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Making of the Imperial U.S. President: A Review

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Background

In devising the U.S. Constitution, the Framers adopted a version of Montesquieu's recommended 'separation of powers' among legislative, executive and judicial functions. Innovating on classical endorsements of 'mixed' governments—those with blended elements of kingship, aristocracy and democracy—Montesquieu famously argued that liberty could best be reconciled with effective government by maintaining clear institutional separation among the three great governmental functions. According to the Framers, moreover, separation of the three would conserve liberty by preventing concentration of power in any single branch. In exercise of their delineated functions and in their institutional vigilance over their respective prerogatives, the separate branches would 'check and balance' one another and thereby forestall tyranny. Though adopted somewhat accidentally, separation of powers soon became a touchstone of U.S. constitutionalism.

Perhaps the boldest stroke was in conceptualising the Presidency. It would not be a prime ministership with occupants drawn from and beholden to the legislature, but neither should it be a kingship wielding power vastly disproportionate to Congress. In contrast with monarchies, so thought the Framers, the legislature would be the new republic's 'most dangerous' branch. This was part of the reason for dividing Congress into two branches, Senate and House of Representatives, which could check and balance each other. James Madison and Alexander Hamilton defended the proposed new Constitution against its opponents in a series of newspaper essays called *The Federalist*. In *The Federalist No.*48, Madison underscores multiple factors posing danger of legislative aggrandisement. The legislature's powers are broad and only vaguely limited, he argues, in contrast with executive and judicial functions. Hence the legislature "can, with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The legislature, moreover, wields the crucial powers of taxation and of setting salaries for executive and judicial officers.

In *The Federalist No.70*, Hamilton extols the virtues of "energy in the Executive." Opponents of adopting the Constitution feared

precisely that. Virginia's George Mason, for one, worried that a democratically elected president, with popular support behind him, could become the most dangerous and lawless kind of monarch. Hamilton took pains in *The Federalist No.69* to point out various constraints on power that would make the Presidency a far weaker office than that of British kings. The President is subject to impeachment, he hastened to point out, and his veto on legislation can be overcome by a two-thirds vote of both legislative houses.

The Federalist notwithstanding, textual limits on presidential power are virtually nil. The Constitution specifies only that the President shall exercise 'executive Power' and take care that the laws be 'faithfully executed.' Congressional responsibilities, by contrast, are itemised in detail, partly to establish the federal government's limited power vis-à-vis the states.

Hamilton's analysis proved accurate for the Constitution's first century but increasingly faulty over the course of the second and into the third. During this latter period, presidential power has expanded mightily on both foreign and domestic matters, to the point where some fear that America's constitutional republic has essentially been overthrown. An elective emperor controls levers of power that would have left the Framers aghast, while Congress slips slowly to the margins. Was this the executive presidency's ordained destiny, despite the Framers' intent and Montesquieu's elegant theory? One hopes not, for America's sake and maybe the world's. Complacent in their power to elect presidents, most Americans now accept the office's engorged parameters and never dare suspect that maybe Montesquieu erred. Comparative analysis suggests that presidential regimes rank lower on freedom indexes and higher on corruption than do parliamentary regimes. The U.S. stands out as the great exception, though not entirely and not perhaps forever.

National Security President

The most predictable source for presidential aggrandisement lay in the overlapping zones of foreign relations, foreign policy, defence and war-making. Though such matters were widely

understood as inherently executive in nature, the Framers saw republican danger in this. Accordingly, they divided these functions intricately so as to ensure legislative voice. Most prominently, they reserved to Congress the awesome power to declare war. They viewed exclusive kingly power in this area as the historical source of excessive warfare and burdensome taxation. Under republican government, no single person should have the power to take the nation to war. That power should lie with the people, through their elected representatives. Moreover, the Framers recognised warfare as the single greatest accelerant of executive aggrandisement. "It is in the nature of war to increase the executive at the expense of the legislative authority," writes Hamilton in *Federalist No 8*. Hence, the war-declaring power provided Congress a check against executive usurpation.

Additionally, Article I, Section 8 confers Congress with responsibilities for 'the common Defence,' especially powers to 'raise and support armies,' to 'provide and maintain a Navy,' and to 'make rules for the Government and Regulation of the land and naval Forces.' At the same time, however, Article II confers the President with weighty military responsibility as 'Commander in Chief' of armed forces and with diplomatic authority to 'receive Ambassadors and other public Ministers.' This complex dicing of authority proceeds further in the areas of treaties and diplomatic appointments. The President holds power to negotiate treaties, but they take effect only upon a two-thirds approval from the Senate. Similarly with 'Ambassadors, other public Ministers and Consuls,' Presidential nominees require two-thirds support from the Senate to secure appointment.

At a certain level of abstraction, as Schlesinger points out, this complicated scheme posits presidential control over foreign policy, while allocating the ways and means of warfare to Congress. Aggrandisement of either function may potentially poach on the other. Bellicose presidential foreign policy, for example, must fail if Congress refuses to prepare for war or declare it. At an extreme this may allow Congress to substitute its own foreign policy for the President's. On the other hand, bellicose presidential policy may back Congress into a corner where it feels it must endorse warfare, thereby ceding its purported authority into presidential hands. The check-and-

balance framework may foster a consultative relationship between the two branches on issues of both foreign policy and warfare. But it may also fail to do so where circumstances allow either branch to gain aggrandising momentum. Ultimately, Schlesinger indicates, maintaining the joint framework requires on-going comity between the two branches in the intended constitutional spirit of balancing executive initiative with republican popular sovereignty.

Additional tensions loomed over well-understood situations where the executive might responsibly use military force without a congressional declaration of war. In all such scenarios, the president's authority to wield military force could be thought to spring either from inherent executive authority or from his constitutionally-designated function as Commander in Chief. Situations of invasion or other emergency, for example, might require rapid action without recourse to Congress. Even without outright invasion, hostilities from foreign powers might place the nation in a state of war requiring prompt response to avoid strategic deterioration. Furthermore, foreign events might place Americans or their property in imminent danger, requiring forceful protection. Episodic interventions to protect life and property--especially from rogue, non-state actors--should not require the full machinery of a Congressional declaration.

It was clear, of course, that presidential aggrandisement on these scenarios could effectively usurp Congress's posited power over war and peace. Supposedly exceptional presidential declarations of emergency or states of hostility could, if overused, swallow the rule of Congressional prerogative. Executive unilateralism should ideally be rare, brief and fully-reported to Congress. In theory, executive abuse or poor judgment might subject the President to impeachment and removal by Congress. In the first few decades under the Constitution, however, it became clear that impeachment would operate only against extreme derelictions of duty. This understanding defanged impeachment as a meaningful check on presidential unilateralism.

Aside from comity, however, there remained one other critical restraint on presidential unilateralism. This was the broad consensus that America had no national interest in alliances or

wars outside the Western Hemisphere. In his Farewell Address upon leaving the Presidency in 1797, George Washington counselled his countrymen against partisan entanglement in the intricate power struggles and interminable warfare of the Old World. American involvement would tend to create divided loyalties, stoke U.S. domestic partisanship, destabilise republican institutions and engender persisting antipathy from powers abroad.

"The great rule of conduct for us in regard to foreign nations is…to have with them as little political connection as possible," Washington advised. "It is our true policy to steer clear of permanent alliances with any portion of the foreign world...."

Roughly a quarter-century later, in the wake of Napoleon's wars, the future president and then-serving Secretary of State, John Quincy Adams, counselled that U.S. military force in the name of freedom abroad would do no good but would instead corrupt America herself into still another agent of oppression. America "goes not abroad in search of monsters to destroy." Better for the world that America take pains first, last and always not to lose its republican character at home. He did not need to add what he surely believed: that warfare abroad would inherently threaten republicanism at home, most likely through an aggrandising presidency.

The Washington/Adams consensus against foreign entanglements and war prevailed through the nineteenth century. It was not much tested during that long period of relative peace in Europe. In consonance, there were few signs of executive usurpation. To be sure, President Lincoln asserted broad emergency powers upon outbreak of the Civil War: jailing 'disloyalists' without legal process; summoning and enlarging the armed forces in contravention of authority conferred on Congress; and spending money without congressional appropriation. Even more audaciously, his Emancipation Proclamation freed the slaves in states defying federal authority. He explained his unilateral Proclamation as driven by military necessity in his capacity as Commander in Chief. (He did not spell out the Proclamation's military advantages, though several can be surmised, among them: undermining the South's labour system by de-legitimating

slave docility; giving slaves incentive to aid Union forces; and providing blacks an idealistic rationale for enlisting in those Union forces.) Though slave emancipation was expanded to the entire nation and made permanent by the Constitution's Thirteenth Amendment, other aspects of Lincoln's expanded executive emergency lapsed with the war's end. It was followed by several decades of strong congressional voice in matters of state.

With Theodore Roosevelt's 1901-09 presidential tenure, however, came glimmerings of novel presidential assertiveness. In foreign policy, there was increasing resort to the 'executive agreement' for compacts with foreign governments. Executive agreements foster presidential unilateralism and sometimes even secrecy, as opposed to the treaty power shared between President and Senate. When the Constitution was adopted, treaties were understood as perpetual unless rescinded, while executive agreements concerned single-act obligations. Hence, treaties were the appropriate device for major compacts, while executive agreements were appropriate for lesser ones. The superior convenience of the executive agreement, however, creates presidential temptation to use it more broadly. As decades passed, executive agreements came to be used more and more frequently and on increasingly major matters, as opposed to treaties. During his tenure, Roosevelt accelerated this trend, most notably striking executive agreements with Japan on limiting emigration to the U.S., on maintaining the 'Open Door' policy in China and on recognising Japan's 'special interests' there. Later presidents followed Roosevelt's lead in resorting more and more heavily to executive agreements in foreign policy. With time, the earlier relationship between treaties and executive agreements turned upside down. On major matters where controversy might prevent securing treaty approval from two-thirds of the Senate, Presidents used executive agreements. Meanwhile, treaties came to govern increasingly minor and uncontroversial matters.

Disillusionment with the results of World War I provoked a dramatic uptick in congressional assertiveness on foreign policy. As the troubled twenties became the totalitarian thirties, it grew increasingly clear that President Woodrow Wilson's military intervention to make the world 'safe for democracy' in a 'war to

end all wars' had accomplished neither. Invoking the Washington/Adams tradition, Congress resolved to keep America's future clear of Europe's bloodletting. It controlled foreign policy more tightly than ever before or since. Most Americans supported the congressional Neutrality Act, mandating non-involvement with looming renewed hostilities in Europe, though the Act contravened the presupposition that while Congress should lead on domestic affairs, the President should lead in foreign policy. Many perceived Hitler's regime as uniquely evil, but others at the time were unconvinced, pointing out that neither the Soviet Union nor the French and British empires could qualify as exemplars of democracy or human rights.

Over the course of the decade, however, the administration of Franklin Delano Roosevelt (FDR), along with influential media and portions of the public, began to see the Third Reich as an especially dangerous and aggressive tyranny that must be resisted. Within constraints imposed by the Neutrality Act, FDR launched a series of manoeuvres as the war broke out designed to ensure Great Britain's victory over the Nazis. As the Nazi-Soviet war began, FDR extended assistance to the U.S.S.R. as well. He moved by careful steps, knowing that he would need to win over a sceptical public along with Congress.

In part, FDR sold the anti-Nazi war as essential to America's own safety. A Third Reich controlling all Europe would be poised to strike at America, which therefore faced an emergency calling for prompt executive action. The notion that Hitler could have launched military force across the Atlantic in the teeth of America's far stronger navy struck many as fanciful at the time and seems even more so in retrospect, though Schlesinger still seems to believe it. Closer to plausibility is that the British and Soviets would lose without American assistance and that prolonged Nazi hegemony in Europe would disastrously reverse history's apparent progress toward democracy and human rights.

Scenarios of imminent British or Soviet defeat without American aid also seem exaggerated in retrospect. As it happened, British naval strength stymied Hitler's thought of lunging across the Channel, while Soviet military and industrial muscle ground the

Wehrmacht down across the vast Russian landscape. U.S. aid and eventual arms unquestionably hastened the demise of the Third Reich. In his heart of hearts, FDR may have felt that this alone merited U.S. military intervention. Contrary to the Washington/Adams position, a second war to make the world 'safe for democracy' would work out better than the first one.

Throughout 1940 and 1941, FDR ramped up executive assertiveness in dealing with the world crisis. Without recourse to treaty requiring Senate approval, he arranged by executive agreement the transfer of mothballed destroyers to Britain in exchange for U.S. use of bases on British soil. Constitutional law professor Edward S. Corwin denounced the deal as "an endorsement of unrestrained autocracy in the field of our foreign relations." Also by executive agreement, FDR stationed troops in Greenland, then in Iceland, as forward measures to protect munitions shipments to Britain against U-boat raids and other Nazi countermeasures. As troops went to Iceland, Senator Robert Taft complained that FDR was eroding the exclusive congressional prerogative to declare war. FDR launched naval convoys of merchant ships carrying supplies to Britain, with a 'shoot-at-sight' order regarding German U-boats. This arguably usurped congressional war powers.

But even FDR did not dare neglect Congress on initiating Lend-Lease, the provision of munitions and other critical goods to Britain and later the Soviet Union. He secured Lend-Lease as a measure for avoiding U.S. military involvement, not for hastening it. Congress seemed to accept this rationale, though Lend-Lease clearly aligned America with some belligerents against others.

It is noteworthy that FDR couched his pre-war initiatives in terms of presidential emergency power, not inherent executive authority or exercise of powers as Commander in Chief. In theory, this placed his assertions of power under tighter constraints than otherwise. His assertion of emergency power quickly widened, however, culminating in his announcement of 'unlimited national emergency.' It is unclear whether prolonged aggrandisement could have engendered a constitutional confrontation with Congress over presidential steps toward higher belligerency.

The Japanese attack on Pearl Harbour foreclosed any such possible confrontation. Congress enthusiastically declared war, first on Japan, then on Germany after Hitler recklessly declared war on America, in fidelity to his Japanese ally. Referring increasingly to his powers as Commander in Chief, FDR soon controlled vast agencies on production, mobilisation, information, transportation and so forth. As Schlesinger points out, these agencies sprang largely from presidential initiative, without congressional authorisation. In contrast to its pre-war stance, Congress by and large acquiesced to this 'energy in the Executive' for purposes of running the war.

In view of what the world learned about Japanese and especially Nazi atrocities, quick destruction of the Third Reich and Imperial Japan seems worth the blood spilled. Whether it made the world 'safe for democracy' is a different question, though the war did usher in durable democracies for both Germany and Japan. Eastern Europe, unfortunately, managed only to replace Nazi with Soviet tyranny. Still another question is whether the blood spilled was excessive. FDR's declared policy of 'unconditional surrender' rather than negotiated peace for both Germany and Japan arguably prolonged the war with hundreds of thousands of needless deaths, both military and civilian. In FDR's defence, some argue that rapid democratic makeovers for Germany and Japan could not have occurred without their unconditional surrender. In any case, 'unconditional surrender' was FDR's unilateral pronouncement, meekly accepted by Congress. What might have happened had Congress pronounced otherwise is anybody's guess.

Hard on the heels of victory came confrontation with the Soviet Union, as Stalin installed communist regimes in Eastern Europe and seemed capable, so it was thought, of enchaining Western Europe as well. President Truman's initial Cold War 'containment' policy pursued the limited but vital role of ensuring democracy in Western Europe. Over time, however, the Cold War metastasised into a hyper-vigilant worldwide campaign against communist influence, subversion and military opportunism. A sense of permanent emergency seemed to warrant extravagant extensions of executive authority. When

North Korea invaded the South, Truman decided that quick U.S. military invention was needed to forestall the spread of communism. He sought no declaration of war from Congress, but instead declared a national emergency, citing his Commander in Chief power as authority for ordering armed intervention. Congress quibbled only as it acquiesced.

To be sure, the Korean intervention was first envisioned as a limited 'police action,' reminiscent of past actions to protect American lives and property against rogue actors. North Korea may have been a state but it was some sort of 'rogue' state. The disastrous later decision to invade North Korea, rather than merely repel the North from the South, was also unilateral on Truman's part, reflecting a policy of communist 'roll-back' that rose up in contention with the more modest 'containment' policy. Once again, Congress threw up its hands. Once war is begun, the Commander in Chief must be left to run it. Truman pushed his Commander in Chief prerogative even further when he announced the dispatch of four additional divisions to American forces stationed in Western Europe. Congress sputtered.

Truman met resistance only when, invoking the Korean War emergency, he ordered his Secretary of Commerce to seize and operate the U.S. steel industry, so as to forestall labour strikes that might curtail flows of supplies to the troops. The ensuing legal case reached the Supreme Court, which rebuked Truman's order as unconstitutional. As the justices explained, the President was Commander in Chief of the armed forces, not the whole country, and he could not seize private property without benefit of authorising legislation.

The decade following the 1953 Korean ceasefire saw entrenchment of a worldwide apparatus for stifling communism, supervised by the President (first Dwight Eisenhower, then John F. Kennedy). A far-flung network of foreign military bases and high on-going defence expenditures became hallmarks of permanent 'emergency.' Covert CIA operations meddled with actual or attempted regime change in Iran, Guatemala, Indonesia, Egypt, Laos and Cuba. Potential threats to 'national security' could be seen in any developments anywhere that might

even potentially abet communism. Moreover, widespread commitments to protect other countries from communism wrote a new chapter in the dream of making the world 'safe for democracy.' If strategic alliances against communism meant partnerships with autocratic or abusive regimes, such regimes could be portrayed as at least potential democracies, as opposed to any lands that fell to communism. So much for Washington's warning against permanent foreign entanglements or Adams's admonition that America go not abroad in search of monsters to destroy.

Under Presidents Johnson and Nixon, the Vietnam War and its extensions into Cambodia and Laos brought unprecedented assertions of 'Commander in Chief' authority to wage hostilities without congressional authorisation. Neither bothered declaring emergency. Johnson's State Department lawyers explained that in an increasingly interlinked world, "an attack on a country far away…can impinge directly on the nation's security." They then arrived at a position that nearly eviscerates congressional prerogative over going to war, contending that, "The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress."

The Supreme Court has never taken up the challenge of deciding whether presidentially-ordered military action violates constitutional assignment of the war-declaring power to Congress. The Court has declined to recognise lawsuits challenging presidential military forays as unconstitutional, claiming that no legal standards can be found for determining whether any given armed intervention is or is not beyond proper executive authority. The whole matter is purely a 'political question,' one that can only be resolved through measures, countermeasures and negotiations between the two political branches, Congress and the President. Frustrating though this may be, the Court's reticence may be wise. On a matter where the Constitutional text is so ambiguous and where situations on the ground may vary widely, how could the Court conceivably lay down once-and-for-all rules

on the limits of presidential power? This leaves the question where else to look for such limits.

Presidential self-restraint seems an increasingly unlikely vehicle. Over the past 25 years, presidential unilateralism with military force has undoubtedly been a bipartisan project. Though the Cold War's end might have left the national security state somewhat adrift, the first Iraq war and armed interventions in the former Yugoslavia provided fresh breezes for presidential unilateralism. In none of these interventions was there any congressional declaration of war. As he ordered hostilities in the first Iraq war, Republican President George H.W. Bush sought and secured congressional endorsement, while disclaiming any obligation to do so. Democrat President Clinton proceeded without congressional authorisation for his anti-Serb bombing campaigns in Bosnia and Kosovo, claiming inherent power to act unilaterally. He did likewise with military interventions in Sudan, Somalia and Haiti, not to mention Afghanistan and Iraq (before 9/11).

Needless to say, the post-9/11 'war on terror' has been a bipartisan gale force in presidential sails. Like the Cold War, the 'war on terror' sustains an on-going sense of emergency, justifying extraordinary measures. George W. Bush launched vast military and intelligence operations overseas, including wars in Iraq and Afghanistan, alongside unprecedented domestic mechanisms of 'homeland security.' President Obama has supervised massive monitoring of domestic communications and a globe-spanning 'secret war' of terrorist assassination through drone strikes and other methods.

The 'war on terror' has featured tortured prisoners; innocent persons detained without charges, adjudication or hope of release; and Espionage Act prosecutions at unprecedented levels. It is difficult to decide whether to be troubled more by the current national security state's stealthy surveillance at home or its too-frequent destructiveness abroad. To be sure, there are dangerous people in the world who want to hurt America while they impose new tyrannies. But we need to weigh that menace soberly against

the potential danger and tyranny of the imperial presidency protecting us.

Administrative President

From their earliest days under the Constitution, Americans wrangled over the proper scope of federal government action on domestic issues. Opposing political parties, for example, were strongly defined by whether they favoured or disfavoured active federal effort to promote economic development. With the dawn of the twentieth century, both major political parties spawned factions favouring a larger federal role in ameliorating domestic problems previously left for the various states to address on their own. In time, often against great resistance, this viewpoint would engender construction of today's vast federal regulatory/welfare state. Often attributed to the exigencies of a closely-interdependent national-scale economy, this state greatly expands the operational scope of both Congress and the Presidency, not to mention the federal judiciary. President Theodore Roosevelt, promoting a more active federal government, became an advocate of presidential assertiveness vis-à-vis Congress in a fashion that prefigured the rest of the twentieth century.

On the domestic front, Roosevelt speechified on broad presidential power to act in times of 'crisis,' without specific legal authority. When "great national crises arise,"" as he explained, "it is the duty of the President to act upon the theory that he is the steward of the people." He seemed to be thinking that because the President is elected by the whole people (albeit indirectly, through the Electoral College), he enjoys ultimate democratic legitimacy to do whatever he thinks urgently needs doing, unless "forbidden by the Constitution or by the laws." This theory of plenary presidential power was a far cry from Madison's insistence in *The Federalist No.48* that the President--"bound within a narrower compass"—was less dangerous than the legislature. The devil, of course, lay in details of how a President might define 'crisis.'

Aside from high-flown rhetoric, Roosevelt cast an unprecedentedly jaundiced eye on congressional requests for

information about executive branch operations. As Schlesinger indicates, such requests historically had been honoured as a rule, within an understanding that refusal should be exceptional and for compelling reasons only. The congressional prerogative to secure executive branch information applied especially on domestic matters, less so on foreign policy. Roosevelt, however, refused a Senate request for documents on why his administration had failed to take certain legal actions against United States Steel. He boasted that the Senate could get hold of the documents only by impeaching him.

Though it is perhaps conceivable that expansion in the powers of all three federal branches could proceed without altering the pre-existing balance among them, such an outcome seems unlikely. More probable is that the pre-existing balance would come loose, that wobbles would ensue and that a new constellation of forces would emerge. Put another way, the expanded federal government challenges the check-and-balance republic with issues the Framers could never have imagined. Though it may not have been inevitable, an enlarged federal government has unquestionably expanded executive power relative to Congress. We may well wonder whether this expanded domestic Presidency remains within bounds of a check-and-balance republic.

A sea change in federal domestic policymaking came with the 1933 onset of FDR's presidency. In response both to the Great Depression and ideological proclivities, FDR and his Democratic Party in Congress launched sweeping socio-economic initiatives, unprecedented in both breadth and scale. They focused on what some have called the three Rs: relief, recovery, reform. Legislation included the National Industrial Recovery Act, the Agricultural Adjustment Act, the Securities Acts of 1933 and 1934, the Social Security Act, the Banking Act, the National Labour Relations Act and the Fair Labour Standards Act, to name just a few. New agencies included the Securities and Exchange Commission, the Social Security Administration, the Works Progress Administration, the National Labour Relations Board, the National Recovery Administration, the Federal Deposit Insurance Corporation, the Federal Emergency Relief Administration and the Farm Security Administration

The scope of laws to be 'faithfully executed' by the President soared, as did the size of administrative bureaucracy he supervised. Again, there is no reason in logic why this expanded power need outpace the simultaneous expansion in Congress's domestic prerogative. Congress still held the taxation and appropriation powers. Moreover, in theory at least, Congress could enact detailed laws and regulations constraining executive discretion in administering the expanded federal state.

Almost from the outset, however, Congress saw this as a chore beyond its capacity. Perhaps not foreseeing the full implications, perhaps daunted by the sheer potential workload, Congressional Democrats seemed to think their popular President should be trusted to steer the ship of state out of what could be seen as a domestic emergency. It tended to legislate in broad and general terms, leaving interpretation to executive judgment. This began taking the form of express congressional delegation of rule-making authority to executive departments and agencies. The constitutionality of doing so soon came under challenge. Was this a delegation of the law-making function from Congress to the executive, thereby violating the constitutionally mandated separation of powers?

The Supreme Court came to rule that such delegation was not inherently unconstitutional. After enacting broad legislative mandates, Congress may relegate detailed rule-making to specialised executive bodies, within constraints preserving the requisite separation of powers. Separation of powers requires that Congress articulate some 'intelligible principle' to guide executive branch rulemaking under a delegating statute. This is not a demanding requirement. The 'intelligible principle' can be gleaned from a statutory declaration of policy or purposes and need not be precise or detailed. Over dozens of cases examining delegated authority, the Supreme Court has found 'intelligible principle' even in such vague phrases as 'just and reasonable,' 'public interest,' 'unfair methods of competition,' and 'requisite to protect the public health.'

Of course, Congress may pass legislation overturning administrative rules or actions that it disapproves. This preserves

legislative supremacy but it is not the 'separation of powers' the Framers intended. Delegated authority may be nearly inevitable in governing complex modern societies. But it poses a question whether an eighteenth century check-and-balance republic can meaningfully operate in the twenty-first century.

Administrative agencies typically perform three major functions. First, they issue binding rules and regulations under their delegated authority. Second, through an office of general counsel, they investigate possible rule breaches and prosecute alleged perpetrators, seeking infliction of administrative penalties. Third, through 'administrative law judges,' they adjudicate prosecutions contested between the agency and those accused. Tellingly, these three functions reproduce Montesquieu's separation of powers among legislation (rulemaking), execution (investigation and prosecution) and adjudication (administrative law judge rulings). Equally telling, however, is that this facsimile 'separation of powers' occurs entirely within the executive branch.

For several decades in the twentieth century rise of America's administrative state, Congress sought to conserve a check-and-balance constitution through a device called the legislative veto. In this context, the legislative veto was a statutory provision allowing one or both houses of Congress, sometimes even a Congressional committee, to reverse an agency action for contravening the statute's meaning or purpose. Hence, Congress could retain a check on executive waywardness or aggrandisement. At its height, some 200 statutes featured some form of legislative veto.

This came to a crashing halt with the Supreme Court's 1983 ruling, *Immigration and Naturalization Service v. Chadha*. *Chadha* ruled the legislative veto unconstitutional after some five decades of common practice. An exercise of legislative veto, as the Court reasons, is essentially a legislative act. As such, according to constitutional fundamentals, it has no force of law unless presented to the President for signature or veto. This presidential presentment requirement forms part of the Framers' deliberate design for preventing autocratic government. The legislative veto, which tampers with that design, therefore cannot stand.

Three justices resisted this sudden overthrow of the legislative veto. A stern dissent warned that the legislative veto provided Congress a crucial accountability check over the executive.

> "Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role."

In its faithful textualism, *Chadha* purports to stand for a constitutional design against autocratic government. In doing so, however, it ignores the vast and looming threat of autocratic government posed by the presidentially-supervised administrative state. The legislative veto is precisely in the spirit of forestalling autocratic government. *Chadha* exalts the Constitution's text about autocratic government over an actually existing threat never imagined by the Framers.

Chadha, according to its dissenters, mistakes the whole point of the presidential presentment requirement and winds up topsy-turvy on the issue of preventing one branch from aggrandising on another.

> "The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defence, a reservation of ultimate authority necessary if Congress is to fulfil its designated role under Article I as the nation's lawmaker."

The dissent goes on to question *Chadha*'s presupposition that the legislative veto represents an exercise of 'lawmaking.' "The power

to exercise a legislative veto," insists the dissent, "is not the power to write new law without…presidential consideration."

Only a year after *Chadha* came a second Supreme Court ruling that helps insulate executive branch agencies from congressional constraint. How much latitude should agencies enjoy in interpreting and applying congressional statutes they administer and enforce? In theory, courts could curb agency power by overruling departures from congressional purpose as courts interpret it. Courts would thereby serve as Congress's watchdogs over executive branch tomfoolery. In *Chevron v. Natural Resources Defence Council*, however, the Supreme Court declined such a role. Instead, courts should honour any 'permissible' statutory interpretation an agency adopts. This green light follows from congressional delegation of administrative policymaking to agencies presumably expert on particular subjects. Hence there should be 'administrative deference' by courts to agencies in interpreting congressional statutes. This makes perfect sense on its own terms, but fails to reckon with its impact on the balance of power between executive and legislature. Impact in favour of the executive only grows as, in a simultaneous development discussed below, agency heads have increasingly become presidential loyalists, not neutral experts.

Bipartisan Power-Grabbing President

Recent decades have seen an acceleration of presidential aggrandisement that exploits Constitutional ambiguities as to executive and legislative prerogatives. The books listed above portray these developments as a kind of 'tipping point' for a nearly irreversible imperial presidency. Schlesinger argues that Nixon attained new heights of presidential imperiousness in domestic matters. He did so in three crucial ways capable of establishing on-going precedent.

First, he greatly expanded use of 'impoundment': refusal to spend congressionally-appropriated funds. Prior to Nixon there had been only isolated episodes of impoundment, as when Jefferson

postponed layouts for gunboats until a better class of craft became available. Nixon, by contrast, practiced 'policy impoundment,' meaning that he refused to expend funds based on simple disagreement with congressional policies standing behind particular appropriations. He claimed inherent executive authority to do so on grounds of keeping taxes low or preventing spending that could fuel inflation. Since all government expenditures implicate both taxes and possible inflation, Nixon under this rationale could override Congress on any spending matter he chose. He claimed, in effect, a second veto on legislation, one that Congress could not reverse by two-thirds vote as with normal presidential vetoes authorised by the Constitution. In the case of the Water Pollution Control Act, he refused to execute the law even though Congress *had* already overridden his earlier veto. Nixon asserted power to practice impoundment without declaring emergency, without requesting congressional reconsideration and without even giving notice.

Second, Nixon asserted novel use of the so-called 'pocket veto,' stemming from a curious wrinkle in constitutional text. Ordinarily, a bill enacted by Congress and presented to the President must be either signed into law or vetoed and returned to Congress, which may override the veto by a two-thirds vote in both houses. When Congress adjourns within ten days after presentment, however, the President may simply 'pocket' the bill without either signing or returning it. Such a bill fails to become law, just as if vetoed, but this 'pocket veto' may not be overridden as such. If it wants the bill enacted into law, Congress must take it through the entire legislative process another time. One apparent purpose of the pocket veto is to prevent placing the President under time pressure either to sign a bill or compose a veto message. If Congress feels a bill is important, it should get it to him before the last minute so that he may properly ponder it.

Prior to Nixon, the pocket veto was used for minor matters and by and large only upon a given Congress's final adjournment or at least the end of a session. Nixon, however, used it aggressively not only when Congress went out of session but when it went into recess. Like impoundment, this provides an override-free means of contravening congressional policy making. One bill, passed 64-

1 in the Senate and 345-2 in the House of Representative, authorised grants to support family medical practice. On a bill passed with such overwhelming support, a conventional veto would surely meet with congressional override. Justifying his pocket veto, Nixon pointed out that Congress was away on Christmas break.

Third, Nixon ramped up assertion of 'executive privilege' against congressional requests for information. Some view congressional power to investigate executive branch incompetence and corruption as equal in importance to the law-making function. There is no constitutional text supporting presidential privilege against such power. It soon became accepted, however, that presidents may rightly assert privilege in matters of special sensitivity or to forestall a course of harassment from Congress.

Following Theodore Roosevelt's dubious precedent, Nixon converted the exceptional into the normative. Necessary communications within the executive branch, he suggested, require an atmosphere of candour. As with lawyer-client and doctor-patient relationships, such candour cannot thrive without guarantees of confidentiality. Just as with lawyer-client and doctor-patient communications therefore, executive branch communications must be shielded from inquiring eyes. The logic is strong but it is easy to see how it leads straight to secret government, contravening fundamental republican principle. In a republic, with exceptions to be sure, the executive branch must operate not in an atmosphere of confidential candour but in an expectation of disclosure, however inconvenient that may be. Lawmakers were astonished to hear Nixon's attorney general assert that Congress could not compel disclosure from any executive branch employee if the President determined that it might impair exercise of his constitutional functions. If allowed to stand, this position could effectively nullify Congress's long-recognised investigatory prerogative, leaving as a check only its appropriations power, along with whatever might be made of impeachment.

Presidents since Nixon have continued to innovate in acquisition of power. What follows is a brief catalogue of key innovations.

Presidential Appointees and White House Staff

Recent decades have seen dramatic increases in the number of presidential appointees to departments and agencies and in the size of White House staff. The swelling number of presidential appointees supplants civil service professionalism with political loyalism. Meanwhile, from FDR's unprecedented six 'presidential assistants,' White House staff in recent years has routinely exceeded 500. Such staff, characterised by intense presidential loyalty, has meanwhile acquired increasing policymaking authority over or aside from the permanent departments and agencies. Just one example is the proliferation of so-called White House 'czars' on things like drugs, energy, e-commerce, domestic policy and whatever.

Executive Orders and Presidential Directives

'Executive orders' and 'presidential directives' allow Presidents to control regulatory policy in derogation of agency expertise and congressional mandates. Neither device holds any constitutional warrant or statutory basis. In his anti-regulatory viewpoint, President Reagan ordered that agencies submit all proposed regulation to a White House Office of Information and Regulatory Affairs (OIRA), empowered to kill any rulemaking that did not pass its 'cost-benefit' analysis. Favouring more active regulation by contrast, President Clinton used OIRA to impose particular White House agendas on rulemaking agencies. It is not clear what either Congress or the Supreme Court could do to stem such White House centralisation of regulatory policy or prevent its careening beyond rule of law boundaries.

Signing Statements and 'Executive Constitutionalism'

Presidential 'signing statements' set the White House up in independently ruling congressional legislation unconstitutional, while what Ackerman calls 'executive constitutionalism' sets the White House up as authority on the constitutionality of its own actions.

In 'signing statements,' the President signing a bill into law pronounces some portion of it unconstitutional and declares that he will therefore not enforce it. This side-steps the Constitution's textual veto mechanism and may covertly allow the President to substitute his own policy preferences for Congress's. Because the ten-day window for signing legislation leaves scant time for careful analysis, signing statements can be disturbingly *ad hoc*.

By contrast, 'executive constitutionalism' refers to the highly-polished professional work churned out by the Justice Department's Office of Legal Counsel (OLC) and the office of White House Counsel (WHC). Both offices produce constitutional analyses of presidential initiatives on par with the sophisticated output of Supreme Court justices and clerks. The problem is that OLC/WHC analyses almost invariably conclude that the presidential initiative in question is constitutional. Rather than acting as neutral constitutional evaluators, both offices view the White House as its client. Though the Supreme Court can ultimately pronounce the presidential initiative unconstitutional, it must wait for an on-point 'case or controversy' before it can issue a constitutional rebuke. By that time, the President's 'first mover' advantage and the prestige of OLC/WHC work product on the President's behalf may have established facts on the ground that the Court cannot easily undo.

Celebrity President

Aside from the national security state, the administrative state, and successful grabbinessin separation of power's grey areas, imperial presidentialism thrives on the increasing charisma of the office itself. Presidential charisma gains momentum from merger of functions as head of government (as with prime ministers) and head of state (as with kings). Head of state ceremonial functions such as receptions, award ceremonies and foreign travel seem trivial only if one ignores the media hype of such events.

Classical writers regarded demagoguery as democracy's chief danger. Both television and the presidential primary system favour the rise of candidates without track records in

statesmanship or party leadership. In recent decades, presidential primaries and incessant television have favoured charismatic outsiders, often with gifts of eloquence, over seasoned politicians. Kennedy, Carter, Reagan, Clinton, and Obama may all be examples of this. Though their presidencies may compare well with those of consummate insiders like Johnson and Nixon, the outsider cinematic trope of 'Mr. Smith Goes to Washington and saves America' remains a distracting popular delusion. The celebrity presidency seems to culminate in late night entertainment show appearances. The curious indignity of such exposure seems outweighed by its popularity.

Remedies?

The books listed here offer a variety of possible remedies for excessive presidentialism. Schlesinger, selectively focused on war-making power as the base for imperial presidency, suggests a less interventionist and militarised foreign policy. Though this ignores the administrative state and other drivers of presidential aggrandisement, the advice is welcome nonetheless. Obama illustrated the pitfalls of adventurism in his Libya campaign to stifle the dictator Qadaffi. The result of Qadaffi's demise has been heightened jihadi influence not only in Libya, but also in Algeria, Tunisia, Egypt and Mali, just for starters.

Since presidential incentives lie toward grandiose adventurism, a sceptical public speaking through Congress can provide indispensible restraint. It was a relief when Obama sought congressional approval for intervening against Syria's dictator Assad. This would almost certainly have aided jihadis again, while raising levels of instability and violence. Based upon precedent, Obama could easily have ignored Congress and acted unilaterally. In a new chapter we hope, he heeded a war-weary U.S. public, speaking through Congress: 'Don't do something. Just stand there.' From their graves, Washington and John Quincy Adams surely applaud America's rejuvenated instinct that armed force to 'do something' about foreign disasters is itself probably a disaster.

To fortify that sceptical public, Schlesinger wants to revitalise congressional prerogative over war and peace. He suggests legislation that would require the President to: 1) report fully, promptly and continuously, with justification, on all hostilities he orders; and 2) terminate hostilities upon a congressional vote that they cease. Such legislation, fostering consultation between the two branches, would protect presidential power to act quickly in the face of exigency while honouring the Framers' intent that a republican legislature should decide ultimate questions of war and peace.

Buckley scarcely conceals his yearning to replace the presidency with something more akin to a premiership. But he admittedly has little to offer for ameliorating the existing imperial presidency.

One suggestion is that Congress sponsor non-binding national referenda on key issues, the results of which could be used to strengthen congressional bargaining leverage against presidents. This vague notion seems pertinent only for situations where the President is strongly on the wrong side of public opinion and Congress on the right side. It also seems to presuppose a united Congress in place of the strongly- and evenly-divided Congress that actually exists these days.

Buckley also advocates liberal use of impeachment, suggesting that this would foster presidential deference to Congress. But liberalised impeachment would require overturning established understanding of 'high crimes and misdemeanours' needed to remove a President from office. 'High crimes and misdemeanours' would need to evolve from serious official misconduct under its current meaning to something more like simple maladministration or even defiance of congressional will and policy. This would make impeachment akin to parliamentary 'no confidence' votes on prime ministers. If such an evolution ever takes place, it will not be soon. Though the lower standard may actually embody what the Framers imagined, the current high standard has entrenched itself in subsequent interpretation.

Among the books reviewed here, Ackerman's is richest in suggesting remedies. I will briefly restate three of his suggestions. Though none can be counted as likely developments, Ackerman earns strong marks for effort.

Sharp Statutory Constraints on Emergency Military Powers

Under this proposal, military force could not be used without a congressional declaration of war, except in presidentially-declared emergencies. Declared emergencies would be limited by period deadlines unless renewed by congressional authorisation. Each succeeding renewal of a declared emergency would require higher levels of congressional approval: from majority, to two-thirds, to three-quarters, and so on. As Ackerman speculates, this would pressure Presidents to be forthcoming and persuasive about prolonged emergencies, would provide Congress a statutory basis and responsibility for evaluating uses of force, and would constrain use of force to compelling situations.

Senate Confirmation of Key White House Policymaking Staff

The original idea of Senate confirmation was that presidents should not wield unilateral prerogative in appointing key officers like ambassadors and department heads. This spirit has been circumvented by the expansion of White House staff and its increasing policymaking power, combined with the idea that the President should be able to appoint his own staff. The meaning of presidential 'staff' has morphed from office help to policymaking czars. As things stand today, the Senate confirms minor ambassadorships while the President enjoys a free hand in appointing powerful officials like the National Security Advisor. In this context, requiring Senate confirmation for high-level White House policymaking staff makes perfect sense. Ackerman's discussion focuses heavily on the bargaining between executive and legislative branches before such a reform could be enacted.

'Supreme Executive Council'

Under the requirement of an actual 'case or controversy' with adversary litigants, it has long been established that the Supreme Court will not issue 'advisory opinions' on constitutional issues. Ackerman proposes an executive branch quasi-judicial substitute to issue 'rulings' on the constitutionality of presidential initiatives. Nominated by the president, confirmed by the Senate, holding office for a set term, members would evaluate presidential initiatives professionally but neutrally, like a court. This would

balance out the prestige of OLC/WHC opinions on presidential power. It would check practices such as slapdash 'signing statements' and defiance of congressional statutes or intent. Though the president could refuse to comply with adverse rulings, the public, press and Congress would get an alert that something was amiss. The president would face meaningful political pressure. Over time, Ackerman suggests, Council rulings might even tempt the Supreme Court to modify its 'advisory opinion' and 'political question' doctrines so as to issue more robust constitutional rulings limiting executive power.

Conclusion

The American Presidency has been explained and defended in terms of Montesquieu's theory that 'separation of powers' secures republican liberty and good governance. There is increasingly strong reason to think that whatever America has achieved in republican liberty and good governance comes in spite of not because of this separation of powers. In view of today's Presidency, both America and the world may need to reconsider 'separation of powers' U.S.-style.