

**Niklas Manhart**

# The Principles Of The Separation Of Powers And Checks And Balances As Reflected In The United States Constitution

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**Bibliographic information published by the German National Library:**

The German National Library lists this publication in the National Bibliography; detailed bibliographic data are available on the Internet at <http://dnb.dnb.de> .

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**Imprint:**

Copyright © 2008 GRIN Verlag  
ISBN: 9783656127758

**This book at GRIN:**

<https://www.grin.com/document/189005>

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***The principles of the separation of powers and checks and balances as reflected in the United States Constitution***

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**1. Introduction: Paulson's quarrel with Congress**

The current global financial crisis has seen different governments taking similar steps in order to restore trust and confidence in the shaken financial system: vast, multi-billion bail-out plans. However, the celerity of the legislative implementation of these countermeasures differs greatly from country to country. A comparison of how these parliamentary acts passed the legislation in Germany and the United States provides an interesting insight into the functioning of the respective systems of government.

On the 13<sup>th</sup> of October, Chancellor Angela Merkel announced a rescue package worth 500-billion Euros for German banks (DW-World, 13.10.2008). Only four days later, on the 17<sup>th</sup> of October, both houses of the German parliament voted in favour of the plan (Reuters, 17.10.2008). The reason for this expeditious achievement lies in Germany's parliamentary system of government: The cabinet and the governing majority in the German Bundestag constitute a densely interwoven unit which is very unlikely to offer governmental initiatives intraparty resistance.

Meanwhile, US Secretary of Treasury Henry M. Paulson had to face a great deal of congressional resistance in order to pass a \$700 billion bail-out called “Emergency Economic Stabilization Act of 2008”. Congressional criticism centred primarily on a provision that “left the bail-out completely in his [Paulson’s] hands, without the possibility of review by Congress, the courts or any other agency” (NY Times, 18.10.2008). After his first proposal on the 19<sup>th</sup> of September, multiple revisions of the original plan were necessary until the bill passed Congress on the 3<sup>rd</sup> of October. American newspapers accompanied those two weeks with a language that reminds of economic or diplomatic talks rather than political negotiations: For the purpose of gaining parliamentary approval, the Bush administration was forced to “*sell* the bailout plan to dubious lawmakers” (NY Times, 22.09.2008, italics added) and “face rough questioning” (ibid.) by both Democrats and Republicans.

This episode is indicative of the level of persuasion that goes into lawmaking in the US. The troubled legislative process is rooted in its presidential system of government, which, unlike Germany’s parliamentarism, is characterised by separation of powers with an elaborate system of checks and balances among the three constitutional branches: Congress (House of Representatives and Senate), presidency and the courts (the Supreme Court in particular). In the following I want to trace back this “vehicle for guaranteeing limits on government power” (Kassop, 2006: 73) to the historical intention of its framers, assess the current distribution of powers and discuss problematic developments.

## **2. Checks and balances in the Constitution of the United States**

### **2.1 Historical intentions of the framers**

After the successful upheaval against British rule, 13 former colonies ratified the Articles of Confederation in 1781, thereby creating a loose confederation of sovereign states. But soon the demand for a new constitution arose. As the Articles of Confederation left too much power to the states (Lowi, Ginsberg and Shepsle, 2006: 78), economic progress was impeded

by local restrictions and boundaries. So power had to be taken away from the former colonies in order to establish a strong national government. By signing the Constitution in 1787, fifty-five representatives agreed on giving away some of the powers they had enjoyed under the Articles of Confederation on the condition that the government accept certain limitations on its powers: federalism, individual rights and separation of powers (Lowi, Ginsberg and Shepsle, 2006: 79).

By distributing power among the constitutional branches, the framers of the Constitution drew on the writings of Charles de Montesquieu. James Madison (*Federalist* No. 47, 1788) quoted the French political thinker in the *Federalist Papers*, stating that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," and "the power of judging be not separated from the legislative and executive powers". While the idea of separating power was not new, the framers gave it a unique twist by dismissing a simplistic separation of power in favour of an intricate system of mutual checks and balances, or in Madison's words (*Federalist* No. 48, 1788):

Unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

So the framers of the Constitution feared that leaving political authority unobstructed would invite intense competition, inducing the winners to tyrannize and the losers to resort to violent opposition (Kassop, 2006: 82). Instead, they envisioned a system of "separate institutions sharing powers", as Neustadt's (in Dickinson, 2006: 456) notorious description puts it, especially in regard of financing executive initiatives: Joint action is required to authorise programmes, to appropriate money and to levy taxes to provide the funds (Maltese and Pika, 2006: 183). Kassop (2006: 83) singles out two main intentions for this constitutional arrangement: Encouraging diversity in the political actors by requiring that they be selected at different times, from different constituencies, by different modes of selection and allocating different aspects of policy to different institutional arenas.



Although this separation proved successful in apportioning power, a new problem arose: As Dickinson (2006: 463) states, the presidential system did not “provide the presidency with a strong enough electoral base to resist congressional encroachment”. The framers’ emphasis on limited government prevented the president and Congress from addressing national problems during the nation’s early years. In turn, citizens failed to develop a strong attachment to a government that “seemed largely ineffectual” (ibid.). This marked the beginning for two contentious developments, the increasing importance of partisanship and the shift to presidential supremacy.

## 2.2 The checks and balances in detail

### 2.2.1 Overview

	Legislative branch can be checked by	Executive branch can be checked by	Judicial branch can be checked by
<b>Legislative branch can check</b>	-	<ul style="list-style-type: none"> <li>• Can overrule veto (two-thirds vote)</li> <li>• Controls appropriations</li> <li>• Controls by statute</li> <li>• Impeachment of president</li> <li>• Senate approval of appointments and treaties</li> <li>• Committee oversight</li> </ul>	<ul style="list-style-type: none"> <li>• Controls appropriations</li> <li>• Can create inferior courts</li> <li>• Can add new judges</li> <li>• Senate approval of appointments</li> <li>• Impeachment of judges</li> </ul>
<b>Executive branch can check</b>	<ul style="list-style-type: none"> <li>• Can veto legislation</li> <li>• Can convene special session</li> <li>• Can adjourn Congress when chambers disagree</li> <li>• Vice president presides over Senate and votes to break ties</li> </ul>	-	<ul style="list-style-type: none"> <li>• President appoints judges</li> </ul>
<b>Judicial branch can check</b>	<ul style="list-style-type: none"> <li>• Judicial review of legislation</li> <li>• Chief justice presides over Senate during proceedings to impeach president</li> </ul>	<ul style="list-style-type: none"> <li>• Judicial review over presidential actions</li> <li>• Power to issue warrants</li> <li>• Chief justice presides over impeachment of president</li> </ul>	-

(Lowi, Ginsberg and Shepsle, 2006: 107)

The sheer number of checks among the three branches is striking. But looking at the formal rights is only one side of the coin. Kassop (2006: 74) duly notes that the expectations imposed on governmental institutions are equally important. She argues (ibid.) that the interpretation of the separation of powers has changed over the years with its political environment, public acceptance being the main indicator for its legitimacy. The next section examines this change for each constitutional branch.

### **2.2.2 Checks by Congress**

When the framers drafted the US Constitution, they provided for legislative supremacy by making the national parliament the most powerful branch (Lowi, Ginsberg and Shepsle, 2006: 106). This is indicated by Article I of the Constitution, which vests all legislative powers in Congress. Madison himself (*Federalist* No. 51, 1788) stressed the importance of parliamentary leadership:

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

Lowi, Ginsberg and Sheple (2006: 108) even suggest that Congress was so likely to dominate the other branches that it needed to be divided against itself, into House and Senate.

Most importantly, congressional power means the right to refuse passing key legislative proposals urged by the chief executive, the right to override a presidential veto and the right to deny funding for presidential priorities (Kassop, 2006: 75). But the likelihood of these checks to be exercised depends primarily on the political context. In case of divided government, the president not belonging to the majority party in Congress, the relationship between the executive and the legislative is characterised by a higher degree of contentiousness and confrontation, whereas unified government favours the president with fewer legislative checks and greater policy coordination and consensus (Kassop, 2006: 76).

But even in cases of unified government, presidential power over Congress remains a matter of bargaining and compromise. Dickinson (2006: 459) exemplifies this with the first presidency of George W. Bush: Although his approval ratings reached unprecedented heights, temporarily peaking at 90 percent, the dynamics governing his relationship with Congress did not change, particularly on domestic issues. Compromise with Democrats remained essential to pass most major legislation. Bush was forced to play off the Republican-dominated House against the more divided Senate even after his party won control over the Senate back after the midterm elections. Dickinson (2006: 475) makes the case that public popularity is a poor substitute for partisan support in Congress.

### **2.2.3 Checks by the president**

While Congress can hamper executive initiatives in many ways, one should not underestimate the president's own constitutional resources. His appellation as "Chief legislator" stems from his power to register disagreement with legislative proposals. According to Article I, Section 7 "every bill which shall have passed the House of Representatives and the Senate shall [...] be presented to the President of the United States; If he approves it he shall sign it, but if not he shall return it, with his objections." As with most checks and balances, the presidential veto can be appraised ambiguously. Dickinson (2006: 476) calls it a "blunt weapon", a "powerful instrument for shaping legislative outcomes [...], but less helpful in getting the president's policies through Congress".

Some analysts argue that the 20<sup>th</sup> century has seen a surge of presidential power. Whereas in the 19<sup>th</sup> century presidential-Congress relations were cyclical, "oscillating evenly within well-defined boundaries" (Pika and Maltese, 2006: 184), Theodore Roosevelt and Woodrow Wilson greatly expanded the presidency's legislative role as the national government responded to the problems of urbanization and industrialization (ibid., 181). Foreign policy in particular helped presidents push their role beyond their former constitutional boundaries (Kassop, 2006: 74). This "rise of the presidency" only came to a

halt when Congress and the courts began opposing the presidential power in the 1970s, not least due to the intervention of the Supreme Court.

#### **2.2.4 Checks by the courts**

According to Kassop (2006: 76), the “weapons of the federal courts are more subtle and not always as visible as those of Congress”: Primarily, they can interpret Congress’s statutory delegations of power to a president narrowly so as to reduce the president’s range of action and they can declare the acts of the president unconstitutional. This power of judicial review was not provided for in the Constitution; Chief Justice Marshall asserted it only in 1803 (Lowi, Ginsberg and Shepsle, 2006: 108). Its employment is fairly rare, long periods of Supreme Court deference to Congress were “punctuated by flurries of judicial review during times of social upheaval” (ibid.). Prominently, the courts declined assessing the constitutionality of the Vietnam War, whereas they showed no hesitation in deciding non war separation of powers cases (Kassop, 2006: 78). This again underpins the notion that the president can act with more confidence the arena of foreign policy as opposed to the numerous obstacles he faces in the national arena.

### **3. Conclusion: Constitutional gridlock?**

With a history of over 200 years, it is no wonder that today’s constitutional framework is “light years away from the expectations of the framers” (Kassop, 2006: 78). While we do not know to what extent the Founding Fathers would be satisfied with the current separation of powers, it can safely be maintained that the system of checks and balances, in spite of all setbacks and problems, has functioned well over the years. Too well, as some analysts argue: Long periods of divided government resulted in a high level of conflict between the executive and the legislative. But I concur with Lowie, Ginsberg and Shepsle, (2006: 114), who claim that even political gridlock is not far removed from the intent of the framers. Although executive efficiency is important, the Constitution stresses competition over deference to the president for a good reason. Only if making public policy remains difficult, the constitutional

idea of mutual checks and balances is being kept alive. Kassop (2006: 87) agrees that the scorecard between Congress and the presidency is currently even. After a period of overwhelming executive preemption in the aftermath of 9/11, Congress is reasserting its power. Not only Mr. Paulson, but the entire administration should be aware of the potential for parliamentary resistance that lies in the Constitution, regardless of partisanship.

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