The Past, Present, and Future of Presidential Power

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ARTICLE

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BY SAIKRISHNA BANGALORE PRAKASH*

I. INTRODUCTION

Since Al-Qaeda struck the World Trade Center and the Pentagon, presidential power has been at the forefront of constitutional law. Critics castigated President George W. Bush for his detention policies,1 military tribunals,2 signing statements,3 interrogation techniques,4 surveillance,5 firing of U.S. attorneys,6 and broad conception of executive power.7 This litany is necessarily truncated in the interests of space.

One of the most eloquent and trenchant critics of President Bush was Illinois Senator Barack Obama. While running for President, the freshman Senator inspired many with lofty rhetoric and his promise to heal America. He especially heartened the small cohort of constitutional law professors.

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Maybe one day, we too could become Senator or President and, at last, do something useful.

Candidate Obama was bracingly transparent about his stances on executive power, due in part to a revealing interview with Charles Savage. Senator Obama did not think that presidents could take the nation to war. He did not believe that presidents could denounce statutes as unconstitutional immediately after signing them. He did not suppose that presidents could ignore statutes regulating the military. Senator Obama promised that upon his ascension to the highest office in the land, he would restore the rule of law and a more constrained presidency.

A funny thing happened on the way to the White House (or, more likely, once the Senator got there). Without any congressional authorization, President Obama took the nation to war against Libya. President Obama issued signing statements denouncing as unconstitutional the very statutes he had just signed and claimed the right to ignore statutes that purported to limit his authority as commander in chief. He continued, in large respect, the broad outlines of President Bush’s detention policies. When it came to presidential power, President Obama’s first and second terms often seemed as if they were the third and fourth terms of President Bush. Americans could be forgiven for recalling the common farm animals from George Orwell’s Animal Farm, who, when they gazed into the farmhouse at the end of the story, could not make out the pigs from the humans.

President Obama cannot be faulted too much, for he fell victim to an iron law of politics: where you stand on executive power turns on where you sit. When he sat in the Senate, the presidency was a much more modest office, at least from his vantage point. Once installed in the White House, ensconced behind the Resolute Desk, things looked very different. Like almost all his predecessors, he came to better appreciate (and see the wisdom of) the broad sweep of power that supposedly comes with the Oval Office.

We ought not to judge President Trump by his campaign statements on presidential power. I say that not because he deserves a free pass. Rather,
do not believe he ever adopted or expressed any considered views on the subject. His statements about President Obama’s abuses of presidential power were nothing more than the jetsam and flotsam of campaign rhetoric. Only those taken in by campaign rhetoric would have regarded his claims about presidential power seriously. Compared to President Obama—who knew something of presidential power, having taught constitutional law at the University of Chicago—President Trump was and is a greenhorn.

In any event, that iron law of politics—where you stand depends upon where you sit—does not just apply to politicians and presidents. It also applies, in its own way, to observers of politics, the hoi polloi, the commentariat, and the professoriate. Some critics of George W. Bush’s presidency exhibited a strange silence as President Obama expanded presidential powers in his own way, expending funds without appropriations,16 changing the effective date of statutes,17 and taking enforcement discretion to new frontiers of non-enforcement.18 And some defenders of President Bush’s muscular executive actions acquired a newfound appreciation for limits on presidential power. We see the same volte-face during the administration of Donald J. Trump. Expansive presidential power is in vogue again in quarters where its virtues went largely unnoticed for eight years. And unabashed fans of President Obama’s unilateralism are becoming re-acquainted with the vices of expansive executive power.

Some might say that the only phenomenon that one can count on is that views of presidential power change as the occupants of the White House change. Yet, with the advent of President Trump, I think the situation is ripe for a sober, detached reassessment and an abandonment of periodic flip-flopping on presidential power. Democrats and Republicans, formalists and functionalists, originalists and living constitutionalists have seen the perils of accommodating presidents and their pretensions to vast power. Everybody has had their ox gored and perhaps many agree that the bleeding ought to stop.

This essay makes four contributions. First, it describes the presidency of the Founders, a description that relies on my book, *Imperial from the*
Beginning: The Constitution of the Original Presidency. Second, it considers the presidency we have today. Third, it hazards predictions about the future of executive power. Fourth, it proposes reforms that Congress could enact that might restrain the presidency.

II. The Presidency, As It Was

Prior to writing my book, Imperial from the Beginning, I had written over a dozen articles on the presidency, with a keen focus on the original presidency. These articles tended to hone in on a single issue and focus on it relentlessly. As a result, I had a solid grasp of particular areas: law execution, removal, unity, foreign relations, war powers, congressional/executive relations, and emergency powers. But this was something of a patchwork understanding because the presidency had so many other facets. In effect, I had mile-deep understandings of a handful of areas. This perspective was bound to give me something of a distorted picture of the original presidency.

While researching and writing my book, I discovered a number of unexpected features of the presidency and became aware of several paths deliberately not taken by the founders. Some of my findings were surely known by other scholars; others were discoveries that are mine alone.

Below, I list ten bombshells about the original presidency that I discovered during my exploration of the original presidency. Of course, they are not genuine bombshells. I have no evidence indicating that Thomas Jefferson was George Washington’s son or that James Madison was the brother of Alexander Hamilton. Rather, they are what pass for bombshells in constitutional scholarship.

1. Features that seem obvious to us—a singular chief executive, the (relative) independence of the executive, the power to appoint, the authority to make treaties—were hardly obvious at the founding. The delegates to the Philadelphia Convention struggled with these and other elements of the executive. They would move in one direction and make some decision. Later, at the urging of dissenters, they would often revisit that original choice and move in a rather different direction. The sophisticated debates, with their twists and turns, unmistakably reveal that we easily could have had a rather different executive. Imagine an executive who served during good behavior. Or one who served at the pleasure of Congress. Imagine a plural executive, a triumvirate, drawn from different regions of the nation. Or a nominal chief executive burdened by the requirement that he obtain the consent of a council on all matters of significance. Consider a pure law-enforcement executive, one shorn of foreign affairs authorities. Or consider

one with all foreign affairs authorities. Each of these was possible. 21 Other than that the new constitution would establish a distinct executive charged with law enforcement, nothing else was remotely inevitable. Everything else was up for grabs.

2. The final contours of the executive they fashioned were tailor made for the President they anticipated. Numerous delegates said the executive was far, far more powerful than many would have initially favored. Delegates repeatedly glanced at the chair of the Philadelphia Convention, George Washington, assumed that he would be heading the executive branch, and created an office with him in mind. 22 Some delegates lamented this tendency, noting that presidential authority accreted over the Convention and that not all future presidencies would have the wisdom, forbearance, or experience of the Commander in Chief of the Continental Army. 23

This tale of an inflating executive demonstrates the power of context. Where one stands on some matter not only reflects where one sits, but also reflects who sits before you. Imagine what the presidency would have looked like if the Constitution had been written in the wake of the Declaration of Independence. Back in 1776, a strong executive was greatly feared, leading to the creation of anemic executives in the states. 24 Similarly, consider what the presidency would look like if Richard Nixon’s presidency immediately preceded a constitutional convention. We might very well have a “cypher” executive that James Madison belittled as inadequate. 25

3. The Executive Power Clause of Article II (often called the “Vesting Clause”) was a significant font of authority. The core of Article II is not Article II, section 2—the section that discusses treaties, appointments, pardons, and the Commander in Chief. Rather, the central provision is to be found in the very first sentence of Article II. The framers followed the example of drafters of the state constitution, almost all of whom conveyed generic executive powers to their state executives, whether unitary or plural. 26 Some expressly provided that state executives would enjoy “other executive powers.” 27 Others made clear exceptions to the grant of “executive powers,” thereby confirming that their vesting clauses were generic grants. 28

The Executive Power Clause amounts to a grant of executive authority, subject to the many exceptions and qualifications found elsewhere in Article II and in the Constitution. As James Madison said in Federalist No. 41,

21. Id. at 37–42, 116–119.
22. Id. at 19.
23. Id.
24. See id. at 31–35.
26. See Prakash, supra note 19, at 73–77.
27. See, e.g., N.C. Const. art. XIX (1776); Del. Const. art. VII (1776).
“[n]othing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.” 29 That was the precise structure of Article II. The “executive power” included authority over law execution, foreign affairs, and control of executive officers. Numerous founders, including Madison, Alexander Hamilton, Thomas Jefferson, and George Washington said as much. 30 And early statutes amply reflected that conception of the Vesting Clause. Congress’s statutes assumed that the President had authorities traceable to that Clause. 31 Finally, early practice conformed to this view, with the President taking actions nowhere authorized by statute and not traceable to Article II, section 2. 32 The source of authority was the grant of executive power.

4. Enacting laws used to be more difficult due to an obscure understanding now utterly lost to us. Today we follow a “Congress” rule for enacting legislation, meaning that the chambers can enact bills over a particular two-year period, what we commonly call a “Congress.” 33 If a bill passes one chamber on March 4 of an odd year and the other chamber passes the bill almost two years later, say on March 1, the chambers can present the bill to the President. If both chambers do not enact the bill in one Congress, the entire process must begin anew in the next Congress. This means that if one chamber passes a bill on January 2 of an odd year, right before the change in Congress, and the other chamber passes it a day later, on January 3, the first chamber must repass the bill before Congress can present the bill to the President.

At the founding, Congress and the President followed a “session” rule because they believed that the Constitution required as much. Under English practice, a legislative “session” was imbued with deep meaning. The “session” was the period for perfecting legislation. Bills not signed into law at the end of a legislative session had to start from scratch in the next. This meant that if a bill was to be presented to the President, both chambers had to pass it in a single session. If a bill did not become law in one session,

30. See PRAKASH, supra note 19, at 65.
31. Most notably, in the Decision of 1789, Congress recognized that the Vesting Clause granted the President constitutional power to remove the Secretary of the Department of Foreign Affairs at will. Id. at 89–91. Perhaps the most famous example occurred when President Washington issued the Neutrality Proclamation, pledging to initiate prosecutions against “all persons, who shall . . . violate the law of nations.” Proclamation of Neutrality (Apr. 22, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON 430–431 (John C. Fitzpatrick ed., 1939).
32. For example, early presidents repeatedly directed prosecutors to bring prosecutions. Id. at 89–91. Perhaps the most famous example occurred when President Washington issued the Neutrality Proclamation, pledging to initiate prosecutions against “all persons, who shall . . . violate the law of nations.” Proclamation of Neutrality (Apr. 22, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON 430–431 (John C. Fitzpatrick ed., 1939).
33. See Michael Stokes Paulsen, A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment, 103 YALE L.J. 677, 689 (1993) (“Individual Congresses expire every two years. Bills passed by only one house have no legal significance. To become laws, they must be passed by both houses and not vetoed by the president within the same term of Congress.”).
both chambers had to pass the bill anew in a new session. That is why presidents invariably hastened to Congress in the waning hours of every session, laboring under candlelight and poring over dozens of bills. If they did not sign those bills during the session in which the two chambers had passed them, both chambers would have to repass them in the next session. The President could not sign the bills into law after the session ended. Furthermore, a return of the bills after the session would have been pointless because the process had to begin anew in the next session, regardless of the return.

5. The Commander in Chief ("CINC") was a rather weak office. It did not encompass power to commence wars, nor did it grant an exclusive power to decide how wars declared by Congress would be waged. A CINC was simply an officer who controlled an army or portion thereof. That is why the British army had hundreds of CINCs—of platoons, brigades, geographical regions, etc. None of these CINCs enjoyed illimitable authority by being the chief commander.

America’s first CINC, George Washington, was a puppet of the Continental Congress. During the Revolutionary War, the Continental Congress commanded the CINC in all sorts of ways. The office was bereft of authority to appoint or remove military officers and soldiers. Congress controlled appointments and removal, with Congress occasionally granting temporary authority to remove because a commander in chief, without more, had no authority to oust soldiers and officers. Washington’s troubles with General Horatio Gates partly turned on the absence of absolute control and the possibility that Congress might replace the former with the latter. Relations also were strained by Gates’s failure to consult with Washington prior to drafting a plan to invade Canada and the fact that Congress had appointed Gates to the Board of War; a board technically superior to the CINC.

The issuance of congressional diktats to the CINC continued after the Constitution’s ratification. Congress determined where troops would be stationed. It determined whom the United States would fight. It decided the type of war to be fought (naval, land, or both). It decided the proper sorts of targets (all enemy ships or only a subset). It decided where the enemy could be attacked (on the high seas, on American territory, or anywhere). And it

34. See Prakash, supra note 19, at 247–248.
35. Id. at 247–248.
36. Id. at 250–251.
37. Id. at 152–153.
38. Id.
39. Prakash, supra note 19, at 37.
40. Id. at 154, 210.
decided the strategic goals of American warfare (territorial conquest or the protection of commerce).  

6. American CINCs lacked any sort of emergency power. In time of war, they could not take property, suspend habeas corpus, or try civilians in military courts. The Continental Congress granted authority to suspend habeas corpus, take property, and try civilians before military courts. It authorized such acts because it understood that the CINC would otherwise lack such authority. These principles continued under the Constitution, with no one claiming that the President had emergency authority, in time of war or peace. President Washington never claimed that he had anything resembling an emergency power to handle crises. In response to a yellow fever outbreak in the nation’s capital, he denied that he could summon Congress to some other place, making a suggestion instead. In the wake of the Whiskey Rebellion, he similarly hewed close to his established statutory authorities, always carefully satisfying the conditions Congress imposed on the summoning and use of the state militias.

7. The contretemps about torture that took place during the George W. Bush administration—whether Congress could bar torture of prisoners—had precedents from the eighteenth and nineteenth centuries. In those centuries, the law of war authorized reprisals against soldiers—what the Romans called “lex talionis.” The idea was that if one nation mistreated the soldiers and sailors of another, the other nation could respond in kind as a means of deterring further mistreatment. Sometimes Congress merely authorized such retaliation. Other times, it affirmatively required the President to engage in retaliation.

The episodes suggest that the President lacks the constitutional authority to mistreat prisoners. That is why Congress had to pass statutes authorizing retaliation. But more significantly the episodes also suggest that Congress can regulate the treatment of prisoners. Congress can choose to safeguard foreign prisoners or it can choose to abuse them. The CINC must carry out the choices of Congress, whatever they may be.

42. See Prakash, supra note 19, at 162.
43. Id. at 210, 217–219.
44. Id.
45. Id. at 212–214.
46. Id. at 211.
47. See Laws of the Twelve Tables, in 1 The Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions 57, 70 n.1 (Samuel Parsons Scott ed., 1932).
48. Act of Mar. 3, 1813, ch. 61, 2 Stat. 829–830 (authorizing the president to “cause full and ample retaliation to be made” should England commit “any violations of the laws and usages of war” against Americans during the War of 1812).
49. See Act of Mar. 3, 1799, ch. 45, 1 Stat. 743 (requiring the president to “cause the most rigorous retaliation to be executed on any such [captured] citizens of the French Republic” should the French mistreat American prisoners during the Quasi-War with France).
8. While serving as president, Washington continued to have private dealings of various sorts. Citizen Washington threatened suit all the time in his personal capacity, primarily in his roles as a vast landowner and bondholder. He also served as trustee for several estates, having agreed to do so before becoming president. Indeed, one state court ordered him to print an advertisement related to his trusteeship of an estate. The advertisement, printed in London, conspicuously noted that George Washington was “ordered” to print the advertisement.

Though no one sued Citizen Washington, I rather doubt that the President thought he had any temporary immunity from suits arising out of his personal affairs. If Citizen Washington could sue and threaten to sue, it would have been unfathomable and incongruous for him to claim some temporary immunity from suits arising out of his personal life.

9. Titles matter. In the first year of the new government, there was a long debate about how the chambers ought to address the President. Some Senators wanted a title meant to suggest majesty in the office. John Adams, presiding over the Senate, was particularly emphatic, deriding “President” as far too pedestrian. Cricket clubs and firehouses have “presidents,” sneered Senator Oliver Ellsworth when arguing for a loftier title. Though the House refused to go along with the Senate, Americans settled on “the Honorable” for the President.

While Adams thought “President” too plain, Samuel Johnson’s famous Dictionary of the English Language defined “President” as, among other things, a “monarch”! Johnson took this definition from Shakespeare’s Antony and Cleopatra. Perhaps Adams was mistaken to dismiss the Constitution’s title as too pedestrian.

Finally, one Frenchman suggested that future presidents would be known as “Washington” just as “Caesar” had become a title denoting leader in multiple languages. This never happened, of course. But had powerful, republican executives become linked with the title “Washington” it would have been entirely appropriate.

10. Although the presidency was limited in a host of ways, the resemblance to a monarchy was palpable. The numerous constraints should not fool or confuse us. While the President was not to be an absolute monarch,

50. See Prakash, supra note 19, at 227.

51. Id.


54. Id. at 45.

55. Samuel Johnson, A Dictionary of the English Language (10th ed. 1792) (entry for “monarch”).

56. Id.

57. Letter from Comte de Moustier to Comte de Montmorin (June 9, 1789), in 16 Documentary History of the First Federal Congress, Correspondence: First Session June–August 1789, at 729, 734 (Charlene Bangs Bickford et al. eds., 2004).
the presidency was more powerful than any existing American executive and some crowned European monarchs. Anti-federalists repeatedly remarked that the Constitution had created an elective monarch. 58 Other observers, including John Adams, Thomas Jefferson, and some foreigners said the same. 59 As the Dutch Stadtholder said, “You have given yourself a king with the title of president.” 60

Yet we cannot see the resemblance. We cannot because we suffer from a form of cognitive dissonance. On the one hand, we know that there are bicycle monarchs in Europe, who have titles and a measure of respect but no real political power. And we know that elective monarchs have long existed and continue to exist around the world. So, we are familiar with weak monarchs and elective ones. On the other hand, we also suppose that America rebelled against a monarchy and could not erect one in its place. The Declaration is an indictment of a powerful executive. It seems unfathomable to suppose that a powerful executive might emerge from the Convention, albeit several years after the Revolution’s conclusion.

But in truth, the English monarchy was a limited republic. Montesquieu himself said that England was a republic disguised as a monarchy. 61 When you compare the actual powers of the President with the English crown, the President is rather powerful. Many of the Crown’s formal powers were not exercised without parliamentary sanction (the power to declare war, for instance). 62 Others had atrophied due to nonuse—like the veto. 63

Moreover, the overwrought reaction to the perceived excesses of George III eventually brought a counterrevolution in thought. Many observers, including Washington, Hamilton, and Madison, supposed that America desperately needed a much stronger federal executive. 64 Because context matters, it is a mistake to read the Constitution as if it were written contemporaneously with the Declaration.

Hence, when learned observers, foreign and domestic, beheld the presidency, they perceived the features of an elective monarch. This republican monarch would steward foreign affairs, execute the laws, command the military, and superintend executive officers. Because the executive was unitary, rather formidable, and yet still limited in authority, labeling the Constitution’s presidency a republican monarch was entirely fitting.

58. See Prakash, supra note 19, at 19–20.
59. Id. at 20–21.
62. See Prakash, supra note 19, at 14.
63. Id. at 239, 251.
64. Id. at 33–35.
As almost everyone supposes, the executive has become more powerful over time. Many find this accretion of power alarming. The specter is monarchy, with historian Arthur Schlesinger coining the memorable phrase “Imperial Presidency.”65 Indeed, even though the presidency was imperial from the beginning, this trope has continuing political currency. It reverberates more than forty years after Schlesinger’s book came out. Critics undoubtedly enjoyed calling George W. Bush “King George.”66 And a different set of critics delighted in comparing Barack Obama to the monarchs, absolutist or not, of old.67

But nothing is new under the sun. Schlesinger merely coined a phrase for a claim that has flourished from the beginning. Jeffersonians called Washington an “embryo-Caesar;”68 Whigs depicted Andrew Jackson as a crowned despot, “King Andrew the First,” standing on a rent Constitution;69 and Democrats decried Abraham Lincoln as a foul dictator who usurped congressional power and invaded civil liberties.70 Almost every president is perceived as an aggressive monarch or a usurping despot.

Still it is useful to contemplate the accretion of monarchical trappings. The modern presidency is not the unpretentious one sought by some early politicians, including Secretary of State Thomas Jefferson. Indeed, they rained fury on Washington for his “royal” levees and his lavish coach, with its four liveried attendants and six bay horses.71 But things have progressed beyond these relatively modest beginnings. Whereas Washington began his presidency in a comparatively small mansion on a corner in Manhattan, the Samuel Osgood House,72 every modern president presides in what would be described elsewhere as an actual palace—the magnificent White House. The president has his palace guard—the dour, silent, and secretive Secret Service. He has courtiers who often tell him how bold and brilliant he is—we call them the White House staff. He holds lavish state dinners, where elaborate repasts are served to foreign heads of state and those whom the President wishes to shower with affection. He has modern coaches—the

65. See generally Arthur M. Schlesinger, Jr., The Imperial Presidency (1973).
68. See Prakash, supra note 19, at 27.
71. Id.
72. See Stephen Decatur, Jr., Private Affairs of George Washington: From the Records and Accounts of Tobias Lear, Esquire, His Secretary 117 (1933).
presidential state car (codenamed the “Stagecoach”), Marine One, and Air Force One. He has his own ditty— “Hail to the Chief”—one borrowed from the British. Compare the president to the queen of England. Admittedly, she is surrounded by more pomp. She has more palaces too. But the presidency is hardly lacking in pageantry.

The presidency is also more monarchical in terms of power. As Schlesinger recounted, the presidency has acquired greater authority over the military, warfare, and the initiation of wars. Modern presidents claim authority to start world wars, ignore congressional attempts to direct those wars (dismissed as unconstitutional and misbegotten “micromanagement”), and disregard generic congressional regulation of the military. The modern president has more practical power to wage war than did King George III, for the latter invariably went to Parliament before the onset of war to secure the necessary funds. Modern presidents seem more concerned with the optics of warfare than any legal niceties. They tend to go to Congress only when they know they will receive a fillip—a resounding “yes” to war.

The presidency also has benefitted from the enormous enlargement of the federal government, with its ever-expanding welfare state. A burgeoning bureaucracy generally (though not inevitably) yields greater presidential power over it and the rules it crafts and administers. Modern presidents command a vast bureaucracy consisting of millions of functionaries. Now their command can be more apparent than real in that the bureaucracy—the so-called “deep state”—may thwart rather than heed their orders. Harry Truman gleefully predicted that Dwight Eisenhower’s presidential commands would be ignored, resisted, and thwarted— “poor Ike” will “sit here, and he’ll say, ‘Do this! Do that!’ And nothing will happen.”

This was not quite true, for a president deeply committed to a handful of tasks over which he has ultimate control, can prevail even over the deep state.

Edward Corwin’s claim that the President is the Chief Legislator becomes ever truer over time. Whereas before, President Washington merely recommended legislative topics for the consideration of Congress, the modern President has far more authority. As party leader, the President ordinarily commands the respect and fealty of his co-partisans in Congress, often able to spur them to support his often vast and sometimes detailed legislative agenda. Moreover, as the locus of federal lawmaking has shifted

73. See Joseph Trevithick, The Presidential Motorcade Is on Full Display as the President Tours Asia, Drive (Nov. 27, 2017), http://www.thedrive.com/the-war-zone/15871/the-presidential-motorcade-is-on-full-display-as-trump-tours-asia.

74. Prakash, supra note 20, at 14.


77. See Prakash, supra note 19, at 246–247.
from Congress to the agencies, many of which are under the President’s thumb, the President may shape the laws (regulations) that emerge from these agencies. These laws often are of far more significance than the often indefinite and undetailed framework statutes that authorize them. Relatedly, because there are so many federal laws, he can, by setting enforcement priorities, decide which laws to enforce and which to ignore. All in all, the President functions as a unitary, junior-varsity Congress.

Some changes to the presidency stem from certain extragovernmental changes. As noted earlier, presidents are the de facto leaders of political parties, able to sway legions of federal and state legislators, and influence millions of party members. Their grip over their parties ensures a base level of support for almost all their acts, including such things as legislative proposals, nominations, and regulatory initiatives.

Whereas the founders contemplated an electoral college exercising independent judgment, Americans now expect electors to reflect the sentiments of their state voters. This makes the presidency a plebiscitary office. When states conduct presidential elections, people believe they are voting for the President rather than for electors. Further, Americans expect that the President will lead the entire government. They expect that he will be responsible for the entire economy, the welfare of citizens, and national defense. He is not just a federal leader. He is the embodiment of the federal government and is often seen as the federal leader.

The advent of technological advances in communications empowers the President to reach out to the public to sway them in ways not conceived at the founding. Washington’s short veto statements and terse national proclamations about legal duties and obligations gave way to Andrew Jackson’s long message defending his veto of the proposed Second Bank of the United States, which in turn gave way to Franklin Roosevelt’s weekly fireside chats. Today, the President continues to address the country on a weekly radio address. But his bully pulpit is so much more powerful. His actions, utterances, and tweets utterly dominate the nightly news, the newspapers and news magazines, and internet news and commentary.

Finally, in practical terms, presidents can amend the Constitution. First, they can appoint justices who will prune and graft the living tree Constitution. Roosevelt was condemned for attempting to add to the Supreme Court’s cohort of Justices, what we now call “court packing.” But though this plan failed, he packed the Court anyway, via the regular appointment process. The Four Horsemen of the Apocalypse, those who steadfastly denied the constitutionality of Roosevelt’s revolutionary program, met the same fate that awaits us all: retirement and death. Roosevelt transformed the Constitution by appointing successors who agreed with his more supple

78. Id. at 49–50.
79. Id. at 305–306.
interpretation of federal legislative power. Second, presidents can alter the separation of powers through repeated constitutional violations. For instance, many suppose that modern presidents can wage war because their successors acquired that power through repeated constitutional encroachments upon congressional powers. Likewise, presidents can make treaties without the concurrence of a supermajority of the Senate—they eschew the label but make the functional equivalent via sole executive agreements or via congressional-executive agreements. Somewhat paradoxically, illegality or unconstitutionality is now the engine of constitutional change.

IV. THE PRESIDENCY, AS IT MAY BE

The immediate past is often the best predictor of the immediate future. Hence, expect more of the same. Indeed, expect much more of it. Expect more executive reach and overreach. Expect more novel claims of constitutional authority. And expect more constitutional transgressions that form the building blocks of changes in constitutional conceptions. The executive’s past is its prologue.

What drives this compulsion to expand? Equal parts human nature, expectations, and incentives. Most presidents become president because they have a healthy, meaning potent, ambition to exercise power. Once they get in the Oval Office, they naturally seek to aggrandize their constitutional office because that helps satisfy their personal desire to exercise power. To be sure, American politicians are typically socialized to believe that their acts are in furtherance of some greater good—economic growth, social welfare, individual rights. But though the policies and goals change, as do the politicians, the ambition to exercise power remains virtually constant.

The desire for greater power also stems from the unrealistic public expectations placed on presidents. We expect the President to fix and fine-tune the economy. For instance, we demand job and income growth and low inflation. If the economy does not oblige, the President is at fault. We also hold the President accountable when trouble brews overseas and we expect him to defend the nation, protect Americans abroad, and safeguard American interests and property. We expect the President to balm the wounds of national tragedy and solve emergencies. When conventional means of securing prosperity and security—constitutional and statutory means—are insufficient, our expectations are in no way tempered. When so

82. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (affirming the president’s power to settle claims of American nationals against a foreign country by sole executive agreement considering the “long-continued practice, known to and acquiesced in by Congress”).
much is expected of our presidents, it is little wonder that they sometimes feel compelled to improvise, stretching and straining the law to accomplish what many of us demand of them.

Finally, the very idea of a living constitution, and its counterpart, living statutes, invites presidents to creatively interpret and reinterpret law to meet the expectations of the people and to satisfy their own desires for power. When presidents push the envelope, they are not acting contrary to the Constitution and its laws, except in a narrow, formalistic sense. Instead, they are participating in the process by which law and understandings of it, are constantly being amended. Moreover, constituents expect their presidents to push the envelope as a means of advancing their shared agenda. Indeed, they will demand it. There’s an old saying, “[i]f you aren’t cheating you are not trying.” Presidents realize that if they are not stretching their constitutional and statutory powers, they will be perceived as not “trying,” meaning they will be regarded as too passive and docile.

One of the most recent examples relates to President Obama and Deferred Action for Childhood Arrivals (“DACA”). Prior to implementing DACA, President Obama publicly denied that he could implement any such program unilaterally. Legislation was necessary, he insisted.83 Obama’s base would have none of this and roundly criticized him.84 Gradually, President Obama experienced a change of (legal) heart. Part of this undoubtedly reflected his base’s fervent desire for incremental (but nonetheless significant) change in the immigration status quo. President Obama gave them the change they sought, doing what he previously declared he could not legally do.85

Does this mean that presidents are always trying to acquire new powers? Is the Executive “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex?"86 Of course not. Presidents balance a need to be seen as acting within the confines of the law with their desire for power and their desire to satisfy their base and advance its interests. Interest groups that stand to lose from presidential action will squawk that the President is acting illegally—behaving like King George III. And there is the possibility that an inattentive public, generally (and rationally) uninterested in most issues, will come to suppose that the President is acting contrary to law primarily because of those who squawk. There is an optimal amount of executive stretching and straining, meaning that there are subop-

84. Id.
85. Id.; see also Matt Wolking, 22 Times Obama Said He Couldn’t Ignore or Create His own Immigration Law, SPEAKER PAUL RYAN (Nov. 19, 2014), https://www.speaker.gov/general/22-times-president-obama-said-he-couldn-t-ignore-or-create-his-own-immigration-law.
timal possibilities as well. Sometimes presidents are too aggressive and other times they are too passive. The best presidents hope to occupy the Goldilockian median.

All the above applies no less to President Donald Trump. For the next three years, expect President Trump to continue to push the bounds of executive power. Expect more law professors to squawk. Expect more judges to squeal. The legal elite did not like “43”—George W. Bush. So, they attacked him. There were innumerable reports, petitions, and letters denouncing this or that legal claim of the Bush administration.

That largely died down during the Obama administration. Some real stalwarts—some steady and constant intellectuals—complained when President Obama did what President Bush did. I think of Bruce Ackerman, for one, and his criticisms of President Obama’s declaration of war against Libya. Louis Fisher also comes to mind for his consistent “congressional-ist” approach to the separation of powers. There are undoubtedly others. But many of the law professors who fired so many shots against President Bush kept their powder dry during the Obama administration.

Things have changed, if you have not noticed. Now the legal academy confronts “45”—President Trump. He is their walking-talking-tweeting nightmare. We have heard any number of debatable claims against him. He has violated the emoluments clause because foreign governments have rented space in his hotels. His campaign violated the campaign finance laws by meeting foreigners who sought to convey opposition research about Hillary Clinton. He is guilty of obstruction of justice because he fired James Comey and so despises the investigation into Russian hacking. Such charges are a double-edged sword. On the one hand, the more one throws up these charges, the more apt one is to stick and the more there

87. See, e.g., Bruce Ackerman, Legal Acrobatics, Illegal War, N.Y. TIMES (June 20, 2011), http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html?mcubz=1&mtrref=www.google .com&assetType=opinion (warning that the “legal machinations” Obama used to justify war without Congressional approval set a “troubling precedent that could allow future administrations to wage war at their convenience”).
is a definite impression on the part of some that there is fire behind the smoke. On the other hand, innumerable spurious charges have the potential to drown out the more serious claims. If people cry wolf too often—if it seems that in the eyes of some almost everything the President does is illegal—those exclamations and rebukes may cause people to ignore the carpers. Denunciation fatigue may take hold.

This is lamentable. Perhaps more than most presidents, this president is especially prone to seek a legal advantage. Yet if the president is said to be violating the Constitution whenever he acts, speaks, or gesticulates, the public will grow weary of it all. The stories of daily constitutional violations, many of them with barely a shred of merit, become like the dog-bites-man stories because they do not merit any attention. Alternatively, they fuel the claim that the media and the President’s critics are obsessed with fake news and fake legal violations.

V. THE PRESIDENCY, AS IT COULD BE

President Trump treasures his book, *The Art of the Deal*. He brags that it was “the No. 1 selling business book of all time.”92 He clearly delights in critiquing the deals struck by others and likes to boast that he would have struck a better deal himself. The Iranian Nuclear Agreement deal comes to mind. He continually berates it as the “worst deal ever.”93 But I have to think a deal like the Munich Agreement is worse because of its appeasement or maybe the Versailles Treaty because of the resentments it nourished. In any event, President Trump clearly likes to make deals. For behind every deal is a mutually advantageous bargain. Even though both sides benefit from a deal, the President clearly enjoys imagining that he has squeezed away the lion’s share of the gains from trade.

I believe that President Trump deeply cares about a handful of policies—immigration, trade, and infrastructure. I do not believe he cares a whit about abstract questions of presidential power—the kind of issues constitutional law professors obsess over. Given the right set of inducements, I predict that President Trump will cheerfully trade away elements of the status quo in return. So to borrow from another dealer, Monty Hall, “Let’s Make a Deal.” Give President Trump something he wants, and we can usher in a more constrained presidency.

What can Congress do to restrain the presidency, within the confines of a Constitution that does not grant Congress carte blanche authority to rework the separation of powers? Quite a bit. Congress has tremendous un-

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tapped authority. Congress holds the purse and enjoys power to carry into execution the powers of the presidency. The reforms instituted in the wake of the Watergate scandal point that way. Not all of those reforms were constitutional. But nothing obliges Congress to repeat those mistakes.

1. Congress, by statute, should make high-ranking White House officials subject to advice and consent. It has, of course, already done this for certain positions. The Director and Deputy Director of the Office of Management and Budget are advice-and-consent positions, as is the US Trade Representative and the Director of the Office of National Drug Control.

But there are conspicuous omissions. The National Security Adviser is one of the most consequential persons in Washington, DC. Think of Henry Kissinger, who helped open up China. He surely was more powerful than the Secretary of State, William P. Rogers. Think of Condoleezza Rice, who had President Bush’s ear and his utter confidence. Controversial individuals like Susan Rice and Michael Flynn should be subject to Senate advice and consent. Such a check ensures a second vetting, one that goes beyond the executive screening.

The same is true of the White House Counsel. The Counsel gives legal advice to the President. Other people giving legal advice to cabinet officials—general counsels—are typically in advice and consent positions. Consequential advisers like Bernard Nussbaum, Boyden Gray, or Donald McGahn should be vetted by the Senate. I am not suggesting that any of these people did anything wrong or that they would not get confirmed. But they provide vital legal advice to the President and therefore occupy an office of paramount significance.

One of the most powerful positions in Washington is the Chief of Staff for the President. Think of Sherman Adams, Dick Cheney, and James Baker. Typically, the Chief of Staff sets the President’s schedule, controls the flow of information, decides which of the multitude of high-ranking officials gets to meet with the President in a more confined setting (face-time), and is a principal adviser. This position, which is far more important than hundreds of other positions that are advice-and-consent, ought to be subject to Senate review. Indeed, last year we witnessed the Director of

Homeland Security, John Kelly, relinquish that office to take on the more important posting of Chief of Staff. 100

I do not mean to be exhaustive here. There may be other positions in the White House complex that ought to be subject to advice and consent. The point is that several of the most powerful Washingtonian offices currently are not subject to the Senate’s advice and consent, and they ought to be. I also do not mean to be critical of current or past occupants. It is true, however, that some White House officials would never have been in the West Wing had the Senate exercised a check on their initial appointment. Others can judge whether a Senate check would have had a salutary effect on the relevant Presidencies.

2. A second reform would be to shutter the Chevron station. The Chevron doctrine is under great attack, with Justices Clarence Thomas and Neil Gorsuch leading the charge.101 Under current doctrine, courts construe many statutes as requiring courts to defer to an agency’s reasonable construction of those statutes.102 Rather than adopt this framework, which amounts to something of a presumption in favor of deference to agency, I think that Chevron deference should only exist when Congress makes clear its desire. When it does not make that preference manifest, the ordinary rule—courts decide statutory questions de novo—ought to apply.

3. A third reform, somewhat related to the second, would be to curtail excessive delegations of legislative authority. There are some who doubt the constitutionality of the countless delegations of legislative power that litter Statutes at Large and the US Code. But put these concerns to one side for now. There are distinct policy reasons for doubting the wisdom of allowing executive and independent agencies to write laws under the guise of writing rules. To begin with, the proliferation of scores of “junior-varsity” Congresses makes it more difficult for the public to gauge the outputs of Washington. More importantly for our purposes, the delegations to executive branch institutions make the executive rather powerful. Baron de Montesquieu predicted that tyranny would result from the combination of legislative and executive powers, for tyrannical laws might be executed tyrannically.103 I do not think that such tyranny is a regular occurrence as things currently stand. But our system could stand to use more separation of the legislative and executive functions. There is practical wisdom in the Montesquieuean maxim that we ignore at our own peril.


101. See, e.g., Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (noting that Chevron deference raises “serious” constitutional questions by precluding judges from exercising their “independent judgment” when interpreting statutes); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that Chevron is “more than a little difficult to square with the Constitution of the framers’ design.”).


103. Montesquieu, supra note 61, at 173.
4. During the Nixon administration, Congress tried to reassert its control over war powers in the War Powers Resolution. Many judge it a failure. Whether that judgment is fair turns on the counterfactual—how many more wars would presidents have commenced in its absence? We do not know the answer to that question. But given recent presidential wars in Libya and Syria, it is perhaps useful to strengthen that Resolution.

Congress can put stronger teeth, with actual bite, in the War Powers Act. Congress could provide that if a president attacks another nation without congressional authorization, the attack immediately triggers a reduction in the Pentagon budget by three quarters. Everyone agrees that Congress controls the purse strings and can decide whether (and how much) to fund the armed forces and the wars they wage. This would be Congress flexing its fiscal muscles to make clear that presidential adventures are disfavored, if not forbidden.

The draconian cut in defense funding would incentivize presidents to secure congressional preapproval of wars. Alternatively, it would require the President to go to Congress and quickly secure funding after the fact. Either way, Congress would have to weigh in and could refuse to authorize (or sanction) new presidential wars.

5. Congress may, if it chooses, effectively end the practice of signing statements. Specifically, Congress could include a poison pill in its statutes: a non-severability clause. Congress sometimes does this with respect to judicial decisions that declare that a portion of a statute is unconstitutional. Non-severability clauses, as they exist now, provide that if a portion of the statute is declared unconstitutional (presumably by the courts), the entire statute is null and void.

Congress could extend the concept of a non-severability clause to executive declarations of unconstitutionality. If a president declares, in a signing statement or otherwise, that some portion of a statute is unconstitutional, Congress can provide that the entire statute is null and void.

Such a poison pill would have the effect of encouraging Congress and the President to work out their constitutional differences before the bill gets sent to the President. As things stand now, there seems to be little in the way of genuine constitutional dialogue. Congress takes its position as expressed in the statute, and the President takes his. There is no give and take because there does not need to be. The President rarely brings matters to a head by vetoing a bill on constitutional grounds. A poison pill facilitates and encourages that serious deliberation necessary to sound defense of the Constitution.104

104. An alternative would be to include a limited non-severability clause. If the President declares a portion of the statute to be unconstitutional, certain portions of the statute (those pre-
6. Congress could openly declare its considered position that executive privilege does not apply vis-à-vis Congress. While the desirability for confidentiality goes without saying, the need for congressional oversight of the executive has constitutional dimensions. Congress could pass a statute, regulating the use of executive privilege vis-à-vis third parties (entities other than Congress) and in that statute signal that the President cannot assert executive privilege with respect to congressional demands for investigation.

7. Declaring one’s sense of the Constitution yields benefits, as the discussion above suggests. Along the same lines, Congress could pass a generic resolve making it clear that Congress disapproves of executive amendments of statutes and the Constitution. More precisely, Congress could make it clear that it does not believe that federal law, in its many forms, authorizes the President to act at variance with existing laws, either as a means of changing those laws or otherwise. Congress could also reject the claim that consistent executive practice, without more, yields a change the Constitution and statutes. Finally, Congress could denounce the maxim “[q]ui tacet consentit,” thereby denying that its silence signals implicit congressional acceptance of executive action.

Similar declarations have been enacted in the past. One that comes to mind is the Senate’s rejection of the idea that treaties should be read dynamically. The Senate issued this rejection in the wake of the Reagan administration’s attempt to reinterpret the Anti-Ballistic Missile Treaty in a manner inconsistent with the original conception that prevailed in the Senate when it granted its consent. The Senate attached this rejection to the Intermediate-Range Nuclear Forces (“INF”) Treaty of 1988 and subsequently repeated it in several advice and consent resolutions.

8. Congress should take another page out of its playbooks from the past, reaching back to episodes where the chambers have passed resolutions condemning particular acts of presidential aggrandizement. The House insisted on its right to information from President Washington regarding the controversial Jay Treaty. Decades later, the Senate censured Andrew

sumably favored by the president) would be inoperative. This allows portions of the statute to continue to hold sway while tethering together the potentially more controversial and vexing parts.


108. See Prakash, supra note 19, at 300.
Jackson’s removal of the Treasury Secretary. The House censured James Polk for “unconstitutionally” commencing the Mexican-American War.

Censures and declarations serve a purpose. They lay out markers about what Congress takes to be permissible and impermissible behavior. They thus supply notice to the other two branches. They also call upon members to engage with the Constitution and state, for the record, their views on some weighty matters of public import. Members should be willing to take stands on whether matters like DACA, the Syrian War, and President Trump’s immigration executive orders are constitutional.

Censures and declarations are easier to pass than impeachment motions because they are less consequential and because they tend to turn on questions of law rather than on questions of fact. In the Senate, a censure is easier to pass than an impeachment conviction for an additional reason; while the latter requires a two-thirds majority, the former only needs a simple majority. Finally, censures enable Congress to respond with a more appropriate level of indignation or outrage. Think of censure as a graduated sanction that makes some level of sanction (and thus some level of deterrence) more probable.

VI. CONCLUSION

The foregoing proposals are obviously not a panacea. They will not rid our nation of the difficulties associated with an imperial presidency. Nor do they speak to the institutional torpidity, sclerosis, and timidity that Congress evinces from time to time. Congress must act to thwart an aggrandizing executive. But the very forces that have conspired to prevent such a reaction will not disappear merely because of a law review article that lists some suggestions. Borrowing from Justice Robert Jackson’s wisdom (issued in another context) we can,

have no illusion that any [law review article] can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” . . . [O]nly Congress itself can prevent power from slipping through its fingers.

For any serious reform to materialize, members of Congress must adopt the institutional perspective even as they cling to the party perspective. This is utterly possible. After all, legislators can promote different perspectives in other areas. Farm state legislators exhibit a remarkable degree
of unity across parties on farm matters, for instance. In that case, they insist upon regional interests at the expense of party unity.

Members of Congress must realize that most of them will spend their remaining political careers on Capitol Hill, not in the White House. Most of them have no shot at the Oval Office. That being the case, they must see that their more realistic ambitions dovetail well with maintaining the institutional prerogatives of the legislature. Perhaps they should read (or reread) Federalist No. 51 and ponder the wisdom of Madison’s adage that the constitutional system depends upon “[a]mbition . . . counteract[ing] ambition. The interest of the man must be connected with the constitutional rights of the place.”112 Too often the interests of the men and women of Congress are not sufficiently connected with the rights of the place. It is time for that to change.