

The Imperial President-The Evolution of the Modern President September 17, 2007 Robert Weibe

Congress sent a request to the Executive Branch for information. The Executive Branch promptly denied their access to the information citing Executive Privilege and separation of powers under the Constitution. Who was this president? Was it Bush? Was it Nixon?

This issue first arose in 1792 when the House of Representatives, when investigating the failure of Indian expedition, called on the Executive Branch for, “for such persons, papers, and records as may be necessary” to its’ inquiry. President Washington, after consultation with his cabinet, agreed to produce the information, even though in their deliberations they considered that the papers may be too secretive in nature, that they ought not give up. They contrasted this with the public good that would be generated from communicating such papers.

The second case arose in 1796, when the House asked for copies of diplomatic instructions and papers relative to the Jay Treaty with Britain. In this case, President Washington rejected the particular request as an invasion of the treaty-making power for which the House was specifically excluded in the Constitution.

This precedent was reversed when Adams became President and other early Presidents continued to assume the Congress had the moral right to information.¹

What are the Powers of the President and How Did They Evolve?

The Constitution provides in Article 2, Section 1, “The Executive Powers shall be vested in a President of the United States of America. He shall hold his office during the term of four years”.

Section 2 provides “the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of several states, when called into active service of the United States; he may require the opinion, in writing, of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices, and he shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise

¹ Fifteen of the Imperial President by Arthur M. Schlesinger Jr. Published by Houghton, Mifflin Co. 1973.

provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they seem proper, in the President alone, in the courts of law, or in the heads of departments.”

Section 3 states, “He shall from time to time give the Congress information of the State of the Union, and recommendations to their consideration such measures as he shall judge necessary and expedient; he may, on extra ordinary occasions, convene both Houses, or either of them, and in the case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other Public Ministers; he shall take care that the laws be faithfully executed, and shall commission all the Officers of the United States.”

Article 2 of the Constitution only contains 678 words.

It was subsequently amended with the 12th amendment which changed the manner of electing President. Initially, the individual who received the most votes was President and the runner-up was Vice-President. This obviously produced situations once political parties evolved where competing individuals were present as President and Vice-President, such as John Adams of the Federalist Party and Thomas Jefferson of the Republican Democratic Party.

The 20th Amendment changed the term of the President to begin on the 20th day of January.

The 25th Amendment dealt with the Presidential Disability and Secession.

Other than that, no further guidance is provided to us with the Constitution.

To supplement and accomplish the basic framework of the Constitution, Congress created Executive Departments in 1789. It established the State Department, War Department, and the Treasury Department. It also established two Executive Agencies, the Post Office and the Office of Attorney General. Initially, the Attorney General actually was a lawyer on retainer to advise the President. He continued to privately practice law. He would basically prepare and argue cases for the executive branch in addition to advising the President.²

In order to understand the limitations on the Executive Powers, it's necessary to look at the environment when the Constitution was framed. First, it is significant to note that the revolution was, in fact, a rebellion against the monarchy and, therefore, of course the framers wanted to avoid replicating the evils of the king. In addition, during the colonial period, Governors appointed by the Crown frequently struck down actions of the Colony Legislatures, thereby breeding much

² The American Presidency, An Intellectual History, Forest McDonald, University Press of Kansas 1994, page 224.

discontent. Thomas Payne, in *Common Sense* directly attacked the King and the tyranny that he invoked on the colonies. The Declaration of Independence also attacked the King, for his absolute tyranny over the States.³

For this reason during the revolutionary war period and the Articles of Confederation, there was no strong executive. The closest thing they had was the appointment of George Washington as General of the Continental Army.

Although he had executive powers over the troops, most of the powers were retained with the Continental Congress. To make matters worse, although the Continental Congress had the authority to make rules, it did not have the power to tax or the power to cause the States to fund their decisions. They had to rely on voluntary cooperation for the funding and execution of their decisions.

There were discussions by Robert Morris, who helped finance the revolution, George Washington and Washington's Aide de Camp, Alexander Hamilton involving the need for a strong and independent Executive.

There was strong opposition to this premise by many including a coalition between John Adams and Richard Henry Lee. They supported the decentralized of the controls to the States and the Congress, instead of a centralized authority in the form of a strong executive branch. Under the Articles of Confederation, the

³ Forest McDonald, page 129.

government was inefficient, ineffective, and bankrupt. Since Congress had no authority to cause their decisions to be executed by the States and/or to raise money, commerce, finance, and economy was in a very troubled state.

As a result of the lack of executive authority, a movement developed which initially was framed as re-writing the Articles of Confederation but evolved into an entirely new constitution. A call was made for a Continental Congress. Alexander Hamilton along with others, believed that the problems that existing under the Articles would cause the “United States” to fragment and pushed to totally reform the organization of the government. One of the changes was the creation of the executive branch to eliminate the problems of execution under the Articles of Confederation.

In the Constitutional Convention, George Washington was generally accepted as the person who would be elected as the first President. Therefore, the office was designed with him in mind. Once he was elected the first President, he took great efforts to frame the duties and perceptions of the office. His Presidency established several traditions including among others, close contact with the people in the form of ceremonies, the title of Mr. President, and of course, until Franklin Roosevelt, the limitation of two terms.

The administration of his Presidency created working procedures and processes of the new government. One example was their efforts to create and establish the collection of revenues and the establishment of credit for the new government. Washington's Secretary of Treasury Hamilton believed that a National bank was needed in order to carry out the business of government. He pushed for the creation of the Bank of the United States. Hamilton, felt that the Bank was needed in order to effectively carry out the obligations of the government. Controversy ensued about the constitutionality of the Bank. On one side, James Madison and Thomas Jefferson believed that the Bank's Charter was unconstitutional. Madison and Jefferson felt that a strict constructionist interpretation of the Constitution should be applied⁴ Washington asked Jefferson and his Attorney General Randall for an opinion on the constitutionality of the Bank of the United States' Charter. They indicated that the Bank was unconstitutional because Hamilton went too far with his necessary and proper argument. They said the measure had to be more than just convenient in executing powers granted to the Federal Government. It had to be truly necessary, that is, indispensable. They took the Constitution's recital of congressional powers literally, saying that to take a single step beyond the boundaries specifically drawn is to take possession of a boundless field of power no longer susceptible to any definition.⁵ After receiving this negative report, Washington asked Hamilton to comment. Hamilton argued that the government possessed authority to adopt the means to attain the end result. He

⁴ The American Presidency, Forrest McDonald, page 232.

⁵ Alexander Hamilton by Ron Chernow, page 352.

argued that the government had the right to employ all means necessary to carry out powers mentioned in the Constitution. He argued that the principles of strict construction, like those argued by Jefferson and Randall would be fatal to the just and indispensable authority of the United States. He said, “that the general principle is inherent in the very definition of government and essential to every step of the progress to be made by that of the United States, namely every power vested in a government is in its nature sovereign and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power”.

Washington was convinced by Hamilton’s argument, thereby applying a liberal interpretation of the Constitution. It is interesting to note that when Jefferson became President, he did not have the same interpretations with respect to the express powers when he purchased the Louisiana Territory. He clearly acknowledged that he did not have the express authority to do so. One wonders if his opinions about the liberal interpretation of the Constitution were applicable to the actual interpretation of the Constitution or merely a means to accomplish the ends of opposing the Bank of the United States.

In the long run, Hamilton’s interpretation of the Constitution has prevailed. Its impact is being felt even today. If a strict interpretation of the Constitution was adopted, our next Presidential election would be much different in that as

previously stated, Article 2 Section 1 of the Constitution refers to the President's term by saying, "he shall hold office". If this clause was strictly interpreted, obviously Hilary Clinton would not be eligible to run for President.

In addition to express powers, implied powers have evolved. These implied powers are those that can reasonably be drawn from the express powers. There are numerous examples of the President invoking inherent powers. Most notable is actions taken by President Abraham Lincoln at the start of the Civil War. He suspended the writ of habeas corpus, withdrew funds from the Treasury, called for the State Militia, placed a blockade on the rebellious States without legislative authority. He claimed the right in a time of emergency to act in the absence of law and sometimes against it, for the public good. He later went to Congress to explain what he had done and to then request their retroactive approval. Lincoln could have, in fact, called a special session of Congress and have them fulfill their duties under the Constitution. But actually, he purposely chose not to, to enable himself to act without their interference. When Congress met, he told them, that his actions "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then as now, that Congress would readily ratify them". Lincoln never claimed authority to act outside the constitution. Congress debated his request for ratification and passed legislation approving legalizing and making valid all of Lincoln's acts, proclamations, and

orders issued before. Please note that Lincoln took emergency action and then sought statutory authority.⁶

In 1948, Truman claimed the power to send America's soldiers to Palestine as part of the United Nations Force without receiving Congressional consent. Although troops were never sent, this issue arose again, when in 1950 the North Korean Army invaded South Korea. The UN Security Council pronounced North Korea's invasion as a breach of peace and asked the Member States to render assistance to United Nation execution of the resolution. Truman committed American air and sea forces to support South Korea. Not until two days after the decision, and three days after North Koreans attacked, did the President meet with Congressional leaders. He told them of his decision and received their support. The same day, he publicly announced his decision and cited the UN Resolution as his authority. A controversy about the constitutionality of the decision arose. The State Department argued that the President, as Commander-In-Chief of the Armed Forces of the United States had full control over the use of the Armed Forces and that there was a traditional power of the President to use the Armed Forces without consulting Congress.⁷

Much debate ensued. It ended inconclusively with the passage of the Senate resolution in which the Senate approved the sending of the Armed Forces to Korea.

⁶ Presidential Quarter Studies Quarterly, Vol. 37 #1, March 2007, pages 2-3.

⁷ The Imperial Presidency, page 133.

It said no additional ground forces could be sent without further Congressional approval. It is noteworthy to say that Senator Richard Nixon of California was among those voting against the inherent presidential authority.⁸

President Johnson felt he was somewhat constricted by the SEATO Treaty concerning US involvement in Southeast Asia. Whereas, the NATO Treaty provided, “Any armed attack against one shall be considered an attack against all”. Unfortunately, the SEATO Treaty had different provisions. It stated, “Each party recognizes that aggression by means of an armed attack against any of the parties would endanger its own peace and safety and the parties shall consult immediately in order to agree on the measures which should be taken for the common defense”. Therefore, the SEATO Treaty in contrast to the NATO Treaty called for discussion. The actual fighting was optional. The signers to the SEATO Treaty were Australia, Britain, France, New Zealand, Pakistan, the Philippines, Thailand, and the United States. Johnson could not get a serious commitment from any other of the countries. On the night of July 31, 1964, an American force raided two small islands off the Tonkin Gulf off the coast of Viet Nam. On August 4th, the Maddox and the Turner Joyce sailed into the Gulf of Tonkin. As soon as the two destroyers moved within the 12 mile limit, it reporting the Maddox was under attack by enemy boats; Johnson ordered retaliation air strikes and went on television to announce it. The next day, a joint resolution was introduced in

⁸ The Imperial Presidency, page 140.

Congress stating, “Congress approves and supports the determination of the President as Commander-in-Chief to take all necessary measures to repel on the attack against the forces of the United States and to prevent further aggression. The United States is prepared and as the President determines, to take all necessary steps, including the use of Armed Forces to assist any member or protocol state of the Southeastern Asia Collective Defensive Treaty requesting assistance in defense of its’ freedom”. The resolution passed with only two dissenting votes.⁹

Korea may have been the first unconstitutional Presidential war because it entirely skirted Congress. Another unconstitutional Presidential war was Kosovo in 1999 where President Bill Clinton used military force, not on the basis of a Security Council Resolution, which he could not get, but by seeking support of NATO countries. This was an extra ordinary stretch. According to this legal interpretation, Presidents need not come to Congress for authority. They only need to obtain support from Italy, Belgium, and other NATO members.

Presidents have interpreted their authority under the Constitution very differently. There have been some rather extremes such as Teddy Roosevelt who said, “My belief was that it was not only the President’s right but his duty to do anything that the needs of the nation required unless such action was forbidden by the Constitution or the laws”. In contrast to this, Roosevelt’s successor, William Taft

⁹ Commander in Chief by Jeffrey Perret, published by Farrar, Straus and Grous 2007, page 230.

states, “The President can execute no power which cannot be fairly and reasonably traced to a specific grant of power or justly implied within such express grant as proper and necessary to its exercise”.

Where there are examples of situations where Presidents have extended their war powers, such as the Mexican War, Korean War, and Viet Nam War, there are other examples where Congress, because of strong public opinion, has delayed the declaration of war. History shows this with the neutrality position before World War I and with Congress’ and the public’s lack of recognition of a world-wide crisis with the Japanese and German regimes before World War II.

There has been a seesaw between the power of the Executive and other branches. In some cases, the Executive Branch has abused the other Branches, such as when Jefferson in conjunction with Congress pushed through a Bill that postponed the opening of the Supreme Court for one full year whereby eliminating potential adversarial decisions by the Federalist dominated Court. Similarly, when Franklin Roosevelt had several of his New Deal Programs ruled unconstitutional, and at the height of his popularity, undertook a program to reorganize the Supreme Court. He lobbied to enlarge the Court membership to dilute the anti-New Deal position of the Court.¹⁰

¹⁰ The Presidency of Franklin Delano Roosevelt by George Mcjimsey, University of Kansas 2000, pages 172-173 and The Presidency of Thomas Jefferson by Forrest McDonald 1976, page 50.

In the post-Watergate era, Congress flexed its' powers over the Executive Branch as a result of Nixon's abuse of his powers. Congress enacted a lacework of new laws aimed at reshaping the Executive Legislative relationship in substantial areas where Congressional prerogative had been slighted. For example, they enacted the Congressional Budget and Impoundment Control Act of 1974 prohibiting unilateral Presidential spending decisions and creating important centralized structures such as the Budget Committees, the Congressional Budget Office to guide the legislative budget process. In foreign policy, the Wars Power Resolution was adopted to insure Congress had a say to the use of Government force and with the Hughes-Ryan Amendment, and the Intelligence Oversight Act to keep it informed with covert operations. There is also the Non-Detention Act and Natural Emergencies Act as well as the Foreign Intelligence Surveillance Act, and Keith Decision which limited the President's internal security powers at home.

In *US vs. Nixon*, the Supreme Court provided that the President's power to assert its Executive Privilege was not absolute and was reviewable by the Courts. In 1976, President Gerald Ford complained that, "We have not an imperial Presidency but an imperiled Presidency. Under today's rules, the Presidency does not operate effectively. That is harmful to our overall national interest".¹¹

¹¹ Presidential Studies Quarterly Vol. 36 #3 Sept. 2006, pages 509-510.

Even with these changes, it did not fully erode the power of the Presidency. The office of the Presidency still has a solid base of authority grounded in its ability to grab the public spotlight and set the agenda. The Commander-in-Chief power, its potential control over policy implementation; its' role in appointments and its' veto leverage its power.

Statutes that were intended to stifle the Presidential Powers, actually gave life in law to the Powers that were earlier only exercised informally. For example, the International Emergency Economic Powers Act designed to limit the President's Power to impose economic sanctions led to the declaration of a dozen of national emergencies. The adoption of the War Powers Resolution did not actually control the President's use of force in such employments as Lebanon, Iran, Grenada, the Persian Gulf (in 1987 and 1988), Libya, Panama, Somalia, Iraq (in 1993 and throughout the no fly zone period), Haiti, Bosnia, Sudan, and Afghanistan in 1998. The Congressional Budget Act did not bring any discipline federal spending with the deficits that continued through the 1980's with a brief period of surpluses in the 1990's.

Presidents starting with Ronald Reagan aggressively used Executive tools such as regulatory review of policy statements to enhance their influence. Federal regulation is one of the basic tools governments use to implement public policy.

During the past 50-60 years, various Presidents have developed an elaborate set of

procedures and requirements to guide the Federal rule-making process. The most important of the current set of Presidential rule-making requirements are in Executive Order 12866 which was issued by President Clinton in September 1993. This Order describes the principles and procedures by which the Office of Management and Budgets Office of Information and Regulatory Affairs reviews hundreds of Agencies significant proposed and final rules before they are published. As a result of these reviews, this office can have a significant if not determinative role in the development of a broad array of public policies.

In January 2007, President George W. Bush issued Executive Order 13422 making significant amendments to the Presidential regulatory review process. These changes have been characterized as a power grab by the White House that undermines public protection and lessens Congressional authority. Supporters of the Order say that the changes are, “A paragon of common sense and good government”. The opposition believes that the new Order creates an almost insurmountable bias in favor of Agency inaction and shifts to the executive, powers that the framers of the Constitution intended to be exercised by Congress. Proponents argue that the Order simply formalizes many principles established in previous administrations.

It is unclear what impact the changes brought on by Bush’s Executive Order 13422 will have on the balance of power between the President and Congress. Congress

has a vested interest in regulations that emerge from the rule-making process having created each Regulatory Agency, confirmed Agency's Heads, and enacted the legislation pinpointing each proposed and final rule. Therefore, Presidential initiated changes that appear to affect those Congressional Directives are naturally of great interest to Congress. Several of the changes made by Executive Order 13422 represent a clear expansion of Presidential authority over rule-making agencies. Possibly, Congress needs to block the implementation of the Order through legislation. In the past, Congress has revoked Executive Orders both directly and by reversing specific provisions of the Order. The President, however, could veto the legislation and, therefore, the enactment of the law would require a 2/3 majority of both Houses.¹²

The impact of events, elections, court decisions, legislative hearings, all impact the balance of powers between the various branches of government. Political context has changed, the world has changed, but the Constitution and the direction it gives to each Branch and the relationship with the other Branches has not changed. Congress will continue to use its power to do its job, attempting to exert some control over the Executive Branch. Still, it will never completely override and control the Executive Branch. The contemporary President retains tools to define the terms of the debate and utilize its offices' structural advantages. The fact is that Congress is a divided body run by collective choices which gives the President

¹² Presidential Studies Quarterly, Vol. 37 #3 Sept. 2007.

inherent advantages (in Alexander Hamilton's terms) of decision, activity, secrecy, and dispatch. Even if the President doesn't get the last say, the President often gets the first move which in itself may shape the landscape over which the subsequent decisions are made. In 2005, President Bush sought to do exactly this, seeking to reframe opinion on Iraq. The President began extensive scheduled speaking engagements defending his policy in Iraq claiming steady progress and suggesting that calls for military withdrawal were premature and unpatriotic. Early in 2006, the Congress renewed the Patriot Act largely on the President's terms.

When his nominees had difficulty obtaining Senate confirmation, they were installed in their post by recess appointments as provided by the Constitution.

So is there a new imperial President? Has the balance of power shifted back to the President? The answer is probably yes. The 1970 shift of power to Congress has shifted back and the Presidential Powers now fill in the vacuum. But in reality there is a significant trend. Whereas there was a rise of Presidential power to the 1960's, it shifted back, away from the Presidencies during the '70's. Then, once again, the Presidential Power was increased from the 1980's and significantly accelerated after 9/11. There is a continual effort by Presidents to expand their powers past Article 2. There are ultimately constraints and checks and counter balances. The modern Presidency has many potent tools. The Presidential Power

is actually the residual powers leftover subtracting out all the power of other actors in the system. However, that power remains conditional.

This presidential power has practical advantages and grave dangers. The advantages are clear. It can provide direction to the nation. There is no way that we as a nation could react and govern if we were lead by numerous executives. The problems of administration that arose during the Articles of Confederation period are not present with our strong executive. This is ultimately what drove the framers to submerge their fear of the monarchy and enable a single person as President. The dangers are best expressed in the words of anti-federalist patriot, Patrick Henry, who states, "If your American Chief be a man of ambition and abilities, how easy is it for him to render himself absolute?." The danger of unilateral authority is immense, therefore, the importance of limitations and balancing is paramount to success.

We must accept that executive discretion is, in fact, increasingly important. Yet, who sets the boundaries between the Branches? The President is not alone in his responsibilities, although it is not the Legislative Branch's responsibility to manage policy implementation on a day to day basis. But Congress has a critical task, its job is to use debate and deliberation to distill priorities and set clear standards to oversee and judge the decisions and actions of others by those standards, to expose both good and bad efforts of the government to public scrutiny and to revisit its

early debate in light of later events. It is through this balance that the framers have equipped us with the appropriate checks and balances to keep our system balanced.