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ALEXANDER HAMILTON: THE SEPARATION OF POWERS

Ronald L. Pratt

IT was fundamental to Hamilton's political creed to establish a national government and to ensure its possession of adequate powers to achieve a national purpose. His experiences with the Congress created by the Articles of Confederation affirmed this creed. The inherent weakness of Congress to carry out its legislation led him to see the need for a strong national government. It is with this as a historical context that his concept of powers and, concomitantly, his principle of the separation of powers must be viewed. It was consistent with Hamilton's thinking, and with his administrative temperament, that power was to be used; but, equally, it was not to be abused. In this respect, the principle of power and the separation of powers must be formulated in the republican structure of the government.

In the *Second Letter from Phocion* Hamilton spoke of a republic as participatory in that it was the right of the citizen to share in the sovereignty of the government by the act of voting. It was essential to a republic to ensure this right as the means whereby a citizen exercises his political freedom. In *The Federalist*, 9, he proposed a more structured concept of a republic. It must possess, at least, these features—separation of powers; legislative checks and balances; an independent judiciary; and be a representative form of government. Initially a republic is describable as that form of government which ensures the participation of the citizen in the process of governing and structurally ensures that any power exercised within it will not be abused.

Nonetheless power, and its exercise, are essential to a republic. In *The Federalist*, 23, 31, Hamilton set out a general concept of power.

He proposed that power must exist without limitation. He defined this more precisely in *The Federalist*, 31, where he wrote "that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation." Granting this broad concept, there are two factors that are essential to power. First, that one be able to specify its object or purpose. Thus, power must be construed in a means-end framework and while its purpose may be a subject of debate once this has been determined then it is necessary to have the sufficient means to achieve it. And, sec-

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ondly, that one must be able to determine the conditions in which power is to be exercised.

Hamilton's observations were being drawn in a discussion of the power of taxation and the matter of a standing army. At issue was the fear of an encroachment upon freedom should these powers be granted to a national government. Hamilton held that these fears are unfounded. What is important is that he considered these powers to be unlimited. Because the government may not be able to foresee the circumstances in which the exercise of the taxation power may be necessary, then it is impossible to determine beforehand what kinds of taxes should be imposed.

Similarly with the matter of a standing army, or national defense, the government cannot wholly pre-define what may be required because it may not be able to determine the circumstances calling for the use of military power. Thus Hamilton contended that once it has been determined that a national government should possess these powers, then no limitation should be placed on them which would render them useless.

Hamilton generally viewed power as discretionary inasmuch as a national government must be able to act for a national good and not be hampered by its inability to foresee all the circumstances calling for its use. However, this does not mean that power, or its exercise, can be arbitrary. Hamilton constantly returned to the theme of individual freedom and energetic government. In the speech which he gave during the Constitutional Convention (June 18, 1787) he spoke of the need for a government "which unites public strength with individual security." While this remark was made in reference to the British government, it also affirmed what he considered to be the fundamental purpose of any government. In order to ensure that power not be exercised in an arbitrary fashion and, thus, avoid the formation a tyranny, it was essential that the diverse powers of the government be separated.

Hamilton did not address himself explicitly to a discussion of the separation of powers. But an understanding of his assessment of the principle can be gathered from some of his writings. To do this we will discuss his views on executive, legislative, and judicial power. At the very least the role of the separation of powers is to avoid any arbitrary use of power and yet the principle must be compatible with its use. In effect the principle must function within the framework of an energetic government and, at the same time, safeguard the freedom of the individual. Historically, Hamilton's thinking on the principle evolved in *The Federalist* (1787-88), *Report on the Constitutionality of the Bank* (1790), *The Pacificus Papers* (1793) and *The Examination* (1801).

I. Executive Power

It was in *The Federalist* and in the discussion of the extension of presiden-

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tial power in the *Pacificus-Helvidius* exchange between Hamilton and Madison that is found his assessment of executive power.

The tenor of its development in *The Federalist*, 67-77, was to ensure that the president is not a monarch and does not possess such extensive powers as to produce a tyrant. If there is a general principle that Hamilton proposed, it was his assertion that the mark of a good government is its tendency to produce a good administration and this requires "energy in the executive." In effect, Hamilton was distinguishing between the office (the structure of the government) and the person who will hold the office and implements its powers (the administration).In describing what characterises an administration, Hamilton wrote:

> The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive or judiciary, but in its most usual and perhaps in its most precise signification, it is limited to executive details and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public monies, in conformity to the general appropriations of the legislature, the arrangement of the army and the navy, the direction of the operations of war; these and other matters of a like nature constitute what seems to be most properly understood by the administration of government. (The *Federalist,* 72.)

Without a good administration, in effect an energetic executive, a government will be ineffective no matter how well planned. While the term energy is somewhat ambiguous, it suggests the characteristic of an executive who will bring a sense of direction to the government and the willingness to put this into effect. Generally, Hamilton listed these factors as essential to this energy—unity, duration in office, salary, and competent powers—which emphasize that the executive must possess some form of independence to be effective. However, he contended that this was not incompatible with a republic. An energetic executive and a republic are ensured by both a dependence on the people and responsibility for the actions of the administration.

While this indicates Hamilton's insistence upon a strong executive, it was the role of the executive in the making of treaties that is pertinent to the principle of the separation of powers. Since the treaty-making power is exercised concurrently with the Senate, then both the executive and the legislative branches of the government are involved. Initially, it was John Jay who considered the relation between the two branches. He pointed out the need for secrecy and dispatch. Secrecy—in that the process of negotiating a treaty may require the discussion of a number of options; dispatch—in that the need to decide may rest upon circumstances that will arise unforeseen. For these reasons it required the executive. Because treaties, by ratification, become the supreme law of the land, then the concurrence of the Senate is required.

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Inasmuch as treaties are the law of the land it was proposed that the Senate alone should hold this power. To this objection Jay responded by showing that other non-legislative acts may have the same effect, or force, of law. For example, the acts of the judiciary in deciding the constitutionality of legislation have the effect of re-affirming the law or nullifying it. Jay pointed out:

> All constitutional acts of power, whether in the executive or in the judicial departments, have as much legal validity and obligation as if they proceeded from the legislature, and therefore whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may with much propriety commit the power to a distinct body from the legislature, the executive or the judicial. (*The Federalist*, 64.)

Thus, there is no abrogation of the principle of the separation of powers the executive and the senate.

When Hamilton reexamined the issue in *The Federalist*, 75, he recalled what Jay had said—namely, that this power requires secrecy and dispatch and, thus, the executive must play an essential role.Moreover, he recalled what Madison, in *The Federalist*, 47-48, already said regarding the separation of powers principle.

Madison generally held that the principle required the powers be distinct but not wholly separate.As distinct, each of the powers designated a specific sphere of action; as not wholly separate, there are situations when one power has a partial agency in the operation of another, as when the executive vetoes a bill or the legislature may override the veto. Madison contended that partial agency does not invalidate the principle; it is when the *whole* of a power is exercised by a branch of the government which possess the *whole* of a different power that the principle is abrogated. Thus, the matter of the executive and the legislature having a role in the treaty-making power is constitutionally acceptable.

Hamilton took a wholly different tact when he proposed that the treaty-making power, since it is a contract between sovereigns, is neither an executive order nor legislative power exclusively. He wrote:

> The power of making treaties is plainly neither one nor the other. It relates neither to the execution of subsisting laws, nor to the execution of new ones, still less to the execution of the common strength. Its objects are contracts with foreign nations which have the force of law, but derive from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. (*The Federalist*, 75.)

Inasmuch as this is not an issue of a distinctive power being exercised illegitimately, then the reason for is being exercised by both the executive and the senate must lie elsewhere. For Hamilton it was to avoid any abuse of power and, thereby, ensure the securing of the interests of the people.The discussion of the treaty-making power, and correlatively the issue

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of what constitutes executive power, re-emerged in the *Pacificus Helvidius* papers. The occasion for this exchange between Hamilton and Madison was the proclamation of neutrality issued by Washington. At stake was the authority of the President to determine the conditions of a treaty and by this determination judge whether the obligations of a treaty held or not. The precise question was whether this authority belonged exclusively to the executive. It was the clause of guaranty of the treaty of 1778 between the United States and France which required the United States to come to the military aid of France should it be attacked that was one of the points of contention. Dependent upon his judgment, the executive could place the nation in a state of war and, thus, overstep the constitutional limits of his authority.

Hamilton's response to the constitutional question was stated mainly in the first letter of *Pacificus*. His argument was formulated around two key principles: 1) that the national government has the obligation, and the authority, to deal with foreign affairs, and 2) that this authority is derived from the general grant of executive powers given in the constitution.

Since the national government deals with foreign affairs, Hamilton asked to which of the branches of the government does it belong? He held that it does not belong to either the legislature or the judiciary, because neither deals with relations between the nation and other foreign powers.It does not belong to the legislature because it does not make nor interpret treaties. It does not belong to the judiciary since legislation is not its proper sphere of activity. The only time when the court may be concerned with a treaty is at the moment of hearing a case which may involve such. Hamilton stated:

> It appears to be connected with that department (executive) in various capacities: as the *organ* of intercourse between the nation and foreign nations; as the *interprete*r of the national treaties, in those cases in which the judiciary is not competent, that is, between government and government; as the *power*, which is charged with the execution of the laws, of which treaties form a part; as that which is charged with the command and disposition of the public force. (*Pacificus*, 1.)

Thus, if the authority to deal with foreign powers were to be vested in any branch, it would be the executive.

The more critical basis was Hamilton's contention that this authority is derivable from the general grant of executive power. This indicates a number of things. Primarily, that the very nature of executive power would legitimize this presidential action. Secondly, that the listing of the powers in the constitution is not an exhaustive description of executive authority. And, lastly, that the sole limits on executive power are those stated in the constitution—namely, that the Senate has a role in the appointment of officers and in the making of treaties, and that the legislature has the right to declare war and grant letters of marque and reprisal. Hamilton insisted that these limitations be interpreted strictly; the implication being that their

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strict interpretation leaves the executive with a discretionary power whereby his actions are justifiable. He extended this to hold that these limits are in face exceptions to the nature of executive power.

> It deserved to be remarked, that as the participation of the Senate in the making of treaties and the power of the legislature to declare war, are exceptions out of the general "executive power"vested in the president; they are to be construed strictly, and ought to be extended no further than is essential to their execution. (*Pacificus*, 1.)

Because the president is the "constitutional executor of the laws" it belongs to the power of the office to take the necessary steps to ensure the fulfilling of the laws. Since this is the end, or purpose, of the office, then the president must also possess the means adequate to achieve this end.Thus, should the interpretation of treaties, or the conditions in which they hold, or not, be the means required then these belong to the sphere of executive power.

Madison, in the *Helvidius* papers, strongly disagreed with Hamilton's position. It is central to his position that the treaty-making power and the power to declare war are not executive in nature; they are not simply exceptions to executive power but are wholly different. The crux of his argument rests upon the nature of a power, first, and, secondly, on the constitutional grant of power.

Madison proposed that the act of declaring war cannot be an executive act, and, thus, not belong to the executive power. In fact the declaring of war is not the executing of a law but the repeal of the existing legal relations between two, or more, nations. It constitutes a wholly new legal situation and by this fact provides a rule, or guide, for executive actions. Thus, to effect a change in the legal relation between the nation and others requires the action of the legislature. It, only subsequently, belongs to the executive to possess the authority to engage in certain actions. While Madison admitted that the executive has a role to play in the declaration of war, it was not an essential characteristic of executive power. Thus, the legislative nature of the power narrows the scope of action, and power, of the executive. The same can be said of the treaty-making power; it, too, is legislative in nature. It is the constitutional requirement of a 2/3 vote of the Senate, rather than a simple majority, that emphasizes its essentially legislative character.

As far as the constitutional grant is concerned, it is the vesting of a power and, thus, both the obligation and the right to judge the conditions in which a power is to be exercised that is fundamental. Hamilton proposed that the vesting of executive power carried with it the right to judge when, and if, this power is to be used. This constituted the justification of the executive's authority to interpret the conditions for treaty obligations. Madison's disagreement was set in the concurrent structure of this power. As a concurrent power vested by the constitution it could be defined: 1) as

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vested partly in one and partly in another power (executive, senate); 2) as vested conjointly in both; 3) as vested separately in both. The third alternative is unacceptable because it is counter to the separation of powers principle. As Madison insisted the principle is nullified when the *whole* of a power is exercised by a department which is vested with the *whole* of another power; partial vesting and exercise, however, are consistent with it. Thus, both the executive and the senate cannot have the *whole* of the power separately, but a partial vesting as conjoint possession and exercise of power is acceptable.

The matter of judgment, or interpretation, in the exercise of this power is also at issue. It was Hamilton's contention that since the treaty-making power is executive in nature then it belongs to the executive to exercise judgment over treaty obligations. Madison saw certain inherent difficulties in this. Granting that the power is concurrent and conjointly vested, then to hold that each can exercise the right to interpret would yield an impossible situation—the dilemma of two wholly incompatible interpretations. It would be the unacceptable situation of an administration speaking with contradictory voices on a matter that involves the national good. Moreover, it would be an encroachment upon the legislature, on the basis that the treaty-making power is legislative, and upon the judiciary, in that the interpretation of the law belongs to it.

In this conflict between Hamilton and Madison it the concept of the "whole of a power" that is of particular importance. Both radically disagree on what constitutes the whole of executive power. It is consistent with Hamilton's concept of power as discretionary, and the need for "energy in the executive," to construe the power more broadly. Madison's concern over the tendency of power to extend beyond its limits led him to view its allocation to the various departments in a more restrictive sense. Thus, their diverse views of the whole of a power is rooted in the general conception that each has of power itself. Both hold the view that the principle of the separation of powers is nullified when the whole of a power is exercised by a department that should not possess it. Since Hamilton argued that the executive should possess the power of treaty-making and interpretation of treaties then the exercise of such is not an infringement of the separation of powers. It seems that the inherent rationale for the separation of powers is efficiency—to insure that the government act effectively and be able to achieve its national purpose. The powers are to be separated into diverse spheres for the purpose of their use; in effect, to provide an area in which the one who possesses the power can act. This seems to be the way in which Hamilton also views legislative power, at least as it involved the issue of the constitutionality of the bank.

II. Legislative Power

In that the purpose of legislative power is to enact laws, to provide the

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rules which govern the conduct of the nation, then the extent of this power is open to discussion. What is the sphere in which legislative power can be exercised and not infringe upon either executive or judicial power? While Hamilton does not attempt to respond to this broad question in his *Report on the Constitutionality of the Bank*, he did raise the issue of what is appropriate in the exercise of legislative power. Does the legislature possess the power to act in the matter of incorporating a bank? And, concomitantly, what is the criterion of constitutionality applicable to that exercise?

The legislative power is vested by the constitution in the Congress. With regards to the constitutionality of incorporating a bank, Hamilton asked two questions: Does it belong to the general power of a government as being a sovereign power to do so? Does it belong specifically to the Congress to do so? His response to both questions was yes.

It can belong to a government as a political society, and because it is sovereign, to act in this situation. Sovereignty signifies primarily that there is no power superior to the power of the government and, thus, it would be within the ambiance of its sovereignty to exercise such a function. Consequently because it is sovereign as regards its end, or purpose, it has the right to use those means to achieve its end. Moreover, every power vested in a government would equally be sovereign in the sphere defined for it. This, for Hamilton, was stated in the supremacy clause of the constitution; namely, that the legislature can create those laws which are the supreme law of the land. Its legislative actions can extend to all cases and can contravene any legislative acts of the states incompatible with the law. Thus, Hamilton held it would be implied by the sovereign power of the government to be able to incorporate a bank.

It belongs specifically to Congress to do so because it is within the sphere of powers delegated to it. Delegated powers are of three kinds: express, implicit and resulting. Express powers are those explicitly stated in the constitution; implied are those powers inferred from the express, as those which function as means to achieve an end. Resulting powers are those that may be consequent to an action of the government, as the extension of its powers to a conquered territory. It was Hamilton's contention that the power to incorporate a bank is an implied power. It can be inferred from the list of stated powers as a means to achieve its end. To put the case succinctly, since Congress has the power to collect taxes, to borrow money, to regulate commerce between the states and to maintain a national defense then it also possesses the power to incorporate a bank as a necessary means to achieve these ends. Necessary here signifies what is useful or convenient to implement its powers; not the absolute necessity advocated by Jefferson. Because, as Hamilton held, there is a natural relation between the end, as defined by the constitution, and the means then this means is within the powers of Congress.

Moreover, it is within this means-end relationship characteristic of

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the nature of a power that provides a test of its constitutionality—not the expediency which may, or may not, lend a credibility to the use of a power nor the intentions of the framers. Hamilton wrote:

> It leaves, therefore, a criterion of what is constitutional and what is not so. This criterion is the *end* to which the measure relates as a means. If the end is clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and it is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority. (*On The Constitutionality of the Bank.*)

He mentioned two further limitations—that the act not infringe upon the existing rights of the states or the rights of individuals. What he is proposing is that the nature of a vested power and what could be construed as the necessary means to implement it constituted the standard of constitutionality of that action. Moreover, the nature of a power may not be exhaustively defined in the enumeration of the powers; others may legitimately be inferred. Similar to what he claimed in the *Pacificus* papers, a power, whether granted to the legislature or to the executive, is not defined exhaustively by the constitution. Presumably the very nature of legislative power and the vesting of that power in a branch of the government suffices to justify its existence. Only when there is an explicit restriction stated in the constitution is there a constraint on the exercise of power.

What can be inferred thus far from what Hamilton has written is that both the executive and the legislative powers constitute sovereign powers. As such there is no power superior to them; and as such they constitute distinctive spheres in which these powers are to be exercised. In their relation to each other, each as sovereign is autonomous and independent of the other. This is suggested in the *Helvidius* papers when Madison raised the objection regarding the action of the executive placing the nation in a state of war. Hamilton held that this situation is acceptable because it does not infringe upon the constitutional authority of congress to declare war. There is no infringement because Congress is still free to act within its own sphere and reject the action of the executive. Because the powers are understood to be co-sovereign and coequal, then each can function legitimately within its own sphere. Again it seems to be the rationale of efficiency—that power must be exercised to achieve its purpose—that prompted Hamilton to interpret the separation of powers in this way. While he admitted the constitutional checks whereby one power can prevent another power from infringing upon its domain, there does not seem to be the need for the powers to balance one another. This may be so because Hamilton does not see the matter of infringement to be a real issue. His view of this is radically changed when he discusses the power of the court, specifically in the series of papers entitled *The Examination.*

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III. Judicial Power

Hamilton's discussion of judicial power was set out first in *The Federalist*, 78-83, and later in *The Examination*. In both these writings, he held that the distinctive power of the court is judicial review. In *The Federalist* 78 his contention that the court possesses this power is based on the existence of a written constitution which states certain limitations to legislative power and which constitution is also held to be fundamental law. Thus it would belong to the court to determine when the legislature exceeded its constitutional boundaries. Because it is a matter of law, he held that this power belongs exclusively to the court. The power of review should only be exercised by those who possess a requisite knowledge of the law.

It was in the context of legislative supremacy and, thereby, the possibility of legislative tyranny that the discussion of review takes place. It was Madison who initially pointed out in *The Federalist* 48 that because the focus upon executive tyranny had dominated American political thinking, the very real possibility of legislative tyranny should not be lost sight of. For Hamilton this legislative tyranny was all too real in the Jeffersonian attempt to restructure the court in 1801. It was this which prompted the writing of *The Examination* and led Hamilton to reconsider the nature of judicial power. While his arguments against the legislative restructuring of the court may be questionable, the issue, nonetheless, led him to examine more closely the principle of the separation of powers.

In that the power of judicial review is one of interpretation of the constitution, it extends to both those cases which are explicitly contained in it, such as the passage of *ex post facto* laws, and those cases where the meaning of the law needs to be clarified. He viewed the court as the intermediary between the people and the legislature—to insure that the will of the people as embodied in the constitution be maintained and that the legislature not usurp it by substituting its own will. In the latter part of *The Federalist* 78 he also saw the court as safeguarding the constitution from the passions of the people. While he does not deny the right of the people to change the constitution, he insists that his should not be done capriciously and certainly not in a moment of popular agitation. Moreover, since popular movements may often be aimed at the suppression of the rights of minorities, it is also the duty of the court to protect these rights.

This view of court as the protector of rights and one whose function must involve the administration of justice is particularly emphasized in *The Examination*. Hamilton wrote:

> This (the court) most valuable member of the government, when rightly constituted, the surest guardian of person and property, of which stability is the prime characteristic; losing at once its most essential attributes, and doomed to fluctuate with the variable tide, degenerates into a disgusting mirror of all the various, malignant humors of party spirit.

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And later in the same paper he continues.

> Its (the court) independence of both (legislature and executive) will render it a powerful check upon the others and precious shield to the rights of persons and property. Safety, liberty are therefore inseparably connected with the real and substantial independence of the courts and judges. (*The Examination*, 14.)

Thus the strength of the court and its ability to function as a protector lies in its independence from the other powers and the turbulence of the people. This independence is rooted in the tenure of the justices and the fact that their salaries cannot be reduced during this tenure. This matter of independence is the focal point of the series since he construed Jefferson's re-examination of the court system as an attack upon its independence.

Because of this, Hamilton reassessed the relation between the court and the other powers and, perhaps for the first time, addressed himself explicitly to the principle of the separation of powers. The general principle, which he has always held but which he now states explicitly, is that the powers must be distinct and independent.

> It is a fundamental maxim of free government that the three great departments of power, legislative, executive and judiciary shall be essentially distinct and independent the one of the other. (*The Examination*, 14.)

There must be a separation both in terms of the powers allocated to these departments and the organization of the departments. He recalled the principle that Madison proposed in *The Federalist*, 47, and his concern over the weakness of the parchment barriers. While the constitution may establish certain powers and checks to insure that there be no abuse of power, this seemed insufficient and Madison turned to the persons exercising the power as a means of insuring independence. Hamilton, as Madison, turned to each department as possessing a *will* of its own and thereby restraining any intrusion from another power. Thus, an effective separation of powers principle must rest upon the distinction between the powers, the office whereby the powers acquire an institutional form and the will of the person who holds that office both to exercise and to protect that power. (*The Examination*, 15.)

This matter of the exercise of will is attached to a distinctive power and office and it is it that functions as the effective barrier against intrusion. For the executive it is the qualified veto; for the legislature it is the power of impeachment; and for the court it is the power to determine the constitutionality of legislative action. In Hamilton's view an abuse of power on the part of any of the departments would depend upon a collusion of wills. How likely this collusion would be is left open, but he assumes the Madisonian principle that "ambition will counter ambition" and such collusion would occur only rarely. It is the power to declare on the constitutionality of the actions of the other powers that defines the distinctive will

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of the court and provides a safeguard against encroachment. While in his previous papers Hamilton emphasized the independent and autonomous shares in which both the executive and the legislature could act, he did not grant to each the authority to determine the constitutionality of their actions. He held only that constitutionality must be determined in the means-end relationship characteristic of power. Now he insisted that it belongs exclusively to the court and not to the other powers thereby ensuring the independence of the courts and providing a counterbalance for any abuse of power. Because he perceived Jefferson's action as an assault upon the court's independence that Hamilton finally addressed himself to the matter of the abuse of power.

IV. CONCLUSION

It is this lack of concern over the abuse of power that may be the weakness in Hamilton's separation of powers principle. Edward Corwin, in *The President: Office and Powers, 1781-1948*, referred to a threefold function of the principle. First, that each power exercises a reciprocal limitation on the others. Secondly, that each can thereby defend itself from the others. And, lastly, that each cannot delegate, or abdicate, its power to the others. He pointed out that the first two defend the executive power, while the last reenforces the power of the legislature and the court. Hamilton did not emphasize the reciprocal limitations but, rather, focused on the autonomy of the spheres of power.

Recent history has amply illustrated the matter of abuse with the growth of executive power and the extended discretionary power claimed to belong to the executive branch. Both Corwin's book and the more recent one by Arthur Schlesinger, Jr., *The Imperial Presidency*, document the abuses of executive power—especially in the area of foreign affairs.

The danger, set out initially by Corwin, lies in the transition from a government of limited powers to one of plenary powers. In his discussion of the nature of executive power, he raised both the issue of the grant of power and the exercise of that grant in foreign affairs. He conceded that Article II of the Constitution was a grant of power and not merely a description of the presidential office. Moreover, to the extent that the list of the powers appears to provide an emphasis, and not an exhaustive description, then the grant would appear to be one of a plenary power in that the powers are broad and complete. He stated, more exactly, that plenary signifies the Constitution is only the mediate source of the power; the people, constituting a sovereign entity, are the immediate source of the power and, thus, empower the government to act in their name.

This is certainly consistent with Hamilton's position. He had argued for the inherently discretionary power of the executive in *Pacificus*. And, while he was speaking of legislative power in *On the Constitutionality of the Bank*, he emphasized the sovereignty of the body politic as the justifi-

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cation for the actions of Congress. He had consistently argued that the Constitution cannot foresee all the circumstances in which power is to be exercised. Thus, the list of the powers cannot be viewed as exhaustive. Given the means-end framework in which he defined power, then it would be inconsistent to allocate an end to the various branches and deny them the means to achieve that end. In this respect, Hamilton was advocating a government of plenary powers.

This raises the problem of establishing limits to a power which was a major concern for both Corwin and Schlesinger. This is not to suggest that Hamilton was unmindful of the need for limits. But he saw them in something of a negative fashion. The government can exercise power except in those cases where it is forbidden by the Constitution to do so and he wanted these restrictions to be interpreted strictly. Moreover, it cannot intrude upon the rights of individuals and of the States. Corwin and Schlesinger see the matter of limitation in the reciprocal relations between the powers; Schlesinger added that the "instincts" of the president may have also restrained him from overextending his exercise of power. Both agreed that the possession, and exercise of a plenary power by the executive invites the dichotomy of conflict and cooperation; again, recent history has shown that the situation has become one of conflict—especially in the rise of secrecy in the executive branch.

It was the intent of the framers of the Constitution to establish an executive which possessed the features of unity and independence, thereby providing the conditions in which the executive, as described earlier by John Jay, could act with secrecy and dispatch. Secrecy provided the executive with the opportunity to take advantage of changing circumstances in foreign negotiations and act accordingly. It was not intended to shield the executive from accountability. Yet this is precisely what has happened when one takes into account the increasing secrecy that marked executive actions from the Gulf of Tonkin situation to Watergate to Irangate. There is no disagreement that negotiations between countries cannot be completely is public; secrecy is necessary to provide a forum in which open exchange can take place. The Constitutional Convention itself took place in the condition of secrecy. Although the results of the convention was subject to ratification, the disagreements and compromises were not publicly known. But the contemporary guise of secrecy has radically changed; secrecy has become a form of deliberate deception. It is now a matter of presidential decisions being made and the people, to whom he is constitutionally accountable, being lied to. While the matter of deliberate deception is not restricted to Irangate, it is the most recent example of the trend. Though the actual role of the president remains a matter of debate, there is no doubt that members of the National Security Council lied to Congress - presumably to shield the president. Hamilton was not averse to presidents making decisions in secret, but he did not intend that the presidents lie or

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not be held accountable. This chain of secrecy—deception—non-accountability can only be broken by a revitalization of the principle of separation of powers.

As Hamilton, and Madison, held the weakness of the parchment barriers could only be compensated for by the will indicative of each power. Hamilton proposed that impeachment indicated the will of the legislature; the veto and judicial review indicated the will of the executive and the court. It seems that a revitalization of the powers would require a renewed willingness to exercise the will aligned with them. The curb upon executive abuse would rest upon the willingness of Congress to use power of impeachment. While, to my knowledge, there is no explicit statement by Hamilton, he seems to accept that impeachment would be used when necessary. This is not to suggest that impeachment be the routine way in which Congress interacts with the president, but prolonged abuse of power would seem to leave no alternative. It is beyond the scope of this paper to address the issue of whether impeachment is really a viable means of redressing an imbalance of power. The impeachment proceedings against President Nixon, with the accompanying social and political divisions, emphasize that it is an extreme measure—only rarely and with extreme reluctance engaged in. It may be that the rectifying of any imbalance is more likely to be achieved by cooperation and the avoidance of conflict. As Schlesinger pointed out the fact that the president consulted with a wide range of sources of information when making decisions, and did not do so in isolation, was not a sign of weakness but a sign of strength. Schlesinger is of the opinion that it is comity, and not conflict, that will restore the balance between the powers.

Nonetheless the matter of abuse still persists and requires constant vigilance. While Hamilton's principle with its emphasis upon the cosovereign and co-equal character of the powers has dominated in the evolution of the American government, Madison's admonition that power tends to extend beyond its sphere and encroach upon the others must be remembered. In effect, Hamilton's principle of government "which unites public strength with individual security" needs to be reaffirmed, since he seems to have neglected it in his emphasis upon the need for "energy in the executive."

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