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A Textual Analysis of Presidential Power under the 2014 Egyptian Constitution

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I. Introduction

In May of 2014, Egypt elected former Field Marshall Abdul Fattah al-Sisi president. Al-Sisi is Egypt's second popularly elected president since the 2011 revolution that ended the three-decade presidency of Hosni Mubarak, and is the first to operate under the Constitution of the Arab Republic of Egypt adopted by popular referendum in January of 2014. The May 2014 presidential election was the fifth time that the Egyptian population has been called to the polls en masse since the Mubarak regime was toppled in early 2011. In that time they have approved of two constitutions, as well as ushered into office two presidents and a two-house legislature. Subsequently, they have seen all of this–bar the 2014 constitution and now al-Sisi–fall by the wayside, removed from the scene by various instrumentalities. For a country that operated under a single regime (a regime governed, at least nominally, by a single constitution) for three decades before the upheavals of the 2011 revolution, the dynamism of the past four years can hardly be overstated.

In these moments of dynamic change, it is important to take advantage of the opportunity to examine the shifting landscape. One year into the al-Sisi presidency, this paper will consider the role of the president, and more broadly the nature of executive power, under the new Egyptian constitution. This analysis will be primarily legal in nature, focusing first and foremost on the text of the 2014 Constitution. This analysis will consider, in particular, the constitutional articles that define: the role and powers of the president; the president's role in defining and implementing state policy and government creation; the relationship between the executive branch and the legislative and judicial branches; and the interplay between the president and the military. Comparisons will be drawn to the text of previous Egyptian constitutions (particularly the Permanent Constitution of Egypt adopted in 1971 and the short-lived 2012 Constitution), and to the original draft of the 2014 constitution (prepared by the so-called Committee of Ten in the immediate wake

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of the ouster of former President Mohamed Morsi in July of 2013). Possible reasons–both practical and theoretical–for the varying levels of presidential power across these documents will be considered.

The ultimate meaning of the constitutional text cannot be properly understood without taking into account many other factors. This paper will therefore attempt to contextualize the text of the constitution by taking into account realities that will undoubtedly influence the way this text will play out in the real world. Specifically, the paper will consider: trends in Egyptian political and economic life in the 20th century; the concept of the executive in Egyptian history; and the roles that important institutions–in particular the military and security services–play in modern Egyptian life and politics. By taking these factors into consideration, we can better understand what the text of the new constitution means. This understanding allows us to more fully consider the role of the president and the nature of executive power under the new constitution, and to consider what these institutions will look like under an al-Sisi presidency–not just on paper but in practice.

II. Background

A. Twentieth Century Constitutional Documents, Presidents

The Egyptian Constitution adopted in 1971 was optimistically christened *The Permanent Constitution of Egypt*. Considering the history of Egyptian constitutionalism to that point, a desire for continuity is understandable. Although the 1971 Constitution did last for several decades, its longevity is the exception to the rule: most of modern Egypt's constitutions have lasted only a brief period of time. This turnover is due in part to the nature of the documents themselves, but also to more general trends and themes in Egyptian political life.

The current Egyptian constitution, ratified by popular referendum in January of 2014, is best understood against background. Any textual assessment of Egypt's newly adopted constitution requires consideration of this constitutional pedigree; this is particularly true in predicting how the 2014 Constitution will in fact operate in the real world, under an al-Sisi presidency. As is clear from past experience, the relationship between the Egyptian president and the constitution is one of push-and-pull: the constitution may impose limits on the president, but the president has often been able to equally impose himself on the constitution.

To understand the role of presidential power under the 2014 Constitution it is necessary to take note (at least briefly) of the nature of presidential power during the tenures of al-Sisi's immediate predecessors. The four presidents that preceded al-Sisi have each cast a long shadow over Egyptian society generally, and Egyptian constitutionalism specifically. Gamal Abdul Nasser, president of Egypt from 1956 until 1970, operated under (or, some would argue, worked around) a succession of constitutional documents. The Permanent Constitution adopted in 1971 lasted throughout the presidencies of both Anwar Sadat (1970-1981) and Hosni Mubarak (1981-2011). In December of 2012, then-President Mohamed Morsi signed into law the Egyptian Constitution of 2012 in the wake of the 2011 revolution.

The Nasser presidency was defined by Egyptian nationalism, pan-Arab idealism, authoritarianism, and a national project that could not be separated (for better or worse)

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from Nasser himself. Perhaps the most salient symbols of Nasser's ambition, and the ultimate limitations of this ambition, are the 1956 nationalization of the Suez Canal and the briefly realized United Arab Republic that between 1958 and 1961 joined Egypt and Syria in a short-lived political unification. The United Arab Republic indeed epitomized much of Nasser's regime–idealistic in its ambition and unitary in its execution, but ultimately falling short. It is also the clearest instantiation of his desire to effect a pan-Arab political alliance in order to add clout to his general stance of non-alignment with the west. A recent history of 20th century Egypt helpfully elucidates the nature of the Nasser project, and its lasting legacy:

> Unlike Napoleon, Nasser did not leave behind a state–merely an ill-defined aspiration. The main reason Nasser could not establish a state was that all of the new vehicles that he had created in the country, the pillars of his project–the new economic system after land reform, the societal changes that the industrialization and the nationalization policies had ushered in and the new Arab nationalist identity and foreign policy–were all personified in him; intentionally or not, the Nasserite sociopolitical venture revolved around the man himself. . . . When the man ceased to exist, the mandate was withdrawn. The project's vehicles (which were supposed to have evolved into the state's lasting institutions) appeared to have been just administrative means, drawing their power from the leader's own legitimacy, the people's consent to him–rather than from a system imbuing those new vehicles with institutional legitimacy.[1]

It is perhaps unsurprising, considering the larger-than-life nature of his presidency that Nasser alternatively circumvented or coopted for his own purposes the various constitutional documents he operated under.[2] A particularly troubling example is Nasser's brutal suppression of the Muslim Brotherhood in the late 1950s, which (until recently) was probably "the worst period of repression in Egypt's modern history."[3] This period of repression included the use of "kangaroo courts" that "operated outside of . . . normal legal channels and institutions."[4] Constitutional guarantees of independence for the judiciary matter little when the president opts to work entirely outside of the judiciary in this manner. In this and other respects, Nasser set the tone for presidential power in Egypt going

1. TAREK OSMAN, EGYPT ON THE BRINK: FROM NASSER TO THE MUSLIM BROTHERHOOD 78 (3d ed. 2013).

2. Between the beginning of the twentieth century and the end of Nasser's presidency, Egypt had no less than four documents of fundamental and (purportedly) inviolable Egyptian law. These were adopted in 1923, 1956 (following the 1952 "July 23 Revolution" that ended the constitutional monarchy and brought Nasser to power), 1958 (a provisional constitution adopted to reflect the establishment of the United Arab Republic, the brief political union of Egypt and Syria effected by Nasser), and 1964 (another provisional constitution). The adoption of each coincided with a significant policy reorientation; in each instance the constitutional document followed the presidential mandate, rather than the other way around.

3. Michelle Dunne & Scott Williamson, *Egypt's Unprecedented Instability by the Numbers*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (March 3, 2014), http://carnegieendowment.org/2014/03/24/egypt-s-unprecedented-instability-by-numbers/h5j3?reloadFlag=1.

4. Nathan J. Brown & Michelle Dunne, *Egypt's Judges Join In*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (April 2, 2014), http://carnegieendowment.org/2014/04/02/egypt-s-judges-join-in. It is worth noting that while these kangaroo courts were probably used most egregiously against the Muslim Brotherhood, their use was certainly not limited to this end; Nasser employed them whenever he needed to work around the largely independent Egyptian judiciary. *Id.*

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forward. A major theme of Egyptian constitutionalism, indeed, is the entrenchment of established power among certain institutions (particularly the presidency and the military) and more generally the consolidation of power among the powerful.

Chief among Anwar Sadat's priorities when he took office in 1970 was to move Egypt out of the long shadow of Nasserism.[5] In addition to structural changes within the government–most dramatically the purging from positions of power prominent Nasser loyalists in the 1971 Corrective Revolution–this project involved attempts to establish a more stable basic law for the country. This culminated in the adoption of the Permanent Constitution of Egypt in 1971, which can be fairly characterized as a modest but real move toward liberalization and more robust legal institutions.[6] While this initial period involved a "softening" in terms of political repression,[7] in later years Sadat would prove more willing to follow Nasser's example in circumventing and manipulating the Constitution. Sadat, who had appropriately enough served as a judge in Nasser's extrajudicial courts, similarly came to work "outside of legal channels and institutions" by "develop[ing] a new set of special courts for security and protecting society from 'shameful conduct.'"[8]

Mubarak operated under the 1971 Constitution during the entirety of his three-decade presidency; during his long presidency, however, he proved adept at manipulating the Constitution to his own ends. The Mubarak presidency is indeed largely defined, particularly in retrospect, by self-perpetuation: by the turn of the millennium the institution of the presidency was "by far the country's most influential political player, with no supervision over its actions."[9] Mubarak used this influence, and this lack of meaningful supervision, to consolidate power and impose himself on other government institutions. By the end of his presidency the parliament and the cabinet had become nothing more than "varied representations of the president's will–executive bodies rather than the pillars of a

5. *See* OSMAN, *supra* note 1, at 180 ("Anwar Sadat . . . led Egypt through an era of change. The new president's leadership . . . represented in effect a counter-coup against Nasser's model. . . . Sadat broke with the USSR to make Egypt a staunch ally of the United States, initiated the peace process with Israel by his dramatic flight to Jerusalem in 1977 and led Egypt away from socialist-style central planning towards what was intended to be free-market capitalism.").

6. *See* Nathan J. Brown, *The Sisi Spring*, THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (February 11, 2014), http://carnegieendowment.org/2014/02/11/sisi-spring/h0sl. (noting that "[p]ast presidential successions in Egypt have brought limited but real periods of liberalizations," and citing the first years of Sadat's presidency as an example of this trend). In addition to the adoption of the 1971 Constitution, Sadat moved to allow the Egyptian judiciary more independence than it possessed under Nasser. As Brown noted in a related article, this process continued (at least initially) under Mubarak:

> Nasser's two successors, Anwar Sadat and Hosni Mubarak, rolled back many of Nasser's moves. To be sure, the regime retained the old ways of moving outside of the judiciary with a series of special courts and extrajudicial procedures. But it allowed much of the court system to retain its autonomy. The Supreme Court evolved into a more independent Supreme Constitutional Court that actually issued a long series of rulings quite politically inconvenient for the regime from the mid-1980s until the early 2000s, in some years striking down more laws than it upheld.

Nathan J. Brown, *Egypt's Judges in a Revolutionary Age*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (February 2012), http://carnegieendowment.org/files/egypt_judiciary.pdf.

7. Krishnadev Calamur, *Muslim Brotherhood: A Force Throughout the Muslim World*, NATIONAL PUBLIC RADIO (August 17, 2013), http://www.npr.org/blogs/parallels/2013/08/17/212583097/muslim-brotherhood-a-force-throughout-the-muslim-world.

8. *See* Brown & Dunne, *supra* note 4.

9. OSMAN, *supra* note 1, at 202.

balanced political system."[10] For many, moves taken in his final years to ensure that his son Gamal Mubarak would succeed him as president represent the most salient example of this entrenchment.[11]

In the final years of his presidency Mubarak twice amended the 1971 Constitution, in 2005 and 2007. These amendments represent, perhaps, the peak of Mubarak's ability to manipulate the legal landscape to his own advantage. In effecting amendments to the country's basic legal document, Mubarak was ostensibly responding to demands from critics that he take steps toward real reform. The Carnegie Endowment for International Peace's contemporary assessment of these amendments, however, is revealing:

> Taken together, the amendments and process by which they were passed constitute an effort by the [Mubarak] regime to increase the appearance of greater balance among the branches of government and of greater opportunities for political parties, while in fact limiting real competition strictly and keeping power concentrated in the hands of the executive branch and ruling party.[12]

The mid-2000s constitutional amendments are merely one example of the "sham democracy" that Mubarak erected during the latter years of his presidency.[13] This sham democracy was bolstered by the brutal repression of any legitimate political threats.[14]

It was not political repression alone, however, that led to Mubarak's downfall. Another key factor is the poor economic conditions and attendant lack of opportunities for young, educated Egyptians that defined the final years of the Mubarak era. As noted already, the nature of presidential power in Egypt has proven malleable, and the state of the economy has played a key role in defining the metes and bounds of this power across the years. The early years of the Mubarak regime were a time of relative prosperity, which facilitated his steady consolidation of power, effected as it was against the backdrop of a fairly contented populace.[15] The economic malaise experienced by Egypt during the 2000s, however, led

10. *Id.* at 203.

11. Though nominally democratic-enhancing, amendments to the 1971 Constitution enacted in 2005 are generally considered a part of Mubarak's efforts to consolidate power; many suggest that these amendments were indeed intended to pave the way for a Gamal Mubarak presidency. *See, e.g.*, Rana Muhammad Taha, Hend Kortam & Nouran El-Behairy, *The Rise and Fall of Mubarak*, DAILY EGYPT NEWS (February 11, 2013), http://www.dailynewsegypt.com/2013/02/11/the-rise-and-fall-of-mubarak/ ("Though a positive move at face-value, opposition movements criticized the amendments as tailored to certain criteria which could only be found in a chosen few candidates, namely Mubarak and his son Gamal.").

12. Nathan J. Brown, Michelle Dunne & Amr Manzawy, *Egypt's Controversial Constitutional Amendments: A Textual Analysis*, THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (March 23, 2007), http://carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf.

13. *See* OSMAN, *supra* note 1, at 206 ("The façade of elections, a multi-party political environment and the existence of upper and lower houses of parliament allowed the regime to claim progress and some political development, and to diffuse some of the masses' anger. The sham democracy was never a threat to the regime.").

14. This repression is chillingly epitomized by the reportedly widespread use of torture to quell political opposition, which increased during the final decade of Mubarak's presidency. *See* Taha et al., *supra* note 11 (noting that "Amnesty International stated [during this period] that [Mubarak's] security authorities . . . enjoyed almost complete immunity from punishment for human rights violations.").

15. Some commentators suggest that the limited attempts at economic reform instituted by Mubarak in the final years of his presidency may have ironically served to undermine him by empowering the middle class, but only to the extent that they became increasingly frustrated with the limited opportunities presented by the Egyptian economy. *See* Ian Ayres & Jonathan Macey, *Did Egypt's Rising Economy Lead to Hosni Mubarak's*

to unrest and intense demonstrations in the years leading up to the Arab Spring.[16] The inability of the Mubarak regime to deal with the economic woes of the country were a key factor in the advent of the protests that led to the overthrow of his government.[17]

The Egyptian presidents of the twentieth century have much in common, and their various constitutional experiences provide common lessons. Notably, all were fundamentally military men. This shared background served both to legitimize their stature with the Egyptian population and was a key feature of each of these presidents' power base. From this solid power base–supplemented in good times by a stable economy–each of Nasser, Sadat, and Mubarak was able to manipulate constitutional documents to their own advantage. This pattern–the use of constitutional documents to consolidate presidential power, rather than to serve as a check on it–is perhaps the most important constitutional legacy of their respective presidencies. As one commentator recently mused, by the time post-Arab Spring Egypt started the process of constitution-drafting "Egypt had a constitutional history that enshrined state power more than it held it accountable."[18]

Fall?, POLITICO (February 8, 2011), http://www.politico.com/news/stories/0211/49736.html ("The Mubarak regime's fatal mistake was not its failure to pass reforms. Rather, it was that it took half steps toward liberalizing the economy – without taking further steps to complete the nascent democratic reforms it initiated in 2006.").

16. *See, e.g.*, Michael Slackman, *Labor Protests Test Egypt's Government*, N.Y. TIMES, April 29, 2010, at A6, *available at* http://www.nytimes.com/2010/04/29/world/middleeast/29egypt.html?_r=0 ("Using an emergency law that allows arrest without charge and restricts the ability to organize, the Egyptian government and the ruling National Democratic Party have for decades blocked development of an effective opposition while monopolizing the levers of power. The open question—one that analysts say the government fears—is whether the workers will connect their economic woes with virtual one-party rule and organize into a political force.").

Osman describes the economic "regress[sion]" Egypt experienced during the second half of the twentieth century:

> Economically, despite significant improvements in the country's infrastructure. . . , and despite an average GDP growth rate of 6 per cent throughout the 2000s, Egypt was ranked in the lower 40 per cent of all *developing* countries in the UN's 2007 Human Poverty Index. This was a reflection of the difficulty of Egyptian's daily lives, from the crumbling education system and decrepit health care, to humiliating transportation. There were more factories, bridges and highways, higher mobile telecoms penetration and increasing access to the Internet, but the economic development of the country, relative to the countries that used to be considered its international peers, had deteriorated significantly. In 2007 32 per cent of the population was completely illiterate (42 per cent of women), 40 per cent of the population were at or below the international poverty line and GDP per capita (at purchasing power parity) was less than half that of Turkey and 45 per cent of South Africa's. And, crucially, there was not only a sense of confusion, resentment, and rejection among the Egyptians–especially the younger ones[–] but increasingly an overarching feeling of an irreparable damage, a national defeat.

OSMAN, *supra* note 1, at 11-12 (emphasis in original).

17. *See id.* at 210 (" The notion that President Mubarak or the power elite that surrounded him could lead the country through the troubled waters of political oppression, corruption, economic malaise, sectarianism and widespread fury, had lost its credibility. That realization allowed the 2011 revolt to gain major traction amongst the people.").

18. Nathan J. Brown, *Egypt's Constitutional Cul-De-Sac*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (March 31, 2014), http://carnegieendowment.org/2014/03/31/egypt-s-constitutional-cul-de-sac/h7su?reloadFlag=1.

B. Post-Arab Spring Constitutional Documents

Since the ouster of Mubarak in February 2011, Egypt has seen a flurry of constitutional declarations, elections and popular referenda aimed at reconstituting a functional political state, ideally one free of the flaws of the Mubarak regime that inspired the 2011 uprising. During this period of reorganization the Egyptian people have twice approved new constitutions by popular vote. The first was the Egyptian Constitution of 2012, approved by popular referendum and signed into law in December of 2012 by then-President Mohamed Morsi. The second is the Constitution of the Arab Republic of Egypt, the current constitution adopted by popular referendum in January of 2014.

In the wake of Mubarak's removal from power, the initial focus was on establishing a functioning democracy and implementing elections.[19] Contemporary constitutional documents were designed to effect this transition. While western commentators largely applauded this "rush to democracy" at the time, in retrospect there has been much criticism of this unwavering focus.[20] The Supreme Council of the Armed Forces of Egypt (SCAF) in March of 2011 adopted by declaration the Provisional Constitution of the Arab Republic of Egypt, meant to serve as the interim fundamental law of the country until a permanent constitution could be drafted. Although essentially a transitional mechanism meant to allow for a move away from military rule and toward democracy, the role of SCAF in this transition is part of a clear pattern: the Egyptian military, and particularly SCAF, has been instrumental in implementing and contextualizing constitutional law in Egypt in recent years. In the power vacuums that followed the ousters of first Mubarak and subsequently Morsi, the military has imposed itself as the only viable arbiter of the process of constitutional rebuilding.[21]

In 2011 and 2012, something resembling democracy flourished in Egypt. Pursuant to the Provisional Constitution, Egypt held parliamentary and presidential elections in late 2011 and early 2012. Although there were concerns regarding corruption, electioneering,

19. *See, e.g.*, Craig Whitlock & Kathy Lally, *Military Moves Quickly to Bring Elections to Egypt*, The Washington Post (February 16, 2011), *available at* http://www.washingtonpost.com/national/egypts-military-vows-quick-vote/2011/02/15/ABwcohG_story.html ("Egypt geared up Tuesday for a breakneck rush to democracy as its military rulers vowed to hand authority to an elected civilian government in six months and ordered legal experts to draft a revised constitution in 10 days.").

20. President Obama, for example, applauded the Egyptian military's eagerness to move the country toward elections. *See* Lee Keath & Hamza Hendawi, *Egypt: Muslim Brotherhood Plans Political Party*, The Seattle Times (February 15, 2011), http://seattletimes.com/html/nationworld/2014227903_apmlegypt.html ("In Washington, President Barack Obama praised Egypt's military council for working toward elections. . . . 'So far, at least, we're seeing the right signals coming out of Egypt,' Obama said.").

While this posture is understandable considering worries at the time regarding indefinite military rule, in retrospect it seems clear that there was not enough "breathing space" allowed for in the transition to a post-Mubarak democratic Egypt. It is worth noting that some western commentators questioned the wisdom of this "rush to democracy." *See* Whitlock & Lally, *supra* note 19 ("Some democracy advocates, however, have questioned whether Egypt is moving too fast in implementing the demands of the protesters, noting that it first needs to set up credible political parties, voting laws and other basic campaign rules.").

21. It was SCAF, for example, that paved the way for the al-Sisi presidential bid. *See Egypt's El-Sisi Bids Military Farewell, Says He Will Run for Presidency*, Ahram Online (March 26, 2014), http://english.ahram.org.eg/NewsContent/1/64/97612/Egypt/Politics-/Egypts-ElSisi-bids-military-farewell,-says-he-will.aspx. SCAF's position of power in transitional Egypt was explicitly granted in the 2011 Provisional Constitution. *See* Egyptian Provisional Const. art. 56 (2011) ("The Supreme Council of the Armed Forces deals with the administration of the affairs of the country. . . .").

and outright electoral fraud,[22] these elections were widely regarded as a step in the right direction.[23] The Muslim Brotherhood's success in these elections was based on a mixture of genuine support among certain sectors of the Egyptian population, the dearth of any other organized (opposition) political party, and manipulation of the electoral process. This manipulation was subsequently recognized by Egypt's Supreme Constitutional Court, culminating in a decision dissolving as unconstitutional the Egyptian parliament in June of 2012.[24] This decision was widely criticized by western commentators at the time but, as a matter of constitutional law, was probably correct. This episode reveals, again, the gulf between mere robustness of popular elections and the reality of a functioning democracy in Egypt: popular elections mean little if they are carried out in contravention of constitutional strictures. This subtlety was unfortunately lost on many western commentators at the time.[25]

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22. *See, e.g.*, Daniel Pipes & Cynthia Farahat, *Don't Ignore Electoral Fraud in Egypt*, NATIONAL REVIEW ONLINE (Jan. 24, 2012), http://www.nationalreview.com/articles/288975/don-t-ignore-electoral-fraud-egypt-daniel-pipes.

23. It is worth reiterating that the immediate point of comparison here was the Mubarak era, in which elections were not only allegedly tainted but little more than political theater.

24. *See* David Hearst & Abdel-Rahman Hussein, *Egypt's Supreme Court Dissolves Parliament and Outrages Islamists*, THE GUARDIAN (June 14, 2012), http://www.theguardian.com/world/2012/jun/14/egypt-parliament-dissolved-supreme-court.

25. CNN's sensational choice of headline at the time is exemplary. *See* Mohamed Fadel Fahmy & Josh Levs, *Some Cry "Coup" as Egypt's Highest Court Annuls Parliament, Military Extends Power*, CNN (June 14, 2012), http://www.cnn.com/2012/06/14/world/meast/egypt-ruling/.

It is important to consider this decision in context. It was in fact one of a pair of decisions made by the Supreme Constitutional Court in June of 2012 that had serious repercussions in terms of the attempted post-Mubarak transition to democratic rule. The first ruling invalidated a law (recently passed by the Muslim Brotherhood-dominated parliament) that had declared that members of the Mubarak regime would be ineligible to pursue the presidency in the upcoming elections. This was followed almost immediately by the decision declaring the parliamentary elections unconstitutional, which resulted in the dismantling of the House of Representatives. Almost exactly one year later, the Supreme Constitutional Court declared that both the Shura Council (the upper house of Egyptian parliament under the 2012 Constitution's bicameral legislative structure) and the constitution-drafting process that produced the 2012 Constitution unlawful, as violative of the 2011 Provisional Constitution. *See* Louisa Loveluck, *Egypt Court Rule Upper House of Parliament Elected Illegally: Supreme Constitutional Court Ruling Expected to Widen Rift Between Egypt's Judiciary and Islamist-Dominated Government*, THE GUARDIAN (June 2, 2013), http://www.theguardian.com/world/2013/jun/02/egypt-court-rules-parliament-illegally.

This series of decisions had the effect of significantly limiting the power of the then-ascendant Muslim Brotherhood generally, and of then-President Morsi specifically. At the time (and subsequently), some have argued that these decisions were inappropriate intermeddling in the democratic process (perhaps at the behest of the military or other entrenched powers). The tenor of the New York Times' reporting at the time is fairly representative in its evocation of these concerns:

> A panel of judges appointed by Egypt's ousted president, Hosni Mubarak, threw the nation's troubled transition to democracy into grave doubt Thursday with rulings that dissolved the popularly elected Parliament and allowed the toppled government's last prime minister to run for president, escalating a struggle by remnants of the old elite to block Islamists from coming to power. The rulings by Egypt's Supreme Constitutional Court were quickly condemned as a 'coup' by Islamists, liberals and scholars. The court's action, coming two days before a presidential runoff, set up a showdown with Islamists who controlled Parliament. . . . Citing a misapplication of rules for independent candidates, the court sought to overturn the first democratically elected Parliament in more than six decades and the most significant accomplishment of the Egyptian revolt. Many analysts and activists said Thursday that they feared the decision was a step toward reestablishing a military-backed autocracy. . . .

The eventual election of Mohamed Morsi, meanwhile, paved the way for the adoption of the 2012 Constitution. The first Egyptian president elected since the Arab Spring, Morsi came to power in June of 2011 and in December of 2012 signed into law the Egyptian Constitution of 2012. Neither Morsi nor the 2012 Constitution–which was denounced by many as overly-influenced by Morsi and the Muslim Brotherhood[26]–would last long, however. Though some suggest that things could have gone differently, the Morsi presidency was in the end doomed by a combination of political and administrative incompetence, lack of support from the military, and popular unrest. This unrest was largely fueled, of course, by the devastating economic conditions that prevailed during the brief and ineffectual Morsi presidency. A contemporary account of the economic situation in the finals days of the Morsi presidency is instructive:

> "Egyptians are especially irate over the miserable economic situation, as the prices of bread, gasoline and natural gas continue to rise . . . . The Egyptian pound is in freefall. And there are frequent power outages, because the government lacks the money to import electricity. . . . The population is growing, and so is the number of high-school graduates, but most lack jobs or prospects."[27]

Morsi's unpopularity was further aggravated by aggressive moves toward consolidating power, epitomized by a presidential decree in November 2012 that effectively "stripped the judiciary of powers to question the president's decisions."[28] This decree was described at the time as a move in the direction of "[a]n absolute presidential tyranny."[29] It is worth noting that this decree, which effectively eviscerated any judicial check on the president's power, was issued despite nominal guarantees under the 2011 Provisional Constitution of

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David D. Kirkpatrick, *Blow to Transition as Court Dissolves Egypt's Parliament*, N.Y. TIMES, June 15, 2012, at A1, *available at* http://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html?pagewanted=all.

While the worries expressed here are not illegitimate, they do not tell the entire story. Indeed, one could argue that these decisions were simply the high constitutional court playing an appropriately counter-majoritarian role by ensuring that political processes remain loyal to constitutional constraints. The proper role of a high constitutional court in checking the outputs of the democratic process (invalidating laws and elections being the clearest examples of this function) is an extremely controversial subject in constitutional law, and one ultimately outside the scope of this paper. The lessons of the June 2012 Supreme Constitutional Court decisions will likely be debated for some time to come.

26. *See, e.g.*, Daniel Steinvorth, *Crisis in Egypt: Morsi at Precipice after Disastrous Year*, SPEIGEL ONLINE (July 2, 2013), http://www.spiegel.de/international/world/egyptian-army-gives-morsi-of-muslim-brotherhood-a-48-hour-ultimatum-a-908823.html (noting that the 2012 Constitution was "a document that bears the clear imprint of Morsi's Islamists").

27. *Id.* (noting also the abject state of the tourism sector and the problem of "[e]xploding government debt").

28. *Egyptian Constitution "Approved" in Referendum*, BBC NEWS (Dec. 23, 2012), http://www.bbc.com/news/world-middle-east-20829911. *See also* David D. Kirkpatrick & Mayy El Sheikh, *Citing Deadlock, Egypt's Leader Seizes New Power and Plans Mubarak Retrial*, N.Y. TIMES, Nov. 23, 2012, at A4, *available at* http://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html?_r=0 ("With a constitutional assembly on the brink of collapse and protesters battling the police in the streets over the slow pace of change, President Mohamed Morsi issued a decree on Thursday granting himself broad powers above any court as the guardian of Egypt's revolution . . . ").

29. Kirkpatrick & Sheikh, *supra* note 28 (quoting "Amr Hamzawy, a liberal member of the dissolved Parliament and prominent political scientist . . . [who further declared that] 'Egypt is facing a horrifying coup against legitimacy and a complete assassination of the democratic transition.'").

an independent judiciary and judicial oversight.[30] Morsi, like his predecessors, was not shy about circumventing constitutional limits where he found it convenient to do so.

In hindsight, the problem for Morsi appears to be that–in addition to the general clumsiness with which he executed his power-grab–he lacked sufficient support from both the Egyptian military and the Egyptian people as he moved to consolidate power. This brings the Morsi experience well in line with the patterns established by his predecessors. Unlike his three immediate predecessors, Morsi was not a military man and ultimately lacked the support of the military at the vital moment. This lack of support culminated, of course, with the military coup that removed Morsi from power.[31] Morsi's lack of support among the Egyptian people largely came down to the economy, and to his more general inability to effectively manage the Egyptian state. One commentator sums up the Morsi presidency as "a short-lived presidency that proved increasingly repressive and intolerant as well as inept," noting that by the end Morsi was "widely regarded as inept and as responsible for a mismanagement of the country's affairs [that prompted] a rapid acceleration of social upheaval and economic unraveling and disarray."[32]

Against this backdrop–punctuated as it was by massive protests–[33]it is hardly surprising that wide swaths of the Egyptian populace celebrated his removal from office, despite the fact that he had been elected by a popular vote just over a year earlier.[34] Like Mubarak before him, Morsi's inability to provide for the basic expectations of his people turned popular sentiment against him. As such, the military's removal of Egypt's democratically

30. *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, Mar. 26, 2007, Mar. 19, 2011, art. 47, *available at* http://www.egypt.gov.eg/english/laws/Constitution ("Judges are independent and not subject to removal. The law regulates disciplinary actions against them. There is no authority over them except that of the law, and it is not permissible for any authority to interfere in their issues or matters of justice."). *See also id.* at art. 49 ("The Supreme Constitutional Court is an independent and autonomous body, uniquely tasked with judicial oversight over the constitutionality of laws and regulations. It deals with the interpretations of legislative texts, all as stipulated in the law.").

31. *See* David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken Into Military Custody*, N.Y. TIMES, July 4, 2013, at A1, *available at* http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html?page wanted=all.

32. Michel Rosenfeld, *On Constitutionalism and the Paradoxes of Tolerance: Reflections on Egypt, the US, and Beyond*, 11 INT'L J. CONST. L. 835, 835-841 (2013).

33. *See, e.g.*, David D. Kirkpatrick, *Backing Off Added Powers, Egypt's Leader Presses Vote*, N.Y. TIMES, Dec. 9, 2012, *available at* http://www.nytimes.com/2012/12/09/world/middleeast/egypt-protests.html (reporting on Morsi's granting of limited concessions in the face of massive protests).

34. The New York Times' contemporary account of Morsi's downfall punctuated his administrative failings and general unpopularity at the time of the coup by noting that even members of his Presidential Guard celebrated after he was removed. *See* Kirkpatrick, *supra* note 31 ("[I]n a sign of how little Mr. Morsi ever managed to control the Mubarak bureaucracy he took over, the officers of the Presidential Guard who had been assigned to protect him also burst into celebration, waving flags from the roof of the palace.").

elected president was largely embraced by popular sentiment;[35] contemporary accounts commonly referred to Morsi's removal as a "popularly backed coup."[36]

Following Morsi's removal, the military again moved quickly to establish democracy. This time, however, there is reason to believe that they were intent to play a more active role in shaping the outcome of the democratic processes they empowered.[37] The 2012 Constitution was suspended (a mere seven months after it was narrowly adopted), and interim-president Adly Mansour's July 2013 constitutional declaration began the process of adopting a new constitution.[38] A ten-man committee made up of legal experts was formed to draft the new constitution, which was then amended in the final months of 2013 by a fifty-member body who had been assembled with the initial intention of redrafting the Committee of Ten document. The Committee of Fifty's draft was finalized in December of 2013 and adopted by a reported 98% vote in a popular referendum in January of 2014.[39]

The success of the January 2014 constitutional referendum was viewed by some as a post-facto referendum on the military's rule of Egypt, lending some measure of democratic legitimacy to Morsi's removal.[40] This view is clearly problematic in certain re-

35. *See* Mary B. Sheridan & Abigail Hauslohner, *Among Many Egyptians, a Dramatic Shift in Favor of the military*, WASHINGTON POST (Aug. 22, 2013), http://www.washingtonpost.com/world/middle_east/egyptian-authorities-finalizing-hosni-mubaraks-release/2013/08/22/fb850a88-0b29-11e3-8974-f97ab3b3c677_story.html ("Hassan Hosny cheered when the Arab Spring roared into Egypt in 2011, toppling its iron-fisted ruler. A year later, the cafe manager cast his vote for the country's first Islamist president, Mohamed Morsi. But now, like much of Egypt, Hosny appears to have done an about-face, supporting a military coup.").

From the Western perspective, where popular elections are often equated with the entirety of a functioning democracy, the popular support for the military removal of an elected president seems odd; President Obama and other western observers expressed "deep[] concern[]" regarding Morsi's removal. *See* Kirkpatrick, *supra* note 31.

More nuanced examinations of the situation, however, understand the need for some amount of "breathing space" in the building of democracy. The instrumentalities of democracy–elections, constitutional guarantees of freedoms, and limitations on government power–are essentially meaningless where these instrumentalities are either coopted or circumvented. This has been the pattern in Egypt in the past regarding constitutional limits on presidential power and there is reason to believe this pattern will continue in the coming years.

36. *See, e.g.*, Orla Guerin, *Egypt referendum also seen as vote on Morsi's removal*, BBC NEWS (Jan. 12, 2014), http://www.bbc.com/news/world-middle-east-25706182; Sheridan & Hauslohner, *supra* note 35 (noting that in the context of Morsi's removal, "[d]emocracy has come to mean getting rid of unpopular leaders, with or without elections").

37. *See* Yezid Sayigh, *From Arab Spring to Presidential Spring*, AL-HAYAT (Apr. 3, 2014), *available at* http://carnegie-mec.org/2014/04/03/from-arab-spring-to-presidential-spring/h6wm ("The fact that this was Egypt's third constitution in three years–besides several constitutional declarations–and that the authorities claimed it had been endorsed by 98.1 percent of the voters who turned out, reinforces the conclusion that procedures and mechanisms continue to be manipulated so as to guarantee specific outcomes.").

38. *See Egypt's Constitutional Declaration Issued, Defines Transitional Period*, AHRAM ONLINE (July 8, 2013), http://english.ahram.org.eg/NewsContent/1/64/76065/Egypt/Politics-/Egypts-constitutional-declaration-issued,-defines-.aspx.

A previous declaration officially dissolved the Shura Council, the final remnant of the Morsi-era democratic experience. *See* Rana Muhammed Taha, *Mansour Issues First Constitutional Declaration*, DAILY NEWS EGYPT (July 5, 2013), http://www.dailynewsegypt.com/2013/07/05/mansour-issues-first-constitutional-declaration/. It is worth noting, finally, that Mansour's power to issue these constitutional declarations itself emanated from a military declaration. *Id.*

39. *See* Patrick Kingsley, *Egypt's New Constitution Gets 98% 'Yes' Vote*, THE GUARDIAN (Jan. 18, 2014), http://www.theguardian.com/world/2014/jan/18/egypt-constitution-yes-vote-mohamed-morsi.

40. *See* Guerin, *supra* note 36

spects: contemporary reports were quick to note problems with the process of the referendum,[41] particularly with the aggressive role the military played in ensuring its success.[42] There is, however, a countervailing suggestion from many that in the months since the referendum popular sentiment has indeed lined up quite neatly with the ruling regime.[43] This is most clear in the Egyptian public's apparent embrace of Abdel Fattah al-Sisi,[44] whose widespread popularity is largely a function of his role as the face of the coup that removed the unpopular Morsi from power.[45]

Keeping in mind the tumultuous history of presidential power and constitutionalism in Egypt, we now turn to a textual analysis of Egypt's newly adopted Constitution.

III. The 2014 Constitution: A Textual Analysis

A. INTRODUCTION

When al-Sisi assumed the Egyptian presidency in June, he became the first elected Egyptian president to operate under the 2014 Constitution. Considering excessive presidential power was a key impetus of the 2011 revolution, it is curious to see many commentators lamenting the lack of substantive changes in presidential power in the new constitution. While it is fair to say that, in a general sense, the 2014 Constitution is "based" on the 1971 Constitution,[46] this assessment is overly simplistic. There are important changes from past constitutions–some quite subtle–that suggest, at the very least, a shift in emphasis going forward. The following sections track the precise language of the 2014 Constitution's provisions regarding presidential and executive power, using its predecessors as guidance (particularly the 1971 Constitution, the 2012 "Morsi" Constitution, and Committee of Ten draft-constitution). This analysis pays particular attention to how

41. *See, e.g.*, David D. Kirkpatrick, *Overwhelming Vote for Egypt's Constitution Raises Concern*, N.Y. TIMES, Jan. 19, 2014, at A7, *available at* http://www.nytimes.com/2014/01/19/world/middleeast/vote-validates-egypts-constitution-and-military-takeover.html ("In a statement, [Secretary of State John] Kerry listed the concerns of international monitors [regarding the January 2014 constitutional referendum], including the 'polarized political environment,' the absence of an inclusive drafting process or public debate before the vote, the arrests of those who campaigned against it, and procedural violations during the balloting.").

42. *See* Guerin, *supra* note 36 ("The military installed authorities want a massive 'Yes' vote in the forthcoming referendum. Lampposts, billboards and buildings are plastered with posters bearing a large white tick. They are hard to avoid. Spotting any posters from the 'No' campaign is a lot harder. People have been arrested for putting them up.").

The Carnegie Endowment for International Peace meanwhile declared that the referendum was subject to "a flawed and undemocratic process" while Egyptian author Ahdaf Soueif claimed at the time that "[t]he only thing this constitution does is that it legitimizes [sic] the very powerful and unquestioned position of the army in Egypt today." *Id.*

43. *See 82 pct of Egyptians happy with Sisi's performance: Baseera*, ASWAT MASRIYA (Aug. 31, 2014), http://en.aswatmasriya.com/news/view.aspx?id=9246237d-9216-4ecd-85a2-4817d9aa1b1c ("Eighty days have passed since former army general Abdel Fattah al-Sisi has been elected as Egypt's president, and already 82 percent of Egyptians are happy with his performance, according to a Baseera poll.").

44. *See, e.g.*, Ursula Lindsey, *The Cult of Sisi*, N.Y. TIMES LATITUDE BLOG (Sept. 12, 2013), http://latitude.blogs.nytimes.com/2013/09/12/the-cult-of-sisi/?_php=true&_type=blogs&_r=0.

45. *See* Marina Ottaway, *Egyptians remain uncertain about future under President Sisi*, BBC NEWS (July 2, 2014) http://www.bbc.com/news/world-middle-east-28126198 ("[al-Sisi] was elected above all for having overthrown President Morsi.").

46. *See, e.g.*, Gregg Carlstrom, *What's in Egypt's Proposed New Constitution?*, AL JAZEERA (Jan. 14, 2014), https://en-maktoob.news.yahoo.com/39-egypt-39-proposed-constitution-064428741.html.

presidential power interacts with the other branches of government and the military under the 2014 Constitution.

B. The Nature of Executive Power

Given Egypt's history, it is unsurprising that the 2014 Constitution contemplates a strong role for the President. The tradition of strong, and at times supreme, executive power stretches back in the Egyptian psyche in a direct line to the Pharaohs.[47] The 2014 Constitution indeed commits the state to "protecting[ing] and maintain[ing]" the "civilizational and cultural heritage" of Egypt, including explicitly the "Pharaonic" period.[48]

The 2014 Constitution deems the President "the head of state and head of the executive branch of government" and tasks him with "defend[ing] the interests of the people, [and] safeguard[ing] the independence, territorial integrity, and safety of the nation."[49] This general language is not significantly different than that of earlier constitutions, which uniformly placed the President (rather than, for example, the Prime Minister) at the head of the executive branch.[50] The Committee of Ten draft-Constitution's language is identical to the 2014 Constitution in this respect.[51]

The 2014 Constitution adopts strict presidential term limits and eligibility requirements. The President is restricted to two four-year terms,[52] a significant restriction considering the lack of specified term limits in the 1971 Constitution. Assuming these term limits are respected, Egypt will avoid another decades-long presidency like that of

47. In addition to the obvious example of the Pharaohs, later periods of Egyptian history also witnessed moments of preeminent executive authority. Cairo served as the seat of the Fatimid Caliphate from the 10th through the 12th centuries. Egypt subsequently spent hundreds of years as a vassal of the Ottoman Sultanate, an example of supreme executive authority if ever there was one.

The end of the Ottoman period came about at the hands of yet another would-be Napoleon, Muhammad Ali. An Ottoman soldier of Albanian descent, Muhammad Ali witnessed (and was duly influenced by) Napoleon's 1798 invasion and conquest of Egypt. Upon the French withdrawal Muhammad Ali managed to fill the political void–thanks largely to the anemic state of the Ottoman Empire in the opening years of the nineteenth century–and claimed for himself, and subsequently his family, the seat of Egyptian power. Muhammad Ali's program to modernize Egypt was successful primarily as a result of his successful imposition of a strong executive structure at the center of the Egyptian state, and his creation (and control) of a modern Egyptian army. This close relationship between preeminent executive power and the military is, of course, mirrored in modern Egypt. The overall influence of Muhammad Ali on the Egyptian psyche can hardly be overstated: until the rise of Nasser 150 years later, Muhammad Ali was–despite not being of Egyptian descent–considered by many the father of the modern Egyptian state.

48. Constitution of the Arab Republic of Egypt, 18 Jan. 2014, art. 50 [hereinafter 2014 Egyptian Const.].

49. *Id.* at art. 139.

50. Constitution of the Arab Republic of Egypt, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 25, 2007, art. 73 [hereinafter 1971 Egyptian Const.]; Constitution of the Arab Republic of Egypt, 26 Dec. 2012, art. 132 [hereinafter 2012 Egyptian Const.].

51. Arab Republic of Egypt Committee of Ten-Draft Constitution, 2 Dec. 2013, art. 114 (translation provided by Distinguished Visiting Fellow John Attanasio, New York University School of Law, spring 2014).

52. *See* 2014 Egyptian Constitution art. 140 (2014) (The language here is identical to that of the Committee of Ten Draft-Constitution and the 2012 Constitution); Arab Republic of Egypt Committee of Ten-Draft Constitution art. 115 (2013); 2012 Egyptian Const. art. 133.

Mubarak.[53] While the 2014 Constitution does not mention the office of Vice-President, much less mandate the appointment of a Vice-President, this is not particularly shocking.[54] Neither the 2012 Constitution nor the Committee of Ten draft-Constitution mentioned a vice-president; under the 1971 Constitution the appointment of a vice-president was strictly permissive, with both appointment and dismissal of vice-presidents left entirely to the discretion of the President himself.[55]

The eligibility requirements are similarly unsurprising and uncontroversial. They do not vary significantly from either the 1971 Constitution nor the 2012 Constitution.[56] The only notable clause is the requirement (present in all post-Arab Spring constitutions) that a presidential candidate "must not be married to a non-Egyptian spouse."[57] This is apparently a direct (and somewhat petty) rebuke to Mubarak, whose wife Suzanne's mother was British.[58]

C. State Policy and Government Formation

The 2014 Constitution tasks the President with "set[ting] the general policy of the state and oversee[ing] its implementation," to be carried out "jointly with the Cabinet."[59] Although not a substantive grant of power, it is notable that a similar clause was present in both the 1971 Constitution and the 2012 Constitution, but conspicuously absent from the Committee of Ten draft-Constitution.[60] This pattern–the Committee of Ten draft-Constitution moving to limit presidential power found under the 1971 and 2012 Constitutions only for the Committee of Fifty to reclaim that power in the 2014 Constitution–is evident in several instances.

The President's general power to set policy under the 2014 Constitution is bolstered by his specific powers to issue decrees having the force of law and to call for referenda.[61]

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53. *Profile: Hosni Mubarak*, BBC News (Aug. 22, 2013), http://www.bbc.com/news/world-middle-east-12301713.

54. *See generally* 2014 Egyptian Const.

55. 1971 Egyptian Const. art. 139 ("The President of the Republic may appoint one or more Vice-Presidents, define their competences and relieve them of their posts").

56. *Id.* at art. 75; 2012 Egyptian Const. art. 134.

57. *See* 2014 Egyptian Const. art. 141.

58. Aya Batrawy *Modest, veil-wearing 'first servant of Egypt emblematic of shift in nation's presidency*, National Post (June 28, 2012), http://news.nationalpost.com/2012/06/28/veil-wearing-egyptian-president-elects-wife-wants-to-be-first-servant-of-the-people/#__federated=1.

59. *See* 2014 Egyptian Const. art. 150.

60. *See* 1971 Egyptian Const. art. 140; *see generally* Arab Republic of Egypt Committee of Ten-Draft Constitution (2013) (lacking any equivalent grant of power).

61. *See* 2014 Egyptian Const. art. 156 ("In the absence of the House of Representatives, the President of the Republic may issue decrees that have the force of law, provided that these decrees are then presented to the House of Representatives, discussed and approved within fifteen days from the date the new House convenes."); *id.* at art. 157 ("The President may call for a referendum on issues relating to the supreme interests of the country.").

The president has the additional power to declare a "State of Emergency" under the 2014 Constitution. *See* 2014 Egyptian Const., art. 154. This power was similarly present in each of the predecessor constitutions. *See* 1971 Egyptian Const., art. 148; 2012 Egyptian Const., Art. 148; Committee of Ten draft-Egyptian Const., art. 129. In each case, the presidential declaration of a state of emergency requires approval of the legislature. *See, e.g.*, 2014 Egyptian Const. art. 154 ("[T]he declaration of a state of emergency must be approved by a majority of members of the House of Representatives."). While the state of emergency power appears to be a readily accepted function of the Egyptian presidency, it is obviously out of

Each of these powers is limited, but there is still cause for concern regarding these provisions. The power to issue decrees is limited by the necessity that the House of Representatives is absent, the need for "urgent measures that cannot be [otherwise] taken," and ex post approval by the re-convened House.[62] The ability to call for referenda is meanwhile limited by the requirement that such referenda involve "issues relating to the supreme interests of the country" and are undertaken "without prejudice to the provisions of the Constitution."[63] Nevertheless, from the American perspective, each of these provisions implicates fundamental separation of powers concerns, namely that the President here is given the power to step into the legislative role by co-opting the law-making function. This concern is bolstered by the vague nature of the language in the relevant articles: there are no clear guidelines that explain what qualifies as a "supreme interest[ ] of the country" or when "urgent measures" are required.[64] Considering other controls over the legislative process granted to the President under the 2014 Constitution, and the past experience of Egyptian presidents dominating the legislative process, the vague nature of these grants of power could prove problematic going forward.[65]

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step with the American constitutional tradition. The Supreme Court of the United States has explicitly rejected the existence of any inherent "emergency" power of the executive. Justice Jackson's eloquent summation of this issue is deeply ingrained in the American constitutional tradition:

> The 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. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from the suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers. . . .
>
> The executive action we [examine in this case] originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limits of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by [legislative] deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649-55 (1952) (Jackson, J., concurring) (internal quotation marks and citations omitted).

62. 2014 EGYPTIAN CONST. at art. 156.

63. *Id.* at art. 157.

64. *Id.* at art. 156, 157.

65. It is worth noting that these powers were similarly granted, in substantially the same form, by each of the earlier constitutions discussed in this section. *See* 1971 EGYPTIAN CONST. art. 147 (presidential decrees), art. 152 (referenda); 2012 EGYPTIAN CONST. art. 131 (presidential decrees), art. 150 (referenda); ARAB REPUBLIC OF EGYPT COMMITTEE OF TEN-DRAFT CONSTITUTION art. 131 (presidential decrees), art. 132 (referenda) (2013).

The President has significant powers in government formation and the appointment of cabinet ministers. The 2014 Constitution mandates that the President "assign[ ] a Prime Minister to form a government,"[66] which must then obtain a vote of confidence from the House of Representatives before being confirmed.[67] If the House of Representatives declines to approve of the first government presented by the Prime Minister, a second government is formed by a new Prime Minister chosen by the President from "the party or coalition that holds a plurality of seats in the House of Representatives."[68] If the House of Representatives declines to approve of this second government, the House of Representatives is "deemed dissolved."[69] This arrangement has the potential to put significant pressure on the House of Representatives to approve the President's first choice, rather than heading down a road that may lead to the dissolution of the House. Additionally, even in the event that the President is forced to choose a government "from the party of the coalition that holds a plurality of seats in the House of Representatives" he "may, in consultation with the Prime Minister, choose the Ministers of Justice, Interior, and Defense."[70]

The President also has the power under the 2014 Constitution to "conduct a cabinet reshuffle" without cause. Such a reshuffle is subject to "approval of the House of Representatives."[71] This check on the cabinet seems to ensure that they will remain loyal to the president in implementing his declared state policy. The Committee of Ten draft-Constitution did not allow the President to "reshuffle" the cabinet, nor did the 1971 or 2012 Constitutions. This is another example of a drift toward expansive presidential power under the 2014 Constitution.

D. Relationship with the Legislature

The 2014 Constitution declares that the House of Representatives is "entrusted with the authority to enact legislations and approving the general policy of the state, [and] the general plan of economic and social development of the state budget."[72] Further, the House of Representatives is tasked with "exercis[ing] oversight over the actions of the executive authority."[73] This oversight is specifically embodied in the House's power to impeach the president or, alternatively, withdraw confidence in the president.[74] Although the power to impeach is consistent across all constitutions, the power to withdraw confidence in the president is an innovation of the 2014 Constitution.[75] As such, this is a counter-example to the general trend whereby the 2014 Constitution exhibits an increase in presidential power when compared to the Committee of Ten draft-Constitution.

66. 2014 Egyptian Const. at art. 146.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at art. 147.
72. *Id.* at art. 101.
73. *Id.*
74. *See id.* at art. 159 (impeachment); art. 161 (withdrawal of confidence).
75. The earlier constitutions did give the legislature the power to withdraw confidence in Prime Ministers and other members of the government, but this power was not extended to the President.

The reason for this exception is, however, probably practical rather than based on any ideological commitment to limiting presidential power. The Morsi experience, and particularly the lack of a constitutional mechanism (apart from full impeachment proceedings) for removing Morsi from power, is the likely reason for this change. As such, the ability of the House of Representatives to withdraw confidence in the president is perhaps less intended as a legislative check on presidential power and more as providing a potential avenue to regime change. Nevertheless, it is a real and potentially important check on presidential power.

Whatever the basis for these legislative checks on the executive, the president also wields significant power over the legislature. In addition to the ability to dissolve the House of Representatives in the circumstances discussed above, and the ability to veto legislation,[76] the president also has the ability to dissolve the House of Representatives "following a public referendum."[77] Given the ability of the ruling regime to influence public referenda in recent years,[78] this provision amounts to a significant check on the legislature. Although tempered by the restriction that subsequent Houses may not be dissolved "for the same reason,"[79] this term is not defined and it seems likely that this could be creatively side-stepped. As a general matter, instances of legislative oversight to executive power should be read in light of the president's ability to dissolve the House of Representatives pursuant to referenda.[80]

E. Relationship with the Judiciary

The 2014 Constitution declares that "[t]he Judiciary is independent and autonomous authority,"[81] that "[j]udges are independent,"[82] that the legal profession is a "free profession"[83] and that "[i]nterference in the affairs of the courts or in the lawsuits under their consideration shall constitute a crime."[84] It further declares that "[t]he Supreme Constitutional Court is an autonomous and independent judicial body"[85] and is:

76. 2014 Egyptian Const. art. 123 ("The President of the Republic has the right to issue laws or reject them. If the President of the Republic objects to a draft law approved by the House of Representatives, he/she shall refer it back to the House of Representatives within thirty (30) days of the date when the House of Representatives notified the President of such approvalIf the President does not refer the draft law back to the House of Representatives within this period, the draft law shall be deemed a Law and shall be issued. If the draft law is referred back to the House within the aforementioned period, and is approved again by a majority of two-thirds of its members, it is considered a law and shall be issued."). Substantially identical provisions are present in earlier constitutions.

77. *Id.* at art. 137.

78. *See supra* note 46.

79. 2014 Egyptian Const. at art. 137.

80. The 2014 Constitution provides several additional instances of oversight, including requiring House approval of declarations of a State of Emergency. *See* 2014 Egyptian Const. art. 154 ("In all cases, the declaration of a state of emergency must be approved by a majority of members of the House of Representatives."). How substantial these checks prove in practice will depend in large part on the ability of the president to exert himself over the legislature as a practical matter. *See* discussion *infra* Section V.

81. 2014 Egyptian Const. at art. 184.

82. *Id.* at art. 186.

83. *Id.* at art. 198.

84. *Id.* at art. 184.

85. *Id.* at art. 191.

> Solely competent to decide on the constitutionality of laws and regulations, to interpret legislative provisions, and to adjudicate on disputes pertaining to the affairs of its members, on jurisdictional disputes between judicial bodies and entities that have judicial mandate, on jurisdiction, on disputes pertaining to the implementation of two final contradictory rulings . . ., and on disputes pertaining to the execution of its judgments and decisions.[86]

Based on the text of the 2014 Constitution, then, the judiciary is clearly independent; as such, it is here that we would perhaps hope to find–in practice–the most significant checks on presidential power. Prior constitutions similarly guaranteed the independence of the judiciary.[87] This conception is bolstered by the fact that under the terms of the 2014 Constitution, the Prosecutor General is selected by the Supreme Judicial Council;[88] under 2012 Constitution the president appointed the Prosecutor General.[89] This is a significant improvement, considering the Prosecutor General "carr[ies] out" the investigation and prosecution of the President in the event of impeachment.[90]

As discussed further below, the Egyptian judiciary has traditionally been considered the most independent branch of government. This is particularly true of the Supreme Constitutional Court. The 2014 Constitution declares that members of the Supreme Constitutional Court "are independent and immune to dismissal" and "are subject to no other authority but the law."[91] As discussed below, however, there are reasons to question whether the judiciary's ability (or desire) to remain independent of political struggles will continue, despite clear constitutional guarantees.

F. Relationship with the Military

As discussed in Section II, the relationship between the Egyptian presidency and the Egyptian military is such that it is difficult to discuss one without mentioning the other. From Muhammad Ali to Nasser to al-Sisi, modern Egyptian executive power has been virtually inseparable from military support. The obvious exceptions to this alignment of interests, of course, resulted in the military coups that removed first Mubarak and then Morsi from power. The 2014 Constitution's provisions outlining the balance of power between the executive authority and the military are among its most important, and in some ways offer the clearest points of departure from past constitutions.

The 2014 Constitution makes clear that the president plays a key role in foreign affairs. In addition to tasking the president with "safeguard[ing] the independence, territorial integrity and safety of the nation,"[92] the 2014 Constitution states that "[t]he President of the Republic represents the state in foreign affairs."[93] This encompasses the power to enter

86. *Id.* at art. 192.
87. *See, e.g.*, 2012 Egyptian Const., art. 168; *id.* at art 170; *id.* at pmbl. § 6.
88. 2014 Egyptian Const. at art. 189.
89. 2012 Egyptian Const., art. 173. The Committee of Ten draft-Constitution entrusted public prosecutions to the Prosecutor General, who was appointed by the president with the approval of the Supreme Judicial Council. *See* Committee of Ten draft-Egyptian Const. art. 162.
90. 2014 Egyptian Const., art. 159.
91. *Id.* at art. 193, 194.
92. *Id.* at art. 139.
93. *Id.* at art. 151.

into treaties and to appoint (and dismiss) "civil and military personnel and diplomatic representatives."[94] These provisions have substantial equivalences in each of the earlier constitutions considered here.

With regard to the president's relationship to the military, the picture blurs somewhat and we find some measure of discontinuity.[95] The 2014 Constitution names the president "the Supreme Commander of the Armed Forces"[96] and indicates that he will "preside over" the National Defense Council.[97] Declarations of war are issued by the president, but only "after consultation with the National Defense Council and the approval of [two-thirds of] the House of Representatives."[98]

There are reasons to believe that the military's ability to check presidential power under the 2014 Constitution will be tangible. Unlike earlier constitutions,[99] the Defense Minister serves as the Commander-in-Chief of the armed forces under the 2014 Constitution.[100] Furthermore, the Defense Minister must be a member of armed forces and is appointed only "upon approval of the Supreme Council of the Armed Forces."[101] This is a marked departure from the 2012 Constitution, which similarly mandated membership in the armed forces but did not mandate SCAF oversight of his appointment.[102] While it is difficult to predict anything with certainty, this change will potentially allow SCAF to increasingly impose itself on the executive branch going forward.

Article 200 of the 2014 Constitution declares that "[t]he armed forces belong to the people."[103] Although this conception is not particularly surprising or necessarily a departure from past conceptions of the Egyptian military, it has novel implications in the wake of the ouster of Morsi (and Mubarak before him). As discussed above, the popular coup that ousted Morsi was given some measure of democratic legitimacy by of the January

94. *Id.* at art. 153.

95. Although this section–and the paper more generally–discusses only the military, it should be noted that the state police are also a key component of the overall security apparatus of the Egyptian state and a key instrumentality of presidential power. Charged with preserving the "public order" by the 2014 Constitution–*see* art. 207–the police have in recent years been at the front lines of clashes with protestors, and have been accused of widespread abuse of civilians (generally those perceived as enemies of the regime) in the period since Morsi's ouster. *See e.g.*, Orla Guerin, *Egypt Police Brutality "Unchecked"*, BBC NEWS (December 3, 2013), http://www.bbc.com/news/world-middle-east-25121936 (describing incidents of police brutality aimed at Morsi supporters); *see generally* descriptions of the Rabaa Square incident, *infra* at note 110. Such brutality is, of course, not an innovation of the current regime. The death of Khaled Said in 2010–beaten to death by police in Alexandria–was one of the sparks of the uprisings that would eventually topple the Mubarak regime. *See* Kareem Fahim, *Death in Police Encounter Stirs Call for Change in Egypt*, N.Y. TIMES , July 19, 2010, at A4, *available at* http://www.nytimes.com/2010/07/19/world/middleeast/19abuse.html?page wanted=all. Under the 2014 Constitution, the police fall under the purview of the Minister of the Interior who, with "assist[ance] from the Supreme Police Council (which is "composed of the most senior officers of the police force") "organiz[es] the police force and manag[es its] affairs." 2014 EGYPTIAN CONST., art. 206, art. 207. This ensures that the state police remain firmly in the executive apparatus.

96. 2014 EGYPTIAN CONST., art. 152.

97. *Id.* at art. 203.

98. *Id.* at art. 152. So far, all powers and limitations thereon track substantially the earlier constitutions.

99. *Compare* 2012 EGYPTIAN CONST., art. 146. . *See also* COMMITTEE OF TEN DRAFT-CONSTITUTION, art. 127.

100. 2014 EGYPTIAN CONST., art. 201.

101. *Id.* at art. 234.

102. 2012 EGYPTIAN CONST., art. 195.

103. 2014 EGYPTIAN CONST., art. 200. *See also* COMMITTEE OF TEN DRAFT-CONSTITUTION, art. 170 ("The armed forces are owned by the people.").

2014 constitutional referendum. The declaration that the armed forces "belong" to the people perhaps plays a similar role. Ex ante, this indicates that the military will not act but for the approval of the people; ex post, the argument might be that any actions previously taken by the military are ratified by way of the people's "ownership." While the language of Article 200 is perhaps just a semantic flourish, the overall stature of the military under the 2014 Constitution appears to have increased vis a vis the president.

One possible move in the right direction is the treatment of military trials. The 2014 Constitution provides for the continued existence of the Military Judiciary ("an independent judiciary" that "adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and their equals"[104]) but expressly limits military trials of citizens to narrowly defined circumstances.[105] This is potentially a significant improvement over the 1971 Constitution: under the 1971 Constitution, which provided no analogous, explicit limits on the military courts,[106] Mubarak used military trials to "avoid[ ] the judiciary when politically convenient."[107] Accordingly, this limit on the military courts is potentially a meaningful check on presidential power.

G. Trends

Overall, two trends emerge upon a textual analysis of the 2014 Constitution. First, the 2014 Constitution appears to drift back in the direction of a strong presidency and concentrated executive power, particularly when compared to the Committee of Ten draft-Constitution that immediately preceded it. Counter-examples to this trend (such as the ability of the House of Representatives to withdraw confidence from the president) are likely explained as a reaction to the Morsi experience, specifically the inability to remove him from power under the 2012 Constitution. Other limits on the presidential power that have been effected–most obviously the implementation of term limits–seem to focus themselves upon limiting the kind of executive excesses that were endemic during the Mubarak years. Second, the military (and particularly SCAF) is given certain new powers, including in some instances increased oversight of executive authority. As discussed further in the following sections, there is reason to believe that this increased military oversight will be tangible and potentially significant.

IV. Explanations for the Textual Changes

There are several practical explanations for the changes present in the 2014 Constitution outlined above, some subtler than others. Most obviously, the 2014 Constitu-

104. *Id.* at art. 204.

105. *See id.* ("Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barrack, or whatever falls under their autonomy; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performances of their duties."). The Committee of Ten draft-Constitution and the 2012 Constitution set substantially identical limits on the Military Judiciary. *See* Committee of Ten draft-Constitution, at art 174; 2012 Egyptian Const., art 198.

106. *See* 1971 Egyptian Const., art. 183.

107. Brown, *supra* note 6 (noting further that during the Mubarak presidency "military courts and a complex of state security courts could be called upon when needed–and were indeed used").

tion–like the 2012 Constitution before it–is a reaction to the excess of executive power that defined the Mubarak regime. Although many argue the new constitution does not go far enough to limit presidential power going forward,[108] definite restrictions such as term limits will do at least some work here. The impulse to limit presidential power in a post-Mubarak Egypt was bolstered by the Morsi debacle. Morsi's inept presidency, punctuated by clumsy attempts to consolidate power, undoubtedly inspired further restrictions found in the 2014 Constitution. The ability of the House of Representatives to withdraw confidence from the president seems a clear reaction to the inability to remove Morsi while remaining within the strictures of the 2012 Constitution.

Considering the harsh lessons of the Mubarak and Morsi presidencies, it is not surprising that the initial Committee of Ten draft-Constitution provides the most robust limits on presidential power of the constitutions considered here. The Committee of Ten was composed of legal scholars and professionals and who appear to have been given significant leeway in their initial drafting. If the Committee of Ten draft-Constitution represents the nadir of presidential power, it is perhaps unsurprising that the transition to the final version witnessed a significant (if subtle) drift back in the direction of pronounced presidential authority.

The composition of the Committee of Fifty goes at least some way to explaining this drift. Although the Committee of Fifty nominally "represent[ed] the breadth of Egyptian society" it "[i]n reality . . . represented the breadth of the Egyptian state as well as state-licensed bodies."[109] The identity of the chairman of the Committee of Fifty bolsters this view. Amr Moussa–a foreign minister under Mubarak who is "known to be close to SCAF"–was "called in by [then] Field Marshall al-Sisi to oversee the drafting of the military-backed constitution."[110] Although there is no way of knowing the precise details of the drafting process under the Committee of Fifty, considering the pedigree of the members and chairman–and the clear influence of the military generally and al-Sisi specifically–the trends noted above hardly appear shocking. A strong presidency, but one accountable to the military, will likely have been exactly what was desired.[111]

Against the backdrop of these practical considerations, it is worth reiterating the importance of executive power in Egyptian history. Though intangible, the tradition of executive power in Egyptian history has a significant gravitational pull on both the political process and the Egyptian psyche. This tradition of a strong executive–which stretches back to the Pharaohs–expanded in the twentieth century to embrace constitutional docu-

108. One commentator's assessment of the 2014 Constitution is that it essentially "fail[s] to deliver on the promise of the 2011 uprising" and has "resulted in a political order in which important state institutions have insulated themselves from the political process, placing themselves in a supervisory position over the entire political system." Brown, *supra* note 18. The chairman of the Committee of 50, Amr Moussa, recently admitted to the BBC that the 2014 Constitution has disappointed many: "There is no 100% in democracy. . . . We have done everything possible to preserve democracy and promote democracy, but there are articles and situations that need to be dealt with, bearing in mind the security of the state and the security of the people." *See* Guerin, *supra* note 36 (quoting Amr Moussa).

109. Brown, *supra* note 18.

110. Robert Springborg, *Abdul Fattah al-Sisi: New Face of Egypt's Old Guard*, BBC NEWS (March 26, 2014), http://www.bbc.com/new/world-middle-east -26188023.

111. *See Egypt's Military Cements its Power*, AL JAZEERA (March 8, 2014), http://www.aljazeera.com/indepth/features/2014/03/egypt-military-cements-power-sisi-scaf-20143611233761553 3.html (noting that SCAF's confirmation that the Defense Minister will head SCAF under the 2014 Constitution is evidence that the "[military] establishment . . . is strengthening its political position at every turn").

ments, in so far as they could be used to reinforce the tradition itself.[112] There is every reason to believe that the Committee of Fifty drafting process was influenced by this tradition.

V. LOOKING FORWARD

Any prediction regarding the reality of presidential power under al-Sisi and the 2014 Constitution must take into account the current situation in Egypt. In the period since Morsi's ouster, Egypt has been marred by violence, political repression, and uncertainty, and faces a dire economic situation. The Carnegie Endowment for International Peace sums up the situation by noting that "Egypt is a far more violent and unstable place than it was before July 2013 or indeed has been for decades."[113] Terrorist attacks and violent clashes between protesters and security forces have become commonplace.[114] The military's August 2013 dispersal of Morsi supporters in Rabaa Square in Cairo is emblematic of this violence. While reports on the number of civilians killed vary widely, Human Rights Watch at the time placed the number at 928, making this "the most serious incident of mass unlawful killings in modern Egyptian history."[115] The raid on Rabaa Square was predictably followed by "a wave of vicious reprisals" by Morsi supporters.[116]

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112. As one commentator notes:

> [I]n the past, [constitutional] documents have served existing regimes rather than shaped them. [This meant that] those who sat in positions of political authority used the constitutional text as a way of enshrining their current position and, especially after the mid-20th century, their ideological orientations as well.

Brown, *supra* note 18.

113. Dunne & Williamson, *supra* note 3.

114. *Id.* ("Since July there have been at least 36 incidents in which ten or more Egyptian were killed in political protests and clashes.").

115. *Egypt: Security Forces Used Excessive Lethal Force*, HUMAN RIGHTS WATCH (Aug. 19, 2013), http://www.hrw.org/news/2013/08/19/egypt-security-forces-used-excessive-lethal-force. The exact sequence of events at Rabaa Square—a stronghold of Morsi supporters protesting the military coup—remains unclear. The BBC's contemporary coverage exemplifies the uncertainty that prevailed at the time. *As It Happened: Egypt Camps Stormed*, BBC NEWS (Aug., 14 2013), http://www.bbc.com/news/world-middle-east-23691401.

The New York Times' contemporary coverage is similarly harrowing:

> For weeks . . . [the] tens of thousands of . . . supporters of Mohamed Morsi [gathered at Rabaa Square and elsewhere], had anticipated a military attack on their sit-ins. They built barricades of bricks, sandbags and steel. They gathered sticks and rocks. Despite their preparations, they knew the raid would eventually come. When it did come, shortly after sunrise on Wednesday, [August 13, 2013,] they appeared stunned by its fury. . . . Using heavy armor and deadly weapons, the army and the police swept into Rabaa al-Adawiya and another smaller encampment across town, in Nahda Square in Giza, in what was the third mass killing since the military took power on July 3. Like the other killings, the government's gunmen appeared to strike their victims with terrible accuracy, with gunshots to the head and chest. The raids were just one front in the violence that coursed across Egypt on Wednesday. Churches were attacked or torched across the country, in a wave of vicious reprisals by Islamists.

Kareem Fahim & Mayy El Sheikh, *Fierce and Swift Raids on Islamists Bring Sirens, Gunfire, Then Screams*, N.Y. TIMES, Aug. 15, 2013, at A1, *available at* http://www.nytimes.com/2013/08/15/world/middleeast/fierce-and-swift-raids-on-islamists-bring-sirens-gunfire-then-screams.html?pagewanted=1&_r=0.

116. Fahim & El Sheikh, *supra* note 115.

This violence comes against the backdrop of severe political repression. Officially designated a terrorist group in December of 2013, the Muslim Brotherhood is once again the target of an intense crackdown.[117] Perhaps most worrying is that the Egyptian judiciary, long considered one of Egypt's more independent institutions, has recently taken steps indicating its willingness to fall in line with the ruling regime.[118] This increased willingness is exemplified by the mass death sentences of Morsi supporters handed down in spring of 2014 by a court in Minya, the capital city of the Minya Governorate. Located roughly 150 miles south of Cairo on the west bank of the Nile, Minya has been described as a "stronghold" of Morsi supporters.[119] In a pair of verdicts in March and April of 2014, the Minya court condemned hundreds of Morsi supporters to death for allegedly killing a single police officer.[120] The majority of the defendants were tried in absentia, and the trials provided virtually no process for the defendants whatsoever;[121] the White House declared that the April verdict "defies even the most basic standards of international justice."[122] In June the sentences of 183 of the Minya defendant was confirmed by the court,[123] a move that Amnesty International called "the latest example of the Egyptian judiciary's bid to crush dissent."[124]

Though the ultimate fate of the Minya defendants is unknown at present—many of the sentences are still subject to appeal, and those tried in absentia are entitled to a retrial if and when they are brought into custody[125]—the broader implications of the death sentences are worrying. Whereas Nasser, Sadat, and Mubarak had to utilize means of

117. Although the Muslim Brotherhood has enjoyed the lion's share of repression since Morsi's ouster, they are apparently not the only targets. The current political oppression potentially has a broader aim, namely the dominance of the legislature by the president. As one commentator explains, "[t]he intention—and likely outcome—of [marginalizing Egypt's nascent political parties in upcoming parliamentary races] would be to produce a parliament that is unable to perform the extensive functions accord to it in Egypt's new constitution, *putting de facto power back into the hands of the president.*". Michelle Dunne, *Five Questions for Sisi, Egypt's Man of Mystery*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Mar. 26, 2014) (emphasis added), http://carnegieendowment.org/2014/03/26/five-questions-for-sisi-egpyt-s-man-of-mystery/h5ua.

118. "Now, all the instruments of the Egyptian state [including the judiciary] seem fully on board [with the repression of the Muslim Brotherhood]. . . . The regular judiciary has led most of the recent crackdown on the Brotherhood, from the Minya [mass death sentence] convictions to other trials of Brotherhood leaders." Brown & Dunne, *supra* note 4.

119. *See* David D. Kirkpatrick, *Hundreds of Egyptians Sentenced to Death in Killing of a Police Officer*, N.Y. TIMES, Mar. 25, 2014, at A1, *available at* http://www.nytimes.com/2014/03/25/world/middleeast/529-egyptians-sentenced-to-death-in-killing-of-a-police-officer.html.

120. *Id.* Minya has a history of resistance to the Egyptian government, and indeed "was the heart of a fierce Islamist insurgency just two decades ago." *Id.*

121. David D. Kirkpatrick, *Uproar in Egypt After Judge Sentences More than 680 to Death*, N.Y. TIMES, Apr. 29, 2014, at A4, *available at* http://www.nytimes.com/2014/04/29/world/middleeast/egypt-sentences-hundreds-to-death.html.

122. *See 529 Denied Right to Meaningful Defense, Face Capital Punishment*, HUMAN RIGHTS WATCH (Mar. 25, 2014), http://www.hrw.org/news/2014/03/24/egypt-shocking-death-sentences-follow-sham-trial (describing the March trial: "The . . . trial, in which the vast majority of defendants were tried *in absentia*, took place in under an hour. The prosecution did not put forward evidence implicating any individual defendant, even though it had compiled significant evidence during its investigations, and the court prevented defense lawyers from presenting their case or calling witnesses. . . .").

123. Kirkpatrick, *supra* note 119.

124. *Egypt Sentences a Further 183 People to Death in New Purge of Political Repression*, AMNESTY INTERNATIONAL (June 21, 2014), http://www.amnesty.org/en/for-media/press-releases/egypt-sentences-further-183-people-death-new-purge-political-opposition-201.

125. *See* Kirkpatrick, *supra* note 119.

working outside of the judiciary, there are worrying signs that al-Sisi may find a more pliable partner in the judiciary, despite the 2014 Constitution's promises of an independent judiciary.[126] As one commentator describes the current situation:

> The Egyptian government's most recent moves against the [Muslim] Brotherhood . . . seem[s] like a replay of historical patterns, but in reverse. The Brotherhood briefly held legal status after the 2011 uprising—it was even allowed to form a political party. Then a court robbed it of that status once again; the cabinet declared it a terrorist organization [in December of 2013], although the government has yet to prove its connection to violent attacks. Mere membership in the Brotherhood is illegal, and the security forces get to decide who, exactly, belongs to the group. In the [March] al-Minya verdict, there were reports that some of those sentenced to hang were already deceased when the crime was committed.[127]

Similarly troubling is the potential role of the Egyptian military going forward. Although al-Sisi technically relinquished his military membership and rank when he announced his candidacy for the presidency, he is still very much considered a part of the military establishment.[128] This understanding is bolstered by the military's role in his candidacy. In addition to ousting Morsi (a maneuver that al-Sisi was intimately involved in) and its role in the drafting and adoption of the 2014 Constitution, SCAF also officially "empower[ed]" the al-Sisi candidacy in March of 2014, claiming that it "considered the army chief's bid for the presidency 'an obligation.'"[129] Considering the ongoing close ties between the al-Sisi administration and the military,[130] it should come as no surprise that commentators have expressed concerns regarding a return to the "old days" of a quasi-military dictatorship in the guise of democracy.[131]

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126. *See* discussion *supra* Section III(E).

127. Brown & Dunne, *supra* note 4; *see also* Kirkpatrick, *supra* note 115 (calling the Minya verdicts "the clearest evidence yet of the judiciary's energetic support for the new government's crackdown on dissent of all kinds in the aftermath of the military ouster last summer of [Morsi].").

128. *See* Springborg, *supra* note 110 ("First and foremost, Field Marshall Sisi is the product of the military high command under former President Hosni Mubarak.").

It is worth noting the al-Sisi wore his military uniform during the single speech he gave to announce both his candidacy for the presidency and his retirement from the military; the message seems clear. *See Multi-Media: Images*, THE WASHINGTON TIMES ONLINE, http://www.washingtontimes.com/multimedia/image/ap_c28d47eefc7f940b4f0f6a706700bfeejpg/.

129. AHRAM ONLINE, *supra* note 21.

130. The Washington Times, in its coverage of al-Sisi's announcement that he would run for president, noted that "[t]he military [has] publicly committed itself to el-Sisi's presidency" and that "[i]ts branches are lined up to help el-Sissi even after he took off his uniform." Maggie Michael & Lee Keath, *In Egypt's Political Vacuum, el-Sissi Looms Large*, THE WASHINGTON TIMES (Mar. 27, 2014), http://www.washingtontimes.com/news/2014/mar/27/egypt-army-chief-says-he-will-run-for-president/?page=all.

131. *See, e.g.*, Springborg, *supra* note 110. This fear is echoed by some Egyptians. *See Egyptians Fear Return to Authoritarianism*, BBC NEWS (Dec. 18, 2013), http://www.bbc.com/news/world-middle-east-25433094 ("But for many who fought to end the long reign of Mr. Mubarak, all this leaves a very bitter taste. . . . Though two presidents have been removed in three years, the old order has not been completely swept away. The army remains the real power here, and much of the hope for a new Egypt has been erased.").

The final piece of the puzzle here is Egypt's dire economic situation. Egypt spends roughly 25 percent of its budget on subsidies[132], and such spending is at present predicated on massive financial support from the Gulf states.[133] While al-Sisi has given little substantive indication of how he will address these economic problems,[134] it is clear that they have the potential, as we have seen in the past, to "stoke popular unrest if neglected."[135] Whatever predictions we make about the nature of presidential power under the 2014 Constitution, the wildcard for an al-Sisi presidency remains the economy. The ability of al-Sisi to assert himself over the political apparatus going forward (assuming that is his intention) will likely depend on his ability to deliver to the Egyptian people some manner of economic stability. If he is not able to repair the economy, al-Sisi will presumably find it difficult, if not impossible, to impose himself in a meaningful manner.

VI. CONCLUSION

While it is too early to draw any definite conclusions, the text of the 2014 Constitution, placed in context, provides certain hints of what the al-Sisi presidency will mean for the nature of executive power in Egypt going forward. The 2014 Constitution places some important limitations on the presidency: term limits, legislative checks, and an independent judiciary. Other provisions, however, offer cause for concern. Increased military oversight of the president's role in military affairs and potentially excessive presidential influence on the legislative process suggest that the military-executive axis will remain the institution with the most tangible control over the political apparatus going forward. As argued already, however, the ultimate ability of al-Sisi (and subsequent presidents, assuming term limits are adhered to) to emulate the executive excesses of his predecessors will largely depend on real world variables that are, as yet, to be determined.

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132. *See* Tarek El-Tablawy & Salma El Wardany, *El-Sisi Says Price Rises to Save Egypt From Debt Drowning*, BLOOMBERG NEWS (July 6, 2014), http://www.bloomberg.com/news/2014-07-06/el-sisi-says-price-rises-to-save-egypt-from-debt-drowning.html.

133. "Government spending on subsidies and on Egypt's 7-million-person bureaucracy is unsustainable without large and frequent infusions of cash from the Gulf states—a short-term plan at best." Dunne, *supra* note 117. The World Bank places total aid from Saudi Arabia, the United Arab Emirates and Kuwait in 2013 at $17 billion. *See Egypt Overview*, THE WORLD BANK, (last visited Oct. 1, 2014), http://www.worldbank.org/en/country/egypt/overview.

134. In fairness, al-Sisi has suggested in interviews that austerity measures may be necessary to address Egypt's economic woes. *See, e.g.*, Louisa Loveluck, *Egypt's Sisi Goes Into Campaign Mode*, THE CHRISTIAN SCIENCE MONITOR (May 7, 2014), http://www.csmonitor.com/World/Middle-East/2014/0507/Egypt-s-Sisi-goes-into-campaign-mode-promises-death-of-Brotherhood-video. Less encouraging, in the same interview al-Sisi "avoided discussing . . . fuel and food subsidies" and "blamed the Brotherhood for the country's economic decline." *Id.* While Morsi certainly contributed to the dire state of the economy, the root causes go much deeper, and al-Sisi will need to address these root causes (rather than merely make the Muslim Brotherhood the scapegoat for all of Egypt's problems) if he hopes to improve the economy. The recent decision to raise energy prices—in al-Sisi's words necessary to save Egypt from "drowning in debt"—are an indication that al-Sisi is taking the economic situation seriously, but were met with outrage by many poor Egyptians. *See* El-Tablawy & El Wardany, *supra* note 132.

135. Dunne, *supra* note 117.

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