

THE PRESIDENT AND THE PUBLIC

PART

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

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THE CHANGING PRESIDENCY

LEARNING OBJECTIVES

1. Explain divergent approaches to studying the presidency and how the Personal Presidency approach differs from the Institutional Presidency approach.
2. Discuss how presidential power has evolved over time.
3. Explain the challenge presidents face for unrealistically high expectations of performance by the public.

For 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. It is tempting, then, to ascribe great significance to *who* holds the office.

This approach might be summed up as the **Personal Presidency**—and it is how most pundits and journalists—and many scholars—treat the study of the presidency. They focus on personal attributes of the individual in office: things like the individual's character, personality, leadership style, communication skills, and political savvy. And they credit those attributes as the cause of presidential success or failure. Some of those who focus on the Personal Presidency approach focus most on individual psychological attributes and categorize presidents and presidential hopefuls according to their personality traits, assuming that those traits will help to explain and predict behavior. Others focus more on skills, such as the ability to mobilize public support through oratory or conduct political horse-trading. But the focus is ultimately on the individual.

An alternative approach focuses on the *presidency* rather than the person of the *president*. This **Institutional Presidency** approach argues that while personal attributes are not irrelevant, they may be overstated when it comes to a president's performance in office. It is more important to understand the significant institutional, legal, bureaucratic, interbranch, and external constraints that all presidents contend with. These institutional constraints shape presidential behavior and influence presidential goals. Adherents of this school of thought therefore emphasize the development of organizational and institutional structures, their impact on presidential behavior, and the strategies presidents employ to navigate the constraints they impose.

The pages that follow draw from both approaches. We start in this chapter with a historical perspective, focusing on the constitutional underpinnings of presidential

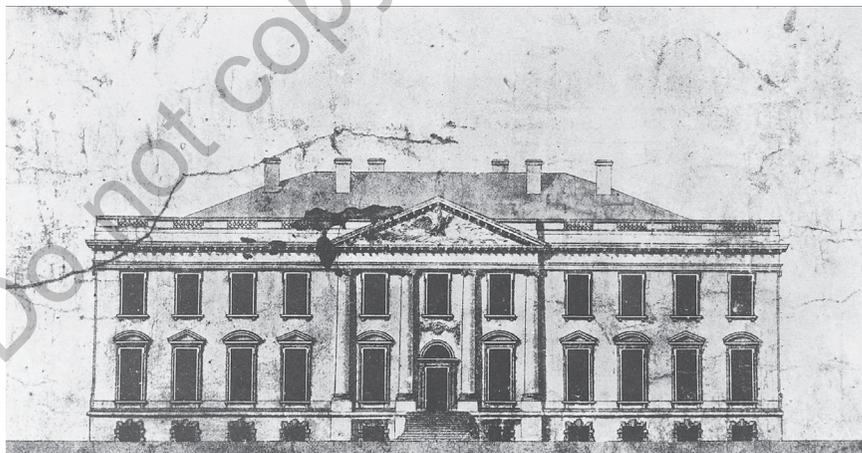


PHOTO 1.2 This is James Hoban's original architectural drawing of the White House from 1792. Like the building itself, the office of the presidency has changed over time.

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power. One might think that fixed provisions in the Constitution would serve as a steady guide to assessing the scope and limits of presidential power. But as the following sections demonstrate, those provisions were the subject of great debate at the Constitutional Convention. As a result, the provisions regarding presidential power contain some ambiguity. Fueled by that ambiguity, the precise parameters of presidential power continue to be contested, even as presidents claim more and more of it. Quite simply, the scope of presidential power and the conceptions of the office have changed dramatically over the years. As Justice Oliver Wendell Holmes once put it, sometimes “a page of history is worth a volume of logic.”¹

THE CONSTITUTIONAL UNDERPINNINGS OF PRESIDENTIAL POWER

Those who invented the presidency in 1787 did not expect the office to become the nation’s central political institution. In fact, Article II 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 I. 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.”²

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, a 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 *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."³ 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.⁴ 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."⁵ 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.⁶ Even where governors were not chosen by the legislature (such as in Massachusetts), their powers were checked by a privy council.⁷ New York stood out as the exception to this practice of weak governors and strong legislatures.⁸

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."⁹ 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 stronger 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.¹⁰ 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.”¹¹ 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.”¹²

The delegates to the 1787 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 of executive power and a new appreciation for 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.”¹³

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.¹⁴ 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 it did not include the lack of an executive as one of them.¹⁵

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.¹⁶ 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.¹⁷ When his fellow delegate from Pennsylvania, James Wilson, moved that the executive should be singular, a “lengthy embarrassed silence ensued.”¹⁸ 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, went the furthest in support of 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.”¹⁹ 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 executive and its power. 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.²⁰ 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.”²¹ On July 17 he began his offensive. Attempting to free the executive from its dependence on the legislature, Morris called for popular election instead. Sherman vigorously objected, and the convention quickly defeated Morris’s motion by a resounding margin. But the battle lines were drawn, and the debate over how to select the executive was far from over.

Heated arguments over methods of 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 the matter 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: a presider, not a decider. 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.²² 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 treaties, appointing ambassadors, and coining money—were all withheld from the president and given to the legislative branch.²³

Convention debate resumed on August 6. When the delegates took up the article dealing with the president, they remained dissatisfied. But they could not agree on how to improve things, and debate ended on August 31 with the powers of the



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.

Courtesy of the Library of Congress, Prints and Photographs Division

president largely unchanged. At that point, the convention sent unresolved issues to the Committee on Postponed Matters. That 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. And of course, southern states were glad to see voting in the Electoral College tied to congressional representation, since the three-fifths compromise over slavery meant a boost for slave states in that regard. 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 both 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.²⁴ 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.²⁵ 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."²⁶

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.²⁷

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 II: “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 I, 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” (emphasis added).

Ironically, the **vesting clause** of Article II was accepted by the whole of the Constitutional Convention without any discussion of its specific language.²⁸ 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.

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.”²⁹ Others, however, such as Alexander Hamilton, saw the

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 subject to Senate advice and consent on some matters
Method of Choosing/Tenure	By Congress Limited term; no chance for reelection	Not specified No limitation on terms	By Electoral College No limitation on terms
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 multiple 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.

newly created presidency as essential to effective government, the source of energy, dispatch, and responsibility in the conduct of domestic and foreign affairs.³⁰ 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 scholar Charles C. Thach Jr. put it in the 1920s, the “joker” in the game of presidential power.³¹

Constitutional language limits both legislative and judicial power. Article I limits legislative powers to those “herein granted.” Article III 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 I. But Article II contains no such limit. Whether the omission was intentional is unclear because the full convention never debated the language. Thach, however, pointed 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, Thach suspected that Morris embraced the language of Article II with “full realization of its possibilities.”³² Certainly, Alexander Hamilton seized on the distinction between the Article I and II 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.³³

In any case, by failing to limit executive powers to those “herein granted,” Article II 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 II 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.³⁴

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 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.³⁵

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.³⁶

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.*"³⁷ 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 such action is in the national interest. Lincoln exercised 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 stretch of time has been described as a period of "constitutional dictatorship."³⁸ In it, 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 a collective *fait accompli*.

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.³⁹

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.⁴⁰ 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.⁴¹ The president eventually admitted that “an alternative set of procedures” was used as part of the interrogation process at those prisons, but he insisted that the procedures, though “tough,” were lawful and did not constitute

torture.⁴² 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.⁴³

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."⁴⁴ 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.⁴⁵ Despite an initial promise to close the military facility at Guantánamo Bay (which Congress prevented), President Obama approved in March 2011 the resumption of military trials there for terror suspects after a two-year suspension.⁴⁶ 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 used aggressive interpretations of his authority under immigration and environmental law to issue numerous unilateral directives, many of which President Trump rescinded with executive orders of his own.

Trump 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. The Supreme Court upheld the travel ban by a 5–4 vote,⁴⁷ but it mooted cases involving Trump's border wall and his "Remain in Mexico" asylum policy after Joseph R. Biden became president in 2021.

For his part, Biden quickly lifted the transgender ban as one of a record flurry of executive actions during his first weeks in office. Like Trump, he went on to broadly construe Congressional legislation to justify executive action. For example, he relied on the 1906 Antiquities Act to unilaterally protect public land in Colorado, Nevada, and Texas by creating new national monuments (while also restoring protection to monuments that President Trump had downsized). He also relied on the 2003 Higher Education Relief Opportunities for Students (HEROES) Act to implement a sweeping student debt relief plan for student loan borrowers affected by COVID-19 (an action that the Supreme Court struck down as beyond the intent of that law).⁴⁸

In short, the ambiguity of the opening sentence of Article II, section 1, coupled with Congressional grants of authority, has allowed individual presidents to expand significantly 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.”⁴⁹ By the 1970s, Arthur Schlesinger Jr. had coined the phrase “the imperial presidency” to describe the office.⁵⁰

Presidents have also taken advantage of broad readings of their specifically enumerated powers, laid out in sections 2 and 3 of Article II, 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 II, section 1, paragraph 1) as well as passages dealing with the right to require opinions from the heads of government departments (Article II, section 2, paragraph 1) and the power to make personnel appointments subject to whatever approval Congress may require (Article II, 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.⁵¹ 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 official at will.⁵² 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. The long-standing precedent is a 1935 case called *Humphrey’s Executor v. U.S.*, in which 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.⁵³ In contrast, the Court had ruled had previously that purely executive officials performing purely executive functions could be fired by the president at will.⁵⁴ This remained true after *Humphrey’s Executor*, but given the large number of independent federal agencies, the Court’s ruling in that case has long placed a significant limitation on the president’s removal power.

Then, in 2020, the Supreme Court voted 5–4 to invalidate the congressional limitation on the president’s ability to fire the director of the Consumer Financial Protection Bureau (CFPB).⁵⁵ In an opinion written by Chief Justice John Roberts, the Court held that the fact that the CFPB is run by a single director who wielded significant executive power distinguished it from the type of independent agencies (run by multimember bodies) covered by *Humphrey’s Executor*. The four dissenters strongly disagreed, arguing that Congress could structure agencies as it chose and that *Humphrey’s Executor*

should have shielded the director from being fired by the president. Trump appointee Neil Gorsuch disagreed in the opposite direction, joining a separate opinion by Clarence Thomas suggesting that *Humphrey's Executor* be overturned altogether.

In 2021, the Supreme Court extended the president's power to fire single-director heads in a case dealing with the Federal Housing Finance Agency (FHFA), an independent agency critical to the regulation of financial markets. It now appeared that any single member director could be fired by the president at will, not just those wielding "significant executive power."⁵⁶ In the wake of the ruling, President Biden promptly fired FHFA Director Mark Calabria, who had been appointed by President Trump, and replaced him with Sandra Thompson, whose values on financial policy more closely reflected those of the Biden administration.

Commander in Chief. This role is specifically enumerated in Article II, 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 I, section 8, paragraph 11), thereby expanding the president's realm of discretionary action.⁵⁷ 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.⁵⁸

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."⁵⁹ Article II itself is sometimes invoked as sufficient (see chapter 10). 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 (in response to that government's use of chemical weapons against its own people) and in January 2020 when a U.S. drone killed Iranian general Qassem Soleimani as he visited Iraq. President Biden also ordered an air strike against Syria in February 2021, in response to a missile attack against Iraq that killed a U.S. contractor and injured an American service member.

There continues to be debate about whether presidents can use military power whenever they deem necessary,⁶⁰ or whether the president may use force only when Congress allows.⁶¹ Although presidential war powers remain largely unconstrained in practice, 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–driven measure made it to the president's desk.⁶² A year later, after Soleimani's death, Congress again tried to limit President Trump's war power by passing bipartisan legislation to block further military action against Iran without its explicit consent. President Trump vetoed both bills. In neither case did Congress muster the necessary two-thirds majority to override the veto.⁶³

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 II, section 2, paragraph 2), and to receive diplomatic emissaries from abroad (Article II, 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.⁶⁴ 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.⁶⁵ 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 a president unilaterally withdraw from NATO, as Trump threatened to do? A bipartisan group of senators proposed, but Congress did not pass, legislation in 2018 and 2019 to prohibit presidents from withdrawing from NATO without Senate consent.⁶⁶ 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 “political question” that courts cannot address. Ultimately, it is up to legislative majorities to curb such actions.⁶⁷

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, and while presidents are now legally required to report all binding executive agreements to Congress, a recent study concluded that executive branch reporting is incomplete and that Congressional oversight has failed.⁶⁸ Congress may give legislative approval to an executive agreement through statute or a joint resolution of Congress. Statutes and joint resolutions require only a simple majority, rather than the two-thirds approval necessary for Senate ratification of a treaty.⁶⁹ When given such legislative approval, executive agreements are referred to as “congressional-executive agreements.”⁷⁰ 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 and organizations such as the Paris Agreement on climate change, the World Health Organization (WHO), and the UN Human Rights Council (UNHRC). President Biden rejoined the Paris Agreement on his first day in office and WHO two days later. He also rejoined the UNHRC in October 2021.⁷¹

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 positively shape the legislative agenda. 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 II, 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.” Nonetheless, 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 II, 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 II, 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**. Presidents since James Monroe had issued them when signing bills into law, 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. Or, like Clinton, a president would note constitutional problems in their signing statements but still enforce the provision unless a court struck it down.⁷² Starting with Reagan, presidents used signing statements 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.⁷³

Bush, however, went beyond such clarifications and 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 used a signing statement to indicate that he could disregard the law and use torture under his commander-in-chief powers if he deemed it necessary.⁷⁴ 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.⁷⁵ 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.⁷⁶ President Trump also continued the practice, issuing thirty-seven signing statements that challenged at least 343 provisions during his first two years in office.⁷⁷ In contrast, President Biden issued only five signing statements during his first two years in office, three of which raised no constitutional objections, and two of which were entirely ceremonial in nature.

Presidents increasingly interpret all five presidential roles broadly. 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.

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.⁷⁸ 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, a two-thirds vote in the Senate is required to convict and remove an official. When the president is tried in the Senate, the chief justice of the Supreme Court presides (because Trump was no longer a sitting president during his second impeachment trial, the president pro tempore of the Senate—Patrick Leahy [D-VT]—presided instead). 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.” Those convicted are still “liable and subject to indictment, trial judgment, and punishment according to law” (Article I, section 3, clause 7).

Article II, 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.”⁷⁹ 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.”⁸⁰ 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.

Trump was just the third president to have been impeached by the House of Representatives, joining Andrew Johnson in 1868 and Bill Clinton in 1998—and the only one to have been impeached twice. All three presidents, in all four trials, were acquitted in the Senate. Richard Nixon would certainly 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) and likely removed from office as well.

Aside from impeachment, how else could a president be removed from office? What if a president does something so dire that immediate action is required to remove him? Some point to the Twenty-Fifth Amendment to the Constitution as a remedy. Although designed to apply to instances of a president’s physical disability, its language does not prevent a president from being removed for other reasons: “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.” If the president

contests 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. 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 use the amendment to remove a president.

More recently, some have pointed to section 3 of the Fourteenth Amendment as a tool that could be invoked to remove or disqualify someone from office. Written in the aftermath of the Civil War to prevent former Confederates from holding office, section 3 says that any person who, after taking an oath to uphold the Constitution, engages in "insurrection or rebellion against the same" or gives "aid or comfort to the enemies thereof" is disqualified to serve in public office unless a two-thirds vote of each house of Congress waives an individual's disability. Could Congress invoke section 3 against a president who engages in insurrection? Article I, section 9 of the Constitution prohibits Congress from passing a "bill of attainder" (any law declaring guilt and prescribing punishment of any individual). Does that mean that one would have to be convicted of insurrection before being disqualified to hold office under the Fourteenth Amendment? Or does section 3 of the Fourteenth Amendment carve out an exception to Article I, section 9?

It remains unclear how—or if—Congress could now invoke penalties under the Fourteenth Amendment.⁸¹ But in September 2022, a state court judge from New Mexico became the first in modern times to use section 3 to remove someone from office. He did so on the grounds that Couy Griffin, a county commissioner in New Mexico, had been arrested and convicted of a federal trespassing charge for his involvement in the January 6, 2021, insurrection at the U.S. Capitol.⁸² The New Mexico Supreme Court later dismissed Griffin's appeal.⁸³ Meanwhile, suits brought under section 3 to remove Rep. Jim Banks (R-IN), Rep. Madison Cawthorn (R-NC), and Rep. Marjorie Taylor Greene (R-GA) from the ballot failed. None directly participated in the insurrection, nor were any of them convicted of anything relating to it. Those who brought the suit against Greene pointed to incendiary statements she made they claimed constituted incitement but note that section 3 applies to those who "*engaged* in insurrection." Courts must decide whether "inciting" an insurrection is equivalent to "*engaging*" in an insurrection and, if so, whether one must be convicted of incitement to be disqualified from public service.⁸⁴

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), commonly known as FDR, was the turning point ushering in 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.⁸⁵

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.⁸⁶ 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 separating Panama from 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 halfway; 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."⁸⁷ 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."⁸⁸ 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.⁸⁹

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.⁹⁰ 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.⁹¹ 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 work 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.

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."⁹² A trip to win popular support for the League ended in political failure and 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.

Wilson's legacy must also include his racist views and actions before and during his time as president. He was, for example, a vocal defender of the Ku Klux Klan, and he resegregated multiple federal agencies after decades of integration. Because of this, the Board of Trustees of Princeton University removed Wilson's name from the university's School of Public and International Affairs in 2020.⁹³

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.⁹⁴ When Roosevelt took office in March 1933, business failures were legion, twelve 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 a record four—that “the only thing we have to fear is fear itself,” the new chief executive swung into action. 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. He was helped, of course, by overwhelming majorities of fellow Democrats in Congress.

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 an innovative 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 and 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.⁹⁵ 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. As James Sundquist wrote:

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.⁹⁶

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.⁹⁷ 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 passed the Reorganization Act in 1939, allowing presidents to hire staff to help them 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."⁹⁸ 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—and created the National Security Council (NSC) to help him do so. 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 Foreign Intelligence Surveillance Amendments Act (FISA) 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.⁹⁹ 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. President Trump, for example, made controversial use of the National Emergencies Act of 1976, which empowers the president to declare national emergencies, in order to activate other provisions delegated to him elsewhere in statute. The act was envisioned as a way to respond quickly to crises

such as natural disasters, but it did not define precisely what constitutes an emergency. Thus, Trump declared an emergency along the southern border of the United States in order to unlock funding that Congress would otherwise not appropriate to build a border wall.¹⁰⁰

Expansion through Custom and Practice

Across a wide range of presidential activities, “action based on usage may acquire legitimacy.”¹⁰¹ 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 crystallize into a regular practice,” the Court determined. After all, “government is a practical affair, intended for practical men.”¹⁰²

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 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.¹⁰³ 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 helped spur the increase in staff by authorizing FDR's reorganization plans in 1939 and then passing subsequent legislation to create additional staff units, such as the Council of Economic Advisers (CEA) and the NSC, within the broader Executive Office of the President. 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—dubbed the Office of Public Engagement by Obama (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 103.¹⁰⁴

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.”¹⁰⁵ 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.”¹⁰⁶ The problem for modern-day presidents is how to project an image that matches the expectations set by such statements.¹⁰⁷ Theodore Lowi has argued that “the expectations of the masses have grown faster than the capacity of presidential government to meet them.”¹⁰⁸ 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. In his first prime-time speech to the nation on March 11, 2021, President

Biden seemed deliberately to deflate expectations by setting clearly attainable goals and stressing to viewers that “I need you.”

Perhaps inevitably, trust in the institution of the presidency (as opposed to its individual occupants) has eroded. By 2022, Gallup reported that only 16 percent of its respondents had a “great deal” of trust in presidency, while 57 percent had “not very much” (21 percent) or “none at all” (36 percent).¹⁰⁹ When he was in office, President Trump took glee in questioning the legitimacy of other governmental and nongovernmental institutions, including the courts and the media (which he branded “the enemy of the American people” in a February 2017 news conference).¹¹⁰ It may not be so surprising, then, that Gallup showed in 2022 that only 7 percent of Americans have a “great deal” of trust and confidence in the media, while 66 percent said they either “do not have very much confidence” (28 percent) or “no confidence at all” (38 percent) in newspapers, TV, and radio.¹¹¹ Whether this diminished trust in institutions (to which we might add 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—gauging strategically what options are viable, and then trying to persuade the many participants in the political process to support those options. 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.

Howell, William G. *The American Presidency: An Institutional Approach to Executive Politics*. Princeton, NJ: Princeton University Press, 2023.

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*, 12th ed. Washington, DC: CQ Press, 2020.

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

Prakash, Saikrishna Bangalore. *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers*. Cambridge, MA: Harvard University Press, 2020.

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.

For a discussion of Article II of the Constitution see the National Constitution Center, "Article II and the Powers of the President," <https://constitutioncenter.org/news-debate/podcasts/article-ii-and-the-powers-of-the-president>, and NPR's Throughline, "Presidential Power," <https://www.npr.org/2020/06/09/873495248/presidential-power>

Indeed, numerous podcasts on the scope of presidential power have been produced in recent years and may be of interest: see (or rather listen to!), for instance, *Presidential*, hosted by Lillian Cunningham; *Can He Do That?*, hosted by Allison Michaels; and *Democracy's Chief Executive*, hosted by Peter Shane.

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