

# The Changing Presidency



Mark Skrobola (MCS@flickr)

Photo 1.1 The White House—nerve center of the executive branch and home of its chief.

**F**or most Americans, the president is the focal point of public life. Almost every day, we see and hear from the president on media platforms old and new, meeting with foreign dignitaries, proposing policies, or grappling with national problems. We like to think of the president as being in charge: an engaged leader who can get things done. During the 2016 presidential campaign, Donald J. Trump portrayed himself as precisely that type of leader, one poised to “Make America Great Again.” But the reality of the presidency rests on a very different truth: Presidents are seldom in command and usually must negotiate with others to achieve their goals. It is only by exercising adroit political skill in winning public and elite support and knowing how to use it that a president can succeed in office.

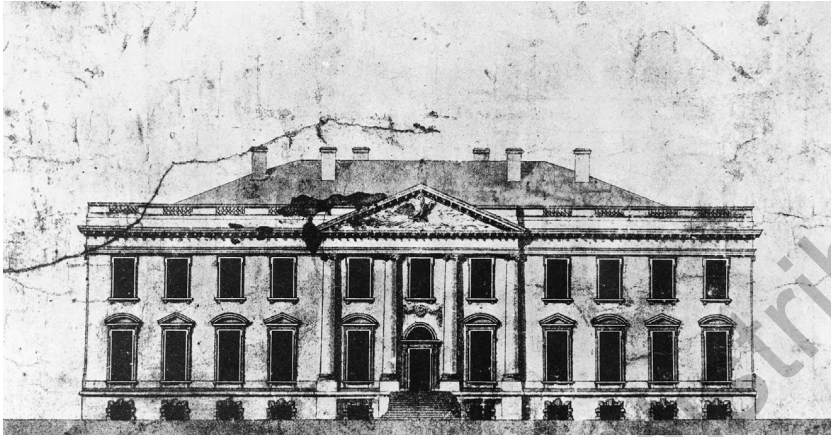
## The Scope of Presidential Power

In some respects, modern presidents are stronger than ever before. At the beginning of the twentieth century, presidents embraced new, expansive

views of presidential power that by midcentury were accepted as normal. They used the power of the “bully pulpit” to shape public opinion. With the advent of radio and television, they became the leading voice in government (under Mr. Trump we have learned how Twitter can expand even further the president’s rhetorical arsenal). In 1921, Congress added to the power of presidents by requiring them to submit annual federal budgets for congressional approval—an action that made presidents policy leaders in a way they never had been before. Staff support for presidents multiplied as the century progressed. And by leading the United States to victory in two world wars and playing for high stakes in the Cold War, presidents took center stage on the world scene.

Yet for some fifty years after World War II, there were a string of “failed” or otherwise abbreviated presidencies. Of the ten presidents serving from 1945 through the end of the twentieth century, only three—Dwight D. Eisenhower, Ronald Reagan, and Bill Clinton—served out two full terms of office. Despite strong public support upon being thrust into the presidency, Harry S. Truman and Lyndon B. Johnson left office repudiated by their party after they involved the country in controversial military conflicts abroad. Both were eligible to run for another term, but neither chose to do so. John F. Kennedy was assassinated before completing his first term. Richard Nixon resigned in disgrace less than two years after his landslide reelection. Nixon’s vice president, Gerald R. Ford, failed to win the presidency in his own right after completing Nixon’s term. Jimmy Carter lost his reelection bid after his public approval ratings plummeted to a record low of 21 percent because of the Iranian hostage crisis and runaway inflation. George H. W. Bush, whose approval rating skyrocketed to 89 percent during the Persian Gulf War, confronted an economic recession and criticism of his domestic agenda and was not reelected. Even Reagan and Clinton were distracted by scandal in their second terms. Reagan faced congressional investigations and an independent counsel probe into the Iran-contra affair. Clinton also was subjected to an independent counsel probe and became the first president since Andrew Johnson in 1868 to be impeached by the House of Representatives (though, like Johnson, Clinton was acquitted by the Senate.) Moreover, both Reagan and Clinton were constrained in their second terms by a Congress controlled by the opposition party.

In the twenty-first century, all three presidents—George W. Bush, Barack Obama, and Trump—faced at least a period of divided government in their first term, with both Bush and Obama ever more limited in their second terms by a Congress in which both chambers were controlled by the opposition. And even though Trump took office in 2017 with fellow Republicans solidly in control of Congress, the president’s low public approval ratings, divisions among Republicans, united opposition from Democrats, and an inexperienced White House stymied even the initial effort to repeal and replace the “Obamacare” health law (which the Republican-controlled



Courtesy of the Library of Congress, Prints and Photographs Division

**Photo 1.2** This is James Hoban's original architectural drawing of the White House from 1792. Like the building itself, the office of the presidency has changed over time.

House of Representatives had voted over 50 times to repeal while Obama was president). All of this reminds us that presidential power is not a fixed commodity. Formal powers mean little if presidents cannot convince others to follow their lead. As Richard Neustadt so succinctly put it, “presidential power is the power to persuade.”<sup>1</sup>

Dramatic changes in presidential fortunes are not new to American politics, nor are failed presidencies. Only fourteen of the forty-four individuals who have served as president—less than a third—have served two full terms in office.<sup>2</sup> Through both success and failure, however, one might think that constitutional provisions would serve as a steady source of presidential power. But as the following sections demonstrate, those provisions not only were the subject of great debate at the Constitutional Convention but also have been interpreted differently by presidents and others ever since. Quite simply, the scope of presidential power and the conceptions of the office have changed dramatically over the years.

## Inventing the Presidency

Those who invented the presidency in 1787 did not expect the office to become the nation's central political institution. In fact, Article 2 of the Constitution, which deals with the executive branch, is known for its brevity and lack of clarity, particularly in comparison with the carefully detailed description of the legislative branch in Article 1. But within the presidency's vague constitutional description lay the seeds of a far more powerful position, one that has grown through elaboration of its explicit, **enumerated powers** as well as interpretation of its **implied** and **inherent powers**.

Recent presidents of both parties have sought to expand those powers. Moreover, through the years, Congress and the public have caused the range of responsibilities associated with the presidency to expand, particularly in response to changes in society and America's position in the world. What has developed since 1789 is the office that now stands at the center of American government and American politics. As Stephen Skowronek puts it, the president has become "the lightning rod of national politics."<sup>3</sup>

The office of the presidency gained stature and a set of precedents from its initial occupant, George Washington. During the nineteenth century, however, the office languished, so much so that Lord Bryce, the British chronicler of American government, felt compelled to explain in 1890 that because of the institution's weaknesses, great men do not become president. Government during this period centered on Congress and political parties, an American invention the founders did not anticipate. A few presidents—most notably Thomas Jefferson, Andrew Jackson, and Abraham Lincoln—seemed to foreshadow strong presidents of the future, but most receded quickly from history. How, then, did the presidency come to assume its exalted position? The answer is complex and involves a variety of factors. At one level, the original design of the office—its structure, mode of selection, and powers—continues to exercise important influence on its operation today. But the office has changed over time in response to the influence of its occupants, changing expectations in Congress and by the public, and the internal dynamics of institutional development.

## Constitutional Design

The events leading to the American Revolution led the colonists to disparage anything resembling a monarch. Thomas Paine's enormously influential pamphlet, *Common Sense*, published in January 1776, sharply dismissed the institution of monarchy, calling it "the most prosperous invention the Devil ever set on foot for the promotion of idolatry."<sup>4</sup> Paine called for a new government that had no executive. Some 120,000 copies of *Common Sense* were sold in just the three months following its publication.<sup>5</sup> The pamphlet's rallying cry against monarchy and executive power had hit a nerve.

In the weeks leading to the Declaration of Independence, the Continental Congress urged the colonies to adopt new constitutions in anticipation of statehood. The resulting state constitutions drafted in 1776 and 1777 "systematically emasculated the power of the governors."<sup>6</sup> Pennsylvania's constitution, drafted by Benjamin Franklin, provided for a unicameral legislature but no chief executive at all. Those states that did create chief executives made them subordinate to the legislature. Most governors served one-year terms, were elected by the legislature, and had little or no appointment or veto powers.<sup>7</sup> Even where governors were not chosen by

the legislature (such as in Massachusetts), their powers were checked by a privy council.<sup>8</sup> New York stood out as the exception to this practice of weak governors and strong legislatures.<sup>9</sup>

As a result, most state legislatures became all powerful, which led to something of a backlash against strong legislatures by other participants and observers of the political process. For example, after serving as governor of Virginia for two years, Thomas Jefferson strongly criticized the concentration of power in the Virginia legislature. The Virginia Constitution explicitly called for the separation of the three branches, but the executive and judicial branches were so dependent on the legislative branch that their powers had been eviscerated. Although mindful of the fear of executive power, Jefferson wrote that his experience with the Virginia legislature had convinced him that “173 despots would surely be as oppressive as one.”<sup>10</sup> If an unchecked executive could lead to tyranny, so too could an unchecked legislature. These experiences informed the delegates to the Constitutional Convention in 1787 and made them more willing to accept a strong executive than they would have been immediately after the Revolution.

Experience with the Articles of Confederation also informed the delegates. The articles were a compact among the thirteen states that the Continental Congress had endorsed in 1777 and the states had ratified by 1781. The articles not only avoided the creation of anything resembling a presidency but also failed even to create an independent executive branch. Over time, this omission proved problematic. Attempts to administer laws through ad hoc committees, councils, or conventions proved unsuccessful, and Congress found it necessary to create several permanent departments (including treasury, foreign affairs, and war) in 1781. Although Congress appointed eminent men such as Robert Livingston, John Jay, and Robert Morris to head them, the departments remained mere appendages of the legislature.<sup>11</sup> Because the articles also failed to create a federal judiciary, the resulting government revolved around a single legislative body. In their zeal to ward off monarchy, the writers of the articles ignored the principle of separation of powers. And because the states had not delegated much power to the national government under the new scheme, the Confederation Congress remained impotent. Indeed, the national government had so little power to control the states that the confederation seemed to be but a “cobweb.”<sup>12</sup> Congress did not even have the authority to regulate commerce among the states. This flaw led to a dire situation in which states fought with each other for economic advantage. Protective tariffs and trade barriers became routine weapons used by one state against another. Trade was complicated further by the states’ different currencies. Some states went so far as to pass legislation canceling their debts. With no federal judiciary to turn to, those affected by such legislation sometimes had no legal recourse. The resulting chaos became a driving force for the Constitutional Convention.

Riots and mob actions in various states, culminating in **Shays's Rebellion** in Massachusetts, also signaled the need for change. Shays's Rebellion—an uprising in 1786–1787 by more than two thousand farmers who faced foreclosures because of high property taxes and economic depression—underscored the chaos. Massachusetts had to rely on a volunteer army to stop the rebellion because Congress was powerless to act. This failure of Congress highlighted the need for a national government capable of maintaining public order and prompted several states to vote to send delegates to the proposed Constitutional Convention. Even more significant, it helped to legitimize the idea of a strong *executive*. As Forrest McDonald has written, “Shays’ Rebellion stimulated many Americans, especially in New England, to talk openly of monarchy as a safer guardian of liberty and property than republican institutions could be, particularly in a country as large as the United States.”<sup>13</sup>

The delegates to the Constitutional Convention came to Philadelphia with these problems in mind. They agreed that the power of the national government had to be increased, although they disagreed over *how* to increase it and how *much* to increase it. Virtually all agreed that the new constitution should impose some form of separation of powers with a distinct executive branch at the national level. But delegates disagreed fundamentally about what that executive branch should look like and just how strong it should be. Despite that disagreement, it is striking that just eleven years after the Declaration of Independence, support had grown for an executive (and even a *strong* executive) because of events at the state and the national levels. In short, the delegates brought to the task of designing an executive office two conflicting attitudes: a healthy skepticism for executive power and a new appreciation of its necessity.

*Initial Convention Debates.* James Madison, the thirty-six-year-old Virginian commonly credited as the chief architect of the Constitution, was the first delegate to arrive in Philadelphia. He was convinced that the national government had to be refashioned, especially to increase its power over the states, but he had given little thought to executive power. In a letter to George Washington two weeks earlier, Madison had admitted, “A national Executive must . . . be provided,” but confessed, “I have scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be clothed.”<sup>14</sup>

The Virginia Plan—written mostly by Madison but introduced on the first working day of the convention by fellow Virginian Edmund Randolph—reflected this uncertainty. The plan called for an executive of unspecified size and tenure, selected by the legislature, and with unclear powers.<sup>15</sup> Indeed, the executive did not appear to be a matter of high importance to Randolph. His opening speech on May 29, 1787, included a

lengthy analysis of the defects of the Articles of Confederation, but did not include the lack of an executive as one of them.<sup>16</sup>

When the convention began its executive branch deliberations on June 1, Randolph revealed his preference for a weak executive by arguing for a plural executive. More than a quarter of the delegates agreed.<sup>17</sup> Although we now take a single president for granted, the delegates debated whether there should be a singular or plural executive—one president or multiple presidents. Benjamin Franklin, for one, had long argued for a plural executive.<sup>18</sup> When his fellow delegate from Pennsylvania, James Wilson, moved that the executive should be singular, a “lengthy embarrassed silence ensued.”<sup>19</sup> Franklin broke the silence by encouraging the delegates to express their views on the matter. The debate that followed was the first of many between those advocating a strong executive and those advocating a weak one.

Roger Sherman, a delegate from Connecticut, took the most extreme position on a weak executive. He saw no need to give the executive an explicit grant of power in the Constitution. Sherman believed the executive should be completely subservient to the legislature: “nothing more than an institution for carrying the will of the Legislature into effect” and “appointed by and accountable to the Legislature only.”<sup>20</sup> In addition, he argued that Congress should be able to change the size of the office at will. Wilson’s motion for a singular executive—a first step toward creating a strong one—eventually won on June 4. But Sherman’s suggestion for legislative appointment, something that Wilson and other proponents of a strong executive vigorously opposed, had won on June 2. On yet another issue, presidential veto power, the delegates steered a middle course. After voting for a single executive, the delegates gave the executive a qualified veto power, subject to an override by a two-thirds vote of the legislature.

These decisions, however, proved to be just the beginning of the debate over the position. On June 15 William Paterson introduced the New Jersey Plan, which proposed simply amending the existing Articles of Confederation rather than replacing them with a new constitution. The plan reintroduced the idea of a plural executive and said the executive should be elected by Congress for a single term.<sup>21</sup> Although the primary motivation of the New Jersey Plan was to protect the power of small states (the Virginia Plan apportioned representation in the national legislature according to population; the New Jersey Plan called for equal representation regardless of size), it is clear that those favoring the New Jersey Plan preferred a weak executive.

Following the first debates on executive power in early June, Gouverneur Morris, a delegate from Pennsylvania, joined the convention. Morris, who had spent most of his life in New York, became, along with James Wilson, one of the most influential proponents of a strong executive. He stood out because of his appearance—he had a wooden leg as a result of a

carriage accident and a crippled arm as a result of a scalding as a child—but as Richard J. Ellis writes, “it was his rapier wit, infectious humor, and brilliant mind that set him apart and drew others.”<sup>22</sup> On July 17 he began his offensive. Attempting to free the executive from its dependence on the legislature, Morris called for popular election by freeholders. Sherman vigorously objected, and Morris’s motion was quickly defeated by a resounding margin. But the battle lines were drawn, and the debate over presidential selection was far from over.

Heated arguments over presidential selection continued for the next week, but when the delegates finished talking on July 26, the plan for an executive that had been agreed on in early June remained unchanged: legislative appointment of a single executive for one unrenovable seven-year term. Thereupon the delegates turned their resolutions over to a five-member Committee of Detail chaired by Wilson. Its task was to take the resolutions passed by the Committee of the Whole and turn them into a draft of the Constitution.

*Committee Work and Final Action.* One of the notable contributions of the Committee of Detail was its decision to use the word *president* to identify what the delegates had simply referred to as “the executive.” The committee rejected the word *governor*, suggested by John Rutledge of South Carolina, because of the negative connotations associated with the royal governors who had ruled the colonies. The committee chose *president* because it was an innocuous term. Derived from the Latin word *praesidere* (“to sit in front of or at the head of” and “to defend”), *president* had historically been used to denote passive guardianship rather than strong executive power. The presiding officer of Congress under the Articles of Confederation was called its president. George Washington, who performed a mostly ceremonial function at the Constitutional Convention, served as its president.<sup>23</sup> Arguably, this choice of a term helped to sugarcoat executive power and make it more palatable.

In its draft of the Constitution, the Committee of Detail followed the convention’s wishes and gave the president relatively little power. That it gave the president a specific constitutional grant of power at all, however, was significant. The alternative would have been to follow Sherman’s suggestion and allow Congress to dictate presidential powers. The Committee of Detail followed the convention’s recommendation for a single executive elected by Congress to one seven-year unrenovable term, subject to impeachment, and with a qualified veto power. The draft also gave the president the power to appoint executive officers, to grant pardons, and to receive ambassadors. But many powers traditionally associated with the prerogative of the executive—such as raising armies, making war, making





Courtesy of the Library of Congress, Prints and Photographs Division

**Photo 1.3** George Washington presides over the signing of the Constitution by members of the Constitutional Convention in Philadelphia on September 17, 1787. This depiction of the event was painted by Howard Chandler Christy and hangs in the U.S. Capitol.

treaties, appointing ambassadors, and coining money—were all withheld from the president and given to the legislative branch.<sup>24</sup>

Convention debate resumed on August 6. When the delegates took up the article dealing with the president, it was obvious that they remained dissatisfied. But they could not agree on how to improve things, and debate ended on August 31 with the powers of the president largely unchanged. At that point, the convention sent unresolved issues to the Committee on Postponed Matters. The committee, chaired by David Brearley of New Jersey, consisted of one member from each state (including Gouverneur Morris). It was in that committee that the final constitutional vision of the presidency took shape.

One of the committee's most significant accomplishments was its cobbling together of a compromise plan for presidential selection. Various proposals had been introduced for either popular election of the president or selection by an electoral body, but the delegates had always reverted to selection by Congress. The Committee on Postponed Matters revisited this issue and offered a novel twist on James Wilson's suggestion. The

committee proposed that a president—and a vice president (the first time this position had been recommended)—be chosen by an Electoral College, consisting of electors from each of the states. Each state would be free to choose its electors (equaling that state's combined number of senators and representatives in the U.S. Congress) as its state legislature saw fit. Electors would meet and vote in their respective states. Each elector would have two votes, only one of which could be cast for a candidate from that elector's state. When the votes from all states' electors were counted, the candidate with the most votes would be elected president and the runner-up would be elected vice president. If no candidate received a majority in the Electoral College, the Senate would choose from among the five candidates who had received the most electoral votes. (The convention later changed this provision so that the House of Representatives, with each state delegation having an equal vote, would decide the outcome in such cases.)

The committee's proposed Electoral College seemed to resolve the problems that had stymied the convention. First, it placated both large and small states. Basing the number of electors on the combined number of a state's senators and representatives served as a compromise between equal and proportional allocation of electors. Large states could support the plan with the hope that they would dominate the Electoral College. At the same time, small states were pleased that each elector could cast only one vote for a home-state candidate. Small states were further assured that if the election was thrown to Congress, each state would have an equal vote. Second, the compromise plan satisfied proponents of an independent president and proponents of congressional selection of the president. Proponents of congressional selection argued that a presidential candidate would seldom get a majority of votes from the Electoral College. They believed Congress would choose the president most of the time anyway, with the Electoral College acting simply as a nominating convention. Advocates of an independent president, on the other hand, saw the Electoral College as an explicit rejection of congressional selection and believed the electors would select the president.<sup>25</sup> Even on those occasions when a candidate did not get a majority, Congress was limited in its choice to the five candidates who had received the most votes in the Electoral College.<sup>26</sup> This provision clearly limited Congress more than the original plan, in which congressional choice was unrestricted. Finally, the proposal for both a president and a vice president resolved concerns about succession if presidents did not complete their terms. In short, as Georgia delegate Abraham Baldwin noted at the time, the Electoral College was "not so objectionable when well considered, as at first view."<sup>27</sup>

Besides its plan for an Electoral College, the Committee on Postponed Matters made a few other significant decisions. It shortened the president's term from seven to four years and made the president eligible for reelection

to an unlimited number of terms. And—of great importance to advocates of a strong executive—it gave the president numerous executive powers that the delegates had previously given to the Senate, including expanded appointment power and the power to make treaties. The resulting language was again a compromise. The president could nominate ambassadors and other public ministers, Supreme Court justices, and all other officers whose appointments were not otherwise provided for. Actual appointment would come only with the “advice and consent” of the Senate. And although the president could make treaties, they could be ratified only by a two-thirds vote of the Senate.<sup>28</sup>

The convention as a whole spent several days in early September scrutinizing the proposals of the Committee on Postponed Matters. The only major change came on September 6, when the convention gave the House of Representatives the power to choose the president if no candidate received a majority in the Electoral College. The change was the result of fear among the delegates that the Senate was becoming too powerful. When voting for president, each state delegation in the House would have one vote. This guaranteed that each state would have an equal vote (a counterbalance to the Electoral College itself, which gives large states an advantage).

On September 8 the delegates created a five-member Committee of Style, chaired by Morris, to write a final draft of the Constitution. This committee was responsible for the opening words of Article 2: “The executive Power shall be vested in a President of the United States of America.” As we shall see, the ambiguity of this sentence continues to be the subject of debate, and it stood in marked contrast to the opening words of Article 1, which seemed to explicitly limit Congress’s powers to those listed in the Constitution: “All legislative powers herein granted shall be vested in a Congress of the United States.” Ironically, the **vesting clause** of Article 2 was accepted by the whole of the Constitutional Convention without any discussion of its specific language.<sup>29</sup> The constitutional language regarding the presidency resulted from compromise, but it was a compromise that ultimately favored the strong-executive model more than the weak-executive one. It gave the president powers independent of Congress, although it imposed certain checks on that power. For example, it gave the president the power to appoint subject to the advice and consent of the Senate, the power to negotiate treaties subject to Senate ratification, and the power to veto subject to supermajority congressional override. Still, the outcome of the compromises generally gave the president the important ability to move first and set the agenda; it favored the strong-executive model on each element of the executive summarized in Table 1-1. Credit usually goes to a small group of delegates, especially Wilson and Morris, who used their strategic positions within the convention’s working committees to further their goal of a strong executive.

**Table 1-1 Models of Executive Considered by the Constitutional Convention**

Elements of Executive	Weak-Executive Model	Strong-Executive Model	Decision by Convention
Relation to Congress	Puts into effect the will of Congress	Has powers independent of Congress	Powers are independent of Congress but have checks and balances
Number of Executives	Plural or single individual checked by a council chosen by Congress or as specified in Constitution	Single individual with no council or only an advisory one, chosen by means other than congressional selection	Single individual with Senate advisory on some matters
Method of Choosing/ Tenure	<ul style="list-style-type: none"> <li>• By Congress</li> <li>• Limited term; no chance for reelection</li> </ul>	<ul style="list-style-type: none"> <li>• Not specified</li> <li>• No limitation on terms</li> </ul>	<ul style="list-style-type: none"> <li>• By Electoral College</li> <li>• No limitation on terms</li> </ul>
Method of Removal	By Congress during term of office	Only for definite, enumerated reasons after impeachment and conviction by judicial body or Congress	For treason, bribery, high crimes, and misdemeanors, by impeachment by majority of House and conviction by two-thirds of Senate
Scope and Source of Powers	Limited powers delegated by Congress	Broad powers from Constitution, not subject to congressional interference	Broad powers delegated by Constitution with congressional checks
Appointment/ Foreign-Policy and War-Making Powers	None—province of Congress	Would appoint judicial and diplomatic officials and participate in foreign policy and war-making powers, including making of treaties	Appoints executive and judicial officials with consent of Senate; shares foreign policy and war-making powers with Congress; Senate must approve treaties negotiated by president

Veto	None	Veto over legislation passed by Congress, exercised alone or with judiciary	Qualified veto: may be overridden by two-thirds vote of House and Senate
------	------	---	--

Source: Joseph E. Kallenbach, *The American Chief Executive: The Presidency and the Governorship* (New York: Harper & Row, 1966), chap. 2.

## Interpreting Constitutional Language

The ambivalence over executive power exhibited by the convention became a permanent feature of American political culture. Like the delegates in 1787, Americans have had to confront the trade-off between tyranny and effectiveness—the one to be feared and the other to be prized. The anti-Federalists, who opposed ratification of the Constitution, frequently pointed to the risks inherent in a national executive, which some considered even more threatening than its British counterpart. As George Mason, a delegate from Virginia who ultimately refused to sign the Constitution, had argued, “We are not indeed constituting a British monarchy, but a more dangerous monarchy, an elective one.”<sup>30</sup> But others—Alexander Hamilton, for example—saw the newly created presidency as essential to effective government, the source of energy, dispatch, and responsibility in the conduct of domestic and foreign affairs.<sup>31</sup> This ambivalence has been reflected over the years in differing interpretations of constitutional language concerning presidential power. The vesting clause drafted by Morris and the Committee of Style—“The executive Power shall be vested in a President of the United States of America”—has proven to be, as presidential scholar Charles C. Thach Jr. put it in the 1920s, the “joker” in the game of presidential power.<sup>32</sup> Constitutional language limits both legislative and judicial power. Article 1 limits legislative powers to those “herein granted.” Article 3 uses the phrase “the judicial power shall extend to,” followed by an enumeration of those powers, which suggests the same sort of limitation of power as in Article 1. But Article 2 contains no such limit. Whether the omission was intentional is unclear, because the full convention never debated the language. Thach, however, points to letters that Morris wrote in which he admitted how much impact small, seemingly inconsequential changes of phraseology could have on the meaning of constitutional clauses. Although Morris did not refer explicitly to presidential power in these letters, his advocacy of a strong executive is well known, and Thach suspects that Morris embraced the language of Article 2 with “full realization of its possibilities.”<sup>33</sup> Certainly Alexander Hamilton seized on the distinction between the Article 1 and 2 vesting clauses as early as 1793 as a way to justify President Washington’s power to issue a neutrality proclamation in the wars between France and England.<sup>34</sup>

In any case, by failing to limit executive powers to those “herein granted,” Article 2 suggests that the scope of presidential power is not confined to the powers enumerated in the Constitution. Carried to its extreme, this view gives the president unlimited executive power. The ambiguity of the first sentence of Article 2 has led to three widely divergent theories of presidential power: the constitutional theory, the stewardship theory, and the prerogative theory.

Proponents of the **constitutional theory**, such as William Howard Taft, argue that presidential power is strictly limited. According to the constitutional theory, presidents have only those powers that are either enumerated in or clearly implied by the language of the Constitution as necessary and proper, or granted by Congress under its constitutional powers. Taft put it this way in his book *Our Chief Magistrate and His Powers*:

The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot fairly and reasonably be traced to some specific grant of power or justly implied and included within such grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power that he can exercise because it seems to him to be in the public interest. . . . [Presidential power] must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.<sup>35</sup>

In contrast, the **stewardship theory** holds that the president can do anything not explicitly *forbidden* by the Constitution or by laws passed by Congress under its constitutional powers. Theodore Roosevelt embraced this view as president and explained it in his *Autobiography*:

My view was that every Executive officer and above all every Executive officer in high position was a steward of the people bound actively and affirmatively to do all he could for the people. . . . I declined to adopt [the] view that what was imperatively necessary for the Nation could not be done by the President, unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well being of all our people whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition.<sup>36</sup>

Taft, who had served as Roosevelt's secretary of war but later ran against him for president, took direct issue with the stewardship theory in his book:

My judgment is that the [stewardship theory], ascribing an undefined residuum of power to the President, is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character, doing irremediable injustice to private right. The mainspring of such a view is that the Executive is charged with responsibility for the welfare of all the people in a general way, that he is to play the part of a Universal Providence and set all things right, and that anything that in his judgment will help the people he ought to do, unless he is expressly forbidden not to do it. The wide field of action that this would give the Executive one can hardly limit.<sup>37</sup>

The **prerogative theory** is the most expansive of these three theories of presidential power. John Locke defined the concept of prerogative power in his *Second Treatise of Government* as the power "to act according to discretion for the public good, without the prescription of the law, and sometimes even against it."<sup>38</sup> The prerogative theory not only allows presidents to do anything that is not forbidden but allows them to do things that *are* explicitly forbidden when in the national interest. Lincoln exercised such prerogative power at the outset of the Civil War. From the outbreak of hostilities at Fort Sumter, South Carolina, on April 12, 1861, to the convening of Congress in a special session on July 4, Lincoln stretched the executive's emergency powers further than ever before. This period has been described as a time of "constitutional dictatorship."<sup>39</sup> Lincoln unilaterally authorized several drastic actions. He called up the militia and volunteers, blockaded Southern ports, expanded the army and navy beyond the limits set by statute, pledged the credit of the United States without congressional authority to do so, closed the mails to "treasonous" correspondence, arrested persons suspected of disloyalty, and suspended the writ of habeas corpus in areas around the nation's capital. Admitting that most of these matters lay within the jurisdiction of Congress rather than the president, Lincoln asserted that they were done because of popular demand and public necessity and with the trust "that Congress would readily ratify them." But he deliberately chose not to call the national legislature in to special session until he was ready to do so, and then he presented it with *faits accomplis*.

Although Lincoln's use of executive power was most freewheeling in the early days of hostilities, he continued to exercise firm control over the war until it ended. He controlled the mail and newspapers, confiscated the property of people suspected of impeding the conduct of the war, and even tried civilians in military courts in areas where civilian courts were operating. To justify such actions, he appealed to military necessity, asserting

that the Constitution's commander-in-chief clause (requiring command of the armed forces) and its take-care clause (that the laws be faithfully executed) combined to create a "war power" for the president that was virtually unlimited. Lincoln's success in defending that position is demonstrated by the fact that neither Congress nor the courts placed any significant limits on his actions during the war.

A century later, Richard Nixon pointed to Lincoln's actions in an attempt to justify illegal covert actions he had authorized as president. In fact, Nixon went so far as to claim that if a president chooses to do something illegal because he believes it to be in the national interest, it is—by definition—no longer illegal. He explained this in a televised interview with David Frost in 1977:

When the President does it, that means that it is not illegal. . . . If the President, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the President's decision in that instance is one that enables those who carry it out, to carry it out without violating the law. Otherwise they're in an impossible position.<sup>40</sup>

Following the September 11, 2001, terrorist attacks, President George W. Bush also exercised prerogative powers. As part of the "war on terror," he authorized the detention of "enemy combatants" at Guantánamo Bay, Cuba. He argued that detainees could be held there indefinitely without charge, without access to a lawyer, and without regard to the laws of armed conflict, which many argued violated the Geneva Conventions and basic due-process rights.<sup>41</sup> He also authorized the CIA to establish secret prisons in several countries to detain and interrogate al-Qaida suspects, a possible violation of international law.<sup>42</sup> The president eventually admitted that "an alternative set of procedures" was used as part of the interrogation process at those prisons, but insisted that the procedures, though "tough," were lawful and did not constitute torture.<sup>43</sup> But behind the scenes, two deputy attorneys general in the Office of Legal Counsel had written memos that justified the use of torture against terror suspects and argued that domestic and international law should not interfere with the president's prerogative war power to use torture if necessary.<sup>44</sup>

Bush also used his war power domestically. Critics claimed that he violated the Foreign Intelligence Surveillance Act of 1978 when he authorized the use of domestic wiretaps without warrants. The nonpartisan Congressional Research Service found the wiretaps to be "inconsistent with the law."<sup>45</sup> The Bush administration, however, pointed to the use of emergency war power by Lincoln and other presidents as justification for the wiretaps and noted that the Authorization for Use of Military Force passed by



Congress on September 14, 2001, implicitly gave approval for the president to take broad measures in response to the war on terror.<sup>46</sup> Despite an initial promise to close the military facility at Guantánamo Bay, President Obama approved in March 2011 the resumption of military trials there for terror suspects after a two-year suspension.<sup>47</sup> Obama's critics claimed that his use of prerogative power was at least as expansive as Bush's. For example, Obama waged a seven-month air war in Libya in 2011 relying only on his power as commander in chief. On the domestic front, he made aggressive use of unilateral directives and prosecutorial discretion regarding such issues as immigration, deportation, and the environment, many of which President Trump rescinded with executive orders of his own.

Through action and rhetoric, Trump has also tested the limits of presidential power. Multiple legal battles arose over a range of actions he took, including his decision to declare a national emergency pursuant to the 1976 National Emergencies Act in order to redirect funds to pay for the construction of a wall between the United States and Mexico, as well as his efforts to withhold funding from so-called "sanctuary cities," revoke the "temporary protected status" of immigrants from countries facing natural disasters or armed conflict, exclude transgender people from the military, and ban travel from several predominantly Muslim countries. Some of these cases he won. For example, the Supreme Court upheld the travel ban by a 5–4 vote,<sup>48</sup> and—also by a 5–4 vote—allowed the transgender ban to stay in place while legal challenges continued in lower courts.<sup>49</sup> Meanwhile the president expressed expansive views on other executive powers—including an absolute right to pardon himself—and waged a loud rhetorical battle designed to discredit those who disagreed with him (be they federal judges, his own intelligence advisers, or the media). Some believed the result was to undermine the rule of law.<sup>50</sup>

All of this serves as a reminder that the ambiguity of the opening sentence of Article 2, section 1, has allowed individual presidents to significantly expand the power of the office. As constitutional scholar Edward S. Corwin wrote in 1957, "taken by and large, the history of the presidency is a history of aggrandizement."<sup>51</sup> By the 1970s, Arthur Schlesinger Jr. had coined the phrase "the imperial presidency" to describe the office.<sup>52</sup>

Presidents have also relied on ambiguities in their specifically enumerated powers, laid out in sections 2 and 3 of Article 2, to further that aggrandizement. Together, the enumerated powers have created at least five presidential roles that have evolved and expanded over time.

*Chief Administrator.* This role for the president is more implicit than explicit as set forth in the Constitution. It rests on the executive-power clause (Article 2, section 1, paragraph 1) as well as passages dealing with the right to require opinions from the heads of government departments

(Article 2, section 2, paragraph 1) and the power to make personnel appointments subject to whatever approval Congress may require (Article 2, section 2, paragraph 2). George W. Bush took the role of chief administrator very seriously. He actively embraced the concept of the **unitary executive**—a concept not widely discussed outside the conservative Federalist Society before Bush took office.<sup>53</sup> Supporters of the unitary executive argue that because the president alone possesses the executive power, the president must have absolute control over the executive branch and its administration, including the ability to control all subordinates and to veto or nullify their exercise of discretionary executive power. Moreover, the president must be able to fire any executive branch officials at will.<sup>54</sup> This view of the presidency holds that attempts by Congress to limit the president's removal power, even in the case of independent agencies, are improper, as are other oversight measures that interfere with executive branch functions.

If fully implemented, these ideas would be a major shift in the balance of power, because traditionally Congress has jealously guarded its oversight powers, thereby denying the president anything approximating a monopoly of administrative power. Moreover, in a 1935 case called *Humphrey's Executor v. U.S.*, the Supreme Court unanimously recognized Congress's power to limit the president's ability to fire officers who perform quasi-legislative or quasi-judicial functions in independent agencies within the executive branch.<sup>55</sup> In 1926, the Court had ruled that only purely executive officials performing purely executive functions could be fired by the president at will.<sup>56</sup> Given the large number of independent federal agencies, the Court's ruling in *Humphrey's Executor* places a significant limitation on the president's removal power. But, as President Trump's Supreme Court appointments shift the balance of power on the Court, that could change. For example, Trump appointee Brett Kavanaugh has criticized the *Humphrey's Executor* ruling as a dilution of presidential authority, both in a 2011 lower federal court opinion and in a 2009 law review article.<sup>57</sup>

*Commander in Chief.* This role is specifically enumerated in Article 2, section 2, paragraph 1: "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." But did this language merely confer a title on the president or imply wide-ranging powers in times of emergency? Lincoln believed the latter. From this germ of constitutional power has grown the enormous control that modern presidents exercise over a permanent military establishment and its deployment. The Constitution stipulates that the legislative and executive branches share the war power, but the pressure of events and the presidency's institutional

advantages in taking decisive action have led Congress to give greater discretion to the executive. Nor was this delegation of power completely unexpected. Recognizing the need to repel attacks when Congress was not in session, the Constitutional Convention altered language describing the role of Congress in armed hostilities from “make” war to “declare” war (Article 1, section 8, paragraph 11), thereby expanding the president’s realm of discretionary action.<sup>58</sup> Over time, presidents have invoked the commander-in-chief clause to justify military expenditures without congressional authorization, emergency powers to suppress rebellion or riot, the internment of American citizens of Japanese descent during World War II, the seizure of domestic steel mills during the undeclared armed conflict in Korea in the 1950s, and the use of warrantless wiretapping as part of the war on terror.<sup>59</sup>

The 1973 War Powers Resolution says that presidents may not commit troops for more than sixty days without Congress authorizing the use of military force or formally declaring war. In fact, both before and after passage of the resolution, presidents have initiated the use of force far more frequently than they have awaited congressional authorization. Most significantly, they have continued to wage war—sometimes for years—without a congressional declaration of war. They do so, as political scientist Richard Pious points out, by relying on “congressional resolutions of support, UN resolutions, NATO resolutions, congressional authorizations, and what they consider to be self-executing treaty provisions, relying on whatever is at hand.”<sup>60</sup> Recent examples of the use of unilateral military force came in April 2017 and again in April 2018 when President Trump authorized U.S. military strikes in Syria without specific congressional approval. He did so in response to that government’s use of chemical weapons against its own people. President Obama chose not to launch an attack on Syria in 2013 after a similar use of chemical weapons. He sought but failed to win congressional authorization for a strike (which, at the time, Trump strongly opposed).

There continues to be debate about whether presidents can use military power whenever they deem necessary,<sup>61</sup> or whether the president may use force only when Congress allows.<sup>62</sup> Although in practice presidential war powers are largely unconstrained, Congress, in a landmark use of its power under the War Powers Resolution, voted in 2019 to end U.S. support for the Saudi Arabian–led war in Yemen. The Yemen Resolution—passed with a bipartisan majority in both the Republican-controlled Senate and the Democratic-controlled House—was the first time a War Powers resolution made it to the president’s desk.<sup>63</sup> President Trump, however, exercised his veto power for only the second time in his presidency; Congress was unable to muster the necessary two-thirds majority to override the veto.<sup>64</sup>

*Chief Diplomat.* When combined with the president's expanded war power, constitutional primacy in the conduct of foreign affairs establishes the office's claim to being the government's principal agent in the world, if not its "sole organ." Presidents are not only authorized to make treaties "by and with the Advice and Consent of the Senate" but also empowered to nominate ambassadors, subject to Senate approval (Article 2, section 2, paragraph 2), and to receive diplomatic emissaries from abroad (Article 2, section 3).

Presidents have varied in how closely they collaborate with the Senate in making treaties, most waiting until after negotiations have been concluded before allowing any Senate participation. But what about terminating a treaty? Ambiguity in the language of the Constitution leads to some question about whether the president can unilaterally withdraw from a treaty.<sup>65</sup> Does that, too, require the advice and consent of the Senate? Throughout the nineteenth and into the early twentieth century, Congress asserted its right to approve such withdrawals, but since then has been more passive.<sup>66</sup> President Trump unilaterally withdrew from the Intermediate-Range Nuclear Forces (INF) Treaty with Russia in 2019. Congress likely would have supported that action if given a chance to vote on it (and the treaty itself included a termination clause), but could Trump unilaterally withdraw from NATO? There would be much less support for that. Indeed, a bipartisan group of senators drafted (but never voted on) legislation in 2018 that would prohibit presidents from withdrawing from NATO without two-thirds consent of the Senate, and they promised to introduce it again in 2019.<sup>67</sup> In the end, the answer appears to be more political than legal. When thirty-two members of Congress sued President George W. Bush, challenging his unilateral withdrawal from the Anti-Ballistic Missile (ABM) Treaty in 2001, a federal district court threw out the case, citing *Goldwater v. Carter*, a 1979 Supreme Court case that held that treaty withdrawal is a nonjusticiable "political question" that courts cannot address.<sup>68</sup> Thus, congressional retaliation would have to be political rather than legal.

Another shift toward presidential dominance in foreign affairs is the increased reliance on **executive agreements** between heads of state in place of treaties. These agreements do not require Senate ratification, as treaties do, although many are given legislative approval by statute (as was NAFTA, the North American Free Trade Agreement, under President Clinton) or a joint resolution of Congress (as was SALT I, the first Strategic Arms Limitation Talks with the Soviet Union, under President Nixon). Statutes and joint resolutions require only a simple majority, rather than the two-thirds approval necessary for Senate ratification of a treaty.<sup>69</sup> When given such legislative approval, they are referred to as "congressional-executive agreements."<sup>70</sup> The scope of President Obama's power to negotiate and implement a nuclear agreement with Iran without congressional approval

became a contentious issue in 2015. Obama secured the nuclear deal, but Trump withdrew from it in 2018. He also withdrew from other agreements, such as the Trans-Pacific Partnership and the Paris Agreement on climate change, and threatened to withdraw from NAFTA (see chapter 10).

*Chief Legislator.* This feature of the president's job did not fully develop until the twentieth century. Before then, the president's role in legislation was essentially negative: the ability to veto. Today, however, the presidents' power to provide leadership for Congress rests primarily on their ability to shape the legislative agenda through active leadership. Congress fostered this development in 1921, when it passed legislation requiring the president to submit a budget for the whole of government. Constitutional language in Article 2, section 3, merely obliged the president to give "the Congress Information of the State of the Union" and to recommend such other measures for its consideration as deemed "necessary and expedient." Legislative leadership is now considered a task for all presidents to fulfill, and they routinely develop detailed legislative agendas and present them to Congress and the nation.

*Chief Magistrate.* This area of presidential activity is perhaps the least clearly recognized, but it is one that George W. Bush expanded as part of his embrace of the unitary executive. It is based on the oath clause of Article 2, section 1, paragraph 8, of the Constitution, directing the president to "preserve, protect and defend the Constitution of the United States," and the general charge in Article 2, section 3, directing the president to "take Care that the Laws be faithfully executed." Proponents of a unitary executive argue that these clauses require **coordinate construction**. In other words, the president, along with the courts and Congress, has the power and the duty to interpret the Constitution to make sure it is preserved and faithfully executed. President Bush's interpretation led to his controversial use of **presidential signing statements** when signing a bill into law. Presidents since James Monroe have issued them, but usually they were ceremonial in nature—designed to state why the president signed a law or to celebrate its passage. Occasionally, however, a president would use them to point out portions of a bill he thought were unconstitutional. In some rare instances, the president would say he would not execute that provision. Other presidents, Clinton, for example, noted constitutional problems in their signing statements, but made it clear that they would enforce the provision until a court struck it down.<sup>71</sup> Starting with Reagan, signing statements were used more systematically—often to clarify how the president believed executive-branch agencies should interpret ambiguous sections of

the law. In 1986, the Justice Department added signing statements to the legislative history section of the U.S. Code.<sup>72</sup>

Bush, however, used signing statements routinely to state his intent *not* to enforce specific provisions of legislation, even if they were not held unconstitutional by a court. For example, he rejected congressional oversight of PATRIOT Act authority to search homes secretly and to seize private papers. Although he signed the McCain amendment banning the use of torture by U.S. officials, Bush quietly indicated that he could disregard the law and use torture under his commander-in-chief powers when he deemed it necessary.<sup>73</sup> And in one signing statement accompanying the Consolidated Appropriations Act of 2005, Bush issued 116 specific objections relating to almost every part of the bill. In short, Bush had a broader conception of the power of the chief magistrate than his predecessors. When he took office, President Obama instructed executive officials not to enforce any of President Bush's signing statements without first consulting with the attorney general, but he nonetheless indicated that he would use signing statements under some circumstances.<sup>74</sup> In fact, he issued a signing statement just two days later, in which he reserved the right to bypass dozens of provisions in the \$410 billion spending bill he was signing into law.<sup>75</sup> During his presidency, Obama issued forty-one signing statements.<sup>76</sup> Trump has also continued the practice. For example, he signed the National Defense Authorization Act (NDAA) into law in August 2018, but issued a separate signing statement deeming about 50 of its provisions to be unconstitutional.<sup>77</sup>

George W. Bush interpreted all five presidential roles broadly. Law professor Jeffrey Rosen called it “the largest expansion of executive power since FDR.”<sup>78</sup> Because the constitutional job description for presidents is permissive rather than confining, it aids such aggrandizement of presidential power. And once expanded, executive power seldom contracts to its previous level—a “ratchet” phenomenon that was apparent during the Obama administration across all five arenas of presidential power, and has continued under Trump.

## Presidential Removal and Ethics

At the Constitutional Convention, Benjamin Franklin urged his fellow delegates to provide a mechanism to deal with a president who has, as he colorfully put it, “rendered himself obnoxious.” Such a mechanism, he said, must provide for the punishment and removal of an individual whose conduct deserves it, but also allow for “honorable acquittal” for those “unjustly accused.” The brutal and unacceptable alternative, he warned, would be assassination.<sup>79</sup> The delegates responded by giving Congress the power to impeach and remove the president, vice president, and all civil officers of the United States (including federal judges).

Article I gives the House of Representatives the sole power to vote on articles of impeachment (the charges to be brought against a government official) and the Senate the sole power to try that individual on those charges. Although the House can vote to impeach through a simple majority vote, the Senate can

convict and remove an official only with a two-thirds vote. When the president is tried in the Senate, the chief justice of the Supreme Court presides. The penalty for Senate conviction does not extend beyond removal from office and “disqualification to hold and enjoy any office of honor, trust, or profit under the United States,” but those convicted are still “liable and subject to indictment, trial judgment, and punishment according to law” (Article 1, section 3, clause 7).

Article 2, section 4, specifies that the grounds for impeachment are “treason, bribery, or other high crimes and misdemeanors.” But what exactly are “high crimes and misdemeanors”? Gerald R. Ford gave the phrase a broad political meaning when he served as house minority leader for the Republicans in 1970: “whatever the majority of the House of Representatives considers it to be at a given moment in history.”<sup>80</sup> Legal scholar Charles Black provided a narrower justification: those offenses “which are obviously wrong . . . and which so threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator.”<sup>81</sup> Black’s definition, however, still requires interpretation, and suggests that a criminal act need not have occurred to warrant impeachment—violations of public trust or even prolonged personal misconduct that harms the nation could be sufficient grounds.

Only two presidents before Trump were impeached by the House of Representatives: Andrew Johnson in 1868 and Bill Clinton in 1998; both were acquitted in the Senate of all charges. Richard Nixon would have been impeached by the House in 1974 if he had not resigned from the office (the House Judiciary Committee had already voted to support three articles of impeachment against him). Other presidents, such as Andrew Jackson and John Tyler, have come close to being impeached, and critics had broached the possibility of impeaching Donald Trump from his earliest days in office. But not until revelations of a whistleblower’s complaint that President Trump “was using the power of his office to solicit interference from a foreign country in the 2020 U.S. election”<sup>82</sup> did impeachment gain traction. That complaint dealt with a July 25, 2019, phone call between President Trump and Ukrainian president Volodymyr Zelensky, in which Trump appeared to condition U.S. military aid to the Ukraine on Zelensky’s commitment to investigate previously discredited claims of wrongdoing by former Vice President Joseph Biden, Jr. (the front-runner for the 2020 Democratic presidential nomination at the time of the call), and his son Hunter Biden. On September 24, 2019, House Speaker Nancy Pelosi (D-CA) announced that the House would begin a formal impeachment inquiry, a process that was formalized by a 232-196 vote of the full House of Representatives on October 31. As early as the end of Trump’s first year in office, an NBC/*Wall Street Journal* survey found that 41 percent of all respondents thought there was sufficient cause for Congress to hold impeachment hearings (with 70 percent of Democrats, 40 percent of independents, and 7 percent of Republicans in favor of hearings).<sup>83</sup> By early October of 2019, a Fox News poll found that a record high 51 percent supported the impeachment and removal of Trump from office.<sup>84</sup>

But continued Republican control of the Senate meant that conviction could only come with support from Trump's fellow Republicans.

While impeachment allows for the removal of the president for wrongdoing, the Twenty-Fifth Amendment to the Constitution allows for removal due to disability: "Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President." Should the president contest that declaration, the vice president and a majority of the principal officers of the executive departments must issue a second declaration of the president's incapacity, followed by a two-thirds vote in both the House and Senate (a higher threshold than that needed for impeachment, where only a simple majority is necessary in the House).

Although some presidents (such as Ronald Reagan and George W. Bush) have voluntarily used another provision of the Twenty-Fifth Amendment to temporarily transfer power to the vice president while they underwent medical procedures, the vice president and the heads of the executive departments have never sought to remove a president. Nonetheless, the *New York Times* published an anonymous editorial by a "senior official in the Trump administration" in September 2018 who claimed that "there were early whispers within the cabinet" of invoking the Twenty-Fifth Amendment against Trump.<sup>85</sup> Then, in February 2019, former acting FBI director Andrew McCabe claimed that Deputy Attorney General Rod Rosenstein had raised the possibility of using the Twenty-Fifth Amendment to remove Trump after the president fired FBI director James Comey.<sup>86</sup> These stories stirred fierce criticism, and it is hard to imagine successfully invoking the Twenty-Fifth Amendment except in cases of true disability, such as the president slipping into a coma or being incapacitated by a severe stroke.

Though not a clause relating to removal, the so-called "emoluments clause" of Article 1, section 9, clause 8, drew attention during the Trump administration. That clause, arguably linked to the notion of "high crimes and misdemeanors," prevents any government official from receiving any gift, payment, or item of value from a foreign state or its representatives without the consent of Congress. In June 2017, the attorneys general of Maryland and the District of Columbia filed suit in federal district court alleging that President Trump had violated the emoluments clause by failing to relinquish ownership of his business holdings when he became president. They contended that payments from foreign states for services from Trump-owned businesses, such as the Trump International Hotel in Washington, DC, violate the emoluments clause. The Trump Justice Department sought to have the case dismissed, but a federal judge allowed it to proceed in July 2018.



A year later, the Fourth Circuit Court of Appeals temporarily dismissed the case on the grounds that the states did not have standing to sue. After the plaintiffs said they would appeal, the Fourth Circuit announced a rehearing, and another emoluments clause lawsuit filed by congressional Democrats remained before the Court of Appeals for the District of Columbia Circuit, so the issue may make its way to the U.S. Supreme Court.<sup>87</sup>

## Expansion of the Presidency

Students of the presidency commonly divide the office's development into two major periods: traditional and modern. In the traditional era, presidential power was relatively limited, and Congress was the primary policymaker. The modern era is typified by presidential dominance in the policymaking process and a significant expansion of the president's powers and resources. The presidency of Franklin D. Roosevelt (1933–1945) was the turning point into the modern era. Political scientist Fred Greenstein argued that the modern presidency is distinguished by four features: (1) The president is expected to develop a legislative program and to persuade Congress to enact it, (2) presidents regularly engage in direct policymaking through actions not requiring congressional approval, (3) the presidential office has become an extensive bureaucracy designed to enable presidents to undertake the first two points, and (4) presidents have come to symbolize the nation and to personify its government to such an extent that the public holds them primarily responsible for its condition and closely monitors their performance through intensive media coverage.<sup>88</sup>

Numerous factors contributed to the expansion of the American presidency. These include actions by individual presidents, statutes enacted by Congress, the emergence of customs, and institutional development. We examine each of these factors in turn.

### Expansion by Individual Presidents

Several early presidents, including George Washington, Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, are often credited with providing their successors with an institutional legacy that left the office more powerful than before.<sup>89</sup> This assertion is true to a certain extent, but it was three twentieth-century presidents, Theodore Roosevelt, Woodrow Wilson, and FDR, who were largely responsible for expanding presidential power and creating the modern presidency.

*Theodore Roosevelt (1901–1909).* As president, Theodore Roosevelt helped the United States become a world power. Concerned over the rise

of Japan as a threat to American interests in the Pacific, Roosevelt sought and obtained a major role in negotiating the Portsmouth treaty, which terminated the Russo-Japanese War of 1905. Closer to home, he intervened in the affairs of neighbors to the south when he considered it vital to U.S. national interests, sending troops to the Dominican Republic and Cuba. Even more blatant was Roosevelt's part in fomenting the rebellion of Panama against Colombia so that the United States could acquire rights to build a canal. An avowed nationalist with the desire to expand U.S. influence in international affairs, Roosevelt ordered the navy to sail around the world as a symbolic demonstration of American military might. The image of U.S. naval ships sailing off the shores of other countries would serve as a potent reminder to those nations that the United States was now a major world power. When Congress balked at the expense, Roosevelt countered that he had sufficient funds to get the navy there; if the lawmakers wanted the fleet to come back home, they would have to provide the money for the return trip.

Roosevelt also responded vigorously to the rapid industrialization of American life and its attendant evils. He had charges pressed against corporations that violated antitrust laws, and he pushed legislation through Congress that gave the Interstate Commerce Commission power to reduce railroad rates. When coal mine operators in Colorado refused to agree to arbitration of a dispute with their workers, Roosevelt threatened to have troops seize the mines and administer them as a receiver for the government. He was the first American chief executive to intervene in a labor dispute who did *not* take management's side. Roosevelt also championed major reclamation and conservation projects as well as meat inspection and pure-food-and-drug laws. Indeed, Roosevelt issued nearly as many executive orders as all of his predecessors combined, dwarfing their use of administrative authority.

Perhaps most important, Roosevelt did much to popularize the presidency after three decades of lackluster leaders. (Of the eight men who served between Lincoln and Roosevelt, only Grover Cleveland is considered a major figure.) A dynamic personality, an attractive family, and love of the public spotlight enabled Roosevelt "to put the presidency on the front page of every newspaper in America."<sup>90</sup> Considering himself the "steward of the people" and seeing the office as a "bully pulpit" from which the incumbent should set the tone of American life, Roosevelt was the first president to provide meeting rooms for members of the press and to hold informal news conferences to link the presidency with the people. His style of leadership depended on extensive use of popular speech, a distinctive reinterpretation of statesmanship that ushered in the era of the "rhetorical presidency."<sup>91</sup> In keeping with his stewardship theory of presidential power,

Roosevelt was also the first president to rely on broad discretionary authority in peacetime as well as in crisis.<sup>92</sup>

*Woodrow Wilson (1913–1921)*. Although Theodore Roosevelt laid the groundwork for use of popular appeals during his presidency, it was his successor, Wilson, who linked inspirational rhetoric to a broad program of action in an effort to address domestic and foreign affairs. Jeffrey Tulis has argued that this effort rested on a systematic, ambitious reinterpretation of the president's role in the constitutional order.<sup>93</sup> A skilled public speaker, Wilson was the first president since John Adams to go before Congress in person to give his State of the Union message, a practice we now take for granted.<sup>94</sup> Like Jefferson, he was a powerful party chief who worked through congressional leaders and the Democratic caucus to influence legislation. He also did not hesitate to take his case to the people, casting himself as the interpreter as well as the representative of their interests.

During his first term in office, Wilson pushed through a vast program of economic reform that lowered tariffs, raised taxes on the wealthy, created a central banking system, regulated unfair trade practices, provided low-interest loans to farmers, and established an eight-hour day for railroad employees. When the United States became involved in World War I during his second term, Wilson went to Congress and obtained authority to control the economic as well as the military aspects of the war, rather than prosecuting it through unilateral executive action. This grant gave him the power to allocate food and fuel, license trade with the enemy, censor the mail, regulate the foreign-language press of the country, and operate railroads, water transportation systems, and telegraph and telephone facilities. At the end of the war, he made a triumphant trip to Europe, where he assumed the leading role in writing the Versailles peace treaty.

Nonetheless, Wilson's reputation has suffered over time because of his racist views; he was responsible, for example, for the resegregation of the federal workforce. Because of this, students at Princeton University in 2015 pushed to change the names of the university's Woodrow Wilson School of Public and International Affairs and its Wilson College. Princeton kept the names but promised to be transparent "in recognizing Wilson's failings and shortcomings as well as his visions and achievements that led to the naming of the school and the college in the first place."<sup>95</sup>

As president, Wilson also provided a lesson in how *not* to work with Congress: His adamant refusal to accept any reservations proposed by the Senate for the League of Nations Covenant of the Treaty of Versailles ensured that the United States would not participate. Wilson's archenemy, Senator

Henry Cabot Lodge (R-MA), calculated that the president's intransigence and personal hatred of him was so intense that the president would reject all compromises proposed to the treaty. Lodge was right: Wilson said it is "better a thousand times to go down fighting than to dip your colors to dishonorable compromise."<sup>96</sup> A trip to win popular support for the League ended in failure and a physical breakdown when Wilson suffered a stroke. As a result, the country whose leader proposed the League of Nations ended up not belonging to the organization at all.

*Franklin D. Roosevelt (1933–1945).* Confronted by enormous domestic and international crises, FDR began a program of action and innovation unmatched by any chief executive in U.S. history. In most respects, his service is now used as a yardstick against which the performance of his successors is measured.<sup>97</sup> When Roosevelt came into office in March 1933, business failures were legion, 12 million people were unemployed, banks all over the country were closed or doing business under restrictions, and Americans had lost confidence in their leaders and themselves. Counseling the nation in his inaugural address—the first of four—that “the only thing we have to fear is fear itself,” the new chief executive swung into action: A four-day bank holiday was declared, and an emergency banking bill was prepared within a day's time. During Roosevelt's first one hundred days in office, the nation witnessed a social and economic revolution in the form of his New Deal. Congress adopted a series of far-reaching government programs insuring bank deposits, providing crop payments for farmers, establishing codes of fair competition for industry, granting labor the right to organize, providing relief and jobs for the unemployed, and creating the Tennessee Valley Authority, a government corporation, to develop that region. With these measures and others, such as Social Security, public housing, and unemployment compensation, Roosevelt established the concept of the “positive state” in America—a government that has the obligation to take the lead in providing for the welfare of all the people.

Internationally, Roosevelt extended diplomatic recognition to the Soviet Union, embarked on the Good Neighbor policy toward South America, and pushed through the Reciprocal Trade Program, which lowered tariffs with other nations. In his second term, FDR began the slow and difficult task of preparing the nation for its eventual entry into World War II. He funneled aid to the allies; traded fifty overage destroyers to Britain for naval and air bases in the British West Indies, Newfoundland, and Bermuda; and obtained passage of the nation's first peacetime draft. After Pearl Harbor, in his words, “Dr. New Deal” became “Dr. Win-the-War.” He took over economic control of the war effort granted to him by Congress, and

established the victorious strategy of concentrating on defeating Germany before Japan. While hostilities were still going on, he took the lead in setting up the United Nations, but he died before he could see the organization established in 1945.

Roosevelt was an innovator whose actions reshaped the presidential office. He was not only an effective legislative leader but also a skilled administrator responsible for a thorough reorganization of the executive branch, including creation of the Executive Office of the President (EOP) (see chapter 6). Even more important, FDR was probably the most effective molder of public opinion the nation has ever known. He pioneered the use of “fireside chats” over radio to explain his actions to the people. In addition, he raised the presidential press conference to new heights as a tool of public persuasion. As a man who could take idealistic goals, reduce them to manageable and practical programs, and then sell them to Congress and the American people, Roosevelt has no peer.

## Expansion through Statute

Congress is another major source of change in the presidency. Legislators have mandated activities that earlier presidents exercised on a discretionary basis or have formally delegated responsibility for activities that traditionally resided with Congress. One of the contemporary presidency’s major responsibilities—serving as the nation’s economic manager—is nowhere suggested in the Constitution.<sup>98</sup> Congress foisted this power on the president. In 1921, Congress passed the Budget and Accounting Act as part of an effort to increase the fiscal responsibility and efficiency of government. The act created the Bureau of the Budget (BOB) in the Treasury Department and required the president to use the expert advice of the bureau to propose annual fiscal policy to the government. Quite simply, the legislation compelled the president to take an active role in domestic policy formulation. James Sundquist said the following:

Before 1921, a president did not have to have a program for the whole of the government, and none did; after that date he was compelled by the Budget and Accounting Act to present a program for every department and every bureau, and to do it annually. Before 1921, a president did not have to propose a fiscal policy for the government, and many did not; after 1921, every chief executive had to have a fiscal policy, every year. That made the president a leader, a policy and program initiator, and a manager, whether he wished to be or not.<sup>99</sup>

Naturally, strong presidents exerted policy leadership before 1921, but nothing had compelled them to act. Likewise, it is wrong to assume that

the Budget and Accounting Act automatically produced strong presidents. The first three affected by the act, Warren Harding, Calvin Coolidge, and Herbert Hoover, dutifully submitted proposals to Congress but seldom exerted strong leadership to secure enactment.<sup>100</sup> That pattern changed under FDR, who used the crisis of the Depression as a rallying cry for policy enactment.

Over time, Congress further expanded presidential power. It created the EOP in 1939 as a source of expert advice to help presidents formulate policy. Congress also added to the president's economic responsibilities by passing the Employment Act of 1946. As Sundquist explains, the act "compels the president to maintain a continuous surveillance of the nation's economy, to report on the state of its health at least annually, and if there are signs of pathology—inflation, recession, stagnation—to recommend corrective action."<sup>101</sup> Despite giving the president new tasks, Congress did not surrender its traditional right to alter presidential proposals, thereby ensuring that tax rates and spending proposals would continue to be a mainstay of partisan politics as well as legislative-executive relations. (See chapter 9 for the politics of economic policymaking.)

Congress has taken comparable action in other areas as well. In 1947, Congress charged the president with coordinating national security policy—foreign policy, intelligence collection and evaluation, and defense policy—through the creation of the National Security Council (NSC). President Truman resisted the newly created NSC as an intrusion on his powers and was slow to use it. In fact, no president can be *required* to use such a structure, but during the Cold War one president after another established administrative machinery designed to achieve the same goal of coordinating American foreign policy (see chapter 10).

During George W. Bush's administration, the Republican-controlled Congress passed legislation sanctioning many of the actions Bush had already taken unilaterally under his war power. This included the Military Commissions Act of 2006, which allowed for military commissions (rather than civilian courts) to try "unlawful enemy combatants," and the FISA Amendments Act of 2008, which expanded government surveillance powers (and which was renewed in both 2012 and 2018). Upon entering office, President Obama sought and received statutory authority for a different type of executive power. Faced with an economic emergency unparalleled since the Great Depression, Obama asked Congress for legislation authorizing the executive branch to seize troubled financial institutions deemed by the Treasury secretary to be too important to fail.<sup>102</sup> The resulting financial reform bill reminds us that Congress can authorize presidents to act in areas wholly absent from the original constitutional design or encourage executives to devise new ways to exercise their traditional responsibilities.

## Expansion through Custom and Practice

Across a wide range of presidential activities, “action based on usage may acquire legitimacy.”<sup>103</sup> This may link back to the presidential-congressional relations just discussed. In a 1915 case, for instance, the Supreme Court upheld presidents’ ability to withdraw lands from public use, since Congress had never objected to their doing so over the years. “Unauthorized acts would not have been allowed to be so often repeated as to crystalize into a regular practice,” the Court determined. After all, “government is a practical affair, intended for practical men.”<sup>104</sup>

Likewise, the Constitution nowhere says that presidents would serve as leaders of their party, but that task has been associated with the office since Thomas Jefferson first established his dominance of the Democratic-Republicans’ congressional caucus. Enormous variation may be found in how presidents pursued such activities and in how successful they were. Some, like Jefferson, had a close relationship with their party, while other executives were virtually abandoned by their partisan allies (Rutherford B. Hayes). At other times, presidents sought, and seemed to derive, greater influence by appearing to serve “above” party (Eisenhower). If the political parties continue to weaken or have difficulty reasserting themselves as structures vital to democracy, this informal part of the president’s job description could disappear.

A third example of precedent and custom can be found in Theodore Roosevelt’s attempt to mediate a labor-management dispute. Earlier presidents had intervened on the side of company owners, but Roosevelt put his prestige on the line when he sought to resolve the anthracite coal strike of 1902, a struggle that had paralyzed a vital industry. Other presidents followed suit: Wilson intervened in eight major disputes, Harding in two, FDR in eleven, and Truman in three.<sup>105</sup> The response of one president to emergency conditions became an accepted precedent for his successors, if they wished to pursue it.

## Institutional Sources of Change

The modern presidency cannot be considered a one-person job, a reality that has had significant consequences for the evolution of the office. To dispatch the many responsibilities placed at the president’s door, the presidency has become a working collectivity. During FDR’s first term, the average number of full-time White House staffers was forty-seven. By Nixon’s second term, that number had grown to well over five hundred. The shift toward what has been called the “institutional presidency” is partly a result of changing customs and practice, but it was also furthered by statute.

Congress spurred the increase in staff by creating the EOP in 1939 and then passing subsequent legislation to create additional staff units,

such as the Council of Economic Advisers (CEA) and the NSC, within that structure. At the same time, presidents unilaterally created their own specialized staff units. These include a congressional liaison office (to help secure congressional passage of presidential initiatives), the Office of Communications (to help communicate the president's agenda to the public and to coordinate the flow of information from the many departments and agencies within the executive branch), and the Office of Public Liaison (to maintain support from interest groups). By some counts, the president's full-time executive staff under Nixon, including presidential advisers in the EOP, grew to more than five thousand. During FDR's first term, comparable executive staff (including grounds keepers and the White House police force) numbered only 103.<sup>106</sup>

## Popular Expectations

---

As the power of the presidency has expanded, so have expectations among the public for what individual presidents can accomplish. And, for much of our history, the office of the presidency took on a special, almost mythic, dimension. As Bruce Buchanan once put it, a belief arose that the institution had "the potential to make extraordinary events happen."<sup>107</sup> Occupants of the position, then, came to be expected to live up to unrealistic levels of performance.

How did such unrealistic expectations take hold? In part, by glorifying the memories of past presidents. The "great" presidents, particularly those who took decisive action and bold initiatives, and even some of the "not so great," came to be treated as folk heroes and enshrined in a national mythology—figures whose birthdays we celebrate, whose virtues we are urged to emulate, and whose achievements we memorialize. Then, at roughly the same time that the imperial presidency emerged, television magnified the importance (and ever-present image) of the president.

When accepting the Republican presidential nomination in August 2016, Donald Trump took the rhetoric to new heights, claiming, "Nobody knows the system better than me, which is why I alone can fix it."<sup>108</sup> The problem for modern-day presidents is how to project an image that matches the expectations set by such statements.<sup>109</sup> Theodore Lowi has argued that "the expectations of the masses have grown faster than the capacity of presidential government to meet them."<sup>110</sup> According to Lowi, presidents now resort to illusions to cover failures and seek quick fixes for their flagging public support in foreign adventures. Advances in communications technologies have increased the ability of presidents to do this. Such behavior—portrayed by Lowi as rooted in the presidential institution, not in individual presidents' personalities—is ultimately self-defeating



because it inflates expectations and ensures public disappointment, which may help to explain the string of failed presidencies described at the beginning of this chapter.

Perhaps inevitably, trust in the institution of the presidency (as opposed to its individual occupants) has eroded. By 2017, Gallup reported that 42 percent of its respondents had “very little confidence” in the institution of the presidency itself—the highest ever reported by Gallup. Only 37 percent reported a “great deal” or “quite a lot” of confidence in the institution of the presidency.<sup>111</sup> At the same time, President Trump himself seemed to take glee in questioning the legitimacy of other governmental and nongovernmental institutions, including the media (which he branded “the enemy of the American people” in a February 2017 news conference).<sup>112</sup> It may not be so surprising, then, that Gallup showed that 38 percent of respondents reported “very little confidence” in newspapers in 2018 (with only 23 percent having a “great deal” or “quite a lot” of confidence), and that 41 percent reported “very little confidence” in television news (with only 20 percent having a “great deal”/“quite a lot”). In both cases, lack of confidence was the highest ever reported.<sup>113</sup> Whether this diminishing trust in institutions (including organized religion) is a short-term phenomenon or a long-term trend is yet to be seen.

## Conclusion: The Changeable, Political Presidency

---

There can be little doubt that today’s presidency is a far cry from the office designed by the Constitutional Convention. Responsibilities have grown enormously, as have means to fulfill them. The contemporary presidency is not a static construct, however. As this overview of institutional development demonstrates, Americans’ perceptions of the office and what they want from it can and do change over time. All too often, observers of the presidency treat temporary conditions as if they were permanent—mistaking a snapshot for a portrait.

To summarize, the presidency is variable for several reasons. First, in no other public office do the personality, character, and political style of the incumbent make as much difference as they do in the presidency. As an institution, the presidency exhibits important continuities across administrations, but the entry of each new occupant has an undeniably pervasive effect on the position’s operation. The presidency is also heavily influenced by changes outside the office and throughout the U.S. political system—whether in the formal political structure (Congress, the executive branch, the courts), in the informal political institutions (political parties and interest groups), in society at large, in the mass media, or in conditions

surrounding substantive issues, particularly national security and the economy. Because of their extensive responsibilities, presidents must contend with all of these influences. Furthermore, although the Constitution and historic precedents give structure to the office, the powers of the presidency are so vague that incumbents have tremendous latitude to shape the office to their particular desires.

The presidency is not only highly *changeable* but also essentially *political*. On occasion, especially in times of crisis, presidents rule by asserting their constitutional prerogatives, but usually they are forced to govern by political maneuvering—by trying to persuade the many participants in the political process. This is a very complex task. Not only must they perform on the public stage of mass politics, but also they must master the intricacies of elite politics, a game played among skilled insiders. In the following chapters, we first examine “public politics” (chapters 2, 3, and 4) and then turn to the skills that presidents bring to relations with other public elites (chapters 5, 6, and 7). These separate dimensions are linked in discussions of major policy areas (chapters 8, 9, and 10).

## SUGGESTED READINGS

Corwin, Edward S. *The President: Office and Powers, 1789–1984*, 5th ed. New York: New York University Press, 1984.

Ellis, Richard J., ed. *Founding the American Presidency*. Lanham, MD: Rowman & Littlefield, 1999.

Farrand, Max, ed. *The Records of the Federal Convention of 1787*. New Haven, CT: Yale University Press, 1911.

Lowi, Theodore J. *The Personal President: Power Invested, Promise Unfulfilled*. Ithaca, NY: Cornell University Press, 1985.

McDonald, Forrest. *The American Presidency: An Intellectual History*. Lawrence: University Press of Kansas, 1994.

Milkis, Sidney M., & Michael Nelson. *The American Presidency: Origins and Development, 1776–2018*, 8th ed. Washington, DC: CQ Press, 2020.

Nelson, Michael, ed. *The Presidency and the Political System*, 11th ed. Washington, DC: CQ Press, 2018.

Neustadt, Richard E. *Presidential Power: The Politics of Leadership*. New York: Wiley, 1960.

- Rudalevige, Andrew. *The New Imperial Presidency: Renewing Presidential Power after Watergate*. Ann Arbor: University of Michigan Press, 2006.
- Skowronek, Stephen. *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*, rev. ed. Cambridge, MA: Harvard University Press, 1997.
- Yoo, John. *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*. Chicago: University of Chicago Press, 2006.

## RESOURCES ON THE WEB

---

For a collection of documents related to the American Founding and the U.S. Constitution, see <http://press-pubs.uchicago.edu/founders/>

For an up-to-date list of presidential signing statements, see [www.presidency.ucsb.edu/signingstatements.php](http://www.presidency.ucsb.edu/signingstatements.php).

## NOTES

---

1. Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: Wiley, 1960), 26.
2. The fourteen presidents who served two full terms are George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, Ulysses Grant, Grover Cleveland, Woodrow Wilson, Franklin Roosevelt, Dwight Eisenhower, Ronald Reagan, Bill Clinton, George W. Bush, and Barack Obama. Recall that while Donald Trump is the forty-fifth president, he is only the forty-fourth person to hold that office, since Grover Cleveland served nonconsecutive terms as the twenty-second and twenty-fourth president.
3. Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, MA: Harvard University Press, 1993), 20.
4. Quoted in Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence: University Press of Kansas, 1994), 127.
5. McDonald, *The American Presidency*, 126.
6. Richard J. Ellis, ed., *Founding the American Presidency* (Lanham, MD: Rowman & Littlefield, 1999), 1.
7. McDonald, *The American Presidency*, 132–133.
8. Richard M. Pious, *The American Presidency* (New York: Basic Books, 1979), 23.

9. Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776–1993*, 2nd ed. (Washington, DC: CQ Press, 1994), 5. One of the drafters of the New York Constitution, Gouverneur Morris, later influenced the creation of presidential power at the 1787 Constitutional Convention.
10. Thomas Jefferson, *Notes on the State of Virginia*, quoted in Ellis, *Founding the American Presidency*, 4.
11. Charles C. Thach Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* (Baltimore: Johns Hopkins University Press, 1923), chap. 3.
12. Pious, *The American Presidency*, 22.
13. McDonald, *The American Presidency*, 151.
14. Quoted in Ellis, *Founding the American Presidency*, 6.
15. Milkis and Nelson, *The American Presidency*, 13–14.
16. McDonald, *The American Presidency*, 163.
17. *Ibid.*, 164.
18. Ellis, *Founding the American Presidency*, 31–32.
19. McDonald, *The American Presidency*, 164; see also Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1911), 1:65.
20. Farrand, *Records*, 1:65.
21. *Ibid.*, 1:244.
22. Ellis, *Founding the American Presidency*, 13.
23. This paragraph is based on McDonald, *The American Presidency*, 157.
24. McDonald, *The American Presidency*, 171.
25. Ellis, *Founding the American Presidency*, 112–113.
26. We use the term *Congress* loosely here. As we have pointed out, the original recommendation of the Committee on Postponed Matters called for the *Senate* alone to choose from among the top five presidential candidates. As finally ratified, the Constitution called for the *House* alone to choose from the top five candidates. After the ratification of the Twelfth Amendment in 1804, the Constitution called for the House to choose from among the top *three* presidential candidates.
27. Quoted in Andrew Rudalevige, *The New Imperial Presidency* (Ann Arbor: University of Michigan Press, 2006), 22.

28. This account of the Committee on Postponed Matters is drawn largely from McDonald, *The American Presidency*, 176–178; see also Milkis and Nelson, *The American Presidency*, 21–22.
29. Edward S. Corwin, *The President: Office and Powers*, 4th ed. (New York: New York University Press, 1957), 12.
30. Quoted in Michael Nelson, ed., *Guide to the Presidency*, 2nd ed. (Washington, DC: CQ Press, 1996), 30. Although this sort of hostility toward a strong executive was common among anti-Federalists, Herbert J. Storing has pointed out that there are greater differences of opinion among them than one might expect. Some anti-Federalists continued to argue for a plural executive or an executive council, but others agreed that a unitary executive was necessary. Storing points out that among anti-Federalists there was even “a fair amount of sympathy for a strong (even, under some circumstances, a hereditary) executive to resist the aristocratic tendencies of the legislature; and some of the Anti-Federalists objected that the President would be too weak to stand up to the Senate and would become a mere tool of aristocratic domination.” Herbert J. Storing, ed., *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981), 1:49.
31. Alexander Hamilton, *Federalist* No. 70.
32. Thach, *The Creation of the Presidency*, 138.
33. *Ibid.*, 139.
34. Alexander Hamilton, “Pacificus, #1,” June 29, 1793, press-pubs.uchicago.edu/founders/documents/a2\_2\_2-3s14.html.
35. William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), 139–140.
36. Theodore Roosevelt, *Autobiography* (New York: Macmillan, 1913), 388–389.
37. Taft, *Our Chief Magistrate*, 144–145.
38. Quoted in Corwin, *The President*, 8 (emphasis added).
39. Clinton Rossiter, *Constitutional Dictatorship* (Princeton, NJ: Princeton University Press, 1948).
40. Interview with Richard Nixon by David Frost, televised May 19, 1977; quoted in Craig Ducat, *Constitutional Interpretation*, 7th ed. (Belmont, CA: West, 2000), 206.
41. Charles Babington, “Critics of Guantánamo Urge Hill to Intervene,” *Washington Post*, June 16, 2005, A2.

42. Dana Priest, "CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing within Agency about Legality and Morality of Overseas System Set Up after 9/11," *Washington Post*, November 2, 2005, A1.
43. "Bush: 'We're Fighting for Our Way of Life,'" *CNN.com*, September 7, 2006, [www.cnn.com/2006/POLITICS/09/06/bush.transcript/index.html](http://www.cnn.com/2006/POLITICS/09/06/bush.transcript/index.html).
44. Christopher S. Kelley, "Rethinking Presidential Power: The Unitary Executive and the George W. Bush Presidency" (paper presented at the annual meeting of the Midwest Political Science Association, Chicago, April 7–10, 2005), 25.
45. Scott Shane, "Report Questions Legality of Briefings on Surveillance," *New York Times*, January 19, 2006, A19. The *New York Times* first reported the administration's use of domestic wiretaps in December 2005: James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers without Courts," *New York Times*, December 15, 2005, A1.
46. Edward Epstein, "Wiretap Defense Invokes Lincoln, Roosevelt; Attorney General Says They Didn't Get Warrants, Either," *San Francisco Chronicle*, January 25, 2006, A3.
47. Scott Shane and Mark Landler, "Obama Clears Way for Guantánamo Bay Trials," *New York Times*, March 7, 2011, [www.nytimes.com/2011/03/08/world/americas/08guantanamo.html](http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html).
48. *Trump v. Hawaii*, 585 U.S.– (2018).
49. Robert Barnes and Dan Lamothe, "Supreme Court Allows Trump Restrictions on Transgender Troops in Military to Go into Effect as Legal Battle Continues," *Washington Post*, January 22, 2019, [www.washingtonpost.com/politics/courts\\_law/supreme-court-allows-trump-restrictions-on-transgender-troops-in-military-to-go-into-effect-as-legal-battle-continues/2019/01/22/e68a7284-1763-11e9-88fe-f9f77a3bcb6c\\_story.html?utm\\_term=.4c19bc937973](http://www.washingtonpost.com/politics/courts_law/supreme-court-allows-trump-restrictions-on-transgender-troops-in-military-to-go-into-effect-as-legal-battle-continues/2019/01/22/e68a7284-1763-11e9-88fe-f9f77a3bcb6c_story.html?utm_term=.4c19bc937973).
50. David A. Graham, "The Strangest Thing about Trump's Approach to Presidential Power," *The Atlantic*, June 7, 2018, [www.theatlantic.com/politics/archive/2018/06/the-strangest-thing-about-trumps-approach-to-presidential-power/562271/](http://www.theatlantic.com/politics/archive/2018/06/the-strangest-thing-about-trumps-approach-to-presidential-power/562271/).
51. Corwin, *The President*, 30.
52. Arthur M. Schlesinger Jr., *The Imperial Presidency*, 2nd ed. (Boston: Houghton Mifflin, 1989).
53. Kelley, "Rethinking Presidential Power."
54. Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, "The Unitary Executive in the Modern Era," *Iowa Law Review* 90 (January 2005): 606.

55. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).
56. *Myers v. United States*, 272 U.S. 52 (1926). In 1988, the Court ruled in *Morrison v. Olson*, 487 U.S. 654, that Congress could limit the power to remove an independent counsel, even though an independent counsel is a purely executive official performing a purely executive function. The lone dissenter was Justice Antonin Scalia.
57. In his concurring opinion in *In re Aiken County*, 645 F.3d 428 (2011), Kavanaugh wrote: "Because of *Humphrey's Executor*, the President to this day lacks day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch" (at 121) and cited a scholar who called *Humphrey's Executor* "one of the more egregious opinions to be found on pages of the United States Supreme Court Reports" (at 120). See also Brett Kavanaugh, "Separation of Powers During the Forty-Fourth Presidency and Beyond," 93 *Minnesota Law Review* 1454 (2009), where Kavanaugh called the *Humphrey's Executor* ruling unwise (at 1472) and asked, "Why shouldn't someone have the authority to fire such persons at will? And if anyone is to possess that power, it must be the President" (at 1473).
58. McDonald, *The American Presidency*, 173–174.
59. Louis Fisher, *Constitutional Conflicts between Congress and the President*, 5th ed. (Lawrence: University Press of Kansas, 2007), chap. 9.
60. Richard M. Pious, "Inherent War and Executive Powers and Prerogative Politics," *Presidential Studies Quarterly* 37 (March 2007): 77.
61. John C. Yoo, "Memorandum Opinion for the Deputy Counsel to the President: The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them," September 25, 2001. The full text of the memorandum is posted at the U.S. Department of Justice website at [www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188_0.pdf). Yoo's book, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005), explicates this theory.
62. Pious, "Inherent War and Executive Powers," 70.
63. Andrew Desiderio, "House Rebukes Trump with Vote Ending U.S. Support for Yemen War," *Politico*, April 4, 2019, [www.politico.com/story/2019/04/04/house-rebukes-trump-with-vote-ending-us-support-for-yemen-war-1255866](http://www.politico.com/story/2019/04/04/house-rebukes-trump-with-vote-ending-us-support-for-yemen-war-1255866).
64. Marianne Levine, "Senate Fails to Override Trump's Veto on Yemen," *Politico*, May 2, 2019, [www.politico.com/story/2019/05/02/senate-trump-yemen-1298350](http://www.politico.com/story/2019/05/02/senate-trump-yemen-1298350).

65. Stephen P. Mulligan, "Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement," *Congressional Research Service*, May 4, 2018, <https://fas.org/sgp/crs/row/R44761.pdf>.
66. For a historical account of treaty abrogation, see J. Terry Emerson, "The Legislative Role in Treaty Abrogation," *Journal of Legislation* 5, no. 1 (January 1978): 46. See also Russell Feingold, "Donald Trump Can Unilaterally Withdraw from Treaties because Congress Abdicated Responsibility," *NBCNews.com*, May 7, 2018, [www.nbcnews.com/think/opinion/donald-trump-can-unilaterally-withdraw-treaties-because-congress-abdicated-responsibility-ncna870866](http://www.nbcnews.com/think/opinion/donald-trump-can-unilaterally-withdraw-treaties-because-congress-abdicated-responsibility-ncna870866).
67. Robbie Gramer, "Trump Can't Do That. Can He?" *Foreign Policy*, January 16, 2019, [foreignpolicy.com/2019/01/16/trump-cant-do-that-can-he-nato-russia-congress/](http://foreignpolicy.com/2019/01/16/trump-cant-do-that-can-he-nato-russia-congress/).
68. *Kucinich v. Bush*, 236 F.Supp.2d 1 (2002); *Goldwater v. Carter*, 444 U.S. 996 (1979), which challenged President Jimmy Carter's unilateral withdrawal from the Sino-American Mutual Defense Treaty.
69. Fisher, *Constitutional Conflicts*, chap. 8.
70. For a defense of congressional-executive agreements, see John C. Yoo, "Laws as Treaties? The Constitutionality of Congressional-Executive Agreements," *Michigan Law Review* 99 (February 2001): 757. For a critique of congressional-executive agreements, including the argument that NAFTA is unconstitutional, see Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," *Harvard Law Review* 108 (April 1995): 1221.
71. American Bar Association Task Force on Presidential Signing Statements, "Report," August 2006, 7–14. The full text of the report is available at [www.abanet.org/media/docs/signstatereport.pdf](http://www.abanet.org/media/docs/signstatereport.pdf).
72. Kelley, "Rethinking Presidential Power," 27.
73. American Bar Association Task Force on Presidential Signing Statements, "Report," 16.
74. Charlie Savage, "Obama Looks to Limit Impact of Tactic Bush Used to Sidestep New Laws," *New York Times*, March 10, 2009, A12.
75. Charlie Savage, "Obama Says He Can Ignore Some Parts of Spending Bill," *New York Times*, March 12, 2009, A18.
76. For a list of the signing statements and more background about signing statements, see *The American Presidency Project*, a website maintained



at the University of California at Santa Barbara: [www.presidency.ucsb.edu/signingstatements.php?year=2013&Submit=DISPLAY](http://www.presidency.ucsb.edu/signingstatements.php?year=2013&Submit=DISPLAY).

77. Charlie Savage, "Trump Claims Power to Bypass Limits Set by Congress in Defense Bill," *New York Times*, August 14, 2018, [www.nytimes.com/2018/08/14/us/politics/trump-signing-statements.html?rref=collection%2Fbyline%2Fcharlie-savage&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection](http://www.nytimes.com/2018/08/14/us/politics/trump-signing-statements.html?rref=collection%2Fbyline%2Fcharlie-savage&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection).
78. Jeffrey Rosen, "Bush's Leviathan State: Power of One," *New Republic*, July 24, 2006.
79. Quoted in Josh Chafetz, "Impeachment and Assassination," 95 *Minnesota Law Review* 347 (2010), 348.
80. United States Senate Art and History, "Impeachment," [www.senate.gov/artandhistory/history/common/briefing/Senate\\_Impeachment\\_Role.htm](http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm).
81. Charles Black Jr., *Impeachment: A Handbook* (New Haven, CT: Yale University Press, 1974), 39–40.
82. Alexa Diaz, "Trump impeachment inquiry: A timeline," *Los Angeles Times*, October 24, 2019, <https://www.latimes.com/politics/story/2019-09-26/ukraine-trump-impeachment-inquiry-timeline>.
83. Sam Schwarz, "Support for Donald Trump's Impeachment Is Higher Than His Re-election Chances," *Newsweek*, December 20, 2017, [www.newsweek.com/donald-trump-impeachment-reelection-2020-753546](http://www.newsweek.com/donald-trump-impeachment-reelection-2020-753546).
84. Dana Blanton, "Fox News Poll: Record support for Trump impeachment," Fox News, October 9, 2019, <https://www.foxnews.com/politics/fox-news-poll-record-support-for-trump-impeachment>.
85. Anonymous, "I Am Part of the Resistance Inside the Trump Administration," *New York Times*, September 5, 2018, [www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html?action=click&module=Top%20Stories&pgtype=Homepage](http://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html?action=click&module=Top%20Stories&pgtype=Homepage).
86. Felicia Sonmez and Matt Zapotosky, "Senate Panel Will Probe McCabe's Claim That Rosenstein Raised Possibility of Ousting Trump Through 25th Amendment, Graham Says," *Washington Post*, February 17, 2019, [www.washingtonpost.com/politics/senate-panel-will-investigate-mccabes-claim-that-rosenstein-raised-possibility-of-ousting-trump-through-25th-amendment-graham-says/2019/02/17/a1f851e6-32d3-11e9-a400-e481bf264fdc\\_story.html?utm\\_term=.9823cfd424b4](http://www.washingtonpost.com/politics/senate-panel-will-investigate-mccabes-claim-that-rosenstein-raised-possibility-of-ousting-trump-through-25th-amendment-graham-says/2019/02/17/a1f851e6-32d3-11e9-a400-e481bf264fdc_story.html?utm_term=.9823cfd424b4).

87. Sharon LaFraniere, "Federal Appeals Court Rules for Trump in Emoluments Case," *New York Times*, July 10, 2019, [www.nytimes.com/2019/07/10/us/politics/trump-hotel-emoluments-constitution.html](http://www.nytimes.com/2019/07/10/us/politics/trump-hotel-emoluments-constitution.html).
88. Fred Greenstein, "Change and Continuity in the Modern Presidency," in *The New American Political System*, ed. Anthony King (Washington, DC: American Enterprise Institute, 1978), 45–46.
89. See, for example, Corwin, *The President*, chap. 1.
90. Clinton Rossiter, *The American Presidency*, rev. ed. (New York: Harcourt, Brace, 1960), 102.
91. Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton, NJ: Princeton University Press, 1987), chap. 4.
92. Milkis and Nelson, *The American Presidency*, 208.
93. Tulis, *The Rhetorical Presidency*, chap. 5. See also Jeffrey K. Tulis, "The Two Constitutional Presidencies," in *The Presidency and the Political System*, 6th ed., ed. Michael Nelson (Washington, DC: CQ Press, 2000).
94. Thomas Jefferson had discontinued the practice as an undesirable indication of monarchist tendencies.
95. Scott Jaschik, "Princeton Keeps Wilson Name," *Inside Higher Ed*, April 5, 2016, [www.insidehighered.com/news/2016/04/05/princeton-will-keep-woodrow-wilson-name](http://www.insidehighered.com/news/2016/04/05/princeton-will-keep-woodrow-wilson-name).
96. William E. Leuchtenburg, *The Perils of Prosperity, 1914–1932*, 2nd ed. (Chicago: University of Chicago Press, 1993), 59.
97. William E. Leuchtenberg, *In the Shadow of FDR: From Harry Truman to Ronald Reagan*, rev. ed. (Ithaca, NY: Cornell University Press, 1985).
98. James L. Sundquist uses the term *economic stabilizer*, and earlier Clinton Rossiter had used the term *Manager of Prosperity*. See Sundquist, *The Decline and Resurgence of Congress* (Washington, DC: Brookings, 1981), chap. 4.
99. *Ibid.*, 39.
100. *Ibid.*, 33.
101. *Ibid.*, 66–67.
102. Edmund L. Andrews and Eric Dash, "U.S. Seeks Expanded Power in Seizing Firms," *New York Times*, March 24, 2009, [www.nytimes.com/2009/03/25/business/economy/25web-bailout.html](http://www.nytimes.com/2009/03/25/business/economy/25web-bailout.html); Hillary Stemple, "Obama Signs Financial Reform Legislation," *Jurist*, July 21, 2010, [jurist.org/paperchase/2010/07/obama-signs-financial-reform-legislation.php](http://jurist.org/paperchase/2010/07/obama-signs-financial-reform-legislation.php).

103. Fisher, *Constitutional Conflicts*, 24.
104. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).
105. Corwin, *The President*, 175–177.
106. Gary King and Lyn Ragsdale, eds., *The Elusive Executive: Discovering Statistical Patterns in the Presidency* (Washington, DC: CQ Press, 1988), Table 4-1, 205. The precise size of presidential staff, however, is hard to calculate. For a discussion of this and an overview of the debates over how to count presidential staff, see John Hart, *The Presidential Branch: From Washington to Clinton*, 2nd ed. (Chatham, NJ: Chatham House, 1995), 43–45, 112–125.
107. Bruce Buchanan, *The Citizen's Presidency: Standards of Choice and Judgment* (Washington, DC: CQ Press, 1987), 25, 28.
108. David Jackson, “Donald Trump Accepts GOP Nomination, Says ‘I Alone Can Fix’ System,” *USA Today*, July 21, 2016, [www.usatoday.com/story/news/politics/elections/2016/07/21/donald-trump-republican-convention-acceptance-speech/87385658/](http://www.usatoday.com/story/news/politics/elections/2016/07/21/donald-trump-republican-convention-acceptance-speech/87385658/).
109. Ruth Marcus, “Trump Said, ‘I Alone Can Fix It.’ How Wrong He Was,” *Washington Post*, January 20, 2018, [www.washingtonpost.com/opinions/trump-said-i-alone-can-fix-it-how-wrong-he-was/2018/01/20/c2802e1a-fe05-11e7-a46b-a3614530bd87\\_story.html?utm\\_term=.fa791e30eb73](http://www.washingtonpost.com/opinions/trump-said-i-alone-can-fix-it-how-wrong-he-was/2018/01/20/c2802e1a-fe05-11e7-a46b-a3614530bd87_story.html?utm_term=.fa791e30eb73).
110. Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca, NY: Cornell University Press, 1985), xii.
111. Gallup, “Confidence in Institutions,” [news.gallup.com/poll/1597/confidence-institutions.aspx](http://news.gallup.com/poll/1597/confidence-institutions.aspx).
112. Michael M. Grynbaum, “Trump Calls the News Media the ‘Enemy of the American People,’” *New York Times*, February 17, 2017, [www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html](http://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html).
113. Gallup, “Confidence in Institutions.”