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FROM A FIXED, LIMITED PRESIDENCY TO A LIVING, FLEXIBLE, BOUNDLESS PRESIDENCY

SAIKRISHNA PRAKASH

A MADISONIAN CONSTITUTION FOR ALL
ESSAY SERIES

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INTRODUCTION

Though James Madison is often deemed the father of the Constitution, he was something of a perplexed uncle when it came to Article II. On the eve of the Philadelphia Convention, he had apparently given little thought about the executive. In "Vices of the Political System of the United States," Madison listed twelve "defects" of the Articles of Confederation. While noting the lack of sanctions for breaking national laws, he omitted the glaring absence of a vigorous, independent national executive. His April 1787 letter to George Washington, written a month before the Philadelphia Convention, sheds light on why: "I have scarcely ventured as yet to form my own opinion either of the manner in which [the national executive] ought to be constituted or of the authorities with which it ought to be cloathed." This was a bit of an overstatement, for as readers of Baron de Montesquieu's *Spirit of the Laws* knows, an executive does what the label implies—it *executes* the law. In the eighteenth century, the word "executive" had a core meaning even if its margins were contested. For Madison to speak of an executive was to signal that he desired an entity tasked with implementing national laws. Even so, the letter reveals that despite his reputation for methodical preparation, Madison was unsure about which additional "authorities" might be vested with the executive.

I. THE FOUNDERS' FIXED, LIMITED PRESIDENCY

A. THE CREATION OF AN ENERGETIC, FORMIDABLE EXECUTIVE

While certain Philadelphia delegates likely wielded more influence over the final contours of Article II—Gouverneur Morris of New York and James Wilson of Pennsylvania come to mind—the Article is best seen as the joint product of many minds. If victory has a thousand fathers, Article II was sired by perhaps fifty. In the end, not all endorsed its final form. Three delegates—Edmund Randolph, George Mason, and Luther Martin—pointedly criticized the formidable executive that emerged from the Convention.

They had ample cause. By the end of the Convention, the executive crystallized into an American version of European monarchies, one whose resemblance to the British monarchy could not be gainsaid. This republican, limited monarchy was hardly foreordained when the delegates first met in May 1787. Rather, the executive acquired power over the course of the Convention, a pattern of accretion that would become familiar to later generations of Americans.

Almost every decision within the Convention tilted towards an energetic executive. The delegates settled on a single executive and rejected a triumvirate, presumably because they agreed with those delegates who warned of violent dissensions and the diffusion of responsibility. After tussling for months over the vexatious question of selection, they finally settled on special presidential electors with a House backstop when no candidate received an electoral majority. This selection process, coupled with a

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guaranteed salary, a lengthy tenure, and no term limits, yielded an independent executive, one not beholden to Congress.

In fact, the new executive — armed with a host of powers — would serve as a counterweight to Congress. The executive would wield a check on legislation in the form of the limited veto, the power of which has grown considerably as presidential confidence waxed over the centuries. Moreover, the president also had power to enforce the law, the ability to pardon all federal offenses, an interstitial authority over foreign affairs, command of the military, and direction of the executive bureaucracy. With respect to making appointments and treaties, the president would need the Senate's consent.

Why did the powers of the executive accrete over the course of the Convention? Blame George Washington, as well as the determined delegates who relentlessly pressed for a robust executive. Washington caused those fearful of a powerful executive to let down their guard. When delegates considered a unitary executive, they fixed upon Washington and were emboldened by the prospect that he would be the first president. Had he not proven that power could be entrusted to him by renouncing it at the end of the Revolution? Those favoring a robust executive rode this Washingtonian tailwind and stubbornly persisted in their views, even in the face of defeats. Under existing fundamental frameworks, including the state constitutions and the Articles of Confederation, Americans had gone too far in hobbling the executive. The reformers insisted that this mistake be avoided at all costs. Whereas plural, weak executives had been the norm, the new Constitution prized executive unity and vigor.

When Americans received the proposed Constitution, discerning minds peered behind the document's trappings to see that the presidency would be far more powerful than contemporaneous state executives, whom James Madison had denigrated as "cyphers." Rather, in the words of Edmund Randolph, in reading the Constitution the people beheld a "little monarch," imbued with more power than many of the crowned monarchies in Europe. Thomas Jefferson said the office was a "bad edition of a Polish King,"— hardly words of flattery. His aide said the Constitution would create a "mixed monarchy," for despite "the humble title of President," the office "would have greater powers than several monarchs have." Prominent Anti-federalists, like Patrick Henry and George Mason, carped that the presidency "squints toward monarchy" and that the Constitution would establish an "elective king." Some supporters of a strong executive rejoiced, with John Adams saying that the Constitution had created a "monarchical republic." Even foreigners saw the resemblance, with the Dutch Stadtholder saying that Americans had given themselves a "king, under the title of President."

The complaints generally flowed in one direction. "We the People" ratified the Constitution in the teeth of innumerable claims that the presidency would be too powerful and would be a monarch. In contrast, precious few complained that the presidency would be impotent or lethargic. The Constitution thus marked a sea change from 1776, when the signers of the Declaration indicted George III for kingly excess. In the Constitution, the Convention had constructed something scarcely different from what the nation had previously forsaken. America was to have, in many respects, a national government with a formidable executive.

The monarchical cast of the original presidency is utterly lost on modern readers of the Constitution. For many readers, the claim might seem downright bizarre. Article II never mentions a crown, a throne, or a fancy title. Our executive is elective, while monarchies seem invariably hereditary. America's executive is clearly limited, whereas monarchy brings to mind despotism—the arbitrary rule of one. Finally, America is a grand republic, one with a guarantee of a "republican form of government," and hence—whatever else it is—it cannot be a monarchy.

But the Founders were more sophisticated when it came to monarchy. That generation knew that monarchs could be elective because many storied monarchies were, including the Papacy and the Holy Roman Emperor. They were also well aware that some governments—so-called mixed monarchies—had elements of both monarchy and republic. They could look behind the forms to see the substance. For instance, Baron de Montesquieu perceived that for all its regal frills, England was a "republic disguised under the form of a monarchy," by which he meant a mixed monarchy. Inspired by the Baron, one might regard the American Constitution that as a mixed, limited monarchy veiled by the trappings of a thoroughly republican façade.

B. ENERGETIC AND FORMIDABLE BUT ALSO LIMITED AND CHECKED

Indeed, it is vital to bear in mind that even with all this—the mixture of national, federal, republican, and monarchical elements—the Constitution still created a *limited, republican* monarchy. In interring the oft-told fairytale that the Framers crafted a weak executive, we must not swing to the other extreme. As powerful as the presidency was, it was clearly not meant to be all-powerful. There were plenty of constitutional restraints, some express and others implied.

First, presidents had to execute the laws of Congress, for they could not suspend or dispense the very statutes they were to take care to faithfully execute. Almost a century before the Constitution's creation, the English Bill of Rights firmly established that the executive could not suspend or dispense laws, as such a power came perilously close to a general authority to legislate. More generally, the English did not suppose that the Crown could (or should) make laws on its own. Instead, the Crown's checks on lawmaking came from the veto, the power to end a session of Parliament (and thereby terminate pending activity), and the routine use of influence to corrupt the independence of legislators. The duty to execute laws made primarily by others and the lack of a generic power to make laws went hand-in-hand and were bedrock features of all Anglo-American executives in the eighteenth century.

Second, and relatedly, presidents had to honor congressional regulation of the army and navy, for military command did not imply authority to start wars or to unilaterally govern and regulate the military. The office of "Commander-in-Chief," an entirely familiar and commonplace position, merely encompassed command of a particular military unit and not autonomy to launch attacks on foreign nations. In fact, both England and America had hundreds of commanders in chief, each charged with commanding a particular component of the military and each barred from unilaterally plunging their nations into war. The Constitution merely granted the president the same sort of military command that generals had, except that the president was ex officio a general of generals and an admiral of admirals—a commander of all military units. That is why Alexander Hamilton said that the president would merely be the

"first General and Admiral." With its express authority to "declare war" and to govern and regulate the armed forces, Congress could control the military and its Commander-in-Chief.

Third, Presidents generally required the consent of the Senate to make appointments and treaties, meaning that they could not unilaterally fill appointed offices or make significant international contracts. These were checks on traditional executive powers and were a nod to those that believed that a council ought to check the executive on certain vital matters. On these questions, the executive was plural rather than unitary, for the need to secure the Senate's consent made the latter partly "executive," a point not lost on early readers of the Constitution or on the Senate itself.

Fourth, presidents depended upon Congress to create and fund executive offices and departments, including the Army and Navy, since chief executives lack the constitutional authority to generate offices or endow them. That is why the first Congress created three early departments—Foreign Affairs, War, and Treasury—and supplied the staffing and pay for each. While the departmental names would sometimes change, and the number of departments and agencies has ballooned, Congress has maintained its monopolies over departmental structure and the purse. The power to create and fund the executive branch's substructure has consistently given Congress leverage over the bureaucracy. While presidents may direct and remove executive officers, Congress makes the laws committed to the care of such officers and may expand or curb their authority, a useful means of signaling subordinacy and influencing behavior.

Fifth, presidents had to honor judicial judgments. At one time, the judicial power was but part of the executive, for both executed the law, albeit in different ways. But the English barred their kings from sitting in judgment and protected their most important judges from executive ouster. In this scheme, no one doubted that judges decided who prevailed in cases brought before them. This was true even when the government was a party as plaintiff, prosecutor, or defendant. This understanding of the executive's relationship to the judiciary carried over to America and our Constitution. Unlike the English kings of old, American presidents could not decide cases. Cases were to be decided by judges, whose judgments the executive was to faithfully execute.

Finally, the Constitution enjoined the president to "preserve, protect, and defend the Constitution." This unique oath, coupled with Article V's amendment process, refutes any notion that presidents may amend the Constitution by other means. Unlike the English Constitution, which changes by practice and by legislative statutes, the American Constitution was meant to be impervious to both. Certainly, the president was not meant to be the instrument of its informal modification, much less its undoing.

C. DEBATES AND DISCOMFORT ON THE BREADTH OF PRESIDENTIAL POWER

In the early years, a few contentious disputes arose about the peripheries of presidential power. In 1789, Representative James Madison read the grant of "executive power" as encompassing an entire class of related powers. Within this category, he argued, was a power to remove executive officers. In other words, the president had constitutional power, via the grant of executive power, to oust executives from office. Madison's interpretation prevailed. In 1793, writing as "Helvidius," Madison reiterated his earlier position about the Article II Vesting Clause. It granted authority, he said. Yet he simultaneously denied

that it encompassed foreign affairs authorities. Fears of the executive were growing and they no doubt influenced Madison's perspective.

The specter of an increasingly regal president loomed in the background, especially in Washington's second term. Though detractors were often reluctant to attack Washington directly, some carped that the presidency was slowly being monarchized. As Jefferson observed, the early fights over presidential power were in part about what type of government America had and what type it would have in the future:

> "Where a constitution, like ours, wears a mixed aspect of monarchy and republicanism, it's citizens will naturally divide into two classes of sentiment, according as their tone of body or mind, their habits, connections, and callings induce them to wish to strengthen either the monarchical or the republican features of the constitution. Some will consider it as an elective monarchy . . . and therefore endeavor to lead towards that all the forms and principles of it's [sic] administration. Others will [view it] as an energetic republic."

II. OUR LIVING, FLEXIBLE, BOUNDLESS PRESIDENCY

Since Washington's presidency, 43 more presidents have come and gone. Yet the underlying debate and disquiet continues unabated. As compared to the late eighteenth century, many may suppose that we have gone a quite a long way to reinforcing the Constitution's monarchical features. As a general matter, our modern system looks more and more like the English system of an unwritten, evolving, common law Constitution—what moderns call a "Living Constitution". The presidency has not been immune to these changes. In fact, it has been one of the Living Constitution's principle agents of informal amendment. The modern executive is at once more republican *and* more monarchical than the original presidency. If the Founders Presidency was meant to be fixed, our presidency is better described as a "Living Presidency," one whose contours are shifting over time, generally in a manner that expands the office.

We have nothing like an absolute monarchy. And though we thrice have had sons follow their fathers into the office, we do not have a hereditary monarchy. Yet no one doubts that presidential powers have accreted over time. Where the office was weak, it is now strong. Where it was strong, it is stronger still. Some of these practical, informal amendments to Article II are somewhat familiar. Others are so much a part of the fabric of the modern presidency that we can scarcely make out that features of the original presidency have been amended and tossed aside. We have forgotten so much of the past that we cannot make out all the modern additions to the office.

A. THE RISE OF THE COMMANDER-IN-CHIEF

Like our burgeoning military, which has ballooned from a thousand soldiers to more than a million men and women in arms, the President's military authority has swollen with the times. Via the alchemy of practice—in this case the repeated violation of constitutional norms—the President has acquired something of a camouflage "gloss" to his executive power, meaning additional authority over the armed forces.

The Commander in Chief has advanced on two related fronts. One relates to the initiation of war. The most infamous violation of existing norms was Harry Truman's "police action" in Korea, when the president asserted that no congressional authorization was necessary because, after all, there was no war on the Korean peninsula. That Truman would commandeer Congress's constitutional authority to wage (declare) war within just a decade of Congress declaring war against six nations in World War II, each of whom had declared war first and were thus aggressors, reflects either mendacity or massive ignorance on his part.

From this unprecedented police action sprung forth a monumental, unwritten amendment to our Constitution. Since Korea, presidents have started wars, large and small, in Grenada, Kosovo, Bosnia, Libya, and a host of other nations. Even when presidents have gone to Congress, they often went merely to consult, insisting that legislative approval was superfluous. Welcome, yes, but entirely unnecessary. As things stand now, executive branch lawyers debate whether presidents have acquired the power to begin messy ground wars. While some such lawyers (joined by allies in Congress) assert that the president can start any sort of war he wishes, lawyers in Democratic administrations have denied that the practice goes so far. The presidency has only acquired a power to start limited wars, they insist. But this conclusion is somewhat shaky given that the Korean War, the most famous war without congressional authorization, was a grueling, horrific ground war with thousands of U.S. casualties. If practice is the yardstick, as many executive branch lawyers insist, the Korean War helps establish that presidents can wage whatever war they wish, meaning that the last 70 years of practice have transferred the declare-war power, root and branch, to the president.

The second military innovation arises from executive insistence that Congress cannot micromanage the armed forces. This claim would come as a shock to the Founders, for Congress expressly enjoys broad constitutional power to make rules governing and regulating the armed forces. Moreover, early Congresses actually exercised such power to determine by law where and how the enemy might be attacked. For instance, such regulation was pervasive during America's Quasi-War with France. During the presidency of John Adams, Congress specified which enemy vessels could be targeted and where they could be attacked. Neither Adams, nor George Washington, nor anyone else uttered any constitutional qualms. Today, commanders in chief routinely declare far less intrusive congressional restrictions unconstitutional and refuse to honor them. Our politicians have utterly forgotten that the original Constitution granted Congress almost plenary authority over the military.

B. THE PRESIDENT AND FOREIGN AFFAIRS

With respect to the broader category of foreign relations, the changes have been less noticeable, in part because Americans pay less attention to the external realm and also because the original allocation of foreign affairs power was always a little more obscure. The biggest transformation is the president's power to bypass the Treaty Clause. The Clause requires the president to secure a two-thirds vote of the Senate before ratifying a treaty. Under the original Constitution, treaties encompassed significant, long-term contracts in which the United States pledged its honor to another nation. This was a functional definition, one that did not turn on terminology. For instance, a president could not evade the Treaty Clause by calling an international contract an "Agreement" or an "Accord." Whatever the label, major, durable, international contracts were treaties.

In the 1930s, however, Franklin D. Roosevelt helped marginalize the Treaty Clause. He made treaties after securing consent via ordinary legislation passed by Congress. Initially, the textual hook was Congress's power to regulate commerce, a power that no one at the Founding supposed encompassed authority to conclude commercial treaties or the power to enable the president to evade the Treaty Clause. Defenders of the innovation claimed that because Congress had the power to regulate foreign commerce, Congress could authorize the President to make international agreements and bypass the Treaty Clause's requirement of super-majoritarian Senate consent.

Ever since, presidents have utilized this scheme—the so-called "congressional-executive" agreement—to bypass the Senate's treaty check. Whenever the president invokes the congressional-executive agreement option, a majority of Senators often favors the international agreement and, crucially, also understands that a two-thirds majority cannot be mustered. In that context, a treaty backed by a majority of both chambers is preferable to no treaty at all. Put another way, Senate majorities essentially choose to ignore the constitutional check of the Senate minority that would block the passage of a treaty but cannot block the enactment of a congressional-executive agreement.

While passing legislation is hardly a walk in the park, it is generally easier than obtaining a two-thirds majority in the Senate. Moreover, the President essentially has an option to choose whatever route he considers more likely to deliver results. He can pursue the Senate's consent to making a treaty by securing a two-thirds majority in that chamber. Alternatively, he can make a treaty by a congressional-executive agreement, i.e., with the concurrence of a simple majority of both chambers. Indeed, other than perhaps embarrassment, nothing prevents the President from selecting one path, and if that proves inhospitable, taking up the other. That has happened once, when, after the Senate rejected a treaty, the President later secured the majoritarian consent of Congress.

There are Senators who have said that certain international agreements (typically arms control) must be made under the Treaty Clause. But why the Treaty Clause supplies a particular monopoly over such agreements is never quite made clear. It may well be that these Senators are attempting to revive their institution's special role in foreign affairs, a position eroded by the sidelining of the Treaty Clause.

As to the routine conduct of foreign affairs, modern presidents have become increasingly assertive, claiming that Congress must give them a free hand. According to executive branch lawyers, Congress cannot, via substantive legislation or appropriations, hogtie presidents by disestablishing State Department delegations or cutting funding. At the extreme, this way of thinking suggests that the President is entitled to a foreign affairs bureaucracy and funding of his own choosing, without regard to congressional priorities. Expect future presidents to continue to push the envelope in this area by objecting to congressional micromanagement in foreign affairs.

C. EXECUTION OF THE LAWS

When it comes to the presidency's principle function—execution of the laws—we are in the midst of a fundamental overhaul. Modern presidents have become less and less faithful executives. They are more prone to becoming lawmakers as they supplement, misconstrue, or flout laws.

Congress's confident grants of broad lawmaking power to executive agencies are a central example. All too often, Congress endows an agency with the broadest of mandates—legislate in the public good—over some subject, be it trade or the environment. Congress delegates freely because it values flexibility, lacks expertise, and seeks to escape responsibility for onerous regulatory burdens. Whatever the reasons for particular delegations, the resulting executive rules are nothing less than federal laws made by means other than bicameralism and presentment. Each of us must obey them on pain of fines or imprisonment. Because executive agencies labor under the president's direction, in practice and in law, their rulemaking powers are essentially his.

Even when there is no formal grant of rulemaking authority, under "*Chevron* deference," executive agencies receive deference for their reasonable interpretations of the statutes committed to their care.[2] Such deference to agencies sometimes inspires tendentious interpretations that help advance the policies of the incumbent president. In particular, rather than seeking the *best* interpretation of ambiguous text—something expected of a faithful executive—*Chevron* deference encourages agencies to discover (or manufacture) ambiguity, vagueness, and uncertainty. After all, the greater the ambiguity, vagueness, and uncertainty in a statute, the greater the array of reasonable readings that the statute will bear, and the greater the chance that the executive can successfully latch on to one that advances its particular policies.

The most interesting feature of unfaithful execution—spurious interpretation of the laws—is more exceptional and more infrequent. It tends to arise when the president feels deeply invested in a matter. During the Great Recession, President George W. Bush used a statute appropriating funds for the bailout of "financial institutions" to rescue General Motors and Chrysler. No plausible reading of the statute permitted the treatment of automobile manufacturers as if they were financial institutions. Moreover, though the House had approved a separate auto bailout, the Senate did not. Despite acknowledging that Congress had not passed an auto bailout bill, the President announced that the "executive branch [would] step in" and supply the funds anyway.

More recently, President Donald J. Trump has signaled a willingness to dismantle the Affordable Care Act (the ACA) *administratively*, something that seems far removed from faithful execution. However much discretion the Act conveys to the executive, it surely does not grant the president the unilateral right to wield that discretion in a way that emasculates the Act. Yet the President has boasted that rather than repealing the ACA, "I think we may be better off the way we're doing it, piece by piece, ObamaCare is just being wiped out." If a judge boasted of wiping out a congressional act via a judicial decision, many would be scandalized. Executive repeal should be no less disreputable. In fact, it is becoming more respectable.

But faithless execution may sometimes arise from *too deep a commitment to a particular law*. For instance, the ACA authorized federal payments to insurers but did not provide an appropriation to actually pay them. The appropriation was to come later. This scheme was in keeping with the norm that granting legal authority to a governmental entity does not automatically supply the funds necessary to exercise the authority. That is why Congress often passes annual authorization bills that are separate from the annual appropriations bills. Recognizing that the ACA supplied no appropriation, the Obama administration

[2] This "*Chevron* deference" stems from a famous 1984 Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837.

publicly approached Congress for a new appropriation to make the payments to the insurance companies. But the Republican Congress balked. Upon realizing that there would be no appropriation, the administration repudiated its earlier position and implausibly asserted that the ACA itself appropriated the necessary funds and that no further appropriation was necessary. The administration's intense

desire to prop up the ACA led to a direct violation of the constitutional rule that no funds can be taken out of the Treasury except by virtue of a law.

More examples abound, but the point is made. The executive will twist and turn Congress's laws to further its principle agenda items, stooping to misread statutes and making a hash of them. Fortunately, because presidents do not typically have hundreds of prized goals, the temptation to play statutory games is not ever present. This means that with respect to many matters, the executive remains a faithful executor of congressional commands. In particular, where the executive has no policy disagreements with the law and faces no external pressure to evade its strictures, relatively faithful execution will follow as a matter of course. This saves legal and political resources for the (mis)interpretational fights that actually matter to the executive.

D. THE EXECUTIVE AS AN AGENT OF INFORMAL CONSTITUTIONAL CHANGE

The final significant evolution has been the executive's willingness to be an agent of informal constitutional change. As noted earlier, the president's express duty to "preserve" the Constitution would seem to bar presidential attempts to alter it. More precisely, the presidential oath, fairly read, seems to reject the idea that presidents could amend the Constitution by repeatedly contravening it.

Nevertheless, the executive has embraced this tactic in theory and in practice. The assumption of congressional war powers, the evasion of limits on the president's command of foreign affairs, and the assumption of lawmaking authority all bespeak a willingness to alter the Constitution via practice. Presidents no longer preserve the Constitution intact. Rather they preserve what they please and despoil the rest.

The executive branch admits as much. In executive branch legal opinions authored by the Department of Justice's Office of Legal Counsel, executive lawyers across several administrations have argued that repeated practice puts a "gloss on executive power." This argument suggests that, through historical practice, the president can acquire constitutional powers not previously his. Indeed, these opinions make frequent reference to historical practices as being important, if not dispositive.

The executive branch's embrace of historical practice as a means of amending the Constitution generates interesting implications. First, perhaps the president does nothing wrong in trying to change the Constitution, whatever his oath might imply. After all, it is hard to fault presidents for trying to change the Constitution via an accepted means—in this case, practice. Second, and more importantly, no power is off limits or forbidden. With diligent violations of the existing legal order, the presidency may acquire any power, whether granted to the federal government or not. In this sense, Article II comes to resemble a floor to presidential power and certainly not a constitutional ceiling. The presidency is not something fixed, but whatever a series of presidents make of it.

Let's be clear. Presidents, by and large, are not Holmesian bad men, as much as partisans of the opposite party might suppose. They do not become more irresponsible or willful upon becoming the president. Nor are they unusually ambitious and power hungry. They are like all highly successful American politicians, with drives related to reelection, policies, and posterity. They want to get things done and be remembered as in the same league as George Washington and Abraham Lincoln.

III. HOW PRESIDENTS REWRITE OUR CONSTITUTION

Presidents are best understood as playing a game. Most of the time, they play this game per the rules (either as they seem or as their advisers explain them), with the cards they are dealt. The issue is that presidents have many more cards than the other players and that the rules tilt the game in their favor.

Which cards and rules explain the president's ability to rewrite Article II and thereby alter the constitutional contours of his office? Some are perhaps the unintended features of the original Constitution itself, while others reflect changes in practice and conceptions that the Founders never contemplated.

A. EXPLOITING ORIGINAL FEATURES OF THE PRESIDENCY

To begin with, consider the structural features of the three branches. Unity in the executive branch conduces to "decision, activity, secrecy, and dispatch," as Alexander Hamilton famously wrote. But unity also proves incredibly advantageous in any contest or dispute amongst the branches. It is far easier for the executive to pursue ever-greater authority because presidents can ignore, sideline, or fire dissenters within their branch. That is to say, the president has an easier time generating internal unity.

In contrast, the other two branches, both of whom are supposed to check a grasping president, are fractured by their sheer multiplicity. Congress literally has a cast of hundreds divided across two chambers. The congressional horde has a distinct collective-action disadvantage in attempts to restrain the one executive. Furthermore, almost all decisions designed to curb the executive must be presented to the president. In the past, presidents have wielded the veto to restrain those who seek to restrain them. The only consequential check on the presidency that cannot be vetoed is impeachment. But impeachments require a two-thirds supermajority in the Senate to convict, a high threshold that has rendered successful impeachments a rarity

The courts are also divided, with the judicial power dispersed among hundreds of federal judges. Even the Supreme Court's considerable authority is split amongst nine justices, meaning that five must unite to take action. Moreover, the courts are profoundly passive instruments of opposition, for they must wait for third parties to bring a proper case. Finally, the courts have declared that some questions are "non-justiciable" meaning that the courts will not resolve them. For example, questions about the constitutional war powers of the presidency are outside the purview of the courts. As a result, the courts cannot check every executive usurpation.

The singular advantages and perils of unity were understood from the beginning. Edmund Randolph, the seventh Governor of Virginia, warned the Constitutional Convention that a single executive was the "foetus of a monarchy," for the executive would eventually strive, strain, and push for more power. For this reason, Randolph unsuccessfully sought a triumvirate. The Convention rejected the idea,

presumably concluding that a triumvirate would struggle and perhaps end in a despotism of one, just as the clashes between the first triumvirate--Pompey, Marcus Crassus, and Julius Caesar—eventually lead to the Ceaser's domination of the Roman empire.

Though he lost on the question, Randolph was absolutely right that the choice of unity was pregnant with consequences. While none of what has come to pass was inevitable, the accumulation of executive power certainly became more probable under a unitary executive. A sole executive can be more aggressive, nimble, secretive, and resolute in the advancement of the presidency's interests. And our unitary executive has proven to be all that and more.

Second, consider the text of Article II and the problem of constitutional drift. While I have sketched what I take to be the original Constitution of the executive, the passage of time unquestionably has eroded those meanings. Many unfamiliar with English and early American understandings might read Article II and perhaps be struck by its many possibilities. What is a Commander in Chief? Perhaps it is whatever the president makes of the office. Or perhaps it gives the president an unrestrained command of the armed forces. For that matter, what is the "executive power?"

Charles C. Thach—author of *The Creation of the Presidency, 1775-1789: A Study of Constitutional History*—long ago said the Vesting Clause of Article II stands as a constitutional "joker," ready to be cited as a legal basis for any executive action not otherwise traceable to some more specific clause. This prospect has not waned over time. Executive privilege, emergency authority, suspension of the privilege of the writ, the taking of private property in time of war—all of these pretensions and more might be accommodated by the Vesting Clause.

Article II could have constrained as well as authorized. Imagine an Article II, Section 5 that specifically restricted presidential power to check a runaway presidency, somewhat mirroring Article I, Section 9. For instance: "The executive shall never take funds out of the Treasury except by virtue of law passed by Congress;" "The executive shall never wage war except by virtue of law;" "The executive shall never make treaties or similar agreements except with the consent of the Senate." History supplies famous examples of legislatures enacting similar limitations on executives. The English Bill of Rights contains many such enactments, most prominently its bars on executive suspensions and dispensations. State constitutions likewise limited executive authority by imposing specific prohibitions. While Article I, Section 9 and the Bill of Rights apply to the executive and therefore limit it, their rules are generally not meant to deal with the peculiar phenomena of executive overreach.

Third, as noted earlier, judicial review of executive action is limited by technical rules. For instance, judicial review of the executive's excesses has always been asymmetrical. Actions harming an individual are reviewable, but actions benefitting an individual are often not, even when they are illegal. Why? The Constitution, through the case or controversy requirement, and associated justiciability doctrines, has long been thought to limit the circumstances under which judges may exercise their judicial power. Because of such constraints, the courts cannot consider the merits of all assertions that the president has violated the Constitution, laws, or treaties of the United States. While the courts have expanded the frontiers of judicial review, they have not gone so far as to make all executive action reviewable.

B. CAPITALIZING ON CHANGED CONCEPTIONS OF THE PRESIDENCY

Additionally, how we today conceive of the office and transformations of society also help account for the ascent of the presidency. In particular, consider four: the advent of the popular mandate; the influence of political parties; the willingness of Congress to fund a vast bureaucracy; and the ascent of living constitutionalism. These factors cannot be laid at the feet of the Founders (unless we wish to censure them for their lack of foresight), but they create the context against which the executive has grown more powerful over the centuries.

The presidency's popular mandate arose from changes in electoral selection in the decades following ratification. The Constitution's system of presidential electors was established, in part, to ensure that men of wisdom and experience, using their independent judgment, would select presidents from amongst the most suitable candidates. How these electors would be chosen was left to the state legislatures. Initially, some states used popular elections to select their electors while other state legislatures appointed the electors themselves. This slowly morphed into a nationwide system of popular elections for presidential electors. For our purposes, what is most important is that the discretion the founders envisioned vanished rather quickly as electors became bound to nascent political parties. Indeed, shortly after the Constitution's framing, electors were expected to vote for their party's nominee and not to exercise their judgment. This made the election of the president seem the choice of the people, especially when the party candidates were known to the people prior to their casting of votes for electors.

Andrew Jackson was the first president to claim that he represented the people of the United States. Recognizing that this spin would add to the luster and power of the presidency, Whigs like Daniel Webster and Henry Clay denounced the claim. The people did not vote for a president, but for electors, they pointed out. Besides, if the president was representative of the entire people of the United States, he would be the only such person in government and would soon become its master, if not master of the people themselves. Jackson's vision prevailed, for observers routinely say that the president uniquely represents the entire people of the United States.

As presidents started to develop policy agendas of their own, it soon became commonplace to assert that their election came with a popular mandate to implement their agendas. Essentially, this meant that the "people" had chosen a policy agenda and wanted the rest of the government to implement it or get out of the way. These claims to a popular mandate tended to be made by allies of the president. But even critics of the notion know that it exerts a powerful appeal.

With the people at his back, the president can apply pressure on all rival institutions, but especially Congress. The same wind or gale force that ushers in a new president may also be used to oust those who refuse to join his policy reformation. Not every congressman will bend to the president. But the president, especially during his honeymoon, has a better chance of seeing his agenda enacted because, after all, the people have spoken and endorsed the man *and* his policy platform.

As the above discussion suggests, political parties not only helped transform presidential contests into meticulously planned campaigns, but they have also had the effect of weakening cross-branch

restraints. James Madison said that "ambition must be made to counteract ambition," meaning that the branches must be constructed in such a way that they feel bound to advance their own interests. But he failed to predict the rise of political parties and the dampening effects they would have on cross-branch competition. Political parties create ties that bind across the branches. Democratic members of Congress are often loath to closely monitor or check, much less attack, a president of the same party. And Republican legislators generally are not in the habit of censuring their standard-bearer. Essentially, presidents and legislators often rise above their station and see the other ties — ideological in this case — that bind them together.

Moreover, these ties sometimes mean that gratifying one man's ambition (say the president's) may simultaneously *promote* the ambitions of another in a different branch (say a committee chair). The policy and personal aspirations of presidents and members of Congress from the same party are often best served by cooperating to promote the joint agenda as reflected in a party platform. Rather than being a rival, the president is often part of the same team.

While party ties will temper the willingness of presidents to criticize legislators of the same party, in practice it seems more likely that these legislators will feel far more constrained in faulting presidents of the same party. The president is perceived as a party's principal leader. As such, party men and women in Congress will have a harder time censuring him because they are far more likely be viewed as malcontents or Quislings. In contrast, presidents can reprimand party leaders without the same fear because, at least in part, they come to embody the party and cannot be attacked for disloyalty to themselves.

Hence the persistence of political parties, while useful in many ways, has the effect of weakening Congress and strengthening the president, at least in interbranch disputes. Because every Congress is, in the words of Abraham Lincoln, a "House Divided," legislators find standing up to the president rather difficult.

There is another way in which Congress helps fuel presidential ambition. Congress funds the very executive institutions that aid the president to advance his policy agenda and simultaneously expand the presidency. For example, Congress supplies a host of aides that assist the president in exercising his powers. The Executive Office of the President is the central nervous system of the modern presidency, with offices like the Office of Management and Budget, the Domestic Policy Council, and the National Security Council. This vast presidential staff of almost 2000 gives presidents the practical ability to monitor and curb the departments. This cadre of elite personnel, composed of political and civil service appointees, both advances the president's agenda and also works to delay, hinder, and obstruct bureaucratic initiatives contrary his agenda.

It is hard to overstate the significance of this dedicated staff. A single man, even with the backing of the people and his party, cannot possibly supervise even the upper echelon within the executive departments, what to speak of the two million-plus federal bureaucracy. There is simply too much going on within the bowels of the departments. With this staff, many of whom endorse the president's agenda, presidents can do much of consequence, for these aides act as a force multiplier of executive power. Officials during the Reagan administration used to say that "personnel is policy," meaning that if you had the right personnel, you could ensure the right sorts of policy. That is especially true of those closest to the president, who can then monitor those in the departments. There is little doubt that the

modern presidency would be a shadow of its familiar self were it not for the congressional funding of presidential personnel.

Relatedly, Congress regularly funds attorneys who see it as their mission to defend the presidency, both the institution and its particular occupants. Both within and without the Executive Office of the President are a small cohort of expert attorneys that, year in and year out, dedicate themselves to, among other things, preserving and expanding presidential power. The most famous of these offices are the Office of Legal Counsel and the White House Counsel's Office, but other legal advisory units serve similar functions.

These lawyers provide counsel, both oral and written, on a whole host of issues, including the president's constitutional prerogatives. On questions of presidential power, these lawyers perhaps conceive themselves as not expanding executive power but instead merely illuminating its reach and confines. Yet no one should doubt that these lawyers generally tend to favor presidential power. Because these lawyers labor in the executive branch, it is hardly surprising that their opinions often endorse expansive readings of presidential power. Every lawyer tends to see a matter from the client's perspective. Over time, new opinions often advance the notions found in previous opinions, resulting in presidential power creep. Even when law seems to stand in the way, these attorneys try to be creative and find a legal workaround that allows presidents to at least partially advance their agendas. Without the assistance of these lawyers, modern presidents could not so easily expand executive power.

The final element of the rise of presidential power is the ascent of the theory of living constitutionalism. Living constitutionalism posits that the meaning of the Constitution ought to change over time. Absent such change, we would be bound to benighted understandings from centuries ago, a prospect that would make the Constitution brittle and might hasten its collapse. The idea perhaps has its greatest pull with respect to individual rights, where many believe that faithfully following outdated conceptions would require us to abandon many rights that we have come to cherish. For many, living constitutionalism is attractive precisely because it offers progress and a means of circumventing Article V's impossibly difficult amendment process.

Once one embraces the idea of living constitutionalism, however, the door opens to living presidentialism. Because changes in the living constitution arise through changes in conceptions and practices, presidents are rather well positioned to effect those changes. By speaking to the public, presidents can start a new dialogue about the need for constitutional change or join an existing conversation and spur it forward. More importantly, presidents have the ability to adopt practices that advance new constitutional conceptions, both with respect to individual rights and governmental structure.

In the area of presidential power, the presidents are obviously best equipped to create new conceptions and practices that advance the presidency's institutional interests and the peculiar interests of the incumbent. In war powers, presidents have seized authority by unilaterally using force without congressional approval. In foreign affairs, presidents likewise can act repeatedly to create "facts on the ground" and then cite those practices as a basis for a change in constitutional conceptions. Finally, with respect to execution of the laws, executives have repeatedly adopted dubious readings of statutes only to claim after the fact that a new understanding of a statute has emerged from these practices. These dubious

readings can take an expansive form or a narrow one, either finding authority where there is none or minimizing some statutory restriction. Either way, the laws that the president must faithfully execute can become protean in the hands of the executive.

IV. THE FUTURE OF THE EXECUTIVE

Yesterday's presidency is different than today's, and the only thing that can be confidently predicted is that the presidency tomorrow will be different as well. Saying that some act is unconstitutional or illegal today in no way implies that it will be so in the future. Change is the only constant.

A. VIEWS ON THE LIVING PRESIDENCY

Is the living presidency a bug or a feature? There is a tendency to lament it as a bug, even among those who generally favor a living constitution. For instance, many liberals lament the rise of presidential war powers, and are eager to trumpet and celebrate the wisdom of the Founders' Constitution. But if Congress should not be tied to a "horse and buggy" conception of the Commerce Clause, as Franklin D. Roosevelt insisted, why should presidents be tethered to a "quill and cannon" conception of presidential powers?

Moreover, if undemocratic courts can update our Constitution by reference to perceived changes in social mores—say with respect to abortion or the death penalty—why should not presidents update Article II to reflect America's superpower status and their own far greater standing in our republican experiment? If we have more international interests in this day and age, can we be beholden to a sluggish, bicameral process before we use force? If the President best represents the people, there is no one better to update our laws and Constitution, particularly Article II, than the only representative of the entire people of the United States. If living constitutionalism is a welcome, even needed feature of our current age, the living presidency is a feature of the mutable system that we have designed.

B. SOLUTIONS TO CURB THE MODERN PRESIDENCY

For those who believe that the Living Presidency is a bug, what can be done to limit or eliminate this bug? Here are five fixes. I do not claim that their adoption would solve all perceived problems with the presidency. Each involves Congress and, as such, each requires a branch that is currently at a disadvantage to struggle to overcome it. I do not suggest that Congress will take these measures, but only that it can do so and that their adoption will help curb the executive.

First, the chambers of Congress should be more willing to express their views on matters of constitutional import. In the past, chambers have censured presidents, most prominently Andrew Jackson and James Polk. Such resolutions are a good idea, for they allow the chambers to express their views without actually trying to impeach and remove. By lowering the stakes, it makes the weapon more usable. Congress could lower the stakes further by opining about presidential power without reference to any particular president. For instance, at the outset of a Congress, the chambers could pass resolutions that express their views about executive privilege, executive wars, or executive practice without referring to any particular dispute. This depersonalizes the resolution and makes resolutions less partisan. Even better, pass a

series of resolutions several months before a presidential election, when no one knows who will serve as the next president.

Second, create a war powers resolution that cuts military spending upon the initiation of conflict. For instance, Congress might provide that should the president start a war, defense spending is automatically cut by three-quarters from the existing appropriation. Such an automatic rule would be constitutional because everyone admits that Congress controls the federal fisc. The rule would have the effect of forcing presidents to secure congressional approval before (or immediately after) each significant initiation of force because without such approval, the funds (and therefore the mission) would peter out.

Third, adopt a strategy of grow and shrink. In the name of economy, Congress has kept its staff small. But it cannot keep up with the massive presidential bureaucracy if it adopts a policy of severe economy. Congress should have a sizable bureaucracy of its own that will help it monitor the executive. In conjunction with this approach, Congress should carefully monitor the president's lawyers and aides and pare them back. One may well suppose that more presidential aides yields more presidential mischief.

Fourth, reduce delegations to the executive. In particular, Congress should curb its reliance upon broad delegations of legislative power to its institutional rival. It can do this by authorizing executive agencies to draft regulations, packaging several of them together for a floor vote, privileging the package by preventing amendments, and then legislatively adopting them as law. To preserve flexibility, these regulations can be given a shelf life of no more than four years. This would force reconsideration of regulations and ensure some measure of responsiveness to changing electoral politics.

Fifth, Congress should rationalize advice and consent. In particular, it should reexamine the offices that currently require advice and consent and do away with the obligation for those inferior offices where such consent seems a waste of time. For instance, the Senate need not be involved in advice and consent for many military positions, or for that matter, many civilian undersecretaries. Congress can then redirect attention to those positions that currently lack a Senate check. The White House Chief of Staff, the White House Counsel, the National Security Adviser—these and dozens of other important offices currently lack Senate consent. Yet these offices are often more important than several cabinet posts and are certainly more significant than the many deputy and undersecretaries that must receive the Senate's consent. The Senate checks matters, because Senators often extract promises from candidates and these oaths have the effect of constraining the president.

None of these will answer all the hopes of those who believe that the Living Presidency is a bug. Though Congress will never cease to let us down, we can certainly expect more from it than we can from presidents who spoke of the regal pretensions of the incumbent while running for the office. A funny thing often happens once a candidate enters the Oval Office. His reforming zeal dissipates as he realizes that his promises to curb the office no longer check someone else's power but rather his own. In contrast, most members of Congress hope to stay in the institution for a long time and many may realize that their authority generally waxes to the extent that the presidency is curbed. Although ambition does not always curb ambition, it is far more likely to do so than a system where the principal constraint on the presidency is its own institutional humility. In recent decades, that has been in rather short supply.