

F.O.R.C.E VIDEO SCRIPT - CHECKS AND BALANCES

Voice Over: In the United States, there is no one “supreme power”—that is, no person or governing body that has total power over how we live our lives. Our three branches of government—executive, legislative, and judicial—provide checks and balances to each other's powers. So what are the powers of each, and how do they each keep an eye on what the others are doing? Let's check in with Professor Sheila Kennedy and find out.

Sheila: In the last few years, we've heard from a number of pundits and legal experts who are worried because America's checks and balances don't seem to be working properly. We can't evaluate those concerns or consider whether they are well founded unless we understand what checks and balances are and what they were intended to do.

The term checks and balances refers to the constitutional structures that were intended to prevent the abuse of government power. There are several, but the two most significant checks on abuse of authority are separation of powers and federalism.

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Let's take separation of powers first. The U.S. government is divided into three branches: the executive, sometimes called the administrative, the legislative; and the judicial. We refer to this constitutional structure, or what I like to call the constitutional architecture, as separation of powers. And it is absolutely fundamental to the American form of government.

The purpose of dividing government powers and responsibilities in this way was twofold. Enlightenment thinkers believed that such a system would be more efficient, a division of labor that would make the best use of specialized skill and expertise. Judges would be better at judging if that was the bulk of their responsibilities. Legislators would be more adept at passing laws, and so forth.

They also believed that a division of power would keep any one branch from becoming too powerful, thus threatening the liberties of citizens. By exercising its own powers and refraining from exercising powers that had been assigned to other parts of government, each branch would check the powers of the other branches. So the legislative branch passes laws, the executive branch administers those laws, and the judiciary evaluates the laws.

Ultimately, the Supreme Court determines whether the laws by the legislators or the actions of the administration are consistent with the Constitution and the Bill of Rights and thus enforceable.

Understanding the structure of our government is important for a lot of reasons. If you want to effect a change, you need to know who has the authority to make that change. Gripping about a zoning ordinance to a member of Congress may make you feel better, but it's not likely to do you much good.

Understanding how the branches operate is also necessary if we're going to cast informed votes. At election time, the airwaves are filled with political advertisements blaming officeholders for doing this or failing to do that. Often, the effectiveness of those charges depends on voters not understanding where the actual responsibility for those actions or inactions lies.

That's particularly true of political campaigns for chief executives—presidents, governors, and mayors. People unfamiliar with checks and balances tend to believe that a president or governor or mayor is who is in charge. He or she can simply decide to make some change, and, I don't know, wave a magic wand and it'll happen. That is very rarely the case. Even presidential appointments to policymaking positions or to the courts often require ratification by the legislative branch. We saw this process during the last administration.

President Trump could not place his candidates for judge on the federal courts without Mitch McConnell's ability to corral a majority of senators to vote for those nominees.

Citizens need to understand the operation of checks and balances and the way they limit the exercise of power in order to arrive at informed opinions about elected officials' performance, and to understand the importance of their legislative votes.

With the systems working properly, adherence to separation of powers doctrine makes laws more precise and more comprehensible. A good example is a case called *U.S. versus Alvarez*, decided back in 2012. The legislative branch—Congress—had passed something called the Stolen Valor Act of 2005 to punish people who lied and said they'd received high military honors when they really hadn't. In 2012, the Supreme Court ruled that the act was unconstitutional because the way it was written infringed on the right to free speech, protected by the First Amendment.

In response, the executive branch, in this case the Pentagon and the president, established a government-funded national database of medal citations, phased in over time, that would allow citizens to verify awards of military honors. And then less than a year after *Alvarez* was decided, Congress also responded, passing legislation to remedy the constitutional problems that the court had found in the language of the original legislation. The new legislation continued the prohibition on false claims, but it narrowed the original legislation in order to remedy or fix the constitutional deficiencies, repealing what had been an originally broad prohibition against wearing such awards without legal authorization and limiting the prohibition to wearers who acted fraudulently and "with intent to obtain money, property, or other tangible benefit." The new legislation also limited the prohibition to the Congressional Medal of Honor and some other specified declarations and medals.

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Alvarez is a good example of the process that has unfortunately become increasingly rare. It allowed Congress to achieve an entirely proper goal without inadvertently infringing the constitutional rights of citizens. As a reminder, I'll give you a number of additional resources to help explain and flesh out what we mean when we talk about the separation of powers.

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Checks and balances don't stop with the division of the federal government into three separate branches. The system that was devised by the founders also gave significant authority to state and local units of government, further dividing power. We call that structure federalism. If you have a zoning issue, for example, you take your case to your local municipal government. If you want to lobby for changes to family or marriage laws, you approach your state legislators. Local, state, and federal authorities have different, although sometimes overlapping jurisdictions. Federalism was an especially influential political movement because of the widespread discontent with the Articles of Confederation. The articles, as we talked about last time, focused on limiting the authority of the federal government. The movement toward a central government with more power was greatly strengthened by the reaction to Shays' Rebellion, which we also discussed last time. Shays' Rebellion was fueled by a poor economy. But that economy was partly the result of the federal government's inability to pay off its debt from the American Revolution.

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The most forceful defense of the new constitution came in the Federalist Papers, which were eighty-five anonymous essays published in New York and written to convince the people of New York to vote for ratification. These articles, as we now know, were written primarily by John Jay, Alexander Hamilton, and James Madison. They promoted the benefits of the new constitution by explaining the political theories and functions driving the various articles of the Constitution.

Citizens who were opposed to the new constitution became known as Anti-Federalists. They were generally local rather than cosmopolitan, their perspective oriented toward plantations and farms rather than commerce or finance. And they wanted strong state governments with a weaker national government.

The Anti-Federalists believe the legislative branch had too much unchecked power—and that there was an insufficient check on the executive branch’s power, especially power of the chief executive. They also believed that a bill of rights should be added to the Constitution in order to prevent a dictator from exploiting citizens.

In response, the Federalists argued that the proposed government would be a government of delegated powers and wouldn’t have the authority to infringe the rights of citizens or the states. They also argued that it would be impossible to list all the rights needing protection—and that, as a consequence, rights that weren’t listed could be easily overlooked or invaded. As we’ll see later, those arguments led to the adoption of the ninth and tenth amendments.

Federalism obviously raises the possibility of conflicts between federal and state laws. When that happens, the Constitution’s supremacy clause provides that federal law prevails.

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One of the issues Americans are struggling with right now is how to ensure that the divisions of responsibility among local, state, and national governments make sense in a world that is so different from the world that existed two hundred-plus years ago. People are far more mobile, businesses routinely operate in several different states, often different countries, and legal distinctions between local and national regulation have blurred. Some areas of law that were historically local, like state-level criminal law, have been joined by federal criminal statutes.

Over the years, and especially during the Great Depression, power shifted rather dramatically to the federal level. The degree to which states can operate free of constraints by the federal government has also been eroded by the states’ increased dependence on federal funding. In order for a state to get federal highway money, for example, that state has to follow federal guidelines when setting speed limits, and it has to adhere to other conditions that are imposed by the Federal Highway Administration.

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Separation of powers and federalism aren’t the only structures that were intended to curb government power. The founders believed that the legislature would be the most dangerous branch. They tried to moderate that danger by creating a bicameral federal legislature—that is, a legislative body consisting of two houses, the House of Representatives and the Senate.

The House of Representatives was intended to be the most responsive to citizens, which is why members run for reelection every two years.

The Senate, where members serve six-year terms, was created to be, as they said, the more deliberative body. By requiring laws to pass both houses, the founders hoped to incentivize negotiation and compromise, two words we don’t hear nearly often enough these days. Again, at the end of this lecture series, I will share with you a variety of resources that help to flesh out those concepts.

The third branch of the federal government is the judiciary. And these days, it is the federal judiciary’s operation that may be the most controversial. There are two reasons for that: something we call judicial independence...and the philosophy of, and justification for, judicial review, the doctrine that gives the Supreme Court the last word on whether a law is constitutional and thus can be enforced.

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Judicial independence is shorthand for the fact that in the federal courts, and we’re only talking right now about the federal courts, judges are appointed for life and can be removed only for improper behavior. This is an important part of our system of checks and balances.

When you think about it, we elect a president who appoints members of the executive branch.

We elect the people, the men and women, who represent us in Congress. Those two branches are therefore answerable to voters. We can dismiss them, vote them out if we don’t like the way they discharge their duties.

The courts, on the other hand, aren’t supposed to do voters’ bidding. They’re responsible to the Constitution and to the rule of law, not to popular passions or the electorate.

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Removing judges from electoral politics was intended to insulate the courts from political pressure. When judges have to decide high-profile or highly charged cases, we want them to make those decisions on the basis of their reading of the law, the facts of the case, and the Constitution, not out of fear of being voted out of office by a public that favors a different result.

When judges are elected, as they are in some states and state court systems, and they have to raise campaign money in order to run their campaigns, there's also concern that they weigh the positions of campaign contributors more heavily than the demands of justice or the requirements of the rule of law. When judges make poor decisions—and some will—we nevertheless want those decisions to be based upon their considered judgments, not political expediency or ideology.

Most Americans are used to the fact that the Supreme Court gets the final word on whether a law or government action is constitutional. That final word, the function of judicial review, was established very early in our country's history in a case called *Marbury versus Madison*. *Marbury versus Madison* was decided in 1803, and it was the first time the Supreme Court announced the principle that a court could void an act of Congress if that court found that the act of Congress was inconsistent with the Constitution. Let me give you the "back story".

In fact, one criticism of the last administration was that by withdrawing from international agreements, it rather dramatically undercut America's global influence.

But if the court ruled that *Marbury's* commission had to be delivered, and Madison still refused, the Supreme Court, having no way to enforce its ruling, no army to send, would be fatally weakened. Given that dilemma, Marshall's decision, in my view, was brilliant. He ruled that the administration was bound by legal commitments of its predecessor. But he also ruled that the statute that had created the judicial commissions was unconstitutional...and that therefore, the commissions were void.

Jefferson reportedly was livid. He'd won the battle but lost the war. The case established the rule that the country has followed ever since. To quote Marshall, "It is emphatically the province and duty of the Judicial Department to say what the law is."

Since *Marbury vs Madison*, the Supreme Court has been the final word on the constitutionality of congressional legislation. And once again, I will, in the last lecture give you additional resources to explain the background of *Marbury* and the concept of judicial independence and judicial superiority.

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You know, there's a growing consensus around the charge that certain of our important government systems are either broken or outdated.

Social scientists define a government as legitimate when it performs in accordance with its philosophical framework, which is typically set out in a constitution—in other words, when a government obeys its own rules, operates in accordance with the rule of law, and is seen by most of its citizens as fundamentally fair. By those measures, it's reasonable to question whether the United States government today is legitimate and if it isn't, what needs to change. Let's begin with the Electoral College. In 2016, Hillary Clinton won the popular vote for president by approximately 2.85 million votes.

Donald Trump won the electoral college based upon a total margin of fewer than 80 thousand votes. That translated into paper-thin victories in three states. Thanks to winner-take-all election laws, Trump received all of the electoral votes of those states.

Winner-take-all systems, which are in place in most states, mean that all of the state's electoral votes go to the winner of the popular vote in that state no matter how close the result. In other words, if a candidate wins a state fifty-point-five percent to forty-nine-point-five percent...or seventy percent to thirty percent...the result is exactly the same. The votes cast for the losing candidate simply don't count.

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Problems with the Electoral College are widely recognized. Among them are the outsized influence it gives swing states, the lack of an incentive to vote for those who favor the minority party in a winner-take-all state, and the overrepresentation of rural and less-populated states. Wyoming, for example, America's least populated state, has 166th of California's population but it has 18th of California's electoral votes. The Electoral College advantages rural voters over urban ones, and white voters over voters of color.

Akhil Reed Amar teaches Constitutional Law at Yale Law School, and he criticizes justifications of the electoral college, including that that it was designed to balance the interests of large and small states and that it reflected the framers' distrust of direct democracy.

As he has pointed out, the framers put the Constitution itself to a popular vote of sorts. They provided for direct election of House members, and they favored the direct election of governors. Amar argues that the Electoral College was actually a concession to the demands of southern slave states that would have been disadvantaged in a direct election system because a huge proportion of its population—slaves—couldn't vote.

Americans pick mayors and governors by direct election. And there's no obvious reason that a system that works for the nation's other chief executives couldn't also work for president.

Amar also points out that no other country employs a similar mechanism. His criticisms have been echoed by Jamin Raskin, a professor of constitutional law and a congressman from Maryland. Raskin argues that in a democracy, every citizen's vote should count equally, but the Electoral College makes votes in swing states hugely valuable while rendering votes in non-competitive states virtually meaningless.

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This situation dramatically increases incentives for strategic partisan mischief and electoral corruption in states like Florida and Ohio. And it permits partisans to swing an entire election by suppressing, deterring, rejecting and disqualifying just a few thousand votes in the right states.

It's also worth noting that the current Electoral College is not the mechanism designed by the founders. Electors were originally intended to be respected locals entrusted to exercise independent judgment, not faceless puppets required by law to cast their votes for the winner of whoever emerged from their state's popular vote. Neither its composition nor its current operation would be recognizable to those who created it.

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Then, of course, there's partisan redistricting, or gerrymandering. After each census, state governments redraw state and federal district lines to reflect population changes. The party in control of the state legislature at the time controls that redistricting process. It can and does draw districts that maximize its own electoral prospects and minimize those of the opposing party. The process became far more sophisticated and precise with the advent of computers, leading to a situation which is aptly described as "legislators choosing their voters" rather than the other way around.

Academic researchers and political reformers blame gerrymandering for electoral non-competitiveness and political polarization. In 2008, Norman Orenstein and Thomas Mann argued that the decline in competition that has been fostered by gerrymandering has entrenched partisan behavior and diminished incentives for compromise and bipartisanship.

Gerrymandering involves packing, which is a term meaning creating districts with supermajorities of the opposing party...

cracking, which is distributing the members of the opposing party among several districts to make sure they don't have a majority in any of them...

and tacking, which involves expanding the boundaries of a district to include a desirable group from a neighboring district. The practice advantages incumbency and it operates to reinforce what's been called partisan rigidity: the increasing nationalization of our political parties.

But perhaps the most pernicious effect of gerrymandering is the creation and proliferation of seats that are considered safe for one political party or the other. Safe districts breed voter apathy and reduce vote participation—and that result is absolutely understandable. Why should citizens get involved if the result is foreordained? Why should they donate to an assured loser? For that matter, unless they're trying to buy political influence for some reason, why donate to a sure winner? What's the incentive to volunteer or to vote when it obviously isn't going to matter?

It isn't only voters living in a supposedly safe district who lack incentives for participation. It becomes increasingly difficult for a party that is considered the sure loser party to recruit credible candidates. As a result, in many of these races, even if both parties have candidates, voters are left with no genuinely meaningful choice.

The anemic voter turnout that gerrymandering produces leads to hand wringing about citizen apathy, usually characterized as a civic or moral deficiency. But voter apathy is actually a pretty rational response to noncompetitive politics. Reasonable people save their efforts for places where those efforts count. And thanks to the increasing lack of competitiveness in our electoral system, absent a wave election with unusually high turnout, those places often don't include the voting booth.

Worst of all, in safe districts, the only way to oppose an incumbent is in the primary. And that almost always means that the challenge will come from the flank or the extreme. When the primary is, for all intents and purposes, the general election, the battle takes place among the party faithful, who tend to be the most ideological voters. So Republican incumbents will be challenged from the right, and Democratic incumbents will be attacked from the left. Even when those challenges fail, they create a powerful incentive for incumbents to toe the line and placate the most rigid elements of their respective parties. Instead of the system working as intended, with both parties nominating candidates believed most likely to appeal to the broad middle, the system produces nominees who represent the most extreme voters on each side of the philosophical divide.

The Electoral College and gerrymandering are major impediments to democratic self-government. But reforms of several other less-well-recognized problems would also help reinvigorate American democracy. And in the resources I'll be sharing, there will be descriptions of some of those systemic problems.

When we look at other systems that are simply obsolete, state administration of elections has to be on the list. State level control over elections made sense when difficulties in communication and transportation translated into significant isolation of populations.

Today, state-level control allows for all manner of mischief, including significant and effective efforts at vote suppression. There are wide variations from state to state in the hours that the polls are open, in provisions for early and absentee voting, and for placement and accessibility of polling places.

In states that have instituted voter ID laws, the nature of the documentation that satisfies those laws varies widely. Voter ID measures are popular with the public, despite the fact that multiple studies have confirmed that in-person voting fraud is virtually nonexistent, and despite clear evidence that the impetus for those laws is a desire to suppress turnout among poor and minority populations.

State-level control of voting makes it difficult to implement measures that would encourage more citizen participation, like the effort to make election day a national holiday or to move it to a weekend.

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Modern technology has made those problems obsolete—and could, if we allowed it to, facilitate a number of suggested improvements: making registration automatic, moving to same-day registration and online registration systems, adopting no excuse absentee ballots or universal vote by mail, eliminating caucuses, mandating at least fourteen-hour election day opening times, and one week of early voting - just to list some of the suggestions that have been made.

Such changes would make for a better, more modern, and far more inclusive and user-friendly American election system.

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Then, of course, there is the very large problem of money in politics and the unworkable system of laws and regulations governing campaign finance. Common Cause has summed the situation up: “American political campaigns are now financed through a system of legalized bribery.” Other organizations, including the Brennan Center for Justice, the Center for Responsive Politics, and the National Institute for Money and State Politics, have documented the outsized influence of campaign contributions on American public policy.

As most Americans know, contributions to parties and candidates are far from the only tools used by wealthier citizens to influence policy. The ability to hire and pay lobbyists, many of whom are former legislators, gives corporate interests considerable clout.

Money doesn't just give big spenders the chance to view or support a candidate, as the Supreme Court naively assumed in its Citizens United decision. It gives them leverage to reshape the American economy in their favor. A system that privileges the speech of wealthy citizens by allowing them to use their greater resources to amplify their message in ways that average Americans can't does great damage to notions of fundamental democratic fairness, ethical probity, and civic equality. Furthermore, the amount of time elected officials now spend raising money is time that could and should be applied to the discharge of the legislative or administrative duties of that person's office.

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Finally, there's the filibuster. The damage being done by the current use of the filibuster is probably less well-recognized than many of the other problems in American governance. But it's no less destructive of genuine democracy. Whatever the original purpose or former utility of the filibuster—when its use was infrequent and required a senator to actually make a lengthy speech on the Senate floor—today the filibuster operates essentially to turn government into government by supermajority. It's become a weapon employed by extremists to hold the country hostage.

Now, you'll remember that the original idea of a filibuster was that, so long as a senator kept talking, the bill in question couldn't move forward. Once those who were opposed to the measure in question felt they'd made their case or exhausted their arguments, they'd leave the floor and allow vote.

In 1917, when filibustering senators threatened President Wilson's ability to respond to a perceived military threat, the Senate adopted a mechanism called Cloture. That allowed a supermajority to vote to end the filibuster.

Later, much later, in 1975, the Senate changed several of its rules again and made it much easier to filibuster. The new rules effectively enabled what you might call virtual filibusters by allowing other business to be conducted during the time a filibuster was theoretically taking place. Senators are no longer required to take to the Senate floor and argue their case.

This virtual use, which has increased dramatically as partisan polarization has become worse, has effectively abolished the principle of majority rule. It now takes 60 votes, which is the number needed for cloture, to pass anything.

This anti-democratic result isn't just in direct conflict with the intent of those who crafted our constitutional system. It has brought normal government operation to a standstill. And it has allowed small numbers of senators to effortlessly place personal agendas above the common good without worrying about the political consequences. A uniform national system overseen by a nonpartisan or bipartisan federal agency with the sole mission of administering fair, honest elections, would also facilitate consideration of other improvements, like vote by mail, that have been proposed for a long time by good government organizations. The current voter registration system was designed when registrars needed weeks to receive registration changes in the mail and to produce hard-copy voter rolls for elections.

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The reforms I've just suggested would have their largest impact on Congress, and, to a lesser extent, state legislative bodies. That focus shouldn't distract, however, from the necessity of other structural changes, beginning with the Supreme Court and the presidency. The recent politicization of the court has significantly undermined public respect for its conclusions. And it has spawned numerous proposals for change, including expanding the number of justices serving on the court and eliminating lifetime tenure in favor of set terms, with eighteen years being the most popular suggestion. That latter proposal, which has been floating around for a long time, recognizes that today's longer lifespans have translated into significantly longer tenures on the nation's high court.

Whatever reforms are ultimately endorsed, however, should have one overriding goal: returning the court to its status as a legitimate arbiter of the law, rather than a political prize to be captured and then deployed as a weapon in America's ongoing culture wars.

A Congress that has asserted its proper role in governance and a politically neutral court should combine to reign in what Arthur Schlesinger in 1974 termed an imperial presidency. It should return operating checks and balances to America's governance.

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