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Power Above Principle: How Conservatives Came to Embrace Presidential Power

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“When the President does it, that means that it is not illegal.”

Richard M. Nixon, Nixon-Frost Interview

“I have an Article 2 where I have the right to do whatever I want as President.”

Donald J. Trump, July 23, 2019

“And if a president does something which he believes will help him get elected, in the public interest, that cannot be the kind of quid pro quo that results in impeachment.”

Alan Dershowitz, January 30, 2020

There was a time, when there was a healthy debate in the United States over the size, scope, and power of the American presidency.¹ Lamentably, that debate is all but over.²

In the early twentieth century, the United States had a presidency limited in size, scope, and power.³ The U.S. was only just emerging as a world power, and given the demands placed upon the office as well as the more limited public expectations, the presidency could be smaller, less powerful, and less ubiquitous.⁴

But in the aftermath of the Great Depression and then World War II, Americans began to embrace presidential power as the solution to the

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1. William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507-08 (2008).

2. *Id.* at 506.

3. David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 509-11, 513-16, 526 (2012).

4. *Id.* at 508, 529.

problems of government.⁵ While the Constitution creates a limited presidency that is enshrined within a separation of power and check and balance system, as the United States grew into an international power, so too did the presidency grow in its power.⁶ Initially, conservatives opposed the rise of presidential dominance, favoring a more balanced and congressionally-driven model of governance.⁷ Eventually, conservatives began to migrate towards embracing a big presidency as a tool to achieving conservative ends.⁸ This migration began alongside the Cold War, when conservatives championed a muscular foreign policy presidency to stop the rise of Communism.⁹ Then, with the presidency of Ronald Reagan, conservatives began to see the virtues of a big presidency in domestic policy as well.¹⁰ This trend continued with George W. Bush and the post-9/11 presidency, where claims of plenary power unencumbered by constitutional restraints or congressional and judicial oversight, posited a “unitary executive” theory of presidential power that was both imperial and divorced from constitutional restrictions.¹¹ Both at home and abroad, the age of the conservative big presidency was established.¹² The presidency of Donald J. Trump increased the power of the presidency via a series of claims that the president was indeed, above the law.¹³ This essay describes the transition from the desire for a balanced governance model to the push for a more powerful President, and examines the consequences of both liberal and conservative ideologies growing in prominence.¹⁴

As the Grateful Dead said, “What a long strange trip it’s been.”¹⁵ Long, indeed. The evolution of the Presidency has taken more than half a century.¹⁶ As for the strange part, to anyone born in the aftermath of World War II, to see conservatives shift from being advocates of small government and limited executive power to today’s chief proponents of a “unitary executive” theory of power and an advocacy of a unilateral presidency, the transformation—as well as the intellectual distance traveled—is breathtaking.¹⁷

5. Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 740 (1998).

6. See Gartner, *supra* note 3, at 533.

7. Nelson Lund, *The Cult-ivation of Executive Power*, 11 GREEN BAG 513, 513 (reviewing GENE HEALY, *THE CULT OF THE PRESIDENCY* 2008).

8. *Id.* at 515-16.

9. *Id.*

10. Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 690-91 (2005).

11. *Id.* at 729-30.

12. *Id.* at 730.

13. See *infra* “Donald Trump and the Death of Conservatism”.

14. See *infra* “The Devolution of the Presidency”, “Selected Supportive Court Decisions”.

15. THE GRATEFUL DEAD, *Truckin’*, on AMERICAN BEAUTY (Warner Records Inc. 1970).

16. See *infra* “The Devolution of the Presidency”.

17. See Yoo, *supra* note 10, at 730.

From the New Deal and the presidency of Franklin D. Roosevelt, came the modern split of the Republican and Democratic parties.¹⁸ The Democrats were an unlikely combination of liberals and Southern conservatives, while the Republicans occupied by the political right were joined by Wall Street, Main Street, and Easy Street, to create a conservative coalition.¹⁹

The Republicans developed their identity by contrasting themselves with the New Deal Democrats, who established a welfare state out of the ashes of the Depression of 1929.²⁰ The face of the welfare state was FDR, and the Republicans not only opposed Roosevelt, but they were also hostile to the growth of presidential power, going so far as to lead the charge to limit presidential terms via the 22nd Amendment, and to see presidential power as a threat to liberty.²¹ The post-World War II Republicans became the party of “no” to the New Deal and welfare state, and the party of “less” government.²²

THE DEVOLUTION OF THE PRESIDENCY

Public and scholarly attitudes about the presidency have fluctuated dramatically in the past seventy years.²³ When Franklin D. Roosevelt brought his unique style and political skill to meet the challenges of the Great Depression and World War II, the presidency became a “modern institution,” which transformed the White House into a vital center of the American political process.²⁴ FDR, considered by most scholars to be one of our nation’s greatest presidents, was a powerful and effective chief executive.²⁵ Under FDR’s leadership, the presidency became the primary catalyst of the American government.²⁶ Because of this, America began to look to the federal government and the President as the nation’s problem solvers.²⁷ The federal government’s power expanded, and with it, presidential responsibilities, ending the era in which a President, such as Calvin Coolidge could claim that his greatest accomplishment was minding his own business.²⁸ Big government led to big presidency.²⁹

18. *Id.* at 604-05.

19. Becky Little, *How the ‘Party of Lincoln’ Won Over the Once Democratic South*, HISTORY (Apr. 10, 2019), <https://www.history.com/news/how-the-party-of-lincoln-won-over-the-once-democratic-south>.

20. *See* Yoo, *supra* note 10, at 604-05.

21. *Id.*

22. *Id.*

23. MICHAEL A. GENOVESE, *THE PRESIDENTIAL DILEMMA: REVISITING DEMOCRATIC LEADERSHIP IN THE AMERICAN SYSTEM* 18 (3rd ed. 2011).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. GENOVESE, *supra* note 23, at 18.

29. *Id.*

Roosevelt was successful at expanding the role of the Presidency alongside the expansion of the government.³⁰ In fact, he was so successful that he transformed the presidency and changed public attitudes about the role.³¹ A “cult of the presidency” began to develop, wherein the office was elevated far beyond the intent of the Framers or the power resources constitutionally given to the Executive.³² The public began to expect, even demand, that the President *solve* problems.³³ Power became more centralized, expectations focused on the presidency, and the road to power ran directly to the White House.³⁴

Roosevelt created expectations of presidential power and leadership that would be imposed on his successors.³⁵ This “heroic” model of presidency was established as a result of FDR’s leadership, and presidential scholars promoted the model as good and necessary.³⁶ From that point on, all presidents would be in FDR’s shadow.³⁷

Elected as President four times, FDR was powerful, popular, and charismatic.³⁸ He got the system moving.³⁹ Increasingly, the presidency became more powerful, more personalized, and the United States was transformed into a President-centered government.⁴⁰ It was in this era, which political scientist Thomas E. Cronin called the “Superman” or textbook image of the presidency, took root.⁴¹ Roosevelt planted the seeds that would grow into a view of the institution of the presidency as the seat of power, benevolence, and wisdom.⁴² As Robert Spitzer notes, “Roosevelt would become the yardstick by which every future president would be measured.”⁴³ High standards indeed.⁴⁴ Roosevelt guided the nation through the Great Depression, led the nation to the eve of victory in World War II, and utterly transformed the presidency.⁴⁵ Roosevelt was a great president, but the myth

30. *Id.*

31. *Id.* at 18-19.

32. *Id.* at 19.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. WILLIAM E. LEUCHTENBURG, *IN THE SHADOW OF FDR* 301 (Cornell Univ. ed., 3rd ed. 2001); PHILIP ABBOTT, *THE EXEMPLARY PRESIDENCY* 181 (1990).

38. GENOVESE, *supra* note 23, at 19.

39. *Id.*

40. *Id.*

41. Thomas E. Cronin, *Superman, Our Textbook President*, *THE WASHINGTON MONTHLY*, Oct. 1970, at 47, 47-49.

42. GENOVESE, *supra* note 23, at 19.

43. ROBERT J. SPITZER, *PRESIDENT AND CONGRESS* 36-37 (Peter Labella & Fred H. Burns eds., 1993).

44. GENOVESE, *supra* note 23, at 19.

45. *Id.*

of FDR took on even greater stature.⁴⁶ An inflated view of Roosevelt passed for fact in popular and scholarly conceptions of the presidency.⁴⁷ He was never really as popular or as powerful as he is remembered.⁴⁸ But if FDR's presidency is the yardstick for presidential success, could any mere mortal be expected to live up to such Herculean standards?

Could Roosevelt's perceived wisdom, virtue, and power extend beyond one man and be embodied in an institution? When FDR died in office toward the end of World War II, his vice president, the diminutive Harry S. Truman, became President.⁴⁹ How could Truman fill the shoes of FDR? How could this interloper presume to grasp and use the power of this grand institution?

TILTING AT PRESIDENTIAL WINDMILLS

Several conservative scholars, such as James Burnham, Willmoore Kendall, Alfred de Grazia, and James Buchanan, sounded the alarm on the growing threat of presidential aggrandizement.⁵⁰ Edward S. Corwin, a conservative scholar, raised concerns that the post-New Deal, post-World War II presidency was growing in power at the expense of constitutional restraints.⁵¹ And while authors recognized the reasons for the rise in presidential power, they also saw the threat posed by presidentialism.⁵² But, their concerns were largely dismissed, as the addictive drug of presidential power seemed an elixir that served the needs and interests of the American public.⁵³

Truman assumed the presidency in the final days of World War II.⁵⁴ In an effort to hasten an end to the war, he ordered the atomic bomb(s) dropped in Japan.⁵⁵ After the war, it was Truman who devised the "containment" policy toward the Soviet Union—a policy which each succeeding president would follow, more or less, until 1989 and the end of the Cold War.⁵⁶ It was Truman who established the Marshall Plan, helped establish the North Atlantic Treaty Organization (NATO), and led the United States back to a

46. *Id.*

47. *Id.*

48. *Id.*

49. GENOVESE, *supra* note 23, at 19.

50. G. Patrick Lynch, *Protecting Individual Rights Through a Federal System: James Buchanan's View of Federalism*, 34 PUBLIUS 153, 153 (Fall 2004); ALFRED DE GRAZIA, *REPUBLIC IN CRISIS: CONGRESS AGAINST THE EXECUTIVE FORCE* 37-38 (1965); Willmoore Kendall, *The Two Majorities*, 4 MIDWEST J. POL. SCI. 317, 317-18 (1960); JAMES BURNHAM, *CONGRESS AND THE AMERICAN TRADITION* 162-63 (1959).

51. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, 28 (4th ed. 1957).

52. GRAZIA, *supra* note 50, at 37-38; CORWIN, *supra* note 51, at 28; C. PERRY PATTERSON, *PRESIDENTIAL GOVERNMENT IN THE UNITED STATES: THE UNWRITTEN CONSTITUTION* 74 (1947).

53. Marshall, *supra* note 1, at 515-17.

54. GENOVESE, *supra* note 23, at 20.

55. *Id.*

56. *Id.*

post-war domestic economic revival.⁵⁷ It was also during Truman's presidency that the Korean War began.⁵⁸

To the surprise of most of his contemporaries, Truman became an effective President, even though his popularity could never match that of FDR, and it would be only after he left office that his contribution was appreciated.⁵⁹ Truman embodied a sense often expressed as follows: Surely if *he* can do the job, there must be something inherent in the office that brings out greatness in even the most common of men.⁶⁰ Thus, the "FDR halo" was born, which could be passed down from President to President, a kind of magic that seemed to confer special powers on the occupant of the White House.⁶¹

When Dwight D. Eisenhower (Ike), a Republican, became President in 1953, he lent a bipartisan air to the majesty of the office.⁶² While not an activist President, Ike did manage to exert a hidden-hand type of leadership in an era when the public seemed anxious to take a break from the hurly-burly world of politics.⁶³ After all, the United States had been through the Depression in the 1930s, a world war in the 1940s, and a nascent Cold War in the late 1940s and early 1950s.⁶⁴ By the Eisenhower era, the American people wanted a rest.⁶⁵ Ike, with a low-key, almost apolitical style, gave them what they wanted.⁶⁶ Ike was amazingly popular, especially for a President who seemed to do so little, and his popularity extended across the entire eight years of his tenure.⁶⁷

Eisenhower, the great military hero, had a rather limited agenda as President.⁶⁸ During his presidency, the Korean War ended, and a massive interstate highway-building program began.⁶⁹ While his substantive accomplishments may have been thin, Eisenhower inspired trust and confidence and helped bring about stability and calm in the nation.⁷⁰

If the "FDR halo" seemed to be in limbo during the Eisenhower years, Ike's successor was determined to pull it out of purgatory.⁷¹ John F.

57. *Id.*

58. *Id.*

59. GENOVESE, *supra* note 23, at 20.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. GENOVESE, *supra* note 23, at 20.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. GENOVESE, *supra* note 23, at 20.

70. *Id.*

71. *Id.* at 21.

Kennedy, the Camelot President, wanted an activist administration, and after eight years of Eisenhower, the public was ready for action.⁷² The political pendulum was swinging towards activism.⁷³ But try as he might, President Kennedy's legislative proposals often fell prey to unresponsive leadership in Congress.⁷⁴ Stymied by an intransigent Congress, which took the system of checks and balances seriously, the Kennedy legislative record was, at best, mixed.⁷⁵ The first Roman Catholic ever to be elected president, Kennedy won the presidency by a razor-thin margin in 1960.⁷⁶ Kennedy presided over the Bay of Pigs fiasco in Cuba, placed military advisors in Vietnam, and successfully led the nation through the Cuban Missile Crisis, but his ambitious and progressive domestic initiatives often were blocked by Congress, which was controlled by conservatives in his own party.⁷⁷ Kennedy achieved tax cuts that stimulated economic growth, started the Peace Corps, and placed civil rights reform on the presidential agenda.⁷⁸ But overall, Kennedy was stymied by a reluctant Congress.⁷⁹

And yet, not all were sanguine about the central role of the presidency and the growth of presidential power.⁸⁰ Conservatives emerged as contrarians, warning that the presidency was becoming a Leviathan, powerful and out of control.⁸¹ This behemoth of a presidency threatened the fabric of representative government and posed a very real threat to the separation of powers that had so ably served the U.S. for so many years.⁸² Calling for less, not more government, conservatives seemed to be tilting at windmills in an era of a powerful government.⁸³

Liberals countered with two main arguments: presidential leadership was inevitable, and presidential leadership was positive.⁸⁴ Presidential leadership was inevitable because when the U.S. became the leader of the West, it required strong, centralized leadership to oppose Communism and provide global leadership.⁸⁵ Presidential leadership was positive in that only a strong

72. *Id.*

73. *Id.*

74. GENOVESE, *supra* note 23, at 21.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. GENOVESE, *supra* note 23, at 21.

80. *Id.*

81. Lund, *supra* note 7, at 513.

82. *Id.*

83. CORWIN, *supra* note 51, at 121-22.

84. *Id.*

85. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 34 (3rd ed. 1961); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1294 (June 1988).

president could overcome the lethargy built into the check and balance system and provide progressive leadership to a system mired in gridlock.⁸⁶

At this time, most conservatives promoted a Whig conception of presidential power.⁸⁷ In this, William F. Buckley Jr.'s *National Review* became the voice not only of conservatism in America, but of a limited presidency.⁸⁸ In 1960, Buckley's former Yale professor, Willmore Kendall published a seminal essay entitled "The Two Majorities," which called for an Executive with limited power.⁸⁹

It was also in the early 1960s that advocates of limiting the President's power found their political guru in Arizona's Republican Senator Barry Goldwater.⁹⁰ During his failed presidential bid in 1964, Goldwater released his campaign manifesto "My Case for the Republican Party." In that essay, Goldwater noted that:

Some of the current worship of powerful executives may come from those who admire strength and accomplishment of any sort. Others hail the display of Presidential strength . . . simply because they approve of the *result* reached by the use of power. This is nothing less than the totalitarian philosophy that the end justifies the means If ever there was a philosophy of government totally at war with that of the Founding Fathers, it is this one.⁹¹

Similar voices found little support in a country mesmerized by all that the presidency seemed to accomplish, even as forces in Congress tried to stand in the President's way.⁹² This led to grumblings among the public and scholars: "How can the Congress stand in the way of progress? . . . There are too many checks on the presidency . . . We need *more* power for the president" went the chants. If the presidency was good and just, it also deserved to be strong, yet Congress stood in the way.⁹³

It should be noted that the exception to the small-government-limited-executive-conservative rule found in the Cold War era, which was when the political right so vehemently opposed the Soviet Union that caused many to

86. Koh, *supra* note 85, at 1294.

87. William S. Stokes, *Whig Conceptions of Executive Power*, PRESIDENTIAL STUDIES QUARTERLY, Spring 1976, at 16, 17.

88. Anthony F. Cottone, *Buckley: William F. Buckley and the Rise of American Conservatism by Carl T. Bogus*, 60 JUN R.I. B.J. 35, 35 (2012) (reviewing CARL T. BOGUS, *BUCKLEY: WILLIAM F. BUCKLEY AND THE RISE OF AMERICAN CONSERVATISM* 2011).

89. Kendall, *supra* note 50, at 317.

90. Gene Healy, *Conservatives and the Presidency*, CATO INSTITUTE (July 5, 2007, 4:00 PM), <https://www.cato.org/blog/conservatives-presidency>.

91. *Id.*

92. *Id.*

93. GENOVESE, *supra* note 23, at 21.

call for an unleashing of the presidential power directed at defeating communism.⁹⁴ This was the first glimmer that conservatives might depend on context or result, instead of philosophy, and that their view of presidential powers was dynamic.⁹⁵ When they saw a dragon to slay, they sought a strongman to do the slaying. In the 1950s and 1960s the dragon was communism; today, the dragons are terrorism and liberalism.⁹⁶

The untimely death of John F. Kennedy in 1963 left unattained the legislative agenda of the slain President.⁹⁷ His successor, Lyndon B. Johnson, was a legislative genius who, exploiting the opportunity, managed to pass an activist program and promote a more ambitious social agenda, which he called the “Great Society.”⁹⁸ In 1964 and 1965, Johnson passed bill after bill, far surpassing anything his critics thought possible.⁹⁹ It seemed the FDR halo and Camelot had merged to produce a protean presidency of power and purpose.¹⁰⁰ We were a nation intoxicated by presidential power.¹⁰¹ And where were conservatives when the celebration of all things presidential rose? Most of them were tilting at windmills.¹⁰²

The FDR halo was revived because Lyndon Johnson brought the strong-presidency model back to life.¹⁰³ The public could breathe easier knowing that a strong president—a superman—was once again at the helm.¹⁰⁴ Johnson’s success confirmed the validity of the heroic presidency model.¹⁰⁵ Johnson’s presidency was positive proof that a strong presidency was a good presidency; and that more presidential power meant greater public good.¹⁰⁶ The public injected another dose of the drug of strong leadership, and it felt good.¹⁰⁷ The American people placed their trust in the president, invested their hopes in the office, and saw the President as powerful, good, and trustworthy.¹⁰⁸ This was the start of the “Cult of the Presidency.”¹⁰⁹

But it would soon prove to be misplaced trust, because the seeds of the “Imperial Presidency” were planted in this period, and it would not be long

94. WILLIAM E. LEUCHTENBURG, *IN THE SHADOW OF FDR* 83 (Cornell U. ed., 3rd ed. 2001).

95. See Lynch, *supra* note 50.

96. Lund, *supra* note 7, at 515-16.

97. GENOVESE, *supra* note 23, at 21.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. GENOVESE, *supra* note 23, at 21.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. GENOVESE, *supra* note 23, at 21.

108. *Id.* at 21-22.

109. Lund, *supra* note 7, at 513-14.

before public trust turned to disdain.¹¹⁰ If the era of the cult of the presidency led to the public and academics demanding more power for the President and placing too much trust in the institution, the harsh lessons of political reality would soon haunt the all-too-trusting and unwary people in both camps.¹¹¹

If the public suspended its disbelief and almost blindly placed its faith in the strong-presidency model, why did academics so easily go along? Of course, there were voices in the wilderness, warning of the dangers of unchecked presidential power,¹¹² but in general, scholars and the public were equally intoxicated by the strong presidency exhibited by Johnson.¹¹³

A sampling of quotes from the classic book title *The American Presidency* by conservative academic Clinton Rossiter, first published in 1956, gives an indication of the status and esteem in which even the conservative Rossiter held the presidency.¹¹⁴

Few nations have solved so simply and yet grandly the problem of finding and maintaining an office or state that embodies their majesty and reflect their character . . .

There is virtually no limit to what the President can do if he does it for democratic ends and by democratic means . . .

He reigns, but he also rules; he symbolizes the people, but he also runs their government . . .

The President is not a Gulliver immobilized by ten thousand tiny cords, nor even a Prometheus chained to a rock of frustration. He is, rather, a kind of magnificent lion who can roam widely and do great deeds so long as he does not try to break loose from his broad reservation.¹¹⁵

And Rossiter wrote that the American presidency is “one of the few truly successful institutions created by men in their endless quest for the blessings of free government.”¹¹⁶ He concluded by writing:

110. GENOVESE, *supra* note 23, at 23.

111. *Id.*

112. GRAZIA, *supra* note 50, at 37-38; ARTHUR M. SCHLESINGER, JR. & ALFRED DE GRAZIA, *CONGRESS AND THE PRESIDENCY: THEIR ROLE IN MODERN TIMES* 33 (3rd ed. 1971).

113. NEUSTADT, *supra* note 85, at 1.

114. GENOVESE, *supra* note 23, at 23.

115. CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 250-51 (2nd ed. 1960).

116. *Clinton L. Rossiter 3d Is Dead; Historian and Political Scientist*, N.Y. TIMES (July 12, 1970), <https://www.nytimes.com/1970/07/12/archives/clinton-l-rossiter-3d-is-dead-historian-and-political-scientist.html>.

It is, finally, an office of freedom. The Presidency is a standing reproach to those petty doctrinaires who insist that executive power is inherently undemocratic; for, to the exact contrary, it has been more responsive to the needs and dreams of giant democracy than any other office or institution in the whole mosaic of American life. It is no less a reproach to those easy generalizers who think that Lord Acton had the very last word on the corrupting effects of power, for, again, to the contrary, his doctrine finds small confirmation in the history of the Presidency. The vast power of this office has not been “poison,” as Henry Adams wrote in scorn; rather, it has elevated often and corrupted never, chiefly because those who held it recognized the true source of the power and were ennobled by the knowledge.¹¹⁷

Rossiter is not alone in his celebration of the presidency and presidential power.¹¹⁸ In 1960, Richard Neustadt published the influential *Presidential Power: The Politics of Leadership*.¹¹⁹ For Neustadt, a strong president was essential in order to overcome the natural lethargy of a system of “separated institutions sharing power.”¹²⁰ Neustadt writes:

The contributions that a President can make to government are indispensable. Assuming that he knows what power is and wants it, those contributions cannot help but be forthcoming in some measure as by-products of his search for personal influence. In a relative but real sense one can say of a President what Eisenhower’s first Secretary of Defense once said of General Motors: what is good for the country is good for the President and *vice versa*.¹²¹

Neustadt’s effective president – his more conservative critics were quick to point out – posits a liberal/activist model of the presidency; or a big, powerful, even dominant presidency.¹²² Neustadt presumes that a small presidency is a weak presidency, one that fails to meet the needs and demands of a global super-power.¹²³

117. ROSSITER, *supra* note 115, at 251.

118. GENOVESE, *supra* note 23, at 24.

119. *Id.*

120. *Id.*

121. NEUSTADT, *supra* note 85, at 185.

122. *Id.*

123. *Id.* at 1.

After examining standard civics textbooks of the 1960s, Tom Cronin discovered an idealized view of the presidency.¹²⁴ This textbook version of the presidency romanticized the office and heaped honor upon the President.¹²⁵ The President was presented as Superman, able to leap tall separations of power in a single bound.¹²⁶

In 1960, Herman Finer presents this view in a combined religious and heroic vision of the presidency, not only as “the incarnation of the American people in a sacrament resembling that in which the wafer and the wine are seen to be the body and blood of Christ” but also as belonging “rightfully to the offspring of a titan and Minerva husbanded by Mars.”¹²⁷ In 1965, James MacGregor Burns informally shared this view by stating that “the stronger we make the Presidency, the more we strengthen democratic procedures”¹²⁸ Finally, in 1976, Grant McConnell opined that “[t]o ask what is to become of the presidency is to ask what is to become of the entire American political order.”¹²⁹

This presidency-centered model, which came to infiltrate many minds, was more than an operating style of government; it was also a *philosophy* of governing.¹³⁰ The President-centered approach to government was an operating style that promotes a system of government in which the President was to direct or lead the people and the other branches of government from a perch of great power and authority.¹³¹ It was a philosophy of government that legitimized a stronger central government and took power away from the other branches, and perhaps even more importantly, it took power from the people and vested responsibility in the hands of government, via the President, to solve problems.¹³² Thus it diminished the democratic responsibility placed in the people, and promoted responsibility and power in the leadership class.¹³³ It also failed to recognize the potential danger of the heroic-leadership model.¹³⁴

The realignment of the political parties that began in the late 1960s as a result of Lyndon Johnson’s policies also added to the conservative embrace

124. THOMAS E. CRONIN, *THE STATE OF THE PRESIDENCY 76-77* (2nd ed. 1980). See also RICHARD M. PIOUS, *THE AMERICAN PRESIDENCY 6* (1979); WILLIAM W. LAMMERS, *PRESIDENTIAL POLITICS: PATTERNS AND PROSPECTS 7* (Ronald K. Taylor ed., 1976).

125. GENOVESE, *supra* note 23, at 25.

126. *Id.*

127. HERMAN FINER, *THE PRESIDENCY: CRISIS AND REGENERATION 111, 119* (2nd ed. 1974).

128. JAMES MACGREGOR BURNS, *PRESIDENTIAL GOVERNMENT: THE CRUCIBLE OF LEADERSHIP 330* (1966).

129. GRANT MCCONNELL, *THE MODERN PRESIDENCY 100* (2nd ed. 1976).

130. GENOVESE, *supra* note 23, at 25.

131. *Id.*

132. *Id.*

133. *Id.*

134. GENOVESE, *supra* note 23, at 25.

of big government and a big presidency.¹³⁵ The FDR coalition of the 1930s and 1940s brought oil and water together by shoehorning liberal Northern Democrats with conservative Southern Democrats, united behind the personality and policies of Roosevelt.¹³⁶ These strange bedfellows began a divorce after Johnson's Great Society program passed civil rights and voting rights legislation in the mid-1960s.¹³⁷

Southern conservatives began to shift their alliance to the Republican Party. Lyndon Johnson was well aware that pushing civil rights endangered the Democratic Party he led, going so far as to predict that "we just delivered the South to the Republican party for a long time to come."¹³⁸

This party realignment gave the South to the Republicans, and also made the Republicans more willing to use the tools of government to solve problems.¹³⁹ The political calculus changed both electorally and politically.¹⁴⁰ Old Democrats, who became known as New Republicans, made an impact on the Republican party.¹⁴¹

But just when the public was lulled into a false sense of complacency and security concerning the benevolence of presidential power, things began to change.¹⁴² They changed quickly and dramatically at the start of the Vietnam War.¹⁴³

U.S. involvement in Vietnam began quietly, escalated slowly, and eventually led to tragedy.¹⁴⁴ By 1966, the United States was engaged in a war that it could not win and from which it could not withdraw without facing dishonor. It was a "presidential war," and it brought the Johnson administration to its knees.¹⁴⁵

As U.S. involvement escalated, and as victory for the United States seemed further and further away, blame was placed squarely on the shoulders of President Johnson.¹⁴⁶ Although the Constitution gives Congress the power

135. Barbara Deckard Sinclair, *Party Realignment and the Transformation of the Political Agenda: The House of Representatives, 1925-1938*, 71 AM. POL. SCI. REV. 940 (1977).

136. *Id.* at 940, 950.

137. See Yoo, *supra* note 10, at 649.

138. Becky Little, *How the 'Party of Lincoln' Won Over the Once Democratic South*, HISTORY (Apr. 10, 2019), <https://www.history.com/news/how-the-party-of-lincoln-won-over-the-once-democratic-south>.

139. *Id.*

140. *Id.*

141. *Id.*

142. GENOVESE, *supra* note 23, at 26.

143. *Id.*

144. STANLEY KARNOW, *VIETNAM: A HISTORY* 11 (New York: Viking, 1983); ALBERT CANTRILL, *THE AMERICAN PEOPLE, VIETNAM, AND THE PRESIDENCY* (Princeton: Princeton University Press, 1976); DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 219 (New York: Random House, 1972).

145. LARRY BERMAN, *LYNDON JOHNSON'S WAR* 113 (New York: W.W. Norton, 1989); LARRY BERMAN, *PLANNING A TRAGEDY: THE AMERICANIZATION OF THE WAR IN VIETNAM* 152-53 (New York: W.W. Norton, 1982).

146. GENOVESE, *supra* note 23, at 26.

to declare war, a grant of power in practice since the Truman administration and the “Korean Conflict,” presidents have often acted unilaterally in this regard.¹⁴⁷ By the time Johnson came to office, presidents had been setting policy in Vietnam for twenty years, largely unencumbered by the Congress.¹⁴⁸ As U.S. involvement escalated, it was the president who was calling the shots.¹⁴⁹ The tragedy of Lyndon Johnson is that after such a sterling start, after such great success, the blunder of Vietnam overwhelmed him and the nation.¹⁵⁰ From such great heights, the president fell to such tragic depths.¹⁵¹ The nation was torn apart.¹⁵² The glue that bound Americans together had lost its adhesiveness, and in its place, divisiveness and conflict overtook the nation.¹⁵³ The strong presidency, so long seen as the savior of the American system, now seemed too powerful, too dangerous, too unchecked—in short, a threat.¹⁵⁴ After years of hearing calls for “more power to the president,” by the late 1960s the plea was to rein in the overly powerful “monster” in the White House.¹⁵⁵

It was a rude awakening. All the hopes, trust, and expectations that had been entrusted to the presidency were being shattered.¹⁵⁶ Johnson was compelled not to seek reelection in 1968 when faced with the near certainty of electoral defeat.¹⁵⁷ But that was not the end of it. His successor was to degrade the nation’s image of the presidency even further.¹⁵⁸

NIXON AND THE BIG PRESIDENCY

If the Vietnam War was tearing our nation apart, Johnson’s successor, Richard M. Nixon, would continue to plunge the presidency and the nation toward the depths of division and degradation.¹⁵⁹ Although Nixon promised in his 1968 campaign to “bring us together,” he only brought the nation together in the collective shame of massive corruption and pettiness, when the President of the United States was named an “unindicted co-conspirator” by the federal grand jury during the crisis of Watergate.¹⁶⁰

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. GENOVESE, *supra* note 23, at 26.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. GENOVESE, *supra* note 23, at 26.

157. *Id.*

158. *Id.*

159. *Id.* at 26-27.

160. *Id.* at 27.

Nixon extended and then ended the war in Vietnam.¹⁶¹ This led to a stunning reelection landslide victory in 1972.¹⁶² From then on it was all downhill.¹⁶³ Nixon's was the most corrupt administration in U.S. history, and the President himself was deeply involved in the crimes of Watergate.¹⁶⁴ With the institution of the presidency already weakened by the tragedy of the Vietnam War, the revelations of corruption, referred to under the umbrella term "Watergate," led to a further diminution of presidential prestige.¹⁶⁵

The first substantial inkling of a conservative transformation from a Whig conception of presidential power to an embrace of a big-president/big-government approach was found, as mentioned, in demanding strong, assertive presidential action in foreign policy—especially as regards US relations with the Soviet Union. These Cold War conservatives often recognized the paradox of calling for a bigger *and* a smaller presidency, something I have referred to as the Goldilox Dilemma: This presidency is too hot (in foreign policy and war), this presidency is too cold (in domestic policy). We could not seem to get the presidential porridge "just right."

Beyond the Cold War advocacy of presidential power, the next step in the conservative embrace of a big presidency reared its head during the presidency of Richard Nixon.¹⁶⁶ Nixon believed in maintaining a powerful foreign policy presidency, and he wanted to set foreign policy unilaterally when possible.¹⁶⁷ In domestic policy, Nixon exhibited only sporadic interest, going so far as to tell journalist Theodore White, "I've always thought this country could run itself domestically without a president, all you need is a competent Cabinet to run the country at home. You need a president for foreign policy."¹⁶⁸

In line with his views on policies, Nixon's domestic agenda—especially his early efforts at reform (e.g., a minimum wage guarantee and HMO proposals) were stymied in the age of divided government.¹⁶⁹ And Nixon soon realized that to avoid deadlock, he needed to exercise as much of a one-man-rule as possible. But how does a president govern *without* Congress? Via an *administrative strategy*.

In the 1970s, conservatives began to explore the benefits of presidential power aimed at achieving their own conservative ends. In 1974, Jeffrey Hart published an essay in *National Review* entitled "The Presidency: Shifting

161. GENOVESE, *supra* note 23, at 27.

162. *Id.*

163. *Id.*

164. *Id.* at 172-73.

165. GENOVESE, *supra* note 23, at 27.

166. See MICHAEL A. GENOVESE, *THE NIXON PRESIDENCY* (Westport: Greenwood Press, 1990).

167. *Id.* at 165.

168. *Id.* at 72.

169. *Id.*

Conservative Perspectives?”¹⁷⁰ Hart recognized that conservatives were understandably suspicious of activist presidents but saw the possibility of a strong president keeping the growth of the administrative state in check.¹⁷¹ Step-by-step, conservatives began to love presidential power.

Nixon went further than Hart. He devised an administrative strategy for governing *without Congress*, using regulatory authority, executive orders, and other forms of administrative authority to govern alone.¹⁷² Big presidency, here we come.

In July 1972, during Nixon’s campaign for a second term, agents for his reelection committee were arrested for burglary at the Democratic party headquarters in the Washington, D.C., Watergate apartment complex, after an attempt to wiretap telephones there.¹⁷³ This precipitating event—which led almost a year later to the special Senate hearings called to investigate Watergate—proved to be only a minor part of the widespread corruption within the Nixon administration.¹⁷⁴

The revelations of Watergate stunned the nation because the President and a number of his top aides as well as Cabinet members had been involved in a variety of crimes and dirty tricks (e.g., obstruction of justice, extortion, burglary, cover-ups, paying of hush money, etc.).¹⁷⁵ What shocked the nation was the level of direct presidential involvement in many of these crimes.¹⁷⁶

Nixon, the only U.S. President forced to resign his office, did have several significant foreign policy achievements—the opening of relations with China, détente with the Soviet Union, drawing the war in Vietnam to a conclusion—and he was somewhat progressive in domestic affairs.¹⁷⁷ But all of these accomplishments were overshadowed by the crimes and corruption of Watergate.¹⁷⁸ Nixon was forced to relinquish his office when faced with the certainty of impeachment by the House and conviction by the Senate.¹⁷⁹

A major transformation began to take place.¹⁸⁰ As a result first of Vietnam, then of Watergate, our Superman became an Imperial President.¹⁸¹ Historian Arthur M. Schlesinger, Jr. argues in his influential book *The*

170. Jeffrey Hart, *The Presidency: Shifting Conservative Perspectives?*, NATIONAL REVIEW 1351 (Nov. 22, 1974).

171. *Id.*

172. RICHARD P. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY* (New York: Wiley, 1975).

173. GENOVESE, *supra* note 23, at 27.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. GENOVESE, *supra* note 23, at 27.

179. *Id.*

180. *Id.* at 28.

181. *Id.*

*Imperial Presidency*¹⁸² argued that the abuse of power by presidents threatened the constitutional integrity of the U.S. system of government.¹⁸³ With the rise of the president's war powers and the increased secrecy surrounding presidential initiatives, the president was usurping and abusing power and acting above the law.¹⁸⁴ Cronin's Superman—savior of the people—became Schlesinger's enemy of the people.¹⁸⁵ The presidency had become a danger to the republic, using its powers not for the public good but for self aggrandizement.¹⁸⁶ A new image of the presidency developed. Superman was no longer on the side of the people; the power of the institution, which Americans thought would be used for good, also granted the bearer a capacity to do wrong.¹⁸⁷ Historian Marcus Cunliffe was compelled to call the presidency a "Frankenstein" monster.¹⁸⁸

Watergate turned out to be the final nail in the coffin of the unambiguous acceptance of the strong-presidency model.¹⁸⁹ The twin effects of Vietnam and Watergate led to an era of deep cynicism regarding politics and the presidency characterized as the Imperial Presidency, along with a call for a corralling of a president perceived as acting above the law.¹⁹⁰ It was a presidency-curbing, if not presidency-bashing, period, an era of "Deliver Us from Presidents" (1967-1974).¹⁹¹

As a reaction against the excesses of power in the Johnson and Nixon presidencies, the Congress attempted to reassert its power by taking a series of presidency-curbing steps, the most notable being the passage of the War Powers Act, which attempted (with little success) to limit the president's war powers, though its enactment was only somewhat successful.¹⁹² If blind faith had characterized the Hallowed Be the President era (1932-1966), blind *distrust* characterized the Deliver Us from Presidents period.¹⁹³ Any and all presidential acts were suspect, and presidential initiatives garnered virtually no support.¹⁹⁴ A weak-presidency model (though not a strong-Congress model) prevailed.¹⁹⁵ In the midterm election of 1974, a new breed of activist

182. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (Boston: Houghton Mifflin Co., 1973).

183. GENOVESE, *supra* note 23, at 28.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Marcus Cunliffe, *A Defective Institution?*, COMMENTARY (Feb. 1968), <https://www.commentarymagazine.com/articles/marcus-cunliffe/a-defective-institution/>.

189. GENOVESE, *supra* note 23, at 28.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. GENOVESE, *supra* note 23, at 28.

195. *Id.*

Democrats was elected to the Congress.¹⁹⁶ Weaned not on FDR's greatness but on Johnson's and Nixon's excesses, this new generation of legislators was less deferential to presidents, less willing to bow to claims of presidential prerogative, and more willing to directly challenge presidents.¹⁹⁷ As a result, the legislative initiatives of Presidents Ford and Carter would fall victim to the Congress's revised, more suspicious attitude toward presidential power.¹⁹⁸

If the Johnson and Nixon years revealed an Imperial Presidency, the Ford and Carter years revealed an Imperiled Presidency.¹⁹⁹ The cult of the presidency gave way to revulsion and distrust. It was a period characterized as "Blessed Are the Meek" (1975-1980).²⁰⁰ In 1980, Vice President Walter Mondale referred to the presidency as "'the fire hydrant of the nation.'"²⁰¹

After Vice President Spiro Agnew resigned the office in 1973 and pleaded *nolo contendere* to charges of tax evasion, Nixon appointed Gerald Ford Vice President.²⁰² Following Nixon's resignation in August of 1974, Ford became America's first "unelected" President.²⁰³ Shortly after taking office, Ford granted his predecessor a "full free and absolute pardon" for any crimes he may have committed as president.²⁰⁴ In Congress and among the public, suspicions persisted that Ford had pardoned Nixon for political or personal expediency.²⁰⁵ In this cynical atmosphere, President Ford's ability to govern floundered and he quickly became a caretaker president.²⁰⁶

In his brief time as president, Gerald Ford did help restore the nation to a period of relative calm, and he helped slowly to restore the integrity of the presidency in a post-Watergate era.²⁰⁷ But the cynicism born of Vietnam and Watergate persisted, and Ford fell as one of its many victims.²⁰⁸

In the aftermath of Watergate and the Nixon pardon, the public elected a relative unknown to the White House, Jimmy Carter.²⁰⁹ As President, Carter attempted to demythologize the presidency.²¹⁰ He recognized that dramatic changes were taking place in the world, and that America's power was

196. *Id.*

197. *Id.*

198. *Id.* at 28-29.

199. GENOVESE, *supra* note 23, at 29.

200. *Id.*

201. Joseph Kraft, *The Post Imperial Presidency*, N.Y. TIMES (Nov. 2, 1980), 31.

202. GENOVESE, *supra* note 23, at 29.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. GENOVESE, *supra* note 23, at 29.

208. *Id.*

209. *Id.*

210. *Id.*

declining relative to the robust hegemony the United States had enjoyed in the immediate aftermath of World War II.²¹¹ Carter tried to get the nation to adjust to the shifting power dynamic, but he was unable to persuade a public hooked on consumerism that they had to settle for less.²¹² When American hostages were taken in Iran, Carter appeared weak and paralyzed.²¹³ The nation cried out for strong leadership, and Carter could not answer the call.²¹⁴

Like Gerald Ford, Carter was a man of great decency but limited political acumen.²¹⁵ He faced a presidency-bashing age with dignity but insufficient skill.²¹⁶ He could not get the Congress controlled by his own party to pass his legislative agenda, and when events around the world came crashing down upon him, Carter was helpless and ineffective.²¹⁷

President Carter's major success was the Camp David peace accords between Egypt and Israel.²¹⁸ He also focused world attention on human rights and achieved civil service reform.²¹⁹ But when double-digit inflation and soaring interest rates combined with Carter's helplessness in the face of Iranian student radicals' taking fifty-two Americans hostage, Carter's presidency was doomed.²²⁰

THE BIG TURNAROUND

After a period of leaderless drift, the nation began to forget about the problems of presidential power, and a hunger for leadership reemerged.²²¹ Problems accumulated, and the nation's "leaders" seemed powerless in the face of these hardships.²²² The urge for the strong-presidency model reclaimed center stage, and a new era, the "Search for a Savior" (1980-1986), appeared.²²³

Ronald Reagan took Washington by storm.²²⁴ Claiming a bold mandate and focusing on just a few key economic items, Reagan managed to get several of his top agenda items enacted into law during his first year as President.²²⁵ After an impressive start, Reagan faltered.²²⁶ Initial success in

211. *Id.*
 212. GENOVESE, *supra* note 23, at 29.
 213. *Id.*
 214. *Id.*
 215. *Id.*
 216. *Id.*
 217. GENOVESE, *supra* note 23, at 29.
 218. *Id.*
 219. *Id.* at 29-30.
 220. *Id.* at 30.
 221. *Id.*
 222. GENOVESE, *supra* note 23, at 30.
 223. *Id.*
 224. *Id.*
 225. *Id.*
 226. *Id.*

dealing with Congress gave way to frustration and defeat.²²⁷ The President could not overcome the system's roadblocks, and unwilling to accept the limits placed upon the office, Reagan and members of his administration went beyond the law and abused their power.²²⁸ Reagan, like Nixon, displayed a lack of respect for the law and attempted to impose a new "Imperial Presidency,"²²⁹ and at the end his presidency, Reagan's legacy was nearly destroyed by the Iran-Contra scandal.²³⁰

Reagan's engaging personality and quick wit helped him become popular, and his borrow-borrow, spend-spend approach to policy may have added to America's military might, the nation was left at the brink of economic insolvency.²³¹ The United States went from being the world's largest creditor/lender nation to becoming the world's largest debtor/borrower nation in 1988.²³² Reagan's regressive tax cuts led to massive deficits.²³³ Thus, when opportunity presented itself, Reagan was unable to convert the collapse of Soviet Communism to America's advantage, leading the United States to decline while Europe and Japan grew.²³⁴

During the Reagan years, conservatives, enamored of the style, personality, and agenda of Ronald Reagan, began a migration from limited government and a limited presidency to advocacy for a strong presidency. Small government rhetoric remained a staple in speechmaking, but in practice, conservatives learned to love executive power—at least when in the hands of one of their own. The power of government, they learned, could be used to achieve certain conservative objectives. The enemy, to these new conservative voices, was not an Imperial Presidency, but an Imperial Congress or an Imperial Judiciary.²³⁵

While remaining true to the traditional conservative small government mantra, "Government is not the solution to our problems; Government is the problem," Reagan presided over a government that incurred record deficits, expanded the size and scope of government, and helped fellow conservatives

227. GENOVESE, *supra* note 23, at 30.

228. *Id.*

229. *Id.* at 29.

230. *Id.* at 30.

231. *Id.*

232. GENOVESE, *supra* note 23, at 30-31.

233. *Id.* at 31.

234. See MICHAEL A. GENOVESE, *THE PRESIDENCY IN AN AGE OF LIMITS* (Westport, Ct.: Greenwood Press, 1993).

235. See generally TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* (1992); AM. ENTER. INST. FOR PUB. POLICY RESEARCH, *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* (L. Gordon Cravitz & Jeremy A. Rabkin eds., 1989); HERITAGE FOUND., *THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS* (Gordon S. Jones & John A. Marini eds., 1988).

make peace with governmental and presidential power.²³⁶ Many conservatives called for the repeal of the 22nd Amendment which limited a president's terms in office.²³⁷ Political scientist Stephen Skowronek noted the irony:

[C]urious is that contemporary conservatives would take up advocacy of a cause that had left many of their own ideological forebears anxious and defensive. In the later years of progressive dominance, American conservatives were still cuing off of a hallowed Whig tradition of hostility to presidential aggrandizement and executive pretension; opposition to progressive political priorities went hand in hand with skepticism toward the progressives' "modern" presidency. The conservatives of the 1950s and 1960s were formalists who shunned the progressives' pragmatism and upheld constitutional arrangements that the shift to presidential government threatened. A diverse array of conservative analysts and theorists—James Burnham, Willmoore Kendall, Alfred de Grazia, and James Buchanan—countered the higher-order aggregations of the progressives' new system of rule by repairing to the original design of American government and expounding upon the congressional and local prerogatives it harbored.²³⁸

After Reagan, scholars and the public seemed once again thoroughly confused as to what limits to place on the President's power.²³⁹ The roller-coaster ride that alternated between strong and weak models of presidential power left the people feeling somewhat schizophrenic.²⁴⁰ This confusion led to the current era, a "Where there is no vision, the people perish" period (1988-2000).²⁴¹

The presidency under George H.W. Bush seemed in a state of suspended animation.²⁴² Bush, compared to Reagan, was a man of uncompromising grayness, a manager during a time the nation needed a leader.²⁴³ The end of the Cold War opened a window of opportunity to exert creative leadership, but Bush was shackled by a vastly depleted resource base, created by the legacy of Reagan's economic mismanagement, and an intellectual cupboard

236. GENOVESE, *supra* note 23, at 10, 30.

237. See generally, Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENTARY 61 (1990).

238. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2075 (2009).

239. GENOVESE, *supra* note 23, at 31.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

that was bare, stemming from a lack of vision for the post-Cold War era.²⁴⁴ In the post-Cold War world, some conservatives returned to the views of the Whigs, but overall Conservatives were not able to put the genie of presidential power back into the constitutional bottle.

Bush was at his best when he had a clear goal to achieve, like the Gulf War, a goal imposed upon him by events.²⁴⁵ But when it came time for him to choose, to set priorities and to decide a direction, the elder Bush floundered.²⁴⁶ As conservative columnist George Will commented, “When the weight of the [presidency] is put upon a figure as flimsy as George Bush, the presidency buckles.”²⁴⁷

In a time that cried out for vision, Bush appeared stagnant.²⁴⁸ There was no clear aspiration to accomplish grand goals.²⁴⁹ When it came time for the public to render judgment via an election, it chose another relative unknown over George H.W. Bush.²⁵⁰

Bill Clinton, who had been a successful governor of Arkansas but was an outsider to Washington politics and little known before the presidential campaign, began his administration with an ambitious set of campaign pledges and an economy creeping toward recovery.²⁵¹ According to Lowi and Ginsberg, President Clinton was “haunted by two ghosts—the legacies of Ronald Reagan and James Madison.”²⁵² The ghost of Reagan can be seen in the enormous debt Reagan left to his successors; that of Madison can be seen in the system of checks and balances, of limited and shared powers—of a separation rather than a fusion of governmental power.²⁵³ Clinton has had other problems including a lack of experience in Washington, winning only 43 percent of the popular vote for president in a three-way race, and running behind virtually every member of Congress in their districts.²⁵⁴ He did not have the typical “coattails” one might expect, nor was he granted the typical “honeymoon” period.

Throughout his presidency, Clinton was hounded by the “character” issue.²⁵⁵ His sexual affair with a young White House intern and his dishonesty about that relationship led to the House impeaching him.²⁵⁶ The

244. GENOVESE, *supra* note 23, at 31.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 32.

249. GENOVESE, *supra* note 23, at 32.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. GENOVESE, *supra* note 23, at 32.

255. *Id.*

256. *Id.* at 18.

Senate, however, while also under the control of Republicans, failed to get majority support on any of the articles of impeachment against Clinton.²⁵⁷ In spite of his many character problems, Clinton remained popular with voters.²⁵⁸ While Republicans attempted to neuter him politically, President Clinton left office with an enormous budget surplus.²⁵⁹

While Republicans and conservatives talked a good game on fiscal discipline, in practice their deeds did not match their words. Ironically, when in office, Republicans acted even worse than the Democrats they so often attacked as reckless big spenders. For example, since 1982, annual growth of the federal government grew more under Reagan and the two Bushes, than under Democrats, Clinton and Obama. Under Reagan federal spending grew 8.7 percent between 1982 and 1985; under Obama between 2010 and 2013, spending grew 1.4 percent.²⁶⁰

GEORGE W. BUSH: IDEOLOGY (CHENEY) AND OPPORTUNITY (9/11)

George W. Bush promised to be a “compassionate conservative,” who during his Republican Party acceptance speech in Philadelphia in 2000 reiterated the comfortable conservative bromide, “big government is not the answer.”²⁶¹ But events would force his hand and he became a wartime president. “Dubya,” like Reagan before him, presided over a significant increase in the size and scope of government. Not only did the younger Bush create the largest government bureaucracy in American history, the Department of Homeland Security (DHS), he was also responsible for dramatic spending increases, two long, costly wars, skyrocketing debt and deficits, the largest entitlement program since Johnson (prescription drug benefits) and increased federal control over K-12 education via the No Child Left Behind Act.²⁶² When the economic recession hit in 2007, Bush promoted massive stimulus government spending to fend off what his chief advisors believed could become a worldwide depression.²⁶³ One may rightly argue the merits of such steps, but one thing is clear: a big presidency was achieving big government goals. With the 9/11 attack against the United States, virtually everyone, liberals, conservatives, and moderates alike, rallied

257. *Id.* at 34.

258. *Id.* at 32.

259. GENOVESE, *supra* note 23, at 35.

260. Camille Caldera, *Fact check: Clinton, Obama left federal government with a lower deficit than when they arrived*, USA TODAY (Dec. 31, 2020), <https://www.usatoday.com/story/news/factcheck/2020/12/31/fact-check-meme-lacks-context-clinton-obama-federal-deficit/6464069002/>.

261. *Acceptance Speech | President George W. Bush | 2000 Republican National Convention, Republican National Convention* (Mar. 7, 2016), <https://www.youtube.com/watch?v=C17yv7BNHsk>.

262. GENOVESE, *supra* note 23, at 11.

263. See TIM ALBERTA, *AMERICAN CARNAGE: ON THE FRONT LINES OF THE REPUBLICAN CIVIL WAR AND THE RISE OF PRESIDENT TRUMP*, Chap. 1 (Harper Collins, 2019).

behind the President and—as happens during a crisis—power gravitated to the White House.²⁶⁴

As soon as the planes hit the Twin Towers, Americans turned almost instinctively to their President. “Do something!” they seemed to plead. In the confusing and frightening wake of the collapsed towers, a void was created. The public expected, demanded even, that the President fill that void, and President Bush did.

As the White House sprang into action, Congress’s power shrank, the courts waited silently on the sidelines, and the public threw its collective weight behind the President.²⁶⁵ The executive branch mobilized the machinery of government to respond to this new threat.²⁶⁶

After a stumbling start, President George W. Bush exercised a bold, muscle-flexing brand of leadership, impressive for its self-confidence as well as its audacity.²⁶⁷ Bush launched a war against the Taliban government of Afghanistan that had been harboring terrorists.²⁶⁸ He declared an international war against terrorism and directed the resources of the country along with a broad based alliance of nations against Osama bin Laden and his al Qaeda terrorist network.²⁶⁹

The debate over presidential prerogative power after 9/11 was fought largely between the *presidentialist* camp who saw an expansive presidency, and the *constitutionalist* camp who argued that the Constitution called for a sharing of power by the president and Congress. After 9/11, the presidentialists grew bolder and began to make claims for the presidency that defied logic and ran counter to the overwhelming historical weight of evidence.²⁷⁰

Emboldened by the terrorist attack against the United States, armed with overwhelming public support for an aggressive response, cognizant of the withering away of an independent congressional response, and unconcerned with the potential checking power of the courts, these presidentialists, led by Vice President Dick Cheney, ratcheted up their claims of presidential power, only to use this newly empowered office as a tool to further a conservative international agenda. Many of these conservatives or neo-conservatives, who

264. GENOVESE, *supra* note 23, at 11.

265. *Id.*

266. *Id.*

267. *Id.*

268. *President George W. Bush addresses a Joint Congress about the War on Terror*, AP ARCHIVE (Jul. 31, 2015), <https://www.youtube.com/watch?v=TYnx-c8pF34>.

269. *Id.*

270. For a critique, see ROBERT J. SPITZER, *SAVING THE CONSTITUTION FROM LAWYERS* 90-128 (Cambridge: Cambridge University Press, 2008).

attacked the use of presidential power when in the hands of Democrats²⁷¹ now called for unchecked power in the hands of the conservative, Bush.

In politics, so many maneuvers are opportunity based. September 11 created an opportunity for conservative presidentialists²⁷² to seize power and pursue their political and policy objectives virtually unchecked. They were not shy about using this power.

How did conservatives, so suspicious of centralized authority and big government, embrace a brand of imperial presidential power that was anything but conservative? In order to square that illogical circle, they would have to rewrite American history, cherry pick the historical data, and ignore the overwhelming weight of evidence to *invent* something called “the unitary executive.”²⁷³

The intellectual pedigree of the unitary executive²⁷⁴ runs back to the founding era, and to Alexander Hamilton, but this goal of creating a unitary office refers to having one person at the helm of the executive branch; and—according to the Framers—is not a grant of plenary power.²⁷⁵ In fact, a careful reading of Hamilton’s writings in *The Federalist Papers* undermines many of the claims of the presidentialist camp.²⁷⁶ And while “necessity” may make the unitary executive an attractive alternative to the constitutional presidency in an age of terrorism, such necessity does not make the unitary executive constitutional.²⁷⁷

If one defines the unitary executive narrowly, of course, there is a unitary—or “one” executive. Yet, the contemporary advocates of the unitary executive do not construe the office narrowly, but expansively.²⁷⁸ They see an office with plenary authority often unencumbered by a burdensome Congress or a Constitution.²⁷⁹

271. See John Yoo’s attack against President Clinton’s use of presidential power in John C. Yoo, “The Imperial President Abroad,” in Roger Pilon, ed., *THE RULE OF LAW IN THE WAKE OF CLINTON* (Washington, D.C.: Cato Institute, 2000).

272. Traditionally, conservatives have been suspicious of governmental and executive power, but in the 1980s, some conservatives, seeing an opportunity for a strong presidency to be put to conservative use, abandoned principle and called for the enlargement of presidential authority (at least when in the hands of Ronald Reagan). See EASTLAND, *supra* note 235, at 2-3.

273. *Id.* at 2094.

274. A select few conservatives did resist the rise of presidential power, among them, see GENE HEALY, *THE CULT OF THE PRESIDENCY* (Cato Institute, 2008).

275. See generally, *The Federalist* No. 70 (Alexander Hamilton).

276. *Id.*

277. See SPITZER, *supra* note 270, at 125-28.

278. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1192, 1205 (1992).

279. See generally, JOHN P. MACKENZIE, *ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION CENTURY* (Found. Press, 2008); JAMES P. PFEIFFER, *POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION* 229-31 (Brookings Inst. Press, 2008).

The modern academic cache for the unitary executive grew primarily out of several law journal articles touting a “new originalist” construction of the robust version of presidential power.²⁸⁰ These law review articles have given a brand of academic legitimacy to the unitary executive. Yet, even many conservatives are skeptical of this newly discovered originalist construction of broad presidential power.²⁸¹ Dissecting the unitary executive doctrine, conservative columnist George F. Will refers to this “monarchical doctrine,” writing “It is that whenever the nation is at war, the other two branches of government have a radically diminished pertinence to governance, and the president determines what that pertinence shall be.”²⁸²

THE INTELLECTUAL ORIGINS OF THE UNITARY EXECUTIVE THEORY

Essentially, the intellectual pedigree for the Bush administration’s expansive view of executive power can be seen in what is called the *unitary executive* (some members of the administration referred to it as the “New Paradigm”).²⁸³ In some ways, it was merely a modern vision of Lockean Prerogative, but in other ways, represented a new challenge to the rule of law. While the administration rarely provided a comprehensive defense of its actions, we can nonetheless *make* the arguments the administration *should* be making in defense of its aggressive use of presidential power. Yet, even when these arguments are presented, the Bush administration falls far short of being persuasive.

THE UNITARY EXECUTIVE²⁸⁴

| <i>Evidence</i> | <i>Plausibility Index</i> |
|--|---------------------------|
| 1. John Locke (<i>Second Treatise</i>): <u>executive prerogative</u> | Implausible |
| 2. Alexander Hamilton’s “ <u>Energy</u> in the executive” | Marginal |

280. See generally, Michael S. Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1205 (1992).

281. George Will, *No Checks, Many Imbalances*, REALCLEAR POLITICS (Feb. 16, 2006).

282. *Id.*

283. See Calabresi & Rhodes, *supra* note 281, at 1205; STEVEN G. CALABRESI AND CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3-4 (Yale Univ. Press, 2008).

284. The Bush administration takes the Unitary Executive further than any previous presidency, claiming that in an emergency or war, the president’s actions are “nonreviewable”. See 2003 Defense Department memo, often referred to as the “torture memo”). Thus, the Bush administration asserts a crisis presidency above the law, above the Constitution, and unbound of the separation of powers, rule of law, and checks and balances. It is this conception of the presidency that the Supreme Court has tried to check in the *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamden v. Rumsfeld*, 548 U.S. 557 (2006) decisions.

| | |
|---|-----------|
| 3. The Constitution: Article II “Coordinate Construction” a. Executive Power b. Commander-in-Chief clause | Marginal |
| 4. Abraham Lincoln’s <u>doctrine of necessity</u> a. The Constitution is not a suicide pact | Powerful |
| 5. Clinton Rossiter’s <u>Constitutional Dictatorship</u> | Marginal |
| 6. Precedent: the history of presidential aggrandizement of power | Plausible |
| 7. Court Cases: <i>United States v. Curtiss-Wright Export Corp.</i> (1936) a. “sole organ doctrine” | Weak |

The Unitary Executive is a model of presidential power which posits that “all” executive powers belong exclusively to the president.²⁸⁵ In its most expansive form, the unitary executive sees presidential authority disembodied from the separation of powers and checks and balances, and thus seems in contradiction to the original model of constitutionalism envisioned by the Framers.²⁸⁶ The extremist or monarchical conception of presidential power was posited by Richard M. Nixon when he said, “[W]hen the president does it, that means that it is not illegal.”²⁸⁷

LOCKE’S “EXECUTIVE PREROGATIVE”

When, if ever, is a president justified in violating the Constitution? While the word *emergency* does not appear in the Constitution, nor did the framers include any provision for extra-constitutional crisis leadership, there was ample historical precedent from other governments they might well have included.²⁸⁸ Some scholars believe that the Founders did envision the possibility of a president exercising supra-constitutional powers in a time of

285. See generally, Yoo, *supra* note 10, at 730; Christopher S. Yoo, Stephen G. Calabresi, & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1, 108 (2004); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, FAC. SCHOLARSHIP PENN L. 786, 801 (2003); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, FAC. SCHOLARSHIP PENN L. 718, 1559 (1997); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 663 (1994).

286. See FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR, 1-2 (New Press, 2007).

287. *Id.* at 1.

288. See NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY, Chap. 34, (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chi. Press, 1995) (describing the Roman’s use of temporary dictatorship in times of crisis).

national emergency.²⁸⁹ But no such provision was written into the Constitution.

Historically, if not constitutionally, during a crisis, the president assumes extra-constitutional powers.²⁹⁰ The separate branches—which, under normal circumstances, are designed to check and balance one another—will usually defer to a president in times of crisis.²⁹¹ The president’s institutional position offers a unique vantage point from which he can more easily exert strong crisis leadership, and the Congress, Courts, and public usually accept the president’s judgments and power grabs.²⁹²

The pedigree of this can be traced back to John Locke.²⁹³ And yet, no such Lockean prerogative found its way into the Constitution, and virtually all evidence from the founding period suggests that the inventors of the presidency openly *rejected* prerogative powers.

ALEXANDER HAMILTON’S “ENERGY” IN THE EXECUTIVE

While most scholars of the presidency and the Constitution conclude that the Framers invented an executive with *limited authority* grounded in a *separation and sharing of power* under *the rule of law*²⁹⁴ some modern executive power advocates ignore the overwhelming bulk of the historical record and selectively choose to cherry pick only those bits of evidence that support their strong executive preference, and ignore the voluminous evidence against their preferred view.²⁹⁵ They often dismiss their critics without facing them, creating a convenient constitutional shroud for presidential power without doing the hard work of making the case for the robust presidency they so desire, and making the separation-of-powers sing with a distinctly, almost exclusively presidential voice.²⁹⁶ Who, among the Framers, is their guiding light? Not James Madison, known as the father of the Constitution, but Alexander Hamilton. Advocates of the Bush position claim Hamilton as an intellectual guide.

289. DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES 20 (Univ. of Pittsburgh Press, 1991).

290. Michael A. Genovese, *Presidential Leadership and Crisis Management* 300-309, PRESIDENTIAL STUDIES QUARTERLY 16, no. 2 (Spring 1986); Michael A. Genovese, *Presidents and Crisis: Developing a Crisis Management System in the Executive Branch* 82, INTERNATIONAL JOURNAL ON WORLD PEACE (Spring 1987).

291. Genovese, *Presidential Leadership*, *supra* note 291.

292. *Id.*

293. John Locke, Second Treatise, §§ 159-61.

294. See MICHAEL A. GENOVESE, THE POWER OF THE AMERICAN PRESIDENCY, 1789-2000, 9 (Oxford Univ. Press, 2000).

295. See EASTLAND, *supra* note 235.

296. See JOHN C. YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, 143-181 (Univ. of Chi. Press, 2005); JOHN C. YOO, WAR BY OTHER MEANS (Atl. Monthly Press, 2006).

Elements of Hamilton's case for an energetic presidency can be found in *Federalist Paper*, number 70. It reads in part:

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy

A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government. Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? . . .

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.²⁹⁷

But it must be pointed out, an energetic presidency is not an imperial or prerogative presidency. If one reads with care, Hamilton's comprehensive analysis of presidential power found in *The Federalist Papers*, it is clear that Hamilton's energetic executive is embedded in a system of countervailing and shared powers; it is not a presidency above or independent of the Congress or the rule of law.²⁹⁸ And Hamilton's energetic executive is but a part of the Framers' story. Even Hamilton did not advocate so robust a presidency as the unitary presidentialist advocates would like. Taken in its totality, the evidence that emerges from a thorough examination of the writings, speeches, and constitutional handiwork of the Framers, reveals a more circumscribed presidency than the unitary advocates suggest.

297. *The Federalist* No. 70 (Alexander Hamilton).

298. *Id.*

COORDINATE CONSTRUCTION

By combining two provisions of the Constitution, the executive power clause and the Commander-in Chief clause (both in Article II), advocates of the unitary executive theory see a geometric expansion of executive authority where the parts, when added together, multiply in significance, creating a prerogative authority for the president. Conveniently forgotten is the fact that the president also takes an oath of office to “preserve, protect, and defend the Constitution of the United States.”²⁹⁹ He must therefore, “take Care that the Laws be faithfully executed,”³⁰⁰ even the laws with which he may personally disagree.³⁰¹ This binds the president to the rule of law.³⁰²

Some see presidential authority in times of crisis and war as creating an executive of virtually unchecked power.³⁰³ A September 25, 2002 Office of Legal Counsel (OLC) memo argues that “[t]hese decisions [in wartime], under our Constitution, are for the President alone to make.”³⁰⁴ Other OLC memos suggest that the president may make things that are unlawful or lawful, and that neither the Congress nor the Courts have the authority to review presidential acts in a time of war.³⁰⁵ But such an expansive reading of the Constitution violates both the spirit and the letter of the law. The Supreme Court, in cases such as *Hamdi v. Rumsfeld* (2004)³⁰⁶ and *Rasul v. Bush* (2004),³⁰⁷ and Congress, in efforts such as their ban on the use of torture³⁰⁸ (a bill President Bush signed, but in a “Signing Statement” argued that while he was signing the bill into law, he did not consider himself bound

299. See U.S. CONST. art. 2, § 1, cl. 8.

300. See U.S. CONST. art. 2, § 3.

301. It is here that the Bush efforts to defy law become so relevant. See, for example, the growing literature on presidential “signing statements”. See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 230 (Little, Brown, & Co., 2007); Charles Savage, *Bush Cites Authority to Bypass FEMA Law*, THE BOSTON GLOBE (Oct. 6, 2006); Charles Savage, *Bush Challenges Hundreds of Laws*, THE BOSTON GLOBE (May 13, 2006).

302. See Michael A. Genovese, *Must a President Obey the Law?*, WHITE HOUSE STUDIES 8, no. 1 (2008): 3-17.

303. The Bush position can best be seen in a series of memos circulated within the administration and later leaked to the press, best known as the “Torture Memos.” See Memorandum from Jay Bybee, Asst. A.G., to White House Counsel, 31 (Aug. 1, 2002) (hereinafter the “Bybee memo”); Memorandum from John C. Yoo, Asst. A.G. to the White House, to White House Counsel 6 (Sept. 25, 2001) (hereinafter the “Yoo memo”) (the author argues for a unitary view of executive).

304. Jane Mayer, *The Hidden Power*, NEW YORKER (June 26, 2006), <https://www.newyorker.com/magazine/2006/07/03/the-hidden-power?irclid=TfBUUnRSXTxyOWjLwUx0Mo3bxUkiXxc3q0Th3y40&irgwc=1&source=%E2%80%A6>.

305. See Michael A. Genovese & Robert J. Spitzer, *Re-examining the War Powers*, PRG NEWSLETTER 30, no. 1, 1 (Jan. 2006).

306. *Hamdi*, 542 U.S. at 509.

307. *Rasul*, 542 U.S. at 484-85.

308. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd, (a)-(d) (2005).

by the law he had just signed),³⁰⁹ have attempted to reclaim some of the power that was lost, delegated, ceded, or stolen.³¹⁰

THE DOCTRINE OF NECESSITY

Perhaps no claim by the Bush administration resonates as powerfully as the “necessity” argument. The old Roman adage *Inter Arma Silent Leges* (in war, the laws are silent), while not constitutionally valid, still holds politically persuasive power.³¹¹ Abraham Lincoln relied on the doctrine of necessity during the Civil War, arguing to Congress on July 4, 1861:

[T]he attention of the country has been called to the proposition that one who is sworn to ‘take care that the laws be faithfully executed’ should not himself violate them. Of course some consideration was given to the questions of power and propriety before this matter was acted upon. The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the . . . tenderness of the citizen’s liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the government should be overthrown when it was believed that disregarding the single law would tend to preserve it?³¹²

Lincoln believed that it was a union (nation) that above all else had to be preserved, because without that union, the Constitution and the rule of law would be meaningless.³¹³ In short, the Constitution *was not* a suicide pact.³¹⁴

Had the Bush administration relied more heavily on the necessity argument they would have been on powerful (if still unconstitutional) ground. Instead, they chose to go further. They claimed that not only is it necessary (for national security reasons) to go beyond the law, but that in such cases,

309. Charlie Savage, *Bush Could Bypass New Torture Ban: Waiver Right is Reserved*, THE BOSTON GLOBE (Jan. 4, 2006) http://archive.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/.

310. See *supra* note 302.

311. See MACHIAVELLI, *supra* note 289, at Chap. 34, (describing the Roman’s use of temporary dictatorship in times of crisis).

312. Abraham Lincoln, President of the United States, July 4th Message to Congress (July 4, 1861).

313. See DANIEL FARBER, *LINCOLN’S CONSTITUTION* 198 (Univ. of Chi. Press, 2003).

314. See RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (Oxford Univ. Press, 2006).

violating the law is not “really” violating the law.³¹⁵ They are, they argue, *above the law*; they are the law in times of war.³¹⁶

The Bush administration claims a legal basis for the monarchical presidency.³¹⁷ While the evidence of such a legal footing is minimal at best, this assertion, matched by bold action, meeting little congressional opposition, became practice and perhaps, precedent. A claim of Nixonian proportions, it quite literally does away with law and replaced it with the will of the executive. This monarchical view entered the political world after 9/11, and a bogus doctrine rejected in the 1970’s became practice in 2001 and beyond.³¹⁸

While the Supreme Court, on several occasions, sought to delegitimize these monarchical pretensions,³¹⁹ the president proceeded as if the court decisions were merely an annoying fly to be swatted away, then ignored. A series of OLC memos attempt to place a legal fig leaf over these claims of power, yet most are mere assertions of power with scant evidence.³²⁰ Combine these memos with the president’s view of “signing statements” (that he can sign a bill into law yet claim that he need not follow the law he just signed)³²¹ and you have a president above the law.

And yet, this is precisely the executive the framers sought to control under the rule of law and separation of powers.³²² There was not a president of the kingly prerogative. As Justice Robert Jackson wrote in *Youngstown*, “the prerogative exercised by George III, and the description of its evils in the Declaration of Independence” left no doubt that the framers stripped the new president of kingly prerogative.³²³

President Lincoln never made such bold and audacious claims. Even as he went beyond the letter of the law, he never claimed an inherent authority to breach the law, and he always recognized that Congress had the ultimate authority to reject his claims of power.³²⁴ If Lincoln momentarily went beyond the law—out of necessity—it was still the law and not his will that

315. See Torture Memo, *supra* note 285.

316. *A Guide to the Memos on Torture*, N.Y. TIMES, <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html?r=0> (last accessed Jan. 8, 2021).

317. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*, 90 CORNELL L. REV. 97, 149-50 (2004).

318. *Id.*

319. *E.g.*, *Rasul*, 542 U.S. 466.

320. See Bybee Memo, *supra* note 304; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), <http://hrlibrary.umn.edu/OathBetrayed/Rumsfeld%204-4-03.pdf>; Jane Mayer, *The Memo*, THE NEW YORKER (Feb. 20, 2006), <https://www.newyorker.com/magazine/2006/02/27/the-memo>.

321. See SAVAGE, *supra* note 302, at 229.

322. See U.S. CONST. art. 1, § 1; art. 2, § 1; art. 3, § 1.

323. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952).

324. Abraham Lincoln, President of the United States, July 4th Message to Congress (July 4, 1861).

was to be supreme. And he called upon the Congress to retroactively approve of his wartime decisions.³²⁵ It is this distinction that separates the Bush version of prerogative from that of his predecessors.

Only if acts are truly necessary to preserve the nation, might a president act beyond the scope of the Constitution. Lincoln was a servant of the law and the Constitution, even as he acted beyond their literal scope, never claiming an inherent power to act beyond the law.³²⁶ Lincoln believed the authority of the government was, during a crisis, the authority to act in defense of the nation, believing he was venturing on congressional territory. He never claimed that all authority was his, but only that in a crisis, the doctrine of necessity embodied authority in the government; authority that the president brought to life. He suggested that acts “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity It is believed that nothing has been done beyond the constitutional competency of Congress.”³²⁷ Thus, in a *legitimate emergency*, the *people* demand that the *president act*, and the president’s actions are *permissible* only if the *Congress* maintains its authority to control and limit or reject the actions of a president.³²⁸ “Must,” he asked, “a government of necessity be too strong for the liberties of its own people, or too weak to maintain its own existence?”³²⁹

SELECTED SUPPORTIVE COURT DECISIONS

In general, the courts have not served as a very effective check on presidential power.³³⁰ While there have been times when the courts were willing to stand up to the president (e.g., some of the Civil War cases, early in the New Deal era, late in the Watergate period, at times in the war against terrorism and during the Trump presidency), overall, the courts have tended to shy away from direct confrontations with presidents, and were often willing to defer to or add to the powers of the presidency.

Defenders of the powerful presidency gravitate towards one court case in particular, *United States v. Curtiss-Wright Export Corp.* (1936).³³¹ In that case, Justice George Sutherland, drawing on a speech in the House of Representatives by then member of Congress, John Marshall, referred to the

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. Abraham Lincoln, President of the United States, July 4th Message to Congress (July 4, 1861).

330. *See generally*, MICHAEL A. GENOVESE, *THE SUPREME COURT, THE CONSTITUTION, AND PRESIDENTIAL POWER* (Univ. Press of Am., 1980); GLENDON A. SCHUBERT, *THE PRESIDENCY IN THE COURTS* (Univ. of Minn. Press, 1957); Louis Fisher, *Judicial Review of the War Power*, 35 *PRESIDENTIAL STUDIES Q.* 466 (2005).

331. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

president as “the sole organ” of American foreign policy.³³² This reference found its way into Sutherland’s opinion and became a rallying cry for presidentialists.³³³ While Sutherland’s “sole organ” remark was merely a judicial aside (*dicta*), it has become the unofficial executive branch mantra for any president’s bold assertion of a broad and unregulated power over foreign affairs. But scholars have found little in *Curtiss-Wright* to rely on in the defense of the prerogative presidency, and other than defenders of presidential power, this case is not seen as significant in granting presidents expansive powers.³³⁴ It may be of comfort, but only small comfort to defenders of presidential power and exclusivity in foreign policy. Interestingly, presidentialists rarely cite the number of cases that limit the president’s imperial authority.

THE CONSTITUTIONAL DICTATORSHIP

Scholar Clinton Rossiter’s “Constitutional Dictatorship” is an effort to resolve the problem Locke and other democratic theorists attempted to solve.³³⁵ The “Constitutional Dictatorship”, is a stark admission of the failure of democratic theory to come to terms with prerogative.³³⁶ Of course, nowhere in the Constitution is it specified that the president should have additional powers in times of crisis. However, history has given us ample precedents where in times of crisis, the powers of the president have swollen.³³⁷

The constant reliance on the executive to solve the many “emergencies” (some self-defined by the president) facing the nation could well lead to the acceptance of the overly powerful executive and make the meaning of the term “emergency” shallow and susceptible to manipulation. With each new “emergency” in American history, the public and our political system may become more accustomed to accepting a broader definition of presidential power to meet each new crisis.

The Court under Rossiter’s constitutional dictatorship generally recognizes the need for government to have inflated powers with which to deal with the crisis, and it will often allow for a “flexible” interpretation of constitutional powers of the president, who is expected to deal with the emergency.³³⁸ Rossiter comes to this conclusion: “In the last resort, it is

332. *Id.* at 319.

333. *Id.*

334. Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENTARY 149, 150 (2016).

335. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 12-13 (Princeton Univ. Press, 1948).

336. *Id.*

337. *Id.* at 12.

338. *Id.*

always the executive branch in the government which possesses and wields the extraordinary powers of self-preservation of any democratic, constitutional state.”³³⁹

Under Rossiter’s theory, the court recognizes the emergency and allows the president to employ additional powers.³⁴⁰ But to be legitimate, the constitutional dictator must recognize the limits on his actions. Franklin D. Roosevelt, in 1942, after requesting of Congress a grant of an unusually large amount of power, assured the legislature that “[w]hen the war is won, the powers under which I act automatically revert to the people—to whom they belong.”³⁴¹ The executive, in short, must return the extraordinary powers it grabbed during the crisis back to their rightful place.

THE HEAVY WEIGHT OF PRECEDENT

Advocates of the unitary executive view argue that there is sufficient precedent to justify inflated claims of presidential power in an emergency.³⁴² Lincoln during the Civil War, Woodrow Wilson in World War I, Franklin D. Roosevelt in the Great Depression and World War II, and others paved the path that Bush would later follow. But so too did Richard Nixon, and while his acts are almost universally condemned, his “when the president does, it that means it is not illegal” motto clearly lives on today in the Trump administration.³⁴³

Presidents Lincoln, Wilson, and Roosevelt may have exercised emergency powers in the midst of crises, but other presidents such as Richard Nixon also attempted to grab extra constitutional power and were rebuffed and condemned.³⁴⁴ What made Lincoln and FDR heroes, and Nixon a usurper? The predicate is a legitimate and widely recognized crisis. Only when there is a genuine emergency can a president attempt to exercise extra constitutional power. Also, the other branches and the public must be willing to cede to the president these powers.³⁴⁵ Third, the president must remain willing ultimately to bow to the will of Congress if it chooses to set policy or limit the president’s exercise of power. And the president cannot use secrecy and distortion to hide from Congressional or public scrutiny. In general, Lincoln and FDR followed these guidelines; Nixon did not. And what of the

339. *Id.*

340. ROSSITER, *supra* note 336, at 12-13.

341. *Presidential Theory of the Commander-in-Chiefship in WWII-And Beyond*, JUSTIA, <https://law.justia.com/constitution/us/article-2/09-presidential-theory-of-the-commander.html#fn-147> (last accessed Jan. 8, 2020) (quoting President Roosevelt’s message to Congress of Sept. 7, 1942).

342. Yoo *supra* note 10, at 729-30.

343. SCHWARZ & HUQ, *supra* note 287, at 1.

344. THOMAS E. CRONIN ET AL, *THE PARADOXES OF THE AMERICAN PRESIDENCY* 96-97 (5th ed. 2018).

345. *Id.* at 129.

case of George W. Bush in the post 9/11 era? Bush may have had the predicate, but he was reluctant to place himself within the rule of law, bowing only when his popularity plummeted to the thirty percent range,³⁴⁶ and the courts chided him on several occasions, and the Congress belatedly reasserted its authority after the opposition Democrats won control of Congress in 2006.³⁴⁷ Until then, he exercised extra constitutional power *and* claimed that his acts were not reviewable by Congress or the Courts, often cloaking his actions in secrecy and duplicity.³⁴⁸ Such a bold and illegitimate interpretation of the president's prerogative powers is unsupportable in law or history.

The Bush administration took the Unitary Executive further than any of its predecessors, claiming that in war the president's actions are nonreviewable.³⁴⁹ Thus, the Bush administration asserted a prerogative presidency that was above the law, above the Constitution, and unbound of the separation-of-powers, rule of law, and checks and balances. In this, the Bush defense would add a seventh leg to the unitary executive: no other branch may question our actions. And if the Bush administration's view became accepted, who is to say that the emperor has no clothes?

Precedent is, at best, of limited utility as a guide for presidential action.³⁵⁰ After all, repetition does not legalize that which is illegal. Because people continue to rob banks, does not mean that such an ongoing action legitimizes robbery. In the same way, merely because presidents have engaged in a certain activity cannot make the illegal, legal. Mere repetition does not legitimize.

Extreme times may sometimes lead to and even justify extreme measures. The terrorist attacks of September 11, 2001 became the predicate allowing an obscure and intellectually threadbare theory of presidential unilateralism to assume center stage and attain a patina of legitimacy to what otherwise should be dismissed out of hand as an extreme and indefensible position.³⁵¹

After all, it must be remembered the framers rejected Locke's prerogative in favor of checks and balances. They rejected Hamilton's expansive executive for Madisonian equilibrium.³⁵² While "necessity" is a powerful

346. Lydia Saad, *Bush's Approval Rating Back in Low 30s*, GALLUP (Oct. 9, 2007), <https://news.gallup.com/poll/101695/bush-approval-rating-returns-low-30s.aspx>.

347. Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 3, 39-40 (2007).

348. See generally, Charles Lewis & Mark Reading-Smith, *False Pretenses*, THE CENTER FOR PUBLIC INTEGRITY (June 23, 2014), <https://publicintegrity.org/politics/false-pretenses/>.

349. Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, On Standards of Conduct for Integration under 18 U.S.C. §§2340-2340a. (Aug. 1, 2002).

350. CRONIN, *supra* note 345, at 3.

351. Bybee Memo, *supra* note 304.

352. CRONIN, *supra* note 345, at 92.

argument, it is not a constitutional argument.³⁵³ The framers did, in Article II, give the president executive power, but it was not absolute, and they did make the president commander-in-chief, but subject to the Congress, so the coordinate construction doctrine cannot be seen in isolation and can only be understood along with Article I. The constitutional dictatorship may well describe our political response to crisis, but that by no means confers a constitutional legitimacy. Precedent clearly suggests that over time the powers of the president have evolved and grown, but so too has history shown us times when the Congress has chosen to tame the prince and limit executive authority. While *Curtiss-Wright*³⁵⁴ may be canonical to presidentialists, a thorough examination of court cases dealing with executive power reveals a much more nuanced and complex portrait of a court that may sometimes shrink from confrontations with the executive but may also at times stand up to and limit power grabs by the president (as *Youngstown*, *Hamdi*, *Rasul*, and *Hamden* suggest).³⁵⁵

Modern day presidentialists such as John Yoo, who served in the Office of the Legal Counsel in the Justice Department in the early years of the Bush administration, leapfrog backwards, largely ignoring the work of the framers, preferring instead to go back to the very British precedents our framers rejected. As Yoo writes, “In interpreting the meaning of the Declare War Clause, we should not look exclusively at what a particularly influential Framers said about the provision at the Federal Convention. To better understand historical context, we should look to the British constitution”³⁵⁶

If the framers rejected the British model, why should we look to it for guidance? It is to the framers and the Constitution that we must look, not to the rejected doctrines of the prerogatives of the Crown.³⁵⁷

In *War by Other Means*, Yoo reveals his selective use of evidence by admitting “I *decided* to take Hamilton as my role model,”³⁵⁸ (italics not in original). *Decided* to take Hamilton? One doesn’t decide what evidence to accept and reject on the basis of personal preference but on the full weight of all the evidence. If anyone should serve as a model of the Constitution, it is James Madison.³⁵⁹ Evidence, not choice must guide judgement.³⁶⁰

353. *Id.*

354. *Curtiss-Wright Export Corp.*, 299 U.S. at 319.

355. See generally *Youngstown Sheet & Tube Co.*, 343 U.S. at 579; *Hamdi*, 542 U.S. at 507; *Rasul*, 542 U.S. at 466; *Hamden*, 548 U.S. at 557.

356. YOO, THE POWERS OF WAR AND PEACE, *supra* note 297, at 27.

357. CRONIN, *supra* note 345, at 93.

358. YOO, *WAR BY OTHER MEANS*, *supra* note 297, at xii.

359. CRONIN, *supra* note 345, at 94.

360. For a critique of Yoo’s view, see David Luban, *The Defense of Torture*, 54 NEW YORK REVIEW OF BOOKS 37-40 (2007).

BACK TO THE FUTURE: DICK CHENEY'S IRAN-CONTRA UNITARY
MONARCHIAL PLAYBOOK

The unitary executive and the conservative imperial presidency was not a 9/11 creation.³⁶¹ Actually, the playbook for the conservative unilateral presidency was scripted during the Reagan years by a little-known member of Congress named Dick Cheney.³⁶²

In the minority report of the Iran-Contra committee,³⁶³ Cheney unfolded a blueprint for presidential dominance that, as vice-president during 9/11, he was able to implement through the compliant President Bush.³⁶⁴ Mr. Cheney first began calling for a monarchical presidency in the aftermath of Watergate and the resignation of Richard Nixon.³⁶⁵ This view was reinforced when Ronald Reagan faced backlash from the Iran-Contra scandal.³⁶⁶ The presidency, Cheney felt, was under siege.³⁶⁷ The post-Watergate reforms weakened the executive and the US response to the crimes of the Reagan presidency brought about a weakened presidency.³⁶⁸ In a dangerous world, Cheney asserted, only a strong president can save us.³⁶⁹ Cheney went so far in the 1987 minority report as to call for “monarchical notions of prerogative” for the presidency.³⁷⁰ When Cheney got his chance, that is precisely what he promulgated. The 9/11 presidency of George W. Bush concentrated powers (e.g., surveillance of US citizens, torture, etc.) into the hands of one man.³⁷¹

As Cheney wrote in the Minority Report, “[T]he Chief Executive will on occasion feel duty bound to assert monarchical notions of prerogative that will permit him to exceed the law.”³⁷²

UNITARY, BUT NOT FOR OBAMA

Conservatives were quick to trim the sails of the presidency when in the hands of the opposition party, especially in the hands of Barack Obama.³⁷³

361. Michael A. Fitts, *The Paradox of Power in the Modern State: Why A Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 841 (1996).

362. *Minority Report*, in *Report of the Congressional Committees Investigating the Iran-Contra Affair*, H.R. Rep. No. 100-433, S. Rep. No. 100-216, (1987).

363. *Id.*

364. Aryn Subhawong, *A Realistic Look At The Vice Presidency: Why Dick Cheney Is An “Entity Within The Executive Branch”*, 53 ST. LOUIS U. L.J. 281, 282 (2008).

365. H.R. Rep. No. 100-433.

366. *Id.* at 585.

367. *Id.* at 445.

368. *Id.* at 445.

369. *Id.* at 450.

370. H.R. Rep. No. 100-433 at 465.

371. For a review of the unitary theory from a conservative perspective, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* (2008).

372. H.R. Rep. No. 100-433 at 465.

373. CRONIN, *supra* note 345, at 101.

Of course, our views often change depending on whose ox is being gored, and thus, a bit of backtracking is to be expected. But many Republican leaders in Congress were determined to do more than merely check Obama's powers. Many Republicans took the "no compromise" pledge, vowing to never work with or support President Obama.³⁷⁴ Senate Minority leader Mitch McConnell went so far as to tell the *National Journal*, "The single most important thing we want to achieve is for President Obama to be a one-term president"³⁷⁵

The mere existence of a black president caused a nightmarish backlash against President Obama.³⁷⁶ It also spawned a Tea Party revolt of right-wing citizens who were outraged that among other things, "the other" was in the White House. They wanted to "take back" the government from "them." When given a chance, these angry voters elected someone about as opposite from Obama as one could imagine.³⁷⁷

Some Republicans and conservatives reacted harshly to these changes.³⁷⁸ A Tea Party (TEA referring to "Taxed Enough Already") movement rose, advocating a variety of not always consistent policies (one oft seen poster at Tea Party rallies was: "Government. Keep Your Hands Off My Medicare!"), but one that was anti-establishment and anti-elitist.³⁷⁹ It would help propel Donald Trump into the White House.³⁸⁰

DONALD J. TRUMP AND THE UBER-UNITARY EXECUTIVE ON STEROIDS

Donald Trump is different. The only president ever elected who had neither military or political experience, Trump approached power not as a seasoned political veteran accustomed to the give and take of bargaining and compromise, but as the head of a family business accustomed to getting his way.³⁸¹ His business style would clash with the requirements of liberal democracy.³⁸² Trump was more comfortable as the "grand jefe" uneasy with

374. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 947 (2018).

375. James R. Carroll, *Mitch McConnell under fire for saying top priority is making Obama one-term president*, LOUISVILLE COURIER-JOURNAL (Oct. 26, 2010), <https://www.tevitroy.org/8245/mcconnell-under-fire>.

376. Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism* 53 ARIZ. L. REV. 827, 833 (2011).

377. *Id.* at 832.

378. *Id.*

379. *Id.*

380. Jared A. Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 U. PA. J. CONST. L. 489 (2018).

381. CRONIN, *supra* note 345, at ix.

382. Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 114 (2018).

the give and take of politics.³⁸³ He was better suited to an illiberal democracy where a strongman could dominate.³⁸⁴

Trump's imperial style and imperious claims clashed—as they inevitably would—with a checks and balance, separation of powers system.³⁸⁵ Acting more like a king than a president, Trump's *Let etat sem oui* attitude while incompatible with limited government, was well suited to his experience and his personality.³⁸⁶

Table 1: The Conservative Migration to Big Government/Big Presidency

| Date | Approach | Leading Advocates |
|-----------|--|--|
| 1950s-60s | Whig Model . . . small government, limited presidency | William F. Buckley <i>National Review</i> Wilmoore Kendall Barry Goldwater |
| 1950s-80s | Cold War vs. Soviet Union . . . Assertive president in foreign affairs | Republican Senator Arthur Vandenberg Rep. Senator Robert Taft Richard M. Nixon Rep. Senator Joseph McCarthy |
| 1970s | Administrative presidency . . . to circumvent Congress and allow the president to govern “when the president does it, that means it is not illegal.” -Richard M. Nixon | Richard M. Nixon |
| 1980s | The Reagan Revolution | Ronald Reagan |
| 1987 | Post-Watergate, Post-Iran-Contra—need to empower presidency and unilateral powers Iran-Contra Committee Minority Report | Congressman Dick Cheney |
| 2001 | Post-9-11 Unilateral Presidency President's actions in war time non-reviewable | Dick Cheney—VP George W. Bush—President |

383. *Id.* at 171.

384. CRONIN, *supra* note 345, at ix.

385. Siegel, *supra* note 383, at 199.

386. Siegel, *supra* note 383, at 200.

| | | |
|------|--|---|
| | Unitary executive | Federalist Society John Yoo |
| 2017 | Imperial Presidency “Divine Right” President above the law | Donald J. Trump Attorney General William Barr |

Trump repeatedly made assertions that he was above the law.³⁸⁷ Extending the unitary executive into a divine right argument, Trump bristled at a Congress that would not bend to his will, and repeatedly attacked the judiciary for finding many of his acts illegal or unconstitutional.³⁸⁸

As president, Donald Trump promoted an illiberal view of power.³⁸⁹ Where liberal democracy meant rule of law, checks and balances, limited government, and a constrained executive, illiberal democracy promoted the view that the voters—as electors—were the limit or check on the executive (or Congress, but only through impeachment; even in budgeting matters, the executive reigned supreme).³⁹⁰ Under illiberal democracy, a president, once elected, had vast amounts of unilateral power with very few restrictions (See Table 1 for the progression to a Trump presidency).³⁹¹ As Attorney General Barr noted in a June 8, 2018 memo to the Justice Department “Thus, under the Framers’ plan, the determination whether the President is making decisions based on ‘improper’ motives or whether he is ‘faithfully’ discharging his responsibilities is left to the People, through the election process, and the Congress, through the Impeachment process,” Barr wrote.³⁹² And while Mr. Barr did not quite say it, a president who acted in an improper or illegal way, but who is reelected or who escapes impeachment, could be above the law.

An illiberal president would—as Trump has done—repeatedly attack and try to weaken the institutions that might block or interfere with the president.³⁹³ Thus, attacks against the courts (e.g., “so called judges”),³⁹⁴ the press (“enemy of the people”),³⁹⁵ Congress (cannot have his tax returns because it is not “impartial”), and the US intelligence agencies (backing

387. CRONIN, *supra* note 345, at 189.

388. *Id.*

389. Siegel, *supra* note 383, at 190.

390. CRONIN, *supra* note 345, at x.

391. *Id.*

392. Bill Barr Memorandum, *Re: Mueller’s ‘Obstruction’ Theory*, (June 8, 2018).

393. Siegel, *supra* note 383, at 200.

394. Donald Trump (@realDonaldTrump), Twitter (Feb. 4, 2017), <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en>.

395. Donald Trump (@realDonaldTrump), Twitter (Apr. 7, 2020), <https://twitter.com/realdonaldtrump/status/1254769296280031232?lang=en>.

Putin's claims that he did not interfere with the US elections) were frequent and at times effective.³⁹⁶

While the Tea Party began as an anti-tax/anti-big government movement, and had a significant impact in electing Donald Trump president, once in office two peculiar things occurred: first, Trump abandoned them agreeing to deficit-busting budgets of over one trillion per year (the largest in history); and second, most Tea Party members either do not know or did not care.³⁹⁷ Rather than losing their support, Trump cemented it. In Trump, Republicans and conservatives now have a president who espouses big government (e.g., a trillion-dollars plus deficit), a big presidency ("I alone can fix it"),³⁹⁸ and a unilateral, and in many ways a monarchical conception of power.³⁹⁹

DONALD TRUMP AND THE DEATH OF CONSERVATISM

The culmination of the conservative migration from a small government/limited presidency approach, to proponent of illiberal democracy signifies the death of conservatism in America.⁴⁰⁰ As Hacker and Pierson write, "Over the last two and half decades, the GOP has mutated from a traditional conservative party into an insurgent force that threatens the norms and institutions of American democracy."⁴⁰¹ And as they further note,

The radicalism of the GOP means that it is no longer a conventional conservative party. It now displays characteristics of what scholars of comparative politics call an "antisystem party"—one that seeks to foment tribalism, distort elections, and subvert political institutions and norms. Although these tendencies appeared well before Trump's election, they have grown only stronger under his presidency.

In short, Madison's formula for ensuring moderation has stopped working. Extremism on the right, rather than provoking a moderating reaction, has become self-reinforcing. Positions that were once at or beyond the outer fringe of American conservatism have become first acceptable and then Republican orthodoxy

396. Donald Trump (@realDonaldTrump), Twitter (July 27, 2019), <https://twitter.com/realdonaldtrump/status/1155240345585750016>.

397. *Trump's Staunch GOP Supporters Have Roots in the Tea Party*, PEW RESEARCH CENTER (May 16, 2019), <https://www.pewresearch.org/politics/2019/05/16/trumps-staunch-gop-supporters-have-roots-in-the-tea-party/>.

398. Yoni Appelbaum, 'I Alone Can Fix It', THE ATLANTIC (July 21, 2016), <https://www.theatlantic.com/politics/archive/2016/07/trump-rnc-speech-alone-fix-it/492557/>.

399. Marc Mohan, *Originalist Sin: The Failure of Originalism to Justify the Unitary Executive Theory*, 24 LEWIS & CLARK L. REV. 1063, 1068-69 (2020).

400. Jacob S. Hacker & Paul Pierson, *The Republican Devolution*, FOREIGN AFFAIRS (July/August 2019), <https://www.foreignaffairs.com/articles/2019-06-11/republican-devolution>.

401. *Id.*

Trump's presidency has reinforced the GOP's insurgent nature, as he and his allies have launched attacks on the foundations of democracy—the press, the courts, law enforcement, the political opposition—with virtually no pushback or even complaints from within their party.

These norm-exploding stances raise the specter of democratic backsliding of a kind that seemed impossible only a few years ago. Yet they are less a departure from the recent history of the Republican Party than a hastening of its march down an alarming path.⁴⁰²

In a 2019 editorial from *The Economist*, the magazine warns of the dangerous direction towards which contemporary conservatism is headed.⁴⁰³ Jettisoning traditional conservative principles and positions, today's conservatism has morphed into a radical, insurgent populism that undermines traditional conservative values.⁴⁰⁴ They wrote,

Conservatism is not so much a philosophy as a disposition. The philosopher Michael Oakeshott put it best: “To be conservative . . . is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant.” Like classical liberalism, conservatism is a child of the Enlightenment. Liberals say that social order emerges spontaneously from individuals acting freely, but conservatives believe social order comes first, creating the conditions for freedom. It looks to the authority of family, church, tradition and local associations to control change, and slow it down. You sweep away institutions at your peril. Yet just such a demolition is happening to conservatism itself—and it is coming from the right.

The new right is not an evolution of conservatism, but a repudiation of it. The usurpers are aggrieved and discontent. They are pessimists and reactionaries. They look at the world and see what President Donald Trump once called “carnage.”

Consider how they are smashing one conservative tradition after another. Conservatism is pragmatic, but the new right is zealous, ideological and cavalier with the truth.⁴⁰⁵

402. *Id.*

403. *The Global Crisis in Conservatism*, THE ECONOMIST (July 4, 2019).

404. *Id.*

405. *Id.*

While conservatives have traditionally been cautious about change, today's conservatives espouse truly revolutionary policies and approaches to governing.⁴⁰⁶ As *the Economist* concludes. At its best conservatism can be a steadying influence. It is reasonable and wise; it values competence; it is not in a hurry. Those days are over. "Today's right is on fire and it is dangerous."⁴⁰⁷

President Trump's repeated legal troubles, his impeachment, and the post-impeachment purge of his administration reflect a dubious legal doctrine that he is legally above the law as he occupies an office with nonreviewable plenary powers.⁴⁰⁸ The leader of a party that was once the party of limited government, Trump has acted upon a discredited constitution theory that the presidency is all-powerful and immune from legal restrictions.⁴⁰⁹

In a Manhattan case dealing with Trump's payment of hush-money to Stormy Daniels, the President's attorney William Consovoy argued before the 2nd Circuit Court of Appeals that as president, Mr. Trump is immune from any judicial intervention or remedy for his actions.⁴¹⁰ Trump himself has said in July of 2019 that, "I have an Article II, where I have the right to do whatever I want as President."⁴¹¹ And his lawyer at the Senate Impeachment trial, Alan Dershowitz, argues that anything a president does to help get re-elected is in the national interest and cannot be an impeachable offense.⁴¹² And in a tweet about the Roger Stone case, Trump claimed that he had a "legal right" to interfere in criminal cases.⁴¹³

Trump also tweeted in June of 2018 that he had "the absolute right to pardon myself,"⁴¹⁴ asserted that he had the power to end birthright citizenship

406. *Id.*

407. *Id.*

408. *President Trump Impeached and Acquitted of Charges Relating to His Conduct of Foreign Affairs*, 114 AM. J. INTL. L. 495 (2020).

409. *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017).

410. Ann E. Marimow & Jonathan O'Connell, *In court hearing, Trump lawyer argues a sitting president would be immune from prosecution even if he were to shoot someone*, THE WASHINGTON POST (Oct. 23, 2019), https://www.washingtonpost.com/local/legal-issues/ny-based-appeals-court-to-decide-whether-manchattan-da-can-get-trumps-tax-returns/2019/10/22/8c491346-ef6e-11e9-8693-f487e46784aa_story.html.

411. President Donald Trump, *Address to Turning Point USA's Teen Student Action Summit 2019* (July 23, 2019).

412. Allan Smith, *Dershowitz: Trump Pursuing Quid Pro Quo To Help Re-Election Is Not Impeachable*, NBC NEWS (Jan. 29, 2020), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/dershowitz-trump-pursuing-quid-pro-quo-get-re-elected-not-n1125816>.

413. Donald Trump (@realDonaldTrump), Twitter (Feb. 14, 2020), <https://twitter.com/realDonaldTrump/status/1228311415192215553>.

414. Donald Trump (@realDonaldTrump), Twitter (June 4, 2018), https://twitter.com/realDonaldTrump/status/1003616210922147841?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1003616210922147841%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.cnn.com%2F2018%2F06%2F04%2Fpolitics%2Fdonald-trump-pardon-tweet%2Findex.html.

via executive order,⁴¹⁵ in spite of the fact that birthright citizenship is assured by the 14th amendment to the Constitution.⁴¹⁶ The Associated Press said that Trump has used the phrase “absolute right” at least 29 times as president.⁴¹⁷

President Trump has even argued that the explicit Constitutional powers of congress – the power of the purse and the war-powers – belong to him as president.⁴¹⁸ To build his “wall,” Trump declared a national emergency where no emergency existed and diverted Congressionally appropriated funds to build his wall.⁴¹⁹ And while majorities in both Houses of Congress voted for a resolution to end the emergency, only twelve Republican Senators voted against the President’s position.⁴²⁰

In February of 2020, the Senate passed a war powers resolution limiting Trump’s military options in Iran.⁴²¹ The Senate passed the resolution by a 55-45 vote margin, with eight Republicans voting against the President.⁴²² The House bill on the war powers passed 224-194, with only 3 Republicans voting against Trump.⁴²³

As historian Steve Hochstadt has written:

It is not surprising that a president so unconcerned about Constitutional norms would try to add to his powers. It is disturbing and dangerous that the Republican Party as a body supports Trump going far beyond what they harshly denounced just a few years ago. Republican Congressmen and -women are sitting by while Trump amends the Constitution by fiat.⁴²⁴

President Trump’s attorney general, William Barr, has proven a willing enabler to Trump’s imperial ambitions.⁴²⁵ As William Falk has written,

415. Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), <https://twitter.com/realdonaldtrump/status/1057624553478897665?lang=en>.

416. U.S. CONST. amend. XIV.

417. Colleen Long & Michael Warren, *Trump’s Idea of Executive Power Is Also Impeachment*, AP NEWS (Jan. 25, 2020), <https://apnews.com/b2d16168986dd61accd475143c544665>.

418. See *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

419. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

420. Susan Davis, *Trump Vows Veto After Congress Blocks His Order to Build Border Wall*, NPR (Mar. 14, 2019), <https://www.npr.org/2019/03/14/703379399/congress-overturms-trumps-national-emergency-declaration-to-build-the-wall>.

421. S.J. Res. 68, 116th Cong. (2020).

422. Catie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html>.

423. Catie Edmondson and Charlie Savage, *House Votes to Restrain Trump’s Iran War Powers*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/us/politics/trump-iran-war-powers.html>.

424. Steve Hochstadt, *Trump the Great and Powerful*, HISTORY NEWS NETWORK (Feb. 18, 2020), <http://historynewsnetwork.org/blog/154316>.

425. William Falk, *Editor’s Letter*, THE WEEK, (Feb. 28, 2020).

He got his job as attorney general by telling President Trump that the Constitution gives him “illimitable discretion” over Justice Department prosecutions; therefore, Trump’s numerous attempts to block or end the Mueller investigation did not constitute obstruction of Justice. Trump’s Article II authority is so expansive, Barr has stated, that neither Congress nor the courts can interfere in his policy decisions or compel him to release information. A delighted Trump has taken Barr’s imperial theory of the presidency both seriously and literally.⁴²⁶

Conservatives once railed against deficits, but Reagan’s and Trump’s budget-busting deficits now seem to pose no problem.⁴²⁷ Conservatives used to caution us about the growth of government, but George W. Bush created the largest government agency in history (the Department of Homeland Security)⁴²⁸ and Donald Trump wants to build a new “space force.”⁴²⁹ Conservatives used to care about character, but today, defend the character-challenged occupant of the White House.⁴³⁰ The list could go on and on.

Today’s conservatives are reactionary nationalists (and many are white nationalists), who wish to radically transform America.⁴³¹ Conservatism—for now at least—seems dead. As *the Economist* concludes, the shift to big government advocacy was “not an evolution of conservatism, but a repudiation of it.”⁴³²

CONCLUSION

Today, both the Republicans and Democrats are big government parties.⁴³³ They merely have different ends to which big government is to be used.⁴³⁴ And yet, now, more than ever, we need to discuss where we want to go as a nation, as well as how we want to get there.⁴³⁵ Assuming that one size (of government) fits all only straitjackets us into a big government corner.⁴³⁶

426. *Id.*

427. Matt Welch, *Remember when Republicans cared about the deficit?*, (July 18, 2019), A13.

428. *Is the United States Safer from A Terrorist Attack Today Than Before Sept. 11? An Interview with Michael Chertoff, U.S. Department of Homeland Security Secretary, and Gus Coldebella, Acting Dhs General Counsel*, 248 N.J. LAW. 21 (Oct. 2007).

429. Clayton J. Schmitt, *The Future Is Today: Preparing the Legal Ground for the United States Space Force*, 74 U. MIAMI L. REV. 563 (2020).

430. Hacker & Pierson, *supra* note 401.

431. Michael Miller, *The Times That Try Our Souls . . . and Define Us for History*, 91 N.Y. ST. B.J. 5 (April 2019).

432. THE ECONOMIST, *supra* note 404.

433. CRONIN, *supra* note 345, at 81.

434. *Id.*

435. Siegel, *supra* note 383, at 205.

436. Gene Healy, *The Right Should Re-Rethink Presidential Power*, CATO INSTITUTE (Nov. 13, 2012), <https://www.cato.org/publications/commentary/right-should-rerethink-presidential-power>.

Yes, big government is necessary to achieve some tasks. No, big government is not the answer to all of our problems.

Was the growth of presidential power inevitable? As the United States rose as a global power, was it necessary to have a strong president? Have conservatives violated the very principles they so long espoused, or have they merely given in to the inevitable? When opportunities presented themselves, was it truly necessary to adapt philosophy to changing circumstances?

Opportunity and *necessity*: two words that well describe why, over time, the power of the presidency expanded. The ambiguities in the original design created opportunities for ambitious men, especially in times of great stress, to increase presidential power.⁴³⁷ The presidency—elastic, adaptable, even chameleon-like—has been able to transform itself to meet what the times needed, what ambitious presidents grabbed for, what Congress and the courts ceded, what the people wanted, and what world events and American power dictated.⁴³⁸

Yet, in other ways, the rise of presidential power is a surprise. It was not supposed to have happened. In strictly constitutional terms, the presidency is a limited office.⁴³⁹ The United States made the long march from the tyrannophobia of antiexecutive bias (Revolution) to no executive (Articles of Confederation) to a limited executive (the Constitution) to today (an uber-imperial presidency).⁴⁴⁰ The presidency has not been one thing, but many. And presidential power has not been static, but dynamic.

The American presidency is a complex multidimensional, paradoxical office.⁴⁴¹ And it is embedded in a *system*—the separation of powers—that intentionally limits the exercise of power.⁴⁴² The office has been occupied by individuals from a wide range of backgrounds, possessing varied skills, motives, goals, and ambitions. They served under dramatically different conditions and circumstances and at all times are supposed to be guided by the rule of law expressed in the Constitution. It should not then surprise us that the history of the presidency reflects the rise and fall and ebb and flow of political power.

The office of the presidency has been shaped by various individuals, operating within a dynamic system under changing circumstances. Some presidents have been strong, others weak. Some eras demand change, others defy it. The presidency has been shaped by industrialization, the Cold War, American superpower status, economic booms and busts, wars and demands

437. Fitts, *supra* note 362, at 830.

438. *Id.* at 833-834.

439. *Id.* at 884.

440. *Id.* at 885.

441. CRONIN, *supra* note 345.

442. Fitts, *supra* note 362, at 841.

for racial change, increasing democratization, globalization, 9/11, and the demands of capitalism. Presidents helped shape some of these changes, were victims of others, and innocent or helpless bystanders in still others. Great social movements, technological changes, newly emergent groups, and a host of other factors created opportunities and restraints on presidential leadership. The story of the rise and fall of presidential power is thus a complex and perplexing one. It is a story of elasticity and adaptability, of leadership and clerkship, of strong and weak officeholders, of change and stasis.

The growth of presidential power was (perhaps) inevitable, the embrace of big government and a big presidency by conservatives was not. Conservatives grew to believe that a big presidency was a good way to achieve many of their policy goals, and jettisoned principle in favor of policy victories.⁴⁴³ They attained some of their victories, but at what cost?

443. Healy, *supra* note 437.