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PRESIDENTIAL POWER AND CONSTITUTIONAL RESPONSIBILITY

THOMAS P. CROCKER*

Abstract: Some constitutional theorists defend unbounded executive power to respond to emergencies or expansive discretionary powers to complete statutory directives. Against these anti-Madisonian approaches, this Article examines how the textual assignment of republican virtues helps to constitute and constrain the president's power. The Madisonian solution for constitutional constraint both creates institutions for unenlightened statesmen and relies on virtue to make governing possible. Constitutional responsibility is a consistent textual theme found in the command to "take Care that the Laws be faithfully executed," the responsibility to remain faithful to the office of president, and the obligation to preserve the Constitution itself. Although presidential discretion in executing and in interpreting the laws is inevitable, this Article explains why presidents are constrained by virtues such as care and fidelity, by integrity in interpretive practices, and by the normative and structural obligations of office. This Article contends that these Article II obligations, paired with the statutory and implied constitutional duty to do only what is both necessary and proper, provide textual grounds for thick normative constraints on presidential power even in the absence of more robust structural constraints. A president's "necessary" power to complete statutory directives is constrained by obligations to do only what is "proper." A president has great responsibility both in executing the laws and in constituting the national community through constitutional practices and commitments.

INTRODUCTION

In the days following the attacks on September 11, Congress granted the President authority to use "all necessary . . . force against

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those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”¹ With this grant of power, President George W. Bush subsequently undertook a number of actions. He deployed military forces to invade Afghanistan and created a prison camp to detain captured “enemy combatants.”² He authorized aggressive interrogation practices and established military commissions to try those detained and interrogated. He created surveillance programs that included electronic monitoring of Americans and sought to avoid judicial review of his policies. All of these actions were said to be necessary to protect national security. Many of these policies were later modified and legitimated by congressional acts and continued by the subsequent administration. “Because the terrorist threat continues, the national emergency declared on September 14, 2001, and the powers and authorities adopted to deal with that emergency must continue in effect,”³ proclaimed President Barack Obama nearly a decade later, sustaining a state of emergency continuously in effect since the September attacks.

In the immediate emergency circumstances in the months following the September attacks, the American people were led to believe that many questions about civil liberties or separation of powers needed to yield to the overwhelming pull of necessity, of national security, of self-preservation. As Thomas Jefferson phrased it, “The laws of necessity, or self-preservation, of saving the country when in danger, are of higher obligation.”⁴ Necessity possesses a compelling logic and motivation all its own. Necessity can set an agenda and compel the means for its fulfillment. Necessity’s preeminence was so unquestionable under the circumstances following September 2001 that Attorney General John Ashcroft could admonish, “To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists.”⁵ After all, James Madison recognized that “[i]t is in vain to oppose Constitutional barriers to the impulse of self-preservation,”⁶ whereas Alexander Hamilton urged that “[t]he authorities essential to the com-

¹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 1, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note).

² *Id.*

³ Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 75 Fed. Reg. 55,658, 55,661 (Sept. 13, 2010).

⁴ Letter from Thomas Jefferson to John Colvin (Sept. 20, 1810), in 11 THE WORKS OF THOMAS JEFFERSON 146, 147 (Paul Leicester Ford ed., 1905).

⁵ Neil A. Lewis, *The Senate Hearing: Ashcroft Defends Antiterror Plan—Says Criticism May Aid U.S. Foes*, N.Y. TIMES, Dec. 7, 2001, at A1.

⁶ THE FEDERALIST NO. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961).

mon defense . . . ought to exist without limitation.”⁷ American policy and practice, the nation’s values and laws, could be subject to, or suspended by, the presidential imperative to take all necessary action to protect national security. In exceptional times, as Jefferson elaborated, “[T]he unwritten laws of necessity, of self-preservation, and of the public safety, control the written laws of *meum* and *tuum*.”⁸ Necessity provides a purported reason to act based on compelling external circumstances, relying on accidents of events, not principles or deliberative purposes.⁹

In Jefferson’s view, the president’s first responsibility is to preserve the nation, even if that means prioritizing “unwritten laws of necessity” over enacted law.¹⁰ Following this reasoning, the president’s primary duty as commander in chief is to respond to urgent circumstances with dispatch, even if that means foregoing broader policy deliberation. Lincoln, for example, claimed authority to violate otherwise operative laws by suspending habeas corpus:

By necessary implication, when Rebellion or Invasion comes, the decision is to be made, from time to time; and I think the man whom, for the time, the people have, under the constitution, made the commander-in-chief . . . is the man who holds the power, and bears the responsibility of making it.¹¹

A strong form of this view found its way into official executive branch legal doctrine after September 11, in memos stating that “[t]he text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of compelling, unforeseen, and possibly recurring, threats to the nation’s

⁷ THE FEDERALIST NO. 23, *supra* note 6, at 153 (Alexander Hamilton).

⁸ Letter from Thomas Jefferson to John Colvin, *supra* note 4, at 146.

⁹ In this respect, necessity frames the founding question of the American Constitution, as Alexander Hamilton asks in *Federalist No. 1*:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

THE FEDERALIST NO. 1, *supra* note 6, at 33 (Alexander Hamilton).

¹⁰ Letter from Thomas Jefferson to John Colvin, *supra* note 4, at 146.

¹¹ Letter from Abraham Lincoln to Matthew Birchard and Others (June 29, 1863), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 465, 467 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS].

security.”¹² In short, with great responsibility comes great power. This responsibility extends presidential power to such a degree that a former Department of Justice attorney could claim that “[a]ny effort to apply . . . [statutory prohibitions against torture] in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants . . . would be unconstitutional.”¹³ If an analysis of presidential power went no further, the U.S. Constitution would create a tidy, closed loop. Circumstances would create the necessity for which the president has primary responsibility. Responsibility would, in turn, trigger the power to respond as necessity required, notwithstanding other applicable law. On this view, the Constitution confers responsibility and power on the president who otherwise remains unchecked and unconstrained when ensuring national security.

Even if the president has responsibility to do what is necessary under emergency circumstances, an analysis of presidential power that went no further, ignoring the role of constitutional text, structure, and values, would be incomplete. By its nature, the Constitution prioritizes written obligations over exceptional situations, constraint over prerogative. This article argues that the constitutional obligations to “take care” and to “faithfully” execute the laws found in Article II,¹⁴ paired with the statutory and implied constitutional duty to do only what is both necessary and “proper,” provide textual grounds for thick normative constraints on presidential power, even in the absence of more robust structural constraints.

Although emergency complicates the operation of constitutional constraints, it does not altogether supersede them.¹⁵ The structure and

¹² Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Authority for Use of Military Force to Combat Terrorist Activities Within the United States 1, 4 (Oct. 23, 2001) [hereinafter *Military Force Memo*], available at <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf>. Justice Clarence Thomas, dissenting in *Hamdi v. Rumsfeld*, expresses a similar view that the president has “primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations.” 542 U.S. 507, 580 (2004) (Thomas, J., dissenting).

¹³ Memorandum from Jay S. Bybee, Head of Justice Dep’t’s Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 31 (Aug. 1, 2002) [hereinafter *Torture Memo*], available at <http://f11.findlaw.com/news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>.

¹⁴ U.S. CONST. art. II, § 3.

¹⁵ See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 33 (1993) (“The American Constitution contains no general provision authorizing suspension of the normal governmental processes when an emergency is declared by an appropriate governmental authority.”).

nature of the executive office itself also constrains a president's actions. So when the German jurist Carl Schmitt argues that liberal democracy founders on its inability to constrain executive power in exceptional circumstances, on closer inspection we find that constraint works through a different grammar.¹⁶ Presidents derive their "unwritten" directives from past practice and present justifications, each rooted in normative visions of appropriate presidential action. No matter the emergency, a president will not vote on legislation, a court will not issue executive orders, and Congress will not represent the nation in international affairs.¹⁷ Certain conceptions of how to exercise power are part of the settled grammar of each office. In addition to these role-specific constraints, a president is also bound by the virtues and excellences that define what it means to fulfill the office's duties well.¹⁸ These claims impart no straw-man. Perhaps no one would contest the claim that the very conception of the office entails particular kinds of constraints. But, by beginning from this uncontroversial premise, a more robust account of presidential constraint becomes possible. A president empowered by his own responsibility retains constitutional obligations, no matter the necessity.

When pulled by the urgency of necessity, Americans confront a dilemma. They can either accept as inevitable the turn to legal black holes in which executive action spins free from constitutional constraints,¹⁹ or they may inquire further into available normative commitments embodied in constitutional text and practice. This Article takes up the latter task, arguing that Article II imbeds expectations for

¹⁶ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 6 (George Schwab trans., 1985) (1922) ("The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to preformed law.").

¹⁷ See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975, 979 (2009).

[T]he thought that officials holding constitutionally constituted offices might be wholly unconstrained by the Constitution proves incoherent. To be a president or a member of Congress or a justice of the Supreme Court is to serve in an institution that is constituted and empowered by the Constitution and, as a result, necessarily constrained by it.

Id.

¹⁸ This thought echoes Alasdair MacIntyre's conception of a practice. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 191 (1981) ("A virtue is an acquired human quality the possession and the exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.").

¹⁹ See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 202 (2006).

presidential virtue to match the demands of necessity. Finding core virtues of care and fidelity at the heart of the executive power is not surprising once we recognize that even powerful theories of executive authority, such as those advanced by Niccolò Machiavelli, always paired virtue with necessity. Discussions of presidential power often focus on institutional and political contexts, giving little attention to the more inchoate normative commitments and constraints the office and its responsibilities entail. This Article seeks to fill this gap, arguing that exercising presidential power requires taking responsibility to and for the Constitution—responsibility to obey constitutional commands and responsibility for the constitutional vision executive discretion creates.

At first glance, it may appear that few would question whether the executive has responsibility to the Constitution, but many might disagree over the content of that responsibility. Moreover, because Madisonian constitutionalism relies on external institutional constraints, not internal obligations of care and fidelity, it avoids the question of normative content altogether.

On closer inspection, both claims are contested. First, rejecting the Madisonian framework of separated powers, some scholars argue that law does not constrain the modern executive, empowered as it is by delegated discretion and emergency circumstances.²⁰ On this view, the absence of thick legal rules regulating executive action paired with the failure of coordinate institutions to provide meaningful oversight means that law fails to constrain the modern executive.²¹ Law—and with it constitutional constraints—recedes, and executive power is responsible only to public opinion and politics. Second, among scholars who accept the Madisonian approach, some caution against active intervention by other branches, particularly during perceived emergencies, preferring courts to play a minimal role, doing little more than insuring proper political process.²² When Congress has already granted great discretion to the

²⁰ See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2011) (“We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity.”).

²¹ *Id.* at 15.

²² See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1, 4 (2004); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 76–77. *But see* Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES IN LAW 643, 647 (2008) (“[T]he Court sits not to resolve the dispute before it, which may leave the Court free to choose the narrowest ground that would serve that purpose, but rather to nourish and protect the basic values of the Constitution.”).

executive, this political process view differs little from the view extolling unbounded executive power. Judicial minimalism combined with congressional acquiescence provides faint institutional oversight. Neither account considers how normative features of our constitutional system might constrain executive authority by providing a basis for evaluating the content of discretionary executive policy.

As this Article argues, so long as the Constitution remains a common reference for our politics, constitutional meanings, and institutional roles, it provides normative constraints on executive power. It is not enough to say that separation of powers is “obsolete,” or that the political process is sufficient to check the modern executive (as some do²³) without also acknowledging the normative constraint of the executive’s constitutional responsibilities. No doubt, constraint, like power, must be embodied in political institutions. But the structural interplay of institutional powers has normative content. Duties to “take care” and “faithfully” execute laws,²⁴ for example, provide meaningful content to institutional boundaries. As constitutional constraints, they are legal constraints, equally available to shape internal deliberation as well as external enforcement by courts and political bodies. External constraints through courts or political process rely on normative conceptions of presidential responsibilities that constitutional meanings make available.²⁵

Responsibility is a consistent textual theme applicable to presidential power. The president is required to take an oath, promising to “faithfully execute the office of the President of the United States,” and “to the best of my ability, preserve, protect and defend the Constitution of the United States.”²⁶ The oath does not bind the president to the more politically abstract conception of “nation,” but to the “Constitu-

²³ See POSNER & VERMEULE, *supra* note 20, at 17.

²⁴ See U.S. CONST. art. II, § 3.

²⁵ Even if the solution to executive aggrandizement is new institutional mechanisms to empower Congress in particular, the puzzle of compliance will still require recognition of particularly constitutional meanings and responsibilities that are related to care and fidelity as constraints on unlimited executive discretion. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* *passim* (2010); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* *passim* (1990). Courts play a role in protecting constitutional values and process from separation of powers imbalances as well. See, e.g., Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991).

²⁶ U.S. CONST. art. II, § 1, cl. 8; see Paul Horwitz, *Honor’s Constitutional Moment: The Oath and Presidential Transitions*, 103 Nw. U. L. REV. 1067, 1068 (2009) (“By committing himself to preserve the Constitution and fulfill his Article II duties, the President ties his own honor to a particular understanding of the Constitution.”).

tion of the United States.”²⁷ The oath is both to the document and to the political composition of the American polity.

The president is also commanded to “take Care that the Laws be faithfully executed.”²⁸ Presidential discretion in executing the laws is inevitable, for it is in the nature of rules that they are never complete, and it is the fate of statutory directives that they are always partial. Nonetheless, presidents must exercise their executive discretion with both care and fidelity. Responsibility for “faithfully execut[ing] the Office of President,” in addition to preserving the Constitution itself, combined with the obligation to “take care” in the execution of the laws, places virtue at the center of the president’s powers.²⁹ Oath and administration therefore entail duties that transcend articulation of the more specific powers of office. A president who claims that necessity requires extra-constitutional action is still bound by the normative constraints of the office, manifest in the duties of care and fidelity. Lincoln was empowered to exercise something recognizable within a system of government as the office of the president only because the Constitution created and constrained that office. In so doing, the Constitution also created the expectation that executive officials would exercise discretion consistent with republican virtue.

To focus on virtue is an important republican ideal, but not one at the forefront of the Madisonian conception of constitutional constraint. Although it may be important to have enlightened statesman exemplifying the best republican virtues, the U.S. constitutional system relies primarily on institutional structure to guide and constrain government actors. After all, “enlightened statesmen will not always be at the helm,”³⁰ as Madison warned. Madison sought to solve the problems of republican agency and institutional aggrandizement through structural design. Factions were to be disarmed by enlarging the republic to “make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”³¹ Concentration of power in one office or person was to be avoided by “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”³²

²⁷ U.S. CONST. art. II, § 1, cl. 8.

²⁸ *Id.* art. II, § 3.

²⁹ *See id.* art. II, §§ 1, 3.

³⁰ THE FEDERALIST NO. 10, *supra* note 6, at 80 (James Madison).

³¹ *Id.* at 83.

³² THE FEDERALIST NO. 51, *supra* note 6, at 321–22 (James Madison).

But institutional structure can accomplish only so much. When the president is acting with discretion on the basis of necessity, with or without statutory authorization, there are few institutional checks on which American constitutionalism can rely. If the emergency is dire, the lack of statutory authorization may be no barrier, as Lincoln's actions demonstrate, and judicial review often comes late if at all, as cases like the 1944 Supreme Court cases *Ex Parte Endo*³³ and *Korematsu v. United States*³⁴ illustrate. The Supreme Court is hesitant to second-guess executive decisions during emergency or war. Yet even during periods of reduced congressional oversight and greater judicial deference, the president is not free from normative constraints. Virtue remains indispensable to constitutional practice, because "[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."³⁵

Virtue does not pose a precise calculus, but requires judgment and reason, effective even when necessity compels action. Necessity may be the mother of invention, but presidential innovation always occurs within a normative context. How this is so is the focus of this Article. Because constitutional responsibility and virtue are inextricable, accounts of presidential power that emphasize the discretionary features of executive practice miss the import of normative constraints for both constitutional meaning and structure. A president's constitutional vision shapes normative conceptions of social and political life, prioritizing and creating policies and practices that help define the American polity. This vision is not unconstrained—as if it operated on a blank canvas—and it is not without guiding virtues and principles. The Madisonian project obscures and ignores how constitutional practice depends on these “softer” constraints. Scholars have addressed how the Constitution invites popular engagement with normative vision,³⁶ but they have largely overlooked how the Constitution directs presidential vision through the lens of responsibility and virtue. Scholars have begun to

³³ 323 U.S. 283, 297 (1944).

³⁴ 323 U.S. 214, 217–18 (1944).

³⁵ THE FEDERALIST NO. 57, *supra* note 6, at 350 (James Madison).

³⁶ See, e.g., 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS *passim* (1998); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW *passim* (2004); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND PRACTICE *passim* (2002); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

focus on how constitutional commitments and constraints work,³⁷ but have not addressed how the discretionary aspects of presidential administration are nonetheless subject to normative constraint. Thus, this Article asks how constitutional responsibilities constrain executive power, even when the supposed unwritten laws of necessity beckon otherwise.

A quick look back to the Authorization for Use of Military Force (“AUMF”) confirms the role of necessity, while introducing an additional responsibility—the president is authorized to take “all necessary . . . actions.”³⁸ Presidential authority would seem to be complete, operating on the intensity of the national security need and the urgency of the crisis situation. But the ellipsis invites us to overlook the substance and logical structure of this authority. The ellipsis displaces something often absent from the public discourse, but not from the text of the resolution. The AUMF conjoins an evaluative term to the operational imperative to authorize use of “all necessary and appropriate force” in responding to the September attacks.³⁹ Similar language is employed in the 2002 congressional authorization to use force in Iraq, which empowered the President to use armed forces “as he determines to be necessary and appropriate.”⁴⁰ What is “appropriate” doing in such legislative empowerment of executive officials? What does “appropriate” mean and what is its source? How does “appropriate” relate to the need to do what is “necessary”?

Such an evaluative conjunction is not novel. The Constitution empowers Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”⁴¹ “Appropriate” is a cognate to the Constitution’s “proper” limit on congressional

³⁷ See Fallon, *supra* note 17, at 985 (“[T]he Constitution performs part of its constraining function by constituting, empowering, and supporting a network of mutually reinforcing institutions with the capacity to visit unwanted consequences on officials who would otherwise not comply with constitutional norms.”); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011) (“[T]he success of constitutional law, in both its constitutive and constraining roles, depends on the willingness and ability of powerful social and political actors to make sustainable commitments to abide by and uphold constitutional rules and institutions.”); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 769 (2010) (exploring “some of the empirical dimensions of official obedience to the law”).

³⁸ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note).

³⁹ *Id.*

⁴⁰ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501 (codified at 50 U.S.C. § 1541 note).

⁴¹ U.S. CONST. art. I, § 8, cl. 18.

necessity. The claim here is simple: the term “appropriate” embeds within executive authority normative constraints, just as “proper” limits the means Congress can employ in furthering its enumerated powers. But what kind of constraint is the requirement of propriety?⁴² What is necessary has been the focus of some judicial attention, but what is proper has been little discussed. Congress has interpreted the Necessary and Proper Clause to expand its powers, not to limit them. Supreme Court opinions have endorsed this view, though the interpretive emphasis since *McCulloch v. Maryland* has been on the meaning of “necessity.”⁴³ Regarding the meaning of the Necessary and Proper Clause, Chief Justice John Marshall explained: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.”⁴⁴ What is necessary is also proper when it is directed to a legitimate end, is not otherwise prohibited, and coheres with the “letter and spirit” of the Constitution. A “proper” exercise of legislative power does more than match means to ends; it also furthers the aims and values of constitutional “letter” as well as the more inchoate “spirit” of the Constitution. Limiting the president’s power to what is “appropriate” does not interfere with the need to match means to ends, but it does require the president to conform to broader constitutional principles and values, and perhaps other laws and treaties, when deciding how to execute a specific law or policy. By giving substance to the “appropriate” limit on the president’s power under the AUMF, we can begin to sketch both instrumental and deontological obligations. The president has an ethical responsibility to do what is “appropriate” in addition to a practical obligation to do what is necessary.⁴⁵

The president’s constitutional responsibility has multiple dimensions. The first is the textual assignment of specific virtues—care and faith in particular—to the exercise of executive power. Part I focuses on

⁴² For the contrary view, that the “necessary and appropriate” clause in the AUMF does not constrain executive power, but expands it, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2081 (2005) (“It seems unlikely that Congress, which views the Necessary and Proper Clause expansively . . . would have used the phrase ‘necessary and appropriate’ as a way to constrain presidential authority.”).

⁴³ See 17 U.S. (4 Wheat.) 316, 421 (1819).

⁴⁴ *Id.*

⁴⁵ This discussion will build on the idea of the completion power presented by Jack Goldsmith & John F. Manning. See Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280 (2006); *infra* notes 228–292 and accompanying text.

these neglected normative constraints on how the executive office may wield its assigned powers.⁴⁶ They remind us that, although constitutional design does not foreclose vast domains of executive discretion, presidential authority is not without other forms of constitutional constraints operating both internally and externally. Within the executive branch, conceptions of virtuous practice can guide actions and policies, producing principles of political morality by which officials hold themselves responsible to the Constitution. As Section I.A examines, even in its most robust theoretical manifestation in Machiavelli's political theory, a claim of necessity always requires virtue.⁴⁷ Moreover, and as Section I.B examines, presidents administer law through the lens of their own constitutional visions that guide their responses to crises.⁴⁸ Outside the executive branch, judgments about how well presidents fulfill their obligations to execute the laws with care and fidelity can mobilize congressional oversight and popular engagement. Courts, by contrast, may be hesitant to interfere with executive discretion. For example, to the extent that courts review executive administration, the *Chevron* doctrine already imbeds great deference to agency expertise.⁴⁹ In some respects, *Chevron* review already looks at the care and fidelity of executive statutory implementations.⁵⁰ But judicial review of agency action is based on statutory limitations set forth in the Administrative Procedures Act.⁵¹ When it comes to constitutional structure, the Supreme Court is more willing to intervene when the president strays too far from congressional instruction, as the Court did in 2006 in *Hamdan v. Rumsfeld*, by holding that the President's military commissions were not properly authorized.⁵² As Section I.C explores, these constraints work through the expectations that the president's responsibility to take care and be faithful to the laws and Constitution create.⁵³ Faithfulness in constitutional interpretation applies all the more when presidents contemplate action that conflicts with courts or Congress, as Section I.D considers.⁵⁴

⁴⁶ See *infra* notes 58–221 and accompanying text.

⁴⁷ See *infra* notes 72–88 and accompanying text.

⁴⁸ See *infra* notes 89–123 and accompanying text.

⁴⁹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

⁵⁰ *Id.* at 843 (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute.”) (emphasis added).

⁵¹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 1001–1011 (2006)).

⁵² 548 U.S. 557, 611–12 (2006).

⁵³ See *infra* notes 124–172 and accompanying text.

⁵⁴ See *infra* notes 173–211 and accompanying text.

Finally, Section I.E examines how constitutional non-enforcement creates a special problem of constitutional conflict when presidents exercise their discretion not to enforce laws.⁵⁵ Whether constrained internally or externally, presidential responsibility for exemplifying particular virtues of office provides a normative ground for evaluating and constraining acts otherwise justified by necessity or prerogative.

The second dimension of constitutional responsibility is the textual limit of what is necessary to what is also proper or appropriate. As Part II explains, what is “proper” will depend on background legal norms and practices that inform, if they do not directly regulate, the range of acceptable executive action.⁵⁶ These legal norms can be both domestic and international. American constitutionalism constructs institutional structures to empower and constrain governing officials. But American constitutionalism does more than build structures. It also consists of ethical claims that hold officials responsible for the constitutional culture they envision. Where necessity might tempt a president to know no law, responsibility to take care and remain faithful to the law reminds officials of their ethically constrained position to do only what is proper no matter the circumstances. Responsibility to Constitution and country is empowering, but it is also constraining, as Part III explains.⁵⁷ This is an important lesson of American constitutionalism—with great power comes great responsibility.

I. THE VIRTUES OF CONSTITUTIONAL RESPONSIBILITY

A president’s responsibility to and for the Constitution is a capacious burden. The modern president sits atop a vast military and civilian bureaucracy capable of generating laws, adjudicating disputes, and executing policy. No other governing officer has available such an immense range of resources and legal tools to shape the everyday lives of Americans. No other governing office is as visible a representation of American constitutional aspirations. Presidents shape not only specific national policies but also normative conceptions of constitutional meaning, each capable of mobilizing people and resources.⁵⁸ Moreover, through the constitutional visions they articulate, presidents seek legitimacy for the practices that further their policies. Rooted in constitu-

⁵⁵ See *infra* notes 212–221 and accompanying text.

⁵⁶ See *infra* notes 222–292 and accompanying text.

⁵⁷ See *infra* notes 293–340 and accompanying text.

⁵⁸ See Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 *FORDHAM L. REV.* 1837, 1843 (2009) (“Presidential popular constitutionalism seeks to generate authority by evoking a *normative image* of the national community.”) (emphasis added).

tional claims, new policy directions find legitimacy in their coherence with our constituted past. A political reward for winning the presidency is the ability to use the office's substantial public voice to persuade others to see the national community in a way that furthers the office holder's proffered vision. Marshaling party and patronage, the modern president has the ability to communicate to the American people through many voices utilizing all the tools of modern media communications. In turn, when the people seek government action, the president is the most direct recipient of the public's attention.

Presidential power is not without its pathologies.⁵⁹ The people and the president create mutually reinforcing dynamics. When the people are fearful, they look to the powers of the presidency to keep them safe; and when exercising discretionary powers, the president looks to the demands of the people to justify and legitimate them. Emergencies are particularly ripe for exploitation of this dynamic relation.⁶⁰ Because the executive branch often has the initial responsibility to take action in response to a crisis, the president is uniquely situated to claim that necessity justifies particular actions, even those superseding operative legal constraints. To legitimate such actions, the president need only refer to the people's popular mandate to secure the nation during times of crises or under continuing threats, even if that mandate is procured through presidential persuasion. The president and the people thereby create the looping effects of mutually reinforcing claims to protect security as necessity demands.⁶¹ Necessity abets these potential pathologies by shifting the burden of responsibility. If circumstances compel the president's actions in light of special obligations to save the country, then it is difficult to hold the president responsible for those actions. After all, they were forced by circumstance, not executed by choice. To understand this tension better, a detour through a key question Lincoln raised is instructive.

⁵⁹ See ACKERMAN, *supra* note 25, at 4 ("The triumphs of the presidency in the past have prepared the way for a grim future. The office that has sustained a living tradition of popular sovereignty threatens to become its principal agent of destruction"); see also PETER SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 20 (2009) ("[I]t is the President who, at the start of the twenty-first century, poses the most profound threat to our checks and balances system.").

⁶⁰ See Sanford Levinson & Jack M. Balkin, *Constitutional Crisis*, 157 U. PA. L. REV. 707, 714 (2009) ("If a central purpose of constitutions is to make politics possible, constitutional crises mark moments when constitutions threaten to fail at this task.").

⁶¹ I borrow the phrase "looping effects" from Ian Hacking, *The Looping Effects of Human Kinds*, in CAUSAL COGNITION: A MULTIDISCIPLINARY APPROACH 351, 351-83 (D. Sperber et al. eds., 1995).

Lincoln asked Congress on July 4, 1861, “Is there, in all republics, this inherent, and fatal weakness? Must a government, of necessity, be too strong for the liberties of its own people or too weak to maintain its own existence?”⁶² In asking this question, Lincoln wrestled with the implications of necessity for executive power. A Constitution that rigidly constrains the president would render him lacking in sufficient “energy” to deal with the “most critical emergencies of the state.”⁶³ A Constitution that permissively enabled a president to act as necessary would render “the security of liberty”⁶⁴ subject to accident and caprice. Confronting a situation where maintaining the union’s “territorial integrity, against its own domestic foes” was at issue, Lincoln claimed that “no choice was left but to call out the war power”⁶⁵ in a situation that belies his own claim. Perhaps the choice was clear, but nonetheless a choice had to be made. The rhetorical appeal to necessity—that circumstances left no choice—is one way of obfuscating the issue of responsibility. If the president had no choice, how could he be responsible? But responsible he is, so the choice was his to make. The conditions under which the choice was made are central to understanding the tension between Constitution and constraint. Even when the executive is caught between rigid formalism and permissive functionalism, the “choice” of action is bound by the obligation of care and fidelity to the Constitution and laws. Lincoln’s question recognizes the fundamental ambiguity of executive power in American constitutionalism. Nothing in this ambiguity, however, frees the executive from the unconditioned commitment to virtue.

To understand this ambiguity better, this Part examines the relation between necessity and virtue in early modern political theory, constitutional text, and the executive’s practice of legal interpretation.⁶⁶ Far from authorizing any action at all—even during an emergency and even with a Machiavellian account of executive power—necessity is bound by virtue, as Section I.A explores.⁶⁷ Section I.B examines how presidents often announce a constitutional vision to guide the nation’s policies and practices, which has the effect of acknowledging and ar-

⁶² President Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 432, 432–37 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS].

⁶³ THE FEDERALIST, No. 70, *supra* note 6, at 424, 426 (Alexander Hamilton).

⁶⁴ *Id.* at 423.

⁶⁵ President Abraham Lincoln, Message to Congress in Special Session, *supra* note 62, at 432–37.

⁶⁶ See *infra* notes 72–221 and accompanying text.

⁶⁷ See *infra* notes 72–88 and accompanying text.

articulating the executive's responsibility to the Constitution.⁶⁸ The president's responsibility to the Constitution is textually manifest in the constitutional duty to "take care that the laws be faithfully executed."⁶⁹ Section I.C investigates how we might understand these duties as normative constraints on executive power.⁷⁰ Finally, the president's choice to act in conflict with, or to ignore, statutory or constitutional constraints presents a challenge to any account of constitutional responsibility. As Sections I.D and I.E discuss, when the president acts in conflict with the law, or refuses to enforce the law, we have the clearest cases when other institutions must intervene to enforce the executive's constitutional responsibilities.⁷¹

A. *Virtue's Machiavelli*

Liberal constitutionalism struggles to reconcile its commitment to legal form with its desire for legal flexibility. Ex ante commitment presents the risk of foregoing future flexibility. Circumstances being unpredictable, adherence to form might prove infelicitous—or worse. In its strongest form, the worry is that strict adherence to constitutional form when circumstances might demand flexibility would convert the Constitution into a "suicide pact."⁷² This worry has early modern roots, as John Locke navigated form and flexibility through the notion of executive "prerogative." Locke reasons that "because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick," executive officials should have all the "[p]ower to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it."⁷³ Future uncertainty creates present prerogative. In so doing, however, Locke merely introduces another problem into the heart of liberal constitutionalism: what and who constrains the exercise of prerogative? One response is that

⁶⁸ See *infra* notes 89–123 and accompanying text.

⁶⁹ U.S. CONST. art. II, § 3.

⁷⁰ See *infra* notes 124–172 and accompanying text.

⁷¹ See *infra* notes 173–221 and accompanying text.

⁷² See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); see also *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("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."). Judge Richard Posner makes this problem the title of his book, elevating the idea that the Constitution is not a "suicide pact" to a central principle of analysis. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY *passim* (2006).

⁷³ JOHN LOCKE, TWO TREATISES ON GOVERNMENT § 159, § 160 (Peter Laslett ed., 1960) (1690).

there is no constraint beyond political constraint.⁷⁴ Thus, Locke only presents the problem of prerogative, which later theorists cease to view as a problem, without providing a framework for its solution. Another perhaps unlikely early modern theorist provides a useful framework, if not the precise content, for resolving this conflict between constraint and prerogative.

Perhaps no other political theorist has written more pointedly on the relation between necessity and virtue than Machiavelli. And perhaps no other political theorist's name is more attached to so particular a political character as the "murderous Machiavel" Shakespeare evokes.⁷⁵ Machiavelli's name is given to an ambitious, self-interested, amoral governing character. To go no further with his thought, one would miss an important strain of republican political theory focused on executive power that begins with Machiavelli. And, as Harvey Mansfield claimed, "For Machiavelli there is just one beginning—necessity."⁷⁶

Necessity and virtue are inextricable, but their relation is complex. "[N]ecessity will lead you to do many things which reason does not recommend."⁷⁷ Although, "necessity makes virtue,"⁷⁸ virtue is that quality in rulers that enables them to act in a way most conducive to the survival of a republic.⁷⁹ Virtue, for Machiavelli, is not simply following the mandates of traditional virtues, but of adapting intelligently to the circumstances. A prince "cannot observe of all those things for which men are held good, since he is often under a necessity, to maintain his state, of acting against faith, against charity, against humanity, against religion."⁸⁰ Necessity dictates the need to act and virtue provides the charac-

⁷⁴ One version of this view, articulated by Carl Schmitt, is that "[t]he most guidance the constitution can provide is to indicate who can act in such a case," but does not provide further constraints. SCHMITT, *supra* note 16, at 7. Or, as Schmitt famously stated: "[S]overeign is he who decides on the exception." *Id.* at 5. Adrian Vermeule and Eric Posner endorse this view of the unbounded Executive as unconstrained through separation of powers or other legal limits. See POSNER & VERMEULE, *supra* note 20, at 18–19; see also WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW 61–84 (1999).

⁷⁵ WILLIAM SHAKESPEARE, THE THIRD PART OF KING HENRY THE SIXTH act 3, sc. 2. ("And set the murderous Machiavel to school.").

⁷⁶ HARVEY C. MANSFIELD, MACHIAVELLI'S VIRTUE 55 (1966).

⁷⁷ NICCOLO MACHIAVELLI, DISCOURSES ON LIVY 123 (Harvey C. Mansfield & Nathan Tarcov trans., 1984) (1531).

⁷⁸ *Id.* at 356.

⁷⁹ 1 QUENTIN SKINNER, FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE 121 (1998) ("[T]he concept of virtu [sic] is thus used to denote the indispensable quality which enables a ruler to deflect the slings and arrows of outrageous fortune, and to aspire in consequence to the attainment of honour, glory and fame.").

⁸⁰ NICCOLO MACHIAVELLI, THE PRINCE 70 (Harvey C. Mansfield trans., 2d ed. 1998) (1532). Machiavelli continues: "And so he needs to have a spirit disposed to change as the

ter of the action. But unlike Aristotle, for whom character produces habits of responding in the appropriate way,⁸¹ Machiavelli prizes action freed from moral constraints, aimed only at addressing the circumstances posed by necessity. Traditional virtues can be useful, but do not require fulfillment for their own sake, because “[s]ome things seem to be virtuous, but if they are put into practice will be ruinous . . . other things seem to be vices, yet if put into practice will bring the prince security and well-being.”⁸² What is seemingly virtuous can only be so judged according to whether it brings about security and well-being. Virtue thus becomes a kind of prudential ability to provide for the security of the state. As one scholar notes, manifesting “[v]irtù” requires political actors to “show reflective prudence, first, in their ability to distinguish among different kinds of necessity; and second, in working out appropriate ways of ordering their responses to them”⁸³

Necessity’s most pressing calling is for the executive to preserve the state’s security. Regarding this end, Machiavelli asserts no limits on available means: “[T]here ought not to enter any consideration of either just or unjust, merciful or cruel, praiseworthy or ignominious; indeed every other concern put aside, one ought to follow entirely the policy that saves its life and maintains its liberty.”⁸⁴ With this view, Machiavelli seems to provide the blueprint for executive prerogative during emergencies. When responding to necessity, an executive should not care about considerations—such as justice—thought extraneous to the task of securing the polity from existential threat. Yet even in the midst of this sweeping statement, virtue is never far away. Even if traditional virtues do not enter into consideration, an executive must exercise virtue in choosing how to respond to the situation necessity presents. For without virtue, the executive renders the polity vulnerable to accident and fortune: “There is no more dangerous nor more useless defense than that which is done tumultuously and without order.”⁸⁵ But, without necessity, there is no occasion for the exercise of the particular virtues that exemplify the power of the executive. In order to exercise Machiavelli’s virtue, then, an executive needs the occasions

winds of fortune and variations of things command him, and . . . not depart from good, when possible, but know how to enter into evil, when forced by necessity.” *Id.*

⁸¹ See ARISTOTLE, NICHOMACHEAN ETHICS BK. II, reprinted in 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1984).

⁸² MACHIAVELLI, *supra* note 80, at 62.

⁸³ ERICA BENNER, MACHIAVELLI’S ETHICS 156 (2009).

⁸⁴ MACHIAVELLI, *supra* note 77, at 301.

⁸⁵ *Id.* at 280.

necessity creates. Security is an achievement that will always be subject to further necessities, and therefore to further exercises in virtue.

For present purposes, we need not delve further into the intricacies of Machiavelli's political thought to see how it is relevant to the executive's relation to virtue.⁸⁶ Machiavelli presents an executive nearly unbounded by constraint—nearly, but not entirely. Virtue is an indispensable quality needed to counter necessity. When Machiavelli advises the Prince to forego certain traditional virtues in favor of what is necessary to avoid potentially ruinous consequences, this instruction in political science presupposes that the Prince is already educated in the proper virtues, which included philosophy and ancient history.⁸⁷ Because this moral education is presupposed, Machiavelli can advise the Prince to use expectations of traditional virtue in others to gain an advantage where necessary. Although Machiavelli's conception of virtue depends on prudential concerns, he nonetheless recognizes that constraint exists in the very necessity that justifies exercise of executive authority. The content of that constraint for Machiavelli is intertwined with the forms of monarchy and republic to which his theory is aimed. In the absence of governing constraints, necessity would dominate political life. But good governance requires more. Such a view differs widely from one that advocates an executive unbound with nothing but politics to trim the problem of unconstrained prerogative. Necessity is not the last word, but the beginning of an inquiry into what virtue in governance requires. For Machiavelli, virtue provides real constraints, and for the legal scholar, virtue becomes a placeholder for legal constraints embodied in constitutional form and practice.

Once later political development gives more specific content to the virtues of good governance, we are able to speak in more specific terms about the virtues required of governing officials.⁸⁸ With the founding of the American republic, those virtues take on very specific requirements that return us to something much closer to eighteenth century conceptions of what are, in effect, Aristotelian virtues. But rather than merely presenting a problem of the relation between constraint and necessity,

⁸⁶ For a full account of the modern Executive's relation to Machiavelli's political theory, see generally HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* (1989). The importance of virtue is explored in J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 31–48 (2d ed. 2003).

⁸⁷ See SHELDON S. WOLIN, *POLITICS AND VISION* 207 (2004) ("The transition to a new type of *virtù* involved a redefinition of princely *virtù* . . .").

⁸⁸ Machiavelli also suggests another solution to the problem of necessity: democratic participation. See JOHN P. MCCORMICK, *MACHIAVELLIAN DEMOCRACY* 16–17 (2011).

Machiavelli provides a framework and a source for its solution. Necessity is constrained by virtue. Virtue's specific content depends on the political constitution of a particular polity. In the American tradition, as we shall see, the Constitution imbeds virtues such as care and fidelity as constraints on executive authority.

B. *Responsibility and Presidential Vision*

To see how circumstances interact with constitutional vision, consider two speeches each delivered by two different presidents in times of crises. Lincoln mobilized great resources to sustain a vision of national unity realized through the people's material sacrifices.⁸⁹ In his First Inaugural Address, the issue he confronted was not only the recent secession of southern states like South Carolina, but also the constitutional justifications proffered in defense of severing the union. Political acts rely on constitutional vision. As a consequence, Lincoln argued that "the Union of these States is perpetual," and that "[t]he Union is much older than the Constitution."⁹⁰ Secessionist southerners contested Lincoln's constitutional vision of the indivisible union. Focusing on the claim that the states have a prior and continuing sovereign status, Jefferson Davis, in his own inaugural address to the confederate states two weeks prior, urged a "right of the people to alter or abolish [their government] at will whenever they become destructive of the ends for which they were established."⁹¹ The rights proclaimed in the formation of the United States, confirmed in the Constitution, "undeniably recognize[] in the people the power to resume the authority delegated for the purposes of government. Thus the sovereign States here represented have proceeded to form this Confederacy"⁹² The people to which he refers are not "We the people"⁹³ of a national community, but the people of the several states. Disavowing rational deliberation, Davis claimed that circumstances compelled insurrectionist actions: "As a necessity, not a choice, we have resorted to the remedy of separation."⁹⁴

⁸⁹ See, e.g., DANIEL FARBER, LINCOLN'S CONSTITUTION 7–25 (2003).

⁹⁰ President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 COLLECTED WORKS, *supra* note 62, at 263, 264–65.

⁹¹ Jefferson Davis, Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), in 5 JEFFERSON DAVIS, CONSTITUTIONALIST 49, 50 (D. Dunbar Rowland ed., 1923).

⁹² *Id.*

⁹³ U.S. CONST. pmbl.

⁹⁴ Jefferson Davis, Inaugural Address of the President of the Provisional Government, *supra* note 91, at 51.

Lincoln would also rely on necessity to justify his actions to preserve the union, later claiming that “measures otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”⁹⁵

Rejecting the argument that the states have sovereign priority over the union, which exists merely as a contract between states, Lincoln reasoned: “If the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it?”⁹⁶ To undo the Union would require the consent of the whole union, not the unilateral actions of individual political bodies, and would imply that the “more perfect Union” lacked in perfection because of the supposed superior status of the individual states.⁹⁷ Thus, Lincoln concluded that “no State upon its own mere motion can lawfully get out of the Union.”⁹⁸ This argument has consequences for the president’s responsibility to the Constitution.

Because of the constitutional vision he imparted, Lincoln declared that, “to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States.”⁹⁹ Taking care to faithfully execute the laws against states whose acts against the “authority of the United States are insurrectionary or revolutionary”¹⁰⁰ required mobilization of all the president’s powers, and the adoption of measures sometimes in conflict with the Constitution and laws. Lincoln’s speech imparted a contested constitutional vision, constructed contrasting civic communities, and mobilized publics on their behalf. Despite later protestations by the Supreme Court to be preeminent in the interpretation of the Constitution,¹⁰¹ Lincoln’s vision had greater immediate, and more lasting, effect than the prevailing view of constitutional structure reflected in Chief Justice Roger Taney’s 1857 decision in *Dred Scott v. Sandford*.¹⁰²

Constitutional visions can also have pervasive effects. Following the attacks of September 11, President Bush mobilized the country to em-

⁹⁵ Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in *SPEECHES AND WRITINGS*, *supra* note 11, at 585, 585.

⁹⁶ President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 *COLLECTED WORKS*, *supra* note 62, at 265.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

¹⁰² 60 U.S. (19 How.) 393, 426 (1857) (holding that blacks cannot be citizens).

bark on a war that “will not end until every terrorist group of global reach has been found, stopped and defeated.”¹⁰³ Whereas Lincoln confronted a defining constitutional debate over the structure and future of the union, President Bush faced no such existential crises. Instead, the vision he projected was much more personal, framed in terms of the President’s own responsibility to the national community. Speaking days after the attacks, he declared: “I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.”¹⁰⁴ Above all else, “[o]ur first priority must always be the security of our Nation.”¹⁰⁵ On the fifth anniversary of September 11, President Bush reiterated his personal obligation: “In the first days after the 9/11 attacks, I promised to use every element of national power to fight the terrorists, wherever we find them.”¹⁰⁶

And use them he did. Executive officials under President Bush argued for unilateral powers in conflict with congressional mandates when it came to restrictions on surveillance under the Foreign Intelligence Surveillance Act (FISA)¹⁰⁷ and when it came to prohibitions against torture and cruel, inhuman, and degrading treatment of detainees under the anti-torture statute¹⁰⁸ as well as under international covenants.¹⁰⁹

Claiming power to pursue an unyielding and unrelenting struggle to secure the homeland enabled the President to conduct the “decisive ideological struggle of the 21st century and the calling of our generation.”¹¹⁰ This struggle “is a struggle for civilization. We are fighting to maintain the way of life enjoyed by free nations.”¹¹¹ The President’s unyielding struggle and responsibility became the task for the country it-

¹⁰³ President George W. Bush, Address to a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) [hereinafter 2001 Bush Joint Session Address].

¹⁰⁴ *Id.* at 1144.

¹⁰⁵ President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 129, 132 (Jan. 29, 2002) [hereinafter 2002 State of the Union].

¹⁰⁶ President George W. Bush, President’s Address to the Nation on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1597, 1599 (Sept. 11, 2006) [hereinafter President Bush’s Address].

¹⁰⁷ 50 U.S.C. §§ 1801–1862 (2006).

¹⁰⁸ 18 U.S.C. §§ 2340–2340A (2006).

¹⁰⁹ See Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, 113 (entered into force June 26, 1987); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹¹⁰ President Bush’s Address, *supra* note 106, at 1598.

¹¹¹ *Id.* at 1599.

self, and—rather than simply capturing and containing defined perpetrators of the September atrocities—civilization itself was at stake, which was something more, it seems, than preserving the Constitution. But the constitutional ideals of liberty and dignity inflect this vision, for “[a]s long as the United States of America is determined and strong, this will not be an age of terror; this will be an age of liberty”¹¹² Although the President admonished that history made it “our responsibility and our privilege to fight freedom’s fight,” this campaign has constitutional implications because “America will always stand firm for the nonnegotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance.”¹¹³ Although security may be the first priority, as the President’s vision unfolds we see that preserving and promoting constitutional values at home and abroad motivated him in part to mobilize the national community to do more than guarantee its physical security.

In claiming a personal responsibility for American security, President Bush answered necessity’s calling. Circumstances, or even history, compelled the moment, not rational deliberation over objectives and methods. The President framed the implications of the circumstantial compulsion in sweeping, and visionary, terms: “For America, 9/11 was more than a tragedy. It changed the way we look at the world.”¹¹⁴ The content of this new vision, however, remained opaque. Other than affirming a commitment to security, liberty, and dignity, there is no other connection between constitutional values and the martial projects actually involved in the struggle against terrorists. What was this new vision and what were its implications? One element is an increased assertion of presidential power to respond to this new world free from judicial or congressional oversight. Recall that a defining assertion of executive power as it emerged was that “[t]he text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of compelling, unforeseen, and possibly recurring, threats to the nation’s security.”¹¹⁵ A personalized

¹¹² 2001 Bush Joint Session Address, *supra* note 103, at 1144.

¹¹³ 2002 State of the Union, *supra* note 105, at 132, 135.

¹¹⁴ President Bush’s Address, *supra* note 106, at 1598.

¹¹⁵ Military Force Memo, *supra* note 12, at 4.

presidential responsibility could generate its own power to match the perceived degree of responsibility.¹¹⁶

This view has precedent in President Franklin Roosevelt's description of his own powers and responsibility, even in the failure of Congress to act as he desired. He proclaimed:

I cannot tell what powers may have to be exercised in order to win this war. The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.¹¹⁷

President Roosevelt's appeal was personal and expansive. But unlike President Bush's similar claims, President Roosevelt recognized his responsibility to the Constitution even in the context of the war powers. Although the content of that responsibility is not specified, mere recognition that it exists serves as a normative constraint on how presidential "powers may have to be exercised."¹¹⁸

Responsibility has a complicated relation to power. Necessity unsettles whatever equilibrium between the two exists. Necessity pulls in the direction of executive discretion to do whatever it takes to resolve the crisis and to provide security. Power enables discretion, and "[e]nergy in the Executive" makes possible vigorous responses to emergencies that in the past have given rise to dictatorship.¹¹⁹ Although there is no constitutional provision authorizing emergency dictatorial powers for the executive,¹²⁰ a president, responsible for security, need not cite other justification for the power to act in the face of necessity.¹²¹

¹¹⁶ John Yoo's reasoning here has antecedents in defenses of the Unitarian conception of executive power, which argues that a president's duty to execute the laws must be accompanied by the power to do so. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549 (1994). The president also relies on personal power in exercising office. See RICHARD NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* *passim* (1990).

¹¹⁷ 88 CONG. REC. S7042, S7044 (Sept. 7, 1942).

¹¹⁸ See *id.*

¹¹⁹ THE FEDERALIST NO. 70, *supra* note 6, at 423 (Alexander Hamilton).

¹²⁰ But see CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 3-14 (Transaction Publishers 2002) (1948) (advocating for the existence of a "constitutional dictatorship" in executive practice to govern during emergencies).

¹²¹ Torture Memo, *supra* note 13, at 31.

So where does responsibility lie when necessity ensnares power? Does responsibility attach to country or Constitution? President Roosevelt said both, and President Bush claimed security as a first priority, but not as the only priority. Even as the longstanding political theory debate urges the priority of self-preservation over the rule of law,¹²² a consistent theme in presidential constitutional vision has been recognition of the executive's responsibility for constitutional values. The president is tamed by inescapable commitments to constitutional virtue.¹²³ Power and discretion exist only within the already existing confines of constraint. Each must operate within boundaries defined by the nature of the office, the circumstances that compel action, the limits of available resources, or the reactions of other political institutions or bodies. Constitutionalizing this constraint embeds further limitations according to the specific powers and responsibilities that constitute the executive office. Foremost of those responsibilities are the virtues of care and faithfulness in executing the laws and preserving, through upholding, the Constitution.

C. *Taking Care of the Constitution*

The president has the obligation to "take care that the laws are faithfully executed."¹²⁴ In this one simple command, the Constitution imbeds two conditions on the exercise of the president's executive power. Placing virtue at the center of the executive power is no careless use of language. Republican political theory both relied upon and aimed at the virtue of citizens and governors. Madisonian constitutional design retains the goal, "first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society"¹²⁵ Recognizing that virtue founders on human frailty and necessity, the second goal of constitutional design is to provide institutional checks for the problems of faction and self-interest, "the diseases most incident to republican government."¹²⁶ These diseases could be cured in part by ensuring that power does not collect in a single governing department. There must be a "separate and distinct exercise of the different powers of government, which to a certain extent is admitted

¹²² See, e.g., LOCKE, *supra* note 73, § 160 (arguing the Executive has "[p]ower to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it").

¹²³ See MANSFIELD, *supra* note 76, at 1–22.

¹²⁴ U.S. CONST. art. II, § 3.

¹²⁵ THE FEDERALIST NO. 57, *supra* note 6, at 350 (James Madison).

¹²⁶ THE FEDERALIST NO. 10, *supra* note 6, at 84 (James Madison).

on all hands to be essential to the preservation of liberty”¹²⁷ This much is embedded in constitutional practice. Believing that aggrandizement of power by one branch at the expense of another would be curbed when office holders identified with their offices, Madison claimed, “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”¹²⁸ This design feature remains unexplained, for it is not clear why officials would identify with their office rather than with factional allies across the government.¹²⁹ It is the ambiguity of this design feature that highlights both the fragility and the necessity of virtue. In order to counteract ambition with ambition, the Constitution requires a certain kind of fidelity to the office and its prerogatives—a willingness to prize law over power.

The Take Care Clause’s meaning is not without its own ambiguity. Is it an assignment of power, as some argue,¹³⁰ or a designation of a duty, as many others argue?¹³¹ Does the duty entail something like a necessary and proper power to make possible a faithful implementation of statutory purposes? The Supreme Court has never provided a full exposition of the clause, and certainly not one that establishes a robust grant of power.¹³² Textually, the clause appears in Article II amongst a

¹²⁷ THE FEDERALIST NO. 51, *supra* note 6, at 321 (James Madison).

¹²⁸ *Id.* at 322.

¹²⁹ See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 951 (2005) (“Yet courts and theorists seldom focus on the question of exactly how the constitutional structure is supposed to create incentives for government officials to care about expanding the power of their own branch or resisting the encroachments of their competitor branches.”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317 (2006) (“Yet it has never been clear exactly how the Madisonian machine was supposed to operate.”).

¹³⁰ See, e.g., WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 78 (H. Jefferson Powell ed., 2002) (1916) (“The widest power and the broadest duty which the President has is conferred and imposed by [the Take Care Clause].”).

¹³¹ Justice Oliver Wendell Holmes states the minimalist, almost tautological, view of the Take Care Clause succinctly: “The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.” *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 61–70 (1994).

¹³² See, e.g., *Myers*, 272 U.S. at 117.

As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.

Id.

list of other duties each commanding what the president “shall” do.¹³³ Moreover, language that instructs the president to “take care” and act “faithfully” is contrasted with the very different language of the “necessary and proper” language in Article I.¹³⁴ The former language suggests constraint. The president’s duty to execute the laws is not according to whatever is “necessary,” but is restrained by what is faithful. A full defense of this view is both beyond the scope of this Article and unnecessary to its resolution. Even if the Take Care Clause is plausibly read as a partial grant of power, it is one that is constrained by its dependence on the duties to take care and act faithfully.

The Constitution provides the institutional framework, yet relies on the virtue of rulers and ruled to implement the design to achieve a common good.¹³⁵ Madison was the architect of the institutional design of checks and balances, yet recognized the fundamental role of virtue:

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.¹³⁶

Virtue in the people leads to virtue and intelligence in the selection of governing representatives, which in turn leads to virtue in fulfilling constitutional responsibilities.¹³⁷ Responsibility and virtue are particularly important where governing discretion extends beyond institutional checks. Although “[e]nlightened statesmen will not always be at the helm,”¹³⁸ no government can survive without virtuous statesman setting the norms and expectations of the executive office. For “a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”¹³⁹

¹³³ U.S. CONST. art. II, § 3.

¹³⁴ *Id.* art. I, § 8, cl. 18.

¹³⁵ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 65–70 (1969). “The strength and spring of every free government, is the virtue of the people.” *Id.* at 120 (quoting MOSES MATHER, *AMERICA’S APPEAL TO THE IMPARTIAL WORLD* 67 (1775)).

¹³⁶ 3 *THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 536–37 (reprint 1996) (Jonathan Elliot ed., 2d ed. 1836).

¹³⁷ These requirements of virtue were not uncontested. AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 121–29 (2010).

¹³⁸ *THE FEDERALIST* No. 10, *supra* note 6, at 80 (James Madison).

¹³⁹ *THE FEDERALIST* No. 70, *supra* note 6, at 423 (Alexander Hamilton).

If the president is bound by the expectation of virtue, how does this fact help us understand the responsibilities of care and fidelity? More than holdovers from a form of political theology,¹⁴⁰ the placement of these two virtues at the heart of the executive power manifests the anxiety attending that power. On the one hand, the executive office was a source of despotism and tyranny in the founding's recent political history. On the other hand, the executive power seems indispensable to a modern political practice dedicated to separating governing functions among distinct departments. Legislative bodies are by themselves not enough. The problem is that tyranny will always be a temptation to an executive charged with responding to the demands of necessity. Madison's solution is to regulate the executive power within a binding constitutional structure that restrains unhealthy impulses, and guides proper responses to necessity. For republican theory, matching solutions to problems required more than institutional design, as John Adams wrote to his wife Abigail Adams: "[T]he new Governments we are assuming, in every Part, will require a Purification from our Vices, and an Augmentation of our Virtues or they will be no Blessings."¹⁴¹ An account of Madisonian solutions is therefore incomplete without recognizing the essential role virtue plays in constraining the offices empowered by the Constitution. Responsibilities of care and fidelity therefore particularize the general expectations of virtue in those who govern. They also provide specific constraints on executive power. Here's how.

Care and fidelity in the exercise of laws requires attending to the best practices of interpretation and implementation—whatever more particularly these may include. First, the executive's actions do not occur in a legal or historical vacuum. Fidelity means remaining faithful to past practices and precedents as well as maintaining continuity across other bodies of law. Something like Ronald Dworkin's Herculean judge may provide a rough guide here. According to Dworkin, when interpreting statutes or the Constitution, judges should interpret the document as a whole, and any interpretation "must fit and justify the most basic arrangements of political power in the community."¹⁴² Engaging in what Dworkin calls "constructive interpretation," the judge (or deci-

¹⁴⁰ See, e.g., PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 23 (2011) ("Political theology understands politics as an organization of everyday life founded on the imagination of the sacred.").

¹⁴¹ Letter from John Adams to Abigail Adams (July 3, 1776), in *MY DEAREST FRIEND, LETTERS OF ABIGAIL AND JOHN ADAMS* 121, 123 (Margaret A. Hogan & C. James Taylor eds., 2007).

¹⁴² RONALD DWORKIN, *LAW'S EMPIRE* 380 (1986).

sion maker) seeks to see the law in its best light, considering precedent and present policy to form a coherent view of the law's purpose and content.¹⁴³ In this way, discretion in executing the law entails responsibility for interpreting the law in its best light. Similarly, when interpreting the laws, the president should aim at the best possible interpretation that makes sense of past practice and provides a coherent fit with present policies. Implementation, not interpretation, is the primary executive task,¹⁴⁴ but the president can fulfill no laws without understanding what they mean and what they require.

Second, the executive's actions have broad implications not only for the rights of affected individuals, but also for the maintenance of a legal culture with priorities and practices that help define the polity's political identity. A president receives and reflects a constitutional culture.¹⁴⁵ A culture that prizes strict adherence to law, or prioritizes respect for human rights and dignity in governing practices, will expect its president to reflect these values. In turn, a president can shape the constitutional culture by choosing to pursue policies and practices in keeping with an administration's policy preferences. Within this dynamic relation between the polity and the president, there is room for variation and flexibility. Within this relation, however, there are constraints, reflected in Adams and Madison's concern for the virtue of the new officials—that they take care and be faithful. Executing the laws in a manner aimed at avoiding constraints or reaching preferred outcomes, no matter how implausible the interpretation, fails to take proper care of being responsible for the law and fails to be faithful to the task of fulfilling legal mandates. At a minimum, the president should not approach this task seeking to minimize or trivialize statutory constraints or obligations, treating the law as a nuisance to be overcome in pursuit of more pressing, necessary matters. As we have seen, necessity creates its own demands that may diverge from the president's responsibility for fidelity and care.

¹⁴³ *Id.* at 211.

¹⁴⁴ Although implementation has been construed as a judicial function, the president can be thought to have a similar obligation to implement legal doctrine within his discretion. See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) ("A crucial mission of the Court is to *implement* the Constitution successfully.").

¹⁴⁵ See Post, *supra* note 36, at 77 ("[C]onstitutional culture is the medium within which constitutional law is fashioned.").

1. Does the President Have "Complete Discretion" When Responding to Necessity?

Necessity animated the Office of Legal Counsel's ("OLC") advice to executive officials in the wake of the September 11 attacks. In the months following September 11, there was a need to guide President Bush's exercise of constitutional and statutory powers as he confronted a range of national security issues. How far could the President go, for example, in pursuing information from detained suspects, and what are the limits on the exercise of military authority on U.S. soil? These and other questions pressed for answers. Under these conditions the infamous "torture memos" were written. What is striking about the August memo is the lengths to which it goes to free the President from legal constraint.¹⁴⁶ Statutes implementing the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment only prohibit acts that are "of an extreme nature," and that the statute "taken as a whole, makes plain that it prohibits only extreme acts," such as infliction of pain with intensity that accompanies "organ failure, impairment of bodily function, or even death."¹⁴⁷ Even if an interrogation method were torture, the memo concluded, "Any effort to apply [the statute] in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional."¹⁴⁸ From its exceedingly narrow conception of torture; to its lack of historical sensitivity to the important role of prohibitions against torture both in the eighteenth century¹⁴⁹ and in the post-World War II development of human rights

¹⁴⁶ See Torture Memo, *supra* note 13, at 1. Many of the controversial memos addressing interrogation have been withdrawn by the OLC. See Memorandum from David J. Barron, Acting Assistant Attorney Gen., to the Attorney Gen., Withdrawal of Office of Legal Counsel Opinion 1 (June 11, 2009), available at <http://www.justice.gov/olc/2009/memo-barron2009.pdf>; Memorandum from David J. Barron, Acting Assistant Attorney Gen., to the Attorney Gen., Withdrawal of Office of Legal Counsel CIA Interrogation Opinions 1 (Apr. 15, 2009), available at <http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf>. Even though some of the most aggressive OLC opinions have been withdrawn, similar views can be found in other Department of Justice (DOJ) defenses of executive power and academic advocacy. See U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 9 (Jan. 19, 2006) [hereinafter DOJ WHITE PAPER] (claiming that the president has all the necessary authority to fulfill his duty to protect the nation from armed attack). These views are by no means moribund.

¹⁴⁷ Torture Memo, *supra* note 13, at 1.

¹⁴⁸ *Id.*

¹⁴⁹ See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 29 (David Young trans., 1986) (1764). See generally LYNN HUNT, INVENTING HUMAN RIGHTS (2007) (tracing eighteenth century rejection of torture as the basis for emerging human rights).

law,¹⁵⁰ to its entirely self-serving account of an effectively unconstrained and unenumerated executive power, the memo seeks only to enable presidential action, not to take care to be faithful to the law.¹⁵¹ This tendentious reading of the statute has drawn much criticism and few defenders.¹⁵² Jack Goldsmith described the memo's rationale succinctly: "[V]iolent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority."¹⁵³

What is difficult about appealing to virtues as guides for presidential action is that they present no definite rules of behavior. What distinguishes a judgment that the "torture memo's" analysis fails to fulfill the virtues of care and faithfulness from alternative judgments? To say that it fails to fit with past and present understandings and practices of law works better as a criticism if the claim that the situation was "unprecedented in recent American history"¹⁵⁴ is false.

Even if we assume that presidents have not confronted a situation like the one presented after September 11 in more than a half-century, it still does not follow that the president has "complete discretion in exercising"¹⁵⁵ his enumerated powers.¹⁵⁶ Discretion always occurs within

¹⁵⁰ See generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010) (tracing the recent historical development of human rights).

¹⁵¹ See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1583 (2007) ("The Torture Opinion relentlessly seeks to circumvent all legal limits on the CIA's ability to engage in torture, and it simply ignores arguments to the contrary.").

¹⁵² See, e.g., Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1155–56 (2006); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1460–61 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1683 (2005); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68–69 (2005); see also Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2017 (2003).

¹⁵³ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 144 (2007). Anthony Lewis is even less generous in his assessment: "The memo reads like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison. Avoiding prosecution is literally a theme of the memoranda." Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, at 4.

¹⁵⁴ Torture Memo, *supra* note 13, at 31.

¹⁵⁵ *Id.* at 38.

¹⁵⁶ Nor does the memo's citation to the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), support the claim that the president has "complete discretion" in exercising presidential powers. In the *Prize Cases*, the Court discussed the president's power to decide under the laws of war who was an enemy belligerent. *Id.* The Court made no general claim about the president's discretion under the Commander in Chief power. *Id.*

practical and legal contexts that limit its exercise.¹⁵⁷ Such discretion is never “whatever it takes,” for there are some options that will be political non-starters, others that will be moral impossibilities, others that are imprudent, and still others that fail to align with a president’s overall vision. It would be childish fantasy to believe that, despite these myriad constraints, the president nonetheless had some unlimited “complete discretion” to proceed in whatever manner he desired.

Alternatively, perhaps by “complete discretion” the claim is that the president does not require or depend upon the judgments of courts or Congress in deciding how to respond. In exercising his Commander in Chief powers, responsibility is the president’s alone. But this cannot be quite right either. Court decisions and congressional statutes set limits to what are available options for exercising the president’s discretion. For example, Congress has the power to appropriate funds on which the Commander in Chief depends. In addition, the Supreme Court, in cases such as *Myers v. United States*¹⁵⁸ or *Youngstown Steel and Tube Co. v. Sawyer*¹⁵⁹ established particular boundaries in which the president must act. So if “complete discretion” cannot be found, then there is room to ask more about the constraints that bind discretion, even if these constraints do not take the form of rules.

Although the problem of presidential responsibility arises as a problem of executive discretion in the first place, it is important to remember that other institutions also define presidential roles. When it comes to exercising discretion, Congress must first provide an intelligible principle to guide executive practices. Courts reviewing executive actions must apply Congressional instructions to executive determinations to decide how much discretion to grant. In each case, the prospect for executive discretion is defined in part, and thereby constrained, through the roles assigned by other institutions. Although the focus in this Article is on the executive branch, it is important to remember that Congress and courts help constitute presidential roles, in addition to popular political expectations.

¹⁵⁷ Moreover, examination of other liberal democracies reveals consistent constraint of executive discretion, even in emergencies. See Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2495 (2006).

¹⁵⁸ 272 U.S. 52, 135 (1926) (approving removal power over executive officials “by virtue of the general grant to him of executive power” and stating that the president “may properly supervise and guide their construction of the statutes under which they act in order to secure the unitary and uniform execution of the laws”).

¹⁵⁹ 343 U.S. 579, 587 (1952) (limiting the president’s ability to take private property as “[t]his is a job for the Nation’s lawmakers, not for its military authorities”).

2. Taking Care with Legal Advice

A presidential advisor has available a number of tools and methods to guide executive decisions. These tools also serve as potential constraints. Foremost among them is the need to reflect accurately the president's proper powers and responsibilities. Method can help or hinder accurate representations of presidential obligations. Recognizing the importance of providing reliable legal advice to presidents, former OLC attorneys Walter Dellinger and Dawn Johnsen, along with seventeen other former OLC officials, drafted a set of principles to guide the conduct of lawyers within OLC on whose advice officials throughout the executive branch rely. One of these principles states: "The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."¹⁶⁰ These principles promote accuracy, forthrightness, institutional precedent, respect for courts and Congress, widespread input, and public disclosure, among others.¹⁶¹ The goal here is to create normative guidelines for the president's legal advisors, recognizing the vexed relation that can exist between a president who wants to do whatever is necessary, and the constitutional traditions that constrain. A president takes care in faithfully executing the laws by relying on institutional actors who themselves are bound by the duty to take care to accurately reflect the law's obligations.

One way to give more precise meaning to the Take Care Clause is to articulate canons of interpretive care. At the very least, advice that conflicts with statutory mandates, or that advises how to evade laws and their consequences fails to fulfill requirements of interpretive care.¹⁶² Care requires attention to executing, not avoiding, law. Care should

¹⁶⁰ WALTER E. DELLINGER ET AL., OFFICE OF LEGAL COUNSEL, PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), reprinted in Dawn E. Johnson, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1604 App. 2 (2007).

¹⁶¹ See *id.*

¹⁶² Here is an insider's description of how attorneys in the Bush Administration viewed the requirements on surveillance imposed by the Foreign Intelligence Surveillance Act and the court it established to oversee the legality of executive surveillance programs:

After 9/11 [David Addington and Vice President Cheney] and other top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.

GOLDSMITH, *supra* note 153, at 181.

provide attention to detail, concern for a law's purpose, understanding of statutory and historical context, and humility in attending to the views of courts and Congress. The precise content of the virtue is less important than the recognition that the president and presidential advisors must take meaningful care in executing the laws. A president's discretion is shaped by advice that renders particular principles and practices most salient.

Although salience can be a matter of background social and political practices, care, like fidelity, aims at interpretive accuracy. Many of the same methods of interpretation applicable to federal courts apply to the president as well. Text, structure, and history, as well as prudential and ethical considerations all are available ways of understanding constitutional meaning.¹⁶³ Statutory construction is often a special skill of executive officials who must engage in the practice, not for adjudicatory purposes, but to implement Congress's wishes. Given the fact that the president's interpretation may often be the only and final interpretation of many legal matters, the burden of care is all the greater. Supreme Court and congressional processes for correcting errors, when available, are cumbersome. Many executive decisions will go unreviewed because potential plaintiffs lack standing or the issue is judged a political question. Thus, the potential lack of outside institutional checks heightens the responsibility to take care when executing legal interpretation.

By contrast, internal checks within the executive branch can be an important part of assuring the integrity of presidential interpretation. But, internal checks are vulnerable to manipulation by aggressive presidential advisors who seek opinions that cohere with the administration's policies, not ones that accurately portray legal impediments to preferred means of achieving those policies.¹⁶⁴ This internal failure characterizes the OLC under Assistant Attorney General Jay Bybee, and led to disagreements over the withdrawal of the permissive analysis found in the "torture memo" within the administration.¹⁶⁵

It is beyond the scope of the present argument to engage in a detailed analysis of the best interpretive methods for the executive branch, because the claim here is simply that part of the virtue of care requires the president to provide "accurate and honest appraisal of applicable law, even if [it] will constrain the administration's pursuit of

¹⁶³ See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982).

¹⁶⁴ See ACKERMAN, *supra* note 25, at 87-116.

¹⁶⁵ See GOLDSMITH, *supra* note 153, at 151, 162.

desired policies.”¹⁶⁶ The president’s responsibility is to execute the laws, not to take care to achieve his policy objectives notwithstanding the legal impediments. In so doing, the president’s constitutional vision will undoubtedly shape priorities and practices, and will guide interpretation in light of broader understandings of laws and their objectives. Because these understandings are public and contestable, they can become a source of external constraint, requiring justification to a skeptical public. Taking care requires providing public reasons that articulate laws in their best light, not self-serving justifications more reminiscent of the “bad man” seeking to avoid law’s consequences.¹⁶⁷

3. Keeping Faith

Keeping faith with the Constitution requires not only development of a coherent and comprehensive constitutional vision, but also recognition of how that vision fits within tradition and practice. Remaining faithful to the Constitution is another way of engaging the American people in the pursuit of principle and policy. Quotidian political pursuits share a common commitment to values and constraints that define Americans’ sense of self.¹⁶⁸ Faithfulness in this sense is a kind of commitment. Like being true to one’s own values and projects extended over a life, constitutional commitment requires fulfillment of political projects and adherence to shared values. Writing for the Court in the 2004 decision, *Hamdi v. Rumsfeld*, Justice Sandra Day O’Connor reviewed aspects of President Bush’s detention of those he unilaterally designated unlawful enemy combatants, and stated:

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we

¹⁶⁶ DELLINGER ET AL., *supra* note 160, at 1604.

¹⁶⁷ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .”).

¹⁶⁸ See SANFORD LEVINSON, CONSTITUTIONAL FAITH 75 (1988) (“When Americans talk about American constitutional law, they are necessarily talking about themselves and, ultimately, what kind of persons they wish to be.”).

must preserve our commitment at home to the principles for which we fight abroad.¹⁶⁹

Faithfulness is easy in the midst of normal and everyday governing. Temptation to break commitments occurs only when crisis arises. When that happens, necessity advises abandoning those commitments that make resolution of the crisis more onerous. Like the Biblical Job, faith can only be outwardly proved through crisis, and if it fails under trial and temptation, then there is reason to doubt its efficacy, rather than its mere coincidence, during normal times.¹⁷⁰ That is, if readily abandoned during crisis, then what appears as faithfulness to the Constitution need not be the product of commitment but rather a consequence of having insufficient occasion to act in conflict with its constraints. The true test of faithfulness to the laws and Constitution arises when necessity presses for political priority in times of national security crisis.

Crisis accentuates the president's powers. It provides the occasion for exercising otherwise dormant statutory and constitutional powers.¹⁷¹ The nature of necessity being what it is, crisis and emergency are predictable, even expected. Because we can plan in advance for the authority executive officials will need in light of the actions they will be expected to take, crisis need be no challenge to the president's faithfulness to the Constitution.¹⁷² To emphasize the president's responsibility for the nation's security connects the executive to the needs of the people in a way that should promote faithfulness to the people's constitutional commitments and institutions. These commitments can come into conflict with the seeming demands of pressing need. Perhaps more than any other official, the president is at the forefront of necessity's imperative. As the "torture memo" argues, the president has the primary responsibility for national security, and is the institutional first responder to any emergency. Thus, being faithful to the laws may require flexibility. Necessity urges the president to jettison constraints,

¹⁶⁹ 542 U.S. 507, 532 (2004) (plurality opinion).

¹⁷⁰ See *The Book of Job* 1:6–2:13, 3, 23, 38–41 (describing God's testing of Job and God's ultimate power and wisdom); see also Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

¹⁷¹ See National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976); International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977); see also HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-505 GOV, NATIONAL EMERGENCY POWERS (2007), available at <http://fpc.state.gov/documents/organization/6216.pdf> (surveying the president's national emergency powers).

¹⁷² See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 77–100 (2007) (outlining new statutory emergency powers to be enacted before the next major terrorist attack).

but the virtue of fidelity reminds the president of the responsibility to the community the Constitution creates.

D. Constitutional Conflict

To a legal tradition now so invested in refinements in methodology regarding federal court constitutional interpretation, it is noteworthy how little attention has been given to presidential interpretive practices.¹⁷³ Indeed, where so much conflict exists—for example, over the scope of the judicially enforceable rights to liberty under the Due Process Clause—presidential interpretive methodology, by comparison, has received far less attention. Whereas the issue over the Due Process Clause is about providing the best interpretation of normative principles, the issue in presidential interpretation is about whether the president is bound by constitutional constraints at all. No one doubts whether the Supreme Court is bound by the Constitution, or for that matter, whether Congress can legitimately act against the Constitution's limitations (even if there is controversy of where those boundaries are in fact located), but there is disagreement over whether the president is bound by the Constitution under conditions of necessity. As the examples of Lincoln suspending habeas corpus or appropriating funds for the military prior to Congressional approval suggest, defensible justifications exist for just such a proposition.¹⁷⁴ These conflicts may be inseparable from the very nature of the executive office and executive power. Executive prerogative is nonetheless bound by constitutional form.

How can the president take care to faithfully execute laws by contravening them? The first argument is that the executive suspends the laws in order to preserve them.¹⁷⁵ When emergencies arise, Jefferson suggested that the president's highest duty is to preserve the nation.¹⁷⁶ As a constitutional practice, emergencies big and small are ever present, rendering constraints susceptible to purposeful manipulation, where

¹⁷³ See Michael Stokes Paulson, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261 (1994) ("The 'Take Care' clause supplements and complements the president's oath as a textual justification for independent interpretive authority."); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) (concluding that "much of the time, it is emphatically the province and duty of the executive branch to say what the law is").

¹⁷⁴ See FARBER, *supra* note 89, at 115–43.

¹⁷⁵ See SCHMITT, *supra* note 16, at 6–7 ("The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency . . ."); see also GIORGIO AGAMBEN, *STATE OF EXCEPTION passim* (Kevin Attell trans., 2005).

¹⁷⁶ Letter from Thomas Jefferson to John Colvin, *supra* note 4, at 146.

they are not already practically evanescent.¹⁷⁷ The second argument recognizes the interstitial interventions of emergency measures, and focuses on the post hoc involvement of courts and Congress in amending or legitimating the conflicting execution. If Congress provides post hoc ratification, then the wisdom of the president's actions is confirmed, and the conflict is abated.¹⁷⁸ If the Court interprets the law to avoid the conflict, or legitimates the priority of the president's inherent power over a contrary statute, then once again, the conflict is dissolved.

To approach the issue of a preclusive power to act in conflict with the Constitution, Justice Robert Jackson's tripartite analysis provides the relevant discursive framework. President Harry Truman issued an executive order instructing the Secretary of Commerce to seize steel mills in order to ensure that an on-going labor dispute did not disrupt steel production during the Korean Conflict.¹⁷⁹ In the 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer*, the President justified this action as necessary to the war effort, asserting before the Supreme Court authority as the Commander in Chief, authority derived from the Vesting Clause, and a duty under the Take Care Clause.¹⁸⁰ Lacking express congressional authorization, the President asserted inherent power to address a national emergency. The Supreme Court issued six different opinions explaining why President Truman did not have the power he asserted.¹⁸¹ Among these, Justice Jackson's concurrence has become "the accepted framework for evaluating executive action in this area."¹⁸² Justice Jackson introduced three categories of executive action. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."¹⁸³ Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority," there exists a "zone of twilight" that will "depend on the imperatives of events and contemporary imponderables" to justify exercise of such au-

¹⁷⁷ See Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 836 (2006) ("[T]he 'normal' American constitutional order can be seen as thoroughly shot through with emergency law and that this constant sense of emergency has fundamentally shaped the possibilities of American constitutionalism.").

¹⁷⁸ With post hoc ratification, the conflict is abated, though not eliminated. Congressional action preserves the conflict while avoiding its consequences.

¹⁷⁹ Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952) (taking action "to assure the continued availability of steel and steel products during the existing emergency").

¹⁸⁰ *Youngstown*, 343 U.S. at 587.

¹⁸¹ As a consequence of the fractured opinion, Stephen Vladeck comments that "*Youngstown* . . . was a mess of a case." Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown's Shadow*, 53 ST. LOUIS U. L.J. 29, 31 (2008).

¹⁸² *Medellin v. Texas*, 552 U.S. 491, 524 (2008).

¹⁸³ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

thority.¹⁸⁴ Finally, when the president acts in conflict “with the expressed or implied will of Congress, his power is at its lowest ebb”¹⁸⁵

When the executive acts in conflict with Congressional statutes, his power is at its “lowest ebb,” but that does not necessarily mean the president lacks power altogether. Justice Jackson does not explain further when the “imperatives of events,” —or more simply stated, necessity—allows the president to act in conflict with Congress.¹⁸⁶ But the possibility is clearly contemplated. By what criteria are we to judge when the imperatives of events appropriately justify executive action in conflict with Congressional statutes? When is the executive permitted to assume “independent presidential responsibility” for the law because of “congressional inertia, indifference or quiescence”?¹⁸⁷ Our questions remain unresolved. If we alter the question to ask what standards we should use to assess presidential assertions of conflicting power, an answer becomes clearer. An executive who assumes “independent presidential responsibility,” retains the same responsibility to take care to faithfully execute the laws as one who operates under dependent presidential responsibility. The criteria do not change, though the circumstances of their application do.

Examining this responsibility in light of a recent conflict between presidential execution and congressional restraint suggests why virtue is needed even in the midst of necessity. In 2005, Eric Lichtblau and James Risen revealed in the *New York Times* the existence of an on-going presidentially authorized secret surveillance program that by all accounts operated in conflict with congressional statutes.¹⁸⁸ Once the National Security Agency (“NSA”) program was revealed, the administration justified it as a legitimate exercise of executive authority necessary to protect national security.¹⁸⁹ First of all, the administration asserted that “the

¹⁸⁴ *Id.* at 637.

¹⁸⁵ *Id.*

¹⁸⁶ A general basis for preclusive power to act in conflict with Congress is difficult to justify on either textual or in founding-era precedents and understandings. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 800 (2008) (“[T]he Founding era provides . . . little support for the judgment that the Commander in Chief possesses a general power to use his substantive wartime authorities to conduct military operations in contravention of statutes.”).

¹⁸⁷ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁸⁸ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. See generally ERIC LICHTBLAU, BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICE (2008) (providing the full story of the surveillance program).

¹⁸⁹ See David E. Sanger, *Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at A1 (reporting President Bush as saying that the surveillance was “a vital tool in our war

President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes.”¹⁹⁰ Moreover, “[b]ecause of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation’s foreign affairs.”¹⁹¹ The justification follows a familiar logic. We saw this in OLC opinions authorizing “harsh interrogation” techniques. Constitutional foundations preserved presidential prerogative over emergencies, and because imbued with responsibility for national security, the President has the requisite authority. In addition, the President also relied upon congressional authorization granted in the AUMF, which “confirms and supplements the President’s constitutional authority to protect the Nation, including through electronic surveillance,” to respond to the September 11 attacks.¹⁹²

The problem with this purported statutory authorization is that there is a much more specific statute that sets forth procedures for engaging in electronic surveillance that President Bush’s program circumvents. In barest outline, these procedures required the Attorney General to approve applications for an order granting authority to conduct electronic surveillance from a special court.¹⁹³ FISA created a court composed of Article III judges sitting as the Foreign Intelligence Surveillance Court (“FISC”). In order to obtain approval, an application must demonstrate a probable cause to believe that the target is a foreign power or an agent of a foreign power.¹⁹⁴ Recognizing the conflict between the statute and the President’s actions, the administration claimed that FISA allowed “that the Executive Branch may conduct electronic surveillance outside FISA’s express procedures if and when a subsequent statute authorizes such surveillance.”¹⁹⁵ The AUMF was just such a statute, according to the administration.

Despite analysis that relies on both inherent and statutory authority, the NSA program met with increased resistance over its legality from

against the terrorists,” that was pursued in a manner “fully consistent with my constitutional responsibilities and authorities”).

¹⁹⁰ DOJ WHITE PAPER, *supra* note 146, at 7.

¹⁹¹ *Id.*

¹⁹² *Id.* at 10.

¹⁹³ 50 U.S.C.A. §§ 1803–1804 (West 2002 & Supp. 2011).

¹⁹⁴ 50 U.S.C. § 1805(a)(3)(A) (2006 & Supp. II 2008).

¹⁹⁵ DOJ WHITE PAPER, *supra* note 146, at 20. FISA prohibited anyone from “engag[ing] . . . in electronic surveillance under color of law except as authorized by statute.” *See* 50 U.S.C.A. § 1809(a)(1) (West 2002 & Supp. 2011).

lawyers within the administration. This resistance erupted into open revolt leading to a showdown at the hospital bedside of ailing Attorney General Ashcroft.¹⁹⁶ The significance of this revolt is that, within the White House, there was dissension over the program that, even on what limited information we know about its details, would appear to have been in conflict with express statutory requirements. President Bush intervened to continue the program, despite awareness of its likely illegality, asking that it be gradually brought into compliance with the law.¹⁹⁷ These dramatic scenes occurred prior to the public revelation of the program, at a time when President Bush and his advisors feared no public recriminations. Indeed, the President is reported to have shut down an internal ethics investigation into the legality of the program, refusing access to investigators because he “makes decisions about who is ultimately given access” to the secret program.¹⁹⁸ These decisions attempted to shield legally questionable practices and their justifications from Congress and the public. Without a public means of accountability, neither Congress nor courts nor the American people can serve as institutional checks on presidential power.¹⁹⁹ And, without substantial and dramatic internal dissension, purportedly illegal practices pass as national security policy.

Other recent examples exist of executive power at its lowest ebb. Asserting that new circumstances made necessary elimination of old constraints, illegal practices like torture passed as national security policy. This Article has already made frequent reference to the OLC “torture memo,”²⁰⁰ the existence of which underscores the fact that government officials engaged in the practice. Moreover, officials advised that legal restraints, like the Geneva Conventions, did not apply to al Qaeda detainees, and promoted the advantages that followed from this determination: preserving flexibility and reducing the “threat” of criminal prosecution under the War Crimes Act.²⁰¹ Subsequently released

¹⁹⁶ David Johnston & Scott Shane, *Notes Detail Pressure on Ashcroft over Spying*, N.Y. TIMES, Aug. 17, 2007, at A14; Scott Shane & David Johnston, *Mining of Data Prompted Fight over U.S. Spying*, N.Y. TIMES, July 29, 2007, at A1; see also LICHTBLAU, *supra* note 188, at 176–85.

¹⁹⁷ See David Johnston, *Bush Intervened in Dispute over N.S.A. Eavesdropping*, N.Y. TIMES, May 16, 2007, at A1.

¹⁹⁸ LICHTBLAU, *supra* note 188, at 229 (quoting Attorney General Gonzales’s description of President Bush’s decision).

¹⁹⁹ See *ACLU v. Nat’l Sec. Agency*, 438 F. Supp. 2d. 754, 782 (E.D. Mich. 2006).

²⁰⁰ Torture Memo, *supra* note 13, at 1.

²⁰¹ Memorandum from Alberto R. Gonzales, White House Counsel, to President George W. Bush, Decision RE Application of the Geneva Convention on Prisoners of War to the Con-

memos document the practice of waterboarding, accompanied by arguments that either implausibly defined torture or implausibly limited the scope of legal restrictions.²⁰² By claiming that the Geneva Conventions did not apply, executive officials could avoid the problem of statutory construction in deciding what counts, for example, as “inhuman treatment.” They could also insulate themselves from knowing commission of war crimes. Thus, the first way of avoiding the implications of limiting statutes is to decide that they fail to apply in the first instance. Whether a statute applies and, if it does, whether it limits the president’s preferred policy are questions executive officials answer for themselves, and only later can Congress or courts challenge their answers.²⁰³ That executive officials have discretion in construing the reach and meaning of statutes in the first place does not mean that no internal legal limits apply.

flict with Al Qaeda and the Taliban (Jan. 25, 2002), available at <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html>.

²⁰² Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen. to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees 37 (May 30, 2005) [hereinafter Bradbury Memo], available at http://www.irishtimes.com/focus/2009/cia_memo1/index.pdf (describing waterboarding Abu Zubaydah eighty-three times and Khalid Sheikh Mohammed 183 times during their respective interrogations). In addition, “the C.I.A. inspector general determined that Mr. Nashiri’s was the ‘most significant’ case of a detainee’s being brutalized in unauthorized ways, including being threatened with a power drill and a handgun.” Charlie Savage, *Trial Without Major Witness Will Test Tribunal System*, N.Y. TIMES, Nov. 30, 2009, at A16; see also CIA INSPECTOR GENERAL, SPECIAL REVIEW: COUNTER-TERRORISM DETENTION AND INTERROGATION ACTIVITIES (September 2001–October 2003), at 42 (May 7, 2004). The legal justifications for engaging in official torture were provided in the Torture Memo, *supra* note 13, at 31. There are many discussions of the problems raised by the Bush administration’s approach. See, e.g., Luban, *supra* note 152, at 1440. See generally Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221 (2008) (arguing that necessity does not trump commitments to constitutional norms); Sanford Levinson, *Preserving Constitutional Norms in Times of Permanent Emergencies*, 13 CONSTELLATIONS 59 (2006) (exploring the contested relation between norms and ever-present emergencies); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005) (arguing prohibition against torture is a legal archetype on which other rules rely).

²⁰³ Post hoc review has proven practically impossible, at least in the case of torture in the “war on terror.” Indeed, the practical and conceptual difficulties with accountability may be best exemplified by Professor Charles Fried’s argument that torture is an absolute moral wrong, but nonetheless those who committed such wrongs should go unpunished. See generally GREGORY FRIED & CHARLES FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* (2010).

How can a president defend practices in conflict with Congress?²⁰⁴ The key factor—once we reject the viability of the claim that the general provisions of the AUMF somehow trump the specific requirements of FISA—is the President’s assertion of power at its “lowest ebb.” But Justice Jackson does not tell us how to decide when diminished power is nonetheless sufficient to justify appropriate action. He warns that a “[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”²⁰⁵ “Caution” needs content, and an appeal to the overriding responsibility for care and fidelity gives meaning to the remaining constraints guiding exercise of a power, which may come at the price of “disabling the Congress from acting upon the subject.”²⁰⁶

Because at the “lowest ebb” the President is not only claiming inherent authority, but also asserting superior judgment, we should therefore expect the highest attention to virtue. Such attention requires more than following necessity’s lead. It requires judgment in accord with the constraints of office, care in avoiding legal conflict to the greatest extent possible, and fidelity to more general constitutional principles such as equality and due process.

Perhaps inherent powers override congressional restraints when the goal is compelling and the means to achieving it are narrowly tailored—a strict scrutiny for inherent presidential authority. National security will always be presented as compelling so, at first blush, the analysis will focus on the means. Part of this scrutiny, however, will have to be consideration of how well both the more specific ends and particular means fit with the virtues of care and faithfulness. To raise this question, we must first move beyond the fact that the President did not admit to the conflict regarding his surveillance program. At a minimum, we have seen that care and fidelity demand more in the interpretation and implementation of law than reliance on flimsy and tendentious justifications for policies the executive wishes to pursue.

Once the conflict is admitted, the president’s broader and more inchoate responsibility to the Constitution, not just to the physical security of the polity, becomes important. This broader responsibility follows

²⁰⁴ See Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1028 (2008) (examining the implications of President Roosevelt’s wiretapping precedent for President Bush’s program).

²⁰⁵ *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

²⁰⁶ *Id.* at 637–38.

from the president's power to shape policy around a constitutional vision, so that the public looks to administrative deeds to understand constitutional meaning. President Bush acknowledged as much, stating that he pursued this surveillance program in a manner "fully consistent with my constitutional responsibilities."²⁰⁷ What belies this claim, however, is the instrumental manner in which the conflict arose. As far as the public record reflects, it is not that compliance with FISA rendered it impossible to protect national security, but that it made it inconvenient.²⁰⁸ Moreover, to the extent that the surveillance program is even more untethered from cause and suspicion in selecting its targets, it creates further conflict with constitutional rights. Fidelity may be inconvenient, and care can be instrumentally costly, but the reason to remain faithful and take care is intrinsic to preserving the Constitution. Thus, because a duty to preserve the physical safety of the nation is ever-present, convenience in achieving that goal falls far short of demonstrating that acting in conflict with congressional statutes is necessary.

Second, do not subsequent congressional amendments to the FISA framework vindicate prior assertions of presidential power? Ex post ratification of ex ante illegality has been a pattern of constitutional practice during emergencies.²⁰⁹ After lengthy public debate over the need to overhaul FISA and provide immunity to telecommunications companies who assisted the NSA in the illegal program, Congress approved new measures loosening some restrictions on wiretapping in terrorism investigations.²¹⁰ This later congressional approval diffuses the problem of the President's reliance on inherent powers in conflict with statutory limits.²¹¹ Does Congress also vindicate the president's care and faithful-

²⁰⁷ Sanger, *supra* note 189.

²⁰⁸ Not only does it seem that the justification is based on convenience, but it appears that the program was not very effective. Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value, Officials Report*, N.Y. TIMES, July 11, 2009, at A1 ("[A] new government review released Friday said the program's effectiveness in fighting terrorism was unclear."); see UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (2009), available at http://www.dni.gov/reports/report_071309.pdf.

²⁰⁹ See, e.g., FARBER, *supra* note 89, at 194–95 (describing Congress's post hoc ratification of Lincoln's actions during the summer of 1861). Some scholars claim that ex post oversight can be used in some circumstances to justify ex ante illegality during emergencies. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1118–1123 (2003).

²¹⁰ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 110-261, § 101(a)(2), 122 Stat. 2436, 2437–57 (codified as amended at 50 U.S.C. §§ 1881–1881f); see Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at A1.

²¹¹ Congress also helps legitimize the continued, and increasingly pervasive, reliance on surveillance as a mode of governing. See Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 4 (2008) ("The National Surveillance State is a per-

ness in executing the laws? It is difficult to see how. As a model of faithfulness, this procedure allows the president to make law through practice. It encourages the president to act first, consult later, and then perhaps, years later, to obtain legislation to ratify practices already undertaken. Acting first and asking later inverts constitutional form, which gives the president power to execute the laws, not to create them. It makes the Congress into less a co-equal branch than a cumbersome advisory committee for executive government. It is difficult to take care to faithfully execute a law not yet written.

Moreover, reliance on this procedure creates broader negative externalities. It encourages executive secrecy. If the price of gaining post hoc ratification is congressional debate, then executive officials may choose to keep illegal practices hidden under the shroud of state secrets, knowing that, if revealed, they can always then seek congressional approval. Without public oversight, accountability becomes more difficult and contentious legal advice gains the status of certainty. Finally, it attempts to embed in constitutional culture the priority of unilateral executive power to act as though necessary, irrespective of the obligations of care and fidelity.

E. *Constitutional Non-Enforcement*

In the modern administrative state, we have become accustomed to the president's wide range of discretionary authority. As we will see, statutory complexity gives rise to the president's power to complete legislative mandates left imperfectly specific.²¹² Does a power to complete the law also entail a power to leave statutes incomplete? What is the president's duty to execute laws he thinks are unconstitutional?

How can the president take care to faithfully execute laws by ignoring them? This is a complex question of constitutional law—one without a clear answer. On the one hand, scarce resources and differential attention will change priorities and executory practices that can lead to some laws being ignored (relative to others). On the other hand, the president sometimes claims power to ignore laws with which he disagrees or that he thinks are unconstitutional. Executive refusal can therefore change the legal landscape through non-enforcement as much as it can through legal conflict.

manent feature of governance, and will become as ubiquitous in time as the familiar devices of the regulatory and welfare states.”).

²¹² See *infra* notes 263–292 and accompanying text.

One version of this controversy involves the president's independent authority to interpret the law.²¹³ Although it may be the case that the Supreme Court is supreme in the interpretation of the law, that does not preclude the president from an obligation to interpret the Constitution and laws. Indeed, because there are many executive actions that will remain closed to searching judicial review—either because of justiciability doctrines or judicial deference—the president is obligated to follow the best interpretation of constitutional and statutory requirements. These interpretations can come into conflict, as they did for President Lincoln over the authority to suspend habeas corpus. Lincoln ignored Chief Justice Roger Taney's 1861 decision in *Ex Parte Merryman*,²¹⁴ depending on later ratification by Congress. President Andrew Jackson disagreed with Chief Justice Marshall on the constitutionality of a national bank, though in this case no conflict with judicial orders ensued.²¹⁵ In each case, it is plausible to think that the President was taking care to faithfully execute the law as he understood it. Importantly, in each case the President publicly justified his decision with reasons reflecting broader constitutional commitments to both form and function. Like the structure of judicial review, presidential interpretation also unavoidably involves articulation of moral claims susceptible to public reason.²¹⁶

A second version of this controversy involves the president's power to refuse to enforce legislative enactments, even those already signed into law.²¹⁷ One mechanism for explaining disagreements with statu-

²¹³ See, e.g., Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 88 (1998).

²¹⁴ 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487).

²¹⁵ President Jackson's Veto Message Regarding the Bank of the United States (July 10, 1832), in 1 THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, FROM WASHINGTON TO HARRISON 418, 423 (Edward Walker ed., 1841) ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.").

²¹⁶ See H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 10 (2008) ("Our actual practices of interpreting the Constitution presuppose the existence of a moral dimension to those practices . . .").

²¹⁷ See Johnsen, *supra* note 151, at 1592–93; Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 81 (2007) (arguing that the president has no power to "sign and denounce"); see also, e.g., David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 62 (2000); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 8 (2000); Christopher N. May, *Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 868–69 (1994); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008); Memorandum from Walter Dellinger, Assistant Attorney

tory requirements is by issuing signing statements. These can usefully articulate how a president understands his duty under the law, and can signal to the public and other political actors what to expect from the president's enforcement priorities. Used in this manner, signing statements can play an important public role by increasing transparency and public accountability.²¹⁸ But when used to declare opposition to the law or intent not to enforce it, signing statements can call into question the integrity of the president's commitment to take care to faithfully execute the law. Using this latter approach, President Bush created controversy by his widespread use of statements, leading to an American Bar Association report questioning the practice.²¹⁹ What made his use of such statements questionable—besides the frequency or even the specific statutes—was the basis on which he claimed non-enforcement power. A signing statement issued along with the Detainee Treatment Act is illustrative: "The executive branch shall construe . . . the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power"²²⁰ Relying on an unspecified notion of the "unitary executive" as well as the catch-all power of the Commander in Chief, the President did not understand these enacted limitations to bind his authority to order particular kinds of interrogations. It is highly questionable whether an assertion of commander in chief power could preclude congressional oversight regarding interrogation methods. But even more, this legislation was the product of intense democratic participation, coming in the wake of public revelations about the severe abuse of detainees at Abu Ghraib.

From the perspective of the Article II virtues, non-enforcement, except when a law is clearly unconstitutional, conflicts with the president's responsibilities to and for the Constitution. First, the president is not without institutional resources to avoid the implications of policies

Gen., to Bernard N. Nussbaum, Counsel to the President, *The Legal Significance of Signing Statements* (Nov. 3, 1993), available at <http://www.justice.gov/olc/signing.htm>.

²¹⁸ Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 310 (2006) (defending use of signing statements).

²¹⁹ AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 5 (2006); see also Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOS. GLOBE, Apr. 30, 2006, at A1.

²²⁰ President George W. Bush, President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 2 PUB. PAPERS 1901, 1902 (Dec. 30, 2005).

he might prefer to avoid.²²¹ For example, the president can veto the bill, negotiate in advance to keep a provision out of a bill, and lobby for its repeal. Second, the president's responsibility is to take care and faithfully execute duly enacted law. The president may have discretion over priorities and resources in addition to how a statute is interpreted and implemented, but it is conceptually incongruous to claim faithful execution by non-enforcement altogether.

Being faithful and taking care require flexibility within limits imposed by the president's responsibility to and for the Constitution. No matter the necessity, the president cannot escape the obligations of virtue. Whether necessity and virtue are understood as theoretical complements (as Machiavelli argued) or as textual responsibilities (as the Constitution provides), the responsibility to protect national security may entail power, but it also entails an antecedent responsibility to constitutional virtues and the political community they sustain.

II. COMPLETING THE PRESIDENT: HOW WHAT IS PROPER CONSTRAINS WHAT IS NECESSARY

Taking care to faithfully execute the laws is an imprecise exercise. Multiple instantiations of policy and practice are consistent with fidelity to statutory directives. As a consequence, courts sometimes give executive officials broad deference as interpreters of their legal duties. This deference, articulated in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*,²²² means not only that executive officials have a first responsibility to faithfully execute the law but also that they often have the final word in interpreting the law. Recognizing this discretionary structure, Jack Goldsmith and John Manning have developed a theory of the "completion power" that authorizes the president to compose the unwritten details essential to executing legislative programs.²²³ Because statutory frameworks are never complete by nature, the president has the constitutional power to bring to fruition the purposes, prac-

²²¹ Using a version of the constitutional avoidance canon shifts attention to another question of legitimacy. See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (explicating how the executive branch has used the avoidance canon as a means of interpreting statutes in the way most favored by the Executive); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006) (discussing the use of the avoidance canon in creating expansive executive power).

²²² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (holding that courts will defer to the Executive's interpretation of a statute if based on a permissible construction).

²²³ GOLDSMITH & MANNING, *supra* note 45, at 2280.

tices, and processes enacted by Congress. Absent structural restraints, Madisonian design solutions have little to say about how the president completes available legal directives.

To justify the completion power, Goldsmith and Manning look to the power the Necessary and Proper Clause confers on Congress, seeing in it an analogue for the president's power to complete legislative schemes.²²⁴ Because executing legislative designs requires matching statutory ends to discretionary means, the completion power enables the president to do whatever is necessary to achieve prescribed ends.²²⁵ The completion power therefore appears to provide constitutional justification for the president's authority to act as necessary in the wake of national emergencies. Where this authority exists, appeal to the "unwritten laws of necessity, of self-preservation, and of the public safety"²²⁶ may prove unproductive. Why appeal to something so evanescent as unwritten law, when we can infer power from constitutional structure and analogous text? Even where specific statutory instructions directing specific responses to pressing emergencies are lacking, the president can bring to completion their overall purpose—preserving and protecting the American people. Much will depend on how the purpose is described. What is more, within specific domains, congressional statutes themselves invite the president to use discretion to do what is necessary to achieve congressional goals.

The completion power therefore becomes a possible way for the president to respond to necessity while taking care to faithfully execute the laws. Completion is much more than non-enforcement. It is also a way for the executive to coordinate—not conflict—with congressional instructions. Goldsmith and Manning's theory has powerful explanatory as well as normative prospects. These normative prospects are underexplored, and provide the basis for further understanding the ways that the Constitution not only empowers, but also constrains the executive. Empowerment is the focus in demonstrating the existence "of a presidential authority to prescribe incidental details of implementation

²²⁴ *Id.* at 2305 ("To understand the nature of the completion power, it is helpful to analogize it to the Necessary and Proper Clause.").

²²⁵ As Goldsmith and Manning observe, the Supreme Court in *Hamdan* makes the case that an incidental power to do what is necessary exists in both the executive and the legislative branches: "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise." *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (quoting *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866)); GOLDSMITH & MANNING, *supra* note 45, at 2306.

²²⁶ Letter from Thomas Jefferson to John Colvin, *supra* note 4, at 146.

necessary to complete an unfinished statutory scheme,”²²⁷ constitutionally sourced in an implied Article II Necessary and Proper Clause. Constraint is harder to locate, particularly where “necessary” is disjoined from “proper.” But, as this Article argues, the analogy has merit, and the practice of congressionally guided executive invention has already been established, creating the possibility of recognizing a “proper” constraint on presidential power.

A. *The Necessary Power*

The completion power provides a way of explaining executive discretion in administering statutes, prosecutorial enforcement of the laws, as well as the use of force in foreign affairs and national defense. The completion power “confers upon the executive a discretion that is neither dictated nor meaningfully channeled by legislative command.”²²⁸ Working in the shadow of unavoidable legislative imperfection, the completion power does not displace the legislative function to engage in lawmaking. Rather, it seeks to carry on where explicit legislative direction leaves off.

Although Justice Jackson’s *Youngstown Sheet & Tube Co. v. Sawyer* concurrence provides precedent for analyzing executive power in relation to legislative enactments, according to Goldsmith and Manning, Chief Justice Fred Vinson’s dissent in *Youngstown* is a judicial basis for the completion power.²²⁹ Chief Justice Vinson reasoned that “[t]he absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws,” did not preclude the President from acting.²³⁰ Citing to a body of additional laws and the overriding purpose behind the United Nations Charter to render assistance in Korea backed by congressional appropriations, Chief Justice Vinson claimed that “[t]he President has the duty to execute the foregoing legislative programs.”²³¹ In essence, although there was no specific statutory mandate instructing the President to seize steel mills to ensure uninterrupted steel production, such action was necessary to fulfill explicit congressional mandates. Beginning with the premise that “the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed,” Chief Justice Vinson concluded that “[f]lexibility as to mode of execution to

²²⁷ GOLDSMITH & MANNING, *supra* note 45, at 2302 (emphasis added).

²²⁸ *Id.* at 2308.

²²⁹ *Id.* at 2302.

²³⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 701 (1952) (Vinson, C.J., dissenting).

²³¹ *Id.* at 672.

meet critical situations is a matter of practical necessity.”²³² Linking the duty to “take care” with the demands of “practical necessity,” Chief Justice Vinson fashioned an account of presidential power that is textually based, but attentive to the demands of necessity. Such attention is authorized by a “practical construction of the ‘Take Care’ clause” that the Court has recognized in other circumstances.²³³ Because of uncertainty about the status of the Take Care Clause to provide a robust grounding for completion power, Goldsmith and Manning look elsewhere for a constitutional foundation.²³⁴ They find it by analogy to Article I’s Necessary and Proper Clause.²³⁵

They find a suitable ground by appeal to the implications of the most basic form of executive power—the “authority to carry out congressional commands directed to the President or his or her agents.”²³⁶ Because it would be impossible for the legislature to specify all aspects of a law’s implementation, the executive must therefore possess a degree of discretion that implies the completion power. Executive completion power is a residuum that exists from the president’s administrative responsibility, which in turn seems to follow from his duty under the Take Care Clause.²³⁷ Eschewing the latter as a source, Goldsmith and Manning must articulate a reason why there exists an express Necessary and Proper Clause in Article I, but no such provision in Article II. They argue that, even in the absence of the express provision in Ar-

²³² *Id.* at 702.

²³³ *Id.* Chief Justice Vinson’s theory, unlike that of Goldsmith and Manning, is explicitly based on the Take Care Clause. *Id.* at 701 (“[W]e cannot but conclude that the President was performing his duty under the Constitution to ‘take Care that the Laws be faithfully executed.’”); see also *In re Debs*, 158 U.S. 564, 578–79 (1895); *In re Neagle*, 135 U.S. 1, 63–64 (1890).

²³⁴ See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 145–46 (1994) (arguing that the Take Care clause should be understood as forming an “executive strong enough [to] stand up to the legislature, but not so strong that one should fear monarchy.”); Lessig & Sunstein, *supra* note 131, at 61–70.

²³⁵ Article I empowers Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

²³⁶ GOLDSMITH & MANNING, *supra* note 45, at 2305. Chief Justice Vinson labeled this basic authority, if presented as the whole of the executive power, as the “messenger-boy concept of the Office.” *Youngstown*, 343 U.S. at 708–09 (Vinson, C.J., dissenting).

²³⁷ Goldsmith and Manning tie this thought to the modern non-delegation doctrine, emphasizing the necessity of executive discretion that the doctrine implies. GOLDSMITH & MANNING, *supra* note 45, at 2305; see *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001).

ticle I, Congress would have had the power anyway, an implication that can be derived from the broad holding of *McCulloch v. Maryland*.²³⁸

One reason Goldsmith and Manning advance for the textual difference is that Article I's vesting clause refers to the "Powers herein granted"²³⁹—whereas Article II assigns "the executive power"²⁴⁰—rendering it practical to include expressly what could have been merely implied. Although they avoid the speculative arguments advanced by John Yoo and other unilateralists who find inherent executive authority in Article II's Vesting Clause,²⁴¹ it is noteworthy that Goldsmith and Manning find an implied, inherent completion power based on an analogy to the Article I Necessary and Proper Clause whose Article II absence is excused by its Vesting Clause. They conclude that, "it would be odd to read the constitutional scheme to assign powers without also assigning incidental authority to carry those powers into execution."²⁴² It would be more than odd. It would be an institutional impossibility, given the way language and rules work. Neither language nor rules are capable of determining in advance all their possible future uses.²⁴³ Because statutes cannot specify everything relevant to fulfilling their mandates, executive officials must have this "incidental authority" to follow rules without which there could be no execution at all. From this basic point, however, Goldsmith and Manning infer a power more robust and comprehensive than incidental.

This more robust and comprehensive power is found in Chief Justice Vinson's reliance on a body of legislation to justify an executive "charged with taking care that a 'mass of legislation' be executed."²⁴⁴ The completion power does not merely authorize the president to fill in gaps within a specific legislative scheme. A "mass of legislation" approach works interstitially, filling in gaps *between* statutes, not merely within them. This method provides a far more comprehensive power to render "conceptual coherence" to legislative language and purpose

²³⁸ GOLDSMITH & MANNING, *supra* note 45, at 2305.

²³⁹ U.S. CONST. art. I, § 1.

²⁴⁰ *Id.* art. II, § 1.

²⁴¹ See, e.g., Military Force Memo, *supra* note 12, at 7 ("[T]o the extent that the constitutional text does not explicitly allocate to a particular branch the power to respond to critical threats to the nation's security and civil order, the Vesting Clause provides that it remains among the President's unenumerated executive powers."); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 706, 709–710.

²⁴² GOLDSMITH & MANNING, *supra* note 45, at 2306.

²⁴³ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 201 (G.E.M. Anscombe trans., 2d ed. 1958).

²⁴⁴ *Youngstown*, 343 U.S. at 702 (Vinson, C.J., dissenting).

across different legislative regimes to do what is necessary in light of past practice and “contemporary imponderables.”²⁴⁵

The Supreme Court has settled on a degree of deference to administrative constructions of statutory language that is not without bounds.²⁴⁶ Under *Chevron*, executive discretion operates within its distinct domain of authorization, filling in gaps where necessary, but always secured by attachment to specific statutes.²⁴⁷ But the Supreme Court has not settled on deference to the executive branch to pursue policy in between different statutory frameworks. In fact, Justice Hugo Black’s majority opinion in *Youngstown* suggests quite the opposite: “[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”²⁴⁸ When the president’s actions shift from completing a specific statutory scheme to carrying into execution a “mass of legislation,” they begin to look more like law making and less like execution. Perhaps when it comes to the demands of national security, however, necessity will compel greater deference to presidential decisions in between, but not against, the law.²⁴⁹ An implied Article II necessary and proper power might therefore help avoid the charge of presidential lawmaking.

A “residual capacity to take the steps necessary to carry out Congress’s program”²⁵⁰ focuses on the language of necessity found in the Article I Necessary and Proper Clause. In so doing, the completion power risks prioritizing function over form in a context in which form

²⁴⁵ *Id.* at 637 (Jackson, J., concurring).

²⁴⁶ See *United States v. Mead Corp.*, 533 U.S. 218, 231, 234 (2001). See generally David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (arguing for a stricter review of agency decisions by courts depending on the level of the policy-maker rendering the decision).

²⁴⁷ The Court articulates the point this way: “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

²⁴⁸ *Youngstown*, 343 U.S. at 587; see also *Hamdan*, 548 U.S. at 591 (stating that “[e]xigency alone, of course, will not justify the establishment and use of penal tribunals” based on presidential power alone because such authority must “derive only from the powers granted jointly to the President and Congress in time of war”); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2372–73 (2006) (“*Hamdan*’s reasoning makes it less likely that future courts will automatically apply special deference in foreign affairs and more likely that courts will find limitations upon independent executive action in detailed congressional prescriptions.”).

²⁴⁹ See Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2664 (2005) (arguing that administrative law provides a basis for “evaluating all exercises of presidential power when Congress has authorized the President to protect the nation’s security”).

²⁵⁰ GOLDSMITH & MANNING, *supra* note 45, at 2285.

matters. Article I's Necessary and Proper Clause occurs in section eight, after a long list of powers enumerated for Congress.²⁵¹ The clause, however broadly read, is tethered to the substance of Congress's enumerated powers, such as the power to regulate interstate commerce.²⁵²

To what is the imputed Article II Necessary and Proper clause tethered? The closest textual correspondence would be the Take Care Clause because the completion power is focused on the president's authority "to carry into execution a legislative scheme,"²⁵³ and presumably to do so faithfully. If that is the case, then despite their hesitancy to ground the completion theory on the Take Care Clause, it is unclear what advantage is derived from imputing authority to accomplish what is already sanctioned by Article II's text. Perhaps the completion power intends more, however, as Chief Justice Vinson's appeal to a "mass of legislation" suggests. At times Goldsmith and Manning intimate this broader meaning that "might lend conceptual coherence to several important areas of executive authority whose connection has not previously been understood."²⁵⁴ Providing "conceptual coherence" to a "mass of legislation" is a way of bundling different grants of executive authority into a more comprehensive necessary and proper power in a context in which executive discretion has been previously understood to be tethered to its specific and disparate domains (such as foreign affairs, executive administration, and prosecutorial enforcement).

To find a comprehensive discretionary power is far more ambitious than the initial presentation reveals—though it is implied by Goldsmith and Manning's appeal to Chief Justice Vinson's *Youngstown* dissent. When combining a "mass of legislation" to provide "conceptual coherence," the completion power might begin to look like a more robust and nuanced version of inherent executive power that other scholars have found in Article I's Vesting Clause.²⁵⁵ The principle difference, at least in its initial presentation, is that the completion power is

²⁵¹ U.S. CONST. art. I, § 8, cl. 18.

²⁵² The key language refers to "the foregoing Powers, and all other Powers vested." *Id.*

²⁵³ GOLDSMITH & MANNING, *supra* note 45, at 2282.

²⁵⁴ *Id.*

²⁵⁵ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE *passim* (2008); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 *passim* (1994); Michael Stokes Paulson, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261 (1994); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 303–04 (1996).

congressionally defeasible.²⁵⁶ Although by its very nature the completion power within statutory schemes cannot be eliminated, Congress can limit the executive's completion power by denying the availability of particular means or by providing more specific instructions. By providing overarching "conceptual coherence" to the president's disparate discretionary powers against the background of congressional defeasibility, the scope of the president's completion power in between statutes will reside in the details. It remains unclear how Congress can ever effectively deny the president power between the statutes because it is impossible to anticipate the direction of future completions. The Court recognized just this dynamic in upholding presidential action in the realm of foreign affairs, noting that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take, or every possible situation in which he might act."²⁵⁷ Thus, the claim that Congress remains in control of the laws is less reassuring the more the president operates interstitially between the "mass of legislation."

What is interesting about Goldsmith and Manning's reliance on Chief Justice Vinson's *Youngstown* dissent is that the problem of scope provided a reason for denying the president a comprehensive completion power in the first place. Justice Jackson's concurrence established formal categories that sorted presidential actions in relation to congressional and constitutional authorization.²⁵⁸ Jackson cautions that "[t]he appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted."²⁵⁹ The Constitution likewise omits an express necessary and proper power from Article II. When "[t]he plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case,"²⁶⁰ a powerful complement to the claim of inherent power would be a claim

²⁵⁶ GOLDSMITH & MANNING, *supra* note 45, at 2282 ("Congress can limit it, for example, by denying the President the authority to complete a statute through certain means or by specifying the manner in which a statute must be implemented.").

²⁵⁷ *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981).

²⁵⁸ The Supreme Court has not always treated these categories as rigidly fixed. "[I]t is doubtless the case that executive action in any particular instance falls not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore*, 453 U.S. at 669. For criticism of the Court's softened approach in *Dames & Moore*, see KOH, *supra* note 25, at 134–46.

²⁵⁹ *Youngstown*, 343 U.S. at 649–50 (Jackson, J., concurring).

²⁶⁰ *Id.* at 646.

to a completion power—an implied necessary and proper power. Yet, this is precisely what the Court withheld from President Truman.

The completion power therefore struggles against precedent (no Court has adopted Justice Vinson's theory), constitutional source (no solid textual basis), and conceptual grounding (no clarity about whether the spaces are within or between laws). And although it provides some discursive salience to unavoidable executive discretion, it may function as a more nuanced justification for inherent executive power, especially by emphasizing power to complete the spaces in between the laws.

Despite these difficulties, there is something useful in thinking about the completion power. For one, it avoids the worst excesses of claiming inherent power based on some dubious notion of prerogative or "the executive power." For another, it provides a way of organizing something that different areas of presidential discretion might have in common. Discretion is always discretion on behalf of particular statutory schemes or enumerated powers. To talk of the completion power reminds the president that discretionary power is always derivative of practices and purposes that depend on Congress or the Constitution, although the president is responsible for fulfilling them. Statutory objectives can be achieved only through executive action to complete them. Finally, the completion power invites consideration of another source of constraint on presidential power. With all powers come constraints, and the completion power's basis in a conception of necessary and proper is no different. By their nature, claims of executive prerogative or inherent power eschew constraint. A better grounded necessary and proper power opens up a new way of understanding constraint even when confronting necessity.

As the next Section explores, if the president has power to do what is necessary in completing statutory directives, the president has a responsibility to do only what is proper.²⁶¹ If Congress enacts legislation that accords "the President broad discretion," then it "may be considered to 'invite' 'measures on independent presidential responsibility.'"²⁶² When acting independently, or in between statutory directives, the president's imputed necessary power carries with it an implied constraint to do what is proper. The question then is what kind of constraint might this be. Because the executive completion power retains

²⁶¹ See *infra* notes 263–292 and accompanying text.

²⁶² *Dames & Moore*, 453 U.S. at 678 (citations omitted) (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

obligations of care and faithfulness, what is proper must cohere with the president's responsibility to and for the Constitution.

B. *The Proper Constraint*

At times the appeal to necessity makes it appear as if executive discretion is complete in itself—no further normative obligations exist. When confronting a crisis, apart from the post hoc possibility of judicial review, why would a president be committed to constitutional constraints? Irrespective of whether a president is in fact committed, why should we expect such commitment by other executive officials? How do such expectations function in our constitutional system, and how are they reflective of constitutional meaning?

If the president has a necessary and proper power to satisfy statutory and constitutional objectives modeled on Congress's power then, without more, it would be a broad power indeed. Since Chief Justice Marshall's opinion in *McCulloch*, Congress has been granted broad authority to enact legislation deemed necessary in pursuit of its enumerated powers.²⁶³ Rejecting Maryland's crabbed view of "necessity," the Court in *McCulloch* found that the term "imports no more than that one thing is convenient, or useful, or essential to another."²⁶⁴ Moreover, "[t]o employ the means necessary to an end is generally understood as employing any means calculated to produce the end."²⁶⁵ As applied to the executive branch, to provide a more restrictive meaning would deprive the executive office "of the capacity to avail itself of experience, to exercise its reason, and to accommodate its [action] to circumstances."²⁶⁶ If the executive branch analogy to the legislative necessary and proper power follows Supreme Court interpretations, then the executive, like the legislature, will have broad authority. For example, focusing on "necessity" the Court has recently announced:

If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to

²⁶³ See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996) ("Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch* . . ."); Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167, 169 (1995) ("*McCulloch v. Maryland* apparently neutered the framer's [sic] misfeasance by reading the necessary and proper clause out of the constitution. The phrase 'necessary and proper,' however, still haunts constitutional theory from its perch in interpretive limbo.").

²⁶⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).

²⁶⁵ *Id.* at 413–14.

²⁶⁶ *Id.* at 415.

which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.²⁶⁷

Such rationality review gives great deference to decision makers in their determinations concerning what is necessary. Matching means to ends in a rational manner is a process that makes no mention of whether the means or ends are deemed “proper,” though the threshold question may be a gloss on “proper” by asking whether the Constitution grants Congress express power.²⁶⁸ Without further inquiry into whether “proper” has a constraining function, “necessary” provides little check on the exercise of congressional prerogatives and, under the completion power, the president’s authority.

“Proper,” by contrast, has received very little independent analysis, suggesting at first glance that it is an unpropitious term on which to develop executive constraints.²⁶⁹ The complete phrase “necessary and proper” appeared in the Constitution without debate or explanation, giving us little insight into founding-era purposes for its inclusion.²⁷⁰ Whereas “necessity” is a recurring conjunct, “proper” rarely makes a focused showing. In *McCulloch*, Justice Marshall does not discuss the meaning of “proper,”—in contrast to his focus on “necessary”—but he

²⁶⁷ *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) (citing *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934)); see also *Heart of Atlanta Motel, Inc. v. United States*, U.S. 379 U.S. 241, 262 (1964) (explaining that Congress’s discretionary power “is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution”).

²⁶⁸ *Heart of Atlanta*, 379 U.S. at 262.

²⁶⁹ This commentary is illustrative: “The word ‘proper’ has been read to mean ‘appropriate,’ which adds little to ‘necessary,’ except for a strong implication that legislation is appropriate only when it does not conflict with another constitutional provision.” Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1378 (1983) (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 228 (1978)). The meaning of “proper” has received some scholarly attention, but primarily in relation to its purported role as a federalism constraint on legislative power. See, e.g., J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 584; Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271 (1993) (“[P]roper’ serves a critical . . . constitutional purpose by requiring executory laws to be peculiarly within Congress’s domain or jurisdiction.”) (emphasis added).

²⁷⁰ See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185 (2003). Barnett concludes that “for a law to be ‘proper’ it must not only be necessary, it must also be within the jurisdiction of Congress.” *Id.* at 217. Recent scholarship has traced the founding era private law usage of the phrase. See Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 2 (2010) (“[T]erms such as ‘necessary,’ ‘proper,’ and ‘necessary and proper’ were indeed ubiquitous in corporate practice.”).

does provide an important limitation on the combined necessary and proper power: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."²⁷¹ What is necessary can only be proper if it is addressed to a legitimate end, not otherwise prohibited by law or the Constitution, and coheres with both the "letter and spirit" of the Constitution. This limitation on necessity requires more than the rational attachment of means to ends because it requires fit and demands consistency with both constitutional text and "spirit." What Justice Marshall means by "spirit" is not specified, but, when added to the Constitution's "letter," should include aspects of the Constitution that form part of the meaning, which includes structural relations as well as the principles and values embodied in text and tradition.²⁷² Under Chief Justice Marshall's understanding of the clause, "proper" does more than simply restate the obvious point that Congress may not violate the Constitution in its legislative enactments.

The Supreme Court's federalism jurisprudence is a primary source for considering the meaning of necessary and proper. When reviewing whether Congress has power to subject states to suit in their own courts, the Supreme Court explained:

When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'²⁷³

A law that is not proper is subject to judicial review and "deserves" to be treated as "usurpation," not effective legislation. Relying on a tradition

²⁷¹ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

²⁷² See *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (referring to "the letter and spirit of the constitution," and claiming that "[t]hese phrases are not merely hortatory"); *United States v. Booker*, 543 U.S. 220, 244 (2004) (reasoning that an "interest in fairness and reliability protected by the right to a jury trial" is expressive of "the spirit of our Constitution"); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 23–24 (2002). See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969) (1964) (describing the inner morality of the law).

²⁷³ *Alden v. Maine*, 527 U.S. 706, 732–33 (1999) (quoting *Printz v. United States*, 521 U.S. 898, 923–24 (1997) and *THE FEDERALIST* NO. 33, *supra* note 6, at 204 (Alexander Hamilton)) (ellipses and alterations in *Printz*).

grounded in the *Federalist Papers*, precedents placing Tenth Amendment limitations on Congress's powers, and the textual reliance on "proper," the Court weaves text, tradition, and structural considerations together to provide a gloss on the limitations provided by "proper." In fact, *Printz v. United States* relies as much on a "principle of state sovereignty"²⁷⁴ as it does on the Tenth Amendment, suggesting that, not only do other constitutional provisions give meaning to "proper," but that background principles not expressly articulated in the text do as well. These may be part of the "spirit" of the Constitution to which Justice Marshall refers. More than simply demanding consistency with other provisions of the Constitution, "proper" exercises of power therefore adhere to broader constitutional understandings and traditions.

Judicial and scholarly discussion of the Necessary and Proper Clause are naturally focused on the legislature. Whatever grants or constraints the phrase may impart to Congress, we must speculate if we are to complete the analogy conveyed by the completion power. Tenth Amendment and state sovereignty principles are not obvious ways of approaching how the executive power to act as necessary may be constrained by what is proper.

On its most simplistic rendering, the limitation "proper" imparts may be its most powerful when applied to the executive power. Recall that necessity is often used to justify executive action that goes beyond, and may even conflict with, the Constitution and laws. The president may need to do whatever is necessary to meet the demand of an emergency situation. Yet, the imputed necessary and proper power has an intriguing consequence for presidential constraint.

If the president is empowered by an implied necessary and proper power, necessity would be more explicitly constrained by Constitutional principles than it is under the usual rationale of inherent power.

That is, if "proper" means no more than that Congress cannot violate the Constitution and laws, then the president's imputed necessary and proper power makes it more explicit that the executive cannot violate the Constitution. Advocates of expansive executive power are quick to add "except where necessary to protect national security." But such an addition would not be "proper." Thus, on this most basic reading, a necessary completion power will be constrained by a proper regard for constitutional constraints. Such a proposition—that the president cannot violate the Constitution and laws—may seem obvious, except for

²⁷⁴ *Printz*, 521 U.S. at 923–24.

when it is not.²⁷⁵ To say that the president is not authorized to act when Congress has chosen to legislate or where the Constitution does not provide express power because it is “improper” adds a further constitutional basis for Justice Jackson’s third category—executive power at its “lowest ebb.”²⁷⁶

Consistency with the laws depends upon what laws apply to executive action. If one wishes to free executive action from legal constraint, one approach is to limit the scope of applicable laws. This dynamic is one reason why advocates of inherent executive power also argue that international legal norms do not bind the president.²⁷⁷ Pushing aside the question of whether the president is bound in some direct way to comply with the norms of international human rights treaties ratified by the Senate as “supreme law of the Land,”²⁷⁸ might the president be bound by them under the obligation to take care and to act as necessary only as “proper” or “appropriate”?²⁷⁹ The limiting of license implied by “proper” expands the domain of law for which the president is responsible, and thereby changes the grammar of presidential power. The question is not some metaphysical question about whether the president is bound by international law, but how the office holder is responsible for the legal world presidential actions create. This responsibility depends in part not only on the president’s own constitutional vision, but on how Congress, courts, and citizens view presidential actions and characterize the laws that apply.

Like its legislative analogue, “proper” means more than constitutional consistency. To be a proper exercise of discretion, presidential action must be consistent with statutory instructions, must further the projects initiated by Congress, and must fit within a broader legal constitutional tradition in a way that furthers and accentuates embedded values. Justifying practices to avoid the implications of statutory constraints, or seeking to distinguish precedents narrowly to permit con-

²⁷⁵ In DOJ memos, John Yoo asserted broad and inherent executive power based on the Vesting Clause of Article II and claimed unconstitutional congressional attempts to limit that power. Military Force Memo, *supra* note 12, at 7 (“[T]o the extent that the constitutional text does not explicitly allocate to a particular branch the power to respond to critical threats to the nation’s security and civil order, the Vesting Clause provides that it remains among the President’s unenumerated executive powers.”).

²⁷⁶ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

²⁷⁷ Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL’Y 73, 75–76 (2006).

²⁷⁸ U.S. CONST. art. VI, § 2.

²⁷⁹ See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 45 (2004); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003).

troversial executive action, are both methods of executive completion that are inconsistent with proper exercise of discretion. As Chief Justice Marshall stated, actions must not only comply with the letter of the Constitution but also with its “spirit.”²⁸⁰ Such inchoate notions may prick the more concretely minded. How are we to make sense of such a vague notion? How is the president confronting an emergency to factor the “spirit” of the Constitution into a decision on detention or interrogation policy?

First, a president is constrained by the Constitution’s “spirit” through her own guiding vision of what kind of community the Constitution constructs. As we saw in Part I, presidents take responsibility for the Constitution in part by constructing their own policies and priorities around a defining set of practices and purposes grounded in their own vision of the constitutional community.²⁸¹ Such constitutional visions guide and constrain how presidents respond to future challenges—presidents cannot act outside their own world views.²⁸² When constitutional vision is combined with constitutional virtues, a president cannot avoid responsibility for either the letter or the spirit. Acting according to an established constitutional vision can produce habits of response as the president furthers a vision across a range of executive decisions. Confronting crises, a president will draw on a settled vision in guiding what issues, policies, and responses are salient. In this way, constitutional culture depends as much on the settled character of the office holder as it does on established institutional distributions of powers.

The role of virtue and vision in establishing habits of response is Aristotelian.²⁸³ Virtue for Aristotle was not a matter of cohering actions with an absolute standard of good, but of adjusting one’s character by aiming to act mediately as appropriate to the circumstances.²⁸⁴ The good life is found in acting appropriately according to the circumstances through settled habits of character and competence. Such a conception of appropriate action both fits the notion of constitutional propriety and emphasizes how Madisonian institutional constraints un-

²⁸⁰ *Gonzales*, 545 U.S. at 39 (Scalia, J., concurring) (claiming that “[t]hese phrases are not merely hortatory”); *McCulloch*, 17 U.S. (4 Wheat.) at 421 (holding that actions that “consist with the letter and spirit of the constitution, are constitutional”).

²⁸¹ See *supra* notes 58–221 and accompanying text.

²⁸² See Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 2–3 (2007).

²⁸³ See *supra* note 81. On the application of Aristotle’s virtue ethics to law, see Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 69–74 (2006); Ekow N. Yankah, *Virtue’s Domain*, 2009 U. ILL. L. REV. 1167, 1173–76.

²⁸⁴ *Id.*; see also MACINTYRE, *supra* note 18, at 190–91.

avoidably rely on virtuous statesmen.²⁸⁵ Discretion well exercised occurs through the settled habits and vision of particular officeholders.

Second, a president confronting a crisis still has responsibility to take care and faithfully execute the laws. Because there is always more than one way to fulfill this responsibility, presidents must exercise judgment in their choice of action. Sometimes, however, taking care could mean violating the law in the name of preserving its “spirit.” Something like this situation has been at stake before in our constitutional history. President Lincoln, addressing Congress in the wake of southern succession, pointedly asked: “[A]re all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?”²⁸⁶ In this situation, necessity overrides some considerations, but not all. Necessity is paired with proper, so that even when the situation may justify extralegal action, care must be taken to proceed only with what is proper. If this point seems incontestable, recall that necessity seemed to compel the practice of torture in the name of national security.²⁸⁷ When combining reflective consideration of the duty to take care and faithfully execute the laws with a proper constraint on what is legitimately necessary, the president cannot ignore the broader constitutional implications of chosen policies and practices. As we have seen, Machiavelli advocated attention to proper virtue when acting as necessary. Even when necessity purports to change the grammar of care and faithfulness to license extralegal actions, a proper regard for law and necessity constrains presidential power. What it means to carry into execution a body of law is to be responsible for the shape those laws will take, and the community they will create.

Understanding “proper” to constrain necessity helps make sense of why Congress might authorize the President to do only what is “necessary and appropriate”²⁸⁸ in using force in Iraq or against the perpetrators of the September attacks. If “appropriate” added nothing, then Congress could simply instruct the President to do what is necessary.²⁸⁹

²⁸⁵ See also ADAM SMITH, A THEORY OF MORAL SENTIMENTS 11–77 (Knud Haakossen ed., 2002) (1759) (emphasizing the role of propriety in his moral theory).

²⁸⁶ Abraham Lincoln, Message to Congress in Special Session, *supra* note 62, at 432–37.

²⁸⁷ See Bob Woodward, *Detainee Tortured, Says U.S. Official: Trial Overseer Cites ‘Abusive’ Methods Against 9/11 Suspect*, WASH. POST, Jan. 14, 2009, at A1. See generally PHILIPPE SANDS, TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008) (detailing the torture of Guantanamo detainee al Qahtani and its war crime implications).

²⁸⁸ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

²⁸⁹ Cf. Bradley & Goldsmith, *supra* note 42, at 2082 (“[T]here is no reason to think that ‘necessary and appropriate’ was meant as an independent and additional restriction.”).

Legislative license is combined with a reminder of legal restraint. The president has wide latitude, but must take responsibility to faithfully execute the laws and not to avoid, or even act against, them. Like all standards and principles, this limitation is unavoidably imprecise.

The fact that “proper” may confound the positivist advisor, or the Schmittian administrator,²⁹⁰ suggests how difficult it is to ground ethical considerations in necessity’s domain. To say that necessity is constrained by what is proper may serve no other—and perhaps no better—purpose than as a reminder that the Constitution is meant to constrain, and to do so with values reflected in the community it sustains. The vitality of that constraint depends on institutions and circumstances, statesmen and citizens. Necessity provides its own language, matched by the “energy” with which the executive is characterized as acting with “[d]ecision, activity, secrecy, and dispatch[.]”²⁹¹ But “proper” is too often either assumed or ignored. Either way, the language of constraint is at times difficult to articulate in the face of readily available language from executive power advocates such as Alexander Hamilton that can be used to justify “an indefinite power of providing for emergencies as they might arise”²⁹² “Proper” reminds us that constraints are operative, but they require us to give them articulation, even in times of crisis. Constitutional responsibility, whether by vision, virtue, or necessity’s propriety, constrains the president’s power.

III. THE NORMATIVE COMMITMENTS OF CONSTITUTIONAL LAW

Constitutional text embeds virtues of office for which executive officials are responsible. Presidents articulate their vision of the constitutional community, exercising discretion in the shadow of their obligations of care and fidelity. They can do this because constitutional design and practice adopt a particular attitude of constrained trust in the president.²⁹³ To fulfill this trust, presidents in turn must demonstrate their continuing commitment to the Constitution and its community. Between trust and commitment exists ample space for constitutional dissonance. In times of emergency or crisis what role do constitutional commitments play in constraining executive action? How do they func-

²⁹⁰ See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096–97 (2009).

²⁹¹ THE FEDERALIST NO. 70, *supra* note 6, at 424 (Alexander Hamilton).

²⁹² THE FEDERALIST NO. 34, *supra* note 6, at 207 (Alexander Hamilton) (selectively quoted in Military Force Memo, *supra* note 12, at 5).

²⁹³ See SCOTT J. SHAPIRO, LEGALITY 338–39 (2011) (explaining how law distributes an economy of trust).

tion? How does the Constitution create and regulate presidential practice?

One approach is to emphasize the administrative function of executive power. If congressional authorization to use force grants broad discretion to the president to do what is “necessary,” what principles guide executive decisions? It may be that once we turn to administrative law, we find that judicial deference will grant substantial latitude to the president. In fact, some argue that the deference may be so great as to render the governance of legal rules a “pretense.”²⁹⁴ In the absence of binding instruction, the rule skeptic can only see ungoverned action. Where rules fail to determine behavior, standards can only provide the pretense of regulation.

Taking up the rule skeptic viewpoint, Professor Vermeule argues that during emergencies or crisis administrative law operates in a legal “grey hole,” wherein courts applying principles of “arbitrary and capricious” review “have dialed down the intensity of judicial review of executive action to the point where review is more apparent than real.”²⁹⁵ When this occurs, the rule of law becomes grey, preserving the façade of legality, while permitting executive action effectively ungoverned by explicit rules. Legal grey holes exist in contrast to the possibility of legal black holes, which prevail in “a situation in which there is no law.”²⁹⁶ With law understood as explicit legislative or administrative rules, holes emerge because “it is beyond the institutional capacity of lawmakers to specify and allocate emergency powers in all future contingencies,”²⁹⁷ and courts will be highly deferential to executive officials. On this view, emergencies cannot be governed by *ex ante* rules that delegate decisions governing exceptional circumstances to executive officials, but can be governed “at most by vague *ex post* standards.”²⁹⁸ Professor Vermeule calls this view “Schmittian” after the Weimar and Nazi jurist Carl Schmitt who criticized liberal legal regimes for their inability to govern discretion during an emergency.²⁹⁹ What is more, we should not worry about the unconstrained consequences of our “Schmittian” administrative law—they are inevitable. Emergencies are to be welcomed, for “[m]any striking innovations in policy and regulation owe their ex-

²⁹⁴ Vermeule, *supra* note 290, at 1106.

²⁹⁵ *Id.* at 1119.

²⁹⁶ DYZENHAUS, *supra* note 19, at 3.

²⁹⁷ Vermeule, *supra* note 290, at 1101.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 1103; *see* SCHMITT, *supra* note 16, at 12–13.

istence to the pressure for improved performance that emergencies and war produce.”³⁰⁰

Alternately, what looks like a legal grey hole may simply be a product of how agency action functions.³⁰¹ In describing agency functions as inevitably a pretense, the alternative “real” legality governing agency action is unspecified. Is the alternative a delegation everywhere bounded by rules? How else would this even be possible? No doubt, under *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, if Congress has delegated authority to the president, then judicial review of executive interpretation will be deferential.³⁰² In light of this deference, Congress need not fill in the details of a force authorization, choosing instead to delegate the details to executive expertise. So, although executive officials will not be governed according to rigid rules, they are not necessarily operating outside the law or in a legal “grey hole” either. Recall that the Authorization for Use of Military Force (AUMF) authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons *he determines*” are connected to September 11.³⁰³ It would be odd to say that a broad delegation of authority is a legal “grey hole” simply because Congress granted the executive substantial latitude to act as “he determines” free from the direction of more specific legislative rules. Legal principles still apply. The president has congressional authority to “determine” against whom to use force. Judicial review still occurs, even if it becomes more deferential when Congress has delegated authority to executive officials to act during crisis.³⁰⁴

When discussing rules, there is a familiar form, even if vagueness persists. “No vehicles in the park” is a rule that requires familiar forms of judicial interpretation.³⁰⁵ Officials who choose to prosecute individuals

³⁰⁰ Vermeule, *supra* note 290, at 1145.

³⁰¹ See Bradley & Goldsmith, *supra* note 42, at 2054 (“The authority conferred by the AUMF does not depend on whether the conflict meets some metaphysical test for war, but rather on how the political branches view the conflict and how they characterize the belligerents in it.”); Sunstein, *supra* note 249, at 2665.

³⁰² 467 U.S. 837, 842–45 (1984); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

³⁰³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note) (emphasis added).

³⁰⁴ See Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States’ Constitutional Approach to Rights During Wartime*, 2 INT’L. J. CONST. L. 296, 297 (2004) (“American courts have sought to shift the responsibility for these difficult decisions away from themselves and toward the joint action of the most democratic branches of the government.”).

³⁰⁵ H.L.A. HART, *THE CONCEPT OF LAW* 126 (2d ed. 1994) (1961).

for violating the rule must exercise judgment, reviewable by courts for conformity to the rule. But when the executive is granted authority to use all “necessary and proper force” that “he determines” falls under the scope of that authority, then more robust forms of judicial interpretation fade into the background. The Court plays a different, though harmonious, role by ensuring access to judicial review, as it did in 2004 in *Rasul v. Bush*,³⁰⁶ and to a minimal amount of constitutional due process, as it did in *Hamdi v. Rumsfeld*.³⁰⁷ Because Congress provided the President with the power to use “appropriate” force against enemies he has power to “determine,” the Court has relatively less legal basis to interfere with the substance of executive discretion.³⁰⁸ These shifting parameters only awkwardly reflect notions such as “grey holes.” Framing this issue as concern for the rule of law skews the discussion by suggesting that, in the absence of more rigid rules, legality does not apply, and by ignoring the constraints of executive responsibility.

If emergencies are governed “at most by vague ex post standards,”³⁰⁹ why are presidents nonetheless compelled to comply with legal constraints in all but the most rare occasion?³¹⁰ Do executive officials, in the absence of “hard look” judicial review purposefully construct policies more representative of Kafkaesque post-modern nightmares in which the executive says one thing and does precisely the opposite, or do they make good-faith efforts to construe policy within legally valid parameters? On the Kafkaesque side, and more indicative of the purposeful creation of “grey holes,” we might point to President Bush’s repeated claims that “[t]his government does not torture peo-

³⁰⁶ 542 U.S. 466, 484 (2004) (plurality opinion).

³⁰⁷ 542 U.S. 507, 532–33 (2004).

³⁰⁸ The Supreme Court, together with lower courts, has avoided issuing substantive rulings in the “war on terror.” See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1029 (2008) (“After years of litigation, hundreds of detainees continue to languish in possibly illegal custody; defendants still face trials in military commissions of uncertain validity; and interrogation practices of questionable legality are still being used.”) (emphasis added); see also Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 256 (2006) (“What is missing . . . is a full appreciation of the value of the Constitution—as a statement of the ideals of the nation and as the basis of the principle of freedom—and . . . of the fact that the whole-hearted pursuit of any ideal requires sacrifices.”).

³⁰⁹ Vermeule, *supra* note 290, at 1101.

³¹⁰ In a rare example of executive noncompliance, President Lincoln ignored a court ruling issued by Chief Justice Taney that held that the President did not have authority to suspend the Constitution. *Ex Parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487). By contrast, President Richard Nixon, despite his desire to do otherwise, complied with the Supreme Court’s decision and handed over the Watergate tapes. *United States v. Nixon*, 418 U.S. 683, 713 (1974).

ple,”³¹¹ when the public record demonstrates otherwise—from Abu Ghraib to Department of Justice memos that document the waterboarding of Khalid Shaikh Mohammed and Abu Zubaydah.³¹² The President claimed compliance with the law while violating it, preserving the public declarative façade of lawfulness.

On the good faith construal, we might point to any number of decisions reviewed by courts that affect the rights of individuals under Congress’s delegated authority. For example, under authority from the International Economic Powers Act as well as subsequent executive orders,³¹³ the Office of Foreign Asset Control (OFAC) froze assets of the Holy Land Foundation for Relief and Development for contributing support to Hamas, a specially designated terrorist organization. The charity challenged its own designation as a terrorist organization and, in *Holy Land Foundation for Relief & Development v. Ashcroft*, the U.S. Court of Appeals for the D.C. Circuit held that OFAC acted on the basis of substantial evidence, and was not arbitrary or capricious.³¹⁴ This decision is highly deferential to discretionary decisions by executive officials, but these decisions do not occur outside of legal constraints. They are recognizably executive decisions in form: they occur on the basis of congressional delegations; they further executive priorities and judgments about how to implement delegated policies and purposes; and they are subject to judicial review, even if only for whether there is a reasonable basis for the agency’s decision. No doubt, judicial review in this case is highly deferential, but to infer from that fact the absence of legal constraints ignores the presence of other constitutional duties executive officials retain for themselves. The law still has an internal aspect that requires officials to see themselves as acting pursuant to the laws that empower them in the first place.³¹⁵

Indeed, attempts to create a legal black hole at Guantanamo failed, as the Supreme Court asserted jurisdiction over detainees held there,³¹⁶ required executive compliance with the Geneva Conven-

³¹¹ Sheryl Gay Stolberg, *Bush Says Interrogation Methods Aren’t Torture*, N.Y. TIMES, Oct. 6, 2007, at A1.

³¹² Bradbury Memo, *supra* note 202, at 37; *see also* INT’L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY 1, 10–11 (Feb. 2007), available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>; Mark Danner, *Voices from the Black Sites*, N.Y. REV. OF BOOKS, Apr. 9, 2009, at 69.

³¹³ 50 U.S.C. §§ 1701–1707 (2006 & Supp. II 2008); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

³¹⁴ *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003).

³¹⁵ *See* HART, *supra* note 305, at 87–88.

³¹⁶ *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

tions,³¹⁷ and encouraged the involvement of Congress in designing appropriate military commissions.³¹⁸ If the law applicable to national security policy remains “grey” it is because scholars and courts alike have preferred resolution of procedural issues rather than judicial vindication of substantive values.³¹⁹ Whatever other adjective might properly be attributable to these decisions, it is not “Schmittian,” for too many legal constraints operate against a supposed unbridled executive decisionism.³²⁰ To assert the existence of an unbound executive decisionism, following Schmitt, is to ignore the Constitution’s normative constraints on executive power.

Between these two approaches the question becomes one of the relation between rules and standards. To say that standards do not sufficiently restrain presidential action is to give preference to a particular way of viewing law as defined by judicial review of rule-governed practice. Faced with congressional delegation to executive officials guided only by standards, judicial review becomes weak and highly deferential. But, just because judges may think they lack sufficient institutional capacity and expertise to second-guess executive decisions, does not mean that those decisions are themselves decoupled from normative legal constraints. Lowered intensity of judicial review may be inevitable when focused on the tendency of courts to defer to delegated executive authority,³²¹ but judicial review does not define all that is relevant to assessing the legal responsibilities of executive action. Just because the judiciary defers to legal decisions made by executive actors does not mean that those decisions are not governed by legal norms and principles. So if discretion and deference are built into the constitutional system, recognizing that it is in the very nature of rules to never be fully determinate, the issue is not the one Schmitt identifies. Law guides constitutional systems during emergencies, even if the balances of gov-

³¹⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).

³¹⁸ *Id.*

³¹⁹ See generally Sunstein, *supra* note 22 (emphasizing importance of courts making minimal decisions); Issacharoff & Pildes, *supra* note 22 (same). The institutional process view, while widespread, has not gone unquestioned. See Martinez, *supra* note 308, at 1061–64. See generally David Cole, *The Priority of Morality: The Emergency Constitution’s Blindspot*, 113 YALE L.J. 1753 (2004) (rejecting the idea of an “emergency constitution” to empower institutions to engage in suspicion-less detention).

³²⁰ See SCHMITT, *supra* note 16, at 5 (“Sovereign is he who decides on the exception.”); see also JOHN P. MCCORMICK, CARL SCHMITT’S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY 206–48 (1997).

³²¹ Vermeule, *supra* note 290, at 1136 (“What I do claim is that the existence of some robust set of black and grey holes is inevitable. The very structure of the administrative state is such that full, thick legality is infeasible.”).

erning power are adjusted. A president who has more power will also have greater responsibility to governing constitutional constraints.

If the president has the responsibility, and therefore the power, to respond to emergencies to preserve national security, the president is therefore also responsible to and for the Constitution and laws. To make this distinction explicit, responsibility comes in two forms—"responsibility to" and "responsibility for."

First, "responsibility to" the Constitution requires compliance with legal rules and the exercise of discretion within appropriate limits. To be responsible to the Constitution is to be subject to external sanctions for noncompliance.³²² But it also means that the president will recognize the Constitution and statutes internally as reasons to design policies and actions in particular ways.³²³ The president will use the authority granted by statutes such as the AUMF to engage in a wide range of policies otherwise ungoverned by congressional instruction. In so doing, the president is taking responsibility to address the situation necessity creates. Executive officials are not free to do anything at all, but are guided by statutory language and purpose, exercising discretion in the shadow of their obligation to do what is appropriate. Administration under conditions of necessity focuses us on the president's responsibility to the laws even when other institutional actors are unable to ensure executive compliance through external means. Judicial review may be highly deferential, but the president retains an independent responsibility to the Constitution. Where courts are deferential, that responsibility can be checked internally through the dissent of officials bound by their obligation to the laws and Constitution,³²⁴ or externally through congressional oversight and political mobilization.

Second, "responsibility for" the Constitution and laws requires recognition of a president's role in forming a political and constitutional culture through the care taken in executing the law and exercising discretion. No matter how a president chooses to respond to an emergency, presidential action helps create the political and ethical community Americans occupy. We see this in how presidents choose to frame a crisis situation and an appropriate response. For example, after

³²² See Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 20–23.

³²³ On the distinction between internal and external points of view in law, see HART, *supra* note 305, at 88–89.

³²⁴ See GOLDSMITH, *supra* note 153, at 146, 182; see also CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 32–37 (2003) (arguing that psychological research shows the danger of the ideological and viewpoint similarity in decision making bodies).

the September attacks, President Bush claimed that “[o]ur first priority must always be the security of our Nation.”³²⁵ By setting priorities, the president constructs a national narrative through which policies and practices are formed in light of constitutional and statutory grants of authority. Out of this narrative, American officials embarked on a multi-year “war on terror,” detained aliens and citizens alike as “enemy combatants,” engaged in torture, and subjected unknown numbers of persons to surveillance without suspicion. Through these and other practices, narratives led to practices that, in turn, shape the constitutional culture in which those practices and narratives find meaning. To be “responsible for” the Constitution is to recognize the obligation to take care and be faithful in shaping and sustaining a constitutional culture. Although “We the People” are not mindless subjects of presidential action, we are not immune to presidential expedience in crafting policy. The president commands a bureaucracy, leads a party, controls media messaging, and claims a mandate from the electorate. Through these exercises of power and claims to legitimacy, a president has an enormous ability to affect the constitutional life of the polity. Institutional design can only do so much to constrain this ability. For the rest, we rely on the president’s virtue and ability to utilize the ethical obligations the Constitution’s virtues entail. These are not merely empty words and “vague standards,” but form the conceptual background that empowers citizens and officials alike to articulate ethical expectations and to demand presidential compliance. Political oversight requires normative constitutional concepts. The president has “responsibility for” what is also “our” Constitution.

Even if the president is responsible to and for the Constitution, what ensures continued constitutional commitment? In what way does that commitment work to stabilize policy and practice over time? Recent discussion has focused the question of constitutional commitment, finding a puzzle in “how popular majorities or other powerful political actors successfully commit themselves to constitutional constraints.”³²⁶ It is one thing to identify the meaning of softer constitutional constraints, as we have done here; it is quite another to understand why a president would ever commit to fulfilling those virtues. Once elected, a president will have ample opportunity to act, seeking policies and practices that further particular interests no matter the finer points of con-

³²⁵ 2002 State of the Union, *supra* note 105, at 132.

³²⁶ Levinson, *supra* note 37, at 660.

stitutional form.³²⁷ One solution to the puzzle of constitutional constraint may be to recognize public choice mechanisms that permit actors to commit themselves to constraining institutional forms even when their self-interest might tempt them otherwise.³²⁸ At bottom, these commitments are contingent social practices that rely on the continued political and social support of citizens and officials.³²⁹ Yet, despite its descriptive usefulness, social and political support through mechanisms described in public choice theory is insufficient to account for the constitutive role of president and polity that constitutional constraints create. "Our" Constitution requires our shared willingness to continue the project of constitutional governance, a project that is inseparable from the persistence of our shared political identity. It is also a project that relies on more than political entrenchment as a hurdle to formal change to provide constraints against presidential innovation in governing forms.³³⁰

Constitutional commitment is constitutive commitment. To be committed to the principles and values embodied in the document is to be committed to the people it constitutes. It is also to be committed to the offices the Constitution creates. To be president is to play a constitutional role already assigned, and therefore already constrained by the form the office takes. Presidential administration is only possible because Congress has further constructed the legal and institutional apparatus that makes that administration possible.³³¹ So one answer to

³²⁷ It may be, however, that "the institutional environment in which officials function may influence their psychological apprehensions of the normative constraints to which they are subject." Fallon, *supra* note 17, at 1026 (citing Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1, 33–35 (2007)).

³²⁸ Levinson, *supra* note 37, at 681–91 (identifying reciprocity, coordination benefits, asset-specific investments in structures and processes, and positive political feedback as entrenching institutions that promote commitment).

³²⁹ *Id.* at 699 ("Regardless of how constitutional changes like this are conceptualized, the practical bottom line is that formal constitutional rules can constrain (or enduringly constitute) political actors only to the extent that political and social support for these rules is sustained.").

³³⁰ Presidents will innovate when possible. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (explaining that during the Clinton presidency, "presidential control of administration . . . expanded dramatically . . . making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda").

³³¹ Ernest Young makes a similar point, arguing that "[w]hile Article II vests the President with executive power, it remains for Congress to 'constitute' that power by devising the institutional structures and procedures through which it may be exercised." Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 441 (2007).

the question of commitment is to observe that part of what it means to be a president is to occupy an already constituted office that requires its holder to work within already constituted institutional structures.³³² To inhabit those structures means more than seeking to achieve self-interested goals; it entails fulfilling the responsibilities that define the office, such as the obligations to take care and be faithful to the nation's political constitution. The question then is not why be committed, but how much innovation is possible.

If the constitution of the polity is prior to constraint, then to act against the agreed principles is to change the political constitution—that is, to change the culture and identity of the people. No doubt, this puts the point dramatically. When acting illegally to conduct suspicionless surveillance of Americans, a president has not reconstituted the polity. But change is accretionary. The more principles and values change or are ignored, the less they play their constitutive role. We can live under a different Fourth Amendment regime, where the boundaries between government searches and individual privacy change in relation to security priorities and social practice.³³³ Such changes reshape the constitutional culture. Further changes that reflect such new commitments across different constitutional protections can produce a recognizably different constitutional culture.³³⁴

There is nothing about constitutional constraints or commitments that make change impossible or stasis inevitable. Given the identity constitutive role of constitutional commitments, however, deviation is difficult, and transgressions can be transformative. Presidents are committed to constitutional constraints, not only because their office is constituted in relation to these defining constraints, but because they play a role in defining the nature of the political community, a role ac-

³³² See Fallon, *supra* note 17, at 987 (“The Constitution constrains officials most fundamentally and pervasively by helping create the context—including the official roles or offices—in which questions of constitutional constraint and even some questions of official motivation arise.”). The understandings of the nature of the office are themselves constraints, but these understandings are not inseparable from the ethical discourse that gives them meaning—the ways we might emphasize particular virtues of office or expectations of what constitutes appropriate action.

³³³ See Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment after Lawrence*, 57 UCLA L. REV. 1, 58–60 (2009) (arguing that the Fourth Amendment protects liberty as well as privacy as suggested by *Lawrence v. Texas*, 539 U.S. 558 (2003)).

³³⁴ See Post, *supra* note 36, at 54 (“Constitutional law can therefore enforce constitutional culture only by intervening an ongoing process of historical development, so that constitutional law is always faced with the choice of encouraging or retarding these evolutionary changes.”).

knowledge through presidential use of vision and the Constitution's expectation of virtue.

Constitutional commitments work not because they are entrenched against change, but because they constitute a way of inhabiting institutions and social practices. In turn, these institutions and social practices imbued with constitutional commitments form the political community's identity over time. To generalize the point to broader understandings of substantive constitutional principles, consider the role that principles embodied in decisions such as *Brown v. Board of Education*³³⁵ or statutes such as the 1964 Civil Rights Act play. These principles, whether by Supreme Court interpretation or legislative enactment, are deeply entrenched in the American constitutional culture, not because of their formal status, but because of the special way they function within our constitutional system. It is not simply that a majority in Congress could overturn the Civil Rights Act, or that a five-justice Court majority could overturn *Brown*, but that the background work of imagination and constitutional vision it would take to do so is daunting.³³⁶ Political actors would have to conceive of the desirability of reversing these decisions, justify to others why change is desirable, and then show how doing so fits within an alternative vision of constitutional culture.

These so-called "small c" constitutional provisions provide a framework through which other provisions and processes are understood.³³⁷ In so doing, form follows function. To count as constitutional, an enactment must play a particular role and, to do that, it must have a particular kind of democratic pedigree that places it at the center of many other policies and practices. To undo the Civil Rights Act would mean retrenching on a commitment to the principle of equality, changing the understanding of the limits and role of congressional power, and forming a very different understanding of the obligations of government in the face of harmful social practices. There are moments when the confluence of social movement politics, fundamental substantive issues, and constitutional change come together to constitute structures that create defining commitments to particular practices and principles.³³⁸ They can be undone, but what it means to undo them is something different

³³⁵ 347 U.S. 483, 495 (1954).

³³⁶ See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1802–09 (2007).

³³⁷ See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001); Young, *supra* note 331, at 411–12.

³³⁸ See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001). See generally 2 ACKERMAN, *supra* note 36.

than shifting course on an ordinary policy question.³³⁹ In this way, political actors are committed to the complete Constitution, not because its provisions are entrenched, but because it defines the institutional order they inhabit.³⁴⁰

Constitutive identity is also reflected in the grammar of presidentialism—the ways the modern president relates to the people, defines a constitutional vision, and puts policy into practice. Grammar is not volitional, on the one hand, because certain structures must be accepted by each person occupying the executive office. On the other hand, there is discretion over linguistic content within constitutional constraints—what to prioritize, when, and how. These issues are part of an on-going constitutional conversation. Presidential innovation works only in a recognizable grammar, the rules of which any individual president must accept even though they are not immutable. In this way “vague standards” do not tell a president what to do during emergencies. Nevertheless, they do channel decision-making processes and provide a site for ethical discourse over what is proper or faithful. The normative commitments of constitutional constraint reflect the constitutive ordering of the president’s responsibilities and the people’s political identity.

CONCLUSION

The Madisonian solution for constitutional constraint both creates institutions for unenlightened statesmen and relies on virtue to make governing possible. Unchecked presidential authority can expand as far as the nature of the office will allow. Recognizing this, the Madisonian tradition supplements the constraint of the office with other institutions, each constituted with powers to check the other. If constitutional constraints went no further, “parchment barriers” may prove insuffi-

³³⁹ Levinson seems to suggest that constitutional commitments “will succeed only by virtue of sustained social and political support,” Levinson, *supra* note 37, at 705, which—although perhaps true—is insufficient to account for the special constitutive status particular constraints play. For similar criticism, see Josh Chafetz, *The Political Animal and the Ethics of Constitutional Commitment*, 124 HARV. L. REV. F. 1, 4 (2011), http://www.harvardlawreview.org/issues/124/january11/forum_648.php (discussing the importance of “how people justify their own practices and institutions and what forms of argument they use to explain their constitutional commitment”).

³⁴⁰ In this way, political participation reinforces the power of federal courts to supervise executive officials. The institutional order defines in part what it means to exercise executive or judicial power. See Rebecca Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 536 (1998) (accountability means “involving the polity in standing behind a political structure which includes a judicial branch empowered to step in if the majority is itself carried away by an impulse to tyrannize”).

cient because the Constitution must be embodied and implemented in governing practice. As necessity leads form to give way to function, institutions are malleable. Judges defer to executive officials, and Congress gives way to presidents who, without more, would have only self-interest and constitutional form to guide their actions. But the Madisonian solution provides more. Though unavoidably incomplete, the Constitution imbeds and requires virtue in implementing governing practice. Taking care and being faithful to the laws and Constitution to do only what is proper when acting as necessary are practices in virtue that cannot be resolved by appeal to institution design or governing method. A president has great responsibility, but part of that responsibility is not only to execute the laws with care and fidelity, but also to play a role in constituting the community through constitutional practices and commitments.

Constitutional commitment is therefore simultaneously a commitment to identity, structure, and substance. Like persons, this identity must be sustained through time and must manifest in the continuity of narrative commitment to traditions, ideals, and beliefs—the content of constitutional culture.³⁴¹ The Constitution matters not only because it structures our politics,³⁴² but also because it sustains our community through shared vision and virtue. To the concretely minded, vibrant politics and executive institutions provide the form for constitutional constraints. But, for the constitutional community, the substance of these commitments require people and presidents to take responsibility for the powers their Constitution bestows.

³⁴¹ See generally MACINTYRE, *supra* note 18 (providing a narrative conception of personal identity); DEREK PARFIT, *REASONS AND PERSONS* (1984) (defending psychological relations as basis for personal identity).

³⁴² See MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 17 (2010) (“The Constitution matters because politics matters.”).