

Washington International Law Journal

Volume 28 | Number 2

4-1-2019

Unenumerated Power and the Rise of Executive Primacy

Cheng-Yi Huang

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Cheng-Yi Huang, *Unenumerated Power and the Rise of Executive Primacy*, 28 Wash. Int'l L.J. 395 (2019).
Available at: <https://digitalcommons.law.uw.edu/wilj/vol28/iss2/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

UNENUMERATED POWER AND THE RISE OF EXECUTIVE PRIMACY

Cheng-Yi Huang*

Abstract: This article argues that contemporary syndromes of constitutional dysfunction do not solely stem from the failures of the controlling executive power. Rather, the tendency of chief executives' appropriation of power is largely due to the fact that the institutional logic of executive power makes them do so. To govern, the chief executive needs to run the government with power, either political or constitutional. These powers are not always enumerated in the constitution, but would still be regarded as constitutional. This paper argues that the idea of taming unenumerated executive powers by definite constitutional language and text is mostly futile. Drawing from recent cases of constitutional controversies in Japan, Taiwan, and Poland, this article suggests that unenumerated powers which cannot be checked by constitutional mechanisms are the cause of the expansion of executive primacy in constitutional democracies. Following the case studies, this article analyzes the nature and problems of unenumerated powers of the executive. Building on the taxonomy proposed by Louis Fisher, the article argues that unenumerated powers are analogous to the "implied powers" in Fisher's discussion. It must be affiliated with formal constitutional authority, but its scope would spontaneously expand if there were no sensible constraints on the use of unenumerated powers. Political actors take advantage of the fuzziness of unenumerated powers as a means of expanding their power. In democratic systems, the judicial branch is usually called upon to resolve boundary issues. As such, populist politicians often seek to control the court immediately after taking office, which in order to temper this threat, and ultimately this action contributes to the re-emergence of executive primacy.

Cite as: Cheng-Yi Huang, *Unenumerated Power and the Rise of Executive Primacy*, 28 WASH. INT'L L.J. 395 (2019).

I. INTRODUCTION: AUXILIARY PRECAUTION AGAINST THE EXECUTIVE POWER?

There are two conceptions of executive power: first, executive power should be confined, and second, executive power should flourish.¹ The first is built on the fear of power being concentrated in the hands of the executive

* Associate Research Professor, Academia Sinica, Taiwan. I would like to thank Professors Yasuo Hasebe, Keigo Komamura, Toru Mori, Masahiro Sogabe, George Shishido, Mayu Terada, and Sota Kimura for their careful explanation and comments on Prime Minister Abe's initiatives for constitutional amendments in Japan. Justices Stanisław Biernat, Andrzej Wróbel, and Marek Zubik of the Polish Constitutional Tribunal offered insightful information during my field trip to Poland in 2016. Professors Lech Garlicki and Mirosław Wyrzykowski provided extremely helpful guidance. Adam Oleksy, Tzung-yuan Lee, Fang-yu Liu, and Junkai Chang have contributed invaluable to this article as research assistants. This paper was presented in the workshop on the Resurgence of Executive Primacy in the Age of Populism at Academia Sinica, June 2018. I thank all the participants' comments and questions. All errors remain my own. Contact: chengyi@sinica.edu.tw

¹ Margit Cohn, *Tension and Legality: Towards a Theory of the Executive Branch*, 29 CAN. J.L. & JURIS. 321, 321 (2016).

branch, while the second avoids fragmenting executive power.² Both approaches are aimed towards promoting the public welfare, but the way in which the executive may achieve this goal differs greatly from one to the other. In recent years, there has been growing concern about the expansion of executive power in countries across the globe and worries about populist politicians maliciously maximizing the power of the executive to advance personal political interests and, consequently, paralyze democratic institutions. In a democratic polity, debate over the proper role of executive power is doomed to be circuitous. On the one hand, voters usually expect political candidates to render electoral promises after stepping into office, which signifies a potent and capable executive power. On the other, the party who lost the election strives to confine the executive power as much as they can, since most of the ruling party's policies go against their agenda and interests. Therefore, the use and control of executive power is a tug of war where one side seeks to maximize its functionality and the other side endeavors to minimize it.

However, the tension between maximalism and minimalism cannot be reduced to merely a conflict between the abuse of power and the rule of law. In fact, there is no doctrine in constitutional law or administrative law preventing leaders and governments from doing their job. For example, Article 2, Section 3 of the U.S. Constitution provides the president the duty and power to "take care that the laws be faithfully executed."³ In a parliamentary system like Japan, its Constitution also bestows powers on the Prime Minister to "submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches."⁴ Apparently, presidents and prime ministers enjoy constitutional powers to carry out law and policies. The rule of law does not require that everything the executive has done should have been expressly mentioned in law or delegated by the legislative branch.⁵ The traditional

² The representative work of the second school is ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010). The first school is well represented in BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

³ U.S. CONST. art. 2, § 3.

⁴ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 72 (Japan).

⁵ This is best illustrated by the decision of the Supreme Court of the United States in *Chevron v. NRDC*, 467 U.S. 837 (1984). Justice Stevens wrote for the court, "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be

doctrine of *ultra vires* essentially demands the government rule with legitimacy and, therefore, combines the elements of legitimacy with legality.⁶ In everyday administration, discretion and deliberation are common features of modern government, which requires dialogic interaction among different constitutional branches.⁷ Checks and balances, therefore, mean that democracy should be guarded with the spirit of vigilance rather than the specter of abhorrence. In *Federalist Paper* No. 51, James Madison wrote:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught man-kind the necessity of auxiliary precautions.⁸

Therefore, to attribute the rise of “executive tyranny” or “imperial presidency” to the maximalist conception of executive power is a misunderstanding, which confuses democratic foundation of modern government with rule-bound government.⁹

necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.” *Id.* at 842–43. Meanwhile, Adrian Vermeule, an administrative law professor at Harvard, also noted, “The internal legal argument is that the power to fill in the details is an indispensable element of what ‘executive’ power means; that to execute a law inevitably entails giving it additional specification, in the course of applying it to real problems and cases. General legislative lawmaking can never go all the way down, as it were, to the actual facts of particular cases.” See ADRIAN VERMEULE, *LAW’S ABNEGATION* 53 (2016).

⁶ According to Trevor R. S. Allan, although A.V. Dicey’s formulation of *ultra vires* doctrine seems to create a tension between legislative supremacy and the rule of law, Dicey also claimed that “Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges.” T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 13–14 (2001). Therefore, *ultra vires* actually combines both “legitimacy” (parliamentary sovereignty) and legality (the rule of law or the internal morality of law). See *id.* at 201. In the same vein, Sir John Laws once noted, “the rule of law is a necessary condition for the exercise of democratic power since, without it, democracy’s own dictates, which must include the decision-maker’s loyalty to the statute which is the democratic source of his authority, are sand not stone.” See Sir John Law, *Wednesbury*, in *THE GOLDEN METWAND AND THE CROOKED CORD* 183, 195 (Christopher Forsyth & Ivan Hare eds., 1998).

⁷ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS*, 191 (William Rehg trans., MIT Press 1992).

⁸ *THE FEDERALIST* NO. 51, at 269 (James Madison), (George W. Carey & James McClellan eds., 2012).

⁹ Eric Posner and Adrian Vermeule use the emergency power to illustrate a marginalist conception of executive power. According to them, there is no point of Pareto efficiency on the curve of the security-liberty tradeoff. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

Nevertheless, some scholars argue that presidents' direct control of bureaucracy undermines the stability of constitutional democracy.¹⁰ Some indicate that the majority party's court-packing strategy paves the way for "dismantling constitutional checks on arbitrary power."¹¹ Some have even coined a new term, "constitutional hardball," as the cause of constitutional rot, which describes the tactic of politicians stretching or defying conventional political practices or unspoken rules of politics in order to derogate the health of the constitutional system.¹² Under this framework, the executive again becomes the focus of discussions regarding constitutional dysfunction. However, this time it is not related to institutional choice like parliamentary or presidential systems during the third wave democratization almost thirty years ago.¹³ At that time, prominent political scientists like Juan Linz claimed that presidentialism is prone to corruption and unstable politics.¹⁴ However, more and more studies have shown that the difference between parliamentarism and presidentialism is not a key factor in the collapse of democracy.¹⁵ Parliamentary systems like that of Poland or Hungary have also fallen prey to authoritarian resurgence.¹⁶

¹⁰ Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. Rev. 78, 148 (2018). This follows the almost thirty-years debates over unitary executive power in the United States. See e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313 (2010).

¹¹ Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* (Sydney Law School, Research Paper No. 17, 2018), <http://ssrn.com/abstract=3103491>.

¹² Mark Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523, 523 (2004). See also Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 101, 106–10 (Graber, Levinson & Mark Tushnet eds., 2018) (Balkin argues, "[b]y playing too much hardball, enhancing political polarization, demonizing their opposition, and attempting to crush those who stand in their way, political actors risk increasing and widening cycles of retribution from their opponents. This may lead to deadlock and a political system that is increasingly unable to govern effectively . . . [and] undermining or destroying norms of political fair play and using hardball tactics to preempt political competition may produce a gradual descent into authoritarian or autocratic politics.").

¹³ JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 143 (1996). See also Bruce Ackerman, *The New Separation of Powers*, 103 HARV. L. REV. 633, 638 (2000).

¹⁴ Tom Ginsburg, Jose Antonio Cheibub & Zachary Elkins, *Beyond Presidentialism and Parliamentarism*, 44 BRITISH J. POL. SCI. 515, 518 (2013).

¹⁵ See Maciej Bernatt & Michał Ziółkowski, *Statutory Anti-Constitutionalism*, 28 WASH. INT'L L.J. 487 (2019); Gábor Attila Tóth, *Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive*, 28 WASH. INT'L L.J. 317 (2019).

¹⁶ See Gabor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 243–256 (Mark A. Graber et al. eds., 2018); Wojciech Sadurski, *Constitutional Crisis in Poland*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra*.

This article argues that contemporary syndromes of constitutional dysfunction do not solely stem from the failures of the controlling executive power. Rather, the tendency of chief executives' appropriation of power is largely due to the fact that the institutional logic of executive power makes them do so. To govern, the chief executive needs to run the government with power, either political or constitutional. These powers are not always enumerated in the constitution but would still be regarded as constitutional. Justice Frankfurter first articulated the existence of unenumerated executive powers in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, arguing: "[T]he powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government."¹⁷ Meanwhile, when Justice Jackson famously penned the "twilight zone" doctrine in *Youngstown*, he also admitted that, "I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications, instead of the rigidity dictated by a doctrinaire textualism."¹⁸ This paper argues that the idea of taming unenumerated executive powers by definite constitutional language and text is mostly futile. Idolatry of separation of powers cannot solve the problems surrounding contemporary syndromes of constitutional dysfunction. Many of the unenumerated powers are essential to the maintenance of the day-to-day operation of government. However, unenumerated powers also create a "grey hole" in the political-legal sphere.¹⁹ In a nutshell, it helps the executive, but it also blurs the line of the executive power.²⁰ Its endless and gradual expansion is the real problem of contemporary constitutional crisis.

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952). However, Justice Frankfurter adopted an approach of judicial minimalism to deal with the unenumerated executive powers. According to his opinion, "The issue before us can be met, and therefore should be, without attempting to define the President's powers comprehensively. I shall not attempt to delineate what belongs to him by virtue of his office beyond the power even of Congress to contract; what authority belongs to him until Congress acts; what kind of problems may be dealt with either by the Congress or by the President, or by both, what power must be exercised by the Congress and cannot be delegated to the President. It is as unprofitable to lump together in an indiscriminating hodgepodge past presidential actions claimed to be derived from occupancy of the office as it is to conjure up hypothetical future cases." *Id.* at 597 (citation omitted).

¹⁸ *Id.* at 640.

¹⁹ DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006).

²⁰ The grey hole created by the unenumerated power is a "necessary evil" for the executive power. On the one hand, the constitution cannot provide a full list of executive powers and the executive has to "take care" the execution of law. On the other hand, the facts that the executive power cannot be enumerated would lead to abuse of powers by the executive in the name of opacity or expediency.

Drawing from recent cases of constitutional controversies in Japan, Taiwan, and Poland, this article suggests that unenumerated powers which cannot be checked by constitutional mechanisms are the cause of the expansion of executive primacy in constitutional democracies. By “executive primacy,” I mean the leading and dominant role of the executive branch, especially the chief executives, either presidents or prime ministers, to control the political agenda on policy issues or constitutional interpretation. Chief executives gain more power by exercising their unenumerated powers without any constitutional breakdown or coup d’état. The expansion of executive primacy does not necessarily mean there is a constitutional crisis, but the non-reviewability of unenumerated powers will gradually cause the power structure to become unbalanced in a constitutional system. This article does not intend to repeat the age-old debate surrounding separation of powers like the differences between formal and functional models, but will focus on how the unenumerated powers micromanage the political system and lead to constitutional imbalance.

The unenumerated powers discussed in this article are subordinate to, or affiliated with, constitutional authority of the chief executive, which is derived from the everyday practice of power.

Due to the frequent indeterminacy appearing in the decision-making process of the executive power, chief executives may act preemptively to interpret the constitution and statutes, to control and discipline the bureaucracy with non-statutory power, to call intra-branch meetings, to employ “shadow warriors,” or even to rule with *alibi* (whether this puppets-controlling could be regarded as the exercise of executive power is another question). In some cases, unenumerated powers are coupled with party machinery. The power of party leadership, combined with constitutional authority of chief executives, makes the power system lean even more towards executive primacy and expands the scope of unenumerated powers.

The following section begins with the Japanese Prime Minister’s control of the Cabinet Legislative Bureau to advance his interpretation of Article 9. Additionally, it also discusses the existence and function of “shadow warriors” employed by Prime Ministers in Japan to facilitate major policies. It then moves to Taiwan to analyze the Taiwanese President’s institutional pendulum between powerlessness and all-powerfulness after the 1997 constitutional amendments. To render their policies, the presidents in Taiwan have to call intra-branch meetings and to assume the position of party

chairpersons. These powers are not constitutionally defined and sometimes are criticized as unconstitutional. However, it is a rational response to institutional plights in Taiwan's constitutional system. The Polish case provides a very different story. Since the return of the Law and Justice party (Prawo i Sprawiedliwość, hereinafter, PiS), its chairperson Jarosław Kaczyński has not assumed any position in the government but functions as the "Godfather" behind the scenes. Presidents or Prime Ministers have to follow his political decisions. His power is extra-constitutional and cannot be counteracted through any constitutional mechanism. The party chairperson controls the President and Prime Ministers as puppets in his hands. The informal chain of control by the party leader represents the murkiest zone of unenumerated powers. The chief executive may share the unenumerated powers with party leaders like Kaczyński. The outcome appears to be that the chairperson is the real political leader with the aid of unenumerated powers stemming from the chief executive. The unenumerated powers in Poland may be illustrated by the act of *falandization*, or twisted interpretation, by the presidents in Poland. Both syndromes of puppet-masters and twisted interpretation, are critical to the Polish constitutional crisis after 2016.

Following the case studies, this article analyzes the nature and problems of unenumerated powers of the executive. Building on the taxonomy proposed by Louis Fisher, the article argues that enumerated powers are analogous to the "implied powers" in Fisher's discussion.²¹ It must be affiliated with formal constitutional authority, but its scope would spontaneously expand if there were no sensible constraints on the use of unenumerated powers. The problem is similar to that of "concept creep" in behavioural science, which is a term used to describe a situation when the scope of a concept is fuzzy and the boundaries have become blurred. Political actors take advantage of the fuzziness of unenumerated powers as a means of expanding their power. In democratic systems, the judicial branch is usually called upon to resolve boundary issues. As such, populist politicians often seek to control the court immediately after taking office, which in order to temper this threat, and ultimately this action contributes to the re-emergence of executive primacy.

II. WAR POWER, BUREAUCRACY AND SHADOW WARRIORS: CONSTITUTIONAL BATTLES IN JAPAN

In the past six years, Japan has been entangled in fierce constitutional battles over war power. Since Shinzo Abe assumed the position of Prime

²¹ LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 70 (2014).

Minister in 2012, the amendment of Article 9 of the 1947 Constitution has become an urgent issue for the Liberal Democratic Party (“LDP”).²² As one of the most significant constitutional provisions in the post-war Japanese Constitution, Article 9, paragraph 1 requires Japan “renounce war as a sovereign right of the nation and the threat or use of forces as means of settling international disputes.”²³ The Renouncement Clause has been a fixture of Japan’s pacifist constitutionalism for seventy years. However, since the Treaty of Mutual Cooperation and Security between the United States and Japan of 1960, the interpretation of Article 9 has been surrounded by controversy.²⁴ The existence of Self-Defense Force and the U.S. military bases in Japan are remnants of the Cold War era.²⁵ Therefore, the question remains of how to reconcile the Renouncement Clause with the practical need for national defense, as well as collaboration with the United States. Using a tactic similar to “court-packing,” the Abe administration took the chance to reshuffle the personnel of the Legislation Bureau. The Bureau is the entity responsible for interpreting Article 9 for the government, which is then binding on the government’s policy. Therefore, if the Bureau’s interpretation is realigned with Abe’s policy, the government may advance its own agenda of constitutional revision. The progress on constitutional revision has made Prime Minister Abe the most powerful leader after WWII and helped his party to win elections since 2012. The following sections first examine how he made progress on the issue of Article 9 and later discuss his way to control bureaucracy in Japan.

²² KIMURA SŌTA (木村草太), JIEI TAI KENPŌ—KORE KARA NO KAIKEN RONGI NO TAME NI (自衛隊と憲法-これからの改憲論議のために) [SELF-DEFENSE FORCES AND THE CONSTITUTION—FOR THE FORTHCOMING CONTROVERSY] 54 (2018).

²³ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9, para. 1 (Japan).

²⁴ Nishimura Yūichi (西村裕一), *Kenpō Kaikaku, Kenpō Hensen, Kaishaku Kaiken—Nippon Kenpō Gakusetsushi no Kantan kara* (憲法改革・憲法変遷・解釈改憲—日本憲法学説史の観点から) [Constitutional Reform, Constitutional Transition, Interpretation and Revision—From the Viewpoint of the History of Japanese Constitutional Theory], in ‘KENPŌ KAISEI’ NO HIKAKU SEIJIGAKU (「憲法改正」の比較政治学) [COMPARATIVE POLITICS OF CONSTITUTIONAL REFORM] 441, 456 (Komamura Keigo (駒村圭吾) & Machidori Satoshi (待鳥聡史) eds., 2016).

²⁵ The United States-Japan military cooperation was formed to deter the expansion of communism during the cold war. Therefore, even though Article 9 of the Japanese Constitution requires Japan to relinquish war power, the self-defense force was set up to protect Japan as well as to collaborate with the U.S. troops. See YOSHIMOTO SADA AKI (吉本真昭), SHIRAREZARU NIPPON-KOKU KENPŌ NO SHŌTAIKENPŌ NO SHŌTAI (知られざる日本国憲法の正体) [THE TRUE CHARACTER OF THE UNKNOWN JAPANESE CONSTITUTION] 343–69 (2014).

A. *Constitutional Maneuvering Through Interpretation: The Tale of the Legislation Bureau*

Since the 1950s, the Legislation Bureau of the Cabinet has issued a series of interpretations setting up a time-honored distinction between “force” and “self-defense.”²⁶ To the legal experts in the Legislation Bureau, the existence of Japan’s Self-Defense Force is not in violation of the Constitution because Article 13 of the 1947 Constitution also requires the government to maintain the Self-Defense Force to secure happiness, or welfare, of the Japanese people.²⁷ Therefore, to the extent the welfare and happiness of the Japanese are at stake, the Self-Defense Force is necessary for carrying out this constitutional mandate. However, Article 9, paragraph 2 provides, “[i]n order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained.”²⁸ According to the Legislation Bureau’s interpretations, paragraph 2 refers to “military force,” which does not include the Self-Defense Force. Therefore, the Self-Defense Force is within the scope of constitutionally permissible “force.”

Based on this interpretation, Japanese constitutional scholars have identified two categories of self-defense: the first is “individual self-defense right” (permissible); while the latter is “collective self-defense right” (impermissible).²⁹ Individual self-defense is permissible because it is claimed by the Japanese people as a right to pursue happiness, as well as a right to protect Japan from foreign attacks. However, if Japan participated in the alliance force to attack other countries, then it would go beyond constitutional delegation of self-protection and be involved with war power, which is

²⁶ NAKAMURA AKIRA (中村明), *SENGO SEIJI NI YURETA KENPŌ KYŪ JŌ—NAIKAKU HŌSEI KYOKU NO JISHIN TO TSUYOSA* (戦後政治にゆれた憲法九条—内閣法制局の自信と強さ) [POSTWAR POLITICS OF THE CONSTITUTION’S ARTICLE 9—CONFIDENCE AND STRENGTH OF THE CABINET LEGISLATION BUREAU] 9 (2d ed. 2001).

²⁷ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13 (Japan) (“All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”).

²⁸ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9, para. 2 (Japan).

²⁹ HASEBE YASUO (長谷部恭男), *Anpo Kanren Hōsei o Aratamete Ronzuru* (安保関連法制を改めて論ずる) [Another Discussion on Security-Related Legislation], in ANPO HŌSEI KARA KANGAERU KENPŌ TO RIKKEN SHUGI. MINSHU SHUGI (安保法制から考える憲法と立憲主義・民主主義) [THE CONSTITUTION, CONSTITUTIONALISM, AND DEMOCRACY FROM THE VIEW OF SECURITY LAW] 91, 93 (Hasebe Yasuo ed., 2016).

prohibited by Article 9.³⁰ Although the line between “individual” and “collective” is sometimes hard to draw, the Legislation Bureau has concluded three principles of “individual self-defense” since 1972: (1) there is an emergent and illegitimate attack on Japan; (2) there are no other suitable means to expel the attack and the forces used shall follow the least and necessary principle; and (3) it is not permissible to join any alliance to prevent the attacks from other countries.³¹

Against this backdrop, in July 2014, Prime Minister Abe abruptly changed the definition of “individual self-defense force” by passing a new resolution in the Cabinet.³² It was a rare case of cabinet politics in Japan, since the Prime Minister usually defers to the interpretation of the Legislation Bureau. However, there is no statutory prohibition on the Prime Minister’s power to reinterpret constitutional provisions. The three new principles include: (1) the attacks are targeted on Japan or on countries geographically adjacent to Japan, the attacks threaten the existence of Japan, or the attacks create immediate danger to destroy the foundation for citizens’ pursuit of life, liberty and happiness; (2) there are no other suitable means to expel the attacks, to secure Japan as an independent nation, and to protect the citizens; and (3) the force used shall follow the least and necessary principle.³³ In this new formula, principle one expressly deviated from the longstanding interpretation held by the Legislation Bureau, which prohibits “collective self-defense.” The new interpretation allows Japan to use force when neighboring countries are under attack by foreign enemy that is regarded as a threat to Japan.³⁴

After the change of interpretation, the cabinet proposed a new legislation, the Peace and Security Act of 2015 (“PSA”), to allow the Self-Defense Force to participate in military cooperation with allied forces or U.N. troops, though their participation is limited to providing logistic support

³⁰ KIMURA SŌTA (木村草太), *SHŪDAN-TEKI JIEI-KEN WA NAZE IKEN NA NO KA* (集団的自衛権はなぜ違憲なのか) [WHY IS THE RIGHT OF COLLECTIVE SELF-DEFENSE UNCONSTITUTIONAL?] 17–18 (2018).

³¹ HASEBE YASUO (長谷部恭男), *Anpo Hōsei kara Kangaeru SaikōSai to Naikaku Hōsei Kyoku no Yakuwari* (「安保法制」から考える最高裁と内閣法制局の役割) [THE ROLE OF THE SUPREME COURT AND CABINET LEGISLATIVE BUREAU FROM THE VIEW OF “SECURITY LAW”], in *ANPO HŌSEI KARA KANGAERU KENPŌ TO RIKKEN SHUGI. MINSHU SHUGI*, *supra*, at 53, 59–61.

³² Martin Fackler & David E. Sanger, *Japan Announces a Military Shift to Thwart China*, N.Y. TIMES (July 1, 2014), <https://www.nytimes.com/2014/07/02/world/asia/japan-moves-to-permit-greater-use-of-its-military.html>.

³³ SADURSKI, *supra* note 11, at 61.

³⁴ KIMURA, *supra* note 22, at 106.

only.³⁵ Several constitutional scholars had criticized the bill as unconstitutional, since it would make collective self-defense an available option for the government.³⁶ Nevertheless, the legislation was passed by the National Diet in September 2015. The legislative process of PSA also engendered the largest public protest against the government since the 1960s.

The most controversial move by the Abe administration is the change in the interpretation of “self-defense.” In fact, when Mr. Abe first became Prime Minister in 2006, he demanded the Legislation Bureau to change its interpretation but it was rejected by then Director-General of the Legislation Bureau, Reiichi Miyazaki.³⁷ When Mr. Abe won the election in 2012, he strategically promoted the Director-General of the Legislation Bureau, Tsuneyuki Yamamoto, who opposed the change, to the bench of the Supreme Court.³⁸ In doing so, Yamamoto cannot prevent Prime Minister Abe from reinterpreting Article 9, since the Supreme Court is a collegial body and is passive in interpreting this clause. Later on, Prime Minister Abe appointed the Ambassador to France, Ichiro Komatsu, as the new Director-General. Under the new leadership of Mr. Komatsu, the Bureau has drafted new interpretations about the Self-Defense Force, and the Cabinet later approved it.³⁹ Former Director-Generals, including Masahiro Sakata and Judge Yamamoto, have spoken out on the media opposing the Abe administration’s

³⁵ The Peace and Security Act of 2015 mainly authorizes the government to use forces in the following cases: (1) to protect the life and safety of oversea Japanese; (2) to defend alliance force stationed in Japan so as to avoid national emergency and to take legitimate defense; (3) to protect life and safety in the operation of peacekeeping with the United Nation; (4) when the surrounding area of Japan is under attack. See KIMURA, *supra* note 22, at 108–14.

³⁶ Takahashi Kazuyuki (高橋和之), *Rikken Shugi ha Seifu ni Yoru Kenpō Kaishaku Henkō o Kinshi suru* (立憲主義は政府による憲法解釈変更を禁止する) [*Constitutionalism Prohibits the Government from Changing Constitutional Interpretation*], in SHŪDAN-TEKI JIEI-KEN NO NAN GA MONDAI KA—KAISHAKU KAIKEN HIHAN (集団的自衛権の何が問題か—解釈改憲批判) [WHAT IS THE PROBLEM WITH COLLECTIVE SELF-DEFENSE?] 183, 195–96 (Okudaira Yasuhiro (奥平康弘) & Yamaguchi Jirō (山口二郎) eds., 2014); HASEBE, *supra* note 29, at 98; KIMURA, *supra* note 29, at 18.

³⁷ Matsutani Sōichirō (松谷創一郎), *Wasureppoi Nipponnin no Tame no “Anpo Hōsei ni Itaru Michi” —Abe Shinzō Shushō no Mitsuru no Senryaku* (忘れっぽい日本人のための“安保法制に至る道” —安倍晋三首相の3つの戦略) [“THE ROAD TO SECURITY LAW” FOR FORGETFUL JAPANESE: THE THREE STRATEGIES OF PRIME MINISTER SHINZO ABE], YAHOO! JAPAN NEWS (Sept. 15, 2015), <https://news.yahoo.co.jp/byline/sochiromatsutani/20150915-00049546/>.

³⁸ Jeremy A. Yellen, *Shinzo Abe’s Constitutional Ambitions*, THE DIPLOMAT (June 12, 2014), <https://thediplomat.com/2014/06/shinzo-abes-constitutional-ambitions/>.

³⁹ See KIMURA, *supra* note 30, at 71–73; *Shushō, Kenpō Kaishaku Henkō ‘Kihon wa Kakugi Kettei’ Shūdanteki Jieiken Meguri* (首相、憲法解釈変更「基本は閣議決定」集団的自衛権巡り) [THE PRIME MINISTER CHANGES CONSTITUTIONAL INTERPRETATION: “BASIC CHANGES ARE CABINET DECISIONS” FOR COLLECTIVE SELF-DEFENSE PATROLS], NIPPON KEIZAI SHINBUN (日本経済新聞) (Feb. 20, 2014), https://www.nikkei.com/article/DGXNASFS2000F_Q4A220C1EB1000/.

change of the long-term interpretation.⁴⁰ The successor of Ambassador Komatsu, Mr. Yuusuke Yokobatake, continues to uphold the constitutionality of collective self-defense right.⁴¹

Prime Minister Abe's control of the Legislation Bureau is quite a showdown between bureaucrats and politicians. It has been a proud tradition of Japan that their bureaucrats come from elite colleges and mostly serve for life, climbing up the ladder all the way to the top.⁴² Therefore, bureaucracy acts as a check on the power of the cabinet. The politicians come and go but the bureaucrats stay for life. The most famous example is the former Ministry of International Trade and Industry (MITI, now Ministry of Economic, Trade and Industry), which has been praised as the architect for Japan's economic miracle and developmental state.⁴³

However, Prime Minister Abe's constitutional reinterpretation of Article 9 has proven that the bureaucrats, even prestigious ones like the Legislation Bureau who enjoys a reputation of expertise, are no longer free from political control. In the past, the General-Director was chosen from the line of Vice General-Directors.⁴⁴ However, Prime Minister Abe intentionally appointed an ambassador to the position to meddle in the bureaucratic culture. Through this display of muscle, Prime Minister Abe is attempting to show bureaucrats who the boss is now.⁴⁵

⁴⁰ See Kyodo, *Two Former Heads of Legislation Bureau Blast Security Bills*, JAPAN TIMES (June 22, 2015), <https://www.japantimes.co.jp/news/2015/06/22/national/politics-diplomacy/two-former-heads-legislation-bureau-blast-security-bills/#.XDMfXVUzaUk>.

⁴¹ See *Cabinet Legislation Bureau Chief Defends Self over Process of Reinterpreting Article 9*, MAINICHI (Mar. 17, 2016), <https://mainichi.jp/english/articles/20160317/p2a/00m/0na/014000c>.

⁴² CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* 21–22, 198–241 (1982).

⁴³ B.C. KOH, *JAPAN'S ADMINISTRATIVE ELITE* 252–58 (1989); TSUJI KIYOAKI (辻清明), *SHINPAN NIHON KANRYOSEI NO KENKYU* (新版 日本官僚制の研究) [A NEW STUDY OF JAPANESE BUREAUCRACY] (1969); MURAMATSU MICHIO (村松岐夫), *SENGO NIHON NO KANRYOSEI* (戦後日本の官僚制) [POSTWAR JAPANESE BUREAUCRACY] (1981).

⁴⁴ SAKATA MASAHIRO (阪田雅裕), 'HŌ NO BANNIN' NAIKAKU HŌSEI KYOKU NO KYŌJI (「法の番人」内閣法制局の矜持) [“THE GUARD OF THE LAW”: THE CABINET LEGISLATION BUREAU'S RESERVATION] (2014).

⁴⁵ 'Hō no Bannin' ni mo Abe Iro Hōsei Kyoku Chōkan ni Komatsu-shi (「法の番人」にも安倍色法制局長官に小松氏) [Mr. Komatsu is the Same Color as Abe in “The Guard of the Law”], *NIHON KEIZAI SHINBUN* (日本経済新聞) (Aug. 3, 2013), https://www.nikkei.com/article/DGXNASFS02047_S3A800C1EA2000/. Shimizu Masato (清水真人), *Tōchi kikō no henkaku ka hakai ka, Hōsei kyoku jinji no shinsō* (統治機構の変革か破壊か、法制局人事の深層) [Reform or Destruction of the Governance System, Deep in the Legislative Personnel Department], *NIHON KEIZAI SHINBUN* (日本経済新聞) (Sept. 3, 2013), https://www.nikkei.com/article/DGXNASFK0201Z_S3A900C1000000/.

B. *Empire-Building Through Personnel Power*

In 2014, the Abe administration created a new office in the cabinet secretariat, the Cabinet Bureau of Personnel Affairs (内閣人事局, *Naikakujiinjikyoku*).⁴⁶ The Bureau is designed to provide a list of appointees for mid-level officials in the government, ranging from the Assistant Secretary (審議官, *shingikan*) or Administrative Vice-Minister (事務次官, *jimujikan*) to the Director (部長, *buchō*). The establishment of the Bureau represents an attempt by the Prime Minister to place the bureaucrats under his or her control. For instance, the involvement of the politically appointed State Minister (副大臣, *fukudaijin*) in the policymaking process on each level establishes a second channel to monitor and to oversee the process of administration.⁴⁷

Personnel power is key to Prime Minister Abe's constitutional battle plan, as well as economic reform.⁴⁸ By replacing the high-to-mid level officials, the Prime Minister has realigned the bureaucratic order with his own political will. After reshuffling the bureaucracy, governmental officials are less likely to function as safeguards against the personal interests of political actors. The potential for promotion, as one of the critical motives for career bureaucrats, would make the mid-level officials more vulnerable to Prime Minister Abe's expressed or implicit directives. In fact, this is the culmination of political reform after the breakdown of the bubble economy in the 1990s.⁴⁹ During the economic downturn in the mid-1990s, political scandals about bureaucrats were rampant and bureaucrats lost support and respect from the general public.⁵⁰ In the wake of economic failure, the Hashimoto administration (1996-1998) proposed administrative reform to reshape the

⁴⁶ Reiji Yoshida, *Abe Moves to Boost Control of Bureaucrats*, JAPAN TIMES (May 27, 2014), <https://www.japantimes.co.jp/news/2014/05/27/national/politics-diplomacy/abe-inaugurate-new-office-exert-control-bureaucrats/>.

⁴⁷ See Mayu Terada, *The Changing Nature of Bureaucracy and Governing Structure in Japan*, 28 WASH. INT'L L.J. 431 (2019).

⁴⁸ KARUBE KANSUKE (軽部謙介), *KANRYŌ-TACHI NO ABENOMIC: IGYŌ NO KEIZAI SEISAKU WA IKANI TSUKURARETA KA* (官僚たちのアベノミクス—異形の経済政策はいかに作られたか) [BUREAUCRACY'S ABENOMICS: HOW THIS UNUSUAL POLICY WAS MADE] (2018).

⁴⁹ HARUKATA TAKENAKA (竹中治堅), *SHUSHŌ SHIHAI—NIPPON SEIJI NO HENBŌ* (首相支配—日本政治の変貌) [CONTROL OF THE PRIME MINISTER—TRANSFORMATION OF JAPANESE POLITICS] (2006).

⁵⁰ See Mary Jordan & Kevin Sullivan, *Japanese Minister Resigns over Bribery*, WASH. POST (Jan. 28, 1998), <https://www.washingtonpost.com/archive/politics/1998/01/28/japanese-minister-resigns-over-bribery-scandal/420f3a7c-17b3-4d5d-a1d6-3d7c9f7cef2e/>. See also Mary Jordan, *Japan Cracks Down on Bribery as Financial Scandal Broadens*, WASH. POST (Jan. 30, 1998), <https://www.washingtonpost.com/archive/politics/1998/01/30/japan-cracks-down-on-bribery-as-financial-scandal-broadens/a9a137e1-eb3c-4c3f-baf6-481186a4aacb/>.

government. When the popular Prime Minister Junichiro Koizumi (2001-2006), who had turned the Liberal Democratic Party (“LDP”) inside-out, took office, he expedited the advancement of governmental reform. In his most ambitious political battle, he successfully privatized the postal service in Japan and shook complacent bureaucrats.⁵¹

The governmental reform initiated by Hashimoto had two prongs: first, in order to enhance the cabinet’s ability to initiate policy, the Prime Minister was given more power to coordinate and direct the policy process; second, as a means of improving the quality of policy-making, the Cabinet Secretariat created more advisory groups under the Prime Minister.⁵² The latter significantly expanded the role of special advisors to the Prime Minister; these offices are now considered key players within the cabinet. For example, during Prime Minister Abe’s second and third terms, one of his five special advisors, Hirodo Izumi, was described as his “shadow warrior.”⁵³ Indeed, a recent scandal involving the opening of a veterinary school in a special location has generated rumors that Mr. Izumi might have received bribery on behalf of the Prime Minister or his family member.⁵⁴

Controlling personnel power, penetrating the policy process, and assigning special advisors as shadow warriors: all of these “reforms” are unrelated to the macro function of constitutional structure, but are necessary for facilitating “governmental reforms” in Japan. These changes do not require any constitutional revision or amendment but still reshapes Japan’s bureaucracy-political relationship. They have made the Prime Minister more powerful than ever through these unenumerated and facilitative powers, which discipline the bureaucracy and cast tacit influence upon the policymaking process.

⁵¹ *The Man Who Remade Japan*, ECONOMIST (Sept. 14, 2006), <https://www.economist.com/asia/2006/09/14/the-man-who-remade-japan>. See also Anthony Faiola, *Japan Approves Postal Privatization*, WASH. POST (Oct. 15, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/14/AR2005101402163.html>.

⁵² TAKENAKA, *supra* note 49, 58–59.

⁵³ In the news report, Mr. Izumi claimed that his job is to express the will of the Prime Minister, when the Prime Minister cannot express himself publicly. ‘*Sōri wa Ienai kara Watakushi ga’ to Shushōhosakan ga... Zenjikan Shōgen* (「総理は言えないから私が」と首相補佐官が... 前次官証言) [“Because I cannot say the Prime Minister,” said the First Co-Leader... Testimonial of the Assistant Secretary General], ASAHI SHINBUN (朝日新聞) (May 30, 2017), <https://www.asahi.com/articles/ASK5Y6FFKK5YUTIL04R.html>.

⁵⁴ Reiji Yoshida, *Breaking Down the Kake Gakuen Scandal: Who’s Lying, Abe or His Political Opponents?*, JAPAN TIMES (June 1, 2018), <https://www.japantimes.co.jp/news/2018/06/01/national/politics-diplomacy/breaking-kake-gakuen-scandal-whos-lying-abe-political-opponents/>.

The Prime Minister now occupies the center of politics. On the one hand, he personifies his electoral support and designates himself as the singular representative of the whole nation. On the other hand, he turns the electoral mandate to marshal bureaucracy. It might not be an exaggeration to say that Prime Minister Abe has fulfilled the dream of generations of Japanese politicians.

In the case of constitutional revision, Prime Minister Abe managed to control the personnel of the Legislation Bureau, which allowed him to gain the power to redefine Article 9 through the mouth of the chief officer in the Legislation Bureau. With this new interpretation in place, further constitutional amendment is foreseeable. Though the amendment itself is not such an urgent issue among citizens, Prime Minister Abe and the LDP have harnessed patriotism and nationalism through this ongoing constitutional battle. They have gained popular support by repeating the necessity of constitutional reform in recent parliamentary elections.⁵⁵

To be clear, the personnel power, policy initiative power, and monitoring power are all subordinate and supportive to the Prime Minister's executive power, which is constitutionally ordained. However, these unenumerated executive powers are now the vital wheels for the Prime Minister to build his empire in Japan's politics.

III. COORDINATION GONE WRONG: THE AMBIGUITY OF PRESIDENTIAL POWERS IN TAIWAN

The Constitution of the Republic of China (known as Taiwan) provided a parliamentary system where the Premier was the head of the executive branch.⁵⁶ However, after democratization, the Constitution was amended seven times. During its second and third iterations, in 1992 and 1994, the governmental system was redesigned as a semi-presidential system with direct presidential election nationwide.⁵⁷ In its current form, the Premier is more like a managing director of the team of the executive, while the President is the boss. The institutional logic is that the President won the election and

⁵⁵ LDP, under the leadership of Mr. Abe, has won general elections for the House of Representatives in 2012, 2014, and 2017; it also won the elections of the House of Councilors (Senate) in 2013 and 2016.

⁵⁶ MINGUO XIANFA [CONSTITUTION] art. 53 (1947) (Taiwan) ("the Executive Yuan shall be the highest administrative organ of the State").

⁵⁷ See e.g., ROBERT ELGIE, SEMI-PRESIDENTIALISM: SUB-TYPES AND DEMOCRATIC PERFORMANCE 28–29 (1st ed. 2011).

appointed her Premier to be accountable to the Legislative Yuan, as well as the President. The Premier is accountable to the Legislative Yuan, in that Article 3 of the 1997 Amendment sustained the original constitutional language, “[T]he Executive Yuan shall be responsible to the Legislative Yuan,” even though the responsibilities of the Executive Yuan had been altered greatly.⁵⁸ Therefore, as of 2006, the Constitutional Court reiterated that the Premier is still the chief executive.⁵⁹ However, the same court also stated in another decision in 2007 that, “subject to the scope of his executive powers granted by the Constitution and the Amendment to the Constitution, the President is the highest executive officer and has the duty to preserve national security and national interests.”⁶⁰

The Constitutional Court’s decisions did not make Taiwan’s mixed system of President-Premier semi-presidentialism more rational and stable. Jiunn-rong Yeh, a prominent public law scholar, has argued that “although constitutional revisions resulted in direct presidential elections, the President’s role and relationship with the Premier and the Legislative Yuan remain ambiguous”⁶¹ He pointed out that “[t]he constitutional ambiguity surrounding presidential powers only exacerbates the tension [of partisan politics].”⁶² The tension among different political parties (representing divergent national identities) reversely constricts the scope of presidential power. In Interpretation No. 520, the newly elected President Chen Shu-bian of the longtime opposition party, Democratic Progressive Party (“DPP”), suspended the construction of the No. 4 Nuclear Power Plant by way of the Premier’s cabinet meeting. However, the Court ruled that even though the President, with his new mandate, may propose new policies or revise existing

⁵⁸ MINGUO XIANFA [Constitution] art. 3 (2005) (Taiwan), <https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0000002>.

⁵⁹ Sifa Yuan Dafaguan Jieshi No. 613 (司法院大法官解釋第 613 號解釋) [Judicial Yuan Interpretation No. 613] (July 21, 2006). In this decision, the court responded to the constitutional status of independent agency in Taiwan and reasoned that even though it is important to uphold independency, it is equally important to emphasize the accountability. The Legislative Yuan cannot deprive the participation of the Executive Yuan in appointing members of the National Communication Commission, which is an independent agency.

⁶⁰ Sifa Yuan Dafaguan Jieshi No. 627 (司法院大法官解釋第 627 號解釋) [Judicial Yuan Interpretation No. 627] (June 15, 2007) (rationale located in paragraph 10).

⁶¹ JIUNN-RONG YEH, *THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS* 65 (2016).

⁶² *Id.*

policies, the Executive Branch has to work with the Legislative Yuan to make the decision jointly, which is the essence of the five-power government.⁶³

The construction of No. 4 Nuclear Power Plant has been an entangled political issue in Taiwan for almost four decades. After President Ma Ying-jeou won his reelection in 2012, his premier, Mr. Jiang Yi-hua announced several options to deal with the nuclear power plant, including referendum and immediate termination. However, the Legislative Yuan majority, which also belonged to the same party as President Ma, disagreed with either referendum or immediate termination. President Ma could not control the Legislative Yuan, even though he was also the chairperson of their shared party, Kuomintang (the Chinese National Party, “KMT”). This is the backdrop of the following episode, which was a showdown between the Speaker of the Legislative Yuan and the President, both of whom are members of the KMT.⁶⁴

A. *Presidential Control of the Legislative Branch: Party Discipline and the Prosecutorial Power*

In September 2013, less than a year before the massive protest of the Sunflower Movement, a constitutional dispute arose between the President and the Legislative Yuan’s Speaker. The constitutional controversy stemmed from a report sent from the Attorney General to the President.⁶⁵ On August 31, 2013, the Attorney General, Mr. Shi-ming Huang, found that the Speaker of the Legislative Yuan, Mr. Jing-pyng Wang, had called the Minister of Justice and the chief prosecutor at the High Court to lobby for a criminal case which involved the caucus whip of the opposition party, Mr. Chien-ming Ker, who was also the Speaker’s good friend.⁶⁶ The Attorney General received this information through wiretapping. Upon learning this information, he went

⁶³ Sifa Yuan Dafaguan Jieshi No. 520 (司法院大法官解釋第 520 號解釋) [Judicial Yuan Interpretation No. 520] (Jan. 15, 2001); Hsu Tzong-Li(許宗力), *Yingjie Lifaguo De Daolai ? ! – Ping Shizi Di 520 Hao Jieshi(迎接立法國的到來?! – 評釋字第五二〇號解釋)* [Welcome the Arrival of the Legislative State?! – Commentary on the Fifth and Second Interpretation], in FA YU GUOJIA QUANLI (2) (法與國家權力(二)) [2 LAW AND STATE POWER] 383, 385–86 (2007). In terms of Five-Power Government, see YEH, *supra* note 61, at 52–57.

⁶⁴ See YEH, *supra* note 61, at 67–68, 175–77.

⁶⁵ Lawrence Chung, *Ma Ying-jeou Drops Appeal, Allowing Speaker Wang Jin-pyng to Keep role*, SOUTH CHINA MORNING POST (Oct. 6, 2013), <https://www.scmp.com/news/china/article/1325475/ma-ying-jeou-drops-appeal-allowing-speaker-wang-jin-pyng-keep-role>.

⁶⁶ Faith Hung, *Taiwan's Ma Asks Speaker of Legislature to Step Down* (Sept. 11, 2013), <https://www.reuters.com/article/us-taiwan-politics/taiwans-ma-asks-speaker-of-legislature-to-step-down-idUSBRE98A04320130911>.

directly to the president's office to report the scandal; the President requested that he provide a briefing of the case to the Premier. Meanwhile, President Ma also summoned the Premier to his residence that same night and told him about the case. About one week after the initial report, the Attorney General held a press conference to disclose the case to the whole nation. Two days later, the President held another press conference in his capacity as the KMT chairperson to revoke Speaker Wang's membership within the KMT.⁶⁷ The Speaker would have lost his seat in the parliament if the revocation were valid, since the Speaker was elected through the track of proportional representation, which requires that the Speaker first be a member of the KMT.⁶⁸ Some conspiracy theories suggest that President Ma was upset by the Speaker's prolonged handling of China-Taiwan trade agreement and wanted someone to take over his job. However, because Taiwan has adopted the semi-presidential system, the President has no power to "fire" the Speaker in any way. Therefore, by way of party disciplinary procedure, President Ma found a channel through which he could substantially control the Speaker.

After this unprecedented development, the Speaker immediately filed an injunction in court to safeguard his membership and later sued the KMT. He won the civil case on his party membership based on procedural grounds.⁶⁹ Mr. Chien-ming Ker also sued the Attorney General and President Ma, claiming that they had violated the Communication Security and Surveillance Act ("Wiretapping Act"), which prohibits government officers from disclosing wiretapped information absent a legitimate reason. Mr. Ker claimed that neither the Attorney General nor the President should have released the information at a press conference or passed the unlawful information on to the Premier. He won the case against the Attorney General but lost the case against President Ma in the district court.⁷⁰ After the

⁶⁷ Lawrence Chung, *Taiwan Speaker Wang Jin-pyng Expelled from KMT*, SOUTH CHINA MORNING POST (Sept. 12, 2013), <https://www.scmp.com/news/china/article/1308336/taiwan-speaker-wang-jin-pyng-expelled-kmt>.

⁶⁸ *Id.* at 2.

⁶⁹ Zuigao Fayuan [Sup. Ct.], Civil Ruling, 104 TAI-SHANG NO. 704 (2015) (Taiwan). The High Court holds that the process of dismissal did not satisfy the KMT's internal rule. However, on appeal, the Supreme Court ruled for Mr. Wang in another procedural ground: the KMT did not assigned attorney in time as required by the Civil Procedure Act, so it rejected the appeal. *Id.*

⁷⁰ *Ker Chien-Ming Suing Ma Ying-Jeou, Huang Shih-Ming on Ten Counts*, TAIWAN NEWS (Oct. 3, 2013), <https://www.taiwannews.com.tw/en/news/2314203>.

prosecutor in the case against President Ma appealed, the high court recently ruled in favor of Mr. Ker and sentenced President Ma to four months in jail.⁷¹

To be sure, the macro mechanism of checks and balances in Taiwan is still in effect and, so far, none of the President's actions have been held unconstitutional by the Constitutional Court. The checks-and-balances mechanisms such as the appointment power by the President, passive dissolution, non-confidence vote, or veto power against legislation, have not ceased to function during the Ma administration, but they also have not kicked in to tame the chief executive's power to seize the other branches. Therefore, the problem is not within the macro design of the checks-and-balances mechanism, but in how the President uses his or her power.⁷²

To expand his or her power, the President may use the informal influence over key officers. For example, in 2006, Parliament revised the statute regarding the appointment process of the Attorney General, providing the President with the power to appoint the Attorney General subject to the consent of the Parliament with a fixed term of four years.⁷³ This institutional design aims to secure the independence of the Attorney General, keeping him away from the chain of command under the Executive Yuan. However, the Attorney General in this case apparently regarded the President as his boss and, therefore, reported the scandal between the Speaker and the DPP's whip to the President at the earliest possible chance. Institutionally speaking, the Attorney General should function like an independent agency but, strategically thinking, he would need support from political branches to avoid any backfire.

The Legislative Yuan is a collective institution, which may not provide the steady support that the Attorney General is inclined to seek out. The President is the one who nominates the Attorney General and is in one of the most legitimate positions of power with the authority to distribute political resources to other political offices. Furthermore, the President enjoys the power to appoint the Premier who leads the whole government.⁷⁴ Therefore, it is rational for the Attorney General to turn to the President before jumping

⁷¹ Taiwan Gaodeng Fayuan [High Ct.], Criminal Decision, 106 ZHU-SHANG-YI NO. 2 (2018) (Taiwan).

⁷² Huang Cheng-Yi (黃丞儀), *Zongtong de Zhengzhi Xingwei Bu Neng Shi Xianfa Weisuo Zhi Ling* (總統的政治行為不能使憲法萎縮至零) [*The President's Political Actions Cannot Shrink the Constitution to Zero*], 232 TAIWAN FAXUE ZAZHI (台灣法學雜誌) 1, 1–2 (2013).

⁷³ Fayuan Zuzhifa [Court Organization Act], art. 66 (2006) (Taiwan).

⁷⁴ MINGUO XIANFA [Additional Articles of the Constitution], art. 3 (2005) (China), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002>.

into troubled waters. As a result, the President may then cast influence over the decisions of the Attorney General, since he turns to the President for help. In this case, the relationship between the President and the Attorney General ran completely against the statutory function of the Attorney General as an independent agency. Meanwhile, the Premier was being informed by the President, further turning the parliamentary design, enshrined in the constitution, into a presidential system. The consequence was a President who sat at the government's apex, and this was achieved without having to change a single word in the constitution or its amendments.

The presidents are usually the ones who lead their parties to victory in an election and then, after the election, they continue to chair their parties. Although the constitution does not prohibit the President from concurrently serving as the Chairperson of the ruling party, the overlapped capacities effectuate the President's immense power to control not only the executive, but also the legislative branch. Opponents of the unity of party leadership and presidency often argue that the fusion of presidential power and disciplinary power from the ruling party relinquishes the President from any form of checking mechanism.⁷⁵ However, in a parliamentary system, the prime minister must also serve as the ruling party's leader. He or she is also the chair in the cabinet council. Therefore, the unity of party leadership and the executive power is common in the parliamentary system and would not be attacked as unconstitutional. The argument has also been made that presidents in a mixed system like Taiwan are not accountable to the legislative branch. He or she does not need to appear in the Legislative Yuan to defend the ruling party's policy or legislation, like a prime minister in a parliamentary system. Neither does he or she have to give a speech such as the "State of the Union," which is delivered by the U.S. president. Checks and balances between the president and the legislature do not seem to work in Taiwan's mixed system.

⁷⁶

⁷⁵ Su Yen-Tu (蘇彥圖), *Liangzhong Jilüjian De Zha zheng: Yige Guanyu Taiwan Dangqian Dang/Guo Feji Zhengyi De Xushi Yu Pinglun* (兩種紀律間的戰爭: 一個關於台灣當前黨/國分際爭議的敘事與評論) [*Two Disciplinary Wars: A Narrative and Commentary on Taiwan's Current Party/Country Disputes*], 232 TAIWAN FAXUE ZAZHI (台灣法學雜誌) 14, 17–18 (2013).

⁷⁶ However, the president is still subject to impeachment and presidential election every four years. MINGUO XIANFA [Additional Articles of the Constitution] art. 2, para. 4–5 (2005) (Taiwan) ("The terms of office for both the president and the vice president shall be four years. The president and the vice president may only be re-elected to serve one consecutive term; and the provisions of Article 47 of the Constitution shall not apply." "Should a motion to impeach the president or the vice president initiated by the Legislative Yuan and presented to the grand justices of the Judicial Yuan for adjudication be upheld by the Constitutional Court, the impeached person shall forthwith be relieved of his duties.").

In Interpretation No. 613 and 589, the court reiterated that the exercise of one power could not deprive the other power of its core function. However, in the aforementioned cases, whether the coordinative and decisional power affiliated with the president infringes upon the core function of other powers is not clearly evident, unless it has expressly violated the statutes. In this vein, the presidents actually enjoy unenumerated executive power and keenly exercise it as a control mechanism in Taiwan.

B. *Power to Call Intra-Branches Meetings*

Although the President is elected directly by the people, Taiwan's constitution provides the President with very limited power. As previously mentioned, the 1947 Constitution adopted the parliamentary system. However, the first National Assembly passed Temporary Provisions in 1948 to bestow immense emergency power to the President, rather than to the Premier of the Executive Yuan, who is the head of the executive branch, according to the constitutional text.⁷⁷ In 1960, the Temporary Provisions were further revised to allow President Chiang Kai-shek to be reelected without term limitation. In 1966 and 1972, the National Assembly twice revised the Temporary Provisions to delegate to the President the power to reorganize the government and to create new bureaus within the President's office.⁷⁸ Throughout the period of martial law, presidential power became overwhelmingly dominant and powerful. Some scholars even claim that the constitution's parliamentary system was mostly destroyed during that authoritarian time.⁷⁹

After the lift of martial law in 1987, and the abolishment of Temporary Provisions in 1991, the Constitution went through a series of amendments, among which the adoption of a semi-presidential system in 1997 was the most significant. According to the 1997 Amendment, the President enjoys the power to appoint the Premier of the Executive Yuan without consent from members of the Legislative Yuan, i.e., the parliament.⁸⁰ However, according to the constitution, the Premier is the one who shall be accountable to the parliament. He or she leads the cabinets to propose legislation, to submit

⁷⁷ Dongyuan Kanluan Shiqi Linshi Tiaokuan [Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion] (promulgated by the Nat'l Assemb. Of the Republic of China, Apr. 18, 1949, effective May 10, 1948) art. 1 (1948) (China).

⁷⁸ Cheng-Yi Huang, *Frozen Trials: Political Victims and Their Quest for Justice*, in TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION (Jerome A. Cohen et al. eds., 2018).

⁷⁹ YEH, *supra* note 61, at 34–36.

⁸⁰ MINGUO XIANFA [Additional Articles of the Constitution], art. 3 (2005) (China).

budgets, and to debate major policies in the parliament. The constitutional court also holds that the Premier of the Executive Yuan is the head of administration, not the President.⁸¹

This brings trouble to the President. Once he or she is elected, he or she has no vehicle to carry out his or her campaign promise. The President becomes a powerless person in the government, owing to the original design of parliamentary system. Though the 1997 Amendment claims to adopt a semi-presidential system, it does not provide the President with power to dissolve the parliament at will.⁸² He or she can only dissolve the parliament when the parliament passes a no-confidence vote on the Premier. In practice, there has never been a vote of no-confidence casted by the parliament; this is because parliament do not want to give the President any chance to dissolve the parliament. Hence, the President, if he or she strictly follows the constitution and its amendments, would not be able to participate in policy deliberation or communicate with members of the executive cabinet. Nor can the President remove the Premier after appointment.

Such dilemmas are due to political compromises in the process of democratization, which have not been cured in the past two decades.⁸³ However, since the first presidential election in 1996, each Taiwanese President has strived to consolidate his or her power not only from within, but also beyond the constitutional purview of the presidency. One salient evidentiary component of this is that all of the Presidents, from both the KMT or from the DPP, have engaged in the practice of setting up meetings with the Premier and cabinet members, sometimes even with parliamentary leaders and mayors of his or her own party. During these informal meetings, major policies are discussed and finalized. However, Article 58 of the Constitution provides no such power to the Presidents.⁸⁴ It stipulates that all the bills, budgets, and major policies shall be presented and decided in the Executive Yuan Council, which consists of cabinet members. Meanwhile, the President

⁸¹ Sifa Yuan Dafaguan Jieshi No. 613 (司法院大法官解釋第 613 號解釋) [Judicial Yuan Interpretation No. 613] (July 21, 2006); Sifa Yuan Dafaguan Jieshi No. 645 (司法院大法官解釋第 645 號解釋) [Judicial Yuan Interpretation No. 645] (July 11, 2008).

⁸² YEH, *supra* note 61, at 65.

⁸³ *Id.* at 37–38.

⁸⁴ Xie Jun-Lin (謝君臨), *Ma Ying-Jiu Xiemian Yi “Yuanji Tiaojiequan Kangbian” Xuezhe Dalian* (馬英九洩密案以「院際調解權」抗辯學者打臉) [*Ma Ying-jeou's Leaked Case is Based on the Scholarly Defense of “Inter-agency Mediation Rights”*], ZIYOU SHIBAO (自由時報) (Mar. 31, 2018), <http://news.ltn.com.tw/news/society/breakingnews/2382413>.

is permitted by the Constitution to call a meeting among different Yuans (in this case, the Legislative Yuan and Executive Yuan) only when there is a dispute between two or more Yuans.⁸⁵ Therefore, these meetings convened by the President are extra-constitutional by nature. Moreover, although there is very little mention about the presidential office in the Constitution, the President organizes advisory boards or meetings, which provides comprehensive policy suggestions or agenda items, such as the human rights consultative committee, indigenous historical justice committee, pension reform meeting, and judicial reform council. All these efforts are a direct response to the constitutional impotence of the presidency after the 1997 Amendment.⁸⁶

During President Ma Ying-Jeou's administration (2008-2016), critics argued that his informal meetings with the Premier, the Speaker of the Legislative Yuan, and KMT party leaders in the presidential office were unconstitutional, due to lack of accountability to the parliament during the decision-making process for major policies decided at these meetings. For example, the continual construction of the No. 4 Nuclear Power Plant, the trade service pact with the People's Republic of China (PRC), and the lifting of restrictions on Chinese investment were all presented, negotiated, and concluded during these informal meetings convened by the President, rather than during the Executive Yuan Council meetings.⁸⁷ Since the power to convene these meetings cannot be found in the Constitution, President Tsai Ing-wen, who is also the Chairperson of the DPP, invited the Premier, cabinet members and key legislators to dine at her residence so as to avoid criticism.⁸⁸ President Tsai asserted that she coordinated this event based on her capacity as the Chairperson of the ruling party. This rationale fuses the nature of the

⁸⁵ MINGUO XIANFA [CONSTITUTION] (1947) art. 44 (Taiwan) ("In case of disputes between two or more Yuan other than those concerning which there are relevant provisions in this Constitution, the President may call a meeting of the Presidents of the Yuan concerned for consultation with a view to reaching a solution.").

⁸⁶ Xiang Chenghua (項程華) & Xie Guo-Zhang (謝國璋), *Woguo Banzongtongzhi Zongtong Zhiquan Jieshi De Tantao-Xingzheng Zongtong Yu Zhongcai Zongtong Quanshi De Keneng* (我國半總統制總統職權解釋的探討—行政總統與仲裁總統詮釋的可能) [A Probe into the Interpretation of the Presidency of the Presidential System in China—The Possible Interpretation of the President and the Arbitration President], 43 XIAN ZHENGSHI DAI (憲政時代) 181, 203–04 (2018).

⁸⁷ Zhāng Yòu Zōng (張佑宗), *Zhāng Yòu Zōng Zhuān Lán Shì Mínmǔ Zhìdù Quēxiàn Bùshì Zǒngtǒng Kèyì* (張佑宗專欄：是民主制度缺陷 不是總統刻意) [Zhang Youzong Column: Is a Defect in the Democratic System, Not the President's Deliberate], SHANG BAO (上報) (Oct. 20, 2016), https://www.upmedia.mg/news_info.php?SerialNo=5967.

⁸⁸ Zhong Li-Hua (鍾麗華), *Zhizheng Juece Xietiao Huiyi Hanka* (執政決策協調會議 喊卡) [Ruling Decision Coordination Meeting], ZIYOU SHIBAO (自由時報) (Apr. 10, 2017), <http://news.ltn.com.tw/news/focus/paper/1092931>.

parliamentary system with the that of the presidency. The power to coordinate is now more entrenched and affiliated with the presidency than ever before, though it is still not enumerated in the constitution.

As we have seen in the case of Taiwan, the unenumerated powers exercised by the Presidents are responses to institutional plights left by constitutional reform in the 1990s. The Presidents are elected by the whole nation but cannot directly lead the administration. To render her policies and overcome institutional hurdles, she has to use the party as a platform to coordinate with both the cabinet members and key legislators. However, if all the major decisions are decided behind the scenes during informal meetings, then the checks and balances mechanisms are simply bypassed. The twilight zone of party leadership enables the Presidents to be the boss of both the executive and the legislature, but it also creates a dilemma that Presidents feel both powerless and all-powerful.

IV. THE TURBULENCE OVER LAW AND POLITICS: UNSEEN AND UNCHECKED POLITICAL LEADERS IN POLAND

A. *The Puppets' Master: Party Leadership and Political Unaccountability*

It is well known that in a parliamentary system the majority party's leader is the Prime Minister. However, this is not always the case in Poland. The Law and Justice party (Prawo i Sprawiedliwość, "PiS") made this exception twice. In 2005, PiS won the elections and formed a coalition with the League of Polish Families party (Liga Polskich Rodzin, "LPR") and the Self-Defence of the Republic of Poland party (Samoobrona Rzeczpospolitej Polskiej, "Samoobrona RP").⁸⁹ At that time, the leader of PiS was Jarosław Kaczyński, who took over as PiS's chairman from his twin brother, Lech Kaczyński in 2003. Jarosław announced, however, that he would not serve as Prime Minister, so that it would not reduce the chances of Lech, who was running for the presidency in two weeks. It was Kazimierz Marcinkiewicz who was chosen and later appointed to the Prime Minister position.⁹⁰ However, Mr. Marcinkiewicz resigned in 2006 so, this time, it was Jarosław Kaczyński, the party's chairperson, who assumed the position of Prime Minister. Jarosław Kaczyński ran the government for about a year, until the

⁸⁹ Radosław Markowski, *The Polish Elections of 2005: Pure Chaos or a Restructuring of the Party System?*, 29 WEST EUR. POL. 814, 830 (2006).

⁹⁰ Frances Millard, *Poland's Politics and the Travails of Transition after 2001: The 2005 Elections*, 58 EUR.-ASIA STUD. 1007, 1025 (2006).

coalition collapsed in 2007 and the Civic Platform party (Platforma Obywatelska, “PO”) took the office. Jarosław Kaczyński has remained as the leader of PiS since then.

After two years of being in the opposition, PiS under Kaczyński's leadership won the election in 2015. This time there was no need to form a coalition in parliament.⁹¹ However, similar to what happened in 2005, despite being the leader of the majority party, Kaczyński decided not to take the office of Prime Minister. Instead, he chose Beata Szydło, a barely recognizable member of the party, to be the candidate for the position of Prime Minister during the campaign. Mrs. Szydło had just operated a successful presidential campaign for Andrzej Duda a few months earlier. Since people were afraid of strongmen like Kaczyński, PiS decided that having Beata Szydło as the candidate might help them to secure more ballots.⁹² Mrs. Szydło served as Prime Minister until December 2017. Her successor, Mr. Mateusz Morawiecki, is believed to have been handpicked by Jarosław Kaczyński as well.

As a result of this political scenario, there is now a system of dual leadership in the Polish politics: officially, Prime Minister Szydło or Morawiecki leads the cabinet; however, as a matter of fact, Kaczyński has been leading the country through his party, PiS. Many have suggested that the final decision-making authority does not belong to the Prime Minister, but instead lies in the hands of Kaczyński.⁹³ Ironically, Kaczyński now enjoys more powers than he had in 2005 even though he is just a member of

⁹¹ In fact, PiS shared its electoral list with minor parties: Poland Together (*Polska Razem*, led by the Minister of Science and Higher Education Jarosław Gowin) and Poland United (*Solidarna Polska*, led by the Minister of Justice Zbigniew Ziobro) ran for the election as the candidates of Law and Justice (PiS). Even now, in the parliament, they are the members of the Parliamentary Club of Law and Justice. Therefore, strictly speaking, PiS did not enjoy a single-party majority. However, both minor parties were aligned with PiS, they shared similar ideologies with PiS and took actions in accordance with PiS's agenda. See Ben Stanley, *Populism in Poland*, in *POPULISM AROUND THE WORLD: A COMPARATIVE PERSPECTIVE* 67, 78 (Daniel Stockemer ed., 2018).

⁹² On a party conference, Kaczyński asked PiS to put Szydło's candidacy forward for the prime minister, because “the [presidential] election showed that Poles are expecting new faces and expecting a generational change.” Paweł Sobczak & Wiktor Szary, *Poland's Kaczyński Names Deputy Party Leader as Potential PM*, REUTERS (June 20, 2015), <https://www.reuters.com/article/us-poland-election-piS-idUSKBN0P00DZ20150620>.

⁹³ According to an article by Jan Cienski of Politico, an anonymous close political ally revealed that there's a line of ministers and deputy prime ministers waiting to see Kaczyński who listens to them all and in the end he makes a decision and those decisions are final. See Jan Cienski, *Poland's 'Powerholic'*, POLITICO (July 11, 2016), <https://www.politico.eu/article/polands-powerholic-jaroslaw-kaczynski-warsaw-law-and-justice-party-pis/>.

parliament now.⁹⁴ As the leader of the majority party he also has the power to give advice on public policy and to set up the political agenda. However, what he has done goes beyond advice and coordination—he substantially rules the country without any checks. Whatever Kaczyński says transforms into the government’s decisions. For example, Kaczyński once mentioned that Poland should not let the incumbent President of the European Council, Donald Tusk, who also served as prime minister of Poland from 2007 to 2014, be re-elected to the office. After repeating his remarks fiercely, Prime Minister Szydło stated that the Polish government would not vote for Tusk in 2017 and would propose its own candidate.⁹⁵

Another example is that, after a big controversy regarding the Amendment on Environmental Protection Law, Kaczyński declared that the amendment must be rewritten, at least partially. A couple of days later, the government proposed changes to the bill. It was also openly known that the ministers, the Prime Minister, and the President met with Kaczyński regularly, though not in the Chancellery Building of the Prime Minister, but at Nowogrodzka street in Warsaw, where the main building of the party is located.⁹⁶ It is common understanding among the Polish people that almost every important decision of the executive power has gone through the machinery of Kaczyński.⁹⁷

Although there is no hard evidence, one thing is clear: Kaczyński is the most powerful politician in Poland nowadays. He dictates the direction of the Prime Minister (and, through him or her, controls the cabinet and the government), and he leads the majority party, and he even has critical influence over the President of the Republic.⁹⁸ So, as the leader of his party,

⁹⁴ An interesting fact: as he is the leader of the Law and Justice party, he is also being called “*Prezes Kaczyński*,” not “*MP Kaczyński*.” While in Polish, “*prezes*” and “*prezydent*” are two different words, the English translation of these two words is the same: “president.” So, Jarosław Kaczyński is being called the “president,” despite being just a regular MP. With the passiveness of the President of Poland and the Prime Minister, this word underlies the wicked position that Kaczyński holds in Poland right now.

⁹⁵ *Warsaw Formally Ditches Support for Tusk EU Candidacy*, DW (Apr. 3, 2017), <https://www.dw.com/en/warsaw-formally-ditches-support-for-tusk-eu-candidacy/a-37811620>. This ended in a big diplomatic fiasco with the twenty-seven EU countries voting for Donald Tusk and Poland being both the homeland of Tusk and the only country against him. *Donald Tusk Re-Elected as European Council President Despite Poland's Objections*, DW (Mar. 9, 2017), <https://www.dw.com/en/donald-tusk-re-elected-as-european-council-president-despite-polands-objections/a-37874185>.

⁹⁶ Cienski, *supra* note 93.

⁹⁷ *Id.*

⁹⁸ President Andrzej Duda has tried some public-relation activities to show that he is independent from the PiS. For example, since 2017, Duda has initiated a constitutional referendum and proposed to hold a referendum on November 10 and 11, 2018, on the latter Poland marks its centenary of independence.

he has the final say on important policies, which would later be effectuated by the government and parliamentary majority with the President's signature. If he were the Prime Minister, Kaczyński's actions would be held accountable politically. If there were at least forty-six members of the *Sejm* (i.e., the parliament) to file a motion of censure against the whole Council of Ministers, PiS would have to propose a new candidate for the Prime Minister.⁹⁹ Meanwhile, were there at least sixty-nine members of the *Sejm* to file a motion of censure against the particular minister, PiS would have to appoint a new one.¹⁰⁰ However, since Kaczyński is neither the Prime Minister nor a minister, there is no way to counterbalance his power. On top of his politically unchecked power, literally speaking, Kaczyński may change the prime minister at will. The only branch that was still independent from his control is the judiciary, especially the constitutional court. Therefore, immediately after PiS came to the power, they turned to the Constitutional Tribunal and tried to get control over the National Council of Judiciary.¹⁰¹

However, this proposal was rejected by Senate in July 2018. *See Senators Reject Polish President's Push for Constitution Referendum*, RADIO POLAND (July 25, 2018), <http://www.thenews.pl/1/9/Artykul/374792,Senators-reject-Polish-president's-push-for-constitution-referendum>. Those fifteen proposed constitutional referendum questions are still available on the official website of the President of the Republic of Poland. *The Proposed Constitutional Referendum Questions*, PRESIDENT PL. (June 12, 2018). Additionally, in July 2017, Duda unexpectedly vetoed the controversial bills on judicial reforms which ignited huge protests on the streets and critics say it would give PiS power to choose judges. *See Polish President Andrzej Duda to Veto Judicial Reforms*, DW (July 25, 2017), <https://www.dw.com/en/polish-president-andrzej-duda-to-veto-judicial-reforms/a-39811692>. *See* Wojciech Sadurski, *Judicial "Reform" in Poland: The President's Bills are as Unconstitutional as the Ones he Vetoed*, VERFASSUNGSBLOG (Nov. 28, 2007), <https://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/>.

⁹⁹ Tekst Konstytucji Rzeczypospolitej Polskiej Ogłoszono W. Dz. U. 1997 nr 78 poz 483, Rozdział VI [Constitution] art. 158 para. 1 (1997) (Poland), <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> ("The Sejm shall pass a vote of no confidence in the Council of Ministers by a majority of votes of the statutory number of Deputies, on a motion moved by at least 46 Deputies and which shall specify the name of a candidate for Prime Minister. If such a resolution has been passed by the Sejm, the President of the Republic shall accept the resignation of the Council of Ministers and appoint a new Prime Minister as chosen by the Sejm, and, on his application, the other members of the Council of Ministers and accept their oath of office."). Poland does not have the impeachment process like other countries do, but a slightly similar procedure provided in Article 198 and relevant provisions offers the basis of the responsibility to be discussed in the State Tribunal for infringement upon the Constitution.

¹⁰⁰ Tekst Konstytucji Rzeczypospolitej Polskiej ogłoszono W. Dz. U. 1997, nr 78 poz 483, Rozdział VI [Constitution] art. 159, para. 1 (1997) (Poland), <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> ("The Sejm may pass a vote of no confidence on an individual minister. A motion for the vote of no confidence has to be submitted by at least sixty-nine deputies. The provisions of Article 158, para. 2 shall apply as appropriate.").

¹⁰¹ MALGORZATA SZULEKA ET AL., HELSINKI FOUNDATION FOR HUMAN RIGHTS, THE CONSTITUTIONAL CRISIS IN POLAND 2015 – 2016 (Joanna Smetek trans., 2016), https://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf.

B. *Falandization: President's Power to Interpret the Law*

There are a couple of presidential actions in Poland teetering upon the borderline of his constitutional powers. For example, as the prelude to the constitutional showdown of court-packing in 2015, President Andrzej Duda refused to swear in three justices to the Constitutional Tribunal whom were appointed by the Civic Platform government. In an interview with the Polish Radio in November 2015, the President described the elections of Constitutional Tribunal judges by the previous *Sejm* as “a gross violation of democratic principles and the stability of a democratic state based on the rule of law.”¹⁰² However, there is no provision in the Constitution authorizing any interpretative power to the President so as to reject constitutional judges whose appointment have been passed by the *Sejm*. When presidential interpretation of the Constitution or a statute go too far, the Polish people use a term, *falandization of law* (*falandyzacja prawa*), to describe the presidential manipulation of legal interpretation to achieve his political purposes.¹⁰³

Falandization was coined after the strategic interpretations offered by Lech Falandysz, the major legal advisor to Lech Wałęsa, the first president in Poland after 1989. President Wałęsa was in office during 1990 and 1995. During his term, his popular support, as well as political coalition, diminished quickly. To consolidate his own power, he relied heavily on strategic interpretations offered by Minister Falandysz who believed that, during the early stages of democratization, the President should expand the scope of his power by informal action, like legal interpretation.¹⁰⁴ In a well-known case over the abnornement two appointments to the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji, KRRiT, “NBC”*), Mr. Falandysz argued that the President enjoyed the power to withdraw his appointments, since he

¹⁰² *Id.* at 19; see also *Prezydent Andrzej Duda: niepodległość jest zobowiązaniem dla wszystkich Polaków* [*President Andrzej Duda: Independence is a Commitment for All Poles*], POLSKIE RADIO SA (Nov. 11, 2015), <https://www.polskieradio.pl/7/129/Artykul/1543232,Prezydent-Andrzej-Duda-niepodleglosc-jest-zobowiazaniem-dla-wszystkich-Polakow>; Christian Davies, *Poland is ‘On Road to Autocracy’, Says Constitutional Court President*, GUARDIAN (Dec. 18, 2016), <https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says-high-court-president>.

¹⁰³ According to Wiktor Osiatynski, “to *falandize* means to stretch the law beyond its intentions and limits in order to foster the interests and power of an institution.” See Wiktor Osiatynski, *The Constitutional Honeymoon Is Over: The Paradoxes of Post-Communist Constitution Making*, in *THE PARADOXES OF UNINTENTIONAL CONSEQUENCES* 143–63 (Lord Dahrendorf et al. eds., 2001). See also ARTUR OLECHNO, *ABUSE OF LAW BY CENTRAL AND EASTERN EUROPE HEADS OF STATES* (U. of Białystok), <https://is.muni.cz/do/law/1237864/web/principles/pdf/olechno.pdf>.

¹⁰⁴ WOJCIECH ROSZKOWSKI & JAN KOFMAN, *BIOGRAPHICAL DICTIONARY OF CENTRAL AND EASTERN EUROPE IN THE TWENTIETH CENTURY* 2833 (Wojciech Roszkowski & Jan Kofman eds., 2008).

had the power to appoint.¹⁰⁵ Nevertheless, there is no constitutional provision granting him the power to dismiss the board members of NBC. Falandysz argued that, if the language of the Constitution is silent, President Wałęsa may interpret the Constitution to fulfill his constitutional duty.

The case of NBC was fiercely debated in Poland. Ultimately, the Constitutional Tribunal reached its conclusion in the following ruling:

According to the Constitutional Tribunal, when the norms are vague and unclear about competence (/authority), the constitutional principle of legitimacy along with the principle of democratic state of law have explicitly indicated that the competence (/authority) cannot be alleged or made up, if the legislators did not express their intention clearly. . . . In reference to the non-expressed competences, the statute must always be interpreted based on the text, and no other ways of interpretation is permitted.¹⁰⁶

This decision of the Constitutional Tribunal set up the final standard of interpreting competence norms. In fact, the conflict between the President and the *Sejm* was the deciding factor in this ruling. Wałęsa was in office until 1995, two years before the enactment of the current Constitution. Therefore, his presidency looked very different from the ones of his successors. First, the power of the President flowed from the amended Constitution of People's Republic of Poland of 1952,¹⁰⁷ and then from the so-called Small Constitution of 1992.¹⁰⁸ Both documents provided an institutional design for the President's role, which was very different from the previously existing one. The power of the President was much broader, though not a typical presidential system. The post-1989 *Sejm* was very outspoken and became the voice of the nation. This competition led to many conflicts between the President and the *Sejm*, or even the whole government. President Lech Wałęsa, therefore, had strong incentives to strengthen his presidential power.

¹⁰⁵ RAY TARAS, *POSTCOMMUNIST PRESIDENTS* 151 (1997).

¹⁰⁶ Case no. W 7/94, Wyrok TK, W 7/94 of the Constitutional Court (Oct. 5. 1994).

¹⁰⁷ One of the two amendments of 1989 actually replaced the name "People's Republic of Poland" with "Republic of Poland" in the constitution.

¹⁰⁸ See generally *Mała Konstytucja z 1992* [The Constitutional Act of October 17, 1992] (discussing the Mutual Relations Between Legislative and Executive of the Republic of Poland, and the local self-government), translated in http://www.servat.unibe.ch/icl/pl02000_.html.

Drawing from the experience of Lech Wałęsa's overreaching power and his constant conflicts with the *Sejm*, the drafters of the 1997 Constitution decided to significantly limit the power of the President and to adopt the parliamentary system, saying goodbye to the semi-presidential system.¹⁰⁹ Unfortunately, this did not mean that falandization disappeared. In fact, it appears to be endemic. During the PiS administration, Prime Minister Szydło decided not to promulgate the judgments of the Constitutional Tribunal, even though there was no statute authorizing her the power to withhold the publication of constitutional judgment.¹¹⁰

The trickiest logic about falandization is that it is not something expressly prohibited by the law, but that it is also not something that is permitted by the law. As such, it always justified the President's action as being "not literally forbidden by law expressly." One recent example of falandization by the President is the extremely controversial change in the Act Regarding the Institute of the National Remembrance. The bill caused tensions between Polish-Israeli and Polish-American relations. The President had three options: he could have either signed the bill into law, referred it to the Constitutional Tribunal (so-called "preventive control"), or returned it to the *Sejm*. Surprisingly, he decided to sign the bill and send it to the Constitutional Tribunal.¹¹¹ This is a very confusing presidential action. On the one hand, if the President has any doubt concerning the bill, he may refuse to sign on it and simply send it to the Constitutional Tribunal. He cannot have it both ways. By signing the bill, the President affirmed that the bill was consistent with the Constitution. However, signing the bill and immediately sending it to the Constitutional Tribunal created a dubious decision on the constitutionality of the regarding law, which might have violated his fundamental duty as the guardian of the Constitution.¹¹² There was no constitutional provision or statute that prohibited such a presidential action, though many lawyers in Poland were convinced that the President had twisted his duty too much.

¹⁰⁹ Jerzy J. Wiatr, *President in the Polish Democracy*, POLITICKA MISAO (Jan. 24, 2018), hrcak.srce.hr/file/42351.

¹¹⁰ Davies, *supra* note 102.

¹¹¹ The Office of President, *Statement by the President of the Republic of Poland on the Amendment of the Act on the Institute of National Remembrance*, PRESIDENT.PL (Feb. 6, 2018), <http://www.prezydent.pl/en/news/art,669,president-decides-to-sign-anti-defamation-bill>.

¹¹² Unfortunately, the very similar situation also took place during the tenure of Bronislaw Komorowski, the premier during Civic Platform administration.

V. PLENARY POWER OF THE CHIEF EXECUTIVE

Having illustrated the different types of unenumerated executive powers with three case-studies, we will now discuss the nature and pathology of the global phenomenon in this section. The first and foremost issue we have to distinguish is whether or not the unenumerated powers are constitutional power. If they are not, there is no need to discuss any normative implication of this type of power. Then, the exercise of unenumerated powers would be a question of *de facto* power, which might or might not violate the basic requirements of constitutionalism. If they are constitutional, what is the difference between unenumerated powers and enumerated ones? Is it the cause of democratic failure? Let us start with the nature of unenumerated powers. As shown in the three cases, all the “powers” exercised by the presidents or prime ministers are not clearly defined in their constitutions. However, are those powers unconstitutional? American constitutional debates over the scope of Article II power provide some clues to navigate this thorny question. Louis Fisher, one of the authorities of separation of powers in the United States, argues that all three powers in the American Constitution have implied powers, which are “powers that can be reasonably drawn from express powers.”¹¹³ He argues that the removal power, for example, which is not listed in Article II, can be construed from the Take Care clause of Article II. Therefore, it is hard to argue that powers that are implied and unenumerated in the Constitution are unconstitutional. Nevertheless, even though he supports the idea of implied powers, Fisher opposes the notion of inherent powers (or the sole-organ doctrine) articulated by Justice Sutherland in his opinion for *Curtiss-Wright*.¹¹⁴ According to Justice Sutherland, in the domestic context, powers that have not been written in the Constitution are left for local states, so there is no implied power reserved for the federal government.¹¹⁵ However, in the realm of international relations, the President enjoys sole and independent power, which does not require legislative delegation, since the sovereignty shall be one on the external issues.¹¹⁶ This is

¹¹³ LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 1 (2014).

¹¹⁴ *United States v. Curtiss-Wright*, 299 U.S. 304 (1936).

¹¹⁵ “[T]hose specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs . . .” *Id.* at 316.

¹¹⁶ “It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.” *Id.* at 319–20.

the inherent power of the President, which enables him or her to gain preemptive power in the realm of foreign affairs. Fisher criticizes the idea of “inherent power” on the grounds that it would grant presidents immense power without any sensible limitation. However, “implied powers,” according to him, have to be affiliated with discernible constitutional authority of the President listed in the Constitution.

The contrast between domestic and international issues has become less and less apparent. For example, the president may take unilateral actions, like memoranda or executive orders, to implement environmental, anti-terrorism, or immigration policies, which substantially impact foreign affairs. Therefore, it is implausible to argue that the president enjoys inherent powers in the terrain of international relations but not in the domestic context. Modern American presidents have frequently relied upon their inherent powers to make domestic policies.¹¹⁷ One prominent example is President Truman’s executive order to seize the nation’s steel industry in the wake of Korean War.¹¹⁸ However, according to Louis Fisher, President Truman appealed to both enumerated and implied powers, rather than his inherent powers, in his order to seize the steel industry.¹¹⁹

One should not be puzzled by this scholarly taxonomy. To make the comparison clearer, the inherent power defined by Louis Fisher is very similar to William Blackstone’s definition of the King’s prerogative as “those rights and capacities which the king enjoys alone.”¹²⁰ In the modern context, Fisher further distinguished inherent power from the prerogative power. According to him, “[u]nder inherent power, the President claims authority to act independently without any interference from the other branches,” while “[p]rerogative accepts that the executive may take the initiative, but only with the understanding that the legislative branch must act later.”¹²¹ By “inherent power,” Fisher means the powers directly derived from the position of the chief executive. Those powers that can find textual (enumerated) or intentional (implied) basis in the constitution would not be regarded as

¹¹⁷ See generally Steven G. Calabresi & Sairishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

¹¹⁸ However, President Truman announced in his letters to the House and the Senate inviting legislative cooperation. Patricia L. Bellia, *The Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES 233, 243–44 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

¹¹⁹ See FISHER *supra* note 113, at 69.

¹²⁰ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 232 (1765).

¹²¹ See FISHER *supra* note 1133, at 73.

inherent powers. To Fisher, the assertion of inherent powers leads to the abuse of powers, since it essentially gives a blank check to the presidents.¹²²

This article has highlighted some actions of chief executives in Japan, Poland, and Taiwan as an exercise of “unenumerated powers,” rather than implied or inherent powers. Unenumerated powers are not clearly defined in the constitutions but are directly or indirectly pertinent to the constitutional authority of the chief executive, which is clearly defined in the constitution. In this sense, my use of unenumerated powers is very close to Fisher’s implied power. For example, the personnel power in Japan does not belong to the Prime Minister but to the cabinet.¹²³ However, according to Article 68, the Prime Minister has the power to appoint the Ministers of State. The Prime Minister controls members of the cabinet and, therefore, may extend his power through the Cabinet’s Personnel Office to control the mid-level bureaucrats in the government. Similarly, the President in Taiwan enjoys constitutional power to coordinate different branches on controversial issues. Therefore, President Ma claimed that he was legally permitted to listen to the report from the Attorney General and to command him to investigate the case of the Speaker’s scandal. In this sense, he placed the Attorney General under his control and cemented the foundation of his unitary executive power. For Poland, when President Wałęsa decided to withdraw his appointments to the NBC, he twisted the language of the Small Constitution to expand his own power. But the “withdrawal” was justified by the Polish President’s power to appoint, even though the language of the Small Constitution did not mention “withdrawal.” These are clearly the implied powers enjoyed by the chief executives to expand their original authority.

To makes things more complicated, murkier issues—like the cases of Mr. Abe’s special advisor, i.e., the shadow warrior in Japan, and Mr. Kaczyński, the puppet controller in Poland—are even more difficult to characterize and regulate under the formal model of separation of powers.

¹²² “A constitution safeguards individual rights and liberties by specifying and limiting government. Express and implied powers serve that purpose. Inherent powers invite claims of power that have no limits, other than those voluntarily accepted by the President. What ‘inheres’ in the President? The word ‘inherent’ is sometimes cross-referenced to ‘intrinsic,’ which can be something ‘belonging to the essential nature or construction of a thing.’ What is in the ‘nature’ of a political office? Nebulous words and concepts invite political abuse and unconstitutional actions. They threaten individual liberties. Presidents who asset inherent powers move the nation from one of limited powers to boundless and ill-defined authority, undermining republican government, the doctrine of separation of powers, and the system of checks and balance.” See FISHER *supra* note 1133, at 70.

¹²³ NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 73. (Japan) (“The Cabinet, in addition to other general administrative functions, shall perform the following functions: Administer the law faithfully; . . . Administer the civil service, in accordance with standards established by law[.]”)

They are exercising political powers but are not held accountable by any constitutional mechanism. These powers are coupled with constitutional authority of the “master” (in Japan) or the “puppets” (in Poland). The political party becomes the channel to negotiate the two powers, constitutional and political, and to fuse the two powers into one. For example, Mr. Ma of Taiwan used his party leadership to remove Speaker Wang’s membership so that he would be disqualified as a member of the parliament. The political powers facilitate or support the expanding constitutional authority of the chief executive, so it is hard to draw a line between political power and constitutional power after the fusion of presidential powers.

After examining the cases of non-statutory executive powers in the United States, the United Kingdom, and Israel, Margit Cohn cogently argues, “the incompleteness of law, supplemented by the political expediency of reliance on non-statutory rules—especially when the executive is challenged by a relatively hostile legislature—virtually guarantees their use.”¹²⁴ It is the vagueness and indeterminacy in statutes or constitutional provisions that gives the chief executives opportunities to reinterpret the language of the constitution and to expand the scope of unenumerated powers. Falandization is one example; there are many cases of unilateral executive action involved with interpretation. Once the chief executives find a loophole in the constitutional text, they may grasp the chance to generate “unenumerated” powers. Once there is one unenumerated power, there probably will be a second, third, and many unenumerated powers created by the presidents. This demonstrates the so-called “concept creep,” which makes the boundary of concept, e.g., the personnel power, blurry and fuzzy.¹²⁵ By way of creeping, the chief executive not only expands his or her “unenumerated” powers, but also makes the executive the prime player in the constitutional arena. To avoid a constitutional crisis, constitutional systems around the globe should pay close attention to the gradual epidemic engendered by the creep of unenumerated powers.

VI. CONCLUSION

Unenumerated powers are flexible and probably impossible to encompass under a fixed, singular, or operational definition. Moreover, they

¹²⁴ Margit Cohn, *Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context*, 64 INT’L & COMPARATIVE L.Q. 65, 101 (2015).

¹²⁵ Cass R. Sunstein, *The Power of the Normal* (Aug. 21, 2018) (unpublished manuscript) (available at <https://ssrn.com/abstract=3239204>).

are coupled with political control or party discipline, which is not the traditional focus of the constitution. In this article, I attempt to delineate the metamorphosis of informal powers enjoyed by the chief executive and describe it as unenumerated powers. I argue that there are powers, either political or constitutional, pertinent to the chief executive's constitutional authority that are not clearly and expressly defined in the constitution. The exercise of unenumerated powers is not so vicious, but how to hold them accountable is the key question. Legal scholars need to know more about the intersection of political powers and constitutional authority.

The chief executives need unenumerated powers to facilitate their decision-making power. Especially in the age of the administrative state, national leaders have to satisfy all kinds of practical needs for the populace. Institutionally speaking, it is the court that should confine the scope of unenumerated powers. However, owing to the dichotomy of politics and law, courts are very rarely willing to deal with the pathology of unenumerated powers. Therefore, the politician's immediate goal after winning the elections is to tame the judiciary or the branch in charge of constitutional interpretation, like the Legislation Bureau in Japan or the Constitutional Tribunal in Poland. This article argues that, once the chief executive gains the primary authority in interpreting the constitution or statutes with constitutional nature, the process of "concept creep" would help the chief executives to expand their constitutional authority and turn the country into a state of executive primacy. This is the epidemic plagued which plagues twenty-first century constitutionalism and may dangerously lead to the resurgence of authoritarianism.

