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Introduction to Constraining the Executive

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The essays in this symposium illuminate aspects of the task of keeping the executive branch within its constitutionally appointed boundaries. The symposium was conceived before the 2016 elections, so its plan was not directed toward the current president. Nevertheless, it is inescapable that, writing after those elections, the authors took recent developments into account.¹ The lessons to be learned from these essays, however, have more permanent application than simply for the immediate present. In this introduction, I review the articles of the symposium hoping to highlight the valuable contribution to separation of powers jurisprudence that each offers for the long term.

This symposium focuses on *means* of constraining the executive. There is, of course, a vibrant recent literature on what constitutes the kind of executive overreach in need of being constrained.² This symposium takes as given that there have been, and will be, instances of executive action or inaction needing restraint (without becoming embroiled in the specifics of any specific example), and turns its attention to what institutional remedies may be available.

A. Constraining the Executive Through the Courts

The courts are the logical place to seek relief when the executive's action needs to be constrained. However, standing requirements might preclude identifying any plaintiff qualified to bring a case under Article III's case or controversy requirement.

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¹ In one instance, that of Levinson and Graber's article, their entire point of departure deals with the specifics of President Trump, though they propose a set of judicial responses that would apply to future presidents with characteristics similar to his.

² See, e.g., Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 *FORDHAM L. REV.* 1199 (2017); contra Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1 (2017).

Four of the articles in this symposium recommend ways to expand how cases challenging the president can be brought in federal court.

1. Professor Randy Beck

Drawing from historical precedent, Professor Randy Beck proposes a broader use of *qui tam* actions. Such actions are already available in American courts under the False Claims Act.³ Under that approach, when money is owed to the federal government, and a private party draws that fact to the executive's attention but the executive fails to pursue the claim, the private party can proceed, keeping a portion of any funds recovered. It is like a whistleblower statute combined with a finder's fee.

The *qui tam* plaintiff has standing because she or he has a percentage of potential money damages to be gained. A good example here is the Antideficiency Act, where criminal penalties can be imposed on an executive officer who spends government money without authorization.⁴ If a private citizen uncovers an unauthorized expenditure of money by an employee of the federal executive branch, that private citizen can bring a *qui tam* action to collect the unauthorized payment back to the federal treasury, minus a share which the private plaintiff gets to keep.

Elsewhere, I have suggested *qui tam* as a way to get before a federal judge the issue of the legality of a war carried on by the executive without the approval of Congress,⁵ where money was spent on expenses of such a war. Beck would allow Congress to go even further. In connection with any specific duty or prohibition imposed on the executive by statute, Congress could add a penalty provision, owed to the U.S. Treasury, by an executive officer who fails in her or his duty. Beck would thus allow Congress to legislate private standing in almost any context it might wish to constrain the executive through the simple expedient of specifying a sum of money an executive agent would owe the government, if found to be deficient in her or his duties under that statute. The *qui tam* plaintiff would thus distinguish herself or himself from the large mass of citizens by her or his interest in a share of that sum.

I see no fault with the logic that this creates a case or controversy regarding the *qui tam* claimant that sets her or him

³ 31 U.S.C. §§ 3729–33 (2012).

⁴ See 31 U.S.C. § 1518 (removal from office); § 1519 (fine and imprisonment); § 1341 (predicate).

⁵ Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 585 (2017).

apart from the average citizen. Unlike *qui tam* actions under the False Claims Act, however, Beck's expanded recourse to *qui tam* does not start with a pre-existing sum of money which is, by hypothesis, owed to the government. That "res" constitutes the case or controversy for Article III purposes.⁶ The *qui tam* statute merely expands the number of persons with a specific interest in that "res." Can Congress both create the "res" and the class of persons with a specific interest in it? Beck maintains from historical precedent that this can be done, and was done, often, in British jurisprudence, going back to the fourteenth century. He maintains that several American states have done the same, including when they were colonies. Legislatures essentially harnessed private energies to enforce duties on public officials by imposing a fine on failure to fulfill such duties and letting the private party share in the fine.

Beck realizes other jurisprudential doctrines, especially the political question doctrine, might yet shield executive action or inaction from judicial scrutiny. He also perceives a danger in over-zealous use of the device he is advancing: executive agents might be chilled in the conscientious performance of their duty by the risk of personal liability. That risk, presumably, would be taken into account as Congress decided the set of executive actions or inactions in regard to which the expanded *qui tam* claims could be brought. Beck suggests three, from recent public events: waging war without Congressional authorization, failing to preserve government emails as government records, and not spending money the Congress has appropriated.

Is there a limit to what Beck proposes? At what point would the Supreme Court say Congress could not create standing where none existed before just by monetizing an executive duty? How to articulate a constraining principle is the weakness in Beck's proposal—though one might view it as a strength, in that no action of the executive would be able to evade judicial review (at least on standing grounds) when the Congress put its mind to so subjecting it.⁷

2. Professors Andrew Hessick and William Marshall

Professors Andrew Hessick and William Marshall also seek to constrain the executive by greater access to the judicial

⁶ See *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (referring to the focus of the False Claims Act on a financial loss to the government).

⁷ Of course, any Congressional bill creating the *qui tam* action might be vetoed, so Beck's remedy would require a two-thirds consensus of both houses of Congress. While not a constraining substantive principle, that does constitute a practical constraint on over-use of Beck's imaginative idea.

branch. In their article, they recommend easier standing requirements for states as plaintiffs. They view litigation of the type brought by twenty-six states against President Obama's "Deferred Action for Parents of Americans" ("DAPA") as a salubrious mechanism for checking executive authority (in that case, executive inaction)—whether a court ends up siding with the president or not.

States as plaintiffs hold advantages over Congress, in Hessick and Marshall's view, because Congress has declined markedly in its vigorous vindication of legislative prerogatives, becoming instead an instrument of partisanship.⁸ A Republican Congress will challenge a Democratic president, but not a Republican one, and vice versa. Of course, the same could be said of state attorneys general and governors, so Hessick and Marshall suggest a form of discretion in judicial rulings on standing that would incorporate whether a bipartisan mix of states' governors or attorneys general were bringing the suit. If such a group of states brings suit, then Hessick and Marshall would ease the standing requirement of "injury in fact" to allow a more speculative kind of injury to be pled, as in *Massachusetts v. Environmental Protection Agency*,⁹ a case where, they maintain, a private party's fear of rising sea levels from global warming would have been insufficient to establish standing.

Are Hessick and Marshall justified in claiming that states have a unique kind of interest, deserving relaxed standing requirements? They recognize the sovereign interest of states to oppose being turned into instruments of the federal government. That was the situation in one part of the challenge to the Affordable Care Act/Obamacare ("ACA") that prevailed before the Supreme Court.¹⁰ There is also the non-sovereign interest that the states have in suing on behalf of their citizens for their citizens' harm, in *parens patriae* actions.¹¹ What they see in addition to these established forms of standing is the states' interest in constraining any federal action (not just presidential action) because federal action will preempt state authority.¹²

⁸ For an in-depth development of the same theme, see Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOBAL LEGAL STUD. 369 (2017).

⁹ 549 U.S. 497 (2007).

¹⁰ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

¹¹ See 15 U.S.C. § 15c (West 2018).

¹² In Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017), Professor Nash explores the concept of a state having special standing when the federal government has legislatively preempted a subject area, but then the federal executive fails to vindicate that interest. Hessick and Marshall's insight is a similar one.

They note states have a legitimacy that private parties do not because of democratic accountability; and they further applaud the development of expertise and judgment from the recurring nature of this kind of litigation involving state actors, as opposed to any private party in a given case.

Yet the same might be said of Congress. Any upholding of presidential action in an area of shared authority cuts back what Congress could do absent the president's action. That affects Congressional prerogatives as much as upholding a presidential action in an area of potential state authority does the state's prerogatives. If getting many states on board confers legitimacy, so also might legitimacy be found for a suit by a house of Congress not brought just by a few members, but sanctioned by a resolution from the house of Congress bringing the lawsuit, as occurred in *U.S. House of Representatives v. Burwell* (originally filed as *Boehner v. Burwell*) (challenging the payments to insurance companies under ACA as not having been appropriated).¹³

Also similar to Hessick and Marshall's argument for the states as parties, the House or Senate, too, will develop expertise over the years, if permitted standing to challenge executive authority. Hessick and Marshall's preference for empowering states, rather than Congress, to sue the executive, thus comes down to a reluctance to weigh in on the side of Congress in balance of powers issues, and a correlative willingness to weigh in on the side of states in federalism issues, at least where the group of states presenting the challenge is bipartisan.

For many years, the D.C. Circuit applied a doctrine of equitable discretion to allow suits by members of Congress in some circumstances.¹⁴ *Raines v. Byrd* appeared to end that route for Congressional standing,¹⁵ but the Court recently opened a new avenue for state legislators to sue agencies of state government in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,¹⁶ distinguishing suits by state legislatures from those by Congress.¹⁷ The Court identified the same concern based on separation of powers that Hessick and

¹³ See *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 169 (D.D.C. 2016).

¹⁴ See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 880–81 (D.C. Cir. 1981), *cert denied*, 454 U.S. 1082 (1981); see also Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1990).

¹⁵ *Raines v. Byrd*, 521 U.S. 811, 818–29 (1997).

¹⁶ 135 S. Ct. 2652 (2015).

¹⁷ *Id.* at 2665 n.12. Regarding the revived standing of states to sue the federal executive for violations of federal legislative prerogatives, see Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism,"* 105 CAL. L. REV. 1739, 1745–50 (2017).

Marshall did about Congressional recourse to the courts, but noted the absence of such a concern when the state legislature was suing a state agency.¹⁸ The defendant was a state agency, not the federal executive, in *Arizona Independent Redistricting Commission*. Hence, the Court's explicit distinction between state legislatures and Congress as plaintiffs might presage the Court's willingness to take exactly the course that Hessick and Marshall advocate, and allow greater standing to states as plaintiffs to invoke the third federal branch to constrain the second federal branch.

3. Professor Michael Ramsey

Professor Michael Ramsey finds new hope for constraining the executive through litigation where the subject is foreign affairs because of the Supreme Court's opinion in *Zivotofsky v. Kerry*.¹⁹ Ramsey points out how the *Zivotofsky* decision restricts the political question doctrine as announced in *Baker v. Carr*,²⁰ cutting back *Baker's* six criteria to only two: (1) whether the issue was textually committed to another branch of government, and (2) whether manageable standards were available for the court to make a judgment. Eliminating the more open-ended of *Baker's* criteria makes it more difficult for a court to cite the political question doctrine. In Ramsey's view, future challenges to executive action in foreign affairs, including the exercise of war powers, would be justiciable insofar as they call on a court to interpret the meaning of a statute or a clause of the Constitution.²¹ If a litigant asks a court to make a factual judgment, however, especially one calling into question whether a presidential decision was justified, the political question doctrine would remain.

¹⁸ *Id.* at 2665 n.12.

¹⁹ 135 S. Ct. 2076 (2015).

²⁰ 369 U.S. 186, 217 (1962).

²¹ Professor Julian Mortenson also sees increased likelihood for successful challenges of presidential action in foreign affairs as a result of *Zivotofsky*, but for substantive reasons in the opinion itself. See Julian Mortenson, *Zivotofsky: The Difference Between Inherent and Exclusive Presidential Power*, 109 AJIL UNBOUND 45 (2017).

"It is not for the president alone to determine the whole content of the nation's foreign policy. That said, it *is* for the president alone to make the specific decision of which foreign power he will recognize as legitimate." Besides taking every opportunity to emphasize the narrowness of its holding, the majority seems repeatedly to go out of its way to celebrate the role of the legislature: "[W]hether the realm is foreign or domestic," the opinion urges over and over again, "it is still the Legislative Branch, not the Executive Branch, that makes the law." There is reason for more than a little suspicion that *Marbury*-style jiu jitsu may be at work here: this decision reaches a pro-executive outcome, but does so through the creation of a vehicle whose analytical structure and overall atmosphere is strikingly pro-congressional.

Id. at 48–49 (footnotes omitted).

Ramsey cannot point to any post-*Zivotofsky* case where a court abandoned the political question doctrine, but he does successfully identify how lower courts have, in writing their opinions, trimmed their reliance on the doctrine because of the *Zivotofsky* formulation. Ramsey also very helpfully traces the history of the political question back to *Marbury v. Madison*,²² through later decisions of the Marshall Court, and the Civil War *Prize Cases*,²³ to demonstrate that *Baker's* restrictive formulation of the political question doctrine was more of an aberration than a continuation of settled jurisprudence. (To this, I would add that Justice Brennan's announcement of six principles for the political question doctrine in *Baker* was actually *obiter dicta*: the Court held the doctrine did not apply to that case, so what was said about when it might apply does not qualify as a holding.)

If Professor Ramsey is correct, perhaps the most important consequence is that *Zivotofsky* will have opened up the courts to deciding whether the War Powers Resolution²⁴ is constitutional.²⁵ That is a profoundly important question that has eluded judicial resolution for forty-five years. Such a question would fit Ramsey's formulation: it would not require analysis of the facts of any particular conflict. Rather, the two fundamental challenges to its constitutionality would be answered as matters of constitutional law: (1) can the president's use of force be restricted to sixty days absent an affirmative vote of Congress; and (2) can Congress delegate to the president its right to choose against whom to wage war for sixty days?

Academics, legislative leaders, and average citizens can only hope that Professor Ramsey's prediction does prove true, and that members of the third branch take up the invitation to constrain the executive in the foreign affairs area, in those instances where a pure question of constitutional law or statutory interpretation is required.

4. Professors Sanford Levinson and Mark Graber

Professors Levinson and Graber make a tremendously original contribution to the academic literature on judicial review of executive action with their submission to this symposium.²⁶

²² *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803).

²³ *The Brig Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1863).

²⁴ 50 U.S.C. §§ 1541–48.

²⁵ See Mortenson, *supra* note 21, at 45.

²⁶ The only recent treatment I have seen that deals with some of these same issues is Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017). Professor Shaw largely opposes judicial cognizance of presidential speeches; while Professors Levinson and Graber base much of their argument for heightened scrutiny of President Trump on his speeches and other public

The entire U.S. constitutional scheme for executive authority rests, in their view, on a conception of the president as minimally qualified, not subject to conflicts of interest, and not emotionally immature. When a president lacks these qualities, specific rules of judicial deference to the executive, and justiciability constraints on suits against him, should no longer apply.

Professors Levinson and Graber maintain President Trump does lack these qualities. Accordingly, courts should approach challenges to his actions with the following presumptions. Wholesale delegations of power from Congress to the president in legislation passed in an earlier era should be narrowly interpreted now, and explicit grants of authority should be required rather than allowed to be inferred. The kind of motive-analysis with which the Supreme Court approached the actions of southern legislatures in the civil rights era, but not in other contexts, should be revived regarding President Trump. Levinson and Graber invite federal courts to make use of President Trump's campaign (and some subsequent) statements as to his own (possibly unconstitutional) motivations. They also encourage federal courts to accept full constitutional challenges, facial and as-applied, to actions by President Trump. They urge a narrowing of the constitutional avoidance maxim, because the premise that a co-equal branch did not intend to violate the Constitution is not true in the case of President Trump.²⁷

Their article focuses entirely on how courts should entertain challenges to a president who is anti-Publian: that is, lacking the virtues that Publius, the pseudonymous author of the Federalist Papers, assumed a president would possess. Professors Levinson and Graber's guiding principle in recommending this approach is that the Constitution has given way to exceptional powers granted to the president in some contexts (war and other national emergency), and to great skepticism of federalism in the face of overt racial motivation for states' actions. So, why in the present context of a president less qualified than any in history, and who has in his own statements evidenced prejudice often and clearly, they ask, should we not also see a tailoring of judicial doctrines developed in more normal circumstances?

pronouncements. However, Professor Shaw departs from her overall premise in her section "Presidential Speech as Evidence of (Constitutionally Forbidden) Government Purpose," *id.* at 137–40, which is where Professors Levinson and Graber have put most of their focus.

²⁷ For a similar skepticism of the constitutional avoidance doctrine, see Aniel Kovvali, *Constitutional Avoidance and Presidential Power*, 35 YALE J. REG. BULL. 10 (2017).

It is true that the Supreme Court has evaluated motive in striking down state governmental action neutral on its face, but with a racially discriminatory effect.²⁸ The normal deference owed to a state legislature was suspended when the assumption of their action in good faith was cast into serious doubt. Levinson and Graber point to *New York Times v. Sullivan*²⁹ as a case abandoning centuries of libel and slander law to create a protection for the press unique in world jurisprudence, all driven by the specific circumstances of the civil rights era. So also, Professors Levinson and Graber argue, we might normally expect a court to ignore campaign rhetoric by a candidate in evaluating that candidate's actions once in office, and even accord some deference to a plausibly constitutional motivation for official action (as in the constitutional avoidance maxim for legislative acts). They argue we should not do so, however, in the case of President Donald Trump, whose campaign (and subsequent) statements of an anti-immigrant nature, for example, corrupted his various travel-bans, thus providing a legitimate basis for overruling them, even though a court might have allowed an identical executive order to go into effect from a president not so tainted. This, of course, was the rationale of the Fourth Circuit in overturning President Trump's exclusion orders for immigrants from select countries he claimed had imposed inadequate vetting, but which the court held were selected because of their Muslim populations.³⁰

Professors Levinson and Graber's suggestions deal with the doctrines of justiciability developed under the rubric of judicial prudence, not constitutional requirement. Adopting what the Professors argue, therefore, would violate no constitutional provision. As noted above, years ago, the D.C. Circuit developed a doctrine of "equitable discretion" for deciding when to grant standing to members of Congress to challenge presidential acts.³¹ The approach advanced by Professors Levinson and Graber should be seen as no more controversial than that.

What is more difficult, however, is to determine "neutral principles"³² for deciding when a president is non-Publian. President Donald Trump qualifies for so many reasons, in the Professors' view, the conclusion is, in mathematical terms,

²⁸ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 340, 340 (1960) (enjoining action by the Alabama legislature to redraw the boundaries of Tuskegee so as to eliminate almost all black residents).

²⁹ 376 U.S. 254 (1964).

³⁰ *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575–76 (4th Cir. 2017).

³¹ See *supra* note 14 and accompanying text.

³² Levinson and Graber's point of departure in their article is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

“overdetermined.” It is not entirely clear which characteristics they would consider sufficient. Among the determinants they cite are President Trump not having won a majority of the popular vote, his being roundly criticized as incompetent by other office-holders, silence of other office-holders who might have been expected to defend him, his business conflicts of interest, his crude speech especially on matters of race, his many factual misstatements, his seeming inability to admit an error, the manifest absence of any previous qualifying experience, and his many changes of position, even within the same day.

Professors Levinson and Graber analogize treating a non-Publian president differently from a “normal” president to reforming a contract in the face of mutual mistake, improvising dialogue in a theater piece when an actor forgets a line, or running a different sports play when the originally planned move becomes impossible. In each such case, however, the parties act to re-establish what would have been done had they known a fact at the start that only became apparent subsequently. That is not the case with President Trump. Most, if not all, of the flaws identified were well known from the campaign. This is more a case of buyers’ remorse than mutual mistake. Indeed, President Trump would maintain there was no mistake at all.

A suggestion I offer is that the decision to treat a president as Publian or not should not be binary.³³ Rather, I would suggest that courts adopt a sliding scale, opting for higher scrutiny of presidential action the more non-Publian the president may be. This approach would allow for different decisions in different contexts: in the instance of President Trump, his statements about the federal judge being ineligible to decide the case involving Trump University because of his parents’ Mexican heritage might serve to justify a non-Publian conclusion in a matter involving immigration, but not, necessarily, in a matter of imposing offsetting tariffs for perceived trade violations by other nations.

The Supreme Court will soon have the occasion to consider the Levinson-Grabber suggestion when it rules on President Trump’s travel bans. Professors Levinson and Grabber have served up to the Court a rationale for taking into account the

³³ Professors Levinson and Graber identify several other presidents whose qualifications for president were minimal, but whom they would not consider non-Publian. As a humbling note to this exercise, I might add to the presidents they suggest, the case of our country’s greatest president, a one-term Congressman from Illinois (though he had experience in the part-time state legislature), who never won a majority of the popular vote, and whom the intelligent critics at the time considered uneducated and uneducable.

very specific facts of this president's behavior, qualifications, and public statements, should the Court be inclined to do so.

B. Constraining the Executive by the Executive?

1. Professor Gary Lawson

In his article in this symposium, Professor Lawson suggests that an effort to constrain the executive might be launched from an entirely different source: the executive itself, and, especially, President Trump himself. Structurally, of course, Professor Lawson is right. A president devoted to limiting executive power can go far to effectuating that result. Lawson identifies several ways: vetoing laws that grant more power from Congress to the executive branch, proposing the repeal of existing laws that grant such delegations, failing to use the authority that has already been delegated, and appointing federal judges who will revive the nondelegation doctrine and otherwise return the executive branch to the limits Lawson believes the Framers intended.

Lawson concedes the attraction of using executive power for "good ends" might overcome these self-constraining instincts of a president. President Obama's approach to immigration reform is a good example. President Obama wanted to grant protected status to two large categories of individuals who had entered America illegally, but withheld doing so for almost six years, saying "for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President."³⁴ Eventually, his desire for the policy outcome overcame his reservations about whether he had the constitutional authority to allow those groups of immigrants to stay.

To have lasting effect, as the President Obama precedent just cited shows, President Trump would have to do more than simply implement his own preferred approach to administrative law. He has ordered his executive branch agencies to repeal two regulations for every one new regulation desired; but a new president could reverse that instantaneously.

The ACA individual mandate has now been repealed, thereby cutting back a huge grant of authority to the Secretary of U.S. Health and Human Services to specify what elements had to be in anyone's health insurance. The next target of the Trump

³⁴ United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 783 (W.D. Pa. 2014) (quoting President Barack Obama, Remarks by the President at the Univision Town Hall, (Mar. 28, 2011, 10:37 AM), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> (<http://perma.cc/2APS-LQR5>)).

administration has already been identified: the Consumer Financial Protection Bureau, created by the Dodd-Frank legislation, with sweeping authority to outlaw “unfair” financial practices, and protected from the Congressional oversight afforded by the appropriation process by reason of being funded directly by the Federal Reserve.

For President Trump to fulfill his promise as Professor Lawson sees it, Trump would have to urge the repeal of more than just the ACA and Dodd-Frank. He would have to get Congress to cut back the very broad delegations of power to the executive enshrined in statutes such as the Federal Trade Commission Act, with its prohibition of “unfair methods of competition,”³⁵ and the Securities Exchange Act, whose section 78j allows the Securities Exchange Commission to promulgate any regulations “necessary or appropriate in the public interest or for the protection of investors.”³⁶ Such a major step would require Congressional majorities supporting President Trump much larger than he now possesses and a systemic review of the statutory underpinnings of the administrative state that has not yet even been commenced.

The way President Trump might come close to achieving the potential Lawson sees for him is more likely in his judicial appointments. Professor Lawson notes that Justice Gorsuch brings an interest in reviving the non-delegation doctrine to the Supreme Court, far beyond any such disposition by Justice Scalia whom he replaced. If future appointments to the Supreme Court and the D.C. Circuit reflect a zealous focus on restoring the non-delegation doctrine (as opposed to simply a commitment to judicial conservatism), President Trump will have constrained the executive more powerfully, and more permanently, than any of the other mechanisms discussed in this symposium. In Professor Lawson’s Monty Python lexicon, that would be “something completely different.”

2. Mr. Paul Baumgardner

Mr. Paul Baumgardner enlivens our symposium with one particular area to constrain the executive. Claiming to be neutral as to the policy, he nevertheless sets forth the arguments against the propriety of presidents issuing Thanksgiving Proclamations. A Jeffersonian respect for the wall of separation between church and state should inhibit presidents from this practice, he maintains, even in the absence of any such proclamation’s calling

³⁵ Federal Trade Commission Act, 15 U.S.C. § 45.

³⁶ 15 U.S.C.A. § 78j(b).

on citizens to undertake particular religious acts or prayers, such as thanking God.

Baumgardner does not provide any constraining principle, so that his arguments would apply just as well to a presidential speech as to a Thanksgiving Proclamation. If that suggestion were followed, I personally would have deep regret. Perhaps the finest Inaugural Address in history, Lincoln's Second Inaugural, places the Civil War squarely in the tradition of a vengeful God's punishment to North and South alike for the offenses of slavery, which both parts of the nation tolerated, promoted, and from which they both derived benefit. Here is the soaring rhetoric that, under Baumgardner's sources and reasoning, should never have been spoken in March of 1865:

Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."³⁷

Since Baumgardner's analysis is directed at presidential speech and not executive actions or regulations, I cannot see how his analysis can be made to have force—except by convincing individual presidents to self-censor. As a personal preference, I would not deprive our nation of the treasure of Lincoln's Second Inaugural Address. As a constitutional matter, Baumgardner does not grapple with the president's own First Amendment right to speak, or freely to exercise his religion. Nor, extrapolating his arguments to apply to Congressional speech invoking God, does

³⁷ President Abraham Lincoln, Second Inaugural Address, BARTLEBY (Mar. 4, 1865), <http://www.bartleby.com/124/pres32.html> [<http://perma.cc/2SR6-CL3H>].

his logic address the provision that any speech made in Congress not be “questioned in any other place.” These are also parts of the Constitution and need to be read in conjunction with, not to be decimated by, the Establishment Clause.

As a thought piece, Baumgardner’s article provides a caution to politicians who might exploit religion, but that assumes that kind of politician is subject to shaming. I personally believe there is a place for religion in public discourse, short of exploitation, and it would be a great loss to see it end.

C. Against Expanded Constraint of the Executive

1. Professor Neal Devins

Professor Neal Devins describes an almost apocalyptically partisan world in Congress, from which situation he derives the conclusion that courts should be even more reluctant to hear lawsuits brought by legislators against executive overreach than they have hitherto.³⁸ Relying on impressive original research, Devins details the demise of the institutionalists in Congress: House members and Senators who would stand up for the authority of Congress even against a president of their own party. Now, Devins sees an urban battle zone pockmarked by hollowed out buildings that once stood for institutional principles, destroyed by their use as targets and weapons in an unceasing partisan divide.

He is largely right. Bipartisanship seems reserved for former Congress members,³⁹ and several current Senators who have formed the Common Sense Caucus,⁴⁰ dedicated to overcoming the partisanship that has stymied legislative progress on America’s most pressing needs. However, the former group is significant for many members who found bi-partisanship only after leaving Congress; and the latter group, while productive in ending the first government shutdown of 2018, has yet to fulfill its promise as the critical mass able to move between the two parties to create a transitory majority of sixty Senators able to overcome filibuster by Democrats, and ideological purity from the

³⁸ Professor Devins is not unique in his pessimistic description of the decline of Congress’s ability and willingness to assert its institutional interests in a bipartisan way. See, e.g., David Fontana & Aziz Z. Huq, *Institutional loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 33–37 (2018).

³⁹ Over 180 former Members of Congress have formed the “ReFormers Caucus.” See *ReFormers Caucus Members*, ISSUE ONE, <https://www.issueone.org/reformers/#reformer-full-list> [<http://perma.cc/BW74-23XH>]. Just over one hundred are Democrats, and over eighty are Republicans. See *id.*

⁴⁰ See Alex Swoyer & David Sherfinski, *Centrist senators form Common Sense Caucus*, WASH. TIMES (Jan. 23, 2018), <https://www.washingtontimes.com/news/2018/jan/23/centrist-senators-form-common-sense-caucus/> [<http://perma.cc/LNA2-MJHA>].

Republicans. For all the reasons Professor Devins laments, we should wish these efforts well; but he's right, their prospects for success are bleak.

We are left with a dysfunctional Congress, incapable of standing up for its institutional privileges against an expanding executive. Professor Devins worries that allowing more legislators' lawsuits will create a new forum for the partisan divide, and may, therefore, paint the courts also with a more partisan cast. This leaves Professor Devins with no specific remedy for the problem he has chronicled: an institutional lassitude by Congress in the face of executive branch encroachments.

Professor Devins and I respectfully disagree on the value of expanded legislator standing.⁴¹ The value served by allowing legislators to sue the executive is not in the unique insight of the legislators' legal arguments, but in the fact that in many cases they may be the only parties with standing to challenge executive actions. I trust courts to cut through the partisan nature of arguments submitted in briefs by members of one party in the House or Senate. What those members do, however, in getting a case to court could be irreplaceable.

Consider, for instance, an executive's failure to enforce laws: whether President Obama on immigration, or President Trump on the ACA tax. What private party would have standing to force a president to act?⁴² Or consider the challenge to a president spending money that was not the subject of an appropriation, as the U.S. Constitution requires?⁴³ If a group of members of Congress, even though entirely partisan, nevertheless are held to have standing (as, for instance, the House did in *U.S. House of Representatives v. Burwell*⁴⁴), and no one else conceivably could, then I would weather the risk that a judge would be drawn into a partisan dispute, in order to get the issue resolved. The political question doctrine would still be available for the judge to avoid ruling if there were too great a partisan divisive risk in doing so.

2. Professor John Yoo

Professor John Yoo presents a contrast to the majority of participants in this symposium by a robust defense of executive

⁴¹ See generally Campbell, *supra* note 5.

⁴² I grant that it is still not clear that even members of Congress would have standing in such situations, but their institutional interest in seeing laws passed by Congress be enforced is of a different kind than that of the average citizen. That is the gist of my article. See generally Campbell, *supra* note 5.

⁴³ "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7.

⁴⁴ See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76 (D.D.C. 2015).

action, occasionally even beyond legal limits. He provides an exhaustive, insightful, and largely laudatory recounting of the presidency of Franklin D. Roosevelt, as analyzed in domestic policy, foreign policy, and civil liberties. Yoo sees the success of FDR's four terms in office as the direct result of FDR's willingness to stretch the powers of the presidency to the utmost.

In the area of domestic policy, Yoo candidly observes with historical hindsight that the New Deal, and tight monetary policy, prolonged rather than alleviated the Great Depression. He criticizes the expansion of the administrative state, whereby FDR's legacy of federal agencies, excessive delegation of power from Congress, and truncating state's reserved powers continues to have effects to this day—not all bad, but mostly so.

Yet in foreign affairs, and civil liberties, Yoo finds redemption for FDR's robust assertion of executive authority. Yoo maintains that if the president abided by the spirit (and the letter) of Congressional enactments consistent with the nation's preference for neutrality, America might never have helped Britain at the time of Britain's greatest need, and might have entered the European theater of war too late, if at all. The wartime civil liberties restrictions, including massive wiretapping without warrants, are similarly justified, in Professor Yoo's view, by their results: An America largely protected from enemy sabotage throughout World War II.

One might put Yoo's position this way: Of what use is the separation of powers, the rule of law, and the Bill of Rights in America in a world where Nazism and fascism had triumphed in Europe and intimidated the United States into the status of a vassal state? This is a variant of Justice Jackson's argument, dissenting in *Terminiello v. Chicago*, that our U.S. Constitution is not a "suicide pact."⁴⁵ The argument is that courts must not ignore what is necessary to protect our country's very existence by an overly scrupulous regard for civil liberties or restrictions on executive action more suited to normal times. Professor Yoo is in this camp, in my view. He has good company; Justice Jackson knew what he was talking about, having just returned from his role as prosecutor in the Nuremberg trials. *Terminiello* dealt

⁴⁵ "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also Linda Greenhouse, *The Nation*; 'Suicide Pact,' N.Y. TIMES (Sept. 22, 2002), <http://www.nytimes.com/2002/09/22/weekinreview/the-nation-suicide-pact.html> (discussing other appearances of this or similar phrases in Supreme Court opinions).

with incitements to a mob, and Jackson detailed in his opinion how manipulation of mobs had allowed Hitler to come to power.

Nevertheless, if we dull our sensitivity to violations of civil liberties and to encroachments by the executive upon the people's representatives in the legislative branch, I believe we run another risk of losing our identity as a constitutional democratic republic of limited government powers and maximum individual freedom. We have already seen these tendencies developing rapidly in our "war on terror," with unprecedented incursions into individual liberties under the Patriot Act, and reliance on *ex parte* judicial proceedings (like the Foreign Intelligence Surveillance Court) to issue search warrants and wiretaps that sweep up information about innocent Americans along with foreign suspects.

Undoubtedly, presidents like FDR (and Lincoln) exceeded the boundaries of executive authority. Undoubtedly, they are also two of the most beloved presidents in our country's history. Both saved our country.

Perhaps we have, tacitly, become the Roman Republic: allocating exceptional powers to Consuls in time of great crisis. The Roman Republic set a strict time limit for their Consuls, with authority automatically reverting to the Senate when the time ran out. That historical precedent, however, is not a comforting one. The Roman Republic grew used to autocracy. The security and welfare offered by those given dictatorial power were favored by the people over their own freedom. The Consul became the Emperor, and the days of Rome as a republic came to an end.

