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## Globalization and the Growth of Executive Power: An Old Story

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# GLOBALIZATION AND THE GROWTH OF EXECUTIVE POWER: AN OLD STORY

ALASDAIR ROBERTS\*

## ABSTRACT

*Americans have always worried about an undue concentration of power in the executive branch. Recently, people have worried that globalization might be making the problem even worse. But the concern is overstated, or at least misstated. Globalization is not a new phenomenon, and most of its effect on executive power was realized decades ago. And globalization might undermine executive power, rather than bolster it, either because globalization undermines the authority of the nation-state or shifts authority to technocrats. If there is a general tendency toward increased executive power in the twenty-first century, this is might attributable more directly to other factors, such as improvements in information technology, intensified electoral competition, and judicial decisions that have undermined checks on the accumulation of authority in the executive branch.*

## INTRODUCTION

This is a story about the apparent collision between an old anxiety and a new trend in economic and social affairs. The old anxiety is the fear of uncontrolled executive power.<sup>1</sup> The United States emerged from a revolution against monarchy, and the system established under the Constitution of 1789 was one in which the power of the president was carefully hedged. But the pressure of events often undermined the initial design. Throughout the twentieth century, the power of the president grew. In 1973, the historian Arthur Schlesinger Jr. lamented the rise of an "imperial presidency" marked by habits of secrecy and

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1. See generally HOWARD FINEMAN, *THE THIRTEEN AMERICAN ARGUMENTS: ENDURING DEBATES THAT DEFINE AND INSPIRE OUR COUNTRY* 159-77 (2008) (describing the growth and decline of presidential power).

exclusion in both foreign and domestic affairs.<sup>2</sup> Schlesinger issued another warning about the imperial presidency thirty years later, during the administration of George W. Bush. The “constitutional balance,” Schlesinger said, referencing the post-Watergate Nixon Administration, had been “upset in favor of presidential power and at the expense of presidential accountability.”<sup>3</sup>

The new trend that seems to be upsetting the constitutional balance of powers even further is globalization. Wallace Steger defines globalization as “a set of social processes that are thought to transform our present social condition into one of globality . . . [that is,] a social condition characterized by the existence of global economic, political, cultural and environmental interconnections and flows that make many of the currently existing borders and boundaries irrelevant.”<sup>4</sup> We might put this more concretely as a condition distinguished by the increased flow of money, goods, people, and information across national borders. It is driven by the inherent dynamics of capitalism, technological innovations, and decisions by governments over the last forty years that have lowered the barriers to cross-border flows.

There are three reasons why globalization might seem to enhance executive power within the American system of government. The first is that many subjects once regarded as matters of domestic policy—such as financial regulation or food and drug safety—are now also addressed in supranational forums, in which national executives have traditionally enjoyed the leading role. In fact, the growing importance of international organizations and intergovernmental networks is said to be producing a new era of “transnational governance.”<sup>5</sup> The second is that porous borders have made the United States vulnerable to new security threats—such as terrorist and cyber attacks, pandemics, and even unexpected economic shocks—and the task of managing these various “security crises” is again something that has been traditionally

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2. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 208 (1973).

3. ARTHUR M. SCHLESINGER, JR., *WAR AND THE AMERICAN PRESIDENCY* 45 (2004). See also Andrew Rudalevige, *The Contemporary Presidency: The Decline and Resurgence and Decline (and Resurgence?) of Congress: Charting a New Imperial Presidency*, 36 *PRESIDENTIAL STUD. Q.* 506 (2006) (reviewing the impact of imperial presidencies prior before and after September 11, 2011).

4. MANFRED B. STEGER, *GLOBALIZATION: A VERY SHORT INTRODUCTION* 7-8 (1st ed. 2003).

5. See generally *HANDBOOK OF TRANSNATIONAL GOVERNANCE* (Thomas Hale & David Held eds., 2011) (describing the advent of transnational governance); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (outlining the interrelationship between intergovernmental networks and transnational governance); *TRANSNATIONAL GOVERNANCE* (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2006) (describing the growth of intergovernmental networks).

regarded as an executive function. Executives often declare *de jure* or *de facto* “states of emergency” in response to such crises, which justifies the expansion of executive discretion.<sup>6</sup> The third is globalization seems to aggravate the phenomenon of “social acceleration”—that is, the quickening of social and economic change.<sup>7</sup> This naturally tends to shift power to the executive because legislative bodies appear unable to address new challenges with sufficient speed, and because the mechanism by which legislatures express their preferences—that is, statutory law—may also be too rigid to accommodate a rapidly-changing world.

The argument that the current phase of globalization is aggravating the problem of executive power is appealing but overstated. In fact, globalization is not a new phenomenon, and most of its effect on executive power was realized decades ago. Modern-day globalization might actually *undermine* executive power, either because it limits the authority of the nation-state or shifts influence to technocrats within the executive branch. If there is a general tendency toward increased executive power in the twenty-first century, it might be more directly attributable to other factors. One factor is the steady improvement of information technology, which has the effect of changing public perceptions about the responsibilities of the federal government and of the president in particular. Another factor could be intensified electoral competition at the federal level, which causes presidents to make bigger promises about the actions they will take to improve the lives of voters. Yet another factor could be a set of judicial decisions that have weakened the constitutional checks on the expansion of federal and executive power.

## I. AN OLD STORY

Arguments about the connection between globalization and executive power sometimes refer to an earlier phase in American history when the nation was largely disengaged from world affairs and

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6. For a discussion about the invocation of emergency powers in response to terror attacks, see MICHAEL FREEMAN, *FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR* 1-24 (2003). However, emergency powers are often sought in response to economic crises as well. Franklin Roosevelt did this at the start of his presidency. See ALASDAIR ROBERTS, *FOUR CRISES OF AMERICAN DEMOCRACY: REPRESENTATION, MASTERY, DISCIPLINE, ANTICIPATION* 84-86 (2017). The Emergency Economic Stabilization Act of 2008, adopted in response to the financial crisis, also provided broad discretion to the executive branch. See George Will, *Bailing Out of the Constitution*, WASH. POST, Mar. 29, 2009, at A15.

7. See WILLIAM E. SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* 1-26 (2004).

executive power was limited. This golden age of isolation was described by James Bryce in his famous study of American government, published in 1887, stated "America, has little occasion to think of foreign affairs."<sup>8</sup> He further stated "[she] lives in a world of her own, *ipsa suis pollens opibus, nihil indiga nostri*."<sup>9</sup> Although Bryce acknowledged the power of the president could expand in wartime, in peacetime his power "is not great."<sup>10</sup> "A President can do little, for he does not lead either Congress or the nation."<sup>11</sup> "In ordinary times the President may be compared to the senior or managing clerk in a large business establishment, whose chief function is to select his subordinates, the policy of the concern being in the hands of the board of directors."<sup>12</sup>

Bryce's view was shared by Woodrow Wilson, who wrote in 1885 that the office of the president had little influence or prestige and that "the power of Congress has become predominant."<sup>13</sup> Wilson conceded that it had not always been this way. In the first decades of its history, the American government was constantly "quarreling and fighting" with European powers, and this had naturally extended the role of the early Presidents, "since theirs was the office of negotiation" in foreign affairs.<sup>14</sup> But in 1885, the country was at peace. The Civil War had been over for twenty years, there had not been a significant dispute over national borders in almost forty years, and wars to pacify "Indian country" were largely concluded. For all these reasons, Wilson observed, presidential influence was waning.

In fact, though, the moment described by Bryce and Wilson was unusual. As Wilson conceded, most of the preceding century of American history had been dominated by worries about threats posed by external influences, and about the indeterminacy and porosity of the nation's borders. These were circumstances that encouraged the

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8. JAMES BRYCE, 3 *THE AMERICAN COMMONWEALTH* 117 (London, Macmillan 1888) [hereinafter BRYCE 3].

9. JAMES BRYCE, 1 *THE AMERICAN COMMONWEALTH* 412 (London, Macmillan 1888) [hereinafter BRYCE 1]. The italicized words are drawn from a poem by Lucretius. It translates roughly as: *It is completely self-sufficient and does not need us*. In 1911, the writer Sydney Brooks described the American situation in these terms: "[T]hat happy or harmful isolation which has relieved America from the effects, at once complicating and fortifying, of a constant external pressure. Alone among the great Powers the United States is not menaced. . . . [The nation exists] in an almost unvexed tranquility. Nothing endangers her national security." See Sydney Brooks, *American Foreign Policy*, 271 *LIVING AGE*, Dec. 9, 1911, at 603, 603.

10. BRYCE 1, *supra* note 10, at 83.

11. *Id.* at 392.

12. *Id.* at 85.

13. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 43 (Boston, Houghton Mifflin Co., 2d ed. 1885).

14. *Id.*

expansion of executive power. During the quasi-war with France from 1798 to 1800, for example, President John Adams acquired a broad power to imprison or deport hostile aliens, and to prosecute conspiracies that "oppose[d] any measure or measures of the government."<sup>15</sup> In 1803, Thomas Jefferson abandoned his own statements about the limits of presidential power in order to execute the Louisiana Purchase, which he considered to be essential to the "peace and security of the nation."<sup>16</sup> The attempt by Jefferson's administration to prohibit overseas trade, an action intended to preserve U.S. neutrality during the Napoleonic Wars, also provoked complaints about the unconstitutional accumulation of executive power and the advent of "unblushing tyranny."<sup>17</sup> James Monroe, a protégé of Jefferson, also purported to take a limited view of presidential powers but nonetheless expanded those powers during the First Seminole War. Presidents Tyler and Polk, also expanded executive powers as tensions mounted with Mexico over the annexation of Texas in the 1840s.<sup>18</sup> And the Civil War resulted in an extraordinary concentration of authority in the hands of President Abraham Lincoln.<sup>19</sup>

The century after the 1880s was also distinguished by an expansion of presidential power in response to threats posed by uncertain or porous borders. Challenges to American security came in three different forms. First, there were threats to the United States posed by other states. The executive acquired extraordinary authority over economic and social affairs after the United States entered World War I in 1917. This is often regarded as a "foreign war," but domestic support for

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15. See generally Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (giving the president authority to imprison and deport "dangerous" non-citizens); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (granting the president power to imprison and deport non-citizens from a hostile nation); Sedition Act, ch. 74, § 1, 1 Stat. 596 (1798) (criminalizing the act of making false statements criticizing the federal government).

16. President Thomas Jefferson, Statement to the Senate and House of Representatives of the United States (Jan. 16, 1804); see also HENRY ADAMS, 2 HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 90 (New York, C. Scribner's Sons 1889).

17. Theseus, *Letter to the Editor of the North American*, NORTH AM. & MERCANTILE DAILY ADVERTISER, May 26, 1808, at 2, 2. See generally Embargo Act of 1807, ch. 5, 2 Stat. 451; Enforcement Act, ch. 33, 2 Stat. 473 (1808) (together granting Jefferson the executive power to enforce the Alien and Sedition Acts); James Duncan Phillips, *Jefferson's "Wicked Tyrannical Embargo"*, 18 NEW ENG. Q., Dec. 1945, at 466 (1945) (examining the effects of the 1808 Jefferson embargo on the United States economy through a case study of Salem, Massachusetts).

18. See ARTHUR BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 46, 70-72, 109 (1921).

19. As James Bryce acknowledged: "Abraham Lincoln wielded more authority than any single Englishman has done since Oliver Cromwell. It is true that the ordinary law was for some purposes practically suspended during the War of Secession." BRYCE 1, *supra* note 10, at 84.

American engagement was also driven by concern that Germany was attempting to incite Mexico to attack the United States.<sup>20</sup> Japan's direct assault on America in 1941 precipitated another concentration of executive authority as the United States entered World War II. By the early 1950s, the Soviet Union was known to have the capacity to drop nuclear weapons on American soil with long-range bombers, a fact that made national borders seem inconsequential. The advent of the long Cold War meant that the unusual power of a wartime president would become a fact of everyday life. In 1948, Clinton Rossiter called it a state of "constitutional dictatorship."<sup>21</sup>

A second dimension of national vulnerability arose from the flow of people across American borders.<sup>22</sup> Immigration into the United States was largely unrestricted at the start of the twentieth century—except for immigration from China, which was prohibited by Congress in 1882.<sup>23</sup> Until the early 1890s, immigrants never met a federal official when they landed at an American port. Between 1900 and 1909, roughly eight hundred thousand people arrived in the United States every year—an extraordinary number, given that the total population was only about eighty million. Many people regarded this unrestricted flow as a serious threat to American democracy because many immigrants were illiterate and "backward in western ideas." Immigrants were also blamed for the spread of "foreign creeds" such as anarchism, socialism, and communism; for acts of terror, such as the assassination of President William McKinley in 1901 and a wave of bomb attacks in 1919; and for increasing radicalism within the American labor movement. From 1917 until the 1960s, the country was seized with the fear that "subversive red elements" had insinuated themselves into major American institutions. The result of these anxieties was another buildup of executive power, through the adoption of immigration laws that granted broad discretion over the entry and removal of aliens, through the establishment of new institutions for counterintelligence such as the Federal Bureau of Intelligence, and through systems of "loyalty testing" for public employees.

A third dimension of national vulnerability had to do with the economy. For most of the nineteenth and early twentieth centuries, the American economy was very open: American businesses depended

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20. U.S. State Department-Office of the Historian, *U.S. Entry into World War I, 1917*, <https://history.state.gov/milestones/1914-1920/wwi> (last visited May 19, 2017).

21. See generally CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (1948).

22. This paragraph draws on ROBERTS, *supra* note 6, at 30-68.

23. U.S. State Department-Office of the Historian, *Chinese Immigration and the Chinese Exclusion Acts*, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited May 19, 2017).

heavily on the inflow of capital from London, Paris, and Amsterdam, and trade between the United States and Europe was extensive.<sup>24</sup> Indeed, the idea of a self-contained “American economy” did not become familiar until the late 1930s. The reality before that time was deep integration into a trans-Atlantic economic system.<sup>25</sup> One consequence of this reality was that the United States was vulnerable to economic shocks from overseas: this was another respect in which borders were inconsequential. “We are part and parcel of a great world economic system,” an American banker said in 1922. “Distress anywhere reacts on us . . . .”<sup>26</sup> The Long Depression of 1873 to 1896, which caused social unrest and political upheaval across the United States, was a thoroughly international crisis. Events overseas also contributed to the United States’ Panic of 1907, its Depression of 1920-21, and to the financial crash of 1929 and the Great Depression of the 1930s.<sup>27</sup>

By the 1930s, neither the American people nor the American establishment were prepared to continue suffering from the economic pain and social unrest that followed from these periodic economic shocks. Some method had to be found to buffer the newly invented “American economy” from external influences and regulate that economy so that it was not afflicted with severe cycles of boom and bust. The result was the invention of an extensive federal apparatus for controlling monetary and fiscal policy, regulating private enterprises, and providing income support to the American people.<sup>28</sup> This was the New Deal apparatus; after the Second World War, it was complemented by the Bretton Woods system for coordinating national economies and controlling cross-border capital flows.<sup>29</sup> One effect of these reforms was to increase, yet again, the power of the American president. The president was assigned the main responsibility for managing the economy. He was responsible for oversight of the domestic apparatus for

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24. See ALASDAIR SCOTT ROBERTS, *AMERICA’S FIRST GREAT DEPRESSION: ECONOMIC CRISIS AND POLITICAL DISORDER AFTER THE PANIC OF 1837*, at 1-11 (2012).

25. For example, see the description of the “economic system of civilization” in BROOKS ADAMS, *AMERICA’S ECONOMIC SUPREMACY* (New York, Macmillan 1900).

26. *Europe Must Go to Work*, KAN. CITY STAR, May 17, 1922, at 5.

27. See CHARLES POOR KINDLEBERGER & ROBERT Z. ALIBER, *MANIAS, PANICS AND CRASHES A HISTORY OF FINANCIAL CRISES* 123-42 (John Wiley & Sons, Inc. 2005) (1978); ROBERT M. MACIVER, *THE WEB OF GOVERNMENT* 289 (1947) (observing about the Great Depression, “The failure . . . of a bank in Austria, the Credit Anstalt, had grave repercussions over the civilized world, precipitating a whole train of economic disturbances. The credit mechanism had become an international one so that a block, interference, crisis or depression anywhere affected the livelihood of peoples hundreds or thousands of miles away.”).

28. ROBERTS, *supra* note 6, at 89-90.

29. JEFFREY A FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* 278-300 (Norton 2006).



economic management, as well as the conduct of international economic affairs through the Bretton Woods institutions. The president's new responsibilities were affirmed in the Employment Act of 1946, which gave the president a new Council of Economic Advisers and required that he issue an annual report outlining his program for maintaining employment, production, and purchasing power.<sup>30</sup>

The effect of all these trends was to produce a system of government that was radically different than that described by Bryce and Wilson in the 1880s. By the mid-1950s, the dominance of the president within the federal government was firmly established. There were, of course, widespread concerns about the concentration of executive power. The period between 1920 and 1980 was characterized by attempts to find ways of taming executive power—for example by overhauling congressional oversight, revising the body of administrative law and methods of judicial review, and improving the capacity of journalists and other nongovernment organizations to monitor the work of executive agencies. But the important point is that this rapid growth of executive power did happen—and moreover, happened mainly as a response to the perceived vulnerability of American society to attacks or shocks from abroad.

## II. HOW GLOBALIZATION UNDERMINES EXECUTIVE POWER

In sum, we can see that concerns about the indeterminacy or porosity of borders are not peculiar to the post-1980 “age of globalization.” They have always shaped the development of American government. Any effect that the current wave of globalization might have on the balance of powers today is small compared to the effects that were felt in preceding decades. In other words, they are effects on the margins. The main impact of globality on executive power was manifested at least a half century ago, and in fact the country is already well practiced in the art of reconciling this expanded executive authority with its longstanding fears about the potential abuse of concentrated power.

We might even go further than this. We could even argue that modern-day globalization is actually *undermining* executive power, rather than enhancing it. There are two arguments that we might make in support of this claim. The first argument has to do with the apparent decline of state authority overall, while the second has to do with the balance of power within the executive branch, between politicians and technocrats.

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30. See Employment Act of 1946, Pub. L. No. 79-304, § 3(a).

First, we will consider the argument about globalization and overall state authority. Obviously the power of the president is limited by the overall capacities of the national government: a strong president in a weak government may be still disadvantaged in comparison to a weak president in a strong government. And in this respect, we must observe that there has been a tendency over the last two decades to argue that the main effect of globalization has been to undermine the power of the nation-state as a whole. This line of argument was set out by Ken'ichi Ōmae in an influential 1995 book, *The End of the Nation State*. Political leaders, Ōmae argued, had made the mistake of assuming that there "always would be borders between countries." But this was a mistake: trade, investment, information, and people now flowed "relatively unimpeded across national borders." One of the consequences was a decline in the relevance of national governments. The idea of a nation-state, Ōmae concluded, was "a nostalgic fiction" at the end of the twentieth century, nation-states were "little more than bit actors" on the global stage.<sup>31</sup>

Ōmae was not alone in making such arguments. The French diplomat Jean-Marie Guéhenno also published a book titled *The End of the Nation-State* in 1995. Guéhenno took a similarly grim view about the effects of globalization on national sovereignty. He argued that the state had been "bypassed by transnational games" and no longer functioned as "the natural space of solidarity and political control"; it was too remote to manage the problems of our daily life, and "too constrained to confront the global problems that affect us."<sup>32</sup> In 1996, the British academic Susan Strange also lamented "the retreat of the state" as a result of globalization. State authority had been hollowed out, Strange argued: "Heads of governments may be the last to recognize that they and their ministers have lost the authority over national societies and economies that they used to have. Their command over outcomes is not what it used to be."<sup>33</sup> The American political scientist Jessica Matthews concurred, arguing in 1997 that globalization had brought an end to the centuries-long trend toward "concentration of power in the hands of states . . . The absolutes of the Westphalian system . . . are all dissolving."<sup>34</sup>

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31. KEN'ICHI ŌMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 12 (1995).

32. JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* 11-13 (1995).

33. SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 3 (1996).

34. Jessica Matthews, *Power Shift*, 76 *FOREIGN AFF.* 50, 50 (1997).

I have argued elsewhere that these predictions about the demise of the nation-state may be overwrought.<sup>35</sup> National governments have been vigorous in reasserting authority in the new millennium, especially in the drive to address new threats to national security and internal order. Indeed, the 2016 presidential race in the United States provides evidence of the resurgence of a more muscular nationalism, with calls for a strengthened military, tighter border controls, and new restrictions on trade and international finance.

Suppose, though, that we put these reservations aside for the moment, and accept that there might be some merit to the argument that globalization is weakening the overall power of states. If this is the case, then the effect is to corrode the power of all national actors, including the executive. Susan Strange made this point directly. As she said in 1996, it is “heads of government[s] . . . [who] lost the authority over national societies and economies that they used to have.”<sup>36</sup> Perhaps it is true that executives play an increased role in international negotiations, or within the mechanisms of transnational governance—but we ought to regard this as a defensive strategy that is intended to preserve influence in a world that is witnessing a general decline in the power of national governments.

There is also a second sense in which globalization might corrode executive power. We sometimes make the mistake of regarding the executive branch as a monolith. But it is not: within the executive, there is also a tension between the political class—consisting of the president, political appointees, and their advisors—and the permanent bureaucracy. One of the features of the neoliberal age was a heightened appreciation of this tension. The Reagan administration came into power with a strong sense that the bureaucracy wielded too much influence over its political masters. “What is actually in place here,” one conservative advisor said at the time, with reference to the career civil service, “is a permanent, self-enclosed system that operates on its own terms, toward its own ends, according to its own laws. This system of permanent government defers only reluctantly to manifestations of public sentiments in elections.”<sup>37</sup> A similar view prevailed within the

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35. See Alasdair Roberts, *The Nation-State: Not Dead Yet*, 39 WILSON Q. 5 (2015). *But cf.* ALASDAIR ROBERTS, *THE COLLAPSE OF FORTRESS BUSH: THE CRISIS OF AUTHORITY IN AMERICAN GOVERNMENT* 1-5 (2008) (arguing that the administrations of President George W. Bush also grappled with the corrosive effects of globalization on the authority of national governments, a fact generally neglected by critics of Bush’s “imperial presidency”).

36. STRANGE, *supra* note 27, at 3.

37. M. Stanton Evans, *Steering the Elephant*, in *STEERING THE ELEPHANT: HOW WASHINGTON WORKS* 1, 2 (Robert Rector & Michael Sanera eds., 1999). *See generally* DONALD P. MOYNIHAN AND ALASDAIR S. ROBERTS, *The Triumph of Loyalty over*

conservative government of British Prime Minister Margaret Thatcher in the 1980s. The main goal of civil servants, one writer said, was to “advance their own careers and improve their own lives.”<sup>38</sup> In both countries, the drive was to find new ways of reasserting political influence over the bureaucracy—for example, by undertaking more aggressive oversight of key bureaucrats, limiting bureaucratic tenure, and sharpening material incentives for public servants to pursue politically defined objectives.

However, the neoliberal project that was launched by the Reagan and Thatcher governments had some unexpected consequences with regard to the balance of power between politicians and bureaucrats. The project was often regarded as one that was aimed at liberating markets and restricting the role of the state.<sup>39</sup> In particular, barriers to cross-border trade and finance were to be reduced. This meant a revival of a globalized economy. But there were still ways in which this globalized economy had to be managed. Methods had to be found for coordinating monetary and fiscal policy, as well as regulation in a wide variety of areas—banking, insurance, antitrust policy, securities trading, food and drug safety, environmental policy, and so on. This proved to be highly technical work. It was naturally the province of bureaucrats, not politicians. Thus the neoliberal project had the effect of bolstering the role of the “permanent government” even while leaders of that project complained about their influence.

One example of this phenomenon can be found in the domain of central banking. Sound money was a key element of the neoliberal platform. In practice, this meant bolstering the autonomy of central banks so that they would be protected from pressure to pursue policies that promoted short-term growth at the risk of increased inflation. There was a worldwide movement toward formal central bank independence after 1980.<sup>40</sup> At the same time, central bankers also developed more sophisticated techniques for communicating and coordinating among themselves. “In the view of Martin Marcussen, the world witnessed the emergence of a “trans-governmental governance network” of central bankers—a “more or less formalized institutional

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*Competence: The Bush Administration and the Exhaustion of the Politicized Presidency*, 70 PUB. ADMIN. REV. 572 (2010) (reviewing the George W. Bush administration's extreme efforts to gain greater political control of the federal bureaucracy by rewarding loyal supporters and prioritizing political goals).

38. *The Trap: What Happened to Our Dream of Freedom? Part 1* (BBC television broadcast Mar. 11, 2007).

39. See DANIEL YERGIN, & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* Chap. 4 & 12 (Simon & Schuster 1998).

40. See ALASDAIR ROBERTS, *THE LOGIC OF DISCIPLINE: GLOBAL CAPITALISM AND THE ARCHITECTURE OF GOVERNMENT* 34 (2010).

framework” for development of central bank policy whose core is “small, coherent, and tightly interconnected.”<sup>41</sup> Similarly, Anne Marie Slaughter argued “that central banks constructed a “dense web of relations” that serve as a conduit for policy deliberations and also for information about central bankers’ “reputations . . . concerning competence, quality, integrity, and professionalism.”<sup>42</sup> This trans-governmental network has had the effect of bolstering the power of central banks against other domestic actors, including both heads of government and legislators. Central bankers are able to defend their own positions by appealing to the prevailing wisdom within the global network. Indeed, the network may impose reputational costs on central bankers who bend to political influence.

Central bankers have constructed a global “epistemic community”: that is, a transnational “network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”<sup>43</sup> They are not alone in this respect. Every policy domain that requires cross-border coordination has the effect of promoting the emergence of such a community, which in turn has the effect of providing national experts with more resources for defending their position in the context of national politics. One recent study observes that “a number of recent empirical studies indicate that national agencies’ participation in transnational networks challenges entrenched national actor constellations by empowering the agencies vis-à-vis their parent ministries.”<sup>44</sup> The effect has been closely studied in the context of the European Union, where researchers have found that in a variety of policy areas, ranging from antitrust to privacy, the integration of domestic regulators into EU-level networks has had the effect of enhancing their “policy autonomy” at home.<sup>45</sup> The end result is that the

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41. *Id.* at 37 (quoting Martin Marcussen, *The Transnational Governance Network of Central Bankers*, in TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION (Djelic and Sahlin-Anderson, eds., 2006)

42. *Id.* (quoting ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER*, 54 (Princeton Univ. Pres., 2004)

43. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG., Winter 1992, at 1, 3 (1992).

44. Tobias Bach, et al., *The Differential Empowering Effects of Europeanization on the Autonomy of National Agencies*, 28 GOVERNANCE: INT’L J. POL’Y, ADMIN., & INSTS., JULY 2015, AT 285, 286 (2015).

45. See generally Tobias Bach & Eva Ruffing, *Networking for Autonomy? National Agencies in European Networks*, 91 PUB. ADMIN., no. 3, at 712 (2013) (addressing EU agencies and their autonomy); Ole Andreas Danielsen & Kutsal Yesilkagit, *The Effects of European Regulatory Networks on the Bureaucratic Autonomy of National Regulatory Authorities*, 14 PUB. ORG. REV. 353 (2014) (reviewing the effect of agency autonomy on EU regulating bodies); Abraham L. Newman, *Building Transnational Civil Liberties:*

power of the executive branch relative to the legislative branch is increased—but this power is held by technocrats rather than politicians within the executive branch.

### III. THE REAL DRIVERS OF EXECUTIVE POWER

The purpose of this paper has been to examine the proposition that the current trend toward globalization has tended to upset the balance of powers within the American system of government, by advantaging the executive over the legislative and judicial branches. The argument so far has been that the proposition is overstated or misguided. It is overstated because globalization is actually a very old phenomenon, and its indisputable effect in enhancing executive power was mainly realized decades ago. It may be misguided in the sense that the effects of globalization in undermining executive power have been neglected. For example, globalization may weaken the sovereignty of states, and thus the power of all actors within those states, including political executives. Globalization may also shift the balance of power within the executive branch away from elected officials and toward experts within the permanent bureaucracy.

If we are concerned about the accretion of executive power, there are probably causal factors other than globalization that deserve more attention. One such factor is the advance of information technology. The constant improvement of communications—for example, through railway mail, telegraphy, wireless and cable broadcasting, the internet, and mobile telephony—has had the effect of shifting public perceptions about distribution of responsibilities among federal, state, and local governments. Controversies or problems that might have remained local matters a century ago are more likely today to attract national attention, and thus to require some kind of response from national authorities, including the president. The classic illustration of this tendency was the effect of television on perceptions about the role of the federal government in enforcing civil rights in the 1960s.<sup>46</sup> Today, two areas in which this trend is observable are the use of excessive force by police and the response to natural disasters such as Hurricane Sandy. Because these events are now universally and immediately observable,

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*Transgovernmental Entrepreneurs and the European Data Privacy Directive*, 62 INT'L ORG., Winter 2008, at 103 (2008) (covering privacy policy in this context).

46. See generally ANIKO BODROGHKOZY, *EQUAL TIME: TELEVISION AND THE CIVIL RIGHTS MOVEMENT* (2012) (discussing how television coverage of civil right groups aided in gaining national attention for the movements).

they command a response from the federal government—and in particular the president—more than they did a half-century ago.

The simple fact of competition between parties may also explain the gradual shift of policy responsibilities to the federal level and the growing prominence of the president on the political stage. For example, the growing role of the federal government in the domain of education policy could be a product of intensified electoral competition. Even Republican administrations, who otherwise profess a commitment to limiting the role of federal government, have been prepared to expand the federal role in education, because it is a policy that appeals to middle class voters.<sup>47</sup> The incentive to engage in such competitive bidding may be increased by the closeness of many recent presidential races.

Constitutional and statutory constraints are supposed to moderate the effects of political competition. The capacity of presidential candidates to make more expansive promises in exchange for votes is supposed to be controlled by constitutional limits on federal jurisdiction and by statutory limits on agency powers. It could be argued, though, that these legal constraints have been significantly weakened by the federal judiciary over the course of many years. For example, courts have endorsed more expansive interpretations of federal powers, largely abandoned the nondelegation doctrine, and adopted more flexible standards on the interpretation of statutes.<sup>48</sup> The result may be that candidates have more discretion to make bigger commitments to voters.

Overall, however, the trend with regard to executive power over the last four decades is difficult to discern. The conventional narrative, about the consolidation of an “imperial presidency,” is probably too simplistic.<sup>49</sup> And perhaps the questions we are asking—Is the federal executive too powerful? What factors aggravate the consolidation of executive power?—are framed incorrectly. For many people, the complaint about the federal government is that it is simply “dysfunctional.”<sup>50</sup> Another way to think about the problem of

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47. See Rebecca Jacobsen & Andrew Saultz, *The Polls—Trends: Who Should Control Education?*, 76 PUB. OPINION Q., JUNE 2012, AT 379, 382-85 (2012).

48. See Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1298 (2015).

49. For a recent example, see Ed Rogers, *The Failed Obama Presidency*, WASH. POST (Jan. 30, 2016), available at [https://www.washingtonpost.com/blogs/post-partisan/wp/2016/01/29/the-insiders-the-failed-obama-presidency-is-what-fuels-trump-and-sinks-clinton/?utm\\_term=.13807ff3c083](https://www.washingtonpost.com/blogs/post-partisan/wp/2016/01/29/the-insiders-the-failed-obama-presidency-is-what-fuels-trump-and-sinks-clinton/?utm_term=.13807ff3c083) (describing the rise of Donald Trump in contrast to Barack Obama).

50. See generally Aseem Prakash & Matthew Potoski, *Dysfunctional Institutions? Toward a New Agenda in Governance Studies*, 10 REG. & GOVERNANCE, no. 2, at 115 (2016) (examining why institutional dysfunction occurs); Graham K. Wilson,

governance at the federal level would be to focus on the general attributes of a well-performing or “functional” system. Such a system would be competent in performing essential tasks, sustaining a high level of legitimacy, and have the capacity to adapting in response to changing circumstances. The question might then be whether the attainment of these three qualities—competency, legitimacy, and adaptability—is compromised today, because of the way in which power is distributed among the political executive, the permanent bureaucracy, Congress, and the judiciary.



