling cabinet secretaries and other officials to explain and justify their departments' actions. When John F. Kennedy served in the House and the Senate, he believed that the real power in the American political system resided in the Oval Office. It was only after he was elected President and faced a skeptical Congress that he realized how much power resided on Capitol Hill. While an individual member has limited authority, the Congress as a whole can be a formidable opponent to any President's plans.

Yet, the Congress itself is divided into two very different bodies, the Senate and House of Representatives. Although the Senate has the exclusive power to confirm nominations and approve treaties, the two bodies participate equally in all legislation and appropriations. The Constitution permits each house to set its own rules, and as a result they have grown distinctly different. The larger House, where membership reflects the population of each state, has set rules that permit the majority to prevail, so long as it stays united. Members of the House operate under rules that limit how long they can speak and reduce their opportunities to block legislation from coming to a vote. The House operates under a hierarchy headed by the Speaker, who is elected by the majority party, and a Rules Committee, most of whose members are chosen by the Speaker. When the House leadership is ready to hold a debate and vote on a bill, the House Rules Committee determines how long the debate will last and how many amendments will be considered. Members of the House gain influence through their seniority, which requires them to win reelection and move up through their party's ranks until they chair a subcommittee or full committee.

By contrast to the majority-run House, the smaller Senate has set rules that

"So long as I have a mind to think, a tongue to speak, and a heart to love my country, I shall deny that the Constitution confers any arbitrary power on any President, or empowers any President to convert George Washington's America into Caesar's Rome."

— North Carolina Senator Sam Ervin, addressing students at the University of North Carolina at Chapel Hill in 1973

A CALL FOR AN EXPANDED GOVERNMENT

In his first Inaugural Address, delivered at the depth of the Great Depression, on March 4, 1933, Franklin D. Roosevelt spoke for those who believe that the U.S. Constitution is an elastic document, designed to grow with the times and to confer extraordinary authority in times of crisis. This is what he said:

If I read the temper of our people correctly, we now realize as we have never realized before our interdependence on each other; that we cannot merely take but we must give as well; that if we are to go forward, we must move as a trained and loyal army willing to sacrifice for the good of a common discipline, because without such discipline no progress is made, no leadership becomes effective.We are, I know, ready and willing to submit our lives and property to such discipline, because it makes possible a leadership which aims at a larger good. This I propose to offer, pledging that the larger purposes will bind upon us all as a sacred obligation with a unity of duty hitherto evoked only in time of armed strife. . . .

Action in this image and to this end is feasible under the form of government which we have inherited from our ancestors. Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. That is why our constitutional system has proved itself the most superbly enduring political mechanism the modern world has produced. It has met every stress of vast expansion of territory, or foreign wars, or bitter internal strife, or world relations. It is to be hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

give greater voice to the minority. In the Senate, all states are equally represented, meaning that California, with 34 million residents (and fifty-three representatives in the House) has two senators, as does Wyoming, with a half million residents (and one representative). The majority of all the senators therefore represent a minority of the population. For certain actions, the Constitution requires the approval of a "supermajority" of senators, such as the two-thirds vote needed to overturn a Presidential veto, to approve a treaty, or to convict a federal official who has been impeached by the House.

Senate rules add another supermajority requirement: it takes a vote of three-fifths of the Senate (currently sixty out of one hundred) to invoke cloture, closing a debate and calling for a vote. Unlike the House, which sets limits on the length of all speeches, senators can engage in "unlimited debate." They can speak for as long as they feel necessary and can use the rules of the Senate to prevent a vote from occurring. This practice is called a filibuster, a name that comes from the Dutch word for "pirate," for those who seize the Senate floor and hold it against all others to prevent a vote from being taken. Only if sixty senators agree can the majority leadership cut off debate and force a vote. Bills that sail through the House with little amendment, therefore, can be subject to delay and revision in the Senate.

Not until 1917 did the Senate establish the cloture rule to cut off filibusters. When the rule was first established, it took a two-thirds vote to establish cloture, which proved almost impossible to achieve. Over the next forty-six years, the Senate was able to invoke cloture only five times. The most significant cloture vote occurred on June 10, 1964. After fifty-five days of debate, supporters of the Civil Rights Act of 1964, which banned racial discrimination in all public facilities, mustered the necessary two-thirds of the Senate to cut off debate. Nine days later the Senate overwhelmingly approved the bill. Because the filibuster had so often been used to protect segregation, senators who favored civil rights had generally refrained from using the filibuster as a tactic. After segregation was illegal, however, the filibuster became a more universally employed tactic.

In 1975, liberal Democrats led a movement to make cloture easier to establish, reducing the needed number of senators from two-thirds to three-fifths. Despite that change, the filibuster has continued to distinguish the Senate from the House, the rules of which prohibit such tactics.

Committees in both the House and Senate hold hearings on prospective legislation, collecting information and listening to testimony, before they vote on a bill that will be reported to the full House or Senate for debate, amendment, and passage. Both the Senate and House must pass legislation in exactly the same form in order for it to be sent to the President for approval before it becomes law. Frequently, the two houses will pass different versions of the same piece of legislation. To resolve their differences they appoint members of each house to serve on a conference committee. Once the conference committee reaches agreement, it reports back to the Senate and House, which must accept or reject the conference report, but cannot amend it any further. The practical result of this complicated process is that legislation almost never passes in its original form, but is revised constantly until a sufficiently broad consensus can be reached. This helps to make sure that legislation benefits and appeals to large portions of the country rather than favoring one region or interest over the others.

To become law, the bill must still go to the White House. The President can approve and sign the bill or can veto—reject—the bill. It takes a two-thirds vote of both the House and Senate to overturn a Presidential veto. If Congress adjourns within ten days after sending a bill to the President, the President can decide not to act on it, neither signing nor formally vetoing it. This is called a pocket veto, which kills the bill, as Congress is out of session and cannot vote to overturn the veto. Presidents will often use the threat of a veto to convince Congress to pass a bill more to their liking. Presidents whose own party controls the majority in Congress will veto bills far less frequently than Presidents who face opposition majorities. Gerald Ford, who had spent decades in Congress as the Republican leader of the House, issued many vetoes during his Presidency to establish more legislative control over a Congress with large Democratic majorities.

In times of national emergency, the President can call the Congress into special session. This was a critical feature during the nineteenth century, when Congress met for just a few months each year, but it became unnecessary in the twentieth century, when Congress began meeting year round. During wartime and periods of economic crisis, Congress has tended to give the President much more room to act, passing legislation quickly and with less second guessing. This was especially true during the First and Second World Wars and during the First Hundred Days of Franklin D. Roosevelt's New Deal in 1933. The nation had been plunged into a deep depression that had caused many banks to fail, businesses to close, and workers to lose their jobs, a crisis so severe that members of both parties felt the urgency to approve the President's legislative proposals to restore economic order. During that period, members of Congress found themselves voting for bills on which they had held no hearings and sometimes had no chance to read in advance.

Once the struggles between Congress and the President have ended and the bill becomes law, it is still subject to judicial review. Even the legislative initiatives of Roosevelt's New Deal, which had overwhelming public and Congressional support, were reviewed by the Supreme Court, which struck down many of its major programs as unconstitutional. In one of the most significant

A CALL FOR A LIMITED GOVERNMENT

In contrast to those who view the Constitution as expansive, there are others who see the role of the federal government as far more confined and insist that all powers not expressed in the Constitution belong to the states. Tom A. Coburn, a medical doctor who was elected first to the House of Representatives and then to the U.S. Senate from Oklahoma, campaigned on arguments that he expressed in his 2003 book Breach of Trust: How Washington Turns Outsiders into Insiders:

In 1791, the framers clarified the Constitution's intent to limit the role of the federal government with the Tenth Amendment, which reads, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' In other words, Congress's role is limited to providing for the common defense, regulating interstate commerce, providing for the general welfare, and levying taxes. All other powers are reserved for the states. . . .Still, most members of Congress are either ignorant of or indifferent to Congress's constitutional guidelines and the warnings in history that should caution us against consolidating too much power in a large central government. The courts themselves have overreached and undermined the founders' design for limited government. I always found it ironic when my Republican colleagues would deliver passionate speeches criticizing the judicial branch for not respecting the Constitution when they were gladly joining their colleagues in the legislative branch in violating the very same document. The next time a member of Congress criticizes the Supreme Court for not respecting the Constitution they should be prepared to offer legislation rescinding about half of the federal budget that is used for purposes never envisioned by our founders.

of the New Deal cases, the Supreme Court rejected the National Recovery Administration, which set production levels and wages for various industries, on the grounds that Congress had improperly delegated its own constitutional powers over commerce to an executive branch agency. Many other Presidents were frustrated by court rulings that ran contrary to objectives. This is why Presidents take such care in making judicial appointments, and why the Senate so often resists Presidential choices.

Other than creating the Supreme Court, the Constitution said less about the judiciary than any other branch of the government. The Constitution left it to Congress to set the number of justices on the Supreme Court and to create the lower federal courts. Congress did this with the Judiciary Act of 1789. Over the next two centuries the federal judiciary has grown larger, more influential, and more controversial. The U.S. Constitution stands as the "supreme law of the land," as it identifies itself in Article VI, which puts federal law above state law, and federal court decisions over state court decisions, when they are in conflict. (Although federal law is supreme, state constitutions and courts are free to recognize rights beyond those included in the federal Constitution.)

Some federal judges have taken a more active approach to the law than others, striking down federal and state laws as unconstitutional. This puts the burden back on the state and federal legislatures to end programs or to pass new laws that will gain the courts' approval. Some judges believe in interpreting the Constitution broadly to meet new developments in society, and therefore refer to a "living Constitution." Others insist that they cannot go beyond the "original intent" of the founders in applying the Constitution to current situations. Both approaches weigh the accumulated court rulings and precedents and attempt to maintain some consistency in how the laws are interpreted. Sometimes the courts will dramatically reverse earlier rulings, declaring them to have been in error. This was especially notable in 1954 when the Supreme Court unanimously declared school segregation unconstitu

tional, sixty years after a previous court had upheld racial segregation. Most cases dealing with federal laws are heard in the lower federal courts and only a few cases reach the

U.S. Supreme Court each term. Once a case reaches the Supreme Court through the appeals process, the Court can review, uphold, or overturn the decisions of other federal judges. The lower federal courts then must tailor their rulings to meet the standards set by the Supreme Court's decisions.

In addition to the three branches, the federal government has also created a number of independent regulatory commissions that straddle the division of powers, performing quasi-administrative, legislative, and judicial functions. Beginning with the Interstate Commerce Commission in 1887 and continuing with the Federal Trade Commission in 1914, Securities and Exchange Commission in 1934, and later agencies, these commissions combine executive, legislative, and judicial functions in an effort to resolve complex economic issues outside of the political arena. Congress created these agencies under the commerce clause, which grants Congress the right to oversee interstate commerce, a justification that the federal courts have accepted as constitutional. The commissions are not entirely "independent," however, as their members are appointed by the President, confirmed by the Senate, and subject to scrutiny by the courts.

This complex system of independence and interdependence among the branches of government also includes a system to punish those who act improp-

erly and violate their offices. Each house of Congress is authorized to discipline its own members, whether censuring (or condemning) them by a majority vote or expelling them by a two-thirds vote. The Constitution also authorizes the House of Representatives to impeach, a form of indictment, any judge or executive officer for "high crimes and misdemeanors." A majority vote is required for the House to impeach. In order for an impeached officer or judge to be convicted, the Senate must hold a trial and cast a two-thirds vote. If this happens, the person is removed from office. The Vice President presides over such trials, except when a President has been impeached, in which case the chief justice of the United States presides.

Impeachment is a rare occurrence. Most executive branch officials accused of crimes either resign or are fired before impeachment proceedings can begin, but federal judges serve lifetime appointments and cannot be fired. In the 1990s, three federal judges were impeached and removed from the bench for crimes ranging from tax evasion to bribery. There have been three impeachment efforts against Presidents. In 1868 and 1998, the House impeached Presidents Andrew Johnson and Bill Clinton. Both were acquitted in the Senate. In 1974, President Richard Nixon resigned in the face of an impeachment that would likely have led to conviction in the Senate.

Impeachment stands as a reminder that no federal official, even the President, is above the law and all can be brought to justice. The American constitutional system is often cumbersome and slow. It has frustrated Presidents and legislators alike. Yet, while the federal government has grown much larger, the basic powers and responsibilities of its three branches have changed very little since the Constitution was first implemented in 1789. In times of crisis, the branches of government pull together to meet a common threat. In ordinary times, they pull back to check and balance each other. No single branch has been able to amass total power and the government remains the agent of the people who elect it.

"It should be remembered, as an axiom of eternal truth in politics,that whatever power in any government is independent, is absolute also."

—Thomas Jefferson,
letter to Spencer Roane,
September 6, 1819