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The Declaration of Independence not only proclaimed our freedom from Great Britain, it also set forth the principles for which the Founding Fathers were willing to pledge their lives, fortunes, and sacred honor: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The battles of the Revolution secured the independence proclaimed in the Declaration; it remained for the revolutionaries to put the ideals of liberty into practice. History has recorded many tragic episodes that bear witness to President Filmore's caution "that revolutions do not always establish freedom." Our's did, largely because it was shortly followed by the framing of the Constitution, what the great American historian George Bancroft termed "the most cheering act in the political history of mankind."

One of our ablest statesmen and constitutional lawyers, Daniel Webster, once wrote: "We may be tossed upon an ocean where we can see no land -- nor, perhaps, the sun or stars. But there is a chart and a compass for us to study, to consult, and to obey. The chart is the Constitution." For nearly two hundred years the Constitution has endured, with relatively few amendments, as a blueprint for freedom. ~~As we approach the bicentennial of the signing of the original four pages of the Constitution, let us not only reflect on the wisdom of the Framers but also rededicate ourselves to~~

~~the values embodied in the document they drafted for the~~
~~ages.~~ For in commemorating the bicentennial of the
Constitution we celebrate not simply the historical event
that took place in Philadelphia on September 17, 1787, but
the process by which we govern ourselves today.

The very notion of self-government was novel when the
Framers embarked upon the experiment of the Constitution.
James Madison, in the Federalist Papers, found it necessary
to urge his fellow citizens not to oppose ratification of
the Constitution because of its novelty. Madison argued
that it was the glory of the American people that they were
✓ not blindly bound to the past but willing^g to rely on "their
own good sense" and experience in charting their course for
the future. "To this manly spirit posterity will be
indebted for the possession, and the world for the example,
of the numerous innovations displayed on the American
theater in favor of private rights and public happiness."

Madison's prediction has proved true. We are indebted to
the Framers for their brave willingness to govern
themselves, and the world is indebted to America for the
example it continues to provide of democratic
self-government. But while the Framers had to overcome the
fear of the new we must now equally fight against
complacency toward the old. There is the danger that a
people that has lived with freedom under law for two

centuries may forget how rare and precious that condition is.

An active and informed citizenry is necessary to the effective functioning of our Constitutional system. As Chief Justice John Marshall, who knew a thing or two about the Constitution, once wrote, "the people make the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will." All of us have an obligation to study the Constitution and actively participate in the system of self-government it establishes. ¶ This is an obligation we owe not only to ourselves and our posterity, but to the Framers, who risked everything for freedom, and to the brave men and women throughout our history who have preserved the Constitution, often at the cost of their lives. ¶ There is no better time than this bicentennial period to refamiliarize ourselves with the Constitution, and rededicate ourselves to the values it embodies.

The central challenge confronting the Framers of the Constitution was to create a stronger national government without at the same time permitting that government to threaten the liberties so recently won. Experience under the Articles of Confederation had demonstrated the inadequacies of a weak government "destitute of energy," yet the Framers' experience under the colonial rule of George

III had demonstrated the threat posed by strong government. The challenge was to reconcile those two experiences, ~~and create a government strong enough to serve the people, yet not strong enough to become the master rather than the servant of the people.~~ As Madison wrote, the difficulty was "combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form."

The solution embraced by the Framers was to diffuse governmental authority. Power was to be shared among separate institutions -- The Legislature, the Executive, and the Judiciary -- in order that no single branch could become so powerful as to threaten the liberties of the people. In considering the allocation of authorities in the Constitution, it is important to keep in mind the purpose of this considered allocation -- nothing less than the preservation of liberty. This is what Hamilton meant when he wrote that the unamended Constitution "is itself, in every rational sense, and to every useful purpose, a bill of rights." Our liberties have been preserved in large part because of the allocation of powers in the Constitution.

~~That allocation has kept government the servant rather than the master of the people, and has accorded the people the freedom to enjoy their rights.~~


This central fact -- that the unamended Constitution is itself a bill of rights, and that the allocation of powers in the Constitution is preservative of liberty -- imposes a special obligation on those who hold office under the Constitution. Those officials must not only discharge their responsibilities but must also respect the constitutional restraints on their offices and, equally important, preserve the constitutional prerogatives of their offices. Any [individual] President is ~~is~~ a trustee of the powers of the office, and cannot yield those powers for expediency or any other purpose. There may be times when a President would prefer to have another branch make a difficult decision or take action vested in the executive, or when a President would be willing to countenance an intrusion on his powers to achieve a particular result. At such times the Chief Executive must recall that ~~the~~ ~~powers~~ were allocated in the Constitution not simply for efficiency but to preserve liberty. In defending the Constitutional prerogatives of the office the President is protecting liberty by fulfilling the Framers' design.

The Framers looked primarily to the President to provide the critical element of "energy" in the government. The problem with the government of the Articles of Confederation was that it was "destitute of energy." The drafters of the Constitution redressed that problem by vesting in the

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Executive "competent powers" to lead the Nation. As Hamilton wrote:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

 The President's popular mandate justified this grant of authority. ~~His just powers are derived from the consent of the governed.~~ Other than the Vice President with whom he runs, the President is the only official in our government elected through a process involving all the voters. Only the President can claim to speak for all the people, because, as Hamilton wrote, his selection looks "in the first instance to an immediate act of the people of America." The office of President has "a due dependence on the people, and a due responsibility."

Perhaps the most pervasive responsibility of the President is to administer the executive branch. The Framers of our Constitution were practical men who recognized, as Hamilton wrote, "that the true test of good government is its aptitude and tendency to produce a good administration." The people look ultimately to the President to ensure the efficient performance of duty by the millions of federal employees scattered among the various departments and agencies across the land. I doubt that any of the Framers, prescient as they were, could have imagined the size and scope of today's Federal establishment. They nonetheless afforded the Presidency the tools to meet the responsibility vested in that office "to produce a good administration."

The key constitutional authority implementing the President's responsibility for administration of the government is his appointment power. The Constitution provides that the President shall nominate, and by and with the advice and consent of the Senate shall appoint, the officers of the United States. The Framers gave the President the responsibility to "take Care that the Laws be faithfully executed," and gave him the power to appoint the officers that assist him in discharging that responsibility. In the landmark case of Myers v. United States, Chief Justice Taft, a former President, wrote that it was a "reasonable implication" from the President's obligation to execute the laws that "he should select those who were to

act for him under his direction in the execution of the laws." The Chief Justice went on to recognize the principle that the President's appointment power carried with it the corollary power to remove those officers in whom he could no longer place his confidence: "as his selection of administrative officers is essential to the execution of laws by him, so must be his power of removing those for whom he can not continue to be responsible." [While there are limited circumstances in which officers are not removable by the President, the basic rule is that the President appoints and may remove at will the officers of the United States.] This ^{removal} power, as the Framers recognized, is necessary if the President is to be responsible for the faithful execution of the laws and the provision of "a good administration."

~~The inviolability of the President's responsibility to execute the laws was further ensured by what has come to be known as the "Incompatibility Clause." In a sharp departure from parliamentary systems, the Framers provided that "no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office." Article I, section 6. Those holding high office in the executive branch -- indeed, the President himself -- may not simultaneously serve in the Legislature. This ensures full loyalty of the officers to the President, and firmly fixes responsibility for the administration of government in the President. It has guaranteed a clear line of demarcation~~

between the Legislature and the Executive, leaving each to its own responsibility in the Constitutional scheme.

The challenge confronting the modern Presidency is to "produce a good administration" ~~as the Framers intended~~ when the Federal establishment has grown so far beyond anything ~~they~~ could have imagined. It is an amazing fact that there are more Federal employees in America today than there were people when the Framers drafted the Constitution. Perhaps President Washington could play an active role in supervising the details of the first administration; it is now the responsibility of his successors to create the mechanisms for control and coordination of the executive branch. *One such mechanism is Executive Order 12291, which I revised*

the Framers

~~During my first month in office, I issued an executive order that constituted an important step in this direction.~~

Executive Order 12291 for the first time provided effective and coordinated management of the regulatory process. Under the executive order, all Federal regulations must be reviewed by the Office of Management and Budget before being issued to determine whether their social benefits will exceed their social costs. The Administration has issued a comprehensive statement of regulatory policy, and established ^{*procedures*} ~~the mechanisms~~ to ensure that this policy is reflected in the actions of individual agencies. ~~The net result has been that for the first time the Federal~~

~~Register, which records new regulatory actions, has grown shorter for three consecutive years.~~ Other initiatives include the recent establishment of the President's Council on Management Improvement, an interagency committee charged with improving management and administration throughout the government; the continuing efforts of the President's Council on Integrity and Efficiency, established in 1981, to root out fraud, waste, and mismanagement; and the comprehensive review of the functioning of the Government undertaken by the President's Private Sector Survey on Cost Control. Given the size and scope of the Federal bureaucracy, the Framers' admonition that the Executive "produce a good administration" requires ~~such~~ careful and continuous attention to regulatory and management reform.

At the same time, however, it is fitting to consider ^{whether} ~~if~~ the Federal Government is today trying to do too much. The Framers did not vest in the national government the responsibility of solving all the problems that might ^f confront the citizens of the Republic; the early Americans were too jealous of their freedom to sanction such an expansive view of central authority. It is the responsibility of the President not only to manage government efficiently, but also to offer leadership in recognizing that spending by government must be limited to ^{that} ~~those~~ functions ~~which~~ are the proper responsibility of

government, and taxing by government must be limited to providing revenue for legitimate government purposes.

The President has no more important responsibility under the Constitution than the conduct of foreign affairs. As John Marshall noted on the floor of the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." In the famous Curtiss-Wright decision of 1936, the Supreme Court agreed with Marshall's assessment: "In this vast external realm, the President alone has the power to speak or listen as a representative of the nation." The President's powers in this area derive from the general grant of executive power, and the more specific grants of authority to make treaties and appoint our ambassadors and receive those of other nations, and his role as Commander in Chief of the armed forces.

The Framers recognized that of the two democratic branches only the Executive possessed the requisite attributes for the successful conduct of foreign relations. Hamilton noted in his description of the executive that "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater member," and John Jay -- himself one of our most successful early diplomats -- argued that "the President will have no difficulty to provide"

those qualities, though they were beyond the capability of a basically deliberative body such as Congress. As Hamilton argued, "The qualities...indispensible in the management of foreign negotiations point out the executive as the most fit agent in those transactions..."

When it came to the defense of the Nation, the Framers were even more unambiguous. Hamilton, who served at General Washington's side during the War of Independence, knew that "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority." In the areas of defense and foreign affairs the Nation must speak with one voice, and only the President is capable of providing that voice.

This is not to say that Congress has no role in the development of foreign policy. On the contrary, the Framers required the assent of two thirds of the Senators to a treaty, and of course only Congress possesses the power to declare war. Even beyond those defined roles the support of Congress has been indispensable to an effective foreign policy throughout our history.

The 1970s saw a rapid rise in Congressional efforts to affect directly the formulation and implementation of foreign policy by the Executive. Over 100 separate prohibitions and restrictions on Presidential authority were enacted in the areas of trade, human rights, arms sales, ⁱ foreign ~~and~~, intelligence operations, and the dispatch of troops in times of crisis. Scholars and officials have differing views on the constitutionality of several of these initiatives. ~~[and a discussion of the legal issues is beyond the scope of this article.]~~ What is important to note, however, is that efforts by Congress to participate in the development of American foreign policy must be accompanied by a recognition of the concomitant responsibility for the development of bipartisan consensus. We need to restore the honorable American tradition that partisan politics stops at the water's edge. ~~The Framers recognized that effective foreign policy demanded that the nation speak with one voice.~~ As Congress attempts to augment its foreign policy ^o ~~r~~ole it must ensure that the result is not simply that America presents a discordant cacophony to the world, to the detriment of its security and interests. The President -- ^o "the sole organ of the nation in its external ~~realitions~~" -- must continually seek the means of developing a bipartisan, Legislature-Executive consensus on America's role in the world and the means of safeguarding that role. ~~[~~As Congress increasingly enters the foreign policy realm it too must

recognize a greater responsibility for developing such a consensus.]

Apart from the President's executive functions, the Constitution accords him a significant role in the legislative process. The President has not merely the power but the duty "from time to time to give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." ~~Article II, section 3,~~ The people have grown to expect leadership from the President not only in executing the laws but also in presenting a *legislative* program to Congress for consideration. ~~The responsibility runs from the annual budget to substantive legislative reform.~~

Perhaps the most prominent of the President's legislative powers is his qualified veto power. This power is qualified in the sense that a bill returned by the President with his disapproval can nonetheless be enacted by a two-thirds vote of both Houses. The Framers accorded the President a veto power for two purposes. First, the Framers recognized the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments," and provided the President a veto so that he could defend the prerogatives of his office, ~~against legislative encroachment.~~ The second purpose of the veto is

as "an additional security against the enactment of improper laws." As Hamilton wrote:

The primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.

The unique perspective the President can bring to bear in reviewing legislation was recognized by Chief Justice Taft:

The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide.

The Supreme Court recently reiterated the importance of the veto power in the Framers' design in the landmark case of INS v. Chadha. That decision struck down the "legislative veto" device, whereby Congress reserved to itself, one House, or even a committee the authority to block agency regulations. The Court, in an opinion by the Chief Justice,

or "veto"

ruled that legislative vetoes were unconstitutional, in part because they purported to permit Congress to act without presenting its action to the President for approval or disapproval. ~~The Court ruled that this violated the carefully devised scheme of the Framers.~~

Many had looked to the legislative veto as a possible means of restoring control by the people's elected representatives over the burgeoning Federal bureaucracy. ~~That option is no longer available, for,~~ as the Court noted;

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.

However, arguments about the efficacy of the legislative veto would not justify bypassing with the carefully designed legislative process established by the Framers, with its requirement of presentation to the President that the President have an opportunity to review legislative acts.

It can now be hoped that Congress, which can no longer ~~review~~ particular agency action through the legislative veto, will take greater care in delegating authority to

block

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agencies in the first place. ~~It is no longer possible for~~
 Congress ~~to~~ ^{can no longer} avoid ~~the~~ hard policy choices ^{by} delegating vast
 power to agencies with only vague guidance as to its
 exercise, with the reservation that particular agency
 actions can be ~~unilaterally reversed~~. [The Chadha decision
 also clarifies that the executive is solely responsible for
 executive agency action, and heightens the responsibility of
 the executive to ensure that such action is consistent with
 the statutes authorizing the action.]

Blocked by
a legislative
veto.

The intent of the Framers in providing the President a
 qualified veto power has been frustrated to a large extent
 by the development of the Congressional practice of
 combining various items in a single appropriations bill.
 The Framers undoubtedly anticipated that Congress would pass
 separate appropriations bills for discrete programs or
 activities, and the President would be able to review each
 program. Until about the time of the War Between the
 States, this was the practice of Congress. Since that time,
 however, Congress has increasingly combined various items of
 appropriation in omnibus appropriations bills. This
 practice makes it difficult for the President to discharge
 the responsibility vested in him by the Framers, because he
 cannot consider the individual items of appropriations
 separately but must either veto or approve the package as a
 whole. ~~When he must either block needed programs so that~~
~~wasteful ones will not be enacted, or permit wasteful ones~~

~~to slip through under the protective wing of needed programs,~~ ^{thus} the President is prevented from using his veto as the Framers intended, "to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."

It is for this reason that we have proposed restoring the Framers' original design ^{through} ~~by passing~~ a constitutional amendment ^{ing} ~~to grant~~ the President line-item veto authority. The constitutions of no fewer than 43 states grant some such authority to the governor, and the experience at the state level suggests a line-item veto would work well at the Federal level.

The powers of the Presidency are limited powers, and the President discharges his constitutional responsibilities in a system according other powers to the coordinate branches of the Legislature and the Judiciary. As the Supreme Court has remarked, there is a "never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances." ~~The President is charged with the faithful execution of the laws, but Congress enacts the laws and through its legislative authority directly affects the President's ability to administer the Federal Government.~~

~~The President appoints the officers of the United States, but Congress establishes the offices and the Senate must approve the President's nominees to fill those offices. The President is responsible for the conduct of American foreign policy, but only Congress can declare war and the Senate must approve treaties negotiated by the President. And while, as Justice Frankfurter noted, the Framers "did not make the judiciary the overseer of our government," it has been established at least since Marbury v. Madison that, in an appropriate case, executive action is subject to judicial review.~~ The members of all three branches take an oath to uphold the Constitution, and it is a tribute not only to the genius of the Framers but also to the statesmanship of those who have held office under the Constitution that the system has worked as well as it has.

Thomas Jefferson called the Presidency "a splendid misery." The Framers intended, as Hamilton wrote, that "the executive should be in a situation to dare to act his own opinion with vigor and decision." The President has at his disposal the advice of learned advisors, and he can consult with the Congress, but the difficult and potentially momentous decisions vested by the Constitution in the Executive are, in the final analysis, his alone to make. Our most tested President, Abraham Lincoln, announced a guide for making those decisions that has not been improved upon:

"I desire to conduct the affairs of this Administration that if, at the end, when I come to lay down the reins of power, I have lost every other friend on earth, I shall at least have one friend left, and that friend shall be down inside of me."

As we prepare to commemorate the bicentennial of the Constitution, let us honor the memory of the Framers who drafted our blueprint for freedom, as well as those who, like Lincoln, did not permit their dream to die. But let us also recognize the workings of a greater force. The signers of the Declaration of Independence acted with "a firm reliance on the Protection of Divine Providence," and Madison, reviewing the work of the Constitutional Convention, noted that "It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution." What President Cleveland said on the occasion of the centennial of the Constitution rings even truer today:

"When we look down upon 100 years and see the origin of our Constitution, when we contemplate all its trials and triumphs, when we realize how completely the principles upon which it is based

have met every national need and national peril,
how devoutly should we say with Franklin, 'God
governs in the affairs of men.'"