
ARTICLE

CONSTITUTIONAL ARROGANCE

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INTRODUCTION

My argument is that the presidency of the United States has the institutional disposition and capacity for constitutional arrogance—to take unilateral actions challenging its constitutional boundaries and extending its powers at other authorities' expense. While every federal branch is prone to push its respective powers to—if not beyond—its limits (which is why the Constitution requires “[a]mbition must be made to counteract ambition”¹), there are several, unique forces incentivizing the presidency, as an institution, to have the disposition and the ability to aggrandize its authority.²

Part I of this Article will define the concept of constitutional arrogance, its possible benchmarks, and the forces pushing Presidents toward it. While the presidency was originally constructed to defend against legislative tyranny,³ its power has grown offensively. Through historical practices⁴ and hierarchical design, the presidency has developed the disposition and capacity to take advantage of constitutional indeterminacy and wrest power from other branches. When Presidents are threatening or achieve such expansions through unilateral actions, they are manifesting constitutional arrogance.

In Part II, I shift focus from the forces generally shaping presidential performance to specific illustrations of constitutional arrogance. I focus on three case studies—recess appointments, removal, and immigration—that demonstrate different ways in which Presidents have taken unilateral actions to expand their control over policymaking.

My perspective is grounded in institutionalism, which seeks to illuminate the context of presidential actions, to situate such actions within the arc of developing presidential authority over time, and to provide a basic language for understanding presidential power.⁵ From this perspective, I suggest, in Part III, that the most potent constraints on constitutional arrogance are judicial review, public opinion, concerns about historical legacy, and conventions. Although law provides a conceptual framework and grammar, these considerations provide some resistance to, but do not always curb, the presidency's propensity and capacity to take advantage of constitutional indeterminacy and undertake

¹ THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

² In keeping with this Symposium's focus, I do not make any comparative institutional judgments in this Article and only examine the presidency's disposition and capacity for constitutional arrogance.

³ See THE FEDERALIST NO. 51, *supra* note 1, at 319-20 (James Madison) (noting that in republican governments legislative authority “necessarily predominates” and the Executive is one check on that power).

⁴ See *infra* notes 16-22 and accompanying text.

⁵ For the classic work on institutionalism, see STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 30 (1993) [hereinafter SKOWRONEK, THE POLITICS PRESIDENTS MAKE], which builds a model for measuring presidential power that situates Presidents in “political time,” which he defines as the cycle through which the presidency, at different times, moves from one kind of leadership mode to another.

unilateral action with the purpose or effect of aggrandizing itself and wresting power from other branches, particularly Congress.

I. THE LANGUAGE AND METRICS OF CONSTITUTIONAL ARROGANCE

In this Part, I explain the basic terms and metrics this Article will use. Arrogance is the most unique term that I use, but the others should seem familiar.

A. *Why Arrogance*

My focus is on the presidency as an institution. It has a discernible design and particular powers and prerogatives: its occupants share distinctive goals, their incentives are similarly structured, and their approaches to governing and institution building are similar. One such approach is the presidency's propensity and capacity for constitutional arrogance. Constitutional arrogance entails Presidents using their unilateral powers to break boundaries and displace other constitutional authorities. This definition is primarily functional,⁶ depending not on motive or intentions but on the presence of unilateral presidential actions challenging, breaking, and extending constitutional boundaries on presidential authority. The actions are offensive,⁷ undertaken in different manners,⁸ all attempting to take charge or arrogate control over constructing or reconstructing constitutional meaning,⁹ at the expense of other authorities.

⁶ For the dictionary definition of "arrogance," see *Arrogance*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/arrogance> [<https://perma.cc/SX2N-L84X>], which defines arrogance as "the state or quality of being arrogant," an "offensive display of superiority" or "overbearing pride."

⁷ The actions are not offensive in the sense of being the opposite of defensive. They need not initiate action or conflict. They must be aggressive exertions of power that exploit constitutional indeterminacy and provoke negative reactions from other authorities. They can sometimes be important steps toward the construction of presidential power. See *infra* note 9 and accompanying text.

⁸ Some people may find the word "arrogance" offensive or overly inclusive. Its meaning may be clearer if the term, which may be used to characterize the posture of any governmental official, including judges, is contrasted with its opposite—constitutional humility, which I have described in the context of judging as being aware of the limitations of one's own knowledge, insights, and power; moderating one's tone; and being respectful and deferential to the constitutional judgments of other branches. See generally Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23 (2007). It may also be useful to consider as possible limiting principles the manner, style, or stance with which Presidents take action, and the pushback by other constitutional actors, such as Congress. Indeed, the term "arrogance" describes a posture or attitude of superiority, and it is common to describe the presidency in terms that are synonymous with arrogance. See generally SAIKRISHNA B. PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015) (discussing the origins of the presidency as a strong, aggressive institution); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973) (arguing that the office of the presidency has exceeded its constitutional boundaries and is out of control).

⁹ See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION 6-7*, 208 (1999) (arguing that the branches "construct" constitutional meaning over time).

B. *The Challenges of Choosing a Metric*

Different metrics can lead to different results. For example, as Eric Posner argues, the balance-of-power metaphor for assessing separation-of-powers questions can be easily manipulated to produce the analyst's preferred outcomes.¹⁰ For formalists, the metaphor is unnecessary because the only pertinent question is whether any exercise of power fits within the Constitution's fixed categories of permissible uses or allocations of power. For functionalists, the metaphor is superfluous since the principal concern will be balancing competing considerations.¹¹ If the metric instead is which branch is the most knowledgeable, the question Cass Sunstein poses, the answer is the presidency.¹² If the metric is which is the least partisan branch, a likely answer might be the federal judiciary, the only branch whose top officials are not subject to the electoral process and are instead guaranteed life tenure and undiminished compensation to protect them from direct political retaliation.¹³ If the metric is which is the most efficient branch, the answer will not be Congress, since the Framers designed the lawmaking process to be "inefficient" and "cumbersome[]." ¹⁴ How we frame questions can shape the answers.

¹⁰ See Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of "Underenforcement"*, 164 U. PA. L. REV. 1677 (2016) (discussing the difficulty of determining what the balance of power between the three branches was intended to look like).

¹¹ Posner's suggested replacement for the balance-of-power metaphor is that we should focus on whether bureaucratic innovation is likely to improve policy outcomes. *Id.* at 1710-11. Yet, this solution hardly follows from Posner's case against the "metaphor" of balance of power commonly used in the separation-of-powers analysis. Indeed, his solution seems to be nothing more than classical functionalism—or balancing—under a different name. It returns us to the balance of power. As Shakespeare famously put it, "[A] rose [b]y any other name would smell as sweet," WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2, or in Gertrude Stein's version, "[A] rose is a rose is a rose," GERTRUDE STEIN, *Sacred Emily*, in *GEOGRAPHY AND PLAYS* 178, 187 (1922).

¹² Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016). Sunstein's argument that the presidency is "the most knowledgeable branch" rests on several unproven claims. The first is that experts are trustworthy and thus merit considerable discretion in the regulatory process. *Id.* at 1617. Second, he seems to regard that being "generalists" is problematic for members of Congress and that their political acumen does not make up for (or disproves) their lack of knowledge or intelligence. *Id.* at 1613-15. Third, he suggests that on regulatory matters, government lawyers perform the function of "translators," but a more apt metaphor is that they are "educators." *Id.* at 1608. If Congress fails to appreciate the merits of proposed changes in regulatory schemes, it is possible the President's lawyers failed to do their job as educators. Moreover, it is likely that, because they are politically savvy, members of Congress can quickly pick up on the extent to which administration lawyers hold them in contempt.

¹³ U.S. CONST. art. III, § 1.

¹⁴ See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (noting the "burdens on governmental processes that often seem clumsy, inefficient, [and] even unworkable . . . were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked").

C. *The Metrics for Constitutional Arrogance*

To measure constitutional arrogance, we need a baseline. The Framers created the presidency to help fix the Articles of Confederation, which had no Executive, and to check Congress, which the Framers regarded as the most dangerous branch.¹⁵ They did not expect presidential authority to grow, but it did.¹⁶ Indeed, James Madison explained that the Constitution and other laws were necessarily “more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”¹⁷ The Framers’ compromise, in fashioning the Executive, is a baseline against which we can measure what has emerged through liquidation—the office’s growth through disposing its occupants and investing them with the unique capacity to take positive action. Merely being disposed to, or attempting to, expand power is not constitutional arrogance. When Presidents act upon their disposition to wrest power from other branches, they are manifesting constitutional arrogance.

Liquidations—especially through historical practices—are a potent force that helps explain expansions in presidential power. The Constitution does not implement itself. Its implementation over time through historical practices has constituted federal executive power.¹⁸ As political scientists Terry Moe and William Howell suggest, presidential power “has grown over time and become more consequential.”¹⁹ To be sure, the expansion of presidential power has not been perfectly uniform or linear, and some powers

¹⁵ See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (discussing James Madison’s view that the Legislature was the most dangerous branch and could create a vortex of power, and the Executive was needed to restrict this power).

¹⁶ See SKOWRONEK, *THE POLITICS PRESIDENTS MAKE*, *supra* note 5, at 20 (positing that each President has tried to take charge and exercise his independent powers); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2093-96 (2009) [hereinafter Skowronek, *The Conservative Insurgency*] (tracing the development of the “unitary executive” construction of presidential power and how the presidency’s power has grown); see also William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507-09 (2008) (explaining the significance of the continual expansion of presidential power).

¹⁷ THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003) (emphasis omitted); see also MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 174 (2015) (quoting Madison’s declaration that, “the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents”) (citation omitted).

¹⁸ See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 135 (1999) (asserting that the relative powers of the three branches must be determined through “the ongoing practice of politics”); see also Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103-09 (2013) (illuminating how the scope of the President’s legal authority might be constrained by historical practice).

¹⁹ Moe & Howell, *supra* note 18, at 133.

or prerogatives have been curtailed.²⁰ Presidents “move strategically and moderately to promote their imperialistic designs—and do so successfully over time, gradually shifting the balance of power in their favor.”²¹ Presidents rarely relinquish power they have acquired; instead, they fortify expansions in their authority over time.²²

A second factor shaping the growth of presidential power is the unintended consequences of the constitutional structure. The executive’s unique design, with a single official at its apex, positions Presidents perfectly to take positive independent action and invests them with the capacity to do so. How often have we heard that the presidency is unique among the branches for its energy and efficiency? Even during the ratification campaign, this was a common defense of the office.²³ Presidents must act. Their constitutional duties extend beyond blocking or resisting policies they oppose. The forces propelling and keeping Presidents in office push them toward taking positive action, not inaction.²⁴ Indeed, Presidents are usually punished for inaction.

Another consequence of the Executive’s hierarchical design is its tendency to suppress vigorous disagreement within the office of the presidency. As a practical matter, there must be an end to debate within the Oval Office because the President’s job is not merely to deliberate but to act. Too much dissent or disagreement cannot be long tolerated, much less rewarded. The

²⁰ There are many notable instances in which the Court overturned the unilateral actions of Presidents. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (overturning the Bush Administration’s decision to hold people as enemy combatants without giving them the opportunity to challenge that status before an impartial decisionmaker); *United States v. Nixon*, 418 U.S. 683, 703-07 (1974) (requiring the President to comply with a judicial subpoena and ruling that presidential aides are entitled only to qualified, rather than absolute, privilege for the purposes of maintaining the confidentiality of information produced within the White House); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952) [hereinafter *Steel Seizure*] (striking down President Truman’s seizure of the nation’s steel mills).

²¹ Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 *PRESIDENTIAL STUD. Q.* Dec. 1999, at 850, 871.

²² *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 *L. & CONTEMP. PROBS.* 1, 28 (1994) (“[W]hen presidents gain new ground, they will not give it back. They want control, and every president will protect not only what he has won, but what all past presidents have won.”).

²³ *See* THE FEDERALIST NO. 70, at 421-23 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (presenting a defense of the unified executive).

²⁴ *See generally* WILLIAM G. HOWELL, ET AL., *THE WAR-TIME PRESIDENT: EXECUTIVE INFLUENCE AND THE NATIONALIZING POLITICS OF THREAT* (2013) (examining how Presidents during war are able to increase power at the expense of Congress); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); Moe & Howell, *supra* note 18, at 136 (“During this same period, moreover, the public began to demand positive governmental responses to pressing social problems and to hold the president, as the symbol and focus of national leadership, responsible for the successes and failures of government.”).

structure facilitates groupthink; the closer people get to the top, the more incentives there are to cooperate with or acquiesce to the President.²⁵

Indeed, the hierarchical design of the Executive Branch necessitates rewarding agreement and punishing or discouraging dissent. The organization is such that loyalty to the President is frequently rewarded by advancement within the government. Loyalty may also be required, as loyalty to the President often correlates with one's position within the executive hierarchy, and dissent or disagreement is unlikely to lead to advancement. Hence, the presidency is often described as an echo chamber—filled with people inclined to tell Presidents what they want to hear.²⁶

A final factor, facilitating presidential disposition toward constitutional arrogance, is constitutional indeterminacy. “[T]he constitutional text on the subject [of the presidency] is notoriously unspecific,”²⁷ which, like constitutional ambiguities or silence generally, invites Presidents to exploit the text to their advantage. Indeed, the President can move more energetically and decisively than the other branches to take advantage of constitutional silence and ambiguity, particularly in responding to intense political and time pressures. It is little wonder that these aspects of the presidency have allowed the presidency “to grow with the developing nation.”²⁸

D. Constraints on Executive Discretion

One response to the claim that Presidents may be disposed toward constitutional arrogance is there are significant checks on presidential misconduct, as recognized in *Nixon v. Fitzgerald*.²⁹ In the course of holding that Presidents are absolutely immune from civil suits for damages based on their official conduct, the Supreme Court explained that other checks on presidential misconduct include impeachment, reelection concerns, the need

²⁵ See generally PAUL A. KOWERT, GROUPTHINK OR DEADLOCK: WHEN DO LEADERS LEARN FROM THEIR ADVISORS? (2002) (discussing the dangers of groupthink that arise from structures that encourage the reinforcement of the leader's perspective).

²⁶ See George C. Edwards, III, *Why Not the Best? The Loyalty–Competency Trade-Offs in Presidential Appointments*, BROOKINGS (2001), <http://www.brookings.edu/research/articles/2001/03/spring-governance-edwards> [<https://perma.cc/2ZGN-AD6B>] (“A newly elected presidential administration places the highest value on an appointee's unwavering commitment to the president and to his programs.”). However, the enforcement scheme is imperfect. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 544–45 (2013) (discussing the prevalence of high-level leaks and the near-absence of formal discipline for leaks); see also *infra* note 30 and accompanying text.

²⁷ Marshall, *supra* note 16, at 509.

²⁸ BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES* 8 (1990).

²⁹ See 457 U.S. 731, 758 (1982) (“The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President ‘above the law.’”).

for political support to maintain leverage with Congress, the visibility of the presidency, and presidential concern with historical judgment.³⁰ Yet, none of these necessarily constrain Presidents' discretion.³¹ Second-term Presidents are, of course, not formally subject to reelection, though they will share concerns about how their legacy will be judged.³² These concerns hardly compel Presidents toward inaction. Even Presidents who construe federal power narrowly will be pushed, to the extent they care about their legacies, to make their marks and strive toward achieving positive accomplishments. Every President is tested by some exigency, for which the failure to act is not an option. History rewards effort and success above all else. Problems or crises must be solved, and subsequent Presidents tend to invest in their predecessors' successful actions or solutions.³³

³⁰ See *id.* at 750-53 (discussing respondent's arguments for why the President should only have qualified immunity and why the "Constitution distinguishes him from other executive officials"); see also JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 207 (2012) (arguing that besides media coverage, government lawyers and courts help to check presidential abuse of power); Bradley & Morrison, *supra* note 18, at 1121-41 (suggesting that law might best constrain presidential conduct by having presidential actions publicly criticized and defended in legal terms). Besides asking readers to trust that there are lawyers performing this function, Goldsmith mistakes some traction for complete stoppage. Indeed, his short stint as head of the Office of Legal Counsel (OLC) (shortened when he resigned to force the Administration to withdraw the much-maligned "torture" memorandum) illustrates a propensity to dismiss rather than listen to naysayers within administrations, at least on issues of high salience. See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 9-12, 161-62 (2009) (discussing Goldsmith's review of the Bush Administration's terrorism policy as OLC, and his decision to resign because the White House was criticizing his actions to rescind or modify so many OLC decisions). Neal Kumar Katyal, an outstanding academic who served in both the Clinton and Obama Administrations, makes a similar argument as Professor Goldsmith. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324-31 (2006) (emphasizing various methods that other executive actors may use to limit a President's power). Nonetheless, we should not forget that Presidents appoint key decisionmakers, who presumably are chosen based in part on their commitments to the President's agenda. Given that the President expects key decisionmakers to do whatever they can to implement his constitutional vision, the key question is how often do Presidents, or administrations, agree *not* to do something that they wanted to do because their lawyers told them not to do it. We do not know the answer, at least not definitively. We know that President Obama pledged as a candidate to close Guantanamo Bay but begrudgingly concluded later, based on legal advice, that he could not do it. However, we do not know on how many other occasions the President was dissuaded from doing something he wanted to do because his lawyers told him not to do it.

³¹ I am using a functional understanding of constraint similar to the one Bradley and Morrison use. See Bradley & Morrison, *supra* note 18, at 1121-22 (defining "constraint of law" as "*when it exerts some force on decisionmaking because of its status as law*") (emphasis in original).

³² See Moe & Howell, *supra* note 18, at 136 ("Broadly speaking, however, it is fair to say that most presidents have put great emphasis on their legacies and, in particular, on being regarded in the eyes of history as strong and effective leaders.").

³³ See generally Julian Zelizer, *You Can't Game a Presidential Legacy*, CNN (Dec. 2, 2013, 7:55 AM), <http://www.cnn.com/2013/12/02/opinion/zelizer-presidential-legacy/> [https://perma.cc/2J9N-FVL7]; Jim Huffman, *Leave the President's Legacy to Historians*, DAILY CALLER (Oct. 16, 2014), <http://dailycaller.com/2014/10/16/leave-the-presidents-legacy-to-historians/> [https://perma.cc/9A6G-9FXJ].

As for media coverage, most presidential action actually occurs under the radar, where it is not subject to public scrutiny. On high-profile, politically salient matters, such as war, civil rights, or health care, Presidents are subject to media coverage, but the proliferation of soft news (commentary rather than reporting hard data) and the public's limited attention span and preference for entertainment undermine its appreciation of what Presidents have actually done.³⁴ Indeed, much of what Presidents do gets reported *after* it is already done. By the time the American public figures out whether something important has happened, the pertinent deliberations and action are often already in the past.

Regarding Presidents' need for congressional support to get preferred policies enacted, much depends on who controls Congress. But congressional and popular support are not synonymous. Of the two, public support is more important,³⁵ and it is common for Presidents to bypass Congress, just as President Clinton cultivated popular support at Congress's expense through the "third way."³⁶ It is through such exercises of unilateral power that Presidents are most able to displace Congress and expand control over policymaking. The next Part examines three examples of Presidents trying to do just that.

II. THREE EXAMPLES OF THE PUSH TOWARD CONSTITUTIONAL ARROGANCE

In this Part, I move from general patterns in presidential performance to concrete illustrations of Presidents' propensity and capacity for constitutional arrogance. I use three case studies to illustrate specific instances in which

³⁴ See, e.g., ALISON DAGNES, *POLITICS ON DEMAND: THE EFFECTS OF 24-HOUR NEWS ON AMERICAN POLITICS* 77 (2010) (noting that soft news has reduced the amount news organizations budget to specialists like foreign reporters, leading to news that is more entertaining but "less extensive than it used to be"); CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 147-196 (2006) (discussing how blogs are beneficial because they bring a large amount of information to light, but demonstrate the problems with deliberation); Markus Prior, *Any Good News in Soft News? The Impact of Soft News Preference on Political Knowledge*, 20 *POL. COMM.* 149, 168 (2003) (noting that while soft news may encourage more people to watch due to its entertaining aspects, evidence is limited that viewers actually learn from soft news—and any positive consequences of soft news regarding the political process remain to be demonstrated). But see Matthew A. Baum & Angela S. Jamison, *The Oprah Effect: How Soft News Helps Inattentive Citizens Vote Consistently*, 68 *J. OF POL.* 946, 957 (2006) (arguing that the use of soft news may facilitate voting competence among at least some citizens).

³⁵ See JAMES DRUCKMAN & LAWRENCE JACOBS, *WHO GOVERNS? PRESIDENTS, PUBLIC OPINION, AND MANIPULATION* 21-40 (2015) (discussing how Presidents strategically court and track public opinion).

³⁶ See STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL* 108 (2008) (describing Presidents undertaking "the third way" as "exemplify[ing] political stances carefully crafted to sidestep established conceptions of the nation's political alternatives and to reach out beyond the President's traditional party base toward some new and largely inchoate combination").

Presidents have undertaken unilateral actions with the purpose or effect of displacing legislative action and expanding control over policymaking. Such efforts could be called arrogations of power.

A. Recess Appointments

Recess appointments are a good case study for presidential propensity and capacity for constitutional arrogance because they involve an express power whose scope has been constructed over time. The Constitution provides that the President may “fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of [the Senate’s] next Session.”³⁷ The Constitution does not define the terms “recess” or “may happen.”³⁸ A narrow reading, favored by some originalists, maintains that the power only applied to vacancies that both arose during intersession recesses (and thus were strictly within Congress’s power to control) and needed to be filled during the recess to prevent important offices from remaining unfilled for long periods of time.³⁹

Presidents wasted little time in trying to extend the power’s boundaries. For example, the first President, George Washington, made three recess appointments, including John Rutledge as Chief Justice of the United States.⁴⁰ President Washington plausibly maintained the power applied to “all Vacancies that may happen during the Recess,”⁴¹ and the chief justiceship had become vacant at the end of June 1795 when the Senate was not in session.⁴² Yet, the appointment elided the problem of vesting Article III power in

³⁷ U.S. CONST. art. II, § 2, cl. 3.

³⁸ See generally HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS (2013) (outlining the basic functioning of recess appointments); Josh Chafetz, *A Fourth Way? Bringing Politics Back into Recess Appointments (and the Rest of the Separation of Powers, Too)*, 64 DUKE L.J. ONLINE 161 (2015) (proposing a multiplicity viewpoint that would allow politics to pervade the recess appointment arena).

³⁹ See, e.g., Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondent, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281) (supporting an originalist interpretation); Michael McConnell, *Democrats and Executive Overreach*, WALL ST. J. (Jan. 10, 2012), <http://www.wsj.com/articles/SB10001424052970204257504577150661990141658> [<https://perma.cc/MH53-GW2H>] (criticizing President Obama’s use of recess appointments); see also THE FEDERALIST NO. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that the Framers created the recess appointment power because “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay”).

⁴⁰ Henry J. Abraham, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 58-59 (2008).

⁴¹ U.S. CONST. art. II, § 2, cl. 3.

⁴² See generally MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000) [hereinafter GERHARDT, THE FEDERAL APPOINTMENTS PROCESS] (describing how allegiance to a party’s political agenda was why the Senate voted down Washington’s first nomination of Rutledge to the Supreme Court).

someone who lacked Article III protections. While the appointment arguably violated the Constitution, subsequent Presidents adopted Washington's extension of the power and made over twenty recess appointments to Article III courts, including President Eisenhower's recess appointment of Earl Warren as Chief Justice and President George W. Bush's recess appointments of three federal circuit court judges.

While President Jefferson's Attorney General concluded the recess appointment power applied only to certain vacancies arising during recesses,⁴³ President James Monroe's Attorney General, William Wirt, reached the opposite conclusion, arguing that the phrase "may happen" was "not perfectly clear," since it could mean either "happen to take place" or "happen to exist."⁴⁴ Wirt maintained that understanding the phrase to mean "happen to take place" was "most accordant with the letter of the constitution."⁴⁵ Based on the same rationale, President Zachary Taylor made over 400 recess appointments to executive positions.⁴⁶

Subsequent Presidents followed the same course, expanding the opportunities for Presidents to exercise this formal authority. In 1901, President Theodore Roosevelt rejected his Attorney General's advice⁴⁷ that the clause did not apply to intrasession recesses and made 160 such appointments (although mostly military appointments) when the Senate was not in formal recess.⁴⁸ Though the Senate Judiciary Committee rebuked President Roosevelt,⁴⁹ the appointments stood, and then in 1921 President Warren Harding's Attorney General Harry Daugherty opined that Presidents

⁴³ See Edmund Randolph, Opinion on Recess Appointments (July 7, 1792) (discussing how Randolph concluded that since the vacancy for the newly created position Chief Coiner of the Mint had occurred on the day the office was created, it could not be filled as a recess appointment) *in* 24 THE PAPERS OF THOMAS JEFFERSON 165-67 (John Catanzariti et al. eds., 1990).

⁴⁴ Exec. Auth. to Fill Vacancies, 1 Op. Att'y Gen. 631, 631-32 (1823).

⁴⁵ *Id.*

⁴⁶ The Senate blocked President Taylor from filling numerous executive positions in retaliation against his controversial plan for Congress to admit two new states, which would have thrown off the balance of power in Congress between pro-slavery and anti-slavery forces. See MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 73-74 (2013) [hereinafter GERHARDT, THE FORGOTTEN PRESIDENTS] (discussing how "Taylor made 428 recess appointments, more than all the recess appointments made by the eleven previous presidents" combined).

⁴⁷ See President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599, 599-604 (1901) (describing the reasoning of Attorney General Knox for why the "President is not authorized to appoint an appraiser at the port of New York during the current holiday adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate").

⁴⁸ See generally Henry B. Hogue, The Law: *Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. Sept. 2004, at 656 (providing an overview of recess appointments and discussing President George W. Bush's recess appointments and placing them in historical context).

⁴⁹ S. REP. NO. 58-4389, at 4 (1905).

have the authority to make recess appointments during intrasession recesses.⁵⁰ Subsequently, Presidents have made recess appointments during intrasession breaks leaving the principal question to be resolved how short in time the break between intrasessions must be to qualify as a recess for Article II purposes.

President Barack Obama pressed this question. Backed by an opinion from his Office of Legal Council (OLC),⁵¹ he claimed the authority to make recess appointments during three-day breaks. The Senate was holding pro forma sessions to frustrate his recess appointment authority *and* was refusing to confirm any of his nominees to three vacant positions on the National Labor Relations Board (NLRB). To ensure the enforcement of labor laws that would have gone unenforced otherwise, the President filled the positions with recess appointments.

In *NLRB v. Noel Canning*, the Supreme Court overturned the President's recess appointments and ruled that the three-day break between intrasessions was not sufficiently long to comprise a "recess" for purposes of making those appointments.⁵² The majority said it had not found a single instance in which an intrasession recess appointment had been made during a break of less than ten days.⁵³ "The lack of examples," the majority inferred, "suggests that the recess-appointment power is not needed in that context."⁵⁴ While the Court overturned Obama's three National Labor Relations Board appointments, it endorsed the longstanding practice in which Presidents made recess appointments during breaks of at least ten days.

Noel Canning is hardly a complete loss for Presidents. While it took both the Supreme Court and the Senate together to define the outer limits of Presidents' recess-appointment power, Presidents secured an enduring victory—entrenching

⁵⁰ See Exec. Power—Recess Appointments, 33 Op. Att'y Gen. 20-25 (1921) (describing Attorney General Dougherty's reasoning for why the President has the authority to make an intrasession appointment to a position where the vacancy was created before the recess begun, but still exists during the recess period).

⁵¹ See generally Memorandum Op. for the Counsel to the President, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (2012), <http://www.justice.gov/sites/default/files/olc/opinions/2012/01/03/pro-forma-sessions-opinion.pdf> [<https://perma.cc/U7TX-HV86>] (describing Assistant Attorney General Seitz's rationale for why "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").

⁵² 134 S. Ct. 2550, 2574 (2014). The importance of the three-day figure derives from the fact that the Constitution does not require the House or Senate to obtain the consent of the other to adjourn unless the break is longer than three days. U.S. CONST. art. I, § 5, cl. 4. Near the end of President Obama's second term, the Republicans controlled the House but not the Senate and the House insisted on the pro forma sessions as a condition of its constitutionally-required consent to Senate adjournments of longer than three days. See Jennifer Steinhauer, *Sometimes a Day in Congress Takes Seconds, Gavel to Gavel*, N.Y. TIMES, Aug. 5, 2011, at A12.

⁵³ *Noel Canning*, 134 S. Ct. at 2566.

⁵⁴ *Id.*

into constitutional law their practice of making recess appointments during Senate breaks of at least ten days, regardless of when or why they became vacant.

The decision incentivizes Presidents to explore how to maneuver around pro forma sessions, which are blocking their permanent and recess appointments.⁵⁵ Presidents may name acting officials to high-ranking executive offices, though such officials are unlikely to wield the same influence as permanent appointees to the positions. Presidents might look for Senate breaks of at least ten days, try to mobilize public support and achieve the same ends through other unilateral actions, or help their party gain Senate control.⁵⁶ Since constitutional arrogance is most likely to be manifested through Presidents' unilateral actions, each of the next two case studies examines instances of such actions being undertaken to expand Presidents' control over policymaking at Congress's expense.

B. *Removal Power*

Although removal is one of the President's most potent weapons, the Constitution is silent on the power. Drawing inferences from the unique design of the executive branch (with only one person in charge) and the Presidents' constitutional obligation to "take Care that the Laws be faithfully executed,"⁵⁷ Presidents have defended their need for the power of removal to ensure their agents comply with their agendas and to reward allies or friends with patronage.⁵⁸ Members of Congress have similar interests, seeking to

⁵⁵ The Senate's pro forma sessions could arguably be characterized as offensive, having the plain purpose and effect of frustrating the President's recess appointment authority. On this perspective, President Obama's attempted recess appointments could be viewed as a defensive measure, as pushback against the Senate's constitutional arrogance, i.e., its brazen attempt to frustrate his recess appointment authority. Yet, the President's actions could also be described, within the context of presidential efforts to expand the opportunities to make recess appointments, as an attempt to reconstruct the boundaries of his authority. While it is tempting to think the tiebreaking authority should go to the Court, particularly since it aligned with the Senate in this conflict against the President, the Court is hardly infallible. Hence, the determination of which acts are offensive and which are defensive, and which acts are manifestations of constitutional arrogance and which are not, depends on the only constraint that transcends the power of any of the branches of the federal government—the judgment of history, which includes the choices leaders make to follow—or not follow—the actions of their predecessors in office.

⁵⁶ Despite President Obama's efforts to find nominees who were trustworthy and confirmable, Democrats undid the practice of allowing filibusters of judicial and executive nominations once they regained the majority. Ramsey Cox, *Senate Confirms All Five NLRB Members*, THE HILL: FLOOR ACTION (July 30, 2013, 10:15 PM), <http://thehill.com/blogs/floor-action/senate/314503-senate-votes-to-confirm-all-five-nlr-b-members> [https://perma.cc/N8PA-XMRY]; see also HAROLD H. BRUFF, UNTRODDED GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 452-53 (2015) (discussing the controversy and offering a constitutional outlook).

⁵⁷ U.S. CONST. art. II, § 3.

⁵⁸ See generally Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1227-28 (2014) (explaining why Presidents need removal power to control their subordinates).

create openings for their allies or making it harder for them to be replaced. Congress has asserted the authority to condition or bar presidential removal authority over various offices based on its powers to create and fund federal offices *and* the Senate's power to provide its "Advice and Consent" to presidential nominations to certain offices.⁵⁹ Congress and the President have thus found themselves in a persistent struggle for control over removal.⁶⁰

Two battles have shaped presidential removal power. The first involves the century-long dispute over the Tenure in Office Act's restrictions on presidential authority to dismiss certain executive branch officials. The other involves Presidents' inability to discharge the heads of independent agencies.

The dispute over the Tenure in Office Act is well known,⁶¹ though it remains significant because its resolution strongly favors presidential power. Initially, Presidents were unsure of the extent to which the law threatened their prerogatives, as it required limited tenures and required rotation in various offices.⁶² President James Madison considered the restrictions to impede presidential authority,⁶³ but President Andrew Jackson backed the law because it allowed rotation in office, which he filled with patronage.⁶⁴ When Congress reauthorized the law in 1867 to cover all executive offices, the threat to presidential authority became clear. When President Andrew Johnson vetoed the law because he believed it impermissibly restricted the scope of

⁵⁹ U.S. CONST. art. II, § 2, cl. 2.

⁶⁰ On the removal power, see generally GERHARDT, *THE FORGOTTEN PRESIDENTS*, *supra* note 46, at 18-19, 31-35, 133-34, 137-38, 168-71; Aziz Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013); Saikrishna B. Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006).

⁶¹ See generally GERHARDT, *THE FORGOTTEN PRESIDENTS* *supra* note 46, at 32, 33, 117, 133-38, 169-70; GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS*, *supra* note 42, at 34, 53-54.

⁶² For the early history of the Tenure in Office Act, see GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS*, *supra* note 42, at 53-54, discussing the spoils system of the Act which "provided that district attorneys and the principal officers who had responsibility for collecting and disbursing money should thenceforth be appointed to serve fixed terms of four years." See also J. DAVID ALVIS, ET AL., *THE CONTESTED REMOVAL POWER, 1789-2010* 62-65 (2013) (discussing the origins and early days of the Act).

⁶³ This opposition tracks Madison's long-held views on the robustness of presidential removal authority. See BILDER, *supra* note 17, at 172-73 (discussing how Madison was the "principal spokesperson favoring executive removal power").

⁶⁴ See ROBERT V. REMINI, *THE LIFE OF ANDREW JACKSON* 201-205, 269, 276-77 (1988) (describing how President Jackson dismissed all but one member of his cabinet near the end of his first term and faced censure for withholding documents pertaining to his defunding the National Bank). President Tyler was equally aggressive in exercising presidential prerogatives, particularly his veto and removal authorities, and faced impeachment for refusing to tell the House of Representatives the names of people he had considered for appointments. GERHARDT, *THE FORGOTTEN PRESIDENTS*, *supra* note 46, at 50-55. These actions helped to construct the respective scope of presidential nominating, removal powers, and executive privilege. The significance of these and other acts of constitutional arrogance depends on how they fit into institutional patterns of constitutional decisionmaking over time.

presidential removal authority, Congress overrode his veto.⁶⁵ When Johnson fired his Secretary of War Edwin Stanton without following the act's requirements, the House impeached him.⁶⁶ The fact that the Senate fell one vote short of removing Johnson has been understood as rejecting the use of impeachment to punish Presidents for good-faith disagreements with Congress over policymaking.⁶⁷ Subsequent Presidents agreed the law was unconstitutional, culminating in its repeal under President Cleveland and the Supreme Court upholding Cleveland's refusal to comply with its requirements before firing and replacing a United States Attorney.⁶⁸ By the time the constitutionality of an analogous statute came before the Court in *Myers v. United States*,⁶⁹ the Tenure in Office Act was already dead. The Court buried similar laws for good.⁷⁰

In the same era, another battle was already under way—over the extent to which Congress could restrict presidential removal authority over the heads of independent agencies. Though Presidents have fared less well in this battle, the decisions are only part of the story. In an important early case, *Humphrey's Executor v. United States*,⁷¹ the Court upheld “[t]he authority of Congress . . . to fix the period during which [Commissioners on the Federal Trade Commission, who wield quasi-legislative and quasi-judicial powers] shall continue [in office], and to forbid their removal except for cause in the meantime.”⁷² One subsequent challenge involved whether all executive functions had to be under the President's control or whether some could be placed beyond the reach of his removal power. When Congress vested an executive function in an official whom the Court found Congress could remove, the Court struck the mechanism down.⁷³ But, when Congress vested quintessential executive authority (prosecutorial discretion) in an

⁶⁵ See BRUFF, *supra* note 56, at 169-70.

⁶⁶ On the impeachment of President Johnson and its constitutional ramifications, see generally WHITTINGTON, *supra* note 9, at 113-57.

⁶⁷ See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 240-44 (1992) (citing the writings of congressmen who explained why they voted not to impeach the President, particularly Senator William Fessenden who explained that “the Tenure of Office Act properly interpreted did not apply to protect Stanton's office. But [Fessenden] said that even if he were wrong on this point, the application of the act to Stanton was at least highly debatable, so that the president should not be removed from office because he had put the wrong interpretation on the statute”).

⁶⁸ *Parsons v. United States*, 167 U.S. 324, 344 (1897).

⁶⁹ See 272 U.S. 52 (1926) (striking down a 1876 federal law requiring that postmasters be appointed and removed by Presidents with the advice and consent of the Senate).

⁷⁰ In *Myers*, Chief Justice Taft, who had served over a decade earlier as President, found that removal power was implicit in the President's authority and held unconstitutional the Tenure in Office Act, even though it was not technically at issue. *Id.* at 176-77.

⁷¹ 295 U.S. 602 (1935).

⁷² *Id.* at 629.

⁷³ See *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down a mechanism empowering the Comptroller General to make cuts in appropriations if the deficit exceeded its permissible range).

independent counsel beyond presidential or congressional control, the Court upheld the mechanism with a 7-1 vote in *Morrison v. Olsen*.⁷⁴ Dissenting, Justice Scalia argued that the law impermissibly allowed the unchecked exercise of executive power.⁷⁵

Since Congress allowed the law to lapse near the end of President Clinton's Administration,⁷⁶ the Court has weakened *Morrison*,⁷⁷ perhaps most significantly in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.⁷⁸ There, the Court invalidated a procedure by which members of a special oversight board, supervised by the Securities and Exchange Commission, an independent agency, could only be removed under a "rigorous good-cause standard," which the President was barred from invoking.⁷⁹ The Court declared *Humphrey's Executor* and *Morrison* only upheld limited restrictions on the President's removal power, where only "one level of protected tenure separated the President from an officer exercising executive power."⁸⁰ The problem with removal of the board's members was that, "[w]ith the second layer [of protection from presidential removal] in place, the [SEC] can shield its decision from Presidential review by finding that good cause is absent—a finding that, given the Commission's own protected tenure, the President cannot easily overturn."⁸¹

In the aftermath of both *Morrison's* weakening and *Noel Canning*, Presidents may consider several ways to influence the heads of independent agencies. These are reminders that, when one path is blocked, Presidents will often seek other means to accomplish their preferred ends.

First, Presidents act strategically in making appointments. The appeals of party allegiance and patronage remain strong for ensuring loyalty and rewarding support,⁸² but how Presidents use patronage in making agency

⁷⁴ 487 U.S. 654 (1988).

⁷⁵ *Id.* at 698-785 (Scalia, J., dissenting). Controversially, Justice Scalia's dissent endorsed the unitary theory of the executive, which holds that all executive power should be under the direct control of the President. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). The theory, at least in its most robust form, spells trouble for the constitutionality of independent agencies, since it would require holding unconstitutional arrangements in which Congress vested executive authority in officials whom the President cannot remove at will.

⁷⁶ See KEN GORMLEY, *THE DEATH OF AMERICAN VIRTUE* 655 (2010).

⁷⁷ See, e.g., *Edmond v. United States*, 520 U.S. 651, 661 (1997) (constructing the Court's "test" for determining when people are inferior officers for Appointments Clause purposes, which Justice Scalia said "*Morrison* did not purport to set forth").

⁷⁸ 561 U.S. 477 (2010).

⁷⁹ *Id.* at 496.

⁸⁰ *Id.* at 495.

⁸¹ *Id.* at 497 n.4. The Court concluded its judgment had minimal impact on administrative arrangements in which officials were exercising executive power. *Id.* at 503.

⁸² One arguable check on presidential discretion is political parties. Under our party system, Presidents are the titular heads of the political parties that nominated them and are expected to

appointments depends on Presidents' agendas, the extent of agencies' importance to Presidents' policy views, and whether agencies require high levels of professionalism or expertise in their management.⁸³ For agencies that are unimportant to Presidents' agendas but whose missions share their policy views, Presidents make appointments based more on loyalty or other political considerations than demonstrated expertise.⁸⁴ Where agencies are important to Presidents' agendas, but whose missions do not share their policy views, Presidents make appointments based on expertise, prior experience, and ideology.⁸⁵ Second, Presidents may threaten to cut funding (which is obviously not unilateral) or use "jawboning" to influence the heads of independent agencies.⁸⁶ Effectively, Presidents (or their surrogates) try to influence these officials through personal interaction.⁸⁷ Third, the Office of Information and Regulatory Affairs (OIRA), situated in the White House,⁸⁸ has helped to coordinate executive agencies' compliance with the regulatory principles set forth in executive orders since 1993.⁸⁹ Because Presidents lack removal authority over the heads of independent agencies and some

implement their agendas. At the same time, the parties exert pressure on Presidents to pursue certain policies and objectives and to use party loyalty as a basis for making appointments. *See* SKOWRONEK, *THE POLITICS PRESIDENTS MAKE*, *supra* note 5, at 198-204, 289-90.

⁸³ *See generally* DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008).

⁸⁴ *See* Gary E. Hollibaugh Jr., et al., *Presidents and Patronage*, 58 AM. J. POL. SCI. 1024, 1026 (2014) (citing arguments that "high-priority departments and agencies receive more appointees selected for loyalty and other political reasons—and fewer selected for demonstrated agency experience—due to presidential desires for responsiveness and distrust of experienced bureaucrats").

⁸⁵ *See id.* at 1036 (citing arguments "that presidents are more likely to place appointees selected for electoral or political reasons in agencies that share the president's policy views, are low on the president's agenda, and to positions that have little influence on policy outputs"); *see also* GERHARDT, *THE FORGOTTEN PRESIDENTS*, *supra* note 46, at 196 (describing how President Coolidge appointed people as heads of agencies and commissions who "opposed or were highly skeptical of the basic missions of the agencies that they were appointed to administer" in a "concerted strategy" to weaken the impact of those agencies); Howell Raines, *Reagan Reversing Many U.S. Policies*, N.Y. TIMES (July 3, 1981), <http://www.nytimes.com/1981/07/03/us/reagan-reversing-many-us-policies.html> [<https://perma.cc/U3QM-N6J3>] (describing various Reagan appointees who shared his pro-business policies).

⁸⁶ *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943 n.1 (1980) (explaining that "[j]awboning" "became part of the political lexicon when President Kennedy sought to restrain prices and wages in the steel industry").

⁸⁷ *See id.* at 943 (describing how "the President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate").

⁸⁸ *See generally* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32397, *FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS* (2009).

⁸⁹ *Id.*; *see* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J. L. & PUB. POL'Y 447, 454-63 (2014) (discussing the presidential use of centralized regulatory review through OIRA to advance policy goals).

(particularly independent) agencies avoid OIRA,⁹⁰ Presidents might try to mobilize public pressure on such agencies, like President Obama has done through executive orders and public statements prompting the Federal Communications Commission to consider implementing the “strongest possible rules” to preserve net neutrality.⁹¹ The third case study further explores the constitutional ramifications of unilateral executive action.⁹²

C. Immigration

The final case study of constitutional arrogance is the executive actions of the Secretary of Homeland Security on immigration, which presumably were done with the approval (if not under the direction) of the President and which attempted to wrest lawmaking control from Congress. The conventional scenario has Congress acting first to make policy, placing the burden on the President to sign into law what Congress approved or veto it, and otherwise leaving some enforcement discretion to the President. But the Administration’s executive actions on immigration occupied a void resulting from Congress’s failure to enact a law in the first place that would have shielded millions of undocumented immigrants from deportation. Thus, the actions of the Secretary of Homeland Security effectively put the onus on other branches to oppose the Executive’s actions through conventional means or risk, through their failure to do so, having the President’s actions become law.⁹³

Shortly after his reelection, President Obama made immigration reform a top priority and sent a proposal to the Senate, which enacted a reform bill.⁹⁴

⁹⁰ See *id.* at 450 (describing agency avoidance of OIRA and proposing a method of systematic evaluation of various measures in response); *id.* at 460-61 (“[T]hough not insisting on extending regulatory review obligations to independent agencies,” President Obama’s Executive Order 13,579 directed “that ‘independent regulatory agencies should comply’ with regulatory requirements imposed by earlier executive orders A number of independent agencies appear to have . . . done some retrospective review and cost-benefit analysis in response. Full-blown regulatory review for independent agencies is on the horizon, though its arrival will depend on several factors, including legal reasoning, presidential elections, presidential relations with Congress, and the perceived burden of regulations issued by the independent agencies”) (footnotes and citations omitted).

⁹¹ Lauren Carroll, *FCC Approves Obama’s Net Neutrality Proposal*, POLITIFACT (Feb. 26, 2015, 5:54 PM), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/510/support-network-neutrality-on-the-internet/> [<https://perma.cc/2V9N-Z72Z>].

⁹² Another notable example of the importance of loyalty and ideology as grounds for nomination or appointment is the tradition that all U.S. Attorneys tender their resignations at the beginning of every new administration. See *infra* note 125 and accompanying text.

⁹³ See generally *infra* notes 98-99 and accompanying text.

⁹⁴ For an excellent overview of the events culminating in these executive actions, and offering a defense of them, see generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015). Before the Administration acted unilaterally, Professors Cox and Rodríguez had laid out the legal framework for such action on immigration. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 465 (2009) (arguing that the asymmetrical power distribution among the three branches of the federal

Several months later, it was clear the House would not act on the Senate bill. The next year, President Obama acknowledged, “I can’t do these things just by myself.”⁹⁵ But, on November 19, 2014, he effectively overhauled immigration through two executive actions.⁹⁶

So, what changed? One thing that did not change was the law. What changed was the necessity for action.⁹⁷

Something else changed, too. The dynamics in policymaking changed. By acting unilaterally, President Obama presented the other branches with three options. The first was allowing the next President to extend or vacate the Obama Administration’s unilateral actions. Since that would not have happened before the next President’s inauguration, this option would work, at least in the short-term, to the President’s advantage.

The second option was for Congress to override President Obama’s actions. Because the executive actions made President Obama’s positions known to Congress, he would have likely vetoed any bill attempting to cancel them. Consequently, Congress needed supermajorities in each chamber to override any veto. Given that legislative inaction is the norm even when only a majority is required for legislative action,⁹⁸ this option clearly favors the President.⁹⁹

government concerning immigration law could be addressed by a formal delegation of power to the President by Congress).

⁹⁵ Katie Pavlich, *His Own Words: Obama Said He Doesn’t Have Authority for Executive Amnesty* 22 *Times*, TOWNHALL (Nov. 19, 2014, 12:00 PM), <http://townhall.com/tipsheet/katiepavlich/2014/11/19/jon-karl-does-obama-think-hes-emperor-of-the-united-states-n1920606> [<https://perma.cc/RGT2-GDBW>].

⁹⁶ Michael D. Shear, *Obama Moves Ahead on Immigration*, N.Y. TIMES, Nov. 21, 2014, at A1. Shortly before the President announced his actions, the Office of Legal Counsel released its memorandum supporting them. The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Deter Removal of Others, 38 Op. O.L.C. (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/C7DF-GKMX>].

⁹⁷ As with President Obama’s executive order on gun control, see Memorandum on Promoting Smart Gun Technology, 2016 DAILY COMP. PRES. DOC. (Jan. 4, 2016), the impetus for presidential action might be the belief that Congress is dysfunctional. On immigration, the President seems to have said as much. *See, e.g.*, Remarks on Immigration Reform, 2014 DAILY COMP. PRES. DOC. (June 30, 2014) (“[T]he problem is, is that our system is so broken, so unclear, that folks don’t know what the rules are.”). The idea that Congress is a broken branch, and that this brokenness enables greater presidential adventurism, fully comports with the concept of constitutional arrogance. *See* Remarks in Las Vegas, Nevada, 2011 DAILY COMP. PRES. DOC. (Oct. 24, 2011) (“[W]e can’t wait for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will.”); *see also* Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1 (“Mr. Obama has emphasized the fact that he is bypassing lawmakers.”). Presidents have enormous incentive to displace or act despite Congress when Congress is unable to defend itself or unwilling to act. *See id.*

⁹⁸ *See INS v. Chadha*, 462 U.S. 919, 958-59 (1983) (“[I]t is crystal clear from the records of the [Constitutional] Convention . . . that the Framers ranked other values higher than efficiency There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”).

⁹⁹ *See Moe & Howell*, *supra* note 18, at 146-48 (explaining why it is so difficult for Congress to respond when Presidents act unilaterally).

The final option was judicial review, which turned out to be the most promising for opponents of the Administration's immigration actions. On January 19, 2016, the Supreme Court granted certiorari to consider several questions, including whether a state had Article III standing to challenge the President's decision not to prosecute an entire class of people rather than specific individuals as illegal aliens, whether the President's decision complies with administrative rulemaking requirements, and whether the Executive's decision violates the Take Care Clause.¹⁰⁰ Rather than resolve these questions one way or another, the Court did neither. After Justice Antonin Scalia's unexpected death in February 2016¹⁰¹ and Senate leaders' resistance to conduct any confirmation hearings for President Obama's nomination of D.C. Circuit Judge Merrick Garland to fill the vacant seat,¹⁰² the Court split evenly 4-4 in the case, reaffirming the Fifth Circuit's ruling to stay the Administration from implementing the new policies anywhere within the United States.¹⁰³

The Court's nondecision has left the Administration with limited options: it could file a petition for rehearing, which would not be considered until next Term; appeal the lower court's judgment on the merits, which would also not be considered until the next Term; seek a declaration in other courts around the country that the judgment of the District Court in Texas should not be extended outside of the Fifth Circuit; or amend the Secretary's actions, such as complying with the requirements for notice-and-comment rulemaking. While each of these options would take some time (the third perhaps the longest of all), none may happen more quickly than the presidential and senatorial elections this fall, whose outcomes will undoubtedly have an effect on both whether and when the Senate confirms a ninth Justice. If the next Administration wants to reaffirm or extend the Obama Administration's immigration actions, then we can expect its fate will be determined more by politics—the voters' choices in the fall elections and the Justice whom the Senate confirms to take Justice Scalia's seat—than the law.

If the legality of the Obama Administration's immigration actions come before a full Court, whenever that might be, the possible outcomes are clear. If the full Court defers to or upholds the immigration actions (both

¹⁰⁰ *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 84 U.S.L.W. 3306 (U.S. Jan. 19, 2016) (No. 15-674).

¹⁰¹ Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/anotnin-scalia-death.html> [<https://perma.cc/D7NZ-Y6YM>].

¹⁰² See Mark Landler & Peter Baker, *Battle Begins Over Naming Next Justice*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/politics/battle-begins-over-naming-next-justice.html> [<https://perma.cc/8H6J-TGWB>]; Jeff Mason & Richard Cowan, *Obama Picks Centrist High Court Nominee; Republicans Unmoved*, REUTERS (Mar. 17, 2016), <http://www.reuters.com/article/us-usa-court-obama-idUSKCN0WIo3D> [<https://perma.cc/A6S3-J7M7>].

¹⁰³ See *United States v. Texas*, No. 15-674, slip op. at 1 (U.S. June 23, 2016) (per curiam) ("The judgment is affirmed by an equally divided Court.").

procedurally and constitutionally), it will reinforce the breadth of a President's discretion in how to go about enforcing the law. If the full Court were to overturn the President's decision, its ruling would likely be an important step toward clarifying the boundaries of presidential discretion on reinterpreting the law in the course of enforcing the law.¹⁰⁴ Just how significant or extensive this step may be will depend on the grounds and narrowness or breadth of the Court's decision, subsequent monitoring by the Congress and the federal judiciary, and the President's determination and capacity to maneuver around any negative judicial opinion and to take advantage of the discretion he—or she—retains, by virtue of his or her office, to be creative in enforcing the law.¹⁰⁵ The final Part considers further the significance of these factors as meaningful constraints on presidential discretion.

III. THE BOUNDARIES ON PRESIDENTIAL DISCRETION

In this Part, I revisit the historical practices shaping presidential discretion and power. I focus on the strongest possible constraints on the propensity and capacity for constitutional arrogance, as reflected in the case studies—judicial review, public opinion, concerns about the judgment of history, and constitutional conventions.

A. *The Limits of Judicial Review*

This Section begins where Part II ended, with judicial review. The courts generally—and the Supreme Court in particular—defer to administrative agencies¹⁰⁶ and uphold executive actions more often than not.¹⁰⁷ Moreover, losses in court are not necessarily final. Adverse rulings mean the laws of particular cases disfavored the President, but Presidents still retain substantial discretion on the degree of their compliance with unfavorable judicial

¹⁰⁴ The question of at what point purported enforcement of the law ceases to be executive but rather becomes legislative action is difficult but not unprecedented. See *Clinton v. City of New York*, 524 U.S. 417 (1998); see also *Steel Seizure*, 343 U.S. 579 (1952). In our symposium, Professor Bellia takes this issue head-on. See Patricia Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016).

¹⁰⁵ Under the governing legal framework, the critical issue is whether the President is acting with the approval of, inconsistently with, or in the absence of, congressional policy. See *supra* note 97 and accompanying text.

¹⁰⁶ For an excellent empirical analysis of the Court's review of administrative regulations, see generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

¹⁰⁷ See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111-46 (2008) [hereinafter GERHARDT, *THE POWER OF PRECEDENT*].

rulings.¹⁰⁸ They may decline, as President Abraham Lincoln famously suggested,¹⁰⁹ to comply with decisions they regard as seriously mistaken.

The principal legal construct for assessing the constitutionality of presidential actions is, however, skewed against the presidency. That construct came from Justice Jackson's concurring opinion in the *Steel Seizure* case, which set forth a tripartite framework for determining the relative strength of the constitutional authority for presidential actions, depending on whether Presidents were acting (1) with congressional approval, which is their strongest constitutional ground; (2) in the absence of congressional action; or (3) contrary to congressional "will."¹¹⁰ This framework (which could also serve as a baseline) gives Congress the opportunity to set the terms for constitutional analysis. Given that nonaction is the norm for Congress, the most common question likely to come before courts will be how to characterize the fact that Congress took no formal action on the matter before them. Nonaction could mean acquiescence, giving the President authority when Congress is silent, as the Supreme Court found in *Dames & Moore v. Regan*,¹¹¹ or nonaction could imply disapproval, as a plurality of Justices found in *Steel Seizure*.¹¹² The fact that Congress considered but did not approve President Obama's immigration reform could be construed in more than one way.¹¹³

B. *Public Opinion and the Stewardship Conception of the Presidency*

Over the course of the last century, Teddy Roosevelt and Woodrow Wilson's stewardship conception of the presidency has become increasingly alluring to other occupants of the nation's highest elected office.¹¹⁴ Under this view, Presidents can do anything as long as the Constitution does not expressly bar it. Presidents presumably have a "residuum" of power to act,¹¹⁵ apart from whatever the Constitution says, and they have construed constitutional

¹⁰⁸ See Moe & Howell, *supra* note 18, at 151 ("[U]nder the Constitution, the Court is not empowered to enforce its own decisions, but must rely on the executive branch to enforce them.").

¹⁰⁹ GERHARDT, *THE POWER OF PRECEDENT* *supra* note 107, at 170, 177.

¹¹⁰ *Steel Seizure*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

¹¹¹ 453 U.S. 654, 675-89 (1981).

¹¹² 343 U.S. at 589, 602 (Frankfurter, J., concurring); *id.* at 655 (Jackson, J., concurring); *id.* at 660 (Burton, J., concurring); *id.* at 665-67 (Clark, J., concurring).

¹¹³ President Obama's legal arguments in support of his executive actions are that he is acting consistently with the laws enacted by Congress. See *supra* note 97-110 and accompanying text. As such, he is arguing that, within the tripartite framework set forth in Justice Jackson's *Steel Seizure* concurrence, he is acting not in the twilight zone (where Congress is silent and the President can allege acquiescence) or in opposition to what Congress has directed (his weakest position), but rather in his constitutionally strongest position—in concert with congressional enactments.

¹¹⁴ See Skowronek, *The Conservative Insurgency*, *supra* note 16, at 2087-92 (describing such a shift in attitude).

¹¹⁵ See GERHARDT, *THE FORGOTTEN PRESIDENTS*, *supra* note 46, at 172.

silence or ambiguity in favor of presidential power. Accordingly, public support is critical as driving or constraining the presidency.¹¹⁶

Yet, relying on public opinion in this manner is problematic. As I have already noted, the public might not know or care about what Presidents do with regard to relatively low-profile matters, such as making lower court nominations or issuing signing statements. Moreover, public support is easy to manipulate. There is a serious question about how to measure public support—who counts, how reliable are the polls, and how strong and enduring must the public support be. For example, Theodore Roosevelt claimed he had the public's support as President, even though at that time women did not have the right to vote and therefore had no formal say over who was President or who served in Congress.¹¹⁷ A supposed virtue of the modern administrative state is that it allows meaningful public input,¹¹⁸ even though public participation in the administrative process is likely small and largely self-selected (if not also operating or displaced through proxies). The information available to the public is imperfect, and most of the public is unlikely to know much or any details about administrative regulations.¹¹⁹

Moreover, public support, which is instrumental to the stewardship conception of the presidency, requires placing the burden on the public to stop Presidents. If public support is to function as a meaningful check on presidential action, the public must, however, be made aware of what Presidents do before they take action. The difficulty is that this cannot always be done. Presidents cannot wait to get public approval each time before they do something. Waiting until public sentiment forms takes time, but that is different than claiming there was public support to begin with.

C. *The Judgment of History Redux*

I have previously noted that concern about how their legacy will be judged may give Presidents pause as they consider how far, or hard, to push or extend the boundaries of their powers. The concern has become more acute because

¹¹⁶ One theory for *Steel Seizure* is that the lack of public support for American involvement in Korea and the seizure made it easier for the Court to strike down the President's action. See generally Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63 (2002).

¹¹⁷ The Nineteenth Amendment, granting women the right to vote, was ratified in 1920, almost a decade after President Roosevelt left office. See U.S. CONST. amend. XIX (declaring that the right to vote shall not be denied to citizens on the basis of sex).

¹¹⁸ For an excellent overview of the different theories of how the administrative state facilitates democracy, see generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). See also Note, *Deweyan Democracy and the Administrative State*, 125 HARV. L. REV. 580 (2011).

¹¹⁹ See generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013) (arguing, *inter alia*, that the American public is generally ignorant about many specifics about policy and government).

of increasingly copious archival and public recordkeeping requirements.¹²⁰ While officials may try to fill records with self-serving justifications, these requirements impose transparency on administrators and establish enduring records for subsequent generations to judge.

D. Constitutional Conventions

Constitutional conventions are rules, habits, customs, or practices which regulate interaction among political actors but are unenforceable in court.¹²¹ “The idea of constitutional construction seeks to identify how constitutional meaning and practices are developed in the interstices of the constitutional text, where discoverable meaning has run out.”¹²² Conventions are enforced primarily through public opinion.¹²³

A classic convention is the two-term presidency.¹²⁴ A more pertinent example is the practice of Presidents explaining their actions.¹²⁵ The Constitution

¹²⁰ See Presidential Records Act, 44 U.S.C. §§ 2201–07 (2012) (defining the stringent process by which presidential and vice-presidential records, including electronic ones, must be maintained and released to the public and generally requiring disclosure at least five years after the end of an administration to pass before release); see also Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003-15 (expanding the reach of the Presidential Records Act, especially regarding electronic records); Exec. Order No. 13,556, 75 Fed. Reg. 68675 (Nov. 4, 2010) (prescribing a uniform system of classifying, safeguarding, and declassifying national security information); Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009) (revoking Executive Order 13,233 and limiting the ability of executive officials and their families to invoke executive privilege to prevent public access to documents).

¹²¹ A.V. Dicey delineates the classic formulation. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 23-24 (10th ed. 1959) (“The other set of rules [in constitutional law, besides those set forth expressly in the Constitution, enacted by statute, or derived from common law,] consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power . . . are not in reality laws at all since they are not enforced by the courts.”); *id.* at 422-23 (“[R]ules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised.”); see also GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS 17-18 (1984) (positing that the distinction made by Dicey between law and conventions ought to be maintained).

¹²² Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1854 (2013); see also BRUFF, *supra* note 56, at 7 (“[A] feedback loop exists in which constitutional text, presidential behavior, and political response produce enduring precedents that operate as constitutional law.”); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181 (2013) (recognizing the usefulness of conventions where formal legal rules fail to provide guidance).

¹²³ See Whittington, *supra* note 122, at 1852-53, 1860 (describing conventions as the general prevailing understandings of the Constitution of the day).

¹²⁴ The two-term presidency convention was followed until Franklin D. Roosevelt breached it. The convention was subsequently codified as constitutional law. See U.S. CONST. amend. XXII.

¹²⁵ Another example of a convention is the tradition that all U.S. Attorneys tender their resignations at the beginning of every new administration. This convention allows incoming Presidents the opportunity, at least once, to select U.S. Attorneys based on their preferred criteria.

does not oblige Presidents to do so, but Presidents often feel they should and consult with legal advisors, including the Justice Department's Office of Legal Counsel (OLC).¹²⁶

Conventions are, however, weak constraints on presidential discretion.¹²⁷ First, they are indeterminate. As Keith Whittington notes, "[T]here is no single authoritative repository of conventions or interpreter of them to resolve disagreements over their existence or meaning [They] are rarely reduced to writing and are instead implicit in tradition and practice."¹²⁸ They are not immune to change.¹²⁹

Second, public enforcement of conventions is uneven. For instance, Presidents' public statements target different audiences and are framed differently than OLC opinions. The public is, however, unlikely to be as familiar with OLC opinions as they might be with presidential statements.¹³⁰

The conventions for OLC memoranda are as follows: they are binding authority within but only persuasive authority outside the executive branch; the White House should not pressure OLC for particular outcomes; and their analysis should be nonpartisan.¹³¹ How these conventions function is evinced by the fallout from the so-called torture memorandum, which addressed the legality of certain interrogation techniques of suspected terrorists.¹³² Once the memorandum became public, its subject matter was so politically salient

Otherwise, the expectation is that U.S. Attorneys will not be replaced for political reasons. *See generally* GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS*, *supra* note 42, at 385-86 n.41.

¹²⁶ On OLC's authority and traditions, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1511 (2010), which discusses the interaction between the President's constitutional views and the OLC's decision to overrule its own precedents.

¹²⁷ In contrast, Presidents' lack of removal authority over the heads of independent agencies is a well-settled legal principle. *See supra* notes 72 and 73 and accompanying text. A direct challenge would likely trigger unfavorable judicial review.

¹²⁸ Whittington, *supra* note 122, at 1867.

¹²⁹ *See also* Bradley & Morrison, *supra* note 18, at 1132-37 (suggesting an important way in which law constrains executive branch officials is through internalizing legal norms). Similarly, Pozen argues that, beyond the bedrock of public opinion, other factors affecting the constraining force of conventions include (1) whether they have been internalized as morally appropriate or normatively binding by government actors and (2) whether relatively resilient equilibrium forces or game-theoretic dynamics contribute to conventions' stability and efficacy. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 61-75 (2014).

¹³⁰ *See generally* *What the Public Knows—in Pictures, Words, Maps and Graphs*, PEW RESEARCH CENTER (Apr. 28, 2015), <http://www.people-press.org/2015/04/28/what-the-public-knows-in-pictures-words-maps-and-graphs/> [<https://perma.cc/D483-QPP3>] (suggesting Americans tend to know some general things about American history and government but not many specifics).

¹³¹ *See generally* Bradley & Morrison, *supra* note 18, at 1133. *See also* Neal Devins & Saikrishna B. Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 546 (2012) (suggesting that OLC lawyers have an incentive to maintain OLC's reputation, in part, "because their future career prospects are tied to it").

¹³² Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), <https://hssl.org/?view&did=741689> [<https://perma.cc/CD9F-V8TN>].

that it grabbed the public's attention, but "[t]he legal analysis . . . was so indefensible that it could not—and did not—withstand public scrutiny."¹³³

OLC did not fare much better with its memorandum on President Obama's recess appointments, which all nine Justices rejected in *Noel Canning*.¹³⁴ That degree of rejection by the Court suggests OLC might have deviated from its convention of producing strong, nonpartisan reasoning in its analyses of constitutional questions. Moreover, the preimplementation release of OLC's memorandum on President Obama's amnesty relief program deviated from OLC's convention of not releasing its reasoning "in advance of policy changes."¹³⁵ Such deviations suggest the possibility that political necessity rather than the law drove certain decisions.

Finally, conventions vest the practices following them with the authority of appearing conventional. Conventions steer conduct into traditional paths. Lawyers do the same, in characterizing contested actions as common and analogous to conduct that has been upheld. Similarly, OLC memoranda purposefully cast presidential actions in terms designed to make them sound conventional. Thus, OLC memoranda are unreliable measures of the extent to which presidential actions are challenging or breaking boundaries.

CONCLUSION

The Framers originally expected the presidency to function principally as a check on legislative tyranny. In time, Presidents have developed the disposition and capacity to expand their powers at the expense of other branches. Over time, as case studies show, only a few meaningful checks keep the presidency within bound—judicial review, public opinion, concerns about being judged by future generations, and constitutional conventions. Yet, each of these can also push Presidents to challenge their limits and wrest power from other branches, perhaps most famously exemplified by Jefferson's Louisiana Purchase, Lincoln's Emancipation Proclamation,¹³⁶ and Franklin Roosevelt's internment of Japanese-Americans.¹³⁷

¹³³ Kathleen Clark, *Ethical Issues Raised by OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 462 (2005).

¹³⁴ See *supra* notes 52-54 and accompanying text.

¹³⁵ Gabriel Malor, 4 *Things You Should Know About DOJ's Legal Justification for Obama's Amnesty*, THE FEDERALIST (Nov. 21, 2014), <http://thefederalist.com/2014/11/21/4-things-you-should-know-about-doj-legal-justification-for-obamas-amnesty/> [https://perma.cc/APT2-UHL6].

¹³⁶ See SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 5, at 78-79, 214.

¹³⁷ See *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (upholding the constitutionality of President Franklin Roosevelt's executive order detaining Japanese-Americans in internment camps); see also SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 5, at 287-324 (discussing President Franklin Roosevelt's "reconstruction," which "pressed hard against the boundaries of [his] political authority").

Although these might be among the most dramatic instances of constitutional arrogance, the propensity and capacity for growth in presidential power is evident in other contexts. For instance, Presidents use their appointment and removal authorities to control executive agencies and they appoint trusted allies to lead independent agencies that are important to their agendas. They use other means, such as raising the stakes, to persuade agency heads, or use personal interactions to control policymaking.

Public opinion matters most in presidential calculations on matters of great political salience, but that is only one factor that can influence Presidents. Once we move under the radar, do concerns about historical judgment, conventions, and judicial review exert more, or less, constraint on Presidents' disposition and capacity for constitutional arrogance? We expect Presidents are strategic in choosing when, how hard, and how visibly they challenge their constitutional limits.¹³⁸ While Presidents are unlikely to be able to wrest other branches' discretion easily or often, they will likely keep trying to expand their own authority as far as the public and other branches will let them.

¹³⁸ While the growth of presidential power during wartime has been documented, see generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (noting that wars and emergencies invariably shift power to the presidency, although other political actors counteract this shift), we still need comprehensive data on the constitutional effects of Presidents' unilateral actions in other contexts. Future research should examine the extent to which such actions have displaced or diminished congressional control over policymaking.

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