Blank Checks, Insufficient Balances[1]

John Ferejohn

Roderick Hills

NYU Law School

November 2014

Does the President have too much power to create new law, or to act unilaterally if he can't do that, without any congressional or even clear constitutional authorization? And, if so, is there anything that can or should be done to redress the balance in favor of Congress? There is a growing trend in both political science and legal scholarship to answer both of these questions in the negative. As a normative matter, many scholars argue that, given the immensity of the problems facing the nation and the fragmentation of institutional power, the President needs to have broad powers to make policy even without Congress' guiding hand. As a positive matter, these scholars also argue that the congressional abdication of responsibility has gone so far that there is nothing much that can be done about Presidential power grabbing, so we might as well get used to the idea. These two claims -- normative and positive -- make up the heart of Eric Posner's and Adrian Vermeule's recent book, *The Executive Unbound*.

At the core of their case for an unconstrained executive Posner and Vermeule are profoundly skeptical as to whether law can actually constrain executive authority. There is, of course, an old republican discourse that argues that law ought not to bind the executive in "emergencies" and that no president should regard his authority as legally cabined if the fate of the republic was at stake. We agree. But Posner and Vermeule go much further in doubting that even in ordinary circumstances that the executive power can be constrained by legalism or rule

[1] Research for this paper was supported by the Filomen D'Agostino and Max E. Greenberg Research Fund.

of law. The positive argument is that presidents will take the power they need as a kind of hostile trespass and Congress is usually unable to coordinate much opposition to such grabs. And the Supreme Court usually defers as well, notwithstanding Justice Jackson's Youngstown concurrence. Trevor Morrison's recent work does much to illustrate how presidential assertion of authority has shaped separation of powers doctrines. Morrison argues that presidential moves are actually legally disciplined, even if they authorize a steady drift of legislative powers to the executive. Posner's and Vermeule's normative claim is that, moreover, there is no reason to worry as presidentially centered decision making is adequately controlled by periodic elections and public opinion.

The inference to be drawn seems obvious: the old-fashioned checks and balances that may have once held the President at bay under the "Madisonian" constitution are obsolete by now. Some have argued that checks and balances have never really worked very well, having been circumvented almost immediately by parties and partisanship.[2] Political scientists Terry Moe and William Howell have argued that the president has, in fact, an enormous capacity for undertaking unilateral action and argued that there is nothing much that courts or Congress are likely to do about it. Recent studies of Presidents' use of signing statements and executive order suggest that the presidential tendency to press against constitutional limitations transcends political party or historical epoch: Regardless of period or party, Presidents engage in what Ryan Barilleaux felicitously terms "venture constitutionalism," staking out aggressively broad readings of Article II powers and often prevailing in these assertions of constitutional prerogative. If Moe and Howell are right, President Obama's switches should not be surprising because, regardless of the intentions of the occupant, the office of the President induces its occupants to construe their

[2] Unlike PV, however, Levinson and Pildes suggest ways that checks and balances might be made more effective during periods of unified party government when the Madisonian version is not likely to work very well.

powers expansively. Moe has long emphasized that electorally driven incentives motivate any president to take powers commensurate with the political fact that they will be held responsible for everything that happens in the economy, the society and outside world.

If these positive arguments are right not much would be lost if the "Madisonian" conception of the structural constitution was abandoned in favor of a more realistic assessment about how the modern separation of powers actually works. There is, simply, not much that could be done about the presidential drift. The normative claim is that if the remaining checks on the executive are inconvenient we should find ways to remove or neuter them. These are powerful and troubling ideas and they force us to ask hard questions: what would be lost if Congress was further marginalized and the president "unbound"? Do we already live in such a world and simply lack the imagination and courage to recognize it? Should more be done to speed things along? And, if the answers to these questions are "little" "mostly" and "yes" what kind of institutional structure should we aim at? Would it be enough to leave most of our constitutional institutions in place – perhaps as hollower shells than they are now – and endorse the president's powers to act unilaterally? Are electoral controls – and other plebiscitary controls -- on the president really sufficient to assure that future presidents would remain accountable and responsive to our collective interests? Or does the four year term, and the relatively weak impeachment mechanism, make electoral "control" chimerical, or even deeply distorting?[3] Indeed, if we are convinced that the executive must be able to make new law without congressional approval, perhaps we ought to adopt something closer to a parliamentary system where the executive would need to maintain continuous political support in parliament or else be required to go back to the voters for new authorization.

[3] Such controls, for example, might induce a president to pander to our preferences while failing to act in our interests:\-- providing circuses and bread rather than good long term policies.

When the unilateralists argue for abolishing the Madisonian constitution what is it they seek to do? There seem to be two prescriptions: first, recognize that the drift of powers to the president have been generally justified by facts about how the political world works. As long as these powers evolve gradually in ways accepted, implicitly or explicitly by the other branches, we should see the evolution of a presidential system as both legal and legitimate (where Morrison and Goldsmith emphasize the first and Posner and Vermuele the second). In any case, according to some political scientists it is an inevitable consequence of the electoral incentives of the various officials. Second, we ought to recognize that the primary mode of democratic accountability runs through the president rather than through Congress. Thus, we ought to see congressional meddling in the administrative state as essentially parochial and undemocratic, which ought to be dismantled as far as possible in favor of the unitary executive. Both of these ideas support the idea that most policy ought to be made as well executed in the executive branch, supervised by an electorally accountable president.

We take issue with both the normative and (albeit to a lesser extent) the positive claims of these Presidential unilateralists.[4] On the normative side we reject the idea that removing checks on presidential powers is necessarily a good thing. Instead, we argue that a suitably updated version of Madisonian checks and balances – where courts and congress can play both positive and normative roles -- could improve the President's democratic accountability with little loss of governmental efficiency or democratic responsiveness. We can accept many of the empirical

[4] McNollgast and Terry Moe, in his writings about executive branch agencies, emphasize the limits of presidential control of agencies either seeing executive branch agencies as agents of congressional majorities (McNollGast) or as agents of divided principals (Moe). The by which the unified (MNG) or divided (Moe) principals seek to control agencies include control over appropriations, legislation, various executive branch supervisory entities (OMB, etc), or congressional plants inside the agencies (Instpectors General, etc). While these authors agree that agencies are not simple agents of the president, they do not agree as to where effective policies will be made. For MNG Congress retains a vital role; for Moe (and Howell) dysfunctional agencies undermine congressional efficacy, leading to more presidential policy making.

observations and theoretical architecture offered by the unilateralists, but remain skeptical that a president would be adequately checked electorally. Electoral accountability is too crude and too infrequent to perform the day to day role that Congress, courts, and, indeed, executive branch officials play in disciplining presidential adventurism.

We also challenge the presidential unilateralists' claim that Presidential self-aggrandizement is inevitable, even in the sweet spot of presidential authority: national security policy. In his new book, Power and Constraint: the Accountability Presidency after 9/11,[5] Jack Goldsmith presents a picture of a highly constrained president operating the national security domain – one that undermines the more ambitious claims of the plebiscitarians. While Goldsmith largely confines himself to the post 911 world he argues, persuasively, that the president has been actually been subjected to an enormous (and thickening) web of legal constraints, partially self imposed for politically compelling reasons. He argues that presidents since at least the time of Gerald Ford, but especially since 911, have dealt with the fact or prospect of external congressional or legal constraints by ramping up lawyering capacities throughout the executive branch, sometimes in the effort to sidestep or narrow these constraints but, more often, to assist administrators in complying with them in an intelligent and flexible fashion.

The result has not been, on the whole, that presidents or their agents take themselves to be free to evade legal restrictions and simply order their mouthpieces to throw up obfuscatory smokescreens. Jack Goldsmith argues that the more usual result is that the agencies have built internal legal institutions and cultures that mirror and anticipate the likely actions of courts, congress, and outside lawyers, establishing new chains of checkoffs into military and other national security decision procedures. He argues that these legal constraints have been effective

[5] New York: Norton press, 2012.

precisely to the degree that internal legal actors (military lawyers, inspectors general, etc) are supported by external forces either as "proxy" agents of Congress or at least of powerful committees or influential individual congressmen, so that their actions are backed by credible threats. Indeed, he argues that the early post 911 attempts to ignore or sidestep legal constraints were counterproductive from the viewpoint of the president and the national security establishment, and that is the reason they were abandoned in the later Bush administration and under President Obama as well.

The national security state is where the president's hand is strongest in fact and arguably where his normative claims are most persuasive. Sometimes a president needs to take actions in secret and with dispatch without checking with other constitutional actors or with the people. But unless national security is urgently at stake congressional players still need to be consulted and the prospects of judicial action must be taken into account. In the larger domain of domestic policy making and implementation such urgency is almost never required. Instead, presidents must often struggle to play a shaping role in policy making. There is no question of course that over the long arc of American history that presidents have accumulated important powers over budgeting, legislative agenda setting, and the administrative agencies. They have tried mightily to grow the Office of the President and the White House into command centers for domestic policy making. Presidents since Ronald Reagan, for example, have routinely tried to get control of regulations by asserting the right to review them in cost-benefit terms but so far these are often rearguard actions, aimed at limiting overenthusiastic agency rule making. As George Bush learned in 2005 in attempting to reform Social Security, and as President Obama has been learning more recently in the area of health care, changing the structure of welfare state institutions is a Sysiphisian task and often meets with similar results.

Thus, in both foreign and domestic policy Congress retains ample powers to direct policy and check the President, at least in principle, if only it chooses to exercise them. But in many areas this is not always easy to do. In our view, Congress's main problem is that the incentives of individual congressmen do not necessarily align very well with Congress's institutional interests in maintaining its authority. Partisanship is one source of misalignment but the deeper source is localism – the fact that members of congress keep their seats only by pleasing their constituents. Successful congressional checks on the president are often closely connected to serving their constituents, aimed to ensure that their voters get their share of the pie. The congressional urge to protect constituents is, however, both a strength and weakness. Presidents can sometimes assemble congressional majorities by guaranteeing benefits to local constituencies even at the price of a loss of congressional powers.

Even so, there have been successful congressionally led efforts to stall or reshape favored presidential policies on wider grounds. We think there is some prospect of Congress vindicating its constitutional prerogatives despite the ample incentives of individual members to shirk in their (constitutional) duties to protect constitutional prerogatives. Doing this effectively may require some new and unfamiliar institutions as well as beefing up some older ones. But we think the thrust of such reforms would remain Madisonian in spirit, in the sense that they would be aimed to achieve the constitutional goals that he and the other framers tried to implement by reinforcing mechanisms of institutional self protection. Of course the question remains whether this is actually a good idea or whether it will simply perpetuate the tendencies to gridlock and paralysis.

The roadmap for what follows begins, in part 1 with a normative argument for the Madisonian constitution, which we see as an effort to *balance* the distinctive virtues of the

departments of government deliberation (congress and judiciary), energy (president), and assent (congress and elections) by means of distributing procedural "checks" to various departments of government aimed at retaining control of their distinctive virtues. In Part 2, we describe Madison's belief that the principal threat to "balance" in the American republic was a mostly overweening legislature; hence, Madisonian checks at the federal level tended to run against the Congress out of a fear that the House of Representatives, because of its closeness to the people, would be the most dangerous branch. We see the same worries about the people behind his express preference (in the Virginia Plan) for a congressional negative on state legislation. We suspect that Hamilton shared Madison's worry about congressional usurpation, not so much from a fear of legislative tyranny as from a fear that the energetic application of executive power would be unduly burdened by congressional meddling. Madison's fears about congressional usurpation turned out to be largely misdirected: we argue in Part 3 that Congress from the very beginning usually had too much trouble getting its act together to constitute a real threat to presidential (or judicial) authority. Madison may have been right to fear too much reliance on the people but wrong to think that the dangers would arise from Congress. In part 4, we show why Madisonian checks have steadily eroded, as Presidents have enlarged their power with what we call "one-way ratchets." These work in two ways. Presidents respond to emergencies by asserting broad constructions of executive power that tend to remain in place legally even after the emergency recedes. And, congressional delegations of authority to agencies tend to be practically irreversible. In part 5, we argue that it is very unlikely that the President can replicate, inside the executive branch (or inside the office of the president), the virtues of a balanced constitutional design – at least not without the backstop of congressional and judicial powers. We argue, based on both theoretical and empirical research, it is very unlikely that the president

could be effectively checked by the prospect of elections. In our concluding discussion we suggest some reforms that would strengthen Congress's capacity for collective action and which would strengthen its influence over some of the regulatory mechanisms inside the executive branch. The point of these reforms would be to ensure that between elections, there is a regular and powerful place for congressionally mediated oversight grounded in its openness to public opinion and criticism.

1. Separating Powers

The American republican experiment was distinctive in many ways but especially in that the national government was placed in the framework of relatively robust, if flawed, state governments. In this context, those who wanted to establish a powerful national government were forced to compromise their institutional ambitions in various ways in order to assure the proponents of state and local power that the new government would not be too dangerous to their prerogatives and rights. James Madison especially regretted the necessity of some of these compromises – especially the nonpopular basis of representation in the Senate, and the absence of a congressional negative on state legislation – as things have evolved, those deficiencies have been partly ameliorated in various ways, especially the evolution of the Senate as an incubator for higher national office (leading senators to seek to represent a national constituency) and the development of judicial review, especially of state legislation. But Madison did not worry much about the presidency, nor about executive powers more generally.

It seems important to reconsider the evolution of constitutional system in light of the arguments for separating powers in the ways recommended by Locke, Montesquieu and Madison. Their arguments were mostly concerned to prevent the government from acting

tyrannically by interfering by exposing people to legally unconstrained interference by governmental officials. Their concerns were echoed in the parade of horribles in the Declaration of Independence but can be found in any number of oppositional tracts in 18th century England and America.

The Constitutional Scheme

To start, we sketch Madison's idea of the separation of powers in the proposed constitution and his defense of checks and balances in Federalist 47-51. Each department was to have its core function, expressed in the vesting clauses, but the other departments were given some role in the exercise of these core functions. Madison and the other framers doubted that a strict allocation of powers by department could be stable. The proposed constitution therefore, out of an abundance of caution, distributed non-core powers among the three departments in order to stabilize the separation of powers. Congress was given the legislative power, which he thought was the powerful in a republic, but the president and court retained regulative roles over legislation. Similarly Congress had a regulative role in the execution of executive and judicial powers.

It is important to see that most of the checks in the proposed constitution were put in place to check Congress rather than the other branches. In Federalist 48 Madison explained that in a republic "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex…. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can, with greater facilty, mask… the encroachments which it makes on the ci-ordinate departments…. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the

judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves." Indeed "… the weakness of the executive may require that it be fortified…" (Federalist 51). Hamilton's description of the judiciary as the least dangerous branch echoes Madison's views as well.

These beliefs, presumably shared by those at Philadelphia (and probably more widely), explain why Congress was divided into two chambers, each with different powers, with the members of each body selected according to different principles. The president was given partial veto in the legislative process and, while this was not articulated in Madison's essays, the judiciary retained the capacity to check legislation after its enactment. Moreover, the president and Senate were given joint control over a separate legislative process which allowed them to act independently of the House of Representatives. Finally the President and the Court were given distinct sources of constitutional authority that could not be directly regulated by Congress.

Madison thought that this lopsided distribution of checks was warranted by the fact that the most dangerous branch in a republic would be the legislative, because its members were closest to the people and most likely to draw their political strength from this connection. In any case he believed that each department had sufficient leverage over the others to defend its own powers from encroachment. He aruged that these checks would be (automatically) invoked (if necessary) by "… giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." (Federalist 51) If the distribution of powers in the first three articles of the Constitution provides the means by which each department could defend itself, he relied on the psychology of institutional self interest (an imputed desire of officials to preserve the powers of their department) to supply to the members of each department the motivation to act to protect the powers of their department: "… the

interest of the man must be connected with the constitutional rights of the place…[so] that the private interest of every individual may be a sentinel over the public rights." (Federalist 51)

With the benefit of hindsight we must say this plan did not work out very well. However, the failure was not complete: checks on Congress – its division into two competing bodies, and parceling out its legislative powers to other branches, etc – have actually turned out to be quite effective in restraining that branch from encroaching on the executive or the courts.[6] In fact Madisonian checks have actually worked pretty well against the Congress but not so well to limit encroachments by the president or the judiciary. Ironically, because collective action problems do not plague the president or Court to the degree that they do the Congress, Madison's design worked to give the President and the Supreme Court plenty of opportunities to aggrandize their institutional powers and limited the likelihood of a coordinated congressional response. The effect has been to carve out large chunks of the legislative power for the other departments.[7] And Congress has rarely been able to stop this.

[6] We agree with Levinson and Pildes that constitutional restraints tend to work better in some political configurations than others – especially in periods of divided government. But we think that even with unified government, there are times when the political incentives of members of the majority party can produce some use of constitutional checks – when the president is perceived to be weak or incompetent or when his term is ending or when the majority is divided as the Democrats have often been throughout the history of the republic. There is a further issue implied by the Separation of Parties Perspective. If one thinks of checks as having a constitutional purpose – to keep other institutions inside their lawful bounds – is there reason to think that checks will be used for such purposes and no others? Checks might well be used to extort concessions not because they represent valid constitutional objections but because they are valuable bargaining tools. No student of American politics will find such a possibility at all farfetched.

[7] From the very beginning of the republic collective action problems severely attenuated the motivations of individual congressmen to protect congressional powers. Ironically, that this was so was a reflection of Madison's own views in Federalist 10: he argued that it would be safe to create a powerful national government on the ground that, in the extended republic, it would be hard for majorities to form to seek private advantage through the national government. But he did not seem to see that this argument implied that it would also be very hard to form congressional majorities to defend what is, after all, the factional interest of the members of Congress. As Levinson and Pildes note, the rise of political parties dampens congressional incentives when the congressional majority is of the same party as the president. This dampening is more pronounced of course when the parties are relatively homogeneous and polarized as they happen to be currently.

Once the government was up and running Madison learned quickly that Presidential powers were much more dangerous than he had thought. He was shocked when Washington unilaterally proclaimed neutrality in the war between the United Kingdom and France. And he was even more appalled when the Jay Treaty was ratified in secret session by the Senate. And his opposition to Alexander Hamilton's broad constitutional constructions is even better known. The Constitution he defended in the Federalist seemed quite different from the Constitution in operation.[8] But the constitutional damage had been done. If the balanced constitution which was ratified in 1787-8 represented a desirable governmental arrangement it was instantly undermined by the fact that president's authority was not really checked in the way that Madison thought it would be.[9] Whether this was a good or bad thing was, of course, a matter of disagreement among the original framers and has remained so.

While we agree therefore that the original Madisonian scheme did not work as he anticipated but that is not to say that it did not work at all nor that it should be abandoned. We think there is a case for reform aimed at vindicating its promise rather than embracing a very different form of government which may be much worse. We may be able, for example, to find reforms to stiffen Congress' jealously of preserving its constitutional authority or to create new institutional allies for the defense of congressional powers. The point would be to require, institutionally as well as intellectually, a more robust public and deliberate justification of the extension of executive powers in both emergency and nonemergency settings. With suitable

[8] John Ferejohn, "Madisonian Separation of Powers," James Madison: The Theory and Practice of Republican Government, Stanford University Press, 2003. Pp. 126-155.

[9] Some have argued that until Andrew Jackson took office American national government was congressionally dominated. We agree that after the repudiation of the Federalists in1800, the leading proponents of an executive led national government when into eclipse. Even so, as the leaders of the Jeffersonian Republicans assumed the presidency one saw them readily adopting Federalist positions on presidential powers allowing the purchase of the Louisiana Territory as well as the establishment of the Second Bank of the United States. In any case most of the period from 1800 to 1824 was unusual in that there was no real partisan contestation One could argue that already, in most infertile ground, the seeds of presidential power accumulation were taking root.

adjustments, a neo-Madisonian model may be capable of exhibiting the "balanced" virtues for which Madison strived – energy, deliberation, and assent.

It is premature therefore to launch a reform program of the kind that may be necessary without a brief excursion into constitutional and political theory. We do this to present a reinterpretation of the Madisonian project a statement of what he was trying to achieve and why it is valuable. To do this we need to present or excavate what we might think of as a Madisonian normative theory which would justify separating powers in the way he recommended, and a Madisonian positive theory that would justify the checks he defended in his Federalist writings. We will try to provide an historically grounded interpretation that makes sense of Madison's project and an account of why, in a narrow sense, it failed. But we also need to see the ways that it succeeded in some part, and we need guidance to see how a reformed system could be made to work. We defend the idea that there remains, in fact, some separation of powers in the American governmental structure, if not precisely the separation that Madison himself proposed. We also think that part of the best explanation of the actual separation of powers is located in the distribution of checking powers among institutions and institutional occupants. Again, Madison's specific claims about how these checks would work did not turn out to be true. But it seems to us that institutional checks have generally been the common element of the American governmental system except for rare and short historical moments.

Balance and Checks

When the Americans began their experiments with republican government during revolution, many of them turned to the example of the Roman republic for ideas as to how such a government might be built. Rome's republican constitution embodied the principles of mixed

government, balancing democratic, aristocratic and monarchical elements. It is important to see that there were two notions of balance in play at Rome: first there was the idea that the social classes – the patricians and plebes – had to be balanced constitutionally. Second was the idea of balancing government among the three principal forms of rule: the one, the few, and the many. These notions overlap of course: the patricians were initially the rich and were relatively few. The plebes were at the start the poor and the many. The patricians and rich generally favored rule by the few but they opposed rule by the one. The plebes had different dispositions, sometimes preferring rule by the many (as when they pressed for the right to legislate for the city), or by the one (as when they supported the Populares politicians like the Gracchi or Julius Caesar). Polybius saw both kinds of balance in the Roman constitution. Polybius's lasting contribution, however was to refine the second conception of balance: he saw the Roman "constitution" as balancing the (deliberative) Senate, with the (energetic) consuls, and the open popular assemblies where laws were presented for popular assent. This "neoclassical" balance was, for Polybius, the secret of Rome's effective government and for its capacity to project power throughout the civilized world.

It is important not to mistake this neoclassical notion of balance (deliberation, energy, and assent) either with the conventional tripartite governmental functions (legislative, executive, and judicial), or with the characteristic institutional homes for these functions (the executive department, the legislature, the judiciary). There may be arguments for balance that apply to the functions or to the departments but, if so, these arguments typically run through the Polybian governmental virtues. Besides, it is not so clear that there really are only three functions. Locke was right to distinguish a fourth, the federative, in which energy was especially important and which might not be legally restrained by statutes in the way that the executive power might be.

Nor is it clear why there should be three rather than two departments. Why not combine the judiciary with either the executive or the legislative branch as other governments have done?

Polybius and Cicero both thought that the power of Rome was based in large part on the capacity of its mixed constitution to harness and coordinate conflicting social classes in the pursuit of common interests. These institutions and practices permitted **energetic** executive officials to be normatively regulated and directed by a **deliberative** (aristocratic) Senate, while enabling the **democratic** assemblies and their representatives (the tribunes) to make the laws and help to preserve popular liberties. There were many checks within the Roman constitution – the tribunes and other magistrates could block action by the Senate or other magistrates – but had positive as well as negative aspects. Negatively, checks could stop public action; positively, they forced leaders to obtain widespread assent to significant public projects. Both identified the *res publica* with those inherited institutions, which had permitted Rome to dominate the Mediterranean world while retaining the distinctive values of Roman life.

Cicero exposited and defended this conception of a balanced constitution in various places: his arguments are sprinkled liberally throughout his public speeches and legal arguments but also, more systematically, in his later writings. In <u>De Republica</u> Scipio (speaking for Cicero) argued that the best pure constitution would be a monarchy but the trouble with monarchy is that if the king were to change his character it would immediately become a tyranny, which is the worst form of government.[10] In this sense kingship while attractive in many ways, was intrinsically fragile. For that reason Scipio preferred a mixed government in which the executive was limited to enforcing laws that had been agreed to by the people, and acting with the advice

[10] "But a regal form of government is particularly and most certainly exposed to change. When a king begins to be unjust, that form of government perishes at once. The tyrant is, at the same time, the worst of all conditions of government, and the nearest to the best." Book I, ch 42.

of a body of experienced and wise men regularly assembled to discuss issues and events.[11] The Roman constitution, on this account, would normally generate deliberatively shaped policies that would effectively respond to the problems facing the state while, at the same time, maintaining the assent of the plebes. Moreover, Scipio implied, this balance would tend to remain stable in the face of disturbing circumstances. It was, in other words, robust or resilient in ways that kingship and other pure forms of government were not.

Cicero did not, however, think that maintaining the constitutional balance would be painless. He defended the extensive allocation of vetoes within the Roman structure and rejected the idea of giving the Senate a direct role in making laws, preferring instead to leave that power to tribunal legislation agreed to in the popular assemblies. He knew, from (often very bitter) experience that these powers could be abused and that correcting abuses would be dangerous and not always successful. Roman history, in his telling, was a record of constitutional conflict, often violent. But despite his aristocratic preference for Senatorial leadership – the consuls were normally to seek and follow senatorial advice -- he thought it better to incorporate the lower orders inside the constitution by recognizing their right to assent (or not) to laws.

By the time that Cicero wrote, however, the republican constitution had obviously failed to prevent civil war and by his account the explanation for this failure was that the division of powers embodied in the "ancestral" mixed constitution had fallen apart. Specifically he thought that the proper role of the Senate had been eclipsed by the growth of populist forms of direct rule through the assemblies. Others have given different diagnoses of the collapse, tracing it to the

[11] "… one which shall be well tempered and balanced out of all those three kinds of government, is better than that ; yet there should be always something royal and pre-eminent in a government, at the same time that some power should be placed in the hands of the better class, and other things reserved for the judgment and will of the multitude." Book I, 45.

greed of landowners or the growth of large absentee armies more loyal to their generals than to the Republic. But every account we know of comes down to the assertion that somehow the stabilizing or checking forces that had permitted Rome hundreds of years of stability had been insufficient to hold things together in context of the extended empire that Rome had built by Cicero's time. In this sense the constitutional failure was not that checks produced gridlock – they could always have done that -- but that constitutional checks were unable to prevent the accumulation of private power and private armies. Was this inevitable? It is not clear. But we take it that the American framers did not assume that the Roman model was simply inapt. They seem to have thought that there was something valuable to learn from the Roman republican experiment even if it came apart at the end.

It may well be true (as Hamilton argued) that a single chief executive (commanding a department of subordinates) is the only or best way to implement energy. But energy is the goal, and the single chief executive is merely the means. Moreover, we think it a mistake to identify the deliberative virtue with the legislative power or with the legislative department. Deliberation is required wherever action is, in any branch of government and in the exercise of any function. How best to implement the deliberative requirement is a complex question that is not settled by the preliminary allocation of powers to particular departments

The vesting clauses of the Constitution appear to connect the familiar tripartite functions (legislative, executive, and judicial) with three branches. But this association is, as Madison argued, highly qualified and incomplete. But the justifications for both the vesting and the qualifications to it can best be located in the "neoclassical" virtues (energy, deliberation, and assent). For example, Hamilton associated energy with the executive function (and probably, had he thought of it, the federative function too), but he also (in Federalist 78) suggested the

deliberative aspects of judging as well. Madison emphasized the capacity for deliberation in the new (relatively small) Congress and especially the (more selective) Senate. And Madison also, associated assent with the overall structure of government in which all authority is drawn directly or indirectly from the people. The dispute with antifederalist opponents largely turned how well assent would be maintained in the proposed constitution. The antifederalist thought the policies pursued by the governmental elites would diverge from the public and state interests and argued that repressive force would be needed to hold the nation together. The opponents wanted more frequent elections and smaller districts that had emerged from the Convention, partly to assure that policies tracked the public interest but also, concomitantly, to assure assent to those policies. There was no disagreement at all about the need to maintain popular assent through relatively frequent recourse to the hustings; the disagreement was over the proposed Constitution would achieve this.

By the time of the Revolution, resort to the Roman model was already a venerable tactic for those seeking to resist tyrannical government, having been employed to this end in Poland, Venice and many other northern Italian cities for more than half a millennium. The English resistance to the Stuarts and later to the Whig Oligarchy, and the novel Dutch republic had also, in various ways, emulated the roman example. Where else should one have looked for a model? The alternative form of popular government, the Athenian democracy, was widely thought to have been disastrous both for individual liberty and prudential statecraft. The Roman republic had at least endured for 500 years (Venice had for much longer) and had to a great extent preserved liberty as well as state power (Poland, not so much).

Liberal Separation of Powers

But the Framers thought about the Roman example in a new context. They had before them the example of Great Britain after 1688 in which republican ideas had been reconciled with liberal virtues of toleration and private property. The liberal component, described in Montesquieu's famous depiction of the English Constitution, emphasized personal liberties which he argued could only be preserved by separating the judicial from the executive and legislative powers. His idea presupposed a more or less modern notion of a functional separation of powers rather than the older notion, found in medieval constitutions, of distributing distinct governmental roles the among various estates or social orders. Perhaps because he was not faced with the practical task of constructing an operating government, Montesquieu gave little thought to how power separation of this kind might be maintained. Perhaps he thought it sufficient to show that the English had in fact maintained such a governmental system. English government at that time was based not only on the representation of distinct social orders within the institutions of government (the landed aristocracy in the House of Lords; the commercial elite and gentry in the Commons), but also on the allocation of powers among institutions with distinct functions. Perhaps that provided sufficient stability by protecting judges, by imposing normative restraints on the king and his ministers, and by making parliamentary legislation the basis for the exercise of legitimate governmental power. One might explain the stability of the functional separation of powers by pointing to the way that these powers were anchored in social classes.

Madison and his compatriots could not, however, draw pre-existing social classes to stabilize governmental functions. This is not because there were no class divisions in the new nation. Rather, it was because the revolutionary project was tethered from the beginning to the ideals held to be "self evident" in the Declaration. The new constitution had to focus on created

institutions and their powers had to arise from their political composition: it proposed to insulate the federal judiciary, for example, from interference by institutional guarantees of salary and life tenure and by requiring interbranch agreement to appoint judges (while forbidding the House of Representatives from any role in judicial appointment). The Constitution checked dangerous legislative powers artificially as well by restricting their scope, dividing them bicamerally, and giving the executive a say in their exercise. But however much emphasis the new constitution placed on using institutional checks to keep the departments in their proper bounds Madison had rather less to say about positive reasons for separating powers. This is not so surprising in some respects since it was Hamilton's job in The Federalist, to defend the structure and role of the weaker branches which would have to fight to maintain their powers against the more powerful legislative branch. Indeed, Hamilton gave explicit defenses of judicial and executive powers based on the necessity of energetic administration of the laws and of judicial deliberation in maintaining a constitutional government.

After their brief and unhappy experience with legislative government under the Articles of Confederation, many American leaders sought to try to establish a balanced or mixed constitution that would assure good government and preserve personal liberties of the kind they had grown accustomed to in colonial times. Many of them agreed with Montesquieu that the English mixed constitution had been effective at preserving the liberties of Englishmen (especially since the start of the 18th C.) and that, suitably reframed, it might be a useful template for the Americans. But, through the widely circulated *Cato's Letters*, they were also well aware of critiques of the Whig oligarchy which, republicans thought, had corrupted that constitution and begun to undermine the liberties it was supposed to support. Those who came to Philadelphia evidently thought that a balanced constitution could be created by instituting

functionally separated departments roughly along the lines that Montesquieu had recommended. But to preserve and stabilize this liberal constitution they drew on the Polybian idea of distributing checking powers among the departments by which they could defend their roles in the new constitutional order. We think that the best way to understand the Madisonian constitution is this. It was an institutional arrangement that sought to maintain liberty by constructing a balanced republican constitution that was stabilized by checks more or less in the way that Polybius and Cicero and envisioned.

It is common parlance to refer to "checks and balances" in a single phrase, as if the two nouns referred to a single undifferentiated system for slowing down government. We believe that it is more faithful to both the Roman and Augustan roots of the ideal to treat "checks" (a barrier to unilateral official action) as a means for producing "balance" (a desirable end-state that well-designed "checks" can help maintain). "Balance" is a Ciceronian ideal: it is a mixture of governmental virtues that different social classes or idealized types of officials were said to possess. The unitary monarch possessed energy; the aristocratic Senate (or House of Lords or Article III judicial branch), deliberation and fidelity to established customs; and the plebian popular assembly (or House of Commons or House of Representatives), the current consensus of the community. If each class or official had a "check," and was able to make adequate use of it then – so the theory went – the result would be "balanced" government characterized by energy, deliberation, and assent. That is, decisions would be deliberatively entered into, energetically pursued, and both the decision and execution would have buy-in from the people at large.

The important thing to emphasize is that, if the checks are credible, then balance would normally be maintained without much need for any active checking at all. Of course there can be mistakes and miscalculations and so one would expect occasional breakdowns and a resort to

overt checks to restore the constitutional order and perhaps punish the undeterred offender. This is not to say that one can infer from the absence of checking that there is balance; it is the other way around; balance produces no checking. The reason that checks would rarely be observed is that in equilibrium all the players expect a costly reaction to any effort to infringe on the prerogatives of the other branches. In Rome, when things worked well (until the time of the Gracchi in the late 2nd Century) the tribunes would rarely block senatorial or consular actions because, presumably, popular demands had been sufficiently satisfied. Later on, according to Cicero, the system became unbalanced so that the Tribunes had to be bought off or intimidated to withhold their checks.

We should lay our cards on the table. We think that there is a lot to be said for balanced government (combining energy, deliberation and assent) not only in order protect conditions of liberty, but also pursue public purposes intelligently and with some degree of popular support. And we doubt that these values, liberal as well as republican, would be well protected inside a hierarchical executive. Hierarchy often blocks the upwards flow of information leading to institutional stupidity of the kind observed in Stalinist and Mao-ist regimes. Even if those at the top want to keep open informational channels, normal human temptations often prevent them from being able to. The hierarchical nature of an energetic executive makes it easy enough to smooth over or avoid political conflicts, to filter out unpleasant facts, and to put off fights to another day. Mixed or limited governments, it seems to us, have a better chance to make and keep promises precisely because interbranch conflict may give some part of the government an interest in keeping commitments even if other parts disagree. But can appropriate balance actually be maintained? That is the question that Madison thought the Constitution answered (in Federalist 51).

3. Madison's Mistake

Whatever he thought prior to the Constitution going into effect, it seems clear enough that by the middle of the 1790s Madison rapidly became convinced that he had underestimated the institutional powers that the new Constitution had conferred on the President, as compared with Congress.[i] He was shocked by the Neutrality Proclamation, in which President Washington unilaterally abrogated the mutual assistance treaty with France. He was even more outraged by the secret negotiation and ratification of the London Treaty, which made enormous and unpopular concessions to British interests and was sprung, as a *fait accompli*, on the American public. On the domestic front, he was appalled by Washington's support for Hamilton's very broad reading of Article I, section 8 powers and he fought unsuccessfully against the Washington administration's efforts to establish the US Bank and to nationalize the war debt. By the early 1790s, he had recognized that the President had great power to control the national agenda in both foreign and domestic affairs and that the Administration could not only easily evade any responsibility to seek council or advice from the Senate, but that it could manipulate partisan and nationalist sentiments to get the lower chamber to follow along meekly. And this realization was brought about by a President whom Madison revered and trusted. Things got much worse under John Adams whom Madison had long suspected of having monarchical sympathies.

One could make a similar claim (as Brutus, the shrewdest of the Anti-Fderalists did) that Madison and the other framers failed to anticipate the powers of the Supreme Court (and Madison would probably have agreed, after the Federalist Judiciary's eager prosecution of the Sedition Act and the *Marbury* and *McCulloch* decisions). To his surprise Congress, and especially the House of Representatives, turned out to be much weaker and less effectual than he thought it would be. Given the crucial role he attributed to institutional checks to preserve the

republican allocation of powers, Madison would likely have been willing to entertain ideas – and eventually even constitutional revisions -- as to how the self-protection powers of weaker republican institutions could be buttressed.

We think the evidence presented by the presidential unilateralists shows just how serious the underestimation of the president's authority was and how persistent these advantages have been. Madison also overestimated congressional powers of institutional self-defense to a similar extent, most obviously by failing to see the corrosive effects of collective action problems. Congress is chronically afflicted by mismatch of individual and collective incentives based on the character of their electoral districts. For most of our history individual congresspersons have been elected from single member districts comprising but a small portion of the nation. Their re-election turns on their capacity to take credit for both the state of the nation and the state of their particular district. But it is much easier to take credit for the latter with district-specific benefits, giving each member of Congress an incentive to focus on ribbon-cutting at federally financed pork projects and constituent casework rather than on diffuse national goods like (for instance) a robust theory of separation of powers). David Mayhew and Morris Fiorina have argued that electorally driven incentives of individual congressmen exacerbate collective action problems by reducing their incentives to provide public goods either for the nation (in the form of good policies) or the institution (by working to maintain its constitutional position).[iiiii12]

[12] Moreover, the characteristic congressional "solutions" to collective action – the formation of committees, congressional parties and party organizations – introduce further agency problems. Worse than that, the fact that congress is internally heterogeneous makes the agency problems extremely difficult to police. The congressional tools for controlling agency problems are very low powered, to use Oliver Williamson's phrase. And to cap matters, electoral turnover in congress implies that internal and external agency problems cannot be policed by the delegating congress but must be enforced by later congresses which may have very different preferences.

In the context of these constituency and election driven incentives it is not really clear whether the invention of political parties exacerbated or ameliorated the problem. Insofar as parties permitted groups of like-minded congressmen to coordinate their activities they may make easier for congressional resistance to presidential usurpations. Indeed this is more or less what happened throughout the 1790s as Madison and other republican led the opposition to various initiatives from Washington and Adams administrations. Of course, Levinson and Pildes would remind us, republican opposition was ineffective as long as the Federalists maintained control of Congress and the executive (and the federal courts as well).

In this context, challenging presidential intrusions on congressional authority produces both costs and benefits for the individual congressmen. The costs are borne entirely by the challengers, while the benefits are enjoyed by any member Congress who thereby retains law-making power. Small wonder, then, that individual members hold back from defying Presidents for fear of earning the opprobrium of constituents. But, shirking by congressmen makes it less likely that a showdown between the President and Congress ever takes place.

In some ways all of these issues appeared pretty quickly once the government was up and running. And they occurred not only within Congress as it tried various organizational solutions to the problem of collective action, They also plagued the state legislatures as well. Indeed Madison's own reaction to the failure of the Virginia and Kentucky Resolutions reads as a kind of extended complaint about the intractability of organizing a response to constitutional abuses. But collective action problems, as serious and persistent as these are, were only part of the problem.

The inadequacy of constitutional checks was partly due to the failure of the framers to understand the role that "the people" could play in constitutional politics. Madison thought that because they were elected in relatively small constituencies in frequent elections, members of the lower chamber would be the closest to the people and most trusted by them in any power struggle. He did not understand that representatives in small elections are often pretty much invisible to constituents – especially if their elections are not strongly contested – and that people more easily identify and feel close to a president or presidential candidate. It is not so much that he was wrong to think that closeness to the people was important; it is just that his idea of closeness was mechanical rather than psychological. Had he been able to imagine Nancy Pelosi, Harry Reid, John Boehner or even Tip O'Neill in their struggles against presidents, he might have seen how powerful a single nationally endorsed leader could be. Had he thought more deeply about Rome, and especially about Caesar and the other *populares* politicians, he might have seen that the most threatening political force to any constitution combines psychological closeness or identification with energy and decisiveness.[iv]

In fact, at the end of that first republican decade we believe that Madison began to see just how important the people could be in a constitutional struggle. This was partly a revelation born of desperation. When the Federalist congress enacted the Alien and Sedition Acts, he and Thomas Jefferson embarked on a futile constitutional campaign to persuade the state legislatures to protect political liberties. When that effort failed, the Republican leaders were forced to do something that he had not previously envisioned (and indeed had largely rejected in Federalist 49 and 5) -- to take the appeal directly to the people in the context of the 1800 presidential campaign. This election -- the "Revolution of 1800" -- not only turned the Federalists out of national office but destroyed their party as a political force, leaving behind only a few federal

judges (some famous; some infamous). But it probably would not have been won had Jefferson not established himself in the popular imagination as a paragon of the people and their liberties.

4. Eroding Constitutional Balance: one-way ratchets

Madison's epiphany about presidential powers is old news and might have been seen by him and others as requiring a modest one-time adjustment in the constitutional means of keeping executive authority within reasonable bounds. But what those reasonable bounds would be was controversial. In opposing President Washington's neutrality policy (which abrogated a mutual defense treaty with France), he argued for a narrow definition of Article II powers in Helvidius (#1), saying that "…the two powers, to declare war and make treaties… can never fall within the proper definition of executive powers." (Writings, 540). In light of the eclipse of treaties in American foreign policy making the example seems perhaps arcane and irrelevant. Indeed we cite it only to show Madison's belated response to the recognition of the dangers of the presidency, even when controlled by the venerated President Washington. We could go on throughout the 1790s to show how complete his conversion was in respect to the abstract constitutional restraints on the president found in Article II. Perhaps he thought that this matter could be fixed by giving correct interpretations to its various cryptic clauses. He was wrong about that too. The political dynamics favoring the accretion of presidential powers were too profound, evidently, to be controlled by giving a better gloss on the text. Such efforts produce even less restraints than the "parchment barriers" he derided elsewhere in the Federalist.

As presidential unilateralists recognize, these presidency-favoring forces work both gradually though the accretion of congressionally delegated powers, punctuated occasionally by

unilateral assertions of new powers during "emergencies" of various kinds that occur in any nation's history. Political scientists have produced two broad lines of argument describing the gradual accretion of presidential powers. The first is centered on the growing pressures for regulation that arise outside government (from economic dislocations or increasing diversity for example). Work by Steven Skowronek, Daniel Carpenter, and Theda Skocpol among others characterize the uneven political response to such largely external events, arguing that they resulted in an accretion of new state capacities (mostly delegated) exercised by relatively powerful and autonomous bureaucracies. Their stories concern the president in important ways but, for the most part, they argue that new state capacities were demanded by changes in the society, were directed by new ideologies, advanced by increasingly independent bureaucracies, and were to some extent inexorably autonomous of the wants of particular presidents.

The second line of argument, traceable mostly to Terry Moe, William Howell and others, is that the gradual accretion presidential power is endogenous to the constitutional organization of political power rather than as a result of exogenous pressures. Briefly, Moe's central insight was that the President's status as the single, highly visible officer elected from a nation-wide constituency gives him powerful incentives to expand the limits of his power. Regardless of whether the law formally assigns a power to the President, his constituents expect him to take actions to solve problems perceived as national, ranging from Hurricanes (Katrina and Sandy) to the collapse of the financial system. Unlike individual members of Congress, Presidents internalize the successes of such ventures, and they take the blame for inaction. This is really one third of Madison's notion: to give each branch the powers to resist the encroachments of others. But Moe argues that the constitutional/political distribution of powers uniquely favors the president. And, moreover, these powers can be used for offence as well as defense.

There is no point in arbitrating among these views in this context: both point to important features of the dynamics of American government and both agree on the basic factual claim: that there has been a long and more or less univocal (if uneven) drift of effective powers to the executive branch. They may disagree a bit about the powers of various executive actors and notably about the powers of the president to actually control the bureaucracy very effectively, emphasizing agency problems within the executive branch. But both agree that the congressional capacity to direct the exercise of delegated powers has declined over time.[v]

Both the gradual and sudden stories describe, and partly explain, what we could call the one way ratchet of presidential power. We could, if we wanted at this point, tell a similar story about federal courts. It seems to us that in this case as well, when a power drifts into the ambit either of the executive or of the courts from Congress, it tends not to come back. And we could characterize this phenomenon as having both gradual and sudden features though the story is a bit different and more complicated. The reason for bringing it up here is that, in our view, the basic mechanism is the same for courts and executive agencies, and has to do with an asymmetry in congressional delegation of authority.

The key idea is that both courts and executive agencies are fairly decisive compared with Congress and have the capacity to shift policies (which constitute a new "status quo" for congressional action) fairly quickly in response to contextual changes – included those generated by elections. And this capacity can be used to anticipate and head off any congressional efforts to recall delegated powers, by shifting policy to a point where the pivotal member of one of the chambers is indifferent between reversing the delegation of authority or leaving things as they

are.[13] The capacity to shift the status quo is not unlimited so we don't think that courts or agencies are completely free to change policies on a dime.[14] Courts need to await cases ripe for decision and the executive agencies may (but may not) need to go through cumbersome rule making processes. If agencies and courts could move fast enough, the one way ratchet would work perfectly in the sense that there would never be a reversion to Congress of previously delegated power. This would, of course, raise lots of questions including that of why Congress would not anticipate this and be pretty stingy with such delegations, limiting them by sunset provisions or refusing altogether to make them. But even if the power to adjust the status quo is only partial it still provides a way for courts and agencies to preserve their powers when political times are tough, waiting until better days to exercise them fully.[vi]

The reasons for the one-way ratchet are fairly simple. Both the executive and courts are, to some significant, extent structured hierarchically with a decisive peak decision maker (either it is a single person or a committee governed by simple majority rule) who cannot be internally blocked from making a policy decision. By contrast, the Constitution fragments congressional powers both internally (bicamerality plus archaic supermajority Senate rules) and externally, sharing legislative powers with other branches which can veto decisions either ex ante or ex post. Congress's basic decision structure is not at all decisive in light of these multiple internal and external vetoes: it faces hard collective action problems that the other branches do not – or at least, not nearly to such a degree. Because of their decisiveness and hierarchical structures, the President and the Supreme Court are pretty well positioned to take care of their institutional

[13] The logic of the one way ratchet is presented in Ferejohn, John, and Charles Shipan. 1990. "Congressional Influence on the Bureaucracy" Journal of Law, Economics, & Organization, 6(Sp), 1-20. See also Gely, Rafael, and Pablo Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases," Journal of Law, Economics, & Organization, 6, 263-300.

[14] For an application of this idea to courts and a discussion of these issues see William Eskridge and John Ferejohn. 1992. "Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State," Journal of Law, Economics, & Organization, 8, 165-89.

interests in preserving and enlarging their constitutional powers: the personal interest of the incumbents tend to line up with the institutional interest of the "place".

But for Congress things are much more difficult. There is really no one, aside perhaps from the chronically weak leaders of the majority parties, to speak for the institutional interests of Congress; and those leaders, because they are party leaders, have only a weak motivation to do this. So, in effect, when the President or the Court makes a unilateral move to assert a new power, they are often pushing on an open door.[vii] That things are arranged this way is, as we have argued, due to the framer's failure to anticipate how the various constitutional institutions would actually work. Ironically the elaborate checks on congressional power have turned out to be extremely effective in preventing congressional reactions to presidential or judicial unilateralism. Moreover they failed, to anticipate the potential far reaching consequences of congressional delegations of authority, and to forsee which institutions see that if they wanted to preserve a balanced and mixed constitution, it would be necessary to place more effective checks on the other constitutional branches – especially the executive branch.

The existence of the one way ratchet suggests caution when making assertions about congressional acquiescence to Presidential claims of power (or to congressional acquiescence to court decisions). Presumably, when Congress delegates a new power to an agency or the President (or both), it has to be that the current majority counts the delegation as a good deal in expectation. That might mean no more than that the current majority believes the immediate benefits of the delegation are large enough to offset any long run costs. Those members will have effectively applied a double discount to future benefits – their "rate of time" discount multiplied by their likelihood of keeping their seats. If the ratchet logic works smoothly, any future Congress will face an agency/court-created status quo sufficient to make sure that there is no

majority to overturn the delegation. "Acquiescence" in this circumstance just means that the agency has done its homework well and has adjusted its policy sufficiently to current political conditions to dissuade congress from curtailing its powers.[viii] One of us has argued that once account is taken of the one way ratchet, there are reasons to seek or preserve ways to limit the constitutional damage incident to congressional delegations of authority by seeking to maintain something resembling the original "balance" of influence embodied in the Constitution.[15] It was argued there that this consideration provided grounds to criticize the overly deferential *Chevron* Doctrine and the formulaic decision in *Chadha* to eliminate the legislative veto. Our suggestions were not heeded, possibly because the seemed based on an unargued originalist assumption that restoring the original balance of powers was necessarily desirable. We did not, in that paper, try to argue for why constitutional balance – the separation of powers and the allocation of checking powers -- was worth restoring. We took the framers' word for it. Posner and Vermeule have argued that conditions have changed and the Constitutional structures have to adapt to the new world. In this paper, therefore, we have tried to supply some additional arguments for balance that would be valid in modern conditions, whatever the original design of the Constitution.

It seems to us that big constitutional changes in the balance of powers ought to be debated explicitly and not settle by drift or unilateral assertion. One can imagine someone in Philadelphia in 1987 suggesting an amendment to the proposed constitution that would give the president not only qualified veto power but also the power to set the status quo in advance of any legislation. In other words, the president would set policy by decree, subject to legislative correction and if none was forthcoming, the President would get the final say as to policy. Our guess is that such a proposal to give such extensive decree powers to the executive would have

[15] William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992). Article I, Section 7

been hooted down and not only by those who sympathized with the state governments. But this is exactly the power that agencies have when they exercise their delegated authority. Not surprisingly therefore, when Congress delegates powers, it normally tries to limit this constitutional damage by slowing the agency policy making process and retaining various controls over agency budgets and personnel. But, as the presidential unilateralists note, these defenses are not really adequate to control agencies; and certainly not to prevent the president (who controls higher powered incentives) to push the agency where he wants it to go. But does this mean that the best thing to do is to give up?

In sum, we accept much of the presidential unilateralists' account of the President's advantages in asserting unilateral power over a fragmented Congress. For the most part, the presidential unilateralists couch this account purely in positive terms and do not use the fact of the President's creeping accretion of power as any reason to endorse such an accretion. The President acts unilaterally much more frequently today than fifty, a hundred, or two hundred years ago, and structural factors make this trend difficult for Congress to resist.

But we ought to recognize that the Supreme Court has often gone along with presidential assertions of authority and that we need to ask if such a compliant posture is a good idea. Sometimes, as in genuine emergencies we would concede a strong case can be made for giving the president ample room to maneuver, at least in the short term. But in other circumstances where long term constitutional consequences are in the offing (ie in the cases of *Chadha* or *Chevron* and in other cases as well), the normative argument for deferring to the executive is not so strong. To say that somehow democracy pushes the Court in this direction is a kind of amazing intellectual claim – one that the Court lacks the credibility to make in our view.

5. Problems with Presidentialism

Is the trend toward a more president-centered government a bad thing? Sometimes the presidential unilateralists suggest that the very fact of the trend suggests that political elites have consciously endorsed it.[ix] As we argued above, arguments in favor of de facto acquiescence are unconvincing. For the most part, however, the presidential unilateralists suggest only that the demise of Madisonian checks and balances should not be resisted for two reasons. First, they suggest that the change is inevitable and resistance is pointless. Second, they argue that presidents can be trusted with unilateral authority even in normal times, because they are adeqauately constrained by their electoral connection with their "principal" (variously defined as "the public," "certain segments of the public," or "the agglomerations of interests produced by the interactions of individuals, institutions, and groups of various sorts such as unions and businesses"[x]). Moreover, unilateralists think that the president has a strong motivation to build structures into the executive branch or, more narrowly, the presidency that guarantee him adequate deliberative advice and evidence of general assent to his policies.

We take issue with the first claim of inevitability below, where we suggest various mechanisms by which Madisonian checks and balances might be re-engineered by tweaking congressional or judicial organization and incentives. In this section, we take issue with the presidential unilateralist's argument that unilateral presidentialism can be adequately constrained by the president's electoral motivations. The modern literature on electoral accountability – which is closely connected to our notion of "assent" -- doesn't really give much reason to think that the kind of intermittent and distracted attention that voters give to governmental

performance or candidate promises provides much reason for optimism either. The problem is easy enough to state: how much control can a heterogeneous collective principal (the electorate), which is uninformed relative to a reelection seeking agent (the president) exert over the agent's behavior, using only votes as the instrument of control? The literature has two main strands, one of which suggests the limits of accountability due to the bluntness of the vote as an instrument of control, the heterogeneity of the principal, the information asymmetry between the principal and agent, and the relative infrequency of elections.[16] Because of these factors – which are intrinsic to the delegation of policy making authority to elected officials -- any elected official has a great deal of agency "slack" within which he can exercise in an (electorally) uncontrollable discretion. This could be good – if the official is motivated and able to pursue common interests – or bad if her motivations are bad or she is incompetent or lazy or has goals very different from her constituents.

The other strand of the literature emphasizes policy distortions that are traceable due to elections such as electoral cycle effects which may be due to fixed terms lengths or to defects of voter rationality such as myopia. These distortions arise from the fact that an official who wants

[16] The theoretical literature distinguishes between two ways that electoral control might work. Moral hazard models emphasize incentivizing the elected official – getting her to take actions that are best for constituents. The classical papers on this include Robert Barro, "The Control of Politicians: an Economic Model", Public Choice 14 (1973): 19-42. John Ferejohn, "Incumbent Performance and Electoral Control," Pubic Choice 50 (1986): 2-26. These papers both show that if the voter are sufficiently heterogeneous that their interests can be represented by the median voter, some electoral control is possible but that there is a great margin for incumbent shirking due to the information asymmetry, infrequency of elections, and bluntness of the vote instrument. Ferejohn's paper additionally shows that if there is enough heterogeneity that the median voter is not well defined, no electoral control is possible. Further work along this line includes Torsten Persson and Guido Tabellini, Political Economics: Explaining Economic Policy, Cambridge: Cambridge University Press, 2000. Adverse Selection models are based on the idea that the electorate can screen candidates, reelecting only those that are "good" in the sense that they are motivated to pursue public interests (without being rewarded or punished for doing so). A good example is James Fearon, "Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance," In Bernard Manin, Adam Przeworski, and Susan Stokes, eds., Democracy, Accountability, and Representation. Cambridge: Cambridge University Press, 1999. Whether selection models lead to high levels of electoral control depends on whether there are "good" politicians in this sense and how hard it is to tell good from bad candidates (evidently, bad candidates will try to imitate good ones). Moreover, in a heterogeneous electorate there notion of a "good" politician may not be well defined.

to be reelected has incentives to find ways to get electoral approval. But since voters find it impossible to monitor most of what the official does, this incentive will be exercised in doing things the voters can observe. And if voters are, in addition cognitively defective in some way – for example if they are myopic, or have short memories, or are vulnerable to other cognitive limits (as psychologists say that everyone is), candidates will have reason to play to those distorting features as well. The basic message of the two lines of research are that elected officials, including a president, are not very controllable by the electorate and that such control or influence that the electorate has gives any president perverse policy incentives of various kinds. In effect any president has electoral incentives to pander to voter beliefs, to produce superficially attractive outcomes (if she can), and perhaps postponing those choices to the period immediately prior to elections, etc.[17] As long as she does these things she is mostly free to pursue her own preferred policies under the veil of voter ignorance.

It's not a pretty picture. And there is a good deal of empirical evidence in support of these claims. This is not to say that the political science literature is univocal on this matter but the theory and empirical work to date are not very encouraging.[18] Unmediated elections are simply not very promising as ways by which presidents (or any elected official) can be induced

[17] For a model in which politicians "pander" to voters (in the sense of taking actions which are not best but are popular) see Eric Maskin and Jean Tirole, "The Politician and the Judge: Accountability in Government," American Economic Review, 94 (2004): 1034-1054. Or, see Canes-Wrone, Brandice, Michael C. Herron, and Kenneth W. Shotts. 2001. "Leadership and Pandering: A Theory of Executive Policymaking." American Journal of Political Science 45(July):532-550.

[18] There is a lot of evidence indicating that, when voting for a president running for reelection, individual voters take account of prior performance in office. See Fiorina, Morris P. 1981. Retrospective Voting in American National Elections. New Haven: Yale University Press. But the statistical effects reported there and elsewhere are fairly weak and in any case party loyalty, which may conflict with retrospective motives, is always the larger effect. Moreover, there is plenty of evidence that incumbents who want to be reelected shape their policies in ways that they think may enhance their chances. But as the previous note suggests, putting these two tendencies together does not imply real electoral control. Voters have too little information and what information they have is largely irrelevant to incumbent actions for such control.

to pursue publically oriented objectives.[19] It is important to see that the argument that presidents have reason to incorporate deliberative capacities inside their administration does not help alleviate this problem at all. Indeed, it only makes the informational asymmetry between president and voters more severe, permitting even more exploitation of voter ignorance. At least this would be true if presidents were to appoint those loyal to his interests.

For that reason, it is far more promising, it seems to us, to have multiple and overlapping mechanisms of accountability which are built up, essentially, of people and institutions whose interests are different from the president. Because of the enormous informational and strategic advantages of the president relative to voters, it is necessary to have independent means to monitor the activities of presidents and their agents. And these monitors must the means to get information from agencies and from other sources as to the effects of policies, and to have the means and motivation to analyze and publicize what they find and, ideally, to reward or punish presidents who step too far out of line. In other words, checking institutions need to be independent of the president, capable of fine grained monitoring, powerful, and competitive with him to some extent. They need not be opponents (though opponents may be very valuable in enhancing democratic control) but to be useful in providing information to voters or other interests it is important that monitors have distinct interests from the president. These may be private interests or public ones (allegiance to law or the constitution for example.

[19] One line of response to this dismal picture is ***to*** model elections as ways in which voters can select among candidates of different qualities. The results here are not much more encouraging. Low quality candidates will be motivated to imitate higher quality, while high quality candidates will try to signal that they are good by taking actions that are costly to imitate for low quality types. But in plausible models voters will often be unable to tell one kind from another, at least until after a term in office.

Many of these institutions are traditional and familiar. The press and broadcast media generally have ample professional motivation to find and reveal information about government activity whether or not the president or his partisans wants it to be published. And, more recently, the development modern highly decentralized social media gives those skeptical of the incumbents lots of motivation and opportunity to spy and gossip and question official actions. The more traditional powers of legislatures can also force the administration to reveal information that the president may not want to share. Congressional control of revenues and appropriations – based on the notion that the legislature has a special claim over the power of the purse -- provides a relatively fine grained instrument of control, at least when Congress is not led by the president's own copartisans. Even if congressmen do not have exactly the same preferences as their constituents they are likely to be somewhat skeptical of presidential programs. Of course, the most important presidential monitors are probably those who want the job themselves: members of the other party and aspirants for the high office itself.

The point is that various elites inside of government and out are continuously present and able to monitor what the president and the agencies are doing. Besides, the various political elites (congressmen, judges, lobbyists, potential opponents, members of other political parties etc) do not suffer the same degree of information asymmetry that voters do. These elites do have heterogeneous policy preferences – indeed probably more strongly felt ones than the general public – and so a president can try to play off one against the other. We do not argue that plural mechanisms of accountability will by themselves "solve" the agency problem or, more broadly, implement the notion of balance. And we don't argue that these complex mechanisms of accountability may not introduce distortions of their own. We think that such distortions may however tend to be self correcting to some extent since there is ample competition among

monitors. The focus on these mediating monitoring institutions is to highlight the importance for democratic accountability of nurturing the complex system of political monitoring.

6. Discussion

At the end of their book Posner and Vermeule say that it not clear that the "Madisonian" system has actually worked better to advance national interests and protect liberties than the unitary UK constitution where, presumably cabinet directs agencies without parliamentary interference. And, if the government loses majority support in Parliament it must either reorganize or submit itself to the electorate. There is no 'lame duck" period during which presidents can seek to stake out new constitutional grounds from which to rule. And, until recently, there has been little in the way of judicially enforceable protections against constitutional overreaching. Maybe we ought to move to such a system.

This is too complex a question to confront in this essay and, anyway, the comparison implicitly holds things constant between the two nations that cannot be constants. But we accept at least that there is a lot to be said for the British constitution and maybe it is better all things considered. Even so, that doesn't mean that eliminating or reducing the effects of checks and balances would be an improvement within the American system. Leaving aside the caveat about comparisons, second best considerations block that facile inference. Indeed, the screamingly obvious "other" fact that would need to be considered is that in the US, the president does not have to maintain a working majority to keep his office. The British government can be immediately called to electoral account if it insists on pursuing a sufficiently unpopular policy. So there is a sense that in the UK the reliance on political checks is clear and univocal. If you

want to remove checks in the US we think that the notion of fixed presidential terms probably ought to be put on the table as well, so that the president would take the risk of being forced to go to the electorate if he wants to advance a policy that he cannot persuade congress to support.

Moreover, while we agree that as a matter of fact presidents have asserted and had a freer hand in emergencies than at other times, it is important to remember that modern government leaders (presidents or prime ministers) rarely claim to rule on based on either on explicit emergency provisions in their constitutions (such as Article 16 of the Constitution of the Fifth Republic) or implied or constructed emergency powers (as in the US) but usually ask, and receive, explicit legislative support. Such cases are not instances of emergency rule at all but seem to be a special intermediate version of ordinary rule. In such cases legality is not suspended and courts can intervene if (and as long as) they choose and the legislature can, at any time, decide to stop cooperating. This intermediate regime is more flexible – indeed it seems to to vary in the extent of powers permitted to the executive as the "emergency" wanes – and it is not clear that it poses the tragic choice between legality and legitimacy that Carl Schmitt emphasized. We have not really seen the kind of emergency where a president would have to act only on his own authority, building an emergency regime out of constitutional bits and pieces (mostly Article II powers we guess) and running a legitimate if not fully legal government. We hope we never do. But if we were to witness such a moment and live through it, we would be inclined to agree with Justice Jackson's Korematsu dissent when he said that a Court ought to refuse to confer legality on presidential actions, however necessary they may have been to save the republic, taken in such a setting. Jackson insisted that the Court retain the distinction between legality and legitimacy.

We argue that, within the American system, it would be good thing to retain robust legislative and judicial checks to balance the executive. There remains the question of whether such checks are possible. The presidential unilateralists remind us that "should" implies "could": If unilateral presidentialism is inevitable, then there is little point to criticizing it for being undesirable. As we noted above, we agree with the presidential unilateralists that there are institutional forces at work in undermining congressional resistance to executive power. But this does not mean that such forces cannot be resisted. The most important point is that the choice between a Madisonian or Schmittian constitution ought to be made deliberately rather than through the tyranny of small institutionally driven accretions of presidential power.

In particular, we emphasize that an institutional weakness suggests that there may be an institutional fix: There are a few cheap and easy ways in which the congressional slide into passivity might be arrested. But it must be said that these easy ways have long been available an not really used. So we must also explore a few not-so-cheap-and-easy proposals. Acquiring a Schmittian constitution through a fit of absent-minded acquiescence, however, is not somehow dictated by the plural structure of Congress or the generalist character of judges: It is, in large part, the result of deliberate doctrinal choices rather than driven by a misplaced desire to preserve a presidency from non-existent legislative threats.

a. Where there's a congressional will, there's a way: Congress <u>could</u> resist the President if it tries – and sometimes it does.

Before one explores ways to strengthen Congress, it is important to acknowledge Congress' existing strengths. The presidential unilateralists downplay – in our view, excessively – the elaborate system of "fire alarms" and internal delegations that allow Congress to play a

much larger role in policing the "gray holes" of judicial review that the presidential unilateralists rightly note are the hallmark of the modern administrative state. We do not dispute that lawmakers "delegate broadly" to "leave the executive and the judges and themselves ample wiggle room for unforeseen circumstances."[xi] Indeed, this characterization of administrative discretion has been familiar at least since Theodore Lowi inveighed against it thirty-two years ago.[xii]

"Hard look" review pursuant to the APA, however, might alternatively be seen as a procedural mechanism by which Congress delegates to interest groups the task of monitoring agency decisions and setting off fire alarms when the decisions go astray.[xiii] Of course, as the presidential unilateralists note, the "substantive" constraints of review under APA section 706(2)(A) are minimal: courts do not frequently kick decisions back to the agency for exceeding their statutory authority. The publicizing effect of the APA processes, however, might be much more robust: They delay and publicize agency decisions for a sufficiently lengthy period that affected interests can bring the issue to the current Congress' attention so that the relevant congressional committee can bring its pressure to bear. Agencies, knowing that they risk the wrath of a subcommittee chair if they depart too far from the preferences of the median member of Congress, stay within predictable bounds when exercising what looks (from the face of the statute and deferential character of judicial review) like "unfettered" discretion. The result is that the agency is always upheld by courts but always nevertheless constrained by the agency's own desire to stay on the good side of the relevant congressional committee. Where the legislature fears that this system of *ex ante* agency self-constraint will break down because of ideological conflict, then they write much more detailed *ex ante* restrictions into their statutes.[xiv]

Some presidential unilateralists say almost nothing about this familiar system of congressional oversight. Yet this system of effective congressional power might provide a much better explanation for some of the events that they attribute to administrative discretion free from congressional controls. Take, for instance, the Secretary of the Treasury's use of TARP funds to aid auto companies. Posner and Vermeule treat this episode as an example of an executive actor's ignoring statutory constraints through an expansive interpretation of the term "financial institution" contained in Section 101(a)(1) of the ESSA.[xv] After all, Congress had failed to pass a specific bill authorizing aid to automakers only months earlier.[xvi]

Far from being a "Schmittian" moment, however, the executive decision to aid the auto companies with TARP funds looks much more like a "McNollGastian" moment of congressional supremacy. During the debate on the TARP program, two barons of the House of Representatives made it perfectly clear that they wanted TARP monies to be made available to automakers. Representative John Dingell, Democrat of Detroit and long-time chair of the Commerce Committee rose to ask his "good friend" Representative Barney Frank, chair of the Banking Committee, whether TARP money could be used to aid distressed automakers, and Frank replied that TARP monies could and should be so used.[xvii] Secretary Hank Paulson – a former Wall Street leader who was no fan of Keynesian extravagance -- had earlier resisted such a use of TARP funds.[xviii] But he changed his mind in December, under considerable pressure from congressional Democrats, who took a different view of his authority. On the McNollGastian account, this hardly looks like an act of an "unbounded executive's" overweening discretion: It looks, to the contrary, instead, like the executive was cowed by the barons of the House, bucking to their view of what the relevant statute meant.

We emphasize Posner's and Vermeule's apparent misreading of the TARP automaker episode, because it is their only example of *presidentially* controlled executive's bending a statute's limits during an economic emergency. They also highlight Fed Chair Ben Bernanke's decision to aid AIG pursuant to section 13(3) of the Federal Reserve Act. On their account, this aid stretched the statute to the limit, given that the Fed effectively purchased an insurance company using its power to discount the notes of "any individual, partnership, or corporation" in "unusual or exigent circumstances."[xix] Chairman Bernanke's decision, however, is hardly a good illustration of the discretion enjoyed by a Schmittian "unitary executive": As posner and Vermeule concede, the Fed is the consummate independent agency the discretion of which is an indication that "the president can exert control in certain areas," because "the sheer complexity of the government response limits the impact of a single person."[xx] It may be, as Posner and Vermeule assert, that the power of the autonomous bureaucratic expert is also not any part of Madison's theory of checks and balances. In a larger sense, however, one can regard the independence of the bureaucratic expert as an instance of checks and balances that is closer to the spirit of James Madison than Carl Schmitt. In any case, the scorecard from the Posner's and Vermeule's narrative of the 2008 crisis is Congressional Barons: 1; Bureaucratic Expert: 1; Schmittian Executive: 0. This is hardly a track record suggesting that Schmittian unbounded executives rule the roost.

b. Doctrinal remedies to strengthen Congress

Congress, in short, has the institutional capacity to set limits on executive power. The real question is whether they will use it. As we noted above, we agree with the presidential unilateralists that legislators' large numbers and small constituencies greatly diminish the incentives of individual congressmen to take stands on questions of congressional power. Each

will want to protect her own turf and make hay at the expense of the administration from time to time. Moreover as Levinson and Pildes emphasize party loyalty is often a stronger motivation than institutional allegiance; the president's copartisans have little incentive to police his powers. Likewise, we agree that generalist judges will be reluctant to face down an agency responding to a perceived crisis. These fundamental institutional constraints, however, can be countered with institutional responses. Some of the weaknesses of the Congress and courts are not inherent in their structure but imposed by bad legal doctrine. To paraphrase a line from an Elizabethan play about the need to constrain executive power, the fault lies not in our institutional stars but in our doctrinal selves. That doctrine could be reversed without requiring judges to transform themselves into judicial Hercules.

For instance, Congress' incentives for controlling the executive depends critically on each chamber's capacity to transform itself into a hierarchically controlled body where the national benefits from aggressive policing of constitutional and statutory lines can be internalized by the party in control of that chamber. The Speaker and majority leader of the two chambers, after all, are major political figures who stand to benefit from legal victories preserving congressional powers against presidents from the opposite party. Henry Clay's campaign against Andrew Jackson – including the Whig censure of Jackson's alleged violation of statutory authority by withdrawing funds from the Bank of the United States – was fueled by Clay's ambitions for the Presidency and the Whig's partisan self-interest in painting Jackson as "King Andrew the First." Large numbers, therefore, need not prevent Congress from pursuing diffuse goods like a limited Presidency, if party allows individual members to internalize those benefits. But of course Jackson was a Whig and, in the end, his challenge did not stop Jackson from killing the Bank.

Legal doctrine, however, can prevent party leaders in Congress from having a full array of tools by which to fine-tune the interpretation of statutes. For instance, one of us has argued that the Court's decision in *Chadha* critically weakened the Congress in relationship to agencies by reducing its capacity to regulate agency decisions that shift the status quo to a point immune from bicameral revision. *Chadha* was not a product of judicial modesty resulting from judges' self-awareness of their limits as generalists: It was the result of judicial philosophy – an ill-advised foray of judges into the thicket of separation of powers. *Chadha* could be reversed or shrunk.

Other doctrines that give Congress more flexibility to adopt internal rules of procedure facilitating quick action and powerful legislative leadership – for instance, the "enrolled bill" rule – can be construed more broadly. The Court could give more deference to committee reports and the right sort of floor colloquies in statutory interpretation: The judicial turn against legislative history disempowers committee chairs and other key members of Congress, depriving them of a tool by which to fine-tune statutes in accordance with the wishes of the majority party that controls the committees.[xxi] Judicial decisions like *Franklin v. Massachusetts* that exempt the President from transparency-enhancing statutes like the APA or the FOIA or the FACA could be reversed or narrowed. Again, a judge does not need to be Hercules and make difficult factual determinations to allow private parties or members of Congress to enforce these statutes broadly. The decision to carve the Presidency out of the APA's definition of "agency" was driven by an ideology of separation of powers favoring presidential power, not any practical assessment of judicial capacity.

And so forth: there are a myriad of doctrinal choices made by courts construing law or adopting methods of statutory interpretation that are the result of what we argue is a misplaced

judicial effort to bolster presidential power in an effort to be faithful to constitutional design. But we suggest that true fidelity to that design requires honoring the constitution's Madisonian spirit rather than some ostensible letter of Article II.

c. More ambitious institutional remedies to strengthen Congress

We acknowledge that the doctrinal tweaks suggested above would play a modest role in bolstering Congress as a referee of the system of checks designed to produce balance, mostly by making it more difficult for the President unilaterally to shift the status quo without Congressional authorization. But what about Presidential refusal to enforce federal statutes at all? Deliberate presidential non-acquiescence in enforcing statutes, expressed in the form of signing statements rose to an all-time high under the Administration of Bush II.[xxii] Judicial refusal to defer to agency decisions will do nothing to remedy executive *inaction*, for there will be no decision to which to defer.

More generally, one might want some mechanism by which Congress' institutional interests could be defended outside of court. We agree with the presidential unilateralists that somehow Congress, as an institution, has failed to preserve its constitutional powers both against the president and against congressmen and parties. The stream of transactions that led to this state of affairs were all voluntary actions taken by consenting adults. But there is a third party whose interests were affected by these exchanges – the republic itself, "We the People", etc – and who had an interest in blocking or at least regulating them, with the purpose of maintaining a balanced government.

We offer, therefore, some more speculative proposals for ensuring that this public interest in balanced policy-making is at least articulated when such deals are being considered. Consider, for instance, the possibility of Congress' creating a Constitutional Assessment Office

("CAO") akin to the CBO or the GAO (both more or less either nonpartisan or bipartisan) whose role it would be to represent the congressional interest in both legal and political fora. The office could be staffed by retired federal judges or others with eminence sufficient to insure that the Office's voice would be taken serious by the public. Being legislative officers appointed by the leadership of Congress, the CAO would have no authority to define private rights or relationships or otherwise exercise executive functions. Instead, its function would simply be to issue "constitutional impact statements" assessing claims of presidential authority in signing statements, veto messages, OLC opinions, or other executive declarations upon the petition of interested parties. Being a unified body with a duty to issue opinions, the CAO would not be suffer from the tendency to duck constitutional challenges to congressional authority that afflicts individual members of Congress. Being a non-judicial body, the CAO would not be limited by principles of ripeness, mootness, standing, or justiciability that allow federal courts to avoid ruling on presidential claims of authority. The CAO's sole duty would be to articulate and defend Congress's institutional interests in the Madisonian scheme.

If one sought to make the CAO a more "high-powered" agency for forcing congressional action, then one might give the CAO the power automatically to places issues on the agenda of each House by amending the Houses' rules. In any case where the CAO deemed that either presidential action or inaction constituted an unconstitutional encroachment on the Congress' legislative prerogative, the CAO's opinion could automatically become a privileged matter to be debated on the floor in the form of a resolution. Any member could raise a point of order, under this proposal, to object to further debate on any other scheduled matter until the Congress took a vote on the CAO's report. In effect, such a rules change would transform the CAO into a

congressional committee the reports of which (like Rules Committee resolutions) enjoy automatic privilege.

The CAO's powers might be further enhanced by guaranteeing a privilege to any officer or employee in the executive branch to report alleged illegality by executive actors, either in the non-enforcement of statutes or the performance of actions forbidden by law. The CAO could either issue an opinion on such allegations or simply publicize them without comment. In cases where the allegations involved classified information, the Congress would have to empower executive officers to report classified information to the CAO free from sanction and also provide adequate training and security to manage leaks from the CAO itself.

We acknowledge that the influence of the CAO's opinions is wholly speculative, depending on the prestige of the office which, in turn, might depend on the degree to which it could be designed as a wholly non-partisan legislative agency. We further concede that similar efforts to bolster Congress' constitutional "voice" have been attempted in the past—notably, the Office of the Senate Counsel – without much effect. Our own sketchy proposal is intended to strengthen these devices by freeing the defense of Congress' institutional interests from the shackles of party loyalties that might otherwise hamper the articulation of that interest whenever the same party simultaneously occupies Capitol Hill and the White House. The prospects for such a non-partisan office are not hopeless: The Office of the Parliamentarians in House and Senate are famously non-partisan even though the Parliamentarians serve at the pleasure of the House leadership.[xxiii] The question of whether the CAO could achieve similar detachment form party interests might depend on careful grandfathering to insure that the CAO did not rule on any pending controversies of interest to the current congressional leadership.

The executive and federal courts, being fundamentally hierarchical organizations, have no need of such a kluge. They have proved more than able to defend their institutional turf without outside help. But Congress, if it has proved nothing else in two centuries, has proved to be (in Ken Sheplse's words) a "they" rather than "it" when it comes to constitutional issues

9. Conclusion

[i] John Ferejohn, "Madisonian Separation of Powers," Chapter 6 in *The Theory and Practice of Republican Government*, Sam Kernell (ed.), Stanford University Press, 2003. Madison's recognition that he had underestimated the powers of the president are hard to date – but certainly by the time of the Jay treaty, he recognized deficiencies in his earlier understanding and began looking around for ways to ameliorate them, sometimes by proposing new glosses on the text and sometimes by proposing more profound adjustments in the political underpinning of the American federal experiment.

[ii] Mayhew argued that these incentives are so strong and omnipresent as to distract members of congress from taking very seriously their role in lawmaking. He argued that this led Congress to develop internal institutions that would create internal incentives for lawmaking that might partly the electoral temptations. Fiorina's focus is more on the distortions in legislation that arise from the imbalance of incentives.

[iii] There is much dispute about what these problems are exactly though few doubt their severity. Krehbiel for example argues that the median congressperson can control committee preferences to assure manage the agency issue. Epstein and O'Halloran's theory concurs in large part. But Cox and McCubbins argue that the median member of the majority party is a better candidate for the principal and that she would try to manipulate committee compositions to solve "her" agency problem. But in no case is the agency problem eliminated. A slightly dissenting vote might be found in Weingast and Marshall's notion of the industrial organization of congress which could be read to say that congressional institutions are arranged to minimize agency problems…but they do not address how far that minimization may go. And in any case none of these authors takes seriously the issue of multiple principals by effectively modeling the issue in a single policy dimension.

[iv] The Roman experience did not warn against the threats coming from constitutional executives but from those "private" individuals or military leaders (Pompey, Caesar, Crassus) who commanded popular identification, or money, and inspired fierce loyalty. Such figures could relatively easily control the elected magistrates either by seeing to their election or bribing or threatening them. Elective office was usually for just a year and collegial so it would not have generated many resources for political struggle. More valuable was the control of a province – but that came after the mandate was finished.

[v] We should point out the Terry Moe has another line of research that emphasizes how agencies are often designed to fail. The president and or congressional actors in seeking advantage might concede to the agency authority to do something but at the price of special procedures permitting congressional or judicial interference. While he gives it a very itnterpretation, he seems to be considering phenomena that McNollGast write about where, as part of delegating authority to an agency, the interests that the congressional majority favors in a delegation are given a procedural seat at the table (with sharp knives and pointy forks).

[vi] In the case where courts or agency can adjust the status quo completely and where there information is complete see John Ferejohn and Charles Shipan, "Congressional Influence on the Bureaucracy," **Journal of Law, Economics and Organization**, vol 6(1990). An application of the model is found in William N. Eskridge, Jr. & John Ferejohn, "Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State" 8 *Journal of Law, Economics & Organization* 165 (1992) With incomplete information and weaker powers to adjust, the ratchet would be less complete but would still exist.

[vii] This is a bit of an overstatement to be sure. We will qualify it later. The point is that Congress itself is unable or unwilling to resist presidential assertions. This is not to say the same thing about individual congressmen or parties.

[viii] The logic is the same for courts interpreting statutes and, in that case, it can be said illustrate a tension between what legality requires in a particular case and maintaining judicial powers in an area.

[ix] For instance, PV "speculate that this trend [away from Madisonian checks and balances]" is due, in part, "to a general sense among the political elites that the erosion of separation of powers has not been a bad thing." (120)

[x] PV at 114.

[xi] PV at 110.

[xii] Theodore Lowi, *The End of Liberalism* (1979).

[xiii] McNollGast, *Administrative Controls as Instruments of Political Control*, 3 JLEO 243 (1987).

[xiv] John D. Huber & Charles R. Shipan, Deliberate Discretion: The Institutional Foundations of Bureaucratic Autonomy (2002).

[xv] "The Secretary is authorized to establish the Troubled Asset Relief Program (or ''TARP'') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary."
[xvi] Auto Industry Financing and Restructuring Act, H.R. 7321, 110th Cong. § 10 (2008).
[xvii] Dingell: "[T]he automobile manufacturers face the most difficult conditions they've faced in decades. We need to do something to help unfreeze the credit markets that are hurting our industry. As I read the legislation, the Secretary has the authority to purchase from a motor vehicle finance company traditional car loans and mortgage-related paper, such as a home equity loan used to purchase cars or trucks. Is my interpretation correct?
Frank: I thank the gentleman, who comes to us with great authority here because of having chaired the committee for years and had some of this jurisdiction, and having been right when other people were resistant, he speaks with a great deal of credibility. And the answer to his question is, yes, it does require that there be consultation with the Chairman of the Federal Reserve, but the Treasury Secretary is empowered to do exactly that.
154 CONG. REC. H10374 (daily ed. Sept. 29, 2008) .
[xviii] See Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and of Government Lending and Infrastructure Facilities, before the H. Comm. on Fin. Servs., 110th Cong. (2008) (statement of Sec. Paulson)(" The TARP was aimed at the financial system … I believe that the auto companies fall outside of that purpose").
[xix] 12 USC 343. As added by act of July 21, 1932 (47 Stat. 715); and amended by acts of Aug. 23, 1935 (49 Stat. 714) and Dec. 19, 1991 (105 Stat. 2386): In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System, by the affirmative vote of not less than five members, may authorize any Federal reserve bank, during such periods as the said board may determine, at rates established in accordance with the provisions of section 14, subdivision (d), of this Act, to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal Reserve bank."
[xx] PV at 59.
[xxi] This assertion, of course, assumes that the majority party, not the median member, controls committees and floor colloquies. This contention is the topic of a lively debate among political scientists that we will not attempt to summarize here.
[xxii] *See* Christopher S. Kelley & Bryan W. Marshall, *Going it Alone: The Politics of Signing Statements from Reagan to Bush II*, 91 Soc. Sci. Q. 168 (2010).
[xxiii] David King,*Turf Wars: How Congressional Committees Claim Jurisdiction* at pp 28-29.