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Ed Thomson, Moderator

THE BALANCE OF POWER IN THE FEDERAL GOVERNMENT

To make an institution function the people who are part of it must work at accomplishing that function. I attach a 2015 paper by Eric A. Posner on Presidential Leadership and the Separation of Powers. He discusses how government has come to function under our constitution, which does not detail how everything should be done.

Strong Presidents have aggregated power to the presidency at the expense of congress and the courts. With the Trump presidency there appears to be a reassertion of power both by congress and the courts. Congress has asserted itself in foreign affair with legislation on sanctions. The courts have challenged executive orders on visas and immigration. Challenges are being asserted on repeal of regulations and distribution of federal funds.

Mr Trump asserted that a wonderful new health care plan would be submitted to Congress as soon as the new secretary of HHS was confirmed. No such plan appeared and the "repeal and replacement" of "Obamacare" was left to Congress which had not prepared for it. Mr Trump, of course, blamed Congress for the lack of success of "repeal and replace".

What is the role/importance of the President? How does he/she function? If he/she does not creat "trust" what is the effect on the office of President?

Is the Trump presidency going to benefit the country by rebalancing the powers?

Do the attacks onthe media and people who leak information show that Mr Trump seeks to avoid the restraints on Presidential power identified by Mr. Posner?

Should we press our Congressional representatives to become more assertive?

Mr Posner asserts that to lead the bureaucracy the President needs its trust. Can Mr Trump gain such trust? What if he fails?

If tax reform is proposed, can anyone trust a President who conceals how it will effect him? If tax reform is attempted does this mean that Congress must exclude the President from the process?

Presidential Leadership and the Separation of Powers  
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Abstract. The presidents who routinely are judged the greatest leaders are also the most heavily criticized by legal scholars. The reason is that the greatest presidents succeeded by overcoming the barriers erected by Madison's system of separation of powers, but the legal mind sees such actions as breaches of constitutional norms that presidents are supposed to uphold. With the erosion of Madisonian checks and balances, what stops presidents from abusing their powers? The answer lies in the complex nature of presidential leadership. The president is simultaneously leader of the country, a party, and the executive branch. The conflicts between these leadership roles put heavy constraints on his power.

While the topic of presidential leadership has fascinated political scientists and historians for decades, legal scholars have completely ignored it. Legal scholars rarely discuss "leadership"—of the president or anyone else. They are concerned with the legal constraints on the presidency, not the opportunities that the office supplies to its occupant. Moreover, in contrast to political scientists and historians, who find it difficult to resist celebrating presidents who show great leadership qualities, legal scholars almost universally take a critical attitude toward the president.<sup>1</sup> And the leaders who are frequently judged "great" by commentators—including Abraham Lincoln, Woodrow Wilson, Franklin Roosevelt, and Ronald Reagan—receive the most critical attention. This is because those leaders turn out, with a few exceptions, to be the presidents who most frequently tread on constitutional norms. This raises a paradox. How can our top presidential leaders also be major lawbreakers?<sup>2</sup>

To address this paradox, we start with the Constitution. The Constitution says almost nothing about leadership. It does not identify a leader of the country, a head of state, or even a head of government. By vesting the executive power in the president, it implies that the president is leader of the executive branch, but not that he is the leader of the country or the government. Moreover, not everyone agrees that the president is leader of the executive branch. Even today it is controversial whether executive agencies must answer to the president; the so-called independent agencies like the Fed do not. Congress sets up agencies and gives them their marching orders, controls their budget, and routinely harangues their chiefs. And, of course, Congress demands that the president comply with its laws, citing the Take Care Clause and the Supremacy Clause. The text of the Constitution could be read to envision a president who is merely an agent of Congress, one who has little discretion to exercise leadership except perhaps of a small staff of assistants.

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<sup>1</sup> A representative example is Bruce Ackerman, *The Decline and Fall of the American Republic* (2010). For an alternative view, see Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2011).

<sup>2</sup> For purposes of this essay, I rely on the judgments about presidential greatness of historians, political scientists, journalists, and compilers of top-ten lists—and do not make my own.



The Constitution is hardly clearer about Congress. The Constitution designates the Vice-President as president of the Senate, but in constitutional practice he is not its leader. The Constitution gives the Senate and House the power to elect officers, and the leadership positions in those institutions emerge from that process. Even so, there is not a leader of the House or of the Senate in a meaningful sense. The real leadership positions are held by the top party official in each body—so Congress has *four* leaders, with the majority leaders being something like coequals. Finally, the Constitution does not create a leader of the courts (though it refers in passing to a Chief Justice presiding over impeachment trials). Congress created the position of Chief Justice, whose powers over the federal judiciary are limited.

Why does the Constitution say so little about leadership? The founders sought a more effective executive after the debacle of the Articles of Confederation, but they also feared an excessively powerful national government, whether one led by an imperial president or by a tyrannical legislature. The solution was to be elections supplemented by the system of separation of powers. Elections would ensure that government officials enjoy popular support when they reach office but they could not, by themselves, prevent those officials from accumulating power while in office and then using that power both to maintain their position and abuse the public trust. The separation of powers addressed this risk. Madison argued that each of the three branches of government would compete for power and in the process constrain each other. The usual picture is one in which the officials in each branch are motivated to inflate their personal power by expanding the power of the branch in which they operate, and hence by resisting the efforts of officials in other branches to extend *their* power. Actions that seek to redistribute power—actions that would result in power being concentrated in one office or branch—would be blocked. Actions that advance the public interest would (presumably) not be blocked. A separate executive branch would enable the government to act quickly and decisively, but because the executive would derive most of its authority from Congress, it would be blocked from expanding its power.

Consistent with the Madisonian structure, then, the Constitution—more by implication than by language—creates a *group* of leaders, but no leader of the nation. The government is a kind of institutional confederacy. The founders, who were well-versed in classical history, may have envisioned a system like the Roman Republic, where there were leaders but no Leader. The Roman Senate was a collective body, and men with distinctive gifts like Cicero could emerge as leaders at critical moments. But leadership was fluid; it moved from one person to another in response to events. The most important office was the consul, but there always were two consuls, and they served only for a year. A dictator could be authorized for short periods during military emergencies. These and many other restrictions on office-holding worked to block—or at least retard—the emergence of charismatic individuals whose power derived from their personalities, connections, accomplishments, and family lineage, rather than from their temporary occupation of an institutional position. The Roman Republic survived for centuries without a king. Men who sought to become Leaders, like Sulla and Caesar, were seen as usurpers. The imperial leadership of Augustus and his successors was not possible until the Republic collapsed.

But the founders' aversion to a national leader ran into trouble from the start. Even while debating in Philadelphia, it was widely understood that the new country would be led by a great man—George Washington. And he would not be speaker of the House or Chief Justice. Just as



he was president of the Constitutional Convention, he would be president of the country. The selection of Washington was an obvious choice. He was not just the hero of the Revolution; he was a natural leader who had earned the trust of his officers and soldiers through many years of war. The new country's best chance was to throw its lot to a man who already enjoyed the trust of the nation. And the position of president rather than House Speaker or Chief Justice was the obvious choice as well. He was a military man, and what the country needed was a military leader to protect it from Indians, Europeans, and internal dissenters. So while the founders drafted a document that failed to recognize a national leader, they prepared the way for the first and greatest national leader. The negation of presidential leadership was to be a legal fiction.

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The immediate resort to presidential leadership spelled trouble for the Madisonian system. The system of separation of powers was supposed to allow decisive action by the executive while blocking it or any other part of government from acquiring excessive power, but it has never been clear how this system could work. The Constitution's checks and balances simply make it difficult for the national government to act—whether for good or for bad. The basic problem with a government action—whether a military operation, negotiation of a trade treaty, or the construction of a new canal—is that it creates losers as well as winners. Vetogates enable potential losers to head off government action that harms them, but the more vetogates that are built into the system, the easier it is for losers to block actions that are in the public interest. This means that government actions that benefit the public can be blocked by people harmed by those actions unless they are compensated. Indeed, even if the actions hurt no one at all, people located at the vetogates can block the action unless they receive special treatment. Separation of powers, which is distinguished from other systems like parliamentary government by the large number of vetogates it creates, just leads to gridlock—an ineffective government.

The rise of presidential leadership, beginning as we said as early as George Washington, only partly ameliorated this problem. Washington alone entered office with a large enough wellspring of trust to enable him to use the office aggressively—and, even then, he frequently acted with extreme caution, careful to consult Congress and follow its laws even during emergencies like the Whiskey Rebellion. Only a few successors with exceptional talents—Jefferson, Jackson, Polk maybe—could overcome the barriers to government action, and they did so only on occasion. However, perhaps because the country was focused inward during the first sixty years of its existence—or perhaps because the party system would permit new forms of cooperation among the branches—the cumbersome structure of the national government could be tolerated. State governments undertook internal development. Congress tended to give the president a free hand for foreign relations and military operations—where quick and decisive actions were necessary, and the gains from security or territorial conquest could be widely distributed. Otherwise, the national government was weak and presidential leadership thin. The great controversies over slavery were resolved by Congress, not the president. And then the system buckled. The country was saved by Lincoln, the greatest leader since Washington, who ran roughshod over the Madisonian system in countless ways. But it was in the twentieth century that separation of powers gave way decisively to a system of personalistic leadership by the president.



The evolution was not linear but it was unmistakable. Markers along the way included Theodore Roosevelt's innovation of appealing directly to the public for support rather than working through Congress; the concentration of national power under Woodrow Wilson; the vast expansion of the federal bureaucracy under Franklin Delano Roosevelt, including the inauguration of a new form of administrative government; and the Cold War-era consolidation of presidential control over a vast standing army and foreign policy. A subtle but important change was that the locus of policymaking authority moved from Congress to the president. While Congress would continue to debate legislation, the president set the agenda. From a legal standpoint, the expansion of presidential power took two forms: the enactment of hundreds of statutes that gave the president vast discretionary authority and large staffs to implement it; and presidential assertions of unilateral authority under the Constitution. The first required active congressional participation, the second, acquiescence; but they were mutually reinforcing, and the Supreme Court—after modest resistance that ended with Roosevelt's court-packing plan—gave its imprimatur.

While the separation of powers eroded, the president's personal authority expanded. Today, he can use his legal and constitutional authority to implement many of the policies he prefers. He still needs congressional authority for major legislative changes, but the president initiates the debate by appealing to the public and demanding support from the thousands of people who owe him favors for patronage and other benefits he has bestowed or has the capacity to bestow. He leads his party, which also gives him authority over Congress when his party enjoys a majority in both houses, and influence over Congress even when he doesn't. He nominates judges who advance his ideological goals, and fills the top ranks of the bureaucracy with his supporters. He leads an institution that gathers and processes information (especially confidential information) much better than Congress can, and this informational advantage—along with the fact that he occupies his office continuously while Congress comes and goes—gives him the ability to set the agenda and control the public debate, to act and confront Congress, passive and divided as always, with a *fait accompli*.<sup>3</sup>

The Obama administration exemplifies all these trends. President Obama came to office promising economic stimulus, financial regulation, universal health care, climate regulation, immigration reform, and reforms to counterterrorism. He set the agenda; Congress reacted. Congress gave him the legislation he sought in the first three cases: economic stimulus, the Dodd-Frank Act, and the Affordable Care Act. The second two examples are of dual significance. Not only did Congress acquiesce in the president's legislative agenda; it vastly expanded his authority, and the authority of his successors, to regulate—that is, to make policy decisions—in the financial and health sectors of the economy. While Congress refused to give Obama the climate and immigration laws he sought, the president implemented his plans administratively, relying both on constitutional norms of executive discretion and existing statutes that gave him vast authority. The regulations were not as far-reaching as the legislation he sought, but they accomplished a great deal. Obama also used his regulatory authority and his legal team to advance gay rights. Of all of Obama's major policy initiatives, the only one that Congress has completely frustrated is his plan to shut down the prison located at Guantanamo Bay.

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<sup>3</sup> William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (2003).



But the erosion of separation of powers did not lead to the abuses that the founders feared. While his critics argue—often with justice—that Obama has violated constitutional norms, the president is not a dictator; his policies have enjoyed the support of majorities or large minorities. It is a major irony that the presidents whom historians and political scientists have declared great leaders and placed on their top-ten lists have engaged in constitutionally dubious behavior on a grand scale: Washington, Lincoln, Theodore Roosevelt, Franklin Roosevelt, Truman, Lyndon Johnson, Reagan. While Nixon reigns as the greatest constitutional lawbreaker—and no one, I think, would call him a great leader—all the presidents who were constitutionally scrupulous have also been the most insignificant and are now forgotten. This raises a question. If the separation of powers no longer constrains presidents from committing abuses, what does?

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The answer lies in the nature of presidential leadership, and the peculiar way in which the psychology of leadership interacts with the institutional system we have inherited from the founders. While George Washington was already turning the office of the presidency into the primary leadership position of the country, he did this in the context of the separation-of-powers structure. Washington was from the start the leader of the country—in defiance of the Constitution—but he was also the leader of the executive branch. Consistent with the constitutional structure, this meant that Washington found himself frequently being opposed by Congress. And then there was a development that the Constitution failed to envision. Washington soon found himself the *de facto* leader of the Federalists. In later years, when the party system fully emerged, the president would formally be the leader of his party. And so with the president today. He leads three separate institutions: the country, the executive branch, and his party.

To understand the significance of this state of affairs, we need to examine the concept of leadership more carefully than we have so far. Broadly speaking, a leader is someone who can motivate a group to act in ways that maximize the well-being of the group or promote its values. Leaders typically face a collective action problem among group members who prefer to act in their self-interest unless they can be assured that all members of the group act in the group interest. The successful leader provides these assurances. Thus, leadership seems to depend fundamentally on the ability of the leader to acquire and maintain the trust of the group. As long as the group believes that the leader will act in the interest of all its members, and is intelligent and informed enough to make correct choices, the group will give the leader its trust, and the leader will be able to lead by making choices on the group's behalf.

How do leaders inspire trust in their followers? A huge and inconclusive literature has failed to identify specific personality attributes or skills that are associated with leadership (though this hasn't stopped thousands of educational institutions from offering courses in "leadership").<sup>4</sup> In practice, however, we can see that the leader demonstrates persuasively—

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<sup>4</sup> In the presidential literature, an immense wave of speculation was triggered by Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (1960); see also Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to Clinton* (2000); George R. Goethals, "Presidential Leadership," *Annual Review of Psychology* 56



through word and action—that he shares the group’s interests and will keep his promises. Most leaders thus depend on their reputation, which they build up through a long career of demonstrating success in different organizations and in increasingly large and heterogeneous groups. Group members typically trust leaders because the leader hails from the group, has demonstrated integrity by keeping his promises, and shown competence by making choices that advance the group’s interest. Nearly all American political leaders were born in America (and, of course, the president must be by law), and all presidents have held office or other significant leadership positions before being elected. Presidents who are judged great leaders overcome entrenched resistance to implement policies that advance the public interest; they do so usually by knitting together a coalition of groups whose trust they have managed to win.

People with identical leadership qualities can be greater or lesser leaders depending on the political context in which they operate. Some authors emphasize the large role of public expectations, which are shaped in part by the behavior of previous presidents; and the way that a president’s biography and personality resonate with the public at a particular moment of history.<sup>5</sup> Thus, the search for a specific personality types that lends itself to leadership is futile. Sometimes, there is little scope for leadership because the country is happy or excessively divided; a leader with exceptional talents may therefore accomplish little. When people have diverse interests, policies that advance the interest of one group may harm another group. The leader faces the challenge of arranging for a transfer to the harmed group, or promising it future policies that will benefit it in return for support for an action that hurts group members in the short term. Circumstances will define in part the interests of the group. So a population will be more unified when facing a foreign threat than when debating the progressivity of taxes. This is probably why wartime presidents are often remembered as great leaders.

Regarding the question why presidents do not abuse their positions, the answer is connected to conflicts inhering in the institutional arrangements that he must manage. In place of the Madisonian triptych of executive-legislative-judicial, let me propose a different tripartite structure: executive-party-country. And in place of the Madisonian political equilibrium maintained by the interaction of three opposing forces, consider a set of concentric circles. The president remains the leader of the executive branch under the surviving detritus of the constitutional structure imagined by Madison. By tradition, he is leader of the country. He is also leader of his party. So the president is leader of three different groups at the same time.

Remember that leadership depends on maintaining the trust of the group. This means acting in the interest of the group, and that often means at the expense of others, the people outside the group. When the president acts as leader of the nation, the group consists of all Americans, while the outsiders are foreigners. When the president acts as leader of his party, the group consists of party members—Democrats or Republicans. When the president acts as leader of the executive branch, the group consists of the members of the federal bureaucracy, including the military. This means that members of one group may be excluded from another group, and yet they look to the same person for leadership.

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(2005): 545-70. There are also thousands of books about the leadership qualities of CEOs, generals, and so on, which collectively manage to produce a small pile of clichés.

<sup>5</sup> Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal* (2d ed. 2011).



Consider, for example, President Obama's counterterrorism policies—including his use of drone strikes to assassinate suspected members of Al Qaeda and the Islamic State. Obama believes that it is in the interest of the country to maintain these policies, but in the process he has angered his party—or a substantial segment of the party, who oppose them. But while aggressive counterterrorism tactics have cost Obama the support of people in his party, they have helped him maintain support among people outside his party, or at least to soften their opposition. The policies make it harder for Republicans to accuse him of being soft on terrorism, of being a closet Muslim, of disregarding American security.

At the same time, many of Obama's policies advance his party's interests. Here, I mean both the party's strategic interests and the values the party stands for. Immigration reform provides a good example. Democrats seek to cultivate the support of Hispanics, and most Hispanics support Obama's executive actions to protect people who entered the country illegally. Obama's support for the Dodd-Frank Act was consistent with Democrats' view that the financial industry should be subject to greater regulation. The Affordable Care Act also advanced a longtime Democratic position that health insurance should be provided universally.

So Obama, like his predecessors, must maintain his leadership of the country and his leadership of the party, and it turns out that strengthening his leadership of one group hurts his leadership of the other group. The mechanism is straightforward. When Obama takes an action that advances the interest of one group at the expense of the other, the group that is hurt begins to wonder whether he has its interests at heart. It is more inclined to distrust him, even as the other group's trust is enhanced.

The president's leadership of the executive branch introduces yet another complicating factor. The federal bureaucracy comprises two groups of people: political appointees and civil-service employees. Political appointees head the agencies and fill their top ranks. Within this group, the highest-ranked appointees must be confirmed by the Senate; lower-ranked positions can be filled by the president without Senate approval. The president almost always selects political officials from the pool of personal and party loyalists. And these people often expect to be rewarded for loyal service with future promotions, access to the president, and plum jobs outside of government in think tanks and elsewhere.

Civil-service employees are typically appointed by the agency heads, who are not permitted to take partisan loyalties into account when hiring and in any event civil-service employees will stay in office long after the administration turns over. Civil-service employees also vastly outnumber the political employees, so while they are nominally subordinate, their expertise, mastery of institutional norms, and numbers ensure that they control most of an agency's day-to-day actions. They can also embarrass their political leaders by leaking confidential documents, complaining to the press, dragging their feet when asked to implement policies that the president favors, and threatening to resign.

The bureaucracy creates both opportunities and headaches for presidential leadership. One way for presidents to maintain party loyalty is to give patronage appointments to party members who are disappointed by his policy choices. Patronage appointments enhance party leadership but it comes at the cost of both executive-branch and national leadership. Civil

75



servants resent serving under hacks. And the country may believe that the president is putting party loyalty over the public good.

If the president is to please the party or the country, he needs the cooperation of the bureaucracy because the bureaucracy is his instrument of action. This not only constrains his freedom to make patronage appointments; it also forces him to protect executive-branch officials from Congress. One of the great flashpoints between presidents and Congress is executive privilege, which all modern presidents have used aggressively to protect appointees from embarrassing inquiries and investigations. But executive privilege raises another problem. When the president uses secrecy to protect officials, the public may suspect that the president is hiding wrongdoing. Presidential secrecy may strengthen his leadership of his bureaucracy but, by sowing distrust among the public, weaken his leadership of the country.

We should also address the risk that the president could abuse power through his leadership of the bureaucracy. This risk plays a part in political discourse, and worries about it have a distinguished historical pedigree. After all, the great Roman leaders who helped bring down the Republic owed their power to their leadership over the army. In the end, soldiers were more loyal to the generals than to the state. In 1951, Truman lost confidence in, and the confidence of, General MacArthur, and it has been argued that the country came close to a coup d'état. In modern times, people worry that the president can use the civilian bureaucracy to spy on citizens, stifle dissent, and interfere with personal freedom. There are still respectable commentators who see the military as a threat to civilian independence.<sup>6</sup>

But as we have seen, to lead the bureaucracy, the president needs its trust, and maintaining the trust of the bureaucracy is in tension with national and party leadership. Reagan was elected on a platform that criticized burdensome federal regulation, but he couldn't simply abolish the bureaucracy. He needed it to unwind some regulations while maintaining others. Thus, he had to temper his criticisms once in office while still trying to appease the anti-regulatory wing of his party. Obama campaigned on a platform calling for greater transparency of the bureaucracy, but has failed to follow through because he needs the trust of officials who work for him. In this case, Obama was willing to anger his party in order to appease the bureaucracy, whose assistance he needed to advance policies he cared about.

Leadership depends on trust, but people tend to distrust those who exercise power over them—the president above all. Presidential leadership is constrained by deep egalitarian and antiauthoritarian norms that constantly replenish the well of suspicion from which the public draws when it evaluates presidential rhetoric and action. The country was settled by dissenters, founded on revolution against a king, and developed by frontiersmen, who contributed to a national mythology of self-reliance. So while presidential leadership is acknowledged as necessary, the actions of president and all contenders for the presidency are subject to relentless scrutiny. This level of scrutiny has increased over the decades in tandem with the rise of presidential power. Today, the president is stripped of all privacy, like the kings of old whose bowel movements were examined by courtiers for signs of disease. Every aspect of his private life (with a partial exception for his young children) is considered a legitimate topic for media scrutiny and public debate. This is meant not only to assure us that our trust in the president is

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<sup>6</sup> Ackerman, *supra*.

not misplaced but, through his ritual humiliation, compensate us for our subordination to him. This tendency is everywhere, and the conspiracy theories that surround every president—in Obama's case, centering on the question of whether he was born outside this country and is a closet Muslim—is only an extreme version of it. In the United States, conspiracy-mongering by alienated political minorities combines with pervasive egalitarian resentment among the wider public that a great man (or woman) lords over all of us, to provide a checking power far more significant than the paper barriers of the Constitution. Day after day the president must labor to retain the public's trust.

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The Madisonian system sought to prevent government abuse by creating a set of competing institutions that check the ambitions of officeholders in each. The theory is that if no branch of government can dominate the government, then power will never be concentrated enough to do real harm. But we can also understand this system in the light of the founders' fears about dominance by charismatic leaders like Caesar or Cromwell. Most of the individuals who operate the levers of power within the various branches would remain faceless cogs in the Madisonian wheelwork, while the handful of talented men who could distinguish themselves would never obtain a national following, or at least not for long. The system was constructed so as to block the emergence of dominating leaders at the national level.

But Madison's system failed because it set up too many vetogates, rendering the federal government unable to function effectively. It also underestimated the unifying power of national leadership. By the twentieth century, it was clear that Madison's system made it impossible for a national government to effectively regulate the new national economy, to provide for social welfare, and to protect the country from foreign threats. Activist presidents with outstanding leadership abilities dismantled the Madisonian system piece by piece, paving the way for our current president-centered system of national administration, one that heavily relies on the magnetism, talent, and organizational abilities of the presidents, who are kept in check these days by public scrutiny, the media, and the challenge of leading different institutions and groups in an enormous country. Those presidents are the presidents that law professors condemn for their lawbreaking and historians celebrate for their greatness.