# Checks and Balances

**CPB :** [00:00:00.09] Civics 101 is supported in part by the Corporation for Public Broadcasting.

**Hannah McCarthy:** [00:00:05.83] When we decided we'd had enough of our own government and went to war and built a whole new government. The guiding principle was no king.

**Kim Wehle:** [00:00:19.9] So the framers of the Constitution were upset about a monarchy.

**Hannah McCarthy:** [00:00:25.0] This is Kim Wehle by the way.

**Kim Wehle:** [00:00:26.5] The Constitution basically took the concept of a monarchy and broke it into what I say almost like a three headed monster or a three handed you know Angel. However you want to see it and so instead of having one boss that would be a king or a CEO of a corporation even the American Constitution separated the government into three parts.

**Hannah McCarthy:** [00:00:48.73] That's right. America is basically Cerberus with wings that three headed hound that guards the gates of the underworld. You've got power carefully divided between each head all supporting the health of one body.

**Kim Wehle:** [00:01:02.05] One is the executive branch which is the president.

**Archival:** [00:01:04.87] The president of the United States.

**Kim Wehle:** [00:01:07.96] One is the Congress the legislative branch.

**Archival:** [00:01:10.99] Members of Congress.

**Kim Wehle:** [00:01:12.4] And the third would be the judiciary the judicial branch which are federal judges.

**Archival:** [00:01:16.75] The court is now sitting.

**Hannah McCarthy:** [00:01:19.48] If you could get a look at this angel beast's DNA you'd see a basic order to it all. A blueprint for the operations of this complex animal otherwise known as the U.S. government.

[00:01:31.69] The thing that has kept it alive for two centuries and counting written into our genetic code from the beginning today on civics 101.

[00:01:44.2] Checks and balances because the people who run this government are no angels. I'm Hannah McCarthy.

**Nick Capodice:** [00:01:50.35] I'm going to Capitol.

**Hannah McCarthy:** [00:01:51.34] And this is the civics 101 starter kit. The basic knowledge you need to understand the rest of American democracy.

**Nick Capodice:** [00:01:58.3] Now it seems a tangled web but you promised me Hannah that there is a structure there underneath the headlines. The tweeting and the campaigning and the arguing there's a foundation at the bottom of it all that keeps the whole thing from toppling over.

**Hannah McCarthy:** [00:02:11.11] There is a swear. It's why I called up Kim Wehle to try to figure out how that system of checks and balances is supposed to operate and how it actually operates. Kim by the way is a law professor at the Baltimore University School of Law and author of a brand new book on our favorite subject to Nick how to read the Constitution and why we asked her what exactly we mean when we talk about checks.

**Kim Wehle:** [00:02:38.65] It means if any one of those branches violates the law or does something that is improper or not consistent with what the public wants there are mechanisms or levers in the Constitution that the other two branches can pull in order to basically impose consequences on the bad branch.

**Hannah McCarthy:** [00:02:58.84] If you think of each head of the government beast as having its own crown that crown vests special powers in that particular head. Powers that allow them to do their own thing and powers that allow them to play watchdog for the other branches.

**Nick Capodice:** [00:03:13.81] What branch you want to do first let's do legislative branch.

**Archival:** [00:03:17.26] Congress.

**Kim Wehle:** [00:03:18.61] Legislate branch means Congress what is a law.

[00:03:21.97] A law is a rule that governs general behavior.

[00:03:26.77] Thou shalt not discriminate on the basis of race. That would be a law that is something that Congress decided and passed through both houses and that is then signed by the president to become a law.

**Hannah McCarthy:** [00:03:40.48] But let's say Congress tries to pass a law that's questionable beast number two rears its head.

**Archival:** [00:03:47.95] The President.

**Kim Wehle:** [00:03:49.72] So the president has a check on that process the president can veto what Congress has done. That would be one check for example.

**Nick Capodice:** [00:03:58.31] And so the president can stop Congress from doing basically the one thing that it really does.

**Hannah McCarthy:** [00:04:02.5] Except Congress can then veto the veto.

[00:04:06.34] It's called a veto override and they can go over the president's head and pass their law anyway even if that law is unconstitutional. But this is a three headed dog remember.

[00:04:17.68] And that third head is a little more stoic.

**Archival:** [00:04:19.78] The courts.

**Kim Wehle:** [00:04:22.21] The court can then can strike down that law and hold it unconstitutional so that's an example of how the legislative branch is checked by both other branches of the federal government.

**Hannah McCarthy:** [00:04:32.62] Judicial review is not a constitutional power. By the way it's the result of one of the end all be all Supreme Court cases Marbury vs. Madison in 1883 in which the Supreme Court established its own power to declare a law unconstitutional.

**Nick Capodice:** [00:04:49.33] That is an insane amount of power when you think about it the Supreme Court can make itself more powerful like it took its superpower crown and made it even more super.

**Hannah McCarthy:** [00:04:59.35] But lest we forget where there's power.

**Archival:** [00:05:01.54] The court.

**Hannah McCarthy:** [00:05:02.36] There is a check.

**Archival:** [00:05:04.98] The President.

**Kim Wehle:** [00:05:04.98] The executive branch checks judges is to decide what cases to bring.

**Nick Capodice:** [00:05:10.38] So you can't rule on something unless somebody asks you to.

**Hannah McCarthy:** [00:05:13.53] Precisely. If federal law is violated it is the executive branch's job to prosecute through the Department of Justice. The DOJ they do that at the district level and then the circuit level after which point a disappointed plaintiff can appeal to the Supreme Court. But what if a federal prosecutor chooses not to take a case to begin with chooses not to prosecute something not to bring it into the court system at all. That's called prosecutorial discretion and it can keep cases away from the Supreme Court.

**Nick Capodice:** [00:05:50.03] Right. And the president is the one who appoints federal judges.

**Hannah McCarthy:** [00:05:52.41] With congressional approval.

[00:05:54.36] But yes when it comes to removing someone from the Supreme Court though that is a horse of a different color.

**Kim Wehle:** [00:06:03.83] Judges can be impeached. Federal judges just like the president can be impeached. Congress can narrow the kinds of cases that federal judges can hear. They can say listen you can only I'm exaggerating but you can only hear disputes involving fights with blue cars versus red cars. That's a that's not an accurate example. But the judges. what's called jurisdiction is defined by the United States Congress. The Congress could also decide we don't want federal judges under the Constitution. The only judges that are required as the Supreme Court the United States or Congress could say listen we want all these cases to go to the states. We are going to abolish the entire federal judiciary.

[00:06:41.18] Other than the Supreme Court that literally would be constitutional.

**Hannah McCarthy:** [00:06:43.13] By the way the same act that established the federal court system the judiciary active 1789 established congressional power to regulate jurisdiction.

**Nick Capodice:** [00:06:52.88] Another branch making its own super powers more super.

[00:06:56.99] You got Supreme Court saying We decide what's constitutional or not. And you've got Congress saying we decide what you can rule on.

**Hannah McCarthy:** [00:07:04.1] And then you've got that third head of the government beast. We might want to think of that as the most enigmatic of the branches the executive presided over by the president.

**Archival:** [00:07:12.92] The president.

**Hannah McCarthy:** [00:07:14.63] The president can't make law or officially rule on whether law is constitutional. A president's job according to the oath of office is to preserve protect and defend the Constitution to make sure that law is upheld. But being in command of the enormous executive branch also means commanding the military the Treasury the Department of Justice and on and on. Most of the power there is implicit so checks are everything. When it comes to presidential reach and most of that checking lies with Congress.

**Kim Wehle:** [00:07:48.92] Well the number one thing we heard in the news right now is impeachment. If the executive branch the president commits high crimes and misdemeanors or even members within the president's cabinet the legislative branch can basically have a trial in the Congress and impeach that is basically fire the wrongdoer.

**Hannah McCarthy:** [00:08:06.44] Short of this fire the president approach Congress can cause a lot of slowdown or flat failure of the president's agenda.

**Kim Wehle:** [00:08:15.86] They can control the executive branch through the budget process. They can say listen we're going to shrink the attorney general's budget we're not going to give the Department of Justice enough money to actually execute the laws. That's going to limit their ability to go off the rails so to speak.

**Nick Capodice:** [00:08:32.09] Ah yes is the all important power of the purse. Yeah.

**Hannah McCarthy:** [00:08:35.18] Congress basically controls the president's allowance because they're the ones approving the budget or making appropriations for certain bills. You can't wield overbearing prosecutorial power if Congress underfunded the attorney general's budget and let's say it's a matter of the president overstepping some bounds. But Congress isn't looking to impeach.

[00:08:56.69] They can still issue a check of sorts because they make the laws.

**Kim Wehle:** [00:09:00.44] Every branch gets their papers graded one way that Congress grades the the papers of the executive branch is to hold hearings. The hearings are for two reasons. One to find out whether Congress needs to do more checking by passing a law that limits the executive branch's power which is well within its authority under Article 1 of the Constitution that vests a legislative power in the Congress and the second thing is to just let the American public know what's going on.

**Hannah McCarthy:** [00:09:31.1] Limiting presidential power like this usually comes after Congress feels like the president has gone too far. Like maybe he didn't act unconstitutionally but that doesn't mean it wasn't wrong like when FDR served for 12 years straight and Congress finally passed the 22nd Amendment and made term limits an official thing.

**Nick Capodice:** [00:09:51.26] Right. Especially in a nation founded on that no king principle. I'm thinking of the War Powers Act Truman and Kennedy entered wars but they didn't actually declare war. So they sidestepped Congress and Congress claps back and passed a law that said presidents are supposed to get approval for most conflict engagement regardless of what they call it.

**Hannah McCarthy:** [00:10:10.25] But in those cases I mean in part because laws take so long to come to fruition. The presidents who got a little too big for their britches they were already out of the White House by the time those laws were passed. So what happens when we need a legal decision immediately. This is where that last black robe clad Cerberus head gets to speak up because the Supreme Court can declare executive actions unconstitutional for example. In 1996 President Bill Clinton wanted the Paula Jones sexual harassment lawsuit dismissed on the grounds of presidential immunity.

**Archival:** [00:10:48.35] The president.

[00:10:48.47] The Supreme Court ruled that a sitting president does not have immunity from civil litigation while in office a court because they get to decide what is constitutional or not. Basically. Clinton eventually ended up in impeachment proceedings.

**Nick Capodice:** [00:11:04.26] But what happens if the president refuses to follow that ruling. Like when Abraham Lincoln suspended habeas corpus during the Civil War and the Supreme Court said no you can't hold people indefinitely without trial just because they're disloyal. And Lincoln just ignored them ignored the Supreme Court. That's just completely illegal.

**Hannah McCarthy:** [00:11:21.84] Yeah. And the thing is that this does happen. And in a case like that Congress could have impeach the president. That would have technically been a proper course of action but they didn't. And to be fair most of us are probably grateful for that Lincoln prevailed and is considered to have been one of the nation's greatest presidents. But it's an important moment to bring up because what if the check system fails to engage. What if Congress and the judiciary or Congress and the president agree to let the other do what they want. Just because they're pals. What if one of these heads is asleep while the other two are just running amok.

**Kim Wehle:** [00:12:00.54] Another example I use is you know a speed camera. There's one on Connecticut Avenue I live outside of Washington D.C. and there's a couple blocks on Connecticut Avenue where everyone slows down and goes below 30 miles an hour because there's a speed camera. Once it's in the rearview mirror. People speed up. So same with the Constitution. If there's not a speed camera catching people and sending them the dreaded ticket in the mail with a little you know snapshot of your of your license plate.

[00:12:28.23] People are going to speed and the president.

**Archival:** [00:12:30.03] The president.

**Kim Wehle:** [00:12:30.66] The Congress.

**Archival:** [00:12:31.47] Congress.

**Kim Wehle:** [00:12:32.76] Federal judges.

**Archival:** [00:12:33.5] The court.

**Kim Wehle:** [00:12:33.6] They'll all blow through the speed limits.

[00:12:36.42] If there aren't consequences and that's the case for Republicans Democrats independent. It doesn't matter who is in the White House or who's in Congress. What I'm saying what matters is protecting the institution. So if if those in power shift whoever's in power is checked whoever's in power has consequences for bad behavior.

**Hannah McCarthy:** [00:12:57.3] Turns out the three headed government monster actually comes with a leash and the person holding that leash it's you they actually have to take the thing for a walk to make a difference.

**Kim Wehle:** [00:13:10.89] There's no constitution cop on the block that is the Constitution is a piece of paper. It's like a contract right. If you if we the people don't enforce it through the voting booth the ballot box or through the courts or a suit of some kind of other mechanism to ensure that our elected leaders are actually complying with the law then the Constitution itself just becomes irrelevant it's a piece of paper it doesn't its rules don't matter you can take out the black sharpie and cross them out. It's only so good as it's enforced.

**Nick Capodice:** [00:13:48.84] I feel like this ultimately makes us the Constitution cops. I mean trust in the system. Appreciate the system sure but know how the system works. Just in case someone sleeping on the job.

**Hannah McCarthy:** [00:14:01.5] Yeah. So. now that we do understand how things are supposed to work.

[00:14:06.93] The failsafe system for keeping the three headed dog alive it might be time to get a better sense of what all of these branches are thinking doing on their own time. Their powers are checked. but what are their powers.

**Nick Capodice:** [00:14:22.89] That's next time on Civics 101.

**Nick Capodice:** [00:14:33.47] Civics 101 was produced today by me. Hannah McCarthy with Nick Capodice and help from Jackie Helbert and Ben Henry. Erica Janik is our executive producer Maureen McMurray thinks that power corrupts but absolute power is actually kind of cool. Music In this episode is by Blue Dot sessions, Lobo Loco and Quicksand. There is a transcript for this episode as well as a bunch of other resources at Civics 101 podcast dot org. And while you're there drop us a line. Click the Ask a question link and let us know what you want to know about civics. We'll do our best to answer it in a future episode. Civics when one is a production of N H PR New Hampshire Public Radio.

**CPB :** [00:15:30.29] Civics 101 is supported in part by the Corporation for Public Broadcasting.