

# THE SEPARATION OF POWERS IN UNITED STATES OF AMERICA: PAST AND PRESENT

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**Abstract:** The American version of the separation of powers was designed to prevent tyranny (i.e., capricious, arbitrary rule) and to ensure the rule of law by preventing the concentration of all powers in any one branch. That legislators, as well as their family and friends, would be subject to the impartial administration and adjudication of laws which they passed was a key factor in assuring these objectives. While Congress was regarded as the most representative and powerful branch in the system, over the course of American history presidential powers have increased enormously, often at the expense of Congress. The emergence and growth of political parties has facilitated this development so that today the presidency is the predominant branch of government, viewed as representing all the people, not special or narrow interests. In recent years, a new and expansive theory of presidential authority, “the unitary executive theory,” has gained currency; a theory which justifies an even greater concentration of authority in the executive branch. Moreover, the Supreme Court in recent decades, largely through an expansive interpretation of both its function and the language of the Constitution, has assumed new power, again at the expense of Congress. While the Constitution has not been amended to alter the original design, the reality is that the present system does not correspond to that intended by the Framers. Yet, the concerns posed by the Framers about a concentration of power remain.

**Key Words:** The Federalist, president, Congress, Supreme Court, delegation, unitary executive theory, tyranny.

## I. INTRODUCTION

The Framers of the American Constitution possessed a theoretical and practical understanding of the separation of powers doctrine and what its implementation would entail. To be sure, only a few may have been steeped in English political writings of the 17<sup>th</sup> and 18<sup>th</sup> centuries dealing with the intricacies of

the doctrine, but most, if not all, possessed a familiarity with Montesquieu's formulation which incorporated much of this earlier thinking, particularly that of Locke.<sup>1</sup> As well, the prior American political experience served to impart a practical understanding of certain of the finer points of the doctrine and its operations. From the early stages of the colonial period, for instance, controversies arose over the proper delineation of legislative and executive functions and duties.<sup>2</sup> More significantly, after independence was declared, eleven of the thirteen states in their new constitutions sought to provide for the separation of powers.<sup>3</sup> In fact, in the constitutions of six of these states, the doctrine was declared to be an inviolable principle of free government.<sup>4</sup>

The fact that these states had little success in maintaining the separation of powers called for in their constitutions did not diminish the deep and widespread regard the doctrine enjoyed.<sup>5</sup> The records of the deliberations at the Constitutional Convention reveal that there was never any question that the resulting constitution would embrace a division of functions between three relatively distinct departments of government.<sup>6</sup> The failures of the state governments only served to provide instructive lessons for the convention delegates on what additional provisions and precautions would be necessary for a viable and enduring government with divided powers.

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1. See Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth Century Political Thought," 78 *American Political Science Review* (1984). On Lutz's showing, Montesquieu was the most widely cited political philosopher in the American founding period. His authority was invoked by both Anti-Federalists and Federalists during the ratification debates. See, for instance, Federalist essays nos 9 and 47. For an excellent treatment of the various versions of the separation of powers doctrine and its evolution in the English political tradition see: W.B. Gwyn, *The Meaning of the Separation of Powers*, vol. IX, Tulane Studies in Political Science (New Orleans: Tulane University, 1965).

2. For a splendid treatment of separation doctrine, its development and application in America, see M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2<sup>nd</sup> ed. (Indianapolis: Liberty Fund, 1998), chpt. 6.

3. The two exceptions were the charter colonies, Connecticut and Rhode Island, which continued to operate under their original charters.

4. The most elaborate of these declarations was that in the Massachusetts Constitution of 1780. Article XXX in its "declaration of right" reads to the effect that no branch of government – legislative, executive, or judicial – shall exercise the power of another "to the end it may be a government of laws and not of men." *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, eds. Oscar and Mary Handlin (Cambridge: Harvard University Press, 1966), 327.

5. For an overview of the failings of the state governments established after the Declaration see Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994).

6. Both major plans set before the Convention, the Virginia and Connecticut, incorporated the separation of powers, though in rudimentary form. Neither plan provided the "balance" that was to be found in the final product. See text below.

While the Constitution Convention wrestled with and resolved many issues intimately connected with the separation of powers, *The Federalist*<sup>7</sup> provides a more coherent point of departure for an understanding and appreciation of why's and wherefore's of the major provisions relating to the eventual constitutional division of authority. The understanding of the separation of powers that emerges from *The Federalist* also forms a useful benchmark for identifying and evaluating the changes that have occurred in the relations between the branches and their relative powers over the course of time. Surveying these changes, in turn, leads straightaway to an examination of recurring and unresolved problems that have arisen in practice; problems that have led some authorities to call for constitutional changes that would eliminate the separation of powers altogether.

## II. THE FEDERALIST ON THE SEPARATION OF POWERS

Many essays in *The Federalist* touch upon matters related to the functions and powers of the branches, as well as their relationship to one another.<sup>8</sup> But a brace of essays, no. 47 through the better part of no. 51, are the most important for understanding the theoretical foundations of the constitutional provisions for the separation of powers. Madison, the author of these essays, begins Federalist no. 47 by taking up the charge of certain Anti-Federalists that there is too much blending of powers in the proposed Constitution which “expose[s] some parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.” In so doing, he also acknowledges in no uncertain terms that a separation of the major functions of government is indispensable for securing liberty and avoiding tyranny. If the Anti-Federalist charge be true, Madison concedes, “no further arguments would be necessary to inspire a universal reprobation of the system” since there is, he holds, “no political truth ...of greater intrinsic value, or ... stamped with the authority of more important patrons of liberty” than 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.”<sup>9</sup> This view, widely shared across the political spectrum of the founding era, unmistakably reflects the influence of Montesquieu's thought. Beyond pointing to indispensable need for

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7. Alexander Hamilton, John Jay, and James Madison, *The Federalist: The Gideon Edition*, eds. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2000). All subsequent references to *The Federalist* are to this edition indicating specific essay followed by page number.

*The Federalist* consists of 85 essays which are widely regarded as the best single source for understanding the theory underlying the Constitution. The authors used the pseudonym “Publius” to hide their identities.

8. Starting with essay no. 52, Publius deals in some detail with the institutions created by the Constitution. He begins with the House of Representatives, then the Senate, moving on finally to the presidency and the courts.

9. *The Federalist*, 47/249.

separated powers, however, these essays provide a wider perspective for not only understanding the purposes served by separation – i.e., its role in insuring constitutional republicanism and liberty – but also the difficulties encountered in endeavoring to insure that the constitutional separation will endure. To begin with, what is not widely recognized is that Madison held that the very existence of a concentration of powers constituted tyranny. Tyranny, that is, is not defined as oppressive or unjust use of power, but rather as the mere concentration of the powers. This understanding follows from Montesquieu’s view of political liberty, “a tranquility of mind arising from the opinion each person has of his safety” which, in his opinion, required “the government be so constituted as one man need not be afraid of another.”<sup>10</sup> Simply put, an individual could not have “tranquility of mind,” i.e., “political liberty,” if powers were in the same hands because the threat of arbitrary and capricious rule would always be present. On this point, Madison quotes extensively from Montesquieu to indicate how even the union of any two powers could lead to arbitrary and capricious rule in contravention of the rule of law. A merger of legislative and executive powers, for instance, could result in the legislature passing partial or unjust laws with impunity by selectively enforcing them to exclude members of these branches, their families and friends. Other combinations produce the same results: if there be a union of the legislature and judiciary, “life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislature*,” while a union of executive and judicial powers would allow “*the judge*” to “behave with all the violence of *an oppressor*.”<sup>11</sup>

This understanding of the character of tyranny was closely related to the view that the separation of powers was essential for the stability and viability of republican government. This much emerges from Hamilton’s observations earlier in *The Federalist* concerning the “petty republics” of times past whose unrest and instability, as he put it, kept them “perpetually vibrating between the extremes of tyranny and anarchy.”<sup>12</sup> Indeed, he contends, had not “the science of politics ... received great improvement,” “the enlightened friend of liberty” would have to abandon “the cause” of republicanism.<sup>13</sup> Chief among those improvements he cites are “the regular distribution of power into distinct departments; the introduction of legislative balances and checks” (i.e., bicameralism) and “the institution of courts composed of judges” serving “during good behavior.” In short, in these passages there is a recognition that the elements of liberal constitutionalism – i.e., the institutions and processes long associated with divided powers – are essential for the rule of law and the liberty as well as the very survival of popular or republican government.

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10. *The Spirit of the Laws*, trans. Thomas Nugent (New York: Hafner Publishing Co., 1949), bk. XI, sec. 6.

11. *The Federalist*, 47/251-52.

12. *Ibid.*, 9/37.

13. *Ibid.*, 9/38.

At another level, that relating to the problem of maintaining the constitutional separation, a conviction prevailed that the legislature would be the greatest threat, i.e., the branch most likely to usurp the powers and functions of the executive and judicial departments. Madison drives this point home forcefully in Federalist no. 48: “in a representative republic,” in which the executive powers are “carefully limited, both in extent and duration,” but where the representative “assembly ...inspired by a supposed influence over the people,” possessing “an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.”<sup>14</sup> Hamilton makes the same observation later in discussing the president’s power of veto where he writes of a “tendency...almost irresistible” on the part of the legislature to “absorb” the other branches. “The representatives of the people, in a popular assembly,” he continues, “seem sometimes to fancy, that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter.”<sup>15</sup> This concern over legislative usurpation was, no doubt, fueled by the experiences at the state level. Madison, for instance, in Federalist essay no. 48 quotes extensively from Jefferson’s “Notes on Virginia” concerning the legislative usurpation of executive and judicial powers in that state. In addition, the more indefinite nature of legislative powers and functions compared to those of the executive and judiciary, coupled with the fact that historically the political ends sought through separation involved greater legislative control over and diminution of executive or royal authority, led Madison’s to conclude that, for good or ill, “in republican government, legislative authority the necessarily predominates.”<sup>16</sup>

That the legislature would most likely be an aggressor in its relations with the executive and judicial branches played a significant role in Madison’s answer to the question with which he was preoccupied in essays nos. 48, 49, and 50, namely, how to maintain the necessary constitutional separation. In many ways these essays are the richest in revealing the assumptions upon which the entire constitutional edifice rests. Will, he asks, “parchment barriers” – marking out “with precision, the boundaries” of each department in the constitution – serve to contain “the encroaching spirit of power?” Such barriers he finds have “been greatly overrated” by the drafters of the state constitutions; they have not served to prevent the “legislature department” from “every where extending the sphere of its activity and drawing all power into its impetuous vortex.”<sup>17</sup> Will appeals to the

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14. Ibid., 48/257.

15. Ibid., 71/371.

16. Ibid., 51/269.

17. Ibid., 48/256-57.

people when there is an evident breach of the constitutional separation serve the purpose of maintaining the constitutional separation? Again, he answers in the negative for various reasons: such appeals, suggesting defects in the Constitution, would undermine the popular respect for it; they would arouse the “public passions” and thereby dangerously “disturbing the public tranquility.” “But the greatest objection of all,” he contends, is that such appeals would not preserve the constitutional equilibrium; given the number, influence, and prestige of the legislators, the people would most likely take their side. But even if this were not the case, he observes, the popular decision would not “turn on the true merits of the question,” but instead upon partisan considerations. Consequently, he concludes, “passions” and not “reason” would carry the day.<sup>18</sup>

Would appeals to the people at fixed intervals serve to maintain the prescribed separation? Once again he finds multiple reasons to reject this solution. If the transgressions occur close to the time of appeals, passions will again dominate. If the transgressions be distant from the time of appeal, he concludes, they may have already taken root and “would not be extirpated” or they may have already accomplished their “mischievous effects” before any remedy could be applied. In addition, he notes, the prospect of “distant prospect of public censure” would not serve as an effective deterrent particularly against the encroachments of a numerous assembly.<sup>19</sup>

## 2.1. The Constitutional Solution

In Federalist no. 51, clearly taking into account the foregoing considerations, Madison sets forth his solution that rests in part on a blending of powers. In essay no. 47, by way of answering the Anti-Federalist critics, he contends that a high degree of blending is consonant with the separation of powers doctrine. In this connection he observes that British constitution, which served as the model for the “celebrated Montesquieu,” does not provide for “departments ... totally separate and distinct from each other.”<sup>20</sup> From this Madison adduces that Montesquieu held that only when “the whole power of one department is exercised by the same hands which possess the whole power of another department” are “the fundamental principles of a free constitution ... subverted.”<sup>21</sup> Clearly Madison believed such a wide latitude of blending necessary since he contends at the outset of essay no. 51 that the “only answer” for “keeping each” of the “constituent parts” “in their proper places” is through “contriving the interior structure of the government.”<sup>22</sup>

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18. Ibid., 49/263-64.

19. Ibid., 50/265.

20. Ibid., 47/250.

21. Ibid., 47/251.

22. Ibid., 51/267.

Madison also stresses that modification of the pure doctrine of separation of powers is necessary to secure the establishment of a competent and independent judiciary. The Founders clearly accepted the proposition that “each department should have a will of its own” and the corollary that flowed from this, “that members of each [department] should have as little agency as possible in the appointment of the members of the others.”<sup>23</sup> Yet, as Madison points out, the “peculiar qualifications” for the judiciary led them to provide for a mode of selection that would best secure “these qualifications.” At the same time, fully aware that nomination to judicial office by the president and confirmation by the Senate might serve to compromise judicial independence, as Madison relates, they provided for the “permanent tenure” of judges with the end of eliminating “all sense of dependence” on these branches.<sup>24</sup> Likewise, familiar with the practices that led to the breakdown of separation at the state level, the Founders also provided that Congress could not reduce the remuneration of judges or the president.

The “great security” against the concentration of powers, as Madison pictures it, involves providing “those who administer each department, the necessary constitutional means, and personal motives, to resist [the] encroachments of the others.” The “constitutional means” basically come down to weakening the strong, and strengthening the weak. Since the legislature is the predominant branch, vested with virtually all the powers delegated to the national government, “the remedy ... is to divide” it “into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of the common functions, and their common dependence on the society, will admit.”<sup>25</sup> But the Framers obviously believed that the executive needed strengthening or, as Madison put it, that “it should be fortified” against potential assaults for the legislature. This fortifying came in the form of a qualified veto; one which would require a two-thirds vote in both chambers to override. In keeping with the doctrine of separation of powers, the “primary” purpose to be served by this veto, as Hamilton takes pains to note in essay no. 73, is to enable the executive to repel the encroachments by the legislature on executive powers; its “secondary” use relates to securing good government and neutralizing the excesses of popular government by blocking the passage of “bad laws, through haste, inadvertence, or design.”<sup>26</sup>

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23. The requirement caused serious problems in the Constitution Convention when it came to the mode of electing a president. A major question was how could a president seek another term of office if he was to be elected by Congress? To gain re-election would he not yield to congressional demands? The eventual solution, the electoral college, eliminated this difficulty.

24. *The Federalist*, 51/268.

25. This is the principal reason for two houses, though the popularly accepted (but erroneous) view today is that principal reason was to act as a brake on the first.

26. The primary purpose of the veto is all but forgotten in modern text dealing with the American system. Instead, emphasis is placed on the secondary function which ultimately serves to bring into question the Framers commitment to popular government. The same may be said of the

Madison's remarks concerning the presidential veto, though brief, are revealing. He acknowledges that, "at first view," "an absolute negative" would appear to be "the natural defence with which the executive should be armed." Indeed, the absolute negative would have been in keeping with Montesquieu's thinking. But Madison, reflecting the concerns raised in the Constitutional Convention, points out that such a veto power might not be "altogether safe, nor alone sufficient": "On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused." He does appear to regard this lack of an absolute veto to be something of a shortcoming when he writes that "this defect of an absolute negative" can perhaps be overcome "by some qualified connexion between this weaker department [the executive], and the weaker branch of the stronger department [the Senate]."<sup>27</sup> On this score, it would appear, he believed a bond might develop between the executive and the Senate since they had to cooperate in the performance of important functions and duties such as executive and judicial appointments and treaty making.

These constitutional provisions for the separation of powers would be for naught lacking the "personal motives," the second pillar in the solution for maintaining the constitutional partition. What good, for example, is the veto power, if the executive fails to wield it when necessary to protect his constitutional authority? At the outset of Madison's discussion of personal motives are found the most frequently quoted passages from *The Federalist*: "Ambition must be made to counteract ambition"; "If men were angels, no government would be necessary"; or "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." These observations point to an underlying strategy, that is, "supplying by opposite and rival interests, the defect of better motives" in order that the constitutional provisions will operate to secure the constitutional separation.<sup>28</sup> More specifically, maintaining the division requires that "the interest of the man" be "connected with the constitutional rights of the place."<sup>29</sup> If this connection exists, then, the partition will be maintained, not out of any feeling of civic responsibility or self-restraint, but rather from the motives stemming from institutional interest. The constitutional means, therefore, are a necessary but not sufficient condition for maintaining the constitutional division of authority. Without the appropriate personal motives to preserve institutional integrity and power, they will not serve their purpose.

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reasons for bicameralism. (See note 25 supra.)

27. Hamilton elaborates upon these considerations in Federalist essay no. 73. He sees advantages in the qualified veto over the absolute in part because executives might be less reluctant to exercise the latter.

28. *The Federalist*, 51/269.

29. *Ibid.*, 51/268.



Ultimately, then, the American system of separation of powers rests on the Framers' understanding of human motivation and, particularly, that of those seeking and holding office. For instance, Madison, in his account, is short on informing us how officer holders are to be given the requisite "personal motives" or how "opposite and rival interests" are going to be supplied. He simply seems to assume that the mere creation of institutions with different powers would itself be enough to supply these interests and personal motives; that the mere existence of these institutions would be enough to create the "opposite and rival interests" that would keep the system on even keel. In the vernacular of modern times, he understood that politicians would "defend their turf."

## 2.2. A Summary Overview

Separation of powers was woven into the Constitution at the Philadelphia Convention. The reasons for this and for the form the separation assumed are clear enough. The Framers sought a system that would observe and preserve the rule of law which they regarded as essential for stability and ordered liberty. To achieve this, they recognized that government would have to be controlled; that those exercising power would not be able to place themselves above the law. These concerns are reflected in Madison's observation that under the proposed Constitution "oppressive measures" were unlikely simply because representatives "can make no law which will not have its full operation on themselves and their friend, as well as on the great mass of the society." And, he warns, if the people "tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty."<sup>30</sup>

While the primary purpose of divided powers was to secure the rule of law and those values closely associated with it, the Founders knew from their experiences that the legislative branch could not be restrained by a mere paper demarcation of powers. To prevent a tyrannical concentration of powers in the legislative department required precautions some of which are not, theoretically speaking, necessarily connected to the doctrine of separation of powers, the most notable of these being bicameralism and life tenure for judges. A blending of powers, principally that providing for the presidential veto, was also deemed essential to prevent a tyrannical concentration. Because of these provisions, intended to maintain separation and to keep the departments on an even keel, the Constitution is commonly referred to as a "balanced Constitution." Only through a blending of powers, the division of legislative authority, and the strengthening of the executive and judicial branches, could the separation of powers serve the ends – e.g., rule of law, ordered liberty, stability – the Framers sought.

Certain aspects of the Founders' understanding of the separation of powers should be kept in mind in light of both subsequent constitutional and political

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30. Ibid., 57/297.

developments and the modern understanding of the constitutional division of powers. In the first place, contrary to modern belief that the founders established “three equal and coordinate branches” of government, they regarded Congress to be the predominant branch. This understanding is evident from the Convention deliberations, *The Federalist*, and the ratification debates in the several state conventions.<sup>31</sup> Moreover, reading the Constitution with an innocent eye reveals as much. Here we find provision for Congress in Article I, wherein virtually all the powers delegated to the national government are set forth. Significantly, Congress also has the authority to police and control the other branches. It can, for example, impeach and remove the president and judges, override presidential vetoes, and control the appellate jurisdiction of the Supreme Court. To be sure, in most cases extra-majorities are required in both legislative chambers for these and like actions, but even so, the judiciary and executive have no equivalent powers or authority over Congress.

A second observation, which also runs counter to much of the contemporary understanding, is that the term “checks and balances” applies in only a very special sense to the American system of separated powers. “Checks and balances,” for instance, have traditionally been associated with “mixed” regimes wherein, not unlike the British system at the time of the American founding, the institutions of government represent the dominant classes or interests within the society. Yet, what the Founders did was to adjust the doctrine of separation of powers to the principles of republicanism which required that all departments, either directly or indirectly, would ultimately be accountable to the electorate. Furthermore, those constitutional provisions, intended to establish a “balanced Constitution,” are best understood as a means to maintain the constitutional separation of powers rather than, as the case in mixed regimes, to insure any balance of power between the major social interests or classes. This, at least, was Madison’s understanding that was also widely shared by members of the Constitutional Convention.

### **III. POLITICAL DEVELOPMENTS AND CHANGING THEORETICAL PERSPECTIVES**

As intimated above, this understanding of separation of powers and, in particular, the status and role of Congress, has changed markedly since the time of founding. The most far reaching aspect of this change is not attributable to modifications of the Constitution or to judicial interpretations relating to the respective powers of the Congress and president. Indeed, the Constitution in most important particulars relating the division of powers has not changed since its inception. If anything, save for certain provisions in the Bill of Rights, the first ten

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31. Perhaps this point is best illustrated by looking at *The Federalist* and the attention devoted to each of the branches. The legislature is treated first in fifteen essays (52-36); ten devoted to the House of representatives, five to the Senate; the executive next in eleven essays (67-77); and the judiciary in six (78-83).

amendments to the Constitution adopted shortly after ratification, at least two subsequent amendments would seem to increase congressional powers: the Fourteenth Amendment, which provides in section 5 that “Congress shall have power to enforce, by appropriate legislation, [its] provisions” that include guaranteeing individuals both “the equal protection of the laws” and protection against “any State” depriving “any person of life, liberty, or property, without due process of law”,<sup>32</sup> and the Sixteenth that confers upon Congress the “power to lay and collect taxes on incomes, from whatever source derived, with apportionment among the several States, and without regard to any census or enumeration.”<sup>33</sup> Despite this, however, political developments over the decades, as well as changing theoretical perspectives concerning constitutional interpretation have served to diminish the status of Congress relative to the other branches. This can best be seen by tracing the major factors that have led to an expansion of presidential and judicial powers often at the expense of Congress.

### **3.1. Changing Constitutional Perspectives and the Rise of the Presidency**

Two related developments within a few decades after ratification of the Constitution served as catalysts in altering the relationship between the branches, at least as this relationship was originally understood. The first of these was the emergence of organized political parties which, not entirely unlike the parties today, were rooted in the states but united in their determination to elect a president of their choice. From the perspective of the constitutional division of powers, Jefferson’s election in 1800 and the ascendancy of his Republican party is significant because it demonstrated how a political party can serve as a bridge or connection between the legislative and executive branches with the president understandably serving as the acknowledged leader of the party. Indeed, as subsequent history shows, the interests of political parties more frequently than not outweigh or trump those institutional interests upon which the Founders relied for preserving the division of powers. The second development involved a significant change in the mode of nominating candidates for the presidency and the manner of their election. On this score, Jackson’s election to the presidency in 1828 is an acknowledged turning point: His nomination was secured through appeals to the people rather than through a congressional party caucus, the nominating process up to 1824, and his election rested largely on the popular vote since most of the states by this time allowed the people to vote for electors pledged to the candidates of their choice. This meant, as Jackson was to maintain in various contexts, that the presidency possessed as firm a popular foundation as Congress. Put in other terms, the Founders believed, consistent with the historical circumstances which gave rise to the separation doctrine, that the will of the people was most authentically expressed by Congress and, in particular, the House of Representatives, but given the development of popularly based parties and mode

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32. U.S. Const. amend XIV, sec. 5.

33. U.S. Const. amend XVI.

of election, the president could now claim to speak for the people just as authoritatively, if not more so, than Congress.

The roots of the modern presidency are to be found in Jackson's claims concerning the representative character of the presidency. His contentions can also be looked upon as initiating the continuing and complex controversies over which branch, the executive or legislative, is the more democratic or most faithfully embodies the values, aspirations, needs, and will of the people.<sup>34</sup> Woodrow Wilson's intellectual odyssey on these and related issues perhaps best illustrates the dimensions of the controversy and the problems that arise from it. His analysis and observations still serve as a foundation for those seeking to "reform" the American system by drastically altering or even eliminating the constitutional separation of powers.<sup>35</sup>

Wilson's *Congressional Government*, published in 1885, ranks among the first and most trenchant critiques of the Framers' handiwork. Many students regard the date of its publication important because Wilson was writing in the post-Civil War period of congressional dominance. In any event, in this work he operated from the premise that, given the character of the Constitution, Congress would inevitably reign supreme. "Our Constitution," he wrote, "like every other constitution which puts the authority to make laws and the duty of controlling the public expenditure into the hands of a popular assembly, practically sets that assembly to rule the affairs of the nation as supreme overlord."<sup>36</sup> This he regarded as "the inevitable tendency of every system of self-government" similar to those established by the Constitution. Wilson expressed no particular displeasure with this tendency. Rather his criticisms were directed to the shortcomings of Congress that rendered it incapable of performing its required functions as the institution through which the people would exercise sovereignty. These criticisms were multiple, some relating to the organization and operations of Congress, but the most telling involved the consequences of its separation from the executive branch. While he could understand the Framers' concerns to insure congressional

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34. Some have argued, not without merit, that the president is obliged to speak in lofty, abstract terms to avoid alienating large segments of the electorate, whereas Congressmen, coming from more structured surroundings, represent real, on-going interests. In this sense, they contend, Congress is more representative than the president. See Willmoore Kendall, "The Two Majorities." *Midwest Journal of Political Science*, 4 (1960) and James Burnham, *Congress and the American Tradition* (Chicago: Henry Regnery Co., 1959).

35. An excellent compilation of the major reforms of the Constitution suggested is to be found in *Reforming American Government*, ed. Donald L. Robinson (Boulder, Colorado: Westview Press, 1985). The bulk of the suggested reforms involve abandoning the Framers' system of separated powers and parallel Wilson's in seeking to emulate the British parliamentary system. See also in this regard *Toward A More Responsible Two-Party System*, Report of the Committee on Political Parties of the American Political Science Association, *American Political Science Review*, 44 (1950), Supplement. This report points to the potentialities of approaching the British parliamentary system through the reform of the political parties.

36. *Congressional Government*, 203.

independence, he believed that it “deprive[d]” Congress “of the opportunity and means for making its authority complete and convenient.”<sup>37</sup> His concerns and criticisms of the separation of powers related largely to the limited range of Congressional authority. Congress “directs” and “admonishes,” “It issues the order which others obey,” “but,” he lamented “it does not do the actual heavy work of governing.”<sup>38</sup> From his perspective, “the only really self-governing people is that people which discusses and interrogates its administration,” functions which Congress must perform on behalf of the sovereign people but cannot given the division of powers. The responsibilities of Congress, then, should go far beyond articulating “the will of the nation” to include “superintending all matters of government.”<sup>39</sup> In short, Congress needs the authority to give direction over how its laws and policies are administered; an authority forbidden it by the constitutional division of powers. As these criticisms suggest, and his earlier writings make clear, Wilson much preferred a “cabinet government” modeled on his understanding of the British government, Though he never fully detailed the specific constitutional changes that would be required to institute such a system, the thrust of his argument is clear: he wanted to place executive powers and functions under congressional supervision. This involved, as Wilson acknowledged, a merger or combination of powers that would have been unacceptable to the Framers.

By 1908, with the publication of his *Constitutional Government*, Wilson’s understanding of the constitutional order, its evolution and needs, had markedly changed. In one sense, his new outlook simply refines and expands upon Jackson’s conception of the presidency and its relation to other branches. Wilson, for his part, had apparently come to conclude that an active and responsible government, one capable of achieving the ends associated with the Progressive movement of the early Twentieth Century to which he subscribed, could be realized most efficiently and effectively through presidential leadership. While he recognized that the Founders scarcely envisioned a president assuming such a positive role in the processes of government, he did believe that changing circumstance and extra-constitutional developments, principally the emergence and growth of political parties, enabled presidents to assume such a role without the need for any basic constitutional changes. To this effect he observes, “He [the president] has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it.”<sup>40</sup> This understanding, as well as the history of the office, led Wilson to conclude that the presidency is largely what its occupant at any given

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37. Ibid.

38. Ibid., 197

39. Ibid., 195.

40. Ibid., 60.

time “has the sagacity and force to make it.”<sup>41</sup>

In contrast to his earlier position that provided for congressional supremacy, Wilson now set forth a conception of the separation of powers in which the president is the centerpiece, “the unifying force in our complex system, the leader both of his party and of the nation.”<sup>42</sup> He points to the inherent advantages which a president enjoys over Congress in the context of a popular government. He repeatedly emphasizes that the president alone represents “the people as a whole,” that “he is the representative of no constituency, but of the whole people.” The nation, he continues, “has no other political spokesman,” the president possesses the “only national voice in affairs.” To this, Wilson adds, when the president does speak “in his true character, he speaks for no special interest.” Aside from the fact that only the president, and not Congress, can speak for the people as whole, Wilson insists that other factors and forces point to his dominance. The country’s “instinct is for unified action, and it craves a single leader” so that once he has gained “the admiration and confidence of the country ... no other single force can withstand him, no combination of forces will easily overpower him.” Or, again, “if he rightly interpret the national thought and boldly insist upon it, he is irresistible.”<sup>43</sup>

Wilson’s views, those expressed in *Congressional Government* and later in *Constitutional Government*, provide a continuum on which the varied conceptions of presidential and congressional authority can be arrayed. Theodore Roosevelt’s “Stewardship theory” of presidential authority, for instance, which holds that a president may act for the common good in the absence of congressional or constitutional authorization unless the act is “prevented by direct constitutional or legislative prohibition,” is obviously in line with Wilson’s presidentially oriented understanding.<sup>44</sup> Likewise, William Howard Taft’s belief that a president must rely on a “specific grant of power” or what can be “justly implied” “as proper and necessary” from such a grant is more in keeping with the traditional understanding that places the legislative branch at the center.<sup>45</sup> As the views of these two former presidents would suggest, the system over time can best be described as swinging back and forth, so to speak, between these two poles. Franklin Roosevelt in advancing the New Deal, for instance, bears all the marks of Wilson’s model president, whereas Calvin Coolidge approximates Taft’s. The so-called “strong presidents” in American history are those who most closely conform with Wilson’s

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41. Ibid., 69.

42. Ibid., 60.

43. Ibid., 68.

44. Quoted in Joseph E. Kallenbach, *The American Chief Executive* (New York: Harper and Row, 1966), 246.

45. Ibid.

image.<sup>46</sup>

A question that preoccupies many students interested in the development and course of the American constitutional system is, which of these two competing systems seems to be gaining ground. That is, despite these swings back and forth, is one understanding or conception perceptively edging out other in the minds of the political elite or the people? Or, to put this somewhat otherwise, is the constitutional order, operationally speaking, moving permanently closer to one pole or the other, i.e., either to a presidentially or congressionally centered system? The answer would seem to be clear enough: During the course of the Twentieth Century there has been movement toward a presidentially centered system, in part due to developments largely extra-constitutional in nature that have strengthened the president's status as the representative of all the people. In light of the presidential role marked out by Wilson, the "reforms" in the presidential nomination process within both major parties after the 1968 presidential campaign surely rank among the most important. While at that time both parties had moved well beyond the control of party elites meeting in the proverbial "smoked filled rooms" to determine their presidential nominees, local and state politicians prior to 1972 still had a large say at the national nominating conventions. Since 1972 the parties have democratized the nominating process so that voters can now express their preferences in state presidential primaries or in state party caucuses. Suffice it to say, this "reform" only serves to strengthen the claim initially made by Jackson that the president is the only true representative of all the people. At the same time, because of their diminished role in presidential politics, the state and local party organizations are weakened which further solidifies the president's position as party leader. In fact, the decline of the parties at the local level, with the attendant rise of presidential leadership, follows upon Roosevelt's New Deal and the assumption by the national government of welfare functions that had previously rendered local party "machines" so viable. Beyond this, of course, and quite apart from his status within his party, the president, largely because he speaks with a single tongue, is far more effective than Congress in utilizing the mass media to advantage. These new avenues have allowed presidents, perhaps to a degree that even Wilson could not envisage, to give "direction to opinion" and speak for "the real sentiment and purpose of the country."<sup>47</sup>

### **3.2. Congress and the Growth of Presidential Powers**

Hamilton feared that presidents, intimidated by the "superior weight and influence of the legislative body," would use their veto powers too sparingly. In his opinion, "there would be greater danger of his not using his power when

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46. War has contributed, in some instances, to rendering a president "strong." For the most part, those presidents who have widened executive powers, advocated centralization of authority in the national government, and who have lead or challenged Congress are described as "strong."

47. *Congressional Government*, 68.

necessary, that of his using it too often, or too much.”<sup>48</sup> Early presidents, for whatever reason, did employ this power sparingly: Washington employed the veto on two occasions, once on constitutional grounds; neither Adams nor Jefferson found cause to veto, but Madison did on seven occasions, citing constitutional objections on four of these. Even Jackson saw fit to veto only twelve bills. Indeed, prior to the Civil War, the veto was used a total of only 52 times. After Jackson, however, vetoes were increasingly based, not on constitutional grounds, but on those of politics and expediency.<sup>49</sup> Since the Civil War most presidents have used the veto with far greater frequency for reasons that are almost always distinctly political.<sup>50</sup> Equally telling as a measure of the president’s increasing role in the legislative process are the relatively few vetoes, approximately 4 percent, that have been overturned. What has occurred over time, of course, is an altered constitutional morality with regard to the proper use of the veto; a morality rooted in the conviction that the president is as much an authentic spokesman for the people, if not more so, than Congress.

While the veto power certainly accords the president a major role in the legislative process, this role is, for the most part, a negative one. Modern presidents have assumed a far more positive role in the legislative process to an extent that many commentators have appropriately dubbed him “chief legislator.” While presidents in the Nineteenth Century, particularly “strong” presidents such as Jefferson and Jackson did initiate some legislation, they normally did so indirectly. While the initiation of legislative measures increased significantly under Theodore Roosevelt, these measures, following tradition, officially emanated from departments and agencies within his administration. Wilson embraced Roosevelt’s activism and moved beyond it to provide the model for modern presidents as legislative leaders by using his State of the Union address – which, breaking precedent, he personally delivered -- to outline his broad policy goals, later following through with special messages to Congress detailing means to these goals. Thus, he linked the presidency to both specific legislation and broad policy initiatives. In significant ways, Wilson set down the path followed by Franklin Roosevelt in advancing his New Deal programs. In more recent times, it has become standard operating procedure for presidents to set forth their legislative agenda; agendas which are normally given priority in the legislative process.

The relationship between Congress, the president, and the bureaucracy is

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48. *The Federalist*, 73/382.

49. See Edward Corwin, *The President Office and Powers: 1787-1957* (New York: New York University Press, 1957), 279.

50. Franklin Roosevelt used the veto more than any other president, 635 times over slightly more than three terms. Cleveland used the veto 584 times over his two terms. Figures on the use of the veto power can be found at: <<http://www.infoplease.com/A0801767.html>> The numbers cited in the text include pocket vetoes. See the Constitution, Article I, section 7, paragraphs 2 and 3 for the provisions relating to the president’s veto powers.



an extremely complicated one in large part due to political considerations, the distribution of power in Congress, and, inter alia, constituent concerns – matters tangentially related to the separation of powers in practice. On the whole, the emergence of the president as “chief legislator” has not aroused much concern, the more so since neither chamber of Congress is suited to assume a major role in initiating policies.<sup>51</sup> Rather, the area of acute concern that has intensified with the growth of a positive government relates to legislative oversight and control of the administrative development and execution of policies authorized by Congress. In this regard, a maxim in Locke’s teachings, *delegata potestas non potest delegari*, comes into play. This doctrine, central to constitutionalism and the rule of law, holds in effect that legislative powers, constitutionally delegated by the people to the legislature, cannot be further delegated by the legislature to another body or agency. While readily comprehensible in theory, in practice it raises the complex question of what constitutes an unconstitutional delegation of legislative authority to the executive branch. The earliest dispute concerning the validity of a congressional delegation occurred over the authority of the president to impose an embargo when he deemed conditions set forth by Congress warranted.<sup>52</sup> Much later, beginning late in the Nineteenth Century, other challenges arose over the grants of discretionary authority to the president in raising or lowering tariff rates.<sup>53</sup> In these instances, the Supreme Court resolved the issue by holding that the discretionary grants by Congress for imposing or lifting the embargo were sufficiently defined and clear cut.

Two cases arise in 1935 involving the congressional delegation of authority to the president by the National Industrial Recovery Act (1933), an act designed to stimulate the economy by promoting fair competition in various sectors of the economy, are of particular interest. One provision of the Act conferred discretionary authority upon the president to forbid the interstate shipment of “hot oil” -- i.e., oil produced in excess of that permitted by state law. Since this grant of authority contained no guidelines concerning when the president should forbid or permit such shipments, the Court for the first time in the nation’s history held the delegation to be unconstitutional.<sup>54</sup> The Court shortly thereafter also ruled that the “Live Poultry Code” of the Act unconstitutional on grounds that the code’s definition of “fair competition,” the goal set by Congress, was so vague as to constitute a

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51. By the Twentieth Century what John Stuart Mill asserted in his *Considerations on Representative Government* was “slowly beginning to be acknowledge” had finally become common knowledge, namely, “a numerous assembly is as little fitted for the direct business of legislation as for that of administration.” This realization, no doubt, accounts for the acceptance of the president’s role as chief legislator. *John Stuart Mill, Utilitarianism, Liberty, and Representative Government*, ed. A.D. Lindsay (New York: E.F. Dutton, 1950), 315.

52. *United States v. The Brig Aurora*, 7 Cranch 383 (1813).

53. See *Field v. Clark*, 143 U.S. 644 (1891) and *Hampton and Co. v. U.S.*, 276 U.S. 394.

54. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

transfer of the legislative function to the executive.<sup>55</sup> Since 1935, however, the Court has not ruled any Congressional legislation in violation of Locke's maxim, though the issue was raised in 1997 when the Court invalidated an act that vested the president with a qualified "line item" veto power; that is, the power to veto specific provisions of an appropriations measure.<sup>56</sup>

The *delegata potestas non potest delegari* doctrine would now appear to be a dead letter. The Court has upheld extremely broad delegations of power to the executive branch. Congress in establishing the Occupational Safety and Health Agency (OSHA), for example, gives the agency a broad mandate, namely, "to assure as far as is possible every working man and woman in the nation safe and healthful working conditions and to preserve human resources."<sup>57</sup> Likewise, Congress has delegated broad authority to independent regulatory commissions. The Consumer Product Safety Commission, for instance, is charged with the responsibility of protecting the public "against unreasonable risks or injury associated with consumer products."<sup>58</sup> With the enormous expansion of government programs and regulation, which has continued with fits and starts since the New Deal, Congress has delegated wide discretionary authority to numerous agencies and commissions. In the first decade of the 21<sup>st</sup> Century, The Federal Register, which records the rules and regulations issued by these bodies in carrying out their missions, had grown to 70 volumes and more than 70,000 pages. OSHA alone has issued some 4,000 detailed rules and regulation.<sup>59</sup>

Various concerns have arisen over this development. The rules and regulations promulgated by these numerous agencies and commission have, in effect, the force of law since they carry penalties for non-compliance and they also impose compliance costs upon various concerns in the private sector. Above all, the number of such regulations lends to the selective and often arbitrary imposition of the rules and regulations thereby undermining rule of law, one of the major goals sought through the separation of powers. Congress for a time, through provisions for one house and two house vetoes of administrative rulings and actions, sought to insure that its laws were interpreted and executed in keeping with its intent. Provisions for congressional veto of specified executive actions, either by one or both chambers, were inserted in a wide variety of legislation – e.g., executive reorganization, regulation of trade, energy policy -- starting in 1932. In 1983, however, such vetoes were deemed a violation of the constitutional separation of powers, that is, unconstitutional congressional intrusion into the executive

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55. *Schechter Poultry Corporation v. U.S.*, 295 U.S. 495 (1935).

56. *Clinton v. City of New York*, 524 U.S.417 (1998)

57. OSH Act of 1970, 29 USC 651.

58. Consumer Products Safety Act (1972), 15 U.S.C. 2051, Sec. 2, para (3).

59. Philip K. Howard, *The Death of Common Sense* (New York: Random House, 1994), 12.

domain.<sup>60</sup> In this decision the Court was reflecting its view that the Constitution requires a strict separation of functions.<sup>61</sup>

Still another and more recent development has contributed to the expansion of presidential authority, namely, the emergence of an expansive “unitary executive” theory that challenges the traditional understanding of the separation of powers as it pertains not only to the relations between Congress and president, but to the courts as well. Succinctly put, the theory holds that “all federal executive power is vested by the Constitution in the President.”<sup>62</sup> Of course, this formulation can be taken to mean, in a manner consistent with the view of divided authority that has largely prevailed since inception of the Republic, that the president can appoint, remove, and otherwise direct subordinates within the executive department; that he is responsible for the faithful execution of the laws. But there is a more expansive and highly controversial version of the theory that goes well beyond asserting those powers related to the traditional executive functions; namely, that there is a corpus of inherent executive powers, critically important in times of war or national emergency, derived from Article II, section 1 (“The executive power shall be vested in a President of the United States”), which grants all executive powers to a single individual and, primarily, Article II, section 2 (“The President shall be Commander in Chief of the Army and Navy of the United States”). On the basis of Article II, section 1, the theory holds that the inherent powers embodied in the Commander-in-Chief clause belong exclusively to the president; that these powers cannot be modified, altered, or in any way diminished by Congress or the judiciary. Thus, the inherent or implied executive powers are shielded from the other branches with their nature and extent, following the logic of the unitary executive theory, being matters for the president alone to determine.<sup>63</sup>

The unitary executive theory assumes great significance for the separation of powers doctrine when it is joined with “presidential signing statements” by means of which it can be effectuated.<sup>64</sup> Though these signing statements have

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60. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). This is not to say that Congress is not able to exercise some control over the execution of its laws, but it now does so largely through a “gentlemen’s agreement” between the agencies and the relevant oversight committees.

61. The notion of a strict separation of function was reinforced in *Bowsher v. Synar* [478 U.S. 714 (1986)] in which the Court held that the Comptroller General, since he could be removed by Congress, could not exercise any executive function relating to budgetary control.

62. This is the definition give by one of its proponents Samuel Alito, recently appointed to the Supreme Court, in “Presidential Oversight and the Administrative State,” reprinted in *Engage* 11, 12 (November, 2001). <[http://en.wikipedia.org/wiki/Unitary\\_Executive\\_theory](http://en.wikipedia.org/wiki/Unitary_Executive_theory)>

63. For a forceful defense of the expansive version of unitary executive theory see: John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005) and his more recent, *War by Other Means: An Insider’s Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).

64. Christopher Kelley, *The Unitary Executive and the Presidential Signing Statement*, Miami

become commonplace only in very recent decades, they have a long pedigree, stretching back to President Monroe. Over the decades, they have served various purposes, the most non-controversial being to indicate what the expected effects of the law will be for the affected parties and how departments and agencies are to interpret the law's provisions.<sup>65</sup> Another, highly controversial use of these statements is that of setting forth what applications of the law, in the president's opinion, would violate the Constitution and/or what provisions of the law in his view are unconstitutional.<sup>66</sup> Such statements are understandably controversial for at least two reasons. First, the president by marking out what he determines to be unconstitutional provisions of a law, thereby signifying that he will selectively apply the law, is in effect exercising an item veto, i.e., nullifying portions of the law. Critics of this process point out that an item veto is not provided for in the Constitution and that if a measure contains unconstitutional provisions, the only constitutional recourse is for the president to veto the entire bill. Second, questions and controversy surround the extent and character of the president's inherent or implied powers. It is apparent that the wider the executive's conception of his powers, the more likely will his signing statements limit the reach of Congress, particularly in areas concerned with national security, the employment of the military, or the accountability of executive departments to Congress. More generally, a president who declares that he will apply a law in a manner "consistent with the Constitution" is, in effect, free to fuse his understanding of the Constitution, including his conception of presidential authority, into the law thereby nullifying specific provisions of the law or limiting its application.

### 3.3. The President: Prerogative and Federative Powers

John Locke's conception of the federative and prerogative powers forms a convenient backdrop for understanding perhaps the most complex and controversial dimensions of the American division of powers. The federative

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University (Ohio), Ph.D. dissertation (2003). Available at <OhioLINK ETD: Kelley, Christopher> See also: Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence: University of Kansas Press, 2002).

65. See "Legal Significance of Presidential Signing Statements," memorandum prepared for Bernard N. Nussbaum, Counsel to the President, November 3, 1993, by Walter Dellinger, Assistant Attorney General. Available at <<http://www.usdoj.gov/olc/signing.htm>>. See also: "CRS Report for Congress, Presidential Signing Statements and Constitutional Implications," 20 September 2006, at <<http://www.fasorg/sgp/crs/natsec/RL33667.pdf>>.

66. On June 5, 2006 a task force of the American Bar Association was formed to investigate the "implications of presidential signing statements for the constitutional doctrine of separation of powers." <<http://www.abanews.org/releases/news/060506.html>> This inquiry was prompted by the controversy surrounding President George W. Bush's use of presidential signing statements that in five years far exceeded the combined total of his predecessors. On this see: "Bush Challenges Hundreds of Laws," by Charles Savage, *Boston Globe*, 30 April, 2006. The report of the American Bar Association task force was highly critical of the use of presidential signing statements, regarding it as, above all, a serious threat to the constitutional separation of powers. It is available at <<http://www.abavideonews.org/ABA373>>

power, as Locke describes it, involves “the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth.” Given its nature, Locke reasons, it is “much less capable” of being “directed by antecedent, standing, positive Laws” than the executive power, which deals with the internal order and welfare of the state.<sup>67</sup> Hence, there must necessarily be a greater reliance on the “Prudence and Wisdom” of those exercising this power. The prerogative power shares some of the characteristics of the federative. The prerogative, as Locke defines it, is the “Power to act,” when unforeseen circumstances or emergencies arise that threaten the well being of the people, with the necessary dispatch “according to discretion, for the publick good, without the prescription of the Law and sometimes even against it.”<sup>68</sup> Thus, again, its proper exercise depends upon the prudence, sensibilities, and intelligence of those who wield it. And like the federative power, the very recognition of its need raises serious questions, if only because its operations are largely outside the confines of the rule of law, the prime end served by the separation of powers.

In light of the American experience, the federative and prerogative powers are not easy to separate. Perhaps the “purest” debate over which branch should exercise the heart of the federative power, that of setting down the broad outlines of the nation’s foreign policy, occurred shortly after President Washington’s proclamation of neutrality in 1793. The effect of this proclamation was to abrogate the 1778 treaty of alliance concluded with monarchist France by declaring that the United States would assume a position of neutrality in the ongoing war between France and England. The opponents of this move contended that Washington had intruded upon legislative authority in abrogating the treaty and that, in any case, the president did not have unilateral authority to do so. Hamilton, writing under the pseudonym “Pacificus,” sought to answer these contentions in a series of essays. In turn, Madison, took up his pen as “Helvidius” and responded point by point to Hamilton’s arguments. Although the immediate issue was a narrow one, Hamilton seized the opportunity to argue for expansive executive powers in the conduct of foreign affairs. Essentially he contended that the president possesses all executive powers, save for the exceptions marked out in the Constitution such as, for example, the power to declare war. As he put it, “The general doctrine ... of our constitution is, that the EXECUTIVE POWER of the nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.”<sup>69</sup> Madison contested Hamilton’s understanding of executive power. In this vein, he wrote: “To say ...that the power of making treaties, which are confessedly laws, belong naturally to the department which is to execute law, is to say, that the executive department naturally includes a legislative power. In

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67. John Locke, *Two Treatises of Government*, with an Introduction by Peter Laslett, rev. ed. (New York: New American Library, 1963), chpt. XII, secs. 146, 147.

68. *Ibid.*, chpt. XIV, sec. 160.

69. “Pacificus” [Alexander Hamilton], essay no. 1, from *The Founders Constitution*, eds. Philip B. Kurland and Ralph Lerner, 5 vols. (Chicago: University of Chicago Press, 1787), 4, 64.

theory this is an absurdity – in practice a tyranny.”<sup>70</sup> Madison went on to maintain that Congress should play the leading role in formulating foreign policies and that the president’s role should be largely instrumental, i.e., mainly confined to executing the policies set forth by Congress.

Madison may be said to have “won” the battle by pointing out that the legislative war making power logically touches upon “the right of judging whether the Nation is under obligations to make war or not.”<sup>71</sup> Technically speaking, then, Congress, not the executive, possesses the constitutional authority to declare neutrality. Aside from this particular issue, however, Hamilton’s position regarding the president’s authority to play a leading role in initiating and executing the nation’s foreign policy has prevailed. Indeed, the Supreme Court has even held that the president has greater discretionary authority in the execution of foreign than domestic policy on grounds that he possesses inherent powers that attach to sovereignty.<sup>72</sup> What is more, even Madison’s rather limited victory, has been erased in practice. In conjunction with other Article II powers, principally his role as “Commander in Chief” of the armed forces, the president has assumed a dominant role in determining whether the country takes up arms or not. The manner in which presidents have maneuvered the nation into war, leaving Congress no alternative to issue an official declaration, is too involved to survey here. But a renown constitutional scholar, writing in the mid Twentieth Century, concluded that only the War of 1812 and the Spanish-America War followed upon “policies and views advanced” in Congress; that the other engagements – the Mexican War, the Civil War, and “our participation in the First World War and the Second ... were the outcome of presidential policies in the making of which Congress played a distinctly secondary role.”<sup>73</sup> If anything presidential powers have increased substantially since this appraisal: since World War II, without any congressional declaration of war, the United States has engaged in major and prolonged military conflicts in Korea, Vietnam, and Iraq – conflicts popularly called “wars” – all presidentially initiated. Some even suggest that a formal congressional declaration of war is now a relic of the past and certainly no obstacle to the exercise of presidential powers.<sup>74</sup>

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70. “Helvidius” [James Madison], essay no. 1, from *The Founders Constitution*, 4, 67.

71. *Ibid*, 4, 65.

72. In upholding a delegation of power to the president to suspend arms shipments to belligerent nations when such would contribute to peace between them, a delegation which Court acknowledged would not pass muster in the domestic field, it held that the president “as sole organ” of the nation “in the international field” possesses a “plenary and exclusive power”; a power which, though subordinate to “the applicable provisions of the Constitution,” “does not require for its exercise an act of Congress.” *U.S. v. Curtiss-Wright Export Company*, 29 U.S. 304, 320 (1936).

73. Corwin, *The President: Office and Powers*, 204.

74. See: Interview with John Yoo at < <http://www.press.uchicago.edu/Misc/Chicago/960315in.html>>. Yoo argues that the traditional understanding of the declaration of war power is unfounded and that, moreover, this power has very limited utility. See also: Testimony of Donald

Despite the experiences gained from these hostilities, controversy over the president's powers during war or times of emergency still remains. While Hamilton conceived of the president's role as commander-in-chief to be somewhat limited, confined largely to "command and direction" of the armed forces,<sup>75</sup> it has come to be something far more expansive. A convenient point of departure for understanding this development is Lincoln's use of the prerogative power during the Civil War. He suspended *habeas corpus*, issued new passport regulations, ordered the blockade of Southern ports, expanded the army and navy, expended unappropriated funds, issued the Emancipation Proclamation, "closed of the Post Office to treasonable correspondence," and, inter alia, instituted a militia draft, all without congressional authorization.<sup>76</sup> These prerogatives, to be sure, were taken when Congress was not in session and, where appropriate, Lincoln sought retroactive congressional approval. But the net effect of Lincoln's initiatives was to make clear that by combining the constitutional injunction to faithfully execute the laws with the "commander-in-chief" authority during war and emergencies, presidents could exercise extremely broad powers that embraced ends and functions normally regarded as within the legislative ambit.

The lessons of the Civil War were not lost on Congress. In World War I, it delegated enormous powers to the president dealing with virtually every major sector of the economy connected with the war effort – industry, agriculture, communications, transportation, mining, food and fuel procurement and storage – by way of anticipating his needs and preempting the use of prerogative powers. The same path was followed in World II. In both instances, most of the powers delegated to the president were then further delegated by the president to boards and commissions, a number of which, while vested with rule making powers that carried the sanctions of law, were creatures of the executive, not Congress. This process has raised constitutional challenges involving delegation and due process, which the Supreme Court, true to its normal state of suspended animation during war time, has rejected.<sup>77</sup>

While the Supreme Court has answered important questions related to presidential powers during times of war, there still remain concerns in the realm of constitutional theory that bear directly on the separation of powers doctrine. The first is, what if the president, during an emergency or war, exercises a power that

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Rumsfeld, Secretary of Defense before the House Armed Services Committee, 18 September 2002, at <<http://www.dod.gov/speeches/2002/s20020918-secdef2.html>>. Rumsfeld suggests the congressional power is, in effect, obsolete.

75. See *The Federalist*, 69/357-58; 74/384-85.

76. Corwin, *The President: Office and Powers*, 231. Here Corwin classifies the types of action taken by Lincoln that did or did not lead to increased presidential powers.

77. *Yakus v. United States*, 321 U.S.414 (1944).



Congress has expressly or even inferentially denied the president? The Supreme Court has had occasion to rule on this question, but the Court was divided (6-3) and seven justices wrote separate opinions, thereby leaving room for speculation and conjecture concerning the limits of presidential powers. The Court's decision arose from President Truman's seizure of the steel mills during the Korean War.<sup>78</sup> Obviously, in justifying the seizure, stress was placed on the grave results that might result for American armed force in Korea if steel production were curtailed for any length of time. On the basis of their opinions, it appears that a majority of the justices subscribed to some notion of extra-constitutional presidential powers, most certainly the traditional prerogative power; that is, more exactly, their opinions indicate that in the absence of any congressional legislation touching upon this circumstance, they would have upheld the president's action. What seemed to be the decisive factor in leading a majority to declare the seizure to be an unconstitutional expansion of executive power was that Congress had on three occasions denied the president— once expressly and twice inferentially — authority to unilaterally seize private property in cases of emergency and that, additionally, Congress had made provision for handling labor-management disputes that had produced this particular crisis.

In recent years, more expansive notions of presidential war time powers have been asserted, particularly since 9/11, that would allow the president to act in such situations contrary to the express will of Congress. In the future, this is to say, the resolution of issues where conditions are alike or similar to those involved in the steel seizure case might well result in a new understanding of inherent presidential powers derived from the "unitary executive theory" (see above). President Truman, for instance, acknowledged the authority of Congress to overturn his seizure decision and to provide the means for the resolution of the difficulties at hand. This position conforms with the nature and purpose of the presidential prerogative power, at least as it is derived from Locke; that is, the legislature may act on the matter at hand when it is capable of doing so. The logic of the more expansive view of presidential powers, however, would hold such presidential action is an inherent executive power, not subject to abrogation or modification by legislative authority.<sup>79</sup> Additionally, and also presumably in accord with elements of the separation of powers doctrine, the president alone, not the legislature or judiciary, would be the judge of extent of the inherent executive powers. Under this new and expansive view of presidential power, most of the prerogatives exercised by Lincoln were not prerogatives as such, but elements of the president's inherent constitutional authority during times of emergency or war. This understanding of presidential powers gains greater plausibility as the powers are seen to relate to protecting the American people or the nation from external threats. Yet, for many, this justification of presidential powers leads straightaway

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78. *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952).

79. See, for example, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," Office of the Attorney General, 19 January 2006, available at <<http://www.fas.org/irp/agency/doj/fias>>



to an “imperial presidency” and the breakdown of the constitutional separation of powers.<sup>80</sup>

It seems safe to assume, much as Madison anticipated, that there will be something akin to a perpetual war between the president and Congress over the boundaries of their respective powers in both times of peace and war. If the past be any guide, however, it is a war that Congress seems to be losing by slow degrees.<sup>81</sup>

#### IV. THE JUDICIARY: THEORETICAL PROBLEMS

As the foregoing indicates the Supreme Court has played a critical role in the American system of separated powers. This role derives from circumstances somewhat unique to the American political experience. Shortly after the Declaration of Independence most states, given their newly independent political status, were obliged to write new constitutions. Soon the idea took hold that the constitutions should rest on the consent of the people rather than the mere sanction of the legislatures that had drafted them.. The Massachusetts Constitution of 1780, still extant, was the first of the post-Declaration constitutions adopted with the consent of the people; the citizens participated not only in the selection of delegates to the constitutional convention that drafted the Constitution but also in its ratification. That this spirit prevailed by the time of the Philadelphia Convention is attested to by the terms of Article VII which call for ratification by special conventions within the states; a provision that, in effect, insured the national constitution would rest on the consent of the people within the states, not the ratification of the state legislatures.

Written constitutions, thus, came to be viewed as contracts of sorts, specifying the basic rules by which a society has consented to be governed. In this context, attention naturally focused on the status and powers of the legislature since it was vested by the people with the bulk of governmental powers. Theoretically speaking, one proposition seemed unassailable: “The powers of the legislature .... are derived from the people at large, are altogether fiduciary and subordinate to the association by which they are formed.”<sup>82</sup> Or, as James Iredale,

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80. George W. Bush has been criticized for policies and activities undertaken in the “War on Terror.” Critics, both on the Left and Right of the political spectrum, contend that his is an “imperial presidency” which has undermined the separation of powers and the rule of law. For a comprehensive statement of this position see: Gene Healy and Timothy Lynch, *The Constitutional Record of George W. Bush*, (Washington, D.C.: The Cato Institute, 2006).

A recent decision by the Court [*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006)] rejected the unitary executive theory holding that the president cannot unilaterally act to set up military tribunals to try detainees from the American military incursion into Afghanistan following 9/11.

81. As Corwin, writing in the mid-Twentieth Century, put it: “the history of the presidency is a history of aggrandizement.” *The President: Office and Powers*, 29-30.

82. James Varnum quoted in Charles G. Haines, *The American Doctrine of Judicial Supremacy*

one of the more prominent lawyers during the founding era put it: “The people have chosen to be governed by such and such principles” in adopting a constitution. “They have not chosen to be governed, nor promised to submit upon any other”; consequently, the legislative body, itself a “creature of the Constitution,” has “no more right to obedience on other terms than any different power on earth has a right to govern us.”<sup>83</sup> This understanding, in turn, gave rise to the fundamental law theory and the principle of judicial review. On this point there was substantial agreement that, as Hamilton was to maintain in Federalist essay no. 78., “The interpretation of the laws is the proper and peculiar province of the courts.” This and the generally accepted proposition that “A constitution is in fact, and must be regarded by judges as a fundamental law,” renders his conclusion almost inescapable: “It therefore belongs to them [the courts] 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.”<sup>84</sup>

The doctrine of separation of powers does not require or call for judicial review. Yet, in the American context, the power has come to play such a distinctive role with respect to the constitutional separation that it cannot be ignored. As a matter of course, the Supreme Court has from an early point in the history of the Republic assumed the function of settling disputes over the respective powers of the coordinate branches. The Court has, as the foregoing discussion clearly indicates, endeavored to mark out the boundary lines between the executive and legislative branches. Its role in this capacity is virtually unchallenged, widely assumed to be the constitutionally sanctioned process for the resolution of separation of powers issues. Indeed, presidential or congressional defiance of any Court resolution would probably not be tolerated since it would be bound to elicit an intensely negative public reaction.<sup>85</sup>

Having noted this much, however, the Courts’ power of judicial review raises issues relating to separation of power and the rule of law that are among the most interesting and controversial.

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(New York: Russell and Russell, 1939), 106.

83. James Iredale, quoted in Haines, *The American Doctrine of Judicial Supremacy*, 115.

84. *The Federalist*, 78/404.

85. The Court’s authority in this respect is difficult to overstate. During the Watergate scandal in the early 1970’s, the Supreme Court rejected President’s Nixon claim to executive privilege and ruled that he had to turn over specific tape recording of his conversations in the Oval Office to the Special Prosecutor. [*United States v. Nixon*, 418 U.S. 683 (1974)] The tapes, as it turned out, revealed Nixon’s involvement in the “coverup.” Despite this, Nixon complied with the Court’s decision to turn over the tapes. No doubt his compliance was forthcoming because it was understood at the time that failure to comply would be grounds for impeachment.

During the ratification struggle, the Anti-Federalist “Brutus” raised concerns over the Court’s power to authoritatively interpret the Constitution. While his specific concern was that the Court, an arm of the national government, would use this power to expand the national government’s jurisdiction at the expense of the States, the more general concern which emerges from his essays is that the Court will become the predominate institution. Over time, he assumed, the Court would establish relatively clear lines that would make out the limits of legislative powers; limits the legislature would not exceed. “And,” he continued, “there is little room to doubt but that they [the legislature] will come up to those bounds, as often as occasion and opportunity may offer” with the result that judiciary will provide “the rule to guide the legislature in the construction of their powers.”<sup>86</sup> He believed as well that the Court would not confine itself to interpreting the Constitution “according to its letter” but, as well, “according to its spirit and intention.”<sup>87</sup> Discovering the spirit of the Constitution, he reasoned, would lead the Court to give meaning to the ends stated in the Preamble, thereby channeling legislative action toward centralizing power at the national level.

Hamilton, in defending judicial review was aware of this line of reasoning. In Federalist no. 81, he goes to some lengths to downplay the possibilities of the federal courts encroaching upon the legislative powers, labeling such charges as baseless. He points to Congress’s power to impeach and remove judges who might persist in such behavior as the ultimate remedy.<sup>88</sup> In a more general vein, Hamilton regarded the judiciary to be the “weakest of the three departments of government” and the “least dangerous to the political rights of the constitution” since it possessed “neither FORCE nor WILL, but merely judgment.”<sup>89</sup> He set forth a constitutional morality with regard to the use of its power of judicial review, namely, this power should be used only when the Court finds an “irreconcilable variance” between the law and the Constitution. Moreover, it should take care to exercise “JUDGMENT,” not “WILL,” which is the prerogative of the legislature.<sup>90</sup>

Hamilton’s concern that the judiciary confine itself to the exercise of judgment, not will, provides a context for understanding past and current controversies surrounding the role of the Supreme Court. For instance, President Franklin Roosevelt’s frustration with the Court’s decisions concerning the

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86. *The Anti-Federalist: Writings by the Opponents of the Constitution, An Abridgment*, by Murray Dry, of the Complete Anti-Federalist edited by Herbert J. Storing (Chicago: University of Chicago Press, 1985), 168-69.

87. *Ibid.*, 167.

88. *The Federalist*, 81/420. He thought that “degrading them [judges] from their stations” “ought to remove all apprehensions” on this score.

89. *Ibid.*, 78/402.

90. *Ibid.*, 78/404.

constitutionality of elements of his New Deal program in the mid-1930's, which resulted in his famous "court packing" proposal,"<sup>91</sup> can best be understood in Hamilton's framework, namely, that the Court was exercising "will" by substituting its "own pleasure to the constitutional intentions of the legislature."<sup>92</sup> Similarly, at various times throughout American history, critics have inveighed against the Court's use of "substantive due process" whereby the Court invalidates laws because it regards their substance to be objectionable.<sup>93</sup> In recent decades critics have also contended that the Court has reached even a new plateau of power through judicial legislation, i.e., going beyond simply nullifying a law to, in effect, legislate by mandating change along judicially determined lines.<sup>94</sup> Indeed, so much is conceded by advocates of the non-interpretive or judicial activist school of thought who see the courts charged with special responsibilities to advance the ideals and rights implicit in the Constitution or to correct the political failures resulting from "gridlock" in the political processes. Their position, in turn, is challenged by "originalists" and "textualists" who subscribe in principle to Hamilton's vision of the Court's role.

Volumes could be written over the in and outs of debate surrounding the Court and its proper role in the American system. The questions surrounding this issue are now central to intellectual disputations over the nature of the Constitution and the wider American political tradition. Suffice it to say here that the Court is no longer the weakling portrayed by Hamilton. Two developments, both of them revealing of the American experience with the separation of powers, account for the growth of judicial power. As most students of the American system would readily acknowledge, the first involves the Fourteenth Amendment added to the Constitution after the Civil War and whose purpose, by all evidences, was to protect the civil rights of the newly freed slaves. In light of subsequent developments the most significant portion of this Amendment is found in section 1

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91. Roosevelt's plan was to appoint one new justice for each sitting justice over the age of 70. That a Senate with a large Democratic party majority rejected this plan, offered by a popular Democratic president, gives some measure of the prestige enjoyed by the Supreme Court among the people.

92. *The Federalist*, 78/405.

93. Perhaps the most notorious example of substantive due process is *Dred Scott v. Sandford*, 19 How. 393 (1857). Here the Court held slaves to be property and then invalidated congressional legislation (the Missouri Compromise) on grounds that it violated the "due process" clause of the Fifth Amendment in abridging property rights, *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court employed "liberty" of the "due process" clause of the Fourteenth Amendment to invalidate state regulation of working hours for bakers as unreasonable, is widely used to illustrate the overreach of judicial power.

94. For a thoughtful and pioneering work dealing with the ramifications of this development, see Charles S. Hyneman, *The Supreme Court on Trial* (New York: Atherton Press, 1963). Works dealing with one or more aspect of this development are far too numerous to cite. A good introduction with bibliography is *Modern Constitutional Theory: A Reader*, 5<sup>th</sup> ed., eds. John H. Garvey and T. Alexander Aleinikoff (St. Paul, Minnesota: West Group, 2004).

that provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” Congress it appears was to play a major role in defining and enforcing the provisions of the Amendment since section 5 reads: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Over the decades, however, the Supreme Court has become the chief enforcer of the “due process” and “equal protection” clauses. Using primarily the “liberty” of the due process it has “nationalized” the major provisions of the Bill of Rights by mandating their uniform application in the states. The Court, moreover, has employed Fourteenth Amendment to make decision that many contend are among most critical in determining the character of American society.<sup>95</sup> Its decisions relating to abortion, school prayer, government aid to religious schools, reapportionment, pornography and obscenity, the death penalty, libel and slander, affirmative action, school busing, and, among others, the rights of the criminally accused have engendered enormous controversy. The Court’s critics contend that in many instances it has intruded on the legislative domain and that, what is worse, its decisions on these and like matters, based as they are on constitutional grounds, have effectively removed from legislative purview concerns that are best handled through the political processes at either state or national levels. The remedy suggested by the critics is the judicial self-restraint; a restraint in keeping with the morality set forth by Hamilton.

The second development, one designed to place the Court’s decisions outside the realm of the normal political processes, is the Court’s assertion that its interpretation of the Constitution is final, authoritative, and binding on the other branches of government.<sup>96</sup> This pronouncement scarcely caused a stir largely because it only reaffirmed what, as noted above, was already acquiesced to by the other branches over the course of the Twentieth Century. Yet, this position is at odds with that held by “strong” presidents of the past, including Jefferson, Jackson, and Lincoln.<sup>97</sup> What is more, the Court’s position encounters a serious theoretical difficulty arising from the fundamental law theory, the very theory originally used to justify judicial review: the Court no less than the Congress is a “creature of the Constitution” and bound by its terms. The logic of the fundamental law theory, in other words, allows for the possibility that the Supreme Court can itself act unconstitutionally. Critics of activist Courts are essentially asserting this in arguing that the Court, contrary to the fundamental law (the rules to which the people

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95. For a typical, hard-hitting critique that makes this and the following points see, Lino Graglia, “How the Constitution Disappeared” in *Interpreting the Constitution*, Jack N. Rakove, ed. (Boston: Northeastern University Press, 1990).

96. *Cooper v. Aaron*, 358 U.S. 1 (1958).

97. Both Jackson and Jefferson would maintain that a president is not constitutionally obliged to enforce decisions of the Supreme Court. Lincoln’s position was more nuanced. He did not accept the proposition that the Constitution necessarily means what the Court says and that it is legitimate, when the Courts errs, to use a variety of political means to force reconsideration of and change in the Court’s view.

agreed to govern themselves), has itself breached the constitutional separation of powers by assuming legislative powers.

Obviously, the controversies over the role of the Court are not going to be resolved by the Court's affirmation that it is the sole judge of the extent of its powers. Nor does the doctrine of separation of powers as it has been developed through practice in the United States provide any clear answer to the question of how the courts are to be kept within bounds. Hamilton's belief that removal of judges through the impeachment process would serve to keep judges in line has been superseded by a new constitutional morality that has prevailed since the time of the Samuel Chase impeachment trial, namely, judges should not be removed for their decisions or unpopular political views<sup>98</sup> Congress has other weapons at its disposal, such as curtailing the Supreme Court's appellate jurisdiction which, due to political and pragmatic considerations, have been resorted to infrequently. Presently, as in the past, recourse to the political processes has been the primary means to direct and control the Court. Thus, in recent decades, a major issues in presidential campaigns have centered on the differences between the candidates over their views on the role of the Court and the ideological orientations of the justices they might appoint. This has alarmed some because the composition of the Supreme Court now involves partisan considerations to an unprecedented extent, thereby undermining its image as an impartial body exercising judgment, not will.<sup>99</sup>

## V. CONCLUSION AND OVERVIEW

The understanding of the constitutional separation of powers – the functions of the branches and their relationship to one another – has changed significantly since the Constitution emerged from the Philadelphia Convention. Perhaps the most notable change relates to the relative position of Congress. Whereas it was intended to be the predominant branch, its status in relation to the other branches has clearly diminished over the decades. As noted at the outset, it still retains all of its original constitutional powers and more, particularly an expansive commerce power. Yet, both the president and the courts have been assertive to a degree that many believe has intruded upon Congress's legislative domain. Certainly, in practice, there is no question that they have acquired powers which have curtailed

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98. On the significance of the Chase episode see: William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: Morrow, 1992). Only one Supreme Court justice has been impeached, Samuel Chase, and he was not removed by the Senate. Since 1789 eleven federal judges have been impeached; seven removed from office. In all cases but one the charges against judges involved indictable crimes. See <<http://www.infoplease.com/spot/impeach.html>>

99. Robert H. Bork, whose nomination to the Supreme Court was rejected by the Senate after an intense and highly emotional political struggle, has written concerning the potential costs and dangers of this development. See *The Tempting of America* (New York: The Free Press, 1990).

the scope of congressional authority.

Now, to be sure, Congress has retaliated in an effort to regain lost powers or to assert its predominance. After the Civil War, Congress reasserted its preeminence by initiating and directing policies for the so-called “Reconstruction” of the defeated states of the Confederacy. But, in the annals of American constitutional history, the Reconstruction Congresses are unique. The more common practice, exemplified when president Nixon was politically weakened during the Watergate scandal, is to legislate in targeted, but crucial, areas. Thus, in 1973 Congress managed to pass the War Powers Resolution over Nixon’s veto. This Resolution was designed to curb the president’s powers to unilaterally commit troops “into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>100</sup> Coming on the heels of a long and unsuccessful war in Viet Nam, whose authorization rested on a single congressional resolution passed soon after a presumed attack on American naval forces when passions were aroused,<sup>101</sup> Congress clearly wanted to curb the president’s power as commander-in-chief to unilaterally commit the nation to sustained hostilities abroad. Likewise, with the Budget and Impoundment Act of 1974,<sup>102</sup> Congress sought regain control of the budgetary process that over the decades, beginning with the passage of the Budget and Accounting Act in 1921, had come largely an executive responsibility. The Budget and Impoundment Act also made it far more difficult for the executive to impound funds appropriate funds – i.e., to delay, sometimes indefinitely, the expenditure of appropriated funds for reasons usually related to efficiency and budgetary concerns – a prerogative dating back to Jefferson’s administration.<sup>103</sup>

These relatively recent congressional efforts to curb the president’s capacity to unilaterally commit the nation to war and to recapture effective control over the budgetary process, two critically important powers, are noteworthy, not for their effectiveness, but because they illustrate the difficulties involved trying to tame the executive. Every president since Nixon has held the War Powers Resolution to be an infringement on the president’s constitutional authority as commander-in-chief and as the nation’s chief agent in foreign affairs. This view that has gained considerable currency with the Court’s decision declaring congressional vetoes,

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100. War Powers Resolution, 7 November 1973, Public Law 93-148, Section 2 (a). Available at <[http://www.policyalmanac.org/world/archive/war\\_powers\\_resolution.shtml](http://www.policyalmanac.org/world/archive/war_powers_resolution.shtml)>

101. This was the famous Gulf of Tonkin Resolution. See <<http://www.vietnamwar.com/gulfoftonkinresolution.htm>> Whether, as believed at the time, American naval ships were attacked is now very much in doubt.

102. The Budget and Impoundment Act, July 12, 1974, Public Law 93-344; 88 Stat. 297-339. Available at <<http://law.enotes.com/major-acts-congress/congressional-budget-impoundment-control-act>>

103. The Act provided that both chambers must approve any impoundment within 45 days. If not, the funds must expended.

either one or two house, unconstitutional (see above). In practice, presidents simply have not complied fully with the provisions of the War Powers Act normally by simply refraining from declaring that American forces are being sent into hostile situations so that provisions relating to congressional approval are never triggered. For different reasons the budget and impoundment measures have not worked out as anticipated. The benefits expected from a comprehensive view of the budget, principally budgetary ceilings and limits on deficit spending, have not been forthcoming in practice. Partly for this reason, Congress has slowly come to see the virtues of discretionary presidential impoundment which it unsuccessfully sought to restore through a limited item veto (see above).<sup>104</sup>

The growth of executive and judicial powers, often at the expense of Congress, can be attributed in large measure to emergence of political parties. Madison, it should be remembered, counted on “opposite and rival interests” to preserve the constitutional division of powers; that is, more specifically, a union or merger of the interest of the office holder with “the constitutional rights of the place.” Thus, he anticipated that a congressional intrusion into what the executive felt to be his legitimate domain would be met by a veto. Similarly, Congress could be expected to take measures to nullify or repel actions by the president or courts that it perceived to be an invasion of the legislative realm. Yet, with the emergence of political parties and their quest for the control of government -- which, with its enormous growth in the Twentieth Century, involves the allocation of resources of a magnitude scarcely imaginable at the time of founding – partisan considerations, not institutional interests, have come to dominate. This means that Senators and Representatives of the president’s political party, short of gross malfeasance or criminal conduct, will support their president’s action even those which do intrude upon legislative authority.<sup>105</sup> To do otherwise, to act upon institutional interest, would be to undermine the party and its chances of retaining the presidency, the only national office and the prize for which both parties vie. Partisanship, albeit in a different way, is also an important factor when it come to Congress’s reaction to the Court’s expansion of power. Quite aside from the esteem it enjoys as institution, the Court is unlikely to issue any controversial decision matter that will not find sufficient political backing in Congress to forestall retaliation. It may be set down as a general proposition that in the halls of Congress any issue involving disputes over the separation of powers, no matter how genuine it may be, will soon or late be reduced to a partisan controversy.

Partisanship, however, has not completely eclipsed institutional interests.

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104. Although the Court declared the first effort in this direction unconstitutional, congressional efforts continue to formulate a process that would pass constitutional muster and give the president this authority.

105. Nixon was clearly going to be impeached and removed from office when he resigned. But the entire affair took months and the loss of party support in the Congress due to the evidences of indictable actions. In the absence of such evidence, the party will stick with its president as evidenced in the Clinton impeachment and trial.



Presidents, more frequently than not, have sought to advance purely institutional interests, to a great degree motivated by their desire to secure a “legacy” that will be looked upon favorably by future generations. American historians and political scientists, for instance, almost invariably rank “strong” presidents, those who protect and expand executive powers, as among the “great” or “near great.” On the other hand, one cannot expect the same degree of institutional interest and concern over “legacy” to be manifest among the membership of large legislative bodies since the rewards are more dispersed. These factors, taken together, help to account for the growth of executive powers, especially when one party controls both the legislative and executive branches. Under these circumstances any resistance to presidential intrusions into the legislative realm on constitutional grounds is likely to be characterized as simply “party politics.”

Looking back on the Framers’ handiwork after more than two centuries of operation, certain conclusions seem warranted. The most important is that they had no way to foresee the role political parties would play in the evolution of the design. The “balance” they sought has been thrown out of kilter by the growth of parties, specifically by the growth of executive and judicial powers. In this regard, it is also evident that while they were concerned to prevent a congressional overreach, they seemed to believe -- perhaps because of the political culture of their time -- that the judiciary would pose no danger to the constitutional separation. For these reasons, it is hardly surprising that in modern times the two most contentious issues in both intellectual and political circles involving the separation of powers turn out to be the proper role of the courts and whether the executive has accumulated too much power.

In the American system of separated powers today, each branch in its own way can direct the resources of society or authoritatively allocate values, powers largely delegated to Congress by the Constitution. Patterns of expectation have developed over time regarding the general domain of each branch, so that despite very real tensions, both theoretical and practical, the system works tolerably well.<sup>106</sup> Underlying this, however, is a very basic question: Can any system of separated powers deal with the real dangers to self-government and the rule of law posed by the necessity to delegate powers in the modern nation state?

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106. Many critics of the system would disagree with this assessment by citing what is now called “gridlock,” principally the inability of Congress and the president to agree upon priorities and specific legislative remedies to acknowledged economic and social problems. Most who seek basic constitutional reform attribute this gridlock to the constitutional separation of powers. For various formulations of this view see *Reforming American Government*, ed. Donald L. Robinson.