

The following is excerpted from: State of Maryland, Separation of Powers: The Role of an Independent Judiciary in Sustaining our Democracy

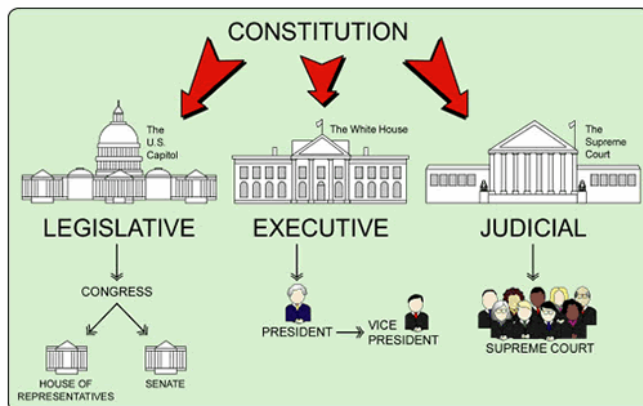
Part I: What Is Separation of Powers?

What do we mean by separation of powers? At the simplest level, it is the idea that a government functions best when its powers are not concentrated in a single authority but are divided among different groups or branches. The United States was the first nation that used a written constitution to formally adopt separation of powers as the framework for its government.

Development of the Concept of Separation of Powers

The idea of separation of powers developed during the period known as the European Enlightenment. The Enlightenment began in the seventeenth century and lasted until shortly before the beginning of the American Revolution. Enlightenment thinkers identified three main powers that were inherent in government. These include:

- Legislative power: the power to make law.
- Executive power: the power to enforce law.
- Judicial power: the power to interpret the law.



“The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power.”
-Justice Louis Brandeis¹,
Myers v. US 1926

Enlightenment theories of separation of powers warned against the concentration of all government powers in the hands of a single individual or authority. They were heavily influenced by the example of England. Over the course of the seventeenth century, England had forged a political system that divided government power among three different authorities.

- Parliament held legislative power. Parliament was made up of two houses –the House of Commons and the House of Lords. Members of the House of Commons were elected. Members of the House of Lords mostly inherited their positions. Both houses deliberated on proposed laws.
- A monarch (king or queen), who inherited the throne for life, held executive power. A series of agreements between Parliament and the monarch had established Parliament’s supremacy, or control, over the monarch. By the early eighteenth century, the monarch’s power was mostly limited to enforcing laws passed by the Parliament.
- A judiciary held judicial power. Up through the seventeenth century, judges in England had served at the pleasure of the monarch. The monarch had been able to dismiss judges at will. But in 1710, the monarch agreed to a request by Parliament to guarantee judicial independence. The monarch agreed that judges will hold their positions “during good behavior.” He also agreed that judges’ salaries could not be diminished while they were in office. No judge could be dismissed unless both houses of Parliament approved.

Part II: What Is Separation of Powers and the U.S. Constitution

The United States Constitution limits the power of the federal government through several means, particularly by separating power between three competing branches. The Constitution does not, however, contain a specific provision explicitly declaring the powers of the three branches be separate. *Separation of powers* is the concept that a government functions best when its powers are not concentrated in a single authority, but are divided among different branches. The United States was the first nation that used a written constitution to formally adopt separation of powers as the framework for its government. The Maryland Constitution mirrors the legislative/executive/judicial split of the United States Constitution. The separation of powers is qualified by the doctrine of *checks and balances* within the government and between the three branches; the United States Constitution, a living document, created and continues to nurture this perfect balancing act as a means to prevent the concentration and abuse of power

Constitutional Powers: Separate And Equal

The framers of the United States Constitution identified three competing divisions or branches of government and the powers of each of these:



Legislative power – the power to *make* law
Executive power – the power to *enforce* law
Judicial power – the power to *interpret* law

In the first three articles of the Constitution, the framers defined the three branches of government that continue to share power in the United States government today. The term “checks” refers to the ability, right and responsibility of each branch to monitor the activities of the others; “balances” refers to the ability of each branch to use its constitutional authority to limit or restrain the power of the others.

Judicial Power: The Courts

Article III of the Constitution establishes the Supreme Court of the United States and “such inferior courts as the Congress may from time to time ordain and establish.” Today, those “inferior” courts include the United States District Courts, which are located throughout the United States and where most federal cases are tried, and the Circuit Courts of Appeal, which review the decisions of the District Courts. The Supreme Court is the court of last resort within the federal judiciary on questions of federal law and the Constitution

The Constitution protects the federal judiciary’s independence from the other two branches by providing that federal judges are secure in their positions and are not subject to removal “during good behavior,” thus they serve for life. The Constitution also give the judiciary the power to hear all “cases and controversies” arising under the Constitution, federal law, treaties with other nations, and other specialized cases, such as controversies between two or more states.

Both Congress and the President have powers that serve to *check and balance* the power of the judiciary. One limitation is that Congress has control over the judiciary’s overall budget. Congress can also act to amend the Constitution if it disagrees with the Supreme Court’s interpretation of the document. Constitutional amendments are difficult and the process mandates approval by two-thirds majority of both houses of Congress and the approval of three-fourths of the states. Finally, Congress has the power to impeach and try federal judges for misconduct in office.

The President's power to nominate all federal judges gives the executive branch control over the individuals named to serve in the courts. This power is shared by the Senate via the Constitutional right of advice and consent in the nomination process. A majority of the Senate must consent to the President's judicial nominations.

Additional limitations to the judiciary's power include the fact that judges can only decide the cases that are brought to them. They cannot declare a law or government action unconstitutional unless they are asked to do so by an affected party. Moreover, the appellate review process ensures that virtually all decisions of individual judges are subject to review by other judges. Even at the Supreme Court, a justice must convince a majority of his or her colleagues to agree to a decision.