

A Question of Power: The Robust Presidency

By William Howell - June 1, 2014

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Depending on the day and audience, President Barack Obama has been called many things, only some of which are fit to print: Wall Street stooge, Main Street sellout, foreign policy novice, socialist. One consistent strain of criticism, however, draws on the theme of executive overreach or, less politely, tyranny. And it is this line of criticism I want to explore here, if only to sketch out a limited defense of Obama's repeated efforts to exercise power in a system of government that does so much to privilege the status quo.

After spending much of his first term in office courting Republican support within Congress, Obama has consigned himself during his second term to some basic facts about contemporary politics: legislative support resides nearly exclusively among co-partisans; rather than softening partisan cleavages, soaring rhetoric about transformational politics will do as much to harden opposition; and the most prevalent opportunities for advancing policy change come not from working with Congress but from working around it.

It comes as little surprise, then, that Obama is fashioning a policy record made of executive orders and other unilateral directives that, by turn, increase the minimum wage for employees of federal contractors, alter overtime pay requirements for workers nationwide, strengthen the oversight of gun purchases, expand environmental regulations, reconfigure domestic and international spying practices, initiate strikes against suspected terrorists abroad, draw down the U.S. military presence in Afghanistan and much more. As announced in his State of the Union speech earlier this year, Obama would no longer wait for Congress to legislate on pressing domestic and international policy matters. Consciously eschewing the "stale political arguments" and "gridlock" that pervade Washington, the president repeatedly signaled his intention to act on his own.

Before he even finished speaking, Republicans began casting Obama as a grave threat to the constitutional order. On the morning of the speech, Sen. Ted Cruz, a Republican from Texas and darling of the Tea Party movement, took to the pages of *The Wall Street Journal* to accuse the president of "(disregarding) the written law." Cruz declared that the "pattern of lawlessness" exhibited by the Obama administration threatened to transform America from a nation ruled by law to one ruled by men. And not just any group of men, but one man: Obama.

Cruz was not the only Republican to take issue with Obama's embrace of executive power. Rep. Randy Weber of Texas tweeted from the floor of the speech that Obama was a "socialist dictator." The next day, former Republican Pennsylvania senator and past presidential candidate Rick Santorum said that Obama's speech was "what tyrants are made of." Conservative pundits enthusiastically concurred. The so-called imperial presidency, which had once so frightened Democrats, now stood in full view of Republicans.

Much of this talk, to be sure, can be chalked up to the everyday posturing of contemporary politics, which are long on magniloquence and short on reason. For as sure as politicians will pander to our baser instincts, Republicans and Democrats will each whip up a thick froth of indignation over what they perceive as gross abuses of the Constitution wrought by a sitting president of the opposite party. Though Republicans may be the ones making hay today, under the George W. Bush administration Democrats read abuse into nearly every exercise of presidential power.

The partisan undertones of these arguments may not be intellectually serious, but that does not mean the arguments themselves do not warrant serious intellectual consideration. The American presidency, like our system of checks and powers more generally, remains very much a work in progress. The precise meaning of "executive power" has always been contested. To make sense of our politics and the president's role within them, then, we would do well to look upon them if not from 30,000 feet, then at least above the

cacophony of today's headlines. And when we do, some basic patterns emerge that clarify why presidents behave as they do – and how we, the American public, are complicit in the matter.

Two facts go a long distance toward explaining the president's relationship with – and persistent longing for – power. The first points to the Constitution. The second implicates Americans themselves.

If not an empty cupboard, Article II of the Constitution offers a rather paltry food supply to a president seeking sustenance in today's politics. Formally, the president can veto legislation, although his veto is subject to congressional override. He can appoint bureaucrats and judges, although these powers too are subject to the Senate's advice and consent. He can receive foreign dignitaries, a power that was largely ceremonial in conception. And he is the commander in chief, a position that was primarily administrative.

When it comes to unambiguous conferrals of influence, that is about it. The founders may have created a system of separated branches, each independent of the others. Such branches, however, were decidedly not coequal. To the contrary, Congress was understood to be the first branch of government, and many of the powers granted to the president – e.g., the veto – were meant to guard against legislative encroachment.

On their own, these basic facts about the Constitution are not especially problematic. The trouble emerges when the spindly Article II sits as backdrop against the extraordinary demands and expectations the American people place upon their presidents. These demands and expectations, to be sure, have evolved over time. Nearly all the trend lines, though, point upward and outward, so that today it is difficult to even conceive of a subject of legitimate government action on which the president can punt.

We expect our presidents to assign meaning to our tragedies, direct water to our droughts, stand up to Russian aggression while ensuring the sanctity of international markets, contain terrorist threats while preserving our civil liberties, advance tough standards of accountability in our schools, reduce our crime, allay the ravages of urban poverty and so much more besides. There simply is no dimension of public life about which the president can claim neither an opinion nor responsibility.

Given the standards to which we hold presidents and the inadequacy of the enumerated powers granted them, it should not come as a great surprise that presidents – all presidents – work doggedly to preserve what statutory authority is delegated to them, read broadly into the vague constitutional provisions, manufacture new tools of influence and expand, whenever possible, the influence they wield over domestic and foreign policy. They must. To do otherwise is to invite nearly universal reprobation.

There may be political costs to those presidents who overreach. The greatest blows dealt, however, occur when presidents do not vigorously and publicly advance the nation's interests. To do anything less, particularly during times of crisis, is to court disaster – as Bush, the flyover president, learned in the aftermath of Hurricane Katrina; and as Obama, the flaccid intellectual, learned during the showdown over the debt ceiling in the summer of 2011. In such moments, presidents appear distinctly unpresidential.

Presidents do not pursue power out of vainglory (though vainglorious they may be). They do so to satisfy us, by whom I mean the contemporary public that holds them and their parties in continual judgment, and the historians who discern and eventually define their legacies. Both constituencies demand action – forthright, public and unapologetic. Those presidents who act are those who fulfill the obligations of their office. Whether their actions and accomplishments are sufficiently prudent, sensitive to the Constitution or statutory limitation, or in line with public sentiment, remain in our politics matters of secondary importance.

If we are troubled by the bold exercise of presidential power, it will not do to beseech the president to change his ways while simultaneously holding him to such outsized expectations. We would do better, if we are serious about the matter, to demand that the adjoining branches of government – namely, Congress and the courts – curtail the power options available for presidents. More foundationally still, we should scale back the demands we so profligately deposit at the feet of our president.

When it comes to power, the dominant trends across presidential administrations are ones of continuity rather than change. The ideological commitments of Bush and Obama differ radically. But when it comes to power, they – like so many of their predecessors – are of a piece.

Seeing one of their own assume the presidency in 2009, constitutional law scholars and liberal Whigs anticipated that Obama would restore some semblance of balance to our national politics. Such hopes, though, proved to be misplaced. Rather than temper the use of presidential power, he has worked hard to extend it.

Like Bush, Obama has steadfastly defended his executive privileges, just as he has staunchly guarded private information about all matter of foreign policy matters. Through unilateral directives, he has successively escalated and de-escalated two major wars abroad. Only in light of the scrutiny caused by the Edward Snowden leaks has he pledged any meaningful curtailment of the national security state. In the aftermath of legislative setbacks, Obama has used all sorts of executive orders on both domestic and foreign policy matters. He continues to rely on executive agreements, which do not formally require Senate ratification, in lieu of treaties, which do.

In many ways, then, Obama picked up where Bush left off. His policy objectives differ dramatically from his predecessor's. But the project of building, protecting and expanding executive power is much the same.

Nonetheless, to the ongoing project of presidential expansion, Obama proffers innovations of his own. Some, such as the transformation of modern warmaking through drones, have received a fair measure of public attention. One of the most striking, however, has been hiding in plain sight: the president's efforts to rewrite major education policy through waivers and administrative fiat.

Obligations over education policy are enshrined in state constitutions, not the federal Constitution. Some of the most striking policy developments of the last half-century, however, have come at the behest of the national government. Tracing back to the original Elementary and Secondary Education Act (ESEA) of 1965 and following on with the creation of a federal Department of Education under the Carter administration, the federal government generally, and the American president in particular, has sought to influence the ways in which children learn around the country.

Such developments came to a head under the George W. Bush administration. Indeed, arguably the single most important domestic policy achievement of his presidency was the 2002 enactment of No Child Left Behind (NCLB). With this law, the federal government helped propagate new systems of accountability, ones that set clear benchmarks for student learning and consequences for schools and districts that failed to meet them.

In 2007, NCLB was first up for reauthorization. Seven years later, it remains so. And in the interim, Congress has done nothing to rectify the most glaring faults of this legislation.

Rather than wait on Congress to fix NCLB, Obama has begun to offer waivers to individual states. Although NCLB remains on the books, he has told states they are free to ignore its most onerous provisions. But he doesn't stop there. The provision of waivers is conditional upon each state's willingness to take up alternative education policies endorsed by the administration – policies, it should be noted, that differ from the contents of NCLB and that most likely would not withstand the legislative process in Congress.

As a general matter, legislation has always trumped unilateral and administrative directives emanating from the president. Executive orders and the like, as a result, have traditionally had to operate in the gaps between legislative pronouncements. But no longer when it comes to federal education policy. Through waivers, Obama is effectively remaking federal law, at once dismantling his predecessor's signature policy achievement and codifying in law his own education policy. Rather than working around Congress' handiwork, then, the president is refashioning it entirely on his own.

What is to be done about this state of affairs? Is ours now a tyrannical presidency, one wholly unaccountable to the people and undaunted by legal or constitutional restraint? And if so, do we have a responsibility to put the president back into the narrow confines established by a narrow reading of Article II powers?

On questions as complex as these, reasonable people can differ. My own view is that the modern presidents are not the bogeymen so many make them out to be. Two reasons help explain why.

First, ample checks remain on the exercise of presidential power. At nearly every turn, presidents confront impediments to their agenda. In Congress, the courts, the administrative state and the larger populace, presidents run up against organized and vocal opponents who work assiduously to undermine their influence. Confer with a former adviser of the president, and she will regale you with tales of heartache and frustration as her boss sought to implement even the most common-sense policy reforms.

The second reason I am not especially keen on reducing the president's power concerns the alternatives on offer. If not the president, then which branch of government can we reliably turn to address the kinds of deep, trenchant, complex national problems we face? With Congress mired in gridlock and the courts institutionally incapable of engaging the minutiae of policy debates, presidents alone offer the kind of leadership needed to address the challenges of climate change, the debt, entitlement reform, and on and on. As the Progressives recognized a century ago, the institutional capacity of the government to solve social problems critically depends on a robust American presidency.

In debates about presidential power, originalist understandings of the Constitution have their place. But so do pragmatic concerns about the capacity of our government to meet contemporary challenges. For the national perspective he offers, the longer time horizon he maintains, and the unique capacity to act with "energy and dispatch," as Alexander Hamilton recognized so long ago, we ought not to shout "tyranny" every time a president uses his powers toward ends we may not share. Presidents who behave this way are not tyrants. Far from it. Rather, in line with their predecessors, they are doing their best in an impossible situation – expected at once to solve massive and complex problems while brandishing constitutional powers fashioned in a bygone era of agrarian farmers, limited government and international isolationism.

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When James Madison shaped a new constitutional system for the United States, he and his fellow framers had one overriding fear: tyranny.

They wanted to divide power between three branches and create lines of separation that prevented the concentration of power in any single branch. The framers based their ideas on an understanding of human nature – and human weakness. They tried to create a system in which ambition would check ambition. However, they knew that citizens can be distracted or deceived into giving up their very freedom. Madison warned future generations that "if Tyranny and Oppression come to this land, it will be in the guise of

fighting a foreign enemy." The framers knew how effective fear can be to induce citizens to give up their liberties. Recent years have proven them once again prophetic in their warnings.

To this day, many Americans misunderstand the separation of powers as simply a division of authority between three branches of government. In fact, it was intended as a protection not of institutional but of individual rights, by preventing any branch from assuming enough power to become tyrannical. No branch is supposed to have enough power to govern alone. Once power becomes concentrated in the hands of a president, citizens are left only with the assurance that such unchecked power will be used wisely – a Faustian bargain the framers repeatedly warned us never to accept. Benjamin Franklin said it best when he warned that "they who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."

Despite these warnings, many people have embraced largely unchecked presidential powers under the assurance that the rising security state will keep them safe. The shift of power to the presidency certainly did not start with President Barack Obama. To the contrary, this trend has been gaining ground for decades. But it has accelerated under Obama, who has succeeded to a degree that would have made Richard Nixon blush. Indeed, Obama may be the president Nixon always wanted to be.

I do not believe that Obama is (or wants to be) a tyrant. However, his unilateral actions are redrawing the lines of separation in our system in a way that I believe could prove destabilizing and even dangerous in the future.

While the "imperial presidency" has been discussed as a danger in our country since its founding, it is a term most associated with Nixon. Presidents such as Andrew Jackson and Franklin Delano Roosevelt showed similar tendencies. Often, war is cited as the reason for extraconstitutional action, such as Abraham Lincoln's suspension of habeas corpus. "Imperial presidency" is not a term that reflects an actual royal ambition or the suspension of term limits. Rather, it refers to a model of the presidency that allows for a wide array of unilateral actions and largely unchecked powers.

What is fascinating is that Nixon was largely unsuccessful in accomplishing this dream of a presidency with robust and largely unlimited powers. Indeed, many of the unchecked powers claimed by Nixon became the basis for articles in his impeachment and led to his resignation on Aug. 9, 1974.

Four decades ago, Nixon was halted in his determined effort to create an imperial presidency with unilateral powers and privileges. But in 2013, Obama wields those very same powers openly and without serious opposition.

-Surveillance. Nixon's use of warrantless surveillance was cited as one of his greatest abuses and led to the creation of the special Foreign Intelligence Surveillance Court. Obama, however, has expanded warrantless surveillance programs to a degree that dwarfs anything Nixon imagined, including initiating a program that captured communications of virtually every U.S. citizen.

-War. Nixon's impeachment included the charge that he evaded Congress' sole authority to declare war by invading Cambodia. Obama went even further in the Libyan war, declaring that he alone defines what is a "war" for the purposes of triggering the constitutional provisions on declarations of Congress. That position effectively converts the entire provision in Article I, Section 8 of the Constitution ("Congress shall have power to ... declare War") into a discretionary power of the president.

-Kill lists. Nixon ordered a burglary to find evidence to use against Daniel Ellsberg, who leaked the Pentagon Papers, and was accused of a secret plot to have the White House "plumbers" "incapacitate" him in a physical attack. People were outraged. Yet Obama has asserted the right to kill any U.S. citizen without a charge, let alone conviction, based on his sole authority. Internal documents state that he has a right to kill a citizen even when he lacks "clear evidence (of) a specific attack" being planned.

-Reporters/whistle-blowers. Nixon was known for his attacks on whistleblowers, using the Espionage Act of 1917 to bring a rare criminal case against Ellsberg. He was vilified for this abuse of the law, but Obama has brought twice as many such prosecutions as all prior presidents combined. Nixon was accused of putting a few reporters under surveillance. The Obama administration has admitted to putting Associated Press reporters, as well as a Fox reporter, under surveillance.

-Obstruction of Congress. Nixon was cited for various efforts to obstruct or mislead congressional investigators. The Obama administration has repeatedly refused to give evidence sought by oversight committees in a variety of scandals. In one case, Congress voted to move forward with criminal contempt charges against Attorney General Eric Holder, which Holder's own Justice Department blocked. In another case, Director of National Intelligence James Clapper lied before Congress on the surveillance programs, and later said that he offered the least untruthful statement he could think of. The Obama administration, however, refuses to investigate Clapper for perjury, let alone fire him. Recently, the administration was accused of searching Senate computers in an investigation of the CIA and trying to intimidate congressional investigators.

These examples are simply those connected with the growing internal security state. Other characteristics of an imperial presidency are equally evident, particularly in the repeated circumvention of Congress in ordering unilateral changes to federal law or suspending federal laws.

While many hail Obama for not taking "no" for an answer from Congress in areas such as health care and immigration reform, they may rue the day another president uses the same powers to negate environmental or anti-discrimination laws.

It has long been said that one of the scariest statements is, "Trust us, we're from the government." The deep American distrust for such a claim was shared by the framers, who rejected a government based on assurances of the best intentions. Madison famously warned, "If men were angels, no government would be necessary." In other words, we have a government that refuses to accept promises of good behavior or motivations from politicians.

Time and time again, Obama has returned to the theme that there is nothing to worry about in surveillance or wars or even the killing of citizens because he promises to use the powers wisely. The administration has been particularly adept in creating internal "committees" to suggest some form of due process before citizens are vaporized or other unchecked powers are used by the president. Since the president creates these committees and appoints their members out of his own authority, he can simply ignore their recommendations. It is little more than the promise of best intentions – the very promise the framers warned us never to accept from our government.

In the end, we have accepted the lure of personality over principle in allowing the expansion of these powers. Obama will not be our last president, but these powers are unlikely to be voluntarily surrendered by his successors. There is a radical change occurring in our system, and we may be at a critical constitutional tipping point in the establishment of an imperial presidency in the coming years.

The danger of this concentration of authority is made more acute by the failure of federal courts to perform their vital function in confining the branches to their constitutional spaces. Federal courts in the past few decades have maintained an increasing position of avoidance in separation-of-powers cases, leaving it to the political branches to fight over turf. Courts now routinely block litigants, including members of Congress, from even being heard on constitutional violations. Years ago, I represented Democratic and Republican members (both conservative and liberal) challenging the Libyan war. They were denied even a hearing.

Congress has proved equally passive, if not inert. Democrats have remained silent in the face of policies that challenge core values of privacy and war, as did Republicans under George W. Bush. That interbranch

tension envisioned by Madison has gradually dissipated. Individual ambition of politicians has replaced institutional ambition, leaving many to curry favor with the White House as legislative powers are drained away by an increasingly powerful president. As that power increases, there is more pressure on politicians to yield in new areas.

This downward spiral may have reached its ultimate expression this year. Framers such as Madison would have been mortified by the scene from the most recent State of the Union address. Obama appeared before a joint session of Congress (and members of the Supreme Court) to announce that he intended to go it alone in achieving his policy goals, refusing to yield to the actions of Congress. One would have expected an outcry, or at least stony silence, from a branch that was being told it would be circumvented. Instead, there was rapturous applause that bordered on a collective expression of institutional self-loathing.

Obama has made it clear that he simply will not take "no" for an answer. When Congress recently refused to pass the DREAM Act to change immigration laws to protect potentially millions of deportable individuals, he simply ordered the very same measures on his own authority. The same unilateral measures were ordered in health care, drug enforcement, online gambling and other areas. The failure of Congress to consent to executive demands was followed by the same measures being ordered on the basis of Obama's inherent authority. Under this approach, Congress is being reduced to an almost decorative element in governance – free to approve but not to block presidential demands.

While Congress clearly retains powers, its members are increasingly finding that discretionary funds and powers blunt efforts to change government programs. Even Congress' power of the purse has become discretionary with the president. When Congress resisted demands of the president on health care, Obama simply shifted \$454 million in funds from the purpose mandated by Congress to his own purpose. When he decided not to consult with Congress on the Libyan war, he simply spent roughly a billion dollars on a war neither declared nor funded by Congress.

Such circumvention – and the new presidential powers – create a perfect storm within the Madisonian system. It raises the very prospect the framers thought they blocked through the separation of powers: a president who can effectively rule alone.

We often refer to ourselves as the "land of the free," as if that status were self-evident. We rarely ask ourselves what those freedoms are and how they have been abridged. Our self-image can border on self-delusion when we take stock of the status of many rights.

We have learned of a massive surveillance program in which every citizen has had telephonic and email data captured by the government. Every citizen has been warned that the president may kill them on his own authority without a charge, let alone a conviction. We have a secret court that approves thousands of secret searches every year and a federal court system that increasingly allows the use of secret evidence. We have a new Obama-era law, the National Defense Authorization Act, that allows for the indefinite detention of people by the government and, while exempted from mandatory detention, allows for such detention of citizens. We still have a detention center at Guantanamo Bay, established by George W. Bush, just over our border to avoid the jurisdiction of U.S. courts. It allows the president to choose who gets a real trial, who gets a legally dubious military tribunal, or who gets no trial at all. While seeking to close the facility, Obama has continued to assert the right to send people to military tribunals on his sole authority – thereby stripping them of core legal protections.

While the erosion of freedoms in the United States has occurred with nary a whimper of regret in this country, it has not gone unnoticed abroad. The United States is now widely viewed as a hypocrite on the subject of human rights and civil liberties. This year, our nation fell to 46th in the world on press freedoms (behind the former Soviet republics of Lithuania and Latvia as well as Romania, Poland, Czechoslovakia, Ghana, South Africa and El Salvador), according to a recent study by Reporters Without Borders. Another

study this year counts the United States as an "enemy of Internet freedom" with countries such as Iran, China and North Korea.

When the full mosaic of new governmental powers is considered, and the full array of rights curtailed in the United States, we are left with a disturbing question of self-identity. We more often seem to define ourselves by what we are not than by what we are.

In the summer of 1787, a telling moment occurred after a crowd gathered around Independence Hall to learn what type of government had been created for the new nation. When Benjamin Franklin walked out of the Constitutional Convention, Elizabeth Powel could wait no longer. Franklin was one of the best known of the framers working on the new U.S. Constitution. Powel ran up to Franklin and asked, "Well, Doctor, what have we got, a republic or a monarchy?" Franklin turned to her and said what are perhaps the most chilling words uttered by any framer: "A republic, Madam, if you can keep it."

It may be that it is not the presidency that has changed. We have changed. As a nation, we seem to have grown almost bored with rights like privacy and due process. We have been passive and pedestrian in watching the rise of an uber-presidency. We no longer view ourselves as directing our government, but as merely bystanders watching matters outside our control.

Worse yet, we seem to have lost not just our identity but even our interest in governance. It was a republic when Franklin was stopped by Powel.

I am not sure that most citizens today would even have stopped him to ask. "Democracy ... soon wastes, exhausts and murders itself," John Adams once said. "There was never a democracy yet that did not commit suicide."

What is truly sad is that if one of the greatest republics in history did die, it is not clear if anyone would even notice its passing.

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