

CONGRESSIONAL ABDICATION AND THE CULT OF THE PRESIDENCY

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There was a revealing moment in the first presidential debate in September 2008, when moderator Jim Lehrer asked the candidates, “Are you willing to acknowledge, both of you, that this financial crisis is going to affect the way you *rule the country* as president of the United States?” [1] Neither John McCain nor Barack Obama thought to quibble with Lehrer’s phrasing. Both, it seemed, were comfortable with the idea that what the president does, essentially, is “rule the country.”

That’s a disturbing notion in a country born through rejection of monarchy. But you could see how the candidates might get the idea that ruling the country was the president’s job. Despite the bitterness of our current ideological battles, liberals and conservatives largely agree on the boundless nature of presidential responsibility. Neither Left nor Right sees the president as the Framers saw him: a constitutionally constrained chief executive with important, but limited, responsibilities. Today, for conservatives as well as liberals, it is the president’s job to protect us from harm, to grow the economy, spread American ideals abroad, and even to heal spiritual malaise.

Worse still, the irrational expectations Americans invest in the office drive the growth of presidential power. Asked to perform miracles, modern presidents have often sought powers to match that responsibility — and all too often Congress has obliged. Indeed, by the time both major parties had settled on their nominees for the 2008 race, it had become clear that whoever won would, as Yale Law professor Jack Balkin observed, “inherit more constitutional and legal power than any president in U.S. history.” [2]

When questioned about the Bush administration’s aggressive approach toward presidential power, Vice President Dick Cheney often commented that he and President Bush aimed to leave the office as strong as they’d found it. And though Bush ended his second term as one of the most reviled presidents of the modern era, that was one charge he’d managed to keep.

To the modern president’s already enormous powers — vast discretion over warmaking, the ability to shape large areas of domestic policy via executive order — George W. Bush had added a host of new powers hardly dreamt of before the twin crises that bookended his presidency. The September 11th attacks gave the president greatly enhanced surveillance authority and new powers over the disposition and treatment of “enemy combatants.” And the intensifying financial meltdown of late 2008 gave him what amounted to a presidential power of the purse: so broad was the authority Congress delegated in the law that established

the \$700 billion Troubled Assets Relief Program, that Bush used it to lend billions of dollars to Chrysler and GM a week after Congress voted down legislation authorizing the auto bailout.

Throughout the Twentieth Century, America drifted far from the Framers' comparatively modest vision of the president's purpose and powers, as more and more Americans looked to the central government — and, increasingly, to the president — to deal with highly visible public problems, from labor disputes to crime waves to natural disasters. And as responsibility flowed to the center, presidential power grew accordingly. In the Twenty-first Century, that trend seems to be accelerating.

If we're disturbed by the growth of presidential power — and we should be — we'd do well to explore how we got here. It won't do, obviously, to curse our bad luck and blame a succession of aggrandizing presidents. Most analysts of the "Imperial Presidency" have concluded, as Arthur Schlesinger Jr. did, that the growth of presidential power over the course of the Twentieth Century "was as much a matter of congressional abdication as of presidential usurpation." [3]

Our experience in the first decade of the Twenty-first Century gives us little reason to amend that assessment. Nearly every recent advance in presidential power has its roots in Congress's willing abandonment of the powers the Constitution grants it.

This essay will explore the growth of executive power in the Bush and Obama years and the key role congressional abdication has played in that growth. I'll begin with a brief discussion of Congress's dominant role in the Framers' original design and James Madison's vision of a self-reinforcing constitutional order in which individual ambition could be properly channeled to preserve the interbranch balance of powers. From there, we'll look at how Madison's plan has worked out in foreign and domestic affairs, focusing chiefly on the last two administrations. Given the presidency's increasing dominance at home and abroad, the answer is, not very well. Finally, I'll suggest some reasons for the failure of the Madisonian vision and ask what, if anything, can be done about it.

CONGRESS'S ROLE IN THE ORIGINAL DESIGN

"In a government where numerous and extensive prerogatives are placed in the hands of a hereditary monarch," Madison wrote, the gravest threats to liberty would naturally be expected to come from the executive. But the American situation would be fundamentally different: in our Constitution, "where the executive magistracy is carefully limited, both in the extent and the duration of its power," *legislative* encroachment was more to be feared. [4]

We often hear it said that we have a government of "co-equal" branches. As Garry Wills points out, though, given the relative powers each branch has under the Constitution, "co-equal" is a misnomer:

Congress can remove officers from the other two branches — President, agency heads, judges in district or supreme courts. Neither of the other two branches can touch a member of the Congress. Congress sets the pay for the other two and also for itself. It decides on the structure of the other two departments, creating or abolishing agencies and courts. [5]

Indeed, in virtually every important area of governance, the Constitution gives Congress the last word. Any treaty the president negotiates is invalid without the Senate's ratification.

The president can, through use of the veto, impede the passage of legislation, but Congress can override that obstruction. Congress has the power to propose constitutional amendments, which become the law of the land when ratified by three-quarters of the states; the president has no role in the amendment process. Moreover, Article I, sec. 8, cl. 18, the so-called “Sweeping Clause,” gives Congress the power to “make all laws which shall be necessary and proper to carry into execution... all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof” — and thus, allows Congress to restrict any authority claimed by the executive “beyond that core of powers that are literally indispensable, rather than merely appropriate or helpful, to the performance of [its] express duties” under Article II of the Constitution. [6] As Wills puts it, “where two [branches] are dominated by a predominating third, there can be no co-equality.” [7]

The enumeration of congressional powers in Article I, sec. 8 clearly demonstrates that it was *Congress’s* job, not the president’s, to set the national direction in terms of policy. Even in foreign affairs, where the chief executive’s powers are thought to be broadest, the authority granted in the national charter is largely managerial and defensive. Just as the president will command the militia to suppress rebellions, should it be “called into the actual Service of the United States,” he can command the Army and the Navy, should Congress pass the necessary appropriations, and he can lead the Army and Navy into battle, should Congress choose to declare war. As “first General” of the United States, in Hamilton’s phrase, the president has an important role, but generals do not have the power to decide whether and when we go to war. [8] “In no part of the constitution is more wisdom to be found,” Madison wrote, “than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous powers: the trust and the temptation would be too great for any one man”. [9]

America’s experience under the Articles of Confederation revealed the danger of “the legislative department... drawing all power into its impetuous vortex”. [10] And, as Madison recognized, given the dominant role the Constitution gave the Congress, there was reason to fear similar encroachments at the federal level as well. “In republican government the legislative authority necessarily predominates,” he wrote in *Federalist* 51, and “this inconveniency” had to be guarded against, lest the legislature appropriate powers properly belonging to the other two branches. [11]

Mere parchment barriers wouldn’t be enough to maintain the interbranch balance of power. Instead, Madison thought we could count on the constitutional architecture itself to channel man’s lust for power in a manner that preserved individual liberty and limited government. “The great security against a gradual concentration of the several powers in the same department,” he wrote, “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. ... Ambition must be made to counteract ambition.” [12]

In the Madisonian vision, then, separation of powers was supposed to be largely self-executing. The members of each branch would have adequate incentive to fight any diminution of their branch’s authority. “The interest of the man” — that is, the ambitions of individual representatives, judges, and presidents — would lead each to defend “the constitutional rights of the place”: the authority of the particular branch each occupied. And *that*, not the fond hope that political actors would forever respect the formal limits written

into the national charter, would prevent any one branch from commandeering powers belonging to the others.

Things haven't quite worked out as planned. At home and abroad, the modern president has absorbed powers that properly belong to the legislative branch. At times, he's seized those powers; but more often than not, he's received them as gifts from a Congress all too eager to hand them over.

CONGRESSIONAL ABDICATION IN FOREIGN AFFAIRS

The Twentieth Century collapse of congressional authority over foreign affairs is a familiar story. We haven't lacked for aggrandizing presidents, but on the Madisonian battlefield of ambition, they've rarely encountered a Congress willing to protect its institutional prerogatives.

That pattern repeated itself during the congressional debate — if you can call it that — over the Iraq War in 2003. Though Bush administration lawyers denied that they needed congressional authorization for the use of force, the administration eventually sought, and secured a resolution granting that authority. It did so despite the fact that Congress, in the main, did not want to be burdened with the vast responsibility the Constitution places on its shoulders.

Indeed, even in authorizing the president to use force, Congress attempted to shirk its responsibility to decide on war. The Iraq War resolution Congress passed in October 2002 is heavy with boilerplate about exhausting other options, but its key clause reads:

The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq. [13]

Even so, prominent members of Congress insisted they hadn't really voted to use force. As then-Senate Majority Leader Tom Daschle (D.-S.D.) put it: "Regardless of how one may have voted on the resolution last night, I think there is an overwhelming consensus... that while [war] may be necessary, we're not there yet." [14] But the Constitution leaves it to Congress, not the president, to decide whether we are "there yet."

In the rush to get the Iraq War debate behind them, most members couldn't even be bothered to do due diligence on the alleged threat. For weeks prior to the October vote, copies of the 92-page National Intelligence Estimate on Iraq were kept in two guarded vaults on Capitol Hill — available to any member of the House or Senate who wanted to review them. In March 2004, the *Washington Post* revealed that only six senators and a handful of congressmen found it worth the effort to go and read the whole document. Senator Jay Rockefeller explained that, when you're a senator, "everyone in the world wants to come see you" in your office and getting away to the secure room — across the Capitol grounds at the Hart Senate Office building — is "not easy to do." He added that intelligence briefings tend to be "extremely dense reading." [15]

Congressional scholar Louis Fisher compares the Iraq vote to the Gulf of Tonkin resolution that authorized the Vietnam War. As with the Iraq War resolution, the Gulf of

Tonkin resolution was worded broadly enough to allow the president to make the final decision about war all by himself. Lyndon Johnson compared the resolution to "grandma's nightshirt" because it "covered everything." [16] And, as with Iraq, the president waited for several months and an intervening election before using the authority granted him. In each case, it was easier for Congress to dodge the issue than to take responsibility.

In the 2004 and 2008 presidential campaigns, a number of prominent Democratic senators who'd voted for the Iraq war vehemently denied they'd done any such thing. Senator John Kerry, the Democrats' 2004 candidate for president, complained on the campaign trail that he hadn't meant to authorize *this* kind of war; "The president bum-rushed the thing" without building a legitimate coalition or getting the UN on board. [17] In 2007, Senator Hillary Clinton's campaign chairman explained that Senator Clinton hadn't voted for war, just "to give the president the authority to negotiate and to have a stick to go over there and negotiate with Saddam Hussein." [18] Senator Joseph Biden, a 2008 candidate for the presidency and our current vice president, offered similar post-hoc rationalizations for his war vote. "If I had known this administration would be so incompetent," he told interviewer Charlie Rose in 2004, "I never would have given them the authority to try to avoid the war," which was an interesting way to describe a resolution titled "Authorization for Use of Military Force Against Iraq." [19]

When it came to the fight against Al Qaeda, congressional behavior revealed a similar lack of Madisonian ambition. In areas ranging from detention of terrorist suspects to anti-terror surveillance, from the very beginning of the conflict, the president made clear that he, not Congress, would set the rules. And when Congress found itself compelled to legislate on those topics, it usually ratified unilateral actions already taken by the president.

In November 2001, President Bush issued a military order allowing him to detain any noncitizen he suspected of terrorist involvement, and, even if that citizen was a legal resident of the United States, he or she would be barred from American courts and tried before a military tribunal with rules determined at the executive's discretion and subject to unilateral alteration at any time. [20] Even in the vast civilizational conflict of World War II, Congress had enacted articles of war and set out procedures to ensure that the executive branch would not write the laws it was charged with executing. But post-September 11 Congresses showed little interest in asserting their constitutional authority to formulate the rules for Twenty-first Century warfare. [21]

By early 2004, President Bush's job approval numbers dipped below 50 percent for the first time, and after April 2005, he never again rose above that mark. [22] Yet time and again, during his presidency's long decline, Congress gave Bush new powers, or placed its seal of approval on powers he'd already seized. As one of its last major acts, in October 2006, the 109th Congress responded to the Supreme Court's June 2006 decision striking down the president's military tribunals order with legislation reinstating most of the powers he'd claimed. [23]

A month after the MCA's passage, the voters gave Congress back to the Democrats, but the new majority proved utterly unable to prevent the president from sending more troops to fight a war that most Americans by then considered a disaster. In August 2007, eager to leave town for summer recess, Congress passed the "Protect America Act," which effectively legalized the NSA surveillance program. [24] In the summer of 2008, after that law expired, Congress passed the FISA Amendments Act, which left very little of the original Foreign Intelligence Surveillance Act standing. Like the PAA, the FISA Amendments Act removed

the requirement for individualized warrants, allowing FISA Court judges to approve the parameters of executive surveillance programs, without access to information about the targets to be observed, or the factual basis for observing them. [25]

In his seminal book *Presidential Power and the Modern Presidents*, Richard Neustadt argued that the presidency is an inherently weak office, and to grow its powers, the president needed to build up political capital and spend it wisely. [26] Oddly enough, though, despite the fact that Bush's political capital had utterly evaporated early in his second term, he continued to secure broad new grants of authority from Congress. Thanks largely to congressional abdication, in the first decade of the Twenty-first Century, the Imperial Presidency is alive, well, and menacing as ever.

CONGRESSIONAL ABDICATION IN DOMESTIC AFFAIRS

In 1966, political scientist Aaron Wildavsky posited that there were really "Two Presidencies": one with broad discretion over foreign affairs, and another with comparatively limited ability to work its will on the home front. "Since World War II," Wildavsky observed, "Presidents have had much greater success in controlling the nation's defense and foreign policies than in dominating its domestic policies." [27]

That remains the case, but two caveats are in order. First, Congress's eagerness to delegate lawmaking authority to executive branch agencies has given modern presidents considerable power to reshape the law via executive fiat. Second, over the last year, the ongoing financial crisis has driven Congress toward new frontiers in delegation. [28]

Delegation of lawmaking authority is nothing new, of course. Since the New Deal era, the legislative branch has only intermittently fulfilled the central duty the Constitution imposes on it: making the law. The first sentence of that document's first article makes clear that "all legislative Powers herein granted" are vested in Congress. The Supreme Court once took that language seriously, as when, in 1935, it struck down a key New Deal program for delegating legislative power to the executive. [29]

But the Court eventually made its peace with statutes that allow the executive branch to both make and enforce the law. Its post-1937 refusal to strike down broad delegations of legislative authority helped give us what Theodore Lowi has called the "Second Republic" of the United States, in which Congress routinely passes statutes with ambitious, noble — and underspecified — goals, leaving it to the relevant executive branch agencies to issue and enforce the regulations governing individual behavior. [30]

True, the president's control over administrative agencies is nowhere near as extensive as partisans of unitary executive theory would like. The Supreme Court has never endorsed the proposition that the Constitution's grant of "the executive power" to the president means that Congress cannot limit his control over the administrative state. Even so, as Elena Kagan, now President Obama's Solicitor General, proclaimed in a 2001 *Harvard Law Review* article, "we live today in an era of presidential administration." [31] The president's ability to manipulate the executive branch bureaucracy has expanded greatly in recent years, "making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda." [32] Though the "unitarians" originally saw presidential control as a way to rein in aggressive regulatory agencies, Kagan argues that

there's little reason to think that "presidential supervision of administration inherently cuts in a deregulatory direction." [33]

President Obama's recent move to regulate greenhouse gas emissions via executive fiat is a case in point. Though legislation to impose a nationwide cap and trade program remains stalled in Congress, the Obama administration recently moved ahead with plans to limit emissions from power plants and large industrial facilities. [34] That decision flowed inexorably from *Massachusetts v. EPA*, in which the 2007 Supreme Court ruled that the 1970 Clean Air Act's definition of air pollutant was broad enough to allow regulation of CO₂ emissions. [35]

The proposed rule doesn't cut as deeply as it might, but the authority Congress delegated in the Clean Air Act could allow the Obama administration to go much further in imposing emission restrictions. According to a comprehensive legal analysis issued by NYU Law School's Center for Policy Integrity, "if Congress fails to act, President Obama has the power under the Clean Air Act to adopt a cap-and-trade system." [36] Even staunch supporters of cap and trade ought to be discomfited by the notion that, in a democratic country, the president could contemplate such a move without specific authority from Congress.

In a political climate where even green-leaning representatives periodically rail against rising gas prices, President Obama may be reluctant to stretch his authority as far as the law will allow. But the more immediate threat represented by the financial meltdown of 2008-2009 has led to a dramatic expansion of presidential power at home.

On the campaign trail in 2008, then-presidential candidate Hillary Clinton declared, "we need a president who is ready on day one to be commander in chief of our economy." [37] There's no hint of such a role for the president in the Constitution's second article, but Clinton's description might well fit a president who can appoint a "czar" to set executive pay at major companies and summarily fire the CEO of GM.

In "The Two Presidencies," Wildavsky noted that "great crises" could enhance the president's domestic policy powers, periodically allowing him to shape policy on the home front as thoroughly he dominates affairs abroad. Earlier this year, the president's chief of staff, Rahm Emanuel, raised Republican ire with his statement that "You never want a serious crisis to go to waste.... [it] provides the opportunity for us to do things that you could not do before." [38]

That sentiment transcends party lines, however. George W. Bush's lame-duck period repeated the pattern that had prevailed throughout his two terms: the announcement of an unprecedented crisis, demands for new presidential powers to meet that crisis, and — after some perfunctory grumbling — Congress's capitulation to those demands.

Treasury Secretary Henry Paulson's original three-page proposal for a bank bailout demanded unchecked power over some \$700 billion in taxpayer assets: "Decisions by the Secretary pursuant to the authority of this Act are non-reviewable and committed to agency discretion, and may not be reviewed by any court of law or any administrative agency." [39] Congress rejected that language, and, on October 3, 2008, passed a much longer bill: some 18,000 words, compared to 849 in Paulson's original draft. The Emergency Economic Stabilization Act of 2008 (EESA) allowed the executive branch to set up the Troubled Assets Relief Program (TARP) to purchase toxic mortgage-backed securities, and the act contained what looked like restraints on the executive branch's discretion. [40] Nonetheless, by the end of 2008, Paulson looked a lot like the modern equivalent of a Roman dictator for economic

affairs, using a broad delegation of authority from Congress to decide which financial institutions would live and which would die.

In December 2008, American automakers General Motors and Chrysler tottered on the brink of bankruptcy, while Congress debated legislation to provide some \$15 billion to keep two of the “Big Three” alive. On December 11, the auto bailout bill failed to pass a key procedural vote in the Senate. But a week later, President Bush announced that, despite the bill’s failure, he had decided to lend the car companies \$17.4 billion. White House spokesman Tony Fratto explained:

Congress lost its opportunity to be a partner because they couldn’t get their job done.... This is not the way we wanted to deal with this issue. We wanted to deal with it in partnership. What Congress said is ... “We can’t get it done, so it’s up to the White House to get it done.” [41]

As the Bush administration saw it, then, by not giving the president the power to bail out the automakers, Congress “lost its opportunity to be a partner,” and the president had every right to order the bailout anyway.

Some commentators saw that decision as yet another example of Bush administration lawlessness. [42] The president claimed that he had the power to act under EESA, the operative clause of which gave the treasury secretary the power to buy “troubled assets” from “financial institutions.” From the start, the Bush administration interpreted that authority broadly, abandoning the original plan almost immediately, and using EESA to buy shares in banks — some of which, such as Wells Fargo, weren’t “troubled.” But invoking the legislation to bail out car companies seemed a bridge too far. How could a statute empowering the executive branch to buy mortgage-backed securities from banks be used to lend money to automakers, which surely couldn’t qualify as “financial institutions”? Having repeatedly insisted that he could not be bound by validly enacted statutes in matters related to national security, it seemed that President Bush had decided he couldn’t be bound by clear statutory language when it came to addressing the nation’s economic woes.

The truth was even more disturbing. A closer look at the TARP statute reveals that Congress wrote legislative language so irresponsibly broad that the administration actually had a colorable argument that it could reshape the bailout as it saw fit. [43] Though Congress recoiled from Secretary Paulson’s September demand for a “non-reviewable” TARP, at the end of the day, as my colleague John Samples pointed out in a recent study, they “delegated more power to Secretary Paulson than he sought originally”:

Paulson’s original draft proposed giving the Secretary the power to purchase only “mortgage-related assets from any financial institution having its headquarters in the United States.” EESA... gives the Secretary the power to buy both mortgage-related assets and “any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability.” [44]

Thus, under the law, the treasury secretary has virtually unlimited discretion to decide what counts as a “troubled asset.” The definition of “financial institution” is equally broad. It includes “*any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the*

laws of the United States or any State, territory, or possession of the United States” (emphasis added). [45]

Various members of Congress angrily protested that the president had gone from buying toxic assets to recapitalizing banks to bailing out carmakers — shifting priorities almost daily, regardless of what the people’s representatives believed they’d authorized. But after ceding such vast authority to the president, their outrage was more than a day late and \$700 billion short. Congress, Samples concludes, “showed itself to be a bit player in a multi-hundred billion dollar drama that appeared to implicate the economic future of the nation.” [46]. Once again, on a core issue of governance, Congress had abdicated its legislative responsibilities, leaving the hard choices to the president. The buck stops *there*.

THE FAILURE OF THE MADISONIAN VISION

In the Madisonian design, recall, the ambition of presidents was to be met and checked by the ambition of legislators. Clearly, when it comes to Congress, that incentive structure has failed. That failure is, in large part, a result of the divergence between the interests of individual legislators and the interests of Congress as a whole in maintaining its constitutional prerogatives. “Congress” is an abstraction. Congressmen are not, and their most basic interest is in getting reelected. [47]

Federalist 51 envisions a constitutional balance of power reinforced by the connection between “the interests of the man” and “the constitutional rights of the place.” Yet, as NYU’s Daryl Levinson notes, “beyond the vague suggestion of a psychological identification between official and institution, Madison failed to offer any mechanism by which this connection would take hold.” [48] Congress retains a few institutionalists (Sen. Russell Feingold (D.-WI) comes to mind) [49], but, for most members, the psychological identification with party appears greatly to outweigh loyalty to the institution. Levinson notes that when one party holds both branches, presidential vetoes greatly decrease, and delegation skyrockets. Under unified government, “the shared policy goals of, or common sources of political reward for, officials in the legislative and executive branches create cross-cutting, cooperative political dynamics rather than conflictual ones.” [50]

For all that, Congress formally retains the powers it has ceded, and could begin using them to reassert its authority at any time. As Professor Charles Black put it in 1974:

My classes think I am trying to be funny when I say that, by simple majorities, Congress could, at the start of any fiscal biennium, reduce the president’s staff to one secretary for answering social correspondence, and that, by two-thirds majorities, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true, and the illustrations are useful for making [clear] the limits — or the practical lack of limits — on the power of Congress over the president. [51]

If Congress has the power to sell the White House, surely it has the ability to, for example, wind down the Iraq War. No less an advocate of broad presidential power than John Yoo points out that Congress could legally “require scheduled troop withdrawals,” and “shrink or eliminate units,” deployed to Iraq. [52] On *Meet the Press* in January 2007, then-Senator Joe Biden offered the typical rejoinder to such suggestions: hey, don’t look at us,

we're just Congress. When host Tim Russert asked Biden, "Why not cut off funding for the war?" Biden replied, "I've been there, Tim. You can't do it." [53]

Actually, you can. In the early 1970s, Congress successfully used strings attached to spending bills to help wind down our involvement in Vietnam. [54] But it seems to take an enormous waste of blood and treasure before voters provide Congress with sufficient incentive to reclaim its powers over war and peace.

If members' constituents regularly chose to punish them for failing to defend Congress's institutional turf, then we'd expect to see that turf defended. But when the president pushes the envelope of his authority via unilateral action, members tend to object only when that action injures vocal constituents: "the fact that [an] executive order might well be seen as usurping Congress's lawmaking powers, or that it has the effect of expanding presidential power, will for most legislators be quite beside the point." [55] Nor do voters often (ever?) object to laws ceding vast authority to the president.

In fact, in both domestic affairs and foreign policy, delegation holds distinct advantages for individual members of Congress, allowing them to position themselves on both sides of any given issue. At home, they can take credit for reform when they pass a high-minded, broadly worded bill, and they can please their constituents by railing against executive branch agencies that use that broad language to impose unpopular costs. Delegation is a "political shell game," says New York Law School's David Schoenbrod: by passing a vague, expansive statement in favor of environmental protection, such as the Endangered Species Act, Congress curries favor with the majority of Americans who favor conservation. Then, when the Fish and Wildlife Service restricts logging throughout the Pacific Northwest to preserve habitat for the Spotted Owl, congressmen get to rail against the bureaucracy for abuse of the authority delegated to it. [56] Members derive similar benefits when, through delegation or inaction, they leave to the president the final decision to go to war — they get to take credit if the war goes well, and blame the president if things go badly.

Delegation's "shell game" works for Congress in large part because the public, conditioned by the media's relentless focus on presidential action, views the president as "our perennial main character, occupying center stage during almost all dramas in national political life." [57] The fact that the federal chief executive is front and center on the nightly news whenever there's a significant economic downturn, a hurricane, or a terrorist attack reinforces the view that he is the man in charge — responsible for, and capable of, dealing with the emergency of the week, whatever it may be. [58] All things considered, as Professor Levinson observes, the current environment of assertive presidents and "stubbornly passive Congresses bears only a very partial resemblance to the mutually rivalrous self-aggrandizing branches imagined by separation of powers law and theory." [59]

WHAT IS TO BE DONE?

In the post-Watergate era, Congress passed a number of laws designed to relimit presidential power. The failure of those reforms has in turn inspired new proposals to address the problem of congressional abdication at home and abroad. [60]

In 1999, disturbed by President Clinton's late-term flurry of executive orders, Representative Ron Paul (R-TX) introduced the Separation of Powers Restoration Act. That

act would have required presidents to identify the specific constitutional or statutory provisions they're relying on to justify any given executive order and allowed congressmen who believed a particular directive was illegal to challenge it in court. [61]

Others have suggested means by which Congress might bind itself before the fact, restraining its tendency toward overbroad delegations of authority. Post-Watergate Congresses frequently used so-called "legislative vetoes" to retain checks on statutes granting power to administrative agencies. [62] Such provisions, inserted into statutes delegating power, allowed Congress to nullify regulations issued pursuant to the authority delegated; but in 1983 case of *INS v. Chadha*, the Supreme Court took that tool away. [63]

Shortly after the *Chadha* decision, then-judge, now-Justice Stephen Breyer suggested replacing the legislative veto with statutory language stating that "the agency's exercise of the authority to which the veto is attached is ineffective unless Congress enacts a confirmatory law within, say, sixty days." Agencies could recommend particular courses of action, but their recommendations would not have the effect of law until they passed through the normal constitutional channels. [64]

After the GOP takeover of Congress in 1994, some enterprising Republican freshmen introduced a measure based on Breyer's idea. The "Congressional Responsibility Act" went further than Breyer did, applying his confirmatory law requirement to *all* executive branch regulations. The act's sponsors hoped to ensure "that Federal regulations will not take effect unless passed by a majority of the members of the Senate and House of Representatives." [65]

The Separation of Powers Restoration Act and the Congressional Responsibility Act were laudable attempts to rein in executive-branch lawmaking, but each had serious flaws. By giving aggrieved congressmen the right to sue, the Separation of Powers Restoration Act aimed to dragoon the courts into the fight over executive orders. But the judiciary would almost certainly resist such a move. [66] Likewise, forcing Congress to vote on significant federal rules is a noble idea, but the Congressional Responsibility Act presupposes a Congress that's interested in taking responsibility for the law. That is not the Congress we have, or are likely to have, anytime soon. [67]

Similar problems have bedeviled congressional attempts to rein in executive warmaking. The 1973 War Powers Resolution has proved an abject failure: in the 35 years since the resolution's passage, presidents have put troops in harm's way over 100 times without letting the WPR cramp their style. [68] Attempts to enforce the WPR through litigation haven't worked either, as judges are unendingly creative in finding ways to avoid policing interbranch fights.

Various scholars and legislators have considered ways to give the toothless WPR real bite. In his landmark study of congressional abdication of war powers, *War and Responsibility*, Stanford's John Hart Ely proposed a "Combat Authorization Act" that would shorten the WPR's current 60-day "free pass" to 20 days and command the courts to hear suits by congressmen seeking to start the clock — automatically cutting off funding if a judge found that Congress did not authorize the intervention. [69] In 2007, Republican congressman Walter Jones introduced a bill similar to Ely's proposal. Jones's "Constitutional War Powers Resolution" would allow the president to use force unilaterally only in cases involving an attack on the United States or U.S. forces, or to protect and evacuate U.S. citizens. As with Ely's "Combat Authorization Act," the CWPR would give congressmen standing to "start the clock," and would cut off funding should Congress refuse to authorize military action. [70]

In 2005, foreign-policy luminaries Leslie H. Gelb and Anne-Marie Slaughter proposed an even simpler solution to the problem of presidential warmaking: "A new law that would restore the Framers' intent by requiring a congressional declaration of war in advance of any commitment of troops that promises sustained combat." Under the Gelb/Slaughter proposal, any prolonged military engagement would require a declaration, otherwise "funding for troops in the field would be cut off automatically." [71]

Each of these proposals has the merit of demanding that Congress carry the burden the Constitution places upon it: responsibility for the decision to go to war. And it's worth thinking about how best to tie Ulysses to the mast. But the problem with legislative schemes designed to force Congress to "do the right thing" is that Congress seems always to have one hand free. Even if any of these measures became law, Congress would remain free to avoid the pinch: ducking responsibility for new regulations and presidential wars. Statutory schemes designed to precommit legislators to particular procedures have a terrible track record. No mere statute can truly bind a future Congress. In areas ranging from agricultural policy to balanced budgets, Congress has rarely hesitated to undo previously enacted limitations when short-term political advantage beckons. [72]

In *War and Responsibility*, Professor Ely noted that the usual solution offered by those of us who rue congressional abdication is an ineffectual "halftime pep-talk imploring [Congress] to pull up its socks and reclaim its rightful authority." [73] Legislators have little incentive to reclaim that authority unless and until their constituents demand that they do so.

The proper target of that "pep-talk" is really the American people themselves — but there's little reason to expect better results there. Like congressmen, voters face their own collective action problem. The chances that any one person can effect the outcome of national political deliberations are so vanishingly small that voters lack the incentive to gather basic information about politics, much less inform themselves about the political pathologies that accompany overbroad delegation. [74] Anyone with the laudable aim of encouraging a "constitutional culture" among the general public faces daunting obstacles, and we shouldn't expect such efforts to solve our current dilemma anytime soon.

THE AUDACITY OF HOPE?

Where does that leave us? After our century-long drift away from the Framers' vision, are we doomed to spiral down through successive cycles of crisis and centralization?

Rather than closing on a note of despair, let me suggest that there are two long-term trends, at least, that could improve our chances of "right-sizing" the presidency.

The first trend is America's waning dominance abroad. One major factor that led to the growth of the Imperial Presidency was America's increasing global role in the Twentieth Century, and its unrivaled supremacy after the collapse of the USSR. As neoconservative commentator Charles Krauthammer wrote in 1987,

Superpower responsibilities inevitably encourage the centralization and militarization of authority.... And politically, imperial responsibility demands imperial government, which naturally encourages an imperial presidency, the executive being (in principle) a more coherent and decisive instrument than its legislative rival. [75]

As the Twenty-first Century progresses, the United States is likely to distance itself from those responsibilities — and, perhaps, from the presidential powers they enabled.

Fareed Zakaria predicts that China and India's rise, along with waning US power, will, in this century, usher in "the Post-American World." [76] A recent report from the National Intelligence Council, the government agency that advises the US intelligence community supports Zakaria's thesis. That report notes that "Shrinking economic and military capabilities may force the US into a difficult set of tradeoffs between domestic versus foreign policy priorities." [77] Fifteen years from now, the United States will retain enormous military power, but economic and technological advances by other nations, coupled with "expanded adoption of irregular warfare tactics by both state and nonstate actors... increasingly will constrict US freedom of action." [78]

It's possible, then, that shrinking American power, and the emergence of new superpowers, will result in the United States behaving more like a normal country in the international sphere. That in turn could help enable a shift to a "normalized" presidency.

The second long-term trend that may reduce the presidency's power and importance in American life is growing distrust of government, or what I'd prefer to call "skepticism toward power." That trend is one of the most important political developments of the last half-century. In the late 1950s, when pollsters started tracking trust, nearly three quarters of Americans said they trusted the federal government to do what is right "most of the time or just about always" — and most of all they trusted the president. Those numbers collapsed after Vietnam and Watergate. [79]

One of the leading experts on this phenomenon is Vanderbilt political scientist Marc Hetherington. Professor Hetherington leans left, so he takes no joy in reporting what the data have convinced him: that the rise in distrust is going to make it very difficult for any future president to have another FDR- or LBJ-style 100 days. Indeed, supporters of national health care discovered over the last year that distrust's rise made it very difficult for them to achieve that goal. [80] But burgeoning skepticism toward power has also made it somewhat more difficult than it was 60 years ago for presidents to permanently evade legal and political checks when it comes to civil liberties in wartime. [81]

Hetherington notes that in the four presidential elections following the largest decline in political trust (1968, 1972, 1976, and 1992) the party that held the presidency lost it three times. [82] A skeptical public tends to vote for divided government, which in turn leads to greater policing of the executive branch. William G. Howell and Jon C. Pevehouse have found that when the public rewards the opposition party, the result is more vigorous policing of the incumbent administration's conduct, including many more congressional oversight hearings. [83]

In our public discourse — especially in Washington, D.C. — we tend to view distrust as a political pathology. But should we? Skepticism toward power lies at the heart of our constitutional culture, and if it makes it harder for presidents to do great works, it also makes it harder for them to abuse power.

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- [12] *Federalist* No. 51, p. 268.
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- [19] Healy, Gene. "A Profile in Cowardice," *National Review Online*. September 25, 2008. <http://article.nationalreview.com/?q=MmJjNzk5YTRmNDA5OWQxZDBiZWl5ODdmMzI0ZTliOTk=#>
- [20] Section 7(b)(2) of the Military Order provides, "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof." That order has been superseded by the Military Commissions Act (P.L. 109-366) passed on October 17, 2006.
- [21] By holding that the president had exceeded his constitutional and statutory authority in the November 2001 military order the Supreme Court's 2006 *Hamdan* decision forced Congress to act, at which point Congress, in the Military Commissions Act of 2006, codified most of what the president had ordered unilaterally five years before.
- [22] Gallup presidential approval polls, available at <http://www.pollingreport.com/BushJob1.htm>;
- [23] Among other things, the Military Commissions Act of 2006 declared that the Geneva Convention did not apply to non-citizen detainees, and that terrorist suspects could not challenge their detention in American courts. *Military Commissions Act of 2006*, Public

- Law 109-366, *U.S. Statutes at Large* 109(2006): sec. 948(b)(g) “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”, sec. 7(a) “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” However, in *Al-Marri v. Wright*, 487 F.3d 160, (4th Cir. 2007), a case involving a legal resident of the United States picked up on American soil and subjected to military detention, the Fourth Circuit Court of Appeals recently held that, “the MCA was not intended to, and does not, apply to aliens like al-Marri, who have legally entered, and are seized while legally residing in, the United States.”
- [24] The PAA removed the FISA court from individualized review of wiretaps of Americans’ phone calls and emails when the government “reasonably believe[s]” that the targeted person on the other end is outside the United States. *Protect America Act of 2007*, Public Law 110-55, U.S. Statutes at Large 110 (2007).
- [25] *FISA Amendments Act of 2008*, Public Law 110-261, U.S. Statutes at Large 110 (2008).
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- [27] Aaron Wildavsky, “The Two Presidencies,” *Trans-Action*, December 1966.
- [28] Perhaps a third caveat is necessary as well: the war on terror has blurred whatever line once separated foreign and domestic policies; many of the powers that President Bush accrued, and President Obama retains, apply on the home front as well. See, e.g., Jack Balkin, “The Constitution in the National Surveillance State,” 93 *Minnesota Law Review* 1 (November 2008).
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- [42] *See, e.g.*, Jacob Sullum, "Illegal Lending Practices," *Reason Online*, December 17, 2008, <http://reason.com/news/show/130600.html>.
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- [47] *See* David R. Mayhew, *Congress: The Electoral Connection*, (New Haven: Yale University Press, 1974).
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- [61] H.R. 2655, 106th Congress.
- [62] See Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate*, (Ann Arbor: University of Michigan Press, 2005) p. 115: “While they varied in form and stringency, legislative vetoes enabled all or part of Congress to review the executive branch’s use of a given power statutorily delegated to it before the executive decision took final effect.... Often the action could be vetoed—sometimes merely by a committee, sometimes by one chamber, sometimes by both.” Rudalevige cites a study showing that 423 such provisions were passed in the 1970s.
- [63] *INS v. Chadha*, 462 U.S. 919 (1983). Specifically, the Court struck down a one-House veto provision in the Immigration and Nationality Act that allowed either House to veto the attorney general’s decision, pursuant to authority Congress had delegated, to allow a legally deportable alien to remain in the United States. According to the Court, the veto provision at issue violated the Constitution’s requirements of Bicameralism and Presentment embodied in the lawmaking procedure outlined in Article I, section 7.
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- [66] Federal courts rarely welcome the opportunity to sort out fights between the other two branches, and they’ve generally denied standing to congressmen alleging an injury to Congress’s institutional interests. See *Raines v. Byrd*, 521 U.S. 811 (1997), see also Ryan McManus, “Note: Sitting in Congress and Standing in Court: How Presidential Signing Statements Opened the Door to Legislator Lawsuits,” *Boston College Law Review* 48 (May 2007): 739-80.
- [67] It’s often argued that abandoning delegation would be impossible because Congress simply would not have the time to make the laws we live under. There’s some force to that objection, though it ignores the fact that, as David Schoenbrod and Jerry Taylor write,

delegation forces Congress to spend a large chunk of its time constructing the legislative architecture—sometimes over a thousand pages of it—detailing exactly how various agencies are to decide important matters of policy. Once that architecture is in place, members of Congress find that a large part of their job entails navigating through those bureaucratic mazes for special interests jockeying to influence the final nature of the law. Writing such instructions and performing agency oversight to ensure that they are carried out would be unnecessary if Congress made the rules in the first place.

David Schoenbrod and Jerry Taylor, “The Delegation of Legislative Powers,” *Cato Handbook for Policy*, (Washington DC: Cato Institute, 2005) p. 157. But an end to

- delegation—whether piecemeal (as with the Breyer proposal) or wholesale (as per the Congressional Responsibility Act)—would force Congress to prioritize. That might mean a return to prescriptive laws, a new respect for federalism, and a renewed appreciation of the Framers' view that the chief danger to republican government lies in legislative overzealousness, not legislative inaction. A Congress that wanted to reclaim control of the law would have to do less, do it constitutionally, and be held accountable for the results. For most legislators, that's hardly an attractive proposition.
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- [79] Table 5A.1 "Trust the Federal Government 1958-2004," *ANES Guide to Public Opinion and Electoral Behavior*, http://www.electionstudies.org/nesguide/toptable/tab5a_1.htm
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- [81] Jack Goldsmith and Cass R. Sunstein, "Military Tribunals and Legal Culture: What a Difference Sixty Years Makes," *Constitutional Commentary* 19 (Spring 2002): 282, 289.
- [82] Marc J. Hetherington, "The Effect of Political Trust on the Presidential Vote, 1968-96," *The American Political Science Review* 93 (June 1999): 312. Hetherington's article was written before the post-9/11 spike and decline; George W. Bush's reelection would make it three out of five.
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