

## **Hindsight's 2020**

In the 1930s, following the startling rise of fascism through the democratic process in Europe, Sinclair Lewis published *It Can't Happen Here*, a dystopian novel on the theme of a similar infection spreading to the United States.<sup>1</sup> Though the events of January 6th, 2021 - in which armed insurrectionists, goaded (and implicitly endorsed) by President Trump,<sup>2</sup> stormed the United States' Capitol - remain fresh in our minds still, Lewis's text is aptly titled: fascism of the kind, seen decades ago, probably could not fall upon the United States. (Or, to borrow from another great American author, it would require a prodigious "plot against America."<sup>3</sup>) In short, what sets the American constitution's version of governance apart from its ostensible twins in the democracies of Europe is what all young civics students learn - or ought to - in their primary schools: the separation of powers and the "co-equal" forces of the branches upon one another.<sup>4</sup> Indeed, what most startlingly differentiates the structure of the United States' form of government from, say, Britain is the independence of the executive from the legislature. As a result, this system protects against the consolidation of power in one individual.<sup>5</sup> Plainly, what the Framers of the Constitution rightly recognized was a tendency for a gluttonous executive to err towards monarchical power if left unchecked by a competing branch of government.<sup>6</sup>

But a worrying trend is afoot: at present, through both judicial and legislative abdication of authority, the President wields tremendous power not directly given to the office by the

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<sup>1</sup> Sinclair Lewis, *It Can't Happen Here* (1935).

<sup>2</sup> See Olivia Rubin, Alexander Mallin & Alex Hosenball, ABC News 'Because President Trump said to': Over a dozen Capitol rioters say they were following Trump's guidance (2021), <https://abcnews.go.com/US/president-trump-dozen-capitol-rioters-trumps-guidance/story?id=75757601>; see also CBS Baltimore Staff, 'We Love You, You're Very Special': President Trump Tweets Message, Later Removed, To Rioters Storming The U.S. Capitol CBS Baltimore (2021), <https://baltimore.cbslocal.com/2021/01/06/its-time-to-go-home-now-president-trump-tweets-message-to-supporters-storming-the-u-s-capitol/>.

<sup>3</sup> Philip Roth, *The Plot Against America* (2004)

<sup>4</sup> Justice Antonin Scalia, On American Exceptionalism to the Senate Judiciary Committee (Oct. 5, 2011), <https://www.americanrhetoric.com/speeches/antoninscaliaamericanexceptionalism.htm>

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

Constitution.<sup>7</sup> This deviation from original design has resulted in an executive that, with the right experience, desire, and intent, could further aggregate power in this branch to the detriment of the rule of law.

And, what's more, this trend is not just seen at the federal level. States across the nation have shown over the last year, in fighting the coronavirus pandemic, just how powerful governors are - wielding largely uncontested power in an effort to fight the disease.<sup>8</sup> I should be clear from the outset: this is not an argument for or against many of measures that governors have taken to slow the spread of a deadly virus. On the contrary, these are questions of policy (and I would readily and happily concede that many measures are ones I myself support); however, these steps are a proxy for *any* executive action taken without a say from the legislature for a substantial length of time. Put plainly, then, the governors here are used as a shorthand for what these state-level executives are capable of achieving: wholly independent actions in the face of a shell of a legislature. To reiterate, though, it is the power - not the manifestations of it in the form of present policies - that is the target of this essay.

To these ends, what I will principally argue for here is what I will call a New War Powers Act. In the 1970s, following the global catastrophe of the Vietnam War, Congress took the critical step to pass legislation that trimmed the President's war-making power.<sup>9</sup> Here, the intent is lifted to apply, broadly, to a fight against an overreaching executive that borders on monarchical power. This novel legislation combines two divergent but essential ideals: the necessity for the executive to make quick, decisive decisions but for the legislature to eventually

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<sup>8</sup> See Trip Gabriel, State Lawmakers Defy Governors in a Covid-Era Battle for Power The New York Times (2021), <https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html>.

<sup>9</sup> See War Powers Act, Encyclopædia Britannica, <https://www.britannica.com/topic/War-Powers-Act>.

have input into those actions.<sup>10</sup> Just the same, the legislature is not alone in reigning in and reclaiming authority - indeed, the judiciary must also make a concerted effort to return to the intent of the Framers and restore needed checks on the executive branch.

### **Constitutional Origins**

In seeking to run as radically counter to the king, from whose thumb they only recently freed themselves, the Framers sought to set up guardrails to isolate and check executive power.<sup>11</sup> James Madison wrote in *Federalist No. 51* that the executive must be “independent of the legislature” for “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others...[a]mbition must be made to counteract ambition...[so as to protect] the rights of individuals [for they] will be in little danger from interested combinations of the majority.”<sup>12</sup> In plain terms, Madison’s words convey the need for the branches of government to not overlap in power: “ambition,” or self-interest, from the individual actors within each branch are placed in conflict - rather than designed for cooperation - with one another.

The resulting governmental system would thus be one in which powers were distributed from the outset and potential encroachments on these delineated roles thereafter would force the branches into a defensive stance. Allegiance, in the Framers’ form of government, would pit actors across (or even within) the branches in order to best prevent unilaterally made measures.

Without the input of the political arms of the government (those sans the judiciary), policy

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<sup>10</sup> See *The Federalist* No. 70 (“[w]herever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office... there is a peculiar danger of personal emulation and even animosity.” which may result in “a feeble Executive” and, in turn, “a feeble execution of the government.”)

<sup>11</sup> See *The Federalist* No. 51

<sup>12</sup> *Id.*

initiatives would lack compromise - or, more basically, a product which is an amalgam of various “ambitions.”

### **State-Level Trends**

Louis Brandeis famously noted that the states in our federal republic are the “laboratories of democracy.”<sup>13</sup> Such is the power of our tiered system of governance: ideas or policies are worked out on the lower levels and, with any luck, make their way into federal law. Of course, though, not all policies are ones that ought to come to the surface. We are, perhaps, in the midst of one such era now with more and more power bestowed to the executive branch at the state level. Take New York state as an example in its fight against the coronavirus pandemic: Governor Andrew Cuomo, under the discretion of his emergency powers, wielded immense personal authority over the state’s handling of what was once the country’s viral epicenter.<sup>14</sup> In the spring and summer - during the early months of the pandemic - Governor Cuomo was rightly heralded as a steady leader, guiding the state through immense emotional and economic disaster.<sup>15</sup>

Nevertheless, not all of the measures that the governor put in place are worthy of praise. Either out of ignorance or expedience, Governor Cuomo sent thousands of patients from the paradoxical safety of a hospital into the buzzsaw of nursing homes throughout the state.<sup>16</sup> Worse yet, in recent weeks, it has come to light that the governor falsified the number of deaths that occurred when the elderly patients were placed back in the care facilities from which they

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<sup>13</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (“a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

<sup>14</sup> Jesse McKinley & Luis Ferré-sadurní, *Cuomo Faces Revolt as Legislators Move to Strip Him of Pandemic Powers* *The New York Times* (2021), <https://www.nytimes.com/2021/02/17/nyregion/cuomo-nursing-homes-deaths.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

originally came in the name of circumventing necessary federal intervention or to belie the foolishness of the effort.<sup>17</sup>

In light of these revelations, the state's legislature has begun to stir. State Senator Gustavo Rivera stated that new legislative efforts are "to remind [Governor Cuomo] that the state government is not one big branch: there's three of them."<sup>18</sup> The proposed legislation "would limit the governor's ability to supersede state laws to combat the pandemic and would establish a 10-person commission, made up of members of the Assembly and Senate, to evaluate any future pandemic-related directives by Mr. Cuomo, as well as suspensions of laws."<sup>19</sup> Indeed, State Senate majority leader, Andrea Stewart-Cousins stated plainly that "the public deserves to have checks and balances."<sup>20</sup>

While the example of Governor Cuomo is an unique, once-in-a-lifetime scenario, it exemplifies the worrying power that governors hold under the heading of emergency powers. Should a governor deem a situation an "emergency," by his or her authority, they suddenly hold nearly unrestricted power.<sup>21</sup> Though the Federalist Papers outlined the scope of the federal government, the sentiment should not be lost on an individual state: allowing power into the hands of one individual - without the requisite input of the other branches of government - spells disaster. By analogy, Leon Trotsky summarized fascism as an end result in which "all the organs and institutions of sovereignty, the executive administrative, and educational powers of the state" are vested in one set of hands.<sup>22</sup> To call it either monarchical or fascistic, it matters not: when power consolidates in one body, it is an immediate cause for concern. This is the power that governors hold, being capable of inhaling the full extent of state power for their use.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Gabriel, *supra* note 8

<sup>22</sup> Leon Trotsky, *Fascism, What is it and How to fight it* (1993).

## **Federal-Level Concerns**

And just the same as at the state-level, the president has slowly gained power more. Most notably, the president has accumulated war powers that likely far exceed what is guaranteed in the Constitution.<sup>23</sup> The process by which this has occurred has started not in the Oval Office but a short ride away in the halls of Congress. Nevertheless, through various laws, the legislature has granted the President seemingly even more unlimited powers to initiate conflict. In February 2020, for example, President Biden called for a drone strike in Syria with no clear imminent threat (these strikes were not a deterrent) and the only Congressional input being nearly twenty years earlier during George W Bush's administration.<sup>24</sup>

But, Congress is not the only entity culpable. Indeed, the Supreme Court, through its *Chevron* doctrine has also granted the President not just the ability to make the law but to interpret it too.<sup>25</sup> In short, the Court has deferred to Congress which has deferred to the President: if the law passed is ambiguous, executive agencies are to dictate what the law says, not courts. Not only does this mean the political tides will violently rock stakeholders,<sup>26</sup> it most dramatically grants the President the force of the judiciary in dictating what the law means.

Both of these forms of deference, from two branches of government, drive the underlying thematic concerns: like the state governors, the President too grows more powerful to the point of muscling out the other branches of government. Simply, the president has become, slowly, more like a king.

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<sup>23</sup> See Jonah Shepp, What Were the Legal (and Strategic) Grounds for Biden's Syria Airstrikes? *Intelligencer* (2021), <https://nymag.com/intelligencer/2021/02/the-legal-and-strategic-grounds-for-bidens-syria-strikes.html>.

<sup>24</sup> See *id.*

<sup>25</sup> See James J. Bernstein, Abandon Judicial "Neutrality": Why Chevron Deference Stifles Technological Innovation, 27 *RICH. J.L. & TECH.*, no. 1, 2020.

<sup>26</sup> See *id.*

## **Possible Solutions**

To these various ends, I offer a two-pronged approach, catalyzed by both state and federal legislatures along with the judiciary, to return to the ideals of the Framers while also considering the divergent interests at play. First, I propose the adoption of a New War Powers Act. This legislation would ensure the needed ability for executives to respond quickly and decisively to emergencies (without the inherent deliberation required by legislatures) while curbing the ability for this power to reign in perpetuity. When Congress passed the original War Powers Act it did so “to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply [to armed conflicts].”<sup>27</sup> This new legislation does the same in principle: to fulfill the intent of our democratic republic’s limitations on the consolidation of power through intra-governmental conflict.

Similarly, it is my sincere hope that the judiciary remains true to the Constitution, not only - if not not at all - to the legislature. In short, challenges to executive authority - despite, or in spite of, Congressional blessing (for example) - does not *de facto* mandate that courts are to adopt the same view out of passivity. On the contrary, the judicial branches throughout our country, not least of which being our Supreme Court, are deferential not to the text of legislation but the Constitution alone. Accordingly, challenges - however few and far between - to these executive actions of all kinds must be actively tested against the text rather than passively accepting the judgement of the legislature or executive agencies. Doing so would implicitly bless

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<sup>27</sup> 50 U.S. Code § 1541

an executive gone wild with no allegiance to the vision and words of the framers or similar political figures.

## **Conclusion**

In addition to hopefully learning of the structure of our government, in primary schools (or at least in mine) we were taught the invaluable lesson of the “Golden Rule”: do unto others as you would have done unto you. Invaluable advice for getting along well with classmates - and an equally helpful doctrine for understanding our present predicament with executive power. However one may feel about a particular policy, each individual action taken by an executive represents the extent of the executive’s power. These various authorities may advance causes we care deeply about; they may also erode any hope of achieving ends that we seek. Limiting executive power - by definition, power that already rests in one set of hands - better limits the devolution of democracy towards tyranny.

Passing legislation offers some of this protection given the recent trend seen at both the state and federal level of growing independent executive agency: a New War Powers Act, passed in the spirit and shadow of the Vietnam War’s presidents, is done with an eye towards returning to the ideals of the framers. What’s more the judiciary is equally key in reigning in executive power: an active Supreme Court, for example, is one that responds not to the impulsive whines of the legislature but the sustained song of the Constitution. In turn, challenges to the demonstrations of an overreaching executive should not be looked at as manifestations of the legislatures will but, rather, gross violations of our system of governance.