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Executive Power in Theory and Practice

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Introduction

HUGH LIEBERT

On June 1, 1787, James Wilson moved that the Constitutional Convention invest executive power in a single individual. As Madison records, a "considerable pause" ensued as one of history's most distinguished deliberative bodies succumbed to "shyness." But of course the silence at the Convention was broken soon enough by speech, and the American presidency has since that time occasioned as much critical deliberation as mute anxiety and awe. Today, some consider the presidency to have grown from a mere "foetus of monarchy" into an "imperial presidency," while others worry that an institution intended to loom large and exude energy risks being fettered like Gulliver with legislative cables. Some see in the American executive the apostasy of republicanism, while others see its salvation. Given the debates that would follow on the heels of Wilson's proposal and continue down to the present, one understands why even the Convention's most daring delegates shied from speaking about such a singular office.

Perhaps the most distinguished entry in the long-standing debates over the American executive is Harvey Mansfield's *Taming the Prince*.¹ Mansfield located the essence of executive power in its *ambivalence*. The political executive enforces laws passed by legislatures but confronts emergencies on his own; he embodies both the passivity of the executor and the action of the executioner. Indeed, he can hardly be one without the other, for his claim to act on behalf of some larger force is all that prevents the exercise of his own will from engendering resentment and resistance. Much of the strength of the American regime arises from its energetic executive, Mansfield claims, but the presidency is not for that reason an American original. The American

executive owes to Machiavelli's "new modes and orders" the doctrine of "indirect rule," or ruling in another's name for the sake of ruling all the more effectively on one's own. Machiavelli's discovery of "indirect rule," and with it executive power, constituted a decisive departure from an older tradition of political thought, which considered how one might rule legitimately in one's own name. When one understands both Machiavelli's political science and the political science it was meant to replace, Mansfield suggests, one can begin to appreciate the "tamed prince" who rules America, however ambivalently and indirectly.

Mansfield's study of executive power was published just as the Cold War's conclusion seemed to predict declining demand for executive energy and dispatch. Since 9/11, however, debates over the nature and proper extent of executive power have assumed a fresh urgency. It is now an opportune time to reconsider executive power along the path that Mansfield pioneered some twenty years ago. This is what the essays collected in this book seek to do. The essays do not, it must be said, always agree with Mansfield's conclusions, but they are all informed by his method. They recognize that understanding executive power entails staging a dialogue between past and present, and between practice and theory.

In considering the executive it is important to start from the beginning. But perhaps the most peculiar aspect of executive power is that its beginning did not coincide with the beginning of political philosophy. "The whole story of executive power depends," Mansfield claims, "on understanding why it is absent in Aristotle."² On Mansfield's telling, Aristotle and Machiavelli agreed that the fundamental problem of politics lay in the insufficiency of law. Even reasonable laws can arouse anger by violating the desire of individuals to choose for themselves; what's more, this anger is somewhat justified, since law's generality prevents it from responding adequately to the nuances of each particular case under its purview. Since law necessarily falls short of full justice it must appeal to fear, and thus even good laws inevitably involve an element of tyranny. The decisive question is whether this tyranny should be diminished or enhanced, whether law's rough edge should be dulled with deliberation and choice or honed into the sharp blade of an unscrupulous prince. The first solution is Aristotle's, the second, which leads ultimately to executive power, is Machiavelli's. But both are in agreement at least with regard to the problem to be solved.

In his chapter, Robert Faulkner questions this claim. He acknowledges that executive power is absent in Aristotle, but denies that its absence can be explained by "deliberation and choice" alone. Instead,

what sets Aristotle apart from his modern opponents is his appreciation of law's ability to win compliance *without* appealing to tyrannical force. In the ideal case, law speaks to the moral opinion of the citizens it governs. It embodies, or at least appeals to, their sense of justice and the good. And thus law commands allegiance on its own. Because law is loved, it need neither be feared nor seek out strategies to minimize its fearsomeness. So there is no executive in Aristotle, Faulkner suggests, not because Aristotle found a softer solution to Machiavelli's problems, but because he discounted the need for "execution" altogether and with it the need for an executive.

If the story of the executive does not begin with Aristotle, then, where does it begin? Hugh Liebert's chapter suggests that the search for the birth of the executive in this history of political philosophy is itself misconceived, because executive power existed in practice long before it was articulated in theory. Augustus deserves credit for its discovery; he beat Machiavelli to the punch. It was Augustus, after all, who proclaimed the restoration of the republic in order to augment his ruling *uno solo*, and it was Augustus who founded a regime premised on just this sort of indirection and ambivalence. Augustus's discovery of executive power was, however, anticipated by elements of republican politics: the Senate's use of indirection to sustain its oligarchy, and, perhaps even more significantly, the effect of imperial expansion on the mechanics of Roman honor. As Rome extended its theatre of operations farther and farther beyond the confines of the city, Liebert suggests, its political theatre became increasingly dominated by characters reluctant to share the stage with others. And these *primi uomini* played before an audience as ready to worship as to applaud, for the republic had grown too large for its citizens to retain any clear sense of their leaders' human dimensions. The first executives, then, were not princes embalmed in theory but demigods presiding over a republic's demise.

Some three centuries after Augustus established the empire, his successor incorporated Christianity into the empire's ruling ideology. In a careful study of three concepts central to Machiavelli's thought—orders, modes, and ways—Thomas Karako's chapter suggests that the heretical Florentine consciously trod along Christianity's "way." It was from Christianity that Machiavelli learned the art of indirect or hidden rule. Just as Christians conquered the world for God, so princes could conquer by portraying themselves as rulers beholden to necessity or fortune. In this way, Machiavelli turned toward human empowerment in this world techniques that had been developed with a view to man's life in the next world.

It has never been entirely clear just how Machiavelli's departure from ancient and medieval political thought informed the founders of liberalism. Paul Rahe's chapter attempts to chart the route from Florence to Malmesbury. Hobbes, he argues, was, in his early years, an attentive reader of Machiavelli. One can track Machiavelli's influence across every page of Hobbes's earliest work, the *Horae Subsecivae*.³ Although Machiavelli's trail is admittedly harder to trace in Hobbes's later work, Rahe claims nevertheless that the fifteenth chapter of the *Leviathan* engages intimately with the fifteenth chapter of *The Prince*. If in Hobbes's early work Machiavelli was a guide to be followed, however, in the pages of the *Leviathan* he is a rival to be refuted. It is not that Hobbes departs from Machiavelli's foundational claims—he agrees that man must be viewed in his amoral wickedness, and agrees too that mankind must be divided into princes and people. But whereas Machiavelli's thought appeals to actual and potential princes, Hobbes's takes the people's perspective. By tending to man in his fear, he claims, one can construct a sovereign more imposing than any of Machiavelli's princes.

But what has this sovereign to do with the constitutional executive? If Hobbes's sovereign looms up above churches and legislative chambers, a force for all to see, the constituted executive would seem to offer only fleeting glimpses of his power—when exercising his prerogative, if even then. Lynn Uzzell's contribution to this book shows that Locke intended all of the difficulty that scholars and citizens encounter when trying to locate sovereignty in constitutions of separated powers. Sovereignty is indeed *latent* in the executive—that is, it is a hidden power revealed only when occasion warrants. But sovereignty is also latent in every other power that Locke devises. Not only the executive, but the legislative and the federative powers seem to waver between latency and actuality; even the powers of “the people” and God are characterized in this way. All is ambivalence and indirection. And the result is that powers held in reserve serve to check powers exercised in practice. It is fear of what might be lurking behind the apparently passive veneer of another “power” that keeps each power in check, Uzzell argues. A system of latent powers, therefore, hinders the sort of tyranny that is all but inseparable from the awesome sovereignty one finds in Hobbes.

Locke's ship of state, steadied in its course by the countervailing tension of its separated powers, carried Machiavelli's insights from England onto the shores of the New World. By the time that Locke's doctrines could be brought to bear at the Constitutional Convention,

however, much of his insight into the necessity of a strong executive had already been hard-won in practice. In political life under the Articles of Confederation, argues Jeffrey Sedgwick, one sees clearly the perils of politics without princes—but one also sees that the political men of the time saw those perils as well. Indeed, the legislative power, supreme under the Articles, all but brought its opposite number into being as it created standing committees and administrative heads to perform many of the functions that the executive would later assume. The Constitution is therefore better viewed as a continuation and refinement of tendencies already emergent under the Articles than as a sharp break with everything that preceded it. Executive power arose to integrate and unify what might otherwise fall apart—and this was true no less in domestic than foreign affairs. If government lacked an executive, it would have to create one. That is more or less what happened in the early history of the American republic.

Even with this practical background in view, however, Locke's theory of executive power was a valuable guide to the American founders. The trouble was, as David Nichols's chapter points out, that Locke was a monarchist—or at least, he framed his political thought with the assumption that hereditary monarchy would continue. How, then, could one bring Locke into line with republicanism? And how could one limit popular excesses when governmental authority arose only from the consent of the people? The leading founders developed a range of approaches to this problem: Hamilton argued at the Convention for a solution similar to Locke's own, for he thought that without institutions closely resembling the British monarchy and aristocracy, the Constitution was doomed. Jefferson favored strict construction combined with an executive capable of wandering outside of the Constitution on occasion, anchored only in the legitimacy provided by his embodiment of the popular will. Madison favored a "Council of Revision" and other mechanisms by which the federal government might protect its rights and the rights of individuals against the excesses of state legislatures.

The Constitution itself, argues Nichols, represents a distinct and persuasive solution to the problem of "unLock[e]ing" republican government. Instead of grounding executive power in an extraconstitutional popular will, the Constitution trusted in the Electoral College and in the Constitution's own authority (which had, after all, arisen from popular ratification) to confer sufficient power on the president. Instead of relying on a Council of Revision, the Constitution trusted the national judiciary and national legislature to protect the rights of the national government and of individuals. The heroes of

Nichols's story are therefore men like James Wilson and Gouverneur Morris—not the founders destined for the greatest fame, perhaps, but still deserving of our respect for their prescient faith in what Nichols calls the “Constitutional alternative.”

Perhaps the most important feature of this Constitution with a view to present controversies over presidential power is its insistence on concurrent powers. As William Galston argues in his contribution to this book, for all of the energy of the Constitution's executive branch, it shares its most distinctive powers with other branches. The founders very much intended the Constitution as “an invitation to struggle for the privilege of directing American foreign policy”—and for the privilege of directing every other sort of policy, for that matter.⁴ They did so because concurrent powers seemed to further the goal they most cherished—not governmental efficiency, but the prevention of tyranny. Presidents such as Lincoln and Truman, even at their most energetic, respected this tradition of concurrent powers. In the wake of 9/11, Galston claims, President Bush did not. The Bush administration's attempt to exclude the legislative and judicial branches from any significant role in the conduct of the global war on terror amounted to a radical break from the nation's most important constitutional traditions.

Where Galston sees a presidency willfully departing from constitutional precedent, Karen Hult, Alison Smith, and John Yoo present a presidency prone more to undue constraint than to expansion. Hult's chapter contends that the modern presidency is hampered not so much by legislative meddling as by the *informal* demands of present-day politics. The president presides over a bureaucracy too large and unwieldy for him to control; as a result, he frequently finds his legislative and administrative agenda stymied by inertia and unaccountability. The president also faces the challenge of packaging himself and messaging his arguments in order to break through all the crush and clutter of contemporary media. With bureaucrats and reporters and handlers and infighters surrounding him, how is a president to be his own man? The proper worry, Hult suggests, is not imperial presidents but imperiled presidents, lacking the energy to do much good—or for that matter, much of anything at all.

To know what he may lawfully do, the president requires the advice of lawyers. Ever since the 1930s, the president has relied in particular on the lawyers housed in the Office of Legal Counsel (OLC) to interpret his constitutional powers for him. This office has been at the center of recent controversies over the War on Terror, since many of its memos

seemed to their detractors overly politicized, and thus unbecoming of an office they considered the “conscience for the government.” In her contribution, Alison Smith questions this view of the OLC. It is of the nature of the OLC to be political rather than impartial and conscientious, she argues, and its inherently political tendencies have only increased thanks to three decades of congressional attempts to usurp executive powers. The presidency is weakened, moreover, when the lawyers who serve it are forced to contend with the will of an attentive and angry public. In the end, Smith suggests, casting the OLC as government’s conscience only increases the furor and recriminations that arise when its lawyers fall short of this lofty vocation—as they must.

A president is constrained not only by the nettlesome necessities of modern leadership and by the diminishment of his advisors, however, but by the tectonic realities of geopolitics. The first year of the Obama administration, according to John Yoo’s chapter, provides a telling case in point. Obama rose to the presidency hoping to change course on many questions arising from the War on Terror—detention, interrogation, trying terrorists, and so on. In the early days of his presidency, it seemed as though he might succeed. But Obama learned quickly, Yoo suggests, that terrorism appears more threatening from the Oval Office than from the campaign trail. And as a result, President Obama began to recognize the wisdom of many of his predecessor’s policies. Politics, and particularly foreign policy, sometimes require us to choose between our safety and our ideals, Yoo claims. But such a choice need not entail the abandonment of the Constitution, for the Constitution draws its strength from its ability to countenance just such necessities. If, in order to prosecute the War on Terror, the president must pursue policies that in more peaceful times might seem unsavory, it only redounds to the glory of the founders that they framed the executive office with sufficient flexibility to make this possible.

Not every founder was so sanguine regarding the president’s war powers. Just before James Wilson silenced the Convention by proposing a unitary executive, Charles Pinckney of South Carolina warned that if executive power were to extend to “peace & war &c.,” it would render the executive a “monarchy, of the worst kind, to wit an elective one.” Since the legislative has largely resigned to the executive its right to declare and oversee wars, Pinckney’s fears may seem to have been realized.

Mansfield’s *Taming the Prince* was published as a generations-long war—a war never formally declared by the legislative—was coming to an end. Mansfield presented the president as a distant heir to

Machiavellian wisdom. And as he told it, the story of how the president assumed his inheritance made for a captivating, Coppola-esque saga of an Italian living for a while in England and then making the journey to the New World, hidden beneath decks. But Mansfield's president was not quite the elective monarch that Pinckney feared, for ambivalence was of his essence; unlike a monarch, the president was not meant to rule in his own name. While he might show a little Machiavellian *virtù* every now and then when he ventured out beyond the bounds of the law to meet a crisis, he would race just as quickly back in to avoid stirring up resistance to his rule.

But what happens to tamed princes when crises linger and states of exception become the rule? As scholars and citizens faced yet another generational struggle so shortly on the heels of the Cold War, this was the question that inspired fear on the republic's behalf. It is in addressing just this question that Mansfield's method proves most valuable. For if one accepts that in practice the executive provides the Constitution's point of closest contact with the world outside of convention—that is, the world of necessity and of virtue—contemplation of the executive might seem to require one to depart from convention in theory as well as in practice. Perhaps one must practice political philosophy to approach the executive properly, and thus put oneself in the place of a founder rather than a mere citizen. Americans can learn much from their own founders' deliberations as they attempted to comprehend and constitute executive power, but they stand to learn just as much, perhaps, from what Madison called their "shyness"—the moment of reflective, worried silence that preceded their deliberations.

Notes

1. Harvey C. Mansfield, Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: Free Press, 1989).
2. *Ibid.*, 25.
3. The authorship of these essays is a matter of some contention. See Rahe's discussion of the controversy in Chapter 4, as well as the sources he cites (n. 7).
4. Edward S. Corwin, *The President: Office and Powers, 1787–1957*, 4th rev. ed. (New York: NYU Press, 1957), 171.