Department of Political Science

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Myths and realities of check and balance in sustaining democracy

- a case study of the American constitution

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Abstract

Scholars, philosophers, politicians, and citizens alike have been fascinated, since their first implementation in old Athens, with the conceptualisation of separation of powers principle, and the checks and balances mechanisms.

Through a case study of the US constitution, this essay analyzes how the separation of powers principle and checks and balances mechanisms, with regards to foreign policy, have been implemented and constitutionalised in the US constitution. Further, this analysis will look at the crucial role of the executive, legislative, and judiciary branches, and their cause and effect on the separation of powers principle, and the check and balance mechanisms within the framework of the US constitution.

Through the analysis of several cases, pertaining to foreign policy, brought before the U.S. Supreme Court a clear pattern has emerged showing that the judiciary has been deferent and on vague legal bases upheld the executive branches decisions. This has transpired for a long period of time and over a wide variety of cases. Only under recent years has it commenced to uphold its mandate of judicial review, thus defending the delicate balance of the constitution.

Key words: separation of powers, checks and balances, democracy, constitution, judiciary, executive, legislative.

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1 Introduction

The areas of democracy, constitutional engineering, and constitutionalism are classic subjects of political science that have, in the last three decades, become increasingly interesting within both the academic community and the newer nations that are engineering a constitutional democracy.

At first, nations looked at other nations they saw as “role models,” (e.g. Nigerian studies of the U.S. constitution and the *Federalist Papers)*. However, recently, countries involved in constitutional engineering have turned more of their attention to countries that have faced similar issues e.g. diverse populations, ethnic and religious divisions, cultural and social patterns etc.[1]

This essay will present a scholarly analysis on how the check and balance mechanisms has been implemented within the scope of the separation of powers principle. This essay will also look at how this mechanism and principle can be associated with aspects pertaining to foreign policy.

The concept of separation of powers and checks and balances existed, throughout the counsel and assembly, in old democratic Athens. The idea of concentration of powers in one person or one institution increased political dangers to the council, the assembly, and the citizens. Although this latter fear of concentration of power leading to political danger is not defined in the same sense as today, the symbolisms have been and ever will be an intrinsic value. The separation of powers as we know it today is connected to the classical doctrine of liberal politics identified by Montesquieu, Rousseau, Locke and others.

To uphold the constitution is to uphold the individual political liberty of each citizen[2]. Thus it is the writer’s opinion that the academic community should have the responsibility to objectively and critically analyse how various constitutions are upheld, both in general and specific cases.

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[1] Reynolds, Andrew (ed.), 2002. The Architecture of Democracy. Constitutional Design, Conflict Management, and Democracy. Oxford & New York: Oxford University Press. Pp. 15.
[2] Gwyn, William B. The meaning of the separation of powers, 1965. Pp. 100.

With justice it can be argued that the constitution of a nation must be a living document, and if adaptations are required they should be carried out within the framework of the constitutional mandate.

1.1 Purpose and the issue

Due to the leading role and example the U.S. constitution is for many newer nations in their pursuit of democracy, I found that a study analysing the implementation of separation of powers and check and balance mechanisms, would show and further help them from any potential difficulties.

The purpose of this essay is threefold. First, to study how the principle of separation of powers has been sustained and reflected on foreign policy. In connection, this essay will discuss whether this implementation has been sustained in accordance with the constitutional mandate or if there has been a shift of power.

Second, to analyze how the checks and balances, as a constitutional mechanism, has been enacted and who are the main actors? Furthermore, it will be discussed how actively engaged and informed they should be in order to consistently and comprehensively carry out the constitutional mandate assigned.

Third, the need to inform citizens of these mandates and rights, within the US constitution, in order for them to further hold their respective politicians responsible for their actions[3], within the scope of the Constitution. The need for the aforementioned cause is explicitly reflected in the oath of affirmation that every elected president is to pronounce[4].

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[5]

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[3] It should be noted that lack of action is also a form of action and as the reader will see there has been plenty of that.
[4] This is not a reflection upon the shortcomings of citizens in general. It is unrealistic to believe that the average citizen has the time to devote 10-15 weeks of fulltime studies that are required to overview the needed material for one area.
[5] U.S. Constitution: Article II. § 1.

The issue at hand is to consider some consequences on foreign policy when the mechanism of checks and balances and the principle of separation of powers are not being upheld or are in contradiction with each other, and therefore looks upon its myths and realities.

1.2 Method

This essay is based on a case study, meaning that the researcher chooses to focus on one specific case, namely the U.S. constitution, without comparing it to other constitutions. As with all case studies this leads to the inability to generalize too broadly in the conclusions since only one particular case has been analyzed6.

Another shortcoming is that it cannot be made comparisons to other constitutions and their implementations of the above mentioned principle and mechanism.

However, since the purpose of this essay is not to draw conclusions that span all or many constitutional systems, the author has found that to be a reasonable concession.

The advantage with this type of case study format is the ability to show emerging patterns. It also has the advantage of being "open" in the terms that the researcher can change the direction of the essay without it having unforeseen consequences[7].

As part of the methodology I have taken the original text of the constitution (1789), regarding separation of powers principle and the mechanism for checks and balances when applicable to foreign policy purposes. I have also used information contained in the *Federalist Papers*. These documents will be my point of departure for my analysis.

6 Esaiasson, Peter, et al, 2003. Metodpraktikan: Konsten att studera samhälle, individ och marknad. Stockholm: Norstedts juridik. Esaiasson m.fl. pp.146.
7 Esaiasson, Peter, et al, 2003. Metodpraktikan: Konsten att studera samhälle, individ och marknad. Stockholm: Norstedts juridik. Esaiasson m.fl. Pp. 122.

1.3 Delimitations

Due to time constraint, unforeseen circumstances, and available material, certain delimitations have taken place.

It would be very interesting to view a study that covers the interaction of all three branches, and further how they uphold and maintain the separation of powers principle and check and balance mechanisms in relation to foreign policy. However, since no comprehensive study has been accessible that analyses, in-depth, the aforementiond, this essay has been forced to focus primary on the role of the judiciary branch vis-à-vis the executive and the legislative.

1.4 Material

A combination of both primary and secondary material has been used. Primary material in the forms of the U.S. constitution, the *Federalist Papers* and the U.S. Supreme Court cases where the opinions has been easily accessible. Invaluable to the analysis of the constitution has been the Federalist Papers, which topic by topic, discuss the decisions and the values that are the foundation upon which the constitution rests. The advantage of being able to use primary material in the form of the constitution and Federalist Papers, which are from the same time and are both verifying the context of each other8, gives an amazing opportunity to understand the underlying thoughts and motives for the different formulations in the constitution.

Secondary materials consisting of essays, course materials, and subject specific books. All material is on an academic level. See reference list.

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[8] Esaiasson, Peter, et al, 2003. Metodpraktikan: Konsten att studera samhälle, individ och marknad. Stockholm: Norstedts juridik. Chapter 15. Thus meets the requirement of being authentic, independent, contemporaneousness and tendentiousness.

There appears to be few studies that are systematically carrying out the analysis of the potential contradictions between the separation of powers principle and the mechanism for checks and balances.

Nonetheless, considering the virtually endless numbers of written material dealing with the U.S. constitution, there is a surprisingly small number small number viewing the process-where it started out and where it is going. There also appears to be few studies that are systematically carrying out the analysis of the potential contradictions between the separation of powers principle and the mechanism for check and balance.

However, the only work that I was able to find, that gave me a well-balanced analysis of the process was a essay written by Professor David Gray Adler9. This work has served as a mentor in educating me to critically analyze court rulings, the role of the constitution, and the courts pertaining to foreign affairs

With regards to the latest development within this field, there are a lack of essays accessible; thus I have used two articles written in the respected New York Review of Books, (practically resulting in that the information cannot be verified from multiple academic resources as of to day). I also feel that the requirement of material review and verification as stated in Metodpraktikan10 has been fulfilled, where they state that out of a non-tendentious material the main arguments can be accepted.

1.5 Disposition

In the next chapter certain key theoretical terms will be analysed and the constitutional powers as outlined in the Constitution (chapter 2). Followed by the main analysis of the implementation of the constitution with regards to foreign policy and also how the three branches have acted (chapter 3) and afterward followed by conclusion (chapter 4).

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[9] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*

[10] Esaiasson, Peter, et al, 2003. Metodpraktikan: Konsten att studera samhälle, individ och marknad. Stockholm: Norstedts juridik. pp. 314 (table).

2 Theory

2.1 Constitutional history

As one might assume, the word *constitution* and its frequent usage did not derive from the Latin term *consititio,*[11] which meant "enactment." [12] The newer adaptation of the word and its meaning came after that the word has been left virtually unused and thus became "available" for new usage. Which lead to the newer adaptation of the word constitution and its newer meaning.

Before referring upon the meaning of the word constitution, it is important to note the "emotive properties" of the words. The word constitution has an implicit positive meaning to most people which is something that the politicians use. They use the positive associations that we hold for the word, whilst in reality the emotional aspects that the word denotes becomes something entirely else13.

"the "thing," comes to be a completely different thing."14

It is thus important to notice the emotional associations with the words since they either consciously or subconsciously affect our disposition towards the constitution.

[11] Ibid. The term *constitutio*, later *constitutiones*, meant at that time a "collection of laws enacted by the Sovereign; and subsecquently the Church".
[12] Sartori, Giovanni. Constitutionalism: A preliminary discussion. Pp. 1.
[13] Sartori, Giovanni. Constitutionalism: A preliminary discussion
[14] Sartori, Giovanni. Constitutionalism: A preliminary discussion. Pp. 3. Sartori demonstrates this skilfully in his example of the word "politics" which during the Middle Ages used as "*dominium politicum*" contrasting "*dominium regale*", meaning that the government derived it legitimacy from the people – the "*polítes* the inhabitant of the *polis*" - thus having positive emotional associations whilst the very same word today means those that "are entitled to arrest us". Sartori concludes with "Let us hope that "constitution" may not have a similar destiny." I agree and thus the importance of analysis of how the implementations take place, this assures the safeguarding of the word and its emotional associations.

2.1.1 Defining it

Much can be derived from the definitions below:

"Constitution: the mode in which a state or society is organized; especially the manner in which sovereign power is distributed" [15]

"The basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it **b :** a written instrument embodying the rules of a political or social organization"[16]

Loewenstein[17] suggests that there are three different types of constitutions; (i) *garantiste*[18] constitution, (ii) nominal constitution and (iii) fake constitution. The first is what we would describe as a "normal" constitution where the constitution is being upheld. The nominal constitution are organisational constitutions in that they organise the political power but does "not restrain the excersise of politcal power in a given polity"[19]. The last type of constitutions represent the ones where the constitution appears to be "real" constitutions while they in fact disregard, for example, Bill of Rights, due process, rule of law etc.

2.2 Purpose of a constitution

Montesquieu stated "The political liberty of a citizen is the peace of mind arising from the opinion each person has of his security; and in order to have this liberty, it is necessary that the government be such that one citizen need not fear another"[20].

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[15] Merriam-Webster Online Dictionary
[16] Ibid.
[17] According to Sartori in Constitutionalism: A preliminary discussion. pp. 10.
[18] Derived from the French and Italian term *garantisme*, meaning guarantees of some kind (Bill of Rights, the rule of law, judicial review, right to due process etc). From According to Sartori in Constitutionalism: A preliminary discussion. pp. 10.
[19] Ibid. pp. 10.
[20] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*

A constitution creates security for the citizens. It sets out the role of the different powers; the different branches that should have those powers; how elections should take place; the rights of the citizens and the responsibilities of them, etc. It regulates the primary functions of a nation and also creates the mechanisms for the citizens to be able to exercise influence and hold elected politicians responsible. Thus, it is the fundamental law of a nation.

For the United States the importance of upholding the constitution is even more prominent, due to the fact the nation is considered to hold a strong constitutional position.21 It is essential to note that the original text of the US constitution now extends to the important rulings made by the US Supreme Court, in sustaining laws and regulating mandates (something utilized more so in the US than in other nations).

Upholding the constitutional principles and mandates is a task for every government; quite so in the case of the US, thus reinforcing its symbolism. To uphold the constitution is to uphold the individual political liberty of each citizen22.

2.3 Separation of powers

"Division of the legislative, executive, and judicial functions of government among separate and independent bodies. Such a separation, it has been argued, limits the possibility of arbitrary excesses by government, since the sanction of all three branches is required for the making, executing, and administering of laws."23

"Separation of powers is a normative prerogative of the constitution, aiming to avoid the dangers of abuse or excessive political power of one branch above the others and or above the citizens needs and or the state fundamental interests'"24

[21] Karvonen Lauri, Statskick – Att bygga demokrati, pp. 153.
[22] Gwyn, William B. The meaning of the separation of powers, 1965. Pp. 100. Builds on the argumentation of Montesquieu which can be found at here.
[23] Encyclopedia Britannica. Academic Version. "separation of power"
[24] M. Duenas year 2000

The well propagated symbolism of the "Washington" model as characterized by its separation of powers between the executive branch and the legislative branch.

What that separation of powers has meant has changed over the years from "a government of separated institutions sharing power"25 to, "a government of separated institutions competing for shared power." Sartori argues that by observing the difference between "separation consists of separating the executive from the parliamentary support, whereas power sharing means that the executive stands on, and falls without, the support of parliament"[26]

Based on these criteria's, the United States Constitution consists of a separation of powers. This means that the President cannot dissolve the Legislative branch, and that the Legislative branch cannot interfere in the *interna corporis* of the executive branch. It "especially cannot dismiss (impeachment aside) a president";[27] these are the governing principles of separations of power. Sartori argues that the defining attributes of the American, or Washington, model is not that it is a system of checks and balances (which it is) but that "the defining and central feature of the Washington model is an executive power that subsists in separateness – on its own right as an autonomous body."

2.4 The separation of powers under the US Constitution

Although the phrase separation of powers never appears directly in the U.S. Constitution, it is clearly implied in its wording: "All legislative Powers[28]"; are "vested in a Congress of the United States"[29], the "executive Power shall be vested in a President of the United States of America"[30] and finally "the judicial power[31]" is "be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.[32]"

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[25] Sartori Giovanni, Comparative Constitutional Engineering 2 ed. Pp. 86.
[26] Ibid. pp. 86.
[27] Ibid. pp. 87.

[28] U.S. Constitution Article I Section 1.
[29] U.S. Constitution Article I Section 1.
[30] U.S. Constitution Article II Section 1.
[31] U.S. Constitution Article III Section 1.
[32] U.S. Constitution Article III Section 1.

In addition, listed below are the constitutional mandates that are of interest to this essay. These will pertain, in one way or another, to the separation of powers principle and checks and balance mechanisms and their relation to foreign policy.

2.4.1 The Legislative

Regarding the legislative function in Article 1, Section 1:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[33]

More specifically Article 1 states this mandate:

ARTICLE I

Section 7

> All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills....

Section 8.

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States
>
> To regulate Commerce with foreign Nations...
>
> To establish an uniform Rule of Naturalization...
>
> To coin Money, regulate the Value thereof, and of foreign Coin...
>
> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

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[33] http://usinfo.state.gov/usa/infousa/politics/legbranc/const2.htm#I1

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
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> To raise and support Armies, ...To provide and maintain a Navy;...
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel invasions;....
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and a other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof...

Section 9

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law;....

2.4.2 The Judiciary

The Constitution does not specifically outline the courts powers on matters pertaining to foreign affairs. However, it was not necessary to do so since it had clearly divided the powers between the legislative and executive. Albeit the Constitution does not explicitly say so, the Framers of the constitution had the clear desire for the courts to act as the "judicial review". This implied the protection of the individual rights of the citizens and also "maintaining a living Constitution whose broad provisions are continually applied to complicated new situations."[34]

The different state courts played such a role (of judicial review) previous to the framing of the constitution. It was the intention of the Framers Madison and

[34] http://www.supremecourtus.gov/about/constitutional.pdf

Hamilton, that the Supreme Court should have such a role for the U.S. at large.[35] The following can be read in *Federalist Papers* 78 regarding the role of the court.

> “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”
> “Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.”

2.4.3 The Executive

ARTICLE II

Section 1

> The Executive Power shall be vested in a President of the United States....

Section 2

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;....

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[35] *Federalist Papers 78.*

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Section 3

. ...he shall receive Ambassadors and other public Mnisters; he shall take Care that the Laws be faithfullly executed, and shall Commission all the Officers of the United States . ....

3 Present situation

Although the Constitution does not in detail outline the role of the judiciary branch of government in relation to issues regarding foreign affairs, it does, however, specifically address matters pertaining to national interest and the performance of national individuals and their private enterprises in times of peace as well as in times of war. In this way, the Constitution opens a wide range of options for judiciary ruling.

3.1 The Judiciary

There are five different areas concerning the judicial branch of government that I wish to address in this section. First, I will discuss briefly the implications of the Curtiss-Wright case regarding arms sales. Second, executive agreements will be addressed. Third, I will review travel cases. Fourth, a brief discussion of the political question doctrine will follow, and finally, I will address treaty termination. Through these five areas of discussion concerning the judicial branch, I will present the judiciary's disposition towards the constitution and in relation to the executive branch, and I will also touch upon the implications of the judiciary's rulings.

3.1.1 Arms deals

The 1936 case of the United States v. Curtiss-Wright Export Corp. became the defining moment of the judiciary's major contribution to the growing power of the executive branch. The Curtis-Wright case dealt with the constitutionality of the executive branch (the president) stopping arms sales to two countries, Bolivia and Paraguay, involved in an armed conflict in Chaco. In the ruling opinion by the Supreme Court in this case, Justice Sutherland wrote that the president is the "sole organ of foreign affairs". Despite the fact that the Curtiss-Wright case only specifically addressed the issue of the armed conflict in Chaco, the language used in the ruling of the justices had a far reaching impact on the powers of the executive branch of government. The far reaching impact of the language of the ruling in this case is well illustrated further in Justice Sutherland's non-confining remarks wherein he created the idea that "authority in foreign affairs was

essentially an executive power"36 through stating the following in the courts ruling:

"...as the very delicate, plenary, and executive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as basis for its exercise an act of Congress."[37]

This language of this ruling was an expansion upon a speech by John Marshall in 1800, which defended the presidents decision to surrender a British deserter to the British Officials. In this speech, John Marshall noted "The President is the sole organ of the nation in its external relations…Of consequence the demand of a foreign nation can only be made on him"[38]. This case in 1800 involved the British deserter Jonathan Robbins who was surrendered to the British in accordance with the *Jay Treaty* after British Officials had made an official demand upon the United States. This particular demand at that time was specifically answered by the President[39]. It is very important to note that Marshall did not intend to in any way to advance the idea that the President through his constitutional powers become a spokesperson of the United States by formulating and/or developing policy[40]. The role of the President had been been confirmed in 1793 by the that time Secretary of State, Thomas Jefferson, and had not since that time been challenged.[41] The remarks of Justice Sutherland, however, in the *Curtis-Wright* case redefined the role of the president by misrepresenting the Marshallian "sole-organ doctrine" and thus granted the President powers that are far beyond the ones stated in the Constitution. Regarding this misrepresentation, Allan McDougal and David Riesman observed that this redefinition of the role of the President confused the "organ" with the "organ grinder"[42] and undermined the constitutional design for dividing the separation of powers regarding foreign policy.

The many references to the *Curtis-Wright* case that followed the initial ruling illustrated clearly the importance and far reaching impact of this ruling.[43]. Adler

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[36] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*. Page 160.
[37] http://laws.findlaw.com/us/299/304.html
[38] Annals of Congress (1800), 10:613-614. http://memory.loc.gov/ll/llac/010/0300/03050613.tif
[39] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*. Page 160.
[40] Also confirmed by Professor Edward S. Corwin who concluded that "Clearly, what Marshall had foremost in mind was simply the President's role as instrument of communication with other governments." David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*. Page 160.
[41] Ibid. pp 160.
[42] Ibid. pp.160.
[43] *Regan v. Wald*, 468 U.S. 243 (1984); *Haig v. Agee*, 453 U.S. 280 (1981); *Dames and Moore v. Reagan*, 453 U.S. 654 (1981); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Zemel v. Rusk*, 381 U.S. 1 (1965); *United States v. Pink*, 315 U.S. 552 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

described this far reaching impact as “court positivism,” which described how a few landmark cases are given such disproportionate importance. Furthermore, Adler quoted Professor Gerhard Casper:

“It has also the paradoxical effect of assigning a disproportionate importance to the few ‘legal’ precedents that do exist. Absent the continuous consideration and reconsideration of rules and principles, a few oracle have led to the emergence of a constitutional mythology that does not bear close analysis”[44]

Based on the available material that I have very carefully reviewed, I am inclined to agree with above stated conclusion, and it is my opinion that with regards to the separation of powers, the statement made by Justice Sutherland is not in consistency with the U.S. constitution[45] Furthermore, regarding the original meaning within the U.S. Constitution, Hamilton writes the following regarding the power the executive branch of governement in the area of foreign affairs:

“The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.”[46]

3.1.2 Executive agreements

The executive branch of goverenement's right to make agreements was further redefined in the case of *United States v. Belmont*. In this case, Justice Sutherland in writing the opinion of the court, argued that the "sole-organ" doctrine and the "recognition power" of the President did not have to be carried out in consultation with the Senate.

“Recognition power” is derived from Article II, section 3 of the Constitution, which states that the President “receives Ambassadors and other public ministers.” The simpleness of this definition clearly defines what the framers of

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[44] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*. Page 161.
[45] In Article I Congress derives exclusive powers to regulate foreign commerce and to initiate all hostilities on behalf of Unites States. In Article II the president *shares* the power to make treaties and appoint ambassadors with the senate. There are only two power that are exclusive to the president, see Chapter 8.3.
[46] *Federalist Papers 75*

the Constitution had in mind regarding the powers of the President in this case. *Federalist Papers 69* states the following:

"The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor."

As can be appreciated here, there is no unusual policy making or governing power to be recognised as part of the office of the President. The President is merely acting as a representative of the United States with no powers whatsoever pertaining to foreign policy[47]. One may also note in the language mentioned above that the President does not even hold the power or authority to reject foreign ministers. The 'function' of the President in relation to foreign ambassadors and public ministers should not under any circumstance be confused with power. The constitution is clear when it states that the President shall "receive ambassadors." This clearly is something that the President should do, and this responsibility has no accompanying powers[48].

A careful review the Belmont case illustrates that the original meaning of the Constitution has been redefined to allow the President to have extensive powers beyond the scope of the framers intentions. In this regard, *Federalist Paper 75* states:

"The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States." – *Federalist Paper 75*

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[47] Professor Louis Henkin has observed that "receiveing ambassadors" appears to be "a function rather than a 'power', a ceremony which in many countires is performed by a figurehead." E.g. the Swedish King holds this function.

[48] Henkin also observes that "while making treaties and appointing ambassadors are described as 'powers' of the president, receiving ambassadors is included in section 3, which does not speak in terms of power but lists things the President 'shall' or 'may do'." Henkin, *Foreign Affairs*, p. 41.

In the courts opinion of the above mentioned case, both the obvious twisting and undermining of the treaty structure and the underlying reasons for that arrangement, are discussed.

There are significant differences between treaties and executive agreements as reflected in Table 1 below:

Table 1.

Treaties	Executive Agreements
A treaty, as is evident from *Missouri v. Holland*, is like a constitutional amendment. It can deal with any subject appropriate to international negotiation.	An executive agreement is strictly limited. It can deal only with subjects especially delegated by Congress or, if made independently by the President, can deal only with normal powers vested in the commander-in-chief and principal diplomatic officer.
A treaty can do what Congress cannot. It confers legislative power on Congress (Missouri v. Holland).	An executive agreement cannot do what Congress cannot. It cannot confer on Congress powers of legislation it did not have before.
A treaty must be ratified to be binding, according to American practice	An executive agreement need not be ratified by the United States.
A treaty, as its name indicates, binds the United States for its duration. It cannot be repealed by act of Congress except for domestic purposes only. The international obligation remains binding.	An executive agreement, as its name indicates, "binds" only as long as it suits ***both*** sides. It morally "binds" only the signing Executive, not his successors. If they wish it to continue, it is by voluntary act. An executive agreement is subject to repeal by act of Congress domestically and internationally. Unilateral indication of desire to terminate suffices. Repeal of authorizing statute suffices.
A treaty has a special significance in constitutional law. It can repeal an act of Congress	An executive agreement is unmentioned in the Constitution and has grown only through the necessity of making agreements of a character not to warrant submission to the Senate. It can be repealed by Congress at any time, but cannot repeal an act of Congress. It can, of course, be nullified or abrogated by treaty, prior or subsequent.
. A treaty, by the Constitution, is the "supreme law of the land."	An executive agreement, with a few the exceptions as to contrary state law or when made pursuant to act of congress, is not supreme law of the land
Only a new treaty can alter or modify an	An executive agreement cannot alter or

earlier treaty.	modify a treaty.
A treaty is submitted to the Senate for formal consideration and consent, rejection, amendment, or reservations	An executive agreement is not "submitted" to Congress for consideration or for approval, rejection, amendment, or reservations. There is no procedure for subsequent approval, sanction, or ratification by Congress.
A treaty lasts, with unimportant exceptions, as long as its terms provide.	An executive agreement is terminable at any time at the unilateral wish of one of the parties. This is true even if it purports to run for a given number of years. No successor to the President is bound by the latter's agreement, although he may consent to permit an agreement to stand.
No secret treaty can be made by the United States. Treaties must be published.	An executive agreement invites secrecy, since the President can make it without notifying anybody. Several secret agreements are now known.

Source: Edwin M.Borchard. *American Government and Politics: Treaties and Executive Agreements.* The American Political Science Review, Vol. 40, No. 4. (Aug., 1946), pp. 729-739.

In the case of *United States v. Pink* (1942), the courts opinion written by Justice Douglas partly affirmed the courts position regarding sole-organ doctrine and the presidential recognition power. Justice Douglas, however, built his opinion on the tacit approval given by Congress to the President. In this case, Chief Justice Stone wrote in his dissent as concurred by Justice Roberts, “We are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment ungratified by the Senate”[49]

In ruling of the case of *United States v. Pink*, a definite shift of power occurred with regards to executive agreements. The Court advanced the power of the President, which some, including myself, hold to be nonexistent, at the expense of the constitutional power of the Senate. This advancement can further be appreciated in the ruling of the *Dames and Moore* case, wherein the Supreme Court sustained President Carter’s executive agreement with Iran securing American hostages. Justice Rehnquist, writing for the Court, “found statutory authorization for much of the agreement, but none for the critical leg – the

[49] *United States v. Pink*, at 249.

suspension of all claims pending against Iran in U.S. courts."[50] Justice Rehnquist argued that the Congress had approved of the President's actions in two ways. First, the "general tenor", in which the President had been given broad discretionary powers, and secondly, that the Congress in formulating the tenor that could be interpreted as an "invited" measure on independent presidential responsibility."

This tacit approval as described above is something that is yet again touched upon in *United States v. Midwest Oil Co.* wherein the Court upheld President Taft's decision to withdraw certain lands from lands that were offered. The Court upheld the President's decision not by arguing that the President had the authority to pick and choose lands under the 1897 Act, but by arguing that the congress was well aware of the actions of the President and had done nothing to stop these actions[51]. This particular argument in my opinion is invalid. The Court basically described that the Executive's abuse of power would be acceptable as long as Congress does not act against it. The important implications of gleaning congressional approval through the silence of Congress will be considered in the next chapter.

3.1.3 Passport

This sub-chapter will discuss the important subject of the issuances of passports, or "travel cases" and will delve into the different dispositions and arguments used by the Supreme Court in granting more and more power to the Secretary of State without a corresponding change in legislation by the Congress.

In the case of *Kent v. Dulles (1958)*, two persons who wanted to travel abroad were denied passports due to a departmental regulation which prohibited the issuance of passports to individuals who were either members of the Communist Party or who wanted to enhance the Communist movement. In this case, the Court upheld that the Fifth Amendment guaranteed the right to travel through the due process clause. Furthermore, Justice Douglas, speaking for the court, found that the freedom to travel was a liberty, protected by the Fifth Amendment, and that any restrictions towards individuals' rights to travel must be in congruence with

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[50] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*. Page 163.

[51] "long-continued practice, known to and acquiesced in by Congress" meant that the president had the "implied consent of the Congress". U S v. MIDWEST OIL CO, 236 U.S. 459 (1915)

the actual congressional lawmaking and thus narrowly construed.[52] Since this ruling, the Court has changed its disposition towards the Executive's power of issuing passports.

In *Zemel v. Rusk*, the Court sustained the current Administration's complete ban on travel to Cuba [53]. The Court opinion written by Justice Warren, argued that since the Congress had knowledge about the Administration's policy restricting travel to Cuba both in wartime and peacetime, this implied an implicit approval of the policy by Congress. On the other hand, Justice Goldberg in a dissenting opinion wrote that so called "precedents" were occurring in close proximity to war and thus became irrelevant since they then fell underneath the President's war powers. The Court in the *Zemel v. Rusk* case also invoked the *Curtiss-Wright* case saying that "the weightiest considerations of national security" allowed travel restraints to be enforced without violating due process.

In this case, it is most interesting to read Justice Hugo Black's very strong dissent in which he critiqued Justice Warren for allowing the executive to make laws, as follows:

"Since Article I, however, vests "All legislative Powers" in the Congress, and no language in the Constitution purports to vest any such power in the President, it necessarily follows, if the Constitution is to control, that the President is completely devoid of power to make laws regulating passports or anything else. And he has no more power to make laws by labeling them regulations than to do so by calling them laws. Like my Brother GOLDBERG, I cannot accept the Government's argument that the President has "inherent" power to make regulations governing the issuance and use of passports"[54]

This same argument was further embellished in *Haig v. Agee* where the Court "recognized enforcement as one method of establishing congressional awareness and approval of the regulation"[55]. Similarly in the ruling in *Dames and Moore v. Reagan*, the Court found approval for the Executive's conduct by nothing more then silence from the Congress in regards to well known and established practices put in place by the Administration. Chief Justice Burger stated that since the Congress in passing the Immigration and Nationality Act of 1952 or while amending the Passport Act in 1978 could not been unfamiliar with the

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[52] *Kent v. Dulles*
[53] *Zemel v. Kusk*
[54] Ibid.
[55] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*. Page 167.

“longstanding and officially promulgated view” that the President could revoke passports for reasons of national security. However, it is important to not that there had never been such official policy leading up to that time, and thus the findings of the Court at that time would seem to be in error[56].

These above mentioned rulings of the Court set a very dangerous precedent: that the State Department through its previously congressionally approved creation of regulations also implicitly had approval for regulations regarding passports. In *Kent*, the Court desired a clear pattern to be shown where the executive branch had acted in a certain way that although known by Congress had not been stopped. In *Haig*, the court went even further in not even requiring a clear pattern to be demonstrated. It is important to note here that the Congress in 1978 amended the Passport Act so that the President had no discretion to act in such a way except when United States was at war with specific countries or when there was imminent danger to Americans.

The Court, however, asserted superiority of national interest when writing “it is obvious and unarguable that no government interest is more compelling than the security of the nation.” Furthermore, the Court put forward that the executive branch could regulate foreign travel as desired as long as they stayed within the limits of due process, and it should be noted that the administration only needed to have a prompt revocation hearing and present a statement giving reasons for taking action.

3.1.4 The political question doctrine

“The principle under which the courts defer the determination of an issue to the political branches of government”[57] is, simply put, the courts concern for its role regarding the issue of separation of powers.

There are two leading, and very different, theories regarding the political question doctrine [58]. The “classical” view which Chief Justice John Marshall presented in *Cohen v. Virginia* where he writes “[the court] have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given.” Meaning that the court must first decide “whether the Constitution has

[56] Ibid. pp 167.
[57] Ibid.pp. 168.
[58] To avoid any possible confusion it should be noted that this is not a political doctrine for example the Carter Doctrine.

committed to another agency of government the autonomous determination of the issue"[59]. Thus the court must first decide if this is an issue of separation of powers before it can invoke the political question doctrine.

The second disposition claims that the court should "weigh the consequences that a particular case might have on the judiciary before addressing the merits of the claim".

Through invoking the political question doctrine the court has significantly strengthened the role of the President relating to foreign affairs. The following discussions of treaty termination and war powers will describe how the political question doctrine has strengthen the role of the President. We shall commence with *Goldwater v. Carter (1979).*

3.1.5 Treaty termination

In 1979, Senator Barry Goldwater challenged President Carter's right to unilaterally terminate the treaty between the U.S and Taiwan with regards to the Mutual Defence treaty adopted in 1954. The Court in its opinion, written by Justice Rehnquist, stated that since "the authority of the President in the conduct of foreign relations and the extent to which the senate or congress is authorized to negate the action of the President,"[60] this issue is a nonjusticiable political-question and not one that concerns the judicial branch of government.

Justice Brennan dissenting with the primary ruling of the Court stated:

"In stating that this case presents a nonjusticiable "political question," Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been " constitutional[ly] commit[ted].""[61]

In my opinion, Justice Brennan's writings clearly illustrate that the Court with its primary ruling in the Goldwater case misunderstood how the political doctrine should be "applied to matters of foreign relations".

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[59] David Gray Adler, *Foreign Policy and the Separation of Powers* from *Judging the Constitution*. Page 168.
[60] GOLDWATER v. CARTER , 444 U.S. 996 (1979)
[61] *Goldwater v. Carter*. Justice Brennan dissenting.

Justice Brennan on the other hand outlined well how the political doctrine should be applied, and he created a framework for this in his opinion in *Baker v. Carr*, as follows:

> “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.”[62]

Based on this framework as outlined by Justice Brennan for deciding if a case should be considered or not it is evident that this paticular case mentioned does not fall under these descriptions and should thus not have been dismissed. Justice Rehnquist in stating that the different branches “has resources available to protect its interests” avoids the main issue at hand which is the constitutionalism of the President's actions. In Powell v. McCormack the court found that it had the duty to decide “whether the action of [another] branch exceeds whatever authority has been committed”[63]

“For, as we pointed out in Baker v. Carr, supra, "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."”[64]

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[62] *Baker v. Carr*. Justice Brennan writing the opinion of the court.
[63] Powell v. McCormack
[64] Ibid.

If we look at the definition of a treaty as in table 1 above, "A treaty is submitted to the Senate for formal consideration and consent, rejection, amendment, or reservations" and also Article II §2 in the U.S. Constitution, it becomes clearly evident that the President with the **consent** of the Senate can terminate a treaty. There stands in my opinion no reason why the President should be granted power to terminate a treaty without the same consent as needed to engage in one since the implications of that action is not less then entering one. Federalist Paper 75 provides no grounds wherein can be found any opposition my opinion. On the contrary, in this paper support can be found for it:

"It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them. And whoever has maturely weighed the circumstances which must concur in the appointment of a President, will be satisfied that the office will always bid fair to be filled by men of such characters as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom, as on that of integrity."[65]

The result of the courts decision to not try the case has placed unconstitutional the executive branch's authority to terminate treaties.

3.1.6 The Bush Doctrine

Ever since the attack on Sept. 11, 2001, President Bush has claimed to have exclusive authority as the Commander in Chief to decide the "means and methods of engaging the enemy"66 and as a direct result the President has done whatever he has desired in the "War on Terror"67. In the Hamdan v. Rumsfeld (2006) case in which the Court decided upon the merits of the Administration's claim that President Bush could try foreign suspects in created military tribunals68 – the court refuted this claim and Justice Stevens wrote for the court:

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[65] Federalist No. 75 *The Treaty Making Power of the Executive*

[66] Department of Justice, "Legal Authorites Supporting the Activities of the National Security Agency Described by the President" (January 19, 2006) from www.cdt.org/security/nsa/20060116doj.pdf

[67]Due to time constraints I cannot fully divulge all the separate actions that have been taken. For a full and thorough analysis I recommend reading "*Why the Court Said No*" by David Cole printed in The New York Review of Books August 10, 2006.

[68] Hamdans lawyers challenged the legality of the tribunals claiming that the President lacked the authority to set courts up and if we look at Article III in the constitution we can clearly see that it is only the legislative branch

"in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[69]

The idea that the President must abide by the "Rule of law" is most definitely not a new concept. What gave this case special standing, however, is that it clearly challenged the executive branch's authority to do as it pleased in the "War on Terror". Combined with the ruling in the Hamdi v. Rumsfeld case wherein the Court also ruled against the executive branch, the Court has finally started to assert that the executive branch is not free to do as it pleases and must adhere to the "Rule of law". In regard to these issues concerning the authority of the executive branch and abiding by the "Rule of law," the following text issued by the Pentagon's 2005 National Defense Strategy becomes very interesting:

"Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism"[70]

As described in the discussion above, it is evident that the executive bransch has a very different opinion of the importance of upholding the law and due process. The real question at hand, however, is legitimacy – without adhering to the rule of law you have no legitimacy and have violated one of the principles that the Constitution was designed to protect, and thus, the risk of moving from a *garantiste*[71] constitution as defined by Loewensteins [72] becomes imminent.

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that has the exclusive authority to set up courts. They also argued that the structure and procedures of the tribunals was in violation with the Constitution, US Military law and the Geneva Conventions.
69 HAMDAN v. RUMSFELD 000 U.S. 05-184 (2006)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=05-184
[70] As quoted in *Why the Court Said No* by David Cole. David Cole is a Professor of Law at Georgetown and a frequent contributor to the New York Review of Books. He is the author of Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism.
[71] Derived from the French and Italian term *garantisme*, meaning guarantees of some kind (Bill of Rights, the rule of law, judicial review, right to due process etc).
[72] According to Sartori in Constitutionalism: A preliminary discussion. Pp. 10.

3.2 The Legislative

It is important to note and discuss that the Constitution grants Congress all legislative powers (see 2.5.1), including the regulatory framework on foreign affair issues. The role of Congress as an active body for the application of a checks and balance mechanism and the separation of powers principle is an integral part of the Senate, the House of Representatives, the specialized commissions and various other committees.

As mentioned in the delimitations section, there is, unfortunately, very little opportunity to analyse in-depth the different areas of legislative action in the face of the increasing executive power grab. I will, however, highlight a few important considerations that illustrate the implications of the unwillingness of the Court to take action when foreign policy is involved. The Court seems to feel that if the Congress does not act despite the fact that the legislative branch itself has at its disposal "formidable weapons"[73] to use as checks and balances, then the Court does not need to act. In this way, the Court shirks the responsibility and mandate given the courts [74]. Let us examine several potential possibilities for legislative inaction. There are several potential explanatory factors that interact with each other in a complex web of connections that well describe the way in which the legislative branch of government renders itself impotent in inaction.

One of these explanatory factors is found in the major difference in how the members of the two branches, referring to the legislative and executive are elected. The executive branch is elected by a national constituent, and it is thus naturally more involved in questions pertaining to national interests. On the other hand, the members of the congress are elected by their local constituents and have thus a greater focus upon the "geographically distributive effects of these

[73] Congress has formidable weapons at its disposal – the power of the purse and investigate resources far beyond those available in the Third Branch. But no gauntlet has been thrown down here by a majority of the Members of Congress. On the contrary, Congress expressly allowed the President to spend federal funds to support para-military operations in Nicaragua and "if the Congress chooses not to confront the President, it is not our task to do so." The last sentence is a quote from the ruling in *Goldwater v. Carr* expressed by Justice Powell. *Sanchez-Espinoza v. Reagan* Circuit Court Ruling found at http://homepage.ntlworld.com/jksonc/docs/sanchez-espinoza-770F2d202.html

[74] Plural 's' since this is referring both to the U.S. Supreme Court and the U.S. Courts of Appeals for the district of Columbia Circuit.

politics"[75]. In a study[76] from 1994 covering the years 1947-1990, it was shown that there had not been an increase in the conflicts between the executive branch and the members of the congress of the opposite party vs. conflicts between the members of congress of the same party. Another study showed that "The President enjoys inherent advantages over Congress in foreign policy, advantages that have been reinforced by various Supreme Court rulings. At the same time, the nature and structure of Congress frustrate congressional attempts to lead on foreign policy."77

The argument that the constituents have a contributing effect is confirmed by Professor Gewirtz[78] writings:

"When Congress is faced with an executive policy that is in place and functioning, Congress often acquiesces in the executive's action for reasons which have nothing to do with the majority's preferences on the policy issues involved…In such a situation, Congress may not want to be viewed as disruptive; or Congresspersons may not want to embarrass the President; or Congress may want to score political points by attacking the executive's action rather that accepting political responsibility for some action itself; or Congresspersons may be busy running for reelection or tending to constituents' individual problems; or Congress may be lazy and prefer another recess."[79]

As illustrated in this quote, the legislative branch faces several issues that may keep it from fulfilling its constitutional mandate. There is, however, nothing here that approves of the courts unwillingness to accept cases that are brought before it. For example, in the case of *Goldwater v. Carter* where several members of the senate and congress backed the claims of the ruling of this case. Based however on the opinion expressed in the opinion in the *Sanchez-Espinoza v. Reagan* case where it is stated that as long as the "majority" of the legislative branch does not act the court finds no reason to act either. What then happens if a minority of the legislative sees a wrongdoing that must be addressed? Will the court then deny such a claim on the basis that it is not the majority that is presenting it? Based on the available information about the difficulties it might be very hard, if not

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[75] Paul E. Peterson; Jay P. Greene. *Why executive-legislative conflict in the United States are Dwindling*, pp. 1.
[76] Ibid. pp.1.
[77] James M. Lindsay *Congress and Foreign Policy: Why the Hill Matters* pp.608.
[78] Paul Gewirtz is the Potter Stewart Professor of Constitutional Law at Yale Law School. Professor Gewirtz teaches and writes in the fields of constitutional law, federal courts and procedure, antidiscrimination law, law in contemporary China, law and literature, and comparative law
[79] Gerwirtz, "The Courts, Congress and Executive Policy-Making: Notes on Three Doctrines, "Law and Contemporary Problems 40 (1976), pp. 46, 79. As quoted in Foreign Policy and the Separation of Powers by David Gray Adler.

impossible, to raise a majority of the congress behind such an action (especially if the majority is of the same party as the president).

4 Conclusion

In a study presented by Shugart and Mainwaring in 1997, it is suggested that presidentialism creates a “dual legitimacy problem” where both the president and the parliament (read congress and senate) can claim popular legitimacy[80]. It, presidentialism, has also been accused of creating a “winner takes it all” situation[81]. There is little doubt that there is continuous exploration of the separation of powers principles as outlined in the U.S. constitution. I find this exploration to better understand the powers invested within the different branches of government to be a healthy aspect of a modern democracy where the mechanisms of checks and balances will be activated and tested and old assumptions tested and if needed adjusted. However, what has not been healthy has been the lack of judicial review. This lack of judicial review has resulted, as demonstrated in chapter 3, in the executive branch gaining more power then what was originally intended under the constitution with regards to foreign policy.

It can with justice be argued that the constitution of a nation should be a living document, and that changes must be effected within that living document. However, it is crucial that these changes take place within the framework of the Constitution. If this process of careful change, based upon the froundation and framework of the document itself, is abandoned for any sort of unilateral action then the delicate balance of the three branches will be shifted, and, thus, the very thing that the Constitution itself was set up to defend will become jeopardized – the guaranteed rights of the citizens. The balance between the need for individual freedom and the societys need for order would become drastically disturbed.

It is important to note that this essay is a case study and as such has certain limitations. The findings of this essay, however, can be of interest for other nations as well, especially ones which have adopted in whole or in part the principles of separation of powers and the mechanism for checks and balances within their constitutions. This essay does indeed show what can occur if the balance of powers is shifted and especially, if the so much needed, judicial review does not take place.

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[80] Grugel, Jean. Democratization, pp. 75.
[81] Ibid. pp.75.

There is a need for critical judgement from the citizens of any nation and involvement by these citizens in the checks and balance process, even if perhaps disobediently (like the mother who lost her son and campaigned outside the Bush ranch) – However, the most important tool in decisively influencing the implementation of the checks and balance mechanism is found within the branches of government with the power and capacity to currently uphold the checks and balance mechanism, the legislative and judicial.

Upholding the constitutional principles and mandates is a task for every government; and especially so specifically for the U.S, thus reinforcing its symbolism. To uphold the Constitution is to uphold the individual political liberty of each citizen[82]. It is thus the writer's opinion that the academic community has a responsibility to objectively and critically analyse how various constitutions are being upheld.

Although there are several excellent essays and books written about specific constitutional points, there are few, however, addressing a wider field[83] then just one or two points aspects. There is a need for new analyses covering all aspects of constitutional implementaion pertaining to the principle of separation of powers and the mechanisms for checks and balances.

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[82] Gwyn, William B. The meaning of the separation of powers, 1965. Pp. 100. Builds on the argumentation of Montesquieu which can be found at here.
83 James M. Lindsay Congress and Foreign Policy: Why the Hill Matters Pp.608

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