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A short history of the separation of powers: from Cicero’s Rome to Trump’s America

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Vittorio Bufacchi

Senior Lecturer, Department of Philosophy, University College Cork

Languages

Français

English



Studies in democracy: Cicero, left, and Donald Trump. Capitoline Museum/Mary Harrsch and EPA-EFE/Will Oliver, CC BY-SA

In the four weeks since he was inaugurated for his second term as US president, Donald Trump has issued dozens of executive orders – many of which are now the subject of legal challenges on the grounds they exceed his authority under the US constitution. As a result, some will inevitably end up in front of the US Supreme Court.

What the court rules – and how the Trump administration responds to its judgments – will tell us a great deal whether the separation of powers still works as US founding fathers intended when they drafted the constitution.

The concept of separation of powers is incorporated into just about every democratic constitution. It rests on the principle of the separation of powers between the three fundamental branches of government: executive, legislature and judiciary.

It's what enables the political ecosystem of checks and balances to create the conditions for democracy to exist and freedom to flourish. But if one of the three branches of government dominates the other two, the equilibrium is shattered and democracy collapses.

We owe this idea of constitutional democracy as a tripartite division of power to an 18th-century French political philosopher, Charles de Montesquieu. He was the author of one of the most influential books to come out of the Enlightenment period, The Spirit of the Laws.

Published in 1748, this work gradually reshaped every political system in Europe, and had a powerful influence on America's Founding Fathers. The 1787 US constitution was drafted in the spirit of Montesquieu's recommendations.

Modern democracies are more complex than those of the 18th century – and new institutions have developed to keep up with the times. These include specialised tribunals, autonomous regulatory agencies, central banks, audit bodies, ombudsmen, electoral commissions and anti-corruption bodies.

What all these institutions have in common is that they operate with a considerable degree of independence from the three aforementioned arms of government. In other words, more checks and balances.

Notwithstanding his immense influence, the idea of a separation of powers at the heart of democracy predates Montesquieu by many centuries. One of the earliest formulations of this idea can be found in Aristotle's work, the Politics. This includes the argument that "the best constitution is made up of all existing forms". By this Aristotle meant a mixed government of monarchy, aristocracy and democracy.

But it was the Romans who developed a working model of checks and balances. The constitution of the Roman republic was characterised by the separation of powers between the tribune of the plebs, the senate of the patricians, and the elected consuls.

The consuls held the highest political office, akin to a president or prime minister. But since the Romans did not trust anyone to have too much power, they elected two consuls at a time, for a period of 12 months. Each consul had veto power over the actions of the other consul. Checks and balances.

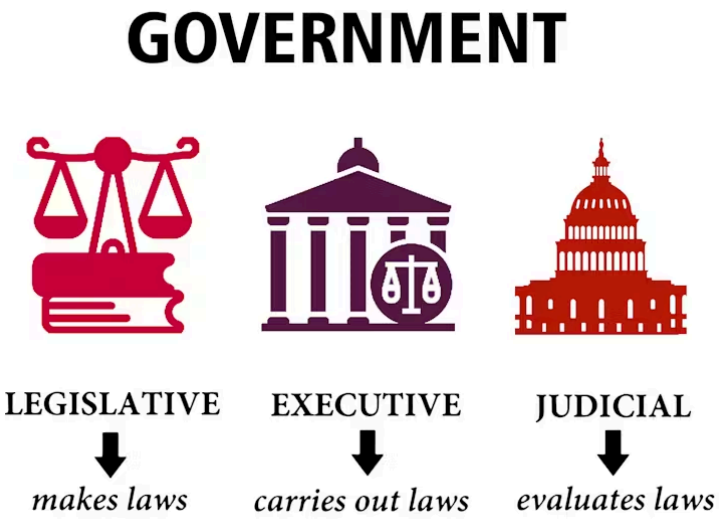
The greatest advocate of the Roman republic and its constitutional mechanisms, was the Roman philosopher, lawyer and statesman Marcus Tullius Cicero. It was Cicero who inspired Montesquieu's work – as well as influencing John Adams, James Madison and Alexander Hamilton in the US.

The Roman republic had lasted for approximately 500 years but came to an end following the violent death of Cicero in 43BC. He had devoted his life resisting authoritarian populists from undermining the Roman republic and establishing themselves as sole despots. His death (on top of the assassination of Julius Ceasar the previous year) are seen as key moments in Rome's transition from republic to empire.

Democracy under threat

Today our democracies are facing the same predicament. In many different parts of the world this simple institutional mechanism has come under increasing attack by individuals hell-bent on curbing the independent power of the judiciary and the legislative.

In Europe, following in the footsteps of Hungarian prime minister Viktor Orbán, the Italian far-right premier Giorgia Meloni has been pushing for constitutional reforms that reinforce the executive branch of government at the expense of the other two branches.



Checks and balances: the three branches of government. TREKPix/Shutterstock

The assault on the system of checks and balances has also been identified in Washington. The use and abuse of presidential executive orders is an indication of this growing political cancer.

During his time as 46th US president, from January 2021 to January 2025, Joe Biden signed 162 executive orders – an average of 41 executive orders per year. By comparison, during his first term Donald Trump's annual average was 55 executive orders. Barack Obama before him was 35.

In his first 20 days since returning to the White House Donald Trump has already signed 60 executive orders. This has included pardoning some 1,500 people who were involved in the January 6 insurrection at the US capitol.

But of much greater concern is the Trump administration's veiled threats to overturn the landmark decision of the US Supreme Court from 1803, Marbury v. Madison, the case that established the principle that the courts are the final arbiters of the law.

In recent weeks Trump has openly criticised federal judges who have tried to block some of his most executive orders. He's been supported by his vice-president, J.D. Vance, who has been quoted as saying that "judges aren't allowed to control the executive's legitimate power".

Meanwhile the president's senior advisor, Elon Musk, accused a judge's order to temporarily block the newly formed Department of Government Efficiency from accessing confidential treasury department data of being "a corrupt judge protecting corruption".



So democracy's delicate balancing act is under serious pressure. If the separation of powers does not hold, and the checks and balances prove to be ineffective, democracy will be threatened.

The next few months and years will determine whether the rule of law will be displaced by the rule of the strongest. At the moment the odds don't look good for Cicero, Montesquieu and Madison.

It takes a brave person to bet on democracy to win this contest, but we live in hope that America will remain the land of the free and the home of the brave.