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**Hamilton's Constitutional Framework and
the American Presidency**
**From the Federalist Papers to Post-1945 Presidential
Practice**

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Main contributions

How can a republic reconcile the need for an energetic executive with the rejection of monarchical power? That question has shaped the American presidency since its founding, for the office was conceived in the aftermath of a revolution fought against monarchy and amid the continuing fear that executive power, if insufficiently restrained, might reproduce the very form of authority the new constitutional order was meant to replace. The problem was never whether executive power was necessary, but how it could be made consistent with republican government. That problem became newly visible in the spring of 2025, when the No Kings protests drew on the language of the Revolution to challenge contemporary forms of executive expansion and, in doing so, revived a constitutional anxiety as old as the office itself. The framework examined here is the one Alexander Hamilton articulated in *Federalist* Nos. 65 to 77. This thesis takes that framework as its starting point and examines the extent to which it has been displaced in presidential practice since 1945.

The thesis has three related aims. First, it returns to Hamilton as a constitutional analyst of the presidency, rather than treating him only as a symbolic figure in contemporary political argument. While Hamilton has often been invoked as a source of authority for a stronger and more unilateral executive, this thesis instead returns to the structure of his argument and to the distinctions on which it depended. Second, it examines the displacement of Hamilton's framework as a structural development produced through the interaction of executive practice, congressional acquiescence, partisan confirmation politics, media fragmentation, and judicial reinterpretation. Third, it asks whether that framework remains available within an intact constitutional structure. In that sense, the thesis is intended both as a historical inquiry into the constitutional logic of the presidency and as an examination of a continuing constitutional and political problem.

Introduction



This aerial picture shows protesters forming a human banner during the "No Kings" national day of protest on Ocean Beach in San Francisco, Calif. on Oct. 18, 2025.¹

On June 12, 2025, President Donald Trump was asked at a White House briefing about the nationwide No Kings protests planned across the country. The President's response was the following: "I don't feel like a king. I have to go through hell to get things approved."² Trump added that a king would not have needed to call the Speaker of the House and the Senate Majority Leader to pass legislation, a remark intended to dismiss the protests but which also revealed the constitutional argument at their core. Two days later, on June 14, 2025, an estimated five million Americans gathered in more than 2,100 cities and towns under the No Kings banner, in what the National Public Radio described as a movement united by "the broader messaging of democracy, constitutional rights and the freedom the United States was founded on."¹ In this perspective, the protesters were not merely accusing Trump of behaving like a king. They were invoking a constitutional tradition that has defined the American presidency from its inception as an office

¹ NPR (2025) 'No Kings day: A recap of the mass anti-Trump protests', 19 October.

² *Time* (2025) 'Trump, on "No Kings" Protests: "I Don't Feel Like a King"', 12 June.

distinct from, and subordinate to, the monarchical model rejected by the Revolution. That tradition finds one of its most systematic and enduring expressions in the work of Alexander Hamilton. As Lawrence B.A. Hatter, associate professor of early American history at Washington State University, observed following the June protests, the No Kings demonstrations embodied “a 21st-century expression of the principles of 1776,” rooted in the founders’ conviction that independence was fundamentally a rejection of monarchy and that the constitutional order was designed to prevent any future executive from ruling as a king.³ That premise provides the starting point of this thesis, which examines Hamilton’s constitutional framework in *Federalist* Nos. 65 to 77 and traces its displacement in presidential practice since 1945.

Hamilton’s constitutional thought cannot be separated from the circumstances that shaped it. Born in either 1755 or 1757 on the island of Nevis in the British West Indies, the illegitimate son of a Scottish merchant and a French Huguenot mother, Hamilton endured considerable hardship before local benefactors recognised his exceptional ability and funded his passage to mainland America in 1772.⁴ He arrived in New York on the eve of revolution, a young man formed entirely under British colonial rule, and within two years had become a prolific pamphleteer in the patriot cause. When the Revolutionary War broke out, he distinguished himself as an artillery officer and later as aide-de-camp to General Washington, serving at his side for four years. That military experience gave Hamilton a close understanding of executive command and a lasting conviction that effective government required both energy and restraint. After the war, he trained as a lawyer, served in the Continental Congress, and emerged as a forceful advocate for a stronger national government, persuaded that the weakness of the executive under the Articles of Confederation had brought the republic to the brink of collapse. In 1787, he attended the Constitutional Convention in Philadelphia as a delegate from New York and was the only New Yorker to sign the Constitution. His own plan of government, presented on June 18, 1787, was considerably more centralised than the one the delegates ultimately adopted, proposing life terms for senators and for the executive, a reflection of his admiration for the stability of the British constitutional system even as he remained committed to republican principles.⁵ Although his plan was set aside, Hamilton signed the Constitution, convinced that it offered a workable foundation for the republic he had fought to create, and thereafter devoted his intellectual energies to its defence and elaboration. It is this subsequent work, rather than his role at Philadelphia, that constitutes his most enduring constitutional legacy.

When the proposed Constitution faced fierce opposition during the ratification debates of 1787 and 1788, particularly in New York, where Anti-Federalist sentiment was strong, Hamilton played a central role in organizing its most sustained published defence. Working alongside Madison and

³ Hatter, L.B.A. (2025) 'Today's "No Kings" movement traces its roots directly to the American Revolution and its seismic break against tyranny', *The Inlander*, 2 July.

⁴ National Constitution Center (n.d.) 'Alexander Hamilton'.

⁵ Britannica (2026) 'Alexander Hamilton'.

Jay under the pseudonym Publius, Hamilton authored fifty-one of the eighty-five *Federalist Papers* published between October 1787 and May 1788, and did so at a remarkable pace.⁶ These essays aimed to explain the Constitution's provisions in detail and to answer critics' objections. Hamilton supervised the project, wrote the majority of the essays, and oversaw their publication. The *Federalist Papers* have since been cited in hundreds of Supreme Court cases as authoritative guides to constitutional meaning and remain among the most important works of American political thought from the founding era.⁷ Among them, Hamilton's essays on the presidency, *Federalist* Nos. 65 to 77, are especially important for this thesis, because they systematically answer the Anti-Federalist charge that the Constitution had created an elected monarchy, a charge revived by the No Kings movement in a markedly different political context.

The constitutional problem to which these essays responded was also an immediate political one. Anti-Federalists argued that the presidency, as defined by the proposed Constitution, was a monarchy in republican disguise, and that the concentration of executive power in a single individual would inevitably lead to despotism. Hamilton's response in *Federalist* Nos. 65 to 77 confronted that charge directly and methodically. Through a series of specific comparisons, he argued that the American President and the British king occupied constitutionally distinct offices in every essential respect that determined whether executive power remained republican or became monarchical. These included the powers to declare war, to make appointments without legislative consent, to create offices at will, and to govern free from prosecution and impeachment.⁸ These distinctions formed the constitutional basis of Hamilton's argument, distinguishing a republican executive from a monarch and grounding the presidency's legitimacy in consent, accountability, and law rather than prerogative.

This thesis asks how Hamilton's framework has operated in presidential practice since 1945. Although presidential power had expanded before this date, including during the Lincoln and Roosevelt administrations, America's emergence from the Second World War as the preeminent global military power created unprecedented structural conditions for sustained executive predominance in war and foreign policy. For that reason, 1945 provides the most productive starting point for the analysis developed here. Chapter 1 examines the war powers framework Hamilton described in *Federalist* No. 69, tracing its erosion through executive precedents, semantic shifts, and claims of military necessity since the Korean War. These developments have progressively substituted consultation with Congress for prior authorisation as the operative relationship between the branches on questions of war. Chapter 2 analyses the appointments power and the Senate's confirmation role as Hamilton described them in *Federalist* Nos. 69 and 76. It shows how the confirmation process has been weakened by partisan alignment and circumvented by the rise of unconfirmed executive advisers whose authority lies beyond the constitutional check

⁶ Library of Congress (n.d.) 'Full Text of The Federalist Papers'.

⁷ Ibid.

⁸ Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. London: Penguin Books, p. 392.

Hamilton deemed essential. Chapter 3 identifies political polarisation as the structural force underlying these developments, arguing that the collapse of cross-partisan common ground, reinforced by media fragmentation and the algorithmic amplification of partisan hostility, has eroded the political conditions necessary for Hamilton's constitutional checks. Chapter 4 turns to Hamilton's concept of executive energy in *Federalist* No. 70, examining how the Supreme Court, the Claremont Institute, and related political actors have invoked Hamilton's language of energy while giving less emphasis to the framework of accountability he placed alongside it. This has contributed to a reading of the *Federalist Papers* that departs in important respects from Hamilton's argument. The thesis concludes that Hamilton's framework has not been formally abolished, but progressively displaced within an intact constitutional structure, and that its restoration depends less on constitutional redesign than on the political will to treat that structure as a set of genuine obligations rather than as a vocabulary for legitimizing unilateral executive action.

Chapter 1 - War Powers and Presidential Practice: Hamilton's Framework Under Pressure

1. Hamilton's Conception of the Power to Declare War

Among the questions Hamilton addressed in *The Federalist Papers*' essays on the presidency, the question of who held the authority to take the nation to war was one he considered essential to resolve. Hamilton's position on that question was clear: the power to declare war belongs to the legislature, not to the executive. To make that case, the author drew on the figure his contemporaries had most reason to distrust, the British monarch, whose prerogative to initiate hostilities without legislative consent embodied precisely what the founders had sought to prevent. In the founders' political imagination, that prerogative represented the model of unchecked executive power that republican government was designed to foreclose.

The Federalist, LXIX (p. 398): "The President is to be the commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies — all which, by the Constitution under consideration, would appertain to the legislature."⁹

In this passage, Hamilton's argument works by negation: rather than asserting Congress's war power directly, he establishes it by showing what the American executive, unlike the British monarch, cannot do. The monarch possesses both the command of military forces and the prerogative to declare war. The President possesses only the former, the latter belonging, under the Constitution, exclusively to the legislature. This comparative method allowed Hamilton to address the concern, common among critics of the new Constitution, that the presidency might come to resemble an elective monarchy. Jane Stromseth, Professor of International Law at Georgetown University and former Director for Multilateral and Humanitarian Affairs at the National Security Council, situates this founding logic within its broader constitutional context. She notes that the framers intended a balance whereby the executive could act defensively in moments of immediate threat, but could not unilaterally take the nation into war. That distinction, she argues, was a conscious reaction against the capacity of monarchs to initiate hostilities without popular consent, and reflected the framers' intention to subject executive war-making to democratic constraint.¹⁰ It is that balance, between executive command and legislative authority

⁹Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. Penguin Classics. London: Penguin Books, p. 398.

¹⁰Stromseth, J.E. (1993) 'Rethinking War Powers: Congress, the President, and the United Nations', *Georgetown Law Journal*, 81, p. 597.

over war, that post-1945 practice has repeatedly tested.

In this perspective, Congress continued to exercise the formal power to declare war through the Second World War, indicating that Hamilton's constitutional allocation of war powers remained operative well into the twentieth century. Following the attack on Pearl Harbor, Congress declared war on Japan on 8 December 1941, then on Nazi Germany and Fascist Italy on 11 December 1941, and later on Bulgaria, Hungary, and Rumania on 4 June 1942. These were the last formal declarations of war enacted by Congress.¹¹ Since 1945, however, Congress has not formally declared war, despite the United States' involvement in sustained military conflicts including, but not limited to, Korea, Vietnam, Iraq, Afghanistan, and, more recently, Iran. In none of those cases was a formal declaration of war sought or obtained.¹² Nevertheless, successive presidents were able to commit American forces to sustained hostilities abroad without ever formally crossing the constitutional threshold that Hamilton believed the legislature alone could authorise. How that threshold has been avoided, and what that reveals about the framework Hamilton designed, is the question this chapter sets out to address.

2. A Permanent Conflict of Legitimacy between Congress and the President

The war powers question, as Hamilton framed it, contains a tension that the constitutional text he was interpreting left open. The Constitution vests the power to declare war in Congress and the command of military forces in the President, but says nothing about how to resolve the conflict that arises when those two institutions, each with a legitimate claim to speak for the people, contest the boundary between them.

The Federalist, LXXI (pp. 410–411): “The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.”

Although war powers are not Hamilton's immediate concern in this passage, his characterisation of legislative behaviour illuminates a broader risk. The threat to constitutional balance is not the exclusive preserve of an overreaching executive, but can originate with equal force in an

¹¹United States Senate (n.d.) 'Declarations of War by Congress'.

¹²Barrow, B. (2026) 'Congress hasn't officially declared war since WWII. Here's how presidential war powers have played out since then', PBS NewsHour, 5 March.

overreaching legislature. A legislature disposed to exert imperious control over the other departments is no less a source of constitutional disruption than an executive that claims the unilateral prerogative to take the nation into war. The constitutional scholar Edward Corwin observed that the Constitution is “an invitation to struggle for the privilege of directing American foreign policy,” a characterisation that locates the conflict between Congress and the President not in the failings of particular administrations or legislatures, but in the constitutional design itself.¹³ The question that Hamilton’s constitutional framework does not settle is not whether either institution has a role, but which of them is entitled, at the moment of decision, to determine that the nation has moved from a condition of peace into one of war.

What the post-1945 record reveals is that successive presidents have not only proceeded on that assumption but have felt sufficiently confident in it to articulate it openly. At the Texas State Republican Convention in June 1992, President Bush, one year after committing over 500,000 troops to the Gulf War without prior congressional authorisation, stated: “I didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.”¹⁴ Congress had not been consulted before the decision was taken. President Trump has since conducted a series of operations without congressional authorisation: the capture of Venezuelan President Nicolás Maduro in January 2026, the B-2 bomber strikes on Iranian nuclear sites in June 2025, and the sustained military campaign against Iran launched in February 2026, for which a War Powers report was submitted claiming authority “as Commander in Chief” and “pursuant to constitutional authority to conduct United States foreign relations.”¹⁵ In none of these cases was Congress consulted, and it is the constitutional foundations of that practice that section 3 examines.

3. Commander in Chief, Command, and the Problem of Initiation

Article II, Section 2 of the Constitution states that “the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”¹⁶ The text is brief and says nothing about the scope of that command. It does not specify whether the clause extends to the initiation of hostilities, or whether it operates independently of congressional authorisation. Hamilton’s own reading of the clause, offered in *Federalist* No. 69 and examined in section 1, was narrow: the President’s military authority amounts to nothing more than the supreme command and direction of the armed forces, the power to declare war belonging, without ambiguity, to the legislature. On that account, the

¹³Corwin, E.S. (1958) *The President: Office and Powers*, 4th edn. New York: New York University Press, cited in Council on Foreign Relations (2017) ‘U.S. Foreign Policy Powers: Congress and the President’.

¹⁴Bush, G.H.W. (1992) Remarks at Texas State Republican Convention, Dallas, 20 June. The American Presidency Project.

¹⁵Bomboy, S. (2026) ‘Does the War Powers Resolution apply to military actions taken in Venezuela?’, Constitution Center, 6 January. Barrow, B. (2026) *op. cit.*

¹⁶United States Constitution, Article II, Section 2.

Commander in Chief clause confers operational authority over forces already committed, not the independent power to initiate hostilities. The post-1945 pattern of executive action suggests, however, that this reading of the clause has not prevailed in practice.

It is with the Korean War of 1950 to 1953 that the divergence between Hamilton's account of the Commander in Chief clause and post-1945 presidential practice first became historically apparent. Charles Stevenson, Professor of American Foreign Policy at Johns Hopkins SAIS and author of *Congress at War*, observes that Korea represented a moment of constitutional reorientation, one in which Congress did not exercise its power to declare war and in so doing set a precedent that subsequent Congresses have largely followed.¹⁷ In this perspective, without seeking prior congressional authorisation, President Truman committed American air, naval, and ground forces to the Korean peninsula in June 1950, grounding the decision in United Nations Security Council resolutions rather than in any legislative mandate. When Truman met with congressional leaders to inform them of his decision, his account of his own authority was direct: "I just had to act as Commander-in-Chief, and I did."¹⁸ Secretary of State Dean Acheson advanced the same position in more expansive constitutional terms, telling Congress that the President had the authority to use the armed forces in carrying out "the broad foreign policy of the United States implementing treaties," and that "this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution."¹⁹ The Commander in Chief clause, understood in these terms, was no longer confined to its original function of directing forces already authorised by Congress. It had been transformed into a self-sufficient constitutional basis for committing American forces to military operations abroad, limited only by the President's own assessment of what the national interest required.

Moreover, the constitutional position Truman and Acheson articulated in 1950 has not remained confined to that conflict. On the contrary, the Vietnam War deepened and extended the Korean precedent. Presidents from Eisenhower to Nixon committed American forces to an expanding conflict in Southeast Asia without a formal declaration of war, relying instead on the Gulf of Tonkin Resolution of 1964 and broad claims of Commander in Chief authority. At its peak, the conflict involved over half a million American troops.²⁰ It was precisely in response to that experience that Congress passed the War Powers Resolution in 1973 over President Nixon's veto, establishing that the President must notify Congress within 48 hours of committing forces to hostilities and must withdraw them within 60 days without congressional authorisation.²¹ Scott Bomboy, editor in chief of the National Constitution Center, has nonetheless observed that up to 2017, of 128 reports filed to Congress by presidents under that Resolution, 126 cite Article II of

¹⁷Stevenson, C.A. (2020) 'The Korea War Powers Precedent', Lawfare, 23 July.

¹⁸Truman, H.S., cited in Stevenson, C.A. (2020) *ibid*.

¹⁹Acheson, D., cited in Justia (n.d.) 'The Cold War and After', U.S. Constitution Annotated, Article II, Section 2.

²⁰Barrow, B. (2026) *op. cit*.

²¹Bomboy, S. (2026) *op. cit*.

the Constitution, and specifically the Commander in Chief clause, as the legal basis for their actions, without grounding that authority in any act of Congress.²² The clause that Hamilton understood as conferring operational authority over forces already authorised by the legislature has become, in practice, an executive claim to an independent right to initiate those forces.

It is worth noting, however, that this expansive reading of the Commander in Chief clause was not what the early postwar constitutional settlement had envisaged. The extent to which the Korea precedent marked a departure from prior executive assumptions becomes clearer when one considers the Senate debates surrounding the ratification of the United Nations Charter in 1945. Article 43 of the Charter provided that member states would make armed forces available to the Security Council through specially negotiated agreements, with each agreement subject to ratification in accordance with the constitutional processes of the signatory state.²³ In the American context, this meant that any commitment of forces to collective security operations would require an act of Congress. Stromseth's reconstruction of those debates suggests that this was not a matter of dispute at the time. She notes that it was regarded as absolutely clear that the President could not make a valid commitment of forces without reference to Congress, and that all parties to the deliberations agreed that military agreements of this character could not be concluded solely by executive action.²⁴ The executive branch had, in other words, explicitly acknowledged in 1945 that the commitment of American forces to Security Council operations lay beyond the President's unilateral authority. The Korea precedent brought that understanding to a close, and the way in which the language of collective security subsequently complicated the more fundamental question of what counts as war in the first place is what section 4 examines.

4. The Semantic Battle over What Counts as War

The questions examined in the preceding sections presuppose an answer to a more fundamental one: how is war to be defined? Hamilton drew a clear constitutional line between the President's command of military forces and the legislature's authority to declare war, but left the definition of war itself unresolved. In that respect, the power to define what counts as "war" is inseparable from the power to determine whether congressional authorisation is constitutionally required. Whoever controls the characterisation of military action controls the threshold at which the legislature's role is engaged.

In this perspective, the Korean War offers the first clear instance of that dynamic in practice. As President Truman himself explained at a press conference on 29 June 1950, the United States was not at war in Korea but was instead participating in a United Nations "police action," a formulation under which the conflict fell outside the constitutional category that would have engaged the

²²Ibid.

²³United Nations (1945) Charter of the United Nations, art. 43.

²⁴Stromseth, J.E. (1993) *op. cit.*, pp. 605–606.

requirement for congressional authorisation.²⁵ That formulation was grounded in United Nations Security Council Resolutions 82 and 83 of June 1950, which called upon member states to assist the Republic of Korea in repelling the North Korean attack.²⁶ The term “police action” had a specific origin within the United Nations collective security framework, where it described the limited and collective use of force that the Security Council could authorise to maintain international peace, as distinct from a full-scale declaration of war between states. Stromseth argues, however, that the distinction was not designed by its proponents to function as a constitutional escape route, allowing the executive to bypass Congress through the selective redefinition of what war entails. It was instead part of an effort to preserve Congress’s exclusive authority to declare war while giving the Security Council access to a limited number of committed forces, with the distinction resting on two considerations, namely the purpose of the action and its scale.²⁷ When Truman applied the category to a conflict that eventually involved hundreds of thousands of American troops, lasted three years, and cost more than 36,000 American lives, the scale and duration of the intervention raised questions about whether the original distinction remained applicable.

The same logic operated in the Gulf War of 1991, where the conflict was framed not as war but as the enforcement of United Nations Security Council Resolution 678, which had authorised member states to use all necessary means to compel Iraqi withdrawal from Kuwait. Once again, the existence of an international mandate was invoked to suggest that congressional authorisation was not constitutionally required. It was precisely that claim that then Senator Joe Biden challenged during the Senate debate preceding the authorization vote in January 1991. A treaty, Biden argued, cannot modify the Constitution’s allocation of war powers, and the United Nations Charter did not in any event give the President the power to take the country into war without congressional approval. Resolution 678, he noted, had authorised but not required the use of force, leaving it to each member state to decide according to its own constitutional processes what action it would take. The President’s actions thus far could be “classified as participation in a police action,” Biden contended, but “an American-led attack on Iraq would cross the threshold into war,” which was a decision “the Framers vested surely and unequivocally in the U.S. Congress.”²⁸ According to Biden, the collective security framework had conflated two distinct questions: whether international law authorised the use of force was one question, and whether the Constitution required Congress to approve it was entirely another. An affirmative answer to the first, he argued, carried no necessary implication for the second.

²⁵Stevenson, C.A. (2020) op. cit.

²⁶UN Security Council (1950a) Resolution 82 (S/RES/82), 25 June; UN Security Council (1950b) Resolution 83 (S/RES/83), 27 June.

²⁷Stromseth, J.E. (1993) op. cit., p. 608.

²⁸Stromseth, J.E. (1993) op. cit., p. 650.

Two decades later, the same pattern recurred in Libya, where the collective security framework and the redefinition of military action were deployed in combination. When President Obama authorised a sustained bombing campaign against Libya in 2011 without congressional approval, his administration grounded the operation in United Nations Security Council Resolution 1973, which had authorised member states to take all necessary measures to protect Libyan civilians, while simultaneously arguing that American operations did not constitute “hostilities” under the War Powers Resolution because the United States had no ground troops in the country and faced no risk of American casualties. White House officials described the operations as “kinetic military action,” a formulation that attracted considerable criticism precisely because it appeared designed to keep American involvement below the legal threshold that would have required congressional authorisation.²⁹

More recent practice suggests, however, that the semantic displacement of war has proved capable of operating independently of any international legal framework. In January 2026, when American special forces entered Caracas and captured Venezuelan President Nicolás Maduro, no United Nations authorisation had been sought and no collective security framework was invoked. The Trump administration described the operation not as an act of war but as a law enforcement operation conducted pursuant to existing federal indictments, with Secretary of State Marco Rubio characterising the accompanying military strikes as force deployed to protect those executing the arrest warrant.³⁰ The pattern was repeated in February 2026, when the administration described its strikes against Iran as “major combat operations” rather than war, without seeking congressional authorisation.³¹ Across each of these episodes, the constitutional category of war was not so much denied as avoided, redefined, or displaced by alternative vocabulary. Hamilton’s framework depends on the assumption that war, as a constitutional category, remains distinguishable from other uses of force. The evidence presented in this section suggests that successive presidents have treated that distinction not as a constitutional constraint but as a variable to be managed.

5. Secrecy, Speed, and the Executive Claim of Necessity

Among the recurring justifications for unilateral presidential action in military affairs, the claim of necessity is distinctive in that it does not contest the legislature’s war powers but renders them inoperative in practice. The argument holds that speed, secrecy, and surprise make prior congressional deliberation impossible or impracticable, thereby recasting the constitutional question as an operational one. In doing so, it conflates two propositions that are not equivalent: that the executive should be capable of acting with urgency when circumstances require it, and that such urgency carries with it an independent constitutional authority to initiate hostilities

²⁹ProPublica (2011) ‘What Exactly Is the War Powers Act and Is Obama Really Violating It?’, 16 June.

³⁰Just Security (2026) ‘International Law and the U.S. Military and Law Enforcement Operations in Venezuela’, 5 January.

³¹Al Jazeera (2026) ‘President or Congress? Who in the US has the power to declare war?’, 18 March.

without legislative approval.

The postwar period produced an early and direct articulation of the necessity argument in a State Department memorandum circulated during the Korean War. The memorandum asserted that repelling aggression could not “wait upon congressional debate,” and that debate over the scope of the President’s power was “essentially sterile, if not dangerous to the success of our foreign policy.”³² The claim was not simply that prior consultation had been impracticable in the specific circumstances of Korea. It was that congressional deliberation over the use of force was itself undesirable, on the grounds that public debate over the limits of presidential power threatened the coherence and effectiveness of American foreign policy.

The operations examined in the preceding sections illustrate how that argument has operated in practice. In each case, the administration presented the use of force as too sensitive and too time-critical to submit to prior congressional deliberation, reducing the legislature’s role to one of notification after the fact rather than authorisation before it. This is precisely the displacement of Congress from the point of initiative to the point of response that Hamilton’s framework was designed to prevent. For the February 2026 strikes against Iran, the Gang of Eight, the eight senior congressional leaders comprising the majority and minority leaders of both chambers and the chairs and ranking members of the intelligence committees who receive classified briefings on the most sensitive national security matters, were notified by Secretary of State Marco Rubio shortly before the strikes began, but were not given a full accounting of the legal justification and were not consulted in any meaningful sense before the decision had been taken.³³ Senator Tim Kaine’s subsequent war powers resolution, which would have required the President to obtain congressional authorisation before continuing hostilities, was defeated in the Senate by a vote of 47 to 53.³⁴ The pattern is consistent with what the Truman administration had established in 1950 whereby Congress is informed, but the decision has already been made.

The necessity argument, however, is not reducible to a question of procedure. It rests on a substantive claim about the nature of the threat that is, by the structure of the argument itself, removed from prior legislative scrutiny. By invoking urgency to justify unilateral action, the executive removes the factual basis for that urgency from legislative scrutiny at precisely the moment when such scrutiny would be constitutionally meaningful. In announcing the February 2026 campaign, President Trump stated that the objective was to defend the American people “by eliminating imminent threats from the Iranian regime.”³⁵ However, the Arms Control Association assessed that the available evidence did not support the characterisation of Iran’s nuclear and

³²Stromseth, J.E. (1993) *op. cit.*, p. 633.

³³CNN (2026a) ‘Congress to vote on Trump’s war powers in aftermath of Iran strikes’, 28 February. Time (2026b) ‘After Iran Strikes, Congress Confronts Its Limited Power Over War’, 1 March.

³⁴Barrow, B. (2026) *op. cit.*

³⁵Trump, D.J. (2026) Statement on Iran strikes, 28 February.

missile programmes as posing an imminent threat, describing the conflict as a war of choice conducted without congressional approval.³⁶ Joe Kent, Director of the National Counterterrorism Center and a Trump administration appointee, resigned in March 2026, stating that he could not “in good conscience support the ongoing war in Iran” and that “Iran posed no imminent threat to our nation.”³⁷ The point is not to determine which assessment was correct but to observe what their divergence discloses about the necessity argument. The very claim that justifies bypassing Congress is one that Congress is structurally prevented from assessing before the decision has already been made.

Hamilton’s framework does not anticipate this difficulty directly, but its constitutional logic points toward it. His account of the war powers presupposes that Congress retains a meaningful role at the moment of decision, not merely the opportunity to respond after force has been committed. What the post-1945 practice of invoking necessity suggests is that the operational conditions of modern warfare have been used to erode that presupposition, substituting executive determination of urgency for the legislative deliberation that Hamilton’s framework assigned to Congress.

6. Technology, Scale, and the Transformed Material Conditions of War

The preceding sections have examined the constitutional mechanisms through which the executive has expanded its war powers in practice. Each of those mechanisms, however, operates against a structural background that the preceding sections have not yet addressed directly, that of the transformation of the material conditions of warfare since 1788. Hamilton’s account of the presidency was formulated in a world without nuclear weapons, intercontinental ballistic missiles, stealth aircraft, or standing alliance systems whose treaty obligations could draw the United States into large-scale hostilities without any prior congressional decision. The constitutional framework he described must therefore be read against a strategic and technological reality he could not have anticipated.

Operation Midnight Hammer, the B-2 bomber strike on Iranian nuclear sites in June 2025, offers a concrete illustration of what that transformation means for the constitutional question this chapter has been tracing. Stealth bombers flew from Missouri to Iranian airspace and back in a single continuous operation, striking three nuclear facilities in a matter of hours.³⁸ The operation was complete before Congress had any meaningful opportunity to deliberate. The pace and character of modern military technology therefore compress the interval between presidential decision and large-scale destruction to a point where the prior legislative deliberation that Hamilton’s

³⁶Arms Control Association (2026) ‘Did Iran’s Nuclear and Missile Programs Pose an Imminent Threat? No’, March.

³⁷Kent, J. (2026) Resignation letter, 17 March, cited in CNN (2026b) ‘Are Trump’s strikes against Iran legal?’, 28 February.

³⁸CBS News (2025) ‘Pentagon briefing on US strikes on Iran nuclear sites’, 22 June. NPR (2025) ‘U.S. strikes 3 nuclear sites in Iran’, 21 June.

framework presupposes becomes, in operational terms, extremely difficult to achieve. The same structural difficulty arises from the alliance commitments the United States has accumulated since 1945. Article 5 of the North Atlantic Treaty, which treats an armed attack against one member as an attack against all, creates a standing collective defence obligation that could draw American forces into sustained hostilities without any specific act of congressional authorisation.³⁹ The constitutional question Hamilton left open, of who decides when the nation crosses the threshold into war, has been rendered considerably more difficult to answer by a strategic architecture that did not exist in 1788. Standing alliance commitments such as the North Atlantic Treaty may already have crossed that threshold by treaty before Congress has had the opportunity to deliberate, while the speed and destructive scale of modern military technology, including the possibility of nuclear exchange, means that the interval between presidential decision and irreversible consequence may be too short for meaningful legislative participation.

Stromseth's reconstruction of the post-1945 constitutional settlement engages directly with the difficulty that modern strategic conditions pose for Hamilton's framework. She observes that disagreement persists over what the constitutional text should mean in a world where wars are rarely declared in advance, American forces are stationed abroad on a semi-permanent basis, and the country's security interests are deeply bound up with those of other states.⁴⁰ That complexity does not, on her account, resolve the constitutional question in the executive's favor. She concludes that a police power model of presidential war authority represents too unbounded a view of executive power.⁴¹ Hamilton drew a clear line between the President's command of military forces and the legislature's authority to decide on war. The transformation of modern warfare has not abrogated the constitutional line Hamilton drew, but it has produced operational, technological, and strategic conditions under which that line is subject to its greatest pressure at precisely the moment of highest constitutional relevance, the moment before the presidential decision to use force has been taken and its consequences rendered, in practical terms, irreversible.

7. From Constitutional Balance to Political Accommodation

In conclusion, the preceding sections have traced six distinct mechanisms through which the constitutional balance Hamilton designed has been displaced in post-1945 practice: the expansion of the Commander in Chief clause into an independent basis for initiating hostilities, the semantic redefinition of war as something other than war, the invocation of necessity and secrecy to foreclose prior legislative deliberation, and the transformation of the material conditions of warfare into a structural argument against congressional participation. Taken together, these mechanisms have displaced Congress from the point of initiative to the point of response, and that displacement appears not as an exception within Hamilton's constitutional framework, but rather as a structural

³⁹North Atlantic Treaty, Art. 5 (1949).

⁴⁰Stromseth, J.E. (1993) op. cit., p. 597.

⁴¹Stromseth, J.E. (1993) op. cit., p. 671.

feature of the institutional order in which it operates.

The durability of that settlement is not, however, reducible to executive ambition. It has required, at each stage of its development, a corresponding congressional acquiescence whose constitutional significance is equally considerable. The Truman formulation examined in section 5, that as Commander in Chief he had the authority to send troops anywhere in the world and did not seek Congress's permission but merely consulted its members, marks the moment at which consultation was formally substituted for authorisation as the operative relationship between the branches on questions of war.⁴² What gave that substitution its constitutional durability was not the force of Truman's assertion but the fact that Congress chose not to contest it. As Stevenson has observed, Korea was the moment at which Congress failed to exercise its constitutional power to declare war, and the pattern established at that moment has been reproduced with sufficient regularity in the decades since to suggest a structural rather than merely situational explanation.⁴³ Congress has been notified, has provided the appropriations necessary to sustain military action, and has periodically adopted resolutions expressing reservations about the scope of executive authority, but it has rarely demanded the prior authorisation that Hamilton's framework assigned to it as a constitutional obligation rather than a political prerogative. The pattern that has consolidated over decades is one of institutional accommodation rather than constitutional confrontation, and that accommodation, sustained with sufficient regularity across administrations of both parties, has gradually assumed the character of settled practice without having secured the constitutional foundation on which such a settlement would need to rest.

As a closing observation, the contrast between Joe Biden's position as a senator and his later practice as president offers, in condensed form, an illustration of the structural argument this chapter has sought to develop regarding the constitutional question of legislative war powers. As a senator in January 1991, Biden contended that the existence of a United Nations mandate did not resolve the domestic constitutional question, that an American-led attack on Iraq would cross the threshold into war, and that the decision to cross that threshold was one the framers had vested unequivocally in Congress.⁴⁴ Upon assuming the presidency, however, Biden submitted War Powers reports invoking his authority as Commander in Chief and his constitutional power to conduct United States foreign relations, without seeking congressional authorisation for military operations against Iran-backed militant groups in Iraq, Syria, and Yemen, relying on the same executive claims he had, as a senator, contended were constitutionally insufficient.⁴⁵ The distance between Biden's 1991 position as a senator and his subsequent presidential practice reflects the institutional conditions that the post-1945 settlement has established for those who hold the executive office, rather than any matter of individual disposition. Hamilton drew a clear

⁴²Truman, H.S. (1951) President's News Conference, 11 January. The American Presidency Project.

⁴³Stevenson, C.A. (2020) op. cit.

⁴⁴Stromseth, J.E. (1993) op. cit., p. 650.

⁴⁵Bomboy, S. (2026) op. cit.

constitutional line between the President's command of military forces and the legislature's authority to decide on war. That line has not been formally erased. However, the evidence examined in this chapter indicates that it has been progressively marginalised, through the accumulation of precedents, semantic adjustments, claims of necessity, and institutional accommodations that together have transformed the constitutional balance Hamilton designed into something closer to a framework within which the executive justifies to itself, to Congress, and to the public the decisions it has already taken.

Chapter 2 - The Power to Appoint and to Create Offices: Hamilton's Framework and the Limits of Legislative Consent

1. Hamilton's Account of the President's Power to Appoint

Alongside the war powers examined in chapter 1, Hamilton subjected the President's power to appoint political and judicial nominees to the same comparative analysis, measuring it against the appointing authority of the British monarch. That distance, he argued, was constitutionally essential to the republican character of the order he was seeking to establish.

The Federalist, LXIX (p. 400): "The President is to nominate, and, with the advice and consent of the Senate, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king."⁴⁶

The President's power to appoint, Hamilton argues, is substantially inferior to that of the British king in two distinct respects. The first is the requirement of Senate confirmation: the President can nominate but cannot appoint unilaterally, the final act of appointment depending on the concurrence of an entire branch of the legislature. The second is the inability to create offices: while the king of Great Britain can bring new positions into existence by prerogative, the President can only appoint to offices that Congress has already established by law. The king is the "fountain of honor" not merely because he fills offices but because legitimate power itself derives from him alone. Office, title, and preferment exist only insofar as the king chooses to confer them. The President, by contrast, derives no such authority from his office alone. He can only appoint to positions that Congress has established by law, and his nominations require the concurrence of the Senate before they can take effect.

That comparative argument establishes how the President's power to appoint differs from that of the king. Having drawn that distinction, Hamilton examines in *Federalist No. 76* why the Senate's role in confirming appointments is constitutionally indispensable.

The Federalist, LXXVI (pp. 430–431): "To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful,

⁴⁶ Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. Penguin Classics. London: Penguin Books, p. 400.

though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity... It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing... He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”⁴⁷

In this passage, Hamilton identifies five pathways through which the absence of a meaningful Senate check might allow personal loyalty rather than public merit to govern executive appointments: a preference for candidates from the President’s own state, family connection, personal attachment, a view to popularity, and the appointment of those who “possess the necessary insignificance and pliancy to render them the obsequious instruments of Presidential pleasure.” All five reflect Hamilton’s concern that unchecked appointment power would, over time, produce an executive branch defined by personal loyalty rather than public merit, and accountable to the President alone rather than to the constitutional order from which the presidency derives its authority. In other words, Senate confirmation ensures, according to Hamilton, that no appointment can rest on personal loyalty alone, the necessity of Senate concurrence imposing an institutional judgment between the President’s preference and the final appointment.⁴⁸ That standard, and the degree to which post-1945 practice has both reflected and departed from it, will be examined in the following sections.

2. The Confirmation Process: Between Institutional Judgment and Partisan Loyalty

The standard Hamilton described in *Federalist* No. 76, in which Senate confirmation would impose an institutional judgment between the President’s preference and the final appointment, presupposed a confirmation process operating independently of what he referred to as “a spirit of favoritism,” by which he meant the tendency of a President to prioritise personal preference over public merit in the selection of appointees.⁴⁹ Post-1945 practice suggests that the confirmation

⁴⁷Ibid., pp. 430–431.

⁴⁸Ibid., p. 431.

⁴⁹Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. Penguin Classics. London: Penguin Books, p. 430.

process has reflected that standard unevenly, shaped by structural conditions that Hamilton's framework did not anticipate and that have grown more pronounced over time.

In this perspective, the data on postwar Cabinet confirmations presents a mixed picture. Voice votes and unanimous consent agreements, procedural mechanisms reserved for nominations when there is little to no doubt about the outcome of the vote and which do not require individual senators to record their vote, were entirely absent under Reagan and H.W. Bush, whose nominees were all subject to recorded votes.⁵⁰ Under Clinton, by contrast, 13 of 14 initial Cabinet secretaries were confirmed without a recorded vote, and under W. Bush and Obama the figures were 8 and 9 of 14 respectively.⁵¹ That variation suggests that the degree to which the confirmation process has reflected Hamilton's standard has depended less on a consistent institutional norm than on the political conditions of each individual administration. Several cross-partisan appointments nonetheless illustrate that the criterion governing appointments has not always been "a spirit of favoritism." For example, Obama's retention of Republican Robert Gates as Secretary of Defense in 2009, a holdover from the Bush administration, produced a confirmation in which institutional judgment operated independently of partisan affiliation.⁵² Moreover, Obama's nomination of Republican Senator Judd Gregg as Secretary of Commerce in the same year, though ultimately withdrawn by Gregg himself, reflected the same cross-partisan approach. The Senate's confirmation of Hillary Clinton as Secretary of State by a vote of 94 to 2 offers a further illustration, a confirmation in which the margin reflected the Senate's judgment of the nominee's qualification rather than the composition of the chamber.⁵³

The structural conditions under which that check operated began to shift in 2013, when Senate Democrats changed the rules governing the confirmation process in a way that reduced the incentive to nominate candidates whose qualifications could withstand bipartisan scrutiny.⁵⁴ Until that point, a confirmation required not only a simple majority vote in favor of the nominee but also the ability to overcome a filibuster, a procedural mechanism by which the minority party could delay or block a vote by extending debate indefinitely. Ending a filibuster required 60 votes, meaning that a president whose party controlled the Senate but held fewer than 60 seats still needed to attract some support from the opposing party to secure confirmation. Senate Democrats reduced that threshold to a simple majority in 2013, and Senate Republicans extended the same change to Supreme Court nominations in 2017. A president whose party controls the Senate can now be confident of confirmation with 51 votes alone, regardless of the nominee's record or qualifications.

⁵⁰Center for Presidential Transition (2023) 'Most Early Cabinet Secretary Picks Get Confirmed With Little Opposition'.

⁵¹Ibid.

⁵²Center for Presidential Transition (2025) 'Confirming the Cabinet: Historical Trends of Cabinet Secretary Confirmations Across the Last Five Presidential Administrations'.

⁵³NBC News (2009) 'Six Obama Cabinet picks win Senate OK', 21 January.

⁵⁴Washington Post (2013) 'Reid, Democrats trigger "nuclear" option; eliminate most filibusters on nominees', 21 November.

The bipartisan character of that transformation suggests that the erosion of the Senate's confirmatory check reflects a structural tendency of the political system rather than the disposition of any particular party.

In this perspective, the confirmation votes of Pete Hegseth as Secretary of Defense and Robert F. Kennedy Jr. as Secretary of Health and Human Services in January and February 2025 respectively illustrate the consequences of that structural shift. Hegseth was confirmed by a vote of 51 to 50, the tie broken by Vice President J.D. Vance, only the second time in American history that a vice-presidential tie-breaking vote had been required to confirm a Cabinet nominee.⁵⁵ Kennedy was confirmed by a vote of 52 to 48, almost entirely along party lines.⁵⁶ In both cases, the confirmation reflected the partisan composition of the Senate rather than a bipartisan institutional judgment about the nominee's qualification for office. In Hegseth's case, three Republican senators, Susan Collins, Lisa Murkowski, and Mitch McConnell, voted against confirmation on the grounds that allegations of sexual misconduct and alcohol abuse, as well as lack of experience necessary to lead the Department of Defense, had not been adequately addressed.⁵⁷ A nomination confirmed by a narrow margin, notwithstanding objections raised on grounds of personal conduct and professional qualification by members of the confirming party itself, illustrates the degree to which the confirmation process had come to reflect presidential preference rather than the independent institutional judgment Hamilton had described as a check upon "a spirit of favoritism."

Against that pattern, the confirmation of Marco Rubio as Secretary of State by a vote of 99 to 0 in January 2025 stands as evidence that the constitutional ideal Hamilton described has not been entirely displaced.⁵⁸ Rubio's confirmation was unanimous across party lines, reflecting a Senate judgment that his qualification for the office was not a matter of partisan dispute, and a confirmation that reflected precisely the absence of the "spirit of favoritism" which Hamilton had described in *Federalist* No. 76. The coexistence of Rubio's confirmation with those of Hegseth and Kennedy within the same confirmation cycle nonetheless illustrates that the erosion of Hamilton's framework has not been uniform but has produced a confirmation process in which the constitutional check he designed operates selectively rather than systematically, its effectiveness depending less on the institutional design Hamilton described than on the political conditions prevailing at the moment of each individual nomination.

⁵⁵Senate roll call vote No. 15, 119th Congress, 1st Session (Hegseth confirmation), 24 January 2025.

⁵⁶Senate roll call vote No. 52, 119th Congress, 1st Session (Kennedy confirmation), 13 February 2025.

⁵⁷CBS News (2025) 'Senate confirms Pete Hegseth as Trump's defense secretary in 51-50 vote', 25 January.

⁵⁸Senate roll call vote No. 8, 119th Congress, 1st Session (Rubio confirmation), 20 January 2025.

3. Appointments without Consent: Czars, Envoys, and Unconfirmed Executive Office Nominations

The confirmation process examined in section 2, however imperfectly, preserves the formal structure Hamilton described: a nomination submitted to the Senate, a confirmation vote recorded, and an institutional judgment interposed between the President's preference and the final appointment. The departure from Hamilton's framework examined in this section concerns the exercise of significant governmental authority by individuals who hold no confirmed office and are therefore beyond the reach of the constitutional check the author regarded as essential.

The practice of appointing personal advisers to exercise executive authority outside the Senate confirmation framework predates the post-1945 period. Franklin Roosevelt's Brain Trust, the informal network of advisers who shaped New Deal policy in the 1930s, established a precedent of significant executive influence being exercised by individuals whose authority derived from personal proximity to the President rather than from any confirmed office.⁵⁹ That precedent developed across the postwar decades as successive presidents appointed policy coordinators, special envoys, and senior advisers whose authority over significant areas of governmental activity was exercised without Senate confirmation and without the accountability to Congress that confirmed officers are subject to. By the time of the George W. Bush administration, the practice had become sufficiently entrenched to attract the label of "czar," a shorthand for presidential appointees whose policy responsibilities are exercised outside the confirmation framework.⁶⁰

It was under the Obama administration that the constitutional implications of that practice attracted sustained congressional attention. The constitutional concern was not confined to one party. The Washington Examiner observed that members of Congress across party lines had objected to the appointment of special advisers, envoys, and board chairmen who coordinated White House policy outside the confirmation framework, their posts having been created and filled by the White House without reference to Congress, so that appointees were neither confirmed by the Senate nor accountable to any congressional committee.⁶¹ Senator Robert Byrd, Democrat of West Virginia, wrote to President Obama in February 2009 noting that "the rapid and easy accumulation of power by White House staff can threaten the constitutional system of checks and balances."⁶²

In this perspective, Mitchel Sollenberger, associate professor of political science at the University of Michigan-Dearborn, and Mark Rozell, professor of public policy at George Mason University, argued in their study of the phenomenon that unconfirmed advisers who exercise policy authority without statutory duties and without accountability to Congress represent a structural departure

⁵⁹Washington Examiner (2009) 'All the President's Czars'.

⁶⁰Ibid.

⁶¹Ibid.

⁶²Byrd, R. (2009) Letter to President Obama, February, cited in Washington Examiner (2009) op. cit.

from the constitutional framework Hamilton described, in which the exercise of significant governmental authority was meant to be traceable to a confirmed office.⁶³ The Obama White House's position that czars working within the White House could not be compelled to testify before Congress added a further dimension to that concern: if the Senate cannot confirm an adviser, and Congress cannot compel that adviser to testify, the institutional checks Hamilton designed are rendered inoperative when they are most needed.⁶⁴

The most recent illustration of that structural pattern is found in the appointments of Steve Witkoff and Jared Kushner. Witkoff was appointed United States Special Envoy to the Middle East in May 2025, President Trump describing him as a close personal friend.⁶⁵ No Senate confirmation was sought or required. The appointment announcement made no reference to diplomatic experience or foreign policy qualification, describing Witkoff instead as a highly respected leader in business and philanthropy.⁶⁶ Similarly, Jared Kushner, the President's son-in-law, conducted high-level diplomatic negotiations with Russia and Iran without holding any confirmed office, his authority deriving entirely from his family connection to the President.⁶⁷ Republican Senator Thom Tillis observed that both men "are not subject to Senate confirmation, and they're not subject to oversight," a formulation that captures both dimensions of the constitutional concern Hamilton had identified: the absence of confirmatory judgment and the absence of accountability.⁶⁸

The pathways Hamilton identified in *Federalist* No. 76 are discernible in each of these appointments. Witkoff's qualification for a senior diplomatic role was described by the President in terms of personal loyalty and business success rather than diplomatic expertise. Kushner's authority derived from family connection. Both reflect criteria that Hamilton had identified as characteristic of appointments made in the absence of a Senate check, producing precisely the outcome Hamilton had warned against in *Federalist* No. 76. Identified by members of both parties as early as 2009, and deepening rather than resolving in the years since, this structural concern suggests that the erosion of Hamilton's confirmatory framework reflects no single administration's disposition, but an underlying institutional drift.

⁶³Sollenberger, M.A. and Rozell, M.J. (2012) *The President's Czars: Undermining Congress and the Constitution*. University Press of Kansas, cited in History News Network (2012).

⁶⁴Washington Times (2009) 'White House: Policy czars won't testify', 23 October.

⁶⁵Trump, D.J. (2025) Remarks at hostage release ceremony, January.

⁶⁶Trump, D.J. (2024) Truth Social post announcing appointment of Steven C. Witkoff as Special Envoy to the Middle East, 12 November.

⁶⁷IBTimes UK (2026) 'Jared Kushner's Peace Envoy Role', March. CREW (2026) Letter to White House on Kushner financial disclosures, 11 March.

⁶⁸Tillis, T. (2026) cited in The Hill, 'Tillis: Kushner, Witkoff leading peace talks doesn't make any sense', 26 February.

4. Creating Offices: The CIA, the National Security Act, and the Limits of Congressional Oversight

The departure from Hamilton's framework examined in sections 2 and 3 concerns the first of the two dimensions of the President's inferiority to the British monarch that *Federalist* No. 69 identifies: the requirement of Senate confirmation. The departure examined in this section concerns the second: the inability to create offices. Hamilton's account presupposed that the President could only appoint to offices that Congress had already established by law, and that the exercise of significant governmental authority would therefore always be traceable to a legislative act that defined its scope and authorised its existence. The National Security Act of 1947 did not violate that presupposition directly, but it created institutions whose subsequent activities extended well beyond what Congress had authorised or could meaningfully oversee, narrowing in practice the constitutional distance Hamilton had described.

Signed by President Truman on July 26, 1947, the National Security Act created the Central Intelligence Agency, the National Security Council, and the Joint Chiefs of Staff.⁶⁹ The Director of the CIA is nominated by the President and confirmed by the Senate, satisfying the formal requirement Hamilton described in *Federalist* No. 69. Confirmation of the director did not, however, bring the agency's covert activities within the reach of the oversight framework Hamilton presupposed. In this perspective, the legislation authorised the CIA to perform "such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct," language that was vague enough to authorise covert operations well beyond the collection and analysis of intelligence.⁷⁰ While the Act clearly authorised intelligence collection and analysis, the authority for covert operations was implied rather than explicit, leading to decades of debate about the proper scope of CIA activities.⁷¹ The term "covert action" itself was not defined in legislation until the 1990s. As Clark Clifford, Truman's administrative assistant and later Secretary of Defense, observed in his memoirs, the CIA had become 'a government within a government, which could evade oversight of its activities by drawing the cloak of secrecy about itself.'⁷²

Congressional oversight of the CIA in the first three decades of its existence was, in the assessment of the Congressional Research Service, nominal rather than substantive. The Subcommittees on the CIA of the congressional Armed Services Committees had nominal oversight responsibility, but Congress generally trusted that the intelligence community could regulate itself, and formal

⁶⁹National Security Archive (2022) 'The National Security Act Turns 75', 26 July.

⁷⁰International Journal of Intelligence and CounterIntelligence (2023) 'Origins of Oversight: Covert Action Amendments to the National Security Act of 1947', Vol. 36, No. 4.

⁷¹Arcadia Publishing (2025) 'September 18, 1947: The Birth of America's Central Intelligence Agency'.

⁷²Clifford, C. and Holbrooke, R. (1991) *Counsel to the President: A Memoir*. New York: Random House, p. 170.

hearings were rare.⁷³ Senator Leverett Saltonstall, who served on the Armed Services Committee and its CIA subcommittee from 1945 to 1967, captured the prevailing attitude toward CIA oversight during that period: “It’s better for gentlemen not to know what’s going on.”⁷⁴ That attitude produced consequences that were beyond the scope of Hamilton’s framework of confirmed offices and legislative accountability. For example, the Iran-Contra affair during the Reagan era illustrates this structural problem. When Congress enacted the Boland Amendment in 1984, cutting off funds for military and paramilitary operations in Nicaragua, the Reagan administration used the CIA and the National Security Council to conduct a covert Contra support programme that circumvented the legislative prohibition.⁷⁵ The congressional investigation concluded that the covert programme had evaded “the Constitution’s most significant check on executive power” and that conducting it with funds outside the appropriations process was “a flagrant violation of the appropriations clause of the Constitution.”⁷⁶ In this perspective, Historian John Canham-Clyne argued that Iran-Contra was not an aberration but “the logical and natural consequence of the existence of the national security state,” in which shadowy agencies with substantial budgets operated with little oversight from Congress or the courts.⁷⁷

In this perspective, in response to revelations of CIA domestic surveillance and assassination plots against foreign leaders, Congress enacted the Church Committee reforms of 1975 and 1976, establishing the Senate Select Committee on Intelligence and imposing formal oversight requirements on the intelligence community.⁷⁸ However, those reforms did not resolve the structural problem. Under 50 U.S.C. § 3091, the President is required to ensure that the intelligence committees are kept “fully and currently informed” of intelligence activities, but the statute permits the President to limit notification on covert actions to the Gang of Eight, rather than to the full membership of the intelligence committees, as described in chapter 1.⁷⁹ The result is an agency created by an act of Congress but operating in significant respects beyond the reach of the oversight framework Hamilton’s constitutional design presupposed.

⁷³Congressional Research Service (2018) ‘Congressional Oversight of Intelligence: Background and Selected Options for Further Reform’.

⁷⁴Saltonstall, L., cited in Frank Church Institute (2019) ‘Curtailement of the National Security State: The Church Senate Committee of 1975–1976’.

⁷⁵Levin Center for Oversight and Democracy (2024) ‘The Iran-Contra Affair’.

⁷⁶Report of Congressional Committees Investigating the Iran-Contra Affair (1987), excerpted at The American Presidency Project.

⁷⁷Canham-Clyne, J. (1991/1992) ‘Business as Usual: Iran-Contra and the National Security State’, *World Policy Journal*, Vol. 9, No. 1.

⁷⁸Senate.gov (n.d.) ‘Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities’.

⁷⁹50 U.S.C. § 3091.

5. The Erosion of Hamilton's Framework: Confirmation, Unconfirmed Advisers, and the Creation of Offices

The evidence examined in the preceding sections traces two distinct displacements of the constitutional framework Hamilton described. The first concerns the confirmation process. Hamilton argued that the possibility of Senate rejection would give the President a strong motive to care in proposing. Post-1945 practice suggests that this check has operated unevenly, its effectiveness depending less on the institutional design Hamilton described than on the partisan conditions prevailing at the moment of each individual nomination. The proliferation of unconfirmed advisers, from the czar controversy of the Obama administration to the Witkoff and Kushner appointments of the current Trump administration, represents a displacement of a different character, one in which the confirmation check is not weakened but circumvented entirely. The second displacement concerns the creation of offices. Hamilton's framework in *Federalist* No. 69 presupposed that the exercise of significant governmental authority would always be traceable to a legislative act. The National Security Act of 1947 created institutions such as the CIA whose subsequent activities extended well beyond what Congress had authorised or could meaningfully oversee.

In *Federalist* No. 69, Hamilton argued that there was 'evidently a great inferiority in the power of the President, in this particular, to that of the British king.' The evidence presented in this chapter suggests that the distance between the two has narrowed across both dimensions of that inferiority. The confirmation process has ceased to operate as a reliable institutional check, its effectiveness depending on the partisan composition of the Senate at the moment of each individual nomination rather than on the constitutional design Hamilton described. Moreover, the proliferation of unconfirmed advisers has created a category of executive power that the confirmation framework does not reach, and the creation of agencies with implied rather than explicit covert authority has generated zones of governmental activity beyond the reach of meaningful legislative oversight. None of these developments has formally erased the constitutional line Hamilton drew. What they suggest, taken together, is that the line has been progressively eroded, through the accumulation of structural changes, partisan shifts, and institutional practices that have transformed the constitutional framework Hamilton designed into something that operates with less regularity than he envisaged.

Chapter 3 - Political Polarisation and the Erosion of Hamilton's Framework

1. Polarisation and the Erosion of Congressional Independence

The first two chapters examined the formal mechanisms through which Hamilton's constitutional framework has been displaced, tracing the erosion of the war powers framework and the confirmation process in turn. In each case the displacement was shown to be not a sudden rupture but an incremental drift, in which the formal constitutional architecture Hamilton described remained nominally intact while the conditions on which it depended were progressively eroded by practice. This chapter examines the political forces which have driven that erosion. Its argument is that the displacement traced in chapters 1 and 2 cannot be understood in isolation from a deeper transformation in American political life since 1945, namely the progressive polarisation of the two major parties along ideological, racial, and cultural lines, and the replacement of independent institutional judgment by partisan loyalty as the operative mechanism in the exercise of constitutional checks.

The starting point of that argument is the assumption Hamilton embedded in Federalist No. 76, that the Senate's confirmation power would function as an independent institutional check precisely because senators would exercise judgment across partisan lines rather than simply ratifying presidential preference.⁸⁰ Whether such independence was ever fully obtained is up for debate, but empirical evidence seems to point to a structural foundation in Congress that has since been dismantled. In this perspective, a 2022 Pew Research Center analysis of congressional voting patterns since 1971 offers an account of that process. The analysis draws on DW-NOMINATE scores, a method developed by political scientists Keith Poole and Howard Rosenthal in the early 1980s that assigns each member of Congress a position on a liberal-to-conservative scale based on their voting record, allowing comparisons across different Congresses and different periods of American history.⁸¹ The data shows that as recently as 1971, 144 House Republicans voted more moderately than the most moderate Democrat, and 52 House Democrats voted more moderately than the most moderate Republican. While these figures concern the House, the Senate showed similar patterns of ideological overlap during the same period. In other words, a broad zone of ideological common ground existed within which members of Congress from both parties could, in principle, exercise the kind of cross-partisan institutional judgment Hamilton's confirmatory framework required. By 2002 that zone had disappeared entirely in the House, and by 2004 in the Senate.

⁸⁰Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. London: Penguin Books, p. 430.

⁸¹Pew Research Center (2022) 'The polarization in today's Congress has roots that go back decades'.

Among the explanations advanced for this transformation, that of Alan Abramowitz and Steven Webster, both political scientists at Emory University, is based on a 2016 study of American voting behavior spanning four decades. Their research shows that the surge in partisan behavior over that period was not produced by voters developing stronger positive attachments to their own party, whose feeling thermometer ratings remained essentially stable across four decades, but by increasingly more negative feelings toward the opposing party. The feeling thermometer is a scale ranging from 0 to 100 degrees, where 0 is the most negative rating and 100 is the most positive. Their average rating of the opposing party, however, fell sharply, from 45 degrees in 1980 to 30 degrees in 2012, a pattern from which Abramowitz and Webster derive the concept of “negative partisanship”, whereby voters and elected officials are defined less by what they support than by what they oppose.⁸² Simultaneously, party loyalty in Senate elections, that is, the share of voters casting ballots for their own party's candidate, rose from an average of 66 percent in the 1980s to 81 percent by the 2008 to 2012 elections, and the personal advantage of incumbency collapsed as Senate races became increasingly determined by presidential partisanship rather than the individual senator's record.⁸³ Senators facing electorates defined by hostility to the opposing party had little political room to exercise the kind of cross-partisan institutional judgment Hamilton's framework required.

Beyond the electoral data, the institutional consequences of that transformation were traced by Steven Levitsky and Daniel Ziblatt, both professors of government at Harvard University, in their account of the erosion of two unwritten norms on which America's constitutional checks had historically depended, namely “mutual toleration,” the recognition of partisan rivals as legitimate competitors, and “institutional forbearance,” the commitment to exercise constitutional prerogatives with restraint rather than to maximum partisan advantage.⁸⁴ According to the authors, for most of the twentieth century, those norms provided the political substrate on which Hamilton's constitutional design operated. Senators were judicious in their exercise of the confirmation power, and most nominees were approved without difficulty even when the President's party did not control the Senate. That pattern began to unravel from the 1990s onward. During President Obama's second term, there were more filibusters than in all the years between the First World War and Ronald Reagan's second term combined, showing the degree to which institutional restraint eroded as a principle of congressional conduct.⁸⁵

In this context, Republicans who showed any willingness to exercise independent institutional judgment risked finding their political careers threatened by a partisan base that had come to regard

⁸²Abramowitz, A.I. and Webster, S.W. (2016) 'The rise of negative partisanship and the nationalization of U.S. elections in the 21st century', *Electoral Studies*, Vol. 41, pp. 12-22.

⁸³Ibid.

⁸⁴Levitsky, S. and Ziblatt, D. (2020) 'The crisis of American democracy', *American Educator*, Fall 2020. Available at: https://www.aft.org/ae/fall2020/levitsky_ziblatt

⁸⁵Ibid.

such independence as a form of betrayal. For example, Senator Jeff Flake of Arizona, a Republican who had publicly criticised President Trump's conduct, announced in October 2017 that he would not seek re-election, telling reporters that “there may not be a place for a Republican like me in the current Republican climate or the current Republican Party.”⁸⁶ In a speech on the Senate floor, he declared that he would not be “complicit and silent” in the face of executive conduct he regarded as incompatible with democratic norms. In this perspective, the erosion of Hamilton's framework traced in chapters 1 and 2 appears not as a series of isolated institutional failures but as the expression of a deeper condition, one in which partisan loyalty has displaced the independent congressional judgment Hamilton regarded as constitutionally essential.

2. Political Polarisation and the Limits of Hamilton's Constitutional Checks

The preceding section traced the structural erosion of the conditions on which Hamilton's framework depended. This section examines how that erosion has operated on three specific constitutional mechanisms Hamilton described: the confirmation process, the war powers framework, and the impeachment mechanism.

The confirmation process was examined in detail in chapter 2, where it was shown to have shifted from an instrument of independent institutional judgment to one increasingly reflecting the partisan composition of the Senate. Polarisation was not merely a consequence of that shift but its enabling condition. The logic Hamilton identified in Federalist No. 76, that the possibility of rejection would be a strong motive to care in proposing, ceases to operate when party affiliation governs Senate voting in lieu of independent institutional judgment.⁸⁷

The war powers framework examined in chapter 1 shows a related pattern. Hamilton argued in Federalist No. 69 that the President's power as commander-in-chief was substantially inferior to that of the British monarch precisely because it was subject to congressional oversight and “the power of the purse”, that is, Congress's constitutional authority to fund or withhold funding for military operations.⁸⁸ This framework presupposed a Congress willing to exercise its constitutional authority independently of the executive, including when the President and the congressional majority belonged to the same party. The example of Senate Republican voting on war powers resolutions in 2026 to date illustrates how partisan loyalty rather than independent institutional judgment has become the primary driver of Senate voting. In January 2026, five Republican senators, Rand Paul, Lisa Murkowski, Susan Collins, Todd Young and Josh Hawley, voted in favor of a motion to proceed on a war powers resolution that would have required the President to seek

⁸⁶NBC News (2017) 'Arizona Republican Sen. Jeff Flake won't seek reelection, dismayed by Trump', 24 October.

⁸⁷Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. London: Penguin Books, p. 430.

⁸⁸*Ibid.*, p. 392.

congressional authorization before conducting further military operations in Venezuela.⁸⁹ A motion to proceed is a procedural vote that determines whether a measure advances to the Senate floor for debate and a final vote. The motion passed 52 to 47, but the resolution was subsequently blocked when Senator Hawley and Senator Young reversed their positions following direct pressure from President Trump, who publicly declared that those five senators “should never be elected to office again,” leaving the Senate deadlocked 50 to 50, a tie broken by Vice President J.D. Vance's vote against the resolution.⁹⁰

In this perspective, Senator Young, by his own account, reversed his position after receiving a private assurance from the executive that the administration would come to Congress in advance to ask for an authorization of force if American forces were needed in major military operations in Venezuela.⁹¹ Yet when a motion to proceed on a war powers resolution concerning Iran came before the Senate in March 2026, none of these same senators, with the exception of Rand Paul, voted in its favor, and the motion failed 47 to 53.⁹² The Council on Foreign Relations noted that Trump succeeded in holding the majority Republican coalition together, whether through genuine conviction or political calculation on the part of individual senators.⁹³ The pattern reflects the dynamic identified in section 1, in which the collapse of cross-partisan common ground and the rise of “negative partisanship” have made it increasingly difficult for individual senators to exercise the kind of independent institutional judgment Hamilton's framework required.

Beyond the confirmation process and the war powers framework, the impeachment mechanism presents a further illustration of the same dynamic. Hamilton had identified the Senate's independence as the constitutional safeguard that alone could make impeachment function as designed. In Federalist No. 65, reflecting on the inherently political nature of impeachment offences, the author warned that prosecutions of this kind would always risk being captured by partisan passion:

The Federalist, LXV (pp. 380-381): “A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will

⁸⁹NBC News (2026) 'Senate advances measure to restrict Trump's power to use military force in Venezuela', 8 January.

⁹⁰NPR (2026) 'Senate Republicans block Venezuela war powers resolution', 14 January.

⁹¹Ibid.

⁹²Responsible Statecraft (2026) 'House and Senate votes fail, giving Trump free rein on Iran war', 5 March.

⁹³Council on Foreign Relations (2026) 'Congress Declines to Demand a Say in the Iran War', 6 March.

seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the preexisting factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.”⁹⁴

The two impeachment trials of President Trump offer evidence relevant to the danger Hamilton had identified in Federalist No. 65. In the first trial of 2019 to 2020, arising from a phone call between President Trump and Ukrainian President Volodymyr Zelensky, Levitsky and Ziblatt observed that Senate Republicans stated from the outset that they would acquit the President regardless of the evidence of wrongdoing, a pre-announced verdict that appears to render the trial's deliberative function effectively inoperative.⁹⁵ The second trial, following the January 6th attack on the Capitol, produced the same outcome through different means. Before the trial had even begun, 45 of the 50 Republican senators voted to declare it unconstitutional on the grounds that a president who had already left office could not be subject to impeachment proceedings in the Senate.⁹⁶ Whether that position reflected a sincere constitutional conviction or a convenient procedural escape from having to rule on the merits of the charge is difficult to determine with certainty. The final vote was 57 to 43 in favor of conviction, falling ten votes short of the two-thirds majority required.⁹⁷ Of the 43 Republicans who voted to acquit, only 16 cited merit-based reasons, the majority continuing to rely on the jurisdictional argument.⁹⁸ Senator Mitch McConnell, who was serving as Senate Minority Leader at the time, voted to acquit on jurisdictional grounds while simultaneously stating on the Senate floor that Trump was “practically and morally responsible for provoking the events of the day,” thereby accepting the substance of the charge while rejecting the Senate's jurisdiction to act on it.⁹⁹

Finally, during Trump's second impeachment trial, the political cost of exercising independent judgment appears to have extended across the Republican party in the weeks between the House vote and the Senate trial, with the backlash against House Republicans who voted to impeach offering their Senate colleagues a visible indication of what awaited them if they voted to convict.

⁹⁴Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. London: Penguin Books, pp. 380-381.

⁹⁵Levitsky, S. and Ziblatt, D. (2020) 'The crisis of American democracy', *American Educator*, Fall 2020.

⁹⁶CBS News (2021) 'House Republicans face some backlash over vote to impeach, sounding a warning to senators', 28 January.

⁹⁷*Ibid.*

⁹⁸NBC News (2021) 'Trump acquitted in impeachment trial; 7 GOP senators vote with Democrats to convict', 13 February.

⁹⁹Just Security (2021) 'In their own words: the 43 Republicans' explanations of their votes not to convict Trump in impeachment trial'.

In this regard, Representative Liz Cheney of Wyoming, third-ranking House Republican at the time, was removed from her leadership position in May 2021 after voting to impeach, with Trump publicly calling for her removal and describing her as a “warmonger” with “no personality or anything good having to do with politics or our Country.”¹⁰⁰ Liz Cheney subsequently lost her Wyoming congressional seat in the 2022 Republican primary to a Trump-endorsed challenger, a result that reflected the broader electoral consequences of exercising independent judgment within a deeply polarised party. Moreover, Representative Anthony Gonzalez of Ohio, who had also voted to impeach, announced in September 2021 that he would not seek re-election, citing “the toxic dynamics inside [his] own party” as a significant factor in his decision.¹⁰¹ Taken together, these cases reflect not just a series of individual political calculations but rather a broader partisan culture in which the exercise of independent constitutional judgment carries a direct and measurable political cost, the precise condition Hamilton had identified in Federalist No. 65 as a threat to the impeachment mechanism.¹⁰²

3. The Structural Causes of Polarisation

The preceding two sections have traced the erosion of the conditions Hamilton's framework presupposed and the displacement of its specific constitutional mechanisms under the conditions of political polarisation this chapter has traced. This section turns to the structural origins of that polarisation. The argument is that the transformation documented in sections 1 and 2 was not a sudden or accidental development but the cumulative product of two structural changes in American society since 1945.

The first structural cause is the transformation of the media landscape following the repeal of the Fairness Doctrine in 1987. The Federal Communications Commission (FCC), whose policy dating from 1949 had mandated that broadcast networks devote time to contrasting views on issues of public importance, voted unanimously under chairman Dennis Patrick to repeal the doctrine on First Amendment grounds, arguing that compelling broadcasters to present opposing viewpoints infringed on their freedom of speech, inadvertently laying the groundwork for a landscape in which partisan media could thrive.¹⁰³ According to Kim Zarkin, a professor of communication at Westminster University in Utah who has researched the FCC for three decades, it was the repeal of the Fairness Doctrine that made possible Rush Limbaugh's conservative talk radio show, which ran from 1988 until his death in 2021 and which, in Zarkin's assessment, set the stage for the

¹⁰⁰CBS News (2021) 'Mitch McConnell says Trump was "practically and morally responsible" for riot after voting not guilty', 13 February.

¹⁰¹CBS News (2021) 'Liz Cheney removed from House GOP leadership', 12 May; Axios (2021) 'House Republicans remove Liz Cheney from leadership over Trump opposition', 12 May.

¹⁰²CBS News (2021) 'GOP congressman who voted to impeach Trump will not seek reelection in 2022', 17 September.

¹⁰³Scott, L. (2025) 'The repeal of the Fairness Doctrine accelerated the polarization of US media', *Poynter*, 22 April.

polarised media environment that followed.¹⁰⁴ The broader boom in partisan talk radio, including figures such as Sean Hannity and others, was similarly facilitated by the end of the doctrine. Portland-based conservative radio host Lars Larson has stated directly that without the doctrine's repeal, "modern talk radio would not have emerged."¹⁰⁵ The significance of this transformation for Hamilton's framework lies in the conditions it eroded. A Congress capable of cross-partisan institutional judgment presupposes an electorate and a political class exposed to a shared information environment. The fragmentation of that environment into partisan media ecosystems operating on opposed factual premises progressively undermined the common ground on which cross-partisan deliberation depends.

The second structural cause is the rise of social media and the algorithmic amplification of partisan content. Eli Pariser, writing in 2011, put forward the concept of the "filter bubble", that is, the information environment produced by personalisation algorithms that learn from user behavior and serve content that confirms existing preferences, progressively narrowing each user's exposure to different viewpoints.¹⁰⁶ As Pariser argues, news provides "the foundation of shared experience and shared knowledge on which democracy is built," and the "filter bubble" appears to undermine that foundation by fragmenting the public sphere into individually tailored information environments.¹⁰⁷ The connection between this dynamic and the "negative partisanship" Abramowitz and Webster identified may also be worth noting. Where algorithms reward outrage and reinforce existing beliefs, the hostility toward the opposing party that Abramowitz and Webster identified as the primary driver of political loyalty is amplified rather than moderated.

These two causes are not independent of one another but mutually reinforcing. The collapse of a shared media environment removes the informational common ground on which cross-partisan deliberation depends, and algorithmic amplification accelerates the "negative partisanship" that makes partisan loyalty the governing mechanism of political behavior. Together they suggest that the polarisation this chapter has traced was not accidental but structural, produced by transformations in the social, technological, and informational fabric of American political life, the cumulative effect of which has eroded, gradually and without formal constitutional change, the institutional foundations on which Hamilton's framework depended.

¹⁰⁴Ibid.

¹⁰⁵Ibid.

¹⁰⁶Pariser, E. (2011) *The Filter Bubble: What the Internet is Hiding from You*. New York: Penguin Press, p. 47.

¹⁰⁷Ibid., p. 50.

Chapter 4 - “Energy in the Executive” and the modern reinterpretation of Hamilton’s argument

The Federalist, LXX (p. 402-403): “THERE is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. **Energy in the Executive is a leading character in the definition of good government.** It is 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. (...) Taking it for granted, therefore, that all men of sense will agree on the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? (...) The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers. The ingredients, which constitute safety in the republican sense are, first a due dependence on the people; secondly, a due responsibility.”

The preceding chapters focused principally on the progressive erosion of the constitutional checks through which Hamilton sought to distinguish the American presidency from the British monarchy. They did not, however, examine in depth the affirmative concept through which Hamilton justified executive power in the first place, namely the concept of energy. That question is of particular importance because the developments traced in the earlier chapters have not been defended solely in disregard of Hamilton’s theory. On the contrary, they have often been justified in his name.

In this perspective, Hamilton’s statement in Federalist No. 70 that “energy in the executive is a leading character in the definition of good government” set in bold in the quotation above has acquired a significance in modern constitutional argument that extends well beyond its original context. It has been invoked by Supreme Court justices, conservative legal theorists, and political actors to justify a conception of presidential power whose practical effect has been to enlarge the scope of executive initiative at the expense of the legislature.¹⁰⁸ Yet Hamilton’s argument in Federalist No. 70 did not present energy as a freestanding justification for executive power. It

¹⁰⁸ Ford, M. (2025) 'John Roberts and the Cynical Cult of Federalist No. 70', *The New Republic*, 12 December.

presented it as one element of a constitutional design that was to be combined with what he termed “safety in the republican sense,” that is, due dependence on the people and due responsibility.¹⁰⁹

The question this chapter therefore sets out to address is whether the modern invocation of Hamiltonian energy represents an application of Hamilton’s framework or a departure from it. If the language of executive energy is now used to justify forms of presidential power that weaken the constitutional restraints Hamilton regarded as essential, then either Hamilton’s own argument contained the foundations of that development, or the concept of energy has been detached from the constitutional structure within which he placed it. The evidence presented in this chapter suggests the latter. Hamilton’s defence of executive energy was inseparable from the framework of accountability by which he sought to preserve the republican character of the presidency. To invoke executive energy while disregarding the framework of accountability within which Hamilton placed it is to depart from Hamilton’s reasoning and to alter its constitutional meaning.

1. Executive Energy in the Jurisprudence of the Supreme Court under Chief Justice Roberts

This section examines how Federalist No. 70 has been used by the Supreme Court to defend a vision of the presidency that differs in important respects from Hamilton’s own argument. More specifically, it argues that the Court has emphasized Hamilton’s defense of executive vigor more than his equally explicit insistence on legal and political responsibility.

Hamilton’s argument in Federalist No. 70 was not that executive energy was sufficient on its own. He argued that energy was essential to good government, but he also insisted that it had to be combined with what he referred to as “safety in the republican sense,” that is, due dependence on the people as well as due responsibility. His defense of executive strength was therefore inseparable from a framework of legal and political accountability.¹¹⁰

The developments examined here should also be understood through a historical lens. In a 2025 article in the *Princeton Legal Journal*, Arah Cho points to Abraham Lincoln’s use of extraordinary powers during the Civil War, including the suspension of habeas corpus, the raising of troops without prior congressional approval, and the blockade of Southern ports, as an early moment in the expansion of executive discretion. The author presents Franklin D. Roosevelt’s wartime measures as a later stage in the same development, citing Executive Order 9066 and the judicial validation of Japanese internment in *Korematsu v. United States* as examples of how claims of necessity could enlarge presidential authority. The immediate legal context, however, is the jurisprudence of the Supreme Court under Chief Justice Roberts. In a 2025 white paper for Berkeley Law’s Edley Center on Law and Democracy, Matthew Hamilton identifies three

¹⁰⁹Hamilton, A., Madison, J. and Jay, J. (1987) *The Federalist Papers*. London: Penguin Books, p. 402-403.

¹¹⁰*Ibid.*

dimensions along which the Roberts Court has expanded presidential authority in recent years: a more formal view of the separation of powers that has come at Congress's expense, an expansion of presidential powers, privileges, and immunities, and a consolidation of presidential control over the administrative state. *Seila Law* and *Trump v. United States* should be read in that context.¹¹¹

In *Seila Law v. Consumer Financial Protection Bureau* (2020), the Supreme Court considered the constitutionality of an agency created by Congress after the 2008 financial crisis to regulate consumer finance. The distinctive feature of the Consumer Financial Protection Bureau (CFPB) was its leadership structure: unlike many independent agencies, which are headed by multi-member commissions, the Bureau was led by a single Director who exercised substantial executive authority but could be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The constitutional question was therefore whether Congress could create an agency combining two features in a single institution, the concentration of significant executive power in one individual and that individual's partial insulation from presidential removal. By a 5-4 majority on the central constitutional question, the Supreme Court held that this structure violated the separation of powers between the President and Congress. Writing for the Court, Chief Justice Roberts reasoned that the Constitution, "with the sole exception of the Presidency," avoids concentrating power in the hands of any single individual, while permitting such concentration in the Presidency because the President is politically accountable through national election. To support that account of the executive branch, the opinion invoked Federalist No. 70 and quoted Hamilton's language on the purposes served by an energetic executive, including the protection of the community, the steady administration of the laws, the protection of property, and the security of liberty. The function of that citation was to support a constitutional preference for a more unified executive, more directly controlled by the President. Yet Hamilton's argument in Federalist No. 70 was not simply an argument for unity or control. It was an argument for an energetic executive within a framework of republican accountability. Hamilton did not present executive energy as a reason to weaken institutional checks, but as an element of constitutional design that also required dependence and responsibility. In *Seila Law*, by contrast, Hamilton's language of executive energy is used to justify stronger presidential control over the executive branch, while Hamilton's equally explicit insistence on accountability plays a less visible role in the Court's reasoning.¹¹²

In *Trump v. United States* (2024), the Supreme Court addressed whether a former President may be criminally prosecuted for conduct allegedly undertaken while in office, in this case in connection with efforts to overturn the result of the 2020 presidential election.¹¹³ The case arose

¹¹¹Cho, A. (2025) 'Lawful Exploitation: Revisiting Hamilton's Words and the Nondelegation Doctrine in Shaping Trump's National Emergencies', *Princeton Legal Journal*; Hamilton, M. (2025) 'Continuity, Change and Contestation: Executive Power at the Start of the Second Trump Administration', Edley Center on Law and Democracy White Paper, Berkeley Law, August.

¹¹²*Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020).

¹¹³*Trump v. United States*, 603 U.S. ____ (2024), No. 23-939, argued 25 April 2024, decided 1 July 2024, p.1.

from the federal prosecution brought by Special Counsel Jack Smith, whose indictment charged former President Trump with, among other things, conspiracy to obstruct the certification of the electoral vote and conspiracy to defraud the United States. The central constitutional question was whether, and to what extent, a former President enjoys immunity from criminal prosecution for acts performed while in office. By a 6–3 majority, the Court held that a former President enjoys absolute immunity for conduct within his exclusive constitutional authority and at least presumptive immunity for official acts more generally. Writing for the Court, Chief Justice Roberts stated that the Framers designed the Presidency to provide for a “vigorous” and “energetic” executive, citing *Federalist* No. 70, and reasoned that the threat of criminal prosecution for official conduct could make a President unduly cautious in the discharge of official duties.¹¹⁴ That use of Hamilton marks a sharp departure from his own constitutional framework. In *Federalist* No. 69, Hamilton insisted that, unlike the British king, the President “would be liable to prosecution and punishment in the ordinary course of law.” For Hamilton, executive energy was therefore justified only within a structure of republican safety, one that preserved legal and political responsibility. In *Trump v. United States*, by contrast, the Court places greater weight on protecting presidential action than on preserving the ordinary accountability Hamilton had treated as essential to distinguishing the American President from the monarch. The result is not complete inviolability in the British sense, but it does place the President in a more legally insulated position than the one Hamilton described. The federal prosecution was later dismissed after Special Counsel Smith moved to dismiss it following Trump’s 2024 election victory, citing the Justice Department’s longstanding position that a sitting President cannot be criminally prosecuted. That dismissal, however, was a later procedural development rather than part of the Supreme Court’s holding.

Taken together, *Seila Law* and *Trump v. United States* illustrate a common tendency in the jurisprudence of the Supreme Court under Chief Justice Roberts. In both decisions, the Court emphasizes Hamilton’s defense of executive vigor more than Hamilton’s equally explicit insistence on legal and political responsibility. In both decisions, *Federalist* No. 70 is used as a source of constitutional language that supports a stronger and more protected presidency. What receives the greatest emphasis is the need for energy, decisiveness, and effective executive control. What receives less emphasis is the framework of dependence and responsibility that Hamilton treated as the condition under which executive energy could remain republican rather than monarchic. That constitutional language, once established by the Court, helped furnish the vocabulary on which the political actors examined in Section 2 below could draw.

¹¹⁴ *Ibid.*, p. 2

2. Executive Energy as Political Doctrine

If Section 1 has shown how the Supreme Court under Chief Justice Roberts helped recast Federalist No. 70 as a source of constitutional language for a stronger presidency, the same language has also been taken up more directly in political and legal commentary. The point is not simply that Hamilton has been cited approvingly. It is that his defense of executive energy has increasingly been treated as a general justification for presidential control, administrative centralization, and freedom of action, while the paired requirements of dependence and responsibility have received less emphasis. In that respect, the judicial and political uses of Federalist No. 70 are not wholly distinct. The former helped furnish a constitutional vocabulary that the latter could deploy more openly as a political doctrine.

The same interpretive shift appears beyond the Supreme Court. In political and legal commentary, Hamilton's language of executive energy is increasingly treated as a broad defense of presidential initiative, often with less attention to the constitutional restraints Hamilton regarded as equally necessary. In a July 2025 post for the Cato Institute, Jeffrey Miron, a libertarian economist and Cato scholar, argued that Hamilton's case for executive energy was originally tied to speed and temporary flexibility, that is, to buying Congress time to gather and deliberate, rather than to the routine displacement of legislative judgment.¹¹⁵ Miron's point is that the language of emergency and executive discretion has gradually moved beyond that narrower purpose. What began as an argument for swift action in exceptional circumstances, he suggests, has become a more general instrument for circumventing legislative deadlock. This criticism matters for the present chapter because it identifies, from outside the conservative legal movement itself, the same broader pattern traced in Section 1: Hamilton's defense of energy is retained, while the limiting framework within which he placed it becomes less central.

That shift appears more directly in the work of John Yoo, Emanuel S. Heller Professor of Law at the University of California, Berkeley, and a contributor to *The American Mind*, a publication of the Claremont Institute. In a January 2026 article, Yoo argued that the Trump administration's effort to challenge independent agencies and post-Watergate constraints was designed to restore the "energy in the executive" that Hamilton called the "definition of good government." He further argued that the laws enacted after Watergate had "dissipated the unity and energy of the executive branch" and that restoring direct presidential control would revive both executive energy and congressional responsibility.¹¹⁶ The significance of that argument lies not in its use of Hamilton's words, but in the constitutional work those words are made to perform. Yoo treats Federalist No. 70 as support for freeing the presidency from institutional restraints that allegedly impede decisive administration. Yet Hamilton did not present energy as a reason to loosen constitutional checks in

¹¹⁵Miron, J. (2025) 'Emergency Powers Are for Emergencies', *Cato at Liberty*, 1 July.

¹¹⁶Yoo, J. (2026) 'Trump's War Against the Watergate Reforms', *The American Mind*, 7 January.

general. He presented it as one element of a design that also required responsibility. In that respect, the political use made of Federalist No. 70 here resembles its judicial use in *Seila Law*: energy becomes a justification for stronger presidential control, while accountability recedes into the background.

A similar use of Hamilton appears in more overtly political defenses of the contemporary presidency. In a July 2025 essay for *Modern Age*, Francis P. Sempa, an attorney and commentator on foreign policy and constitutional history, argued that Trump is “a Hamiltonian president” because he believes in Federalist No. 70’s “Energy in the Executive.”¹¹⁷ Sempa presented Hamilton’s text as a defense of broad Article II authority, cited in chapter 1, and then placed Trump, who argues that the nation is in a permanent state of crisis, within a long line of presidents, from Washington and Lincoln to Franklin D. Roosevelt and Truman, who had exercised expansive executive power in moments of crisis. To treat the nation as being in a permanent state of crisis distorts Hamilton’s argument as to no longer be treated primarily as a theory of republican executive office bounded by constitutional responsibility. It becomes instead a tradition of presidential assertiveness stretching across American history ignoring the specific circumstances of such presidential action. A similar tendency appeared in a February 2025 *Wall Street Journal* opinion, which argued that Hamiltonian energy includes the authority to impose consequences for poor performance and misconduct and used that claim to defend Trump’s efforts to discipline and remove officials within agencies created by Congress.¹¹⁸ In both cases, Federalist No. 70 is used less as part of a balanced constitutional framework than as a legitimating language for decisive presidential action.

Taken together, these interventions show how Federalist No. 70 has come to function as a political doctrine as well as a judicial resource. The common thread is not that every commentator reads Hamilton in exactly the same way. It is that Hamilton’s language of vigor, unity, and decisiveness is repeatedly detached from the framework of legal and political responsibility within which he placed it. Even where accountability is invoked, as in arguments that stronger presidential control promotes democratic responsibility, the accountability in view is narrower than Hamilton’s own formulation, which tied executive energy not only to electoral dependence but also to a broader structure of constitutional restraint. What emerges from these political uses of Federalist No. 70 is therefore not a straightforward continuation of Hamilton’s argument, but a reinterpretation of it, one that helps justify a more unilateral conception of presidential power than the one Hamilton sought to defend.

¹¹⁷Sempa, F.P. (2025) 'Donald Trump: Hamiltonian President', *Modern Age*, July.

¹¹⁸Wall Street Journal (2025) 'Hamilton Would Smile at Trump's Push for Accountability', February.

Conclusion

The No Kings movement, drawing on the rhetoric of 1776, framed contemporary executive expansion as a drift toward monarchical power. As Lawrence B.A. Hatter, associate professor of early American history at Washington State University, observed following the June 2025 protests, these demonstrations represented a “21st-century expression of the principles of 1776,” rooted in the founders’ conviction that independence was fundamentally a rejection of monarchy and that the constitutional order was designed to prevent any future executive from ruling as a king.¹¹⁹ That premise provided the starting point of this thesis, which has examined Hamilton’s constitutional framework in *Federalist* Nos. 65 to 77 and traced its gradual erosion in presidential practice since 1945.

Although Hamilton’s direct role in drafting the Constitution was comparatively limited, his constitutional legacy rests predominantly on the *Federalist Papers*, especially his defence of the presidency in *Federalist* Nos. 65 to 77. In these writings, Hamilton articulated a comprehensive vision of the American executive’s constitutional powers, emphasizing that the President was not an elected monarch. In this perspective, in *Federalist* Nos. 65 to 77, Hamilton offers a comprehensive comparison between presidential powers and those of the British monarch, highlighting clear distinctions in war-making authority, appointment powers, office creation, and susceptibility to prosecution and impeachment. This comparison reflected the broader consensus of the founding generation that the republic’s legitimacy rested on rejecting hereditary and unchecked executive power.

This thesis has identified three principal dimensions along which Hamilton’s framework has been displaced since 1945, alongside a fourth in which the language of that framework has been invoked to justify the displacement itself. Chapter 1 documented the progressive erosion of Hamilton’s distinction between the President’s military command and Congress’s authority to declare war, showing how precedents, semantic shifts, and claims of executive necessity have steadily narrowed this constitutional boundary. Chapter 2 demonstrated that the Senate’s confirmation power, designed by Hamilton to check presidential favoritism, has operated unevenly, its effectiveness shaped more by partisan dynamics than by constitutional design. Chapter 3 identified political polarization as the structural force undermining these institutional checks, intensified by media fragmentation and the rise of negative partisanship. Chapter 4 revealed that Hamilton’s assertion in *Federalist* No. 70 that “energy in the executive is a leading character in the definition of good government” has been appropriated by justices, legal theorists, and political actors in ways that give less emphasis to the framework of accountability he placed alongside it.

¹¹⁹ Hatter, L.B.A. (2025) ‘Today’s “No Kings” movement traces its roots directly to the American Revolution and its seismic consequences’, *Inlander*, 16 June.

Importantly, this thesis has shown that this displacement was not produced by executive ambition alone. As Jack Goldsmith, Learned Hand Professor at Harvard Law School, noted after the Qasem Soleimani airstrike, the vast military apparatus and discretion vested in a single individual arose through “congressional authorization, delegation, and acquiescence.”¹²⁰ In this perspective, Congress has often failed to insist on prior authorization for sustained hostilities, the Senate has increasingly exercised confirmation powers along partisan lines, and the Supreme Court has prioritized executive energy over accountability. Thus, the displacement reflects institutional choices made over decades and across administrations, rather than an inevitable constitutional trajectory.

Given that these changes have occurred within an unamended constitutional framework, a further question remains: can Hamilton’s original framework be restored? The war powers clause, the appointments clause, and the impeachment mechanism remain formally intact, though they have not operated with consistent force in practice. The presidential oath, to “preserve, protect, and defend the Constitution”¹²¹ indicates that constitutional order depends not only on formal checks, but also on the willingness of officeholders to honor them. The challenge, as this thesis has shown, lies less in the text of the Constitution than in the political and institutional conditions shaping its interpretation and enforcement.

Any such restoration will be difficult. The entrenched forces of rapid and secretive military action, a permanent national security state, deep partisan polarization, and judicial deference to executive discretion have made the equilibrium Hamilton envisioned more difficult to sustain. Yet these very pressures underscore the enduring necessity of his constitutional principles. As executive power becomes more expansive in practice, the need for institutions charged with oversight to retain both the capacity and the resolve to act becomes correspondingly greater. The question is not whether the constitutional resources for a balanced presidency exist, but whether future leaders across the executive, legislative, and judicial branches will treat these mechanisms as binding obligations rather than discretionary options. This is ultimately a political question rather than a constitutional one. The constitutional resources necessary to restore Hamilton’s vision remain present. Whether they are used will depend, as Hamilton himself would likely have recognised, not only on the text of the Constitution, but on the conduct of those entrusted with giving it life.

¹²⁰ Goldsmith, J. (2020) ‘The Soleimani Strike: One Person Decides’, Lawfare, 3 January.

¹²¹ United States Constitution, Article II, Section 1, Clause 8. *Constitution Annotated*.

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Hamilton's Constitutional Framework and the American Presidency

From the Federalist Papers to Post-1945 Presidential Practice

James William Hamilton

Abstract

This thesis examines Alexander Hamilton's constitutional framework for the American presidency as set out in Federalist Nos. 65 to 77 and traces the extent to which that framework has been displaced in practice from the post-1945 period to the present day. Its central argument is that Hamilton's framework has not been formally abolished, but progressively displaced through executive practice, institutional drift, political polarization, and judicial reinterpretation. Chapter 1 examines Hamilton's distinction between the President's role as Commander in Chief and Congress's exclusive authority to declare war, arguing that this distinction has been progressively eroded since 1945 through expansive readings of Article II, the semantic redefinition of war, the invocation of necessity and secrecy, and the transformed material conditions of modern warfare. Chapter 2 turns to the appointments power and shows that Hamilton's framework of Senate confirmation as a check upon presidential favoritism has weakened both because confirmations have become increasingly shaped by partisanship and because significant executive authority is often exercised by unconfirmed advisers. Chapter 3 identifies political polarization as a structural force underlying these developments, arguing that the erosion of cross-partisan institutional judgment has weakened the political conditions on which Hamilton's constitutional checks depended. Chapter 4 examines Hamilton's concept of executive energy in Federalist No. 70 and argues that the Supreme Court and political actors have increasingly invoked Hamilton's language of vigor and decisiveness while detaching it from the framework of accountability within which Hamilton placed it. The thesis concludes that the modern presidency operates at a growing distance from the constitutional equilibrium Hamilton described, but that its restoration depends not on the invention of new constitutional principles, but on the willingness to uphold the independence, restraint, and accountability that Hamilton regarded as essential to a republican executive.

Key words

Hamilton; Federalist Papers; American Presidency; Executive Power; Constitutional Framework; Political Polarization