Yet Another Rogue President?[1]
Recent Developments in Presidential Constitutionalism

Presidents occupy an interesting constitutional position. They are bound by oath to "preserve, protect, and defend" the Constitution as it is written, and in its entirety. Their primary constitutional responsibility is administrative in the most mundane sense of the word—to take direction. They are required to faithfully execute laws that Congress has written. Since most laws are inherited from past Congresses, the sitting president will not have even influenced their shape with the substantial legislative tools they wield. Yet presidents are simultaneously expected to serve as institutional partisans. "The interest of the man" is "connected with the constitutional rights of the place," as James Madison wrote in Federalist #51 (Cooke, ed., 349). Their primary felt responsibility is expansive: championing and then realizing the implementation of favored policies. Each modern president aims to achieve a strong legacy of accomplishment in this regard.

Under such conditions few presidents are able to resist exploiting or even inventing constitutionally questionable tools of control. Howls of protest descend from political opponents and well-reasoned arguments are made by constitutional scholars when a president engages in such constitutionally dubious behavior. David Gray Adler and Louis Fisher are currently two of the most prolific and persistent of the latter, but a cottage industry of such scholarship was spawned by the presidencies of George W. Bush and Donald J. Trump (e.g. Adler, Fisher, Rudalevige, Crenson and Ginsberg, Schwarz and Huq, Bauer and Goldsmith). Others defend the legitimacy of presidential prerogative with more expansive readings of

[1] This title is an intentional play on Keith E. Whittington's 2002 article in the *William & Mary Quarterly Law Review* titled "Yet Another Constitutional Crisis." Whittington's point is that Americans often call normal, typical constitutional disputes crises. Similarly, every president is now frequently accused of violating the Constitution, but one of my points here is that constitutional violations are not created equal, and some are more constitutionally destructive than others.

presidential power (Yoo, Prakash). A few argue that traditional constitutional strictures no longer matter (Posner and Vermeule).

The more holistic views of constitutional development tend to place the narrower and more expansive views of presidential power in juxtaposition: there is a literal Constitution endowed with meaning, but alongside it are extra-constitutional practices and settlements that evolve over time. This seems like a more accurate view of how American constitutionalism has actually proceeded than the understandings offered by the constitutional sticklers or those who think that the presidency was "imperial from the beginning."[2]

Yet these views about the space between Constitution and constitutionalism cannot afford to deal simply in explanations of the past. Their success depends on two additional matters. First, they must contemplate a set of guidelines for presidential constitutionalism. Absent such guidelines a president's constitutional claims would likely threaten to stretch well beyond the Constitution's plausible meaning (Levitsky and Ziblatt, 127-28). Second, they should develop an understanding of the present state of presidential approaches to constitutionalism. Looking closely at the present can help us discern what constitutional moves are available to presidents and a possible trajectory of development. This chapter aims to do these two things, first by setting forth norms and standards that presidents should heed in a system of competitive constitutionalism and then by examining the constitutionalism of the last three full-term presidencies.

Norms for Presidency-led Constitutionalism

---

[2] Whittington writes of a "realist constitutionalism" at odds with what those who would charge a president with technical violations of the Constitution at every turn. Being realistic about a constitutional tradition requires understanding that there will be new and innovative interpretations of a constitution considered at odds with more traditional ways of thinking. Innovative interpretations allow the institutional order to argue its way toward effective responses to new challenges and it aligns the felt need of public opinion in a form of ongoing popular sovereignty (2136-7; 2124-5).

The best-known work of commentary on presidential constitutionalism is Jeffrey Tulis' work on Woodrow Wilson. Tulis stressed that Wilson inaugurated a "second constitution," where the president was expected to coordinate policy innovation. This development was judged to be negative, in that it was a departure from the founders' Constitution, entailed significant civic difficulty and enabled presidential demagoguery.

Among the most interesting critiques of Tulis' view is that the space between the literal Constitution and presidential constitutionalism is more generative. No workable constitution can spell out every contingency. Since the US Constitution is particularly hard to change and vague, it is open to interpretative alterations and new constructions that preserve constitutional government, making it more meaningful and relevant across time.

George Thomas stresses that "the interaction between our small 'c' constitution and the large 'C' written Constitution might be said to be the *whole* of our constitutionalism" (21). In his reading the American political tradition is created by the innovative constitutional approaches of key actors and the subsequent contests between them and others that occur within the Constitution's institutional housing. The Supreme Court is not the final arbiter of constitutionalism. Presidents have led the way, with FDR constructing a more activist constitutionalism and Ronald Reagan spearheading a counter-movement of narrowed possibilities for government action (chapters 3 and 5). They are the Constitution's most successful recent interpreters.

Joining Thomas in emphasizing the possibility of fruitful interplay of Constitution and constitutionalism are Stephen Skowronek and Keith Whittington. Similar to Tulis, Skowronek notes that Progressive-era constitutionalism centered on engaging the president as the nation's recognized leader. The Progressives and FDR enacted substantial new policies that gave meaning to their era (796-801). The modern administrative state that they built has

sharply attenuated the possibilities for innovative executive leadership, however. An ambitious contemporary president like Barack Obama cannot clear away the existing structures of government to enact a new program. Thus, modern-day progressives cannot realize their programmatic ambitions. Nor are conservatives so strong or ambitious that they can roll back the modern state (803-4). This has yielded a government that is less effective, less innovative, and less responsive than one hopes democratic governments might be. Skowronek wonders where needed constitutional renewal will come from in the present age, especially if the "twentieth century remedy" for constitutional ineffectiveness—an active, constitutionally redefining presidency—is not possible (804-5)

In discussing the concept of "constitutional crisis," Whittington implicitly defends innovative constitutional moves for similar reasons. Constitutions are "instrumental goods," that aim to create good politics (2138). Over time "new political sensibilities may regard long-accepted constitutional provisions as substantively unjust, or...outmoded," as was the Democrats' view during the New Deal (2113). Commentators readily resort to calling the fights over constitutional matters that ensue "crises." Even routine wrangling between partisans is often deemed a crisis. Whittington stresses that almost every one of these difficulties is actually just the Madisonian system at work, with one institution or party wrestling with another, often on their way to some sort of settlement. He says we substantially err in calling too many things a crises, first because these disputes do not really threaten constitutional operations. But second, and more ominously, because talk of a crisis may justify rash actions, which could genuinely endanger our quite functional constitutional tradition (2147-9).

Whittington stresses that in such an agonistic constitutional environment "the distinction between reinterpretation and actual infidelity can be difficult to pin down" (2114).

He also notes, helpfully but cryptically, that "the difference between extended political conflict and actual constitutional crisis turns crucially on the intentions, expectations, and commitments of the individuals who exercise the formal powers established by the Constitution" (2142-3). Since presidents are intimately involved in constitutional reinterpretation and the aggressive interplay of institutions that may result, we should aim to develop clearer standards of what kind of behaviors we can expect from the presidents who do this work. In short, we cannot simply conclude that it is normal to engage in whatever constitutional fight a president chooses to, or to use whatever methods they wish in those fights. Constitutions are things that limit as well as empower. So we must specify parameters and ground rules for constitutional fights if we are to embrace agonistic constitutionalism.

We might begin by applying observations of someone who thought about this kind of constitutionalism as much as anyone: James Madison. Madison expected each institution to jealously guard its own powers (as long as they had the means to protect them, Cooke, ed., Federalist #51, 348-9). Couple this with his observation that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty...the [boundaries between the] legislative, executive, and judicia[l]" branches (ibid., Federalist #37, 235), and the implication is clear: disputes between branches are natural, inevitable, and hardly debilitating.[3] But there are two further implications for the working out of constitutional disputes: no branch has a "superior right of settling the boundaries" of their

[3] This kind of thinking was, of course, borrowed. Aristotle, Polybius, Machiavelli, and Harrington had all stressed that a successful political order would contain societies' major disagreements within disparate institutions that could grope their way toward accommodation. The more this was able to occur, the more effective a government would be, with an attendant decrease in the likelihood of civil war between rival factions. Montesquieu had worked out these principles even further. Successful republics were not built on altruism, but of ambitious actors defending rival institutions.

powers, and the institutional structure itself is intended to contain almost all constitutional disputes (ibid., Federalist #49, 339).

While we cannot always count on them doing so, presidents working within the American constitutional tradition should consistently acknowledge that the other institutions occupy legitimate constitutional space. Their "rivals for power" have their own prerogatives, and must be expected to defend them. Agreement is not expected; mutual recognition is. This view normalizes conflict, even conflict based on divergent claims about the Constitution.

Furthermore, a president should work through constitutional disputes "in house," with the other institutions of government, using recognized procedures. Negotiations undertaken and compromises struck are to be with the other branches rather than with any outside entity. As Jeremy Waldron puts it, "there is something reckless, even pathological, about a mode of political action in which the walls and structures intended to house actions...suddenly become invisible, transparent, or even contemptible, to the actor" (15). Exceptions to recognizing constitutional "walls and structures" should be relatively rare. If a branch steps on an exclusive power of another branch, no negotiated settlement is warranted. A true existential crisis of government might necessitate a different approach, but as Whittington argues, these are rare indeed.[4]

A related matter is that even when reinterpreting the Constitution's meaning, the Constitution itself—its words and its spirit—cannot be ignored. Obviously, these are typically the matters that are in dispute, but the point is that one cannot simply substitute a

---

[4] Whittington argues that only the secession crisis and subsequent Civil War count as a true crisis of the American constitutional order. Almost every other dispute—Reconstruction, the New Deal, Watergate, etc. occurred within the bounds of institutional politics. His thinking is reminiscent of Michael Walzer's argument about when it might become acceptable to target civilians in war: not never, but almost never, only in a true existential crisis for a nation, which is in reality quite rare.

personal interpretation of the Constitution for the Constitution itself. Extreme bargaining positions, wholly new views of the document's meaning and interpretations well outside of the Constitution's meaning threaten to problematically tip the balance too far away from the actual document. These expectations need not hamstring attempts to adapt constitutional meaning to the times. Whittington notes that FDR was not simply substituting his own view of the Constitution for a traditional view—he was arguing within an already well-established interpretive viewpoint and disputing what was merely a differing interpretive approach, not the Constitution itself (2137-8).

Along with process expectations, there should be expectations about public engagement. The president is not just any person—he or she occupies a role that requires a high degree of constitutional fidelity. The president is free to think whatever he or she wishes about constitutional matters and to articulate those thoughts publicly. Yet the president's obligation to faithful execution requires bracketing personal beliefs and interests that are at odds with the Constitution (Kent et al.). The most famous example of such scrupulousness was Abraham Lincoln making no secret of his hate for the peculiar institution of slavery, but simultaneously recognizing a legal obligation requiring him not to interfere with it in states where it was legal.

In *How Democracies Die*, Steven Levitsky and Daniel Ziblatt offer a series of process guidelines about constitutions that alert citizens to behaviors that are authoritarian. Outright rejection of a constitution, suspension of its parts, using extraconstitutional means such as violent insurrection to change the government, and undermining the legitimacy of a

constitution are hallmarks of authoritarianism (23). These may be attempted, or they may be advocated through a president's rhetoric.[5]

Ultimately, the president should strengthen constitutional practice in the United States, not degrade it. Pointing out imperfections and proposing amendments can be a part of this work. A required accompaniment of doing so is something akin to how Martin Luther King, Jr. said he approached unjust laws. The president should make clear what specific constitutional provisions are problematic and why. There should be clarity about how to remedy such imperfections and these efforts should be undertaken within the arguable parameters of constitutionalism. King pledged his marchers would only break laws "lovingly," because they craved the protection of laws and justice could be extended to all Americans (King). They could not achieve respect by undermining the rule of law itself. Presidents must protect constitutionalism for similar reasons—without it having the kind of government that protects all Americans in ways they have come to expect is exceedingly chancy.

A standard on this front is whether the president has primarily inflamed public passion or primarily enlightened the public. Public appeals are an expected part of the modern presidency, but we do not amend the Constitution by plebiscite for good reason. Madison devoted Federalist #49 and #50 to demonstrating why. He concluded that "the *passions*, therefore, not the *reason*, of the public would sit in judgment" if this were done (Cooke, ed.,

[5] While the American founders rejected the Articles of Confederation and employed extralegal means in forming and ratifying the new Constitution, they were quite far from rejecting constitutionalism in doing so. Representatives were chosen by official bodies to formulate the Constitution, these representatives set forth a structure of popular government, and they formulated a discussion-based popular mechanism for ratification. These moves were also justified by the widely-recognized dubious workability of the Articles themselves. More than 230 years later there are important ongoing discussions about the Constitution's overall workability (e.g. Levinson; Sabato). While presidents may advocate substantial constitutional reforms, a call to replace the current Constitution would be problematic coming from the president. This person has accepted the chief executive position on the understanding that they will "preserve, protect, and defend" the Constitution. Besides going back on their public oath, presidents are in too advantageous of a position to turn their constitutional leadership into authoritarian leadership by scrapping a working constitution.

Federalist #49, 343). Stoking passion is clearly a powerful tool in politics, but good constitutional stewardship requires reason to explain what should be done and to keep the public from rash, constitutional eroding actions inspired by their emotions.

Finally, there are expectations that may deal with the resolution of constitutional disputes. Does the president possess a spirit of compromise that may facilitate dispute resolution or an attitude that makes such disputes intractable? If constitutional disputes are relatively normal occurrences, then there will always be a fair number of such matters during any presidency. Non-settlement of some disputes is inevitable, as pointed out by Mariah Zeisberg in this volume. Yet a president whose disputes tend to prove intractable is more suspect than those whose disputes end in varied ways. Similarly, when many disputes are resolved unilaterally by a president in the president's favor, then there would be reason to suspect that the normal constitutional interplay is being short-circuited.

Though the sharp elbows of partisanship are often at work in constitutional disputes, the values that inform resolutions should have cross-partisan appeal. Fights over matters like executive privilege will frequently recur. Settlements in these instances of iterative dispute should be relatively enduring, ideally acceptable if the parties would be transposed. In general, disputants should not attempt to prevent constitutional discourse or disputes themselves. If "conflict in a constitutional system is not a bug—it is a feature," then the desired results cannot be to eliminate them, at least not wholesale (Levinson and Balkin, 711). With these guidelines in mind, it should be instructive to consider them against the last three completed presidencies.

George W. Bush: Unitary Aspirations and Multilateral Results

George W. Bush came to the presidency intimately familiar with how the executive branch worked in practice under two recent presidents, as well as access to those who had

served in the last four Republican administrations. From this experience he developed the conviction that the presidency had been problematically constrained after Watergate, and that the measure of an effective president in his time would be to reestablish presidential power. As Julian Zelizer wrote, "Bush would spend an enormous amount of political energy, before and after 9/11, trying to vest more power in his office" (6-7).

There is an important additional dimension to this quest: in attempting to extend presidential prerogative he did not feel himself to be at odds with the Constitution. On the contrary, he did not doubt that he was fully in accord with it. Thus, in the course of a presidency that pursued broad executive power, Bush consistently talked up the Constitution. His second inaugural address began with the acknowledgment that "on this day, prescribed by law and marked by ceremony, we celebrate the durable wisdom of our Constitution."[6] His Republican convention speech in 2000 frankly acknowledged that he "believe[d] the presidency—the final decision point in the American government—was made for great purposes. It is the office of Lincoln's conscience, of Teddy Roosevelt's energy, of Harry Truman's integrity and Ronald Reagan's optimism."[7] To Bush these four role models had used the office as it was intended to be used. They often acted aggressively, and courted constitutional controversy in doing so. Bush intentionally placed himself in this class, consistently defending an aggressively presidentialist version of constitutionalism.

To call the office "the final decision point" is an interesting locution, indicative of constitutionalism rather than Constitution. The president often acts last in the legislative

[6] January 20, 2005, found at the University of California Santa Barbara's "American Presidency Project": https://www.presidency.ucsb.edu/documents/inaugural-address-13. All subsequent presidential addresses will be referenced from this source.

[7] August 3, 2000: https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-republican-national-convention-0

process, with a bill signing or a veto, yet laws are typically a matter of mutual decision. When they are not, Congress has the final say with the possibility of a veto override. The president executes laws after they are made, yet the Supreme Court's work is often last in sequence, adjudicating whether the administration of laws oversteps constitutional bounds.

Any significant constitutional flaws—Bush singled out those related to slavery—had been left in the distant past, with amendments that used the founders' own values to extend the document's benefits.[8] The value of individual freedom from government action was particularly important to Bush.[9] Bush called for only one constitutional amendment during his presidency—defining marriage as a union of a man and a woman. This position was employed as a wedge issue during the 2006 midterm election, a proposal to codify a preferred policy rather than a critique of constitutional structure. If anything, it indicated that Bush took the Constitution more seriously than most of his fellow same-sex marriage opponents. This was a constitutional remedy to the full faith and credit clause potentially requiring all states to recognize such unions (which federal courts eventually required by striking down the Clinton-era Defense of Marriage Act [DOMA] as a violation of the equal protection clause).

---

[8] Remarks at Goree Island, Senegal July 8, 2003: https://www.presidency.ucsb.edu/documents/remarks-goree-island-senegal-0 and September 17 2003 remarks at rededication of the National Archives Rotunda: https://www.presidency.ucsb.edu/documents/remarks-the-rededication-the-rotunda-the-national-archives

[9] E.g. in his first State of the Union Address, January 29, 2002: https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-22. One might think in listening to Bush that the Constitution directly expressed values instead of offering up rules of constitutional law. Instead of it imposing a duty on him to faithfully execute the law, saw it limiting state power, promoting religious toleration, fostering respect for women, upholding equal justice and the rule of law, and protecting private property. Specific clauses do relate to and uphold these ideas, of course, but setting forth this list is also an interpretive act. It marks out certain values as privileged and conceives of those values in Bush's own way. Positing slavery as a corrected flaw and personal freedom as the Constitution's greatest benefit suggests that the solution to slavery was simply to abolish it. Once this was done, all could enjoy freedom from an interventionist state. This implied approach to the challenge of emancipation is less than inspiring, and has parallels to the president day, helping to explain why Bush found it difficult to meet the felt needs or have his message resonate with most African Americans.

In practice Bush's constitutionalism prompted frequent separation of powers complaints and inter-institutional jousting. Despite this, the president paid substantial rhetorical respect to the other branches. This was relatively easy early in his presidency, when Bush was popular, there were Republican majorities in Congress, and bipartisanship on major legislation was not uncommon. Respectful cross-branch rhetoric continued during more adversarial episodes. Bush used his 2006 State of the Union Address to instruct listeners that institutional disagreements were to be bound by a housing of civility:

> In a system of two parties, two chambers, and two elected branches, there will always be differences and debate. But even tough debates can be conducted in a civil tone, and our differences cannot be allowed to harden into anger. To confront the great issues before us, we must act in a spirit of good will and respect for one another, and I will do my part.[10]

His Farewell Address acknowledged that there was "legitimate debate" about many of the executive decisions made during the War on Terror.[11] In a nearly contemporaneous "exit interview" with Brit Hume he related that "many of the decisions I made are being adjudicated. And of course, I have lived by, and future presidents will live by, the decisions of the Supreme Court."[12] Despite a great deal of criticism from scholars and opposing politicians, Bush's public utterances were typically well within the mainstream of the American constitutional tradition.

These constitutional niceties were accompanied by a substantial tendency to claim unilateral power and to act unilaterally, even in areas typically recognized as subject to shared control. Bush touted an aggressive version of the "unitary theory" of the executive—that the president alone has the authority to direct the bureaucracy (Calebresi and Yoo; Pierce). In

[10] January 31, 2006: https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-13
[11] January 15, 2009: https://www.presidency.ucsb.edu/documents/farewell-address-the-nation-2
[12] January 7, 2009: https://www.presidency.ucsb.edu/documents/interview-with-brit-hume-fox-news

the sense that the president directs the bureaucracy to administer the laws, this is true enough (though Congress has intentionally created independent agencies and other quasi-independent bureaucratic actors). Bush's version of the idea allowed the president much greater discretion over what the bureaucracy would do.

This was particularly the case in the War on Terror, where Bush reasoned that national security gave him, as Commander-in-Chief, the ability to direct American forces wherever and however he wished (Bybee memo). Bush used this rationale to create a new category of prisoner, the enemy combatant, whom he held without the protections of the US-ratified United Nations Convention Against Torture. Domestically he used this rationale to gather meta-data from communications conglomerates and to conduct warrantless wiretaps that did not involve the judiciary or Congress.

On many occasions inherent presidential power was used to assert that presidential decisions were inherently legal, not to be contested by either the Congress or the Supreme Court (Kleinerman, 4-6). In the wake of revelations about rough interrogations that many thought amounted to torture, Congress required the use of the Army field manual's standards for questioning captured combatants in late 2005. Bush objected, and essentially cancelled this legal requirement in a presidential signing statement, saying that it violated the president's prerogative to supervise government employees.[13] Never mind that the Senate had voted 90-9 in favor of the amendment and that it was championed by a living symbol of the damage inflicted by torture in the person of Senator John McCain.

A number of potential constitutional disputes were initially obscured because of secrecy. How the administration approached domestic intelligence gathering illustrated this

[13] December 30, 2005: https://www.presidency.ucsb.edu/documents/statement-the-department-defense-emergency-supplemental-appropriations-address-hurricanes

tendency. Prior law about how to conduct domestic surveillance was in place, but the Bush Administration chose to ignore it (Fein). The president reasoned that the Foreign Intelligence Surveillance Act's requirements were out of date and not applicable to an executive charged with keeping Americans safe and in command of vast technological capabilities. The press eventually reported on this matter as whistleblowers emerged. These revelations did not stop the surveillance, however, as Bush relied on secrecy, the lack of judicial standing from potential plaintiffs, Congressional quiescence, and a healthy degree of public support to continue to collect evidence from domestic sources.

In many instances, President Bush did more than contribute to the resolution of constitutional disputes, he dictated his preferred resolutions. The nature of the executive office enabled this outcome, with its relatively quick and decisive decision-making and direct authority over a vast bureaucracy. Signing statements were elevated into a means of thwarting Congress' will. In too many cases, his was "a unitary power to say what the law is," effectively having one person, trumping longstanding treaty obligations, established laws (like FISA) and even court proceedings, Bush's Madisonian rhetoric to the contrary notwithstanding (Pfiffner, 2008, 138).

There were many exceptions to this unilateralism. Despite the president's insistence, the Supreme Court ruled that enemy combatants had a right to challenge their incarceration in court, for instance. Bush responded by asking Congress to write law validating the use of military commissions, which it did. Such resolutions involved significant input from other branches, amenable to the character of American constitutional processes, if still questionable from a civil liberties perspective.

There is an ongoing debate about whether George W. Bush succeeded in expanding presidential power or not (compare Pfiffner 2015 with Silverstein, for instance). In the near-

term, Bush was frequently successful in his quest to exert significant executive control over a wide variety of policies. He acted in new, bold, and precedent-setting ways. This "constitutional hardball" prompted substantial public protest and interbranch wrangling. In the long run, this made his influence vulnerable to reversal or retrenchment as his popularity waned. In the words of his own White House Counsel Brent Berenson, "the hope for revivifying presidential power ended up foundering on some of the war on terror-related policies that Congress and the public ultimately perceived as too pro-executive or too unilateral" (Richey, 11).

Bush generally would have been more successful, and his policy positions considered more legitimate had he consistently sought support from Congress through law (Calebresi and Yoo). Even though Bush pushed, and in some instances broke the bounds of what is considered constitutional, his presidency also underscored the resilience of the Madisonian system of checks. In the end, the Bush presidency was a qualified victory for competitive constitutionalism. Unilateralist tendencies provoked high profile institutional and public pushback, much of which succeeded in producing broader participation in policy making.

Nevertheless, problematic lessons could have been internalized by those in a position to run for the presidency. A president can assert allegiance to the Constitution while also substantially pushing away the boundaries of institutional checks. In the hands of a very popular president this might substantially undermine the separation of powers. This would be a particular danger with a compliant Congress and an executive-friendly Supreme Court. Additionally, this approach could be problematic when decisions might be kept secret, as in certain aspects of national security.

Barack Obama: Attenuated Reconstitutionalization

Barack Obama's success in the presidential campaign of 2008 came in no small measure from running against President Bush's constitutionalism. Campaign crowds embraced Obama's critique of the incumbent and his promise to "reconstitutionalize" the presidency. In a Lancaster, Pennsylvania stump speech at the end of March 2008 he proclaimed that "the biggest problems we are facing right now have to do with George W. Bush trying to bring more and more power into the Executive Branch and not go through Congress at all, and that's what I intend to reverse when I'm president."[14] As a teacher of constitutional law Obama was well positioned to make credible arguments about the Bush Administration's truncated respect for the separation of powers. He pledged to protect Americans from terrorism without compromising their rights, to respect the constitutional prerogatives of the other branches, and to hew faithfully to the rule of law.[15] This was both good politics and a signal of interest in establishing a more orthodox separation of powers relationship.

Despite significant successes, Obama would find these promises difficult to fulfill as president. His first inaugural address chided the country to "set aside childish things"—a call to actively legislate to meet the challenges of the moment using the separated institutions that shared powers.[16] By 2014 an exasperated Obama suggested that if he faced continued

---

[14] March 31, 2008 campaign speech.

[15] After listing perceived constitutional failings by George W. Bush in his stump speeches, Obama noted that in his presidency there would be

> No more ignoring the law when it is convenient. That is not who we are. And it is not what is necessary to defeat the terrorists....The separation of powers works. Our Constitution works. We will again set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary. This Administration acts like violating civil liberties is the way to enhance our security. It is not. (Obama August 1 2007)

[16] January 20, 2009: https://www.presidency.ucsb.edu/documents/inaugural-address-5

recalcitrance from the Republican-majority Congress he would do what he could unilaterally through executive orders.

The complexity of modern policy, the felt need to act in certain situations, and six years of strong partisan division with Republican Congressional majorities prompted President Obama to make a number of unilateral moves of questionable constitutionality. Strong political cross-pressures developed regarding gay marriage and immigration that led him to act when Congress would not (Rudalevige 2016; Volpp). Like George W. Bush, Obama possessed an expansive view of the president's national security power that was used to continue initiatives that many found troubling (e.g. Burns). These factors combined to yield a presidency that, though far more sensitive to separation of powers norms and not anywhere near as legally innovative as Bush's, fell short of the high expectations for constitutional fidelity that Obama had set for himself.

In most cases, particularly in his first term, Obama showed significant care in approaching separation of powers processes. The administration took a nuanced and, for many, a frustrating approach to DOMA, for example. In 2011, the president ordered the Justice Department to continue enforcement of the law, but also announced that it would not defend the law's constitutionality in federal court. This move simultaneously fulfilled the president's duty to execute the law faithfully while recognizing the importance of Congress' will. It also acknowledged that the Supreme Court would likely be DOMA's final arbiter through judicial review, while allowing the administration to argue that the law was not constitutional in front of the high court (Tipler, 288).

This scrupulousness increasingly gave way, prompted by the vicissitudes of governing. The Supreme Court invalidated the Affordable Care Act's (ACA) requirement that states expand Medicaid and recruit insurers to build health insurance packages for their citizens.

Obama ordered the federal government to build the exchanges and unilaterally delayed implementation of aspects of the program, including the employer mandate. House Republicans sued Obama for doing so, citing "executive overreach" that violated the "take care" clause. Surprisingly, the suit was allowed to proceed in federal court. It could have developed into an interesting case on administrative latitude, however Republicans pulled the suit when they feared that it might affect Donald Trump. More likely these would have been deemed logical administrative adjustments to preserve the law's viability "well within the executive branch's discretion" (Jost and Lazarus, 1971). Nevertheless, it meant that some significant aspects of the ACA would be determined by presidential fiat rather than legislative text.

Other unilateral moves were less justified. Obama involved US military personnel in the Libyan civil war without Congressional authorization. In doing so he used the novel claim that since US military personnel would only be providing air support they were not engaged in war. He interpreted the Bush-era Authorization for the Use of Military Force as justifying US drone strikes in Yemen. Having pledged himself to greater transparency than his predecessor, the continuation of a domestic surveillance program was problematic for the same reasons it was under President Bush. Two landmark international agreements—the Paris Climate Accord and the Iran Nuclear Agreement—were not submitted to the Senate because they would not have met the 2/3rds majority requirement for ratification.[17] Obama issued his own signing statements as well, and hid other directives in order-like memos that, though less numerous than that of his predecessor, were reminiscent of his approach (Crouch et al; Kelley).

[17] Since executive agreements have come to mean anything a president calls an executive agreement, these actions were not unconstitutional per se, but the move quite clearly contradicts the founders' intent.

President Obama did consistently recognized the legitimate constitutional space occupied by other institutions and the importance of the separation of powers in his public rhetoric. This passage from *The Audacity of Hope* offers a serious lesson in constitutionalism. The Constitution

> is the way we argue about our future. All of its elaborate machinery—its separation of powers and checks and balances...are designed to force us into a conversation, a deliberative democracy in which all citizens are required to engage in a process of testing their ideas against an external reality, persuading others of their point of view, and building shifting alliances of consent (92).

In these words and others Obama articulated the Constitution versus constitutionalism dynamic as well as any president. Yet this was also offered as an a priori understanding, articulated outside of the presence of real controversies that would test these commitments in practice.

Tired of Congress not legislating on significant issues like unemployment benefits, immigration, and gun control, Obama shifted tone in early 2014. In remarks before a Cabinet meeting he said that he would be happy to work with members of Congress, but "I've got a pen...and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward."[18] He repeated some version of this idea several times, underscoring the president's ability to act unilaterally.

Obama continued to speak of his respect for the other branches, and work with them as he could. However, his later messages could easily be taken to mean that if Congress does not write the legislation desired by the president that the president can produce similar results on his own. All Congressional Republicans (and some Republican-appointed federal judges) had to do was to strongly oppose Obama's policy enthusiasms, refuse to compromise with him

---

[18] January 14, 2014: https://www.presidency.ucsb.edu/documents/remarks-prior-cabinet-meeting-and-exchange-with-reporters-2

and they would force the president out of the deliberative conversation he mentioned in *The Audacity of Hope*. Obama expected Republicans to engage in negotiations with him in matters constitutional and otherwise, but there is nothing that requires constitutional disagreements to be handled at the negotiating table. A President can aim to make this happen, but they often lack the bargaining advantages that this would require.

The Obama Administration defended presidential prerogatives in certain novel situations. After Republicans regained control of the Senate in 2011, the body went into brief, pro forma "gavel-in, gavel-out" sessions to prevent the president from making recess appointments. The president made them anyway. He was taken to court by a Pepsi distributor who objected to one such appointee enforcing a collective bargaining agreement. A unanimous Supreme Court sided with the Senate in *NLRB v Canning* (2014), reasoning that only the chamber itself could determine whether it was in session or not. The president abided by the Court's decision.

Having been criticized for providing air cover in Libya without Congressional authorization, Obama sought and received it to rein in Syria's Bashar al-Assad. Though he decided not to act on the "red line" that seemed to have been crossed, the episode demonstrated that he had not set a durable new precedent in the initiation of hostilities.

Among the most controversial settlements during the Obama years were those produced by Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Under these programs the administration allowed non-citizens who arrived as children and for parents who did not have legal status but whose children did to register with the government in return for a pledge not to deport them absent specific criminal activity.

The administration's justification was clear: Congress had failed to act on the matter and there had to be a practical means of dealing with the estimated 11-12 million individuals covered by the orders that was fair to them and not beyond the government's capacity to execute. These were executive-initiated policies of unusual scope on a highly sensitive subject, a thing that should be addressed through law. Obama's executive orders produced a fairly typical "half-a-loaf" constitutional result involving multiple institutions. The federal courts stayed DAPA permanently, but DACA was allowed to proceed (Chen). Congress subsequently tried but failed to cancel the program through law. The Trump Administration's attempt to cancel DACA was deemed capricious by the courts and rejected.

In 1960, Richard Neustadt Began *Presidential Power* by musing on Woodrow Wilson's observation that by the turn of the 20th century the president had become free to be "as big a man as he can." Neustadt's corollary was that the president was no longer free to be "as small as he might like." The president was expected to do something about almost everything, but was without the corresponding ability to actually do so without incurring substantial costs (6). Modern presidents have been enabled to act forcefully by constitutional innovations such as executive agreements, administrative rulemaking, and signing statements. Obama's case indicates that presidents are no longer free to be as constitutionally scrupulous as some might like to be. The administration of complex laws along with the presence of heightened partisanship and high expectations means that almost any president will employ tools that sometimes short-circuit constitutional intent. The question is how often and how egregiously they do so. Obama's instances were not particularly egregious, but when a president comes to office pledging constitutional scrupulousness, the compromises they make will look all the more hypocritical for it and provide much fodder for their opponents.

Donald J. Trump: His Own Personal Constitution

As a candidate, Donald Trump had a very tenuous knowledge of the Constitution.[19] He did not substantially improve on that understanding during his presidency. Nor, seemingly, did he have a solid commitment to acting constitutionally (Pfiffner 2021). This may have been partly due to a lack of knowledge, but it was also caused by an inability to think of constitutionalism independently of partisanship and self-interest. Nevertheless, he managed to employ the Constitution to positive effect rhetorically, both as a candidate and as president, touting his judicial appointees' fidelity to the document and referencing clauses that appealed to his followers. Trump attempted to evade constitutional processes he found problematic, most notably by challenging the peaceful transfer of power to President-elect Joseph R. Biden. This effort built upon his having undermined public support for key constitutional norms. These developments represent substantial challenges to the tradition of American constitutionalism.

Trump took presidentialism into messianic territory during his 2016 convention speech, suggesting that "I alone can fix it"—a broken system that did not work for average Americans.[20] His inaugural address characterized his oath of office as a pledge to the American people's aspirations rather than a legal obligation. Presidents often work to elide the space between Constitution and their own preferred constitutionalism, but Trump did not do this because he did not recognize any potentially embarrassing space between the two. The Constitution, as he saw it, was a means to his own empowerment. To a Turning Point

[19] In a closed-door meeting with Republican lawmakers in the Summer of 2016 intended to relieve doubts about his candidacy, Trump was asked about Article I. This gave the Republican nominee an opportunity to demonstrate respect for Congress. Trump replied that he would "not only…stand up for Article I. I'll stand up for Article II, Article XII, you name it of the Constitution" (Sullivan and Rucker).

[20] July 21, 2016: https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-republican-national-convention-cleveland

USA youth group Trump remarked that "I have an Article II, where I have the right to do whatever I want as president."[21]

The other branches and the bureaucracy continued their work during Trump's term, providing plenty of familiar constitutional restraint. For example, the federal judiciary twice invalidated administration attempts at a near-total travel ban from several predominantly Muslim nations, citing them as violations of the establishment clause. Yet the president frequently failed to recognize constitutional boundaries, accept the presence of agonistic constitutionalism, or consistently show respect for the other branches—matters that served to erode Madisonian norms.

When other branches agreed with his administration, the president was fine with the separation of powers; when they did not, he questioned their powers and their dedication to the Constitution. The most extraordinary example of this is his public letter to Speaker Nancy Pelosi, delivered after the House impeached him for the first time. President Trump accused the House of "an unprecedented and unconstitutional abuse of power." This is an odd claim, as impeachment is clearly a constitutional prerogative of the House. The administration could easily have argued that impeachment was unwise or unwarranted in this case instead. In this and in many subsequent speeches he heaped invective on Democrats, saying that they were "at war" with American democracy, they aimed to "nullify" the previous election, and they "detest America's constitutional order."[22]

Even so, President Trump tended not to frontally assault constitutional processes. Instead, he attempted innovative work-arounds. He used more acting secretaries than any

---

[21] July 23, 2019: https://www.presidency.ucsb.edu/documents/remarks-turning-point-usas-teen-student-action-summit-2019

[22] December 17, 2019: https://www.presidency.ucsb.edu/documents/letter-the-speaker-the-house-representatives-the-articles-impeachment-against-the

other president and dragged his feet on appointments, openly pleased that those in acting positions were beholden only to him. He expedited judicial consideration for controversial administration positions by frequently requesting emergency hearings (many of which the Supreme Court did agree to hear). There was an attempt to shift military funding toward the reinforced Mexican border wall by using a declaration of emergency. Instead of directly ordering a coup, he so stoked the anger of supporters that they overran the Capitol. He simultaneously recruited willing copartisans there to prevent official certification of the Electoral College vote. His legal team's protestations of constitutional fidelity during this episode was thin and self-serving.

Despite his lack of constitutional knowledge or concern, much of Donald Trump's work as president occurred within constitutional bounds.[23] Corporate tax relief, the marquee legislative accomplishment of the Trump Administration passed Congress. The president was well within his right to renegotiate NAFTA and withdraw the nation from the nearly completed Trans Pacific Partnership because of the "fast track" authority delegated to presidents by Congress. He could unilaterally walk away from the Iran Nuclear Agreement and begin the process of extracting the US from the Paris Climate Accord, as these international agreements had been entered into unilaterally. This was also true of the cancellation of Obama-era rules on fuel efficiency and water quality. President Trump had

[23] This included occasional sops to the powers of the other branches, as when Trump strongly opposed "birthright citizenship" for the children of the undocumented, a longstanding constitutional principle. When pressed on the matter he replied with an utterly orthodox statement: "you know who is going to determine that? The Supreme Court of the United States" (Nov 2, 2018). Trump's willingness to rely on the federal courts was aided by his success in placing two justices on the Supreme Court by this time, with the third to come just prior to the 2020 election.

less of a stomach for foreign military adventures, so he did not often push the envelope of executive justification for initiation of the use of force.[24]

After his 2020 election loss the Trump team futilely and flailingly attempted to gain satisfaction through the federal courts, recognition that he could not unilaterally cancel an adverse election result. Many of these developments led Trump critics Bob Bauer and Jack Goldsmith to conclude that Trump's "law-breaking bark…has often been worse than his bite" (2).

It is in the public realm, through his rhetoric, that Trump did the most constitutional damage. His rhetoric featured vituperation, rather than education (Stuckey; Edwards). Applied to utterances about the Constitution this meant Trump provoked public division and rage, while undermining the legitimacy of his opponents' constitutional positions. Interestingly, for someone so accustomed to provoking opposition, Trump bristled at opposition to his own version of constitutionalism. Those who countered him were not deemed to be simply wrong about the Constitution, but to hate it.

Trump did not go to the authoritarian extreme of repudiating the Constitution. To the contrary, he supported it rhetorically. The Constitution was one in a pantheon of items that he suggested all citizens should revere, including the American flag, law and order, the national anthem, law enforcement, military personnel, and pride in the nation's history.[25] As such, the Constitution seemed to be as much of a prop as a complex set of legal requirements to him. Nevertheless, it did contain items that he singled out for his strong support: the 2nd

---

[24] Trump did order airstrikes in Syria without informing Congress or gaining Congressional approval and ordered the assassination of Iranian Major General Qasem Soleimani, who had coordinated anti-US efforts among forces sympathetic to Iranians in the Middle East.

[25] See e.g. Remarks at National Republican Congressional Committee Dinner of March 20, 2018: https://www.presidency.ucsb.edu/documents/remarks-national-republican-congressional-committee-dinner-2

Amendment and protection for the free exercise of religion. At the same time, he was willing to gratuitously and intentionally violate constitutional guarantees, such as when he ordered the forcible clearing of a peaceful protest in Lafayette Square to stage a photo opportunity. He repeatedly averred that he might serve longer than the two-term limit imposed by the 22nd Amendment and he called the emoluments clauses "phony" (e.g. Marshall).

There was the distinct danger in this of protecting the constitutional rights of political allies, but not of others, as well as undermining constitutionalism's best qualities, its ability to house political disagreement and its universalism. This danger was exacerbated by his apocalyptic rhetoric about his opponents. Consider these words from his official reelection announcement:

> If we had a Democrat president and a Democrat Congress in 2020...they would shut down your free speech, use the power of the law to punish their opponents which they are trying to do now anyway. They'll always be trying to shield themselves. They would strip Americans of their constitutional rights while flooding the country with illegal immigrants in the hopes it will expand their political base, and they'll get votes someplace down the future.[26]

He also frequently suggested that his opponents had engaged in treason, were fomenting a coup, and should be arrested. He called the press, explicitly protected by the First Amendment, the "enemy of the people."[27] Trump repeatedly called into question the integrity of the 2020 election, and most of his voters have come to think of the election as "stolen." In all of this, Trump courted what Madison called "the danger of disturbing the public tranquillity by interesting too strongly the public passions" (Cooke, ed., Federalist #49, 340).

---

[26] June 18, 2019: https://www.presidency.ucsb.edu/documents/remarks-announcing-candidacy-for-the-republican-presidential-nomination-2020

[27] e.g. April 10, 2019: https://www.presidency.ucsb.edu/documents/remarks-and-exchange-with-reporters-prior-departure-for-san-antonio-texas; October 14, 2019; October 7, 2020: https://www.presidency.ucsb.edu/documents/tweets-october-7-2020 ; February 24, 2017: https://www.presidency.ucsb.edu/documents/remarks-the-conservative-political-action-conference-national-harbor-maryland

While Trump's rhetoric suggest that legal norms are worthy of respect, they also fail to recognize hallmarks of effective constitutional government—the existence of a loyal opposition, the legitimacy of differing constitutional positions, and the peaceful transfer of power. As observers of authoritarianism have long pointed out, autocratic leaders often use the housing of a legal structure to disguise their designs. Trump's arguments effectively raised the ire of his supporters and eroded constitutional norms. Thus provoked, his most avid supporters attempted a motley coup under the guise of saving the republic.

During Donald Trump's presidency there were some constitutional settlements that seem fairly typical. When the administration's executive orders on immigration were struck down, they were rewritten. The array of nations it applied to was changed and it was justified in a more careful way, so as to be found constitutional. Trump's use of a declaration of emergency to secure border wall funding from military appropriations was declared invalid. Though he disagreed and continued the emergency, a power legally delegated to him by Congress, Trump had to turn to other funding sources. In the face of perceived presidential misconduct two impeachment proceedings were held and two Senate trials were conducted. These are rare events, and the playbook used for them was disputed, but they did proceed, resulting in acquittal both times.

Other constitutional results were less satisfying (see e.g. Ulrich, Pfiffner 2021). These were mainly areas where Trump had the power to act unilaterally and acted contrary to longstanding norms. Trump's near-total refusal to produce documents for Congress, particularly during his second impeachment hindered legislators and the public in their quest to meaningfully consider presidential misconduct. The stonewalling continued after Trump left office and is now in the hands of the courts. Trump flouted the Constitution's emoluments clauses, profiting from those who wished to curry favor with the administration, both foreign

and domestic, at his luxury properties. He used his unilateral power to pardon political allies who engaged in shady behaviors.

Many have argued that Trump plunged the United States into a constitutional crisis. Others suggest that he was effectively restrained by the Neustadtian web of Washington actors (see the discussion in Iling, as well as Singh). Strangely, both of these observations may be true. The president degraded public respect for constitutional values and ran roughshod over constitutional norms. These actions have endangered the republic because they substantially altered public discourse and public opinion. Simultaneously he was effectively restrained in most areas of constitutional practice that pertained to actual governance. Ultimately these latter setbacks seemed to matter less to Trump than that he should remain "in charge" and perceived as powerful by his supporters.

There is little doubt that Donald Trump would have retained power past January 20th 2021 if he could have gotten away with it. He would also have chosen to forcibly put down protests in the name of law and order, even using the military to do so, but was restrained from doing so by those around him. There was much talk during these years about how much greater the constitutional damage would be if President Trump were a more disciplined figure. In terms of policies effected or presidential influence extended this would likely be true. But its principle figure seemed less motivated by those things than about being in the office and continuing in the office. In the final analysis this has left the constitutional trappings of the constitutional regime intact, but with the public unwilling to agree to disagree in the way that is required to have effective constitutionalism.

Conclusion

The mere presence of constitutional disputes is not a sign of civic health or disease. The particular shape and nature of these disputes is. Though some significant constitutional

moves are met with indifference by other branches, more typically constitutional development in the United States is determined by active interplay among institutions. When institutions possess opposing ideas about the Constitution, behavioral expectations apply to each branch, not just the presidency. Some of these expectations are specific to a particular branch. The Supreme Court should only schedule cases that are ripe for adjudication, for instance. Others apply to all three, like the necessity to recognize that other institutions occupy legitimate constitutional space.

As the institutional actor most consistently and palpably at work throughout the nation, the president is at the center of most constitutional controversies. While the approach of each chief executive might be thought idiosyncratic, in these recent presidencies three archetypes of behavior have been demonstrated. One president paid genuine homage to the Constitution's separation of powers regimen while methodically attempting to stretch the power and control of the executive. A second attempted a more cooperative and orthodox division of responsibilities, but entertained compromises to this approach in the face of practical barriers including partisan recalcitrance. A third mistook, as much as he could, the demands of constitutionalism with his own interests. The juxtaposition of messianic expectations for the president with limited formal constitutional resources suggests that these archetypes will be repeated.[28] The relatively mild hypocrisies and frequent elisions of the first two typically offer avenues toward the constitutionally healthy place of agreeing to disagree. Not so the third type.

Much of the American public has an abstract preference for constitutional democracy, though recent events suggest that this preference is thin. Programmatic preferences will

---

[28] A fourth archetype has yet to be attempted—a president who would argue that the Constitution's institutional structure is not working well and thus substantial changes are required.

almost always seem more important to them than more abstract commitments to process, and thus will tend to threaten them. Most Americans also have a distaste for the rough and tumble debates that constitutional democracy produces, viewing them as troubling anomalies rather than a feature of the system. Instructing citizens that they are inevitable and generative would likely be as futile as attempting to school them in how these contests should be conducted. In this scenario, what can effectively preserve the American constitutional tradition?

The best hope may be to rely on old American saws—mythical phrases about government that are familiar to most Americans and frequently deployed by well-meaning politicians and media: "checks and balances," the "separation of powers," and even the greatest canard, "coequal branches." These phrases are typically poorly understood and often misused, but they also offer short, understandable explanations of agonistic constitutionalism.[29] These talismanic phrases may not produce veneration for the Constitution, as was hoped by James Madison, but they can at least help to explain to a skeptical public why democratic politics is not simply a matter of happy agreements, or fully responsive to the whims of a strongman and, someday, a strongwoman.

---

[29] That governments are built around fictions is an observation that goes back at least as far as David Hume. Drawing on Hume, Edmund S. Morgan's *Inventing the People* deftly argued that popular sovereignty itself was an invention of public opinion, a meaningful myth that enabled Enlightenment ideals about government to be adopted and put into practice. Despite it not being literally true that "the people rule" in a democracy, this idea does helpfully constrain political options, making politics in a nation that believes it much more popular than ones that believe, say, in the fiction of the divine right of kings. On the particular phrases mentioned here, see Michael Zuckert's chapter on James Madison in Leibiger, ed., where he corrects the most persistent mistake in most Americans' thinking about how their system of government was conceived. Madison defended checks and balances as something that would maintain the separation of powers rather than checked government being an end of itself (103). My own work on "coequal branches" amply demonstrates that this oft-heard phrase is another governing myth. The federal government's institutional processes are too often functionally separate and sequentially undertaken for this phrase to make much sense in most contexts. Historical development also demonstrates significant swings in the relative power of each institution. And yet, if politicians and others use this phrase in the right way, to describe how institutions wrestle with each other in practice, then it may be of useful.

List of Works Consulted

Adler, David Gray. 2012. "The Framers and Executive Prerogative: A Constitutional and Historical Rebuke," in *Presidential Studies Quarterly* 42(2): 376-389.

Bauer, Bob and Jack L. Goldsmith. 2020. *After Trump: Reconstructing the Presidency*. Washington, DC: Lawfare Press.

Burns, Sarah. 2017. "Debating War Powers: Battles in the Clinton and Obama Administrations" in *Political Science Quarterly*, 123(2): 203-223.

Calabresi, Steven G. and Christopher S. Yoo. 2008. *The Unitary Executive: Presidential Power from Washington to Bush*. New Haven: Yale University Press.

Chen, Ming H. 2017. "Administrator-in-Chief: The President and Executive Action in Immigration Law," *Administrative Law Review* 69(2): 347-429.

Cooke, Jacob E., ed. 1961. *The Federalist* written by Alexander Hamilton, John Jay and James Madison. Middletown, CT: Wesleyan University Press.

Crenson, Matthew and Benjamin Ginsberg. 2007. *Presidential Power: Unchecked and Unbalanced*. New York: W. W. Norton.

Crouch, Jeffrey, Mark J. Rozell, and Mitchel A. Sollenberger. 2013. "President Obama's Signing Statements and the Expansion of Executive Power," *Presidential Studies Quarterly*, 43 (4): 883-899.

Edwards, George C., III. 2020. "The Bully in the Pulpit," *Presidential Studies Quarterly* 50(2): 286-324.

Fein, Bruce. 2007. "Presidential Authority to Gather Foreign Intelligence," in *Presidential Studies Quarterly* 37(1): 1-22.

Fisher, Louis. 2008. The Constitution and 9/11: Recurring Threats to America's Freedoms. Lawrence, KS: University Press of Kansas.

Iling, Sean. "Are We in a Constitutional Crisis Yet?" *Vox*. October 9, 2019 found at: https://www.vox.com/policy-and-politics/2019/10/9/20905503/trump-white-house-letter-democrats-impeachment

Jost, Tiffany Stoltzfus and Simon Lazarus. 2014. "Obama's ACA Delays—Breaking the Law or Making it Work?" *New England Journal of Medicine*, 370: 1970-71.

Kelley, Christopher S. 2012. "Rhetoric and Reality? Unilateralism and the Obama Administration," *Social Science Quarterly* 93(5): 1146-1160.

Kent, Andrew, Ethan J. Leib and Jed Handelsman Shugerman. 2019. "Faithful Execution and Article II," *Harvard Law Review* 132(8): 2111-2192.

King, Martin Luther, Jr., 1963. "Letter from a Birmingham Jail," *The Atlantic Monthly* 212(2): 78-88.

Kleinerman, Benjamin. 2009. *The Discretionary President: The Promise and Peril of Executive Power*. Lawrence, KS: University Press of Kansas.

Levinson, Sanford. 2006. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It*. Oxford: Oxford University Press.

Levinson, Sanford and Jack M. Balkin. 2009. "Constitutional Crises," University of Pennsylvania Law Review 157(3): 707-753.

Levitsky, Steven and Daniel Ziblatt. 2018. *How Democracies Die*. New York: Broadway Books.

Marshall, Abbey. "Trump Claims He's the Victim of 'Phony Emoluments Clause,'" *Politico*, October 21, 2019 found at: https://www.politico.com/news/2019/10/21/trump-emoluments-clause-053289

Morgan, Edmund S. 1988. *Inventing the People: The Rise of Popular Sovereignty in England and America*. New York: W. W. Norton.

Neustadt, Richard E. 1990. *Presidential Power: The Politics of Leadership from Roosevelt to Reagan*. New York: Free Press.

Obama, Barack. 2006. *The Audacity of Hope: Thoughts on Reclaiming the American Dream*. New York: Crown Publishers.

Pfiffner, James P. 2008. "Constraining Executive Power: George W. Bush and the Constitution." *Presidential Studies Quarterly*, 38(1): 123-143.

Pfiffner, James P. 2009. "Presidential Signing Statements and their Implications for Public Administration," *Public Administration Review*, 69(2): 249-255.

Pfiffner, James P. 2015. "The Constitutional Legacy of George W. Bush," *Presidential Studies Quarterly*, 45(4): 727-741.

Pfiffner, James P. 2021. "Donald Trump and the Norms of the Presidency," *Presidential Studies Quarterly* 51(1): 96-124.

Pierce, Richard J., Jr. "Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of *The Unitary Executive* by Steven G. Calabresi and Christopher S. Yoo." *Journal of Constitutional Law* 12(2): 593-614. Philadelphia: University of Pennsylvania.

Posner, Eric A. and Adrian Vermeule. 2010. *The Executive Unbound: After the Madisonian Republic*. Oxford: Oxford University Press.

Prakash, Saikrishna Bangalore. 2015. *Imperial from the Beginning: The Constitution of the Original Executive*. New Haven, CT: Yale University Press.

Richey, Warren. "Bush Pushed the Limits of Presidential Power," *Christian Science Monitor*, January 14, 2009 found at: https://www.csmonitor.com/USA/2009/0114/p11s01-usgn.html

Rudalevige, Andrew. 2005. *The New Imperial Presidency: Renewing Presidential Power after Watergate*. Ann Arbor: University of Michigan Press.

Rudalevige, Andrew. 2016. "The Obama Presidency: Some Late-Term Patterns," *Presidential Studies Quarterly* 46(4): 868-890.

Sabato, Larry J. 2007. *A More Perfect Constitution: Ideas to Inspire a New Generation*. New York: Bloomsbury.

Schwarz, Frederick A. O. Jr and Aziz Z. Huq. 2007. *Unchecked and Unbalanced: Presidential Power in a Time of Terror*. New York: The New Press.

Siemers, David J. 2018. *The Myth of Coequal Branches: Restoring the Constitution's Separation of Functions*. Columbia, MO: University of Missouri Press.

Sievert, Joel and Ian Ostrander. 2017. "Constraining Presidential Ambition: Controversy and the Decline of Signing Statements," *Presidential Studies Quarterly* 47(4): 752-776.

Silverstein, Gordon. 2009. "Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy," *Presidential Studies Quarterly* 39(4): 878-895.

Singh, Robert. 2017. "'I, the People': A Deflationary Interpretation of Populism, Trump, and the United States Constitution," *Economy and Society* 46(1): 20-42.

Skowronek, Stephen. 2014. "Twentieth-Century Remedies." *Boston University Law Review* 94: 795-805.

Stuckey, Mary E. 2020. "The Power of the Presidency to Hurt: The Indecorous Rhetoric of Donald J. Trump," *Presidential Studies Quarterly* 50(2): 366-391.

Tipler, Kathleen. 2013. "Obama Administration Non-Defense of DOMA and Executive Duty to Represent," *Maryland Law Review* 73: 287-312.

Tulis, Jeffrey K. 2014. "Two Constitutional Presidencies" in *The Presidency and the Political System*, Michael R. Nelson, ed., 10th ed. Washington, DC: CQ Press.

Ulrich, Lana. "Trump and Our Constitution: A Year in Review" from the *Constitution Daily* blog of the National Constitution Center, January 26, 2018, https://constitutioncenter.org/blog/trump-and-the-constitution-a-year-in-review-and-our-coverage

Volpp, Leti. 2019. "DACA, DAPA, and Discretionary Executive Power: Immigrants Outside of the Law" in *California Journal of Politics & Policy*, 11(2): 1-20.

Waldron, Jeremy. 2016. *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press.

Whittington, Keith E. 2002. "Yet Another Constitutional Crisis?" *William & Mary Law Review*. 43(5): 2093-2149.

Yoo, John. 2005. *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*. Chicago: University of Chicago Press.

Zelizer, Julian. 2010. *The Presidency of George W. Bush: A First Historical Assessment*. Princeton: Princeton University Press.

Zuckert, Michael. "James Madison in *The Federalist*: 'Elucidating the Particular Structure of this Government'" in Stuart Leibiger, ed., *A Companion to James Madison and James Monroe*. Oxford: Wiley-Blackwell.