

INTRODUCTION: THE PRESIDENCY AND CONSTITUTIONAL DEVELOPMENT

The presidency occupies a central constitutional role in American government. The chief executive is the focus of leadership, authority, and policy direction. Presidential power expands in response to demands that neither Congress nor the courts can fulfill. The modern presidents, beginning with Franklin Roosevelt, have been the principal leaders in responding to world war, economic crisis, budget deficits, and various international tensions. These foreign and domestic challenges require presidential leadership to protect, defend, and define the national interest.

When the Founding Fathers wrote the Constitution, they were reacting, in part, to the excesses and abuses of executive power imposed by the British Crown during the colonial and revolutionary war experiences. They were also trying to develop an independent executive branch that was not included in the Articles of the Confederation. The Framers focused major attention on the specifics of legislative power and authority as a check on executive power. They designed a tripartite system of separation of powers and checks and balances to achieve an equilibrium between the executive and legislative branches.

According to James Madison, the principal architect of the federal government's structure at the Constitutional Convention, the system of separated powers and checks and balances was necessary to control political power.¹ In *Federalist Paper*, Number 51, Madison argued that too much governmental power causes abuses that endanger personal liberty and security. Uncontrolled power can lead to tyranny. If the executive gains power at the expense of the legislature, the constitutional system could be threatened. To prevent any of the three branches—executive, legislative, judicial—from dominating the other two, each must be relatively independent. This is achieved by separation of powers. Also, the three branches would have checks and balances over each other to counteract power concentration and domination of any one branch over the other two.

The Madisonian model is one of limited government. Neither the executive nor the legislative are dominant. However, the Madisonian emphasis on balance and equilibrium between the executive and legislative has two principal liabilities: It is an inherently adversarial structure and it frequently produces stalemate or inaction. Forrest McDonald² argues that the Founding Fathers distrusted executive power so much that they created a constitutional design which made it difficult for the two branches to cooperate. Separation of powers was favored over the British choice in the 1720s of a ministerial system which merged the executive and legislative branches and reduced the Crown to a ceremonial role. The constitutional conflicts between the two branches make policy initiatives and innovations difficult to achieve without extraordinary presidential or legislative leadership and executive-legislative cooperation. McDonald argues that this has been infrequent except for wartime and economic crises.

In contrast to the Madisonian model of checking potential executive abuses, Alexander Hamilton, in *Federalist Paper*, Number 70, struck a particularly modern note by arguing for "energy" in the executive, "as a leading character in the definition of good government." Hamilton believed that vigorous executive leadership was "essential to the protection of the community against foreign attacks; it is not less essential to the administration of the laws."

Hamilton's essay identified several important characteristics of a strong presidency. First, the president should be vigorous in carrying out constitutional roles and responsibilities by demonstrating "energy." If he does this, then "good" or "effective" government will result. Second, the president's authority in international and domestic policy is equally important. He is responsible for protecting the nation and administering the laws. Third, the constitution provides the president with four sources of authority to meet his responsibilities. These are unity (a single executive), duration in office (a four-year term with unlimited reeligibility until enactment of the Twenty-second Amendment), adequate compensation, and competent powers (found in Article II of the Constitution).

The formal constitutional powers of the president enable the chief executive to be both independent and interdependent in policy-making responsibilities. Congress cannot control the president. The chief executive is protected by the Madisonian concept of separation of powers. The president also shares power with Congress. This makes the executive both an independent and coterminous branch of the national government. Second, the executive participates in the policy-making process as an equal partner with Congress. Through "competent powers," the executive checks and balances the legislative branch.

The Hamiltonian chief executive is a strong leader who protects the nation against foreign attacks, administers the laws, and secures liberty against the dangers of ambition, faction, and anarchy. Nearly all of the strong presidents of the nineteenth and twentieth centuries defended their constitutional authority in Hamiltonian terms. When abuses of presidential power occurred, Congress usually asserted the Madisonian model of equilibrium and checks and balances.

Most presidents prefer the Hamiltonian view of executive power. They exercise active and positive leadership rather than defer to Congress in negative or passive ways. The six presidents discussed by the historians in Part I of this book—Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Harry Truman—were all vigorous leaders. Together with the presidents serving from 1952 to the present, they promoted executive policy initiatives in Congress, exercised a ceremonial role as leader of the entire nation, rose above party politics and became national leaders, and, since John Kennedy, established a plebiscitary relationship with the public through direct communication in televised speeches and messages from the Oval Office.

The Hamiltonian model of vigorous executive leadership is more applicable to presidential foreign policy leadership and crisis management than it is to the domestic policy arena.

Presidents have had much more flexibility in foreign policy initiatives than in domestic policy proposals. Unless some kind of economic catastrophe (e.g., the Great Depression of the 1930s) occurs requiring the exercise of extraordinary executive powers, presidents must acknowledge a sharing of domestic policy initiatives with an active and involved Congress.

Constitutional checks and balances, fortified by Madison's warning in *Federalist Paper*, Number 51, that "ambition must be made to counteract ambition" usually have modified or delayed executive domestic policy initiatives. We can see this in the proposals by Truman for civil rights; in Eisenhower's initiatives to return various federal programs to the states; in the delays to enact Kennedy's New Frontier initiatives in civil rights, aid to education, and health insurance for the elderly; in the resistance to Nixon's decentralization efforts and welfare reform proposals under New Federalism initiatives; in Carter's energy and urban policy proposals; and in the inability of Reagan to go as far as he wanted in cutting federal spending for the poor and the needy and to return programs to the states and the private sector. Exceptions to this usual pattern include FDR's First New Deal, Johnson's Civil Rights and War on Poverty initiatives, and Reagan's early budget and tax cuts and increases in military spending.

The reasons for executive inability to act quickly on domestic policy initiatives are not difficult to identify. After the president announces proposals in the State of the Union address, his initiatives must gain support from interest groups, state and local governments, and Congress. Each of these competitors can counteract the "ambition" of a "vigorous executive" (to use the notions of Hamilton and Madison).

Interest groups, which are not mentioned in the Constitution, are referred to by Madison as "factions" in *Federalist Paper*, Number 10. These are the non-governmental associations which influence domestic policy by promoting benefits for their members and preventing government action harmful to their members. Interest groups provide campaign funds to members of Congress and get support for their views. The president must convince interest groups to support his initiatives or find ways to counteract them. Frequently, he is unsuccessful or stalemated.

The federal system of fifty state and thousands of local governments presents a situation of considerable complexity and fragmentation of power for an ambitious domestic policy president. The president is required to build coalitions and gain support from many governors and mayors. There is a sharing of responsibility between national policy goals and the actual provision of services by state and local governments.

Congress sees itself as a partner with the president on domestic policy, both from the standpoint of its seventeen clauses of power in Article I, Section 8, of the Constitution and from the constituency-based nature of Congress in serving the people back home. Congress expects the president to lead the House and Senate in domestic initiatives, but Congress also expects to deal with the president in the final determination of policy results. Consequently, Congress expects the president to persuade, bargain, negotiate, and compromise. It expects the president to give and take. This takes time and effort from an ambitious president. The president needs to expend enormous political resources and capital to achieve major domestic policy initiatives.

The three principal limits to domestic policy—interest groups, the intergovernmental system, and Congress—can be overcome by a vigorous Hamiltonian-type president. This has occurred on at least two occasions since 1945: Johnson's initiatives on civil rights, voting rights, and the Great Society antipoverty and aid to education program in 1964-65; and Reagan's \$35 billion budget cuts, \$225 billion tax cuts, and huge increases in defense spending in 1981. The ingredients for their achievements were clear: enormous landslide election victories,

partisan support in Congress, quick response by Congress in the early months of the new administration, public support for the new president resulting from assassination—in the case of Johnson, sympathy for Kennedy; for Reagan, an unsuccessful assassination attempt—favorable media publicity and enough interest group support to overcome strong opposition. Both presidents benefited from a combination of effective leadership and a perceived need for change which mobilized huge voting support in Congress early in their presidencies. Without these ingredients, most presidents faced the normal obstacle course on domestic policy. James MacGregor Burns has characterized this obstacle course as a “deadlock of democracy,”³ which means protracted battles with Congress and interest groups on major domestic policy initiatives of any president.

According to Forrest McDonald,⁴ contemporary examples of executive-legislative policy deadlock or stalemate include electoral politics and the Twenty-second Amendment. The Republican party has an electoral advantage over the Democrats in presidential contests, while the Democrats dominate the House of Representatives. Control of the Senate has become more competitive. Consequently, the presidency and at least one house of Congress are usually in partisan disagreement over domestic policy. The Twenty-second Amendment, limiting the president to two terms, produces a lame-duck syndrome in the president’s second term. The president and Congress do not need each other, and an adversarial relationship occurs. By the third year of the second term, the president usually shifts attention away from domestic initiatives to foreign policy.

The president is much less interdependent with Congress in foreign policy initiatives. In *Federalist Paper*, Number 69, Hamilton carefully distinguished between the sharing of powers and independence of the American executive in foreign policy, particularly as commander in chief and in making treaties. The sharing of presidential authority was in sharp contrast to the British King who had nearly absolute powers in these two areas. The King had “the entire command of all the militia” while “the president will only have command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. . . . The President is to have power, with the advice and consent of the Senate, to make treaties. . . . The King of Great Britain is the sole and absolute representative of the nation in all foreign transactions.”

The strong presidents of the past two centuries dominated U.S. foreign policy. They shared power with Congress in treaty-making and appointments and needed appropriations for military and other

foreign actions. At the same time, the presidency, beginning with FDR, became nearly autonomous in two important areas: the national security state and warmaking powers. The absence of effective constitutional constraints created a potential for enormous abuses of executive power. Arthur Schlesinger, Jr., characterized this problem as the danger of an "imperial presidency."⁵

World War II, Cold War, Soviet aggression, the nuclear age, the worldwide responsibilities of the United States, international crises and emergencies—all of these factors have resulted in a demand for strong presidential leadership in the last fifty years. Presidents have sufficient constitutional and legislative authority to meet these challenges. The president is the commander in chief of the armed forces, the principal negotiator of treaties and executive agreements, the chief diplomatic representative of the nation, and has congressional authority to appoint certain officials, such as the NSC adviser, without senatorial approval. The principal legislative enactment which guarantees strong foreign policy leadership is the 1947 National Security Act. This law established the Central Intelligence Agency, the National Security Council, the Defense Department, and the Joint Chiefs of Staff. The president was provided an enormous institutional apparatus and bureaucracy to conduct intelligence-gathering, to coordinate information from the State and Defense Departments, to unify the armed services and their military commanders, and to engage in covert activities. This institutional structure is essential to a strong foreign presidency.

The problem of the foreign policy presidency, as stated earlier, is unchecked authority and the potential for abuse. This has occurred on at least three occasions since 1945: the Vietnam War, Watergate, and the Iran-Contra Affair.

The Vietnam War showed that the president (Lyndon Johnson) can initiate and conduct war which has no resolution, which has misguided objectives, and which lacks the necessary support from Congress and the American people. President Nixon's extension of the Vietnam War into Cambodia was as questionable as Johnson's earlier escalation. The abuse of power was obvious: The conduct of a full-scale war in a distant part of the world requires the support of more than a group of executive "cold warriors" making policy in the White House. An isolated executive became unaccountable to Congress and the public and caused great damage to the country.

The same holds true for Watergate and the Iran-Contra Affair. When President Nixon used the CIA to prevent the FBI from investigating Watergate and established "plumbers" and enemies lists, he showed contempt for constitutional procedures and the rights of

individuals. The "third-rate" burglary of the Democratic Party Headquarters became a political fiasco for Nixon, leading to calls for his impeachment and resulting in his eventual resignation from office. The point is that Nixon used the national security apparatus to develop the coverups in Watergate.

The Iran-Contra Affair of the Reagan presidency also shows the dangers of isolation when the executive develops a foreign policy without consulting with Congress or informing the American public. Here the issue was gaining the release of American hostages in Lebanon by trading arms to Iran and then using the profits from these arms sales to aid the rebel forces in Nicaragua. Reagan's problem was that Iran was a State Department-designated "terrorist" country which had held American hostages since 1979 during the Carter presidency. The Ayatollah Khomeini was one of the most hostile anti-American demagogues in the world. Further, Congress had specifically prohibited arms shipments to the Nicaraguan Contras at the very time that Lt. Col. Oliver North, General Richard Secord, and Albert Hakim were involved in establishing secret Swiss bank accounts and overseas offshore companies to channel funds to the Contras. The point is that the national security apparatus was used for these covert and illegal activities. The National Security Council staff assumed operational functions, when in fact the 1947 law confined them to staff functions. Further, according to the Tower Board report, President Reagan was unaware of the Contra diversion and mismanaged this entire affair.

The last point to be made about the unilateral nature of presidential actions concerns the war power. Since 1945, the United States has been involved in two full-scale wars in Korea and Vietnam, along with military engagements in Lebanon, Grenada, Libya, Panama, and elsewhere without having a single declaration of war by Congress. The constitutional requirement of having Congress initiate war by declaring it, has been superseded by presidents who are both the initiators of war and its conductors.

Congress enacted the War Powers Resolution in 1973 over President Nixon's veto in an effort to regain constitutional participation in the war power. The resolution requires that the president inform Congress within forty-eight hours after U.S. troops are committed to combat, and that the president must consult with Congress. Combat must end within sixty days unless Congress extends the deadline for return of U.S. troops. Four observations can be made about the War Powers Resolution. First, every president from Nixon to Bush has claimed that the law is an unconstitutional limitation on the executive's powers as commander in chief. Second, no president has consulted

with Congress prior to committing U.S. troops. Third, the power of Congress to force the withdrawal of troops within sixty or ninety days may constitute a legislative veto. Such legislative vetoes were declared unconstitutional by the Supreme Court in 1983.⁶ Finally, the Supreme Court has refused to rule on the enforcement provisions of the War Powers Resolution.

Constitutional Authority and The President

Three kinds of presidential powers are found in the Constitution—in Article II and in the lawmaking process section of Article I: powers exercised by the president alone, powers that are shared with the Senate or both houses of Congress, and negative powers to prevent action by Congress. Exclusive presidential authority found in Article II includes commander in chief of the armed forces, granting of pardons and reprieves for federal crimes, receiving ambassadors, faithfully executing the laws, and appointing officials to lesser offices. Presidential powers shared with the Senate include the treaty-making process (requiring two-thirds approval) and the appointment of ambassadors, judges, and other high cabinet and executive officials.

The president also shares powers with both houses of Congress in the legislative process. A bill becomes a law either with the president's approval or by a two-thirds vote overriding a veto. Negative powers include presidential vetoes of legislation, executive privilege or the power to withhold information from Congress, and impoundment of appropriated funds. Neither executive privilege nor impoundment are found in the Constitution. These powers are the result of Supreme Court decisions (executive privilege) or legislative authorization (impoundment). Another type of negative executive power is the president's authority to order sequestration (across-the-board budget cuts) under the Gramm-Rudman-Hollings law when the president and congress cannot agree on a budget deficit-reduction plan.

The following eleven essays—six by historians and five by political scientists—are divided into two parts: historical perspectives on the presidency and constitutional development from Thomas Jefferson to Harry Truman, and the modern presidency and various policy and leadership issues in the constitutional context from 1945 to the present. The essays address several aspects of the Constitution, particularly Articles I and II as they affect the presidency, including:

1. *Executive Power*: Do the words "executive power" in Article II mean a grant of discretionary power, or did the constitutional Framers intend it as a general power within the context of

subsequent enumerated powers ("faithfully execute the office," "Commander in Chief," "require . . . opinions," "make treaties," "appoint ambassadors . . . judges . . . and other officers," etc.)? Does the Constitution, during times of crisis, suggest an executive prerogative power that can supersede constitutional constraints? What is the constitutional meaning of "executive privilege"?

2. *Dual Administrative and Ceremonial Roles of Presidents:* In addition to the president's administrative responsibilities, does the Constitution include a ceremonial role? If so, were the constitutional Framers aware that England was separating the chief of government and ceremonial roles as the United States joined them? How does the ceremonial role compare in significance to the president's chief administrative role?
3. *Separation of Powers:* Does the Constitution suggest that any one of the three branches of government is superior to the other? Is it constitutionally permissible for each branch to interpret the Constitution on its own? To what extent did the constitutional Framers permit a sharing of power between the Congress and the president?
4. *National Welfare:* How have Americans used their constitutional authority to promote federal government involvement in economic affairs and domestic social welfare policies and programs? Does the "General Welfare" clause in the Preamble enable the president to assume "executive power" through positive action? Are there any other constitutional provisions in Articles I or II that facilitate the growth and expansion of executive power in domestic policy?
5. *Foreign Relations and the War Power:* Is the president generally preeminent in making foreign policy, or is policy shared with Congress? Is the treaty-making power a principal basis for presidential foreign policy? What are executive agreements? Does presidential control of foreign policy enhance the possibility of an "imperial presidency"?

How extensive is presidential authority under the commander-in-chief clause? Does the presidential oath imply the use of "emergency powers" and "executive prerogative" in national emergency and foreign military engagements?

Does the United States have two constitutions—a "War Constitution" that grants extraordinary executive powers in times of domestic and international crisis, and a "Peace Constitution" where the chief executive is constrained by Articles

I, II, and III provisions dealing with the separation of powers and checks and balances?