February 19, 2010

The Ill-Made Prince: A Modest Proposal for a New Article II

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ABSTRACT

This Article considers the recent controversies over claims of extensive executive authority by the Bush Administration and suggests that they stem at least partially from the inartful and tentative phrasing of Article II and the resulting efforts by advocates of executive authority to transfer all available authority to the President. Its analysis begins with the drafting of Article II and the battles over its meaning during the Washington and Adams Administrations, then moves forward to illustrate the ways in which its negative features have repeatedly sparked political crises and inter-branch confrontation, particularly by those who read into the executive’s “unitary” character an entire ideology of executive impermeability and impunity. The Article attempts to illustrate the negative effect of Article II’s wording by suggesting how a revised Article II would read if it were designed to ensure that the presidency should be accountable and democratic in its selection and operation. The new Article would abolish the electoral-vote system, cabin the president’s duty to “take care that the laws be faithfully executed” to ensure that it is not used as an opportunity for extravagant assertions of nontextual authority, and sets up a mechanism by which a President who has been repudiated during an off-year election would be required to revamp her administration or resign. A final reform would shatter the “unitary executive” by placing the legal and law-enforcement activities of the United States under the authority of an elected Attorney General. The Article ends with the proposed text of the new Article II.

* Professor of Law, University of Baltimore. This essay elaborates on a short article that appeared in The Atlantic. Garrett Epps, The Founders’ Great Mistake, THE ATLANTIC, Jan. 2009. I am grateful to the faculty of New York Law School for the opportunity to present the essay as a work in progress. Profs. Michael Dorf and Joshua Chafets of Cornell Law School invited me to present the paper to their advance Constitutional Law seminar, where student suggestions were extremely thoughtful. I received helpful suggestions from Nienke Grossman, C.J. Peters, Sanford Levinson, Michael Meyerson, Stephen Shiffrin, and Nadine Strossen. Julianna Bell, David Allen, Michael Harmon and Colleen O’Brien contributed research assistance to this project.
I.

Introduction

In constitutional terms, the crisis of the years 2001-2008 was chiefly a crisis in the extent of presidential authority. The Bush Administration asserted the president’s “inherent” authority to ignore a Congressional statute barring its warrantless wiretapping program;\(^1\) it detained American citizens without trial or charge as “enemy combatants”;\(^2\) it secretly set aside legal norms against torture established by treaties ratified by Congress and incorporated into U.S. law;\(^3\) it claimed the prerogative of suspending by the use of presidential signing statements parts of Congressional statutes whose constitutionality it questioned;\(^4\) it asserted “executive privilege” against Congressional investigation to an extent unrivaled in American history;\(^5\) and it sent executive law enforcement officials, for the first time on record into the offices of a member of Congress.\(^6\)

President Bush and his defenders, however, continue to assert that even his most aggressive assertions were not only warranted under the Constitution, but were all but demanded by the proper interpretation of that document and of the President’s proper role in the American system.\(^7\)

The Bush team’s legal analysis has been the subject of extensive criticism.\(^8\) One thesis of this Article, however, is that there is sufficient ambiguity and inartful phrasing within the Constitution in general, and Article II in particular, to lend to Bush’s claims a certain surface plausibility, whatever one may think of their fidelity to the spirit, rather than the text, of the Constitution. The thought is an uncomfortable one. Might the problem actually be, not the violation of our fundamental law, but that fundamental law itself?

Many Americans like to see the presidency as the product of a proud history and as the embodiment of the nation. Over more than two centuries, the presidency has accrued its own icons and pageantry—the splendor of the White House; the liturgical majesty of the Inaugural Address and the State of the Union message; the musical backdrop of “Hail to the Chief” and the warlike emblem of the Presidential seal. The ghosts of its greatest holders—noble, disinterested Washington; determined, eloquent Lincoln; indefatigable, fearless Franklin Roosevelt—shed

\(^{1}\) Brief for the Appellants at 34-35, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007) (Nos. 06-2095 & 06-2140), 2006 WL 4055616.
\(^{5}\) Sheryl Gay Stolberg, Bush Asserts Executive Privilege on Subpoenas, N.Y. TIMES, June 29, 2007.
\(^{8}\) For an analysis—and rejection—of the constitutional arguments Bush’s legal team used to support policies in defiance of Congress, see David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689, 693, 705-11 (2008).
luster on the most ordinary of current tenants. Even those who viciously assail the incumbent president often frame their attacks within an overall (quite sincere) claim of respect for the office and the Constitutional that created it.

From early 2006 forward, President Bush’s conduct in office and the results of his policies made him perhaps the least popular president in modern American history. Bush was repudiated decisively in the 2006 off-year elections, and spent his remaining time in office finding ways to pursue rejected policies over the opposition of the people and the Congress.

The orderly succession of a newly elected president is an occasion of high hopes. Its democratic pageantry underlines the fact that in the United States, leaders are replaced by voting rather than by military coup, show trial or the guillotine. The spectacle is one that, though it is now common elsewhere, is in some senses an American invention.

But the transition from pageantry to policy is usually a bumpy one, and too often the four years of a president’s term end in personal tragedy and cruel public disillusionment. The shining hope recedes before us nonetheless, quadrennium by quadrennium, that this time we will get it right: we will choose a leader who will fulfill the promise of the office and take us as a nation to the destination we have long imagined history has designed for us. Usually by mid-term, the national dialogue is rich with the lament that in former times we found a Washington, a Lincoln or a Roosevelt, but that our current enfeebled polity can produce nothing comparable. Obviously much of this is the false perspective of history, which hides the flaws of those it loves and mercilessly magnifies the failures of those who failed its test. And some is the inevitable hangover that results when high rhetoric meets intractable reality. But we need not be dismissive of political hope to question whether part of the perennial disappointment of American democracy lies in an office that is in fact badly designed, so cumbersome and rickety in its operation that it often cannot respond in a way that addresses the nation’s crises and speaks to the best in its people.

Jack N. Rakove, one of the great living constitutional historians, has written that “the creation of the presidency was [the Framers’] most creative act.” They were attempting to design something the modern world had never seen—a republican chief executive, who would owe his power to the people rather than to heredity or brute force; a citizen who would be elevated peacefully to the headship of the state, and who would after a term of years return to the status of citizen without dying or being beheaded. It was a daring act of imagination; the wonder is not that they got so much wrong, but that they got anything at all right.

But how much did they get right? The presidency may be their most creative work—but

10 Robin Toner, The 2006 Elections: News Analysis; A Loud Message for Bush, N.Y. TIMES, Nov. 8, 2006. In spite of this “loud message,” Bush escalated the Iraq conflict and issued more executive orders and signing statements. In 2007, Bush ordered an additional 30,000 troops to Iraq, bringing the “total to a peak of more than 160,000.” Steven Lee Myers, Bush Defends Iraq War in Speech, NEW YORK TIMES, Mar. 20, 2008. Comments by Dick Cheney evidence the administration’s ambivalence to the public opinion on the war: “[W]hen told in an interview with ABC News that two-thirds of Americans said the war was not worth fighting, Mr. Cheney replied, ‘So?’” Id. Bush also continued to issue signing statements and executive orders, such as 2007’s “secret executive order authorizing ‘enhanced’ interrogation techniques.” BRUFF, supra note 4, at 259-260; Charlie Savage, Bush Declares Exceptions to Sections of Two Bills He Signed Into Law, N.Y. TIMES, Oct. 14, 2008, at A17.
11 This may have begun to happen to the current president. See, e.g., Adam Nagourney & Megan Thee-Brennan, “Poll Finds Edge for Obama Over G.O.P. Among the Public,” The New York Times, February 12, 2010.
that doesn’t make it their best. Our Constitution is now 220 years old; the form of government designed at Philadelphia has survived despite what seemed at the outset almost insuperable odds. The United States has been transformed from a small collection of marginal ex-colonies into the most powerful nation on earth and the nation to which most other advanced democracies look for leadership. The President of the United States has accrued a set of informal titles—such as “leader of the Free World”—that are the equivalent of the English monarch’s “defender of the faith.” Even in difficult times, it is hard not to conclude that the survival and success of the nation constitute in some sense conclusive proof that the office of its leader was well designed, and indeed almost divinely inspired.

But has the nation survived because of “presidential courage,” to use the phrase of one recent writer—or despite its presidents and the office they hold? The creativity of the drafting of Article II does not necessarily constitute proof of its wisdom; and the survival of the nation is not in and of itself proof that its institutions are optimal, or even satisfactory.

Consider the possibility that the presidency, as designed by the Framers and outlined in Article II of the Constitution, is in fact one of those mistakes—that it is not only flawed but almost botched. In this Article, I suggest that Article II is flawed in every way. The method of electing presidents is undemocratic and dangerous; presidents’ powers are badly defined; and presidents, even those who fail grotesquely in office, are not adequately accountable to those they serve.

As noted above, the Framers had little experience in designing an executive for a republic, and the subsequent development. Their vagueness and inexperience have contributed to a permanent state of uncertainty in the proper scope of presidential power. The electoral-vote system they shamefacedly cobbled together has never worked the way they intended. And Article II raises troubling issues of democratic theory and accountability that take a toll on the defensibility of our system and far too often lead to perverse and negative political and policy outcomes.

What I am arguing runs deeply counter to the American grain. Can we take a dispassionate look at the executive leviathan that has grown out of Article II? Truly, this is a

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13 The phrase traces back to the Cold War and President Truman’s 1947 speech to Congress concerning Greece and Turkey; the speech outlined the Truman Doctrine:

The loss of Greece to an ‘armed minority,’ he warned Congress, would be ‘disastrous’ not only for Greece ‘but for the world.’ It would have disastrous effects upon Turkey, sow ‘confusion and disorder’ across the ‘entire Middle East,’ and discourage the people of Europe who were ‘struggling against great difficulties to maintain their freedoms and their independence.’ To avoid such a calamity, the United States had to ‘take immediate and resolute action’ on behalf of ‘free peoples’ everywhere, who ‘look to us for support in maintaining their freedoms.’ Truman’s last remark underscored still another theme in the national security ideology, specifically the belief that leadership of the free world was a sacred mission thrust upon the American people by divine Providence and the laws of both history and nature.


most puissant prince—but is it not possible that this prince is also ill made?16

The Article looks at the language of Article II and reviews briefly what we know of the debate surrounding its drafting and ratification. It illustrates how, only a few years after the Constitution went into operation, advocates of broad presidential authority proposed a view of the office that owes almost nothing to the text and that grants the president authority based almost solely on non-textual sources. The Article further suggests that the method of election and succession in the text was ill thought out, owes its existence to the Constitution’s fatal embrace of slavery, and has failed the nation repeatedly in ways that have undermined the legitimacy of the office and have on occasion brought the country to the edge of civil violence.

The Article further examines what the elliptical text of Article II actually tells us about a president’s authority. It notes that the huge edifice of executive power has been erected largely on a non-textual foundation—a kind of collective agreement that the American president must have certain powers. This has, in some scholarly and political circles, hardened into extreme political dogma.17 The Article then notes a malign interaction among three features of the office—the reticence of Article II, the complexities of the executive theories spun to fill the textual silence, and the relatively primitive methods of political accountability set up by the Constitution. The stew formed by these three elements, I suggest, makes the powerful presidency indefensibly immune from full democratic accountability. This, I argue, has led to repeated dangerous and regrettable episodes in which the president has felt empowered to act in the absence of public assent to consequential decisions or even in defiance of properly expressed majority opposition. The latter case I refer to as the “runaway presidency,” and I suggest that, like many of the features mentioned above, it is a dangerous flaw in a constitutional system designed to operate and maintain a modern democratic nation.

Finally, I modestly suggest that we deal with the flaws I outline by scrapping Article II in its entirety and adopting a new one. To repair the dangerous gaps and mistakes in the current Article II, I propose changing the provisions for presidential election and succession, and laying out in detail the powers of limitations of the presidency with at least the specificity the Framers used in Article I, § 8, which empowers Congress. Finally, I suggest that we break with what I regard as the destructive notion of the “unitary executive”18 by dividing the executive power

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16 The allusion is to Sir Launcelot, the doughtiest warrior of Arthur’s court, but who was referred to by several authors as “the Ill-Made Knight.” See T.H. WHITE, THE ONCE AND FUTURE KING (1958). Like Launcelot, the current American prince is powerful and often bold and successful; but Launcelot, even though mighty, is also the cause of the destruction of Camelot through his dalliance with Queen Guinevere. As a knight, he is simply too powerful for his role as a loyal servitor of King Arthur. It is my argument that the American president has become too powerful, and too little subject to check, to be a faithful servant of his or her sovereign, the American people.

17 Dick Cheney has said that “the Bush White House had been justified in expanding executive authority across a broad range of policy, including the war in Iraq, treatment of terrorism suspects and the domestic wiretapping program. And he said the president ‘doesn’t have to check with anybody’ — not Congress, not the Courts — before launching a nuclear attack to defend the nation ‘because of the nature of the world we live in’ since the terrorist strikes of Sept. 11, 2001.” Rachel L. Swarns, Cheney Defends Bush on President’s Role, N.Y. TIMES, Dec. 21, 2008, at A16. Cheney has also argued that the president’s wartime power is limited almost solely by the president’s discretion. See Cheney unplugged: Gitmo has been a ‘first-rate facility,’ WASH. TIMES, Dec. 18, 2008, at A13 John C. Yoo is among scholars who argue that U.S. presidents have broad powers to, among other things, initiate hostilities and interpret treaties. E.g., John C. Yoo, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 CAL. L. REV. 851, 853, 864 (2001); John C. Yoo, Point/Counterpoint: Kosovo, War Powers, and the Multilateral Future, 148 U. PA. L. REV. 1673, 1674 (2000).

18 The Vesting Clause in Article II of the U.S. Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1, cl. 1. Theorists who support the notion of the “unitary executive” interpret the Vesting Clause to give the president all-encompassing power over executive
under the Constitution between two actors—a president who will continue has head of state and chief of government and an elected attorney general who will, under the direction of the president, execute the legal policy and law-enforcement operations of the federal government while maintaining democratic legitimacy and a suitable independence of the president. To compound my audacity, I offer for discussion a proposed text of the new Article II as an appendix to the Article.

A modest agenda indeed.

I do not expect that the nation will drop its preoccupation with war and economic calamity and turn to the Article V amendment process to bring the Constitution closer to my heart. But this sort of quixotic reformist impulse is one of the (relatively few) privileges of being a constitutional scholar rather than an elected official or a judge. I am offering my “proposed” Article II as a heuristic device, to help us think about how better to manage the flawed Article II the Framers left us. Precisely because that Article II is so oracular and imprecise, the actual workings of the Presidency today depend on a set of extratextual constitutional understandings, which take the form of practical working arrangements among the branches and tacit assumptions among the citizenry. Those arrangements and assumptions are not much easier to change than is the Constitution’s text itself. But change they do, over time, in response to political reality, public demand and (to at least a small extent) scholarly commentary. If this essay contributes a tiny fraction to the latter process of change, it will have met or exceeded its author’s expectations.

II.

A Democratic Presidency

A reader can fairly ask at this point what metric I am using to assess Article II. My starting point is the assumption that the United States in the twenty-first century aspires to be what we call an advanced democracy. 19 Though the terms are ambiguous, they describe a family of governments that simply did not exist in the eighteenth century when the Constitution was written and ratified. Modern democracies are not easy to define formally. For example, Britain, with its parliamentary system, unwritten constitution, primitive separation of powers and underdeveloped protection of individual rights clearly qualifies; 20 so does France, with its strong

functions, including the power to remove all lower-level federal officers and direct their actions. E.g., ST E V E N G. CALABRE S I & C H R I S T O P H E R S. Y O O, T H E U N I T A R Y E X E C U T I V E : P R E S I D E N T I A L P OWER F R O M W A S H I N G T O N T O B U S H 3-4, 418 (Yale Univ. Press 2008) (“The president is thus not only the commander in chief of the military, but also the law enforcement officer in chief of the federal government.”). For an exposition supporting the “anti-unitarian” view that constitutionally granted presidential power is actually far more limited, see M A R T I N S. F L A H E R T Y, T H E M O S T D A N G E R O U S B R A N C H, 105 Y A L E L.J. 1725 (1996).

19 Arend Lijphart writes that political scientists widely support Robert Dahl’s criteria for democracy: “1) the right to vote; 2) the right to be elected; 3) the right of political leaders to compete for support and votes; 4) elections that are free and fair; 4) freedom of association; 6) freedom of expression; 7) alternative sources of information; and 8) institutions for making public policies depend on votes and other expressions of preference.” ARE N D L I J P H A R T, P AT T E R N S O F D EMOCRAC Y : G OVERNMENT F ORMS AND P ERFORMANCE IN THIRTY-SIX COUNTRIES 48-49 (Yale Univ. Press 1999) (citing to R O B E RT A. D A H L, P O L Y A R C H Y : P ARTICIPATION AND O P P OSITION 3 (Yale Univ. Press, 1971)).

20 Id. at 10-11, 19. “The United Kingdom has a parliamentary system of government, which means that the cabinet is dependent on the confidence of Parliament. In theory, because the House of Commons can vote a cabinet out of
presidency, detailed constitution, Cartesian separation of powers and venerable declaration of rights. Britain and France are highly centralized unitary states. Germany and the United States maintain a large constitutional role for subsidiary state governments. In Britain and France, elections produce dramatic changes in political direction; in Italy, Japan and Israel, parliamentary procedures and proportional representation give politics a kind of eerie stability that belies the rapid change in personnel. But all of them would be considered “advanced democracies.” Russia has an elaborate parliamentary structure, a judiciary and elections but would not; China, despite modernization and a growth of capitalism, also would not. Iraq and Afghanistan, despite their U.S.-approved constitutions, are clearly not.

Popular voting by itself does not make a nation democratic; for example, the candidate rolls may be limited to one party or the electoral process may be stacked to favor one party, as in Zimbabwe; the people may be “allowed” to vote on referenda designed to empower specific political figures, as in Venezuela and Colombia; the elected officials may be subject to effective veto by unelected elite bodies such as the Islamic Guardian Council in Iran.

The entire theory of democracy is a question that extends beyond my own powers to encompass and well beyond the scope of this essay. The best I can do is offer as a premise my conviction that democracy means more than letting people blow off steam by voting. The government exercising power should have been installed by a fair, open process at the end of which the winner receives enough votes to indicate significant popular support—and, in all cases, more votes than the loser. I draw this conviction in part from the useful core definition of democracy set forth by the Austrian-born philosopher Karl Popper in his seminal work The Open Society and Its Enemies. Popper’s definition is ruthlessly practical. “In a democracy, the rulers—that is to say, the government—can be dismissed without bloodshed,” he writes. If this seems like a minimal definition, that perception demonstrates how successful democracy has
been; for most of human history, death has been the only means of political change at the top.  

What is the significance of genuine elections? A system that slights the importance of a true electoral process, I argue, risks all too easily becoming something that Popper would not recognize as a democracy. If a system claims the mantle of democracy while disregarding scrupulous majoritarianism, a ruling individual or party—precisely the entities who should be made vulnerable in a Popperian system—will find it all too tempting to manipulate the process in order to retain power while claiming the legitimacy of popular consultation. That is true whether the disregard for the actual result takes the form of curtailing the right to vote in order to ensure a suitable electorate, short-cutting vote counts in order to produce “finality,” or substituting an elite intermediate body between the voters and the result.  

But in the end, I suspect, my sincerely held philosophical views are just epiphenomenal explanations for a gut feeling—a profound emotional conviction that a process that advertises itself as being based on the consent of the governed should genuinely attend to whether that consent is given. Even Madison, who never encountered a modern democracy and might not have much liked it if he had, argued that the “republican principle” permitted the majority to defeat the “sinister designs” of a minority “by regular vote.” I think that using the language of democracy to justify a system in which electoral losers gain power (whether in the United States or in Zimbabwe) ought to be met with what the late Charles Black once called in another context

32 Shakespeare’s Richard II outlines the customary old-world means of executive succession in a memorable soliloquy:

For God’s sake, let us sit upon the ground
And tell sad stories of the death of kings;
How some have been deposed; some slain in war,
Some haunted by the ghosts they have deposed;
Some poison’d by their wives; some sleeping kill’d;
All murder’d: for within the hollow crown
That rounds the mortal temples of a king
Keeps Death his court and there the antic sits,
Scoffing his state and grinning at his pomp,
Allowing him a breath, a little scene,
To monarchize, be fear’d and kill with looks,
Infusing him with self and vain conceit,
As if this flesh which walls about our life,
Were brass impregnable, and humour’d thus
Comes at the last and with a little pin
Bores through his castle wall, and farewell king!

William Shakespeare, Richard II 3:2 160-75. On the “political theology” of royal power that inspired and informed the play, see Ernst Kantorowicz, The King’s Two Bodies: A Study in Mediaeval Political Theology 24-42. (1957). So acute was Shakespeare’s vision of the executive dilemma at that time that some historians credit the report that, at a time of political turbulence, Elizabeth I remarked, “I am Richard II, know ye not that?” At any rate, history does record that the Queen forbade Shakespeare’s company from performing the complete text of the play, insisting that it omit the famous deposition scene, in which Richard is removed as king by the rebel Bolingroke, later Henry IV.

34 See Bush v. Gore, 531 U.S. at 127 (Stevens, J., dissenting).
35 See U.S. Const. art. II, § 1, cl. 2.
36 The Federalist No. 10 (James Madison).
“one of the sovereign prerogatives of philosophers—that of laughter.”  

Beyond genuine popular election, a democratic system has other indispensable features: that laws are made by a freely elected legislature that has the power needed to deal with the problems before it; that a system of law, including an independent judiciary, binds both citizen and sovereign; that all citizens are viewed as equal; that all citizens possess a certain core of rights that government lacks the power to abrogate except in exceptional circumstance; and that government is held accountable to the people in a meaningful way.

This modest core definition of democracy gives us a crude yardstick to assess Article II. A chief executive who is not elected by the people and who cannot be held accountable would fail this minimum test. A chief executive who can rewrite or suspend legislative enactments would fail this minimum test. A chief executive who can rule by fiat, or who can invade the rights of individuals without effective judicial oversight, would fail this minimum test.

It may be objected that an effort to cabin the president within democratic limits and legal norms is in some sense a fool’s errand because of what Harvey Mansfield famously dubbed “the ambivalence of executive power.” This “ambivalence” arises, Mansfield argues, because the very notion of “the executive” makes a promise that the office “carries out” the will of the legislature.

But the “execution” of legislative enactments encounters a problem of indeterminacy—a general law cannot be “first exact then self-sufficient or perfect.” This is of course beyond the capacity of any human legislative body. “Even the best law is always too general to be reasonable because it must defer to the human nay-sayer.”

For this reason, Mansfield suggests, a chief executive (especially one embodied in one

38 The legislature should be an assembly rather than an all-wise lawgiver or even a small council of notables because only a plurality of voices can actually approximate the multiplicity of interests and viewpoints that are inevitable in a complex modern nation-state.
39 Some democratic theorists object to “rights” because they remove certain issues from the purview of the majority. But remember my definition is not based purely on the majority-rules aspect of democracy. True self-government and individual liberty are both functionally impossible under a system where majorities, or governments acting in their name, need not respect individual rights.
40 It’s hard to improve on Montesquieu for this proposition: “When legislative power is united with executive power in a single person or a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.” CHARLES LE SECONDAT, LE BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 11:6 at 157 (1748, Anne M. Cohler et al. tr. 1989).
41 Harvey Mansfield, The Ambivalence of Executive Power in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 314 (Joseph M. Bessette & Jeffrey Tulis, eds, 1981). Though to question so punctilious a writer as Professor Mansfield is surely to risk chastisement, I believe that he has here made a common error in the use of the fashionable word “ambivalence”—for executive power itself, in the American experience, is rarely “ambivalent.” It is much more commonly full-throated and enthusiastic, whether it is seizing steel mills, promoting undeclared wars, jailing dissidents or “enemy combatants” or pardoning courtiers who have broken the law. Professor Mansfield’s phrase, as I read his classic essay, refers to the ambivalence of constitutional thinkers about executive power—their fear of its ungovernability and their yearning for its successful assertion. The idea of the executive, especially when all executive power is to be vested in one man, evokes an atavistic and childlike yearning for certainty and faith, much like the cry of the perplexed peoples of the world to an absent God in W.H. Auden’s “Spain”:

Intervene. O descend as a dove or•
A furious papa or a mild engineer, but descend.

42 Id. at 315.
43 Id. at 329.
44 Id.
person—“the unity of the office implies the possibility, though unlikely, of one man who would be the perfect executive” 45) must often cloak his quest for personal authority in at best partly sincere deference to the legislative will, popular sovereignty and the majesty of law, and must at other times bring to the task of “faithfully enfor[cing]” the law at least a credible show of willingness to behave arbitrarily or even lawlessly. 46 The modern executive is, in Mansfield’s terms, “now subordinate, now independent.” 47

But even granting that the gap between executing law and wielding personal power can never be entirely closed, it does not follow that the gap is either incommensurable or invariable. That is to say, there is no reason to throw up our hands and suggest that the insouciance of a Franklin Roosevelt or the resolve of a Lincoln are indistinguishable from the recklessness of a George W. Bush or the authoritarian thuggery of a Richard Nixon. Nor should we conclude—in this area of constitutional study or in any other—that the foreordained failure of an effort to eliminate all ambiguity stultifies any attempt to reduce it. Law in all its functions seeks to limit the influence of forces that can never be conquered: the unpredictability of the future, the indeterminacy of language, the inscrutability of human motivation and the inability of any shared notion of the good to fully constrain human irrationality. Success in law-making (and its self-exalted subfield of constitutional draftsmanship and interpretation) is to be measured by degrees. My contention is not that Mansfield’s “Machiavellian prince” 48 can be redesigned to eliminate all possibility of treachery and excess, but the more modest proposition that, taking constitution-making as a genuine attempt to restrict the capacity of government to turn into tyranny, the current provisions of our Constitution do the job significantly less well than they might.

Nor is the effort at constitutional reform, I wish to say at the outset, an effort to weaken the presidency out of civic dismay or mere partisan pique at the events of 2001-2008. It is not my project to amputate that part of the office that is “bold and impressive,” leaving only the part that is “bashful and retiring.” 49 Indeed, I offer a number of textual powers and immunities to the president that are currently either tacit or unavailable in the constitutional text. 50 A large republic with a powerful government needs a correspondingly strong executive branch. But strength can arise from certainty—from a clear grant of power, even though such a grant must also set out or imply the limits of what is granted. That kind of strength, I argue, is a more dependable source than the strength that can be wrung from ambiguity, silence and the legacy of unpunished usurpation. In fact, I would echo Professor Peter Shane, in his important book Madison’s Nightmare, 51 when he explains that greater collaboration between Congress and the president will result in more decisive and effective policy, not in paralysis or political debility. Professor Shane analyzes the debate over executive authority as a contest between what he calls “presidentialists,” advocates of unaccountable unilateral executive power, and “pluralists,”

45 Id. at 327.
46 See id. at 316.
47 Id. at 331.
48 Id. at 331.
49 Id. at 325.
50 See notes ___--___, infra, and accompanying text. it
51 PETER SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009). Readers interested in exploring in greater detail the kind of critique of executive power explored in this Article should begin with this brilliant work by one of academia’s foremost scholars of the separation of powers. In addition, Professor Shane’s book offers dozens of policy proposals more feasible than a rewrite of Article II. It is my hope that readers of this Article may find proposals like Shane’s appealing and understand the stakes behind the daily struggles among the branches in a new way.
advocates of multivocal deliberation in all political decision-making.

[T]he key question in the pragmatic debate between presidentialism and pluralism is whether the President is likely to make better decisions against a background understanding that the executive branch is constitutionally entitled to policy-making authority that is substantially beyond the power of Congress to regulate or the authority of the courts to review. Or is the President likely to make better decisions if we posit the reverse—that Presidents are substantially susceptible to congressional regulation in foreign and military affairs, and at least presumptively accountable to oversight by the other branches of government?52

Color me pluralist. My position echoes Shane’s: I believe that involvement of other branches not only leads to better decisions, but in the end conduces to the successful assertion of executive power, because the assertion takes place, as often as possible, not in the teeth of opposition but with the support of the people’s representatives.

Finally, I accept freely any caution that we must not make the president “dependent on” or “the creature of” the legislative branch; accept it, that is, as long as we understand the unspoken modifier “unduly.” Even the contemporary presidency must “depend” on the legislature for appropriations and may be destroyed by the legislative mechanism of impeachment. The idea of “checks and balances” makes each branch in some way “dependent on” the others. But again the question is one of degree: the legislature may check the functions of the presidency without being able to direct them. And if constitutional reforms ground each branch in a direct line to the people, they cannot reasonably be accused of turning any branch into a creature of any other.

If the above seems excessively theoretical, I would suggest that the project of constitutional reform of the presidency takes on a practical urgency because there is a second test for a well-made prince. A proper executive must work. She must be chosen in a way that is democratically legitimate and that does not cause profound instability or disruption of government and society. A proper executive must take power in an orderly and effective fashion and must also yield power when its mandate expires without any attempts to foreclose to her successor the power that properly belongs to her. A proper executive must be able to manage day-to-day business of governing without perennially waverin betwee paralysis and de facto dictatorship.

By these standards, the American presidency is at best marginal. The leader we admire so much is an ill-made prince.

In the rest of this Article, I consider some of what I consider the flaws in the drafting of Article II and a few of the problems that have arisen from its flawed draftsmanship. As noted above, my criticism is not value-neutral evaluation of constitution-making craft. My concern instead is to make suggestions that would render the executive power in the constitutional order more functional, more democratic and more accountable. The gaps and silences in Article II have allowed presidents and advocates of presidential power to expand a president’s claims of authority almost without limit. These claims in themselves are dangerous, as they afford a constant temptation to presidents—who usually regard themselves as virtuously engaged in the crucial work of the Republic—to overreach whenever they encounter any setback in pursuing their political agendas. Textual grants of hither-to implied powers would suggest their own

52 Id. at 57.
limits; for the executive, no less than for the legislative, “enumeration presupposes something not enumerated,”\textsuperscript{53} while silence lends itself to usurpation.

\textsuperscript{53} Gibbons v. Ogden, 22 U.S. 1, 195 (1824).
III.

Writing and Reading the Presidency

As Rakove notes, inventing the presidency required the Framers to be creative. As Professors Peter Shane and Harold Bruff write, “Nothing in experience or untraditional theories told Americans how to select an executive.”⁵⁴ Nor were they clear on what authority an executive should have. Immediately before the opening of the Convention, no less systematic a thinker than Madison admitted to George Washington that “[a] national Executive must also be provided [but] I have scarcely ventured as yet to form my own opinion about either the manner in which it ought to be constituted or of the authorities with which it ought to be clothed.”⁵⁵

The models they had to work from were hardly promising.⁵⁶ On the one hand, all of them knew the British Crown, from which they had fought to free the colonies only a few years earlier.⁵⁷ Even though Parliament had begun to assert itself after the Glorious Revolution of 1678, the King of England retained many absolute powers, royal prerogatives that could not be formally limited by Parliament.⁵⁸ The King’s ministers were accountable to Parliament, but the King could do no wrong, and even to think of removing him from office—even by imagining his death—was treason.⁵⁹

On the other extreme, however, were the weak executives created by the revolutionary constitutions of the states. Madison in particular felt horror for these populist governments, which featured large powerful legislatures and weak governors or executive councils.⁶⁰ One of the principal aims of the Philadelphia Convention was to curb the excesses of these state

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⁵⁵ James Madison to George Washington, April 16, 1787, in James Madison, Writings 80, 82-83 (Jack N. Rakove ed., 2000).
⁵⁶ In 1787, democratic self-government existed almost nowhere on earth. Kings, emperors, czars, princes, sultans, moguls, feudal lords, and tribal chiefs held sway across the globe. Even England featured a limited monarchy and an entrenched aristocracy alongside a House of Commons that rested on a restricted and uneven electoral base. The vaunted English Constitution that American colonists had grown up admiring prior to the struggle for independence was an imprecise hodgepodge of institutions, enactments, cases, usages, maxims, procedures, and principles that had accreted and evolved over many centuries. This Constitution had never been reduced to a single composite writing and voted on by the British people or even by Parliament. The ancient world had seen small-scale democracies in various Greek city-states and pre-imperial Rome, but none of these had been founded in a fully democratic fashion. In the most famous cases, one man—a celebrated lawgiver such as Athens’s Solon or Sparta’s Lycurgus—had unilaterally ordained his countrymen’s constitution. Before the American Revolution, no people had ever explicitly voted on their own written constitution.


⁶⁰ Shane & Bruff, supra note ___, at 6-7.
governments, and so it’s not surprising that the delegates shied away from imitating them.\footnote{61} Finally, they had the “executive” model of the Confederation Congress, which had striven mightily to govern the country through committees and ad hoc bodies, with at best indifferent success.\footnote{62}

In fact, the executive received far less attention at Philadelphia than did the legislative power.\footnote{63} Much more of the Convention’s time was spent creating the new Congress—spelling out its authority and deciding how it would be apportioned and elected. Not until the delegates had a sense of the legislative body did they seriously turn to designing the presidency. And when they did, there was another reason for continued reticence—the overwhelming favorite for the post of first president, George Washington, was also the presiding officer of the Convention. As Gordon S. Wood has noted,\footnote{64} Washington was not just the foremost figure in the new nation, but in many ways the most admired man in the world at the time—someone with a moral authority greater than that wielded today by a figure like Nelson Mandela. Max Farrand writes that Washington’s “commanding presence and the respect amounting almost to awe which he inspired must have carried weight, especially in so small a gathering in the ‘long room’ with the president [of the Convention] sitting on a raised platform.”\footnote{65} Farrand notes occasions upon which Washington upbraided his fellow delegates in the tones of a schoolmaster\footnote{66} and others on which he is said to have actually made his views on specific issues at least tacitly known.\footnote{67}

To express too much fear of executive authority might have seemed disrespectful to Washington. Is it wrong to infer the unseen gravitational force of Washington in the first mention of what would come to be called the “unitary executive”? On June 1, as the Convention met in the Committee of the Whole House, James Wilson moved before the Convention “that the Executive consist of a single person.” After Pinckney seconded this motion, Madison writes, “[a] considerable pause ensued.”\footnote{68} Eventually Nathaniel Gorham, the chairman of the committee, asked whether delegates simply wanted to proceed to vote. Benjamin Franklin—who at 81 can be assumed not to have been overawed even by Washington—at this point spoke up and said “that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it before the question was put.”\footnote{69} The debate afterwards was brief and seemingly desultory, and the delegates apparently welcomed Madison’s suggestion that “it would be proper, before a choice should be made between a unity and a plurality in the Executive, to fix the extent of the Executive authority.”\footnote{70}

Thus, beyond the inexperience of the drafters, their reticence before Washington may be

\begin{footnotes}
\footnote{61} Charles Thach suggests that the contrasting model of the New York constitution, which had a much stronger executive than did most of the Revolutionary constitutions, was an important source of practical ideas for the drafters, and that delegates from, or familiar with, New York played a leading role in the drafting of Article II. Charles C. Thach, Jr., The Creation of the Presidency, 1775-1789: A Study in Constitutional History 29-37, 76 (Liberty Fund 2007).
\footnote{62} See Thach, supra note ___, at 45-75.
\footnote{63} For an excellent account of the executive deliberations’ fitful nature, see Forrest MacDonald, The Presidency: An Intellectual History 160-81 (1994).
\footnote{65} Max Farrand, The Framing of the Constitution of the United States 64 (1913).
\footnote{66} Id. at 65.
\footnote{67} Id. at 65-66.
\footnote{69} Id.
\footnote{70} Id. at 47.
\end{footnotes}
another reason why later interpreters have found the original debates on the presidency, in the worlds of Justice Robert H. Jackson, “almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”

The fruits of these inhibited, disjointed and desultory debates are deeply marked by ambiguity and ineptitude. To begin with, the system of choosing the president is indefensible by any sane democratic theory—and was so even at the time it was adopted. It owes its creation to the worst possible inspiration—chattel slavery. At the Convention, Madison noted that “the people at large was in his opinion the fittest” source of election, and “would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character.” But without a great deal of regret, he immediately sacrificed this principle because “the right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty . . . .” Later in the Convention, Madison reiterated his preference for direct election of the president despite “the disproportion of qualified voters in the N[orthern] and S[outhern] States, and the disadvantages which this mode would throw on the latter.” Madison reasoned that this disproportion would “be continually decreasing under the influence of the Republican laws introduced in the S[outhern] States” and “the more rapid increase of their population.” Madison said that “[a]s an individual from the S[outhern] States he was willing to make the sacrifice.”

But any fair reading of the Notes must conclude that as a region, the South was not willing to make any substantial sacrifice of guarantees for slavery. It is true that some delegates from the North expressed a preference for electors because of a distrust of the people or a belief that they would have no basis for assessing candidates from other states. But what debate there was was dominated by the interests of the slave system. In the event, the electoral-vote system produced a mighty engine of protection for those interests—especially as the growth of Southern population during the antebellum period was marked not (as Madison expected) by growing proportions of free citizens and increasing republicanism, but by an explosion of the slave population and increasingly repressive and unfree institutions designed to protect the peculiar institution.

The electoral system became a bulwark of slave power because electors were apportioned by the same three-fifths principle as members of the House of Representatives, a decision that outraged many Americans at the time and later and eventually contributed to the dissolution of constitutional order and bloody civil war. The representation of slaves, as historian Leonard L. Richard notes, produced an electoral system that gave the slave states enough excess representation to tip the scales and produce Southern domination of the executive branch. The first time that these “slave seats” were decisive was in 1800, when the majority of electoral votes won by Jefferson and Burr was produced solely by the South’s excess representation. Without the votes of slave-generated electors, Adams would have been re-elected.

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71 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
72 Id. at 327.
73 Id.
74 Id. at 365.
75 Id.
76 Id. at 366.
77 See, e.g., id. at 50-51.
78 LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1787-1861 at 42 (2000). The question of legitimacy is complex, however. It seems likely that Jefferson would have won a popular
So the electoral college was a bad idea, even at the time. As Akhil Amar has noted, it does not fulfill any of the other post-hoc justifications offered for it, particularly that of “protecting” the small states in the presidential selection process. 79

Moreover, as written into the text, the electoral system was a bad idea gone wrong. Under Article II’s almost incoherent procedures, the electors vote only once, and if they do not choose a president by a majority, the election proceeds into the House of Representatives, where each state, regardless of size, will have one vote, while the Senate will choose the Vice President. 80 This confusing setup sowed the seeds of disaster, which was not long in coming.

In addition, the delegates’ ambivalence about the vice-presidency (it was not added until September, when the Convention was near its end81), led to sloppy draftsmanship. Though we take for granted today that the vice president becomes president upon the death, removal or resignation of the president, Article II didn’t quite say that—it said only that “the powers and duties [of the presidency] shall devolve upon the vice president.” 82 This set the stage for a bruising constitutional battle in 1841, the first time a vice president succeeded on the death of a president,83 and was not remedied until 1967, when the Twenty-Fifth Amendment was adopted. The unclarity of the drafting has also lent a kind of spurious plausibility to Vice President Cheney’s claim that, when it suits the vice-president, he or she can be independent of the executive branch. 84

Given the enormous role the presidential office occupies today, it is remarkable how cavalier the Framers were about the president’s powers. He has very few exclusive ones: he can require members of his cabinet to give him their opinions in writing; he can convene a special session of Congress “on extraordinary occasions,” and may set a date to adjourn Congress if the two houses cannot agree on one; he receives ambassadors, and he is commander in chief of the armed forces; and he can pardon “offenses against the United States.” 85

vote—had there been one. Enough states used the legislative designation method of selecting electors that no nationwide popular vote figures can be put together. On the other hand, a popular vote including slaves might have surprised Jefferson with the depth of support for Adams, who was one of only two firmly anti-slavery presidents to hold office before the Civil War, the other being his son John Quincy. Both Adamses were politically weak one-term presidents; both were succeeded by popular Southern slaveowning presidents, Thomas Jefferson in 1800 and Andrew Jackson in 1828. The logic of the “slave power” analysis of antebellum history suggests that no anti-slavery president could succeed in office, even if he gained election. See also DON E. FEHRENBACKER, THE SLAVEREHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY (Ward McAfee ed. 2002)

79 Amar, supra note , at 148-50.
80 U.S. Const. art. II, § 1, cl. 3; id., Amend. XII.
81 The Vice-Presidency appears for the first time in the Report of the Committee on Remaining Matters, delivered to the Convention on September 4. MADISON, supra note , at 575.
82 U.S. Const. art. II, § 1, cl. 6.
83 See, e.g., MacDonald, supra note , at 319.
85 U.S. Const. art. II, §§ 2-3. One area that the Framers did dither over, disturbingly enough, is the ambiguous grant of authority over war. Congress has the power to “declare war”; but the president is the military commander in war and peace, and obviously would gain additional power during armed conflict. U.S. Const. art. I, § 8, cl. 11. Madison, in fact, wanted to allow the Senate to make treaties of peace without the President’s approval. “The President . . . would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace.” Id. at 599-600. As with so many ideas floated in the humid air of that Philadelphia summer, this warning was never followed up.
The Framers also gave the president a number of powers shared with the Senate—to make treaties and to appoint federal judges and other “officers of the United States.” And, finally, a president has two specific duties—to give regular reports on the state of the Union, and to “take care that the laws be faithfully executed.” These are not powers; but the lack of detail in the language of Article II, and the relative paucity of explicit powers granted by it, have impelled presidents to convert the “take care” duty into a claim of authority, rather than of accountability.

A president may be impeached by the House and removed from office by the Senate. But the Framers were very skittish about any procedure that would make him easy to remove. In the debates at Philadelphia, they explicitly rejected the idea that an impeached president should step aside pending the outcome of a trial. And both the text and the debates reflect a sense that impeachment should be used for cases of treason and bribery rather than for political failure, no matter how catastrophic. The Framers in the end put in no means by which a president could be held politically accountable during his term for political failures—a gap in the constitutional order that continues to bedevil us today.

The text of Article II is so vague, in fact, that it functions as a kind of Rorschach test, a mute inkblot onto which readers can project their ambitions, hopes and fears. As draftsmanship, it is so oracular that it gives rise to at least three speculations. First, one might conclude that the Framers had in mind a very weak, ministerial executive, who would simply do the bidding of Congress in all but interstitial matters, and that it expressed this wish by providing only a few powers and pointedly omitting many others. That model of an executive would have conformed to a certain theory of republicanism that was current at the time of the Framing; but it seems the least likely conclusion, for statements made before, during and after the Convention indicated that, whatever the Framers had in mind for the executive, it was something more than a kind of political butler to Congress. Second, one could conclude that the Framers so patently assumed a strong, indeed dominant role for the executive that they thought it hardly worth their while to spell that out. This is the argument often advanced by executive-power hawks in the contemporary debate, who breezily assert that the “original intent” or “original understanding” of the executive role “clearly” support whatever extravagant claim of authority the current president is advancing. Given the confusion that reigned during ratification about what Article II actually meant, this hypothesis seems only slightly less strained than the first.

The third possibility, which I regard as by far the most plausible, is simply that the Framers had little idea what a new republican executive would look like; that they were

86 U.S. CONST. art. II, § 2, cl. 2.
87 Id. at § 3.
“ambivalent,” in the sense used by Professor Mansfield, about how much power they wanted to give the new president; and finally that, exhausted by the struggle to provide for the election of Congress and define its powers, they simply ran out of time and energy to engage in the detailed work of empowering and limiting the executive branch. In any case, the text they wrote provided little clear warning that the office of president would become uniquely powerful, and often predominant over Congress. In fact, when citizens considered the draft Constitution during the ratification debates in 1877 and 1788, many of their objections focused not on the executive itself but on the potential power that the Senate might amass if it worked in tandem with the president in appointments and foreign affairs.

Anti-federalists were, of course, not limited to making consistent arguments against the Constitution. Some did argue that the president would be a Caesar or a dictator, but others throughout the debate continued to argue that the office was too weak to be independent of Congress. Few if any of them, however, foresaw the modern presidency; in large part that’s because the office as we know it today bears little relation to the text. Instead, the presidency is the intellectual handiwork of Alexander Hamilton, who took little part in drafting Article II and who expressed a view of the office at wide variance from the republican aspirations of most of those taking part in framing and ratifying the new Constitution.

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94 What one might call the “exhaustion hypothesis” is suggested by Leonard Levy as a partial explanation for the Convention’s nearly fatal omission of a Bill of Rights. See Leonard W. Levy, Origins of the Bill of Rights 12-13 (1999). And framing a Bill of Rights would have been easy work, compared to that of charting the unknown path of a republican, elected head of state.

95 One of the first major attacks on the new Constitution was published during the Pennsylvania ratification debate, the first in the process. “Centinel” warned that “[t]he Senate. Besides its legislative functions, has a very considerable share in the Executive; none of the principal appointments to office can be made without its advice and consent.” In this system, the president “would be a mere pageant of state, unless he coincides with the views of the Senate, [and] would either become the head of the aristocratic junto in that body, or its minion.” See “Centinel” [Samuel Bryant], “A Most During Attempt to Establish a Despotic Aristocracy,” in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION. PART ONE: SEPTEMBER 1787 TO FEBRUARY 1788 at 52 (B.Bailyn ed 1993). In the first major speech by a Framer, James Wilson answered “Centinel” at a public meeting in Pennsylvania on October 6, 1787. James Wilson, “Everything Which is not Given, is Reserved,” id. at 63. Wilson’s reply is interesting in light of the subsequent dogmatism that has gathered around the idea that the Constitution embodies a strict “separation of powers.” Wilson undertook to refute the charge that “predict[ed] the institution of a baneful aristocracy in the federal senate.” Id. at 66. Wilson said, that “[t]his body branches into two characters, the one legislative and the other executive.” Id. As a legislative body, the senate could “effect no purpose, without the co-operation of the house of representatives,” he noted, while “in its executive character, it can accomplish no object, without the concurrence of the president.” Id.

96 “In Pennsylvania, the Anti-Federalist ‘Philadelphensis’…equated the President to a monarch because of his command of the nation’s military forces: ‘Who can deny but the president general will be a king to all intents and purposes, and one of the most dangerous kinds too; a king elected to command a standing army? Thus our laws are to be administered by this tyrant; for the whole, or at least the most important part of the executive department is in his hands.’” Colonel Richard D. Rosen, Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1, 78-79 (1998) (quoting Philadelphensis, Essay IX, Philadelphia Freeman’s Journal (Feb. 16, 1788), cited in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 57, 58 (John R. Kaminski & Gaspare J. Saladino, eds., 1981)).

Hamilton’s attendance at Philadelphia was sporadic at best. He was also a member of Congress, which was meeting in New York at the same time. And, as he himself said, he was outvoted by his fellow delegates from New York and thus would have exercised little power had he stayed in his chair for the entire Convention. He did make one remarkable speech, on June 18, 1787, in which he expressed deep skepticism at the idea of a republic that could govern the entire nation. Far better, he suggested, to adopt the British model.

Of the King of England, he noted, “The hereditary interest of the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad—and at the same time was both sufficiently independent and sufficiently contro[led], to answer the purpose of the institution at home.” In Hamilton’s plan, the president would be elected by electors, but would then serve for life. He would have an absolute veto on federal legislation and would have sole power to appoint the important cabinet positions. He would, Hamilton admitted, be a monarch, but an “elective monarch.”

Hamilton’s plan was so far from the mainstream of thought at the convention that none of its provisions was ever seriously discussed. Nonetheless, Hamilton was and remains the chief theorist of the presidency, first in his essays in The Federalist and then in his work as George Washington’s Secretary of the Treasury and de facto prime minister.

American constitutional thinkers today often discern in the Constitution a neat system of powers parceled out to the three branches, with limited but clearly defined overlap. But in

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99 Hamilton was joined at the Constitutional Convention by “two opponents of federal power who would smother his influence. Albany mayor John Lansing, Jr., was a prosperous landowner, and Robert Yates a pretentious judge on the New York Supreme Court. Both were vocal foes of efforts to endow Congress with independent taxing powers...instead of leading a united delegation, Hamilton was demoted to being a minority delegate from a dissenting state.” CHERNOW, supra note ___, at 227. “Hamilton drifted back and forth between New York and Philadelphia that summer. ‘Yates and Lansing never voted in one single instance with Hamilton, who was so much mortified at it that he went home,’ George Mason told Thomas Jefferson. ‘When the season for courts came on, Yates, a judge, and Lansing, a lawyer, went to attend their courts. Then Hamilton returned.’ With Yates and Lansing gone, Hamilton still could not vote because each state needed a minimum of two delegates present, so he became a nonvoting convention member.” Id. at 236 (citing to THOMAS JEFFERSON, THE ANAS OF THOMAS JEFFERSON 87 (Franklin B. Sawvel ed., Da Capo Press 1970)).
100 MADISON, supra note ___, at 135-36.
101 Id.
102 In this regard he would have had more power than the King of England. Although at that time, George III claimed the prerogative of vetoing measures passed by Parliament, in practice the royal negative had not been used since the time of William III, and an understanding had grown up that the King would not exercise its putative veto. J. HOWARD B. MASTERMAN, A HISTORY OF THE BRITISH CONSTITUTION 164-65 (1912).
103 MADISON, supra note ___, at 135-36.
104 This is by no means a fanciful designation or a metaphor of my devising. Hamilton was the first Secretary of the Treasury. In England at the time (as today), the official title of the Prime Minister was “First Lord of the Treasury.” Hamilton, because of his office, his ability and ambition, and his well-known close relationship with President Washington, was also sometimes called “the prime minister” by the press of his day.
105 In 2000, the Supreme Court wrote:

The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this ‘very structure’ of the Constitution that exemplifies the concept of separation of powers. While the boundaries between the three branches are not ‘hermetically sealed,’ the Constitution prohibits one branch from encroaching on the central prerogatives of another.
fact, the first Washington administration was a time of some confusion about inter-branch relations. In one famous episode, Washington personally came to the Senate to ask its advice on a pending treaty—with results so unsatisfactory that he vowed never to return. On another, Washington sought advance consultation with the Justices of the Supreme Court about the prospective effect of the U.S. Treaty with France, but was met with a reply that is used as the authority for the Court’s refusal to provide “advisory opinions” to the other branches.

Further illustrating the ambiguities of Article II, the First Congress conducted a long debate about whether Article II’s provision that appointment of “officers of the United States,” coupled with its silence about removal, meant that Cabinet officers and others either must serve during “good behavior” or could only be removed with the “advice and consent” of the Senate, which had approved their appointment. And the initial statutes creating what are today called Cabinet secretaries provided that the Secretary of the Treasury would report to Congress rather than to the President—anathema to today’s “separation of powers” theorists.

MacDonald writes that these ambiguities allowed Hamilton to begin to shape the executive branch into something much more like his vision at the Convention than the text would suggest it should be. Hamilton’s theory of the presidency was much closer to the elective king of his speech than to the vaguely republican chief magistrate sketched in Article II, but it is


The court in Chadha had explained: “The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility.” INS v. Chadha, 462 U.S. at 951.

I am still searching the text for the language that separates the “branches” and “prohibits” them from exercising powers of other “branches.” I put the word “branches” in quotes because I am still searching the text for the idea that the federal government has three separate “branches.” The Constitution speaks only of the federal government having three “powers”: “[a]ll legislative powers herein granted” vested in Congress, see U.S. Const., Art. I § 1; “[t]he executive power” vested in the president, see id. Art. II § 1; and “[t]he judicial power of the United States,” vested in a Supreme Court and other “inferior courts” when and as Congress sees fit to establish them, see id. Art. III § 1. The Constitution uses the word “branch” once, to indicate the more popular house of state legislatures, which were at least presumptively bicameral. See id., Art. I 2 (voters for House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”; id, Amendment XIV (same prescription for voters for Senators). In metaphorical terms, we can imagine “powers” as blending or separating in many ways: “branches,” by contrast, are distinct, splitting off from the stem at different points and sharing nothing. I may seem to be waxing pedantic here, but I am belaboring this point to explain that the idea of a tidy Monteskan “separation of powers” stems from a post-ratification enactment of the text, one that may be quite valid or may be entirely eisegetical, but certainly cannot in either case be claimed as reflecting “original intent” or “original understanding.”

107 MACDONALD, supra note ____, at 227-28. MacDonald suggests in fact that Chief Justice John Jay at least would have been eager to cooperate with the request, had not the Court’s recent decision in Hayburn’s Case, which he regards as a misstep, enmeshed them in a conception of the judicial power that precluded taking on any responsibility assigned by the other branches. Id.
108 U.S. CONST. art. 2, § 2, cl. 2.
109 Id. at art. 3, § 1.
110 Id. at art. 2, § 2, cl. 2.
111 See THACH, supra note ____, at 143.
113 See MACDONALD, supra note ____, at 207.
gospel to the executive hard-liners who have driven the debate about executive authority since the early days of the Reagan administration.

In his *Federalist* essays, designed to persuade the public to accept the new Constitution, Hamilton was relatively modest in his claims for the presidency. He treated the listed powers of Article II as exclusive, meaning that the president had no power not granted in the text. Thus, he said, “there is no pretence for the parallel which has been attempted between him and the King of Great-Britain.”114 He did celebrate “unity” in the executive, meaning that its functions were lodged in one and only official115; but, as Richard Loss notes, he made no mention at all of the language that, after ratification, he would argue was most significant about Article II—the “vesting clause” at the beginning of the article, which uses the phrase “the executive power.”116 The omission suggests that, while the issue of ratification was in doubt, he was studiously underplaying his vision of the office.117

Hamilton did, however, famously proclaim that “energy in the executive is a leading character in the definition of good government.”118 An energetic executive, he wrote, needed unity in one person, a reasonably lengthy term of office, and sufficient power to remain independent of the other branches.119 The president must be able to act against the opposition of the people, Congress or both. “When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.”120 And if the president, like the prime minister in a parliamentary system, were dependent for office on Congress, this would simply feed “the tendency of the legislative authority to absorb every other.”121

Before ratification, then, Hamilton presented the president as a vigorous but republican chief magistrate, confined to his listed powers, many of which were shared with the legislature, whose ability to act energetically was protected chiefly by a four-year term of office and safety from removal except by impeachment and conviction. But once the new Constitution went into effect, Hamilton’s view underwent a subtle but important shift.

The first major dispute over presidential authority arose over the highly charged issue of relations with France.122 When revolutionary France went to war against Britain and the other monarchical powers of Europe, many Americans believed that both gratitude and republican fraternité required America to aid its former ally. Some American sea captains took out letters of marque from the French Republic and began to harass British shipping, and arms merchants outfitted French ships with ordnance and ammunition. Britain regarded these as hostile acts attributable to the United States. France’s ambassador, the infamous Citizen Genet, made himself obnoxious to his hosts in the U.S. government by publicly rallying support from pro-

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114 *FEDERALIST* NO. 69 (Hamilton).
115 Id., No. 70.
116 See U.S. CONST., art. II, § 1 (“The executive power shall be vested in a President of the United States of America.”)
118 *FEDERALIST* NO. 70 (Hamilton).
119 Id.
120 Id., No 71 (Hamilton).
121 Id.
122 An excellent account of the Franco-American dispute and its effect on American politics can be found in ELKINS & MCKITTRICK, supra note ___, at 303-73.
French associations in the United States, and openly suggested that he might rally the American people in opposition to their own elected leaders if Washington’s policies struck him as insufficiently pro-French.123

Hamilton, Washington and more conservative Federalists were rightly terrified of war with the powerful British Empire. As president, Washington unilaterally proclaimed that the United States would be neutral.124 France’s American supporters fiercely attacked Washington for having exceeded his constitutional authority. The power to make treaties, they said, was jointly lodged in the president and the Senate; how could the president unilaterally interpret or change the terms of the treaty with France?125

Under the pen-name “Pacificus,”126 Secretary of the Treasury Hamilton defended Washington’s power to act without Congressional sanction. The “Pacificus” essays are the mother document of the “unitary executive” theory that has been a mainstay of conservative thought for the past generation.

Hamilton’s new interpretation centered on the first words of Article II: “The executive power shall be vested in a President of the United States of America.” Hamilton contrasted this wording with Article I, which governs Congress and which begins “All legislative powers herein granted shall be vested in a Congress of the United States.” What this meant, Hamilton argued, was that Article II was “a general grant of power” to the president. The specific powers listed in the article were not exclusive at all; they were merely examples of the sort of thing the president could do, and should not be interpreted “as derogating from the more comprehensive grant contained in the general clause.” In fact, while Congress was limited to its enumerated powers, the executive could do literally anything that the Constitution did not expressly forbid. Every other power that a national chief executive could imaginably possess was “completely lodged in the President.”

Congress’s war and treaty powers were not independent prerogatives of the legislative branch, but anomalies, mere exceptions to the president’s control over foreign affairs, and as such, “to be construed strictly—and . . . to be extended no further than is essential to their execution.” All other control over the “intercourse of the U[nited ]States with foreign powers” was the president’s alone.

The president, in fact, could so conduct foreign policy as to force Congress’s hand in matters of war and peace: “The Legislature is free to perform its own duties according to its own sense of them—though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions.”127

Madison responded to the “Pacificus” essays with an impassioned series of articles under the pen-name “Helvidius.”128 Madison undertook his answer to Hamilton at Jefferson’s request; Jefferson wrote that if not answered, “his position will be taken as confessed.”129 Madison did not dispute the idea that the “vesting clause” clothed the president in powers other than the few listed in Article II; he himself had said as much during the debate over whether the president had

123 Id. at 341-54.
124 George Washington, A Proclamation (April 22, 1793).
125 See ELKINS & MCKITTRICK, supra note ___, at 356.
127 Id.
128 “Helvidius No. 1,” (Madison), in THE PACIFICUS-HELVIDIUS DEBATES, supra note ---, at 55.
129 Jefferson to Madison, July 7, 1793, in id. at 54.
the power to remove executive branch officials without the consent of Congress. However, he strongly challenged Hamilton’s argument that specific powers lodged in the other branches should be constructed as narrowly as Hamilton argues. His reason was that these grants of authority could be viewed as derogations of “the executive power” only if a writer took the view that “the executive power” referred specifically to the powers held as prerogative by the British Crown. “The power of making treaties and the power of making war,” he wrote, “are royal prerogatives in the British government, and are accordingly treated as Executive prerogatives by British commentators.” He then sarcastically appended Hamilton’s own discussion of the Treaty Power as “partake[ing] more of the legislative than the executive power” from Federalist 75.

Forrest MacDonald views Hamilton as having far the better of the debate. Morton Frisch regards this debate as elaborating “part of a more complete Constitution.” Whether or not Hamilton’s logic was irrefutable, the Pacificus view of the presidency has proved remarkably durable. In this context, note that disagreeing with Hamilton does not mean claiming that the Constitution does not create a “unitary executive.” Of course it does. There’s only one president, and the president is the wielder of “the executive power.” Evidence suggests, however, that to the contemporary drafters of the Constitution, the importance of “unity in the executive” was not that in some way it gave the executive a shield against other branches, but that it foreclosed the alternative “plural executive” model, in use in a number of states, in which the chief executive was surrounded by a constitutionally mandated executive council whose assent was required before he could take certain actions. The Framers decided against that model at the convention. That decision does not, however, provide any interpretive guidance for assessing whether any function of the government should be entirely under the president’s control. But Hamilton’s interpretation has proved durable even though there is little in the record to indicate that other participants in the Framing or Ratification intended “the executive power” to incorporate presumptively all the prerogatives of the Crown.

To say this is not to accuse Hamilton of deliberate obfuscation prior to ratification. Power often flows to the executive out of necessity; Hamilton, perceiving the nation to be in danger from his political enemies, put his prodigious skills as a lawyer to work to create a rationale for keeping foreign affairs safely under Washington’s control. Washington used his power wisely; but it was during his administration that the seeds of the “national-security state” were planted.

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130 See THACH, supra note ___, at 130-36.
131 See MACDONALD, supra note ___, at 238.
133 MADISON, supra note ___, at 601-02.
IV.

Pacificus in Elysium:

The Contemporary Theory of the “Unitary Executive”

The “unitary executive” theorists seem to reason from the internal unity of the executive branch to a kind of external imperviousness—a claim that any sharing of authority, or even any requirement of accountability, with the other two branches would in some manner shatter the internal cohesion of the executive branch. Hamilton’s paternity is readily apparent in even the most seemingly far-fetched claims of George W. Bush’s administration.

Let us take, as an example, the earliest of the famous Office of Legal Counsel memoranda, written after Congressional passage of the Authorization for Use of Military Force in response to the September 11 attacks. On September 25, one week after passage, Deputy Assistant Attorney General John C. Yoo of the Office of Legal Counsel told the president that with or without the resolution, he had the power to initiate full-scale war against anyone he chose: “The historical record demonstrates that the power to initiate military hostilities, particularly in response to the threat of an armed attack, rests exclusively with the President.”

This is a sweeping claim—in essence, Yoo argued that the power to begin and conduct warfare, more conventionally seen as a power shared with the Congress, is in fact the President’s alone, and that the constitutional power to declare war is irrelevant to the decision to go to or remain at war. “Some commentators have read the constitutional text differently,” he concedes. “They argue that the vesting of the power to declare war gives Congress the sole authority to decide whether to make war.” But Yoo rejects this contention, relying on Hamilton: “The Framing generation well understood that declarations of war were obsolete,” he wrote. “Instead of serving as an authorization to begin hostilities, a declaration of war was only necessary to ‘perfect’ a conflict under international law.” Not only had “Great Britain and colonial America waged numerous conflicts against other states without an official declaration of war,” but Hamilton himself had written that “the ceremony of a formal declaration of war has of late fallen into disuse.”

The invocation of Hamilton was not random. Hamilton’s spirit pervades the memo. It is present in Yoo’s claim that “it is clear that the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action,” he argues. (As noted above, it’s possible to read the decidedly unclear text of Article II as uniting the executive power in one

136 Id. at 6.
137 Id. at 7.
138 Id.
139 Id. at 7.
140 Id., quoting Federalist No. 25 (Hamilton).
141 Id.
official as a means of forestalling the executive-council approach.) Yoo then argues that “the constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature—such as the power to conduct military hostilities—must be resolved in favor of the executive branch.”\textsuperscript{142} The centerpiece for this argument is the allocation of the executive power in seventeenth century Britain between King and Parliament.\textsuperscript{143} The text of Article II merely “marks the points at which several traditional executive powers were diluted or reallocated. Any other, unenumerated executive powers, however, were conveyed to the President by the Vesting Clause.”\textsuperscript{144} For this argument, Yoo cites Pacificus himself.\textsuperscript{145}

But Pacificus’s argument, broad as it is, is then extended by Yoo beyond what even Hamilton would probably have claimed, and far beyond what is necessary for the immediate issue. Recall that the opinion was issued a week after Congress gave the President broad authority to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”\textsuperscript{146} The administration was preparing a response focused on Afghanistan and on the command structure of Al Qaeda, and was undoubtedly readying still-undisclosed measures to track and apprehend or kill anyone involved in the attacks who remained at large. As even Yoo admits, this Congressional authorization meant that “the president can be said to be acting at the apogee of his powers if he deploys military force in the present situation.”\textsuperscript{147}

But that was not enough for the purposes of the memo. As Jack Goldsmith, a later head of OLC under George W. Bush, wrote recently, Yoo “went a large and unsupported step further, and concluded that Congress could do nothing to check the President’s power to respond to the terrorist threat.”\textsuperscript{148} Yoo argued that the Authorization was unnecessary and even (reading between the lines) somewhat impudent in its implied assertion of any Congressional role in the decision when, against whom or to what extent to make war. In fact, Yoo argues, “Congress’s support for the President’s power suggests no limits on the Executive’s judgment whether to use military force in response to the national emergency” created by September 11.\textsuperscript{149} This includes even the implied and rather tepid limitation in the language authorizing force against those who were responsible for or aided the attacks. The President’s authority could not be so cabined, Yoo argued:

\begin{quote}
[T]he Joint Resolution is somewhat narrower than the President’s constitutional authority. The Joint Resolution’s authorization to use force is limited only to those individuals, groups, or states that planned, authorized, committed or aided the attacks, and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups or states, which cannot be determined to have links to the September 11 attacks. Nonetheless, the President’s broad constitutional power to use military force to defend the Nation, recognized by the
\end{quote}

\textsuperscript{142} Id. at 8.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 9.
\textsuperscript{146} Authorization for Use of Military Force, supra note ____.
\textsuperscript{147} Yoo, supra note ____., at 21.
\textsuperscript{148} JACk GOLDSMITH, THE TERROR PRESIDENCY 98 (2007).
\textsuperscript{149} Yoo, supra note ____., at 22.
Joint Resolution itself, would allow the President to pre-empt or respond to terrorist threats from new quarters.\textsuperscript{150}

This is an extraordinary claim. I think that, despite its obvious descent from Pacificus, it goes beyond what even Hamilton would have claimed. It would permit the President to “pre-empt” any perceived threat on her own authority. Congress cannot cabin that authority before the fact, nor is it needed to ratify it after the fact. In support of this breathtaking claim, Yoo cites several historical cases, including President Truman’s decision to intervene in South Korea after the North Korean attack in 1950,\textsuperscript{151} President Reagan’s air strikes against Libya in 1986,\textsuperscript{152} President George H.W. Bush’s unilateral decision to intervene in Somalia in 1993,\textsuperscript{153} and President Clinton’s decision to attack Yugoslavia in 1999.\textsuperscript{154}

As will be noted below,\textsuperscript{155} some of these actions cited as support for the President’s authority to pre-empt enemies represent episodes of questionable legality, rather than perspicuous presidential authority. And all of them present legal features unmentioned in Yoo’s claim of unilateral authority to attack anyone the President chooses. Presidents Truman, Bush and Clinton purported to be acting in furtherance of international treaty obligations of the United States—a source of authority the Yoo memo does not so much as mention. President Reagan, again, claimed to be acting in an emergency situation in direct response to an alleged Libyan attack on a German discotheque. None of the attacks was a “pre-emptive” attack on a nation that had not attacked anyone but might later. These circumstances, which imply limitations on unlimited, unchallengeable presidential authority, are inconvenient for the “unitary executive” Yoo is construing, which can wage war anywhere, at any time, for any reason, without being constrained either in advance or after the fact by Congress.

What is most striking about this memo is not that, as Harold Bruff writes, it is selective in its use of constitutional history while ignoring contradictory authority.\textsuperscript{156} Nor is it the fact that, as Goldsmith remarked about another Yoo memo, “it rested on cursory and one-sided legal arguments that failed to consider Congress’s competing wartime constitutional authorities.”\textsuperscript{157} What I find most striking about Yoo’s argument is that in the Hamiltonian universe of presidential-power discourse, it has a certain powerful Frankenstein logic, a hideous hebephrenic plausibility. Hamilton created a language in which executive power is presumed to be above the law and largely insusceptible of either limitation of accountability.\textsuperscript{158} As an abstract matter, the

\begin{itemize}
\item \textsuperscript{150} Yoo, supra note ___, at 23.
\item \textsuperscript{151} See id. at 15.
\item \textsuperscript{152} See id. at 19.
\item \textsuperscript{153} See id. at 10-11.
\item \textsuperscript{154} See id. at 15.
\item \textsuperscript{155} See infra, notes __-__ and accompanying text.
\item \textsuperscript{156} See BRUFF, supra note ___, at 108.
\item \textsuperscript{157} GOLDSMITH, supra note ___, at 148 (2007). Goldsmith is discussing subsequent Yoo opinions that pushed the boundaries of the legal definition of torture. Id. at 143. These “torture memos” are unquestionably the most controversial OLC opinions that have yet been revealed, and arguably (though Goldsmith does not so argue) permitted the commission by United States intelligence and military personnel of acts of torture in contravention of fundamental international law. I have focused on the earlier memo in order to avoid the inflammatory dialogue that surrounds the “torture memos,” (beginning with the latter epithet). In the opinion I discuss, Yoo was analyzing a body of law far more extensive and invoking a universe of commentary and experience more readily available both to government lawyers like Yoo and to those advancing the claims of other branches and the public. Yoo’s neglect of countervailing authority is thus all the more striking.
\item \textsuperscript{158} The Hamiltonian tone surfaced again in the Justice Department’s public defense of the warrantless wiretapping
\end{itemize}
idea that the framers of a self-governing republic “clearly” intended to create a chief executive with unlimited power to wage war is absurd. But the transformation wrought by Hamilton in the concept of the executive is like Alice’s trip through the looking-glass. Consequence is decoupled from cause; labels transcend substance; patent nonsense becomes erudition subject to debate.

program ordered by President Bush. (The formal OLC opinion justifying this program has not been made public, but after The New York Times revealed the program, the Department issued an unsigned “white paper” defending its legality. See United States Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006). That document cheerfully asserts that

The Founders, after all, intended the federal Government to be clothed with all authority necessary to protect the Nation. See, e.g., The Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (explaining that the federal Government will be “cloathed with all the powers requisite to the complete execution of its trust”); id. No. 41, at 269 (James Madison) (“Security against foreign danger is one of the primitive objects of civil society . . . . The powers requisite for attaining it must be effectually confided to the federal councils.”). Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation’s foreign affairs. See, e.g., The Federalist No. 70, at 471-72 (Alexander Hamilton) . . .

Id. at 6. For a detailed critique of the “White Paper,” see BRUFF, supra note 4, at 160-77. Note also the tone of bland self-assurance, a key ingredient of the con man’s spiel. You thought a specific prohibition by Congress against certain conduct could limit executive power? Silly rabbit! No one else ever thought that, certainly not the Framers. One also has to admire the insouciance of the “after all” in the first sentence. What in heaven’s name does it mean, other than “and by the way, I agree with myself as I say this”?

Speaking of rabbits, like the Energizer Bunny, Professor Yoo continues to insist that his claims of unchallengeable presidential authority derive from Hamilton. In a recent essay, he asserts that President Bush was not obligated to follow the Foreign Intelligence Surveillance Act in wiretapping communications involving American individuals he suspected of communicating with terrorists or terror sympathizers. Despite its clear terms forbidding such domestic eavesdropping except with a warrant, Yoo wrote, “[i]t is absurd to think that a law like FISA should restrict live military operations against potential attacks on the United States.” This is apparently because the executive branch had decided that FISA, “enacted . . . during the waning days of the Cold War,” was obsolete when applied to the current situation, and had further determined that it would prefer not to ask for changes in the law. All this is within the president’s power, he argued, and he cited Hamilton as his source.

The power to protect the nation, said Alexander Hamilton in the Federalist, "ought to exist without limitation," because "it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them." To limit the president's constitutional power to protect the nation from foreign threats is simply foolhardy. Hamilton observed that "decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number." "Energy in the executive," he reiterated, "is essential to the protection of the community against foreign attacks."

John Yoo, Why We Endorsed Warrantless Wiretaps, The Wall Street Journal, July 16, 2009, available at <http://online.wsj.com/article/SB124770304290648701.html (accessed July 16, 2009), quoting FEDERALIST NO. 23 (Hamilton). Note that here the imperial executive has again annexed territory not belonging to it. The discussion Yoo selectively quotes from Hamilton does not even concern whether the executive has the authority to engage in certain acts. It is in fact a discussion of whether Congress should have the power to maintain a standing army and navy. Id. Hamilton is specifically referring to powers granted Congress under Article I, § 8, "to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support." Id. But any mention of power it to a “unitary executive” what a protruding wallet is to a pickpocket. The power is valuable; it would be convenient to have; I distract the mark and grab it.
V.

Partisanship and Presidential Power

In assessing the utility of Hamiltonian language, it is useful to remember an additional fact about Pacificus: The Neutrality Proclamation controversy also marked the beginning of the two-party system. At Philadelphia, and during the Framing debate, the very idea of parties stood in bad odor with most spokesmen for the Constitution. Members of the projected federal government were conceived of as individuals acting in the public interest and to some extent in their own. The structural provisions of the Constitution were largely conceived of as providing incentives and obstacles for individuals who might misuse their authority to amass personal power or private wealth. Madison’s fear of and scorn for “faction,” though perhaps not directly aimed at the British party system, at least indicated a sense of danger in the growth of organized groups contending for collective, rather than personal, power.

But by the time of the Neutrality controversy, a huge ideological divide had opened between politicians allied with Jefferson—who regarded Washington (and later his successor, Adams) as aspiring monarchs—and the Federalists, who favored centralization and a powerful executive. The French Revolution itself was the chief engine of this unsought transformation of American political life. The Revolution, the execution of Louis XVII and Marie Antoinette, the repeated coups and counter-coups of the pre-Consular period, the reign of terror that sent first aristocratic liberals, then veterans of the Revolution itself, to the guillotine, the radical social innovations of the Republic, and the systematic attempt to displace Christianity in French life in favor of a new “religion of reason” had an impact on European and American thought akin to that of the Russian Revolution in the early twentieth century.

Figures gathered around the Washington Administration now became known as Federalists in a more exclusive sense than the one arising from the former ratification struggle. These Federalists were opposed to those who came to be called “Democratic Republicans,” who were identified with Jefferson and, increasingly, with Madison. Many Federalists were genuinely shocked by the willingness of Democratic Republicans, and especially of their leader, Jefferson, to defend and even embrace the shocking excesses of the French Revolution. Jefferson’s language must have seemed strikingly sanguinary, even to eighteenth-century ears. In a 1793 letter to his former private secretary, the American diplomat William Short, Jefferson (then Secretary of State) upbraided Short for reported criticisms of the French Jacobins for executing King Louis and others:

The liberty of the whole earth was depending on the issue of the contest, and was ever such a prize won with so little innocent blood? My own affections have been deeply wounded by some of the martyrs to this cause, but rather than it should have failed, I would have seen half the earth desolated. Were there but an Adam and an Eve left in every country, and left free, it would be better than as it now

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159 Rakove notes that the Framers “saw the president not as a leader who would mobilize governing coalitions but as an executive who would rise like a patriot king above party, free from the baits of intrigue and corruption that the lessons of history ascribed to both Stuart kings and Georgian ministers.” RAKOVE, supra note ___, at 268 (1996).
The dispute over the Neutrality Proclamation was the opening battle in this bitter ideological battle between pro-French Jeffersonians on the one hand and pro-Administration Federalists on the other. Hamilton and Washington in particular were appalled by the French excesses, loath to give Britain an excuse to attack the United States. They also had an instinctive sympathy for the English mode of government that Jefferson, influenced by his years in Paris, lacked. Not long after Jefferson wrote, Hamilton expressed very different views about the events in France, which he called “a state of things the most cruel sanguinary and violent that ever stained the annuals [sic] of mankind, a state of things which annihilates the foundations of social order and true liberty, confounds all moral distinctions and substitutes to the mild & beneficent religion of the Gospel a gloomy persecuting and desolating atheism.” Significantly, Hamilton noted in a context that made it clear that Jefferson was among his targets, “the time must come when it will have been a disgrace to have advocated the Revolution of France in its late stages.”

And into the relationships among patriot leaders who had stood shoulder to shoulder against England came the suspicion—never again to be entirely banished from American political thought—that the other party was disloyal and even overtly traitorous.

Hamilton at some level must have feared that to give Congress a role in deciding about neutrality would be to risk putting traitors in charge of foreign policy. The Neutrality controversy took place in the context of an ongoing dispute that eventually led Hamilton and the Federalists to embrace the Alien and Sedition Acts as necessary tools to suppress the Jeffersonian internal threat. In retrospect, history makes clear that both sides of the incipient partisan divide were sincere patriots—as Jefferson proclaimed in his first Inaugural address, they were all republicans and they were all federalists. But it is also true that the dispute between them was not about small marginal policy differences, but about enormously consequential domestic and foreign policy decisions that would shape the nature of the new country for generations. And when the stakes are high—as they often are in democratic politics—it is all too easy to mistake the loyal opposition for a foreign-backed Fifth Column. One feature in the strong arguments for the “unitary executive,” I submit, has been their use in subduing domestic opposition, which is seen, often sincerely, as allied with, and sometimes more dangerous than, foreign enemies.

The climax of the Federalist-Jeffersonian struggle was a peaceful political revolution. But the presidency, ambiguously designed to function in war and peace, was also not clearly designed to be handed over peacefully in an election. And this part of the story illustrates the next problem with Article II. In 1800, the ungainly electoral-vote system nearly brought the two sides to civil war.

Scholars still debate whether the Framers foresaw the prospect of a contested presidential

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160 Jefferson to William Short, January 3, 1793, in THOMAS JEFFERSON, WRITINGS 10003-04 (1984). The tone of omelets and eggs is strongly reminiscent of the apologies offered for Stalinist and later Maoist excesses by those we now consider to have been Communists dupes. One can almost see why Conor Cruise O’Brien was tempted to write, ungenerously and hyperbolically, that had Jefferson been alive in the twentieth century, he would have admired Pol Pot. See CONOR CRUSE O’BRIEN, THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION (1996).


162 Id. at 835.

election and a peaceful shift of power.\textsuperscript{164} Certainly some of them believed that a duly elected president would simply be re-elected until his death or resignation, at which point his place would be taken by the vice-president, beginning the cycle again.\textsuperscript{165} Washington refused to run for a third term, however, and his vice president, John Adams, was elected in the first contested presidential election in 1796.\textsuperscript{166} But the divisions in the country were so great, and Adams’s leadership was so erratic, that by 1800 the unthinkable occurred, and Thomas Jefferson led his opposition Republican Party to a sweeping victory over the incumbent in both the electoral vote and the Congressional elections.\textsuperscript{167}

But the original text of Article II contained no provision for a ticket—one presidential and one vice-presidential candidate.\textsuperscript{168} Each elector was supposed to vote for two candidates.\textsuperscript{169} All the votes would be totaled and the candidate with the most would win, unless no candidate got a majority.\textsuperscript{170} In 1800, Jefferson and Aaron Burr had agreed to run as a team. But by a still-mysterious miscommunication, all the Jeffersonian electors voted also for Burr, producing a tie in the electoral vote and throwing the election into the House of Representatives.\textsuperscript{171}

The politics of this could not have been worse—because the Congress that would do the choosing was the old, heavily Federalist Congress, which had been repudiated by the voters. It would be as if, in 2000, the Republican 106\textsuperscript{th} Congress had been charged with deciding between Al Gore and Joe Lieberman for President.

The process of choice lasted five days and 36 ballots,\textsuperscript{172} before Hamilton threw the vote to Jefferson (much as he despised the Vice President, he regarded Burr as “an embryo-Caesar”\textsuperscript{173}). This choice began the train of events that led to his death at Burr’s hands three years later. But more important, it exposed the fragility of the election procedure, which was

\textsuperscript{164} The framers expected, the story goes, that after George Washington passed from the scene, electors would typically scatter their votes across a wide range of candidates…According to George Mason, in a remark at Philadelphia relied upon by many a modern storyteller, ‘nineteen times in twenty’ the electors would likely fail to generate a first-round majority winner. As national presidential parties began to congeal in the 1790s and later hardened into permanent features of the political landscape, the broad dispersion of electoral votes anticipated by Mason never occurred. Instead, elaborate preelection coordination via party caucuses and conventions typically narrowed the field to two leading presidential candidates, one of whom almost always emerged with an absolute majority of first-heat electoral votes.

AMAR, \textit{supra} note _____, at 148-49 (quoting 2 \textit{THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500} (Max Farrand ed. 1966)).

\textsuperscript{165} Hamilton on at least one occasion seemed to suggest this method of succession as the norm. In 1792, he urged Washington to run for re-election, suggesting that his service “need not continue above a year or two more—and I think that it will be more eligible [sic] to retire from office before the expiration of the term of an election, than to decline a reelection.” “The Necessity of Reelection: To George Washington (July 30, 1792),” in \textit{ALEXANDER HAMILTON, WRITINGS 751, 753} (Joanne B. Freeman ed., 2001).

\textsuperscript{166} CHERNOW, \textit{supra} note _____, at 514.

\textsuperscript{167} For an account of these events, see, e.g., \textit{BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY} (2005).

\textsuperscript{168} U.S. CONST. art. II, § 1, cl. 3.

\textsuperscript{169} Id.

\textsuperscript{170} Id.

\textsuperscript{171} See Goldstein, \textit{supra} note 139, at 520.

\textsuperscript{172} Id.

\textsuperscript{173} Hamilton to an Unknown Correspondent, Sept. 26, 1792, in \textit{HAMILTON, supra} note _____, at 792.
soon “repaired” by the Twelfth Amendment,174 which requires the electors to vote for one candidate for president and another for vice-president.175 This was the first patch on Article II, but far from the last—the procedures for presidential election and succession were changed by constitutional amendment in 1933,176 1951,177 1961,178 and 1967.179 None of this fine-tuning has been able to fix a system that remains indefensible in theory and unreliable in practice. In 1824, 1876, 1888, and 2000 it produced winners who had received fewer votes than the losers, and it came startlingly close to doing so again in 2004; in 1824, 1876 and 2000 it produced prolonged uncertainty and even the threat of civil unrest.180

This system remains by far the worst feature of the Constitution.181 Its genesis was in the Framers’ desire to protect slave societies. It has the effect today of reducing a state government’s incentives to encourage voting. That’s because a state’s electoral vote remains the same no matter what percentage of its population votes in the election. Measures that reduce participation can perversely boost the power of the political leaders of the state, who gain influence in national politics from their perceived ability to deliver electoral votes.182 If that can predictably be done by reducing voter turnout, they have shown their willingness to do exactly that. During Southern segregation, a Southern state’s electoral votes might be determined by fewer than 10 percent of the eligible voters.183 The electoral vote total remained unchanged.184

In addition, I believe that the current system of election—in which the winner is the candidate who gleans a majority of electoral votes, regardless of whether he wins even a plurality of popular votes—has a corrosive effect on presidential candidates and presidents themselves. The aim of a presidential campaign is to win office by the most effective means available. This claim may seem overblown as it relates to 2000; but that is because we know the end of the story. Recall that one pivotal event in the squalid grapefruit-republic saga of the Florida recount was the so-called “Brooks Brothers riot,” in which paid operatives of the Republican Party managed to shut down the manual recount of ballots in Dade County by preparing to storm the Board of Elections office. Had the Board or another Board been less easily intimidated by mob threats, actual violence might easily have ensured. See John Lantigua, “Miami’s Rent-a-Riot,” Tuesday, November 28, 2000.

For a thorough explanation of this critique, see generally George C. Edwards, Why the Electoral College Is Bad for America (2005).185 E.g. Governor Benjamin (“Pitchfork Ben”) Tillman of South Carolina instituted an “Eight Box Law,” which required voters to place their ballot in an appropriate box. Since misplaced ballots were void, the law had the intended effect of reducing African American voter participation by fifty percent between 1880 and 1884. More importantly, the law exponentially increased the Governor’s statewide popularity, which aided the Governor in a successful bid for the United States Senate. Charles W. McKinney, Jr., Democratic Intent? The Perils and Promise of Constitutional Reform in the New South, 3 Charleston L. Rev. 555, 556-57 (2009). See also Crawford v. Marion County Election Board, 553 U.S. ___ (2008) (state officials may burden right to vote even if effect and apparent intention will be to boost political prospects of party holding majority on Supreme Court).


174 Id.
175 U.S. Const. amend. XII, cl. 1.
176 U.S. Const. amend. XX, § 3 (clarifying the line of presidential succession when the president-elect dies before taking office).
177 U.S. Const. amend. XXII, § 1 (creating a two term limit for the office of the president).
178 U.S. Const. amend. XXIII, § 1 (allocating electoral votes to the District of Columbia).
179 U.S. Const. amend. XXV (further clarifying the line of presidential succession).
180 John C. Nagle, How Not to Count Votes, 104 Colum. L. Rev. 1732, 1734 (2004). In 1800, preparations were underway to send the Virginia militia to seize “Washington City” and install Jefferson as President had the House vote come out the other way. This claim may seem overblown as it relates to 2000; but that is because we know the end of the story. Recall that one pivotal event in the squalid grapefruit-republic saga of the Florida recount was the so-called “Brooks Brothers riot,” in which paid operatives of the Republican Party managed to shut down the manual recount of ballots in Dade County by preparing to storm the Board of Elections office. Had the Board or another Board been less easily intimidated by mob threats, actual violence might easily have ensured. See John Lantigua, “Miami’s Rent-a-Riot,” Tuesday, November 28, 2000.
182 E.g. Governor Benjamin (“Pitchfork Ben”) Tillman of South Carolina instituted an “Eight Box Law,” which required voters to place their ballot in an appropriate box. Since misplaced ballots were void, the law had the intended effect of reducing African American voter participation by fifty percent between 1880 and 1884. More importantly, the law exponentially increased the Governor’s statewide popularity, which aided the Governor in a successful bid for the United States Senate. Charles W. McKinney, Jr., Democratic Intent? The Perils and Promise of Constitutional Reform in the New South, 3 Charleston L. Rev. 555, 556-57 (2009). See also Crawford v. Marion County Election Board, 553 U.S. ___ (2008) (state officials may burden right to vote even if effect and apparent intention will be to boost political prospects of party holding majority on Supreme Court).
184 Nagle, supra, note ___ at 1762.
route to that goal lies in conceding defeat in the popular vote, candidates will take it. Every four years, as the seemingly interminable election process enters the home stretch, at least one candidate is faced with the possibility of gaining the White House by targeting electoral victory and conceding the popular vote.185 (In 2008, this candidate was Sen. John McCain, whose campaign propounded a strategy—whether a plausible one or not, the only one available to him—of winning by carrying Pennsylvania even though every reliable political observer expected then-Sen. Barack Obama to gain a majority of the popular vote. But electoral-college cynicism has no party label: in both 2000 and 2004, it seemed possible that Democrats might be the ones hoping on election night for an electoral vote that would reverse the voters' preference.186) The people, then, are only secondary players in the mind of a candidate seeking election or re-election. The electoral map, not the people, becomes the arbiter of success, and during every minute of a presidential election, a president and her advisers are aware that it is to that map that accountability is due. “Where your treasure is,” Scripture teaches, “there will your heart be also.”187

The prospect of winning without, in the truest sense, winning is a cynical one, and must, to a greater or lesser extent, undermine a president’s respect for the people as his sovereigns and employers. One of the most curious aspects of the Bush presidency was the extent to which candidate Bush promised to be “a uniter, not a divider,” but then proceeded to govern as if opposition or even questioning of his will was treason. The most obvious explanation for this disjuncture would be simple deceitfulness—the “unity” rhetoric being a meaningless expedient adopted to gain power. But I can’t help wondering what effect the Florida imbroglio and its ugly conclusion had on a man whose self-concept, we now understand, was curiously unformed. Bush took office knowing that he was not the people’s choice—more than half a million more Americans succeeded in voting for Gore than voted for Bush. He had, perhaps, envisioned himself as entering office in a wave of popular acclaim that would provide him with the affirmation he so obviously sought as compensation for inner wounds. Instead, he was once again a kind of political stepchild; at some level, the aggressive authoritarianism of his presidency—its ostentatious contempt for democratic norms and constitutional institutions—might be seen as a campaign of revenge against those who had rejected him.

Behind the contingencies of individual elections lies an even uglier fact. Under the Constitution as written, a state legislature still retains today the prerogative of simply failing to hold a popular vote for president.188 During the prolonged Florida recount dispute, the Republican majority in the Florida Legislature passed a measure to aside the results of the

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185 See LEVINSON, supra note ___, at 87-89.
188 The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. This is the source for the statement in McPherson v. Blacker that the state legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution.

popular vote and simply declare Bush electors as the winners.\(^{189}\) Democratic lawyers believed that this would be held unconstitutional—not because it was a gross violation of democracy, but because it violated the Constitution’s textual command that only “Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”\(^{190}\)

Beyond that, electors cannot legally be forced to vote for the candidate to whom they are pledged. As recently as 1976, after the close race between Carter and Ford, Republican leaders were openly attempting to persuade Democratic electors to cross over and cancel the results of the popular vote. In testimony before the Senate Judiciary Committee, that year’s Republican vice-presidential nominee, Bob Dole, was remarkably frank about the planning to engineer an electoral coup that year:

> we were looking around on the theory that maybe Ohio might turn around because they had an automatic recount. We were shopping—not shopping, excuse me. Looking around for electors. Some took a look at Missouri, some were looking at Louisiana, some in Mississippi, because their laws are a little bit different. And we might have picked up one or two in Louisiana. There were allegations of fraud maybe in Mississippi, and something else in Missouri. We need to pick up three or four after Ohio. So that may happen in any event. But it just seems to me that the temptation is there for that elector in a very tight race to really negotiate quite a bunch.\(^{191}\)

Bad as the 2000 controversy was, it would seem tame beside a close election in which both the popular vote and the nominal electoral-vote total were set aside by the action of a rogue elector suborned by the losing party. In all, the electoral vote system is not a disaster waiting to happen; it is a disaster happening over and over to a nation perennially surprised at its inadequacy.


\(^{190}\) U.S. Const., Art. II. § 1, cl. 4.

\(^{191}\) EDWARDS, *supra* note ____, at 72.
VI.

Interregnum: Power without Responsibility

Even when the election system works passably, a newly elected president must next endure another indefensible feature of the succession process. In the United Kingdom, the Prime Minister and his government tender their resignations “as soon as the [adverse] results of a General Election are known”\textsuperscript{192}; in France, a newly elected President is inaugurated within a few weeks at most.\textsuperscript{193} But Barack Obama had to wait 11 weeks—nearly a quarter-year—before assuming office. The presidential interregnum is a recurrent period of danger that has frequently produced serious political and constitutional damage.

No date for the inauguration is specified in the Constitution. But the process of ratification in 1787 and 1788 created uncertainty about when the first presidential election would be complete. Though the four-year term system would suggest that Washington had been elected in 1788 (presidents being elected in years divisible by 4), in fact, the first presidential electors weren’t chosen until January 1789. Before the Constitution took effect, the Confederation Congress set March 4, 1789, as the beginning of the first president’s term, to allow time for the new government to get up and running. (Washington wasn’t able to actually take the oath until April 30.) The slowness of news and travel created a prolonged dead period between the vote and the new election. Congress did not even set a uniform election day in November until 1845.\textsuperscript{194} But once March had been set as the beginning of the first presidential term, the long delay could be corrected only by constitutional amendment, since the Constitution itself specifies a four-year term for the president; any change in the swearing-in date would be an illegal shortening of the outgoing president’s term.

This accidental flaw nearly destroyed the nation in 1860-61. Lincoln was elected in November, but the indecisive, feckless Buchanan continued in office for more than four months, the whole of the disastrous “secession winter” in which the lower-South states were permitted to seize federal arsenals and forts that would later form the backbone of the Confederate military effort.\textsuperscript{195} By March 1861, the situation was so desperate that Lincoln had to sneak into Washington in disguise\textsuperscript{196}, and the Civil War was nearly already lost.

A second disaster befell the nation in 1932-33, when Franklin Roosevelt ousted Herbert Hoover by the most crushing margin in American history, but had to wait four months to take office. During that period, the Depression worsened and Hoover attempted to force the new president to abandon his proposals for economic reform and essentially govern according to Hoover’s specifications.

In 1933, the nation ratified the 20th Amendment, which eliminated the lame-duck session

\textsuperscript{192} STANLEY DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 175 (7th ed. 1994).
\textsuperscript{193} Constitution of 4 October 1958, as amended, Article VII.
\textsuperscript{194} See COLEMAN, ET AL., PRESIDENTIAL ELECTIONS IN THE UNITED STATES: A PRIMER, CONGRESSIONAL RESEARCH SERVICE 38 (2000.)
\textsuperscript{195} See DAVID HERBERT DONALD, LINCOLN 267 (1995). “During the winter of 1860-1861 while Lincoln was constructing his cabinet, the country was falling to pieces.” \textit{Id}. Buchanan “deplored secession but said nothing could be done to stop it.” \textit{Id}.
\textsuperscript{196} See \textit{id}. at 277-79.
of Congress in December after an election and cut the interregnum in half.\textsuperscript{197} But eleven weeks is still too long. It is routine now, for example, for defeated or retiring presidents to issue pardons during this period that they would have found politically indefensible before the election.\textsuperscript{198} That politically minded or potentially corrupt pardons are a legitimate grounds for critique of a president is not simply intuitively true but historically demonstrable: President Gerald Ford’s pardon of his predecessor, Richard Nixon, has been persuasively praised as sparing the country the ordeal of a trial and critiqued with similar cogency as giving at least the appearance of a payoff to the man who had made Ford vice president. Whatever the verdict of history, the American voters had a chance to be heard—the pardon was issued on September 8, 1974,\textsuperscript{199} two years before the election, and very likely played a role in Ford’s narrow defeat by Jimmy Carter two years later. Whatever one’s view of the pardon itself, can anyone make a serious argument that it was irrelevant to a voter’s assessment of Ford’s leadership?

There is no real reason for lodging the pardon power with a president who is no longer accountable to the voters. It conduces neither to justice nor to democracy. But bad as this is, it’s far from the worst danger of the interregnum. In December 1992, President George H.W. Bush, disregarding his defeat for re-election, committed U.S. troops to a disastrous military mission in Somalia, leaving his successor to clean up the mess.\textsuperscript{200} Like Truman in 1950, Bush refused to seek Congressional authorization.\textsuperscript{201} Thus one man, who in the United Kingdom or France would have already been a private citizen, was able on his sole authority to bind his successor and the nation to a policy of military action. The ill-thought-out Somali mission, before its conclusion in 1995, resulted in a significant number of U.S. military personnel killed or wounded and in a foreign-policy wound that, commentators argue, crippled the Clinton Administration’s willingness and ability to respond to the genocide in Rwanda in 1994.\textsuperscript{202} Even had the Somalia mission been less disastrous than it was, it would still be troubling to think of young Americans dying in a foreign conflict that was initiated unilaterally, with neither democratic deliberation nor constitutional check. Like the elder Bush, an interregnum president retains the power of life or death over the nation, but the voters have no means of holding him accountable. On any grounds—whether those of democratic theory or those of practical governance—this outcome merits the criticism often attributed to Talleyrand of Napoleon’s execution of the Duc d’Enghien: “It was worse than a crime; it was a mistake.”\textsuperscript{203} A constitutional design that allows this to

\textsuperscript{198}See, e.g., Proclamation No. 6518; 57 Fed. Reg. 62,145 (Proclamation No. 6518; 57 Fed. Reg. 62,145 (December 24, 1992))(announcing pardon by President George H.W. Bush of six high-level officials suspected of involvement in the Iran-Contra affair). On January 20—the day his successor was to be inaugurated at noon—President Bill Clinton pardoned not only a fugitive financier, Marc Rich, whose application had short-circuited normal Justice Department procedures, but also his own brother, Roger, who had been convicted of conspiracy to distribute cocaine. Official website, Office of the Pardon Attorney, United States Department of Justice, http://www.usdoj.gov/pardon/ (accessed March 27, 2009).
\textsuperscript{199}Proclamation 4311, September 8, 1974.
\textsuperscript{203}The apothegm is too witty and cogent to eschew, though scholars suggest that the true locus classicus is Talleyrand’s explanation of his own failure to resign after the execution: “If Bonaparte has committed a crime, that is no reason I should make a mistake.” See JOSEPH MCCABE, TALLEYRAND 219 (1907).
happen, even only occasionally, is flawed and needs repair.

To fix this flaw, we should require that a newly elected President should be inaugurated within a week. Americans used to the current system will object that this will not give the president time to assemble a Cabinet—but in England and France the new chief executive is prepared with ministerial nominations because they will be needed right away. Our system gives candidates the dangerous luxury of running for president without serious thought about who will govern with them; a shorter interregnum will force the creation of something like the British shadow cabinet, in which a candidate makes public the names of his key advisers. In exchange for this duty of rapidity, I suggest changing the constitutional provision that permits the Congress to require Senate confirmation for executive officials below Cabinet rank. If we are to require greater dispatch and greater accountability from the president, we should be willing to grant her the chance to staff her administration in some reasonable time. The present system, in which as many as 70 officials may be blocked from assuming office at the whim of a single senator, verges on insanity. Even an accountable, democratic head of state should have the power to run her own department.

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204 David Fontana, The Permanent and Presidential Transition Models of Political Party Policy Leadership, 103 NW. U. L. REV. COLLOQUIY 393, 396-397 (2009). “…[I]t is quite common in all forms of constitutional systems for the political parties out of power to clearly identify which (senior and junior) members of their parties will lead the party in certain policy areas. This is particularly so in dozens of British-inspired parliamentary systems…Likewise, political parties in semi-presidential systems (such as France) have also often clearly defined their policy leaders even when out of power.” Id. at 395.

205 Stuart Minor Benjamin & Mitu Gulati, Mr. Presidential Candidate: Whom Would You Nominate?, 42 Loy. L.A. L. Rev. 293, 296 (2009). “Britain has a tradition of ‘shadow governments,’ in which the party out of power has an entire cabinet of alternative (or ‘shadow’) ministers who are generally expected to take on those same roles if their party comes to power. Voters thus have a sense not only of the Prime Minister they are potentially electing but also of the ministers who will serve in the cabinet.” Id.

206 U.S. Const., Art. II § 2 cl. 2.

VII.

The Accountability Deficit

That brings us to the most common presidential malfunction, the ‘runaway presidency’—a political situation in which a president has grotesquely failed, but refuses to change course or even compromise. All too often, a runaway president asserts his untouchability even though the policy he adheres to has never been the subject of electoral dispute—and sometimes when he himself has not even been elected to his office. John Tyler was the first of these accidental presidents. Taking office only a few weeks after the inauguration of William Henry Harrison, Tyler proceeded to govern in more or less open defiance of the Whig Party that had elected him. Though the Whigs represented a nationalist strain in politics and had been elected to enact a nationalist platform, Tyler governed from a pro-Southern state’s-rights perspective, empowering his native South and helping sow the seeds of the Civil War.208

Andrew Johnson was another runaway president who crippled efforts to solidify the Union’s victory in the Civil War. Politically, Johnson had no popular mandate at all. He was an afterthought who had barely met Abraham Lincoln. But after the assassination, Johnson adopted a pro-Southern Reconstruction policy, and treated Congress with such contempt that rumors swept the nation that he would order the Army to break it up by force.209 The object of his policy was to put power back into the hands of the Southern whites who had led the Confederacy; he used his veto against all civil-rights legislation and permitted Southern whites to terrorize the freed slaves and white Unionists.210

Certainly there are times when presidential firmness is better than rapid changes in policy to suit public opinion. Executive theorists in the United States often pose the choice that way—steady independent executive leadership or feckless inconstant pursuit of popularity, or what Hamilton called “the temporary delusion” of public opinion.211 But not all shifts in public opinion are delusive or temporary. An executive should have some independence of public opinion, but a model of the office that treats public opinion as irrelevant is neither democratic nor republican; it is properly called authoritarian.

A democratic system is not an intermittently electoral dictatorship; the executive does not get absolute ownership of the powers of office for a fixed time; he or she is given a political

208 Tyler’s intransigence on core issues all but destroyed the Whig Party. For a summary of the legislative stalemate and political disaster that followed his succession, see Michael F. Holt, The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War 122-62 (1999).
210 Johnson’s course of leniency with the Southern power structure is laid out in Eric Foner, Reconstruction, America’s Unfinished Revolution 1863-1877 (1988). President Lincoln’s plans for Reconstruction are not known—the martyred President knew how to keep his own counsel until the appropriate moment—but he had suggested before his death that some blacks be allowed to vote. Id. at 74. Johnson resolutely opposed any black suffrage. Id. at 179-84. He dismantled Lincoln’s experimental Unionist government in Louisiana and returned control to Southern whites, id. at 182-84. He vetoed every Republican attempt to protect the civil rights of the freed slaves. See id. at 163, 247-51. Despite repeated attempts by the Republicans (who had elected him vice-president) to arrange a compromise policy, Johnson insisted that his policy must prevail and accused the leaders of his own party of being as disloyal as the Confederate leadership had been, id. at 249. Johnson’s obduracy eventually impelled his own party to impeach him, though removal failed by one vote in the Senate. Id. at 333-36.
mandate that can be revoked or limited by a political process of legislative or electoral repudiation.\textsuperscript{212} The views of the people and their representatives form a legitimate part of the political equation.

American political thinkers tend to think loosely about exertions of presidential authority. The paradigm case too often seems to be Lincoln rallying the nation in the wake of Fort Sumter, or Franklin D. Roosevelt summoning Americans to form “the great arsenal of democracy” during the dark days before Pearl Harbor. Because these great leaders used their authority broadly, the thinking goes, assertions of executive prerogative are presumptively valid and desirable.

But these two cases were emergency assertions of power by presidents with popular mandates: Lincoln had just won a presidential election that also provided him with a handy majority in Congress;\textsuperscript{213} Roosevelt in 1940 was an enormously popular president with a Congress in which his party outnumbered the opposition by two to one in one house and three to one in the other.\textsuperscript{214} Both presidents eventually sought and obtained congressional approval for their bold executive actions.\textsuperscript{215}

There are actually three different kinds of presidential assertions. First, there is the case in which a president with an authentic political mandate takes bold action, and as soon as practicable asks Congressional approval of what has been done. This situation clearly accords with constitutional design and, equally important, with the basic concept of democratic self-government—that the people, or their representatives, shall be consulted whenever possible. Much the same principle applies to the case where a president who lacks a popular mandate takes a bold action but freely submits it to Congress after the fact.

There is a second type of case that can easily be confused with the first, however: that is where a president with little or no political mandate acts to further a surprising or obscure political agenda. Under these circumstances what poses as bold leadership is simply usurpation, and a president’s refusal to consult or compromise with Congress is not firmness but rigidity. A striking case of this second type occurred in 1950, when President Harry S. Truman ordered U.S. forces into battle against North Korean troops that had invaded South Korea.\textsuperscript{216} Truman, who had succeeded Roosevelt in 1945, had been elected in his own right in 1948;\textsuperscript{217} but the issue of

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\item[212] Id. at 1064-68. Under Britain’s Parliamentary system, a Prime Minister will typically resign in the wake of his or her party’s electoral defeat. See Thomas O. Sargentich, The Limits of the Parliamentary Critique of the Separation of Powers, 34 WM. & MARY L. REV. 679, 725 (1993); Adam Tomkins, In Defense of the Political Constitution, 22 OXFORD J. LEGAL STUD. 157, 171 (2002). The House of Commons can also pass a vote of “no confidence” in the Prime Minister, forcing his or her resignation. Id.
\item[213] In the 37th Congress (1861-63) Republicans held 108 of 183 seats in the House and 31 of the Senate’s 50 seats. See infra internet sources cited note 177 (discussing election results for 37th Congress). See also JAMES M. MCFHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 232, 241 (Oxford Univ. Press 1988) (discussing Lincoln’s share of the popular vote and geographic returns for the 1860 presidential election).
\item[217] FRANK FRIEDEL, THE PRESIDENTS OF THE UNITED STATES OF AMERICA 71 (White House Historical Association
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U.S. military involvement in Asia had hardly been mentioned during the campaign, which turned largely on domestic issues and on Truman’s promise to extend and refine Roosevelt’s New Deal social welfare policies. Truman, however, declined to ask for any permission from Congress to conduct a full-scale war in Korea, claiming instead that his authority flowed from the United Nations Charter as a treaty made under the authority of the United States. The decision, in the long run, proved costly both for the country and for Truman; when the war went badly, both Congress and the public identified it as Truman’s sole responsibility.

President Lyndon B. Johnson’s preparation before his intervention in Vietnam was in some ways similar. Though Vietnam has been discussed during the election campaign of 1964, Johnson had given voters the impression that he had no intention of escalating the war. In fact, plans to do exactly that were well under way, and in March 1965 Johnson’s dispatch of ground forces into South Vietnam marked the beginning of the full-scale engagement of the U.S. there. Johnson had, in the wake of the Tonkin Gulf incident, secured at least the form of Congressional authorization for immediate military response to the supposed attack on U.S. naval forces off the coast of Vietnam; but at no point were either Congress or the voters actually asked for consent to a policy of Americanizing and escalating the war. Once again, the decision to cut Congress and the people out of the loop exacted a terrible price on the perceived legitimacy of the war, on public perception of American democratic institutions and on Johnson’s own considerable domestic legacy.

Obviously my claim is not that Truman was wrong to respond to emergency in Asia, or wrong to respond promptly and strongly. Emergency action was needed to prevent the destruction of an American ally and a major setback to America’s strategic position. If one posits that the United States had vital interests in an independent South Korea, then prompt response to defend those interests is exactly what a democratic chief executive should provide. However, even if Truman regarded the nation’s vital interests as irrevocably committed to his own policy, there are reasons both of utility and of legitimacy why he should have permitted Congress to participate in the decision once the initial commitment had been made. The decision to commit the nation’s military force to open-ended conflict is a consequential and complex one, and in a democratic system it requires more than a simple yes-or-no response from the branch
that retains the authority to “declare war”\textsuperscript{224} and to “raise and support armies.”\textsuperscript{225} War aims, and the means by which the country will attain them, are important too. The troubled legacy of Korea includes a long-standing debate about whether the United States had, by refusing to use force sufficient to repel the Chinese intervention on the Korean peninsula, cravenly or unwisely settled for less than “victory” in the war.\textsuperscript{226} But what would victory have looked like? At its most basic level, “victory” might have been seen as simply the restoration of the status quo before the North Korean invasion. This had been achieved early in the war; but U.S. forces moved above the 38\textsuperscript{th} parallel with an uncertain aim.\textsuperscript{227} Observers began to suspect that the American aim was reunifying Korea under a pro-American government\textsuperscript{228}—the mirror-image of the aim of the Stalinist regime in Pyongyang. And some inside and outside the U.S. began to suspect that America secretly was seeking a full-scale engagement with the People’s Republic of China, aimed at overthrowing the revolutionary government in Peking and restoring the Nationalist regime of Chiang Kai-Shek.\textsuperscript{229}

Obviously the costs and consequences of any of these three aims would have been radically different. The ambiguity created by the president’s unilateral action may have contributed to the fear that led the Chinese to intervene in Korea—with immense negative consequences for the U.S. and the world. A public debate in Congress would have required the Administration to enunciate its goals more clearly and in a form that would have permitted the public to hold it accountable for failing to achieve them or impulsively exceeding them. The same logic would clearly have applied in Vietnam: “Why Are We in Vietnam?”\textsuperscript{230} was a question asked repeatedly and quite sincerely during the post-1965 fighting, and the answers of two administrations were unsatisfactory and variable over time. In such a situation, public support for a war can hardly be maintained, and the democratic legitimacy of asking Americans to die in battle is extremely shaky.

Of course, situations like this are precisely the ones in which a president will be most easily convinced that support for war entails the question of the nation’s vital interests or even survival. “Dean,” Truman reportedly told his Secretary of State when he heard the news of the invasion of South, “we’ve got to stop the sons-of-bitches no matter what.”\textsuperscript{231} If the exigency was, in his mind, that great, then refusing Congress even the theoretical right to refuse its assent could be seen as not only justifiable but praiseworthy.

But even if one concludes that Truman was in retrospect correct, it is precisely the life-or-death decisions that our Constitution generally insists be made by more than one systemic actor. A refusal by Congress to endorse the war might have been a defeat for the nation; but it would

\textsuperscript{224} U.S. CONST. art. 1, § 8, cl. 11.
\textsuperscript{225} Id. at cl. 12.
\textsuperscript{226} For a discussion about General MacArthur’s stance on “victory” in Korea versus the retreat instead chosen by Truman, see NIALL FERGUSON, COLOSSUS: THE PRICE OF AMERICA’S EMPIRE 88-94 (Penguin Press 2004).
\textsuperscript{227} PERRETT, supra note ____, at 164. “MacArthur’s instructions to cross the parallel had been issued by the Joint Chiefs, but they reflected the full range of Truman’s and Acheson’s confusion on the kind of war they were fighting, the role of the Soviets, and the risk of Chinese intervention.” Id.
\textsuperscript{228} See RANDALL BENNETT WOODS, QUEST FOR IDENTITY: AMERICA SINCE 1945 54 (Cambridge Univ. Press 2005). The author notes that before the Korean War, the U.S. referred the issue of Korean unification to the U.N. Id. Soviets in Korea rejected the U.N.’s attempt at a countrywide election. Id. The Korean War followed shortly thereafter.
\textsuperscript{229} For a contemporaneous analysis of these suggestions, see I.F. STONE, THE HIDDEN HISTORY OF THE KOREAN WAR (1952).
\textsuperscript{230} See, e.g., NORMAN MAILER, WHY ARE WE IN VIETNAM?: A NOVEL (1967).
\textsuperscript{231} MERLE MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN 273 (Berkley Publ’g Corp. 1974).
unquestionably been a catastrophic setback for Truman. The ease with which a president can confuse the national interest with his own forms a powerful argument for requiring him to consult as much as possible when the stakes are highest.

And consider: what if the worst, from Truman’s point of view at least, had happened, and Congress had refused to permit the war to continue? I personally think that decision would have been wrong, and possibly dangerous. But there is no reason for my personal judgment to displace Congress’s collective wisdom, even if I turn out to be right. And consider the second decision to go to war in Asia, made with only the most deceitful observance of constitutional form by President Johnson.232 Had the people’s representatives blocked that escalation, the consequences for Johnson would have been malign—but it hardly seems controversial to suggest that, even today, the United States and the world as a whole would be a much better place.

In short, policies for unexpected emergencies need discussion and ratification by Congress and the people. This cannot be provided in advance; and though it may be risky to allow these constitutional forces to enter a situation once initial decisions have been made, on the whole the balance of risks weighs on the side of allowing them to participate. If the United States is to blunder into fiasco, then the blunder should be that of the nation as a whole. And if Congress and the people make unwise decisions, then, to paraphrase Justice Holmes in a different context, the only real meaning of republicanism is that they should have their way.233 A theory of presidential authority that denies them their role is indefensible both on instrumental and democratic grounds.

The third and final type of presidential assertion arises when a president’s policy and leadership has been decisively repudiated by the voters in the only legitimate way—either by failure to re-elect him or (more often and more dangerously) by sweeping his Congressional allies out of office at a midterm election. In our system, presidents not seldom do what George Bush has did in 2006—simply insist that they will persist in the conduct that has alienated the country.234

In a parliamentary system, a chief executive in such a situation would be obliged to tender his or her resignation.235 American political theory resists the idea of presidential resignation; it embodies Madison’s fear of making the executive the creature of the legislative. But resignation following an adverse mid-term election would be a recognition that the president is a creature not of the legislature but of the people—and the people are the sovereigns in the American constitutional order.

The basic disconnect between the voters and the executive is not an artifact of the Bush years; it’s not even rare. It happens over and over, and our failure to notice it is a function of our crabbed theory of democratic constitutionalism. Clinton was decisively repudiated in 1994,236 because the voters objected to his policies.237 He persisted in office (though slowly adjusting his

232 See SCHLESINGER, supra note _____, at 179-185. “Though it amused him [Johnson] to taunt members of Congress by pulling the Tonkin Gulf resolution out of his pocket and flourishing it as proof that Congress had authorized the escalation of American involvement, he did not believe for a moment that the resolution provided a legal basis for his action.” Id. at 181.
234 See supra note 9.
235 See supra note 196.
236 See supra internet sources cited note 177. As a result of the 1994 midterm elections, the Democrats lost majorities in both chambers of Congress. The Democrats lost 54 seats in the House and 9 seats in the Senate.
237 See R. W. Apple Jr., The 1994 Elections: News Analysis: A Vote Against Clinton, N.Y. TIMES, Nov. 9, 1994, at A1 (‘‘Dissatisfaction with President Clinton, with liberalism, with the Democratic Party... combined to create a surge

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policies), and the two branches remained so far apart that the government had to be shut down for 28 days in 1995-96. While this episode is now remembered as an example of Clinton’s political mastery, it was actually a sign of structural failure. Imagine that the Al Qaeda attacks of September 11, 2001, instead happened on February 1, 1996, when refusal to compromise had led the executive to send most of its ‘nonessential’ employees’ home.

After an election like 1994 or 2006, it would be more reasonable to require either presidential resignation or a compromise between the branches, forming the equivalent of a government of national unity. This would be done by having a president present to the new Congress an entirely new cabinet, made up of members of both parties, which the Congress would approve or disapprove as a whole as a verdict on the administration’s change of direction. My proposal would trigger this requirement upon the loss by the president’s party of forty or more seats in the House. This number would have produced a national-unity requirement in 1946, 1974, and 1994—all, in retrospect, occasions where the Republic might have profited from cooperation among the branches. I use House seats as the trigger because every member of the House must be elected every two years; the happenstance of what Senatorial class is up for election in a given off-year could skew the results. It is also a recognition of the idea that the House is the “popular branch,” even today; even though Senators are also elected by popular vote, House members represent smaller constituencies and are thus closer to the people.

Note that even the resignation option would not violate separation of powers by giving Congress “control” of the executive branch—a resigning president would be succeeded by his running mate, not by an official designated by the other party. The new president would have the option of attempting to create his own political mandate—and the possibility that he or she would succeed would serve as a disincentive to a new Congress to simply refuse to approve any coalition government in hopes of forcing the incumbent to resign.

The mechanism of the government of national unity is one that we would do well to adopt as a practice even if it is not constitutionally mandated by a new Article II. The election of one official currently gives one person and one party a monopoly on the executive power for four years. The party that is excluded from power has no incentive to behave as a responsible opposition; it is actually more advantageous to operate by obstruction, denial, filibuster and (if necessary) meretricious impeachment. In his 2010 State of the Union Address, President Obama rather plaintively asserted that “if the Republican leadership is going to insist that 60 votes in the Senate are required to do any business at all in this town -- a supermajority -- then the responsibility to govern is now yours as well.” There is so far no indication that the Republicans have taken this invitation seriously, nor would an observer concerned solely with relatively political advantage suggest that they would be wrong to spurn it. A realistic prospect of a share of the power might serve to temper the terror of total exclusion from executive power that is currently a part of our system; politicians with a hope of partial power might be able to develop an appetite for less than scorched-earth opposition.

by Republicans, especially conservative Republicans”.


239 U.S. Const., Amend. XVII.

VIII.

An Elected Attorney General

As a final reform, we should reconsider the entire Hamiltonian concept of the “unitary executive.” When that idea was framed, no one had any idea that a president might end up as head of the largest employer in the nation. (In fact, when George Washington left Mt. Vernon to become the first president, the number of people working for him went down, not up.) The idea that a choice between two candidates constitutes a useful political check on the policy and behavior of the entire executive branch—including the Department of Justice, the National Oceanic and Atmospheric Administration, the Central Intelligence Agency, and the International Water and Boundary Commission—doesn’t pass the straight-face test. Of course, Congress can, if it chooses, exercise oversight over selected parts of the executive bureaucracy. But even when it musters the will to do so, the flawed notion of executive power that permeates our system enables defiant behaviors like those the Bush Administration used to block meaningful investigations of the Justice Department.

The solution the Framers used in other areas was simple—to protect against abuse of power, they divided it. Congress was divided into a House and Senate to ensure that the legislative process would not be so efficient as to absorb power properly belonging to the other branches. The danger now is an aggrandized executive branch, and the remedy is the same. We should divide the executive branch between at least two elected officials and possibly more.

This idea may seem like a radical novelty, but it is in fact the theory of the Framers applied to changed circumstances. To prevent tyranny, James Madison wrote in *Federalist 51*, “ambition must be made to counteract ambition.” Most Americans live under a divided executive in their state governments, which typically include independently elected governors, attorneys general, secretaries of state and often other more specialized offices such as land, railroad or insurance commissioners. We should seriously consider amending the Constitution to allow for an attorney general to be elected during the non-presidential election years.

The idea of an elected attorney general at first seems like effrontery. If the Framers had believed that the attorney general should be independent, surely they would have said so. But in fact, not even the idea of an attorney general was discussed at Philadelphia. The first attorney general, Edmund Randolph of Virginia, functioned in essence as a legal adviser to the president—the equivalent of today’s White House counsel. There wasn’t enough work to pay him full time, so he had to hang out a shingle to make ends meet. His high-level government

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242 *Wood*, supra note ___, at 56.
245 *See* id.
246 *Federalist* No. 51 (Madison).
work involved writing legal opinions with a quill pen. He didn’t have legions of eager lawyers at his command; he had no investigators at all, much less a 12,000-agent FBI. He couldn’t investigate anybody; he couldn’t wiretap anybody; he couldn’t prosecute anybody. He wasn’t in charge of the independent federal prosecutors in the states. He wasn’t even a member of the Cabinet until late in Washington’s second term.

The office has changed in ways that the Framers simply could not have imagined. In fact, “change” seems too tame—perhaps “metastasis” might be better. Today, the Attorney General commands a terrifying law-enforcement machine and calls the shots of an army of federal prosecutors nationwide. He supervises all federal litigation, all federal criminal prosecution, and the massive machinery of the FBI. He has at his disposal the weapon of the federal grand jury. Of all the members of the president’s cabinet, the attorney general has the broadest and most terrifying power over the lives of ordinary Americans.

Yet we retain the fiction that this potential Grand Inquisitor is somehow the equivalent of good natured young Edmund Randolph, hanging about New York to run errands for the president. The federal law-enforcement bureaucracy has now become so powerful that its control by an unscrupulous president constitutes a serious threat to civil liberty in the nation. And much of that power is by statute supposed to be exercised in a politically neutral way, not according to a president’s political agenda. Questions of criminal prosecution, for example, are supposed to be insulated from political influence. But clearly—as the U.S. attorney scandal and the ongoing investigation of vote-fraud and bribery investigations by the Bush administration show—there is a good deal of wishful thinking in that premise.

Reform proposals have tended to focus on requiring the president to name an attorney general for a fixed term, or tuning over the appointment power to an independent commission. Neither of these is satisfactory. An appointed attorney general who can’t be removed is accountable to no one; an unelected appointing authority makes the office the gift of an elite. The massive power of Justice should flow from the people; it requires popular election.

The most salient objection to an elective attorney general is that it will make the office political. My contention is that the office is already political, and is seen as such by many presidents. Far too often, presidents of both parties have staffed the office with cronies who can be counted on to use the Justice Department to pursue the president’s political agenda and to


250 See id. at 153-54; see also infra note 193.

251 See id.

252 See id.


254 Randolph was elevated to a cabinet position only as a result of being appointed Secretary of State. See Susan L. Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: in the Beginning There was Pragmatism, 1989 DUKE L.J. 561, 584 (1989).


256 Nearly a century ago, the Supreme Court described the fearsome prosecution machine as “a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety.” Blair v. United States, 250 U.S. 273, 282 (1919). Those who have experienced a federal grand jury pray nightly that they will not be called before one, appearing in secret, alone, without counsel (and often without the protection of the Fifth Amendment) to answer any questions a federal prosecutor may dream up.


shelter his administration from legal scrutiny. But it is common to claim that, because the office is a presidential appointment, it is somehow accountable to the people because they get the opportunity to elect the president.\footnote{See \textit{id.} ("The president is elected, and that means voters can hold him responsible for the actions of the attorney general.")} But that’s an indefensible claim, as noted above. Making the office elective will permit a more direct line of accountability than the diffuse one that runs through the White House. It may further be objected that an elected attorney general might attain office by using demagogic tactics, and might use the office as a launching pad for her own presidential campaign. The only realistic answer to this is, perhaps so. We already have a superfluity of demagogic rhetoric about matters of criminal justice from presidential candidates. And while it is true that an elected attorney general might become a rival to the president, dealing with potential rivals is already a part of a president’s job. Elected attorneys general are, as was said before, a common feature of state government—and often the system works quite well. It may not always do so, of course, but compared to what? I believe it might be better than the present system.

It also has a psychic advantage: as Professor Mansfield noted, the current unitary executive creates a tacit expectation that one person can be found who will be the kind of all-knowing parental leader the popular unconscious sometimes dreams of: “the unity of the office implies the possibility, though unlikely, of one man who would be the perfect executive.”\footnote{\textsc{MANSFIELD}, supra note \_\_\_, at 327.} Dividing the executive authority will send the contrary message: that there is no one person who can be trusted with that much power.

In summary, there’s no guarantee that an elected attorney general will not be as great a knave as Alberto Gonzales—but ambition will counteract ambition, as presidential employees elsewhere in the executive branch will have every reason to monitor and limit the Attorney General’s excesses, even while the subordinates of an independent attorney general will have the means and the motive to curb extralegal initiatives by a president.

The enthusiasm of the John Yoos and Alberto Gonzaleses for reviving torture and imprisonment without trial would have had trouble leaping the firebreak between White House and Justice Department. Careful constitutional design would give the president adequate authority to dictate national policy even over the objections of the attorney general. Critics will complain of friction between the two, but friction is a vital element of our system of government, and some built-in suspicion between those in charge of political direction and those in control of the massive federal law-enforcement apparatus is inevitable and better conducted in the open than in secrecy. A divided executive branch might have other deficiencies; but it would not lend itself to the kind of efficiency that secret policemen prize and ordinary citizens fear.
Conclusion: The Separation of Powers

“Some are born great,” Shakespeare wrote in a darkly comic context, “some achieve greatness, and some have greatness thrust upon ‘em.” These words could be tragically applied to the second President Bush. Seldom in American history has one man had greatness so insistently thrust upon him; nor has any figure I can think of—with the possible exception of Andrew Johnson—been so resolute in refusing this gift of fate and dashing headlong to his doom. Imagine that, after the 2000 election debacle, Bush had understood that his “victory” was not a sign of God’s favor but the product of a deeply divided nation, more of whose people had voted for his opponent than for him. He could have reached out to the opposition, formed something like a government of national unity, and attempted to govern from the center. Such a move—a fulfillment of his pledge to be “a uniter, not a divider”—would have drawn wide approval, both for its magnanimity and for its recognition that the people’s preferences were for a compromise on matters of social and economic policy. On Inauguration Day, his relationship to the public was still fluid. He might have forged a lasting base of popularity and consensus from which he could have moved a trusting and engaged nation in the direction of his political vision.

Bush let that moment slip away, choosing instead to claim a full palette of prerogative independent of either popular support or legislative consent. The first ten months of his first term were devoted to pursuit of a hard-right agenda—considerably at odds with the implied promise of unity he had made in his campaign—and an aggressive deployment of executive power to make up for his lack of a clear mandate from the people or from Congress.

And yet fate offered him a second chance. After September 11, 2001, a frightened but resolute nation turned to its President for leadership. Figures across the spectrum were prepared to follow and support a leader who would turn his face toward creating a coordinated effort, at home and abroad, to neutralize the threat of Al Qaeda and its allied groups. Imagine

261 William Shakespeare, Twelfth Night II.5:127-30. What today we mistake for sententious wisdom was actually in Twelfth Night a malicious joke, in which the courtiers of Lady Olivia tempted the odious Malvolio to authorize his own doom by aspiring above his station. Without naming names, I think we can agree that the United States has seen its share of Malvolios in the presidency. Perhaps greater precision in constitutional drafting would spare us the ascent of future ones, or make those who do ascend less willing to believe that greatness is their appointed lot.


267 John P. Burke, Becoming President 129-52 (Lynne Rienner Publ’s 2004).

268 Daniel J. Freeman, The Canons of War, Note, 117 YALE L.J. 280, 306 (2007) (“President Bush’s approval ratings underwent a historic spike following the terrorist attacks of September 11, 2001, rising from about fifty percent between August 28 and 30 to about eighty percent between September 14 and 16).

269 Over 85% of Americans supported President Bush’s initial military action in Afghanistan. Gallup, Attack on
that in the wake of the attacks, Bush had reached out to Democrats, forming (as would happen in many other democratic nations under similar crisis conditions) a bipartisan War Cabinet, consulting with Congressional leaders, and conveying to the people that he was governing with more attention to security and peace than to the 2002 elections. Such a government would have almost certainly pursued the challenge immediately before the nation—a war of necessity against Al Qaeda’s leadership and the rogue Afghan regime that harbored them—with all the resources available, and it is difficult to imagine that such a single-minded effort would have failed.

Imagine the political and social consequences of a swift, decisive victory over the authors of the attacks, complete with the capture or death of Bin Laden. America at the time commanded world support. Americans at home were and would have remained united and admiring (recall that in the weeks after September 11, poll results showed that, for the first time in more than a generation, the number of Americans who trusted their government was rising sharply). Yet again, a triumphant Bush would have been poised to push for his own agenda, within the confines of the legislative and democratic processes.

Alas, that was not to be either. Remember that Bush pursued the war of necessity with the minimum investment of time and resources—with the result that the Al Qaeda leadership slipped away and re-established itself in inaccessible areas of Pakistan. And having asked for and been given extraordinary new statutory powers under the heading of national security, the Administration secretly grasped for more and deliberately deceived both its allies and its opponents in Congress.

His focus was not so much on the task at hand as on his own view of himself, and the view of those around him of the proper role of the Presidency in the constitutional order. To attain its aims with Congressional authorization was seen as less desirable than to do so without such authorization. To keep the public in the dark—or even to deceive them—was seen as less desirable than to seek their informed assent, even if it would almost certainly be granted.

We know now that the Administration’s focus was in fact on a war of choice it intended to pursue in Iraq—one only tangentially related to the struggle Congress and the people had ratified. And though in retrospect the forced march toward an invasion of Iraq seems like an egregious instance of what Barbara Tuchman called “the march of folly,” still the decision to go to war against Iraq presented Bush with a third opportunity to broaden his base of support.

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270 Following the September 11th terrorist attacks, the “trust in government” index spiked from 26% in March 2001 to 64%. Virginia A. Chanley, Trust in Government in the Aftermath of 9/11: Determinants and Consequences, 23 POL. PSYCHOL. 469, 469-70 (2002).


272 See generally Stephanie C. Blum, What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform, 18 B.U. PUB. INT. L.J. 269 (2009) (discussing President Bush’s use of national security in order to gain new statutory powers under the Patriot Act and FISA).


274 BARBARA W. TUCHMAN, THE MARCH OF FOLLY: TROY TO VIETNAM (1984). In The March of Folly, Barbara Tuchman “reviews major instances of arrantly stupid behavior on the part of persons in power—the Trojans letting in the Wooden Horse despite the clash of arms within; the Renaissance Popes blindly failing to reform before the Reformation and to forestall the looming Luther; the English, red in face and coat, stubbornly alienating colonies.” Tony Weir, A Strike Against the Law?, 46 MD. L. REV. 133, 138 (1986).
Remember that he did seek formal authorization for the war.\textsuperscript{275} Imagine if he had used the authorization once again to broaden his Cabinet and his circle of advisers—might we not imagine, not only that the war would not have riven society as it did, but that it might have been better and more successfully fought if more eyes had seen the sketchy and inadequate plan for war and occupation?\textsuperscript{276} And had the war still gone badly, might not the nation have remained more unified if its Democratic supporters had been brought inside the tent to voice their criticism, rather than being dismissed as traitors when they even questioned the Administration’s strategy?

And even after all these defeats snatched from the jaws of victory, Bush might have at least softened, if not redeemed, his legacy after the 2006 election, when his Iraq war policy had been unambiguously repudiated by the nation.\textsuperscript{277} (Few off-year elections since 1866 have centered so clearly on one issue.) What if he had told the nation that he had heard its verdict and that he would now plan and consult for a genuine change—once again, inviting Democrats inside the process and broadening his government to include not only (for the first time) moderate Republicans but actual Democrats as well? What if he had not insisted on escalating rather than abating American involvement in this rejected war?

Analysts are debating whether the “surge” policy that Bush adopted after 2006 will in fact produce a better outcome than an orderly preparation for withdrawal might have done.\textsuperscript{278} At the moment, many discern in the current Iraqi situation an improvement that seemed impossible just a few years ago, and attribute this increased stability to the “surge” and its implied renewal of American commitment to the war. But it is as hard to judge the long-term prospect in Iraq now that things are going well as it was during the dark days of 2005 and 2006.\textsuperscript{279} We cannot know whether, a decade hence, history will praise Bush for his vision in creating the surge, or pillory him for postponing inevitable failure until he could be sure it would happen on another President’s watch.

What we can be sure of today is that Bush took this final decision in the teeth of popular opposition, and that he ostentatiously excluded public support from his calculations of what was needed to complete the mission in Iraq. Few can doubt that his vice president spoke for Bush when, in 2008, he responded to news that two-thirds of the people viewed the war as not worth the sacrifice:

“So?”\textsuperscript{280}

These words might in fact serve as the epitaph for the promise of the Bush Presidency, a promise that, as suggested above, was at several points real enough to be worth mourning. And when historians assign blame for Bush’s failure, I imagine that the greatest share will fall on the President’s own flaws of character and training. Bush was the insistent and ingenious author of his own destruction, and though it is hard to see such a small figure as tragic, his story certainly


\textsuperscript{276} On the poorly staffed and conducted “planning” for the postwar period, see generally Thomas Ricks, \textit{Fiasco}.


\textsuperscript{279} Id.

illustrates the classical dramatic proposition that character is fate.\textsuperscript{281} The central mistake Bush made, then, was to regard public support, legislative oversight and democratic accountability as worthy of but one derisive syllable.

But that mistake was one that features of our system taught him to make. It is necessary to feel empathy for Bush. He was relatively inexperienced, placed in office despite losing the popular vote, and required govern against legislative opposition. These problems would daunt any man. Further, he surrounded by voices telling him that to accommodate or include the opposition in decisions would be a mark of personal weakness and constitutional malfeasance. And whenever his personal wishes received even a momentary or incidental check from the constitutional system, there were voices at his side prepared with elaborate legal arguments to convince him that no one should be allowed to stand in his way, or even to question him after the fact.\textsuperscript{282}

Our Constitution and its tradition have a teaching function, and the vagueness of Article II and the relentless power hunger of many who have made use of it offered a dangerous lesson for a leader who took office with little background and sophistication. Of all political lessons, “you should have more power” is the easiest for a leader to understand, and the hardest for him to critique.

Hence my idea that we should re-examine what it is that Article II, and the practice and commentary that have grown up around it, are teaching aspiring presidents and those who would serve them. We will not rewrite the Constitution to prevent another Bush-style disaster; but we can look at our interpretations of the current document and ask ourselves whether they are justified and whether they are the best interpretations we can find. A different set of glosses on Article II should be available—ideas that suggest that a regard for popular support is not weakness but strength; that legislative consultation is not abdication but democratic leadership; that accountability is not fatal to authority, but intrinsic to its preservation. Imagine a nation governed by something like my proposed Article II (or your own) and let us see whether that vision is not a better reading of the one we have than that offered by the advocates of presidentialism and authoritarian government.

In summary: Presidents should be directly elected by the voters, with no intermediate body to distort their verdict. Once the vote is counted, the president-elect should take office within a week—a week during which the outgoing president would be prohibited from employing the pardon power. During a president’s term, as noted above, repudiation by the voters would require the president either to create a government of national unity or to resign.

Next, Article II should be rewritten to include a specific and limited set of presidential powers. This is no more threatening to “energy in the executive” than is the enumeration of Congressional powers—any textually granted power should be interpreted through something like the “necessary and proper”\textsuperscript{283} clause of Article I which allows Congress to assert incidental power needed to carry into effect its textual prerogatives. But, as Chief Justice Marshall famously wrote in \textit{Gibbons v. Ogden}, “enumeration presupposes something not enumerated.”\textsuperscript{284} The “unitary executive” theorists should no longer be allowed the spin a quasi-dictatorship out of the bare phrase “the executive power.”\textsuperscript{285}

\textsuperscript{281} See HERACLITUS, FRAGMENTS 97 (Brooks Haxton tr. 2003).
\textsuperscript{282} See supra notes 124, 137, and 145.
\textsuperscript{283} U.S. CONST. art. I, § 8, cl. 18.
\textsuperscript{284} See supra note 45.
\textsuperscript{285} U.S. CONST. art. II, § 1, cl. 1.
The extent of the Commander-in-Chief power, for example, should be spelled out to make clear that it does not crowd out Congress’s power to start—and stop—armed conflict. The duty to enforce laws of Congress needs to be clarified—it is not a power to decide what the law is and then enforce that regardless of statute, it is a duty to follow the rules laid down by the Constitution and the statutes. Other specific powers of the president could be the subject of a healthy debate. I propose a line item veto, modeled on the one rejected by the Supreme Court in _Clinton v. City of New York_. In addition, I propose to give for the first time a textual basis for executive privilege that parallels that set out in cases like _United States v. Nixon_. It has been ironic to watch the Bush administration asserting a plenary sweep for the non-textual privilege of the president, while showing open contempt for the textually guaranteed privilege of Congress. I also provide absolute immunity from suits against the President for her official actions, codifying the result in _Nixon v. Fitzgerald_. And I provide an automatic stay of all civil litigation against a sitting President for actions taken before her entry into office, thereby mercifully reversing the Supreme Court’s grotesque error in _Clinton v. Jones_. In some cases, the effect will be to expand textual power by codifying practices that have evolved over the years in the face of textual silence or ambiguity. The practical effect, however, will be to constrain the elasticity of the assertions of “inherent” or “applied” power.

The aim of the current exercise is not the geld the executive branch or make it the creature of any other branch. But the underlying principle should be that a democratic leader has sufficient but not unlimited powers. And finally, the Attorney General should be elected to counterbalance the imbalance that lodges policymaking and enforcement power in one office.

The changes I have proposed would not erode the separation of powers—they refer in each instance back to the people, who are the appropriate source of all power, and they do not make the executive the creature of any other branch. They would still leave plenty of room for “energy in the executive,” but they would afford far less opportunity for high-handedness, secrecy and simple rigidity to supplant democratic self-governance. It’s not surprising that the Framers did not understand the dangers of the office they designed. But there is no excuse for our not noticing today that something in our government is badly out of balance.

There is a difference between executive energy and autocratic license; between leadership and autocracy; between the democratic firmness of a Lincoln and the sextant-smashing obsessiveness of a Bush. If we do not learn to distinguish between them soon, we may find ourselves in a shipwreck from which we as a nation under law cannot recover.


287 418 U.S. 683, 713 (1974) (holding that the President may not claim executive privilege as to “demonstrably relevant” evidence in criminal trials).

288 For the first time in American history, the Bush administration sent executive law-enforcement agents into the Congressional office of a member of the House. United States v. Rayburn House Office Building, Room No. 2113, Washington, D.C. 20515, 497 F.3d 654 (CTA D.C. 20007).


291 _THE FEDERALIST NO. 70_ (Alexander Hamilton).
Appendix

Article II (new)

§1. Office of the president. The power to execute this constitution, laws made pursuant to it, and treaties made or which shall be made under the authority of the United States, shall be vested in one president of the United States, except as provided in section __ herein, pertaining to the election of the attorney general.

§2. Election and Succession

The president and vice-president of the United States shall be chosen by the people at large. Each candidate for president and vice-president shall run as a slate, such slate to be qualified for the national ballot under reasonable regulations as specified by Congress. The presidential election shall be conducted over a period, uniform across the country, to be specified by Congress adequate to permit every citizen desiring to do so to participate. In each case, the winning slate shall be the slate receiving the highest number of votes nationwide, provided only that Congress may by law provide for a second election among the two candidates receiving the largest number of votes when no candidate shall receive more than __ percent of the votes cast at the first election.

The president shall take office one week following the final election specified by Congress pursuant to section 2 above. She shall take the following oath or affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." The vice president shall take the same oath, excepting the designation of the office assumed.

No person shall serve as president or vice-president, nor be a candidate for either office, who shall not have attained the age of 35 years at the time of her election and who shall not have been a citizen of the United States for fourteen years previous to her election.

In case of the death or removal of the president, the vice president shall become president and shall take the oath specified again. The vice-president shall during her service as vice-president serve as president of the Senate.

The president and vice president shall each, at stated times, receive for their services, a compensation which shall neither be increased nor diminished during the period for which they shall have been elected, and shall not receive within that period any other emolument from the United States, or any of them.

§3. Powers of the President

The President shall be Commander in Chief of the armed forces of the United States, and of the militia of the several states, when called into the actual service of the United States; provided only that she shall not initiate the use of military force without prior authorization by

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292 At present, because the oath is not specified in the Constitution for the vice-president, that official does not take the analogue of the presidential oath but rather the oath prescribed for members of the Congress. Though this oath is not prescribed by statute for the vice-president, the practice might lend spurious plausibility to the claims of a future vice president to be immune to restrictions enacted on the executive branch.

293 This provision marks a decisive change from the original Article II in that it affords immigrants the right to be eligible for the presidency. Cf. U.S. Const. art. II, § 1, cl. 5 ("No person except a natural born citizen... shall be eligible to the office of President").
the Congress pursuant to Article I, § 8, except in case of a sudden attack upon the United States or any of them or the territory of the United States, or of an emergency of similar exigency.

When the president shall order the use of military force by the armed forces or militia or both in response to a sudden attack or emergency, the president shall convene a special session of Congress within one week of such order, unless military necessity shall make such a session impossible, in which case the session shall be called as soon as either the president, or the speaker of the House of Representatives and the president pro tempore of the Senate jointly, shall judge such session to be possible.

The president shall be chief of the cabinet, whose members shall be specified by law, and shall have the power to convene a meeting of the cabinet or of any of its members and require in writing the opinion of its officers or any of them upon any subject relating to the duties of their respective offices.

The president shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur. After consultation with the leaders of the majority and minority in the Senate, she shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and lower federal courts, and the heads of the executive departments. All other inferior executive officials shall be appointed by the president; but the Congress may by law vest the appointment of such inferior officers as they think proper in the courts of law or the heads of the executive departments.

The president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session, provided only that no person shall receive two such appointments to the same office during successive recesses.

The president may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, she may adjourn them to such time as she shall think proper.

The president shall conduct the foreign relations of the United States in conformity with this Constitution, laws enacted pursuant to it and with treaties made or which shall be made under the authority of the United States, provided that she shall consult with the leaders of the minority and majority in Congress except in situations that shall require secrecy, in which case the Congress shall be notified as soon as practicable thereafter.

The president shall have the power to rescind all or part of any dollar amount of any discretionary budget authority specified in an appropriation Act or conference report or joint explanatory statement accompanying a conference report on the Act. She shall notify the Congress of such rescission or veto by a special message not later than ten calendar days (not including Sundays) after the date of enactment of an appropriation act providing such budget authority or a revenue or reconciliation act containing a targeted tax benefit, and such rescission

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294 Is it wishful thinking to believe that a requirement of conference before nominations are made might head off some of most squamose confirmation battles? If Senators are offered the opportunity to object to nominees or caution the President about potential difficulties, surely we should not assume that no president will be wise enough to heed their warnings, and that no Senate leadership venial enough to invent meretricious opposition to nominees once their preliminary consent has been given.

295 This clause is designed to alleviate the logjam over confirmation that has become a dreary staple of Washington life over the past generation. If we expect a President to take office within a week, we should afford him the opportunity to staff an administration with dispatch. Cabinet officials would and should still require Senatorial confirmation.
shall take effect until and unless it is re-enacted in a separate bill by both Houses of Congress, in which case it shall become law without the president’s signature.\(^{296}\) All monies otherwise appropriated shall be spent as directed by law.\(^{297}\)

The president shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment or as noted above in Amendment XIV; no such pardon shall be granted during period between the presidential election, or in the case of two such elections as hereinbefore provided, the first presidential election, and the inauguration of a new president.

§ 4. Duties

The president shall give from time to time to the Congress information of the state of the union, and recommend to their consideration such measures as she shall judge necessary and expedient; no less than seven days after such a message, the president shall appear before the two Houses of Congress for a time sufficient to answer questions from the members.

The president shall faithfully observe, obey and execute this Constitution, laws made pursuant to it, and treaties made or which shall be made under the authority of the United States; when she shall determine that the national interest requires her to act in the absence of clear authority set out in the sources of law above, she shall at the next session of Congress submit a written message outlining her reasons for taking such action and the authority therefor; and if Congress shall not by vote of both Houses approve her action, she shall immediately cease;

The president shall commission all the officers of the United States.

§5.  Immunity and removal

The president shall be immune from civil suit for official actions founded upon official actions taken during her term of office,\(^{298}\) and all civil suits pending against her upon assumption of her office for actions taken before the commencement of her term of office,\(^{299}\) or which shall be commenced against her during her term of office for such actions, shall be stayed for the duration of her service.\(^{300}\)

Neither the president nor vice-president nor any of her Cabinet members or principal advisers as designated by law shall be questioned in any other place about advice they have directly furnished the president, provided that all official papers prepared pursuant to the president’s authority to require advice from members of the cabinet and legal advice from the attorney general shall be made available to Congress subject to conditions as may be specified by law to ensure the protection of confidential information, and further provided that such questioning may take place in the context of a criminal proceeding against any person where a

\(^{296}\) This clause overturns *Clinton v. City of New York*, which held that the Line Item Veto Act was unconstitutional. See *supra* note 184. Supporters of the line item veto argue that the veto power will curb wasteful spending by enabling the President to eliminate unnecessary earmarks from legislation. Steven G. Calabresi & Nicholas Terrel, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1710-11 (2009). Indeed, as a testament to its effectiveness, the line item veto power has been extended to the Governors of forty-four states. *Id.* at 1710, 1736.

\(^{297}\) In response to President Nixon’s flagrant use of impoundment to advance his policy goals, Congress attempted to curb the use of impoundment through the Impoundment Control Act of 1974, which required the President to seek legislative authorization prior to impounding appropriations. Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLIAMETTE L. REV. 395, 403-04 (2009). This provision effectively codifies the Act.

\(^{298}\) This clause codifies the holding of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

\(^{299}\) This clause is intended to reverse the result of *Jones v. Clinton*, 520 U.S. 681 (1997), which held that the President is not afforded immunity from civil litigation for actions that occurred before the President took office.

\(^{300}\) *Id.*
judge shall determine that such questioning is necessary, in which case such questioning shall take place under rules set by the court to preserve insofar as practicable the confidentiality of the information provided in response.

The president, vice president and all civil officers of the United States, including the attorney general, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

When an election for members of Congress held during the president’s term shall produce a loss of 40 or more seats in the House of Representatives, the president shall at her sole election have the choice of (1) resignation to be succeeded by the vice-president; or (2) designation of a government of national unity by requiring resignation of all members of the cabinet and assembling within one week a new cabinet made up of equal numbers of members of both parties. If she shall elect to designate a government of national unity, the new cabinet shall be confirmed by the House, not the Senate, as a slate, rather than individually, and if the House shall reject the slate submitted by the president, the president shall then resign and be succeeded in office by the vice-president.

§ 6. Office of the Attorney General

The United States shall have one attorney general, who shall be elected for a term of four years during those years in which members of Congress shall be elected but no presidential election shall be conducted. The election shall be conducted under the rules and procedures specified in § 1 of this Article.

The attorney general shall be the principal law officer of the United States and shall give legal advice to the United States government and to the president, the executive departments and all agencies of the government. The attorney general shall represent the United States in all legal proceedings and shall conduct the investigative and law-enforcement functions of the Department of Justice, as Congress shall by law direct.

The attorney general shall provide legal advice, conduct legal proceedings, and direct enforcement activities in faithful conformity with this Constitution, laws made pursuant to it and treaties made or which shall be made under the authority of the United States.

The attorney general shall give the president legal advice, in writing, at the president’s request and at other appropriate times and shall inform the president of the actions taken by the Justice Department, and shall attend sessions of the Cabinet as specified above when the full cabinet meets or at other meetings requested by the president; however, the president may not require the resignation of the attorney general upon designation of a government of national unity or at any other time.

The attorney general shall from time to time give to the Congress information of the state of the legal and law-enforcement policy and actions of the United States, and shall furnish to Congress information requested concerning the same, excepting only such information as may compromise ongoing legal investigations or reveal information properly classified, in which case such information shall be provided promptly when circumstances allow.