

Were the Constitution’s Authors a Little Too Optimistic?

The nation’s founding document has a blind spot. Trump is making it visible.

di Adam Liptak

The men who drafted the Constitution knew they were playing with fire when they created a novel and powerful new office: the president of the United States.

“The first man put at the helm will be a good one,” Benjamin Franklin [said at the Constitutional Convention](#) in June 1787, referring to George Washington. “No body knows what sort may come afterward. The executive will be always increasing here, as elsewhere, till it ends in a monarchy.”

The framers were not blind to the danger that they were creating a new kind of king, and the Constitution they adopted a few months later tried to strike a balance in inventing what was then a wholly novel office. They wanted a president who was decisive, responsive and responsible. But they also sought to establish a constitutional structure able to constrain a president who aspired to be a monarch.

They differed about how to achieve that balance. Alexander Hamilton, who argued in favor of an exceptionally strong president at the convention — he proposed, for instance, that they should serve for life — [wrote in *The Federalist Papers*](#) that there was more to fear from populists than from those committed to a firm and efficient government.

“Of those men who have overturned the liberties of republics,” he wrote, “the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”

The Constitution’s framers were doubtless brilliant, and the document they drafted has endured. It is the oldest written national constitution still in force anywhere in the world. But, as the nation commemorates its 250th anniversary, some constitutional scholars say the second Trump presidency is calling into question whether the nation’s founding charter and sacred text truly provide the balance the founders wanted.

President Trump has used the power of the federal government to bully universities, law firms and news outlets; undermined the independence of the Justice Department by instructing it to prosecute his political enemies; defied Congress by impounding money it had instructed him to spend; flouted countless court orders; and cut off funding to states led by Democrats.

That list is hardly exhaustive, and it is certainly possible to quarrel with given items in the bill of particulars. And it is not as though other presidents have always been punctilious in following the Constitution’s commands.

Still, the second Trump presidency is different in kind, legal scholars said, one that approaches the maximalist view of presidential power that Franklin and other founders feared.

Saikrishna Prakash, a law professor at the University of Virginia and the author of “The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers,” said the modern presidency would be unrecognizable to the framers.

“I think they’d be astonished, not merely by Trump, but by the breadth of the executive power in the modern era,” he said.

The office the framers created — the American president — was unlike any other chief executive in any other nation at the time. And while other aspects of the Constitution have been quite influential, few modern democracies followed its vision of executive power.

The exceptions were mostly in Latin America, where strong presidencies created in the 19th century often degenerated into dictatorships. Parliamentary models, in which the executive — there, the prime minister — emerges from and is accountable to the legislature are more common.

In a parliamentary system, the executive and the legislature are in dialogue rather than structural opposition. Prime ministers generally do not serve fixed terms and may be removed by a vote of no confidence.

The framers rejected that model for something new. They were looking for a sweet spot. They wanted a president less powerful than the king they had rebelled against but more effective than the state governors of the time, who were all but powerless, or prime ministers, who were creatures of the legislature.

The framers were trying to solve a puzzle, Michael W. McConnell, a law professor at Stanford, wrote in “The President Who Would Not Be King: Executive Power Under the Constitution.” “How could the delegates achieve the independence, vigor, secrecy and dispatch necessary for an effective executive without rendering him an elected monarch?” he asked.

Defining the scope of the new office had an improvised quality. James Madison, writing to Washington just before he left for the Constitutional Convention in Philadelphia in April 1787, said he had not given the matter much thought.

“A national Executive must also be provided,” [Madison wrote](#). “I have scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be clothed.”

Indeed, Professor McConnell wrote that Madison, revered as the father of the Constitution, was a “quintessentially legislative personality, and had few ideas about how to construct an executive branch.”

Hamilton was another matter. At the convention, he argued for a president who would serve for life and have absolute veto power over legislation. The Constitution did not go quite that far: It called for four-year terms to build in a measure of political accountability and allowed presidential vetoes to be overridden by two-thirds majorities in Congress.

But his basic attitude stood. The next year, [defending the proposed Constitution](#) during the ratification debates, Hamilton set out his vision of presidential power: “Energy in the Executive is a leading character in the definition of good government,” he wrote.

In those same papers, [Madison acknowledged](#) that “the accumulation of all powers, legislative, executive and judiciary, in the same hands” may “justly be pronounced the very definition of tyranny.”

But he added that the Constitution had solved this problem through the separation of powers and by providing for checks and balances.

Few Checks on a Demagogue

The framers believed that the threat of impeachment and removal would be a decisive check on the president. They envisioned a Congress that would be jealous of its institutional power and would muster, when appropriate, not only a simple majority vote in the House of Representatives to accuse presidents of misconduct but also a two-thirds vote in the Senate to convict and remove them.

“To the extent that they’re worried about a demagogue, they think impeachment will be the mechanism,” Professor Prakash said. “They expected that impeachment would deal with scoundrels.”

But they failed to anticipate a development that would make impeachment improbable: the rise of political parties.

The [classic account](#) of this constitutional blind spot is “Separation of Parties, Not Powers,” a 2006 article in *The Harvard Law Review* by Daryl J. Levinson and Richard H. Pildes.

“To this day, the idea of self-sustaining political competition built into the structure of government is frequently portrayed as the unique genius of the U.S. Constitution, the very basis for the success of American democracy,” they wrote. “Yet the truth is closer to the opposite.”

“As competition between the legislative and executive branches was displaced by competition between two major parties,” they added, “the machine that was supposed to go of itself stopped running.”

Many presidents have tested the Constitution’s limits. Thomas Jefferson pulled off the Louisiana Purchase even though he believed it was unconstitutional. Abraham Lincoln suspended the writ of habeas corpus. Richard Nixon created a culture of executive lawlessness that culminated in the Watergate scandal and his resignation.

This suggests the founding generation may have been unduly optimistic about the power of norms and expectations, grounded in part in Washington’s sterling character. “I do think that they expected that the president would be bound by a sense of duty to the law and to the Constitution,” Professor McConnell said.

The rise of political parties, to say nothing of the current extreme polarization between them, has made other forms of congressional supervision of the president vanishingly rare. There have been four presidential impeachments in the history of the United States, of Andrew Johnson, Bill Clinton and, twice, Donald J. Trump. In none of the four cases did the Senate muster the required two-thirds vote to convict.

Today, Professor Prakash said Congress would be entitled to tell the executive branch that Immigration and Customs Enforcement agents must display badges and not wear masks. Lawmakers could, he added, forbid the president from using the National Guard to enforce the law.

“They have a lot of authority,” he said. “It’s just that, in the modern era, it’s very hard for them to flex it, because half the Congress is in the president’s pocket and the president has a veto.”

Michael J. Klarman, a law professor at Harvard and the author of “The Framers’ Coup: The Making of the United States Constitution,” said the framers could not have predicted all that would come in the centuries after they drafted the nation’s founding charter. “I don’t think they could imagine where we ended up,” he said.

The framers were wary of popular democracy. Senators were initially chosen by state legislatures, to insulate them from passing political passions.

Similarly, the framers envisioned an electoral college made up of discerning citizens who would exercise independent judgment in deciding who was fit to be president. Hamilton described the original expectation in the Federalist Papers. “Men chosen by the people for the special purpose” of selecting the president, [he wrote](#), “will be most likely to possess the information and discernment requisite to such complicated investigations.”

“They tried to create a system that was resistant to populist influence,” Professor Klarman said. “When they talked about what populist interests could produce, they actually described a kind of demagogic authoritarian like Trump.”

These days, those circuit breakers are gone: Voters elect senators, and the Electoral College is a formality. A structure designed by elites wary of direct democracy has moved toward one far more responsive to the popular will.

That has made the government more vulnerable to the sort of populism that the framers feared. But it may also — whether expressed in public opinion, on the streets and at the ballot box — supply a counterweight to the executive overreach that some of the men who drafted and ratified the Constitution feared.

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