

A Wolf in Sheep's Clothing: The Unilateral Executive and the Separation of Powers

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“Everybody sees what you appear to be, few feel what you are, and those few will not dare to oppose themselves to the many, who have the majesty of the state to defend them.”¹

–Niccolò Machiavelli

I. INTRODUCTION

The United States Constitution vests all executive powers in a president.² This is the unitary executive theory. By virtue of this, many believe the president is vested with the power to act unilaterally. This is the unilateral executive theory. However, the unilateral executive portends more than action. In reality, the unilateral executive theory provides an opportunity to implement a unilateral agenda. Thus, the aim of this paper is to consider executive power, the separation of powers, and the unilateral executive theory to determine if presidential power under the separation of powers doctrine is actually “a wolf in sheep’s clothing.” With regard to this, we will consider the intentions of the framers, the text of the Constitution, and the mandates of governmental necessity.

The executive, legislature, and judiciary represent the three fundamental branches of government. Yet the Constitution does not expressly delineate a separation of powers doctrine. In fact, the Constitution contains no provisions explicitly declaring that the powers of the three branches of the federal government shall be separated. Indeed, to some degree separation of powers is a misnomer. Professor Richard Neustadt observed that “[t]he Constitutional Convention of 1787 is supposed to have created a government of ‘separate powers.’ It did nothing of the sort. Rather, it

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1. NICCOLÒ MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 66 (1950).

2. *See* U.S. CONST. art. II, § 1, cl. 1.

created a government of separated institutions *sharing* powers.”³ Principal among such powers are those executive in nature.

As such, it is important to survey executive power. This survey will begin with a select review of Alexander Hamilton’s contributions to *The Federalist*. This includes consideration of the various executive powers under the U.S. Constitution. As Hamilton observed, in order to ensure good government it is necessary to ensure an independent and energetic execution. Given this, the preconditions necessary to maintain an energetic executive will be examined. Further, the competing notions of executive power espoused by James Madison and Alexander Hamilton will be explored. These notions illustrate visions of executive power that are weak and strong, respectively. Finally, we must consider the leading interpretation of executive power by the U.S. Supreme Court. In critiquing this interpretation, several conceptual problems will be identified and explored.

Next, in order to gauge the propriety of the unilateral executive theory, a review will be made of the separation of powers doctrine. In surveying this doctrine, the roots of separation of powers theory will be considered together with James Madison’s contributions to *The Federalist*. This reveals a system that is almost wholly reliant on competition among government branches to employ the various checks and balances, which in turn prevent the consolidation of government power. In interpreting this doctrine, two strains have emerged in the Court’s jurisprudence. These strains, respectively, are firmly rooted in “formalism” and “functionalism.” However, a close examination reveals that each approach is flawed. While each approach has distinct shortcomings, the fatal flaw in each is the failure to take into account the impact of political parties on the separation of powers. Broadly speaking, the biggest problem with the Court’s separation of powers jurisprudence is that it does not represent a distinct separation of powers law, and it does not take into account the role of political parties in unifying government.

Having briefly reviewed executive power and the separation of powers doctrine, the primary focus will switch to the unilateral executive theory and its sources of support. More specifically, five sources of support are identified. The five sources include: (1) the unitary nature of the executive office; (2) implied executive powers under the Constitution; (3) executive tools such as signing statements, executive orders, and executive agreements; (4) supportive legislation; and (5) the marginalization of the legislative and judicial branches of government. A review of these sources suggests that political parties, in marginalizing the legislative and judicial

3. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29 (1990).

branches, can magnify the power of the four remaining sources. Notably, without this magnification it appears that the four remaining sources would be consistent with the Constitution. Indeed, there is substantial evidence indicating that the framers intended unilateral executive action.⁴ More importantly, such action may represent a constitutional necessity. However, in the end the role of political parties and the magnification of the remaining sources may impermissibly tip the balance of power among our three branches of government.

The degree to which unilateral executive action and agenda are acceptable must be determined relative to both the text of our Constitution and the mandates of necessity. But what powers are encapsulated by the text of the Constitution and who is to interpret this text? Also, what are the mandates of necessity? It is of course necessary to acknowledge and explore these questions in addressing the propriety of the unilateral executive theory. Finally, in conclusion, the genealogy of modern executive power will be considered relative to the unilateral executive theory and the perhaps veiled character of the executive office.

II. EXECUTIVE POWER

In order to understand the unilateral executive phenomenon, it is first necessary to understand executive power in the United States. The contributions of Alexander Hamilton to *The Federalist* are particularly helpful in developing such an understanding. By way of background, Hamilton was the most avid contributor to *The Federalist*, which was written as an authoritative explanation of the proposed government and its Constitution. *The Federalist* was published in New York newspapers beginning on October 27, 1787 in an effort to secure state ratification of the proposed U.S. Constitution.⁵ In *The Federalist*, Hamilton considers each facet of the proposed executive and explains how they combine to produce the characteristics of good government. In doing so he paints the picture of an energetic president who is vested with implied executive powers, which he can unilaterally wield.

In *The Federalist No. 69*, Hamilton examines “the real characters of the proposed executive” in an attempt to gain support for a unitary executive.⁶ Having just recently escaped the dominion of the Crown, the Ameri-

4. See generally JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 47 (W.W. Norton & Co. 1987) (1920) (discussing the corollaries of establishing a unitary executive).

5. Charles R. Kesler, *Introduction to THE FEDERALIST PAPERS*, at ix-x (Clinton Rossiter ed., Signet Classic 2003) (1961).

6. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 5, at 414.

can colonists were of course weary of centralized power. Therefore, Hamilton's examination of the executive was a crucial task in helping to defuse their concerns and secure ratification of the Constitution. In other words, Hamilton's analysis was focused as a means limited to this end. As a result, Hamilton did not explore the murky depths of executive power in *The Federalist* to as great an extent as he did in later works. A review of these later works indicates that he did not reveal key portions of his constitutional philosophy in *The Federalist*.

The unitary character of the executive branch was one of the more controversial aspects of the proposed executive power.⁷ Many framers worried that consolidating the executive power in a single man would in effect create "the fetus of monarchy."⁸ Thus, it is not surprising that the unitary character is the first feature of the executive that Hamilton addresses. He notes that the most prominent feature of the executive is "that the executive authority, with few exceptions, is to be vested in a single magistrate."⁹ He then examines the characteristics of specific executive powers to distinguish them from the power wielded by the British King.

Unlike the British King, the president is elected for a term of four years and as such he wields no hereditary power. Nevertheless, Hamilton recommends that the president be "re-eligible as often as the people of the United States shall think him worthy of their confidence."¹⁰ In short, Hamilton believes that the president must be accountable for his actions and that a four year term with indefinite re-eligibility will provide for increased accountability. Hamilton argued that term limits would have five ill effects. He argued that term limits: (1) would produce a diminution of the inducements to good behavior; (2) would encourage the tendency of using "corrupt expedients" because only a limited time is available to achieve presidential objectives; (3) would deprive the community of the advantage of having a more experienced executive; (4) would banish "men from stations in which, in certain emergencies of the state, their presence might be of the greatest moment to the public interest or safety";¹¹ and (5) would "operate as a constitutional interdiction of stability in the administration . . . [b]y necessitating a change of men, in the first office of the nation."¹² Notably, the first and second of the ill effects may be troublesome when coupled together with unilateral executive power.

7. This is well illustrated by the contentious debates that took place on June 1, 1787 at the Constitutional Convention. See MADISON, *supra* note 4, at 45-47.

8. *Id.* at 46.

9. THE FEDERALIST NO. 69, *supra* note 6, at 414.

10. *Id.*

11. THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 5, at 437.

12. *Id.* at 438.

Hamilton goes on to note that the president may also be removed while in office through impeachment for treason, bribery or other high crimes and misdemeanors.¹³ However, Article I, Section 2, Clause 6 of the Constitution stipulates that a two-thirds majority is required to impeach the president. As will be discussed below, the two party political system and the power of party affiliation and loyalty can significantly reduce the risk of presidential impeachment. By virtue of this reduced risk, a political environment is produced, which can be characterized as more hospitable to executive hegemony.

Hamilton also notes that the president is vested with a qualified, as opposed to an absolute, veto power. He argued that this functions as a check on both the executive and legislative branches.¹⁴ He also remarks that the president, in his capacity as commander in chief, is limited in his control of the armed forces to when they are “called into the actual service of the United States.”¹⁵ This provides little consolation though, as the president himself may call them into service. This point is well illustrated by the numerous military “conflicts” and “interventions” that have occurred throughout the history of the United States. Interestingly, this seems to remain true despite the enactment of the 1973 War Powers Resolution, which sought to limit the power of the president to wage war without the approval of Congress. This is not surprising given Hamilton’s assurance that “[t]he direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”¹⁶ In fact, Hamilton finds that “[o]f all the cares or concerns of government, the direction of war most peculiarly demands . . . the exercise of power by a single hand.”¹⁷

He also notes that the president has the substantial ability to grant reprieves and pardons.¹⁸ However, he observed that this power is not extended to cover cases of impeachment. Yet it seems clear that this limited restriction is only meaningful if the impeachment process has real teeth. If history is any indication, presidential impeachment has been somewhat of a paper tiger. It appears likely that political parties may have played a primary role in de-clawing this tiger.

13. THE FEDERALIST NO. 69, *supra* note 6, at 414.

14. *Id.* at 415.

15. *Id.*

16. THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 5, at 446.

17. *Id.*

18. THE FEDERALIST NO. 69, *supra* note 6, at 415.

In addition, Hamilton observed that the president can recommend measures to Congress that he believes are necessary and expedient.¹⁹ At first glance, this may seem like a nominal power. To the contrary, in the presence of powerful party allegiances, this is actually a quite significant power. In fact, this ability can actually serve as a vehicle with which to unilaterally advance an executive agenda. For instance, if the president and a majority in Congress are unified through party affiliation and the president recommends a measure, generally speaking, that measure will receive additional support simply by virtue of his party affiliation. Therefore, the president can exercise his power to introduce measures and can rely to some degree on party affiliation to, in effect, unilaterally advance his agenda through the legislature.

It is also important to observe that in listing executive powers, Hamilton seemingly classifies the provision to “take care that the laws be faithfully executed” as a *power*.²⁰ This is very significant, as will be discussed below, because it seems to infer that the president has a somewhat open-ended source of implied power. In fact, this clause has been interpreted quite broadly in recent years. Further, the president has broad appointment powers and the power to commission all officers of the United States.²¹ In addition, the president has exclusive removal power over officials performing strictly executive functions.²² The power to remove is the power to control. These powers help to secure loyalty among commissioned officers and appointees, which in turn increases his chances of successfully implementing a unilateral agenda. Finally, Hamilton observed that the president is vested with the power to receive ambassadors and other public ministers and the power to make treaties with the advice and consent of the Senate. Surely, these powers provide the opportunity to substantially influence U.S. foreign policy. The sum of his powers in this area provides the president the means with which to independently advance his agenda on a global scale.

The powers described thus far provide the impetus for energetic execution. In *The Federalist No. 70*, Hamilton confirms that “[e]nergy in the executive is a leading character in the definition of good government.”²³ Hamilton finds that energy in the executive “is essential to the protection of the community against foreign attacks; it is not less essential to the

19. *Id.*

20. *Id.* at 416.

21. *Id.* at 416, 419.

22. *See Myers v. United States*, 272 U.S. 52, 176 (1926) (finding that the president has exclusive removal power over all executive officials); *cf. Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (limiting the president's exclusive removal power to officials performing strictly executive as opposed to quasi-legislative or quasi-judicial functions).

23. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 5, at 421.

steady administration of the laws; to the protection of property . . . [and] to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”²⁴ On the other hand, Hamilton deplores a feeble executive as this implies feeble execution.²⁵ With regard to this it is helpful to consider Professor John Koritansky’s insights on Hamilton’s philosophy of government and administration.

From the point of view of this interpretation we can read with an enlightened eye what Hamilton says in *Federalist No. 68* about his degree of agreement with Alexander Pope’s famous statement that, “For forms of government let fools contest—That which is best administered is best.” It is true that Hamilton brands Pope’s statement a “political heresy” but we should note how careful he is to state his disagreement in a way that reveals a considerable agreement. Without breaking sentences Hamilton follows Pope’s heretical statement by saying, “. . . yet we may safely pronounce that the true test of a good government is its aptitude and tendency to produce a good administration.” In contrast to Pope’s statement, forms of government are important, but they are only so in so far as they tend to promote good administration, Hamilton’s response to Pope is very clever; for while he does charge Pope with heresy, he misses the point of that heresy—or rather, he actually endorses it! Surely the scandalous or heretical element in what Pope says is the suggestion that it does not matter what ends or purposes a government owns; so long as whatever it does it does effectively and efficiently, and takes care of themselves. And Hamilton appears to agree. Pope had been careless—he had perhaps misused a bit of poetic license—in saying that “forms” are absolutely unimportant. Forms, in truth, have a secondary importance as they tend to foster or hinder good administration. But the point remains that the relatively pedestrian standards of administration as such, effectiveness and efficiency, are the standards of government as a whole. It is this consideration that recommends the most important part of the formal structure of the government Hamilton is helping to establish, namely the unitary character of the executive.²⁶

Overall, Hamilton identifies four ingredients necessary for an energetic executive. These four ingredients are unity, duration, adequate provisions

24. *Id.* at 421–22.

25. *Id.* at 422.

26. John Koritansky, *Alexander Hamilton’s Philosophy of Government and Administration*, PUBLIUS, Spring 1979, at 99, 112–13.

for support, and competent powers.²⁷ With regard to unity, Hamilton states that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”²⁸ In short, he finds that a unitary executive will be more efficient and easier to hold accountable for his mistakes.²⁹ Accordingly, he finds that unity can be destroyed “in two ways: either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part, to the control and cooperation of others, in the capacity of counselors to him.”³⁰ With regard to duration, as discussed above, Hamilton believes that there is a need for indefinite re-eligibility. Adequate provisions for support are also necessary. This involves financially insulating the president from Congress as otherwise “[t]hey might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.”³¹ Finally, in terms of competent powers Hamilton reviews the veto, military, treaty-making, and appointing powers of the executive, which “combines, *as far as republican principles will admit*, all the requisites to [executive] energy.”³²

Ultimately, two competing notions of executive power have developed. One view, the “strong executive theory,” finds that a president may do anything not specifically prohibited by the Constitution. The other view, “the weak executive theory,” finds that a president may only exercise powers that are *expressly* enumerated to him by the Constitution or delegated to him by Congress under one of its enumerated powers. Professor Harvey Mansfield describes the two notions of executive power as “a weak executive resulting from the notion that the people are *represented* in the legislature, [and] a strong executive from the notion that they are *embodied* in the executive.”³³

Interestingly, in terms of a constitutional executive, these two notions can be traced back to Madison and Hamilton, respectively. While Hamilton and Madison each made substantial contributions to *The Federalist* they did not share similar views on executive power. Upon close inspection it appears there is “tension between Hamilton and Madison in *The Federalist Papers* regarding representation, and correspondingly, regarding

27. THE FEDERALIST NO. 70, *supra* note 23, at 422.

28. *Id.* at 423.

29. *Id.* at 423, 426.

30. *Id.* at 423.

31. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 5, at 439.

32. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 5, at 462 (emphasis added).

33. HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 5–6 (1989).

the issue of executive initiative versus legislative supremacy.”³⁴ Seemingly, their goal of securing constitutional ratification behooved them to avoid a confrontation on the issue in *The Federalist*. Still, a confrontation regarding executive power was on the horizon.

Following ratification of the Constitution, in 1793 President George Washington declared by executive proclamation that America was “neutral in the war between Britain and France.”³⁵ Following Washington’s proclamation, Madison and Hamilton engaged in a famous debate on executive power. In support of the strong executive view, Hamilton defended the proclamation under the assumed name of “Pacificus.”³⁶ On the other hand, in support of the weak executive view, Madison attacked the proclamation under the assumed name of “Helvidius.”³⁷

While Hamilton’s passages in *The Federalist* might seem to indicate otherwise, he was a firm subscriber to the strong executive view. As Professor Koritansky notes, “[w]hen Hamilton writes about the executive in the *Federalist* he has to respond to the fear among his readers of executive tyranny, and so he *veils* the most expansive possible interpretation of the executive’s constitutional powers.”³⁸ To the contrary, as Pacificus, “his purpose is to announce and vindicate the more expansive interpretation.”³⁹ Essentially, Hamilton argued, “executive power, unlike legislative power, is more than the sum of its parts” and therefore “executive power, in the singular, can be illustrated, but it *cannot be enumerated* because it cannot be exhausted.”⁴⁰ Further, Hamilton argued that the president has the power to judge for himself the meaning of law with regard to his execution thereof.⁴¹ This interpretation clearly paints a picture in which the executive emerges not as a coequal branch of government, but rather as *the* ultimate sovereign entity in the United States. Establishing the president as the sovereign is not surprising if the preservation of the United States is the ultimate province of the executive as Hamilton maintains.

Conversely, as Helvidius, Madison denied the executive any discretion as to foreign affairs or interpreting the law.⁴² In stark contrast to Hamilton, Madison believed that the president’s only responsibility is to faithfully execute the laws—seemingly with a blind eye toward the resulting

34. Koritansky, *supra* note 26, at 114.

35. MANSFIELD, *supra* note 33, at 275.

36. *Id.* at 276.

37. *Id.*

38. Koritansky, *supra* note 26, at 115 (emphasis added).

39. *Id.*

40. MANSFIELD, *supra* note 33, at 276 (emphasis added).

41. *Id.* at 277.

42. *Id.* at 278.

consequences.⁴³ In light of such notions, the efficacy of Madison's approach appears to be questionable at best. Surely the enumerated executive powers serve as an illustration that the president was not intended to be wholly and blindly subservient to the legislature. Still, Madison's approach paints a picture in which the legislature is *the* ultimate sovereign entity in the United States. As a practical matter, this poses several problems. Most importantly, for reasons described above by Hamilton, this is antithetical to an energetic administration. This, in turn, reduces sovereign efficiency and security; in a time of national emergency these problems could very well be fatal. Again, "the true test of a good government is its aptitude and tendency to produce a good administration."⁴⁴ If history is any indication, legislative governance fails this test miserably. It follows that "[c]ontemporary political scientists generally concede, some reluctantly and some with enthusiasm, that Congress cannot govern and that only the president can."⁴⁵

The struggle between the strong and weak executive theories continues to this day. The longevity of this controversy is not surprising though because neither *The Federalist* nor the Constitution contains an exhaustive list of executive powers; neither expressly defines executive power *per se*. Mansfield observed that "[t]he lack of an official definition allows each president to become responsible for creating his own" definition of executive power.⁴⁶ This explains the historical fluctuations between strong and weak presidents. Notably, the strong view has been adopted by many of our greatest presidents, including Abraham Lincoln and Theodore Roosevelt. Roosevelt argued that the president could "do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution."⁴⁷

In light of the ambiguity surrounding executive power, the Court has had no easy task in identifying its parameters. Not surprisingly, the Court has struggled at completing this task. This is well exemplified by the tripartite analysis of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, otherwise known as *The Steel Seizure Case*.⁴⁸ In this case, the Court was faced with the task of deciding whether President Truman was "acting within his constitutional power when he issued [Executive Order 10340] directing the Secretary of Commerce to take possession of and op-

43. *Id.*

44. THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 5, at 413.

45. Koritansky, *supra* note 26, at 121.

46. MANSFIELD, *supra* note 33, at 278.

47. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 389 (1913).

48. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

erate most of the Nation's steel mills."⁴⁹ At the time, a dispute had arisen between the steel companies and their employees, which prompted the Steelworkers' Union to give notice of a nation-wide strike.⁵⁰ The president feared that such a strike would result in a stoppage of steel production at the height of the Korean War. Clearly this posed a threat to our national security. As such, President Truman argued that seizure of the steel mills was necessary to avoid a national catastrophe and was authorized by the aggregate of his constitutional powers as the nation's chief executive and the commander in chief of the armed forces.⁵¹ The Court did not agree and held that the seizure order was unconstitutional.⁵²

Nevertheless, Justice Jackson concurred in this decision and in doing so he formulated a tripartite analysis to identify the contours of executive power. His approach has been frequently referenced and heralded as "the most celebrated judicial opinion of the separation of powers canon."⁵³ The approach involves cataloging executive action into one of three distinct groups. The first group includes presidential action that is pursuant to congressional authority. Justice Jackson argued that in this group presidential power is at its apex.⁵⁴ The second group includes presidential action in the context of congressional silence. Justice Jackson refers to this group as "a zone of twilight" in which the president "can only rely upon his own independent powers."⁵⁵ The third group includes presidential actions that are incompatible with the expressed or implied will of Congress. Here Justice Jackson finds that the president "can rely only upon his own Constitutional powers *minus any constitutional powers of Congress* over the matter."⁵⁶

Troublingly, Justice Jackson's tripartite approach seems to indicate an executive subservience to the legislature. Because Congress creates laws and the president is entrusted with their execution does not necessarily mean that he is subservient to the legislature. Stating that presidential power is at its apex when pursuant to congressional authority implies that the president acts with less strength in exercising his independent powers. This suggests an executive subservience to the legislature. The third group places the president in a similar position by defining executive power as being residual in nature when in conflict with congressional sentiment.

49. *Id.* at 582.

50. *Id.* at 582–83.

51. *Id.* at 582.

52. *Id.* at 589.

53. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314 (2006).

54. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

55. *Id.* at 637.

56. *Id.*

This also limits executive independence. Hamilton finds that executive dependence on the legislative body violates “fundamental principles of good government.”⁵⁷ To be sure, the president is responsible for *taking* care that the laws are faithfully executed. Still, this does not fully encapsulate his duties or intended function. Indeed, the presidential oath tellingly states, “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.”⁵⁸ This oath confirms that the province of the president is not simply to execute laws but more accurately it is to execute *the office* and to defend the Constitution. This is consistent with Hamilton’s notion that the preservation of the Union must ultimately be the province of the executive.

Overall, Justice Jackson’s approach seems somewhat inconsistent with this notion and in practice can alter the nature of the executive office. In other words, Justice Jackson’s analysis may reduce the president to a mere messenger boy for Congress. This could have dangerous consequences in the face of exigent circumstances. As Justice Vinson observed “[u]nder this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon.”⁵⁹ In short, Justice Jackson’s approach substantially reduces executive power and in doing so changes the character of the office. At bottom, the president’s power is constitutionally proscribed and “is not to be construed as deriving from Congress’ actions, but rather that it derives from the Constitution itself, and that it can set itself into motion.”⁶⁰

It follows that the discretion and executive powers vested in the president may be more expansive than is recognized by Justice Jackson’s analysis. The actual latitude of this discretion will be considered in greater detail below. Broadly speaking, the existence of expansive executive powers is not surprising given the lofty charge of preserving, protecting, and defending the Constitution. In connection with this, it is also not surprising that the president is capable of acting unilaterally. Given the nature of his responsibilities, this seems to be somewhat of a necessity. However, at some point unilateral executive action can change the balance of government power. It can lead to the usurpation of power intended for coordinate branches of government. This of course undermines the spirit behind the separation of powers doctrine. Consequently, the question becomes how

57. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 5, at 432.

58. U.S. CONST. art. II, § 1, cl. 7 (emphasis added).

59. *Youngstown*, 343 U.S. at 708–09 (Vinson, J., dissenting).

60. Koritansky, *supra* note 26, at 117.

much unilateral action is acceptable and who is charged with determining the benchmark for acceptability?

III. THE SEPARATION OF POWERS

The separation of powers doctrine is aimed at preventing the consolidation of government power and is a hallmark of the U.S. government. More than a hallmark though, it “is the chief of the ‘auxiliary precautions’ necessary against oppression by government . . . [and] is auxiliary [only] to ‘dependence on the people’ or to representation, the primary precaution.”⁶¹ However, separation of powers theory does not owe its genesis to our founding fathers. In fact, the categorization and separation of government powers was a topic discussed by many, including Enlightenment philosophers John Locke and Baron de Montesquieu.

In his *Second Treatise* on government, Locke grouped government power into two distinct categories: legislative and executive.⁶² Locke argued that consolidation of these powers was dangerous. Specifically, he worried that there is

too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage.⁶³

For this reason Locke argued that laws require perpetual execution by a separate body of government.

Similarly, Montesquieu discussed the ideal separation of government powers, which he coined as “*trias politica*.”⁶⁴ Specifically, Montesquieu described a division of political power between executive, legislative, and judicial government functions. He based this model on the British system, in which he perceived a separation of powers between the King, Parliament, and the judiciary. Ultimately, he believed that political liberty could be found only when there is no abuse of power.⁶⁵ He stated: “But constant experience shows us that every man invested with power is apt to abuse it,

61. HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 115 (1991).

62. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT: SECOND TREATISE* § 143, *reprinted in* 1 *THE FOUNDERS' CONSTITUTION*, at ch. 10, doc. 3 (Peter Laslett ed., 1965), *available at* <http://press-pubs.uchicago.edu/founders/documents/v1ch10s3.html>.

63. *Id.* § 144.

64. *See* CHARLES DE SECONDAT, *THE SPIRIT OF LAWS* (Prometheus Books 2002) (1900).

65. *Id.* at 150.

and to carry his authority as far as it will go.”⁶⁶ To prevent such abuse, Montesquieu firmly believed that “power should be a check to power.”⁶⁷ In other words, he believed that government must divide power to prevent its abuse.

The force of Montesquieu’s analysis is reflected in the debates at the Constitutional Convention of 1787. For instance, on July 17, 1787, James Madison remarked that “[i]f it be essential to the preservation of liberty that the Legis; Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other.”⁶⁸ Citing Montesquieu, Madison explains that such a separation is necessary, otherwise “tyrannical laws may be made and may be executed in a tyrannical manner.”⁶⁹ For this reason, Madison strongly urged that a system of checks be designed to balance and harmonize power among separate branches of government.⁷⁰

The need for a separation of powers was further examined in *The Federalist*. Because men are not angels, Madison argued in *The Federalist No. 51* that “[i]n framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁷¹ Madison further argued that in order to achieve such stability, in the structure of government, “ambition must be made to counteract ambition.”⁷² In light of American federalism, this means counteracting ambition in both the federal and state levels of government.⁷³ In other words, America requires a separation of powers between distinct levels of government and a separation of powers within each level of government. Overall, Madison believed that the ideal government must be structured to furnish proper checks and balances between executive, legislative, and judicial branches of government.⁷⁴ He believed this could be achieved only by giving to those who administer each such branch “the necessary constitutional means, and personal motives, to resist encroachments of the other [branches].”⁷⁵

Notably, in his original draft of what would become the Bill of Rights, Madison included a proposed amendment that would make the separation

66. *Id.*

67. *Id.*

68. MADISON, *supra* note 4, at 311.

69. *Id.*

70. *Id.* at 312–13.

71. THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 319 (emphasis added).

72. *Id.*

73. *Id.* at 320.

74. *Id.* at 317–18.

75. *Id.* at 318–19.

of powers explicit.⁷⁶ More specifically, Madison proposed as his sixteenth amendment that:

The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.⁷⁷

However, his proposal was rejected because his fellow congressmen believed the separation of powers was implicit in the Constitution.⁷⁸ In other words, they believed the substance of the amendment was already provided for in the text of the Constitution itself. As such, the separation of powers doctrine is not expressly delineated anywhere in the Constitution.

Still, the structure of the Constitution reflects the intent to create three separate branches of government, and it addresses these three branches in turn. Notably, the legislature is the first branch of government addressed in the Constitution. In fact, the first sentence of Article I states: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The first sentence of Article II states that "[t]he executive Power shall be vested in a President of the United States of America." Importantly, this language renders the executive branch the only branch of the federal government to rest its power in an individual as opposed to an institution. Finally, the judiciary is addressed in the first sentence of Article III, which states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The prominent placement of these sentences and the fact that each article is dedicated to a separate branch of government underscores the vital importance that separation of powers played in the minds of the framers.

The fact that the legislature is addressed in the first article is not surprising given Madison's insistence that "[i]n republican government the legislative authority, necessarily, predominates."⁷⁹ Madison believed that

76. CONGRESS OF THE UNITED STATES: IN THE HOUSE OF REPRESENTATIVES, MONDAY, 24TH AUGUST, 1789, at 3 (New York, Greenleaf 1789), available at http://memory.loc.gov/cgi-bin/query/D?rbpebib:3:/temp/~ammem_OEj4.

77. *Id.*

78. Exploring Constitutional Conflicts: Separation of Powers, <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm> (last visited Dec. 4, 2007).

79. THE FEDERALIST NO. 51, *supra* note 71, at 319. The issue of legislative versus executive supremacy would later become a focal point for the development of great tension between Hamilton and Madison. This will be discussed in greater detail below.

dividing the legislature into two competing branches would help to limit legislative supremacy.⁸⁰ Apart from internal constraints, Madison also believed that it was necessary to prevent any one branch from dominating the others and “to guard against dangerous encroachments by still further precautions.”⁸¹ Yet, as Alexander Hamilton notes, “the insufficiency of a mere parchment delineation of the boundaries of each [branch is clear]; . . . and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved.”⁸² However, this presupposes a system where there is competition among government branches, which compels the use of their defenses.

Still, many structural safeguards were implemented to assist in achieving this goal. For instance, broadly speaking, congressional authority to enact laws can be checked by an executive veto, or by a judicial determination that a law is unconstitutional. Similarly, executive action might be checked congressionally through budget control and impeachment, and judicially through a determination that an executive act is unconstitutional. Finally, the judiciary may be checked through executive nominations and congressionally through the confirmation and impeachment processes. Of course these examples represent only a few of the many structural safeguards that characterize and shape our understanding of the amorphous separation of powers doctrine.

Professor E. Donald Elliott observed that because there is no express constitutional explication of the separation of powers doctrine, “the ‘text’ in separation of powers law is everything that the Framers did and said in making the original Constitution plus the history of our government since the founding.”⁸³ As a result, the judiciary has had no easy task in outlining the contours of this doctrine and trying to enforce its underlying principles. This difficult task is further complicated by the need to address political parties and their ability to undermine the separation of powers doctrine. Not surprisingly, given its propensity for unilateral action, many of the most difficult separation of powers issues involve the executive branch.

In considering the separation of powers doctrine, it is clear that two competing approaches have emerged in the Court’s jurisprudence—the “formal” and “functional” approaches. The formalist approach is characterized by a rigid interpretation of the separation of powers doctrine.⁸⁴

80. *Id.*

81. *Id.*

82. THE FEDERALIST NO. 73, *supra* note 31, at 441 (emphasis added).

83. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989).

84. This approach was utilized by the Court in many cases. See *Metro. Wash. Airports Auth. v. Citizens for Abatement of Noise*, 501 U.S. 252, 255 (1991) (finding a separation of powers violation in creating a Board of Review composed of nine members of Congress that was given authority to veto

This seems to be the predominant approach in the Court's jurisprudence.⁸⁵ Under this approach the Court views the legislative, executive, and judicial vesting clauses as not only a grant of specific powers but also as a limitation on each branch of government. In other words, the formalist approach interprets the vesting clauses of the Constitution as affirmative grants of power *and* power-restricting boundaries. Through its rigid interpretation, this approach sacrifices government flexibility at the altar of alleged textual formalism.

The formalist approach places great emphasis on maintaining exclusivity of legislative, executive, and judicial power. This approach seems to overlook the fact that “[v]irtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange Commission—exercises *all three* of the governmental functions the Constitution so carefully allocates among Congress, President, and Court.”⁸⁶ More importantly, it is necessary to share power to check power. In fact, the various checks and balances structured into the Constitution serve as a reminder that our system, while divided into separate branches, anticipates that power will be shared. As Justice Jackson has noted, “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”⁸⁷ Inasmuch as formalist rigidity can prevent this from happening, formalism loses track of the Constitution's predominant purpose.

Contrary to the formalist approach, the Court has also adopted a functionalist approach, which places less emphasis on rigidity and more emphasis on pragmatism and governmental flexibility.⁸⁸ This approach “perceived overlapping areas of competence rather than strict boundaries, an evolutionary rather than textual and historical approach, and the use of balancing tests to determine whether new arrangements could be accommodated.”⁸⁹ While this approach provides for greater flexibility, it does so

decision of an agency exercising executive power); *Bowsher v. Synar*, 478 U.S. 714, 728–29 (1986) (holding that separation of powers was violated by maintaining removal power over an executive officer by Congress); *INS v. Chadha*, 462 U.S. 919, 953–54 (1983) (holding that Congress may not promulgate a statute granting to itself a legislative veto over actions of the executive branch consistent with separation of powers principles).

85. This is underscored by the fact that after trying the competing approach the Court ultimately reverted back to the formalist approach in *Airports Authority*, 501 U.S. at 255.

86. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORN. L. REV. 488, 492 (1987) (emphasis in original).

87. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 579 (1952) (Stewart, J., concurring).

88. See *Morrison v. Olson*, 487 U.S. 684, 692 (1988) (upholding law which limited the president's executive power by placing a “good cause” requirement on the president's ability to remove an independent counsel).

89. NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 273–74 (3d ed. 2005).

at the expense of establishing clear boundaries. The functionalist approach eschews such boundaries in favor of *ad hoc* judicial determinations and discretion. Unfortunately, this provides very little guidance as to the constitutional contours of the separation of powers, and ultimately, this approach places the doctrine at great risk of being distorted by the ever-changing tides of judicial sentiment.

On the one hand, the formalist approach has the benefit of drawing clear-cut boundaries. Regretfully, these boundaries seem to focus only on the respective vesting clauses as opposed to the intended goal of providing “the necessary constitutional means and personal motives to resist encroachments of the other [branches].”⁹⁰ On the other hand, the functionalist approach does have the flexibility necessary to achieve this goal. Unfortunately, however, the functionalist approach offers almost no clear boundaries. Further, inasmuch as this is the case, the functionalist approach renders the separation of powers highly susceptible to manipulation. Most importantly, however, both approaches fail to take into account the impact of political parties on the separation of powers. Overall, the Court confirms that “the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”⁹¹ Yet, for the aforementioned reasons, both the formalist and functionalist approaches fail to adequately safeguard this security.

Given this, it is not surprising that constitutional theorists, such as Professor Elliott, describe our separation of powers jurisprudence as simply “abysmal.”⁹² Elliott states that our separation of powers jurisprudence is abysmal “because the Supreme Court has failed for over two hundred years of our history to develop a law of separation of powers.”⁹³ Rather than create a separation of powers law, the Court has merely “reached a collection of results in separation of powers cases” and in so doing has undeniably failed to develop “a body of principle and theory that is coherent and useful in enabling the system ‘to be wiser than the individuals who constitute it.’”⁹⁴ As a result, Elliott finds that “our separation of powers law is now dumber than the individuals who make it, as if there were some virtue

90. THE FEDERALIST NO. 51, *supra* note 71, at 318–19.

91. *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

92. Elliott, *supra* note 83, at 506.

93. *Id.* at 507 (emphasis added).

94. *Id.* (quoting Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 145 (1984)).

in judges blinding themselves to the practical consequences of their decisions about governmental structure.”⁹⁵

The failure to take into account the impact of political parties and the failure to create a clearly defined and functional separation of powers law has had many unfortunate consequences. Most troubling is the seeming inability of the Court to prevent disproportionate concentrations of government power from gradually developing over time. This is particularly troublesome if we give credence to Lord Acton’s warning that “[p]ower tends to corrupt, and absolute power corrupts absolutely.”⁹⁶ To be sure, James Madison saw the concentration of government power as the root of tyranny. Madison states in *The Federalist No. 47* that the “accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”⁹⁷ Nowhere is the risk of consolidation more pronounced than in the executive branch, which is unitary by its very nature. After all, Article II vests all executive power in “a President of the United States of America.”⁹⁸ At bottom, of the many problems with the Court’s separation of powers jurisprudence, perhaps the most notable is its reluctance to confront the unilateral executive phenomenon.

IV. THE UNILATERAL EXECUTIVE

In simplest terms, the unilateral executive can be understood to mean an executive acting unilaterally. However, to truly understand this phenomenon one must dig deeper. The true hallmark of the unilateral executive is not executive action *per se*. Rather, the heart of the unilateral executive phenomenon lies in the pursuit of a unilateral executive agenda, and the unilateral determination of the means with which to achieve this agenda. This in turn requires a consolidation of power in the executive.

In tracing the consolidation of power in the executive, it is important to first observe that there is a consolidation of power in the federal government. The Supremacy Clause establishes the Constitution, federal statutes, and U.S. treaties as “the supreme Law of the Land.”⁹⁹ In short, this ensures that federal law will trump state law. A fair inference from this is

95. *Id.* at 507.

96. Phrases.org – Phrase Finder, <http://www.phrases.org.uk/meanings/288200.html> (last visited Dec. 04, 2007). This phrase was coined by Lord Acton in a letter to Bishop Mandell Creighton in 1887. *Id.*

97. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 298.

98. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

99. U.S. CONST. art. VI, cl. 2.

that the federal agenda and policies, which are encapsulated by law, will overshadow conflicting state policies. Moreover, in *McCulloch v. Maryland*, Chief Justice Marshall found expansive federal power in the Necessary and Proper Clause. This clause gives to Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁰⁰ In *McCulloch*, Marshall notes that the Constitution includes both express and implied powers. He interprets “necessary and proper” to mean “convenient” and “useful” and finds that by virtue of this, “[u]nless a specific means be expressly prohibited to the general government, it has it, within the sphere of its specified powers.”¹⁰¹ Given this, it appears that not much is left of state residual sovereignty.¹⁰² At bottom, it appears that true power is consolidated in the federal government—the federal government is *the* sovereign. The president is the focal point of that sovereign.

Having established this, we must now explore the means by which power might be consolidated in the president. We must explore the sources of unilateral executive action. There are five primary support sources for such action. The first source is the unitary nature of the executive office. The second source of support comes from an affirmative finding and expansive interpretation of implied executive powers under the Constitution. This involves expansive interpretations of the take care, commander in chief, and foreign policy powers. The third source of support comes from executive tools, including among others, executive orders, executive agreements, and executive signing statements. The fourth source of support is the marginalization of the legislative and judicial branches. This includes the use of jurisdiction stripping, the impact of political parties, and a resurgence of the politics of fear. The final source of support comes from related legislation such as the Patriot Act, Military Commission Act, and Detainee Treatment Act.

As discussed above, the Constitution stipulates that “[t]he executive Power shall be vested in a President.”¹⁰³ This confirms the consolidation of all executive power in the president. This also confirms the unitary character of executive power under the Constitution. The unitary character in turn assists the president in his ability to act unilaterally. Put differently,

100. U.S. CONST. art I, § 8, cl. 18.

101. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

102. U.S. CONST. amend. X (The Tenth Amendment states “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). However, this provides little protection if provisions such as the Necessary and Proper Clause are interpreted as implied powers with a seemingly open-ended scope.

103. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

the vesting of executive power in a single individual enables that individual to act independently and with greater speed in wielding that power. These are key characteristics of the unilateral executive theory.

The president also derives substantial authority from his implied constitutional powers. This is an important component of the aforementioned strong executive approach. Proponents of this approach argue that the vesting clause of Article II operates as a grant of all powers executive in nature.¹⁰⁴ In other words, they believe that contrary to Article I, which limits legislative powers to those “herein granted,” the vesting clause of Article II gives the president power beyond those specifically enumerated. In keeping with this theory, Article II does not expressly limit executive power to those herein granted. Aside from this theory, many argue that the president is vested with broad implied powers. Principal among such powers are his abilities to direct foreign policy, serve as commander in chief of the armed forces, and take care that the laws be faithfully executed.

Through various constitutional provisions and by virtue of his role as a figurehead for the U.S. government, the president has the opportunity to create, initiate, and change foreign policy. There are six principal avenues with which to do this. These six avenues include responses to foreign events, proposals for legislation, negotiation of international agreements, policy statements, policy implementation, and independent action.¹⁰⁵ Of the six, only proposals for legislation do not provide the opportunity for *direct* unilateral action. The remaining five allow for direct unilateral action and the establishment of a unilateral agenda. Further, “[a] spokesman and head of the foreign service, the armed forces, the intelligence services, and the bureaucracy, the President usually responds to such events and thus initiates U.S. policy.”¹⁰⁶ Further still, “[t]he President as the chief spokesman of the Nation, directs Government officials and machinery in the daily conduct of diplomacy, and has the principal responsibility for taking action to advance U.S. foreign policy interests.”¹⁰⁷ While Congress is capable of exercising some influence over foreign policy, because the president initiates and is responsible for taking action to advance U.S. foreign policy, “the lion’s share . . . [falls] to the President.”¹⁰⁸

There may also be implied powers vested in the president by virtue of his role as the commander in chief of the armed forces. Professor Julian

104. See Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 YALE L.J. POCKET PART 84 (2006).

105. Richard F. Grimmett, *Foreign Policy Roles of the President and Congress*, CONG. RES. SERVICE REPS., June 1, 1999, available at <http://fpc.state.gov/fpc/6172.htm>.

106. *Id.*

107. *Id.*

108. EDWARD S. CORWIN, *THE PRESIDENT, OFFICE AND POWERS: 1787-1957*, at 171 (4th rev. ed. 1957).

Ku argued that the president “does possess an exclusive Commander-in-Chief power that authorizes him to refuse to execute laws and treaties that impermissibly encroach upon his inherent constitutional power.”¹⁰⁹ Ku explains that because the president is already vested with a general executive power, which includes the power to be chief of the armed forces, the “most sensible textual inference” is that the Commander-in-Chief Clause operates “as a constitutional constraint on the other two federal branches, especially Congress, from interfering with the President’s command.”¹¹⁰ This interpretation provides the president with the power to act unilaterally even in the face of opposing laws or treaties. This also seems to place the legislature in a position of subservience to the president. Notwithstanding, Ku argued “[t]he existence of this exclusive power is supported by the text of the Constitution as well as judicial precedent and the practice of past presidents.”¹¹¹

Finally, there may also be implied powers in the constitutional mandate that the president “*shall* take Care that the Laws be faithfully executed.”¹¹² This is confirmed by Madison’s *Notes of Debates in the Federal Convention of 1787*. In his notes from June 1, 1787, Madison records a debate on “the extent of the Executive authority.”¹¹³ During this debate Charles Pinckney, a South Carolina representative to the convention, moved to strike out a constitutional provision conferring power on the executive to “execute such other powers not Legislative nor Judiciary in their nature.”¹¹⁴ In doing so, Pinckney explained that this language was “unnecessary” because the object of this language was already included “in the ‘power to carry into effect the national laws.’”¹¹⁵ Tellingly, a vote was taken and because a majority agreed with Pinckney the words were in fact struck out.¹¹⁶ Overall, the Supreme Court has found that by virtue of the Take Care Clause the president has the implied power to act without statutory authorization to enforce laws or protect federal rights.¹¹⁷ This of course provides an alternate justification for the exercise of unilateral executive action.

In addition to implied or inherent powers, the president has various executive tools, which can employ unilateral action in furtherance of a unilat-

109. Ku, *supra* note 104, at 84.

110. *Id.* at 85.

111. *Id.*

112. U.S. CONST. art. II, § 3 (emphasis added).

113. MADISON, *supra* note 4, at 47.

114. *Id.*

115. *Id.*

116. *Id.* at 48.

117. See *Cunningham v. Neagle*, 135 U.S. 1, 63–64 (1890) (finding that there is an inherent power to protect resting by necessity in the executive).

eral agenda. This is particularly true with regard to executive agreements, executive orders, and executive signing statements. Executive agreements are agreements made between the executive branch of the U.S. government and a foreign government. Unlike treaties, the president makes these agreements without the ratification of the Senate. In *United States v. Belmont*,¹¹⁸ the Supreme Court confirmed the validity of executive agreements and held that they took precedence over conflicting state policy.¹¹⁹ Similarly, in *United States v. Pink*,¹²⁰ the Court states that executive agreements “have a similar dignity” as treaties, and seemingly indicates that executive agreements might be on par with treaties.¹²¹ If this is true it means that executive agreements could be capable of overriding both state *and* federal law.¹²² In short, because executive agreements are given substantial weight and because the Senate does not confirm executive agreements, they provide the president with a powerful means of advancing a unilateral foreign policy agenda.

Executive orders also represent very powerful tools. An executive order is a decree issued pursuant to executive authority, which can have the force of law. Such orders can put forth commands to cabinet officers, “establish governmental bureaus, modify rules, change procedures, and enforce existing statutes.”¹²³ Despite their utility and longstanding use, critics have attacked executive orders. They charge that many presidents have usurped the legislative power of Congress by issuing orders having the force of law while abandoning “any pretense of tying the executive order power to existing law.”¹²⁴ They argue that “[b]ecause law, in essence, can be made at will, and sometimes in secret, [through executive orders] both Congress and the public are excluded from the entire legislative process.”¹²⁵ While legislative usurpation is surely a legitimate concern this argument misses the mark. The legitimacy of executive orders *qua* executive orders is not wholly dependent on an affirmative legislative mandate. Rather, the president is vested with independent powers, which he may exercise through the use of executive orders. As a matter of fact, these

118. 301 U.S. 324 (1937).

119. *Id.* at 331–32.

120. 315 U.S. 203 (1942).

121. *Id.* at 230.

122. *See* *Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888) (finding that when there is a conflict between a treaty and a federal statute the court will try give effect to both, but if that is not possible, the last in time will prevail). Therefore, if executive agreements are tantamount to treaties they can override federal law, which contradicts and precedes them.

123. JAMES L. HIRSEN, *GOVERNMENT BY DECREE: FROM PRESIDENT TO DICTATOR THROUGH EXECUTIVE ORDERS* 6 (1999).

124. *Id.* at 8.

125. *Id.* at 14.

orders can be issued without congressional approval and can greatly assist the president in acting unilaterally.

Another executive tool that has become a major point of contention is signing statements. A signing statement is a written pronouncement issued by the president of the United States upon signing a bill into law. They have been used as a tool to make substantive, legal, constitutional, or administrative pronouncements on the bill that is being signed. In recent years the prevalence and controversial use of presidential signing statements has come under the microscope. The controversy surrounds the use of signing statements to create legislative history, alter the intended interpretation of a bill, limit the execution of a bill, or to declare that a provision of a bill is flat out unconstitutional. Using signing statements in this manner can have a significant effect on both U.S. domestic and foreign policy. This is poignantly exemplified by a December 2005 signing statement, which asserts that the president can “bypass a statutory ban on torture.”¹²⁶

In placing the recent controversy over signing statements into perspective, it is helpful to observe that, “[i]n all, Bush has challenged more than 800 laws enacted since he took office, most of which he said intruded on his constitutional powers as president and commander in chief.”¹²⁷ This is somewhat alarming because, “[b]y contrast, all previous presidents challenged a *combined* total of about 600 laws.”¹²⁸ Given the reinvigorated use of signing statements, it is not surprising that “Bush has virtually abandoned his veto power, giving Congress no chance to override his judgments [and] . . . has vetoed just one bill since taking office, the fewest of any president since the 19th century.”¹²⁹

For these reasons the American Bar Association formed a task force to consider presidential signing statements and the separation of powers doctrine. As a result of their investigation the task force found that “the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress,” is in fact “contrary to the rule of law and our constitutional system of separation of powers.” However, this controversial use of signing statements is not without its defenders. Proponents of signing statements urge that “[i]f the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers,

126. Charlie Savage, *Bush Cites Authority to Bypass FEMA Law*, BOSTON GLOBE, Oct. 6, 2006, at A1.

127. *Id.*

128. *Id.* (emphasis added).

129. *Id.*

then it arguably follows that he may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing.¹³⁰ There is some force to this proposition. The logical extension of this argument is that “a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President’s unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority.”¹³¹

Notwithstanding, the use of signing statements is a troubling executive tool. This is true for two reasons. First, the use of signing statements may marginalize the legislative and judicial branches. The legislature may be marginalized by having the meaning of laws changed, by having their laws selectively enforced, and by losing the opportunity to overcome executive objections through the standard veto process (a two-thirds majority vote in Congress as provided for by Article I, Section 7, Clause 2). Also, the judiciary and the practice of judicial review may be marginalized if the Supreme Court is compelled to accept signing statements as binding interpretations of legislative or constitutional provisions. Second, the use of signing statements is troubling because it is essentially unregulated. Unfortunately, the Supreme Court has not yet been presented with the opportunity to squarely address the limits of signing statements. For this reason, by default, we are seemingly faced with unbridled executive discretion in their use. Ultimately, the use of signing statements must be closely examined and limited to ensure fidelity to the separation of powers doctrine.

It is also important to consider the role of political parties in the marginalization of the legislative and judicial branches of government. Since our founding, “Madison’s vision of competitive branches balancing and checking one another has dominated constitutional thought about the separation of powers through the present.”¹³² Madison believed that each branch of government would compete for power and as such “[a]mbition must be made to counteract ambition.”¹³³ Competition between branches, in other words, was to be *the* synergist for the active implementation of checks and balances. Surely, in the absence of political parties, “it was possible to imagine that, once elected, officeholders would not be tempted by constituent pressures and competing ideological or policy goals to sacrifice the constitutionally assigned duties and powers of their branches—simply because constituent pressures and divergent interests were kept to a

130. Walter Dellinger, *Memorandum for Bernard N. Nussbaum Counsel to the President*, 48 ARK. L. REV. 333, 337 (1995) (memorandum dated Nov. 3, 1993).

131. *Id.*

132. Levinson & Pildes, *supra* note 53, at 2317.

133. THE FEDERALIST NO. 51, *supra* note 71, at 319.

minimum.”¹³⁴ This of course changed with the emergence of a strong two party political system.

Professors Daryl J. Levinson and Richard H. Pildes argue, “the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.”¹³⁵ If competition disappears, what is left to counteract ambition? For this reason, “[t]he practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics.”¹³⁶ It must be observed that the dynamic switches from competitive when political parties divide government, to cooperative when political parties unite government.¹³⁷ This results in the disappearance of checks and balances during periods of strongly unified government. As a result, the impact of political parties “calls into question many of the foundational assumptions of separation-of-powers law and theory.”¹³⁸

Succinctly put, as a catalyst for unified government, political parties set the stage for presidential dominance. Political parties can unify the three branches of government by espousing a certain ideology and vision. Meanwhile, the president is the head of his respective political party. Therefore, if this same party also dominates other branches of government it may be inferred that the president will wield a substantial influence over them. As a practical matter, this may result in a consolidation of power in the executive. A corollary of this is the marginalization of branches that are heavily influenced by political partisanship. Parenthetically, in terms of marginalization, “the most serious damage has been done to the legislative branch” as is reflected by “[t]he sharp decline of congressional power and autonomy in recent years.”¹³⁹

The marginalization of coordinate branches is further bolstered by the presidents appointment powers. The president may exercise this power to appoint government officials along party lines. This of course extends the president’s influence even further. In keeping with this, in *The Steel Seizure* case, Justice Jackson noted that “[p]arty loyalties and interests, sometimes more binding than law, extend [the president’s] effective control into branches of government other than his own and he often may win, as a

134. Levinson & Pildes, *supra* note 53, at 2318–19.

135. *Id.* at 2315.

136. *Id.*

137. *Id.*

138. *Id.*

139. Al Gore, Address on Martin Luther King Day (Jan. 16, 2006), in HUFFINGTON POST, Jan. 16, 2006, http://www.huffingtonpost.com/2006/01/16/the-full-text-of-al-gore_n_13930.html.

political leader, what he cannot command under the Constitution.”¹⁴⁰ This might prove to be equally true for a presidential candidate. Indeed, some might argue that it is more than a mere coincidence that the five Republican appointed Justices of the Supreme Court, in resolving the 2000 presidential election, voted in favor of George W. Bush while the four Democratic appointed Justices voted in favor of Al Gore.¹⁴¹

Political parties may also make existing executive tools much more effective. For instance, when government is strongly unified through political party affiliation, the president may have a greater chance of successfully influencing the legislative process by recommending expedient measures. In addition, his nominative and veto powers may also be reinvigorated. The president could enjoy a greater chance of having his nominations confirmed and a reduced chance of being overridden by a two-thirds majority after exercising his veto power. Moreover, when government is united under a single political banner, the president may receive greater latitude in using signing statements, executive orders, and executive agreements. Similarly, he may also receive greater discretion in interpreting executive power, which paves the way for expansive interpretations of implied executive powers pursuant to the Take Care Clause, the Commander-in-Chief Clause, and the foreign policy provisions of the Constitution.

The magnification of executive power is alarming as it may very well operate as a one-way ratchet. In other words, once the augmented powers are legitimized it may not be possible to take them away. This is particularly alarming because it seems possible that augmented executive powers might be legitimized over time through mere tacit consent. This is in keeping with the notion that, through the Declaration of Independence, consent is established as “the complete ground of the legitimacy of all forms of authority.”¹⁴² What is more, in the face of a strongly unified government, the president may enjoy a reduced risk of impeachment. In this way political parties may actually reduce the effectiveness of the principal check on the exercise of executive power. This is true not only by reducing the chances for successful impeachment—it is also true by reducing the risk of *potential* impeachment.

140. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

141. *See generally* *Bush v. Gore*, 531 U.S. 98 (2000).

142. John Koritansky, *Thomas Paine: The American Radical*, in *HISTORY OF AMERICAN POLITICAL THOUGHT* 63 (Bryan-Paul Frost & Jeffery Sikkenga eds., 2003). Additionally, as Koritansky observed “the doctrine of legitimation by consent has the consequence of obliterating distinctions among the manner or motive from which one gives consent.” *Id.* at 64. Therefore, Koritansky argued “[a] consent to someone’s authority that is extracted by threat would have to be said to be as legitimating as consent given in a mood of cool deliberation, balancing less pressing good and evils.” *Id.*

Finally, political parties may also provide the executive with new tools. This can be achieved through supportive legislation. In the face of a strongly unified government, Congress may create laws, which expand executive power and potentially reduce the power of the judiciary. Under this theory Congress operates as an executive instrument. Put differently, party affiliation might transform the legislature from a coequal branch of government to a mere ministerial arm of the president. For instance, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,¹⁴³ better known as the USA PATRIOT Act or Patriot Act, is a controversial bill that was signed into law on October 26, 2001, which provided immense power to the executive branch. Notably, a Republican Congress passed this act and essentially bestowed its power on George W. Bush—a Republican president. More notably, the Patriot Act was passed with minimal debate after only forty-five days of consideration.

Other examples of supportive legislation include the Detainee Treatment Act of 2005,¹⁴⁴ the Military Commissions Act of 2006,¹⁴⁵ and the USA PATRIOT Improvement and Reauthorization Act of 2006,¹⁴⁶ among others. Each of these acts augments presidential power. Notably, it was ensured that each was signed into law before the congressional elections on November 7, 2006.¹⁴⁷ Boldly, the Detainee Treatment Act strips the Supreme Court of habeas corpus jurisdiction over detentions at Guantánamo Bay by placing “exclusive review” in a single federal court—the United States Court of Appeals for the District of Columbia.¹⁴⁸ Acknowledging the number of detainees, the limited resources of this court, and the lack of an appeals process seems to reveal that exclusive review was established in this one court in order to prevent detainees from having meaningful access to the court system. Similarly, the Military Commissions Act contains “habeas provisions,” which remove access to the courts for any alien detained by the U.S. government who is determined to be an enemy combat-

143. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

144. Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680, 2742–44 (2005) (codified as amended at 28 U.S.C. § 2241 (2006)).

145. Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948 (2006)).

146. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192 (2006).

147. The Military Commissions Act was swiftly pushed through Congress and signed into law on October 17, 2006—just under three weeks prior to the Congressional elections.

148. Notwithstanding, the Supreme Court may have the ability to exercise habeas corpus jurisdiction under the All Writs Act, 28 U.S.C. § 1651 (originally enacted as part of the Judiciary Act of 1789). Subsection (a) of the All Writs Act authorizes the courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

ant, or who is *awaiting* determination regarding enemy combatant status. This could allow the U.S. government to detain aliens indefinitely without prosecuting them in any manner. In addition, the bill limits the ability to invoke the Geneva Conventions as a source of rights.¹⁴⁹

The habeas provisions illustrate the controversial notion that the Ordain and Establish Clause¹⁵⁰ and the Exceptions Clause¹⁵¹ provide Congress with the power to unilaterally strip federal courts of their jurisdiction. This undermines the basic tenets of judicial review and marginalizes the role of the judiciary in government. In *Marbury v. Madison*,¹⁵² Chief Justice Marshall confirmed the role of the Supreme Court as the ultimate expositors of constitutional interpretation.¹⁵³ More specifically, Marshall determined that “[i]t is emphatically the province and duty of the judicial department to say what the law is [because] [t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”¹⁵⁴ From this it appears that the Court is properly charged with determining the constitutionality of executive action.

In his January 16, 2006 Martin Luther King Day Address to the American Constitution Society and Liberty Coalition, Al Gore stated: “In a properly functioning system, the Judicial Branch would serve as the constitutional umpire to ensure that the branches of government observed their proper spheres of authority, observed civil liberties and adhered to the rule of law.”¹⁵⁵ The use of jurisdiction stripping then is tantamount to ejecting the umpire in the middle of the game. The notion of jurisdiction stripping is particularly troubling when used as a vehicle to further a unilateral executive agenda. As such, the practice of jurisdiction stripping seems to represent a clear violation of the separation of powers doctrine.

In summary, a review of the five sources of support for unilateral executive action suggest that political parties may marginalize the legislative and judicial branches and may magnify the power of the remaining four sources. Again, in the absence of such magnification, it appears that the power generated through the four sources would otherwise be constitutional. As was discussed above, unilateral executive action is not a constitutional anomaly. Rather, such action appears to have been intended by the framers and in reality may represent a constitutional necessity.

149. Military Commissions Act, 10 U.S.C. § 948b(g).

150. U.S. CONST. art. III, § 1.

151. U.S. CONST. art. III, § 2, cl. 2.

152. 5 U.S. (1 Cranch) 137 (1803).

153. *Id.* at 177.

154. *Id.*

155. Gore, *supra* note 139.

V. CONCLUSION

Ultimately, the degree to which unilateral executive action and agenda are acceptable must be determined relative to a number of considerations. Important considerations include necessity, security, and consistency with the spirit of government, which is encapsulated by the separation of powers doctrine. However, principal among the considerations must remain the actual text of the Constitution. But again, who is to interpret this text? If the Constitution vests power in separate but equal branches of government, wouldn't each branch be responsible for interpreting its respective powers? In *Marbury*, the Court establishes the basis for judicial review and answers this question in the negative.¹⁵⁶ Changing the answer to this question now would fly in the face of over 200 years of jurisprudence. For this among other reasons, the Court must define a separation of powers law, which enables them to take a more active role in establishing boundaries on executive power—boundaries that are both clear *and* workable. Seemingly in furtherance of this goal, Professor Ku recommends that “[r]ather than deny its existence, the critics of [implied presidential power] should reframe their arguments to define reasonable limitations on the scope of . . . [that] power.”¹⁵⁷

More to the point though, the aim of this paper was to consider executive power, the separation of powers, and the unilateral executive theory to determine if presidential power under the separation of powers doctrine is actually a wolf in sheep's clothing. From the review of executive power and the unilateral executive theory it appears that we might answer this question in the affirmative. However, to get a more definitive answer it is helpful to explore the genealogy of modern executive power.

Professor Harvey Mansfield explored this topic in great detail in *Taming the Prince*. Having carefully traced the roots of executive power Mansfield finds that “[t]he modern doctrine of executive power was begun, or better to say founded, by Niccolò Machiavelli (1469–1527), with full consciousness of his departure from tradition, *sanza alcuno rispetto*.”¹⁵⁸ This may seem shocking at first given the conceptual distinctions separating Machiavelli's prince from our own president. On closer inspection, though, our notion of executive power does appear to trace directly to Machiavelli. Indeed, “the history of Machiavellism is chiefly a process of domestication, whereby Machiavelli's thought was appropriated and absorbed by liberal constitutionalism so that it could be regularized and le-

156. See *Marbury*, 5 U.S. 137.

157. Ku, *supra* note 104, at 84–85.

158. MANSFIELD, *supra* note 33, at xvii. The phrase “*sanza alcuno rispetto*” essentially means “without any respect.”

gitimized.”¹⁵⁹ The byproduct of this process is a tamed prince in the form of a constitutional executive. Thus, the constitutional executive is more “an invention of liberalism, of Locke, Montesquieu, and the American founders, rather than of Machiavelli and Hobbes.”¹⁶⁰

Still, through our constitutional executive, American republicanism “has not only republicanized English monarchy but also [it has] constitutionalized the anti-constitutional Machiavellian prince, so that the impulse to get results, regardless of the Constitution, is incorporated into the Constitution itself, and the devices of Machiavelli are made available to the office first held by George Washington.”¹⁶¹ By embracing the notion of executive power, the framers “imported not only the strength of monarchy but also some of the techniques of tyranny.”¹⁶² Despite this—or perhaps because of this—throughout *Taming the Prince*, Mansfield reflects on the ambivalence of modern executive power. The ambivalence of modern executive power is rooted in temperance and functional utility. In other words, Machiavellism has been tempered and incorporated in the Constitution to satisfy the mandates of necessity. Thus, Machiavellism has been incorporated to ensure not only efficiency in administration but also to ensure adequate protection for the American regime. The importance of such protection was alluded to by the Supreme Court in *Cunningham v. Neagle*, which found that there is an inherent power to protect that rests by necessity in the executive.¹⁶³ Boldly, Mansfield finds that the Constitution “would not work without a branch whose function could be accurately described—though you might never hear it described that way—as getting around the constitution when necessary.”¹⁶⁴ As Abraham Lincoln rhetorically posited, “[a]re all laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?”¹⁶⁵

Thankfully, the process of “getting around the constitution when necessary” is only applicable in the most extraordinary of situations. This is true by virtue of the broad implied powers, which our Constitution vests in the executive. Generally, these broad executive powers ensure that the president does not *need* to get around the Constitution. The president does not generally need to get around the Constitution, in other words, because

159. *Id.* at xix.

160. *Id.* at xviii.

161. *Id.* at xix.

162. *Id.*

163. 135 U.S. 1, 63–64 (1890).

164. MANSFIELD, *supra* note 33, at xix. By contrast consider Justice Rehnquist’s notion that “[t]he laws will thus not be silent in time of war, but they will speak with a somewhat different voice.” WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 225 (1998).

165. REHNQUIST, *supra* note 164, at vii (citing Abraham Lincoln, Message to a Special Session of Congress (July 4, 1861)).

the Constitution enables him to change from sheep to wolf in order to faithfully execute his office and “preserve, protect and defend the Constitution of the United States.”¹⁶⁶ In this manner our president is empowered to meet the mandates of necessity without destroying our constitutional foundation.

If the executive is in fact a wolf in sheep’s clothing, it appears that Hamilton may be the one responsible for having slipped on the sheep suit. In fact, Professor Koritansky finds that “[t]he picture of American government that emerges from reflecting on Hamilton’s thoughts is that of a constitutional monarchy” and, therefore, “Jefferson and the republicans knew whereof they spoke when they branded Hamilton a ‘monarchist’ and a ‘monocrat,’ even if Hamilton never himself referred to his own thought in those words following the respectful repudiation of the avowedly monarchical stance he had taken in the Philadelphia Convention.”¹⁶⁷

Hamilton realized that power must be vested in one sovereign agency and that within that agency “sovereignty must come into a single point of focus or else what they do is in vain.”¹⁶⁸ Notably, both John Locke and Thomas Hobbes stress this point “although Locke had also seen more clearly than Hobbes the need to veil the terrifying image of the monarch by calling for a body of legislators separate from the person of the executive.”¹⁶⁹ Professor Mansfield concludes that “everyone agrees on the necessity of a strong executive, but also agrees, it appears, on the importance of concealing that necessity.”¹⁷⁰

It appears that the “veil” for Hamilton’s “liberal monarch” was provided by the separation of powers doctrine.¹⁷¹ While Madison emphasized the importance of this doctrine, through his carefully crafted explanation of executive power, “it was Hamilton rather than Madison who expressed what really held it all together.”¹⁷² While Hamilton helped to secure broad executive powers, it is clear that his efforts did not truly secure a constitutional monarch. Wholly aside from the extent of executive power, surely a monarchy cannot be established when each president is limited to two

166. U.S. CONST. art. II, § 1, cl. 7.

167. Koritansky, *supra* note 26, at 118.

168. *Id.* at 113–14.

169. *Id.* at 114. Koritansky finds that it is

pretty well established that Locke’s discussion of “executive prerogative,” read carefully, reveals the extent to which his doctrine of legislative supremacy is a formal requirement that can be dispensed with under severely extenuating circumstances; and thus legislative supremacy can be said to veil the Hobbesian character of libertarian government when circumstances are more ordinary.

Id. at n.24.

170. MANSFIELD, *supra* note 33, at 2.

171. Koritansky, *supra* note 26, at 114.

172. *Id.*

terms in office. For evidence of this one need look no further than the precedent set by Washington, which is now mandated by the Twenty-Second Amendment.¹⁷³ All in all, however, “[w]e remain perhaps closer to a constitutional monarchy than it is comfortable for a democracy to admit.”¹⁷⁴

173. The Twenty-Second Amendment states:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

U.S. CONST. amend. XXII, § 1.

174. Koritansky, *supra* note 26, at 121.