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OCHLOCRACY: ARE WE THERE YET?

GARRY WILLS*

Does the United States Constitution favor democracy? It is easy to suppose so. Some might even think it enshrines democracy or is based on it. But the authors of the Constitution did not think so. Democracy was not only a suspect but a feared concept in the eighteenth century. Rousseau, it is true, favored it; but he was out of step with his times. He considered the ancient Athenian democracy an ideal. Most Enlightenment thinkers, by contrast, believed that fifth and fourth century Athens possessed an unstable and unjust government, as even its own most famous political thinkers, Plato and Aristotle, maintained.

The Enlightenment, from Montesquieu to Locke to Hume to James Madison, preferred the Roman republic for its supposed centuries-long achievement of “mixed government.” Polybius, a proud Greek subject of the Roman republic, praised it for creating a polity that mixed elements of monarchy, oligarchy, and democracy, each tempering the others. Democracy, without the corrective presence of monarchy and oligarchy, becomes “ochlocracy,” mob rule. Madison believed that a majority should (and ultimately would) have its way; but only after forming a considered opinion, with observer-participants arguing for minority rights and ideally reaching a consensus.

We Americans began altering that conceptual framework soon after the ratification of the Constitution. Gordon Wood traces the first stages of that development, as we went from the Enlightenment to the Romantic Period, from Washington to Lincoln, from honoring elite Romans to glorifying the German Volk, “self-determination” in government came to mean direct determination by the people.¹

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1. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 330 (1969).

A recent event in our history shows how different are the concepts of modern democracy from those of the Constitution. When Antonin Scalia died unexpectedly in 2016 and Barack Obama nominated Merrick Garland for the empty seat on the Supreme Court, the President still had eleven months to serve in office, and the 114th Senate still had eight months to advise and consent to the nomination.² But Senate leaders refused to begin the confirmation process.³ Even before Judge Garland was nominated, Majority Leader Mitch McConnell said he would refuse to consider *any* nomination.⁴ This was unprecedented. Twenty-four earlier nominations had been made in the last year of a president's term, and twenty-one of those were confirmed by the Senate.⁵ In this case, the Senate simply stalled the Constitutional process for 293 days, the longest such abdication in our history.⁶

What is interesting to our purpose here is the argument made for this abdication. Majority Leader McConnell would later claim that, with a Presidential election just eight months away, we should wait to nominate a Supreme Court justice because "*the American people should have a say in the Court's direction.*"⁷ Republican Senator Kelly Ayotte agreed that "Americans deserve an *opportunity to weigh in.*"⁸ And self-styled Constitutional defender Ted Cruz wrote: "We owe it to [Justice Scalia and] the Nation[] for the Senate to ensure that the *next* President names his replacement."⁹

2. Michael D. Shear, Julie Hirschfeld Davis, & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html> [<https://perma.cc/PMT7-5H4M>].

3. *Id.*

4. *Id.*

5. Barbara A. Perry, *One-Third of all U.S. Presidents Appointed a Supreme Court Justice in an Election Year*, WASH. POST (Feb. 29, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/29/one-third-of-all-u-s-presidents-appointed-a-supreme-court-justice-in-an-election-year/> [<https://perma.cc/C7E3-4FP5>].

6. Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, WALL ST. J. (Jan. 3, 2017), <https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952> [<https://perma.cc/4DHV-JZV8>].

7. 162 CONG. REC. S1523 (daily ed. Mar. 16, 2016) (statement of Sen. McConnell) (emphasis added); see Carl Hulse, *The Shifting Standards of Mitch McConnell*, N.Y. TIMES, May 29, 2019, at A19.

8. Carl Hulse & Mark Landler, *After Antonin Scalia's Death, Fierce Battle Lines Emerge*, N.Y. TIMES (Feb. 14, 2016) (emphasis added), <https://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-death-cuts-fierce-battle-lines-in-washington.html?searchResultPosition=1> [<https://perma.cc/6R9H-DMMH>].

9. Ted Cruz (@tedcruz), TWITTER (Feb. 3, 2016, 4:27 PM) (emphasis added), <https://twitter.com/tedcruz/status/698634625246195712?lang=en> [<https://perma.cc/Q63N-SEJM>].

All this despite the fact that the Constitution took many steps to prevent the people from “weighing in” or “having a say.” The document gives six proofs that an independent judiciary should not be directly responsive to the people.

The House of Representatives, all of whose members are responsible to the people every two years, has no say in the appointment of judges. If letting the people weigh in were a requirement, this is the obvious instrument for doing it.

The President, who was at first not directly elected by the people, but by personally independent electors (in their “college”), is the only one who can nominate a justice.

The Senate is the sole body that can confirm a nominee, and it is removed from immediate popular pressure by longer and staggered terms, exposing no more than a third to removal by any new election. Moreover, the Senate too was not originally elected by the people but by state legislatures.

To guarantee what Hamilton called “independent spirit in the judges,” they are given “permanent tenure.”¹⁰ The people, either voting directly or through their representatives, cannot punish a judge by firing him or her except through the clumsy process of impeachment and trial by different bodies of the legislature.

Further, to increase the Court’s freedom from pressure, judges’ compensation “shall not be diminished during their Continuance in Office.”¹¹ No one can cut or increase their pay to punish or reward them.

If a judge should commit high crimes and misdemeanors, the directly elected House members can challenge him or her by impeachment, but only the indirectly elected Senate can convict and remove him or her.

If the Constitution could have added any further measure to prevent the people from “weighing in” or “having their say,” the Framers would presumably have added it to these six clear indications of their intent. Yet in all the attacks on Senator McConnell for closing up the advice and consent shop for a year, there were next to no reminders of the Constitution’s hedging of justices off from any popular “having a say” or “weighing in.”

There are several possible reasons for this silence. It will be noticed that two of those legal inhibitions do not remain the same. The President is no longer (in practice) chosen by electors acting independently of those who chose them. And United States Senators are no longer elected by state legislatures. These changes are part of the larger tendency toward egalitarian democracy that grew throughout the nineteenth and twentieth centuries. This was a part of a

10. THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (E.H. Scott ed., Chicago: Scott, Foresman & Co. 1898).

11. U.S. CONST. art. III, § 1.

strong drive against the original situation in which the Constitution was incubated. One does not have to agree with all parts of Charles Beard's interpretation of the Constitution to admit that it was a document written *by* an elite *for* an elite.¹² In order to include elite slave owners in the proposed government, weird ways of counting show up in the document, like the notorious three-fifths inclusion of slaves (for population), skewing representation of states in the House but giving small states equal power with large states in the Senate (Southern free population was sparser in the 1780s than in the North).

As the country became more egalitarian, democracy crept or forced its way into our politics, making it more inclusive—by constitutional amendments, legislation, the party system, citizen activism, or technology (from radio and TV to the current “social media”).¹³ Reflecting these trends, Richard Neustadt argued, in his 1960 book *Presidential Power*, that the presidential ticket is the only one voted on by all of the people. This ideally can give presidents a more inclusive view of the nation and its needs and thus give them more leverage to bargain over policy and practice with government officials elected by smaller constituencies. Presidents can serve as arbiters between the claims of those officials, with their narrower power bases.¹⁴

Neustadt's book came out at a favoring time, since presidential action in the civil rights unrest gave a moral basis for saying that the presidents can

12. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

13. See U.S. CONST. amends. XIII (abolishing slavery), XIV (creating due process and equal protection rights), XV (prohibiting denial of the right to vote on the basis of race), XVII (providing direct votes for Senators), XIX (extending the right to vote to women), XXIII (creating presidential electors for D.C.), XXIV (prohibiting poll tax), XXVI (establishing the right to vote at age eighteen). Legislation includes states passing bills for initiative, referendum, and recall. See, e.g., 1965 Wis. Act 666 (creating the Wisconsin recall process); Jefferson B. Fordham & J. Russell Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495, 497 (1950) (discussing the Ohio adoption of popular legislation initiative and referendum). Court action includes the so-called “one man, one vote” decisions. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (permitting an equal protection claim related to legislative districts to proceed despite political question doctrine arguments); *Gray v. Sanders*, 372 U.S. 368 (1963) (finding a vote weighing system violative of the Fourteenth Amendment); *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring congressional districts to have roughly equal populations if practicable); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (same); *Avery v. Midland Cty.*, 390 U.S. 474 (1968) (same); *Bd. of Estimate of New York v. Morris*, 489 U.S. 688 (1989) (finding the Board of Estimate of New York City's electoral process violative of the one man, one vote ideal); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (holding district apportionment based on total population to be permissible under the Fourteenth Amendment).

14. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* 26–29 (1960).

correct injustices at the local level. In 1957, President Eisenhower sent federal troops to integrate schools in Arkansas. In 1961, the Kennedy administration sent justice officials to support Freedom Riders in the South. In 1962, President Kennedy sent federal marshals to integrate a university in Mississippi. In 1963, he sent troops to integrate a university in Alabama. In 1965, President Johnson gave his *We Shall Overcome* speech¹⁵ and guided passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Presidents looked very good when facing up to a Governor Barnett of Mississippi, a Faubus of Arkansas, a Wallace of Alabama, or a Senator Harry “Massive Resistance” Byrd of Virginia. The President was expressing a national consensus on justice over the defenders of local privilege.

At this shining time for the presidency, a note of glamour was added when Washington became a kind of Hollywood East. Even before John F. Kennedy was elected, Norman Mailer predicted he would be the first “hipster president,” one who might show courage by daring to take into the White House “the most beautiful first lady in our history,” a First Lady with an eighteenth-century face.¹⁶ Washington, formerly a sleepy Southern town of pasty bureaucrats and sleazy lobbyists, now had dieting touch-football players willing to be pushed into Bobby Kennedy’s swimming pool.

But Camelot darkened overnight. Arthur Schlesinger, a swimming pool pushee who had been an ardent Neustadtian in the sixties, was writing a denunciation of what he called “the imperial Presidency” by 1973.¹⁷ Moving from Kennedy to Nixon, Schlesinger reversed Dante’s scheme, climbing down from luminescent Paradiso to sulphurous Inferno. But the makings of presidential imperialism far antedated Nixon—or, for that matter, Kennedy. As pacifist Randolph Bourne famously wrote, “War is the health of the State.”¹⁸ He could have said, more precisely, that war is the health of the presidency. That was clear even in the wars of Lincoln, or McKinley, or Wilson; but it became crushingly evident in the 1940s. Franklin Roosevelt on his sole and secret authority developed the atom bomb, Harry Truman on his sole and secret authority used atom bombs in 1945 and in 1946, and Congress gave every president the sole authority to use the bomb without any notice given to Congress or permission granted by it.

15. President Lyndon Baines Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965) (including President Johnson’s famous “We Shall Overcome” message), <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise> [https://perma.cc/3TEA-EX85].

16. Norman Mailer, *Superman Comes to the Supermart*, ESQUIRE, Nov. 1960, at 119, 123–24.

17. ARTHUR M. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* viii (1973).

18. RANDOLPH S. BOURNE, *The State, in WAR AND THE INTELLECTUALS*, COLLECTED ESSAYS 1915–1919, at 65, 71 (Carl Resek ed., 1964).

When President Truman took the nation to war in Korea, Congress would willingly have given him a declaration of war, but Secretary of State Dean Acheson advised him not to let Congress control any war making (as decreed by the Constitution) since that might weaken his right to go straight to war in using the bomb. Congress has never since then declared a single war.

The newly awesome power of the president is symbolized by “the football” that goes with him everywhere, by “the button” which President Trump accurately called his “button,” saying it was bigger than that of North Korea’s Kim Jong Un, and “my Button works.”¹⁹ He alone has the legal right to make it work. Since the awesome power has been given to presidents to unleash unilaterally the greatest destructive power in human hands, we have seen an increasing militarization of the nation.

That can be seen in the use of the title Commander in Chief for the President. In the Saturday Night Massacre of 1973, White House Chief of Staff Alexander Haig, directed by President Nixon, told Deputy Attorney General William Ruckelshaus to fire Special Prosecutor Archibald Cox.²⁰ When Ruckelshaus said no, Haig told him, “Your commander in chief has given you an order.”²¹ Nixon was not Ruckelshaus’s “Commander in Chief.” The Constitution says, “The President shall be Commander in Chief *of the Army and Navy* of the United States, and of the Militia of the several States *when called into the actual Service of the United States . . .*”²² That is, the President is not even the Commander in Chief of National Guardsmen until and unless they are nationalized. And he is certainly not the Commander in Chief of civilians like Ruckelshaus, or like you, or like me. Yet we are often told, at election time, that we should be careful in choosing a man who will be *our* Commander in Chief.

Many small signals indicate the military status of the President. Contemporary presidents receive and return military salutes, though it is the uniform that is supposed to be saluted, not the man. General Eisenhower was not saluted when out of uniform, even when he was President. President George Washington embodied the ideal of civil leadership. Mount Vernon did

19. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2018, 6:49 PM), <https://twitter.com/realdonaldtrump/status/94835557022420992?lang=en> [<https://perma.cc/G2S9-Q6L9>].

20. Amy B. Wang, *The Saturday Night Massacre: ‘Your Commander in Chief Has Given You an Order’*, WASH. POST (May 11, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/05/11/the-saturday-night-massacre-your-commander-in-chief-has-given-you-an-order/> [<https://perma.cc/GZN2-4EH6>].

21. *Id.*

22. U.S. CONST. art. II, § 2 (emphasis added).

not have military symbols in its design or ornaments. Ordinarily, Washington was not saluted. Only when Congress decreed that the Whiskey Rebellion was a treasonous levying of war against the United States did Washington put his uniform back on and ride out to lead the federalized militias in person. They, but only they, and only then, saluted their Commander in Chief. That vision was enough to end the rebellion, and President Washington resumed his peacetime role.

But now we have presidents who never saw military service—like President Bill (“didn’t inhale”) Clinton²³ and President Donald (“bone spurs”) Trump²⁴—being saluted and returning salutes on and off the presidential airplane or helicopters. This was a practice initiated by Ronald Reagan, whose own training made him refer once to military costume. Jesse Jackson had to remind him that it is a uniform, not a costume.²⁵

This militarization is also seen in the proliferation of classified secrets, modeled on the secrecy of the atomic project. Wartime discipline is imposed now at any and every turn. When Hamilton said that the characteristic marks of President should be “secrecy” and “despatch,”²⁶ he meant that he should keep secrets from an actual or potential enemy, not from Congress or the people. Yet when Richard Nixon was bombing Cambodia, the Cambodians certainly knew about it—Garry Trudeau had his Cambodian farmer in Doonesbury say, “Look, Martha, here come the bombs.” It was only secret from Congress and from us citizens.

Along with the militarization of the president, we have the personalization of the vote for him. In normal times, when people elect a president, some may do so because they think he or she agrees with them on issue A, while others who oppose that view of issue A, or are indifferent to it, vote because of a presumed agreement on issue B, or C, or so on. That is why it is often said that, as affecting a particular issue, a president needs a mandate as well as election—that is to say support for acting on that issue. George W. Bush, fresh from re-election in 2004, did not understand that. He said, “I earned capital in the

23. Gwen Ifill, *Clinton Admits Experiment with Marijuana in 1960’s*, N.Y. TIMES, Mar. 30, 1992 at A15.

24. Steve Eder & Dave Philipps, *Donald Trump’s Draft Deferments: Four for College, One for Bad Feet*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/us/politics/donald-trump-draft-record.html> [<https://perma.cc/4PF6-LVHS>].

25. The author personally overheard Mr. Jackson make this statement multiple times as a journalist covering Mr. Jackson’s campaign for President.

26. THE FEDERALIST NO. 70, *supra* note 10, at 385 (Alexander Hamilton).

campaign, political capital, and now I intend to spend it.”²⁷ He decided to spend it on privatization of Social Security. He quickly found that he was not elected to do that. Even though he had a majority in both houses of Congress, they could not push that through. It was blocked in the House by Nancy Pelosi, the minority leader then. Asked when she would support some form of privatization, she answered. “Never. Is never good enough for you?”²⁸

Of course, a sitting president can win a post-electoral mandate in contested areas by bargaining with opposition. That is what many consider being presidential. Neustadt said the essence of presidential power is persuasive bargaining.²⁹ But Bush could not bring himself to do that on Social Security, and Donald Trump does not care to do it on anything. He is demonstrating the possible danger that lies in the fact that he and his vice president are the only officials voted for by all the people. A president can take his own person as a mandate for anything he thinks or wants. Once he is voted in, the election serves as approval of all his subsequent words and deeds.

President Trump thinks that all the approval he needs on any issue is that he was elected. That is why he has to dismiss any suggestion that Russian interference could make that a corrupt election. That is why he likes to relive the 2016 election. He re-enacts the campaign in his perpetually staged crowd rallies. His final argument is always (imitating Chevy Chase on the old Weekend Update) that “I’m president—and you’re not.”³⁰ His election ended all disagreement with him. In practice, this means that, in order to assert his own legitimacy, he will delegitimize any entity that seems adverse to him—treaties, international organizations, the Congress, the courts, the press, the bureaucracy, the polls, the universities, the vote counts.

That is exactly what James Madison did not like about democracy, the claim that election directly reflects the will of the people:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not

27. Richard W. Stevenson, *Confident Bush Outlines Ambitious Plan for 2nd Term*, N.Y. TIMES (Nov. 5, 2004), <https://www.nytimes.com/2004/11/05/politics/campaign/confident-bush-outlines-ambitious-plan-for-2nd-term.html> [<https://perma.cc/N46A-DELE>].

28. TIM GROELING, WHEN POLITICIANS ATTACK: PARTY COHESION IN THE MEDIA 41 (2010); Peter Beinart, *Nancy Pelosi is Winning*, THE ATLANTIC (Jan. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/why-nancy-pelosi-wont-compromise-border-wall/580516/> [<https://perma.cc/8TUV-HLLJ>].

29. NEUSTADT, *supra* note 14, at 26–29.

30. Lesley Stahl, *President Trump on Christine Blasey Ford, His Relationships with Vladimir Putin and Kim Jong Un and More*, CBS NEWS 60 MINUTES (OCT. 15, 2018), <https://www.cbsnews.com/news/donald-trump-full-interview-60-minutes-transcript-lesley-stahl-2018-10-14/> [<https://perma.cc/7FGA-FED4>].

improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators, but advocates and parties to the causes which they determine? . . . [T]he parties are, and must be, themselves the judges³¹

This brings me back to my opening point—that judges should not be chosen by popular acclaim or plebiscite. To avoid that, the Constitution puts in place the various barriers to direct participation in judicial appointments by the populace. And the parallel with this in the general structure of our government is the famed system of checks and balances that slow up judgment, force people to look at things from many angles, make them consider various (even minority) claims. Madison, after Hume, called this process a “refining” of political opinion. The majority will have its way, but only with a refined opinion—others call this a “deliberated” or “considered” majority judgment.

To insure this, the parts of government should be open to scrutiny. Congress makes laws and declares war. Presidents execute laws and wage wars. And Congress is given oversight responsibility to see that the laws and wars are managed as the legislators intended. The President is required by the Constitution to report to Congress “from time to time.” That is a legal term of art. It does not mean “occasionally” but from the time last reported to the time being reported. It means that no time should be left out as not responsive to Congress. But, in line with all the other growths of presidential power, the State of the Union address, rather than a report to the people who legislate, means that the President lays out his own agenda for laws he wants Congress to pass and the populace to support.

Presidents become less accountable to Congress, as I have said, in times of war. President Roosevelt would not have been able secretly to develop the atom bomb in peacetime. War gave him sanction. Even short of war, a president frees himself of accountability by maintaining a constant state of crisis. Any reduction in presidential power (even a Canadian tariff dispute) is treated as a threat to national security. If the President is challenged in any way, the nation is in peril—he loses leverage abroad. George Orwell knew that Big Brother has to whip up a sense in his subjects that the state is always under siege. That was the purpose of the daily Two Minutes Hate.³² Napoleon had a different

31. THE FEDERALIST NO. 10, *supra* note 10, at 55–56 (James Madison).

32. See GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

way of maintaining a sense of crisis, signaling danger but always claiming victory. As Ferdinand Mount wrote recently:

The stream of bulletins and orders of the day that he issued formed a running narrative, unquenchably bullish and boastful, shamelessly exaggerating the enemy's losses and minimizing his own. . . .

....

. . . The untruthfulness of the bulletins became so notorious that the phrase "to lie like a bulletin" crept into popular parlance.³³

Today, we may be learning what it is "to lie like a tweet." Trump's raging storm of daily tweets combines Orwell's two-minute hate and Napoleon's battle-issued bulletins. They are bolstered by his Fidel-length tirades. He lives for and on television.

Napoleon wanted everyone to recognize his star of destiny, which was the guarantor of the rightness of his actions. Trump's "star" is his "gut." It makes him more knowledgeable than the experts. It submits to no accountability. He derides, impedes, tries to abort any investigations of himself or his family. He grants clearance to classified secrets to loyalists who will keep *his* secrets, not the information that will keep the nation safe. Logs are no longer kept of White House visitors, note-taking is forbidden. Observers, even staff members, are not admitted to his meetings with Putin. Even the one necessary outsider, the interpreter, is ordered not to reveal what went on, and then is ordered to give Trump any notes taken. We cannot see, or even ask for, Trump's business or tax records.

Investigations into this president are derided, dismissed, or hampered, as "witch hunts." Any reporting that is critical of his administration is "fake news" to be suppressed, while his favorite "news," obsessively watched by him, is just an extension of his administration, his own personal Pravda. Election made him untouchable. We are all to trust his gut. He is certain no one can match his boasted I.Q. (undisclosed), his expertise (unearned), his beauty (unrecognized), his crowds (unverified), his "brand" (tarnished), his great memory (except for spelling), his brilliance (self-bestowed), his reputation (inside his continually dissolving inner circle), his claiming the best words (covfefe), or claiming the best people (Scaramucci), his all-round wonderfulness.³⁴ All these stellar qualities shine the more against the backdrop

33. Ferdinand Mount, *An Ordinary Man*, 66 N.Y. REV. BOOKS, no. 6, Apr. 4, 2019, at 40 (book review).

34. *How Businessman Trump Turned Exaggeration into his Brand*, PBS NEWS HOUR (May 30, 2018), <https://www.pbs.org/newshour/show/how-businessman-trump-turned-exaggeration-into-his->

of any rivals or challengers—they are all losers, failures, low-lives, morons, low-IQ, whack jobs, crazy, ugly. Against them, he considers insult the only proper argument, contempt the only proper demonstration. Eager to be the judge of his own case, he awards himself many titles, including “stable genius.” He deserves to be celebrated with military parades, modeled on Bastille Day or the Fourth of July. He cuddles with, almost melds with, the flag. He *is* the nation.

Resentful that anyone else could be called “elite,” he told his crowd of loyalists in Grand Rapids, Michigan, that he should have that title. His listeners rose with him in vicarious spasms as he reached this ecstasy of self-love: “I have a better education than them, I’m smarter than them, I went to the best schools, they didn’t. Much more beautiful house, much more beautiful apartment. Much more beautiful everything. And I’m president and they’re not.”³⁵

The “them” referred to are all those he fears and (through him) all those his audience fears. So, he reassures them. They, through him, are more beautiful than their critics: “We’re the elite. You’re smarter. You’re sharper. You’re more loyal.” There could not be a better example of what Madison feared in a democracy—a people being judge in their own cause. This is the most direct kind of democracy—unmediated, impatient of delay, beyond any doubt, refusing to consider other opinions, especially minority opinions (why pay attention to “losers”).

Madison said that a willingness to observe checks and balances was the sign of public virtue (the agreement on the common good over private interests).³⁶ A disregard for the ways to reach fair judgment shows there is no longer

brand [<https://perma.cc/5FCD-TLPE>]; Jill Colvin, *The Art of the Boast: Trump’s a Master*, U.S. NEWS (Oct. 19, 2019), <https://www.usnews.com/news/politics/articles/2019-10-18/the-art-of-hyperbole-trumps-got-it-down-pat> [<https://perma.cc/ACJ6-MHLM>]; Sarah Lyall, *Trump’s Twitter War on Spelling*, N.Y. TIMES (Aug. 31, 2019), <https://www.nytimes.com/2019/08/31/us/politics/trump-twitter.html> [<https://perma.cc/SDB3-F8UM>]; Matt Flegenheimer, *What’s a ‘Covfefe’? Trump Tweet Unites a Bewildered Nation*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html> [<https://perma.cc/JDA3-ASFQ>].

35. Rachel Scott, *President Donald Trump Calls Democrats ‘Sick People,’ Takes Victory Lap on Mueller Report During Rally in Michigan*, ABC NEWS (Mar. 28, 2019), <https://abcnews.go.com/Politics/president-donald-trump-hold-campaign-rally-michigan-1st/story?id=61987526> [<https://perma.cc/HDG9-5VGA>]. See also Jonathan Capehart, *What Happened When ‘Little Pencil-Necked Adam Schiff’ Took an Eraser to Trump and His Enablers*, WASH. POST (Mar. 29, 2019), <https://www.washingtonpost.com/opinions/2019/03/29/what-happened-when-little-pencil-necked-adam-schiff-took-an-eraser-trump-his-enablers/> [<https://perma.cc/85YE-ZRBW>].

36. See THE FEDERALIST NO. 51, *supra* note 10, at 288–89 (James Madison).

sufficient virtue in the people. Checks and balances are not magic things that operate on their own. If the people do not want them to work or want to ignore them or dismiss them—as Mitch McConnell dismissed congressional approval of nominees—there is no cure for that abdication. As Madison said in Federalist No. 55:

As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree, than any other form. Were the pictures which have been drawn by the political jealousy [or suspicion] of some among us, faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism, can restrain them from destroying and devouring one another.³⁷

The presidency of Donald Trump did not spring up at us out of an abyss. It is an extreme but logical culmination of the permanent war footing of our government, the personalization of the state in the presidency, the sequestration of ever-growing amounts of knowledge as classified or privileged, the escalation of any policy proposal to a national security threat, and the concatenation of each of these things with all the others. They have eroded the structures protective of public virtue that were assembled in the Constitution. And the result is not democracy in the sense described by Polybius long before the time of Madison. The result is ochlocracy, rule of the mob by the mob's preferred leader.

Whatever the electoral vs. popular vote, Trump was in fact elected, and all facets of his character were amply and repetitively on display before that election. He was mean (insulting the appearance of Ted Cruz's wife and slandering his father),³⁸ crude (boasting of his genitals),³⁹ ghoulish (creeping

37. *Id.* NO. 55, at 309–10 (James Madison).

38. Aaron Blake, *9 Truly Awful Things Ted Cruz and Donald Trump Said About Each Other*, WASH. POST (Sept. 23, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/23/9-truly-awful-things-that-were-said-between-ted-cruz-and-the-man-hell-now-support-donald-trump/> [https://perma.cc/8YHC-X64F].

39. Dana Milbank, *Trump Finds a Cure for His Small-Hands Problem*, WASH. POST (Jan. 22, 2019), https://www.washingtonpost.com/opinions/with-enough-facetune-skill-and-creativity-trumps-team-can-make-anything-possible/2019/01/22/05d6015e-1e84-11e9-8e21-59a09ff1e2a1_story.html [https://perma.cc/J92W-BGSA].

around behind Hillary Clinton in the debate),⁴⁰ and lied (all those Muslims in New Jersey cheering the attack on the Twin Towers).⁴¹ We knew what we were getting when we got it. If he is a Frankenstein's monster, doesn't that mean that we as a nation are the monster's maker, a collective Dr. Frankenstein, no longer Madison's virtuous people?

Of course, we can take refuge in a dodge that is the reverse image of Trump's claim that his election settled all matters until the next election. We can say that we made a mistake electing him in 2016, but we cannot correct that mistake until he comes up for re-election in 2020. But that ignores the way government by the people should work on a continuing basis. No deep change in American life has taken place just from elections. Take any resisted change you can think of—abolitionism, the civil rights movement, the union movement, the women's movement, the gay rights movement, the current ecology movement. Each of them did not take a recess in non-election years. They used activism, protest, accusation, education, boycotts, petitions, civil disobedience, to build a public demand for change.

Some said that calling for Trump's impeachment was "premature," that we had to work "within the system," meaning the electoral system. But the same charge of being premature was used against each of the causes I have listed. A beginning had to be made. There was no instant grant of what was being asked for. It took time, energy, planning, effort, and sacrifice to make people return to Madison's task of acting like a "virtuous people." Others say that we cannot even rely on elections, since so much is now determined by money and by those who have it in abundance. Some think there can only be a beginning of real reform if we eliminate or curtail the influence of money. But that is probably impossible. Our non-virtuous Supreme Court has undermined all direct attacks on money in politics by saying that the unfettered use of money is a form of free speech,⁴² that corporations are persons,⁴³ and that we should not discriminate against people just because they are rich.⁴⁴

40. Sarah L. Kaufman, *Why was Trump Lurking Behind Clinton? How Body Language Dominated the Debate*, WASH. POST (Oct. 10, 2016), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/10/10/why-was-trump-lurking-behind-clinton-how-body-language-dominated-the-debate/> [<https://perma.cc/UK3K-GECX>].

41. Glenn Kessler, *Trump's Fuzzy Vision on the Sept. 11 Attacks*, WASH. POST (Sept. 12, 2019), <https://www.washingtonpost.com/politics/2019/09/12/trumps-fuzzy-vision-sept-attacks/> [<https://perma.cc/4QDE-VFFL>].

42. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–86 (1978).

43. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010).

44. See *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 740–43 (2008).

What are we to do about such decisions? The same thing abolitionists did about the *Dred Scott*⁴⁵ decision—attack slavery, not the Court.⁴⁶ In the same way, attacking money in politics is not the most effective way to fight its evil effects. We should attack the evil that is being wrought by such money. When Congress members are in effect bought by the Koch Brothers, the Sackler Family, Coke and Pepsi, Big Oil, Big Pharma, do not attack them for having money. They are prepared for that, since they defend their evil use of money by spending, as well, on good things—things like museums, or orchestras, or schools. Attack the evil, not the money—attack the poisoning of the world’s air by the Koch Brothers, the poisoning of people with opioids by the Sackler family, the obesity caused by Coke and Pepsi, the pricing of medicine by the pharmaceutical industry. The progress that was made against the tobacco companies did not happen because they were rebuked for being rich but for spreading cancer. These are the tasks that are posed to a virtuous people. Elections ratify what is achieved. They do not, of themselves, cause it. When Madison said that a republic could only exist where the people are virtuous, he did not make voting the only exercise of that necessary virtue.

45. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

46. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 429 (1978).