
ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS

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INTRODUCTION

When I teach presidential power, the first thing I ask my students is to imagine a different President in office. If they support the current President and believe those who oppose him are doing so for partisan or otherwise illegitimate reasons, they should visualize a President whom they completely distrust. Conversely, if they dislike the current President, they should conceive of the President in power as someone they support and that those opposing him are acting illegitimately. This exercise is helpful, I believe, for focusing attention on the underlying constitutional issues rather than upon the wisdom, or lack thereof, of a particular President's policies.

Nevertheless, the exercise may be harder than it seems. Views as to whether or not an exercise of presidential power is legitimate tend to be based less upon legal abstractions than upon perceptions of the particular President in power. Someone supporting a particular President, for example, is likely to believe that Congress should not have the power to interfere with the President's

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unilateral decision to send troops into armed conflict or that Congress should not have the authority to demand the President turn over documents to an oversight committee. Conversely, someone who believes a President's agenda is improperly motivated or ill-advised is more likely to support constitutional principles that provide significant checks and balances upon the President's exercise of power.

In this way, views on presidential power tend to be more variable than views on other constitutional issues because they intuitively relate to who is in power in a way that views on other controversial constitutional issues – such as abortion, free speech, or freedom of religion – do not.¹ There was, for example, a remarkable sea change in Washington, D.C., on January 20, 2001, as to who supported, and who opposed, a broad constitutional definition of presidential power.² And if party control of the Presidency changes in the next election, I suspect we will witness a similar sea change on January 20, 2009.

For this reason, the subject of this Symposium on presidential power is well timed. Because the question of who will hold the Presidency after the next election is so much in doubt, this is the perfect opportunity to examine the nature of presidential power as an abstract matter, rather than as a criticism or as an apologia of a specific President's actions. This is what I intend to do in the following Essay.

Specifically, I contend that the power of the Presidency has been expanding since the Founding, and that we need to consider the implications of this expansion within the constitutional structure of separation of powers, no matter which party controls the White House. Part I of this Essay makes the descriptive case by briefly canvassing a series of factors that have had, and continue to have, the effect of expanding presidential power. Part II suggests this expansion in presidential power has created a constitutional imbalance between the executive and legislative branches, calling into doubt the continued efficacy of the structure of separation of powers set forth by the Framers. Part III then offers some suggestions as to how this power imbalance can be alleviated, but it does not present a silver bullet solution. Because many, if not all, the factors that have led to increased presidential power are the products of inevitable social and technological change, they are not easily

¹ Constitutional views concerning federalism, as well, have not been immune from political considerations. See Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 801 (2006). Indeed, although liberals, for example, have long resisted constitutional theories that protect states' rights, their views on this issue have begun to change as states have begun to be more progressive than the federal government on many issues. *Id.* at 811; see also Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 *B.U. L. REV.* 175, 224 (2008) (commenting that "federalism can be ideologically indeterminate," and "friend or foe to progressive movements").

² See, e.g., Dana Milbank, *In War, It's Power to the President*, *WASH. POST*, Nov. 20, 2001, at A01.

remedied.³ Thus, the Essay ends with only the modest conclusion that regardless of who wins the Presidency, it is critical that those on both sides of the aisle work to assure that the growth in presidential power is at least checked, if not reversed.

I. THE EXPANSION IN PRESIDENTIAL POWER

A. Background

The notion that presidential power has expanded exponentially since the time of the framing is, of course, uncontested.⁴ The extent of that growth, however, is not always fully appreciated. At the time of the framing, for example, Madison, among others, believed the legislature was the most powerful branch,⁵ and for that reason he supported the creation of a bicameral legislature.⁶ Congress needed to be divided into two branches so that it would not overwhelm the other branches.⁷ Correspondingly, the executive needed to be unitary so that it would not be weakened in its battles with the legislature.⁸

Two hundred years later, any suggestion that Congress is twice as powerful as the executive would be deemed ludicrous.⁹ Particularly in the areas of national security and foreign affairs,¹⁰ the Presidency has become the far more

³ See *infra* text accompanying note 19.

⁴ Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1816-17 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (“Now, it is the President [instead of Congress] whose power has expanded and who therefore needs to be checked.”).

⁵ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 322-23; Greene, *supra* note 4, at 141-48.

⁹ See Flaherty, *supra* note 4, at 1727.

¹⁰ E.g., Flaherty, *supra* note 4, at 1818 (1996); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2350 (2006). To be sure, the position that the Presidency has become too powerful in the areas of national security and foreign affairs is not unanimous. Elsewhere in this Symposium, for example, John Yoo argues that there have been few great Presidents in recent history, with the implicit suggestion that this might be true because presidential power is unduly constrained, even in the areas of foreign policy and national security. John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421 (2008). But if the ability of an individual to achieve greatness in office is a function of the power of that office, then consider the record of Congress. How many Congressional leaders in the last fifty years have been able to demand and command national attention for their agendas and have been able to successfully effectuate their goals? It’s a short list, arguably including only Lyndon Johnson and Newt Gingrich. Perhaps even more probative in demonstrating Congress’s relative weakness is that even during times of severely wounded Presidencies, such as those of Nixon in 1974, Carter in 1980, or Bush in 2007, effective national leadership did not emerge from the Congress. The bottom line is that the weakest president at his worst hour is far more powerful than any Senator or member of the House.

powerful branch.¹¹ In 2006, for example, a new Congress was elected based in large part on the desire of the American people to get out of an unpopular war.¹² Yet, the President was able to use his authority to continually out maneuver the newly-elected Congress and pursue a war that even many of those in his own party opposed.¹³

It would be a mistake, however, to assume that the expansion of presidential power vis-à-vis the other branches is only a recent development.¹⁴ Justice Jackson recognized this trend over fifty years ago when he wrote in *Youngstown Sheet & Tube Co. v. Sawyer*:¹⁵

[I]t is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence

¹¹ See *supra* note 10. Whether the executive has achieved a similar dominance over Congress in the domestic arena is less clear and has spawned a serious and spirited academic debate. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 550 (1994); Flaherty, *supra* note 4, at 1816-17; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5 (1994); Jonathan Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2418 (2006).

¹² Adam Nagourney & Megan Thee, *With Iraq Driving Elections, Voters Want New Approach*, N.Y. TIMES, Nov. 2, 2006, at A1.

¹³ See Harold J. Krent, *From a Unitary to a Unilateral Executive*, 88 B.U. L. REV. 523, 523 (2008).

¹⁴ See generally ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1st ed. 1973) (focusing on the purported executive branch abuses of the Nixon Administration). But see RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS*, at ix (1990) (arguing that the Presidency is relatively weak). Interestingly, Neustadt does not argue that the Presidency is weak in an absolute sense. Rather, his definition of weakness, as he makes clear in the preface to the 1990 edition of his book, relates to the gap between "what is expected of a man (or someday a woman) and assured capacity to carry through." *Id.*

¹⁵ 343 U.S. 579 (1952).

upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.¹⁶

Notably, the reasons Justice Jackson offered as to why power has concentrated in the executive go far beyond the ambitions and personalities of those who have held the office.¹⁷ Rather, they are the inevitable results of technological, social, and legal changes encompassing a variety of factors.¹⁸ These factors include: 1) the constitutional indeterminacy of presidential power, 2) the precedential effects of executive branch action, 3) the role of executive-branch lawyering 4) the expansion of the federal executive branch, 5) presidential control of the administrative state, 6) presidential access to and control of information, 7) the inter-relationship between the media and the Presidency, 8) the role of the Presidency in popular culture, 9) military and intelligence capabilities, 10) the need for the government to act quickly, and 11) the rise of a strong two-party system in which party loyalty trumps institutional prerogative. I shall discuss each of these factors in turn.

B. *Reasons Why Presidential Power Continues to Expand*

1. The Constitutional Indeterminacy of the Presidency

The first and perhaps overarching reason underlying the growth of presidential power is that the constitutional text on the subject is notoriously unspecific, allowing as one writer maintains, for the office “to grow with the developing nation.”¹⁹ Unlike Article I, which sets forth the specific powers granted to Congress,²⁰ the key provisions of Article II that grant authority to the President are written in indeterminate terms such as “executive power,”²¹ or the duty “to take care that the laws be faithfully executed.”²² Moreover, unlike the other branches, the Presidency has consistently been deemed to possess significant inherent powers.²³ Thus, many of the President’s

¹⁶ *Id.* at 653-54 (Jackson, J., concurring).

¹⁷ *See id.* This is not to say that personality has not played a part. The efforts of Presidents Reagan and Clinton, for example, to give the President greater control over federal agency action have had substantial effects in consolidating presidential authority over the administrative state. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

¹⁸ *Cf. Youngstown*, 343 U.S. at 653-54 (Jackson, J., concurring).

¹⁹ BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES* 8 (1990).

²⁰ U.S. CONST. art. I, § 8.

²¹ *Id.* art. II, § 1.

²² *Id.* art. II, § 3.

²³ *See, e.g.,* Calabresi & Prakash, *supra* note 11, at 550; Greene, *supra* note 10, at 123. *But see* *Chambers v. NASCO*, 501 U.S. 32, 44 (1991) (holding courts have the inherent power to sanction litigants); *McGrain v. Daugherty*, 273 U.S. 135, 174-176 (1927)

recognized powers, such as the authority to act in times of national emergency²⁴ or the right to keep advice from subordinates confidential,²⁵ are nowhere mentioned in the Constitution itself.

In addition, case law on presidential power is underdeveloped. Unlike the many precedents addressing Congressional²⁶ or federal judicial²⁷ power, there are remarkably few Supreme Court cases analyzing presidential power. And the leading case on the subject, *Youngstown Sheet & Tube Co. v. Sawyer*,²⁸ is known less for its majority opinion than for its concurrence by Justice Jackson, an opinion primarily celebrated for its rather less-than-definitive announcement that much of presidential power exists in a “zone of twilight.”²⁹

Accordingly, the question whether a President has exceeded her authority is seldom immediately obvious because the powers of the office are so open-ended.³⁰ This fluidity in definition, in turn, allows presidential power to readily expand when factors such as national crisis, military action, or other matters of expedience call for its exercise.³¹ Additionally, such fluidity allows political expectations to affect public perceptions of the presidential office in a manner that can lead to expanded notions of the office’s power.³² This perception of expanded powers, in turn, can then lead to the perceived legitimacy of the President actually exercising those powers. Without direct prohibitions to the contrary, expectations easily translate into political reality.³³

2. The Precedential Effects of Executive Branch Action

Presidential power also inevitably expands because of the way executive branch precedent is used to support later exercises of power.³⁴ Many of the

(indicating that the Congress enjoys a non-textually explicit power to investigate executive branch malfeasance).

²⁴ See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993). *But see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

²⁵ *United States v. Nixon*, 418 U.S. 683, 713 (1974).

²⁶ See, e.g., *United States v. Lopez*, 514 U.S. 549, 551-58 (1995); *Wickard v. Filburn*, 317 U.S. 111, 118 (1942).

²⁷ See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Baker v. Carr*, 369 U.S. 186, 237 (1962).

²⁸ 343 U.S. 579 (1952).

²⁹ *Id.* at 637 (Jackson, J., concurring).

³⁰ See HINCKLEY, *supra* note 19, at 8; Flaherty, *supra* note 10, at 1816.

³¹ See Flaherty, *supra* note 4, at 1816.

³² See HINCKLEY, *supra* note 19, at 9-11.

³³ See *id.* at 8. Richard Neustadt, of course, recognized the negative aspects that the expectations game placed on presidential power. See NEUSTADT, *supra* note 14, at ix. In his view, the fact that a President could often not perform all that was expected of him tended to weaken rather than empower the Presidency.

³⁴ See, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1561 (1997); Flaherty, *supra* note 10, at 1819.

defenders of broad presidential power cite historical examples, such as President Lincoln's suspension of habeas corpus, as authority for the position that Presidents have considerable powers in times of war and national emergency.³⁵ Their position is straight-forward. The use of such powers by previous Presidents stands as authority for a current or future President to engage in similar actions.³⁶ Such arguments have considerable force, but they also create a one-way ratchet in favor of expanding the power of the presidency. The fact is that every President but Lincoln did *not* suspend habeas corpus. But it is a President's action in using power, rather than forsaking its use, that has the precedential significance.³⁷ In this manner, every extraordinary use of power by one President expands the availability of executive branch power for use by future Presidents.

3. The Role of Executive Branch Lawyering

The expansion of presidential power is also a product of executive branch lawyering. Because of justiciability limitations, many of the questions surrounding the scope of presidential power, such as war powers,³⁸ never reach the courts.³⁹ In these circumstances, the Department of Justice (DOJ) and its Office of Legal Counsel (OLC), the division that is charged with advising the President as to the scope of his or her powers, are the final legal authorities opining on these issues.⁴⁰

This means, in effect, that the executive branch is the final judge of its own authority. Not surprisingly, this dynamic leads to broad interpretations of

³⁵ See Calabresi & Yoo, *supra* note 34, at 1561; Yoo, *supra* note 10, at 441.

³⁶ *Id.*

³⁷ A notable exception to this is President Washington's decision not to seek a third term. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 575-76 (1999) ("Washington's refusal to run for a third term – despite popular and political enthusiasm for his continued service – helped steer the nation clear of monarchy and established a de facto two-term limit on presidential service."). Until Franklin Roosevelt sought a third term in 1940, Washington's forbearance stood as setting an unwritten constitutional norm that Presidents should seek no more than two terms. See *id.* at 578-79. The two-term limit, of course, eventually became a hard rule of law. U.S. CONST. amend. XXII. In response to Roosevelt, a constitutional amendment imposing the two-term limit was enacted in 1951. *Id.*

³⁸ See, e.g., *Doe v. Bush*, 322 F. 3d 133 (2003); *Ange v. Bush*, 754 F. Supp. 509 (1990).

³⁹ H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL*, at xvii (1999).

⁴⁰ *Id.*; see also Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682 (2005) (characterizing the OLC, along with the Office of the Solicitor General, as the "principal constitutional interpreters for the executive branch").

executive power for a variety of reasons.⁴¹ To begin with, the President, simply by his power of appointment, can assure that his Attorney General views the primary duty of the office is to empower the administration and not to some abstract, dispassionate view of the law.⁴² President Kennedy selected his brother to be Attorney General, President Nixon his campaign manager. Neither appointment, I suspect, was based on the desire to have a recalcitrant DOJ. Moreover, even when the President chooses a person renowned for her independence, the pressures to bend to the President's will are considerable. Not only does the Attorney General act under the threat of removal, but she is likely to feel beholden to the President and bound, at least in part, by personal loyalty.⁴³

Some might argue that even if the Attorney General may be overly susceptible to the influence of the President who appointed her, the same should not be true of the career legal staff of the DOJ, many of whom see their role as upholding the Constitution rather than implementing any President's specific agenda. But the ability of the line lawyers at DOJ to effectively check executive branch power may be more illusory than real. First, the lawyers in the DOJ are likely to have some disposition in favor of the government if only because their clients are the President and the executive branch.⁴⁴ Second, those DOJ lawyers who are hired for their ideological and political support of the President will likely have little inclination to oppose the President's position in any case. Third, as a recent instance at DOJ demonstrates, the President's political appointees can always remove or redeploy staff attorneys

⁴¹ Concededly, this is not always the case. As Nina Pillard notes, there are two competing models of executive branch lawyering: the "arms-length" and the "client" models. Significantly, the arms-length (or idealistic vision) posits that the lawyers act, not as "advocates for executive power" but as "proponents of the best view of the law." Pillard, *supra* note 40, at 685. As such, lawyers working under this approach can be expected to provide checks, rather than support, against executive branch expansion. The client model, in contrast, provides that the government lawyers use their legal skills to further the interests of their client, the President. Under this model, government lawyers, rather than being a check on presidential power, are agents of it, subject only to internal conscience or ethical constraints. The problem, however, is that because the President controls the DOJ, he can effectively choose the client model of executive branch lawyering if he is at all inclined to aggressively assert presidential prerogative.

⁴² See *infra* note 47 and accompanying text.

⁴³ The ability (and motivation) of the Attorney General to challenge a President is also likely to be particularly diminished in times of crisis. The most famous documented example of this involves Attorney General Francis Biddle and the evacuation of Japanese Americans during World War II. Although Biddle had considerable doubts as to the constitutionality of the evacuation order, he ended up dropping his opposition in the face of military objections and a President who had, nonetheless, decided to go through with the action. GREG ROBINSON, *BY ORDER OF THE PRESIDENT* 107 (2001).

⁴⁴ See Pillard, *supra* note 40.

if they find them too independent.⁴⁵ Fourth, even if some staff lawyers have initial resistance to the President's position, the internal pressures created by so-called "group-think" may eventually take over.⁴⁶ The ability of a staff attorney to withstand the pressures of her peers in adhering to legal principle in the face of arguments based on public safety or national security can often be tenuous, particularly when the result of nay-saying may lead the lawyer to exile in a less attractive assignment.

To be sure, the DOJ has, at times, viewed itself as a truly independent voice. Attorney General Edward Bates, appointed by Lincoln reportedly stated that it was his duty "to uphold the Law and to resist all encroachments, from whatever quarter of mere will and power."⁴⁷ Robert H. Jackson, in contrast, looking back from the perch of a Supreme Court Justice, saw his role as the Attorney General during the Roosevelt Administration otherwise, describing in one case the opinion he offered as Attorney General as "partisan advocacy."⁴⁸ But whatever the views of those individuals holding the position of Attorney General, those views are, at best, only of secondary importance. Far more important are the views of the Presidents who appoint the Attorneys General, and in this respect the positions of the occupants of the White House have been

⁴⁵ See, e.g., Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, WASH. POST, Dec. 10, 2005, at A03 (documenting how career DOJ attorneys were marginalized by political appointees in certain voting rights cases).

⁴⁶ The term "groupthink" was coined originally by Yale social psychologist Irving Janis as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action." See generally IRVING JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1982). Janis developed this theory by examining how "small, high-level groups of government officials used faulty decision making procedures that resulted in fiascoes in U.S. policy," Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1257 (2003), such as Roosevelt's complacency before Pearl Harbor, Truman's invasion of North Korea, Kennedy's Bay of Pigs, Johnson's escalation of the Vietnam War, and Nixon's Watergate break-in. According to Janis,

under the influence of groupthink, groups believe that their goals are based on ethical principles and they stop questioning the morality of their behavior. This tendency may foster overoptimism, lack of vigilance, and sloganistic thinking about out-groups. At the same time, groupthink causes members to ignore negative information by viewing messengers of bad news as people who "don't get it."

JANIS, *supra*. Thus, Janis explains, group members engage in self-censorship to repress dissent. IRVING JANIS, *VICTIMS OF GROUPTHINK* (1972).

⁴⁷ LUTHER A. HUSTON, ARTHUR S. MILLER, SAMUEL KRISLOV, & ROBERT D. DIXON, JR., *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 51 (1968).

⁴⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 648 n.17 (1952) (Jackson, J., concurring); see also LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 277 (1987) (ascribing to the Solicitor General's Office under President Reagan the practice of routinely elevating politics over independent legal judgment in pursuing its cases).

consistent. As one study states, “[t]he President expects his Attorney General . . . to be his advocate rather than an impartial arbiter, a judge of the legality of his action.”⁴⁹ Under such a system, the pressure for DOJ to develop expansive interpretations of presidential power is inexorable.

4. The Growth of the Executive Branch

A further reason for the growth of presidential power relates to the expansion of the federal executive branch. The massive federal bureaucracy existing today extends far beyond what the framers likely imagined.⁵⁰ And significantly, for our purposes, the head of that bureaucracy is the President who thereby has all the capabilities and powers of the administrative state at his disposal.⁵¹ The substantive scope of his authority, moreover, is breathtaking.⁵² The President leads a federal bureaucracy that, among other powers, sets pollution standards for private industry, regulates labor relations, creates food and product safety standards, manages the nation’s lands and natural resources, enforces the federal criminal law, oversees the banking industry, and governs a host of other activities too numerous to mention.⁵³ This may not have been the way it was intended. As Gary Lawson has written, it is questionable whether the delegation of powers to the executive, upon which the administrative state is based, is consistent with the original understanding.⁵⁴ Yet whether consistent with the Framers’ design or not, the expansion of the federal bureaucracy necessarily invests the Presidency with enormous powers.⁵⁵ And as the federal bureaucracy continues to expand, so does the power of the Presidency.⁵⁶ Indeed, even if Congress were able to limit the President’s direct control over the administrative state (a matter that will be discussed in the next Subsection), the President’s powers stemming from an expanded federal bureaucracy would still increase, if only through his powers of appointment.

⁴⁹ HUSTON, MILLER, KRISLOV, & DIXON, JR., *supra* note 47, at 52.

⁵⁰ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233-37 (1994).

⁵¹ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587-91 (1984).

⁵² See *id.* at 583-86.

⁵³ See, e.g., *id.*; Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 463 (2008) (listing portions of regulatory policy delegated to administrative agencies).

⁵⁴ Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002).

⁵⁵ Cf. Strauss, *supra* note 51, at 587 (describing the degree to which administrative agencies are centrally managed by the President).

⁵⁶ See *id.*

5. Presidential Control of the Administrative State

Related to the expansion of the federal administrative bureaucracy is the increased ability of the president to control that bureaucracy. For many years, the federal bureaucracy stood literally as a “fourth branch of government,” enjoying considerable independence from both Congress and the Presidency.⁵⁷ Recently, however, as Deans Harold Krent⁵⁸ and Elena Kagan have stated,⁵⁹ Presidents are beginning to control the federal bureaucracy for their own political agendas in a manner that has not occurred previously. Krent demonstrates how President George W. Bush has been able to circumvent congressional efforts to delegate decision making to office holders and to retain such authority for himself,⁶⁰ while Kagan shows how President Clinton was able to use directives and other measures to more effectively control and claim ownership of agency action.⁶¹ The Clinton and Bush Presidencies will likely serve as lessons to future administrations, suggesting that increased control of the federal bureaucracy is yet another way that presidential power will continue to expand.

6. Presidential Access to and Control of Information

If, “[i]n the information age, information is power”⁶² then most of that power rests with the executive. Because of its vast resources, the executive branch has far greater access to information than do the co-branches of government.⁶³ In addition, the executive branch has far greater ability and expertise to gather, examine, and cull that information than do the transitory legislative staffs in the Congress. Congress, for example, does not have at its disposal the information gathering capabilities of the intelligence agencies or the technical expertise of the military in determining when there is a threat to national security.⁶⁴ Instead, it must rely on the executive for that appraisal and therefore must continually negotiate with the executive from a position of weakness and dependence.⁶⁵ Moreover, this disparity in access and control of information is only likely to worsen as the world becomes more complex,

⁵⁷ See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 440; Strauss, *supra* note 51, at 578-79.

⁵⁸ Krent, *supra* note 13, at 524.

⁵⁹ See Kagan, *supra* note 17, at 2248.

⁶⁰ Krent, *supra* note 13, at 532.

⁶¹ Kagan, *supra* note 17, at 2290.

⁶² Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 737 (2002).

⁶³ *Id.*

⁶⁴ For a discussion of the conflicts between the Executive branch and Congress over access to information, see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal – Do Nothing*, 48 ADMIN. L. REV. 109, 111-16 (1996).

⁶⁵ *Id.* at 119-20.

because complexity necessarily requires increasingly sophisticated methods of information collection, analysis, distillation, and dissemination. And because only the executive branch is likely to have the expertise and the resources to perform these functions, its relative powers will again increase.

7. The Media and the Presidency

As Justice Jackson recognized in *Youngstown*, the power of the Presidency has also been magnified by the nature of media coverage. This coverage, which focuses on the President as the center of national power,⁶⁶ has only increased since Jackson's day as the dominance of television has increasingly identified the image of the nation with the image of the particular President holding office.⁶⁷ The effects of this image are substantial. Because the President is seen as speaking for the nation, the Presidency is imbued with a unique credibility. The President thereby holds an immediate and substantial advantage in any political confrontation.⁶⁸ Additionally, unlike the Congress or the Court, the President is uniquely able to demand the attention of the media and, in that way, can influence the Nation's political agenda to an extent that no other individual, or institution, can even approximate.

8. The Presidency in Popular Culture

Relatedly, the role of the institution of the President in popular culture also enhances presidential power. As numerous commentators have noted, the public often perceives national power as directly related to the power of the incumbent President.⁶⁹ For that reason, the citizenry tends to rally behind the President because he is seen as standing for the country.⁷⁰ This is why the citizenry tends to become invested in a President as soon as he is elected, and is why his popularity always rises immediately after an election.⁷¹ Of course, it may be true that the perception of the President as all-powerful can work to his detriment in that he can be held responsible, sometimes unfairly, for matters that are beyond his control.⁷² But the fact that the President is held responsible in these circumstances is a testament to his perceived power and authority.

To be sure, the role of public culture in enhancing the power of the presidency is not exclusively a modern phenomenon. Efforts were made to create a popular mythology surrounding the President as far back as President

⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (Jackson, J., concurring).

⁶⁷ For an account of the power of image in politics, see NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 7, 125-41 (1986).

⁶⁸ *Youngstown*, 343 U.S. at 653-54.

⁶⁹ See, e.g., HINCKLEY, *supra* note 19, at 12.

⁷⁰ *Id.* at 10.

⁷¹ *Id.*

⁷² *Id.* at 11.

Washington.⁷³ But as the political and popular culture surrounding the Presidency continue to coalesce, a sitting President's ability to use popular culture for political benefit is seemingly enhanced as well.⁷⁴

9. Military and Intelligence Capabilities

The President's power is also enhanced by the vast military and intelligence capabilities under his command. In his roles as Commander-in-Chief and head of the Executive Branch, the President directly controls the most powerful military in the world and directs clandestine agencies such as the Central Intelligence Agency and National Security Agency.⁷⁵ That control provides the President with immensely effective, non-transparent capabilities to further his political agenda and/or diminish the political abilities of his opponents.⁷⁶ Whether a President would cynically use such power solely for his political advantage has, of course, been the subject of political thrillers and the occasional political attack. President Clinton, for one, was accused of ordering the bombing of terrorist bases in Afghanistan to distract the nation from the Lewinsky scandal,⁷⁷ and President Nixon purportedly used the Federal Bureau of Investigation to investigate his political enemies.⁷⁸ But regardless whether such abuses actually occurred, there is no doubt that control of covert agencies provides ample opportunity for political mischief, particularly since the inherently secretive nature of these agencies means their actions often are hidden from public view. And as the capabilities of these agencies increase through technological advances in surveillance and other methods of investigation, so does the power of the President.

⁷³ See Juilee Decker, *Paintings and Sculptures*, in *THE AMERICAN PRESIDENT IN POPULAR CULTURE* 15-28 (John W. Matviko ed., 2005); Hanna Miller, *Memorabilia*, in *THE AMERICAN PRESIDENT IN POPULAR CULTURE*, *supra*, at 3.

⁷⁴ Indeed, as part of this trend, presidents in recent years have more frequently used venues of popular culture, such as late night television and radio talk shows, as vehicles to further their political agendas. See POSTMAN, *supra* note 67, at 132. For a more recent account of this phenomenon, see *Hillary Clinton to Visit Letterman Again*, MSNBC, Jan. 30, 2008, <http://www.msnbc.msn.com/id/22901851>, which lists recent visits to Letterman's show by presidential hopefuls.

⁷⁵ U.S. CONST. art. II, § 2; Norman C. Bay, *Executive Power and the War on Terror*, 83 *DENV. U. L. REV.* 335, 338 (2005).

⁷⁶ An extreme example of how such power could be used by an Administration to control its citizenry is, of course, the subject of George Orwell's classic novel 1984. See GEORGE ORWELL, 1984 (1949).

⁷⁷ See, e.g., *Cohen Criticizes 'Wag the Dog' Characterization*, CNN ONLINE, Mar. 23, 2004, <http://www.cnn.com/2004/ALLPOLITICS/03/23/wag.dog/index.html>; Byron York, *Gen. Water-Carrier: Henry H. Shelton of the Joint Chiefs. (Testimony Before the Senate Armed Services Committee on Dangers of Republican Budget Cuts)*, *NAT'L REV.*, Dec. 20, 1990, at 26.

⁷⁸ DeWayne Wickham, *McClellan Admission Evokes Memories of Nixon Era*, *USA TODAY*, Nov. 27, 2007, at 13A.

10. The Need for Government To Act Quickly

Presidential power also has increased because of the exigencies of decision making in the modern world. At the time of the founding, it would take weeks, if not months, for a foreign government to attack American soil. In the twenty-first century, the weapons of war take only seconds to arrive. The increased speed of warfare necessarily vests power in the institution that is able to respond the fastest – the presidency, not the Congress.⁷⁹ Consequently, the President has unparalleled ability to direct the nation’s political agenda.⁸⁰ The power that comes with being the first to act, moreover, does not end when the immediate emergency is over. Decisions made in times of emergency are not easily reversed; this is particularly true in the context of armed conflict. The President’s commitment of troops inevitably creates a “rally round the flag” reaction that reinforces the initial decision.⁸¹ As Vietnam and now Iraq have shown, Congress is likely to be very slow in second guessing a President’s decision that places soldiers’ lives in harm’s way. That Congress would use its powers (as opposed to its rhetoric) to directly confront the President by cutting off military appropriations seems fanciful.

11. The Increasingly Polarized Two-Party System

The final reason why presidential power has increased relates to the rise of a highly polarized two-party system in which party loyalty trumps institutional concerns. The beginnings of this polarization can be traced to the enactment of the Civil Rights Act of 1964.⁸² The passage of that Act ended an era that had effectively been a three-party system in the United States: the northern Democrats, the southern Democrats, and the Republicans. During this “three-party” era, members of Congress needed to work across party lines to develop working majorities on particular issues.⁸³ Their political fortunes and reputations, therefore, were closely tied to the success of Congress as an institution.

In contrast, in the highly polarized two-party system currently dominating national politics, a member’s political success depends more on the fortunes of her particular party than on the stature of Congress. This means members of Congress have a greater personal interest in the President’s success as leader of

⁷⁹ *But cf.* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 533-37 (2002) (recounting Congress’s authorization of the use of military force against terrorists seven days after 9/11 and the subsequent invasion of Afghanistan).

⁸⁰ On the power of media to set the general political agenda, see generally DORIS A. GRABER, *MEDIA POWER IN POLITICS* (4th ed. 2000).

⁸¹ Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2678 (2005); NEUSTADT, *supra* note 14, at 247.

⁸² Joseph Gershtenson, *Mobilization Strategies of the Democrats and Republicans, 1956-2000*, 56 POL. RES. Q. 293, 295 (2003).

⁸³ *Id.*

their party than they have in Congress as an institution. Correspondingly, because the President is the leader of his or her political party, the President can expect greater loyalty and discipline from party members than occurred in previous eras. The result of this is that when the President's party controls the Congress, he or she can proceed virtually uncontested.⁸⁴ Consequently, in an era of highly polarized parties, there no longer exists the constitutional balance purportedly fostered by separation of powers. Rather, the constitutional balance becomes what Daryl Levinson and Richard Pildes term a "separation of parties."⁸⁵ The problem, of course, is that separation of parties serves as no balance at all when both the Presidency and the Congress are controlled by the same party. In those circumstances, the power of the Presidency is effectively unchecked.

II. A CONSTITUTIONAL IMBALANCE?

The expansion of presidential power is only part of the story. Because the constitutional commitment to separation of powers depends on a balance between the executive and legislative branches,⁸⁶ the related question that must be addressed is how the expansion of presidential power relates to the powers of the Congress. In this respect, it does not appear that any expansion in the powers of Congress have kept pace with the increasing power of the President.⁸⁷

At least two significant changes since the Founding have worked to Congress's advantage in its battles with the Presidency. First, the Supreme Court has recognized Congress's non-textual power to investigate and oversee the executive branch.⁸⁸ This power is significant and, indeed, has at times been enormously effective in uncovering executive branch malfeasance.⁸⁹ But

⁸⁴ See Joshua Green, *The Rove Presidency*, THE ATLANTIC, Sept. 2007, at 52, for documentation of Congressional Republicans' reluctance to challenge President Bush even when disagreeing with his policies.

⁸⁵ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316-23 (2006).

⁸⁶ See *supra* notes 5-8 and accompanying text.

⁸⁷ Congress, of course, does have a substantial array of weapons at its disposal in its battles with the Presidency. See Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 324 (2002). The question here, however, is whether Congress's powers vis-à-vis the Presidency have expanded at the same rate as the president's powers vis-à-vis Congress.

⁸⁸ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927); William P. Marshall, *The Limits on Congress's Authority To Investigate the President*, 2004 U. ILL. L. REV. 781, 782-83. Interestingly, the recognition of Congress's investigatory power is not new and dates back to an investigation of a failed military campaign during the Washington Administration. *Id.* at 786-88.

⁸⁹ For a history of congressional investigations from the beginning of the nation through the nineteenth century on to 1974, see CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975). Unfortunately, however,

the power to investigate has not, and likely cannot, fully compensate for the power the Presidency enjoys in controlling information. After all, Congress's oversight authority is not self-executing, and, as the experience of both the Clinton and Bush II presidencies have shown, frequently can be frustrated by a combative President. Moreover, even if Congress has the political will to force a recalcitrant administration to turn over information, the President's control over information may be so absolute that Congress does not even know what to ask for.⁹⁰ How can Congress, for example, request materials relating to a domestic surveillance program if it does not know that such a program exists?

Second, Congress's power vis-à-vis the President has arguably increased because the President is subject to term limits⁹¹ while members of Congress are not.⁹² However, the extent to which this factor significantly alters the balance of powers between the two branches is unclear. After all, a weakened, lame-duck presidency occurs only in the second term and even then can be mitigated by the presence of a Vice President or other obvious heir-apparent.

More significantly, outside the Congressional oversight and term limits examples, the other developments affecting inter-branch relationships are either neutral in their effects or favor the Presidency. For example, although Congress also benefits from the expansion of federal power – because it can enact programs that serve member's constituencies and bring funding to members' home districts – these benefits do not empower Congress in relation to the Presidency. And while Congress can, as Neal Devins argues, use its funding authority to exert pressure on the President to try and force him or her to run the agencies in accord with its political goals,⁹³ it is still the President who, at the end of the day, controls what the federal bureaucracy does.⁹⁴

Meanwhile, many of the other factors discussed in the previous Section serve to benefit only the presidency and do so largely at Congress's expense. The President's ability to respond quickly to emergencies, for example, leaves Congress out of the decision-making process and makes any subsequent actions by Congress seem untimely and ineffectual.⁹⁵ The military and covert

Congressional investigations have also been used as political weapons to illegitimately distract Presidents from pursuing their agendas, *see, e.g.*, BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS* 22-23 (3d ed. 2002) (discussing Congress's abuse of its investigatory powers); *see also* Marshall, *supra* note 88.

⁹⁰ *See generally* JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (explaining that some of the Administration's actions in the war on terror were kept secret from the coordinate branches).

⁹¹ U.S. CONST. amend. XXII.

⁹² *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

⁹³ Devins & Lewis, *supra* note 53, at 482.

⁹⁴ *Id.* at 467. It is also noteworthy, as the experiences of the Republican Congress under President Clinton and the Democratic Congress under Bush II demonstrate, that any congressional threat to cut off funding to the executive branch may be a threat that endangers the Congress more than it does the President.

⁹⁵ *But see* Paust, *supra* note 79, at 533-37.

agencies' increased capabilities benefit only the President who directs them. The fact that the President can demand media attention and use the public culture to his advantage diminishes the visibility, and therefore the effectiveness, of a Congress that does not have similar tools.

The result of all this, I would suggest, is that the system of checks and balances that the Framers envisioned now lacks effective checks and is no longer in balance. The implications of this are serious. The Framers designed a system of separation of powers to combat government excess and abuse and to curb incompetence.⁹⁶ They also believed that, in the absence of an effective separation-of-powers structure, such ills would inevitably follow.

Unfortunately, however, power once taken is not easily surrendered. Regardless of which party nominee wins the 2008 presidential election, therefore, it is unlikely that the imbalance of power that has developed in recent years will be easily remedied. Not using all available power requires a principled restraint that likely extends beyond the capabilities of most politicians.

III. RECALIBRATING THE BALANCE: SOME MODEST SUGGESTIONS

What then, if anything, can be done to recalibrate the balance of power? After all, short of constitutional amendment,⁹⁷ it is not clear how powers once exercised can be taken away or seriously constrained. Nevertheless, although the challenge is considerable, let me at least offer a few modest suggestions to start the dialogue.

First, I suggest we rethink the role of executive branch precedent. While the actions of previous Presidents might provide some precedential authority for the legality of those actions, executive branch precedents should not be seen as conclusive or even necessarily persuasive in establishing constitutionality. Moreover, other Administrations' forbearance in not taking similar actions in comparable circumstances also should be considered precedential authority. In this manner, the precedential value accorded previous executive branch actions will no longer favor only expansive notions of presidential power.

Second, greater effort should be made to promote DOJ independence. The Senate, regardless of which party is in power, should aggressively exercise its confirmation powers to assure the persons taking the reigns at the DOJ and the OLC are committed to the "arms-length" and not the "client" model of executive branch lawyering.⁹⁸ Similarly, those assuming key legal positions in the next administration should strive, as much as possible, to be independent

⁹⁶ THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

⁹⁷ I have suggested elsewhere that one way to weaken executive power is to follow the state model and adopt a divided executive. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2246, 2248 (2006).

⁹⁸ See *supra* note 41.

by maintaining distance between their legal conclusions and a President's political agenda.⁹⁹

Third, greater efforts must be made to combat executive branch secrecy. If a major check on the Presidency is political accountability to the citizenry,¹⁰⁰ such accountability cannot occur without transparency. Accordingly, if presidential power is to be curbed, reforms that would minimize secrecy and impose more accountability on the executive branch should be seriously considered. Equally important, executive branch arguments that such reforms are categorically unconstitutional should be rejected.¹⁰¹

Fourth, Congress should pursue its institutional obligations even if so doing might conflict with the political demands of the majority political party. Thus, for example, efforts should be made to ensure vibrant congressional oversight of executive branch action, even when the Presidency and the Congress are in the same party's control.¹⁰²

Finally, we all need to resist the temptation, alluded to in the introduction of this Essay, to reflexively support as constitutional the actions of Presidents whom we support. With presidential power still relatively undefined in the case law, the present time may provide the best, if not the last, opportunity to set constitutional limits on the exercise of this power. Achieving this goal should be the responsibility of a President's allies, as well as her opponents.¹⁰³ After all, one does not have to be an originalist to accept the proposition that the Framers, having just gone through a revolutionary war to depose a monarch, did not create a constitution that, in the name of national security or foreign policy, would vest unchecked power in the hands of a single individual.

⁹⁹ See generally Dawn Johnsen, *Guidelines for the President's Legal Advisors*, 81 IND. L.J. 1345 (2006).

¹⁰⁰ Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 25 (1995).

¹⁰¹ Vice President Cheney made such an argument in his dispute over the release of the names of the participants on his energy task force. According to the Vice President, the information was entitled to complete protection under the Recommendations Clause, on grounds that the task force was formed to help the president make legislative recommendations to Congress. See U.S. CONST. art. II, § 3; *Walker v. Cheney*, 230 F. Supp. 2d 51, 59-60 (D.D.C. 2002).

¹⁰² For the reasons discussed above, though, I am skeptical as to whether such vigorous oversight would actually occur. See *supra* notes 82-85 and accompanying text.

¹⁰³ The work of Jack Goldsmith particularly deserves to be lauded in this respect. See generally GOLDSMITH, *supra* note 90.