

Who Has Power to Do What in our Constitutional Government?

We're bombarded these days with questions about which parts of the government have power to do things like set tariffs, spend money, or activate the National Guard. The Constitution's distribution of powers and responsibilities among the States and the three branches of the federal government is what we call *separation of powers*, which the founders recognized as essential to a free society:¹

The accumulation of all powers, legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny.

A. What powers are reserved to the States?

Though "We the People of the United States" did "ordain and establish this Constitution for the United States of America",² the Constitution was in fact ratified not by individual voters, but by 13 individual sovereign States deeply wary of centralized federal government. At that time, the States took precautions to guard their own sovereignty and influence. For example, though members of the House of Representatives would be chosen by popular vote, senators would instead be chosen by each State's legislature. And the president - even today - is not elected by popular vote, but by the electoral college, members of which the various States appoint.

While the States - through the Constitution - granted to the three branches of the newly formed federal government specifically identified powers, all other powers the States reserved for themselves or their citizens. This is made perfectly clear in the Tenth Amendment, which provides:

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.

Important powers that the States retain include, among others, the power to regulate and conduct elections (including elections for federal offices); to license and regulate lawyers; to train and appoint officers of state militias (now called the National Guard); and to provide for the public health and safety. This last is sometimes called the "general police power". The United States Supreme Court has defined this broad power to include "[p]ublic safety, public health, morality, peace and quiet, law and order"; and observed that "[a]n attempt to define [police power's] reach or trace its outer limits is fruitless."³

Most of the laws and rules we ordinary citizens are familiar with are part of the general police power -- for example, traffic laws; most criminal law; regulation of zoning and land use, business operations and professional occupations; and the keeping of public order. Your State Police exercise general police power, as do municipal police and fire departments. In a vast country like ours, state and local laws are enforced best by locals who understand their own communities - not by strangers from the next state over, or from Washington, DC.

In short, though it might seem like the Federal government is all-powerful, it is not. Our States retain authority over most aspects of government which ordinary citizens experience.

¹ James Madison, Federalist No. 47.

² Preamble to the US Constitution.

³ *Berman v. Parker*, 348 US 26 at 32 (1954).

B. *How does the Constitution distribute powers among the three branches of the federal government?*

The three federal government branches (the Congress, the President and the Judiciary) have only those powers specifically set forth in the Constitution - all other powers being reserved to the States or the People.

i. *Congress*

The power to make federal laws, or to legislate, belongs exclusively to Congress. [Art. I, §1] The Constitution grants Congress other specific powers. [Art. I, §8] Among them are the powers to:

- Impose and collect taxes
- Pay the debts and provide for the "common defense and general welfare of the United States"
- Borrow money
- Regulate international commerce
- Make uniform rules for naturalization of persons
- Declare war
- Raise, fund and regulate the US Military
- Provide for State militias (now called the National Guard), and provide for calling them up to execute "the laws of the Union, suppress insurrections and repel invasions"

ii. *The President*

Compared to the powers of Congress, the listed constitutional powers of the President are few. [Art. II] The President is the Commander in Chief of the US Military (and of State Militia when those are "called into the actual service of the United States"). Other Presidential powers include powers to:

- Grant reprieves and pardons - but only for federal offenses
- Make treaties - but only with Senate approval
- Appoint ambassadors, Supreme Court justices and other "Officers of the United States" - but only with Senate approval

Beyond the President's constitutional powers are those powers that Congress grants to the President through legislation.

But the President has specific duties. Like other members of government, the President takes an oath to "preserve, protect and defend the Constitution of the United States." [Art. II, §1] And the President "shall take care that the laws be faithfully executed." [Art. II, §3]

iii. *The Courts*

Article III of the Constitution places the judicial power with the Supreme Court, along with "such other courts as Congress" may establish. Today, the Article III courts include, in addition to the Supreme Court, the 13 Federal Courts of Appeal and the many Federal District Courts. Among the kinds of cases that Article III courts decide are those involving the Constitution and federal laws. Thus, under the Constitution, Article III judges are the interpreters of both the Constitution and federal laws.

C. Checks & Balances

Under the Constitution, not only are powers distributed among separate branches of government, but the powers of each branch are checked and balanced by the powers of the other branches. These checks & balances were key for the founders, who were wary of any branch having too much unchecked power. As Thomas Jefferson put it:

[T]he powers of government should be so divided and balanced among several powers of the magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others.⁴

We have already seen how the States' power is balanced against the power of the federal government through the States' influence in choosing Congress and the President. In turn, the States' power is restrained by constitutional prohibitions against the States themselves doing things in the federal domain; *e.g.*, the States are not allowed to make treaties or print money. [Art. I, §10]

As to checks & balances among the federal branches, the Declaration of Independence shows the founders were particularly wary of unchecked executive power. The Declaration lists 27 grievances against the King of England. Taken together, these show that the King had been behaving as law unto himself: The colonies had no *rule of law* - but only the *rule of one man*.

- Though the most famous grievance in the Declaration concerns taxation without representation, it is only one of 27. Far more numerous are those noting the *absence of the rule of law*, 10 of which address the King's actions to impair or prevent lawmaking in the colonies. In essence, the King forbade or disbanded colonial legislatures and disregarded legitimately made laws.
- Two grievances concern the courts: The King had "obstructed the administration of justice" by refusing laws for "establishing judiciary powers"; and had "made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."
- Four grievances concern the King's illegitimate use of armed forces within the colonies: "He has affected to render the military *independent of and superior to the civil power*." Besides that, the King had installed standing armies and quartered troops; and had protected troops from punishment for crimes they had committed against the civilian population.

To address this concern born of experience, the Constitution gives Congress plenty of checks on the President's powers. For example:

- Though the President has the duty to see that the laws are enforced, only Congress has the power of the purse: under the Constitution, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." [Art. I, §9] This ensures that when the executive branch spends money, it remains accountable to the will of the people.
- While the President has the power to appoint ambassadors, Supreme Court justices and other officials, key appointments require the Senate's consent.
- Though the President is the Commander in Chief of the United States armed forces, it is Congress who has the power to raise, support and regulate those forces - as well as the forces of the States' National Guard. And it is Congress - not the President - who can declare war.
- Congress has the power to impeach the President. [Art. I, §§2 and 3]

⁴ Thomas Jefferson, *Notes on the State of Virginia*, Query XIII at ¶4 (1782); <https://docsouth.unc.edu/southlit/jefferson/jefferson.html#p115>.

But the President has a check on the powers of Congress, too: The President can veto legislation - in which case, the legislation will not be effective unless 2/3 of both houses of Congress over-ride the veto. [Art. I, §7]

Finally, members of the Judiciary are appointed by the President with the consent of the Senate; and federal courts other than the Supreme Court are established by Congress. The Judiciary, in turn, serves as a check on both Congress and the President when it interprets the Constitution and federal laws. Judicial interpretation prevents both Congress and the President from overstepping their authority and thus holds our elected officials to the rightful limits of their powers. As Alexander Hamilton discussed limitations on constitutional power in Federalist No. 78:

[These limits] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

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