
THE AGE OF THE WINNING EXECUTIVE:
THE CASE OF DONALD J. TRUMP[†]

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INTRODUCTION

The election of Donald J. Trump, although foretold by Matt Groening's *The Simpsons*,¹ was a surprise to many.² But the shock, disbelief, and horror were especially acute for the intelligentsia. They were told, guaranteed really, that there was no way for Trump to win. Yet he prevailed, pulling off what poker aficionados might call a back-door draw in the Electoral College.

Since his victory, the reverberations, commotions, and uproars have never ended. Some of these were Trump's own doing and some were hyped-up controversies. We have endured so many bombshells and purported bombshells that most of us are numb. As one crisis or scandal sputters to a pathetic end, the next has already commenced. There has been too much fear, rage, fire, and fury, rendering it impossible for many to make sense of it all. Some Americans sensibly tuned out, missing the breathless nightly reports of how the latest scandal would doom Trump or why his tormentors would soon get their comeuppance. Nonetheless, our reality TV President is ratings gold for our political talk shows.

In his Foreword, Professor Michael Klarman, one of America's foremost legal historians, speaks of a degrading democracy.³ Many difficulties plague our nation: racial and class divisions, a spiraling debt, runaway entitlements, forever wars, and, of course, the coronavirus. Like many others, I do not regard our democracy as especially debased.⁴ Or put another way, we have long had less than a thoroughgoing democracy, in part

[†] Responding to Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of Democracy — And the Court*, 134 HARV. L. REV. 1 (2020).

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¹ See *The Simpsons: Bart to the Future* (Fox Broad. Co. television broadcast Mar. 19, 2000).

² I was less shocked than many, for I had penned a 2012 exam question that centered on the feats of a President Donald J. Trump.

³ See generally Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of Democracy — And the Court*, 134 HARV. L. REV. 1 (2020).

⁴ The American people do not seem to think so either. As of October 2020, three percent believe that the nation's biggest problem is with the judicial system/the courts/the law. Two percent think it is elections/electoral reform. *Most Important Problem*, GALLUP, <https://news.gallup.com/poll/1675/most-important-problem.aspx> [<https://perma.cc/P5YE-VAFF>]. I admit that in the wake

because we have tolerated (indeed celebrated) certain nondemocratic elements. Think of judicial review and the Constitution's limits on majoritarian rule. Klarman rather favors certain forms of nondemocratic decisionmaking, as when he exhorts unelected courts to invalidate legislative gerrymandering and voter identification laws.⁵

Even if one accepts Klarman's argument that American democracy is in a death spiral, in part because of Trumpian rhetoric and conduct, the grim truth is that President Trump has not stretched his office more than his predecessors. Indeed, when critics charge that a President has done something illegal or unconstitutional, the accusation is barely newsworthy, for it has a dog-bites-man quality. In adopting expansive (and sometimes implausible) readings of his legal authorities, President Trump has august company, for Bill Clinton, George W. Bush, and Barack Obama were no different. This secular expansion of presidential power, and not Donald Trump, constitutes an enduring threat to our Constitution. With each passing administration, the implied limits of Article II fade while its perceived grants of authorities noticeably balloon. The second branch has slowly swallowed the authorities of the first, and, perhaps one day, it will also free itself of the constraints imposed by the third.

Like his predecessors, the current President pursues his ends using the tools at his disposal. Every modern President relies on legal advice from executive branch lawyers and is happy to discover that they enjoy vast arrays of statutory and constitutional authority. These lawyers, both career and political, tend to favor broad readings of executive power, stroking the hand that feeds them and aggrandizing their institution's authority. Likewise, every President delights in relying upon his predecessors' acts, what Justice Felix Frankfurter would call "gloss."⁶ This executive whataboutism has deep roots. For instance, Abraham Lincoln cited Andrew Jackson's suspension of habeas corpus to defend his wartime suspensions against Democratic attacks.⁷ It is only fair and common sense that what's good enough for the Democrats' one-time Hero of New Orleans is good enough for the Republican Rail Splitter. Or so Lincoln must have supposed. His successors (and their defenders) routinely draw such comparative lessons.

of the last two presidential contests, concern about foul play spiked. In 2016, it was foreign interference. In 2020, it was vote fraud. In my mind, these worries were largely means of coping with disappointment, attempts to make sense of the inconceivable defeat of their favored candidate. I do not believe that these worries signal a thoroughgoing or broad public concern with elections or electoral reform. Only time will tell.

⁵ See Klarman, *supra* note 3, at 184–87, 190–94.

⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

⁷ See Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 260, 268–69 (Roy P. Basler ed., 1953).

Whether an Executive's legal maneuvers and schemes will ultimately prevail is uncertain. That turns on a host of factors: perceived plausibility, the popularity and apparent needfulness of the underlying action, and whether the courts can intervene. What is certain is that Presidents of all stripes are continuously stretching and straining to enact their agendas, political and personal. One imagines that lawyers receive recurring calls with the following directive: Find a plausible (meaning non-laugh-inducing) legal argument that permits the President to take some act or adopt some measure. If the argument prevails in court, fantastic. If the argument fails, at least we tried to advance the President's agenda. Moreover, we can spin any judicial defeat as a partisan decision that refused to credit our winning arguments. If the President adopts strained legal arguments and prevails some of the time, the incumbent benefits because he can do more than he would have had he adopted more faithful, and more restrained, readings of his constitutional and statutory authority.

Staunch partisans fail to see the continuity across administrations. They tend to imagine that we have periods of legality punctuated by bouts of profound illegality. These periods somewhat track inaugurations. The result is that at all times portions of the country are rather outraged and agitated. We have had Clinton Derangement Syndrome, followed by Bush Derangement Syndrome, followed by Obama Derangement Syndrome.

This President deranges too. His talent and capacity for deranging seem singular. He delights in trolling his opponents, broadcasting claims that are demonstrably false and airing assertions and accusations that seem designed to get a rise out of foes.⁸ He is the Troller in Chief.

For instance, he says exasperating things about his own legal authority. The President has said in reference to the Mueller investigation: "Nobody ever mentions Article II It gives me all of these rights at a level nobody has ever seen before. We don't even talk about Article II."⁹ On another occasion, he said, "I have an Article II, where I have the right to do whatever I want as [P]resident."¹⁰

The reality is duller. He has not done "whatever [he] want[s]." Whenever the President has lost in the courts, he has obeyed. He inveighs

⁸ See Charlie Savage, *Trump Keeps Losing in Court. But His Legal Strategy Is Winning Anyway*, N.Y. TIMES (Nov. 27, 2019), <https://nyti.ms/37LRBsJ> [<https://perma.cc/7K99-BRML>].

⁹ Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him "The Right to Do Whatever I Want,"* WASH. POST (July 23, 2019, 9:46 PM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/> [<https://perma.cc/WV49-TAMV>]. For a scholar of Article II, this claim is deeply painful. My scholarly community speaks of the Vesting Clause all the time. More ominously, the comment confirms a darker suspicion: he has not read my work.

¹⁰ *Id.* Now, it is possible that he was referring to something relatively narrow (but rather consequential) like directing the investigation or firing Robert Mueller.

against the courts, but he is merely according them the same disrespect he accords all his opponents. He has not forced states to reopen their economies during the coronavirus pandemic, despite fiercely wishing to do so.¹¹ He has not assumed complete control over the content of federal law, thereby displacing Congress. The President has inverted the Teddy Roosevelt maxim. He speaks loudly and wields a small stick.

A genuine autocracy could come about only after a more far-reaching breakdown in the separation of powers, one that would permit a President to wield power like an authoritarian. It is therefore critical to recognize that we have already witnessed several such breakdowns and that if we judge Trump by his actions (and not his words), he has made the same sort of strained legal arguments that are now standard fare across all recent presidencies.

Here, I touch upon some (but not all) of the more memorable legal disputes during his Administration. I discuss matters of presidential responsibility and presidential power. I hope to ensure that Trump can no longer say “nobody ever mentions Article II.” My thesis is that where the Constitution’s separation of powers is concerned, President Trump is more of the same, with huge doses of brashness, braggadocio, and balderdash thrown in.

I. LOCK HIM UP: PRESIDENTIAL ACCOUNTABILITY AND RESPONSIBILITY

The federal executive reflects a number of design choices. The Founders erected a more perfect, unitary executive, so that it would be energetic *and* accountable. An executive-by-committee often would be shrouded in confusion and complications, as fingers of blame pointed in multiple directions for the inevitable missteps.¹² In the midst of the backbiting and recriminations, defeats would be orphans and accountability impossible. In contrast, with a unitary institution, no one has doubts about whom to blame for failures in law execution, foolish vetoes, and imprudent pardons. Far before Harry Truman, the buck was to stop with the President.

The presidency also would be responsible as a matter of law. Impeachment was the obvious route. But there was another path left unmentioned, the ordinary legal process. Now, many modern readers understand the Constitution to implicitly forbid criminal prosecution and

¹¹ See Jennifer Jacobs, Justin Sink & Saleha Mohsin, *Trump Declares He Has “Total” Authority to Reopen After Virus*, BLOOMBERG (Apr. 13, 2020, 9:15 PM), <https://www.bloomberg.com/news/articles/2020-04-13/trump-declares-he-has-power-to-open-up-states-not-governors> [<https://perma.cc/6G8P-5QW8>].

¹² See James Wilson, Speech to the Pennsylvania Convention, Dec. 4, 1787, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453, 480 (Jonathon Elliot ed., Philadelphia, J.B. Lippincott & Co., 2d ed. 1836).

punishment of sitting Presidents.¹³ But very few read it to bar criminal investigations of the incumbent.¹⁴

In my view, the impeachment and investigation of President Trump reveal, yet again, some truths about partisanship and incentives. First, removal-via-impeachment of a President is all but impossible. To the credulous outsider, impeachment appears as a shiny, tantalizing prospect. But everyone in the game knows it is a phantom menace.¹⁵ Second, special counsels (like their independent counsel cousins) should seldom be appointed, for they habitually reflect a Captain Ahab obsession with nailing their targets. Too often, counselor investigations are but the continuation of partisan politics via other (prosecutorial) means.

A. *Why “You’re Fired” Is a Mirage*

In practice, the impeachment machinery has proven too unwieldy, requiring as it does a House majority and a Senate supermajority.¹⁶ On top of these requirements, the process is timewasting, sometimes resulting in a hung jury, with either no impeachment or no supermajority for conviction. Seeing this, is it any wonder that we have had so few impeachments? We have long had a full-time Congress and have had, over the course of centuries, many thousands of civil officers. Yet the House has impeached but twenty and the Senate convicted only eight.¹⁷

Thomas Jefferson scorned impeachment and explained its weakness: “[T]he combination of the friends and associates of the accused, the action of personal and party passions, and the sympathies of the human heart, will for ever find means of influencing” legislators “and thus secure th[e] impunity” of the accused.¹⁸

With the impeachment of Bill Clinton, there was some initial mystery. Would he resign? Hell no, said the President.¹⁹ Would he be

¹³ See A Sitting President’s Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. 222, 222 (2000).

¹⁴ See Philip Bobbitt, *Indicting and Prosecuting a Sitting President*, LAWFARE (Jan. 14, 2019, 2:58 PM), <https://www.lawfareblog.com/indicting-and-prosecuting-sitting-president> [https://perma.cc/W35U-FZKJ].

¹⁵ See Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 571 n.141 (1999) (book review).

¹⁶ See U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6.

¹⁷ *List of Individuals Impeached by the House of Representatives*, HISTORY, ART, & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> [https://perma.cc/YBB6-SR2B].

¹⁸ Letter from Thomas Jefferson to Adamantios Coray (Oct. 31, 1823), NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/98-01-02-3837> [https://perma.cc/KV2Q-X3EY].

¹⁹ See Alison Mitchell, *President, Facing Vote, Denies Perjury and Says He Won’t Quit*, N.Y. TIMES (Dec. 14, 1998), <https://movies2.nytimes.com/library/politics/121498impeach.html> [https://perma.cc/4A3U-RK57].

impeached? Eventually, by a partisan vote.²⁰ Would the Senate convict and remove? Emphatically, no. The punishment did not fit the crimes, or so many reasonably concluded. In between there was a lot of discussion about whether committing perjury and obstructing justice were high crimes and misdemeanors given the peculiar context.²¹ Moreover, some said it should be more difficult to overturn an election, meaning that impeachments ought to play out differently when Presidents were in the dock.²²

This time around, there was rather less mystery and certainly no cliffhanger. We knew the plot and denouement. Except the roles were reversed. This time, Democrats fulminated against the incumbent, speaking of duties and unhappy, reluctant votes to impeach and convict.²³ Republicans fell back on denouncing Democratic coups and partisan witch hunts.²⁴

What little drama there was centered on the question of whether to impeach at all. Speaker of the House Nancy Pelosi, having concluded that Republicans had suffered after the Clinton impeachment, said there would be no partisan impeachment as long as she was in charge. The evidence needed to be overwhelming and the vote bipartisan.²⁵ Given this standard it seemed that the President would not be impeached, no matter what. Indeed, that seemed one of the lessons of the Clinton impeachment, with the conventional wisdom holding that Republicans had incurred political costs.²⁶

²⁰ See Peter Baker & Juliet Eilperin, *Clinton Impeached: House Approves Articles Alleging Perjury, Obstruction*, WASH. POST (Dec. 20, 1998, 12:00 AM), <https://www.washingtonpost.com/politics/clinton-impeachment/clinton-impeached-house-approves-articles-alleging-perjury-obstruction> [<https://perma.cc/33VC-CTYK>].

²¹ See, e.g., Alison Mitchell, *The President's Acquittal: The Overview; Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES (Feb. 13, 1999), <https://www.nytimes.com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html> [<https://perma.cc/MTP6-35XB>].

²² See Speech by Jerrold Nadler During House Floor Debates on Resolutions to Impeach President Clinton (Dec. 18, 1998), in *Excerpts from Dec. 18 Impeachment Debate*, WASH. POST (Dec. 18, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/excerpts121898.htm> [<https://perma.cc/6ALY-FU9Q>].

²³ See David Cohen, *Nadler on Trump: "A Continuing Threat to the Integrity of Our Elections,"* POLITICO (Dec. 15, 2019, 9:56 AM), <https://www.politico.com/news/2019/12/15/nadler-trump-impeachment-elections-085433> [<https://perma.cc/A257-JSUR>].

²⁴ See Morgan Chalfant & Brett Samuels, *Trump Slams "Witch Hunt" After House Impeachment Vote*, THE HILL (Oct. 31, 2019, 11:43 AM), <https://thehill.com/homenews/administration/468322-trump-slams-witch-hunt-after-house-impeachment-vote> [<https://perma.cc/9JU4-CART>].

²⁵ See Kyle Cheney & Lily Stephens, *From "He's Just Not Worth It" to "I Want Him in Prison" — How Nancy Pelosi's Impeachment Talk Has Changed*, POLITICO (June 6, 2019, 7:16 PM), <https://www.politico.com/story/2019/06/06/nancy-pelosi-impeachment-talk-evolution-1356588> [<https://perma.cc/8XN8-NQB9>].

²⁶ See David Leonhardt, *Opinion, The Clinton Legacy: Impeachment Hurts the President*, N.Y. TIMES (Oct. 13, 2019), <https://nyti.ms/2VDSbCr> [<https://perma.cc/Q3ZK-M874>] (challenging this conventional wisdom).

But if politics is the guiding light, restraint is risky too. It eventually became clear to Speaker Pelosi that passivity had significant downsides. Portions of the Democratic base believed that impeachment was warranted by January of 2017.²⁷ By 2019, they had helped make Pelosi the Speaker. They had great expectations of a rousing and cathartic impeachment. With a host of plausible constitutional arguments that the President committed impeachable offenses, the hordes demanding Trump's coiffed scalp could not be held at bay. Elections have consequences, said Barack Obama.²⁸ The 2018 election had them for Trump.

The President's lawyers argued the facts and the law. Focus, for a moment, on the law. The two charges, using executive authority for private ends and obstruction of congressional prerogatives, were not established crimes, as the President's lawyers pointed out.²⁹ But so what? Of course, the Impeachment Clause of Article II does not merely refer to violations of the criminal code. Rather the phrase "high Crimes and Misdemeanors"³⁰ is a term of art, one that I believe encompasses the idea that the officer has said or done something that renders him unfit for the office. If a judge said the entire federal judicial system was corrupt and members of the House believed the claim was destructive to the public's trust in the courts, they could vote to impeach. If a Secretary of Defense misused federal funds to paint his house, that could lead senators to convict. Title 18 of the U.S. Code is not the touchstone of impeachability.

Moreover, I believe that all civil officers can be impeached for getting the Constitution wrong, even when their beliefs are grounded on good faith disagreements over its meaning. If a federal judge honestly believes he can revise federal legislation, he can be impeached because others can conclude that he lacks such power. The same principles apply to Presidents. Assertions of good faith belief, grounded in the advice of counsel or otherwise, do not shield the incumbent. The phrase "my lawyers approved this" supplies no immunity. Hence if members of the House believed that the President had a constitutional duty to cooperate with their inquiry and the President violated that duty, Representatives could have impeached him. People forget that the House impeached

²⁷ See Matea Gold, *The Campaign to Impeach President Trump Has Begun*, WASH. POST (Jan. 20, 2017, 12:19 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/01/20/the-campaign-to-impeach-president-trump-has-begun> [<https://perma.cc/M4SS-4EJY>].

²⁸ Eric Cantor, Opinion, *What the Obama Presidency Looked Like to the Opposition*, N.Y. TIMES (Jan. 14, 2017), <https://nyti.ms/2jJKMNI> [<https://perma.cc/6KNL-GVYC>].

²⁹ *Trial Memorandum of President Donald J. Trump*, in *Proceedings Before the United States Senate* 25–27, 47–55 (Jan. 20, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/01/Trial-Memorandum-of-President-Donald-J.-Trump.pdf> [<https://perma.cc/BZ59-T3H7>].

³⁰ U.S. CONST. art II, § 4.

President Clinton for failing to adequately cooperate with its impeachment investigation.³¹

Though I have a broad reading of impeachable offenses, a reading that aligns with Professor Michael Paulsen's,³² I differ from those who diffidently argue that the House must impeach whenever a majority of Representatives concludes that a civil officer has committed an impeachable offense.³³ My disagreement stems from the absence of any imperative in the Impeachment Clauses. For instance, the "sole power of impeachment"³⁴ does not naturally bring to mind a *duty* to impeach. Moreover, I suspect that the House will do little else but impeach under this supposed duty. There is no shortage of venal and power-hungry civil officers.

We can draw some lessons from the episode. We already knew that conviction of a President is all but impossible, in part because of "party passions" and in part because a President's defenders can often cite predecessors who have done much the same thing the President is accused of doing.³⁵ Further, the meaning of "high Crimes and Misdemeanors"³⁶ will be forever contested, especially when the stakes are high. Perhaps the only new lesson is that sometimes failing to impeach will be perceived as costlier politically than actually impeaching a President. When that is true, impeachment will follow as a matter of political expedience. Partisanship can trigger an impeachment even as it thwarts any conviction.

In any event, Thomas Jefferson was correct when he described impeachment as something of a "scarecrow."³⁷ Essentially, months were spent to censure President Trump, and although he seemed deeply irritated by it all, he never seemed scared. Indeed, in the waning days of the 2020 election, he welcomed a second impeachment.³⁸ I would say

³¹ See H. COMM. ON THE JUDICIARY, IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 105-830, art. IV, at 76 (1998).

³² Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689, 701-02 (2018) (book review).

³³ CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN'S GUIDE 158-59 (2017). Even those who disagree with one or more of Professor Sunstein's particular conclusions will agree that this is an illuminating book.

³⁴ U.S. CONST. art. I, § 2, cl. 5.

³⁵ See generally Josh Blackman, Opinion, *Trump Acts Like a Politician. That's Not an Impeachable Offense.*, N.Y. TIMES (Jan. 23, 2020), <https://nyti.ms/2GcXLoJ> [<https://perma.cc/EQV8-X9PH>].

³⁶ U.S. CONST. art. II, § 4.

³⁷ Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON 135, 137 (Paul Leicester Ford ed., 1905).

³⁸ Courtney Subramanian, "I Want Them to Do It": Donald Trump Says He Welcomes Second Impeachment Over Supreme Court Seat, USA TODAY (Sept. 22, 2020, 9:16 PM), <https://www.usatoday.com/story/news/politics/elections/2020/09/21/supreme-court-trump-says-he-welcomes-democratic-impeachment-threat/5855392002> [<https://perma.cc/987F-UA0B>].

that yearning for an impeachment is unprecedented. But many things the President says are without precedent.

B. “*This Is the End of My Presidency. I’m F[***]ed.*”

In urging a foreign investigation of the Bidens’ dealings in Ukraine, the President must have thought that turnabout was fair play. After all, the President and his campaign had been the subject of an almost three-year inquiry, one that had enmeshed him in allegations that he was a Russian dupe or patsy and an obstructor of justice.

Needless to say, these allegations were not the makings of a honeymoon. Rather, the President was greeted with acrimony, innuendo, and suspicion. As former Director of National Intelligence James Clapper put it in 2017, the inquiry and doubts were a “dark cloud” over the incoming Administration and the new President.³⁹

The President was far more colorful. Upon hearing of the appointment of Robert Mueller as special counsel, the President apparently said: “Oh my God. This is terrible. This is the end of my Presidency. I’m f[***]ed.”⁴⁰ He went on to say: “Everyone tells me if you get one of these independent counsels it ruins your presidency. It takes years and years and I won’t be able to do anything. This is the worst thing that ever happened to me.”⁴¹ He was right.

Before the election, many in the national security establishment were apoplectic about the prospect of a President Trump.⁴² He seemed cozy with Vladimir Putin and sometimes equated American and Soviet foreign policies. Few Americans like such moral equivalency. The FBI conducted an elaborate investigation of the President’s campaign, including securing Foreign Intelligence Surveillance Act (FISA) warrants against someone who had worked with the CIA in the past.⁴³ Perhaps they really believed there was not only smoke but fire as well. But it soon should have been evident that there was no there there. Trump was not conspiring with Putin about how to steal the election from

³⁹ Nolan D. McCaskill, *Clapper Pushes Back Against Trump: Russia Probe Not a “Witch Hunt,”* POLITICO (May 12, 2017, 12:42 PM), <https://www.politico.com/story/2017/05/12/james-clapper-donald-trump-russia-probe-witch-hunt-238319> [<https://perma.cc/4ZBH-G8JJ>].

⁴⁰ 2 ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 78 (2019).

⁴¹ *Id.*

⁴² See Nahal Toosi, *Trump Makes Intel Community Queasy*, POLITICO (Aug. 17, 2016, 1:35 PM), <https://www.politico.com/story/2016/08/trump-intelligence-community-unhappy-227120> [<https://perma.cc/Q69V-K4SD>].

⁴³ Gregg Re & Brooke Singman, *Carter Page FISA Warrant Lacked Probable Cause, DOJ Admits in Declassified Assessment*, FOX NEWS (Jan. 24, 2020), <https://www.foxnews.com/politics/carter-page-fisa-warrant-lacked-probable-cause-declassified-doj-order-finds> [<https://perma.cc/DSQ7-3TU6>]; Charlie Savage, *Justice Dept. Says Facts Did Not Justify Continued Wiretap of Trump Aide*, N.Y. TIMES (Jan. 23, 2020), <https://nyti.ms/2TNdhj7> [<https://perma.cc/43WJ-FFQ7>].

Hillary Clinton. Someone who publicly calls upon Russia to release emails is unlikely to be someone who surreptitiously conspires with it. Someone whose campaign meets with an obscure Russian lawyer in Trump Tower to acquire kompromat does not have a backchannel to Putin. Finally, the use of unverified opposition research, much of it sourced from someone with suspected ties to Russian intelligence, to justify a *spy* operation, was a low point for our counterintelligence community.⁴⁴ It gave a new meaning to counterintelligence. Given the venom toward candidate Trump reflected in the text messages and emails of government personnel, it seems fair to say that all reasonable and unreasonable inferences were drawn against him and his associates.

Should there have been an investigation of foreign interference in our election? Absolutely. Should it have been focused solely on the Trump campaign? Absolutely not. There was no investigation of news reports that the Ukrainian embassy had shared compromising information on Paul Manafort with the Democratic National Committee.⁴⁵ There was no investigation of the Steele Dossier, much of which was allegedly sourced from someone educated in Russia and previously investigated as a possible spy.⁴⁶ When queried about his failure to investigate the Steele Dossier's origins, Robert Mueller, a smart and distinguished man, said it was "outside [his] purview."⁴⁷ Yet his appointment letter from Deputy Attorney General Rod Rosenstein said Mueller was "to ensure a full and thorough investigation of the Russian government's efforts to interfere in the 2016 presidential election."⁴⁸ Possible Russian efforts to disseminate scurrilous information about either candidate were clearly within his "purview."

⁴⁴ See Adam Goldman & Charlie Savage, *The F.B.I. Pledged to Keep a Source Anonymous. Trump Allies Aided His Unmasking.*, N.Y. TIMES (July 25, 2020), <https://nyti.ms/2WU7EjD> [<https://perma.cc/VTA7-67JT>].

⁴⁵ Kenneth P. Vogel & David Stern, *Ukrainian Efforts to Sabotage Trump Backfire*, POLITICO (Jan. 11, 2017, 5:05 AM), <https://www.politico.com/story/2017/01/ukraine-sabotage-trump-backfire-233446> [<https://perma.cc/835U-G5FK>]; John Solomon, Opinion, *Ukrainian Embassy Confirms DNC Contractor Solicited Trump Dirt in 2016*, THE HILL (May 2, 2019, 7:00 PM), <https://thehill.com/opinion/white-house/441892-ukrainian-embassy-confirms-dnc-contractor-solicited-trump-dirt-in-2016> [<https://perma.cc/K3JR-ET3E>].

⁴⁶ Katie Benner & Adam Goldman, *Justice Dept. Documents Highlight Criticisms of Mueller Inquiry*, N.Y. TIMES (Sept. 25, 2020), <https://nyti.ms/2Hz4MEb> [<https://perma.cc/32H6-JSR3>]; see also James M. Casey, Opinion, "Unmasking" Steele Dossier Source: Was Confidentiality Ever Part of the Deal?, THE HILL (Aug. 1, 2020, 8:00 AM), <https://thehill.com/opinion/white-house/509645-unmasking-steele-dossier-source-was-confidentiality-ever-part-of-the-deal> [<https://perma.cc/Z3V3-8K5U>].

⁴⁷ Brett Samuels, *Mueller Declines to Answer Dozens of Questions from Lawmakers*, THE HILL (July 24, 2019, 2:06 PM), <https://thehill.com/policy/national-security/454557-mueller-declines-to-answer-dozens-of-questions-from-lawmakers> [<https://perma.cc/82JF-F45Z>].

⁴⁸ Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/39CC-95FG>].

Of course, few people knew at the outset of the investigation that there was no fire and very little smoke with respect to collusion or conspiracy. With the firing of James Comey, the Director of the Federal Bureau of Investigation, the investigation got new legs as a more serious charge was laid on the table. Had the President obstructed justice when he ousted Comey? The charge was that Trump had influenced an investigation for corrupt reasons. He hoped to slow down, impede, *obstruct* the investigation of him and his associates, or so the critics supposed.⁴⁹

This is certainly plausible. Perhaps Trump had corrupt reasons for firing Comey. But in my view, the most likely reason for firing Comey is that Trump grew to despise him. First, while Comey was telling Trump he was not under investigation, he refused to say so publicly.⁵⁰ To Trump, this seemed fishy. In fact, Comey may have been deceiving Trump, neglecting to mention that Trump might yet be a target of the investigation. Second, Comey also seemed to create a predicate for newspaper reportage on the Steele Dossier. By briefing Trump, he made it palatable for news outlets to report on the salacious Dossier. And that is what happened.

None of this mattered to critics. To the detractors, it was patently obvious that Trump fired Comey for wicked reasons. To them, Trump was a liar, a grifter, and corruption incarnate. But should one open a criminal investigation of a President based on this tissue of speculation about his motives for taking a facially constitutional act? After all, the Special Counsel report itself listed many possible non-corrupt reasons for the alleged acts of obstruction.⁵¹ Should there have been a drawn-out and dogged prosecutorial investigation of George Bush's pardons of Iran-Contra figures⁵² or Bill Clinton's pardons of well-connected allies?⁵³ We can have suspicions but still refrain from resorting to a full-on criminal investigation. More is needed than conjecture.

If I am wrong and investigations should commence based on rank speculation about corrupt motives, then we will be probing dozens of investigators. Should James Comey be investigated for obstruction of

⁴⁹ See Klarman, *supra* note 3, at 77–78, 80–81.

⁵⁰ Matt Apuzzo & Michael S. Schmidt, *Comey Says Trump Pressured Him to “Lift the Cloud” of Inquiry*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2017/06/07/us/politics/james-comey-statement-testimony.html> [<https://perma.cc/E8ZE-5A6K>].

⁵¹ MUELLER, *supra* note 40, at 157.

⁵² Andrew Glass, *Bush Pardons Iran-Contra Felons, Dec. 24, 1992*, POLITICO (Dec. 24, 2018, 7:21 AM), <https://www.politico.com/story/2018/12/24/bush-pardons-iran-contra-felons-dec-24-1992-1072042> [<https://perma.cc/74P9-RK4H>].

⁵³ Josh Gerstein, *Clinton Pardon Records Offer Fuel for Hillary's Foes*, POLITICO (Jan. 28, 2016, 4:11 PM), <https://www.politico.com/story/2016/01/hillary-clinton-pardon-record-218331> [<https://perma.cc/LT39-MAVW>].

justice for leaking departmental memos, one of which contained classified information, with the express intent of securing a special counsel?⁵⁴ He clearly sought to influence the investigation. To be sure, there is a benign story — Comey wanted to get to the bottom of Russian interference. But there is a corrupt story as well — Comey was retaliating against the man who fired him. What is the true reason? Who knows? Let a formidable, hyper-focused, and relentless prosecutor figure it out!

Or what of Robert Mueller? Should he be investigated for obstruction because some people suppose he corruptly shaped his investigation?⁵⁵ The President's many defenders will have no problem assigning a corrupt motive. It is easy to baldly claim that Mueller scorned Trump and wanted to enmesh him in a prolonged investigation. And if that does not describe Mueller, it certainly could describe his associates, each of whom *might* be guilty of influencing the investigation for corrupt motives once we interrogate their hearts. And should anyone appointed to investigate Mueller or Comey themselves be investigated on the speculation that they too had corrupt motives? Will Attorney General Bill Barr, or John Durham, be the subject of a special counsel probe? And so on, ad infinitum?

To be clear, I am not arguing that any particular investigator or lawyer was motivated by corrupt reasons. Rather my point is that it should take far more than a bare allegation that someone had a corrupt motive in taking some act that influenced an investigation or prosecution. If all it takes is a threadbare accusation, then every prosecutor (including the Chief Prosecutor⁵⁶) can be investigated every time they conduct or brush up against an investigation or prosecution. It does not take much imagination to concoct a story of corrupt motives.

For partisans, ingenuity is not in short supply. In all such cases, partisans justify their acts by saying that they are merely investigating

⁵⁴ Katie Bo Williams, *Comey Leaked Memos to Prompt Special Counsel*, THE HILL (June 8, 2017, 11:46 AM), <https://thehill.com/policy/national-security/336932-comey-leaked-memo-to-prompt-special-counsel> [<https://perma.cc/N7T5-X7WM>]. Per the Inspector General's report on Director Comey's leaks, of the departmental memos Comey leaked to his lawyers, one contained classified information. The others were released contrary to departmental rules and policy. See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REPORT OF INVESTIGATION OF FORMER FEDERAL BUREAU OF INVESTIGATION DIRECTOR JAMES COMEY'S DISCLOSURE OF SENSITIVE INVESTIGATIVE INFORMATION AND HANDLING OF CERTAIN MEMORANDA 52–59 (Aug. 2019), <https://www.oversight.gov/sites/default/files/oig-reports/01902.pdf> [<https://perma.cc/5SSJ-W5TH>].

⁵⁵ See, e.g., John Solomon, *Giuliani Calls for Mueller to Be Investigated for Destruction of FBI Evidence*, THE HILL (Dec. 27, 2018), <https://thehill.com/hilltv/rising/422963-giuliani-calls-for-mueller-to-be-investigated-for-destruction-of-fbi-evidence> [<https://perma.cc/HK37-6JCA>].

⁵⁶ Although some regard presidential involvement in prosecutions as constitutionally improper, the Constitution makes the President the Chief Prosecutor of all offenses against the United States. See generally Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005). Early Presidents sometimes halted prosecutions and at other times commanded them or spurred them forward. See *id.* at 553–63. There was nothing constitutionally amiss with President Trump's interest in the case even if some thought it unwise or misguided.

potential wrongdoing. The Democrats hounding the President believe that they should be able to get to the bottom of his supposedly illegal schemes. The President believes the same about President-elect Joseph Biden, Hunter Biden, and their Ukrainian exploits. Both sides should be more wary. Do we really need an investigation of an insurgent presidential campaign based on the thinnest of reeds? Do we truly require an investigation of an opponent's son, with the *President* applying pressure to foreign governments to cooperate? Investigations of political opponents — and that is what both of these were — require some discretion and circumspection. Neither side showed any forbearance. I hope the two episodes are not harbingers of the future. But experience suggests otherwise.

In print, I argued that the President could fire Mueller but that he ought to permit the investigation to continue.⁵⁷ My confidence was misplaced. The Special Counsel's team did not crown themselves with glory. They secured many convictions, but only because President Trump had a cast of rogues as associates. They could not get the big fish because their entire theory of the case turned on the President's heart and they were not allowed access to it. The sprawling and over-long investigation proved again that special counsels (and their teams) have all the wrong incentives. Give a prosecutor an unlimited budget and a rather narrow set of targets and they will be hell-bent on prosecutions. Special prosecutors who do not secure convictions are judged failures, and no one takes the job to be a flop. Finally, special prosecutors are decidedly independent; the supposed ability of Deputy Attorney General Rod Rosenstein to fire Mueller was more chimerical than real. Anyone who ousted Mueller would be subject to an avalanche of criticism and, as we have seen, a possible obstruction of justice investigation.

When it comes to executive responsibility, we are at sea. Impeachment is not much of a real mechanism of accountability but more of a tool to score partisan points and perhaps to express grave disquiet. And counselor investigations tend to be rife with partisanship and bad incentives. Politicians outside the White House looking in utterly love these strong-willed counsels until their co-partisan captures the presidency and then they belatedly experience their many evils. Finally, the White House deploys a host of legal claims to thwart all manner of congressional investigations: executive privilege, testimonial immunity, and good old-fashioned stalling.⁵⁸ If you can get past an election, the party

⁵⁷ John Yoo & Saikrishna Prakash, Opinion, *Of Course Trump Can Fire Mueller. He Shouldn't.*, N.Y. TIMES (Apr. 13, 2018), <https://nyti.ms/2IPCfp5> [<https://perma.cc/QY4J-SPNL>].

⁵⁸ Klarman asserts that the Trump Administration is untransparent. See Klarman, *supra* note 3, at 38–40. But a focus on Trump has led him astray. Every presidential administration clams up. Barack Obama promised the most transparent administration ever but asserted executive privilege with respect to the Fast and Furious fiasco and invoked testimonial privilege for his White House

demanding the information may lose power or may lose interest. Either way, delay works.

The only institution that has a chance of supplying some accountability is elections. But this mechanism has its own limits. Voters cast their ballots to both hold politicians responsible and secure sound policy. Like politicians, voters are apt to excuse bad acts in return for securing the good policies they desire. Apparently, elections are the worst means of securing an accountable presidency, save for all the rest.

II. MAKING THE AMERICAN PRESIDENCY GREAT AGAIN: EXECUTIVE POWER

Presidents arrive at 1600 Pennsylvania with differing degrees of knowledge about their high office. George Washington came to the presidency with perhaps unparalleled familiarity and expertise, for he had presided over the Convention that constructed the office.⁵⁹ He had also served as Commander in Chief and had worked for a federal executive (the Continental Congress), as well as with many state executives.⁶⁰ Despite this unequaled knowledge and experience, he still had doubts and questions. Moreover, he was not afraid to admit that he was wrong and that the presidency lacked certain authority.⁶¹ He was, in many ways, the ideal President — decorous and dutiful, serious and sagacious, respectful and righteous.

Or take a more recent example. Barack Obama must have been quite knowledgeable about the presidency, having taught constitutional

officials. Josh Gerstein, *Judge Rejects Obama's Executive Privilege Claim over Fast and Furious Records*, POLITICO (Jan. 19, 2016, 1:16 PM), <https://www.politico.com/story/2016/01/judge-rejects-obamas-executive-privilege-claim-over-fast-and-furious-records-217970> [https://perma.cc/323W-T63W]; Steven T. Dennis, *White House Cites Immunity, Rebuffs Issa Subpoena for Simas*, ROLL CALL (July 15, 2014, 8:49 PM), <https://www.rollcall.com/2014/07/15/white-house-cites-immunity-rebuffs-issa-subpoena-for-simas> [https://perma.cc/3FCW-DLHR]. President Trump's failure to invoke executive privilege in the face of the Mueller investigation was a tactical mistake that no other President is likely to repeat. No President is going to cooperate with an investigation because they see that they may be investigated for *obstruction* for more than two years despite having utterly waived executive privilege.

To be clear, I believe that as an original matter, the Executive lacked privileges and immunities other than his guaranteed salary. See SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 220–35 (2015) [hereinafter PRAKASH, *IMPERIAL FROM THE BEGINNING*]; Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1145 (1999).

⁵⁹ JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* 171 (2004).

⁶⁰ See Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1375, 1382, 1387 (2013).

⁶¹ See PRAKASH, *IMPERIAL FROM THE BEGINNING*, *supra* note 58, at 301 (noting that Washington admitted that he had violated the Constitution in nominating someone ineligible to serve as Justice).

law for many years.⁶² As a candidate, he staked out clear positions against the imperial pretensions of the modern presidency and his immediate predecessors.⁶³ But once in office, he seemed to have forgotten lessons he had taught and learnt. Presidents could not wage war absent an imminent threat to the nation, he said.⁶⁴ But there he was waging war in Libya.⁶⁵ Presidents could not issue signing statements to “undermine congressional instructions as enacted into law.”⁶⁶ But there he was issuing such signing statements.⁶⁷ And so on. The number of flip-flops befitted someone born and raised in the Aloha State. But executive power always seems more expansive from behind the Resolute Desk.

Candidate Donald Trump seemed unburdened with knowledge about the presidency.⁶⁸ He was going to make America great again.⁶⁹ Why would the Constitution pose a barrier to that?

To the President’s critics, this unfamiliarity perhaps made the President especially untethered to the Constitution. It perhaps explains why they regard him as lawless.⁷⁰

The detractors are right that his presidency played fast and loose with the law and the Constitution.⁷¹ But they are mistaken in thinking there is something new under the sun. Rather, the story is one of continuity, in the sense that recent Presidents listen to their lawyers and their lawyers often (but not invariably) find authority for the Executive’s

⁶² Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES (July 30, 2008), <https://www.nytimes.com/2008/07/30/us/politics/30law.html> [<https://perma.cc/932C-G6UJ>].

⁶³ Charlie Savage, *Barack Obama’s Q&A*, BOS. GLOBE (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA> [<https://perma.cc/89T5-D2Q3>].

⁶⁴ *Id.*

⁶⁵ Dominic Tierney, *The Legacy of Obama’s “Worst Mistake,”* THE ATLANTIC (Apr. 15, 2016), <https://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461> [<https://perma.cc/L4AN-XJWM>].

⁶⁶ Savage, *supra* note 63.

⁶⁷ Karen Tumulty, *Obama Circumvents Laws with “Signing Statements,” a Tool He Promised to Use Lightly*, WASH. POST (June 2, 2014), <http://wapo.st/T8AE3N> [<https://perma.cc/A5K6-XTV6>]. *But cf. id.* (noting that the Obama Administration utilized signing statements less frequently than the Bush Administration).

⁶⁸ Corey Brettschneider, *Trump vs. the Constitution: A Guide*, POLITICO (Aug. 4, 2016), <https://www.politico.com/magazine/story/2016/08/2016-donald-trump-constitution-guide-unconstitutional-freedom-liberty-khan-214139> [<https://perma.cc/6TBZ-YL7M>].

⁶⁹ Jeremy Diamond, *Donald Trump Jumps In: The Donald’s Latest White House Run Is Officially On*, CNN (June 17, 2015, 11:07 AM), <https://www.cnn.com/2015/06/16/politics/donald-trump-2016-announcement-elections/index.html> [<https://perma.cc/49RH-8S2L>].

⁷⁰ Michael Tomasky, *Trump Is America’s First Lawless President*, DAILY BEAST (Dec. 19, 2017, 5:02 AM), <https://www.thedailybeast.com/trump-is-americas-first-lawless-president> [<https://perma.cc/6NPP-A25F>].

⁷¹ Catherine Rampell, Opinion, *The Lawless Law-and-Order President*, WASH. POST (June 4, 2020, 6:40 PM), https://www.washingtonpost.com/opinions/the-lawless-law-and-order-president/2020/06/04/04977832-a695-11ea-bb20-ebf021f3bbd_story.html [<https://perma.cc/VY77-6Y7E>].

agendas, particularly in the national security context.⁷² The lawyers are apt to whisper: *You have vast statutory and constitutional authority. You can do more than your critics suppose. The limits on the office recede with time, for you stand on shoulders of modern giants, each of whom has a legacy of expansive readings of presidential power.* As a result, modern Presidents are not shrinking violets. They push and push and grab and grab.

Where the Constitution's text and practice supposedly favor presidential power, presidential power is rock solid and cannot be moved. Where constitutional text and practice disfavor presidential power, the meaning of constitutional text can nonetheless float in favor of the presidency. So the presidency wins, again and again, or so say its lawyers.⁷³ Presidents can do more than a reading of the Constitution might suggest because inconvenient text can be massaged and spun. Disadvantageous practices can be reimagined and twisted to favor presidential power. To be clear, the President does not always get what he wants. But in the minds of their lawyers, Presidents win far, far more often than a neutral umpire might suppose.

Some fail to see the enduring pattern. For instance, during the Bush Administration, some progressive scholars claimed that it was uniquely aggressive.⁷⁴ But the Obama Administration was no different, save for its pursuit of progressive ends. When it came to assertive readings of presidential power, it was the Bush Administration's equal, in every respect.⁷⁵ Having said this, I have no interest in debating who was more transgressive and aggrandizing. I have no deep quarrel with those who grudgingly admit that while Obama was bad, Trump (or Bush) was worse. This is rather like crowing that my scoundrel is less roguish than yours.⁷⁶

⁷² SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* 226–33 (2020); see Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 838 (2017); Mary Dudziak, *Opinion, Shedding Light on Secret Laws Governing Presidential Power*, THE HILL (Aug. 27, 2019, 1:00 PM), <https://thehill.com/opinion/white-house/458970-shedding-light-on-secret-laws-governing-presidential-power> [<https://perma.cc/AX8F-HJAU>].

⁷³ PRAKASH, *supra* note 72, at 90, 126.

⁷⁴ See, e.g., PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 55 (2009) (describing Bush Administration's claims as "breathhtaking" and "contempt[u]ous" of the law); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 1 (2006) (asserting that Bush Administration had "made unprecedented claims of unchecked executive power").

⁷⁵ See, e.g., PRAKASH, *supra* note 72, at 51–52, 55–56, 91, 93, 128; Jack Goldsmith, *Opinion, Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014, 7:41 AM), <https://time.com/3326689/obama-isis-war-powers-bush> [<https://perma.cc/KZL9-3JTT>].

⁷⁶ For similar reasons, I disagree with those, like my friend John Yoo, who single out President Trump as a "Defender in Chief." See generally JOHN YOO, *DEFENDER IN CHIEF: DONALD*

A. Acts of War

Though President Trump once said “I love war in a certain way,”⁷⁷ he did not take America to war. That is, he did not use sustained force against foreign militaries or targets. And yet the President did commit what an older generation of international lawyers called acts of war, namely uses of force that would either signal recourse to war or supply the other nation just cause for declaring it. He attacked Syrian military bases twice and killed a notorious and powerful Iranian general.⁷⁸

His lawyers no doubt informed him that each strike was constitutional. In so doing, they could rely upon a string of Office of Legal Counsel opinions, each of which claims broad presidential authority to wage war.⁷⁹ Given that President Trump has not read any scholarship on the subject, and cannot be expected to do so, why would he second-guess his advisors?

So, notwithstanding the grant of power to Congress to declare war,⁸⁰ it seems that in the modern era our Presidents can decide that American military will be used to kill foreign generals and, if need be, foreign heads of state. If Presidents can wage a massive ground war on the Korean peninsula,⁸¹ why can't they attempt to kill President Muammar Qaddafi⁸² and lob missiles at the mastermind of the Iranian Revolutionary Guard?

In 2019, members of Congress were sufficiently roused by acts of war that they sought to lay down constitutional markers. From the second term of the Obama Administration (2015), the United States has been

TRUMP'S FIGHT FOR PRESIDENTIAL POWER (2020). Every modern President defends presidential power for instrumental reasons. In particular, greater presidential power helps Presidents keep their promises, advance their policy agendas, grow the economy, and defend the nation. Accordingly, every modern President appears as a “Defender in Chief” because every one of them adopts a stance of sweeping presidential power.

⁷⁷ Nick Corasaniti, *Against a Backdrop of War, Ad Portrays Trump as Reckless*, N.Y. TIMES (Sept. 10, 2016), <https://nyti.ms/2cCB4C> [<https://perma.cc/T8XC-ANQU>].

⁷⁸ Michael R. Gordon, Helene Cooper & Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://nyti.ms/2oFFrOn> [<https://perma.cc/3L4J-ECVQ>] (describing the first attack); Michael Crowley & Andrew Restuccia, *Trump Strikes Syria*, POLITICO (Apr. 14, 2018, 8:40 AM), <https://www.politico.com/story/2018/04/13/trump-syria-strikes-523051> [<https://perma.cc/QT3K-XUD3>] (describing the second attack); Karen Zraick, *What to Know About the Death of Iranian General Suleimani*, N.Y. TIMES (Jan. 3, 2020), <https://nyti.ms/39w5nQB> [<https://perma.cc/Z3D5-79MP>].

⁷⁹ See, e.g., April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, slip op. at 1 (O.L.C. May 31, 2018), https://www.justice.gov/sites/default/files/opinions/attachments/2018/05/31/2018-05-31-syrian-airstrikes_1.pdf [<https://perma.cc/MA68-T93Z>].

⁸⁰ U.S. CONST. art. I, § 8, cl. 11.

⁸¹ Mary L. Dudziak, *The Toxic Legacy of the Korean War*, WASH. POST (Mar. 1, 2019, 2:30 PM), <https://www.washingtonpost.com/outlook/2019/03/01/toxic-legacy-korean-war> [<https://perma.cc/VE54-FKPS>].

⁸² LEON PANETTA, *WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE* 354 (2014) (admitting that one goal of the Libyan war was regime change).

assisting a Saudi war against Houthi tribesmen.⁸³ By continuing that assistance, the Trump Administration perhaps stoked the embers of the anti-war wing within the Democratic party. Whatever the case may be, the House and Senate passed a resolution directing the President to remove the armed forces from the Saudi-Houthi conflict.⁸⁴ In other words, U.S. assistance for the fight against the Houthis had to stop. Yet the Senate could not override the President's veto of the measure.⁸⁵

The next year, legislators bestirred themselves again, attempting to direct the President to "terminate the use of United States Armed Forces for hostilities against" Iran.⁸⁶ The immediate cause was the killing of Qassim Soleimani and an apprehension that the President might order military attacks against Iran again. President Trump vetoed the resolution and the Senate could not override the veto.⁸⁷ Again, the collective voice of Congress was somewhat muzzled.

B. *America First, The World Last*

Elsewhere in foreign affairs, Congress also tried to stand up to the President. The President obsesses about the trade deficit⁸⁸ and thus favors large weapons sales.⁸⁹ By law, Congress has essentially ceded the regulation of weapons sales to the presidency, reserving to itself an expedited procedure for overturning those exports.⁹⁰ During the Trump

⁸³ Bruce Riedel, *Who Are the Houthis, and Why Are We at War with Them?*, BROOKINGS (Dec. 18, 2017), <https://www.brookings.edu/blog/markaz/2017/12/18/who-are-the-houthis-and-why-are-we-at-war-with-them> [<https://perma.cc/U9BK-DBAV>].

⁸⁴ S.J. Res. 7, 116th Cong. (2019); Tara Golshan, *Congress Passes Historic Resolution to End US Support for Saudi-Led War in Yemen*, VOX (Apr. 4, 2019, 12:00 PM), <https://www.vox.com/2019/4/4/18293954/war-powers-resolution-passes-congress-yemen-bds> [<https://perma.cc/YJZ2-LMRA>].

⁸⁵ Marianne Levine, *Senate Fails to Override Trump's Veto on Yemen*, POLITICO (May 2, 2019, 2:49 PM), <https://www.politico.com/story/2019/05/02/senate-trump-yemen-1298350> [<https://perma.cc/4MV9-QRZR>].

⁸⁶ S.J. Res. 68, 116th Cong. § 2(a) (2020); David Welna, *War Power Resolution on Iran Is Latest Attempt by Congress to Reclaim Clout*, NPR (Jan. 7, 2020, 5:45 PM), <https://www.npr.org/2020/01/07/794334043/war-powers-resolution-on-iran-is-latest-attempt-by-congress-to-reclaim-clout> [<https://perma.cc/9EXL-BRVH>].

⁸⁷ Clare Foran & Ted Barrett, *Senate Fails to Override Trump Veto of Iran War Powers Resolution*, CNN (May 7, 2020, 5:02 PM), <https://www.cnn.com/2020/05/07/politics/senate-iran-war-powers-resolution/index.html> [<https://perma.cc/LS6G-4CRB>].

⁸⁸ Keith Johnson, *What Trump Really Doesn't Get About Trade*, FOREIGN POL'Y (Feb. 24, 2020, 4:07 PM), <https://foreignpolicy.com/2020/02/24/trump-trade-war-china-europe-deficit> [<https://perma.cc/3GGM-2T3M>].

⁸⁹ See, e.g., Masaya Kato, *Trump Sees Big Arms Sales as Quick Fix for Japan Trade Deficit*, NIKKEI ASIA (Apr. 20, 2018, 2:49 PM), <https://asia.nikkei.com/Politics/International-relations/Trump-sees-big-arms-sales-as-quick-fix-for-Japan-trade-deficit> [<https://perma.cc/F7P4-5YFY>].

⁹⁰ PAUL K. KERR, CONG. RSCH. SERV., RL31675, ARMS SALES: CONGRESSIONAL REVIEW PROCESS 1-5 (2020).

Administration, Congress tried to pass resolutions of disapproval.⁹¹ But as a general matter, such resolutions have no chance of success, for Presidents can veto them.⁹² Moreover, Presidents will never sanction sales that Congress might override, such as munitions to Iran. Presidents will approve arms sales only when they know that there is little real chance of a congressional override.

Regarding treaties and commitments, the President has been on a withdrawal spree.⁹³ Call it the Art of the Undeal. He withdrew from several trade and arms control treaties, renegotiated others under a threat of withdrawal, and toys with leaving other treaties. For supposed political commitments, he withdrew from the Iran nuclear non-deal deal and from the Paris Climate Accord.⁹⁴ Finally, he jettisoned the Trans-Pacific Partnership by declaring he would never attempt to secure its legislative approval.⁹⁵ The President's evident loathing of international agreements has led some scholars to promote a Hotel California approach to international agreements. America can check in, but it can never leave.⁹⁶ In other words, some scholars suppose that it should be relatively easy to make agreements but rather difficult to leave them. Given their esteem for international law, this construct makes sense. But one can be forgiven for supposing that this approach lacks any basis in constitutional materials, either original or current.

Legislators have attempted to limit presidential withdrawal from treaties. The prospect that the President might withdraw from NATO triggered profound agitation in some quarters. In 2019, the House passed a bill to reaffirm that it was "policy of the United States" to "remain a member" of NATO.⁹⁷ Further, the House sought to prohibit the use of any funds to "withdraw" from NATO.⁹⁸ In the Senate, the

⁹¹ E.g., Catie Edmondson, *Senate Votes to Block Trump's Arms Sales to Gulf Nations in Bipartisan Rebuke*, N.Y. TIMES (June 20, 2019), <https://nyti.ms/2Xr6ca2> [<https://perma.cc/XE8M-ZT8A>].

⁹² E.g., Michael D. Shear & Catie Edmondson, *Trump Vetoes Bipartisan Resolutions Blocking Arms Sales to Gulf Nations*, N.Y. TIMES (July 24, 2019), <https://nyti.ms/2ZcAjig> [<https://perma.cc/5QVV-RQVV>].

⁹³ Richard Haass, Opinion, *Trump's Foreign Policy Doctrine? The Withdrawal Doctrine.*, WASH. POST (May 27, 2020), <https://www.washingtonpost.com/opinions/2020/05/27/trumps-foreign-policy-doctrine-withdrawal-doctrine/> [<https://perma.cc/T2WC-QDCM>].

⁹⁴ Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://nyti.ms/2KMeG2f> [<https://perma.cc/L7AJ-D7KF>]; Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), <https://nyti.ms/33qAvO5> [<https://perma.cc/W2V4-DMM9>].

⁹⁵ Andrew Glass, *Trump Scuttles Trans-Pacific Trade Pact, Jan. 23, 2017*, POLITICO (Jan. 23, 2019, 12:20 AM), <https://politi.co/2FQtuge> [<https://perma.cc/6LJG-HY34>].

⁹⁶ Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J.F. 432, 480 (2018).

⁹⁷ NATO Support Act, H.R. 676, 116th Cong. § 4(1) (2019).

⁹⁸ *Id.* § 5.

Foreign Relations Committee reported a similar bill to the Senate floor.⁹⁹ The 2020 National Defense Authorization Act actually required advance notice prior to withdrawing from the Open Skies Treaty.¹⁰⁰ But the President gave notice to the treaty parties that the United States would withdraw from the treaty this year.¹⁰¹ The Administration ignored the legislative notification requirement, arguing that it was unconstitutional under the circumstances.¹⁰²

The end result is again familiar. Presidents generally get their way in foreign affairs. It is an area of perceived executive responsibility and expertise.¹⁰³ Legislators are relatively uninterested because there are few electoral payoffs. And there is a long practice of Presidents prevailing in these clashes, which reinforces the first two points. Why develop expertise when the Executive will prevail? Why pay attention when you will enjoy little to no influence? Legislators understandably conclude that they have better uses for their time. Knowing this vicious cycle, Presidents are apt to twist or ignore any congressional attempts to limit their latitude in foreign affairs.

C. Law Twistification

In law execution, this President has continued the pattern of his predecessors. Where a President (or members of his administration) cares little about some policy, the executive branch goes about the business of attempting to faithfully execute congressional commands. The politicians and the civil servants may make mistakes. But good faith mistakes of law and fact are unavoidable.

If something matters to the President, however, faithfulness often gets tossed out the window. We have seen this most vividly with respect to the wall. For a while, the President sought money for his wall and was rebuffed by his fellow Republicans.¹⁰⁴ Finally, in 2019, he got limited funds (almost \$1.4 billion).¹⁰⁵ He could not secure more. Nonetheless, the President's legal advisers came up with the expedient of transferring

⁹⁹ S.J. Res. 4, 116th Cong. (2019).

¹⁰⁰ Pub. L. No. 116-92, § 1234, 133 Stat. 1198, 1648 (2019).

¹⁰¹ David E. Sanger, *Trump Will Withdraw from Open Skies Arms Control Treaty*, N.Y. TIMES (May 21, 2020), <https://nyti.ms/3bQyePt> [<https://perma.cc/HK9V-L7MX>].

¹⁰² Scott R. Anderson & Pranay Vaddi, *When Can the President Withdraw from the Open Skies Treaty?*, LAWFARE (Apr. 22, 2020), <https://www.lawfareblog.com/when-can-president-withdraw-open-skies-treaty> [<https://perma.cc/F5TR-994S>].

¹⁰³ HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 38–66 (1990).

¹⁰⁴ Jonathan Bernstein, *Where's Trump's Wall? Republicans Refused to Pay for It*, BLOOMBERG (Dec. 4, 2018, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2018-12-04/trump-s-wall-still-isn-t-funded-thanks-to-republicans> [<https://perma.cc/6LG5-ELR2>].

¹⁰⁵ Jacob Pramuk & Christina Wilkie, *Trump Declares National Emergency to Build Border Wall, Setting Up Massive Legal Fight*, CNBC (Feb. 15, 2019, 2:52 PM), <https://www.cnbc.com/2019/02/15/trump-national-emergency-declaration-border-wall-spending-bill.html> [<https://perma.cc/43CR-UNHA>].

funds from within the Department of Defense budget.¹⁰⁶ They said he could declare a national emergency, access untapped funds, and build a larger portion of the wall. Presto chango, on the same day he got a little over a billion from Congress, the pot of available wall funds mushroomed to over \$8 billion.¹⁰⁷

Was this sleight of hand legal? It turns on how best to make sense of legal texts. On the one hand is common sense. If you believe the meaning of a statute is fixed at the time of enactment and that ordinary meanings matter, it seems rather silly to say that there was an emergency, for the latter word conjures up the idea of something unforeseen and unanticipated. Illegal immigration is a perennial problem and thus does not seem the stuff of emergencies. Perhaps if thirty million people entered the nation illegally after the passage of some budget act, one might say there was a genuine emergency because the levels were unforeseen and unprecedented. But that did not capture the actual situation. The President got funding for his beloved wall and mere moments later uttered the magic words “national emergency” and siphoned off funds from other accounts.

On the other hand is the amendatory power of practice and dazzling gloss. Presidents have repeatedly declared (and redeclared) “emergencies” in contexts where almost no one believes there is a crisis.¹⁰⁸ In so doing, they have adopted, and acted upon, an idiosyncratic view of “emergency”: when the President believes that an act is merely useful, he can declare an emergency and thereby access statutory authority that turns on a declaration of emergency.¹⁰⁹ If this is the relevant sense of “emergency,” then the President did nothing unusual, much less illegal. He merely rode the coattails of his predecessors and what one might call a peculiar “common law” definition of emergencies; that is to say, for these statutes, practice has sanctioned a new and nonstandard sense of “emergency.” While I favor arguments grounded on original meanings and disfavor arguments grounded almost entirely on practice, executive branch lawyers understandably cotton to arguments from customs, especially when those governmental habits favor presidential power.

Or consider a rather different topic, health care. The President ran on a platform of repealing the Patient Protection and Affordable Care

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418> [<https://perma.cc/TZ78-K5Z2>].

¹⁰⁹ *See id.*

Act¹¹⁰ (ACA).¹¹¹ But he could not convince Congress to repeal the Act.¹¹² Thwarted by the pesky legislative process, the President pivoted to the “Pen and Phone” strategy of his predecessor. “We are not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help that they need. I’ve got a pen, and I’ve got a phone,” said President Obama.¹¹³

This President added an “eraser” to that toolkit. In the case of the ACA, Trump essentially intoned “We can’t wait” for Congress to repeal the Act. Rather, he would erase the ACA administratively. Congress’s inaction, an excuse for presidential unilateralism in the prior administration, resurfaced with a vengeance. Speaking to supporters, the President said the following: “You saw what we did yesterday with respect to health care. It’s step by step by step. . . . One by one, [the ACA is] going to come down”¹¹⁴ He also said, “We’re taking a little different route than we had hoped In the end, it’s going to be just as effective [as a legislative repeal]. And maybe it will even be better.”¹¹⁵

It was a remarkable admission. I am not an ACA expert. Like every member of Congress that passed it, and our two recent Presidents, I have not read the vast majority of it. Yet let me hazard a guess. It is hard to imagine that the ACA contains a self-destruct button that allows Presidents to blow it up. But in some measure Trump is just saying out loud what has been done before *sub silentio*.¹¹⁶ Presidents evade, shrink, and disembowel statutes that they disfavor. Trump is merely applying a principle to an extremely significant statute and being quite open about it.

D. Unicameralism and the Reverse Veto

To speak of executive *discretion* with respect to the enforcement of congressional laws is to unduly minimize the latitude that Presidents currently enjoy. Instead it is best to regard the modern Executive as enjoying a parallel lawmaking authority to supplement, and in some

¹¹⁰ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

¹¹¹ Chris Donovan & Adam Kelsey, *Fact-Checking Trump’s “Repeal and Replace” Obamacare Timeline*, ABC NEWS (Mar. 24, 2017, 8:07 PM), <http://abcn.ws/2oeQwRS> [<https://perma.cc/D66D-MMT6>].

¹¹² Leigh Ann Caldwell, *Obamacare Repeal Fails: Three GOP Senators Rebel in 49-51 Vote*, NBC NEWS (July 28, 2017, 12:14 PM), <https://www.nbcnews.com/politics/congress/senate-gop-effort-repeal-obamacare-fails-n787311> [<https://perma.cc/GFK6-HU4S>].

¹¹³ Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBS NEWS (Jan. 14, 2014, 12:44 PM), <https://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress> [<https://perma.cc/X95P-7G4Z>].

¹¹⁴ *Inside Politics* (CNN television broadcast Oct. 15, 2017), <http://transcripts.cnn.com/TRANSCRIPTS/171015/ip.01.html> [<https://perma.cc/HDQ2-3EMT>].

¹¹⁵ *Id.*

¹¹⁶ PRAKASH, *supra* note 72, at 226–33.

cases supersede, congressional laws. This authority arises from outright delegations of legislative power, for the power to create rules is in many instances a power to legislate.¹¹⁷ Relatedly, the *Chevron*¹¹⁸ doctrine not only grants the executive interstitial lawmaking power, it also fosters an attitude of contempt for congressional policies and preferences because the doctrine instructs that the executive branch can openly eschew the best reading of a statute in favor of one that is merely reasonable.¹¹⁹ Executives regularly attempt to manufacture statutory uncertainty and then cite that faux uncertainty to advance the President's agenda. Furthermore, consider the not-uncommon situations where Presidents claim statutory authority where none exists and where the Executive manufactures exceptions to inconvenient laws. Finally, Presidents are increasingly willing to adopt strained (but convenient) readings of their constitutional authority as a means of bypassing inconvenient statutes. These constitutional claims are self-fulfilling, for the more often they are voiced, the more they seem rooted in reality. Sometimes just saying something repeatedly helps make it so. It is the constitutional version of "fake it till you make it."

Given that our modern government is suffused with executive law, it is often better to view the Executive as having lawmaking power and Congress as having a veto. Presidents, with an assist from Congresses, have partially flipped the script of Article I. Whereas the Constitution grants legislative power to Congress and vests the President with a limited veto, in the modern era the President enjoys extensive chunks of legislative power with Congress exercising a pathetic veto.

This becomes most clear when looking at the vetoes issued by President Trump. He's issued eight.¹²⁰ Every one of these vetoes related to narrow legislative attempts to overturn administrative action. I've mentioned these vetoes earlier. They relate to arms sales, foreign wars, and an emergency declaration.¹²¹ For now, two points. First, no cameral vote to override was even close to the constitutional threshold. Not once did a chamber muster anything close to the two-thirds necessary to override.¹²² This strongly suggests that the underlying bills were more symbolic than meaningful, because in passing these bills, members certainly knew that they could not override any veto. The bills were

¹¹⁷ Cf. Kimberly Wehle, *How Trump Has Exposed Congress' Self-Inflicted Weaknesses*, POLITICO (Jan. 22, 2020, 5:12 AM), <https://politi.co/2txtOgq> [<https://perma.cc/4LLX-VMHN>].

¹¹⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹¹⁹ Dan Farber, *Everything You Always Wanted to Know About the Chevron Doctrine*, LEGAL PLANET (Oct. 23, 2017), <https://legal-planet.org/2017/10/23/everything-you-always-wanted-to-know-about-the-chevron-doctrine> [<https://perma.cc/WAV9-M2JX>].

¹²⁰ *Vetoes by President Donald J. Trump*, U.S. SENATE, <https://www.senate.gov/legislative/vetoes/TrumpDJ.htm> [<https://perma.cc/7XEC-3TPN>].

¹²¹ *Id.*

¹²² *Id.*

meant to send a message of displeasure and were not meaningful attempts to legislate.

Second, and more importantly, the legislative measures reflect feckless attempts by Congress to claw back authority from the President, either delegated or usurped. Needless to say, if legislators need a two-thirds majority in both chambers to check executive law or executive usurpations,¹²³ it becomes astonishingly difficult. This is higher than the threshold to impeach in the House.¹²⁴ The only equivalent is the threshold necessary to amend the Constitution.¹²⁵ Moreover, a legislative override of executive action may prove meaningless because Presidents enjoy a last-mover advantage. Even should Congress vote to “veto” executive acts and, later, override any presidential veto, the President decides how to respond to the legislative overrides. Presidents might yet refuse to honor the congressional veto of presidential action by citing the Constitution and utilizing interpretational games to continue with the executive policy. The Executive might say that the congressional override is but a suggestion or that it does not mean what a straightforward reading would suggest.

The end result is that it is surpassingly hard for Congress to overturn particular action, much less claw back legislative authority. The only time legislative vetoes of executive action have any traction is when the acts of an outgoing administration are overturned by the two chambers and presented to a President of a different party. Every other time, the President will prevail.

To be sure, the courts remain as checks on executive action. But their power is limited. Most legal questions involving the scope of executive power, statutory and constitutional, never make it to the courts. Moreover, some legal questions that do come before the courts are not justiciable.¹²⁶ You might suppose that some emergency declaration is unlawful, but the courts might conclude that no one has standing or that it is a political question. Of course, some judicial walls will hem in the Executive here and there. But the President need only prevail sometimes for the practice of executive usurpation to be a success. Even a twenty-five or fifty percent success rate is fairly good when you are exceeding (and thereby amending) the bounds of the presidential office.

Having delegated copious powers to the living, growing presidency and having acquiesced to judicial grants of authority to the Executive (like the *Chevron* doctrine), what James Madison described as an “impetuous vortex”¹²⁷ — the legislature — now has become something of a

¹²³ U.S. CONST. art. I, § 7, cl. 3.

¹²⁴ See *id.* art. I, § 2, cl. 5.

¹²⁵ *Id.* art. V.

¹²⁶ See, e.g., JARED P. COLE, CONG. RSCH. SERV., R43834, THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS 1 (2014).

¹²⁷ THE FEDERALIST NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 2003).

bountiful giving tree. To be sure, Congress continues to exercise significant authority over taxes, spending, and crimes. But it is merely an interested bystander as to many species of federal legislation, meaning the rules and sometimes spurious interpretations that emanate from the Executive.

III. TIRED OF WINNING

The President promised us that we would “win so much” that we would be “tired of winning.”¹²⁸ And he was right. Many are tired of winning. Many are weary of executives seizing authority to advance their political and personal agendas and, in the process, aggrandizing the office. Of course, some Presidents are motivated by the purest of motives. A strong-willed and constitutionally wayward Abraham Lincoln at the outset of the Civil War comes to mind.¹²⁹ But most often, Presidents stretch and strain to keep their ordinary campaign promises, to advance their policy goals, or to gain some personal political advantage. This is not the stuff of heroes.

The failure to see that Presidents of both parties are pushing the boundaries of their office outwards reflects a willingness to avert one’s eyes when one’s favorite is running amok and an eagerness to ascribe the worst motives to Presidents of the other party. The reality is that to opponents, many things an incumbent does seem utterly lawless, especially because the policy seems so misbegotten, even immoral. Allowing illegal immigrants to stay in the country and work — that seemed immoral to the many Americans opposed to illegal immigration.¹³⁰ We must have a rule of law! Spending money on a wall without an appropriation by claiming a faux emergency, that is immoral and unconstitutional to boot.¹³¹ What about the rule of law!

But opportunistic and fleeting trysts with the rule of law and inconsistency with respect to matters of executive power should not be the order of the day. We cannot hope to put the executive genie back in the bottle if half the nation will excuse and even defend presidential misconduct whenever their party occupies the White House. Voters must

¹²⁸ Tom Lutey, *Trump: “We’re Going to Win So Much, You’re Going to Be So Sick and Tired of Winning,”* BILLINGS GAZETTE (May 26, 2016), https://billingsgazette.com/news/state-and-regional/govt-and-politics/trump-we-re-going-to-win-so-much-you-re-going-to-be-so-sick/article_2f346f38-37e7-5711-ae07-d1fd00f4c38.html [https://perma.cc/C7QE-ACM5].

¹²⁹ I have criticized Lincoln’s emergency actions as unconstitutional. See PRAKASH, IMPERIAL FROM THE BEGINNING, *supra* note 58, at 206–20.

¹³⁰ Victor Davis Hanson, *Illegal Immigration Is Immoral*, NAT’L REV. (Dec. 7, 2011, 9:00 AM), <https://www.nationalreview.com/2011/12/illegal-immigration-immoral-victor-davis-hanson> [https://perma.cc/54BP-YJBE].

¹³¹ Kailani Koenig, *Nancy Pelosi: Border Wall Is “Immoral, Expensive, Unwise,”* NBC NEWS (Apr. 23, 2017, 11:52 AM), <https://www.nbcnews.com/politics/congress/nancy-pelosi-border-wall-immoral-expensive-unwise-n749841> [https://perma.cc/FJ43-XA4T].

introspect and realize that even if they believe Obama (Trump) was better than Trump (Obama) on matters of executive power, that Obama (Trump) was still unhelpful for the vital cause of a President under the law. The age of the winning Executive is an era where the rule of Constitution is losing.

There are some who imagine that we have a rule of law and that our regime properly acknowledges that Presidents, via practice, can acquire novel powers.¹³² But if this constitutes a healthy rule of law, woe unto us all. Our modern practices reflect seismic shifts in the allocation of power — war powers, treaty powers, and law execution. If these transformations are consistent with the rule of law, there is nothing permanently outside the Executive's grasp. Presidents might yet acquire the entire legislative power or come to ignore the courts, with such practices putting a shiny gloss on the executive power. These scenarios may seem fanciful, but one could have said the same about Anti-Federalists who prophesized an expanding, grasping Executive. Some things are absurd until they no longer are. Kind of like the idea of President Donald J. Trump.

¹³² See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).