FROM POWER TO PRIVILEGE:
UNDERSTANDING THE ROLE OF THE EXECUTIVE AND THE BROADENING OF EXECUTIVE POWER

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Abstract

The purpose of this thesis is to investigate the extent of executive power in the U.S. and how the role of the executive has grown beyond what was intended by the U.S. Constitution, impacting the principle of separation of powers. We will find that the modern energy in the executive has gone beyond the ingredients in the *Federalist Papers* that Alexander Hamilton argues are necessary to constitute a democratic republic. In the first chapter, I analyze the origins of the role of the executive and the intentions of the extent of executive power. Chapter 2 outlines the use of unilateral presidential directives such as the executive order and the presidential signing statement and how they have been used to broaden presidential power. Chapter 3 investigates the current energy in the executive as outlined by Hamilton in the *Federalist Papers* and argues that the modern executive is unconstitutional due to abuses of executive power propagated by self-interest. Here we find that the growth of power in the U.S. presidency compromises the energy in the executive because of what it does to the individual. This analysis uses examples from a broad range of administrations to support the argument that although the Constitution states that the “executive power” is vested in the President of the United States its over-interpretation has led to excessive, unconstitutional reach by presidents. This thesis traces how the broad interpretation of presidential power has led to “executive privilege,” a doctrine asserted in early U.S. administrations and amplified during the Bush Administration, and the significance of “executive privilege” not appearing in the U.S. Constitution.

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Introduction

When drafting the U.S. Constitution, the founders carefully debated the role of the executive. Fearing the threat of tyranny after leaving the King of Great Britain, the founders wanted to create a system that would balance the powers of government and that would have the best chance of having a functioning and stabilized democracy. The role that was created was established from personal experience and knowledge of the role of the executive. During the Philadelphia Convention, otherwise known as the Constitutional Convention of 1787, the possibility of a plural executive rose into question, but the principle of a single executive was settled on. The Founders thought it to be vital to their new democracy that there be a single executive vested with the necessary power to make swift decisions in times of national crisis. In Article II, Section 1 of the U.S. Constitution, the founders write that “the executive power shall be vested in a President of the United States of America.”1 The article goes to state the voting procedures for this office as well as term limits and requirements. It also outlines the powers that the president has in terms of filling vacancies and making appointments. Article II ends by noting that “he shall take care that the laws be faithfully executive.”2 The executive power vested in the president can be seen as four different types of power under the Constitution. There are expressed powers, implied powers, delegated powers, and inherent powers. Powers that are specifically mentioned in Article II of the Constitution are considered to be the expressed powers. These powers include the president’s power to negotiate treaties, grant reprieves and pardons, appoint officers and federal judges, and power as commander and chief of the Army

2 Ibid. 552.
and Navy. Implied powers are considered to be powers that are not directly expressed in the Constitution but implied. Since the list of expressed powers is limited in the Constitution implied powers are powers that can be considered necessary to the powers expressed in the Constitution. An example of an implied power would be the president’s power to remove as well as appoint federal offices. Delegated powers are powers delegated to the president by Congress and the fourth type of power is inherent. Inherent powers are powers that the president interprets or claims to be inherent in the office of the president. The president may only use executive power if it is delegated by Congress, expressed or implied by the Constitution, or claimed to be inherent. Inherent powers are typically justified by the president’s oath to “faithfully execute the Office of the President of the United States” and to his or her best ability “preserve, protect, and defend the Constitution of the United States.”

This short article in the Constitution has been interpreted a numerous amount of times and ways in order to fit each administration. With a broad outline of executive power as written in Article II, presidential powers have continued to be interpreted and have increased over decades. Executive powers have been used throughout U.S. history during times of war or national crisis. Due to the extent of the crisis, presidents have used their power to make executive decisions in order to preserve or protect the nation. Administrations as early as Abraham Lincoln and as recent as George W. Bush, have been strong supporters of broadening executive power. The expansion of presidential power, to their defense would ensure that the government would not be too controlled by Congress or the administrative state. Executive powers have grown immensely over time and have been broadened by individual presidents and administrations.

4 Ibid. 27.
The majority of the expansion of presidential power has been driven by the use of unilateral presidential directives. According to Graham Dodds in *Take up Your Pen: Unilateral Presidential Directives in American Politics*, there are over two dozen types of unilateral presidential directives. The most common being the executive order, there are also administrative orders, certificates, signing statements, designations of officials, general licenses, proclamations, military orders, and presidential announcements. Unilateral presidential directives are used to provide direct actions from the executive branch. These directives have been used often throughout presidential administrations and are relatively unchecked by the other branches of government. As stated by Dodds, “more controversially, they may enable presidents to unilaterally enact their own policy preferences by a mere stroke of a pen, as they can serve to prompt congressional action, to preclude it, or to circumvent a recalcitrant Congress.”

In this thesis, we will review the origins of the role of the executive and the expansion of executive power through unilateral presidential directives such as the executive order. Though signing statements, and proclamations are also commonly used in presidential administrations, this thesis will focus on the use of the executive order since they date back to even the earliest administrations and their use and overuse has raised concerns amongst political scholars. We will also analyze the early conceptions of the role of the executive through both ancient and modern political philosophers and investigate the broadening of executive power throughout U.S. history. This broadening of executive power has impacted the energy in the executive. In *Federalist 70*, Hamilton argues that “energy in the executive is a leading character in the definition of good government.” We can define the energy in the executive as the human part of the office. The part

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7 Ibid. 4.
that is, so to speak, meant to break the law when it needs to broken. Historically, there has been a dilemma between the nature of man and instituting governments. This thesis returns to the fundamentals of the role of the executive in order to understand why the current role is unconstitutional.

The Federalist Papers provide us a deeper understanding of executive power and the role of the executive. Yet, regardless of their warnings of self-interest and ambition, the office of the U.S. president has become a pivotal and potentially dangerous part of our government as a threat to maintaining a democracy capable of internal checks and balances as the founders intended. Throughout the course of each chapter, we will evaluate the extent of executive power and learn how the term executive privilege has grown and been interpreted. Executive privilege when invoked by the president allows the president to withhold information or deny a request from Congress. It is an implied power, not directly stated in the U.S. Constitution. As executive power has continued to grow and broaden, so has executive privilege. Due to the unchecked power in the office of the presidency, some administrations, more than others, have utilized executive privilege to benefit the needs of the president. According to Ginsberg, “some presidents are better able than others to exercise leadership and to wield the powers of the office. Yet over time, the presidency as an institution has grown in power.”  

This thesis analyzes the origins of the executive and the role of executive power, outlines the history of unilateral presidential directives such as the executive order in the U.S. presidency, and investigates the current energy in the modern executive.

Chapter 1 begins with the analysis of the origins of the executive and the dilemma of the nature of man with which the framers of the U.S. Constitution struggled with. This chapter also

Ginsberg. 18.
investigates the importance of having strength in the executive and the dangers of a strong executive that is not responsible. In this chapter, we will take a look at two Supreme Court cases as well as Abraham Lincoln’s *Message to Congress* to evaluate earlier efforts to broaden executive power. Chapter 2 focuses on the use of the executive order and how the increase use of this particular unilateral presidential directive has been a tool to broaden the scope of presidential power. This chapter will also review the other types of unilateral presidential directives such as presidential signing statements, and how their use has impacted the expansion of presidential power. Chapter 3 investigates the current energy in the modern executive. The energy in the executive is represented by the individual and as I mentioned earlier, is the human part of the office. In *Federalist 70*, Hamilton wrote that there should be an energetic executive. There is an office of the president with certain power and authority, and then there is the individual that assumes that office. The two are different and separate. The founders wanted an energetic president to be the human part of government. The part that could make executive decisions and who could in a way, break the law when it needed to be broken. But, the founders knew the dilemma of the nature of man: that man is driven by ambition and self-interest. So, they put checks and balances and a separation of powers in place to protect their new democracy. It is necessary to have an energetic executive, but it is also necessary for that individual to be responsible. The powers written in law and the Constitution are only written, it is what the individual choses to do with those powers that defines the energy in the executive. Chapter 3 investigates why the modern energy in the executive is no longer as intended by Hamilton in the *Federalist Papers* and argues the current role of the executive is unconstitutional.
Hamilton writes that “the ingredients that constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers.”\textsuperscript{9} He also writes that “the ingredients which constitute safety in the republican sense are due dependence on the people, and due responsibility.”\textsuperscript{10} The Constitution was written with this in mind, that there would be a separation of powers and checks and balances to constitute safety in the republic. Safety can be defined as fair and equal representation, the protection of unalienable rights, and system with power derived from its people. But when unity is destroyed, this designed system can no longer constitute safety in the republican sense. In this thesis we will analyze the ingredients which constitute the energy in the executive and how this is reflected in the modern executive. The theory of the unitary executive is also important when considering the expansion of presidential power. According to Ginsberg:

Unitary executive theory holds that all executive power inheres in the president except as explicitly limited by the Constitution. According to this view, the president is a sovereign subject to some restraints such as Congress’s control of revenues, its impeachment power, and its power to override presidential vetoes. Some proponents of unitary executive theory also aver that presidents have their own power to interpret the Constitution as it applies to the executive branch and need not necessarily defer to the judiciary.\textsuperscript{11}

Later in this thesis, we will analyze the theory of the unitary executive and how it expanded during the Bush II administration.

What we will learn from this re-telling of history and analysis of presidential power is that the office of the president has grown into a part of our government that was not intended.

\textsuperscript{9} Federalist #70
\textsuperscript{10} Ibid.
\textsuperscript{11} Ginsberg, 28.
The U.S. president holds too much power in order to sustain the energy in the executive that is vital to the role in order to constitute safety in the republic. I will analyze how executive power has broadened over the course of U.S. history and has developed into not just power, but a privilege. The term executive privilege, originally used to protect the office of the presidency, has helped fuel the broadening of executive power. Though the role of the executive was created to sustain a democracy, the continued growth of power in this one branch of government diminishes the principle of separation of powers and now threatens the U.S. Constitution.
Chapter 1: Understanding the Role & Responsibility of the Executive

Introduction

In *Federalist 70*, Alexander Hamilton states that “energy in the executive is a leading character in the definition of good government.”\(^{12}\) Therefore, the role of the executive should be vital to a good government. But how can we ensure that the executive power vested in a single individual will continue to promote good government? How can we protect the will of the people while also containing the passions of the individual executive? The role of the executive must be strong enough to execute good government but controlled enough as to not encourage tyranny. In *Federalist 70*, Hamilton describes good government as having protection against foreign attacks but also having a steady administration of laws, protection of property, and security of liberties.\(^{13}\) Today, we can consider a good government as having fair and equal representation and protecting the civil liberties and rights of individuals. When writing the *Federalist Papers*, the framers made certain to reassure citizens that the executive, while holding the individual role of the President of the United States, would not be a king.

As Hamilton said, “The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate.”\(^{14}\) In *Federalist 69* and *70*, Hamilton outlines the character of the executive and the difference between a president and a king. The *Federalist Papers* not only provide the reasoning behind the functionality of the separation of powers, they advocate for a strong executive. In *Federalist 70-77*, Hamilton writes about why a strong executive is compatible with a republican government.\(^{15}\) As Hamilton put it,


\(^{13}\) *Federalist* #70

\(^{14}\) *Federalist* #69

“the history of the doctrine of the separation of powers needs to be considered with special emphasis on executive power.”

In this chapter, I will be focusing on the origins of the role of the executive to further support my argument that the modern role of the executive is unconstitutional. I will be using the works of Harvey Mansfield, along with John Locke, Louis Fisher, Aristotle, Machiavelli, and the Federalist Papers to outline the intent of the role of the executive. The importance of Mansfield’s analysis in this chapter is his analysis of Aristotle and the absence of the executive. His view of the executive further supports my argument that the modern role of the executive was not intended by the founders. Though Mansfield focuses on a “tame prince,” we were never meant to have a republic with a prince. Mansfield’s findings in Aristotle’s Politics are pertinent to understanding why the president should not have as large as a role as it does. Though having strength in the executive can be vital when it comes to making executive decisions during times of crisis, the role should not be central to our government. What we will learn from this chapter is a better understanding of the history of the role of the executive and how and why it was formed. The Founders struggled with creating a republic that could counteract the ambitions and self-interest of man. This will provide the framework to understanding the expansion of presidential power and how the energy in the executive has changed.

Mansfield’s Taming the Prince analyzes the role of the executive in the American system of separation of powers. Mansfield follows the idea of Machiavelli’s The Prince, that the role of the executive is much like a monarch or prince when it comes to having the necessary power to take action in a crisis but unlike Machiavelli, the executive needs to be held accountable and must be willing to take punishment. While the executive branch is meant to be an equal power

16 Mansfield. 12.
amongst the branches of government, the executive power vested in a single individual, a President of the United States, much like a monarch. The role of the executive, deriving from the term execute—to complete an action or to kill someone officially—is to execute the law and protect the people as a whole.

Mansfield analyzes the works of both ancient and modern political philosophers and argues for a strong yet responsible executive. *Taming the Prince* outlines why the exemption of the role of the executive in Aristotle’s *Politics* is important when considering the role of the modern executive in the works of Machiavelli, Montesquieu, Hobbes, and Locke. In this chapter we will analyze the role of the executive as intended by the framers of the Constitution as well as investigate the origins of the executive. We’ll take a look the broadening of executive power by U.S. president’s such as Abraham Lincoln as well as two Supreme Court Cases regarding the functions of executive power. Finally, we will evaluate why strength in the executive can be vital to the practices of good government, but how too much power can be dangerous to a democratic republic.

**Executive Power: The Ancients vs. The Moderns**

The early study of the character of the executive can be traced back to Aristotle’s *Politics*. Mansfield believes that “the whole story of executive power depends on the understanding why it is absent in Aristotle.”\(^\text{17}\) He highlights that Aristotle’s *Politics* only mentions the role of the executive as a literal executioner—“the one that carries out punishments and guards prisoners”—; and that “Aristotle’s only advice is to divide up the job so that no one person takes all the discredit.”\(^\text{18}\) Mansfield writes that this is all Aristotle has to say about executive power but continues to analyze what was implied, “…one’s dominant impression

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\(^{17}\) Mansfield. 25.
\(^{18}\) Ibid. 24-25.
remains that executive power in the modern, expanded sense is missing from Aristotle’s *Politics.*” What modern political philosophers have dismissed in *Politics*, Mansfield argues is important to the modern executive. Where Aristotle lacked emphasis in the role of an executive, philosophers such as Machiavelli, Hobbes, and Locke argue that it is because of the undeniable nature of man that there must be an executive in any legitimate government. These modern philosophers disregard Aristotle’s reasonings because they claim they are inconsistent or that he could not have anticipated our modern-day problems. Mansfield also makes reference to Plato’s *Laws* and that he avoids creating an executive as well. “Rather than seizing upon the criminality of mankind to justify a terrifying or at least impressive magistrate, the Athenian Stranger begins his treatment of punitive legislation by deploring the shameful necessity for it.” Mansfield does write that it is human nature in its resistance to law that makes the strong executive necessary, but “we shall find it necessary to speak of non-human nature.”

In Aristotle’s *Politics*, he defines the problem of formal executive power and real executive power. The formal defines executive power as “using impersonal roles or functions, the result being to show what executive power ought to be.” The real defines executive power as “the actual personal essence of executive power, which cannot be divided into, or delimited by, functions defined from outside by persons not wielding such power.” For the modern philosophers, executive power emerges because of the individual’s resistance to law and reason. The nature of man is driven by passions and self-interest and therefore must be governed by a strong executive.

19 Mansfield. 24-25.
20 Ibid. 27.
21 Ibid. 26.
22 Ibid. 28.
23 Ibid.
24 Ibid. 29.
In Josiah Ober’s analysis of Aristotle’s *Politics*, he discusses the notion of citizenship and that the ideal regime would have to offer citizenship to all persons. For the Aristotelian reason, all persons have the natural qualification for citizenship.25 What Mansfield points out in *Politics* is that it is the citizen that emerges in politics, not the individual, and that because humans have the ability to speak, “they themselves say what politics is when they establish their politics, for politics is always someone’s or some group’s particular politics.”26 Whereas modern philosophers argue the importance of the executive because of the innate nature of the individual, “to attempt to understand politics directly from nature fails to grasp the element of choice and freedom by which we assert what we want or think fitting.”27 The citizen, which the government is created for, emerges only in politics, while the individual may exist before or outside of politics. The citizen is created, not born. Therefore, the existence of an executive simply for the reason of ruling the individual is unjustifiable.

So why do we vest the executive power in a President of the United States? Hamilton advocates for the role of the executive and outlines its character in *Federalist 69*. The duties and responsibilities of the executive are listed, and Hamilton compares the president with the King of Great Britain along with the Governor of New York to prove that power vested in the executive is different. This power is not absolute, unlike a king, and there are a system of checks and balances that are set in place to ensure that no one branch or individual garners too much power. Hamilton addresses the concerns of the people the idea that “a vigorous executive is inconsistent with the genius of republican government.”28 He disputes this concern by stating

26 Mansfield. 31.
27 Ibid.
28 *Federalist* #70
that having energy in the executive is essential to protection against foreign attacks, the administration of laws, and “to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”

29 In his *Second Treatise of Government*, John Locke discusses political power as having the right to make laws with the penalty of death. It is for preserving property, employing the force of the community, and executing laws all for the public good.

30 Early on in Mansfield’s *Taming the Prince*, he discusses Aristotle’s idea of the mixed regime. There is an analysis of three parts that should be in all regimes that must be considered separately: the deliberative body, the magistracies, and the judiciary. This resembles the modern legislative, executive, and judicial branches but “the magistracies are discussed in the plural without reference to the need for unity in one man that modern theories of the executive assert, or to the monarch out of which the modern executive developed historically.”

31 A mixed regime is Aristotle’s solution to the dilemma of the free man, or human nature. A mixed regime “consists of democracy and oligarchy, or of natural necessity and human choice.” A democracy promotes a system of self-government and freedom of choice while an oligarchy promotes complete oppression and control. A democracy without control though can create anarchy. “No free man, Aristotle says, willingly tolerates a monarchy that rules, without being held to account, over similars and betters for its own benefit, not for that of the ruled.”

32 Rule is defined by producing or promoting the common benefit. It also means beginning or together. As Mansfield notes,

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29 *Federalist* #70
31 Mansfield. 47.
32 Ibid.
33 Ibid. 49.
34 Ibid. 48.
“When he says that the form of politics is “above all” the reality, Aristotle implies that political assertions are more than mere wants or wishes set forth with no regard to truth or reality: They are arguments about what politics requires, setting forth claims to be worthy of ruling or sharing in the rule for good reason. No one can be a ruler merely because he wants or need to rule. Rather his need must arise from some alleged competence, some positive contribution offered to the whole.”

Ryan Balot also analyzes Aristotle’s mixed regime. In Aristotle’s *Politics* there is a two-part framework involving the philosophy of the mixed regime. Balot outlines that the first focuses on the highest questions of human good while the second “was devoted to the flourishing of individuals more than the salvations of the city as a reified entity.” The second part refers to the political life of the city, Balot notes that “the political life of the city existed in order to enable the citizens to flourish, and not the other way around.”

Aristotle also points out that executive power is not wielded in one’s own name. “The reason for not ruling in one’s own name is that all exercise of power is thought to be unjust. Rule, when it is perceived to be rule, is perceived to be unjust; so no one wants to claim responsibility for it.” Mansfield argues that in modern democracies, no one “claims” to rule, so no one takes responsibility. “The claim to rule of those ruling in our democracies is precisely what is “covered up” by the modern doctrine of executive power, which is a claim not to rule – in fact, a disclaimer.”

35 Mansfield. 48.
37 Ibid.
38 Mansfield. 29.
39 Ibid. 30.
Machiavelli, Hobbes, Locke, and Montesquieu all oppose Aristotle and Mansfield argues that “all modern political science is reactive to Aristotle’s, but in such fashion as to direct attention away from Aristotle.” Many modern political philosophers chose to turn away from Aristotle’s analysis in Politics casting it off as inconsistent or obscure. What Mansfield draws out is the dilemma of “human nature in its resistance to law,” and that this is what makes the strong executive necessary. According to Mansfield,

“It is doubtful whether, with such a reversal, we are faithful to the capabilities of the American Constitution, for the forms of that Constitution show what free government aspires to as much as they check its ambition. But to the extent that we are mainly concerned to be ‘realistic,’ we are compelled to set the forms of politics against its realities. In no part of modern politics is this discrepancy more marked than in the idea of executive power.”

After his analysis of the ancients and Aristotle’s exempt of the executive, Mansfield turns to the politics of Machiavelli and Locke and the modern executive. For Machiavelli, the role of the executive lies in the act of execution. He believed that the executive should be as strong as monarch and have the necessity to use an absolute power if needed. “He is so confident for the need for fear that he abandons all concern, vital in the Aristotelian tradition, for the distinction between the tyrant and the king who rules justly. When nature is understood as such necessity, the ground for such a distinction disappears.” Even after Machiavelli, philosophers such as Hobbes and Bodin argued for this necessity as well. “After Machiavelli, the necessity for the executive to act as a tyrant was reconceived as the need for a sovereign—leader or ruler—; or

40 Mansfield. 30.
41 Ibid. 28.
42 Ibid. 71.
43 Ibid. 181.
else it was effectively dismissed or depreciated in the form of a separate and subordinate executive power, as described by the constitutionalist supports of the rule of law.”

Miguel Vatter outlines that in Plato’s Republic a city is only made possible due to justice and justice means to allocate functions. He writes that a “true statesman is the one who understands how to recognize and distribute functions according to the most harmonious mix.” In contrast, Vatter argues that Machiavelli believes in the nature of the individual. He believes that the individual is born of chance and that society should be constructed in the diversity of luck.

Machiavelli developed two modes of the modern executive. The first mode considered almost any act of the sovereign to be legal. This is where his necessity for the need of an absolute sovereign was embraced. “With a new notion of justice as incorporating necessity, politics and morality will be bright into alignment—and hence, so will princes and peoples.”

The second mode, on the other hand, refuses this necessity. Instead, the form of a constitution is founded. This provides a stable government without the need for a tyrant with a separation of powers. The original notion of a separation of powers was twofold: “to separate the executive (including the judiciary) from the legislative, and to place the executive in a subordinate role. In both respects the end was to maintain the rule of law.” This would help ensure a control of executive power. The separation was intended to prevent the legislature from applying laws to

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44 Mansfield. 182.
46 Vatter. 80.
47 Ibid.
48 Ibid.
49 Mansfield. 182.
suit themselves and to prevent the executive from changing the law for his or her own best interest.50

Locke’s political science analyzes that though the modern executive and the modern constitution are both mutually dependent, they are also antithetical. “Each needs and opposes the other.”51 For Locke, the act of constituting contains the principle of free government and the necessary end of self-preservation. Two elements of political science that Locke analyzes are also found within the modern constitution: legislative power and executive power. In contrast to Machiavelli, Locke has a different view of the executive:

“When a people constitutes a government, it places the legislative power in certain hands. The legislative power extended the principle of free government first expressed in the act of constituting. Placing supremacy in the legislative power, Locke frequenting insists, assures the rule of law and prevents the exercise of arbitrary power.”52

Laws do not always attain the desired end of a legitimate government. This is where the executive comes in. The end of any legitimate government is the public good, “the protection of life, liberty, and property.”53 The legislative power represents the principle of free government while the executive power applies it to the ends of society. This enforces the necessity of the executive.54 According to Locke, executive power is a natural right that is bestowed upon all men. The term executive meaning the right to execute their own will and to be their own judge. All men have the right to this natural power, but it also generates a political power “which men

50 Mansfield. 182.
51 Ibid. 181.
52 Ibid. 189.
53 Ibid.
54 Ibid.
have, by right, to protect other men, generates a political power that can ensure that protection; for every man’s being his own executive in his own case leads to great inconveniences.”  

When political power is generated, it is then divided amongst legislative powers and executive powers. So unlike Machiavelli’s *Prince*, there isn’t an executive power that is vested in a single individual. The legislative powers are for lawmaking and the executive powers are for punishing crimes or for protecting from a foreign threat. Any natural executive power generated from man, is simply that of self-preservation. Locke argues that “since the legislative power makes standing rules…neither absolute monarchy nor the absolute prince is a true form of government. No single person, that is, can have both legislative and executive power in a civil society, as every person does in the state of nature.” For Locke, executive power is a natural power and in a civil society, it is replaced by the supremacy of the legislative power. Mansfield points out that “executive power is subordinate, but the executive person may not be.”

When it comes to the role of executive power in the U.S., the founders used what they knew from experience to create our Constitution. They believed in the foundations of a democracy but also believed in having a human part or natural part to the three branches of government. A single executive would have the power act on human instinct rather than through rule of law. Vatter writes that, “founding fathers must depend on their own virtue because they are not confronted by an already existing people, they do not face a pre-existing society…In the beginning, everything depends on the charisma of the leader because there is no routinization of

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55 Mansfield. 194.
56 Ibid. 199.
57 Ibid. 200.
58 Ibid. 201.
power, no institutional framework within which power can be transferred according to certain mechanisms, and so on.”

**The Role of the Executive**

The role of the executive was created in the U.S. Constitution for a purpose. It differs from the other three branches of government because unlike the legislature or judiciary, the branch is dependent on a single individual. Alexander Hamilton was an advocate for a strong executive, because he believed it was necessary in order to constitute good government. Mansfield argues that the executive should not be subordinate to the legislature. This is because though the purpose of the legislature is to protect the principle of free government by creating and preserving laws, the purpose, or end, of the executive is the preservation of men. There must be a strong executive in order to override laws if necessary. An executive must follow the laws, but they must also know when it is necessary to break them. This does not mean that the executive should have the necessity to act as a tyrant, which Machiavelli would argue for, but when it comes down to preservation of mankind, there must be a strong executive to take the necessary actions. Mansfield calls for a responsible modern executive, one that can be held accountable for his actions and will take punishment if necessary. The executive should not be “God-like Princes.” “There must always be a sovereign, but to use Machiavellian distinction, there is an ordinary sovereign—the legislature—that makes standing rules, and an extraordinary sovereign—the executive—who stands perpetually ready to go beyond the rules, responding to the motion of human things.”

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59 Vatter. 59.
61 Ibid. 203.
The nature of the executive must be controlled as well. Mansfield argues that having derived from the origins of monarchy the executive must be republicanized. At its conception in Machiavelli’s *Prince*, Mansfield writes that the executive has been either republican or popular. He analyzes that “Machiavelli’s prince followed a policy of winning over the people; Hobbes’s sovereign was authorized by all; Locke’s executive power was derived from each man’s natural executive power...Montesquieu’s executive satisfies the people’s desire for security along with their appetite for partisanship.”\(^{62}\) Unlike other roles of an executive leadership, the American president is elected by the people, hence republican. But the American president is also a single executive with powers that are not elected by the legislature.\(^{63}\) This makes the executive character strong. “The American Constitution established the first republic with a strong executive that is consistent with republicanism.”\(^{64}\)

While Mansfield’s early analysis of Aristotle shows the absence of the role of the executive except for in the literal role of an executioner, the modern role of the executive is closer to Machiavelli’s power of the prince. The modern executive has power that is not a burden, as Aristotle would outline, but a tool, that in the past few decades has been used to advance personal agendas influenced by self-interest. Louis Fisher writes in *Constitutional Conflicts between Congress and the President* that, “it is important to understand the practical forces that led to the creation of the separation branches. The American structure of government owes its existence to the experiences of the framers, not the theory of Montesquieu or precedents borrowed from England. The framers used Montesquieu selectively, adopting what they knew to

\(^{62}\) Mansfield. 247.  
\(^{63}\) Ibid.  
\(^{64}\) Ibid.
be inapplicable.” The framers built the foundations of America’s system of self-government by utilizing their experience of what they knew of monarchy. The framers did not want an executive that would be more powerful than the will of the people, but they also wanted an executive strong enough to make executive decisions in times of national crisis.

Over the course of U.S. history, there have been a handful of presidents that have also argued for a strong executive. Their actions have broadened executive power through the use of unilateral presidential directives such as executive orders and proclamations. We will review three distinct cases where the extent of executive power was challenged by early U.S. presidents such as Lincoln and Truman. Lincoln’s Message to Congress will lead us to question the balance of powers between Congress and the president. Here Lincoln highlights what he believes to be an inherent flaw in all republics. In the case of Youngstown Sheet & Tube Co. v. Sawyer, we will see how unlike the struggles for power between Congress and the president, use of executive power can also affect individual liberties. The last case we will review is Morrison v. Olson, here we will see a distribution of power, and an effort to check the power of the president.

Lincoln’s Message to Congress

In 1861, President Abraham Lincoln ordered a military response after a confederate attack on Fort Sumter and authorized a suspension of habeas corpus in Maryland. After being ruled that his actions were unconstitutional, Lincoln wrote in a message to Congress:

“Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers

65 Louis Fisher, Constitutional Conflicts between Congress and the President (Lawrence, KS: University Press of Kansas, 2014), 7.
of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.”  

In Lincoln’s defense he also asks, “is there, in all republics, this inherent, and fatal weakness? Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?” I would agree that Lincoln did act unconstitutionally, but that his response to Congress leaves us to further investigate the relationship between the president and Congress. If the role of the president is to be the human part of government, to act when necessary, then should Congress be able to have more control over the president? How can we ensure that the president is acting in the best interest of the nation? I can agree that what Lincoln did here was to defend the union, but, his actions and those after him have only continued to broaden the scope of executive power. In his statement, Lincoln sees this inherent flaw in the system that it can either be too strong, or too controlled by Congress, or too weak to protect its own people. But the founders knew that the system was not perfect. It was not meant to be one or the other, it was meant to have both. Mansfield would argue that Lincoln’s decision was a necessary use of executive power. When Congress is not able to make swift decisions in times of need, it is the responsibility of the president to make an executive decision. This along with actions such as the Emancipation Proclamation were his efforts to broaden the power of the executive branch. Lincoln’s challenge to Congress was not the first and was definitely not the last when it comes to the interpretation of the extent of executive power.

67 “Message to Congress in Special Session”
68 Ibid.
Youngstown Sheet & Tube Co. v. Sawyer

In 1952, President Harry Truman issued an executive order to seize private steel mills as temporary government property during the Korean War. This action was taken to avoid a potential strike from the workers that would impair the war effort. This resulted in the case of Youngstown Sheet & Tube Co. v. Sawyer. Mr. Justice Black delivered the opinion of the court:

“The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions.”

In this case, this was not a responsible use of executive power because it was not in the best interest of the individual rights of the owners and employees of the steel mill. This was not a direct action from the president against an impeding law passed by Congress or for the preservation of men, it was to assist the war effort by avoiding a strike—an action that was argued to be in the best interest of the nation, but did not have standing in Court. In this case, I believe that Mansfield’s view would question the responsibility in this executive order. It is necessary to have a strong executive willing to act when necessary, but also a responsible one. What Truman did was temporary and to benefit war efforts, but it was to avoid a potential strike from workers. Here, Truman would be prematurely acting to impede individual rights. Unlike

Lincoln’s actions to authorize a suspension of habeas corpus, a power vested in Congress and not the executive, Truman’s actions impacted the rights of the privately-owned steel mills.

*Morrison v. Olson*

In 1988, there was a case regarding interfering with the powers of the executive branch. The case posed the question of the constitutionality of the independent counsel—a separate entity from the U.S. Attorney General—provisions of the Ethics in Government Act of 1978. The issue rose during the House Judiciary Committee’s investigation into the role of the Justice Department in regard to a controversy between the House and the Environmental Protection Agency (EPA). The Judiciary Committee had a report from the investigation that had suggested that an official from the Attorney General’s Office, appellee Theodore Olson, had given a false testimony during the investigation. The report also suggested that two other officials had withheld documents from the investigation. Pursuant to the Ethics in Government Act, the report was sent to the Attorney General requesting that he appoint an independent counsel “…pursuant to the Act's provisions, the Special Division (a special court created by the Act) appointed appellant as independent counsel with respect to Olson only, and gave her jurisdiction to investigate whether Olson's testimony, or any other matter related thereto, violated federal law, and to prosecute any violations.” The appellant claimed that the Act’s provisions by the independent counsel were unconstitutional and that the independent counsel had no authority to proceed in the matter.

The court held that the Act did not violate the principles of the separation of powers by interfering with the functions of the Executive Branch. “The Act's provision restricting the

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71 Ibid.
72 Ibid.
Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, does not impermissibly interfere with the President's exercise of his constitutionally appointed functions.”73 The majority opinion was that while the independent counsel has authority within the area, it is still limited and may be removed by a higher executive branch officer. The role of the counsel should be considered to be inferior. Justice Antonin Scalia provided the dissent in that the appointment of the independent counsel “removes sole authority from the executive branch in conducting criminal prosecutions, which is provided by the Constitution.”74

Article II of the Constitution states that, “he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other offices of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law…”75 In this case, the independent counsel was created to prevent any abuses of power by the president. The Court’s ruling can be seen as a check on executive power as well. Though the Constitution clearly states that it the president that shall nominate and appoint offices, the appointment of the independent counsel was not that of a principal officer. The majority ruled that:

While the independent counsel has broad discretion and authority within the area granted by the special division, it is still limited by the special division's grant of power. The counsel also is limited in tenure by statute and may be removed for good cause by a higher executive branch officer or when the related activities are complete. This means that the independent counsel should be considered an inferior rather than a principal officer.76

73 Morrison v. Olson
74 Ibid.
75 Ibid.
76 Ibid.
In this case, we see a distribution of power within the branches of government. Because the power of the independent counsel did not increase power in any branch, it was not considered to be interfering with the powers of the executive branch. The general delegation of powers within the branches of government have been considered concerning to political scholars as well. Later in the chapter, we will review Louis Fisher’s argument concerning the delegation of legislative powers and Congress.

**Strength in the Executive**

Scholars such as Mansfield would argue that a strong executive is necessary in any form of legitimate government because unlike Congress, a president is able to make swift and necessary decisions to protect the people. This does not mean that this power should be taken lightly or used frivolously. An executive is responsible for the well-being of the people and the nation and should be held accountable for his or her actions. As Hamilton writes in *Federalist 70*, “a government ill executed, whatever it may be in theory, must be, in practice, a bad government.” Though advocates of strong executive, including several U.S. presidents, may argue that the broadening of executive power can be beneficial to good government, others have argued against this and have analyzed the dangers in an expanded role. In *The Cult of the Presidency*, Gene Healy writes that the founders never intended for the president to be a “national leader.” According to Healy, “for them, the very notion of “national leadership” raised the possibility of authoritarian rule by a demagogue who would create an atmosphere of crisis in order to enhance his power.” Healy points out the founders efforts to create a more modest role, rather than a central figure in American politics. In *With the Stroke of a Pen*, Kenneth Mayer

77 *Federalist #70*
concludes that “such a concentration of [executive] power, especially in combination with an inefficient Congress and a deferential judiciary, poses the clear risk for misuse.” When asked the question if the use of an executive order can bring forth the imperial presidency, his answer is no, but he does call out Congress on what they can do to reverse the expansion of power in the presidency. Louis Fisher argues for a stronger Congress to control the unruly executive who has gone beyond its limits of power as intended by the Constitution.

Each branch has designated powers and responsibilities as listed in Articles I and II of the Constitution, but throughout history there has been a plethora of circumstances where the extent of those powers and responsibilities are tested. In Fisher’s chapter on treaties and executive agreements, he writes that “the President has constitutional authority to recognize foreign governments, but the exercise of that power can encroach on the prerogatives of Congress.”

Though the branches of government were created to have a system of checks and balances ensuring that no one branch, or individual would garner too much power, the executive was not created to be controlled by Congress. The lawmaking powers of the president have gone beyond what was intended by the Constitution, but due to the intentions of the role of the

80 Here Fisher and Mayer agree when it comes to the role of Congress and the impeding growth of presidential power. Fisher writes that “the President’s legislative power, invoked on rare occasions in the early decades, is now discharged on a regular basis throughout the year in the form of executive orders, proclamations, and other instruments of executive lawmaking” (Fisher, 129). Fisher argues that the lawmaking power should reside in Congress and calls upon Congress to take back their legislative powers. Mayer also calls on Congress to step up to the increasing power in the executive. He writes that “The ultimate check on executive energy is – and should be – political. Congress can step in to reclaim the ground it has lost to the executive, and its failure to do so is much more a function of political will than of any flaws in constitutional arrangements.” (Mayer, 222). I want to point out here that Mayer believes that executive energy should be checked and that the ultimate check is political. Though this thesis will not divulge more into this particular argument, we will focus on the importance of the energy in the executive and how it has changed in the modern presidency.
81 Louis Fisher, *Constitutional Conflicts between Congress and the President* (Lawrence, KS: University Press of Kansas, 2014), 270.
executive, we may call for a more responsible executive rather than a more controlled one. The framers specifically chose an executive that would not be controlled by Congress. The Virginia Plan and New Jersey Plan were both discussed during the Constitutional convention of 1787 to determine what type of executive would best suit the needs of this new democracy at the time. Both plans provided for a weak executive because it was thought to be required by the genius of republican government.\textsuperscript{82} The Virginia plan proposed an executive that would be elected by the legislature and the New Jersey plan offered an executive that would be elected and removable by a congress.\textsuperscript{83} “It was not until nearly the end of the convention that a strong executive independent of the legislature was decided upon, though most of the framers were searching throughout for ways to accomplish just that.”\textsuperscript{84}

Mansfield notes that it was during the Revolutionary War and Shays’ Rebellion when Americans came to recognize the need for a strong executive. They needed an executive that would be “capable of secrecy and swift response” in times of both domestic and foreign crises.\textsuperscript{85} The U.S. Constitution was the first republic with a strong executive that was also consistent with republicanism.\textsuperscript{86} The framers call for a strong executive in order to make executive decisions in times of emergencies and to protect the people as a whole. “The task of political science in \textit{The Federalist} was to show that an energetic executive could be republicanized. That we take the completion of the task for granted today is a sign that it was well done, not that it was superfluous.”\textsuperscript{87}

\textsuperscript{82} Mansfield. 249.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid. 250.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid.
The framers were right in advocating for a strong executive, but that the modern executive has gone beyond what was intended by the Constitution. The *Federalist* warned that “men are not angels”\(^\text{88}\) and that they are driven by their passions and self-interests, but because of the broadening of executive powers and the distribution of powers to administrative offices there has been a lack of responsibility by both the executive and legislative branches. Though the framers were cautious about the nature of man and how that would affect this new government, they could not anticipate factors such as growth, population, and even advancements in technology and modern life. They knew that the system was not perfect but that it would be efficient for the type of republic that they envisioned. Now that the nature of our government has changed (i.e. expanded presidential powers, the delegation of legislative powers by Congress) our system of checks and balances is consistently tested to bound the extent of executive powers.

**Conclusion**

“The American Constitution established the first republic with a strong executive that is consistent with republicanism. Here the theory of the executive emerges from the shadows cast by existing or previous practice.”\(^\text{89}\) The framers wanted to establish a democratic republic that would have checks and balances to ensure that a monarchy would not arise. “The American president is neither a revived Roman dictator nor a moderated British monarch; he is one main feature of a new experiment in self-government which will attempt to found the first successful republic.”\(^\text{90}\) From the analysis of Aristotle and ancient political philosophers we learn the importance of why the role of the executive was left from *Politics*. The term executive was often found when in the use of an executioner, a job that was necessary, but not a role that was popular

\(^{88}\) *Federalist* #51
\(^{89}\) Mansfield. 247.
\(^{90}\) Ibid.
or that of a central figure. Even then the responsibility of the executioner was divided and not vested in a single individual. Aristotle pointed out the difference in the individual and the citizen. The citizen is created and not born, and it is the citizen that creates politics. The individual represents the nature of man and his or her resistance to law and reason. It is the nature of man that must be ruled in order to protect the principle of free dom. But since Aristotle’s citizen is created then the existence of an executive simply for the reason of ruling the individual is unjustifiable.

The study of the modern political philosophers such as Machiavelli, Montesquieu, Locke, and Hobbes show that they ignored the political science of Aristotle when it comes to the executive. Machiavelli and Hobbes argue for a strong executive with the necessary power of a tyrant in order to protect men and to make necessary decisions. Locke argues for a somewhat weaker executive that abides by the laws of the legislative. Mansfield calls for a more responsible executive that is willing to take punishment if necessary and to be held accountable for his or her actions. We have seen some of this through impeachment trials which we will explore later on in this thesis, but due to the extent of As we have seen, there have been cases where the strength of the executive has been broadened and tested. Lincoln urged for broader executive powers when he gave his message to Congress posing this question: “is there, in all republics, this inherent, and fatal weakness? Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?”

President Truman’s executive actions during the Korean War were determined to be beyond his extent of executive power and the independent counsel case shows a distribution of power which Justice Antonin Scalia argues weakens the authority of the executive.

91 Mansfield. 247.
The executive was created to be separate from the legislative branch. It is important for a democratic republic to have laws enforced, but in order to preserve men it is also important to know when laws should be broken. This does not mean that the one breaking them, the executive, should have power that is uncontrolled. Mansfield argues that it is necessary to have a strong executive that is willing to make swift decisions in times of emergencies. Fisher calls out the executive for having a growth of lawmaking power that has increased drastically over time and Mayer also calls on Congress to reclaim their ground. The executive power of the modern president has become unhinged but only because responsibility lacks in the executive. A strong executive is necessary to preserve men, but a responsible executive is necessary to preserve democracy. Without a responsible executive, strength in the executive could lead to tyranny.

Introduction

In Abraham Lincoln’s Message to Congress in Special Session on July 4, 1861, he asks, “Is there, in all republics, this inherent, and fatal weakness?” “Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?”92 Lincoln wrote this in response to his executive action after a confederate attack on Fort Sumter where he advocated for a strong executive and the broadening of executive powers.

The extent of the U.S. president’s executive power has been questioned throughout history. What are the limits on a president’s use of executive power? There must be some line drawn between carrying out the responsibilities of the office and utilizing presidential power to aid self-preservation. The use of the executive order has continued to be an example of how executive power has grown and threatened the system of separation of powers. This chapter outlines how the increased use of the executive order has led to an abuse of power by the office of the presidency that goes beyond what was intended in the U.S. Constitution, therefore weakening the system of separation of powers.

The executive order has become a growing tool for U.S. Presidents to use when they want quick and affirmative action. The use of the executive order can be seen as a bypass of the slower pace of the legislative branch. “Theoretically, the president has the exclusive power to issue these types of policy statements (unilateral presidential directives). Presidents do not send

executive orders to Congress for a vote. Instead, an executive order merely becomes law after the
president signs his name to a specific directive.” Presidents have been utilizing the executive
order to implement their own policies and to essentially create laws without notice or input from
the legislative branch. According to the table from the Brookings Institute below, the use of
executive orders has increased over time with a spike in use during the Theodore Roosevelt
administration through the administration of Harry Truman. As stated in Table 1.1, Franklin D.
Roosevelt issued 3,522 executive orders in his 4,422 days in office. Traditionally, executive
orders have been used during times of national crisis or emergency. FDR entered office during
the Great Depression and made promises to build back the economy. Though the use of
executive orders has declined since the FDR administration, their use is still prominent in the
expansion of presidential power.

93 Adam L. Warber, Executive Orders and the Modern Presidency: Legislate from the Oval Office
94 John Hudak, “Obama's Executive Orders; A Reality Check,” Brookings (Brookings, August 15, 2016),
https://www.brookings.edu/blog/fixgov/2014/01/30/obamas-executive-orders-a-reality-check/)
Presidential signing statements are also a growing use of executive power. According to a Congressional report by Todd Garvey:

“Presidential signing statements are official pronouncements issued by the president contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the president’s interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner

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that comports with the administration’s conception of the president’s constitutional prerogatives.”

Similar to executive orders, presidential signing statements date back to the early 19th century but their use has become significantly more controversial in the modern era. Presidents have increasingly used signing statements to employ objections or provisions to congressional enactments. Garvey notes that “President Reagan initiated this practice in earnest, transforming the signing statement into a mechanism for the assertion of presidential authority and intent.” The use of signing statements to assert presidential authority was also increased by George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama.

Article II of the Constitution outlines that, “the executive Power shall be vested in a President of the United States of America.” This power is to be held by an individual of whom would assume office for no longer than a four year term and would swear by an oath to “faithfully execute the Office of President of the United States, and will to the best of [his or her] ability, preserve, protect and defend the Constitution of the United States.” Over the course of the American History, U.S. Presidents have taken it upon themselves to act upon what they believed was necessary in order to fulfill their oath to the country.

**Executive Orders & The U.S. Presidency**

The evolution of the office of the presidency is an ongoing topic amongst scholars. The U.S. Constitution provides a vague description of the functions of the executive branch and leaves it up to the interpreter to define the uses of executive power. The evolution of the use of

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97 Ibid.
98 Ibid.
100 Ibid. 551.
executive power can derive from many different types of unilateral presidential directives, one of them most commonly known as the executive order. Other types of presidential directives include administrative orders, certificates, signing statements, designations of officials, general licenses, proclamations, military orders, and presidential announcements. The separation of powers was created to ensure that no one branch of the U.S. government (executive, legislative, judicial) would garner too much power over the other. There are checks and balances set in place so that the three branches can have the necessary powers to check on one another. In the U.S. Constitution, both Article I and Article III outline the duties of the legislative and judicial branches, but in Article II the use of “executive power” can be considered to be vague. One scholar who first looked at the evolution of the power of the presidency, Richard E. Neustadt, asks “what are the foundations of presidential power?” This question is the foundation for years of scholarly research into the progression of presidential power.

Neustadt discusses the power of the person who occupies the presidency. His focus is on the individual in office and how he or she can project his own ideals, views, and will on to the administration and make an impact. This focus on the individual is found throughout other works as well. Presidential scholar Graham Dodds writes that “presidents have long relied on unilateral directives to enact their preferences across a wide range of policy areas.” These unilateral directives are used so that presidents can enact their own policy preferences over a wide range of governmental actions. A few of the most well-known unilateral directives include “Abraham Lincoln’s Emancipation Proclamation, FDR’s wartime internment of Japanese

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103 Ibid.
104 Dodds. 4.
Americans, Harry Truman’s desegregation of the military, JFK’s creation of the Peace Corps, Bill Clinton’s proclamations of new national monuments, and George W. Bush’s executive orders for faith based initiatives, the detention of suspected terrorists, and domestic spying.”

What Dodds brings attention to is a quote by Robert B. Cash in “Presidential Power” (1963), “the history of executive orders is, to a great extent, a narrative of the evolution of presidential power.”

When looking at the strategic nature of the executive order, Adam Warber acknowledges that, “very few studies have analyzed the strategic nature of executive orders to explain how presidents have used them to pursue major policies. At this point, scholars continue to assume that executive orders are a powerful policy tool that presidents inherit when they enter office.” Warber also draws attention to the work of Kenneth Mayer who concludes that presidential power has increased significantly because of executive orders. As Warber discusses the strategic nature of executive orders, he makes note that it is a tool that presidents “inherit.” Now, there are expressed powers that the president has which are clearly “expressed” in the Constitution, and there are inherent and implied presidential powers. The expressed powers include: the power to grant reprieves and pardons, the power to makes treaties, and the power to fill up all vacancies that may happen during the recess of the Senate. Inherent, or implied, powers can be interpreted differently since they are not clearly expressed in the Constitution. The unilateral powers of the president, including the executive order, are implied or inherent powers. Instead of being clearly defined, “these powers are alleged powers that presidents derive by

105 Dodds. 5.
106 Ibid.
108 Ibid. 2.
reading into and interpreting the vague provisions of the Constitution. An advantage of unilateral powers is that the president can use them to pursue policy while by passing Congress.”  

This leaves room for an abuse of power by the office of the president. “Theoretically, the president has the exclusive power to issue these types of policy statements (unilateral presidential directives). Presidents do not send executive orders to Congress for a vote. Instead, an executive order merely becomes law after the president signs his name to a specific directive.” This uncontained use of executive power has caused a shift from a congressional system of government to one focused around presidential leadership. According to a leading presidential scholar, Terry Moe, there was a rise of a "new institutionalism" from the previous political institutional theory of rational choice. Moe evaluates the progression from a system of congressional government to the now modern system of a government centered around presidential leadership.

This evolution can be considered a result of the ever-growing use of the executive order. Philip Cooper notes that “since the administration of Abraham Lincoln, American presidents have issued more than 12,000 executive orders in the excess of 4,500 proclamations having the force of law.” Cooper also notes that the executive order is typically ignored in literature of public administration. There is focus on the use of executive orders during time of war or for foreign policy, but it is otherwise sparse. Cooper calls on the “constitutionality of particularly controversial presidential mandates.” This leaves room for an abuse of power by the use and

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110 Warber. 4.
111 Ibid.
114 Ibid.
overuse of the executive order. Cooper also suggests that “although chief executives have considerably more power by virtue of the executive order and proclamation than is generally understood, it is power that should be used with great care.”  

Moe points out that a pivotal part of presidential leadership is the capacity to act unilaterally and to make a law on his or her own. This action is a central force of presidential power. Moe writes that “we argue that the president's powers of unilateral action are a force in American politics precisely because they are not specified in the Constitution. They derive their strength and resilience from the ambiguity of the contract. We also argue that presidents have incentives to push this ambiguity relentlessly to expand their own powers-and that, for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them.”

Unilateral presidential directives give the executive branch an advantage to power that the legislative and judicial branch do not have access to. According to Mayer, “working from their position as chief executive and commander in chief, presidents have used executive orders to make momentous policy choices…determining how legislation is implemented, and taking whatever action is permitted within the boundaries of their constitutional or statutory authority.”  

According to Moe there has been a power shift from the traditionalism of presidential studies that has evolved to the revolution that is the modern presidency. An issue of great concern to many scholars though in this age of the modern presidency, is whether or not

115 Cooper. 235.
117 Ibid.
“unilateral action undermines the checks and balances associated with the separation of powers.”

Moe also writes on presidential structure that there are two purposes in bringing to light the revolution of presidential power:

The first is to bring the presidency more squarely within the terrain of positive theory by presenting it as a well-developed, nuanced, and powerful institution in its own right, rather than as a caricature whose only role in politics is to make life a little more difficult for legislators. The second is to argue that, despite positive theory's admiration of congressional power, presidents actually have substantial advantages over Congress in the institutional struggle to control government, advantages that lead to a creeping presidentialization of the system.

This “presidentialization” of the system is what several scholars warn about in regard to the growth of power by the office of the president and the executive branch. Daniel Gitterman also argues that “The United States Constitution lays out three hypothetically equal branches of government—the executive, the legislative, and the judicial—but over the years, the president, the chief executive, has emerged as the dominant political and administrative force at the federal level.”

More recent articles on the topic of the progression of the executive order have focused on the presidency of Donald Trump. As one analyst put it, “President [Donald] Trump's governance style has heightened long-standing concerns that presidents have been asserting more

power, through executive orders and other means, than the Constitution intended.”

This assertion of more power has significantly grown throughout U.S. history. Some would say the growth is due to the New Deal-era when there was an expansion of the federal government. In Franklin D. Roosevelt and the New Deal, William E. Leuchtenburg, states that “in eight years, Roosevelt and the New Dealers had almost revolutionized the agenda of American politics.”

During this time, the federal government became an institution to the American people that was directly concerned with their welfare, even more so than the state and local governments. FDR signed the Social Security Act that would help support citizens during the Great Depression. Under this act, citizens would be able to file unemployment claims. The act created a national system of insurance where workers would receive retirement annuities at the age of 65. The act also set up a system of unemployment insurance. FDR also created the new Federal Emergency Relief Administration along with the Civil Works Administration. Both were an expansion of federal operations. Others have attributed the growth of executive power to the end of the Cold War as well as the decline of foreign policy in Congress. Some warn that President Trump’s “mounting [use of] executive orders and criticism of the justice system” may imperil the system of checks and balances. This chapter assesses how the evolution of executive power has ultimately led to the current energy in the executive which was unintended by the Founders.

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124 Leuchtenburg. 326
125 Ibid. 331
126 Ibid. 132.
127 Ibid.
128 Ibid. 121.
The use of the executive order has increased extensively throughout American history and during particular U.S. presidencies. Though the U.S. Constitution provided some structure and foundation to the extent of executive power, there was room for interpretation. There has been use of the executive order that has been beneficial to the nation, but the continued use of the unilateral presidential directive has led to further expansion of executive power. Fisher notes that, “The President’s legislative power, invoked on rare occasions in the early decades, is now discharged on a regular basis throughout the year in the form of executive orders, proclamations, and other instruments of executive lawmakers.”  

With the continued expansion of power by the office of the president and the overuse of the executive order, there is a growing danger of abuse of power by the executive branch. This chapter will argue that the increased use of the executive order has in fact expanded presidential powers beyond what is intended by the Constitution and undermines the separation of powers.

**The History of The Executive Order**

What constitutes an executive order? This presidential tool is one of several unilateral directives that when entered into office, the president has authority to utilize. It provides a direct and affirmative action by the individual. The executive order is a tool that is used to enforce policies or enact laws quickly that may otherwise take time in the normal legislative process. “Executive orders are directives issued by the president to officers of the executive branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept delegation of authority under which they will henceforth be responsible for the implementation of law.”  

Throughout history, U.S. presidents have used the power of the

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131 Louis Fisher, *Constitutional Conflicts between Congress and the President* (Lawrence, KS: University Press of Kansas, 2014), 129.
132 Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence, Kan.: Univ. Press of Kansas, 2014), 16.
executive order to implicate their own views and enact laws. “For many administrations, this simple process of promulgating authoritative policies is far more attractive than the arduous effort needed to move a bill through Congress…there is no requirement for notice and public participation.” The only requirement for the use of the executive order is that it must be published in the Federal Register.

The formality of the executive order has developed over time. “The earliest Executive Orders sometimes took the form of hastily scribbled Presidential endorsements on legal briefs or upon the margins of maps.” Presidents would simply write “approved” or another short comment and an action would be taken. A formal process for the executive order didn’t occur until President Ulysses S. Grant created one by an executive order in 1873. This would mark the first of many modifications to the formality of the executive order process. President Herbert Hoover also issued an executive order in 1929 to establish a process for the executive order.

Prior to 1907, there was no way of keeping track of executive orders. The State Department began to assign numbers to each order as well as file them in a Federal Register. “The Federal Register Act, which mandates publication of most official pronouncements by executive agencies as well as executive orders and proclamations, was adopted in 1935.” By 2013, the number of executive orders had reached 13,654. But since the early orders were not numbered, the amount of actual orders can range from 15,000 to 50,000. The process for the development of the executive order has been developed over several different presidencies as

133 Cooper. 17.  
134 Ibid.  
135 Ibid.  
136 Ibid.  
137 Ibid.  
138 Fisher. 119.  
139 Cooper. 17.  
140 Fisher. 119
well. According to Cooper, “…the current governing guidelines for the issuance of executive orders are themselves from an executive order issued by President Kennedy. Executive Order 11030 was first promulgated in 1962, though it has been amended by a number of later orders issued during the Johnson, Carter, and Reagan administrations.\footnote{Cooper. 17.}

The use of executive orders has increased over the history of American Presidents (see Table 1.1). As I mentioned earlier in this chapter, the president’s use of the executive order, only invoked on rare occasions is now used on a regular basis.\footnote{Fisher. 129} As a part of the president’s oath to “faithfully execute the Office of the President of the United States, and…preserve, protect and defend the Constitution of the United States,”\footnote{Alexander Hamilton et al., \textit{The Federalist Papers}: (New York, NY: Signet Classic, 2003), 551.} the executive order is a tool that can be used to ensure the president is able to fulfil his or her oath. Article II Section 3 of the Constitution also states that “he shall take Care that the Laws be faithfully executed.”\footnote{Ibid. 552.} Article II of the Constitution has been interpreted over the years to validate the executive actions of the sitting U.S. president. According to Phillip Cooper:

“The Court has also recognized that the president has independent constitutional authority under Article 2 that can be used to justify an order in appropriate circumstances, whether Congress disagrees with or supports the chief executive. At the same time, presidents are not relieved of their constitutional obligation to respect properly enacted statutes, and courts can intervene to issue findings on the validity of presidential actions.”\footnote{Cooper. 24.}
Executive orders have been used for a variety of different reasons. Some have been connected to the politics of a president, but they have also been dictated by circumstance.\textsuperscript{146} There have been many executive orders that have been issued during a time of emergency, war, or economic downfall. Though the term was not used during that time, the Louisiana Purchase was executed via an executive order.\textsuperscript{147} When Franklin Roosevelt took office in 1933, impacts of The Great Depression were still devastating the nation. After his inauguration, FDR called an emergency session of Congress. In the following 15 months, the president had issued around 674 executive orders and from 1933 to 1945, he had issued altogether around 3,723 executive orders.\textsuperscript{148} Executive orders have also been used to declare national emergencies, “a step that authorizes an immense range of unilateral warrants, including – theoretically – the power to restrict travel, impose martial law, and seize property, transportation networks, and communications facilities.”\textsuperscript{149}

**The Growing Power Behind Executive Orders**

Though executive orders have been used to combat issues and provide solutions to national oversight, this tool of executive power vested in a single individual can be almost completely unchecked and can cause an abuse of power. Without notice or public opinion, the president can issue an order for an immediate action. There are examples in history where presidents took action that did not stand to be constitutional. As highlighted in chapter 1, in 1952, President Harry Truman issued an executive order for the temporary seizure of steel mills during the Korean War.\textsuperscript{150} His action brought forth the case of *Youngstown Sheet & Tube Co. v.*

\textsuperscript{146} Cooper. 39.
\textsuperscript{148} Cooper. 40-41.
\textsuperscript{149} Mayer. 7.
\textsuperscript{150} *Youngstown Sheet & Tube Co. v.* Sawyer, 343 U.S. 579 (1952)
Sawyer, where the majority opinion ruled that “the President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here.”151 There have been other instances where executive orders have not been overturned. President Roosevelt’s Executive Order 9066, “led to curfews, removal from homes and businesses, and ultimately incarceration in what were euphemistically called ‘relocation centers’ but were in fact concentration camps.”152 This order which was later affirmed by Congress, Roosevelt claimed was his under his authority and power as the President of the United States and Commander in Chief. As a result, 117,000 Japanese Americans were places in these camps.153 These actions and circumstances have been factors in the overall increase of executive power that goes well beyond what the Constitution has intended.

There is a wide variety of motivations that have prompted presidents to use executive orders. This allows presidents to “accomplish directly what they might otherwise do through legislation or other administrative actions.”154 This is the president’s way of bypassing the checks and balances of our governmental system: contradicting what the Constitution was intended for, a separation of powers by three coequal branches. “They have not only been used to meet challenges that simply would not wait for more traditional policymaking; but have also been employed in some daring cases of presidential leadership.”155 Another concern is the use of executive orders on claims of emergency conditions. This leaves room to question what constitutes a national emergency and the danger of claiming an emergency when the conditions

151 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)
152 Cooper. 78.
153 Ibid.
154 Ibid. 80.
155 Ibid.
do not warrant the order, undermining credibility.156 A recent example of this issue is President Trump’s use of the executive order to declare a national emergency on the border with Mexico. This use of executive power was Trump’s way of bypassing Congress to have access to billions of dollars, that he was initially denied, to build a wall on the border of the U.S. and Mexico. According to the New York Times, his actions initiated “a highly charged policy dispute into a confrontation over the separation of powers outlined in the Constitution.”157

The continued use and overuse of the executive order has led to executive decisions that are purely out of self-interest rather than the interest of the people and nation as a whole. The office of the president, created to “take care that the laws be faithfully executed,”158 has developed into an office that strives on the character of the individual and forgets that the power is meant to be in the hands of the people. While “Neustadt argued that presidential orders, by themselves, lacked the necessary practical authority to alter the behavior of others in government,”159 an executive order with the ambition of a single executive can alter the fundamental principles of a democratic republic.

This behavior doesn’t stop at the federal level of government. The actions of the president set an example for other leaders in the country as well:

“There have been mixed experiences with the use of executive orders by governors and mayors around the nation. There is evidence that a number of governors, such as Jeb Bush in Florida and Pete Wilson in California, have been increasingly willing to follow the lead of the president and to use executive orders to address issues that seem too difficult to handle through the normal legislative or administrative process.”160

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156 Cooper. 71.
159 Mayer. 17.
160 Cooper. 80.
The use of the executive order has escalated drastically over history. The instances where presidents have used this power with intentions that are not necessarily constitutional have broadened the use of the order. This continued growth and expansion of presidential power is dangerous to the principles of the separation of powers and the fundamentals of the Constitution.

**The Presidential America**

The Federalist Papers laid the foundation for the U.S. Constitution and the system of the separation of powers. In Federalist 47, Madison writes, “...where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.”

As envisioned by the founders, an executive, legislative, and judicial branch were set in place to provide a system of self-government that could control the passions of men. The executive branch, at its conception, had its doubts. How could the framers guarantee that the office of the president wouldn’t evolve into a monarch or absolute tyranny? The Declaration of Independence, after all, lists 27 facts of the injustices that the King of Great Britain inflicted on the people over the course of history. But the system of separation of powers provided checks and balances to ensure that no one branch of government or person would garner too much power. As Madison states in Federalist 51, “ambition must be made to counteract ambition.”

In Federalist 51, James Madison writes that, “if men were angels, no government would be necessary.” But men are not angels, they are in fact the complete opposite. The dilemma of

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164 Ibid.
self-government is human nature. People are driven by their passions, and therefore they are flawed. Madison then continues to claim that, “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.” The Founders could not anticipate how the relationship between Congress and the President could have evolved.

These principles are what created the foundations of our system of checks and balances and separation of powers. Power was to be derived from the people, and no one branch of government or individual should garner too much power. The institution of the presidency has changed since the founding of the nation. “For most of the nineteenth century, the presidency was an institution on the periphery of national politics.” There were a few circumstances where the president exercised extraordinary power such as Jefferson, Jackson, and Lincoln, but for the most part presidents had little influence over congressional barons or provincial chieftains. The job of the president was to execute policy, not to make it. Policymaking was the role of the legislators, leaders of the House and Senate.

The role of the president was strong, but it was equal with or at least did not overcome the role of Congress. Power in the executive began to grow as ambition grew in its candidates. The role slowly grew from executioner to decision maker and with the tool of the executive order, U.S. presidents have been able to fuel their ambitions.

167 Crenson and Ginsberg. 352.
168 Ibid.
As Matthew Crenson and Benjamin Ginsberg note in their study of presidential power, “For a generation or more, the power of the White House has grown during Republican and Democratic administrations alike. Congressional investigations, personal scandals, and impeachment may have slowed but never halted its advance. Even as presidential approval ratings plummet, presidential power continues to function and grow.” 169 This phenomenon is due to no other than the growth of ambition and lawmaking power amongst the presidency.

Presidents began to make a career out of running for office and sought the position to make history. This sparked a path of institutionalizing ambition, in contrast to balancing the power amongst the branches of government.

The political ascent of the presidency was neither accidental nor inevitable. It was contingent on an intersection of presidential motives, means, and opportunities that began to emerge no later than the early decades of the twentieth century. The motives grew more aggressive as the business of becoming chief executive demanded more drive – the ‘fire in the belly.’ 170

These candidates driven by ambition strived on making quick and affirmative decisions and promising platforms of change and policymaking. “They were impatient with its bounds and limits, and their efforts to overcome them provided much of the animating force that drove the expansion of presidential power.” 171 The executive order was no longer a tool for emergencies but of political strategy and ambition driven action. There was a growth in the “presidential agenda” strive to make executive decisions.

The character of the president changed from playing member to leading force in the American government. The growing use of the executive order helped broaden the role of the executive overall strengthening the power of the president.

169 Crenson and Ginsberg. 352.
170 Ibid.
171 Ibid.
Conclusion

The role of the executive has played a vital part in our democratic system. Every four years the people join together to elect an individual whose values and ideas they agree with. They have high hopes that this individual will be able to make a difference in the everyday lives of the people and enact change that will benefit our country. This single individual is responsible for “faithfully execute [ing] the Office of the President of the United States, and…preserve [ing], protect [ing] and defend [ing] the Constitution of the United States.”\(^{172}\) And, our president is to take Care that the Laws be faithfully executed.”\(^{173}\)

The executive power is to also be vested in this single individual. The power to employ executive orders as he or she sees fit. The broadening of executive power has been a topic analyzed by presidential scholars for the past few decades. The history of the executive order has provided us with background knowledge needed to understand its development. There have been pivotal instances in history, such as the Youngstown Sheet & Tube Co. v. Sawyer case and President Roosevelt’s Executive Order 9066, that can constitute as few of the many factors of the overall expansion of the use of the executive order. The power of the executive order has grown extensively and has been a tool for the modern ambitious president. The increased use of the executive order has led to an abuse of power by the office of the presidency that goes beyond what was intended in the U.S. Constitution, therefore weakening the system of separation of powers.

The executive order has been a tool for the president to use to exert his or her own self-interest. Though not all orders have been inheritably negative, they have been a growing tool for

\(^{173}\) Ibid. 552.
the president to use to bypass Congress. These actions have continued to promote the expansion of presidential powers by weakening the system of separation of powers.

“The expansion of presidential power is itself a source of democratic decay, because presidents diminish American democracy by being presidential. When presidents rule by decree in even the most routine matters, they diminish democracy. When they and their subordinates ignore, circumvent, and express disdain for legislative process, they diminish democracy. When they create decision-making processes designed to mute debate and discussion in order to enhance their own power, presidents diminish democracy.”

Has our government become what Madison had warned us about? Have we grown beyond countering ambition? This leaves us to question the legitimacy of the role of the president in the system of the separation of powers and a democratic republic. It is the responsibility of the executive to secure liberty “against the enterprises and assaults of ambition, of faction, and of anarchy.” But given that the modern executive is ambitious, can it protect the people from itself?

174 Crenson and Ginsberg. 367-368.
Chapter 3: Executive Energy and The Modern President

Introduction

Alexander Hamilton writes that “the ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers. The ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility.”176 The energy in the executive has always been a present force throughout U.S. history. By “energy in the executive” we mean the human part of the presidency. There is the office of the presidency and the actor or individual. The energy in the executive has been used to strengthen the power in the office by acting during times of emergencies and national crisis. What we could argue in this case is that though laws (acts) are created to preserve the principles of freedom and self-government, the role of the executive is to preserve men. It is when the role of the executive is focused on self-preservation that executive energy can become a threat to the principle of separation of powers.

The current energy in the executive has vastly changed from what was intended by the framers in the U.S. Constitution. The modern president has seen a growth in executive power that was warned about by the framers. The literature on this topic provides several different viewpoints on the modern energy in the executive. Some scholars would argue that the Constitution is a “living document” therefore so should the role of the executive, or that the framers at least contemplated that there would be a growth of a strong executive. Others argue that the increase of executive legislation has created an unintended executive. There is also the argument of the “unitary executive” on the extent of power in the office of the president. This

176 Federalist #70
chapter will review the existing arguments on the modern energy in the executive and outline how the current energy in the executive was not intended by the U.S. Constitution.

**Energy in the Executive**

*In The Progressive Presidency and the Shaping of the Modern Executive,* Andrea Katz turns to Woodrow Wilson’s argument that the Constitution is a “‘living document,’ capable of adapting to fit the spirit of the times.”177 Therefore, the role of the executive must adapt to fit the spirit of the times. But to what extent can the executive continue to adapt before it can be considered unconstitutional. The framers created a presidency with checks and balances and a separation of powers to ensure that no one would be above the law. The framers knew that men were driven by self-interest so they created a system that would be able to control that. Afterall, “ambition must counteract ambition.”178

Some political scientists argue that it was the Progressive Era that shaped the modern presidency. “The Progressives envisioned an enlarged executive, one outside the original guidelines of the U.S. Constitution, which they deemed ‘archaic,’ ‘undemocratic,’ and unsuited to the demands of the modern age, in which mass capitalism dislocated, alienated and disenfranchised the common man.”179 This was a time of political reform and industrialization; a time for presidents such as Theodore Roosevelt, and then Woodrow Wilson followed later by Franklin Roosevelt to take charge and make changes. Strong presidencies advocated for the broadening of executive power. The role of the president began to evolve into a more pivotal one, one that left a legacy. This provided the opportunity for the president to do more and act

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178 Federalist #51
swiftly in times of national crisis. They believed that it was vital to have a strong executive that is also republicanized in order for their democracy to exist. The Progressives had a strong faith in public servants with expertise. They believed, as other scholars would argue for, in a responsible executive that would execute the laws faithfully. Due responsibility is a key factor to the energy in the executive. Responsibility is compromised when the individual is consumed by self-interest in leaving a legacy or becoming a career politician. The “fire in the belly” that the Progressives amplified in the single executive has grown to be a danger to our democracy because of what the role does to the individual. The Founders warned against the nature of man being driven by ambition and self-interest and that there must be controls or checks in place. Here we can ask, has the role of the executive become too vast to be controlled?

Morton Frisch argues that “the language of the Constitution, its specific allocation of powers between Congress and the President, shows that a relatively independent executive with a substantial degree of power was contemplated at least by the leading framers of that document.”\(^{180}\) What the framers did not foresee was the shift in power between Congress and the President. Fisher argues that there has been a transfer of power from the legislative branch to administrative offices. “Although Congress cannot surrender the basic legislative power entrusted to it by the Constitution, it may give substantial discretionary authority to the executive branch and the independent regulatory commissions.”\(^{181}\) But since legislative power cannot be constitutionally delegated by Congress, the powers delegated aren’t legislative powers.\(^{182}\)


\(^{181}\) Louis Fisher, *Constitutional Conflicts between Congress and the President* (Lawrence, KS: University Press of Kansas, 2014), 270.

\(^{182}\) Ibid.
Fisher’s concern is that since Congress is delegating authority and not taking responsibility for their legislative powers, this leaves a growth of legislative powers by the executive branch. “The general drift of authority and responsibility toward the President over the past two centuries is unmistakable. More threatening than this trend is executive activity cut loose from legislative moorings and constitutional restrictions – presidential action no longer tethered by law.” 183 Fisher points out that most of the original legislative power that is meant to be vested in Congress is now exercised by executive agencies, independent commissions, and the courts. 184 With the allocation of powers between Congress and the President as stated in the Constitution, an independent executive could be republicanized and responsible. Since legislative powers have shifted into the hands of the executive, executive power is too extensive in order to maintain a responsible president that is not driven by self-interest. In this case ambition does not counteract ambition, and the unchecked power in the executive is a threat to our democracy.

“The President’s legislative power, invoked on rare occasions in the early decades, is now discharged on a regular basis throughout the year in the form of executive orders, proclamations, and other instruments of executive lawmaking.” 185 Fisher disagrees with the growth of the executives lawmaking power and pushes for more congressional controls. He believes that Congress should take back their legislative powers and control the executive. Advocates for a strong energetic executive would argue against Congress controlling the president as it interferes with principle of separation of powers. Scholars such as Mansfield argue

183 Fisher. 324.
184 Ibid. 129.
185 Ibid.
for a strong yet responsible executive that is still republicanized in order to maintain a
democratic system with due dependence on the people.\textsuperscript{186}

According to Megan Covington, “the increased use of executive legislation in the
absence of challenges from Congress of the Supreme Court has expanded the power of the
president beyond constitutional bounds and poses a serious threat to our democracy.”\textsuperscript{187} This
expanded use of presidential power has created an energy in the executive that in some scholar’s
opinion can be especially dangerous. Though the fear of a president becoming a dictator can be
elaborate, “the tendency by modern presidents to use executive legislation to expand the scope of
their power is especially dangerous considering that neither the Supreme Court nor Congress is
very likely to challenge an executive order, rendering the most important check on presidential
legislation virtually nonexistent.”\textsuperscript{188} The use of executive powers has continued to expand due to
national crises as well. According to William Scheuerman, “…where the executive faces a
seemingly endless series of ‘crises’ or ‘emergencies,’ provides a heightened scope for executive
discretion. At the same time, the US-style separation of powers, in which an independent
president faces a potentially obstinate Congress, offers the executive many incentives to exploit
crises, real or otherwise.”\textsuperscript{189} This leaves room for an energy that promotes corruption and lack of
responsibility; one that the framers did not intended when writing the Constitution.

There is also the argument of the unitary executive. Jeremy Bailey discusses the unitary
executive and the Constitution. According to Bailey, “broadly, the argument from the unitary

\textsuperscript{186} Harvey Claflin Mansfield, \textit{Taming the Prince: The Ambivalence of Modern Executive Power} (New
\textsuperscript{188} Covington. 1.
\textsuperscript{189} Scheuerman, William E. "Emergencies, Executive Power, and the Uncertain Future of US Presidential
executive recommends a powerful president on the grounds that the unitary executive is compatible with constitutional design and democratic theory. Although the origins of the term are unknown, it seems to have arisen in its present form in the Reagan Justice Department.”

The unitary executive theory dates back to the 1980s. It was popular amongst Reagan’s legal team and according to Graham Dodds in the *Unitary Presidency*, “Steven Calabresi [who worked in the West Wing of the Reagan White House] is generally regarded as the father of the unitary executive theory.”

According to Bailey, “central to the recent argument from the ‘unitary executive’ is the claim that the unitary executive is consistent with the text and history of the Constitution…unitarians also argue that the unitary executive is consistent with democratic theory.” He addresses the political thought of Hamilton that there should be an energy in the executive. This energy is associated with “an expansive interpretation of executive power.”

Though Hamilton was an advocate for an energetic executive, he also wrote that both the president and the Senate would share removal power. Bailey argues that “Hamilton’s statement limiting presidential removals illuminates his larger argument about executive energy. By showing how ‘duration’ would check ‘unity.’”

The unitary executive argument essentially has two forms, domestic and foreign. “According to the domestic argument from the unitary executive, the oneness of the executive power, the fact that the Constitution vests the executive power in a president means that

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192 Bailey. 453.
193 Ibid.
194 Ibid.
195 Ibid.
Congress may not limit the ability of the president to control executive branch officials.”196 What this argument holds, is that Congress cannot limit the removal authority of the president by creating independent commissions or by subpoenaing executive officers to testify.197 As for the foreign argument, Bailey writes that it is John Yoo who has made the most extensive case. “According to Yoo, the ‘text, structure, and history’ of the Constitution reveal that the document does not set up a precise legal method or ‘fixed process’ for waging war, but is rather quite ‘flexible’ and can therefore accommodate twentieth-century practice, in which presidents assume that they may change the state of the nation from peace to war with or without congressional approval.”198 This flexibility, if not checked, is a threat to the democratic process. The energy in the executive loses the ingredients of unity and due responsibility for which Hamilton argued. “Hamilton defended ‘energy’ in the executive, and, in that argument, wrote that ‘unity in the executive’ was necessary both for energy and for democratic accountability.”199 With a heightened executive, the unity amongst the three branches of government can be impacted in a way that threatens the democratic structure of the separation of powers.

When Rogan Kersh examines the Federalist Papers and in particular, Federalist No. 67, he points out that it is “a vigorous defense of the chief executive and contains intense language to alleviate fears of a dictatorial president.”200 The framers made an effort to ensure the people that having an individual executive would not constitute tyranny. What Kersh argues is that Federalist 67 provides a “deeper explication of the blend of republican and energetic

196 Bailey. 453.
197 Ibid.
198 Ibid.
199 Ibid.
government.”201 Jeffrey Sedgwick analyzes the Federal Convention of 1787 and how the framers wrestled with the question of how to create an executive with republican character. He writes that “the prevailing wisdom was that republican government could survive only in small, homogenous communities where the civic virtue and mutual attachment of the citizenry would produce a devotion to the common good that made an energetic executive unnecessary.”202 On the other hand, Sedgwick writes that nationalists argue the opposite, that “multiplicity of interests would encourage a politics of compromise and moderation.”203 Either way, the founders advocated for a strong yet responsible executive.

With lack of unity, duration, and competent powers, the energy in the executive cannot be what Hamilton intended. He argued that “the ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility.”204 So if responsibility is lost, and due dependence shifts from the people, there can be no safety in the republican sense, there can be no republic at all. The modern energy in the executive has gone beyond the ingredients that Hamilton argues are necessary to constitute a democratic republic. The current energy threatens our democracy.

Throughout the course of this chapter, we will analyze the current energy in the executive and how it has progressed. We will also take a look at the recent administrations of Bush II, Obama, and Trump and investigate the change in executive energies in the modern U.S. presidency. Finally, this chapter will argue how the modern energy in the executive is unintended by the framers of the U.S. Constitution and threatens our democracy.

203 Ibid.
204 Federalist #70
Unity & Due Responsibility

What constitutes the energy in the executive and why is it so vital to our democratic process? Hamilton was a strong advocate for the role of the executive and writes that “energy in the executive is a leading character in the definition of good government.” He argues that not only “is it essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”

Hamilton continues to outline the ingredients which constitute the energy in the executive. These include unity, duration, an adequate provision for its support, and competent powers. All of these can be found in an energetic executive that is compatible with a democratic republic. It is only when these ingredients are compromised that democracy is threatened. Hamilton even outlines that “unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counselors to him.”

As power has shifted away from Congress and into the hands of the executive, U.S. presidents over the past few decades have grown to be more influenced by others.

Due to the broadening of executive powers the unity that constitutes as a vital ingredient of executive energy has been impacted. The president responsible for “the security of liberty against the enterprises and assaults of ambition,” is driven by that very ambition. An officer

205 Federalist #70
206 Ibid.
207 Ibid.
208 Ibid.
209 Ibid.
who is meant to have power that is checked by Congress and the Court is excused to act in self-interest simply on the broad definition of executive power. The energy in the executive is not meant to be ambitious, rather protect the country from the assaults of ambitions. Strength in the executive, as some scholars would argue for, is different from ambition in the executive.

Terry Eastland writes in *Energy in the Executive* that “for what the Constitution proposes to establish is limited government that can maintain the conditions of freedom against internal and external threat, administer the nation’s laws and encourage rational deliberation and choice on the part of a self-governing people.” He continues to add that “the presidency it regards as necessary for achieving this government, which the framers saw as good government, is a strong one.” With strength in an executive comes due responsibility. As Hamilton writes in Federalist 70, “the ingredients which constitute safety in the republican sense are a due dependence on the people, and due responsibility.” An executive driven by self-interest lacks due responsibility and is therefore not a strong office which can constitute safety in the republican sense. A strong executive has been advocated for in the past in order to make executive decisions in times of national crises. Executive power was intended to be checked in order to prevent an ambitious executive driven by self-interest.

The energy in the executive has vastly changed since the founding of the Constitution. The role of the president has grown into a character that was unintended by the framers. With the continued broadening of executive power, the role of the president has continued to grow beyond what was intended by the principle of the separation of powers. Though there have been

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211 Ibid.
212 *Federalist* #70
advocates for a strong executive throughout U.S. history, we will take a look at three recent administrations and how their executive energies have impacted the role of the modern president.

**George W. Bush (R)**

The Bush administration has been infamously known for its efforts to broaden the use of executive power. Through efforts by George W. Bush’s Vice President, Dick Cheney, the role of the office of the presidency changed, and not necessarily for the better. According to Gordon Silverstein, “the period after Watergate and the Vietnam War, Cheney told reporters on Air Force Two in 2005, was ‘nadir of the modern presidency in terms of authority and legitimacy,’ a period in which the chief executive’s ability to lead ‘in a complicated, dangerous era’ was severely diminished.”

When elected as Vice President to George W. Bush, Cheney was determined to restore the executive branch and expand its power.

In *The Power of One*, Rosen states that “one of the defining principles of the Bush administration has been a belief in unfettered executive power.”

Rosen continues:

Indeed, President Bush has taken the principle to such unprecedented extremes that an ironic reversal has taken place: A conservative ideology that had always been devoted to limiting government power has been transformed into the largest expansion of executive power since FDR. Often criticized as mere political opportunism—a cynical rationale devised after September 11 to allow the president to do whatever he likes in the war on terrorism—Bush’s embrace of the “unitary executive” is in fact the culmination of an internal debate among conservatives that dates back to the Reagan administration. The initial idea—born out of efforts in the 1980s to limit government expansion—was that a strong dose of presidential power was necessary to constrain the burgeoning federal power of Congress. But, with Bush’s excesses, conservatives are reaping the

consequences of the Leviathan state that they once warned against: Once executive power is viewed as absolute, centralized, and indivisible; it tends inevitably to grow.215

The unitary executive, what Rosen writes was inspired by Hamilton’s call for “unity in the executive,” was created around the idea that the president needed to have full use of executive power in order to control the executive branch.216 A stronger presidency meant that there would be a more limited government, as conservatives have argued is what the founders intended. Having a passive president would risk the chance of the growth of a central government.217 In order to ensure strength in the executive, the Bush administration worked to broaden executive power. National emergencies and crises have always been at the helm of the use of executive powers.

As outlined in Chapters 1 and 2, in 1861, Abraham Lincoln took executive action after the Confederate attacks on Fort Sumter during the Civil War. The Court ruled that Lincoln lacked power in this case and overstepped Congress.218 In Youngstown Sheet & Tube Co. v. Sawyer, President Harry S. Truman seized steel facilities during the Korean War which was later ruled as a lack of power without authorization from Congress.219 In Apologist for Power: The Yoo Brief, Executive Power and the State of Exception, Kampmark writes that “the state of emergency that supposedly triggers such a violent response is one with a distinctly long genealogy. ‘History is filled with examples of emergency powers being corrupted or abused, from the appointment of

215 Rosen. 8.
216 Ibid.
217 Ibid.
dictators *rei gerundae causa* in the days of the Roman Republic to the invocation powers in Weimar Germany.’”

The Bush administration took advantage of emergency powers as well. According to Huq, “the most significant Bush/Cheney innovation was planted at the taproot of our Constitution. It was the insistence that the president can exercise what Cheney in 1987 called ‘monarchial notions of prerogative.’ That he can, in other words, override validly enacted statutes and treaties simply by invoking national security.” With national emergencies such as the terrorist attacks of 9/11 and the assumed weapons of mass destruction in Iraq, the war on terror was the ultimate excuse of abuse of power. Cheney’s monarchical claim “underwrote not only the expansion of torture, extraordinary rendition and warrantless surveillance but also the stonewalling of Congressional and judicial inquiries in the name of ‘executive privilege’ and ‘state secrets.’”

The Bush administration leveraged the fears post 9/11 attacks to reverse “the erosion of presidential power since Watergate.” They were able to create an executive that was unconstrained by both Congress and the Court. According to Huq, “it achieved what James Madison once called the ‘accumulation of all powers, legislative, executive and judiciary, in the same hands,’ which he condemned as ‘the very definition of tyranny.’” With the emergence of executive privilege and Cheney’s call for monarchial notions of prerogative, the extent of executive power as intended in the U.S. Constitution was redefined. After incidents such as

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222 Ibid.
223 Ibid.
224 Ibid.
Watergate, the Bush administration focused its efforts on the “rebalance” of the separation of powers. What was viewed as a rise in legislative and judicial powers at the time, led to efforts to increase the power of the executive all while claiming the constitutionality of having strength and energy in the executive. In *The Law: Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy?*, Silverstein discusses how unlike past presidents such as Lincoln and Truman, Bush used a national crisis to “defend the exercise of inherent executive power not as a temporary response to emergency, but as a fundamental constitutional right and responsibility.” The Bush administration defended the argument that Article II of the Constitution grants both broad and inherent powers.

Silverstein continues that:

“Faced with an unprecedented crisis in 2001, the Bush administration acted as it saw fit, as had other presidents faced with immediate crises, including Thomas Jefferson and Lincoln. But unlike Jefferson and Lincoln, the Bush administration did not come to Congress later for post hoc authorization…the Bush administration certainly knew that Congress in the shadow of a crisis would willingly authorize just about anything Bush asked.”

The lawyers within the Bush administration worked toward ensuring that the president’s actions were not only unfettered but constitutional. They developed theories that fortified the president’s use of executive power and Bush’s claim to inherent powers that were a constitutional right. They claimed that in regard to foreign policy that the president has the final authority and that in terms of national security that the president “is legitimately entitled to override constitutional and statutory constraints to preserve and protect that security.”

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225 Huq. 21-22.
226 Silverstein. 882.
227 Ibid.
228 Ibid.
229 Ibid.
goal of these lawyers was to assert that these executive actions were a constitutional right. Therefore, to redistribute the allocation and distribution of power at the national level. The Bush administration reset the distribution of powers as intended by the principle of separation of powers to benefit the office of the president. The executive branch, once seen as an equal power amongst the three branches of government, could now act as it saw fit on the grounds of executive privilege or in response to a threat to national security.

As Hamilton outlines, unity is a vital ingredient to having energy in the executive and energy in the executive constitutes good government. However, “unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counselors to him.”

Barack Obama (D)

In *Dismantling the Imperial Presidency*, Huq warns that after the Bush administration we could not rely on Obama alone to restore the allocation and distribution of power to its constitutional order. He writes that, “No matter how decent, any new president is tempted by the tools and trappings of executive authority.” The Bush administration, as well as administrations before, expanded the use of executive power, creating an energy in the executive that was more powerful than originally intended. Regardless of the current executive’s intentions, being held accountable for the amount of power that now rests in the executive branch takes strength as well as due responsibility. In *Executive Power in the Obama Administration and the Decision to Seek Congressional Authorization for a Military Attack against Syria*:

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230 Silverstein. 883.  
231 *Federalist* #70  
232 Huq. 21.  
233 Ibid.
Implications for Theories of Unilateral Action, Kenneth Mayer states that “although he [Obama] explicitly and repeatedly promised to reverse many Bush administration policies and practices and rejected his predecessor’s view of executive power, he actually made few dramatic retrenchments and even went further in some areas.”

The examples that Mayer provides are the prison at Guantanamo Bay remaining open, the continuation of the extraordinary rendition policy, invoking the state-secrets doctrine, the increase of drone attacks, ordering military action without congressional approval, and continuing the surveillance policies that were established during the Bush administration.

Mayer even went as far to state that, “compared to President George W. Bush, ‘in several fundamental respects we have experienced wider assertions of unconstitutional executive authority under President Obama.’”

Like other strong executives before him, President Obama took a broad view of executive authority. Mayer continues to state that, “in acting unilaterally, he articulated the same justifications as his predecessors did: compensating for congressional opposition and dysfunction, protecting national security and the national interest, interpreting statutory and constitutional language in a way that preserves presidential flexibility, and protecting the institution of the presidency.” It is because of the executive’s priority in protecting the institution of the presidency versus protecting the institution of the separation of powers and the Constitution, that changes the energy in the executive. An energetic executive is comprised of

235 Ibid. 822-823
236 Ibid. 823.
237 Ibid.
238 Ibid.
unity and a due dependence of the people. Growth of an unfettered power can only lead to executive decisions made by self-interest.

Donald J. Trump (R)

Years of broadening executive authority and pushing the limits of executive power laid the groundwork for the Trump administration. Throughout the course of U.S. history, an office that was built on unity, responsibility, and dignity, has succumbed to the self-serving notion that it’s ok, if the president does it. The president’s best interest is now considered to be the nation’s best interest, and as long as there’s a claim to executive privilege, then the president can be above the law. Donald Trump used the fear of a growing centralized government to validate his abuse of power all in the promise to “Make America Great Again.” The broadening of executive power, no different than the administrations before him, is now amplified and paraded in front of the media. The 2016 election and the inauguration of Donald Trump prompted further investigation into the extent of executive authority and executive power. Less than a month after the inauguration, Hansen writes that, “National Security Advisor Michael Flynn was forced to resign after misleading Vice President Mike Pence regarding his conversations with Russian Ambassador Sergey I. Kislyak involving the lifting of sanctions against Russia.”239 This prompted the FBI investigation into the Trump Administration and possible connections to Russia which led to President Trump firing FBI Director James Comey.240 The start of Trump’s presidency exhibits actions of self-preservation and self-interest which he has continued to argue that he has the authority to do so under executive privilege.

240 Ibid. 235.
During his term as president, Trump has exhibited countless instances of abuse of executive power. When Trump issued Executive Order 13769, he was accused of being discriminatory and violating the Establishment Clause and the First Amendment. Otherwise known as the “Muslim ban,” the President, as many others have done in the past, validated his actions by claiming a threat to national security. In a piece on the *Opinion of the Court in Trump v. Hawaii*, they highlight that, “in a television interview, one of the president’s campaign advisers explained that when the president ‘first announced it, he said, ‘Muslim ban’...He said: ‘Put a commission together. Show me the right way to do it legally.’ The adviser said he assembled a group of Members of Congress and lawyers that ‘focused on, instead of religion, danger...based on places where there [is] substantial evidence that people are sending terrorists into our country.’”\(^\text{241}\)

In *Trump v. Hawaii*, the court ruled that the president lawfully exercised his power as president to issue travel bans under the Immigration and Nationality Act (INA).\(^\text{242}\) The INA outlines that foreign nationals who are seeking entry into the U.S. must undergo a vetting process.\(^\text{243}\) “The Act also vests the president with authority to restrict the entry of aliens whenever he finds that their entry ‘would be detrimental to the interests of the United States.’”\(^\text{244}\) In the *Opinion of the Court in Trump v. Hawaii*, this case is compared to *Korematsu v. United*


\(^{243}\) Opinion of the Court in Trump v. Hawaii

\(^{244}\) Ibid.
*States* where the Court “gave a pass to an odious, gravely injurious racial classification authorized by an executive order.”\(^{245}\) They write that:

As here, the Government invoked an ill-defined national security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about a particular group’s supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies’ views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government’s policy.

Trump’s abuses of power in office led to his recent impeachment. On December 18, 2019, the House approved articles of impeachment on the charges of abuse of power and obstruction of Congress. These charges led to an impeachment trial that was held in by the Senate. Though the Senate website states that their role in impeachment is when “the Senate sits as a High Court of Impeachment in which senators consider evidence, hear witnesses, and vote to acquit or convict the impeached official,”\(^{246}\) there were no witnesses present. The Senate voted to acquit the president of all charges leaving Trump in office and ready to run for the 2020 Presidential Election. In *All the President’s Lawyers*, Hansen writes that, “As representatives of the people, vesting the power of impeachment for treason and other high crimes with Congress, in theory, ensures that the people have a say in responding to the executive abuse of power.”\(^{247}\) But what the framers of the Constitution might not have predicted was the “extreme partisan divides that now hobble congressional ability to check executive abuse of power.”\(^{248}\) The partisan divides in Congress and in our country, influence the unity ingredient in executive energy. As Hamilton

\(^{245}\) Opinion of the Court in Trump v. Hawaii


\(^{247}\) Hansen. 231–52.

\(^{248}\) Ibid.

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predicted, “unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counselors to him.”

If unity is destroyed, then we no longer have the energetic executive that is vital for our democratic system, as intended by the framers.

The most recent incident that led to the impeachment trials was a phone call between Trump and a foreign entity. According to Sean Wilentz, “with a single telephone call, Donald Trump betrayed the presidency in ways almost unimaginable until that moment. During the call, he attempted to pressure a foreign leader to help him smear and destroy both a chief political opponent and that opponent's political party to benefit himself in a presidential election.”

Wilentz argues that this is different than Trumps other transgressions because “it is an attack on the foundations of our republic, turning diplomacy into a weapon of personal and partisan political power.”

Wilentz also quotes the Federalist Papers where Hamilton writes that “a president, through ‘cabal, intrigue, and corruption,’ might help ‘foreign powers to gain an improper ascendant in our councils.’” The mechanism that they created to defend this was impeachment.

A further attempt to convict the president of corruption was a lawsuit by congressional Democrats that accuses Trump of violating the emoluments clause in the Constitution. Article I, Section 9 of the U.S. Constitution states that “no title of nobility shall be granted by the United

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249 Federalist #50
251 Ibid.
252 Ibid.
States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any King, Prince, or foreign State.”

Congressional Democrats argued that Trump violated the emoluments clause “by refusing to allow lawmakers to review and approve his financial interests.” The lawsuit was dismissed by a federal appeals court.

Conclusion

The energy in the executive that was intended by the framers of the Constitution no longer exists in the current office of the president. What was first advocated as strength in the executive has turned into self-interest and an uncontrollable amount of executive power in the executive branch. With the theory of the unitary executive and arguments on the increase legislative powers of the executive, we have seen a shift in power from the other branches of government to the executive branch. This power has only increased and continues to threaten the ingredients that constitute the energy in the executive. An office that was meant to have limited powers, now acts in self-interest claiming that the president’s interest is the nation’s best interest.

In The Case For Impeachment, Wilentz writes that President Trump, “even declares in public that he is the law, claiming that, according to Article II of the Constitution, ‘I have the right to do whatever I want as president.’” Though Article II of the Constitution is broad and executive power has been interpreted differently throughout U.S. history, it does not state that president has the right to do what he or she wants, nor does it state that the president is above the law. The main ingredient that constitutes energy in the executive is unity, and without unity the

253 The U.S. Constitution, Hamilton. 549
255 Wilentz. 45.
intended energy in the executive cannot exist. According the Federalist Papers it is energy in the executive that constitutes good government.256

256 Federalist #70
Conclusion

This thesis examined the origins of executive power and the role of the executive, the growth of unilateral presidential directives including the executive order, and investigated the current state of energy in the executive branch. Through this analysis, we learn the intended purpose of the role of the executive and how that role has changed due to the broadening of presidential power. Though having a Supreme Court and Congress are important to a democratic system, it is vital to have someone “who stands perpetually ready to go beyond the rules, responding to the motion of human things.” But, it is even more vital to have a republicanized executive, one that is able to counter ambitions and protect individual freedoms. The separation of powers was designed to ensure that there would be a republicanized executive, one who’s powers could be checked. The Founders believed that the role of the executive was necessary to their republic, but they did not envision that the president would become a central figure to the nation with powers that are essentially unchecked.

This return to the fundamentals of the role of the executive has helped us in understanding why the current role is unconstitutional. The principle of separation of powers that was created by the framers, was not designed to accommodate a balance of power with an office that has become a central figure in our government. It is not the individual itself that corrupts the office, but rather the power of the office that corrupts the individual. In *Federalist 70*, Alexander Hamilton argues that “energy in the executive is a leading character in the definition of good government.” In this thesis, I define the energy in the executive as the human part of the office. The part that is meant to break the law when it needs to be broken. Having an energetic

257 Mansfield. 203.
executive was encouraged. Strength in the executive ensured that there would be a balance amongst the laws that ruled men and the unalienable rights of men themselves. The growth of power in the presidency compromises the energy in the executive because of what it does to the individual. It is vital to have a human part to government, but as the framers warned: “men are not angels.”

In Chapter 1, we analyze human nature and its resistance to laws. We outline the role of the citizen and how it differs from the nature of man. By reviewing cases from Lincoln and Truman’s presidencies we are able to see the effects of abuse of executive power in earlier U.S. administrations. We learn why the role of the president was created, its intent, and the warnings from the framers. Through taking a look at the works of both ancient and modern political philosophers, we are able to have a deeper understanding of the origins of the role of the executive and the expectations of executive power. This analysis also sheds light on the importance of the absence of the executive in Aristotle’s Politics, further supporting my argument on why the current role of the executive is larger than it should be, therefore threatening the principle of separation of powers. We find that the extent of power in the executive has been long debated and the attempts to broaden executive power has occurred in administrations throughout U.S. history.

In Chapter 2, we review the use of unilateral presidential directives and analyze the history of the executive order as well as its growth throughout U.S. history. We also take a look at presidential signing statements and how they have impacted the growth of executive power. We learn that the origins of the executive order dates back to times of the Louisiana Purchase.
and that the actual amount of executive orders can range anywhere between 15,000 to 50,000. 258 We learn that the increase of the use of the executive orders, as well as presidential signing statements has helped broaden the extent of executive power throughout administrations. By taking a look at specific executive orders and instances of abuse of power, we learn that this broadening of power has been increasingly dangerous to the role of the executive.

Chapter 3 investigates the energy in the executive as outlined by Alexander Hamilton in the *Federalist Papers*. By investigating the ingredients that comprise of an energetic executive, we find that unity is threatened in the modern executive. In this chapter, we review the administrations of George W. Bush, Barack Obama, and Donald Trump and find how executive power has developed into executive privilege. The meaning of executive privilege here goes beyond the traditional meaning used when invoked by the president, allowing them to withhold information or deny a request from Congress. The meaning has evolved with the office, as presidents can claim they are privileged to expand their powers because they are entitled to by Article II of the Constitution. The continued broadening of the role of the executive has been used to justify abuses of presidential power. We learn how strength in the executive as advocated for in the past, has turned into an ambitious executive driven by self-interest as the framers warned. The energy in the executive is no longer what was intended, and executive power has grown beyond the limits in the Constitution. Too much power in one branch of government is dangerous to democracy and when unchecked, is a threat to the very principles that our nation was founded on. In this case, we must be reminded of Madison’s words in *Federalist 49*:

“As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power,
is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.”\textsuperscript{259}

This leads us to the question: what now? We have seen an immense growth of executive power over the course of U.S. history and it only seems to continue. Scholars such as Mayer and Fisher call on Congress to reclaim their power and authority over the president. Mayer writes that “the ultimate check on executive energy is – and should be – political. Congress can step in to reclaim the ground it has lost to the executive, and its failure to do so is much more a function of political will than of any flaws in constitutional arrangements.”\textsuperscript{260} There have been attempts to check the president through impeachment trials, and out of the total of three presidents that have been impeached [Andrew Johnson, Bill Clinton, and Donald Trump]\textsuperscript{261}, two have been more recent presidencies – showing the overall growth in presidential power and its impact on the modern presidency.

What we can conclude here, is that though there have been efforts to check the power of the president from Congress and the Supreme Court, the role of the executive has grown beyond what the system was designed for. Even if there were more efforts by Congress to reclaim power or authority, there would be pushback by the citizens because the president is an elected official and has become a central figure. The office of the presidency has developed into primary role in the nation. The individual that holds this office is no longer simply vested with executive power

\textsuperscript{259} Federalist #49
\textsuperscript{260} Mayer. 222.
and deemed Commander in Chief, but “Leader of the Free World.” It is this exact power and position of authority that corrupts the individual holding office. The Founders knew that power corrupts, so they created a system that would have a balance of powers and believed that first and foremost, power should derive from the people. This power should be a shared responsibility.

The current role of the executive has been a subject of concern for many political scholars. In *Unmaking the Presidency: Donald Trump's War on the World's Most Powerful Office*, Susan Hennessey and Benjamin Wittes use the term “mismatch” to analyze the current Trump administration and the fundamental character of the office of the president. They write that “at its core, to a far greater degree than Americans commonly imagine, the office of the presidency depends on a measure of civic virtue. We don’t mean civic virtue in the lofty or nostalgic sense of expecting our elected leaders to be scholar-statesmen who can theorize a system of government as easily as they can lead one, nor do we mean virtue in the sense of personal righteousness and purity.”

Hennessey and Wittes go on to define the expectations of the office, what they call the “traditional presidency.” They write that:

“It does not expect presidents to be paragons of virtue, but it does expect them to espouse shared values and to at least pose as role models. It expects presidents to speak of service and putting others before self. It expects presidents to, at a minimum pay lip service to following the law and embracing an ethos of civic duty. And it pervasively depends on presidents thinking they enforce and comply with rules in good faith. By contrast, it was resoundingly clear on January 20, 2017, that Donald Trump’s life and candidacy were an ongoing rejection of civic virtue, even if we define the term loosely.”

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263 Ibid.
Hennessey and Wittes highlight that Trump declared war on the expectations of the traditional presidency. His personal ambition was at the forefront of his campaign and his unapologetic brash behavior was used to his advantage. According to Hennessey and Wittes “he never spoke of the presidential office other than as an extension of himself.”264 Today, we have seen a presidency like no other, but it didn’t happen overnight. The character of the Trump presidency has been long in the making. The continued broadening of power could only lead to an office that would be corrupted by power. An office as flashy and important as the presidency has become is more desirable by individuals that are driven by self-interest. The mismatch between Trump and the office of the presidency that Hennessey and Wittes argue is that “he did not even pretend to share a common understanding with his predecessors of its nature and purpose.”265 Instead, they write that Trump had his own vision for the presidency. Trump’s presidency has found us asking the question “Can he do that?” And due to the expansion of presidential power over decades and the broad interpretation of presidential power in the Constitution, to an extent he can – or he can try. As Hennessey and Wittes write, “the Constitution doesn’t describe much about what a modern-day president should actually do.”266

The office of the presidency has grown way beyond what the founders could have ever imagined, and the scope of presidential power is uncontrollable. It is time that we ask ourselves if this is something that we want to be continued? And isn’t our duty as the people “to alter or to abolish and to institute new government…whenever any form of government becomes destructive?”267 To prevent the continued growth of executive power, I believe that we should

264 Hennessey and Wittes. 8.
265 Ibid.
266 Ibid. 9.
start looking at ways to bring back the fundamentals that the Founders intended for this republic. An area of study that could be explored more could be the models of government that the Founders used to help design the Constitution. We know that some of what the Founders used was from their experience of tyranny under the British king, but it could be valuable to further investigate the reason behind the structure of government that they designed. Scholars such as José Barreiro have studied the Native American roots of American Democracy. In his book, *Indian roots of American democracy* he discusses the impact of the Iroquois Indians on the founding of American Democracy.\(^{268}\) It would be interesting to investigate the structures of their government and how that was utilized during the drafting of the Constitution. This is something that is not typically mentioned when discussing the framers of the Constitution, so it may be beneficial when analyzing the current state of government and the fundamentals of American Democracy. Though I value looking at the fundamentals and returning to history, looking into new ideas of structuring the American presidency would also be a beneficial study. Even comparative studies amongst other democracies could be a start to a new way of rethinking the American presidency. Since the start of the Trump Administration, and even prior, there have been studies that compare the current type of American leadership to other forms of government as well. For example, “The List” by Amy Siskind, documents Trump’s first year and highlights authoritarian impulses in his leadership.\(^{269}\) I believe that it would also be beneficial to study how governments can change over time and not necessarily for the better.

What we learn from early on in this thesis and from political philosophers such as Aristotle, is that there has always been a dilemma when it comes to the nature of man and


\(^{269}\) SISKIND, AMY. *LIST: a Week-by-Week Reckoning of Trumps First Year*. Place of publication not identified: BLOOMSBURY, 2019.
instituting governments. There has to be a balance so that the government does not become too controlling, but also so that power does not become entirely vested in a single individual. Today, we find ourselves in a government that has been completely altered due to the broadening and abuses of executive power. Like our founding fathers before us, whenever any form of government becomes destructive of these ends it will be at the hands of the people to dissolve political bands and to assume the certain unalienable rights endowed to them in order to form a more perfect union.270

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Biographical Statement

As a student of the Johns Hopkins University Advanced Academic Programs, Samantha Wyman focused her studies with a concentration in democracies studies and governance as a part of the M.A. in government requirements. Prior to her research at Johns Hopkins, Wyman received a dual bachelor’s degree in communication and international studies with a minor in political science from Western Carolina University. Wyman has interned for a Florida House Representative and worked for the Palm Beach County Supervisor of Elections Office in South Florida during the 2016 General Election. During her undergraduate studies, she also participated in Model United Nations and attended three Southern Regional Model United Nations conferences. Wyman’s studies at Johns Hopkins have consisted of the founding of American democracy, the principle of separation of powers, constitutional law, and presidential power. Her thesis research required an extensive analysis of the founding documents such as the Federalist Papers and the U.S. Constitution. She also consulted the works of key political scholars such as Harvey Mansfield, Richard Neustadt, Terry Moe, Kenneth Mayer, Philip Cooper, Gordon Silverstein, Ben Ginsberg, Rogan Kersh, and Louis Fisher. Wyman plans on continuing her research into the constitutionality of the current role of U.S. president by attending law school.