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EXECUTIVE AND
EXECUTIVE POWER IN THE
AMERICAN REPUBLIC

By Mackubin Thomas Owens and
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THE EVOLUTION OF THE EXECUTIVE AND EXECUTIVE POWER IN THE AMERICAN REPUBLIC

By Mackubin Thomas Owens and Stephen F. Knott

THE MODERN REPUBLIC AND THE BIRTH OF EXECUTIVE POWER

As Americans, we take for granted the idea of a government that is both free and yet strong enough to preserve the security of its citizens. But the fact is that such a government is a recent invention, first emerging as a result of political thought and practice in eighteenth century England and only coming to full flower in Philadelphia with the drafting of the American Constitution of 1787. As Harvey Mansfield wrote in his book *Taming the Prince*, “the combination of freedom and strength does not arise easily or naturally,” a fact confirmed “both by the grand outline of modern history and the experience of the ancients.”¹

Throughout history, strong governments have generally been monarchies, but at the expense of freedom. It was in republics that freedom was supposed to reside but, before the creation of the American Republic, the republican form of government had a mixed record at best. Ancient republics were characterized by constant struggle between the few (oligarchs) and the many (the *demos*) that led to instability and weakness. Modern republics also either came to grief (the German cities) or faded into irrelevance and obscurity (Venice and the Dutch Republic).

But in Philadelphia, the Founders created a government that combined the freedom of republics with the strength of monarchies. The Founders’ innovation that permitted this pairing of freedom and security to work was the “executive.” In Mansfield’s words, “the executive provided the strength of monarchy without tolerating its status above the law, so that monarchy would not only be compatible with the rule of law and the supremacy of the Constitution, but would also be expected to serve both. Furthermore, the recasting of monarchy as executive power made it dependably democratic as well as legal and constitutional.”²

Ironically, it was Nicolo Machiavelli who created the concept of the modern executive (*esecuzioni*). In so doing, Machiavelli rejected both the classical Greek idea of the “best regime” and the contemporary concept of the “Christian Prince,” who was concerned with the salvation of the peoples’ immortal souls. Machiavelli traced the weakness and vulnerability of the Italian republics to their leaders’ preference for otherworldly concerns. But a republic is mortal and its preservation must be the central concern of Machiavelli’s Prince, who also achieves glory by that preservation. The Prince goes behind speech to “effectual truth,”

¹ Harvey C. Mansfield, Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: The Free Press, 1989), p. xv.

² *Ibid.*, p. xvi.

resorting to such remedies as quickness of decision, suddenness of execution, manipulation of necessity, self-reliance (*uno solo*), secrecy, denial of responsibility, and reliance on “one’s own arms.”

So how did Machiavelli’s anti-constitutional—indeed tyrannical—prince, intended by the Florentine to achieve results at any expense, end up as the executive power in a liberal constitution? The answer is that over the next two centuries, Machiavelli’s prince was “tamed”—constitutionalized and liberalized—by means of the political thought of Machiavelli’s successors.

First, Thomas Hobbes established the doctrine of executive *power* in the context of sovereignty. In the state of nature, all men have the executive power, the right to self-defense. But Hobbes’ state of nature constitutes a “war of all against all” wherein the life of man is “solitary, poor, nasty, brutish, and short.” Thus in the interest of their own safety and security, individuals give up their individual executive power to the sovereign power of the state. For Hobbes, he who has the power of the sword—the executive power—has the sovereign power.

John Locke, “America’s philosopher,” moderated Hobbes’ state of nature as the prelude to the establishment of a government that protects the natural rights of its citizens. Locke subordinated the executive to a constitution intended to provide freedom and security for those who live under it. Under Locke’s constitution, the legislative power is supreme, but he makes room for an independent executive power called the “prerogative,” which he describes as the power “to act according to discretion for the public good, *without the prescription of the law and sometimes even against it.*”³

Since the fundamental law that the executive ultimately must implement is to preserve society, it is “fit that the laws themselves should in some cases give way to the executive power, or rather to *this fundamental law of nature and government, viz. that as much as may be, all members of society are to be preserved.*”⁴ The prerogative is rendered necessary by the fact that laws arising from legislative deliberation cannot foresee every exigency. For the safety of the republic, the executive must retain some latitude for action.

The executive was further moderated, constitutionalized, and republicanized by Montesquieu, whose work was widely read by America’s founding generation. Montesquieu refined Locke’s constitution by separating judicial power from the executive, giving us the idea of three political powers and the necessity of each maintaining its independence from the others.⁵

The component parts of the Constitution that emerged from Philadelphia in 1787 were now in place. And a critical element of the US Constitution was the idea of an independent executive,

³ John Locke, *Second Treatise of Civil Government*, various editions, Chapter XIV: Of Prerogative, Sec. 160 (emphasis added.)

⁴ *Ibid.*, Sec. 159 (emphasis added).

⁵ On the process of “taming” Machiavelli’s *esecuzioni*, see Mansfield, pp. 121-278.

whose power does not derive from the legislative branch—as it does in parliamentary governments—but possesses his own constitutional status.

TO PHILADELPHIA: ESTABLISHING A REPUBLIC WITH A STRONG EXECUTIVE

In the summer of 1787, fifty-five delegates—described by the absent Thomas Jefferson as “an assembly of demi-gods”—met in Philadelphia to draft a Constitution to replace the very flawed Articles of Confederation. These delegates were presented with a unique opportunity to create, as Alexander Hamilton put it, a government founded on “reflection and choice” rather than “accident and force.”⁶

Once the Constitution had been drafted it was then explained and defended in a series of 85 essays intended to influence New York to vote for ratification. Writing under the pseudonym of “Publius,” James Madison, Alexander Hamilton, and John Jay published a series of 77 essays in three New York newspapers between October of 1787 and August of 1788. These essays plus 8 more were compiled in two volumes and published as *The Federalist*.

The government that these men drafted included a number of innovations. First, the United States would differ from traditional republics by being *wholly representative* and *wholly elective*. It was not to be a “mixed” constitution, which gives different classes separate powers or separate branches -- e.g., a house of commons representing the people, a Senate or house of Lords representing the aristocracy, and an executive prime minister representing some sort of monarchical principle. No *part* of the government (e.g., the popular assembly) would *be* the people as a whole (*Federalist* 63). *All* of its branches are derived from the people, not just the lower house (*Federalist* 14, 39).

Second, the United States was to be an “extended republic.” Throughout history, republics had always been limited in geographical extent, usually no larger than cities. But as noted earlier, these small republics had ripped themselves apart in factional disputes between the few rich and the many poor. The American republic would embrace not only a large geographical area but also a “multiplicity of factions,” meaning that majorities would constantly be shifting, thereby “enlarging and refining the public view” (*Federalist* 10).

Third, the United States would be “partly national, partly federal.” The national government would be supreme in its sphere, the states in theirs. Of course the line between the two spheres would need to be worked out in particular cases.

In addition to the federal *vertical* separation of powers between the national governments and the states, the national government itself would be characterized by a *horizontal* separation of powers. As Madison wrote in *Federalist* 47, “The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of

⁶ Joyce Appleby, *Thomas Jefferson* (New York: Times Books, 2003), p. 16; *Federalist* 1. Hereafter, all references to *The Federalist* will be in the text. There are many editions of *The Federalist*. The definitive one is that edited by Jacob Cooke, (Middletown, CT: Wesleyan University Press, 1961).

tyranny.” Thus if the Constitution did not provide adequately for the separation of powers, “no further argument would be necessary to inspire a universal reprobation of the system.”

Finally, the Constitution provided for a strong executive, yet one consistent with republicanism. This was the most difficult task of all, confirmed by the fact that it was not until the end of the convention that the delegates came to agree upon a strong executive independent of the legislative branch. The American president was to be elected and therefore republican. He would possess powers independent of the legislature. He would be able to handle emergencies but not be simply a pale imitation of the Roman “dictator.” He would be able to provide energy and unity but did not represent an alien monarchical principle.

In *Federalist* 70, Hamilton writes that “a government ill executed, whatever it may be in theory, must be, in practice, a bad government.” He had in mind the inability of the government under the Articles of Confederation to deal with domestic crises such as Shays Rebellion as well as foreign humiliations such as the taking of American hostages by the Bey of Algeria. But how could a strong, energetic executive be consistent with the genius of republicanism? Explaining how this could be achieved was the most daunting task undertaken by Publius in the *Federalist*.

Having demonstrated the necessity of the Union in *Federalist* 1-22, Publius turns next to the question of how much power is necessary to the union and upon whom that power should be exercised. It is in this section that he prepares the way for the discussion of the executive (numbers 67-77) by reminding his readers of the force of *necessity*. Although the government created by the Constitution is a limited one, the purpose of which is to protect the natural rights of its citizens, it may still face emergencies and exigencies that require the forceful exercise of power. As Hamilton writes in *Federalist* 23:

The authorities essential to the common defense are these: 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. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

To be a good government, the American Republic must remain a limited, constitutional government, but not passive or vulnerable to the exigencies of necessity (e.g., war and rebellion). And the means of insuring a limited but strong government was to be the executive.

To those who argued that a strong executive was incompatible with republican government, Hamilton replied that it was precisely the former that made the latter viable in the real world.

As he wrote in *Federalist 70*, advocates of republicanism must hope that their claim “that a vigorous executive is inconsistent with the genius of republican government” is wrong because if it is not then they condemn their own principles.

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

Hamilton further contended that the President needed to be equipped with “competent powers” and be given incentives to resist congressional incursions on his power through a fixed salary and a lengthy term of office that would allow him to implement his plans. He also argued that “unity” in the executive, meaning one person, not a committee, was a vital element for presidential success. He noted in *Federalist 74* that “of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” The president brings to the conduct of war and foreign policy the essential qualities of “decision, activity, secrecy and dispatch” (*Federalist 70*). Implied in Hamilton’s treatment of the executive is the troubling concept of the *prerogative*.

As republicans, the framers of the Constitution were wary of the prerogative, since it had been the basis for what they considered to be the tyrannical excesses of the British king. When the king could not secure the statutes he wanted from Parliament, he often sought to rule extra-legally, through binding proclamations, regulations, or decrees, unilaterally suspending laws with which he disagreed. Instead of adjudicating through the law courts, the king would instead resort to prerogative tribunals, such as the king’s council, the Star Chamber, and various commissions. Lacking the legitimacy of the law, kings, their lawyers, and defenders of royal power in general argued that prerogative, defined as absolute power, constituted an alternative mode of governance. In response to such royal overreach, the English Bill of Rights of 1689 states that “the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.”⁷

Nonetheless, while refraining from actually using the term, the Constitution incorporates the idea of a *limited* prerogative. This limited prerogative was in no sense the royal divine right

⁷ At: http://avalon.law.yale.edu/17th_century/england.asp.

against which they had fought the Revolution, but one limited in the way that Locke had used it: an executive discretion required by necessity. It was applicable in time of war and rebellion, not during normal times characterized by peace. The wording of the Constitution itself illustrates the incorporation of the prerogative. While Article I reads “all legislative power herein granted...,” makes it clear that not all legislative power is granted to the Congress (much being left to the states), Article II reads “*the* executive power...” implying that *no* executive power, including Locke’s limited prerogative, is withheld from the president.

But the framers were cognizant of a danger that harkened back to the concern that Madison had voiced in *Federalist* 47: the potential combination of “will,” the essence of legislative power (*Federalist* 78) and “force,” the primary executive power, pose a special menace to liberty. As two scholars recently have observed,

Legislative will, to be just, must be expressed in general, forward-looking laws. Thus the Constitution explicitly prohibits both *ex post facto* (retroactive) laws and bills of attainder (which declare a given party guilty of a crime without trial—with penalty attached). Executive force, to be just, must be applied against specific offenders for past actions. When the same hands exercise both powers, however, the law easily becomes an instrument of force, used to target opponents with oppressive rules that are only *ex post facto* laws and bills of attainder by another name.⁸

While the framers of the Constitution believed that executive power was necessary to ensure the success of the American republican experiment in a dangerous world, they also understood the danger that an unbridled executive might pose to republican liberty. A good president will wield the prerogative prudently. If he doesn’t, there are two constitutional remedies: elections and impeachment.

THE EXECUTIVE AND THE WAR POWER

One of the primary issues that faced the framers of the Constitution was the question of the relative importance of domestic and foreign affairs, and by extension, the roles of Congress and the president. On June 25, 1787, Charles Pinckney spoke on behalf of the primacy of domestic affairs in American politics:

Our true situation appears to me to be this—a new extensive Country containing within itself the materials for forming a Government capable of extending to its citizens all the blessings of civil and religious liberty—capable of making them happy at home. This is the great end of Republican establishments. We mistake the object of our government, if we hope or wish that it is to make us respectable abroad. Conquest or superiority among other powers is not or ought not ever to be the object of republican systems. If they are sufficiently active and energetic to rescue us from contempt & preserve our

⁸ David Corbin and Matt Parks, “The Hegemonic Presidency,” *The Federalist*, June 28, 2014. <http://thefederalist.com/2014/06/08/the-hegemonic-presidency/>

domestic happiness and security, it is all we can expect from them—it is more than almost any other Government ensures to its citizens.

Four days later, Hamilton replied to Pinckney “It had been said that respectability in the eyes of foreign nations was not the object at which we aimed; that the proper object of republican Government was domestic tranquility & happiness. This was an ideal distinction. No Government could give us tranquility & happiness at home, which did not possess sufficient stability and strength to make us respectable abroad.”

This exchange between Pinckney and Hamilton reflects a broader debate over the legislative and executive branches, for in domestic affairs, the legislative is dominant but in foreign affairs, the executive takes precedence. As Thomas Jefferson observed in a letter to Caesar A. Rodney, “in times of peace the people look most to their representatives; but in war, to the executive solely...to give direction to their affairs, with a confidence as auspicious as it is well-founded.”⁹

James Ceaser, the eminent presidential historian, has written that the Founders in fact distinguished between a “zone of law,” where the guidance of policy by general rules is possible (the domestic arena) and the legislative branch is dominant, and a “zone of ‘high’ discretion,” where policy cannot be set, or set effectively, by general rules (the realm of foreign policy and defense).¹⁰ This distinction corresponds to Jefferson’s description and suggests that in the latter, the executive will have an advantage when it comes to the war power, although the legislative branch is not altogether excluded. Indeed, the practical question is where to draw the line between the legislative and executive branches.

The debate at the Constitutional Convention over the war power as a particular species of executive power was, as one might expect, influenced by the experiences of the delegates as colonists living under British rule and, perhaps most importantly, from their experiences during the American Revolution. This wartime experience convinced many of the more prominent delegates, including George Washington, James Madison, and Alexander Hamilton, that the Articles of Confederation, under which the United States had governed itself throughout much of the conflict, were woefully ineffective in conducting war and foreign policy. As Edmund Randolph observed at the Convention, the Articles were “totally inadequate to the Peace, Safety and Security of the Confederation.”¹¹

Additionally, many of the delegates to the convention were well versed in the history of republics, both ancient and modern, and their reading of history led them to recognize that republics were uniquely vulnerable to both internal and external forces. Survival of republican government depended on the ability to balance the need for resisting foreign aggression with

⁹ To Caesar A. Rodney, in Merrill Peterson, ed., *Jefferson: Writings* (New York: Library of America, 1984), p. 1218.

¹⁰ James W. Ceaser, “Kingdom Come: The Irresistible Rise of the Imperial Presidency,” *The Weekly Standard*, July 28, 2014, p. 37.

¹¹ Quoted in Richard H. Kohn, “The Constitution and National Security: The Intent of the Framers,” eds. Paul J. Bolt, Damon V. Coletta, and Collins G. Shackelford, Jr., *American Defense Policy* (Baltimore, MD: The Johns Hopkins University Press, 2005), p. 89.

the need to preserve liberty at home – a complicated task, needless to say, particularly in light of the fact that while the preservation of liberty was the animating force of the American experiment, liberty could be undermined by the very government designed to ensure its success and survival. This threat was seen to be particularly acute within the government’s military arm, but there was an additional threat to liberty from within: the potential for the sudden whims of passion on the part of the people to rob unpopular minorities (including “men of property”) of their freedom, which in turn might require the government to use the force of arms to defend minority rights.

During the debates in the Constitutional Convention over the war power, only one delegate, Pierce Butler from South Carolina, proposed that the power to declare war be given to the president. No other delegate endorsed Butler’s position, and even Butler seems to have moved away from the idea as the convention dragged on through the summer of 1787. One of the more significant actions taken by the convention delegates regarding the war power was the decision to alter an initial draft of the Constitution that read that Congress should have the power to “make” war. At the urging of James Madison and Elbridge Gerry the delegates altered the language to read that Congress shall have the power to “declare” war. The proponents of the change argued “make” war could be interpreted to mean conducting war, while “declaring” war made it clear that the conduct of the war was an executive function. Also, importantly, the framers believed that by giving the power to Congress to “declare” war rather than “make” war the president retained the ability to “repel sudden attacks.”

Not all the founders were pleased with this semantic change. One delegate, Roger Sherman of Connecticut, argued that by “narrow[ing] the power [of Congress] too much” the Constitution would allow the President “to commence war”¹² -- a prediction that over time turned out to be quite prescient.

In the end, the delegates at the Constitutional Convention produced a document that appeared to give both Congress and the president a share of the power over war and national security. In Article I, the framers gave Congress the power to declare war, provide money for the common defense, raise and support armies, provide and maintain navies, call forth the militia, suspend habeas corpus, and regulate foreign trade. In addition to “vesting” the president with the “executive power,” to include the prerogative, Article II gave the President the role of Commander in Chief of the armed forces, the power to commission officers of those forces, to receive foreign ambassadors, to take care that the laws be faithfully executed, and to grant pardons for federal offenses. Uniquely among the three branches of the new federal government, the President was mandated by the Constitution to take an oath requiring him to “preserve, protect, and defend” the Constitution.

Following a remarkably rapid but hard fought constitutional ratification process, the new government came into being in New York City on March 4, 1789, when the first Congress convened. President George Washington was inaugurated on April 30, 1789, taking the helm

¹² Robert Scigliano, “The War Powers Resolution and the War Powers,” in *The Presidency in the Constitutional Order*, eds. Joseph M. Bessette and Jeffrey Tulis (Baton Rouge, LA: Louisiana State University Press, 1981), pp. 124-143.

of an executive branch with a mandate to carry out his Article II powers as ill-defined as they were.¹³

EXECUTIVE POWER IN ACTION: WASHINGTON AND THE EARLY REPUBLIC

It is doubtful that the Article II powers vested in the President would have been granted without the assumption by the convention delegates that George Washington would be the first president. He was, as has been noted repeatedly by historians of the period, the “indispensable man.”

President Washington wasted no time in attempting to flesh out the details of the President’s article two powers as his request, in the President’s First Annual Message to Congress (commonly referred to today as “The State of the Union Address”), for a “secret service fund.” This fund would be controlled by the president and would allow the chief executive to conduct clandestine operations free from congressional oversight. The “Contingency Fund” passed in 1790 and granted the President the authority to avoid the usual reporting procedures mandated by Congress – the President was essentially given a blank check in order to conduct secret operations he deemed to be in the national interest.

Whether they knew it or not, the members of the first United States Congress had taken the initial step toward authorizing what would later become known as the “imperial presidency.”¹⁴ A series of American presidents used this fund, well before the 20th century, to authorize an astounding array of clandestine operations without congressional authorization, some explicitly involving acts of war, including the attempted overthrow of foreign governments.¹⁵

George Washington established a number of other precedents that would be cited by his successors to justify presidential leadership in matters of war and national security. In the early days of his presidency, Washington believed that his power to negotiate treaties was shared with the Senate, but after a dismal experience where he genuinely sought the advice of the upper chamber, he quickly abandoned the practice. Washington also refused in 1795 to hand over to the House of Representatives correspondence related to the Jay Treaty with Great Britain by invoking for the first time the doctrine of what would become known as executive privilege. And most importantly, by issuing his Neutrality Proclamation of 1793, announcing that the United States would remain neutral in the war between Britain and France, Washington made it clear that while Congress had the power to declare war the

¹³ For a look at the early history of the American republic, see Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009).

¹⁴ The term was coined by historian Arthur M. Schlesinger, Jr., in *The Imperial Presidency* (Boston, MA: Mariner Books, 2004). Schlesinger, a onetime proponent of presidential activism and an advisor to President Kennedy, was an advocate of a loose interpretation of the president’s article two powers but later changed his mind when that power was used by Republican presidents.

¹⁵ See Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency* (New York: Oxford University Press, 1996), for a discussion of 18th and 19th century American covert operations.

president had the authority to declare American neutrality in the absence of such a declaration.¹⁶

President Washington's issuance of the Neutrality Proclamation divided the government and the nation along partisan lines, with the Hamiltonians arguing both that Washington's decision was constitutional and was good policy for the new nation. For Hamilton, writing under the pseudonym of "Pacificus," the fact that Article II "vested" the president with the "executive power" was grounds enough to sustain Washington's unilateral issuance of the proclamation. Hamilton believed that the power of the Congress to declare war and the power of the Senate to ratify treaties were the exceptions to a general grant of power given the president over foreign affairs and national security. It was simply impossible, Hamilton argued, for any Constitution to include a "complete and perfect specification of all cases of executive authority" – in other words the "vesting" clause is an open-ended clause that permits the president to deal with contingencies as they arise. Congress can change the nation from a "state of peace" to a "state of war" but the president can "do whatever else the laws of nations ... enjoin in the intercourse of the United States with foreign powers."¹⁷

Madison, writing under the pseudonym of "Helvidius" and speaking for the Jeffersonians—advocates of a "strict" interpretation of the Constitution—argued that Washington's position represented a dangerous move in the direction of monarchical government. By removing the "landmarks" or limitations on presidential power, Washington was violating the spirit of separation of powers and checks and balances by blurring the line between declaring and conducting war. Executives are prone to war, Madison argued, for war strengthens their power and provides them with opportunities for patronage and raises them to a position of preeminence that is inimical to republican government.

According to Madison, Washington's actions and Hamilton's defense of those actions in the neutrality crisis made it more likely that future chief executives would be tempted to absorb the power to both declare and conduct war. It was a dangerous step, Madison argued, to ignore the wisdom of the framers of the Constitution, who "separated the power of declaring war from that of conducting it." He warned that Washington and Hamilton had heightened the prospect of "the danger of its [war] being declared for the sake of its being conducted."¹⁸

Both Jefferson and Madison were outraged by Washington's and Hamilton's interpretation of presidential power, and Jefferson's campaign for the presidency in 1800 was fueled in part by a

¹⁶ For a discussion of Washington's expansive exercise of presidential power over foreign affairs and national security see Forrest McDonald, *The Presidency of George Washington* (Lawrence, KS: The University Press of Kansas, 1974), chs. 6-8 and Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-2007* (Washington, DC: CQ Press, 2007), ch. 3.

¹⁷ Scigliano, "The War Powers Resolution and the War Powers," p. 128.

¹⁸ Ruth Weisbourd Grant and Stephen Grant, "The Madisonian Presidency," in *The Presidency in the Constitutional Order*, eds. Joseph M. Bessette and Jeffrey Tulis (Baton Rouge, LA: Louisiana State University Press, 1981), pp. 48-50.

desire to overturn the Federalist Party’s “imperial presidency.”¹⁹ But in fact, Jefferson did no such thing. As president, Jefferson wrote repeatedly of the importance of executive deference to the legislature, but behind the scenes he manipulated the legislative branch to do his bidding, or in some cases simply deceived Congress in order to achieve his goals. His justification of his war with the Barbary Pirates, which was sanctioned by Congress, was filled with misrepresentations and half truths.²⁰ Jefferson portrayed the American entry into the war as a defensive measure, when in fact in his instructions to his naval officers prior to Congress approving the use of force the President urged them to be aggressive in order to foster a nineteenth century version of the Gulf of Tonkin incident in the Gulf of Sidra.

To make matters worse for constitutional purists, Thomas Jefferson believed that the president possessed Locke’s limited prerogative. Jefferson, who is frequently cited as a champion of openness and deference to the people, noted that “all nations have found it necessary, that for the advantageous conduct of their affairs, some of these [executive] proceedings, at least, should remain known to the executive functionary only.” Adumbrating the views of John Yoo, one of the legal architects of George W. Bush’s war on terror, Jefferson argued that the Senate “is not supposed by the Constitution to be acquainted with the concerns of the executive department.”²¹ Jefferson’s conception of executive power sounds remarkably current: “on great occasions every good officer must be ready to risk himself in going beyond the strict line of the law,” and he added that there were “extreme cases where the laws become inadequate to their own preservation, and where the universal recourse is a dictator, or martial law.”²²

Jefferson made a similar argument in a letter to John B. Colvin. Responding to Colvin’s question concerning “whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law...,” Jefferson wrote,

A strict observance of the written law is doubtless one of the highest duties of a good citizen, but it is not the highest. The laws of necessity, of self preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means...It is incumbent on those only who accept of greatest charges, to risk themselves on great occasion, when the safety of the nation, or some of its very high interests are at stake.²³

¹⁹ By 1800, supporters of Alexander Hamilton and President John Adams were considered members of the Federalist Party (“Party” being loosely applied here, as Hamilton and Adams differed with and despised one another). Jefferson’s followers were known as Democratic-Republicans.

²⁰ See for instance Christopher H. Pyle and Richard M. Pious, *The President, Congress, and the Constitution: Power and Legitimacy in American Politics* (New York: The Free Press, 1984), p. 287.

²¹ Thomas Jefferson to George Hay, June 17, 1807, *The Writings of Thomas Jefferson*, ed. H.A. Washington, 9 vols. (Washington, D.C.: Taylor and Maury, 1853, vol. 5, p. 97.

²² *The Works of Thomas Jefferson*, Paul Leicester Ford, ed. (New York: G.P. Putman, 1898), vol. 9, p. 211.

²³ To John Colvin, in *Jefferson: Writings*, pp. 1231-33.

It is ironic that Thomas Jefferson, the arch-critic of all that Hamilton stood for, essentially governed as a Hamiltonian chief executive.

Madison, it must be noted, did act in a constrained manner when he became President; so constrained indeed that he came close to losing the War of 1812. The American war effort was marked by the destruction of the nation's capital and multiple failed invasions of Canada. As one of Madison's biographers observed, the president rejected the idea that he needed to lead the nation into war, in fact "he took the nation into war knowing it was divided and ill prepared and depend[ed], naively, on its ability to mobilize and rise to the occasion once war had been declared."²⁴

ANDREW JACKSON AND JAMES POLK

After the War of 1812, the Federalists as a political party essentially disappeared from the political landscape, leaving the United States with only one national party, the Republicans, which, with the rise of Andrew Jackson, came to be known as Democratic-Republicans and then simply Democrats. But the Democratic Party split in the 1830s in response to what many considered the unprecedented high-handed acts of President Jackson. Calling him "King Andrew the First," these national Democrats took the name of "Whig" from the 17th- and 18th-century opponents of royal absolutism in England. They believed that Jackson, styling himself a "tribune" of the people, was instead, combining legislative "will" and executive "force" in a way that Madison had warned about in *Federalist* 47. Jackson's high-handedness is reflected in his (probably apocryphal) response to the decision handed down by Chief Justice John Marshall in *Worcester vs. Georgia* (1832): "the chief justice has made his decision. Now let him enforce it."

The Whigs sought to limit executive power, believing that the legislature, being closest to the people, should be the predominant branch of the government. This extended to the war power as well. Confirming the fear expressed by some delegates to the Federal Convention that granting the president the unilateral authority to repel attacks and engage in defensive war would prove too tempting for holders of the executive office, James K. Polk positioned American forces in a disputed border region with Mexico in 1846. Mexican soldiers allegedly fired on the Americans, giving Polk his war, which was declared by Congress despite the opposition of the Whigs, including a one-term congressman from Illinois, Abraham Lincoln.

ABRAHAM LINCOLN AND THE WAR OF THE REBELLION

No president in American history has faced a greater crisis than Abraham Lincoln confronted in the spring of 1861. Although sections of the country had threatened disunion many times in the past, the emergency had always passed as some compromise was found. But in 1861, Lincoln faced a rebellion "too powerful to be suppressed by the ordinary course of judicial

²⁴ Ralph Ketcham, "James Madison and the Presidency," in *Inventing the American Presidency*, ed., Thomas Cronin (Lawrence: University Press of Kansas, 1989), p. 356.

proceedings.”²⁵ By the time of his inauguration on March 4, 1861, seven states had declared their separation from the Union and had set up a separate provisional government called the Confederate States of America.

A little over five weeks later, at 4:30 am on April 12, 1861, rebel gunners opened fire on Fort Sumter in Charleston harbor. In response, Lincoln issued a call for 75,000 volunteers to serve ninety days. Denouncing the president’s policy of “coercion,” four more states left the Union. The ensuing war, the most costly in American history, would last for four agonizing years. When it was over, between 600,000 and 750,000 Americans had died and the states of the South had suffered economic losses in the billions of dollars when measured in terms of today’s currency.

Lincoln was entering uncharted waters as he confronted the rebellion. There were few precedents to which he could turn in response to the emergency facing the government.²⁶ Claiming broad emergency powers that he argued the Constitution had vested in the executive branch, he called out the militia of the loyal states, authorized increases in the size of the regular army and navy, expended funds for military purchases, deployed military forces, blockaded Southern ports, suspended the writ of habeas corpus in certain areas, authorized arbitrary arrests, and empanelled military tribunals to try civilians in occupied or contested areas. He took these steps without congressional authorization (Congress was out of session and not scheduled to reconvene until December of 1861).²⁷

Nonetheless, he subsequently explained his actions to Congress, writing to the Senate and House on May 26, 1862, “it became necessary for me to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should let the government fall at once into ruin, or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it with all its blessings for the present age and for posterity.”²⁸ Later he authorized conscription and issued the Emancipation Proclamation.

Lincoln laid out the dilemma he faced in his address to Congress in special session after Fort Sumter, in which he defended his suspension of the writ of habeas corpus:

The whole of the laws which were required to be faithfully executed were being resisted, and failing of execution in nearly one third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such

²⁵ “Proclamation Calling Militia and Convening Congress, April 15, 1861, Roy Basler, ed., *The Collected Works of Abraham Lincoln*, nine volumes (New Brunswick: Rutgers University Press, 1953), vol. IV, p. 332.

²⁶ James McPherson, *Tried by War: Abraham Lincoln as Commander in Chief* (New York: Penguin, 2008), pp. 4-5.

²⁷ On Lincoln’s actions in a constitutional context, see, e.g. Daniel Farber, *Lincoln’s Constitution* (Chicago: University of Chicago Press, 2003); and Mackubin Thomas Owens, *Abraham Lincoln: Leadership and Democratic Statesmanship in Wartime* (Philadelphia: Foreign Policy Research Institute, 2009).

²⁸ To the Senate and House of Representatives, May 26, 1862, *CWL*, vol. V, pp. 241. Cf. Message to Congress in Special Session, July 4, 1861, in Roy Basler, ed., *Abraham Lincoln: His Speeches and Writings* (New York: Da Capo Press, n.d.), pp. 594-609. Hereafter *AL*.

extreme tenderness of the citizen's liberty, that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly: are all the laws but one to go unexecuted, and the Government itself to go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken if the government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?²⁹

Lincoln believed that the power he needed to deal with the rebellion was a part of the executive power found in the Constitution. As he wrote to James Conkling in August 1863, "I think the Constitution invests its commander-in-chief, with the law of war, in time of war."³⁰ In addition to the commander-in-chief clause, he found his war power in the clause of Article II requiring him to "take care that the laws be faithfully executed," and his presidential oath "to preserve, protect, and defend the Constitution of the United States."

Lincoln arguably utilized executive power to a greater extent than any president in history, which seems remarkable in light of his Whig background. But Lincoln argued that he never took any steps that were unconstitutional. Instead, he contended, the Constitution is different in times of war and times of peace. Nonetheless, Lincoln entertained no doubt that any extraordinary powers were limited to the duration of the emergency and not applicable to normal times. As he said in reply to Erastus Corning and a group of War Democrats who had criticized certain of his war measures:

I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not lawfully be taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good for a well one. Nor am I able to appreciate the danger apprehended by the meeting [of the New York Democrats] that the American people will, by means of military arrest during the Rebellion, lose the right of Public Discussion, the Liberty of Speech and the Press, the Law of Evidence, Trial by Jury, and Habeas Corpus, throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.³¹

THE PROGRESSIVES AND THE RISE OF THE MODERN PRESIDENCY

While Lincoln exercised his powers in an expansive way, he did so on behalf of a government that was *limited in scope* to protecting the equal individual rights of American citizens: life, liberty, the acquisition of property, and conscience. Thus Lincoln saw the Constitution as

²⁹ "Message to Congress in Special Session," *AL*, pp. 600-601.

³⁰ To James Conkling, August 26, 1863, *AL*, p. 721.

³¹ To Erastus Corning and Others, June 12, 1863, *AL*, p. 705.

embodying the principles of the Declaration of Independence. He accepted the view of the Founders that a government could be both strong and limited in purpose.

Lincoln articulated the relationship between republican government as provided for by the Constitution on the one hand and liberty and the Declaration on the other in a fragment that he probably composed in 1860, perhaps as the basis for some speeches he gave in New England. Here Lincoln observes that as important as the Constitution and Union may be, there is “something back of these, entwining itself more closely about the human heart. That something, is the principle of ‘Liberty to all’” as expressed in the Declaration of Independence. With or without the Declaration, Lincoln continues, the United States could have declared independence, but “*without* it, we could not, I think, have secured our free government, and consequent prosperity.”³²

Lincoln refers to the Declaration’s principle of liberty for all as a “word ‘fitly spoken,’ which has proved an ‘apple of gold’ to us.”³³ The Union and the Constitution, are the picture of silver, subsequently framed around it,” not to conceal or destroy the apple “but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture. So let us act, that neither picture, [n]or apple, shall ever be blurred, or broken.” In other words, republican liberty was the real thing to be preserved by saving the Union and the Constitution.³⁴

It is necessary to point this out because of the new political science that triumphed over that of the Founders during the latter part of the nineteenth century: the political science of the “Progressives,” which captured both the Republican and the Democratic Parties. Although many historians have treated the Progressives as merely a “good government” reform movement, the fact is that they essentially “re-founded” the American republic, transforming the basis of government from human nature and natural rights to “history” and “progress.” The Progressives asserted a new conception of man, who possesses no natural rights, but who does have potentially limitless material needs that must be provided by an administrative state governed by “experts.” The Progressives effectively replaced liberty with “efficiency” and the concept of “rights” with prescriptive entitlements.

The era following the Civil War and Reconstruction essentially marked a return to the idea of limited government. The reversion of the presidency to its pre-war status is illustrated by the fact that most Americans cannot name a president between Grant and Roosevelt. But during this period, the “social question” began to arise: how was the American constitutional system to deal with the challenges of the post-war urban and industrial revolutions? While during the Civil War and Reconstruction, Lincoln and the Republicans adhered to a long tradition of Anglo-American constitutional principles, the Progressives, both intellectuals (e.g., Herbert

³² Fragment, *The Constitution and Union* [1860?], *CWL*, Vol. IV, p. 169.

³³ Proverbs 25:11. “A word fitly spoken is like apples of gold in frames of silver.”

³⁴ A number of writers have commented on the importance of this fragment for understanding Lincoln’s actions as war president. See Herman Belz, *Lincoln and the Constitution: The Dictatorship Question Reconsidered* (Fort Wayne, IN: Louis A. Warren Lincoln Library and Museum, 1984), pp. 19-20; and Walter Berns, “Constitutional Power and the Defense of Free Government,” in Benjamin Netanyahu, ed., *Terrorism: How the West Can Win* (New York: Farrar, Straus, and Giroux, 1986), p. 154.

Croly and John Dewey) — imbued with the doctrine of progress arising from German political philosophy — and politicians, such as Theodore Roosevelt and Woodrow Wilson, abandoned those principles — the natural-rights constitutionalism of the founders—for a set of “modern” ideas.³⁵

Above all others, Woodrow Wilson, both as an intellectual and professor (he was the president of Princeton University) and later a politician, embodied the essence of the new political science, arguing that the Constitution was not up to dealing with the complexities of 20th century American life. The Constitution, said the Progressives, was outdated, that it was incompetent to deal with contemporary economic and social ills, and that, if applied at all, ought to be applied as a “living” document, modified to meet the changes of modern life.

The touchstone of Wilson’s new political science was his 1912 campaign address, “What is Progress?” in which he attacked the Declaration of Independence and argued on behalf of replacing the political science of the Founders with a new political science based on the evolutionary theory of Charles Darwin. Wilson also expressed frustration with, if not outright scorn for, the separation of powers.³⁶ For Wilson, the checking-and-balancing function of the Constitution constituted a barrier that for many decades had prevented the national government from enacting the social and economic policies that Wilson and the Progressives had advocated.

Ignoring the other part of Madison’s argument for separating powers—energizing government through the clash of rival and opposite ambitions—the Progressives saw the Constitution’s separation of powers as an effort to enshrine legislative primacy. For the Progressives, energetic presidents prior to the modern era were anomalies. In the name of good government and efficiency, the Progressives sought to create a new constitutional order, with the president as its driving force.

Accordingly, Wilson and the Progressives reconceived the Office of the President. Wilson’s executive would overcome the original Constitution’s structural obstacles by rising above them. The means for doing so was party government, permitting the president to initiate a common policy agenda in order to breach the mere “parchment” barriers that divided the legislative and executive branches. As one Wilson scholar has observed:

The president would make the case for policy innovation directly to the people. Once armed with plebiscitary legitimacy, he might more easily prod an otherwise parochial Congress to address national needs. Madisonian fears about the mischiefs of faction would be overcome by separating politics and administration: Congress and the president would jointly settle upon the desired policy agenda, but its details, both in design and execution, would rely on non-

³⁵ For a sample of Progressive writings, see Ronald J. Pestritto and William J. Atto, eds., *American Progressivism: A Reader* (Lanham, MD: Lexington Books, 2008) and Pestritto, ed., *Woodrow Wilson: The Essential Political Writings* (Lanham, MD: Lexington Books, 2005). For an intellectual biography of Wilson, see Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (New York: Rowman and Littlefield, 2005).

³⁶ Wilson, “What is Progress?” <http://teachingamericanhistory.org/library/document/what-is-progress/>.

partisan expert administrators' special insight and technical skill, operating under the president's general direction and control.³⁷

This reconceived presidency would also become the primary instrument of a new Constitution, one stripped of any foolish preoccupation with limited government.

In other words, executive power would grow in parallel with the growth of government in general. No longer would the president be seen as, at best, Congress's co-equal or, at worst, the legislature's frustrated servant. Instead, Wilson's president would be a proactive government's innovator-in-chief, one who understands the direction of historical forces but who unites this understanding with popular yearnings. For the Progressives, the president was to embody the will of the people.

However, one of the unintended consequences of the Progressive conception of the president and executive power is that Americans have come to expect almost impossible things of modern presidents. Presidents in turn come to office with almost impossible agendas to match heightened public expectations. A few recent examples serve to make the point:

John F. Kennedy claimed that “man can be as big as he wants. No problem of human destiny is beyond human beings. Man's reason and spirit have often solved the seemingly unsolvable – and we believe they can do it again” and that the president “must be prepared to exercise the fullest powers of his office – all that are specified and some that are not.” His vision of American omnipotence led him to proclaim that the United States would “bear any burden, pay any price” to defend liberty around the globe, including in the swamps of South Vietnam.

Lyndon B. Johnson believed that America could win the hearts and minds of the South Vietnamese by exporting a model similar to the Tennessee Valley Authority to the Mekong Delta. His “Great Society” was accompanied by extravagant claims by members of his administration that poverty would be abolished in the United States by 1975. Johnson saw no boundary between himself and the office he held; when a young military officer tried to direct Johnson to his presidential helicopter, LBJ snapped, “Son, they are all my helicopters.”

Nixon launched a “war” on drugs, which is now America's longest war, having been poorly fought for 43 years.

Jimmy Carter's Vice President, Walter Mondale, argued that it was the proper role of government to assist “the sad.”

George W. Bush fought a “war on terror” and sought to transform Iraq and Afghanistan into Jeffersonian democracies.

Barack Obama noted when he clinched his party's nomination that “this was the moment . . . when the rise of the oceans began to slow and our planet began to heal.”

³⁷ Michael Uhlmann, “Taming Big Government,” *The Claremont Review of Books*, summer 2007. http://claremont.org/index.php?act=crbArticle&id=711#.U3VJM_lXTo.

All of these extravagant claims, and many others, have produced an “expectations gap” that is fueled by inflated rhetoric, demagoguery, and pandering, and would repulse the founding fathers (although it should be noted, in fairness, that it is also fueled by the insatiable demands of the American public). In *Federalist* 71, Hamilton warned of the danger that demagogues posed to republican government:

The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation, that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset as they continually are by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it.

The founding fathers understood something many modern politicians and political scientists do not: the more the office of the presidency is personalized and the more the presidential portfolio is inflated, the more the executive branch is diminished. It is important to note that for the Founders, the presidency provided both a floor and a ceiling that protects but also energizes the office; without this, the office is trapped in a cycle of raised expectations followed by public disappointment and cynicism.

CONCLUSION: WHAT IS THE PROPER ROLE OF THE EXECUTIVE IN REPUBLICAN GOVERNMENT?

It is clear that executive power has changed considerably since the Constitution was drafted in Philadelphia in 1787. Has this change been for the better? The answer seems to lie in the distinction between domestic politics and foreign affairs, between Ceaser’s “zone of law” and “zone of ‘high’ discretion.” When it comes to the latter, American presidents can rightly say that they are simply following in the footsteps of their illustrious predecessors to justify an expansive interpretation of their powers. In addition, there are other informal practices presidents can employ to rally support for their unilateral exercise of the war power. These include presidential use of the bully pulpit and the ability to speak with one voice, in contrast to the discordant chorus of voices, 535 of them, found on Capitol Hill.

The symbolism associated with the President’s role as Commander-in-Chief should not be underestimated, for he can “wrap himself in the flag” and appeal to the American people to support the men and women in the field. Few members of Congress are going to push to check

or remove a president who claims that they are undermining his war policies and by so doing are undermining the forces in the field. Even during our most unpopular wars, whether it was the War of 1812, the Vietnam War, or Operation Iraqi Freedom, Congress stopped short of halting these wars even though they had the constitutional means to do so. Many members of Congress, for political reasons, would just as soon duck these issues and let the blame fall on the White House.³⁸

Additionally, the rise of political parties has made checking the President more difficult. In fairness to the Framers, they did not foresee (or perhaps hoped not to see) the rise of political parties which over time replaced loyalty to the institution of Congress with loyalty to the party leader, the President. If the President's party controls Congress, he is likely to have his way with them on matters of war and peace. This, needless to say, undermines the principle of separation of powers and checks and balances. Perhaps most importantly, at a cognitive level, something seems to happen when a person travels the short distance from the Capitol to 1600 Pennsylvania Avenue – the ability to move swiftly and without congressional encumbrances suddenly becomes appealing even to a president who may have spent his entire career in Congress.

But critics of expansive executive power in times of emergency argue that there is never a justification for disregarding Congress and arguably the Constitution itself. Was it appropriate for Abraham Lincoln to suspend habeas corpus even though the Constitution clearly grants that power to the Congress? Was Franklin Roosevelt justified in covertly positioning the United States for entry into the Second World War? Was President Kennedy wrong to unilaterally blockade Cuba (the euphemism of choice was “quarantine”), a recognized act of war, during the missile crisis of 1962?

All of these examples (and many more) suggest that, during times of war and other emergencies, necessity has trumped a strict fidelity to the Constitution. Granted, the actions of these “strong” presidents contributed to the emergence of the United States as the world's lone superpower. Nonetheless, for constitutional purists, such actions, despite their occasional positive results, remain suspect. Worse, the lukewarm response to these actions demonstrates that the nation has endorsed the idea that law of necessity permits the president to eviscerate the constitutional underpinnings of separation of powers and checks and balances. In other words, the people of the United States through their elected officials sold their constitutional soul in the name of safety, or in some cases simply to enhance the nation's power and prestige.

Critics of the expansive use of executive power during times of emergency contend that the prospect of returning to a more balanced and constrained view of executive power over war and national security seems dim – as mentioned, members of Congress who ascend to the White House critical of presidential power frequently reverse course once they settle into the executive mansion. Barack Obama is a case in point: while campaigning in December, 2007, Obama noted that “the president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent

³⁸ Cf. Walter McDougall, *The Constitutional History of US Foreign Policy: 222 Years of Transition in the Twilight Zone*, FPRI Philadelphia Paper, July 2010, <http://www.fpri.org/articles/2010/07/constitutional-history-us-foreign-policy-222-years-tension-twilight-zone>.

threat to the nation.”³⁹ But in March, 2011, President Obama authorized just such an attack on targets inside Libya without seeking congressional approval, and with limited (at best) consultation with congressional leaders. Many in Congress objected, but no serious effort was made to reverse the president’s decision, thereby, once again, relegating the idea of an “invitation to struggle” to the ash heap of history.

But the Founders would have understood the use of a more expansive executive power during time of war as part of the zone of “high” discretion, even if some of them would not have approved of it. They understood that necessity sometimes requires the sort of executive discretion that Locke identified.

However, when it comes to executive discretion in domestic affairs—the zone of law—the situation is different. Even strong nationalists like Alexander Hamilton acknowledged limits to the president’s roles and functions: he was to engage in the steady administration of the law, protect the right to property, conduct (in partial concert with the Senate) the nation’s foreign relations, including negotiations, oversee military preparations, and if need be, direct a war. He was to avoid demagogic appeals and he certainly was not expected to democratize the world, comfort the sad, or heal the planet.

Defenders of the Progressives’ executive argue that a strong president is necessary in domestic affairs because of congressional deadlock. According to this view, if Congress refuses or is unable to act, it is the responsibility of the president to do what is necessary. As President Obama has stated, he has both a pen and a phone and the power to use them. Many commentators see President Obama’s action in November of 2014 – his issuing an executive order that essentially provides amnesty for millions of illegal aliens – as a particularly egregious manifestation of untethered, unconstitutional executive action within the zone of law.

But critics of today’s administrative state argue that the Progressives’ executive is problematic in two main respects. First of all, the Progressives’ innovations have seriously eroded the separation of powers envisioned by the framers of the Constitution. There is little now to check the president, especially in light of the administrative state, which features “independent” agencies that the president can use to circumvent the will of Congress, as well as a multitude of “czars” who are not subject to confirmation. Accordingly, presidents can now use administrative law as the English kings once employed the royal prerogative and not in the limited sense that Locke described.

As Philip Hamburger writes in his recent book, *Is Administrative Law Unlawful?* the Obama administration’s grant of waivers to favored companies exempting them from some provisions of the Affordable Care Act (known colloquially as Obamacare) is the same as the king’s “dispensing power.” When the administration unilaterally decides that it will no longer enforce certain provisions of a law passed by Congress, it is exercising what the English king’s

³⁹ Charlie Savage, “Barack Obama’s Q & A,” *The Boston Globe*, www.boston.com, December 20, 2007.

lawyers called the “suspending power.” When the president issues executive orders that make law or rules binding individuals, he has exercised the equivalent of the royal prerogative.⁴⁰

Hamburger goes on to observe that when administrative agencies such as the Environmental Protection Agency (EPA)—which are not courts of law—issue orders binding on individuals and businesses or subject them to administrative hearings without juries or independent, they are in fact acting in accordance with prerogative government, issuing general warrants and writs of assistance, and utilizing self-incrimination and ex officio proceedings such as the Star Chamber and the Royal High Commission. This has led some to suggest that we have reached the point that Madison described in *Federalist* 47: The tyrannical accumulation of all powers, legislative, executive, and judicial, in the same hands. It reflects the comment that Nixon made in response to a question about alleged abuses of power during his presidency: “when the President does it, that means *it* is not illegal.”

Second, the Founders’ idea of an “energetic executive” still presupposed a limited government. They envisioned an executive who would act in a sober manner rooted in a respect for the Constitution and its limits. Unfortunately, the Progressives replaced the idea of a limited republican government by an unlimited federal government that exercises redistributionist and regulatory powers in order to meet the “needs” (really just expectations) of an ever more demanding and dependent public. Thus an already large and unwieldy federal establishment, expanding to meet rising public expectations, threatens to become yet larger, more powerful, and harder to control.

It is important to note that it is not only Democrats who have embraced Progressivism. Republicans have as well through what has come to be called “compassionate conservatism.” George W. Bush was strongly sympathetic to progressive-style intrusions into civil society and former Bush advisor Michael Gerson, an architect of “compassionate conservatism” has shown in his recent book, *Heroic Conservatism*, that he is certainly no fan of limited, constitutional government.⁴¹

Hamilton saw the strong executive as absolutely necessary for the survival of republican government by acting energetically in the zone of high discretion: foreign affairs and war. However, in the zone of law, Congress was to be the dominant actor. But the government envisioned by the Founders was limited. The rise of Progressivism has complicated matters. Now the executive acts in a discretionary manner not only in foreign affairs but also in the zone of law, a development that would concern the Founders.

⁴⁰ Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

⁴¹ Michel Gerson, *Heroic Conservatism* (New York: HarperCollins, 2008).



FACT SHEET

"A nation must think before it acts." - Robert Strausz-Hupé

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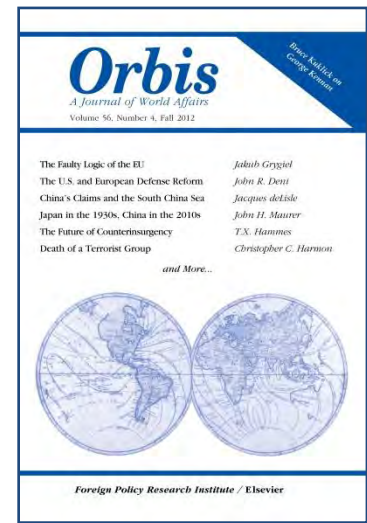
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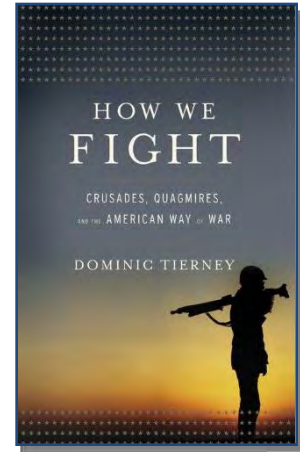
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¹ See [“The Impact of the Foreign Policy Research Institute: Or, Can a Small Organization in Philadelphia Change the Course of History?”](#) by Alan Luxenberg, BackChannel, November 2013.

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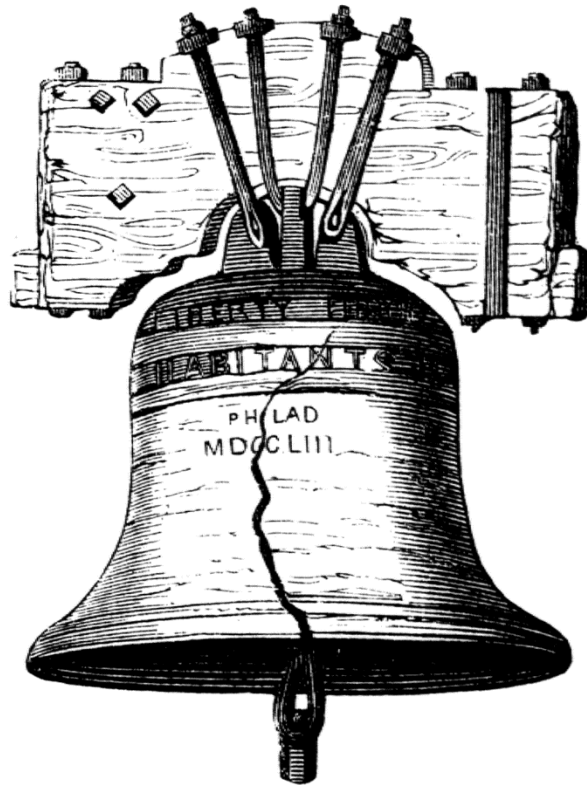
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