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Author(s): BENJAMIN A. KLEINERMAN

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The Constitutional Ambitions of James Madison's Presidency

BENJAMIN A. KLEINERMAN

Michigan State University

Following Richard Neustadt, scholarship on the presidency tends to focus on presidents as single-minded seekers of political power. But, precisely because of the grandness of their political stage, presidents may, in fact, have constitutional ambitions concerning not how much power they will have but how they will wield their constitutional powers. James Madison's presidency provides an important case study of a president's constitutional ambitions. Entering office with constitutional concerns about the power of the presidency relative to the other branches, Madison used his own presidency and especially the War of 1812 to model a new type of constitutional office that he thought would fit better in the system of the separation of powers.

Scholarship on the presidency remains frozen within the post-Neustadt perspective concerning the uniqueness of the “modern” presidency (Neustadt 1990). The study of the institution and actors in the past has long promised a thaw, but the melting thus far has been marginal. The dominance of Neustadt’s approach has been problematized both by the rational choice scholars studying the presidency and by the historical approach that has already been taken by scholars like Stephen Skowronek (see, for instance, Moe and Howell 1999; Skowronek 1997). The former, however, have not so much moved beyond Neustadt’s focus on power as formalized it (Skowronek 2009). They have continued to assume that presidents are primarily, if not solely, focused on the accumulation of political power. The latter, although having moved beyond Neustadt’s focus on power, have focused so much on the question of political authority, in its connection to the wielding of power, that they have failed to appreciate the ideational origins of the very concern for authority (Siemers 2009). They have failed to appreciate that presidents seek political authority—not just to wield power—but also to instantiate themselves in history as a certain kind of president only willing to do certain kinds of things. In other words, precisely because of the grandness of the stage on which presidents act, any reductionist account of their ambitions will necessarily do violence to some portion of their motivations and corresponding actions.

Benjamin A. Kleinerman is an associate professor of constitutional democracy in the James Madison College at Michigan State University and the author of The Discretionary President: The Promise and Peril of Executive Power.

Just as Neustadt's single-minded focus on power could not really account for Eisenhower's odd behavior as president, so too, as Skowronek (1997) himself admits, his focus on the presidential quest for political authority in different political times and the frictions that quest inevitably creates cannot account for the relative lack of such frictions in Eisenhower's presidency. The grandness of the presidential stage certainly does invite presidents to seek political power and authority so as to wield it to achieve the "extensive and arduous enterprises" about which Hamilton (Hamilton, Alexander, James Madison, and John Jay 2003, 436) wrote so eloquently; but, the vagueness of the Constitution's definition of presidential power also permits presidents to create their legacy as much by the manner in which they occupy the constitutional office as by that which they do with it. Although the Constitution certainly encourages a certain kind of presidency, it still allows presidents to mold the office in a manner that comports with their conception of the proper constitutional presidency. And this possibility means that any deterministic account of presidential behavior will always fail to appreciate that any given president does not simply act within a predetermined constitutional order of the presidency; instead, presidents can do as much to shape for themselves, based on their constitutional ideas, the office in which they then preside.

James Madison's presidency is fascinating because his own prior worries about the "extra-constitutional" scope of presidential power caused him to pursue a far more constitutionally restrained presidency. One cannot understand Madison's presidency without understanding Madison's thoughts about the presidency. Using Madison's presidency to appreciate the essential importance of a president's constitutional conception of the office also helps us to make sense, more recently, of the critical differences between the Barack Obama and the George W. Bush presidencies. Although Obama has wielded power in many of the same ways as Bush did before him, his constitutional conception of the office seems much more limited than his predecessor. In other words, Madison's presidency shows us that the Constitution does not merely establish the "rules of the game" in which the president seeks to achieve political authority and wield power. Instead, the constitutional presidency itself can be actively shaped by its occupants. One has to integrate not just what a president wants to achieve while holding power but the kind of presidency presidents want to create for themselves.

Madison's presidency invites us to integrate his constitutional viewpoints in order to make sense of the heretofore contradictory record concerning his presidency. John Adams, the Federalist who one would not think prone to hyperbole about his Republican opposition, wrote that Madison's administration "has acquired more glory, and established more Union, than all three predecessors, Washington, Adams, and Jefferson put together" (quoted in Rutland 1990, 208-9). Yet, despite this lofty praise, Madison is never ranked as one of our great presidents. Instead, as Robert Rutland shows, another Adams—Henry Adams—"set the tone for a harsh judgment of Madison's presidency by a long recitation of 'executive weaknesses' and mismanagement. Generation after generation of American historians accepted Adams's judgment" (Rutland 1990, 208). Madison is usually ranked at best in roughly the "middle-of-the-pack." At the same time, many in Madison's own time were much more generous to him—much more like John Adams in giving him credit for holding the Union together during the War of 1812.

So, what is the reason for this dramatic discrepancy between our time and his? Why has Henry Adams's negative judgment won out over his great-grandfather's? I would suggest that the discrepancy arises from our failure to integrate a presidents' constitutional conception. And, in failing to integrate a presidents' constitutional conception, we tend to judge them by a "one-size-fits-all" standard of power maximization. How successfully did President *x* maximize his power and/or authority while he held the office? By these standards, Madison fails. Most importantly, he failed to use the War of 1812 to maximize his power in the way we think a successful president "ought" to use war.

We typically rank presidents as most successful when they successfully navigate the country into, through, and out of war through their unwavering and unflinching leadership. Madison's equivocal presidential rankings stem from his odd leadership during the major war of his presidency. Rather than maximize his power and control the "storyline" of the war, he tended to defer to his cabinet, Congress, and even the states. Then, after the war, when he could have reclaimed that "storyline" by showing the importance of his leadership, he emphasized instead how important it was that a federal republic could successfully fight a war without sacrificing either its federalism or its republican principles.

Madison's presidency should interest us in part because his own constitutional conception would rate his presidency better than ours would; but it should also interest us because, as Andrew Polsky (2012) has shown so well in his recent book, our emphasis on presidential power maximization leads to presidential power-grabs that are not supported by or grounded in the polity. Thus, presidents cannot sustain the wars they seek enough to win those wars; they have the constitutional and political authority to take the country to war but not the authority to sustain that war over the length of time necessary to win it. Seeking to exhibit their ability to lead by themselves, presidents do not encourage or even allow the other branches to play their proper constitutional roles. In the long term, focusing on power maximization as the marker of presidential success leads to a short-sighted focus that fails to account for the effects that a presidents' actions and words have on the polity as a whole. The failures of power-maximizing presidents like George W. Bush and Lyndon Johnson in their respective wars point back again to the example of Madison. In other words, rather than simply defending Madison against the charges that he failed in the War of 1812 because he did not lead the fledging nation as it ought to have been led, Madison's presidency ought to lead us to rethink the way we study presidents. The question ought not to be did Madison fail according to our typical notions of presidential success, but how does Madison's example help us reconfigure standards at a time when typical notions of how to succeed no longer ring true?

Madison, the foremost theorist of the Constitution, did not merely understand himself as occupying the presidency in order to advance some subset of Republican political priorities. Nor did he aim merely to acquire and wield power in the manner that one would expect from Neustadt's conception of the office. As I will show in the course of this article, Madison failed as a president precisely on those grounds by which we judge them. He did not effectively lead Congress in the manner we expect; he failed to manage his cabinet effectively; and he failed to capitalize on the War of 1812 to transform himself and his administration into the objects of greatness one would expect from a great

president. But it is precisely on those grounds (with the exception of his failure to manage his cabinet) that Madison ranked himself successful. He held the presidency, even during a relatively successful war, in a manner that neither deformed Congress nor the federal nation. Through his own example, Madison managed to inculcate a new notion of presidential power: despite the temptation to give all authority and power to the president, the president should be seen as only one component of our complicated system of separated powers. By conducting a successful war in a manner that neither destroyed our federal system (despite the temptation) nor destroyed congressional independence, Madison showed that his constitutional conception could survive even in perilous times. For this reason, Madison's presidency is tremendously successful precisely because he did not have to become a "great" president in order for it to be so. Resisting the allure of greatness in order to comport with a republican constitutional order, Madison actively sought to transform the presidency into something much less active. Having seen the danger overwrought executive power poses to republican constitutionalism, he consciously chose to create, in his own presidency, a new model of presidential power.¹

In advancing the argument that Madison sought to model a certain type of more restrained presidency, I should acknowledge Ralph Ketcham's important essay from many years ago, which made a similar argument. Like Ketcham, I will suggest that Madison learned something about the dangers of presidential power only once the republic began and only after he saw the kinds of power grabs Alexander Hamilton was willing and able to make from within the executive administration under George Washington. My assessment departs from Ketcham's on two important points. First I will not suggest that the presidency of his friend and political ally Thomas Jefferson solved any of these dangers. Ketcham seems confident that Madison, like Jefferson, viewed the solution as roughly the following: "to be safe, executive power had to be in the hands of people who were more faithful to republican principles than were Hamilton, John Adams, Timothy Pickering, and even the revered Washington" (1989, 352). In contrast, I will suggest that Madison came to view the growth of executive power as rooted in the republican principle itself. It is not enough then merely to keep it out of the hands of bad "monarchists" like Hamilton and in the hands of "good" republicans like Jefferson. The problem of executive power exists as much, if not more, when it is in the hands of popular presidents as unpopular presidents. Fully to confront Ketcham's argument, I would have to undertake a much fuller investigation of Madison's stint as Jefferson's secretary of state. Both this and much of Madison's first term in office, however, are beyond the scope of this article. My aim here is only to establish the nature of Madison's aversion to overwrought executive power and the nature of his correction to that power through the example of his presidency, especially during the War of 1812. Only with that as a baseline would it then be worthwhile to investigate the scanty evidence regarding any distance between Madison and Jefferson during the latter's presidency. Second, Ketcham investigates the relationship between Madison's theory and Madison's practice at a fairly general level. Thus, he fails to distinguish between that

1. Bruce Miroff argues that John Adams also entered the presidency with a certain "conception of the executive" and aimed to fulfill and illustrate that conception while in office (1993, 78-80).

deference, which is mere political weakness on Madison's part, and that which really does follow from his political principles. Madison's political principles do not, as Ketcham sometimes argues, demand a weak presidency. Instead, they demand a presidency, unified and thus responsible to the people, but restrained to its proper sphere of authority (Kleinerman 2009, 121-24; see also Grant and Grant 1981). Madison aims to model not weakness—to the extent he showed weakness during his presidency, it was because of his personality flaws and lack of political prudence—but restraint.

Madison's Political Thought on the Constitution

To appreciate fully Madison's presidency, it is first necessary to understand his political thought concerning the Constitution and its relationship to presidential power. Madison is unlike so many of our other presidents because his most significant political accomplishments are not related to having been president. Instead, Madison distinguished himself first as the founding generation's most thoughtful constitutionalist. And, in the politics of the late 1780s and 1790s after the ratification of the Constitution, Madison was, in the first and last place, a constitutional partisan much more than he was a political partisan. Or, it might be more precise to say that Madison was a political partisan insofar as he was a partisan of the Constitution. At the national level, Madison's political partisanship was always informed by his understanding of both the powers of, and the limits upon, the national government that had been created by the Constitution.

We are unaccustomed to politicians working within the boundaries imposed by the Constitution to get what they want politically. It is not that they do not care about the Constitution; it is just that they view the Constitution in much the same way as we view the rules of a sporting event. The rules exist so that the sport is played fairly and on an equal footing, but the real thing is the game itself, not the rules. Today's typical politicians tend to view the Constitution, at its best, as something within which they play their political sport, and if it is frustrating their intentions, around which they have to maneuver.

From early in the 1790s until he became president, Madison seemed to care more about the Constitution than about the political sport that was played within its borders. Some of his most important and memorable political acts were in defense of a certain principled understanding of the meaning of the Constitution even as he otherwise agreed with the politics in the situation. As will be explored more subsequently, in 1793, Madison, as *Helvidius*, takes up his pen to argue vehemently against Hamilton's argument, as *Pacificus*, even as he actually agrees with the action—Washington's proclamation of neutrality—that Hamilton was seeking to defend (Kleinerman, 2009, 119-47).² His argument is motivated not by mere politics but by a defense of the Constitution over

2. I realize this is not the conventional view of the dispute over the Neutrality Proclamation. It is simply beyond the scope of this article to show the extent to which Madison, as *Helvidius*, points to principles on which he could (and does) support the actual issuance of the Neutrality Proclamation, even if he does not support the principles Hamilton has offered to justify Washington having issued it. For a reading similar to mine, see Schmitt (2000).

and against Hamilton. He disagrees only with the constitutional principles upon which Hamilton has defended Washington's proclamation. Near the end of his second term in the presidency, Madison vetoes legislation for internal improvements that his own message to Congress would seem to have favored. He does so because, although he thinks the national government should be involved in internal improvements, he does not think that the Constitution, as it presently stands, empowers the government to undertake them (Rosen 1999).

Moreover, the nature of Madison's constitutionalism is itself striking. Rather than being concerned that the public remain true to his vision of the Constitution that he is said to have "fathered," Madison is most concerned about fidelity to the public's understanding of the Constitution when it was ratified (Sheehan 2009). In actuality, many of the things that Madison wanted did not make it into the Constitution and Madison was actually somewhat pessimistic in his private letters about the totality of the Constitution that he had such a decisive role in helping to shape (Zuckert 2009). For these reasons, one might have expected him to try, as Alexander Hamilton did, to shape the Constitution into something closer to that which he originally wanted (Kleinerman 2009, 93-94). Especially if it is right to say that Madison is the "father" of the Constitution, one would expect a father to attempt to shape his son into the kind of man he had always wanted him to be. Instead, Madison's constitutionalism is distinctly republican in the sense that he thought the most important guide to understanding what the Constitution means should always be what the public understands the Constitution to mean.

But Madison's republican constitutionalism follows naturally from his conception of the role constitutions ought to play in political life. Even as Madison, as he argues in *The Federalist Papers*, thought a Constitution places a crucial "brake" on the public's role in the government insofar as it attempted to prevent the misguided and dangerous legislation that had been passed in some of the state governments prior to ratification, this "brake" aims only to allow a more reasonable public to govern. The Constitution is not intended, as it sometimes seemed in Hamilton's conception, to allow elite government to replace the public's rule. The aim of the Constitution is to allow public reason to govern. Without the guidance of a Constitution, public passions will govern (Hamilton, Madison, and Jay 2003, *Federalist* #49, 514).

Madison's concern for republican constitutionalism in which the Constitution serves as the conduit of public reason helps to begin to explain why he is so much more concerned about the scope of presidential power than Hamilton. Hamilton wants most of the real governing to occur within the presidential administration (Flaumenhaft 1992; Koritansky 1989). The president would govern, and the people would, at most, pass judgment on that government through either the legislature's response or reelection. Hamilton's constitutionalism insulates the people from government so that the elites who know best how to govern the people can do so. By contrast, Madison really does want "the reason . . . of the public . . . to control and regulate the government" (Hamilton, Madison, and Jay 2003, *Federalist* #49, 514). Through their fastidiousness about the limits of governmental power under the Constitution as they understand it, the public could exercise its reason to control and regulate the government. The problem is that this works only as long as the inherent populism in the republican executive is bridled and

controlled. If the executive becomes the agent of popular will over and against the annoying limitations of the Constitution, then the public reason—which is only made possible by the self-imposed limitations of the Constitution—becomes replaced by an overt populism embodied by the presidency.³ Jeffrey Tulis's *Rhetorical Presidency* makes a similar argument concerning the distorting effects of presidential populist rhetoric on the rationality of the public policy produced by the Constitution (Tulis 1987). Madison's commitment to the rational public policy made possible by the constitutional order causes him to distrust the singular focus on presidential rhetoric and power. Madison's prior concern for the constitutional order caused him to model a different kind of presidency more amenable to the constitutional order of which he is merely a part. Although, given Madison's own awareness of the more lasting effect of institutional change, it should not surprise us that it was only the political party system instituted in the 1820s that most succeeded in controlling the "presidentialist" direction of the constitutional order (Ceaser 1979; Milkis 1999). The political party system aimed to achieve constitutional ends through "extra-constitutional" processes, connecting the people's constitutional reason to the government in a manner that Madison would have appreciated.

Although Madison began forming his constitutional conceptions in the 1780s both in preparation for the Constitutional Convention and in his defense of that Constitution, it was only after he saw the Constitution in action that he formed a more clear conception of both its powers and its limits. Most importantly for our purposes, Madison publicly distinguishes his constitutional conception from Hamilton's most clearly in relation to the question of presidential power.⁴ That is, the dangers that Madison came to see

3. Jeremy Bailey argues persuasively that it was Jefferson who first saw these populist possibilities in the presidency—possibilities that made Jefferson see the "extra-constitutional" possibilities of prerogative as something much more than just the temporary setting aside of law in emergencies but as actually inviting the "constant agency" of a populist president looking to do the people's good wherever he could. In other words, for Bailey's Jefferson, the Louisiana Purchase is both a regrettable departure from the constitutional order *and* an ideal opportunity to display the possibilities of presidential prerogative (Bailey 2007). If Bailey is right to characterize Jefferson's presidency in this manner, then, given both their friendship and Madison's role as Jefferson's secretary of state, how does one square my conception of Madison's presidency with it? Did Madison show any indications of misgivings as Jefferson accumulated and wielded the degree of power that he did in the Embargo crisis? As I have shown in other work, Jefferson's presidency seems to embody precisely the kind of constitutionally untethered executive "representative of the people" about whom I am suggesting Madison was particularly concerned (Kleinerman 2009, 148-64). Although it is certainly true both the Embargo and the Louisiana Purchase allowed Jefferson to avoid the outright war about which Madison might have worried the most, Madison's thoughts on the dangers of executive power are sufficiently astute to perceive that both the Embargo and the Purchase might be dangerous even though they were not war. Did Madison show any indication of trying to rein in these excesses? Indicating that Madison mostly went along with Jefferson, Burstein and Isenberg write, "Thomas Jefferson entertained grand expansionist plans, and James Madison was in favor of them all" (2010, 443). And on the embargo issue, they write, "Madison's role in the embargo earned him a good many enemies" (Burstein and Isenberg 2010, 457). In other words, in his time as secretary of state, Madison did not seem to diverge from the direction his friend and commander in chief had taken. But, perhaps, without his having to say so, he offered up his presidency as a correction to the populist excesses of his dear friend.

4. Of course, Madison's first disputes with Hamilton concern the question of the Bank and, accordingly, how one ought to interpret the "necessary and proper" clause. Madison wants to insist on a limited interpretation of that clause for the same reason that he insists on a limited interpretation of the inherent constitutional powers of the president: to preserve the constitutional landmarks that make republican constitutionalism possible.

emanating from the presidency caused him further to refine his understanding of both this specific Constitution and constitutionalism more generally.

Washington's Proclamation of Neutrality was issued in response to the war between France and Great Britain. Because of our previous alliance with France during the Revolutionary War, it was not clear what our disposition would be or should be in this war. Washington attempted to clarify this question by issuing his proclamation. A constitutional question then arose as to whether Washington had the power to issue the proclamation independent of Congress. Hamilton takes up his pen as *Pacificus* in order to argue not only that Washington had the constitutional power to issue the proclamation but that he was also wise to do so.

Madison begins his response to Hamilton by suggesting that only "foreigners and degenerate citizens among us who hate our republican government" would agree with these arguments (Hamilton and Madison 2007, 55). Madison's disagreement with Hamilton revolves around the constitutional principles by which Hamilton has justified this power. Writing as *Pacificus*, Hamilton had justified Washington's proclamation by suggesting that it fell within the scope of the executive power. Hamilton claims the executive power is necessarily broad and unsusceptible of enumeration. The listed powers are merely examples of the executive power rather than exhausting that power. Hamilton goes so far as to suggest that the war-making power itself falls within the executive power, but this Constitution chose to except it out of the executive power and give it to the legislature in order to make it more safely exercised (Hamilton and Madison 2007, 8-17).

For Madison, the essential threat in Hamilton's argument rests in its destruction of constitutional "landmarks." For Madison's constitutional republicanism to work, constitutional simplicity is required. To love the Constitution, the people must understand the Constitution. Hamilton's principles—in their complex and derivative claim about executive power—"strike at the vitals" of the Constitution (Hamilton and Madison 2007, 56). Hamilton's argument is, Madison argues, "pregnant with inferences and consequences against which no ramparts in the constitution could defend the public liberty, or scarcely the forms of republican government" (Hamilton and Madison 2007, 65). To contest these principles, as Madison says in a letter to Jefferson, he does not want to turn "the controversy too much into the wilderness of Books" (Madison 1983, 15:59). Instead, he aims to deduce the principles of the Constitution from the language of the Constitution in its most straightforward form. In its most straightforward form, "the natural province of the executive magistrate is to execute laws, as that of the legislature is to make them" (Hamilton and Madison 2007, 59). By this construction, the power of making treaties and the power to declare war are naturally—and thus constitutionally—legislative powers rather than executive ones. Where, in Hamilton's hands, the war-making power naturally belongs to the executive but is given to the legislature for republican safety, in Madison's hands, the power to declare war is naturally legislative insofar as it requires deliberation—a deliberation only possible in the legislative branch of government.

Emphasizing these constitutional landmarks is that much more important, Madison argues here, because of the particular dangers that the presidency poses to the constitutional order. If the presidency were a comfortable part of the constitutional order,

capable both of asserting itself and fully susceptible of control by the other branches, then this strident insistence on constitutional landmarks would not be as necessary. But, because of the ever-expanding nature of presidential power—even or especially due to its roots in the people—one must insist that much more strenuously on constitutional principles, which hem in the presidency. As Madison argues in this debate with Hamilton, if one accepts Hamilton’s claims about the natural province of the executive being to take the country to war, then one should expect some later thinker to claim that the president in this republic does possess this constitutional power. And this, Madison thinks, would be extremely problematic for a constitutional republic. This is just one more example of Madison insisting over and against Hamilton, as in the Bank Case, on constitutional landmarks of power when Hamilton wants to adopt a more flexible mode of constitutional interpretation. Although this case may be that much more important because it runs against the people’s own republican instincts: to give their executive as much power as he needs. In other words, this disagreement between Madison and Hamilton may be even more important because there is even more at stake than there was in the case of the Bank. Whereas in the Bank Case Madison could appeal to the republican nature of the regime by alleging an elitist or monarchist conspiracy, he is now arguing against one dangerous direction the republican regime can lead itself down. The problem is not the monarchists who are betraying the people; the problem lies in the people themselves.

The danger that the presidency poses to the constitutional order revolves essentially around its potential to benefit most from war making. Madison writes, “War is in fact the true nurse of executive aggrandizement.” Madison continues,

In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. (Hamilton and Madison 2007, 87)

Executive war making is dangerous because the executive has so much to gain from war. This is true even or especially in the case of a republican executive. Given this danger, republican states disarm the executive by placing the power to take the country to war in different hands. And, given how much the president has to gain from war, this disarming will only work if the public remains vigilant about it. As Madison says elsewhere, the public must keep a “watchful, tho not censorious, eye over that branch of government which derives the greatest accession of power and importance from the armies, offices, and expenses which compose the equipage of war” (Madison 1983, 17:241). If the people do not want the republic to be constantly at war, they must keep a close eye on the presidency.

The argument here is not, however, just that it is dangerous for the executive to have the war-making power. The argument is also that the decision itself properly belongs to the legislature given the deliberation required to take the country to war. As such, the role of the executive is to issue “mere recommendations” to the legislature. He

argues that “in exercising the constitutional power of deciding a question of war, the legislature ought to be as free to decide, according to its own sense of the public good, on one side as the other side” (Hamilton and Madison 2007, 93).

Importantly and interestingly, the War of 1812 presents precisely such a situation. In fact, one of the criticisms often made of Madison is that his message presenting Congress with the case for war against Great Britain was not sufficiently strong. He did not make it sufficiently clear to Congress that he wanted a war and thus did not lead the country to war the way he should have. This, however, seems to be one of those criticisms that evaluates Madison by standards other than his own. If Madison were aiming, in the manner of a Neustadtian president, to maximize his power and authority, then it would not make sense to present an ambiguous war message to Congress. Because he is aiming to create a new model of presidential power, through his own example, Madison fulfills his constitutional aims.

Madison’s Distrust of Popular Executive Power

Madison insists so strenuously on the proper constitutional place of the presidency precisely because he came to see how dangerous the executive power could be in a republic. At the founding of the Constitution, Madison worries more about legislative usurpation because he thinks that, since the legislature represents the people most clearly and the regime is a republic, the republican spirit embodied by the legislature would overwhelm the other two branches. By the 1790s, however, Madison had come to see the matter differently than he did at the founding. It is not that Madison no longer worried about the representatives of the people usurping power, it is just that Madison came to see that, in a republic, an elected executive was an even more dangerous “representative of the people” than the legislature. In 1799, reflecting on the direction the revolution in France had taken, Madison claims it is “an example in point against the doctrine so ardently propagated by many, that in a republic the people ought to consider the whole of their political duty as discharged when they have chosen their representatives.” Instead, they should always remain aware that “such agents are not incapable of violating the trust committed to them” (Madison 1983, 17:238-39). This is to say that Madison’s famous turn toward republicanism, toward Jefferson and away from Hamilton, does not mean that he had become sanguine about the possibility of abusive representatives simply because they are elected by the people. Instead, Madison had come to see, partially by the experience in France and partially by the experience in the United States with the Alien and Sedition Acts that the real threat in a republic comes from the elected executive rather than the legislature (Ketcham 1989, 352). One might well argue that Madison’s turn to republicanism was motivated by a desire—insufficiently appreciated by him at the founding—to infuse the constitutional order with a constitutional populism that would resist the allure of a popular and thus powerful presidency. This constitutional populism is the only alternative to what would amount to an elected monarchy.

Having only at first seen the presidency through the lens of monarchy, Madison realized that the threat of the executive is greater precisely because this executive is

elected. Once he saw the fundamentally representative character of the president, he came also to see that it constituted at least as much if not more of a danger than the legislature. The presidency constitutes such a danger because its constitutional role would allow it to manipulate the people in a manner that conduces to its own power. A king had no interest in doing this insofar as his power does not derive from popular acclaim. Reflecting on the revolution in France, Madison realizes that an elected executive, however, can benefit tremendously from “real or pretended apprehensions of ‘crises’.” Continuing, Madison writes, “Hence the propagation and management of alarms has grown into a kind of system” (Madison 1983, 17:241). That is, Madison here predicts the permanent problem that republics face from overweening executives, a problem illustrated by what happened in France under Napoleon. This is a problem specific to representative executives because their power increases most when situations require their unique capability to exercise power with dispatch and decisiveness. Thus, there is an incentive for them to manipulate situations so as to claim the need for their institutional powers. Where a monarch’s power remains relatively more stable, the elected executive’s power, especially relative to the legislature, increases tremendously in crisis situations.

Of course, one might speculate even further and suggest that his experience under the presidency of a popular executive such as Jefferson might have further solidified these lessons regarding the dangers to the constitutional order of a popular presidency. On this point, Madison left very little evidence that he had doubts about Jefferson’s turn toward a new kind of presidential populism. His doubts about the dangers of executive power and even of a popular and thus powerful executive are quite clear. That he would have connected these doubts to his friend, Jefferson, a popular and powerful executive, if ever there was one, would seem natural. There is, however, no concrete evidence of Madison having made this connection. Perhaps we are left only with the Madison’s very quiet rebuke to his much louder friend in the form of his much more constitutionally restrained presidency.

In light of Madison’s actual experience as president during the War of 1812, the next part of these political reflections is also tremendously important. Madison writes,

Although a protracted and complicated war, and the multiplied alarms from without and within, might account for a rapid growth of the Executive Branch in the French Government, it may have been not a little facilitated by the consolidation of France into one simple republic. In this particular the United States have an advantage that cannot be too much prized. Our state governments by dividing the power with the Federal Government, and forming so many bodies of observation on it, must always be a powerful barrier against dangerous encroachments. (Madison 1983, 17:242)

Where France is a consolidated national government in which the national authorities enjoy unquestioned and unchecked power, the United States has a government with a variety of “intermediate, local authorities” that can check the excesses of the national government. As such Madison conjectures that the federal system of the United States might better guard against the concentration in the executive that took place under Napoleon in France. In other words, Madison’s famous turn to federalism and away from the consolidated national government may have been prompted partially by his concerns

about executive power. As in the passage quoted above, they were concerns made most acute by war but which persisted even in situations short of war. “Multiplied alarms from without and within” could arise as much in peace as in war. Thus, it not just war that makes the executive dangerous. It is the functional expectations of the executive branch and its correspondent ability to use those expectations to manipulate the people in a manner that would redound to the power of the executive. Federalism can help to hold this danger in check because it creates an alternate source of legitimate authority that can cast doubt on executive claims of alarm. The states, these “bodies of observation,” would hold an overweening executive in place in a manner that he realized was necessary, else republican government transform into nothing other than elected monarchy.

One should also notice in connection to this point that, as Madison discusses earlier in the paper, the mere separation of powers within the national government does not seem as effective in checking the encroachment of power as federalism. Madison writes, “The prompt and uniform concurrence of the two Departments, said to prevail in all the public measures, is a strong indication either that both are governed by the voice of the nation, or that one is extremely compliant with the will of the other. The first supposition being rejected, the inference from appearance certainly is that the Executive rules the Legislature, rather than that the Legislature rules the Executive.” Madison continues, “Taking this for the fact, what a subject does it present for the meditation of free nations” (Madison 1983, 17:239). Based on this observation and others Madison made in the context of the Alien and Sedition Acts passed during the Adams presidency, Madison came to be somewhat more pessimistic about the ability of the national legislature to exercise the checking function he had envisioned for it in *Federalist* #51. And, given this pessimism, Madison came to place more hope in the principle of federalism and the checking power of the states to resist the encroachments of the national government.

Madison’s Presidency and the War of 1812

This brief foray into Madison’s political thought reveals how central the presidency had become to Madison’s whole constitutional understanding. Unlike Hamilton, for whom the strong presidency was the essential condition for successful republican government, Madison saw the strong presidency as a critical danger to republican government. Although he might still agree with Hamilton that “energy in the executive” was an essential condition of republican government, he might also now emphasize that the opposite could also be true. Energy in the executive could be both essential *and* dangerous to successful republican government. And, given that the energy of the executive did not need to be supplemented, he seems to have wanted to place more emphasis on safety in the executive. So, given his overriding concern about the dangers of a strong presidency, his presidency offered him the opportunity to illustrate the possibility of an alternative model through his example. Madison’s presidency would still possess as much energy as is necessary but no more than is safe to republican government.

Given my claim that Madison’s reinvigorated concern for the federal nature of the republic arose as a response to the dangers of a republican executive, it is both important

and illuminating that federalism presents the greatest dilemma for him in the most important part of his presidency: the War of 1812. Without getting into all of the details of this interesting war—a war often referred to as America’s second war for independence—one of the essential problems for Madison as president was how to hold the Union together during the war. Although the states are tremendously important intermediate institutions, which can contain an overweening executive, their very independence presents a problem when the Union as a whole is at war. The independence of the states presented Great Britain with the opportunity to win the war by dividing the Union.

For a variety of reasons having to do with both their political principles and their commercial interests, the New England states were simply unwilling to participate fully in the War of 1812. For instance, they refused to use the state militias to participate in the attacks. Madison writes in a letter to Wilson Cary Nicholas in 1814, “You are not mistaken in viewing the conduct of the Eastern states as the source of our greatest difficulties in carrying on the war, as it certainly is the greatest, if not the sole, inducement with the enemy to persevere in it” (Madison 1867, 2:593). Much of the reason that the British persisted in the war is their belief that they could foster sufficient dissent to the war among the Federalists in New England. Thus, they hoped that the Federalists would lead New England out of the Union. Some Federalists, using language similar in tone, at least to that which had been used by some of the more extreme Jeffersonians while out of power in the 1790s, worried extensively about the encroaching nature of the national government during the war. Thus, as president, Madison was presented with a situation that bears a striking resemblance to that which he had reflected upon in 1799. Only now, he was the executive of the national government, and the New England states were acting in a manner that they understood as being, in Madison’s words, a “powerful barrier against dangerous encroachments.”

Of course, this description of the situation abstracts significantly from the reality of the dissent among the Federalists in the New England states. In the passage I just cited, Madison celebrates federalism when it acts as an essential check on a dangerously encroaching national government. But the reality of the situation during the War of 1812 is more that the Federalists in the New England states were acting in a manner that bordered on treason, and the national government, so far from being dangerous and encroaching, lacked sufficient power to crack down on their treason (Hickey 2012).

Nonetheless, one can imagine a president different than Madison doing exactly as he worries in these earlier political reflections. That is, one can imagine a president using the war and the behavior of the Federalists in the New England states to consolidate power in the national government and crack down significantly on these troublesome intermediate powers. In truth, this tactic would not have been entirely unjustified. A president concerned, first and foremost, for his power and authority would likely have followed precisely such a course. And, in doing so, that president might be fully justified. And, in failing to take these steps, Madison appears not to live up to our standards for our presidents. Daynes and Hopkins write, “Had Madison exhibited more decisive leadership, and had he exercised the same prerogative power as George Washington did in some of the uncertain situations that faced the first president, Madison would likely have been considered a more successful president today” (2008, 230).

From his constitutional perspective, however, Madison seems to have used the war as something of an opportunity to illustrate that one can fight a war without sacrificing free institutions. Success for him stems from something other than the ability to marshal and consolidate his leadership. In a message to the Republican members of the Legislature of Massachusetts, delivered in 1815 after the conclusion of the war, Madison says, "Whatever differences of opinion may have existed among good citizens, all will rejoice in the happy result of the contest in which we have been engaged" (Madison 1867, 2:599). It is worth noting, as an aside, that although many historians and even the general public now see the War of 1812 as a failure partially because of the burning of Washington, this was not the way it was seen at the time. Then, many thought the British willingness to relent on certain practices they did to Americans at sea meant that it was actually a success. They relented, for instance, on the principle of impressment of Americans at sea. Thus, Madison would have met general agreement in calling the war a "happy result." The reasons for which he was willing to fight the war, reasons that generally revolve around the continuing British unwillingness to treat the United States as a sovereign nation in its own right, rather than as a wayward son who the British could continue bullying, were accomplished.

That the war could illustrate the ability of a federal republic successfully to fight war was obviously not the reason for which it was fought. But, if this illustration were another "happy result" of the war, Madison did everything he could to draw out that as well. Madison says in the same message: "If this has been attended with difficulties and with sacrifices, with anxieties and with apprehensions, we have a reward in the reflection that the rights of our Country have been successfully maintained, under peculiar disadvantages" (Madison 1867, 2:599). Madison indicates that, although this war had a significant degree of difficulties—difficulties that would be beyond the scope of this argument to detail—they were worth it because the rights of the country were maintained during the war. What are the rights of the country that caused such peculiar disadvantages? Here, Madison must be referring to some combination of the federal nature of the republic and the constitutional limitations on the sovereign power fighting the war. Madison proved in this war that a federal constitutional republic could fight a war without having to give up its federalism and its constitutionalism in favor of a consolidated national executive. Madison repeats this sentiment in his message to Congress in 1815: "in reviewing the scenes through which it has been attained we can rejoice in the proofs given that our political institutions, founded in human rights and framed for their preservation, are equal to the severest trials of war as well as adapted to the ordinary periods of repose" (Israel 1966, 1:139). In both this message and in the prior message, the "reward" of the war and that in which we should rejoice is not so much the peace or the terms of it, but rather the knowledge that it had been successfully fought without sacrificing the nature of our political institutions. Although it would be both bizarre and unfair to say that Madison fought the War of 1812 so as to prove that a war could be fought successfully in a way that befits a constitutional republic, it is also clearly the case that he made the most of the opportunity afforded him. By successfully prosecuting the war in a manner that did not exercise the full array of the president's supposed prerogative powers and in a manner that preserved Congress and even the state's essential

roles, Madison proved that it could be done. A republic did not need to turn to a powerful executive in crisis situations with all the dangers that attend to that turn.

As further evidence of Madison's use of this war as an example of the proper behavior of the president in war, one could look at his initial message to Congress about the possibility of war with Great Britain. He has been criticized by some, even in his own time, for being insufficiently decisive in his desire that the country go to war (Hickey 2012, 44). He presents a long message to Congress, in which he is never entirely clear that this is his desire. After listing a number of wrongs suffered by the United States at the hands of the British, he says only, "Whether the United States shall continue passive under these progressive usurpations, and these accumulating wrongs; or, opposing force to force in defense of their national rights . . . is a solemn question, which the Constitution wisely confides to the Legislative Department of Government" (Madison 1999, 4:437). As Madison said in the 1793 debate with Hamilton, the question of going to war is rightly given to the legislature rather than the executive. While the conduct of war requires "energy," the decision to go to war requires legislative deliberation. So, although Madison has every right to present his opinion of these matters to the legislature, in his role as executive, it is not for him to prejudge the outcome. The decision rightly remains entirely a legislative decision. It is because the executive is most interested in war, and benefits the most from it, that Madison insists so strenuously that the decision rests in the legislature. Even as president, Madison continues to defer to the legislature on this question. Again, Madison's presidential behavior only makes sense in light of his constitutional understanding.

As I said in the introduction, the recent failures of presidential power and authority conceived in terms of power-maximization recommends a reconsideration of both Madison's presidency and the constitutional understanding that informed it. Instead of maximizing his power by spearheading the drive toward war, Madison insured that Congress was as much "on the hook" for the war as him. Thus, whereas it might appear—especially to current presidents who insist they single handedly possess the war-making power—that Madison seemed weak in his message to Congress by inviting them to decide for themselves on the question of war, one might also suggest that it made Madison's position that much stronger. As Madison insisted to those who blamed him for the war's failures afterwards, this war was as much Congress's war as his. Insofar as victory in democratic war typically takes a concerted and sustained effort on the part of the whole democracy, including both the president *and* Congress—by asking Congress to declare war—may better insure this sustained effort.

The real failure of the war was the attack on Canada—an attack begun not so much because the United States was trying to conquer Canada as because it was thought that, if Canada were conquered, the United States would have a pawn with which to negotiate in dealings with the British. In return for Canada, the British might make certain concessions on questions surrounding impressments of Americans at sea. The failure to conquer Canada, however, is not so much a failing of Madison's as a complete failure of his generals, who were either incompetent or gutless or both. Although one can surely fault Madison as commander in chief for his failure to manage his generals adequately, this failure is less an indictment of his theory of the presidency and more an indictment of his management style. Madison's failings, to the extent that they existed, derived more

from his character than from his theory of the presidency. John Calhoun sums up this character failing nicely in a letter to a friend in 1812: "Our President tho a man of amiable manners and great talents, has not I fear those commanding talents, which are necessary to control those about him. He permits division in his cabinet. He reluctantly gives up the system of peace" (quoted Sweeny 2012, 70). Calhoun is right about Madison's conduct of the presidency. He permitted too many divisions in his cabinet and failed sufficiently to control his generals; but these failings are not related to his constitutional understanding of presidential power. Even though he calls for deference to Congress, Madison mixes that deference with an argument for complete executive control over the executive branch of government. His argument on the question of executive control of the executive branch resembles in many ways what we would now call the argument for a "unitary executive."⁵ His theory does not demand presidential deference to cabinet members or generals. Madison's theory on these questions has no bearings on his failures. They derive more from a failure of political prudence than of political principle. To attribute Madison's failures to his principles is fundamentally to mistake his principles. Madison did not subscribe to a theory of weak presidential power. Thus, he was not weak in relation to his cabinet and his generals because it was demanded by his theory. Instead, Madison subscribed to a theory of presidential power according to which the president is strong and independent in his sphere of power; but that sphere is circumscribed by the fact that there are independent powers held by the other branches of government and by the states. As I said at the beginning, Madison never abandoned, at least in principle, Hamilton's dictum that energy in the executive is essential to good government; he simply complimented that principle with the notion that too much energy in the executive could become dangerous to good government.

This relationship between independent powers in separate branches returns us again to the critical relationship between the legislature and the executive in matters of war. In discussing the War of 1812 years later, Madison responded to the charge that "the war was commenced without due preparation." That is, the charge is often made that the United States simply did not sufficiently think through how many troops it would need and what strategies it would need in this war with the British. In other words, the charge is made that Madison simply had not prepared the country for war. In response to this charge, Madison writes, "It was, in fact, not the suddenness of the war as an Executive policy, but the tardiness of the legislative provisions, which gave whatever colour existed for the charge in question" (Madison 1867, 3:556). He continues the letter claiming that the military preparations recommendations made by the executive to the legislature would have prepared us for war in a manner that the preparations actually enacted by the legislature did not. He writes, "It may be safely affirmed that the force contemplated by the executive, if brought into the field as soon as it might have been, would have been far

5. By contrast, Ketcham suggests that Madison accepted congressional "dictation" on his cabinet appointments as a matter of "republican spirit." He writes, "Madison saw danger in an executive so far from, so independent of, congressional opinion as to find himself defying it" (Ketcham 1989, 355). But, as Ketcham himself notes at the beginning of his essay, Madison was in favor of an independent executive: he was just worried that the sphere of executive influence sometimes grew too large. Accepting congressional dictation arose then not from Madison's principles insofar as it violates executive independence but from his political imprudence.

more adequate to its object than that enacted by the Legislature could have been" (Madison 1867, 3:556). Although we might evaluate this claim as the rationalization of a man seeking to defend his legacy, there is also some truth to the claim when one looks at the historical record. Madison was calling for greater and more expedient military preparations than the legislature was willing to provide.

Madison's argument in this letter is, however, more profound than just a post hoc defense of his actions as president. Madison is insisting here that if the legislature is at least as responsible if not more so for war making, then the failure to prepare the country for war is at least as much Congress's fault as the president's. As Madison writes here, the executive's responsibility is to conduct the "suddenness of war." The legislature's responsibility is to prepare the country for war by passing legislation that funds it and funds the troops. If the legislature fails to do this adequately, this cannot be the president's fault. Instead, it is the fault of the branch that bears this responsibility. Madison's letter is as much a correction of the dangerous republican tendency to lay all blame and praise on the head of the executive. Madison's defense of his behavior as president points as much to the mistaken manner in which we think of the question as it does to the mistakes he made. Given that the executive can merely make recommendations to Congress, why is it that we should hold the president responsible for something over which he ultimately does not have power? Madison understands the Constitution as always connecting responsibility to power. So, to hold the executive responsible for the conduct of the war, the executive must be commander in chief. But to hold the executive responsible for the military preparedness for war, the executive branch would have to be capable of passing the requisite legislation on its own. Instead, it makes much more sense to hold the branch that holds this power responsible for its use.

The fact that we hold the president rather than the legislature responsible for military preparedness is, Madison would say, of a piece with our whole overvaluation of presidential power. The evaluation of the War of 1812 should concentrate as much on the legislature as on the president. How well did the legislature prepare the country for war? In concentrating solely on the executive, Madison would suggest, we create the engine of executive aggrandizement.

A Critique of Madison's Constitutional Understanding

Having investigated the constitutional understanding that informed Madison's behavior as president, we are now in a position to evaluate that constitutional understanding better. Precisely because Madison himself defends the Constitution insofar as it promotes political reason over and against political irrationality, Madison's own constitutional understanding invites and even demands not just that we understand it on its own terms but that we also evaluate it. Madison insists that a republican executive is dangerous to our constitutional order. For that reason, he does all he can both to invigorate those institutions that can restrain the executive and to model (and thus encourage) a constitutionally circumscribed executive. Underlying this constitutional understanding is his belief that the legislature should be held responsible for something

like war preparedness because only the legislature possesses (and should possess) the power to prepare the country for war.

Given this constitutional understanding, we ought to return again to the War of 1812. Madison argues that the legislature should be as involved in his war as the executive. But, given the nature of their place in the legislature, legislators do not have the same incentive to be responsible in the manner in which they handle the war. Precisely because they know that responsibility will ultimately fall more on the president than on them—the War of 1812 was called at the time and even still today “Mr. Madison’s War”—they have no incentive to conduct themselves responsibly in their fulfillment of their powers. Thus, during the War of 1812, members of Congress were, at one and the same time, both irresponsible in failing to pass the legislation necessary to get the country ready for war and irresponsible in their zest for war, especially in their zest for the invasion of Canada (Stagg 1976). This irresponsibility should remind one of the high school teenager who drives his parents’ car ridiculously fast partially because he is not responsible for the payments on it if it crashes or for the payments on his insurance if he gets a speeding ticket. The fact that the country holds the president, and not Congress, responsible for what happens in a war encourages presidential responsibility. Although one can assign responsibility to the legislature, as Madison tried to, the problem is that this collective responsibility will not fall on any individual legislators. Individually, members of Congress can escape any real responsibility even as, collectively, Congress is held responsible.

The problem of this lack of responsibility in the legislature encourages us to empower the president sufficiently that we can hold him responsible in a manner that we cannot hold the legislature. And it is not clear that doing this would be antirepublican. One of our greatest presidents, Abraham Lincoln, saw that executive energy is an essential supplement to the republicanism of the legislature. If exercised vigorously but in a manner that is still somehow tethered to the Constitution, the executive’s leadership need not necessarily constitute the danger to the republic that Madison feared. This is not, however, to say that we should return to our unthinking devotion to vigorous executives. If Madison teaches us anything, it is that we should demand that vigor be tempered by a due awareness of the republican constitution that it serves. If untempered by this awareness and untethered from the Constitution, then the vigorous president becomes dangerous in all the ways about which Madison was so rightly worried. In fact, as I have suggested throughout, Madison’s conduct of the War of 1812 serves as a useful foil to some of our recent presidential wars. Where Madison enlisted the whole polity in the war by calling on Congress to take the responsibility to decide to declare it, “go-it-alone” presidents like Johnson and Bush have a more difficult time sustaining their wars because they always insist that they need only their own authority to undertake them.

Conclusion

When Bush assumed office in 2001, he, along with Dick Cheney, were quite explicit that they aimed to restore the powers of the presidency to those it should

rightfully possess under the Constitution. As though he were explicitly drawn by a constitutional theorist in order to illustrate the exact opposite of Madison's constitutional theory of presidential power, Bush was convinced that the president was too weak constitutionally and that his administration must actively seek to restore the constitutional powers and prerogatives of the presidency. In fact, if one analyzes all of the significant political battles of Bush's first year in office (prior to 9/11), they all revolve around this attempt to restore the constitutional powers of the presidency. And, for the remainder of his time in office, from the controversies over signing statements and executive orders to the controversies surrounding the Office of Legal Counsel (OLC) and its legal instructions, Bush's presidency was, as his former head of the OLC Jack Goldsmith called it, marked by what amounted to a "theological" drive to insist on the powers of the presidency (Goldsmith 2007). Just as Madison's presidency cannot be understood without incorporating his constitutional conceptions of the office, such is also the case with Bush's presidency. Rather than merely using both Madison and Bush sought, as one of their political goals, actively to construct a new constitutional understanding of the office's power and authority. And that constitutional construction cannot be simply ignored by being understood merely as a means to their other political goals. The constitutional construction became, in and of itself, one of their primary political goals.

In Madison's case, that constitutional construction could be said to have succeeded to the extent that it lay at the root of the manner in which the political parties were constructed—a construction that forms the basis of the antirhetorical posture taken toward the president in the nineteenth century. As Jeffrey Tulis shows, that posture was essential to allowing the whole separation of powers system to function properly. Once that posture was destroyed in the twentieth century, the size of the stage and the voice of the presidency overwhelmed the rest of the separation of powers system (Tulis 1987). Thus, Madison was right that the republican presidency constituted a profound threat to the constitutional system—a threat that Madison aimed to control through constitutional constructions that overemphasized the power of Congress and the power of the states. It was, however, the "extra-constitutional" political party system—in which both the power of the states and the power of Congress were made more secure—which ultimately succeeded in taming executive power in the manner Madison wanted (Milks 1993).

Just as Madison's constitutional construction of the presidency arose in response to the excesses of the republican executive, one might also hope that a post-Bush presidency found a constitutional construction that tempered his admirable case for executive vigor with an awareness of the constitutional order in which that vigor is situated and which it is meant to serve. Whether Obama has achieved this combination is beyond the scope of this article. It might suffice to say that, while he has sometimes achieved this combination at a rhetorical level, his administration's penchant for secret legal memos, which give the president at least as much power as Bush, if not more, point more to a new kind of constitutional construction in which the president presents himself as weak in his public rhetoric, while actually claiming large amounts of constitutional power "behind-the-scenes." In truth, this might not be all that new a combination. Many years ago, the

presidential scholar Robert Scigliano characterized Jefferson's presidency as having precisely this combination (1981). None of these combinations, however, can be seen and understood unless constitutional construction itself comes to be understood as an essential component of the presidency.

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