

## RECONSIDERING THE MODERN HANOVERIAN KING

SANFORD LEVINSON\*

Perspectives on executive power might not break down along the usually predictable liberal-conservative lines. With regard to the recent tendency for the executive branch to rely increasingly on presidential “super-assistants,” often referred to by the press as “czars” of their particular subject-area domain, I tend to share with Bruce Ackerman the view that this is a very unfortunate development.<sup>1</sup> It would be far better if these “czars” were subject to Senate confirmation and, perhaps even more importantly, congressional oversight in the form of having to testify before Congress. “Czars” are currently exempt from congressional oversight as presidential “assistants.” The reason for having more czars, however, is a failure of comity in the Senate, which, in turn, has led to a failure to give timely hearings and vote nominees up or down.<sup>2</sup>

There are many other examples of divisions within ordinary political ranks concerning executive authority. I disagree, for example, with the robust reading of the war power offered by former Yale Law School Dean Harold Koh with regard to the skirmish in Libya,<sup>3</sup> and I disagree even more strongly with a number

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\* W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. This essay was adapted from panel remarks given at the 2012 Federalist Society Annual Student Symposium held March 3, 2012, at Stanford Law School in Palo Alto, California. I am extremely grateful to have been given the opportunity to participate and to the editors for making these remarks appear more flowing and coherent than I suspect they were at the time.

1. Bruce Ackerman, Op-Ed., *Restoring the Cabinet's Role*, WASH. POST, Mar. 11, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/10/AR2009031002839.html>.

2. See, e.g., Binyamin Appelbaum, *Nominees at Standstill as G.O.P. Flexes Its Muscle*, N.Y. TIMES, June 19, 2011, <http://www.nytimes.com/2011/06/20/us/politics/20nominate.html>.

3. See, e.g., *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 11 (2011) (prepared statement of Harold Hongju Koh, Legal Adviser, U.S. Department of State).

of things that Professor John Yoo has written about the scope of presidential power in the realm of foreign and military policy.

In thinking about executive power, one of the themes running throughout the discussion is the need to reform certain aspects of how we organize our officialdom. Again, one might emphasize that there appears to be a certain bipartisan dissatisfaction with many aspects of contemporary governance, even if there is also vigorous disagreement as to the direction of specific reforms. I want to place my remarks within the context of our discussions of line-item vetoes and Congress's relationship to agencies, though somewhat obliquely. Rather than weighing in on the specific merits of proposed changes (or retaining the status quo), I want instead to focus on different sensibilities toward considering potential reforms.

One of the things I found fascinating about the presentation by Professor Michael McConnell<sup>4</sup> was its degree of radicalism, no doubt a surprising comment to those who do not usually think of him in such terms. Nevertheless, there are two senses in which it might be not only provocative, but even helpful, to address his potential radicalism. With regard to his central topic, the organization of the modern administrative state and the relative powers of Congress and executive agencies, one might see him as echoing one of the basic issues addressed in the great debate in the 1960s in China.<sup>5</sup> That debate pitted against each other the comparative powers of ideologically committed Communists—who (in their self-definition) were concerned with, and responsible to, the general good of the Chinese people—against experts, whose authority was based on specialized knowledge, whether or not such knowledge was, as one might say, “politically correct.” Obviously, one need not turn to China to find such debates. Similar debates—far less disruptive, fortunately, than those in China—occurred in this country about the relative autonomy of administrative agencies and the basis of their au-

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4. Michael W. McConnell, Professor, Stanford Law Sch., Remarks at the Thirty-First Annual Federalist Society National Student Symposium (Mar. 3, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).

5. See BRUCE J. DICKSON, *RED CAPITALISTS IN CHINA: THE PARTY, PRIVATE ENTREPRENEURS, AND PROSPECTS FOR POLITICAL CHANGE* 30–33 (2003).

thority.<sup>6</sup> The Administrative Procedure Act, the focus of Prof. McConnell's remarks, was the outcome.

The basic debate, both then and now, is this: How (and, of course, by whom) should rules be made? What is the relative trade-off between looking to experts versus looking either at the demos or, at the very least, a particular portion of the demos that claims authority to rule because of its deep connection with the people? In this debate, politics is seen by and large as the choice of first-order values rather than a means by which one might most efficiently and rationally achieve already-agreed-upon ends by choosing among various available means. Expert knowledge certainly seems relevant to the latter that might not be (so much) the case when it is the choice of ends themselves that is at issue. A common refrain is that experts should be kept "on tap rather than on top."

Professor McConnell issued a valuable call for basic reform of congressional organization, with which I strongly agree, by focusing on the filibuster rules and other aspects of congressional organization. As already noted, he also suggested that it is time to take a careful look at the Administrative Procedure Act, and to ask if an act drafted in the mid-1940s<sup>7</sup> still serves us well sixty years later. I am not a professor of administrative law; I have no informed opinions on the adequacy of the Administrative Procedure Act. What I thoroughly applaud, however, is Professor McConnell's injunction that we actually look with a critical eye at whether it truly matches the needs of our present polity.

I would go further than Professor McConnell. In recent years, I have applied the same spirit of critical scrutiny that he admirably displays toward the Administrative Procedure Act to the Constitution of the United States itself.<sup>8</sup> Let me put my point in the most dramatic way possible: I will stipulate, for sake of argument, something I do not in fact really believe, which is that Professor Yoo gets it exactly right when he claims the 1787 Constitution was

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6. See, e.g., Jack M. Balkin & Sanford Levinson, *Morton Horwitz Wrestles with the Rule of Law*, in *TRANSFORMATIONS IN AMERICAN HISTORY: LAW, IDEOLOGY, POLITICS, AND METHOD*, 483–99 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010) (discussing debate among James Landis, Louis Jaffe, and Roscoe Pound about the legitimacy of the administrative state).

7. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

8. See generally SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

designed to create a president with powers of Hanoverian kings.<sup>9</sup> I will even stipulate that such a conception of the presidency made sense in 1787, whatever my actual doubts in that regard. I do not, however, think that is the most important question. Instead, we should be asking if we would adopt such a conception today if we were designing the Constitution anew.

Consider, for example, one of the most fundamental realities about *any* monarch, including the Hanoverian variety: they can be dolts. There was no reason for the American Revolution other than that George III was one of the most inept kings of all time with regard to responding to the grievances of the colonists. If he had been more politically astute, if he had accepted Edmund Burke's advice, for example,<sup>10</sup> there is every reason to think that we would have ended up like Canada rather than in a very bloody and destructive war that got us our independence. I am not saying that I am unhappy we are independent. The central point is simply that among the things wrong with monarchs is the simple truth that they are not selected for their sagacity.

We get to select our presidents in a way that even today the British do not get to select their monarch. But we should still ask ourselves if we end up with presidents who possess the sagacity we might genuinely wish for. Whatever the definition of executive power, we should ask this question: Is the modern president likely to be somebody to whom we are truly comfortable deferring as much as we do, across the spectrum of commander-in-chief, chief economist, chief public health officer of the country, and chief disaster specialist? Frankly, it seems that in the twenty-first century, the answer is no. Presidents of the United States are too often fairly extreme examples, if not of "reds" (or, in this country, "blues"), then, most certainly, of, at best, gifted amateurs without genuine expertise as to the issues they must confront.

With regard to the commander-in-chief power, it is no coincidence that the last president in whom I have retrospective confidence to be commander-in-chief was Dwight Eisenhower. Eisenhower actually was the *de facto* commander-in-chief of

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9. Cf. John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1967–68 (2009).

10. See Edmund Burke, *On American Taxation*, Address Before the British House of Commons (Apr. 19, 1774) (advocating the full repeal of the Townshend Revenue Act of 1767), available at [http://www.gutenberg.org/files/15198/15198-h/15198-h.htm#AMERICAN\\_TAXATION](http://www.gutenberg.org/files/15198/15198-h/15198-h.htm#AMERICAN_TAXATION).

the greatest military victory in history. Ironically, this meant that he had the capacity to stand up to the military after he became president himself, because he knew something about the military.<sup>11</sup> It was he, of course, who notably (and correctly) warned us about the growing strength of what he termed the “military-industrial complex” and its ability to distort the basics of American culture and politics.<sup>12</sup> I may be a partisan Democrat, but I have come to the (reluctant) conclusion that the country was probably better off with Eisenhower as president than it would have been with Adlai Stevenson, whatever my preference for many of Stevenson’s domestic policies.

Since Eisenhower, we have had a string of amateur presidents, almost all of whom evoke strong feelings of like or dislike. I am no fan of George W. Bush; I was horrified by some of the things that Professor Yoo wrote defending Bush’s exercise of presidential power. I assume that many in the Federalist Society were no fans of Bill Clinton, and are no fans of Barack Obama now, in terms of their capacities to be commanders-in-chief. I think all of us are right in a sense: It is highly unlikely that we would select these particular men to make the most fundamental decisions of peace and war, life and death.

In contrast, consider the alternative: rule by experts. The financial crisis is a good example of such a contrast to the phenomenon of amateur presidents. One of the most interesting books about the financial crisis was written by David Wessel, a reporter for the *Wall Street Journal*.<sup>13</sup> One of the points he made was that the head of the Federal Reserve, Ben Bernanke, and the Secretary of the Treasury (and former head of Goldman Sachs), Hank Paulson, made key decisions, whether popular or not, to address the economic crisis. We can stipulate that they know something about the economy. George W. Bush is basically nowhere to be seen in this book, and nobody in the reviews has suggested either that the author got it wrong descriptively or that the country would have been better off if Bush had taken an

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11. See generally DAVID A. NICHOLS, *EISENHOWER 1956: THE PRESIDENT’S YEAR OF CRISIS—SUEZ AND THE BRINK OF WAR* (2011).

12. For an excellent discussion of this distortion, see Aaron B. O’Connell, *The Permanent Militarization of America*, N.Y. TIMES, Nov. 4, 2012, <http://www.nytimes.com/2012/11/05/opinion/the-permanent-militarization-of-america.html?pagewanted=all>.

13. DAVID WESSEL, *IN FED WE TRUST: BEN BERNANKE’S WAR ON THE GREAT PANIC 10–15* (2009).

active part in the decisionmaking. Frankly, it is more reassuring to me that Bernanke or other administrative officials are in charge of making critical decisions about economic policy rather than either President Bush or President Obama.<sup>14</sup>

When we open up the question about the adequacy of our 1787 Constitution for our decidedly twenty-first century reality, a host of additional questions present themselves. Might we, for example, question the desirability of what is often called the “unitary executive,” which is another way of describing perhaps inordinate confidence placed in the ability of a single individual—the President—to make ultimate decisions across a host of domains in which he or she has no genuine expertise? Even within the United States, the conception of a unitary executive is fairly unique to the federal government. For instance, almost all states—there are only two exceptions—reject the unitary executive. They have, in Harvard Law School Professor Jacob Gersen’s valuable term, “unbundled” their executive branches.<sup>15</sup> It is certainly not clear they are worse for the unbundling.

Nor is it clear that we are served well by the rigid notion of separation of powers that generated the “Incompatibility Clause” barring members of Congress from simultaneously serving in presidential cabinets.<sup>16</sup> Back in 1987, during the Bicentennial of the 1787 Constitution, Lloyd Cutler’s article *To Form A Government* suggested that achieving a modern, more workable, national government entailed changing some of our basic presuppositions.<sup>17</sup> One need not replace presidentialism with a parliamentary form of government in order to believe that repeal of the Incompatibility Clause would serve the nation. We might be well served if members of Congress could simultaneously serve in a president’s cabinet.

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14. Of course, it remains crucial *which* experts a president chooses to rely on, and nothing in the text should be taken to suggest that experts will necessarily agree with one another. It is precisely this fact of dissensus that makes “rule by experts” most problematic as a political norm. For an excellent—and thoroughly dispiriting—account of Barack Obama’s significant failures with regard to his own choices of experts to listen to, see RON SUSKIND, *CONFIDENCE MEN: WALL STREET, WASHINGTON, AND THE EDUCATION OF A PRESIDENT* (2011).

15. See generally Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010).

16. See Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 231–36 (2007) (explaining the constitutional origins of the incompatibility clause).

17. See generally Lloyd Cutler, *To Form a Government*, 59 FOREIGN AFF. 126, Fall 1980.

Alternatively, we might muse on the implications of the fact that the Supreme Court has interpreted the Constitution as precluding the line-item veto,<sup>18</sup> even though most states have granted their governors such a power. I have very mixed feelings about veto systems at both the national and state levels. I believe that most scholars ignore the counter-majoritarian difficulties posed by the existence of executive powers like the presidential veto. One of the unfortunate features of our political system is the extent to which the presidential veto has turned us into a tricameral, rather than a bicameral, system. In part this is because even though it is not impossible to override a presidential veto, ninety-five percent of all vetoes are upheld.<sup>19</sup> One might have different sorts of results if there were a fifty-five percent requirement, or even, as Adrian Vermuele has spoken about, the requirement switched from a supermajority of the whole membership of each house to a supermajority of a quorum in each house.<sup>20</sup> We should recognize, however, that the presidential veto—and the ability even to use the threat of veto to mold legislation—has far more implications for our national politics than does judicial review of federal statutes, which remains far too much an obsessive focus of the legal academy.

The modern presidency, of course, is far more than the sum of its formal, constitutionally-granted, powers. Consider the fact that, although Jefferson was certainly happy to try to lead Congress from the White House,<sup>21</sup> he also did not like speaking in public.<sup>22</sup> His “state of the Union” messages to Congress, therefore, were all written, as was the custom for the next century. Today, however, we have a “rhetorical presidency,” in the words of Jeffrey Tulis. The concept of a “rhetorical presidency” arose with Woodrow Wilson, who began travelling to Capitol Hill to deliver addresses and contributed to making the President into much

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18. *Clinton v. City of New York*, 524 U.S. 417, 418–20 (1998).

19. The figure is closer to ninety-three percent for regular vetoes; the figure becomes higher when pocket vetoes, which cannot be overridden, are included. See Bruff, *supra* note 16, at 242–43; Senator Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 329 (1998); Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956, 967 (2012).

20. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 409–10 (2004).

21. MICHAEL FOLEY & JOHN E. OWENS, CONGRESS AND THE PRESIDENCY: INSTITUTIONAL POLITICS IN A SEPARATED SYSTEM 193 (1996).

22. JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 44 (1996).

more of a cult figure.<sup>23</sup> And we continue to expect presidents to be highly partisan leaders of their political parties, reflected, among other ways, in their vetoes and appointments.

I would be far more inclined to trust a president who fit the Madisonian or Hamiltonian notion—perhaps we simply should say “fantasy”—of the virtuous person interested in the public good, than a president who is always looking at the next election and the necessity of pandering to Ohio or some other “battle-ground state” that must be carried in the bid for re-election. Ironically or not, one of the best defenses of the Twenty-Second Amendment—which limits the president to two terms—is that a second-term president is not only a lame duck, but also takes on more of a monarchical bearing, inasmuch as the mechanism of electoral accountability is basically eliminated. In any event, we must rethink how one integrates the reality of a modern party system into an eighteenth-century constitution that was drafted under what we, in retrospect, can regard as the almost lunatic assumption that there would not be a party system and that it would not end up responding to politics.<sup>24</sup>

Let me end by citing James Madison and my favorite passage in all of the Federalist Papers, the conclusion of *Federalist* Number Fourteen. In it, Madison emphasizes that the American people should learn the “lessons of experience,” and he praises the revolutionaries for not being bound up by what he calls “names”—including, in our own time, reliance on such “names” as Madison or Hamilton themselves—or tradition and instead forging “the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.”<sup>25</sup> I do not spend much, if any, of my time Founder-bashing; I think they did the best they could for 1787. The people I want to bash are us today, who have not learned that all-important lesson from the generation of the Founders, which is to look at the lessons of experience and do what Madison and his associates did in 1787: gather in our own conventions—Thomas Jefferson, of course, thought that it would be desirable to have conventions, and even new constitutions, every nineteen years—and actually scrutinize the extent to which the Constitu-

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23. See generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987).

24. DAVID M. KENNEDY ET AL., *THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* 206 (2010).

25. *THE FEDERALIST* No. 14, at 104–05 (James Madison) (Clinton Rossiter ed., 1961).

tion is working well.<sup>26</sup> We would see, alas, that it is not. If we can imagine, as we should, returning to, and scrutinizing, a landmark statute like the Administrative Procedure Act, we ought to be able as well to envision the even more necessary scrutiny of the Constitution. It is not the Constitution, but our own failures of imagination and nerve, that stop with the Administrative Procedure Act.

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26. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in *THE ESSENTIAL JEFFERSON* 176, 179 (Jean M. Yarbrough ed., 2006); Letter from Thomas Jefferson to Samuel Kercheval, Reform of the Virginia Constitution (July 12, 1816), available at <http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=244&division=div1>.