



Separation of Power in American Constitution

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1. Introduction

The term separation of powers originated with the Baron de Montesquieu, a French enlightenment writer. However, the actual separation of powers amongst different branches of government can be traced to ancient Greece. The framers of the Constitution decided to base the American governmental system on this idea of three separate branches: executive, judicial, and legislative. The three branches are distinct and have checks and balances on each other. In this way, no one branch can gain absolute power or abuse the power they are given.

2. Historical Background

The idea of threefold division of state functions may be traced back to the writings of Aristotle and Cicero. "According to Aristotle, a state should have three functions—deliberative, magisterial and judicial. Bodin, a French philosopher, further emphasized the necessity of separating these three powers. He was especially in favor of separation of the

judicial functions from the other two functions. The powerful exponent of this theory was Montesquieu (1689- 1755). He developed this theory in his book *The Spirit of Laws* published in 1748. Montesquieu lived in France during the tyrannical rule of Louis XVI, who was an absolute monarch having authority over the life and death of the people. He combined in him all the legislative, executive, and judicial powers. In other words, he was the source of laws, the seat of executive authority and the fountain of justice. In the opinion of Montesquieu people in France did not enjoy any liberty because of a combination of all the three powers in the monarch. In or about the year 1730 Montesquieu visited England and was highly impressed by individual liberty enjoyed by the English people. He concluded that liberty of the English people was safe because their constitution was



based on the Principle of separation of powers”¹.

3. Separation of power in USA:

“It is safe to say that a respect for the principle of separation of powers is deeply ingrained in every American. The nation subscribes to the original premise of the framers of the Constitution that the way to safeguard against tyranny is to separate the powers of government among three branches so that each branch checks the other two. Even when this system thwarts the public will and paralyzes the processes of government, Americans have rallied to its defense.

At no time in this century was the devotion to that principle more vigorously evoked than in 1937, when Franklin Roosevelt introduced a plan to add justices to the Supreme Court. The conflict set off by the President's plan is more understandable when viewed in the historical context of expanding judicial power as well as in the

contemporary context of pro- and anti-New Deal politics”².

In the early national period, the judiciary was the weakest of the three branches of government. When Chief Justice John Marshall established the principle of judicial review in *Marbury v. Madison*³ by declaring an act of Congress unconstitutional, he greatly strengthened the judiciary. Even though the high court only exercised this prerogative one other time prior to the Civil War. The establishment of judicial review made the judiciary more of an equal player with the executive and legislative branches. Despite of the express mention of this doctrine in the Constitution, U.S. incorporates certain exceptions to the principle of separation with a view to introduce system of checks and balances. For example, a bill passed by the Congress may be vetoed by the President in the exercise of his legislative power. Also treaty making power is with the President but it's not effective till approved by the Senate. It was the exercise of executive power of the senate due to which U.S. couldn't become a

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<http://www.archives.gov/education/lessons/separation-powers>

³ 5 US 137, 1 Cranch 137, 2 L Ed. 60(1803)

¹http://sbd.ksu.edu.tr/Images/images/files/8_boztepe.pdf

member to League of Nations. The Supreme Court has the power to declare the acts passed by the congress as unconstitutional. There are other functions of an organ also which are exercised by the other. This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the power. Therefore the constitution which gives a good mention of the doctrine in its provisions also does not follow it in its rigidity and hence has opted for dilution of powers just like India.

The United States has three branches of government. The executive, legislative and the judicial branch. Each of these branches has a distinct and essential role in the function of the government and they are following:

Article I. Legislative

Article II Executive

Article III Judicial

i. Executive Branch:

The executive branch consists of the President vice president and 15 Cabinet-level departments such as State, Defense, Interior, Transportation and Education etc.

The primary power of the executive branch rests with the president, who chooses his vice president, and his Cabinet members who head the respective departments. A crucial function of the executive branch is to ensure that laws are carried out and enforced to facilitate such day-to-day responsibilities of the federal government as collecting taxes, safeguarding the homeland and representing the United States political and economic interests around the world. “Executive power is vested, with exceptions and qualifications, in the president by Article II, Section 1, of the Constitution. By law the president becomes the Commander in Chief of the Army and Navy, Military of several states when called into service, has power to make treaties and appointments to office ,with the Advice and Consent of the Senate receive Ambassadors and Public Ministers, and take care that the laws be faithfully executed. By using these words, the Constitution does not require the president to personally enforce the law; rather, officers subordinate to the president may perform such duties. The Constitution empowers the president to ensure the faithful execution of the laws made by Congress. Congress may itself terminate such appointments, by



impeachment, and restrict the president. The president's responsibility is to execute whatever instructions he is given by the Congress. Congress often writes legislation to restrain executive officials to the performance of their duties, as authorized by the laws Congress passes. In *INS v. Chadha* (1983), the Supreme Court decided (a) The prescription for legislative action in Article I, Section 1, requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives and Section 7 requiring every bill passed by the House and Senate, before becoming law, to be presented to the president, and, if he disapproves, to be re-passed by two-thirds of the Senate and House represents the Framers decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure.” This procedure is an integral part of the constitutional design for the separation of powers. Further rulings clarified the case; even both Houses acting together cannot override Executive veto’s without a 2/3 majority. Legislation may always prescribe regulations governing executive officers.”⁴

⁴<http://www.legalservicesindia.com/article/article/sep>

ii. The legislative Branch:

The legislative branch consists of the Senate and the House of Representatives, collectively known as the Congress. There are 100 senators; each state has two. Each state has a different number of representatives, with the number determined by the state's population. At present, there are 435 members of the House. The legislative branch, as a whole, is charged with passing the nation's laws and allocating funds for the running of the federal government and providing assistance to the 50 U.S. states. “Congress has the sole power to legislate for the United States. Under the non-delegation doctrine, Congress may not delegate its lawmaking responsibilities to any other agency. In this vein, the Supreme Court held in the 1998 case *Clinton v. City of New York* that Congress could not delegate a "line-item veto" to the President, by which he was empowered to selectively nullify certain provisions of a bill before signing it. The Constitution Article I, Section 8; says to give all the power to Congress. Congress has the exclusive power to legislate, to make laws and in addition to

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the enumerated powers it has all other powers vested in the government by the Constitution. Where Congress does not make great and sweeping delegations of its authority, the Supreme Court has been less stringent. One of the earliest cases involving the exact limits of non-delegation was *Wayman v. Southard* (1825). Congress had delegated to the courts the power to prescribe judicial procedure; it was contended that Congress had thereby unconstitutionally clothed the judiciary with legislative powers”⁵.

iii. The Judicial Branch:

The judicial branch consists of the United States Supreme Court and lower federal courts. Its primary function is to hear cases that challenge legislation or require interpretation of that legislation. The U.S. Supreme Court has nine Justices, who are chosen by the President, confirmed by the Senate, and have a lifetime appointment”⁶.

⁵<http://www.legalservicesindia.com/article/article/separation-of-power-in-india-&-usa-483-1.html> (Last Accessed on 29-10-2014)

⁶ <http://education-portal.com/academy/lesson/separation-of-powers-definition-examples-quiz.html#lesson> (Last Accessed on 29-10-2014)

Despite of the express mention of this doctrine in the Constitution, U.S. incorporates certain exceptions to the principle of separation with a view to introduce system of checks and balances. For example, a bill passed by the Congress may be vetoed by the President in the exercise of his legislative power. Also treaty making power is with the President but it’s not effective till approved by the Senate. It was the exercise of executive power of the senate due to which U.S. couldn’t become a member to League of Nations. The Supreme Court has the power to declare the acts passed by the congress as unconstitutional. There are other functions of an organ also which are exercised by the other. India, too, followed U.S. in adoption of the checks and balances which make sure that the individual organs doesn’t behold the powers absolutely. This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the power. Therefore the constitution which gives a good mention of the doctrine in its provisions also does not follow it in its rigidity and hence has opted for dilution of powers just like India.

4. Effect of Separation of power:



While the framer of American constitution needed to create a powerful central government they also wanted to protect the system from possible misuse of power that's why they separate the parts of the government, and by balancing them against each other. As a result, it can be said that the American Federal government is divided, decentralized and fragmented. They locates the President and Congress at different points in American political system Since each of them has different responsibilities and faces different pressures, they may not always view matters from the same perspective. As a result of separation of powers, powers and functions are also divided between national government and state governments. Limiting national power by creating two sovereigns-the national government and state governments has fundamental consequences in the American system of government. Indeed, federalism contributes to further fragmenting influence by giving state governments independence from the central government. Moreover, Congress is divided inside as a House of Representatives and a Senate. This bicameral structure of the legislative branch is designed to limit popular currents that

many of the framers saw as a radical threat to the economic and social order.

“The personnel of the three branches of government were strictly separated and no member of one branch is allowed to be member of any other branch of the government so that each branch can represent different constituency. Checks and balances system was created so that different governmental agents are balanced against one another. Under this system, the President's influence over Congress is limited by the separation of powers. Since the President is granted no legislative powers except for recommending from time to time measures to Congress and qualified right of veto, this principle constitutes a major limitation on the power of the office. However, power of legislative branch over the executive is clear. Indeed, according to Constitution, Congress can impeach and remove the President, and investigate and oversee the executive branch and its agencies. It also can override the President's veto power by two-thirds vote of each chamber. Since the division of the structures of the Government results in the division and weakening of the Party system, the conflict between the two wings of a party

may be more intense than the conflict between the parties. Therefore, the President's political effectiveness in party depends on the congressional co-operation. Although President is leader of his party, he has to use different tactics and tools to persuade the members of Congress"⁷.

5. Criticisms:

The theory is criticized on the ground that the government is an organic unity and absolute demarcation of powers is impossible. It is neither practicable nor desirable to divide it into three water-tight compartments. As pointed out by J.S. Mill, complete separation and independence of the various departments of the government would result in frequent deadlocks and general inefficiency.

- i. Violation of Organic Unity of Government
- ii. Impracticability
- iii. Parliamentary Government in England
- iv. Not Powers but Functions
- v. Inequality of Organs
- vi. No Guarantee for Individual Liberty

⁷http://sbd.ksu.edu.tr/Imagesimages/files/8_boztepe.pdf (Last Accessed on 29-10-2014)

6. Conclusion

It has been well said by Lord Acton that Power corrupts and absolute power tends to corrupt absolutely. Conferment of power in a single body leads to absolutism. But, even after distinguishing the functions, when an authority wields public power, then providing absolute and sole discretion to the body in the matters regarding its sphere of influence may also cause abuse of such power. Therefore, the doctrine of separation of powers is a theoretical concept and is impracticable to follow it absolutely.

The status of modern state is a lot more different than what it used to be. It has evolved a great deal from a minimal, non-interventionist state to an welfare state, wherein it has multifarious roles to play, like that of a protector, arbiter, controller, provider. This omnipresence of the state has rendered its functions becoming diverse and problems, interdependent and any serious attempt to define and separate those functions would cause inefficiency in government. Hence, a distinction is made between 'essential' and 'incidental' powers of an organ. According to this differentiation one organ can't claim the powers essentially belonging to other organ because that would



be a violation of the principle of separation of powers. But, it can claim the exercise of the incidental functions of another organ. This distinction prevents encroachment of an organ into the essential sphere of activity of the other.