



We the People

THE CITIZEN AND THE CONSTITUTION

Directed by the Center for Civic Education

Strengthening Democracy in America

Issue Brief

Topic 1—Balance of Power

No free government, or the blessing of liberty, can be preserved to any people but by a ... frequent recurrence to fundamental principles. —George Mason, Virginia Declaration of Rights, 1776

- 1. Strengthening Democracy in America video excerpts**—View three noted scholars and a highly respected former member of Congress present their perceptions of the intent of the Framers regarding the balance of power among the three branches of the national government and the evolution of that relationship to the present day. Begin with Video 1, Section 7, *Balance of Powers*, an interview with Jack Barlow. Then watch Video 2, Section 1, *Governmental Institutions—Decline in the Strength of Congress* with William Galston and Video 4, Section 6, *Shift in Balance of Power from Congress to the President* with Norman Ornstein. For additional perspectives, see Section 5a, below.
- 2. Background**—The Founders of the United States and the small group of them who became Framers of the Constitution intended Congress to be the *dominant branch* of the national government. Congress, the branch of government most accessible to the people, was intended to be the voice of the people. This was especially true of the House of Representatives, which was elected directly by the people. Evidence of the Founders’ intent is plentiful in their writings, documentation of their debates, and in the fact that the first and most-detailed part of the Constitution, Article I, is devoted to Congress. Article II establishes the executive branch and Article III establishes the judicial branch; both articles are much shorter than Article I.

The placement and design of the three branches of government in the nation’s capital, Washington, D.C., provides physical evidence of the Founders’ intent that Congress dominate the national government. The Capitol, which includes the House of Representatives and the Senate, is a large building placed on a hill overlooking a long mall that reaches to the Potomac River. In the entrance to the House of Representatives, Alexander Hamilton’s words are eloquently displayed: “Here, sir, the people govern.” The White House was a relatively small building compared with European capitals and more than a mile away from Congress. The

Supreme Court did not have a permanent home until 1935, almost one hundred and fifty years after the establishment of the government in 1789.

One of the main reasons the Founders created a dominant Congress was that they were afraid that a strong executive would be able to increase its powers, violate the limits placed upon those powers, and transform a republic into a despotic tyranny. This fear was based not only upon their extensive knowledge of the history of political systems, but also on their firsthand experience with what they considered to be the tyrannical rule of the British king and Parliament.

The Founders also feared direct democracy with majority rule. This fear was based largely on their concern that, as Aristotle believed, the majority—who had a little or modest amount of property—would unfairly deprive the few, who were rich, of their property. So, they developed a Congress with a House of Representatives elected directly by white men in the thirteen states who had at least a modest amount of property. Sometimes called “the people’s” house, it was and is today the most democratic and accessible institution of the national government.

To protect those with the most property from the possibility of unfair treatment by a majority in the House of Representatives, the Framers, among other measures, created a Senate with members not directly elected by those eligible to vote for members of the House, but selected by state legislatures, which were typically dominated by people with more property and political influence than the average citizen. It was not until 1913 that the Seventeenth Amendment was passed. It called for the direct election of senators by the people who were eligible to vote at that time.

From the founding of our nation until about the 1930s, Congress dominated the national government. The exceptions were typically during wars or other national emergencies, when it was dominated by particularly strong presidents. For example, President Abraham Lincoln was dominant during the Civil War, President Woodrow Wilson during World War I, and President Franklin D. Roosevelt during the Great Depression and World War II.

Shift of the balance of the power from Congress to the presidency—Many scholars agree that the balance of power shifted from Congress to the presidency during the Roosevelt Administration and has remained there to this day. Although circumstances, such as wars and other national emergencies, often justify presidents assuming more powers than the Framers of the Constitution anticipated, it has been common for the presidency to keep these increased powers even when national emergencies are over. During the 1960s and 1970s, this prompted some scholars to claim that the country was endangered by an “imperial” presidency holding too much power in relation to the other branches of government.

The shift in power from Congress to the presidency was also facilitated by the failure of Congress to assert its authority through (1) taking the lead in the creation of legislation in domestic and foreign policy, (2) passing legislation to limit the power of the presidency, and (3) overseeing the actions of the president and executive agencies. The unwillingness of Congress to assert its authority in regard to war powers, for instance, has led to presidents having almost unlimited power in this area of critical importance to the nation and its people.

Current problems in Congress, such as polarization between the two parties, have led to the breakdown of the use of “regular order” in the deliberation and drafting of proposed legislation.

Some scholars argue that this has been accompanied by a failure to negotiate and compromise in decision-making and the passing of vague laws to facilitate acceptance by those who might object to specifics. Vague laws have led to the transfer of legislative power from Congress to the presidency, which has considerable latitude in interpreting them. It has also resulted in a transfer of power from Congress to the Supreme Court, which can interpret such laws at its discretion.

Since at least the times of Plato and Aristotle, students of government have warned of the tendency of democracies to evolve into the type of executive tyranny feared by the Founders. This tendency has been confirmed a number of times throughout history when presidential democracies, such as ours, have given way to military dictatorships. To counter this tendency, it is necessary to focus upon, among other factors, the danger in a democracy of the demise of the power of its representative institutions that enables the rise in the power of its executive and judicial institutions.

The United States has evolved from a republic in which only white men with property had the right to elect people to Congress to respond to their needs and interests. It is now a representative democracy in which almost everyone eighteen years of age and older has the right to elect members of Congress and other government officials and to run for public office. At the national level, Congress, and particularly the House of Representatives, is the most democratic and accessible branch of the government and the best way for citizens to exercise their right to self-determination; that is, their right to a voice in the making of decisions that might affect their lives, liberty, and pursuit of happiness. When the power of Congress is diminished and assumed by the presidency and the Supreme Court, which are less democratic elements of the national government, not only is representative democracy diminished, but democracy itself is endangered. Principles of self-government, political equality, and majority rule can be violated and the legitimacy of the system can be eroded. Instead of a nation of, by, and for the people, there is the danger of it becoming one of, by, and for the few.

3. Issue—Should the current balance of power among the three branches of the national government be maintained, or should power be shifted to Congress from the presidency and the Supreme Court?

- **Rationale for the balance of power being held by the president**—The argument for a single, strong, “energetic executive” to lead the nation, especially when there are pressing matters of national concern, was set forth by Alexander Hamilton in Federalist 70. The shift of power to the presidency has typically been justified by claims that it is necessary during national emergencies, such as 9/11 and the war on terror, to have strong, decisive figures to deal efficiently and effectively with urgent issues that might affect national security and the welfare and survival of the nation. The claim is also made that globalization and the need to be able to deal efficiently with the international economy require the powers to deal with such matters and their domestic counterparts to lie primarily with the presidency.
- **Rationale for the balance of power being held by Congress**—The argument of the Framers for the balance of power residing in Congress was due primarily to a fear of the emergence of a charismatic, tyrannical executive that had occurred in republics and

emerging democracies throughout history to the present day. Some claim that this concern alone should justify the dominance of Congress over the presidency.

The argument is also given strength by Thomas Jefferson's claim that the only "safe depository of the ultimate powers of the society" is "the people themselves." It follows that arguments for the primacy of Congress also reflect Jefferson's belief in popular sovereignty; that is, a belief in control of government by the people through their representatives, who are more accessible and responsive to them than an executive or the judicial system.

4. Alternative policies

Maintaining the status quo—Some claim that the current predominance of the presidency over Congress is necessary to deal with the pressing concerns resulting from 9/11 and the war on terror. Others cite the important and pressing economic issues resulting from globalization and the need to deal efficiently with the interests of the United States in the world economy. Those who support maintaining the status quo typically claim that the probability of the emergence of a tyrannical executive and a shift toward authoritarianism is made almost impossible by such factors as the strength of current governmental institutions, the vitality of a free press, the strength of civil society, and the dominant American political culture with its commitment to the rights of individuals.

Reversing the balance of power—Others claim that there is abundant evidence that power has shifted from Congress to the executive and judicial branches since the time of the founding of the national government. Some argue that this shift is dangerous to the continuation of a free and democratic society and there is an urgent need to rectify things. The following are some of the ways people have suggested to restore a more productive balance of power among the three branches of the national government.

The Constitution might be changed to increase the power of Congress in relation to the executive. This might include reducing the veto override vote to a majority instead of a supermajority, eliminating mid-term elections, and changing terms of members of the House from two years to four years. However, given the difficulty of the amendment process, among other considerations, it is not practical to pursue these methods. This leads to focus upon remedies that are possible within the current constitutional structure that either call for Congress to merely do a better job of fulfilling its current responsibilities or instituting changes in the scope of its authority or in its processes and procedures. Remedies that have been suggested for Congress include the following:

- Adhering to regular order in the legislative process
- Avoiding the drafting of vague laws that shift legislative power to the presidency and the judiciary
- Curbing the almost unfettered uses of military force by the president by passing legislation requiring the use of such force in emergencies to be approved by a small body of elected officials from Congress and the executive branch
- Asserting its "power of the purse" authority to influence priorities in the federal budget

- Taking a more active and forceful role in the formulation of the federal budget rather than reacting passively to the president’s budget submission to Congress
- Conducting more robust oversight of the implementation by the executive and its agencies of domestic and foreign policy
- Initiating more “legislative oversight” to ensure that recently approved laws are effective and serving the people as they were intended
- Strengthening majority rule in the Senate by eliminating or limiting the use of the filibuster
- Strengthening majority rule in the House by eliminating the use of the Hastert Rule and requiring bills supported by a majority of members of the House to be given a floor vote. This would not require amending the Constitution.
- Taking the lead on solving the nation’s long-range problems, such as transportation, infrastructure, and energy independence, through increased public hearings and debate
- Making all “important” federal regulations subject to congressional review and approval
- Give all funds collected by executive agencies, such as fines and fees, to the Department of the Treasury so that Congress can use its power of the purse to decide how they should be spent rather than leaving that decision up to executive agencies

5. **Online resources**—The following is a short list of some online resources that might be useful in gaining more understanding of the topics covered in this issue brief. Reviewers are encouraged to find more resources and to forward any they find useful to the Center at quigley@civiced.org. Please also send any suggestions for improving this issue brief to the same email address.

a. **Strengthening Democracy in America video series.** View highly informed perceptions of the intent of the Framers regarding the balance of power among the three branches of the national government and the evolution of that relationship to the present day. Start with Video 1, Section 7, Video 2, Section 1, and Video 4, Section 6, then watch these videos for additional information:

- Video 2, Section 2, with William Galston, Senior Fellow, Brookings Institution
- Video 3, Section 8, with The Honorable Lee Hamilton
- Video 4, Sections 1, 2, 3, 8, 10, 12, and 13, with Norman Ornstein, Resident Scholar, American Enterprise Institute

b. **Other online resources**

- Congressional Research Service, “Separation of Powers: An Overview”: <https://fas.org/sgp/crs/misc/R44334.pdf>
- Rachel del Guidice, “3 Bills Sen. Mike Lee Thinks Could Shift Power ‘Back to the People’”: <http://dailysignal.com/2017/05/17/3-bills-sen-mike-lee-thinks-shift-power-back-people/>
- Indiana University Center on Representative Government, “Congress Keeps Ceding Power to the President”: <https://www.congress.indiana.edu/congress-keeps-ceding-power-the-president>

- Carl Hulse, “Executive Branch Overreach? Lawmakers Blame Themselves”:
<https://www.nytimes.com/2016/02/09/us/politics/executive-branch-overreach-lawmakers-blame-themselves.html>
- DecodeDC, “Congress Is Ceding Power to Supreme Court”:
<http://www.decodedc.com/congress-is-ceding-power-to-supreme-court/>
- Max Bloom, “The President Shouldn’t Set Congress’s Legislative Agenda”:
<http://www.nationalreview.com/article/448923/separation-powers-executive-overreach-president-shouldnt-set-legislative-agenda>
- Greg Richter, “Witnesses Warn House Panel: US Is in a 'Constitutional Crisis'”:
<https://www.newsmax.com/Newsfront/Judiciary-Congress-ceding-power/2014/02/26/id/555012/>
- Pippa Norris, “Presidential and Parliamentary Executives,” from *Driving Democracy*:
https://sites.hks.harvard.edu/fs/pnorris/Acrobat/Driving_Democracy/Chapter_6.pdf
- Jim Tankersley and Alan Rappeport, “G.O.P. Rushed to Pass Tax Overhaul: Now It May Need to Be Altered”:
<https://www.nytimes.com/2018/03/11/us/politics/tax-cut-law-problems.html>