

## Practical Implementation of Separation of Powers in USA during 2004-2012: Checks and Balances

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### Abstract

*Unified platform is guaranteed to promotion of justice and equality in a country. Fair constitutional building is the sign of separation, quality, law and liberty which provide the way of good governance and rule of law. Americans adopted the theory of separation of powers and checks and balances in their constitution to ensure rights, liberty and equality and to stop any probable abuse of power in governmental machinery. Separation of powers is the theory of Montesquieu who presented his ideas about government, laws, liberty, human rights, slavery, separation of powers, etc. He was against such political systems which could banish liberty, equality and human rights. Both ideas are associated to distribution, and division of powers and functions as well as to maintain balance of power among three institutions of government including legislature, executive and judiciary. The interrelationship between both ideas enhances the traditional, constitutional and democratic behaviors in America promoting supremacy of the institutions. To analyze the practical implementation of the abovementioned theories with special reference to the political setup of America during the given period, this study primarily focuses on qualitative data.*

**Key Words:** American Congress, Checks and Balances, Constitution of United States of America, Rule of Law, Separation of Powers

### Introduction

Political system of the USA is a unified platform in order to manipulate decision making behavior among different institution of the country. Its details may be subjective in both in good governance and political development. Separation of power refers to distribution and division of powers and functions among institutions which enable them to act independently. It was adopted to restrain power encroachment and ensure responsibilities upon various organs of the American state. 'Separation of powers' and 'checks and balances' are associated with each other. While, checks and balances is a mechanism which makes institutions more accountable and responsible. It refers to check the power of the associations of government to ensure duties, limits and independence. They develop cooperative relationship among different institutions of the government. Americans adopted theory of separation of powers and checks and balances in their political system to maintain relationship among institution of the country i.e. legislature, executive and judiciary having their distinct jurisdictions.

Checks and balances are the basic requirement of separation of powers for the provision of 'necessary constitutional means' and 'to prevent the monopoly of one branch over other branches'. It protects not only separation but also helps to establish legitimate authority through designed institutional manners. This type of political system shows combination of division-of-labor and checks and balances (The Founders' Constitution, 2014).

The Legislature in the United States is bicameral comprising of the House of Representatives wherein members are elected according to the population of the respective states and Senate having fixed membership from every state. Executive is commanded by the President who implements national laws and policies with the help of a cabinet and a body of civil servants. The judicial branch comprised of mainly the Supreme Court and other subordinate courts which interprets laws while arbitrating legal disputes.

All these three major organs of government also have the powers to maintain checks and balances upon each other in order to prevent misuse of authority by other administrative organs of the state. The governmental system of America provides an interesting insight into the successful working and application of the theory of separation of powers expounded by Montesquieu.

### **Theory of Separation of Powers**

Doctrines about division and distribution of powers have been discussed by many ancient and modern political thinkers of the world. The purpose of the philosophers is to explore the ways that elaborate how governments can be established and how can laws, liberties and equality be protected. Aristotle and Plato have presented the classifications of government and distribution of authorities among associations of the government. Jean Bodin, a political thinker of the 16th century, explored the power in theory of sovereignty in which the sovereign was responsible to exercise all powers. Further, major western and Muslim political philosophers preferred rule by one person (monarchy) and some were against it. For example, Montesquieu wanted the separation in power whereas Jean Bodin denied it. Montesquieu is considered a modern political thinker who presented the "theory of separation of power". He divided the power into three branches of government comprising of legislature, executive and judiciary; all of these should have checks and balances on each other. His theory influenced the constitutional makers of the USA hence they incorporated it into American Constitution (Hermon, 1964).

Separation of power in the writing of Montesquieu has outstripped the other contributors of the said theory as the former inducted new and distinct features to the doctrine which were missing from the previous writings e.g. he proposed a modified relationship of the judiciary with other organs of the state. His theory has influenced the constitutions of many countries throughout the world. He argues that the separation of the branches of government into three distinct institutions is the only way to avoid despotism, absolutism and arbitrary rule. The responsibilities and duties of the executive should be distinctly separated from the legislature; executive should only be placed in the hands of monarch. Legislature should be placed in the hands of public representatives which should meet frequently at the request of the Monarch,

but not constantly. He argued that the denial of this ideal system would lead to the end of liberty and establishment of despotic government. He, however, advocated the protection of a constitutionally limited monarchy and separate institution of the representatives' body (Nugent, 1752).

The theory of separation of powers stresses that the major institutions of state should be functioning freely and therefore, no individual should have the right and power to interfere these offices; and each institution of the state should be separated from other institutions in exercise of their powers and duties. The intentional cause of the said separation is the protection of fundamental rights and laws in order to safeguard the individual liberty and to guard against tyranny.

### **Theory of Checks and Balances**

Checks and balances refer to governmental affairs where power of the one branch is checked by the other branches officially. It modifies the doctrine of separation of powers and may be operated both in parliamentary and presidential form of government. The Ancient history shows that absolute executive authority was vested to king or monarch. But presently, doctrine of checks and balances is the supreme principle of constitution to maintain balance of power in public institutions. Checks and balances is a mechanism that is designed to limit the power of a single individual and institution. The main objective behind that is to develop harmonious interrelationship among institutions and state to counter the abuse of power, corruption and oppression. Moreover, it is associated with institutional legitimacy to run governmental affairs and legal ideas smoothly.

In federalist papers, Madison described that power had an encroaching nature. It should be better to maintain balance between three different organs of the government, which could restrict abusive use of power. He argued that provision of security towards governmental branches should be made mandatory with the help of the constitutional means so that the various branched could work within their respective domain as provided by the constitution. The doctrine of checks and balances ensures that each organ had ability to resist invasion from other organs. Madison stated that personal motives develop feeling of jealousy, authoritative and abusive nature of the application of authority. So, the principle of checks and balances provides each organ of the government an ability to limit the application of an extensive power influencing the jurisdiction of the other branches of the government (Hamilton, Jay, & Madison, 1864).

### **Incorporation of 'Separation of Powers' and 'Checks and Balances' in US Political System**

United States of America (USA) is one of those democratic federations that have a deep-rooted system of separation of powers and checks and balances. Political entity of USA is entirely different from other systems of the world. The evolutionary institution (Congress) of USA is the consultative body having authority applicable to both internal and external matters of the nation. While, executive power (President) is characterized to remove any member of his cabinet without the consent of law making body as well as the sole power of vetoing the acts of congress. The judiciary of USA has distinct character in the form of judicial review which is activated by the

Courts to restrict encroachment of tyranny and authoritative behavior of other institutions (McDonald & Forrest, 2018).

Traditionally, the functions of federal government are separated among three independent and legal organs of the country. The supreme executive authority is vested within the office of the President looking after domestic and foreign affairs as a sole head of government and head of state. The law-making responsibilities are vested to Congress further comprising two organs i.e. Senate and House of Representatives. The Supreme Court resolves conflict between federal and states' governments as well as among states. It also interprets law, constitution, safe guard fundamental rights and democracy in the political system of USA (Peltason, 2004).

The main objective of the framers of the constitution was to restrict the rise of tyranny in America through transparent division of powers. Therefore, the framers smartly developed a system that provides specific level of power to permit each institution to influence the action of the others. The core idea of doctrine of checks and balances is that no unit of government should be able to get too far out of control without being put in check by the others. For example, if President acts like a despotic king, he can be impeached by Congress. Similarly, if Congress tries to pass an unconstitutional law, it will be overturned by Supreme Court. The constitution makers contemplated the key role of president in the time of war, like declaration of war and deployment of troops for other country. However, the president was made bound to take approval of Senate to declare a war against external aggression. Thus, the said act not only made president powerful but also involved Congress to exercise the right to declare war (Division of Powers, 2016).

### **Practical Implementation of 'Separation of Power' and 'Checks and Balances' in USA (2004-2012)**

Checks and balances and separation of powers are the most essential characters of the political system of America. It neglects abusive and rigid behavior and autocrat manner in the functions of government under the shadow of constitution. The all fundamental principles of constitution and welfare of state are protected and promoted by both ideas. Moreover, accountability, answerability and responsibility are secured by the combination of both. The constitution makers cleverly designed such a system which has developed the transparent and responsible exercise of authority.

### **Presidential Role**

Historically, both the abovementioned ideas work under the protection and provision of the Constitution of the USA; where president has a sole power in major decision making process. On the other hand upper house of the Congress (Senate) has a certain type of authority to limit the power of the president and to maintain balance of power (Cavalli, 2013).

### **President as Chief of Defense**

Immediately after 9/11, the power of the president was enhanced in the wake of war on terror. During the time of terrorist threat, the then president George W. Bush and his administration used its defense power neglecting congressional consent to declare war. President Bush argued that Congress has no right to check the war power of the chief executive. President Bush vetoed several types of congressional actions in 2007, including Iraq Supplemental Appropriations Bill, that demanded president to withdraw American troops from Iraq; but the president denied his assent to the said bill (Elsea, Garcia, & Nicola, 2008).

On the other hand, the significant manifestation of executive power can be traced when president Obama, without formal approval of the congress, decided to intervene in Libya and later in Syria. Moreover, he, unilaterally, ordered, i.e. without the consent of Congress to apply the use of force, that the U.S. forces would participate in those operations that were conducted by the United Nations Security Councils (UNSC). The said act was also a violation of the terms of War Powers Act (WPA), 1973, which required at least congressional notification regarding troops' commitments and cooperative permission within 60 days of any such involvement (Masters, 2017).

### **Executive Power**

Historically, directives of the presidents are used as a primary tool of the administration relying on separation of power. In contemporary US institutional relations, increasing arbitrary implementation of presidential executive power is the basic problem which is the result of massive reliance upon the executive orders with a motive to curtail power of the congress. When the war against terror started after 9/11, President Bush claimed that he was authorized to use military power as chief commander of armed forces to preserve national security and national interest of the country (Branum, 2002).

President Barack Obama issued 277 executive orders during his two tenures as President of the USA whereas President George W. Bush issued 291 executive orders during his term of eight years. President Obama issued executive orders mainly about domestic policies; he issued 37 out of 39 executive orders about domestic policy and only 2 related to foreign policy (Wit, 2015) & (Muzaffar, et.al. 2018).

Although the majority of the executive orders issued by the both President Bush and President Obama were domestic in nature related policies and regulations in their own country. In January 2010, President Obama issued a Presidential Moratorium against Yemeni detainees of Al Qaeda; they tried to set off a bomb hidden at Detroit-bound airline on December 2009 (Alexander, 2012). The Senate has passed a bipartisan immigration bill, but Republicans in House of Representatives have blocked it. They made statement that illegal immigrants can cause security threat to home country. On that pretext, president Obama issued executive order about immigration policy to counter congressional actions (Philbert-Ives, 2018).

## **Emergency Powers**

Theoretically, political scientists conceived that the office of president is weak to take his decision freely. But practically, the power of the president has increased as chief executive and commander to proclaim actions to make historic policy choices as well as appointing and dismissing high officials. Thus, the administrative and regulatory processes are recognized and determined by the so-called proclamations (Waldron, 2013).

During his electoral campaign, President Obama frequently criticized the Bush administration for failing to understand security challenges. But during his own term of eight years in the presidency, his administration has regularly put security programs managed in the wake of the 9/11 attacks compromising over the constitutionally protected rights and liberties of American citizens (Masters, 2017).

## **Power related to Foreign Affairs**

The Constitution of United States has deliberately divided duty between the executive and the legislative branches in order to preserve the unity as well interests of the federation. It is like a judicious move aimed at preventing tyranny and encouraging responsive, vigilant and responsible institutions. In foreign relations President Bush acted sharply against terrorists after the 9/11 attacks and war with Iraq was initiated in 2003 without approval of the congress. President Bush decided to deploy forces in Panama without approval of the Congress. In addition to Afghanistan and Iraq, U.S. military forces have been in action in Yemen, Syria, Libya and Philippines. Despite that, neither President George Bush nor President Barack Obama requested permission from the Congress for the continued use of the U.S. military in other countries (Guzzini, 2002).

## **Role of Congress**

Historically, Congress has a rich tradition of keenly observing and checking of the presidential actions related to national security and domestic affairs. Soon after the start of war on terror, US Congress sharply demanded to make president answerable to the Congress and to provide full information about his counterterrorism policy. Congress always has exercised checks on executive affairs while reviewing executive actions. The former president Barak Obama's administration has been restricted many times by the Congress with the help of invocation of the application of the doctrine of checks and balances; the law making body often challenged his policies under the rules and regulation as provided by the constitution. It has raised many questions upon the actions of the executive branch and demanding a careful application of the administrative responsibilities. Also, the Senate Foreign Relations Committee has been empowered to suggest changes or recommend modifications before granting its approval regarding foreign affairs (Schumer, 2007).

Senate and the House of Representatives served their responsibilities to make government more responsible and transparent. It has helped to depoliticize many issues, avoid judicial rebuke, and promote national interests. In era of President Bush; Senators of the USA have adopted more aggressive and questionable behavior toward

executive. In November 2005, the Democrat senators initiated discussion about American invasion on Iraq and failure of the Intelligence Committees concerning to declare war. As a result of that initiative, more than 153 members have succeeded to make executive branch accountable. Moreover, both parties including Democrats and Republicans joined hands in the Congress to give tough time to administration. Thus, Congress has started to behave more aggressively to oversight administrative actions (Schumer, 2007).

Besides, Congress also remained silent about numerous abuses of power made by the executive, for instance, American detention facilities in Iraq and allegations of abusive treatment of detainees at Guantanamo Bay. But Republican Senator John McCain intervened and presented an amendment in the Senate of United States which is known as “McCain Amendment” promised to forbidden inhumane treatment of prisoners held by the United States, regardless of where they are located, and confined interrogation method to those specified in the Army Field Manual. He introduced amendment in the Senate on October 3, 2005; it quickly got widespread support passing two days later securing 90 votes in favor and only 9 against (Luban & Newell, 2019).

In June 2009, Congress of the America adopted the first series of legislative measure to check the power of the executive branch that the prisoners of war against terror transferred to other countries should be sent back to America for the trial. Moreover, the Congress has full financial power whereas the president cannot spend money without congressional approval. For instance, in 2012, when President Barack Obama issued an executive order to close the prison at Guantanamo Bay, the legislative assembly of the country acted against it and blocked the consumption of US finances for the said transfer. Moreover, in 2012, National Defense Authorizations Bill was challenged by the congress and passed in amended form in January 2013. In that process Congress limited the budget of the military on transferring prisoners from Guantanamo jail. In another example, roughly twenty percent of the federal budget was approved and allocated by the Congress to internal defense and international defense related activates and only one percent for the foreign aid (Garvey & Sheffner, 2019).

The annual appropriations process permits congressional committees to review in detail the budgetary affairs related to military and foreign matters. Even, every year, Congress has to assign and allocate money for federal affairs related to defense and international affairs. Congress has also right of investigation related to spending of money. For instance, in time of Obama administration, Congress repeatedly raised questions over spending funds to transfer of detainees of Guantanamo Bay. It has exclusive power to raise questions and it acted as an investigating agency over foreign policy or national security concerns. It has inquired and raised questions regarding 9/11 attacks and money which was spend in foreign operations. It raised questions about the prisoners of Central Intelligence Agency (CIA), its interrogation programs, and the 2012 attack on U.S. diplomatic facilities in Benghazi over Libya (Masters, 2017).

## **Role of Judiciary**

Since American invasion in Afghanistan in 2001, many groups and individuals started to challenge the American administrative measures in the courts. The administration's policy on detainees was under attack in both superior and lower courts of America since 2004. The several types of cases were dealt by American superior judiciary and prosecuted which ensured the implementation of requirements of international law to the prisoners of war (Thomas, 2020).

There were numerous foreign nationals who had been arrested and captured in Afghanistan after American invasion in Afghanistan. They were being held at Guantanamo Bay; they petitioned for fair trial by their relatives and attorneys. They challenged their detention, arguing that they had not been fighting against the America. They highlighted the issue that they had not been formally charged with any illegal acts and they had not been permitted to meet with their legal counsel, and had not received access to a court or tribunal, and they sought access to counsel, freedom from interrogation, and release from custody under the writ of habeas corpus.

In *Hamdan vs. Rumsfeld* (2006), the Supreme Court observed against Bush presidency that his administration established military tribunals without congressional consent and later the Court decided that it is an unconstitutional action on the part of the executive (Julian, 2006).

Some critics argued that it is a non-serious behavior of the president towards Judiciary. Judiciary is a constitutional institution of the country protecting liberties of their citizens. It follows the constitutional codes and conducts and cannot take any decision which contradicted with the supreme law of the country. Chief justice Roberts who was targeted by the president Obama remarked that president adopted nontraditional behavior in his State of the Union address (Schweitzer, 2011).

## **Analysis of Political System of USA**

The mutual cooperation and collaboration among institutions develops the political stability and intensifies institutional development. Historically, both ideas in America are the products of constitutional makers in order to manipulate liberty, rights and better opportunities for the betterment of their citizens on the basis of equality. They wanted to establish a system in which natives should be empowered and local interests should be secured. Constitution of America ensures all fundamentals which promote rule of law and legitimacy through systematic distribution of powers and function and affairs of government. Judiciary is the watchdog to safeguard liberties, constitution and democracy while practicing and applying the power of judicial review. American congress is a unified institution which behaves collectively regarding the matters of national interests. Good governance prevails where transparency, openness, rule of law and equality are existed. In American federal form of government, these characteristic have been functioning smoothly. Justice demands fair and true implementations of laws which, in turn, guarantee free and just society as well as country. Both justice and equality are interlinked with each other which are the unique features of the constitution of the America and their organizations for betterment of the country. Moreover, political



development is concerned to democratic values, political tolerance and collective decision making behavior of the country which are present in America for the purpose of free, fair and accountable institutions. As a result, judiciary can declare the the actions of Congress and president null and void of which are contradictory to fundamental rights, constitution and democracy. Welfare state refers to socio-economic stability, prosperity and opportunities; American also set the precedent of social welfare having equal socio-economic rights under the constitution. The association between separation of power and checks and balances promote superiority and sovereignty of the Constitution. On the one hand, Montesquieu's theory advocates independent role of the three political organizations of the country whereas, on the other hand, checks and balances do not pose any threat to the independence of the separation of powers but protect it. For example, if president uses veto power, Congress has the right to override it. Similarly, Judiciary has the right to declare law null and void, but Congress can amend the Constitution. If power is concentrated into a single hand, citizens will not enjoy equal rights and government's policies will not fulfill their necessities; hence, they will behave aggressively and challenge the government which can be cause anarchy and uncertainty in the whole country. It will, in turn, create clash among institutions and collapse the state.

### **Conclusion**

It is concluded that, in the political system of the US, cooperative and vigilant behaviors exhibited within the institutions of the government, are the sign of constitutional and political development. The true implementation of both the doctrines under discussion protects the rights, liberties and equality of its citizens in a true sense. Traditionally, separation of powers is seen with distribution of power among associations of government but it is associated with checks and balances targeting encroaching nature of power, curtailing tyranny and despotic mindset. So, political system of America is the cluster of constitutional bindings, traditions, precedents and evolutionary development which developed the America and converted its polity into free, fair and just state protecting all fundamentals. Both ideologies should be applied to every country so that to secure political, constitutional and democratic development in order to improve more welfare as well as the prosperity of institutions and country.

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