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# Presidential power and its expanding influence: Suggestions on how to strengthen checks and balances.

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Presidential power and its expanding influence: Suggestions on how to strengthen checks and balances.

Jesse Hooker

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## I: Introduction

The increased use of executive power by the Executive Branch is a fundamental problem in American politics and society. The United States Constitution does not give the president the power to single-handedly write his preferred policy into law. The Founders believed in a lawmaking body that would debate, argue, and compromise important policy decisions as a group. Despite the original intent of the authors of the Constitution, executive orders are increasingly used by presidents of both the Republican and Democratic parties to institute laws and create public policy initiatives that circumvent the primary law-making body; the United States Congress.<sup>1</sup>

When the American experiment has worked, it has relied upon behavioral norms created by the founders and tweaked throughout history. The norms, such as the limited use of impeachment powers, dictate how and when it is appropriate to use powers delegated in the Constitution. When crafting the American Constitution, the founders knew that people were ambitious. They crafted a document which attempted to create institutions that provided that no single branch of government could usurp the other two. They knew that political leaders were flawed and believed that many of the checks and balances were necessary to curb ambitious leaders. They gave power to institutions to act because they feared tyranny from ambitious politicians, but those powers have been rarely used due to norms of behavior that established a shared belief about how government institutions work.

Two of the norms that have been established throughout U.S. history are institutional forbearance and mutual toleration.<sup>2</sup> When someone is elected they are given a mandate from the people. Another elected official respects that mandate. The honeymoon effect is a direct result of mutual toleration and institutional adherence. These two norms are not written into the

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<sup>1</sup> President or King - The Use and Abuse of Executive Orders in Modern-Day America - Tara L. Branum

<sup>2</sup> Levitsky, Steven, and Daniel Ziblatt. How Democracies Die. Broadway Books, 2018.

Constitution, but without them the constitutional checks and balances will not operate as the founders, or the common person, expects them to. If the U.S. abandons the norm of mutual toleration and institutional forbearance, institutional powers can be used merely because they can, not based on whether they should.

Constitutional Hardball, as defined by Steven Levitsky and Daniel Ziblatt, is when individuals and parties attempt to exploit the letter of the law to undermine the spirit of the law.<sup>3</sup> All failing democracies experience instances of constitutional hardball which destroy the democratic institutions of those countries. In 2004, when Venezuela's high court proved too independent, congressional allies of President Hugo Chávez added 12 seats to the 20-member court and filled them with loyalists.<sup>4</sup> In postwar Argentina, when President Juan Perón encountered Supreme Court opposition, his congressional allies impeached three of five justices on grounds of "malfeasance" and replaced them with loyalists.<sup>5</sup> These are foreign countries that went through periods where their democratic institutions were undermined. It would be naive to think that constitutional hardball has not happened in U.S. history. During the 1850s, polarization over slavery undermined America's democratic norms. Southern Democrats viewed the antislavery position of the emerging Republican Party as an existential threat. They assailed Republicans as "traitors to the Constitution" and vowed to "never permit this federal government to pass into the traitorous hands of the Black Republican Party."<sup>6</sup> Undermining democratic norms by empowering presidents with power is a serious threat to the democratic institutions of America.

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<sup>3</sup> Levitsky, Steven, and Daniel Ziblatt. "How Wobbly Is Our Democracy?" The New York Times, The New York Times, 27 Jan. 2018, [www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html](http://www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html).

<sup>4</sup> Levitsky, Steven, and Daniel Ziblatt. "How Wobbly Is Our Democracy?" The New York Times, The New York Times, 27 Jan. 2018, [www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html](http://www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html).

<sup>5</sup> Levitsky, Steven, and Daniel Ziblatt. "How Wobbly Is Our Democracy?" The New York Times, The New York Times, 27 Jan. 2018, [www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html](http://www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html).

<sup>6</sup> Levitsky, Steven, and Daniel Ziblatt. "How Wobbly Is Our Democracy?" The New York Times, The New York Times, 27 Jan. 2018, [www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html](http://www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html).

It would be hypocritical, as well as dangerous, to seek change when a president from the opposing political party is in power, but to ignore the problem once a president from one's own party has been elected.<sup>7</sup> Everything that an Executive does becomes precedent, just as everything a Congress does becomes precedent. To fight against excessive unilateralism on the part of one president of a different party compared to a president of your party would be hypocritical and dangerous to American democracy. During a congressional hearing on limitations to executive orders Congressman Jack Metcalf stated:

“It is important to note I am criticizing many of the Presidents. A steady increase in controversy over Presidential directives has arisen since FDR's administration. The use of these directives is a constitutional issue, and I am not distinguishing between Republican or Democrat Presidents. They have all been guilty as have those of us in Congress who sometimes find it politically convenient to allow the President to wield such broad power just with a stroke of the pen.”<sup>8</sup>

The institutional prerogatives given to the president and congress must be used judiciously in accordance with the shared norms institutions have been formed with. The President, Congress, and the Supreme Court enjoy several powers which, if deployed without constraint, will undermine the American democratic system. All three branches are susceptible to overreach, but the branch that has done the most overreach in the last 70 years is the executive. Due to the abundant use of presidential pardons, executive orders, and wartime powers, the President has free reign to behave as he sees fit, with little congressional oversight. The balance of power has accumulated in the Oval Office and Congress has been deprived of several of its constitutional functions. It is important to find a way to rebalance the federal government so that Congress may perform its duty.

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<sup>7</sup> Starr, Kenneth. The Starr Report. FORUM, an Imprint of Prima Pub., 1998.

<sup>8</sup> Congressional Limitation of Executive Orders: Hearing on H.R. 3131, H.Con. Res. 30, and H.R. 2655 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong. 3 (1999)

In his farewell address, George Washington said the job of the president is merely to “administer the executive government of the United States.”<sup>9</sup> If the president’s job is to administer, then it seems the presidents over the last 60 years have abused their powers and become law-making entities. The purpose of this essay is to recommend to Congress actions that can be taken to retake power from the Executive Branch without violating the norms of institutional forbearance and mutual toleration. In doing this, the essay first looks at the rise of the Executive Branch and the contributing factors in Part II. Part III examines the benefits of checks and balances and the founders’ intent. In Part IV, the essay examines Congressional actions taken in the past to curb the accumulation of power in the Executive. Finally, in Part V the essay makes recommendations for how Congress and the Supreme Court should act in the future to stop “executive unilateralism.”<sup>10</sup>

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<sup>9</sup> Washington, George, 1732-1799. Washington's Farewell Address to the People of the United States. Hartford, Conn. :Printed by Hudson and Goodwin, 1813. Print.

<sup>10</sup> Barack Obama. 2007, On the George W. Bush Presidency.

## II: Rise of the Executive branch.

In his recent book, *The Soul of America*, Jon Meacham writes that no understanding of American life and politics is possible without a sense of the mysterious dynamic between the presidency and the people.<sup>11</sup> This is an unspoken commerce involving the most ancient of institutions, a powerful chief, and the more modern of realities, a free, disputatious populace.<sup>12</sup> This dynamic is a balancing act that has been ongoing since the onset of the current government. Since 2001, the power balance has swiftly moved towards the accumulation of power in the presidency. However, the Executive branch has been accumulating new powers for nearly the entirety of U.S. governing history.

### 2a. Presidential Power

As law professor William P. Marshall explains, “every extraordinary use of power by one president expands the availability of Executive branch power for use by future presidents.”<sup>13</sup> It is inconsequential if the action has been condemned by past presidents and critics alike because “it is a president’s action in using power, rather than forsaking its use, that has the precedential significance.”<sup>14</sup> In other words, each successive president continues to add to his office’s list of extraordinary orders and directives, expanding the reach and power of the presidency and granting the Executive vast amounts of powers.

One of the first instances of presidential accumulation was in 1798 with the passage of the Alien and Sedition acts. The act, among other things, authorized the Executive to arrest and detain those who spoke out against the government and deport foreigners at will. The act was passed by both the House and Senate and signed by President John Adams. The Legislative

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<sup>11</sup> MEACHAM, JON. *SOUL OF AMERICA: the Battle for Our Better Angels*. RANDOM HOUSE, 2019.

<sup>12</sup> MEACHAM, JON. *SOUL OF AMERICA: the Battle for Our Better Angels*. RANDOM HOUSE, 2019.

<sup>13</sup> Whitehead, John. “Rise of the Imperial President.” *Richmond County Daily Journal*, 8 Mar. 2018, [www.yourdailyjournal.com/opinion/columns/79282/rise-of-the-imperial-president](http://www.yourdailyjournal.com/opinion/columns/79282/rise-of-the-imperial-president).

<sup>14</sup> Whitehead, John. “Rise of the Imperial President.” *Richmond County Daily Journal*, 8 Mar. 2018, [www.yourdailyjournal.com/opinion/columns/79282/rise-of-the-imperial-president](http://www.yourdailyjournal.com/opinion/columns/79282/rise-of-the-imperial-president).



branch sought to empower the presidency so that a certain party, the Federalists, would be able to rule the government in the manner they thought best. James Madison, often described as the Father of the Constitution wrote, in a letter to Jefferson, “the Alien bill proposed in the Senate is a monster that must forever disgrace it’s parents.” The act, though legally passed, gave the president a monarchical power that many at the Constitutional Convention of 1787 abhorred.

Throughout the 19th century, the Executive Branch continued to grow as presidents who had the support of the people were elected. For instance, President Andrew Jackson used his presidential influence to wage a war on the National Bank. In March 1829, Upon taking office, Jackson ordered “an investigation into the bank’s policy and political agenda.”<sup>15</sup> In 1833, He announced that the government would no longer use the National Bank and proceeded to use his “executive power to remove all federal funds from the National Bank.”<sup>16</sup> President Abraham Lincoln, a wartime president, played his part in the executive aggrandizement of the 19th century. Faced with a union that was falling apart, He issued executive orders to call up state militia for federal military service and to expand the size of the regular military forces.<sup>17</sup> He proclaimed a blockade of Confederate ports.<sup>18</sup> He suspended the writ of habeas corpus to curtail anti-Union activity by disloyal citizens and he authorized the borrowing and spending of money to pay for defense of the Union.<sup>19</sup> President Lincoln did all this without the prior approval of Congress. In his July 4, 1861, Message to Congress, President Lincoln said “no choice was left but to call out the war power of the Government; and so to resist force employed for its

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<sup>15</sup>“Andrew Jackson Shuts down Second Bank of the U.S.” History.com, A&E Television Networks, 16 Nov. 2009, [www.history.com/this-day-in-history/andrew-jackson-shuts-down-second-bank-of-the-u-s](http://www.history.com/this-day-in-history/andrew-jackson-shuts-down-second-bank-of-the-u-s).

<sup>16</sup> “Andrew Jackson Shuts down Second Bank of the U.S.” History.com, A&E Television Networks, 16 Nov. 2009, [www.history.com/this-day-in-history/andrew-jackson-shuts-down-second-bank-of-the-u-s](http://www.history.com/this-day-in-history/andrew-jackson-shuts-down-second-bank-of-the-u-s).

<sup>17</sup> Synnott, Greg. “Abraham Lincoln and Executive Power.” Center for Civic Education, [www.civiced.org/lincoln-lesson?page=multimedia\\_lincoln\\_john\\_patrick\\_transcript](http://www.civiced.org/lincoln-lesson?page=multimedia_lincoln_john_patrick_transcript).

<sup>18</sup> Synnott, Greg. “Abraham Lincoln and Executive Power.” Center for Civic Education, [www.civiced.org/lincoln-lesson?page=multimedia\\_lincoln\\_john\\_patrick\\_transcript](http://www.civiced.org/lincoln-lesson?page=multimedia_lincoln_john_patrick_transcript).

<sup>19</sup> Synnott, Greg. “Abraham Lincoln and Executive Power.” Center for Civic Education, [www.civiced.org/lincoln-lesson?page=multimedia\\_lincoln\\_john\\_patrick\\_transcript](http://www.civiced.org/lincoln-lesson?page=multimedia_lincoln_john_patrick_transcript).

destruction by force for its preservation."<sup>20</sup> Through this message, President Lincoln was able to secure the support of Congress for his use of executive power and expand the powers of the Executive Branch.

It was also not the only time that the presidency has been given powers by Congress that were originally intended for the Legislative branch to wield. The Constitution states that it is in Congress's power to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," and regulate trade between the US and other countries.<sup>21</sup> However, over the last 50 years Congress has shifted many of the powers to raise and lower tariffs to the Executive branch. President Trump's recent tariffs are constitutional because of the Trade Expansion Act of 1962.<sup>22</sup> The administration cited a provision that gives the Secretary of Commerce the authority to investigate and determine the impacts of any import on the national security of the United States and the president the power to adjust tariffs accordingly.<sup>23</sup> Wilbur Ross, as the Secretary of Commerce, conducted an investigation and published a report that gave President Trump the ability to bypass the constitutional responsibilities of Congress.

Another power the Executive branch has been able to usurp from the Legislative branch is the ability to employ military action. Over the past 60 years, through a combination of executive initiative and congressional abdication, the United States has engaged in large scale offensive wars, absent congressional war declarations, despite Congress's constitutional authority and mandate to formally declare the nation's wars.<sup>24</sup> In those 60 years, there have

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<sup>20</sup> Synnott, Greg. "Abraham Lincoln and Executive Power." Center for Civic Education, [www.civiced.org/lincoln-lesson?page=multimedia\\_lincoln\\_john\\_patrick\\_transcript](http://www.civiced.org/lincoln-lesson?page=multimedia_lincoln_john_patrick_transcript).

<sup>21</sup> Article One, Constitution.

<sup>22</sup> 19 U.S. Code § 1962. Safeguarding national security

<sup>23</sup> Golshan, Tara. "Why Trump Can Raise Steel Tariffs without Congress." Vox.com, Vox Media, 8 Mar. 2018, [www.vox.com/2018/3/8/17097206/trump-tariffs-congress](http://www.vox.com/2018/3/8/17097206/trump-tariffs-congress).

<sup>24</sup> III, Joseph V. Gallagher. "Unconstitutional War: Strategic Risk in the Age of Congressional Abdication." 2011, doi:10.21236/ada547427.

<http://ssi.armywarcollege.edu/pubs/parameters/articles/2011summer/gallagher.pdf>

been 162 notable military deployments despite the fact that Congress has never declared war.<sup>25</sup> However, in many instances they have passed resolutions giving the president authority to act with military powers.<sup>26</sup> Many others, such as the Korean and Vietnam wars, were never sanctioned by Congress.

President Truman's use of military power as a "police action" during the Korean conflict set a precedent that the Executive does not need Legislative support to engage in military action. Before Truman, no previous president had deployed US forces into a foreign war without obtaining or at least seeking congressional approval.<sup>27</sup> Using the newly created precedent, in 1954 President Eisenhower sent 700 military advisors to South Vietnam without congressional debate or justification.<sup>28</sup> President Kennedy increased the number to 16,000.<sup>29</sup> The Vietnam and Korean wars, two long and unpopular conflicts, are direct products of the executive using his powers abusively and without the consent of Congress.

Following the Vietnam War, Congress decided to pass the War Powers Resolution Act of 1973 in an attempt to rein back power from the Executive. In a direct response to the failure in Vietnam and President Nixon's unprecedented abuses of power, Congress set the requirement for the president to report to Congress within 48 hours of the introduction of armed forces with

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<sup>25</sup> III, Joseph V. Gallagher. "Unconstitutional War: Strategic Risk in the Age of Congressional Abdication." 2011, doi:10.21236/ada547427.

<http://ssi.armywarcollege.edu/pubs/parameters/articles/2011summer/gallagher.pdf>

<sup>26</sup> III, Joseph V. Gallagher. "Unconstitutional War: Strategic Risk in the Age of Congressional Abdication." 2011, doi:10.21236/ada547427.

<http://ssi.armywarcollege.edu/pubs/parameters/articles/2011summer/gallagher.pdf>

<sup>27</sup> III, Joseph V. Gallagher. "Unconstitutional War: Strategic Risk in the Age of Congressional Abdication." 2011, doi:10.21236/ada547427.

<http://ssi.armywarcollege.edu/pubs/parameters/articles/2011summer/gallagher.pdf>

<sup>28</sup> III, Joseph V. Gallagher. "Unconstitutional War: Strategic Risk in the Age of Congressional Abdication." 2011, doi:10.21236/ada547427.

<http://ssi.armywarcollege.edu/pubs/parameters/articles/2011summer/gallagher.pdf>

<sup>29</sup> III, Joseph V. Gallagher. "Unconstitutional War: Strategic Risk in the Age of Congressional Abdication." 2011, doi:10.21236/ada547427.

<http://ssi.armywarcollege.edu/pubs/parameters/articles/2011summer/gallagher.pdf>

the intent to perform combat operations.<sup>30</sup> Additionally, it requires congressional authorization for the president to sustain commitments of US forces beyond 60 days—and a new authorization if the commitment extends beyond 90 days.<sup>31</sup> The act has largely been ignored by every president since Nixon. In 1986, Ronald Reagan attacked sites in Libya in retaliation for a bombing, which injured Americans but did not have congressional approval.<sup>32</sup> In 1999, Bill Clinton launched airstrikes in Yugoslavia, aimed at preventing genocide, without giving notice to Congress or consulting lawmakers.<sup>33</sup> In 2011, Barack Obama authorized military strikes in Libya while arguing that the War Powers Resolution did not apply. The Supreme Court has declined to hear cases brought against the executive and congress has been unable and, in some cases, unwilling to hold presidents accountable for the use military force.

In 2001, following a devastating attack against the U.S., congress allowed the executive to not only wage war on a sovereign power, but to wage war on a vaguely defined group of people. On September 14th, in a joint resolution, Congress gave the president the power:

To use all necessary force and appropriate force against those nations, organizations, or persons, he [emphasis added] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.<sup>34</sup>

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<sup>30</sup> “H.J.Res. 542 — 93rd Congress: War Powers Resolution.” www.GovTrack.us. 1973. January 13, 2019 <<https://www.govtrack.us/congress/bills/93/hjres542>>

<sup>31</sup> “H.J.Res. 542 — 93rd Congress: War Powers Resolution.” www.GovTrack.us. 1973. January 13, 2019 <<https://www.govtrack.us/congress/bills/93/hjres542>>

<sup>32</sup>Desjardins, Lisa. “When Can a President Use Military Force? The Answer Is Complicated.” PBS, Public Broadcasting Service, 17 Apr. 2018, [www.pbs.org/newshour/nation/when-can-a-president-use-military-force-the-answer-is-complicated](http://www.pbs.org/newshour/nation/when-can-a-president-use-military-force-the-answer-is-complicated).

<sup>33</sup>Desjardins, Lisa. “When Can a President Use Military Force? The Answer Is Complicated.” PBS, Public Broadcasting Service, 17 Apr. 2018, [www.pbs.org/newshour/nation/when-can-a-president-use-military-force-the-answer-is-complicated](http://www.pbs.org/newshour/nation/when-can-a-president-use-military-force-the-answer-is-complicated).

<sup>34</sup> Authorization for the Use of Military Force, Public Law 107-40 (S.J. Res. 23), 107th Cong. (September 18, 2001).

This provision indefinitely expanded Executive authority without putting any oversight on the powers being used. It stated that In times of crisis, the Executive has the power to use otherwise unconstitutional actions. John Yoo, a justice department official during the Bush Administration, was also a leading advocate for the expansion of presidential wartime powers. Yoo argues that the constitutional power of congress to declare war does not play an important role in the domestic process of deciding on whether to go to war.<sup>35</sup> Instead, Congress should utilize its power of the purse if it wishes to stop executive military action. According to Yoo, the event's surrounding the horrendous actions perpetrated on september 11, allowed the president to utilize massive amounts of military power without further approval from Congress. Despite these terrible events, Congress should not willingly abdicate, surrender, or concede their power to check the executive branch solely due to tragic events committed against the U.S.

## **2b. Reasons why the Presidency has expanded**

After accepting the position that the presidency has been gaining power, the question arises as to why the presidency has been able to gain power. There are two main answers to this question. The first is that the presidency itself has sought to expand the powers of the Executive. When he completed the Louisiana Purchase, Thomas Jefferson exercised his own Executive power because he thought it was in the nation's best interest. The Executive has also gained power has been through Congress's willingness to delegate its own powers to the Executive. The power to enact tariffs is one of many powers that the presidency has gained since the founding. Both reasons for Executive enlargement rely on either the people, who in times of crisis, have demanded action from the Executive that exceeds the constitutional mandate, or partisanship, which empowers presidents of the same political party as the majority, regardless of the impacts of the future. Strong presidents such as FDR, Teddy Roosevelt,

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<sup>35</sup> "John Yoo." Interview with John Yoo, Author of *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, [press.uchicago.edu/Misc/Chicago/960315in.html](http://press.uchicago.edu/Misc/Chicago/960315in.html).

Abraham Lincoln, and others, have been called to action by the people to fix problems that were originally supposed to be solved by the legislative branch.

Strong presidents have typically been powerful presidents. Teddy Roosevelt viewed his broad use of presidential powers as the “Stewardship Theory”, which means that the President should have the power to act as a “steward” over the country, regardless of what the Constitution dictated. Theodore Roosevelt contended that the president should be able to use his office to help the country by any means necessary.<sup>36</sup> In his first inaugural speech, FDR, another extremely powerful president, stated “the government must deal with the economic crisis as we would treat the emergency of a war.”<sup>37</sup> To address it, Americans “must move as a trained and loyal army willing to sacrifice for the good of a common discipline.”<sup>38</sup> Moreover, he warns that if Congress does not take the steps he believes are necessary, he would demand “broad executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.”<sup>39</sup> Roosevelt was cheered by the masses for his willingness to wrestle power away from Congress and into the Executive because he was loved by the people. Without the people’s support, Executives would have a very difficult time gaining power.

Theodore Roosevelt established the notion of the “bully pulpit” using the prestige and reach of the White House to rally the American people to certain ideas and legislation. His attempt to shape policy by interacting with the people was radically different than any Executive before him. The constant coverage of the president by media outlets allowed the people to see and hear from the leader of the country on issues affecting domestic and foreign policy. FDR

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<sup>36</sup> MEACHAM, JON. SOUL OF AMERICA: the Battle for Our Better Angels. RANDOM HOUSE, 2019.

<sup>37</sup> “Only Thing We Have to Fear Is Fear Itself”: FDR's First Inaugural Address.” HISTORY MATTERS - The U.S. Survey Course on the Web, [historymatters.gmu.edu/d/5057/](http://historymatters.gmu.edu/d/5057/).

<sup>38</sup> “Only Thing We Have to Fear Is Fear Itself”: FDR's First Inaugural Address.” HISTORY MATTERS - The U.S. Survey Course on the Web, [historymatters.gmu.edu/d/5057/](http://historymatters.gmu.edu/d/5057/).

<sup>39</sup> “Only Thing We Have to Fear Is Fear Itself”: FDR's First Inaugural Address.” HISTORY MATTERS - The U.S. Survey Course on the Web, [historymatters.gmu.edu/d/5057/](http://historymatters.gmu.edu/d/5057/).

continued the tradition of utilizing media with his fireside chats where he would be able to talk to millions of Americans on a weekly basis. Today, the media is a powerful tool that can be used to influence American thought on every political issue. No other personality in public life can begin to compete with a president in access to the public mind through modern methods of communications.<sup>40</sup>

Strong presidents have sought to expand the Executive powers, but not all presidents believe in presidential expansion. Theodore Roosevelt's hand-picked successor, William Howard Taft, believed that an Executive who exercised near unlimited power was dangerous to the nation. He writes:

The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest ....<sup>41</sup>

Taft believed that the undefined nature of what was in the public interest did not give the president the ability to circumvent the due process of government established by our founding fathers. It was therefore dangerous to the country for any man to expressly gain powers not enumerated in the Constitution or congressional decree.

However, many laws giving power to the president have been passed by Congress and supported by members of political parties. Political parties, although useful in a democracy, get in the way of members of Congress standing up to a president because the president is a member of the same party. Thus, someone supporting a particular president, for example, is more likely to believe that Congress should not have the power to interfere with the president's

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<sup>40</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.  
<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

<sup>41</sup> President or King - The Use and Abuse of Executive Orders in Modern-Day America - Tara L. Branum

unilateral decision to send troops into armed conflict or that Congress should not have the authority to demand the president turn over documents to an oversight committee.<sup>42</sup>

Partisanship has contributed to congress getting rid of many of its constitutional powers, especially when an Executive feels they are unable to get their policy agenda enacted by congress.

Leading up to 2000, the U.S. populace saw a renewed effort by Congress to reestablish the power of the Legislative branch. A U.S. Joint investigation in 1999 investigated the use of executive orders and the possible abuse of power from executive orders. Following the Joint Investigation, there was a push to pass H.R. 2655, The Separation of Powers Restoration Act. The Separation of Powers Restoration Act is designed to restore the separation of powers between Congress and the president, as set forth in Article I and II of the Constitution of the United States of America by: terminating all existing states of national emergency and removing from the Executive Branch any power to declare national emergencies; vesting power in Congress alone to declare states of national emergency; and restricting presidential power to issue executive orders by denying them any force of law except as provided for by Congress.<sup>43</sup> The bill failed to pass in large part due to the horrific attacks carried out on September 11, 2001. The people of America feared for their lives and their loved ones and, in an act of haste and desperation, sought to give power to a person who could quickly hold the culprits responsible. Rather than reinstating a strong separation of powers, Congress gave the Executive unprecedented ability “in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”<sup>44</sup>

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<sup>42</sup>Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.

<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

<sup>43</sup> [http://commdocs.house.gov/committees/judiciary/hju63865.000/hju63865\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju63865.000/hju63865_of.htm)

<sup>44</sup> Authorization for the Use of Military Force, Public Law 107-40 (S.J. Res. 23), 107th Cong. (September 18, 2001).



## **Part III: Arguments against a Strong Executive**

### **3a. Founding Father Arguments**

Classical Greek Theorists, such as Polybius and Aristotle, believed that governments and the political ordering of society are brought about to protect and promote a common good. Governments ruled by one, some, and all could either be virtuous or corrupt based on their ability to govern based on the moral standpoint of the community.<sup>45</sup> According to the polybian modal, a monarchy is the best possible form of government because it consists of a single person who is effective at promoting the common good. At times of great crisis, the founders of the country recognized the need for a government to act with efficiency and gave war powers to the Executive Branch. However, Greek philosophers also recognized that the worst form of government is a tyranny. The most effective form of government, when utilized by someone who does not seek the common good, is the most detrimental form of government to the people.

The Founders, having recently suffered a multitude of grievances under the tyranny of the king of England, sought to create a government that would not be able to effectively wage war against the common good. Following Greek philosophers, they determined that the most ineffective form of government would provide the best safety net for the government's ability to wield power against its own people. The Articles of Confederation sought to make a government where power was placed in the states, not in the federal government. From 1781-1787, when the Articles of Confederation were in place, the states were in charge of taxation, the standing militaries were state militias, and the period was characterized by ineffective government. The

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<sup>45</sup> Champion, Craig B. "Polybian Demagogues in Political Context." *Harvard Studies in Classical Philology*, vol. 102, 2004, pp. 199–212. JSTOR, [www.jstor.org/stable/4150039](http://www.jstor.org/stable/4150039).

conventional view of this period is that it was dominated by deep factional conflict concerning the amount of power that should be vested in the national government.<sup>46</sup>

Many, even at the Constitutional Convention of 1787, believed that the correct type of government for the country to adopt would be to divide into a confederation of states. Richard Henry Lee, as early as 1776 proposed "that a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation."<sup>47</sup> Patrick Henry in a speech before the State House in 1787 said "That Government is no more than a choice among evils, is acknowledged by the most intelligent among mankind, and has been a standing maxim for ages."<sup>48</sup> Henry then echoed Richard Lee's call for a confederation saying, "When reflecting on these and many other circumstances, I must think those States will be fond to be in confederacy with us."<sup>49</sup> Those who argued for a confederation feared of the evils that could be committed under a Constitution that had an Executive and how the "President may easily become King."<sup>50</sup>

While several founders argued for a weaker government, others believed that a strong government was necessary, as long as it limited itself through a system of checks and balances.

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<sup>46</sup>Eric M. Freedman, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 *Yale L.J.* 142 (1978) Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/727](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/727)

<sup>47</sup>Eric M. Freedman, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 *Yale L.J.* 142 (1978) Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/727](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/727)

<sup>48</sup>"Speech of Patrick Henry (June 7, 1788)." Andrew Carnegie Wealth June 1889 < 1876-1900 < Documents < American History From Revolution To Reconstruction and Beyond, [www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-\(june-7-1788\).php](http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-(june-7-1788).php).

<sup>49</sup>"Speech of Patrick Henry (June 7, 1788)." Andrew Carnegie Wealth June 1889 < 1876-1900 < Documents < American History From Revolution To Reconstruction and Beyond, [www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-\(june-7-1788\).php](http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-(june-7-1788).php).

<sup>50</sup>"Speech of Patrick Henry (June 7, 1788)." Andrew Carnegie Wealth June 1889 < 1876-1900 < Documents < American History From Revolution To Reconstruction and Beyond, [www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-\(june-7-1788\).php](http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-(june-7-1788).php).

The Constitutional Convention of 1787 followed 6 years of, in the words of George Washington, “a national power so diffused, it is fast verging to anarchy and confusion.”<sup>51</sup> Shays Rebellion showed that the government was ill-equipped to deal with important matters of state. The Constitutional Convention of 1787 was originally intended to revise the Articles of Confederation, instead James Madison arrived with a bold plan for a new form of government. The plan divided powers into the three branches of government that we still have today in order to not allow one group or person from taking over the entirety of the federal government. In Federalist 51, Hamilton, arguing for the newly proposed Constitution of the United States, writes “by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>52</sup>

The Founders’ original belief, and what many early presidents adhered to, was that the largest part of government would be the legislative branch. Congress was given the power to tax, to declare war, to regulate commerce, to establish post offices, and to make all laws “necessary and proper” to carry out it’s powers.<sup>53</sup> Thomas Jefferson, upon reaching the presidency, remarked the following while writing about the dangers of tyranny in American Government:

The executive power in our government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period.<sup>54</sup>

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<sup>51</sup> “Inaugural Address.” The American Presidency Project, 30 Apr. 1789, [www.presidency.ucsb.edu/documents/inaugural-address-16](http://www.presidency.ucsb.edu/documents/inaugural-address-16).

<sup>52</sup> The Avalon Project - Federalist Papers, 1888, [avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp).

<sup>53</sup> U.S. Constitution. Article One.

<sup>54</sup> Jefferson, Thomas, and Noble E. Cunningham. *The Inaugural Addresses of President Thomas Jefferson, 1801 and 1805*. Columbia: University of Missouri Press, 2001. Print.

The Founders feared tyranny in all its' forms. They believed that the welfare of the people was the object of governance and that too often in human history had kings and monarchs neglected the well being of the people. In order to secure the liberty of the people, the checks and balances of government must be preserved so as to protect the people from government excess and abuse.

### **3b. A Balance between the Legislative and Executive Branch.**

The Founders realized it was possible for people to abuse the powers of the office they would be elected for. James Madison warned, in Federalist No. 47, that the "accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>55</sup> He, like many Founders, feared the accumulation of power within the different sections of the government. Thus, a series of checks and balances were put into place to limit the authoritative power of any one branch. As identified in past sections, the powers of the Executive have been growing exponentially since the Constitution was founded. Because the constitutional commitment to separation of powers depends on a balance between the Executive and Legislative Branches, the related question that must be addressed is how the expansion of presidential power relates to the powers of the Congress.

Over the past 230 years since the Constitutional Convention there have been at least two significant changes that have worked to Congress's advantage in the power interplay between the Executive and Legislative branch.<sup>56</sup> Firstly, the Supreme Court has recognized the non-textual congressional ability to investigate and oversee the executive branch. However this power cannot fully compensate for the power the presidency enjoys in controlling information.<sup>57</sup>

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<sup>55</sup> The Avalon Project - Federalist Papers, 1888, [http://avalon.law.yale.edu/18th\\_century/fed48.asp](http://avalon.law.yale.edu/18th_century/fed48.asp)

<sup>56</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.  
<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

<sup>57</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.  
<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

The power is not self-executing and partisanship can always stand in the way of congressional oversight. Moreover, even if Congress has the political will to force a recalcitrant administration to turn over information, the president's control over information may be so absolute that Congress does not even know what to ask for.<sup>58</sup>

The second advantage has been the limitation on the number of times a single president may hold office. Term limits have been placed upon the Executive Branch severely limiting the ability of a president to become a dictator. However, the extent to which this factor significantly alters the balance of powers between the two branches is unclear.<sup>59</sup> Handpicked successors and heirs apparent are common occurrences that can extend a president's bargaining power. Furthermore presidents do not tend to give power up, even if they were critical of past presidents who wielded extensive powers. The advantages that Congress have gained have not been able to keep up with the advantages the Executive has gained.

The problem with executive power is that it has extended beyond the what the Legislative Branch can hope to control through oversight and investigation. For example, the expansion of the federal government has led to the expansion of programs that Congress has been able to write into law. However, it is still the president who, ultimately controls what the federal bureaucracy does.<sup>60</sup> The majority of people are working under the supervision of the president and Congress is unable to see what is going on all the time. The President, meanwhile, enjoys the luxury of a large cabinet and staff to oversee the implementation of policy.

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<sup>58</sup> See generally JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007)

<sup>59</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.  
<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

<sup>60</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.  
<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

#### **IV. Modest Solutions**

As a disclaimer to the following suggestions on how to fix the power imbalance in the federal government, I believe, even with all the suggestions coming into fruition, it will be difficult, if not impossible, to fix the imbalance. After all, short of constitutional amendments, it is not clear how powers once exercised can be taken away or seriously constrained.<sup>61</sup> That being said, certain periods during the last 100 years are notable for having weak presidents. Following the imperial presidency of Nixon, Ford and Carter needed to be weak presidents because the public did not want the Executive to have power. Following the Watergate Scandal, the public pushed for president's who would not exercise as much power as Nixon and Johnson. Ford and Carter were also presidents who choose to work with the legislature and not use secrecy to achieve their goals.

##### **4a. Presidential Personality.**

The first solution I'll propose is to elect a president who is willing to not use excessive and questionable presidential powers to get things they want done. President Gerald Ford believed in an open and forthcoming presidency. In his autobiography he wrote that, for a president, "Honesty is the always the best policy in the end."<sup>62</sup> He also wrote that when he took office the country was angry, upset, and hurt by the actions of a president that used his position to exploit the nation.<sup>63</sup> His choice to pardon Richard Nixon, while doing little to heal the breakdown between the country and the presidency, was one of the few extreme uses of

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<sup>61</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.

<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

<sup>62</sup> Ford, Gerald R. A Time to Heal: the Autobiography of Gerald R. Ford. The Easton Press, 1987.

<sup>63</sup> Ford, Gerald R. A Time to Heal: the Autobiography of Gerald R. Ford. The Easton Press, 1987.

executive power in Ford's presidency. The majority of which, is characterized by a willingness to work with his former colleagues in the House and the Senate to advance policies.

One of the most important ways to curb presidential power is to elect a president who is not willing to abuse his office, and who will not use past presidential actions as precedent for further abuses of power. While the actions of previous presidents might provide some precedential authority for the legality of actions, Executive Branch precedents should not be seen as conclusive or even necessarily persuasive in establishing constitutionality.<sup>64</sup> The way that this suggestion will come to fruition is to have more engagement by the public and to have leaders step forward who will put power aside and focus on healing the rift between our branches.

The president, when elected, can not be swayed by the partisan nature of politics to achieve sweeping policy changes. Instead, the elected president must be willing to stay true to his word and not be corrupted by the power he possesses. For instance, President Barack Obama was once a presidential candidate with deep misgivings about executive power.<sup>65</sup> However, when he left office he was one of the "most prolific authors of major regulations in presidential history."<sup>66</sup> Despite being blocked for most of his presidency by Republican leadership in congress, President Obama employed executive power to create over "560 major regulations" and caused both Hillary Clinton and Donald Trump to criticize his use of power.<sup>67</sup>

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<sup>64</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505.

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<sup>65</sup> Appelbaum, Binyamin, and Michael. "Once Skeptical of Executive Power, Obama Has Come to Embrace It." The New York Times, The New York Times, 13 Aug. 2016, [www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html](http://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html).

<sup>66</sup> Appelbaum, Binyamin, and Michael. "Once Skeptical of Executive Power, Obama Has Come to Embrace It." The New York Times, The New York Times, 13 Aug. 2016, [www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html](http://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html).

<sup>67</sup> Appelbaum, Binyamin, and Michael. "Once Skeptical of Executive Power, Obama Has Come to Embrace It." The New York Times, The New York Times, 13 Aug. 2016, [www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html](http://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html).

The consequences of a president who is unwilling to exercise executive powers is that Congress will be the most powerful branch of government. In a Gallup poll taken on March 1st of 2019, 26% of Americans are unhappy with how Congress is handling its job.<sup>68</sup> Handing power over to a body that currently has the support of about one-fourth of the population seems a little ill-advised. Furthermore, if a president is unwilling to use the expanded powers, many actions that could be settled by executive order would need to be passed by Congress as bills. This would slow down government actions and debate. In an increasingly speedy world, many Americans would be upset by a slow government that can not address problems quickly.

#### **4b. Congressional Oversight**

In Congress, increasing political polarization has reduced the ability of legislators to supervise the Executive Branch even if they had the appetite to do so.<sup>69</sup> In cases where they do agree, such as the War Powers Resolution, Congress has not been willing to challenge the president on issues unrelated to the War Powers Resolution. An inflection point in the long-term decline of congressional oversight came after 9/11, when Congress passed the Authorization for Use of Military Force Act, a measure initially intended to combat terrorism but has been used more broadly in application. For nearly 17 years, the AUMF has served as the legal justification for expanding military operations across the Middle East, many of them only tenuously related to the original intent.<sup>70</sup> Despite its expanded use, legislators continually resist changing the AUMF to constrain executive powers. If they did, presidents would have a much harder time engaging in military strikes designed as counterterrorism efforts.

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<sup>68</sup> Gallup, Inc. "Congress and the Public." Gallup.com, [news.gallup.com/poll/1600/congress-public.aspx](https://news.gallup.com/poll/1600/congress-public.aspx).

<sup>69</sup> "The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump." Council on Foreign Relations, Council on Foreign Relations, [www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump](https://www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump).

<sup>70</sup> "The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump." Council on Foreign Relations, Council on Foreign Relations, [www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump](https://www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump).



Congress is equally reluctant to stand up to the president on trade. Despite misgivings over President Trump's protectionist trade policies, Democratic and Republican legislators have essentially given up on the issue. In June, Bob Corker, the Tennessee Republican who chairs the Senate Foreign Relations Committee, proposed a bill that would require the president to seek congressional approval for tariffs enacted in the name of national security.<sup>71</sup> However, he has not been able to gain sufficient support for the measure from fellow Republicans, who, with midterm elections looming, are reluctant to cross the sitting president.

What is clear in both these cases is that Congress is at the mercy of the president on many issues. Reasserting its position as an important part of government should be our Congress primary concern moving forward. That does not mean that the Executive Branch and the Legislative Branch need to be enemies, rather It means that the Executive should not move unilaterally to enact policy. Having Congress keep a watchful eye on the president's actions will ensure more support and, hopefully, reduce the partisan rift in Washington.

Keeping in mind the importance of congressional oversight, it is important that the Executive Branch is still able to fulfill its constitutional duties. In the current Congress and era. Democrats in the House have challenged President Donald Trump's actions and prerogatives at every turn. They have even threatened impeachment. In December of 2017 a resolution of impeachment failed in the House by a vote of 58-364.<sup>72</sup> On March 27th, 2019 Congresswoman Tlaib (D-Mich) introduced a resolution calling for an investigation into whether President Trump has committed impeachable offences.<sup>73</sup> Disagreement with a political opponent should not be the driving force behind impeachment actions. If there is evidence of wrongdoing, then actions

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<sup>71</sup> "The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump." Council on Foreign Relations, Council on Foreign Relations, [www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump](http://www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump).

<sup>72</sup> Marcos, Cristina. "Tlaib Unveils Resolution to Investigate Trump Impeachment." TheHill, 27 Mar. 2019, [thehill.com/homenews/house/436161-tlaib-unveils-resolution-to-investigate-trump-impeachment](http://thehill.com/homenews/house/436161-tlaib-unveils-resolution-to-investigate-trump-impeachment).

<sup>73</sup> Marcos, Cristina. "Tlaib Unveils Resolution to Investigate Trump Impeachment." TheHill, 27 Mar. 2019, [thehill.com/homenews/house/436161-tlaib-unveils-resolution-to-investigate-trump-impeachment](http://thehill.com/homenews/house/436161-tlaib-unveils-resolution-to-investigate-trump-impeachment).

should be taken, however, looking forward to a post-Trump world, it would set a dangerous precedent to allow partisanship to be sufficient grounds for impeachment.

#### **4c. Independent DOJ.**

If presidential power is to be curbed, reforms that would minimize secrecy and impose more accountability on the Executive Branch should be seriously considered. Equally important, Executive Branch arguments that such reforms are categorically unconstitutional should be rejected. For instance, Vice President Cheney made an argument that the names of the members of Bush's energy task force were protected and did not need to be divulged to congress despite members of both parties asking for them.<sup>74</sup> According to Vice President Cheney, the names were protected under the Recommendations Clause on the grounds that the task force was created to make Legislative recommendations to Congress. The secrecy around what many presidents are doing behind closed doors should be disposed of. In order to expose secrets the president is keeping from Congress, and keep the executive branch accountable, an independent Department of Justice should be sought.

Article II vests the "executive power" in the president alone, and he alone wields it.<sup>75</sup> Many have taken this to mean that the president is able to do what he likes with his executive branch subordinates, whether it be hiring, firing, ordering them to act in certain ways, or ordering them to stand down. A few norms and practices established since Watergate have stifled the ability of the president to act in any manner they wish, but the president still holds massive amounts of power over the DOJ.<sup>76</sup> Every presidency since Watergate has embraced policies "for preserving DOJ and FBI independence from the President in certain law enforcement and

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<sup>74</sup> Marshall, William P. ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS, Boston University Law Review, Vol 85:505. <https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

<sup>75</sup> U.S. Constitution. Article II

<sup>76</sup> "Independence and Accountability at the Department of Justice." Lawfare, 5 Feb. 2018, [www.lawfareblog.com/independence-and-accountability-department-justice](http://www.lawfareblog.com/independence-and-accountability-department-justice).

intelligence matters.”<sup>77</sup> One of the most important practice, is the inability for the president to fire special counsel. Instead, the Deputy Attorney General is in charge of such actions.

Last year, when President Trump wanted to fire special counsel Robert Mueller he was unable to do so. President Trump was unable to achieve the goal he confided to the White House Counsel Don McGahn because of the process that he would have to go to. In order to fire Mueller, then the executive branch would have to ask publicly for the DOJ to fire him. If Deputy Attorney General Rod Rosenstein refused, President Trump could fire him, but it would be a political disaster akin to the Saturday Night Massacre. This has been enough to keep the Executive at arms length away on very public matters, but more independence should be given to the Executive Branch so that they are unable to abuse DOJ influence.

More independence does not mean less oversight. It would be dangerous if FBI officials “with guns and badges and wiretaps” were unaccountable to anyone, or believed they were.<sup>78</sup> However, Congress should add to its increasing oversight functions, the function of close oversight of the DOJ. In relation to the Russia investigation, already Congress has held two closed door meetings with FBI Director Chris Wray and have kept close tabs on what is going on in the investigation. The DOJ will also be held accountable by the Foreign Intelligence Surveillance Court. Currently, the DOJ must convince the FIS before gaining a warrant for matters related to the Russia investigation.<sup>79</sup> If Congress were to expand the function of the FISC to oversight of the DOJ in all matters relating to executive abuses of power, it would provide the accountability needed for the DOJ without the president wielding too much power over it.

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<sup>77</sup> “Independence and Accountability at the Department of Justice.” Lawfare, 5 Feb. 2018, [www.lawfareblog.com/independence-and-accountability-department-justice](http://www.lawfareblog.com/independence-and-accountability-department-justice).

<sup>78</sup> “Independence and Accountability at the Department of Justice.” Lawfare, 5 Feb. 2018, [www.lawfareblog.com/independence-and-accountability-department-justice](http://www.lawfareblog.com/independence-and-accountability-department-justice).

<sup>79</sup> “Independence and Accountability at the Department of Justice.” Lawfare, 5 Feb. 2018, [www.lawfareblog.com/independence-and-accountability-department-justice](http://www.lawfareblog.com/independence-and-accountability-department-justice).

#### 4d. Bipartisanship

The largest factor that allows for the near limitless use of executive power, is a Congress that is willing to give powers to the executive of the same political party. Speaking before the House Committee on Rules William Olson said the following regarding executive orders:

Presidential directives were used to legislate to accomplish political objectives which could be viewed as “liberal” and political objectives which could be viewed as “conservative.” No constitutional power should be misused, irrespective of the benefit perceived for a political objective. If constitutional processes are violated, in the end, we all lose.<sup>80</sup>

The Liberal and Conservative political objectives of the president’s have at times fallen in line with members of Congress who wish to see those policies enacted. They are content to leave executive orders unchallenged, even if they realize that the precedent set by the current administration may be used by future presidents.

Any attempt to curb executive power must be met with bipartisan support from Congress. Attempts in the past such as the formation of a Special Senate Committee on the Termination of the National Emergency, co-chaired by Sens. Frank Church (D-ID) and Charles Mathias, Jr. (R-MD) had the support of both parties in Congress. The efforts of this bipartisan committee resulted in the successful codification of efforts to restore the constitutional separation of powers, through a check on the presidential exercise of “emergency powers,” by means of the National Emergencies Act.<sup>81</sup> Other contemporaneous statutory efforts to check presidents’ unconstitutional exercise of power include the War Powers Resolution, the International

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<sup>80</sup>Olson, William J. “The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?” Cato Institute, 27 Oct. 1999, [www.cato.org/publications/congressional-testimony/impact-executive-orders-legislative-process-executive-lawmaking](http://www.cato.org/publications/congressional-testimony/impact-executive-orders-legislative-process-executive-lawmaking).

<sup>81</sup>Olson, William J. “The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?” Cato Institute, 27 Oct. 1999, [www.cato.org/publications/congressional-testimony/impact-executive-orders-legislative-process-executive-lawmaking](http://www.cato.org/publications/congressional-testimony/impact-executive-orders-legislative-process-executive-lawmaking).

Emergency Economic Powers Act, and the amendment of the Trading with the Enemy Act of 1917 all had bipartisan support in Congress.

Today the partisan divide is so large it seems unimaginable that the two parties would unite to curb presidential power. In 1994 Pew Research began asking 10 questions about “political values” including government regulations, benefits for the poor, and racial discrimination. The average gap between self-identified Democrats and Republicans on these questions in 1994? Fifteen points. Today, it’s 36 points, up from 33 percent in 2014.<sup>82</sup> As long as the parties hate each other, they will never unite against the vast expansion of executive power.

#### **4e. Supreme Court Involvement**

The ineffectiveness of many of the programs passed by Congress aimed at curbing presidential powers can be attributed to a lack of U.S. Supreme Court involvement. The Supreme Court has ruled that an executive order has been unconstitutional only twice in U.S. History. The First of these occurred in 1952 when the U.S. Supreme Court negated the seizure of the steel mills ordered by President Truman, observing that:

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.<sup>83</sup>

The judgement by the courts made it clear that the president should not make laws but only enforce them. The courts followed this statement by remaining silent until President Clinton’s executive order relating to the hiring of permanent striker replacements by federal

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<sup>82</sup>Shepard, Steven, et al. “Study: Americans More Divided along Party Lines than Ever.” POLITICO, POLITICO, 5 Oct. 2017, [www.politico.com/story/2017/10/05/poll-americans-divided-party-lines-243466](http://www.politico.com/story/2017/10/05/poll-americans-divided-party-lines-243466).

<sup>83</sup> U.S. Supreme Court *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

contractors. The U.S. Court of Appeals for D.C. struck the order down and the decision was never appealed to the Supreme Court.

The Supreme Court's silence on executive law-making powers through executive orders, as well as their unwillingness to confront a president who ignores congressional actions is detrimental to the country. Consistently court cases such as the *The Conservative Caucus v. Reagan* (1987) and *Campbell v. Clinton* (1999) have refused to have been heard by the Supreme Court. *The Conservative Caucus v. Reagan*, which sought to challenge the implementation of treaties without Congressional approval, was an effort by Republican lawmakers to reassert its ratification powers. Meanwhile, *Campbell v. Clinton*, which sought punishment for Clinton's refusal to obey the War Powers Resolution, sought to bring the deployment of troops under congressional purview. It will be impossible to restore the balance of power without all branches of government working in concert to do so.

## V. Conclusion

The dangers faced by the American people if executive aggrandizement is allowed to continue, is a breakdown of the system of government that has been at the core of American Democracy throughout its 225 year history. Already, the normal behaviors of mutual toleration and institutional forbearance are being set aside to advance partisan goals and expand executive power. In order to fulfill campaign promises, President Trump recently declared a national emergency to secure 5.7 billion in funds for border security.<sup>84</sup> This followed months of negotiation with Congress and the longest government shutdown in U.S. History.<sup>85</sup> Immediately, democrats stated that this act resembled “a dictatorship rather than a democracy.”<sup>86</sup> In reality, The Military Construction Codification Act of 1982 provides that the president can reallocate funds for military construction projects when he declares a national emergency “that requires use of the armed forces.”<sup>87</sup> Contrary to Democrats’ claims, this national emergency declaration does appear to be lawful. That doesn’t mean it’s good public policy, good precedent, or that it does not violate the norm of institutional forbearance that is important to our countries preservation and function.

When the executive is given the power to unilaterally make decisions, it is dangerous to the preservation of democracy. No president should be able to circumvent the checks and

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<sup>84</sup>Watkins, Devin. “Why Trump's Border Wall National Emergency Is Constitutional.” Washington Examiner, 20 Feb. 2019,

[www.washingtonexaminer.com/opinion/why-trumps-border-wall-national-emergency-is-constitutional](http://www.washingtonexaminer.com/opinion/why-trumps-border-wall-national-emergency-is-constitutional).

<sup>85</sup>Watkins, Devin. “Why Trump's Border Wall National Emergency Is Constitutional.” Washington Examiner, 20 Feb. 2019,

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<sup>86</sup>Watkins, Devin. “Why Trump's Border Wall National Emergency Is Constitutional.” Washington Examiner, 20 Feb. 2019,

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balances placed on them by our Constitution. However, Congress has given the president the very tools to do so. On top of that, when challenged by Congress, the Supreme Court has not been willing to stand against the powerful Executive Branch. Moving forward, the country needs to find a way to halt executive aggrandizement while also continuing to serve the needs of the American people.

To change the balance of American politics would be a nearly impossible task. However, for the preservation of democracy and the resistance of tyranny, change needs to occur soon. The president wields enormous amounts of power and if a president is ever elected who will abuse his powers to usurp the will of the people, the checks and balances our Founders created have eroded to the point the other branches will not be able to stop them. It is paramount that this issue is addressed and dealt with, and, an effort is made to restore the guardrails of democracy.