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## Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action

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# ACTUALLY WE SHOULD WAIT: EVALUATING THE OBAMA ADMINISTRATION'S COMMITMENT TO UNILATERAL EXECUTIVE-BRANCH ACTION

William P. Marshall\*

## INTRODUCTION

In 2008, then-Senator Obama ran for President on a platform that called for, in part, an end to the expansive assertions of executive power that had been advocated by the Bush administration.<sup>1</sup> Six years later, things have changed. Faced with one of the most obstructionist Congresses in American history,<sup>2</sup> President Obama tested the limits of presidential power in a range of circumstances. He used his enforcement powers to implement stalled immigration reform;<sup>3</sup> he used recess

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<sup>1</sup> Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 781 (2013); Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST. J. (Mar. 23, 2012, 12:31 AM), <http://on.wsj.com/H0KB6p>.

<sup>2</sup> See ROBERT DRAPER, DO NOT ASK WHAT GOOD WE DO: INSIDE THE U.S. HOUSE OF REPRESENTATIVES xv–xix (2012) (quoting Republican Representative Kevin McCarthy as saying, “We’ve gotta challenge [Democrats] on every single bill,” and noting that top House Republicans met the night of President Obama’s inauguration to devise a plan to “mortally wound” President Obama through “united and unyielding opposition”); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 273–75 (2011) (describing the current dysfunctional state of American politics). For a contrary view contending that the federal government is not suffering a crisis of dysfunction, see Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 CALIF. L. REV. 373 (2011).

<sup>3</sup> See generally Policy Memorandum from U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec., on Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility Under Immigration and Nationality Act § 212(a)(6)(A)(i) (Nov. 15, 2013), available at [http://www.uscis.gov/sites/default/files/US CIS/Laws/Memoranda/2013/2013-1115\\_Parole\\_in\\_Place\\_Memo\\_.pdf](http://www.uscis.gov/sites/default/files/US%20CIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf). The order directed that the removal provisions of the Immigration and Nationality Act not be enforced against persons who had been illegally brought into the United States as children. *Id.* at 6 (“An alien who entered without inspection will therefore remain ineligible for adjustment, even after a grant of parole, *unless he or she is an immediate relative . . .*” (emphasis added)). This Article will refer to the President’s action as the “Dreamers Initiative.”

appointments to circumvent congressional attempts to block his nominees;<sup>4</sup> and his administration used its litigation authority to refuse to defend DOMA, although the unconstitutionality of that statute was far from clear.<sup>5</sup>

To be sure, the administration's record is not completely one-sided. President Obama did not raise the debt ceiling unilaterally, although some argued that he had the power to do so.<sup>6</sup> And he chose to seek authorization from Congress to engage in military intervention in Syria although there was precedent suggesting he did not have to.<sup>7</sup> But, by and large, President Obama has employed executive power aggressively when he believed circumstances required.

Some have defended President Obama's expansive use of presidential power in these circumstances as justified precisely because Congress has become so obstreperous. According to this view, the President does, and should have, the

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<sup>4</sup> See Melanie Trottman, *Obama Makes Recess Appointments to NLRB*, WALL ST. J. (Jan. 4, 2012, 9:16 PM), <http://online.wsj.com/news/articles/SB10001424052970203513604577141411919152318#>. The controversy in this appointment stemmed in part from the fact that it took place intrasession during a period when the Senate was convening pro forma every three days. See generally Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (Jan. 6, 2012). In a formal opinion, the Justice Department opined that the use of the recess appointment power was permissible in this circumstance. *Id.* at 1 ("The convening of periodic pro forma sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause. In this context, the President therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments."). The issue is currently before the U.S. Supreme Court. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom. NLRB v. Noel Canning*, 133 S. Ct. 2861 (2013).

<sup>5</sup> In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the majority (five Justices) struck down DOMA as unconstitutional. *Id.* at 2696. Three dissenters agreed that there was no jurisdiction for the Court to hear the case. See *id.* at 2699 (Roberts, C. J., dissenting); *id.* at 2697–98 (Scalia, J., dissenting, joined by Thomas, J.). Justices Scalia and Thomas also opined that DOMA was constitutional. *Id.* at 2705. While Justice Alito agreed with Justices Scalia and Thomas on the merits, he disagreed as to standing and believed that the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) could properly defend DOMA. See *id.* at 2711–20 (Alito, J., dissenting). The duty of the President to defend allegedly unconstitutional laws is discussed in Aziz Huq, *Enforcing (But Not Defending) "Unconstitutional" Laws*, 98 VA. L. REV. 1001 (2012); Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 27 (2000); Saikrishna Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

<sup>6</sup> See Neil Buchanan & Michael Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1176–78 (2012).

<sup>7</sup> See Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES (Sept. 8, 2013), <http://nyti.ms/16dHV5p>.

power to aggressively use executive power when Congress does not act responsibly or appropriately.<sup>8</sup>

This Article contests that position. It agrees with the premise that increased polarization in American politics has made the work of the executive branch more difficult and that this Congress in particular has failed to act responsibly. It also agrees that presidents may no longer be able to expect that members of Congress will abandon their partisan interests in favor of the common good.<sup>9</sup> It does not agree, however, that separation-of-powers constraints on the presidency should be adjusted to reflect this new political dynamic.

Presidential power has already expanded dramatically since the middle part of the twentieth century, and it is increasingly difficult to contest the proposition advanced by Martin Flaherty and others that the executive branch has become the most dangerous branch.<sup>10</sup> In light of this reality, investing the presidency with even more powers is problematic no matter what the circumstances.

Part I of this Article provides the necessary background by briefly describing the partisan political gridlock faced by President Obama and identifying some of the unilateral uses of presidential power employed by the Obama administration in its efforts to overcome or circumvent its political opponent's obduracy. Part II places the Obama administration's actions in context by discussing why presidential power had already become so expansive and why it continues to expand. Part III discusses the paradoxical role that congressional obstruction plays

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<sup>8</sup> See David Pozen, *Self-Help and the Separation of Power*, 124 YALE L.J. (forthcoming Oct. 2014); Letter from Professor Hiroshi Motomura et al., to President Barack Obama, Regarding Executive Authority to Grant Administrative Relief for DREAM Act Beneficiaries (May 28, 2012), available at [www.nilc.org/document.html?id=754](http://www.nilc.org/document.html?id=754) (arguing that the President is empowered to selectively enforce immigration laws); Susan Rosen Wartell, *The Power of the President: Recommendations to Advance Progressive Change*, CTR. FOR AM. PROGRESS (Nov. 16, 2010), <http://www.americanprogress.org/issues/opengovernment/report/2010/11/16/8658/the-power-of-the-president/> (contending that the President has the power in a wide range of areas to take actions when Congress will not act).

<sup>9</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2318 (2006) (noting the transformation from a democracy of civic virtue in the late eighteenth century to the Jacksonian democracy of the 1820s, which involved more particularistic and partisanship interests).

<sup>10</sup> See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 6 (2010) (“[T]he presidency represents the graver threat: while Schlesinger was prophetic in sounding the alarm, it has become a far more dangerous institution during the forty years since he wrote *The Imperial Presidency*—and these threatening trends promise to accelerate over the decades ahead.”); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (“Now, it is the President whose power has expanded and who therefore needs to be checked.”); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008) (arguing it is critical that both parties assure presidential power is at least checked, if not reversed); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1727 (1996) (“Never has the executive branch been more powerful . . .”).

in relation to presidential power. As this Part notes, although congressional action can stultify a President's agenda, it may paradoxically serve as a catalyst for the expansion of presidential power. Part IV identifies some of the concerns related to the centering of power in the presidency and questions whether, for whatever reasons, including congressional obstruction, presidential power should be expanded in a manner that accentuates those concerns. Weighing the concerns of government breakdown and harm to the national interest on one side versus aggrandized presidential power on the other, it contends that the constitutional answer to this question, with very minimal exception, should be no.

Two caveats before proceeding. First, this Article will focus on the President's power over domestic policy—the subject of President Obama's "We Can't Wait" initiatives. The presidency historically has been construed as having even more authority over foreign policy than domestic matters;<sup>11</sup> and the President's power to act unilaterally in the international arena also brings to the fore different considerations than his actions back home. Second, the Article will center on the question of whether presidential power should be further expanded and does not address the issue of whether the settled accessions to the President's power that have accrued over the last two and one-quarter centuries should be reneged. Taking back existing powers raises its own set of concerns. To begin with, it may be unrealistic to argue that presidents should no longer use tools or powers that have become commonplace. Further, the position that presidents should no longer have powers that the executive branch has long exercised is also in tension with the fact that, for better or worse, reliance on measures taken by previous administrations has historically been treated as precedential authority in adjudging the constitutionality of presidential action.<sup>12</sup>

## I. BACKGROUND

In his 2013 State of the Union Address, President Obama announced, "America does not stand still—and neither will I."<sup>13</sup> In so stating, the President signaled that he was committed to relying on unilateral exercises of his power when he was unable to work his agenda through Congress. President Obama's State of the Union speech, however, did not set forth a new strategy. The President had earlier announced a "We Can't Wait" strategy to exactly the same effect:<sup>14</sup> the

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<sup>11</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321–29 (1936). To be sure, the line between foreign policy and domestic affairs is becoming increasingly blurred—particularly in the context of surveillance policy and other matters related to the war on terror.

<sup>12</sup> See *infra* notes 45–48 and accompanying text.

<sup>13</sup> President Barack Obama, State of the Union Address (Jan. 28 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-uni-on-address>.

<sup>14</sup> See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1 (describing "We Can't Wait" as a comprehensive strategy, devised and labeled by the President himself in the fall of 2011, "to more aggressively use

administration would do what it could to circumvent the gridlock in Congress and accomplish several domestic policy initiatives through the unilateral exercise of executive power.<sup>15</sup>

The administration's choice to pursue this strategy was understandable. Beginning virtually the moment President Obama assumed office, congressional Republicans made clear that they would block the key parts of the President's agenda when at all possible.<sup>16</sup> Further, lest they might waver in this course, those same Republicans quickly learned that if they even appeared to be accommodating to the Obama administration, they would face considerable political resistance back home from an increasingly uncompromising conservative base.<sup>17</sup>

The Republicans' tactics led to anticipated results. Many of the President's nominees were not confirmed, and much of the President's agenda was stalled.<sup>18</sup> The tactics also led to the federal government devolving into a state of chronic dysfunction as the Senate minority's use of the filibuster, along with Republican control of the House after the 2010 elections, meant that the President could get almost nothing through Congress.<sup>19</sup> The government shutdown in the fall of 2013 was just one of the many examples of this dysfunction.<sup>20</sup>

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executive power to govern in the face of Congressional obstructionism"); *Remarks by the President on the Economy and Housing*, WHITEHOUSE.GOV (Oct. 24, 2011, 2:15 PM), <http://www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing> (President Obama remarking "[w]ithout a doubt, the most urgent challenge that we face right now is getting our economy to grow faster and to create more jobs. . . . [W]e can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will.").

<sup>15</sup> See *A Year of Action: Pursuing Opportunity for All*, WHITEHOUSE.GOV (Feb. 8, 2014, 1:48 PM), <http://www.whitehouse.gov/photos-and-video/video/2014/02/08/year-action-pursuing-opportunity-all> (video highlighting actions that President Obama has taken "without waiting for Congress").

<sup>16</sup> See, e.g., DRAPER, *supra* note 2; David M. Herszenhorn, *Hold On to Your Seat: McConnell Wants Obama Out*, N.Y. TIMES CAUCUS BLOG (Oct. 26, 2010, 5:12 PM), <http://nyti.ms/17Qyp63> (quoting Mitch McConnell interview with National Journal saying, "The single most important thing we want to achieve is for President Obama to be a one-term president"). But see Glenn Kessler, *When Did McConnell Say He Wanted to Make Obama a 'One Term President'?*, WASH. POST FACT CHECKER BLOG (Sept. 25, 2012, 6:00 AM), <http://wapo.st/OmykmH> (quoting Mitch McConnell in National Journal as saying, "I don't want the president to fail; I want him to change").

<sup>17</sup> See MICHAEL GRUNWALD, *THE NEW NEW DEAL: THE HIDDEN STORY OF CHANGE IN THE OBAMA ERA* 19 (2012); Scott Keyes, *Republicans in Disarray: Losing Candidates Increasingly Unwilling to Unite Behind GOP Nominees*, THINK PROGRESS (Aug. 31, 2010, 12:45 PM), <http://thinkprogress.org/politics/2010/08/31/116639/republican-party-disunity/>.

<sup>18</sup> Binyamin Appelbaum, *Nominees at Standstill as G.O.P. Flexes Its Muscles*, N.Y. TIMES, June 19, 2011, at A17.

<sup>19</sup> According to one (albeit, partisan) study, as of November 22, 2013, the Senate had filibustered eighty-two of President Obama's nominees compared to eighty-six nominee filibusters for all other presidents. See *It's Time to Fix This Unprecedented Obstruction*, DEMOCRATIC POL'Y & COMMC'NS CTR. (Nov. 22, 2013), <http://www.dpcc.senate.gov/?p=blog&id=276>. At the same time, the passage of legislation under President Obama has

The administration perceived this gridlock as a threat to the national interest.<sup>21</sup> As such, unilateral action seemingly became the only plausible alternative for the President to address the problems facing the country and allow the President to accomplish what he believed he was elected to achieve. President Obama's State of the Union Speech and his announcement of the "We Can't Wait" strategy were simply articulations of the administration's commitment to a unilateral strategy that had already begun.<sup>22</sup>

The mechanisms used by the Obama administration in engaging in unilateral executive-branch action were varied. Some of the President's unilateral actions, including agency rulemaking,<sup>23</sup> not defending the constitutionality of politically controversial statutes,<sup>24</sup> and the use of the federal contracting power to exact compliance with policy choices by private entities,<sup>25</sup> had been used before. Others, such as the recess appointment authority or the decision to selectively enforce federal statutes, were taken to new levels.<sup>26</sup>

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ground almost to a standstill. *'Do-Nothing' Congress on Track for One of the Least Productive Years Ever*, NBCNEWS.COM (Nov. 26, 2013, 1:57 AM), <http://www.nbcnews.com/politics/politics-news/do-nothing-congress-track-one-least-productive-years-ever-v21578861> (noting the current Congress's scant record in passing legislation).

<sup>20</sup> See Lori Montgomery & Karen Tumulty, *Washington Braces for Prolonged Government Shutdown*, WASH. POST (Oct. 2, 2013, 3:47 AM), <http://wapo.st/15Gx1Y1> (discussing the fall 2013 government showdown).

<sup>21</sup> See Saul Jackman, *President Obama Should Issue an Executive Order to Raise the Debt Ceiling*, BROOKINGS INST. FIXGOV BLOG (Oct 14, 2013, 11:30AM), <http://www.brookings.edu/blogs/fixgov/posts/2013/10/12-debt-ceiling-and-the-power-of-the-president-jackman>.

<sup>22</sup> See David Jackson, *Obama's New Slogan: 'We Can't Wait'*, USA TODAY (Oct. 24, 2011, 1:04PM), <http://content.usatoday.com/communities/theoval/post/2011/10/obamas-new-slogan-we-cant-wait/1#.UuagZWQo568> (providing details of the President's new policy initiatives and intent to issue executive orders).

<sup>23</sup> See, e.g., Sam Dillon, *Obama to Seek Sweeping Changes in 'No Child' Law*, N.Y. TIMES, Feb. 1, 2010, at A1 (noting the President's use of executive orders to implement changes to No Child Left Behind legislation).

<sup>24</sup> See Meltzer, *supra* note 5, at 1202–04 (providing examples of presidents refusing to defend arguably constitutional statutes).

<sup>25</sup> See Steven Greenhouse, *Plan to Seek Use of U.S. Contracts as a Wage Lever*, N.Y. TIMES, Feb. 26, 2010, at A1; Ann O'Leary, *The Power to Act*, AM. PROSPECT (Sept. 1, 2010), <http://prospect.org/article/power-act-0> (citing President Franklin D. Roosevelt's executive order "prohibiting defense contractors from discriminating on the basis of race" and President Johnson's Executive Order 11246 "prohibiting discrimination and requiring affirmative action to assure representation of underrepresented minorities in the workforces of businesses receiving federal contracts" as the first instances of presidents using the federal contracting power to effectuate regulatory policies).

<sup>26</sup> The President's recess-appointment claim broke new ground by its conclusion that an intrasession break constituted a recess. His decisions to selectively enforce immigration and health-care laws presumed a new level of discretion in the President's duty to see that the laws are faithfully executed. See Delahunty & Yoo, *supra* note 1, at 783 & n.8.

Some of these actions were justiciable. The legality of the President's recess appointments, for example, is now before the U.S. Supreme Court.<sup>27</sup> Others appeared to avoid the possibility of judicial review. The administration's decision not to defend DOMA, for example, would seem to be the type of executive-branch action that the courts would rule nonjusticiable.<sup>28</sup> And with respect to other matters, the jury (or, more accurately the judiciary) is still out. For instance, it is unclear who might have standing to challenge the President's decision to delay the implementation of the Affordable Care Act or the decision not to enforce immigration laws against certain immigrants who had come to the United States as children.<sup>29</sup>

But whether or not these actions will lead to court rulings, it is worthwhile to pause for a moment and consider whether such aggressive use of presidential power is consistent with the constitutional commitment to separation of powers and whether, even if not technically illegal, such actions should be considered appropriate under our constitutional structure.

In order to do so, however, we must first overcome an initial barrier. Discussions of the legality of executive-branch actions often tend to devolve into whether one supports the particular President then in office. This, of course, is not really surprising. For one, it simply echoes the behavior of political actors. Adherence to principle seldom seems to get in the way when the exercise of power is at stake,<sup>30</sup> as time after time those who have adamantly opposed presidential power by one President suddenly become executive power proponents when their own candidate is in office (and vice versa).<sup>31</sup>

The reaction to presidential power based on who is in office is also understandable because it is often based on intuitive trust and/or policy predilection. A congressional demand for records, for example, is likely to be reflexively perceived as nothing more than an attempt to embarrass a President by those who support that administration, while at the same time, it is seen as a necessary effort to uncover deep-rooted corruption or malfeasance by that

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<sup>27</sup> Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom.* NLRB v. Noel Canning, 133 S. Ct. 2861 (2013).

<sup>28</sup> The constitutionality of the law, however, could be (and was) defended by other litigants. *See* United States v. Windsor, 133 S. Ct. 2675, 2684–89 (2013) (legislative group permitted to defend the constitutionality of a federal law when the Attorney General would not); *see also* Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 70–71 (2014).

<sup>29</sup> Crane v. Napolitano, 920 F. Supp. 2d 724, 746 (N.D. Tex. 2013) (dismissing a challenge to President Obama's Dreamers Initiative for lack of standing); *see also* Delahunty & Yoo, *supra* note 1, at 786 (contending that the legality of the Dreamers Initiative is likely nonjusticiable).

<sup>30</sup> *See* Frederick Schauer, *Is Legality Political*, 53 WM. & MARY L. REV. 481, 481–82 (2011); Marc Hetherington & Thomas Rudolph, *Why Don't Americans Trust the Government? Because the Other Party Is in Power*, WASH. POST MONKEY CAGE BLOG (Jan. 30, 2014, 8:09 AM), <http://wapo.st/1fjcMkq>.

<sup>31</sup> *See, e.g.*, Hetherington & Rudolph, *supra* note 30.



administration's political opponents. Similarly, a President's efforts to take extraordinary measures in pursuit of favored policy goals such as combatting global climate change or expanding aid to religiously based social services organizations is likely to be viewed more sympathetically by those concerned about those issues than those who are not. Thus, with respect to some of the Obama administration's actions, there seems little doubt that supporters of the Consumer Financial Protection Bureau (CFPB) will likely find the recess appointment of Richard Cordray more justified than those who oppose that agency. Similarly, those who believe the deportation of individuals who were raised within the United States marks a profound injustice are far more likely to support the administration's Dreamers Initiative than those opposed to immigration reform.<sup>32</sup>

For that reason, it may be advisable to introduce our discussion of presidential power in a way that tries to eliminate any intuitive bias. Accordingly, when considering some of the unilateral initiatives taken by President Obama, let us also keep in mind the following hypothetical actions of a subsequent presidency.

1) A President's refusal to defend the individual mandate provisions of the Affordable Care Act against a takings or substantive due-process attack.

2) A President's refusal to enforce the Affordable Care Act to collect the necessary revenues to make the Act financially viable.

3) A President's decision to selectively enforce civil-rights and voting-rights laws.

4) A President's use of his recess appointment powers over a long federal holiday weekend to install a controversial candidate to the U.S. Supreme Court after the Senate has overwhelmingly voted to reject that individual's nomination.

## II. THE EXPANSION OF PRESIDENTIAL POWER

There is little doubt that the congressional Republicans have successfully been able to frustrate much of President Obama's agenda virtually since the time he took office (including the time period where the Democrats controlled both the

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<sup>32</sup> This is not always the case. Some notable conservatives have expressed sympathy for the goals of President Obama's Dreamers Initiative even as they have criticized his unilateral actions. Gene Healy, *Obama's Executive Unilateralism*, WASH. EXAMINER (June 18, 2012, 7:00 PM), <http://washingtonexaminer.com/obamas-executive-unilateralism/article/745481> ("Obama's [mini-DREAM act] is hardly the most terrifying instance of administration unilateralism. In fact, as a policy matter, it's a humane and judicious use of prosecutorial resources. But given the context, it stinks. It looks uncomfortably like implementing parts of a bill that didn't pass, and . . . the move sits uneasily with the president's constitutional responsibility to 'take Care that the Laws be faithfully executed'"); Ilya Shapiro, *President Obama's Top 10 Constitutional Violations of 2013*, FORBES (Dec. 23, 2013 at 3:38 PM), <http://www.forbes.com/sites/realspin/2013/12/23/president-obamas-top-10-constitutional-violations-of-2013/> (criticizing congressional failure to act and Obama's unilateral action with respect to the immigration status of persons brought into this country as children).

House and Senate). This does not mean by itself, however, that the presidency lacks sufficient power any more than a cold January means the planet is not undergoing global warming. It simply means that this President has not been able to exercise his power as successfully as he would have liked.

The reality is that President Obama came into power when executive-branch power was (and is) at its historical apex.<sup>33</sup> Since the middle of the twentieth century, presidential power has expanded at a dramatic rate, and that expansion continues unabated.<sup>34</sup> Some of this is simply a result of a new sophistication and assertiveness in the use by his predecessors of long-existing mechanisms of presidential power. On the domestic side, for example, presidents have become increasingly adept at using executive orders as a substitute for legislative action.<sup>35</sup> Moreover, as then-Professor Elena Kagan documented, presidents in recent years have been increasingly able to master their ability to control the administrative state to further their political and policy agendas.<sup>36</sup> Correspondingly, on the international side, presidents have become increasingly adept at using executive agreements as a substitute for Senate-ratified treaties and unilateral military action, instead of declarations of war, to pursue their foreign policy goals.<sup>37</sup>

The reasons why presidential power has dramatically expanded, however, do not end with the fact that those sitting in the Oval Office have generally chosen to use their office aggressively, although certainly that is a factor.<sup>38</sup> It is also due to a number of factors that inevitably work to invest power in the executive branch, whether intentional or not.<sup>39</sup> These include (1) the presidency is the only branch of government that can act expeditiously in a more complex world that increasingly

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<sup>33</sup> See, e.g., MICHAEL A. GENOVESE, *A PRESIDENTIAL NATION: CAUSES, CONSEQUENCES, AND CURES* 3 (2012) (“For better or worse, the United States is today a presidential nation.”); Greene, *supra* note 10, at 125 (discussing the expansion of presidential power since the founding).

<sup>34</sup> Even a President such as Ronald Reagan, who was committed to reigning in the federal government, was expansive in his use of presidential power. His executive order taking control over agency rulemaking by subjecting it to review by the Office of Management and Budget is widely considered one of the most extensive exercises of power by executive order in history. See KENNETH MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWERS* 126–30 (2001).

<sup>35</sup> See GRAHAM G. DODDS, *TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS* (2013) (discussing the role of executive orders in setting national policy).

<sup>36</sup> See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (identifying an increase in presidential involvement in directing the administrative state).

<sup>37</sup> HAROLD J. KRENT, *PRESIDENTIAL POWERS* 88, 96 (2005).

<sup>38</sup> As Michael Gerhardt has noted, presidents tend to be remembered when they engage in inventive and daring exercises of presidential power and forgotten when they are more cautious. MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY* xv (2013).

<sup>39</sup> Marshall, *supra* note 10, at 509–19.

calls for immediate action,<sup>40</sup> (2) the executive branch is the only branch able to collect and maintain the data and information necessary for governing in complex times,<sup>41</sup> (3) both media and popular culture tend to focus on the presidency as the embodiment of the national government,<sup>42</sup> (4) the presidency possesses vast military and intelligence capabilities,<sup>43</sup> and (5) the fact that the executive branch has grown massively, giving the President enormous resources at his disposal to set and frame policy.<sup>44</sup>

Further, there are two other factors of particular interest for our purposes that have led to the expansion of presidential power. The first is legal. In the jurisprudence surrounding executive-branch authority, the constitutionality of the exercise of presidential power builds upon itself.<sup>45</sup> In both the opinions of the federal courts and the Office of Legal Counsel in the Department of Justice,<sup>46</sup> actions taken by one President serve as precedents in justifying actions taken by later presidents.<sup>47</sup> That means, essentially, that the exercise of presidential power

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<sup>40</sup> Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2677–78 (2005).

<sup>41</sup> See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 111–16 (1996); Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 737 (2002). In the words of Francis Bacon, “knowledge is power.” See JOHN BARTLETT, FAMILIAR QUOTATIONS 111 (Christopher Morley & Louella D. Everett eds., 11th ed. Little, Brown & Co. 1940) (1882) (attributing “Nam et ipsa scientia potestas est” (knowledge is power) to Francis Bacon).

<sup>42</sup> See STEPHEN J. FARNSWORTH, SPINNER IN CHIEF: HOW PRESIDENTS SELL THEIR POLICIES AND THEMSELVES 3–4 (2008). Cf. NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 125–41 (1985) (articulating the way television advertisements have become the primary means of communication between government representatives and the people).

<sup>43</sup> Norman C. Bay, *Executive Power and the War on Terror*, 85 DENV. U. L. REV. 335, 338 (2005).

<sup>44</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–91 (1984) (discussing the President’s authority and direction of agencies).

<sup>45</sup> See Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1140 (2013) (summarizing the normative power internalized by the executive branch and appearance of legal constraints).

<sup>46</sup> The OLC is the entity within the Justice Department that reviews the legality of presidential actions. See, e.g., *id.* at 1101. Because so much of what the President does is not justiciable, the role of OLC is especially critical in setting the parameters of presidential power. *Id.*

<sup>47</sup> See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412–13 (2012) (“Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers.”).

works as a one-way ratchet, with each successive President able to rely on the actions of his predecessors as legal justification for his own initiatives.<sup>48</sup>

The second is political pressure. One of the unanticipated byproducts of the expansion of presidential power is that it imposes increased political demands upon the office. The more power the President has, the more expectations are placed upon his presidency.

For this reason, the growth in presidential power that has occurred since the founding does not always work to the President's advantage. In the current political climate, for example, there is no doubt that the President is perceived by some as the main player in the setting of the national agenda.<sup>49</sup> Yet, at the same time, the assertion advanced by many that presidential powers are far less expansive than that perceived by the electorate is undoubtedly true.<sup>50</sup> The power of the President is limited in many key respects.<sup>51</sup> He cannot enact legislation,<sup>52</sup> appropriate funds,<sup>53</sup> enter into treaties,<sup>54</sup> declare war,<sup>55</sup> or even assign people to key government positions on his own<sup>56</sup>—even when the public expects him to act and even when he has promised to do so.<sup>57</sup>

The gap between the expectations placed on the presidency and its ability to meet those demands, therefore, can be a source of political embarrassment to any

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<sup>48</sup> See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive in the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1561 (1997) (noting how the first seven presidents exercised the power of the office over the executive branch with vigor and without much limitation).

<sup>49</sup> See, e.g., Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2613 (2006).

<sup>50</sup> See, e.g., *id.* (“The President’s formal powers under the Constitution are far too narrow to justify the hoopla that surrounds presidential elections.”); ALAN BRINKLEY ET AL., *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* (1997); Steven G. Calabresi, *The Era of Big Government Is Over*, 50 STAN. L. REV. 1015, 1040 n.141 (1998) (citing Theodore Lowi’s proposition that “the expectations of the masses have grown faster than the capacity of presidential government to meet them”).

<sup>51</sup> See ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 262 (2006) (“[T]he power of the president, however great, remains conditional.”).

<sup>52</sup> U.S. CONST. art. 1, § 1.

<sup>53</sup> *Id.* art 1, §§ 8–9.

<sup>54</sup> *Id.* art 1, § 8; *id.* art. 2, § 2; *id.* art. 6.

<sup>55</sup> *Id.* art. 1, § 8.

<sup>56</sup> *Id.* art. 2, § 2. *But see id.* art. 2, § 2, cl. 2 (defining power of the President to appoint during congressional recesses).

<sup>57</sup> A very recent instance of this, for example, is President Obama’s inability to close Guantanamo despite his promises that he would do so. See Carol Rosenberg, *Why Obama Can’t Close Guantanamo: National Security Policy Is Foiled by Congressional Politics and Bureaucratic Infighting*, FOREIGN AFFAIRS (Dec. 14, 2011), <http://www.foreignaffairs.com/articles/136781/carol-rosenberg/why-obama-cant-close-guantanamo>. The irony of Guantanamo is that although the use of the facility as a detention center was created by executive order, it may be ended only with the assistance of Congress. *Id.*

president.<sup>58</sup> Indeed, for precisely this reason, some commentators have argued that the President's power should be sufficient to meet those expectations.<sup>59</sup> For reasons advanced elsewhere, I am not persuaded that the expectations placed on the office of the presidency should by themselves create a legal basis for a President's expanded use of powers.<sup>60</sup> But I do not question that the existence of those expectations provide an enormous political incentive for a President to act aggressively. Presidents, after all, do not want to be perceived as failures.<sup>61</sup>

Faced with such expectations, it becomes extraordinarily difficult for a President not to use the powers that are seemingly available, and few presidents have been able to voluntarily avoid that temptation.<sup>62</sup> The political scales are such that, whether ideologically committed to a powerful presidency or not, any President is likely to be aggressive in the use of tools at his disposal.<sup>63</sup>

### III. THE ROLE OF CONGRESSIONAL OBSTRUCTION

The story of the expansion of presidential power, however, is not only the story of the executive branch. It is also a tale of congressional behavior. In that respect, Congress has been far from blameless.

Most fundamentally, as many observers have noted, Congress has become increasingly reluctant to defend its institutional prerogatives in the face of the exercise of presidential power. Rather, instead of presenting a common concern for protecting their institutional authority, members of both parties have instead let partisan concerns dominate their agendas.<sup>64</sup> Accordingly, Congress has often been

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<sup>58</sup> Two recent examples of a President being unable to pass a central part of his agenda include President George W. Bush's failure to achieve social security privatization and President Bill Clinton's failure to enact health-care reform.

<sup>59</sup> See Calabresi, *supra* note 50, at 1040. Cf. BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES* 145 (1990) (arguing that the President must act beyond constitutional parameters in order to meet public expectations regarding his foreign-policy role).

<sup>60</sup> I have argued elsewhere that increased expectation on the presidency should not lead to awarding him with more political power. See William P. Marshall, *Why the Assertion of a "Nationalist" Presidency Does Not Support Claims for Expansive Presidential Power*, 12 U. PA. J. CONST. L. 549, 552 (2010) (asserting that additional grants of presidential authority are unwarranted because of the current imbalance between Congress and the presidency).

<sup>61</sup> GENE HEALY, *THE CULT OF THE PRESIDENCY* 7–9 (2008) (discussing our "Plebiscitary Presidency" and "Congressional Abdication").

<sup>62</sup> See GERHARDT, *supra* note 38, at xii (noting that although Whig presidents were ideologically opposed to broad uses of presidential power, they nevertheless exercised those powers aggressively).

<sup>63</sup> *Id.*

<sup>64</sup> Levinson & Pildes, *supra* note 9, at 2313, 2319, 2329–30.

compliant in the expansion of presidential power—particularly when the President and congressional majorities are from the same party.<sup>65</sup>

The actions of congressional Republicans during the Obama administration showcase another reason why presidential power expands—congressional intransigence can at times be as much of a catalyst as congressional acquiescence in leading to a President’s use of power. And this is particularly true when that intransigence can be tied to obstructionist tactics that are arguably outside the bounds of appropriate legislative behavior.<sup>66</sup>

Consider, for example, the decision by Senate Republicans not to allow a vote on Richard Cordray’s appointment to the CFPB. By most accounts, the Republican opposition to Cordray stemmed not from any objection to him personally but because they objected to the creation of the CFPB that he was nominated to lead.<sup>67</sup> But the CFPB had already been created by statute over Republican opposition, and the move to block Cordray was simply an effort to effectively block an agency from being able to accomplish what it was created to do. Blocking Cordray, in short, was an attempt to repeal the CFPB through the back door.

The same strategy was taken to a more extreme level in the appropriations battle that led to the government shutdown in the fall of 2013. In that instance, a number of Republicans indicated that they would not vote for an appropriations bill unless the administration agreed to repeal the Affordable Care Act, even though the appropriations measures had nothing to do with the implementation or even the funding of that legislation.<sup>68</sup> Again, the effort was to try to force the repeal of a law that they did not have the legislative ability to repeal directly; but, in this case the Republicans elevated their tactics by in effect holding an unrelated measure hostage to their legislative demands. (To place this in perspective by using a counterpartisan example, consider a situation in which congressional Democrats assert that they will not agree to pass any appropriations bills unless the Republican administration agreed to take unrelated measures such as ending the

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<sup>65</sup> To be sure, this is not always the case. Many congressional Democrats, for example, opposed the enactment of the line item signed into law by President Clinton, while a majority of Republicans supported this measure. See U.S. SENATE, *U.S. Senate Roll Call Votes 104th Congress—1st Session* (Mar. 23, 1995), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=104&session=1&vote=00115](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=1&vote=00115); OFFICE OF THE CLERK, U.S. HOUSE OF REPS., *Final Vote Results for Roll Call 95* (Feb. 6, 1995), <http://clerk.house.gov/evs/1995/roll095.xml>. The Court eventually struck down the cancellation procedures in the Line Item Veto Act in *Clinton v. New York*, 524 U.S. 417 (1998).

<sup>66</sup> See Pozen, *supra* note 8 (manuscript at 3–5).

<sup>67</sup> See Jay Carney, Press Secretary, White House Press Briefing (Jan. 5, 2012), available at <http://www.whitehouse.gov/photos-and-video/video/2012/01/05/press-briefing#transcript> (“[T]he case here is pretty stark. The Republicans unfortunately in the Senate simply refused to allow Richard Cordray to have an up or down vote—not for any reason that had to do with his qualifications. . . . Why? Because they don’t even want the Consumer Financial Protection Bureau to be in operation.”).

<sup>68</sup> See Jonathan Wiseman, *A Texas Senator Stops Talking, and a Vote on Spending Nears*, N.Y. TIMES, Sept. 26, 2013, at A1.

use of the federal death penalty or appointing a Supreme Court Justice with a left-of-center ideology.)

David Pozen has offered a thoughtful and creative argument that a Congress employing such tactics may be justly criticized as violating what he terms the “constitutional conventions” present in interbranch relationships that allow the government to effectively function.<sup>69</sup> But one does not even have to reach Pozen’s theoretical conclusions in order to recognize that a President will feel compelled to do something whenever he believes that his powers are being improperly curtailed. Given both the expectations placed upon the office and the ambitions of those elected to it, a President who believes he has been wrongly cornered is likely to strike back. The problem if he does so, however, is that his actions will affect the lines in separation-of-powers concerns long after he has left office. As long as his actions do not cross justiciability lines, or as long as Congress does not have the political will or muscle to undo the President’s efforts, his actions will serve to legitimize similar actions taken by successors to the office. The irony of congressional obstruction, in short, is that it can work to increase presidential power in the long run.<sup>70</sup>

#### IV. UNCHECKED PRESIDENTIAL POWER VERSUS CONGRESSIONAL OBSTRUCTION

##### A. *The Dangers of Centering Power in the Presidency*

The high-school-civics arguments against vesting too much power in any one individual hardly needs significant embellishment here, as both history and elementary political theory offer more than substantial evidence of the dangers created by single-person power. On the historical side, one needs to look no further than twentieth-century Europe to see the dangers inherent in single-person rule.<sup>71</sup> On the theoretical side, one needs to look no further than the separation-of-powers theory advanced in Federalist 47 to understand the relevant political point. As Madison wrote, “[t]here can be no liberty where the legislative and executive

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<sup>69</sup> Pozen, *supra* note 8 (manuscript at 4). Pozen then goes on to argue that congressional violation of such conventions may serve to provide a legal justification for a president to engage in methods of self-help that can include some uses of power that are otherwise outside his constitutional limitations. *Id.* A full analysis of Pozen’s legal position that congressional misfeasance can or should serve to justify a President’s extraordinary use of power is beyond the scope of this Article although this Article does note that any President’s use of power, no matter what its rationale, inevitably serves to justify similar uses of power by subsequent presidencies. This Article further discusses the issue in *supra* notes 45–48 and accompanying text and *infra* notes 70, 75–78 and accompanying text.

<sup>70</sup> See, e.g., GERHARDT, *supra* note 38, at 4–11 (noting the Whig Party’s obstructionism in the face of President Martin Van Buren’s efforts to lead the country out of an economic crisis ended up having the long-term effect of empowering the presidency).

<sup>71</sup> See generally BRUCE F. PAULEY, HITLER, STALIN AND MUSSOLINI: TOTALITARIANISM IN THE TWENTIETH CENTURY (3d ed. 2009) (explaining the dangers of single-person power in all three forms of European totalitarianism).

powers are united in the same person or body . . . .”<sup>72</sup> Furthermore, and beyond separation-of-powers concerns alone, the danger of combined power becomes even greater when that power is vested in a single person; a single ruler necessarily allows for more secrecy and less transparency than government by collective bodies.<sup>73</sup>

For these reasons, many have already sounded the alarm about the increasing power of the presidency. Bruce Ackerman, for example, has argued that the increased availability of the presidency’s unilateral powers has already “transformed the executive branch into a serious threat to our constitutional tradition.”<sup>74</sup> And when so much executive action is beyond the purview of the courts and outside the focus of a Congress that is more interested in partisan victories than protecting its institutional prerogatives, his warning does not seem to be beyond the pale.

Yet, even if one does not yet hear the clarion-call warning of a too-powerful executive, there are serious concerns that should be considered before one too quickly defends unilateral executive-branch actions. One primary factor in this respect is the role of precedent. As noted above, every presidential action serves as precedent to justify similar exercise of power by successor office holders.<sup>75</sup>

The authority of precedent, moreover, works not only legally, but also politically. Each presidential action makes it easier politically for successive presidencies to use the same tactic. The recognition of this reality, in turn, is particularly significant because when so many issues of the legality of presidential power are beyond the reach of the courts, the one remaining check on unilateral presidential action is political. The claim that a President is acting beyond his powers can be a potent one, and there are numerous instances when presidents have suffered some political backlash for acting alone.<sup>76</sup> Indeed, as of this writing, President Obama’s political opponents are seeking to use his “We Can’t Wait” strategy as a rallying cry against his efforts.<sup>77</sup> But arguments claiming that a President has exceeded his bounds in engaging in a specific action lose much of their strength when the forces marshaling those arguments have supported or

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<sup>72</sup> THE FEDERALIST NO. 47, at 216–17 (James Madison) (Jim Manis ed., 2001) (quoting Montesquieu).

<sup>73</sup> See generally Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 62 (2011) (noting the lack of transparency inherent in a single executive); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009) (noting the same).

<sup>74</sup> ACKERMAN, *supra* note 10, at 4.

<sup>75</sup> See *supra* notes 46–48 and accompanying text.

<sup>76</sup> See, e.g., GERHARDT, *supra* note 38, at 76–77 (discussing the political backlash against the unilateral exercise of power exercised by President Zachary Taylor).

<sup>77</sup> David Nakamura & Ed O’Keefe, *Boehner: Immigration Reform Stalls Because GOP Has ‘Widespread Doubt’ About Obama*, WASH. POST (Feb. 7, 2014), <http://wapo.st/1fM8XVQ> (noting political backlash against President Obama for having exercised powers unilaterally).



promoted similar actions by previous presidents.<sup>78</sup> In short, presidential actions not only serve to provide legal justifications for successor presidents, they also provide political cover for that successor's actions.<sup>79</sup>

Equally troubling, unilateral exercises in presidential power also provide political impetus for successor presidents to replicate those actions. As we have seen, successor presidents will be pressured by the expectations placed on the presidency to engage in whatever actions they can to meet those demands.<sup>80</sup> Moreover, as a practical political matter, if an earlier President has taken unilateral action in response to the demands of one of his constituencies, it will become increasingly difficult for the next President to turn down a request for unilateral executive action from one of his constituencies. The genies of unilateral executive action are not easily returned to the bottle.

To take us back, then, to our previous hypotheticals,<sup>81</sup> this means that a President's decision not to defend DOMA becomes precedent and, perhaps, incentive for a later administration's decision not to defend the ACA or another disfavored statute. The decision to selectively enforce immigration laws serves to justify and perhaps tempt a later administration's decision to not enforce, or to selectively enforce, civil rights or voting rights laws. Choosing to use the recess-appointment power to circumvent nomination gridlock works to support and perhaps induce a later administration's decision to use the recess-appointment power even more expansively.

There is, of course, an age-old lesson in this: what goes around comes around.<sup>82</sup>

### *B. The Dangers of Congressional Obstruction*

At this point, it is necessary to point out that the perils of a too-powerful presidency are not the only dangers to the national polity. Obstructionism also poses a serious threat to democracy, and congressional behavior that brings government to a standstill imposes very real and serious hardships. The loss of social-security checks or other government benefits places people's lives at risk. Government shutdowns and/or government defaults can trigger major economic disruptions. A failure to properly fund the military and/or provide for the maintenance of the nation's intelligence capabilities threatens national security.

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<sup>78</sup> This, of course, does not mean that many who supported unilateral exercises of presidential power by previous administrations will not object to similar exercises of presidential power (for substantive goals that they do not support) nonetheless. Intellectual honesty, unfortunately, is not a hallmark of our current political climate.

<sup>79</sup> President George W. Bush's reliance on President Franklin D. Roosevelt's use of military tribunals to try Nazi saboteurs as precedent for trying alleged terrorists after 9/11 is notable in this respect. *See* KRENT, *supra* note 37, at 148.

<sup>80</sup> *See supra* notes 46–63 and accompanying text.

<sup>81</sup> *See* discussion in *supra* Part I.

<sup>82</sup> *See very generally* JUSTIN TIMBERLAKE, *What Goes Around . . . Comes Around, on FUTURESEX/LOVESOUNDS* (Thomas Crown Studios 2006).

And while the twentieth century is replete with the tragedies of single-person dictatorships,<sup>83</sup> it also shows how political dysfunction can be a factor in breeding the conditions from which a totalitarian state can emerge.<sup>84</sup>

The assertion that a President may need to unilaterally act over congressional opposition in order to protect the nation, in short, may at times be valid.<sup>85</sup> Indeed, it may even be that a President who waits too long for a recalcitrant Congress to act in times of crises should be blameworthy for allowing the nation's welfare to fall into jeopardy. The assertion that a President should *never* be able to circumvent congressional obstruction, therefore, may be a claim that goes too far.

Yet, even here when the consequences of obstructionism look dire, it may still be problematic to reflexively dismiss or even minimize the legitimacy of Congress's actions. To begin with, distinguishing between when a President acts because overarching national concerns are at stake and when he does so based on his political imperatives is a particularly difficult line to draw—and the matter is only further compounded by the fact that presidents tend to see their own agenda and the country's agenda as essentially indistinguishable. Presidents, in short, will almost always overstate the threat.

More to the point, congressional action blocking a President is not always inherently pernicious. The Constitution was designed so that one branch could check the actions of the other.<sup>86</sup> That Congress can frustrate the efforts of even a very popular President is what separation of powers presumes.

There is also a problem in definition: what a President might see as pernicious obstruction might very well be seen by the Congress itself as no more than its duty to stand up to policies with which it disagrees. And in this respect, the fact that a President may believe that he was elected to further a particular agenda should not matter. The very nature of separation of powers is that the election is only the first step, and not the last, in determining what is ultimately enacted into law. Accordingly, if Congress (or even just a minority within Congress) disagrees with the President's perspective on the dangers facing the nation and has tools at its disposal to fight against the President's policies, why should it not be expected to use those tools to do so—even when gridlock follows?

To be sure, congressional obstruction is much harder to defend when its only purpose is to cause a particular President to fail. Yet, even then, the critique that the opposition has somehow acted “wrongly” is not as straightforward as might be initially assumed. We now live in an era that some have termed the “permanent

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<sup>83</sup> See generally PAULEY, *supra* note 71.

<sup>84</sup> See, e.g., ERIC D. WEITZ, *WEIMAR GERMANY: PROMISE AND TRAGEDY* 81–83 (2007) (noting the role of political dysfunction in Weimar Germany as providing an opening for the Nazi takeover).

<sup>85</sup> For an argument that the need for the President to act may provide legal authority for him to do so, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

<sup>86</sup> THE FEDERALIST NO. 51, at 232 (Alexander Hamilton or James Madison) (Jim Manis ed., 2001).

campaign,”<sup>87</sup> where each elected official is constantly seeking traction for the next election, and neither side wants to give any quarter to the other for fear of losing the same. Accordingly, if the President seeks to gain (or would likely gain) electoral momentum by his actions,<sup>88</sup> why should the oppositions’ attempts to stultify that effort be any more problematic? James Madison, after all, might have described this scenario as simply “[a]mbition . . . made to counteract ambition.”<sup>89</sup>

### C. *Who Should Prevail?*

There is no easy answer as to who should prevail when the choice is between unilateral presidential action on one side and congressional obstruction on the other.<sup>90</sup> Both are fraught with inherent peril. The obvious solution is that both sides should seek to avoid using or provoking any excesses in power by working together with the broader interests of the country in mind; yet, that hope undoubtedly seems naive given our current state of political antagonism and dysfunction.<sup>91</sup> A second approach might be to remind the political actors that, even if they are not likely to be moved by a sense of bipartisanship, they should at least be concerned that their tactics will be used as precedent by their opposition when the other side has the opportunity.<sup>92</sup> Still, it is hard to be optimistic that this stratagem will work either, given that thinking long term does not appear to be a prevalent mode of thought in today’s political climate.

For these reasons, I would suggest that the answer to who should prevail in the battles waged over the President’s power to unilaterally trump congressional

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<sup>87</sup> See SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN* 7 (1980).

<sup>88</sup> See BRENDAN J. DOHERTY, *THE RISE OF THE PRESIDENT’S PERMANENT CAMPAIGN* 6 (2012) (arguing that presidents are increasingly acting with an eye to the next election).

<sup>89</sup> THE FEDERALIST NO. 51, *supra* note 86, at 232. A better argument might be that there are certain congressional tactics that are, or should be deemed, out of bounds because they are excessively countermajoritarian. There is the so-called Hastert rule, under which the House majority will not bring a measure to the floor for a vote unless a majority of the majority supports the measure. See Mark Strand & Tim Lang, *The Hastert Rule*, CONG. INST. (July 17, 2013), <http://conginst.org/2013/07/17/the-hastert-rule/>. The Hastert rule might be criticized since it prevents the House from voting on provisions that might otherwise have the support of a majority of house members (if not a majority of the majority party). The wholesale use of the filibuster to block a President’s nominees or key legislation might be similarly condemned if it systematically works to prevent Senate majorities from acting. See *supra* notes 16–20 and accompanying text (noting the number of filibusters taken against President Obama’s nominees). Nevertheless, the conclusion that those procedures are somehow illegal is difficult to maintain given their historic practice and the fact that the Constitution gives relatively free rein to congressional behavior. See, e.g., U.S. CONST. art. 1, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

<sup>90</sup> And it may be that we will never have a judicial opinion on the subject, given justiciability concerns.

<sup>91</sup> See *supra* notes 16–20 and accompanying text.

<sup>92</sup> See *supra* notes 45–48 and accompanying text.

obstruction should be based on a simple calculus.<sup>93</sup> Which is more dangerous to a democracy—unilateral presidential power or congressional obstruction? My sense is the former. Congress may have the ability to obstruct, but it otherwise does not have the day-to-day powers of the modern presidency. It can control the purse, but it does not control the myriad components of the federal bureaucracy. It can pass legislation, but it cannot create law at the stroke of a pen.<sup>94</sup> It can engage in political theatrics, but it does not have the dramatic setting of the Oval Office from which to issue its pronouncements.

Further, given the massive growth in presidential authority that has already occurred,<sup>95</sup> it makes sense that the strong presumption should be against the further expansion of the powers of the executive. As Abner Greene has argued, “Now, it is the President [instead of Congress] whose power has expanded and who therefore needs to be checked.”<sup>96</sup>

To be sure, as noted previously,<sup>97</sup> there may be a need for some exceptions if and when congressional obstruction truly threatens the nation. But those exceptions should be extraordinarily limited. Indeed, *Youngstown Sheet & Tube Company v. Sawyer*<sup>98</sup> may have already set the standard. If taking over the steel mills to assist in a war effort is not a satisfactory rationale to overcome a recalcitrant Congress,<sup>99</sup> there should be very few other justifications that suffice.<sup>100</sup> Certainly the mere claim that “we can’t wait” or that “America does not stand still” should not alone provide the necessary justification to increase the President’s powers.<sup>101</sup>

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<sup>93</sup> As David Pozen notes, those battles are far more often waged in the political arena than in the courts, as both sides make the public constitutional case that each other’s actions are proper or improper. See Pozen, *supra* note 8 (manuscript at 46–48) (citing Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008)); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004); see also Bradley & Morrison, *supra* note 45, at 1140 (noting the tendency of the executive branch to justify its actions on legal grounds).

<sup>94</sup> See MAYER, *supra* note 34, at 4 (analyzing how presidents have “used a tool of executive power . . . to wield their inherent legal authority”).

<sup>95</sup> See *supra* notes 33–48 and accompanying text.

<sup>96</sup> Greene, *supra* note 10, at 125.

<sup>97</sup> See *supra* notes 64–70, 83–85 and accompanying text.

<sup>98</sup> 343 U.S. 579 (1952).

<sup>99</sup> *Id.* at 585–89.

<sup>100</sup> As Justice Jackson stated in his iconic *Youngstown* concurrence, the President’s power is at its lowest ebb when he “takes measures incompatible with the expressed or implied will of Congress.” *Id.* at 637 (Jackson, J., concurring).

<sup>101</sup> See, e.g., Richard W. Garnett, *Executive Overreach: How Both Parties Have Ignored the Constitution*, COMMONWEAL (Sept. 14, 2012, 11:01 AM), <https://www.commonwealmagazine.org/executive-overreach>.

## CONCLUSION

Although once committed to stemming the tide of presidential power expansion, President Obama has since become a proponent of energetic unilateral executive-branch action. Faced with a relentless and uncompromising opposition in Congress, the President has come to believe that it is only through the exercise of his unilateral powers that he will be able to accomplish his agenda and meet the promises that he made to the American people.

At one level, President Obama's motivations are understandable. Congress has become unduly obstructionist, and because of its obstreperousness, many serious problems facing the country have gone unresolved. Nevertheless, expanding presidential power is a risky business in the long term even if it offers considerable benefits now. Already the balance of power between the executive and the legislative branches in Washington has, through the forces of history and exigency, swung markedly towards the former. When one adds to this equation the inherent and limitless potential for abuse in any government in which power is centered in a single individual, the conclusion that the presidency is now the most dangerous branch is indisputable. The assertion that its powers should be further increased, therefore, requires a far stronger rationale than "we can't wait."