II. THE "FOETUS OF MONARCHY" GROWS UP

Little at the Constitutional Convention of 1787 provoked more debate than the shape and scope of the executive branch. Delegates had to determine how the president would be selected, how long he should serve, whether he should be able to run for office more than once, how much power he should have—and even whether the president would be a "he" or a "they."[1] Indeed, when James Wilson of Pennsylvania moved that the executive should consist of a single person, the room lapsed into an uncomfortable silence. Some of the framers were unconvinced of the need for an executive branch in the first place. Others thought that executive power, like legislative power, must be strictly divided as a bar to future tyranny. For them, a single executive was, in Virginia governor Edmund Randolph's phrase, "the foetus of monarchy."[2]

Monarchy, of course, was what the framers wanted to avoid. The American colonies' experience under King George III and his colonial governors made that model of executive leadership both normatively and politically a nonstarter. Concentrating power in one individual, as the pseudonymous "Cato" later wrote in opposition to the Constitution, "would lead to oppression and ruin. . . . The world is too full of examples, which prove that to live by one man's will became the cause of all men's misery." The power to make war, to conduct diplomacy, to appoint administrators and judges, to pardon crimes, to convene and dismiss the legislature—all these needed to be checked and controlled.[3]

At the same time, the first U.S. government under the Articles of Confederation had lacked any separate executive branch. State constitutions drafted subsequent to the Declaration of Independence, with a few

notable exceptions, had provided for extremely weak governors. Under the Articles of Confederation, the administration of government—thus, of the war for independence—was erratic at best; only the notable exertions of financier Robert Morris, ambassador Ben Franklin, and General George Washington kept the government solvent and its armies in the field. In most states, governors were required to act in concert with advisory bodies selected separately and had few powers to act unilaterally in any area. The Virginia Constitution of 1776, for example, required that the governor work in conjunction with a Council of State and limited executive powers to those specifically granted by the legislature.

Defending the work of the Constitutional Convention in *Federalist* No. 48, Madison argued that the result of such institutional restrictions was merely to substitute the risk of one form of tyranny for another. Indeed, legislative tyranny was in some ways more dangerous than executive tyranny, since the legislature was closer to the passions of the people and could degenerate into mob rule. "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," Madison warned. This vortex was blocked in the state constitutions only by "parchment barriers" insufficient to withstand it. So Madison sought a framework that would provide "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The goal was to separate institutions rather than to separate powers per se; in fact, powers would necessarily be shared to the extent required to give each branch some ability to prevent unilateral action by the others.[4]

The framers, then, wanted an executive that would be constrained but still competent. Two unsatisfactory executive models stood before them: one too strong and one too weak. Like Goldilocks, they sought a balance that would be just right. Yet striking that balance would require a resort to ambiguity that has only been clarified, when at all, in the political practice and precedent of more than two hundred years of American history. The presidential powers dictated by Article II of the Constitution are barely modified from the framers' work in 1787. But in fits and starts the American presidency has grown to fill the enormous demands placed upon it by American expansion, industrialization, and globalization. The "foetus of monarchy" has grown up.

THE CONSTITUTIONAL CONVENTION

The rough draft of the Constitution outlined a president rather different from the one we know today. That president was to be selected by Congress; he was to serve a single seven-year term, ineligible for reelection; and the powers of treaty making and of appointing ambassadors and judges were to be vested in the Senate.

Getting even this far had been a struggle. A large minority of the delegates, led by Randolph, favored a plural executive of some kind—perhaps a committee of three, or six, or even a number that would vary according to the will of Congress. Others, including Madison, thought presidents should garner legislative advice from and share the veto power with a "council of revision" that brought together the executive with members of the judiciary or a Constitutional Council made up of regional representatives of the states. The key, divisive questions were inseparably intertwined: pondering the nature of presidential powers required establishing how the president was to be elected, how long he might serve, and whether he might be removed (and, if so, by whom). Unable to agree even on what order to take up these questions—form before powers? powers before form?—the delegates settled on what seemed the least bad alternative. Many were unwilling to hand the election of the president over to the public, fearing at best that the larger population in the north would dictate the choice and at worst that voters might be swayed by demagogues plotting a return to monarchy. Given the rudimentary state of mass communication and education, it seemed quite likely to the framers that most in the wider electorate would be uninformed about political issues and events, especially about potential leaders not from their own state.

Still, congressional selection, though it placed the choice of president in the hands of those most knowledgeable about politics and policy, made it hard for the president to be independent of the legislative branch. A long, single term was one answer: it would prevent a reelection-minded president from cozying up to Congress, trading favors for votes. But it seemed prudent as well to minimize the powers the president might exert, in case his strings were pulled by legislative puppetmasters nonetheless.

So matters stood for much of the convention, until the notion of an Electoral College emerged in early September 1787 from the catchall committee dealing with postponed matters. The idea of having some intermediary body of electors, independent of the legislature but made up of informed elites, had been floated earlier in the convention and cast aside. Yet as Georgia delegate Abraham Baldwin put it, the proposal was "not so objectionable when well considered, as at first view."[5] As refined by the committee, the Electoral College provided for a compromise between those who wanted direct election and legislative selection (since state legislatures could pick electors directly if so desired) and between those who wanted proportional representation and equal states' rights. It also provided that electors meet in their own states, minimizing travel, but also that they vote for at least one person not from their own state, minimizing parochialism. Presidents would serve for four years and would be able to run as many times as they wished. While (as later decided) the House of Representatives, voting by state delegation, would make the final selection if no victor emerged with a majority of the electoral votes, nominees would at least have been chosen independent of the legislative "vortex."

With this jury-rigged system in place the framers could revisit the powers assigned to the executive. For example, the appointment and treaty powers were restored to the president, though linked to senatorial consent. After some haggling the congressional threshold for overriding a presidential veto was increased to two-thirds of each chamber. And the House and Senate were respectively given the ability to impeach and remove the president from office, for treason, bribery, or "other high crimes and misdemeanors."

These provisions did not prevent renewed criticism of a unified executive as the Constitution went to the states for ratification. In the Virginia ratifying convention, for example, Patrick Henry suggested that the document had many "deformities," chief among them "an awful squinting: it squints towards monarchy." After all, Henry went on, "Your President may easily become king. . . . If your American chief be a man of ambition, and abilities, how easy is it for him to render himself absolute?" In New York Cato piled on, arguing that an "arbitrary and odious aristocracy or monarchy" awaited the United States, since presi-

dential power under the Constitution "differs but very immaterially" from that of the British king. And not merely a king but an emperor might be in store. "You do not believe that an American can be a tyrant?" Cato scorned. "[Y]our posterity will find that great power connected with ambition, luxury, and flattery, will . . . readily produce a Caesar, Caligula, Nero, and Domitian in America."

Alexander Hamilton soon fired back. "If, in this particular, there be a resemblance to the king of Great Britain," he mocked, "there is not less a resemblance to . . . the Man of the Seven Mountains." Unlike a hereditary monarch, Hamilton went on, the president would be elected for a fixed term; further, the president could be impeached and removed from office; his vetoes could be overridden by Congress; and his taxes, treaties, and appointments could be rejected. He would have no power to dismiss the legislature and, unlike the king (who led the Church of England), had "no particle of spiritual jurisdiction." The president's powers, in short, were checked on all sides. There was thus "no pretense for the parallel which has been attempted."

This argument was not meant to downplay the importance of having a single executive in charge. With the requisite structural defenses in place, a vigorous president was actually a good thing, since his ambition would both check and be channeled by the ambition of others in government. And as Hamilton later wrote, "energy in the executive" sprang largely from the fact that the "unity" of having a sole individual as president made it possible for the executive branch to act decisively, quickly, and, where necessary, in secrecy. The very title of *president,* narrowly construed, simply means "presider"—in this case, an officer who would preside over the execution of the will of Congress. Hamilton, though, in keeping with the Madisonian imperative that each branch be able to withstand the "encroachments" of the other branches of government, argued that the president must be able to resist legislative aggression. The president's powers, not kingly but "competent," provided one bulwark. The structural advantages of unity, as contrasted with the collective (and thus slow) deliberative processes of the bicameral Congress, provided another. Third, unity enhanced executive accountability. That is, come election time, it allowed the public to know who to blame.[6]

The Federalists won the argument, winning narrow ratification in

Virginia and New York to bring eleven states into the new union by July 1788.[7] And on February 4, 1789, the Electoral College made George Washington the first president of the United States.

CONSTITUTIONAL POWERS & CONSTRAINTS

Most of the powers of the president are listed in Article II of the Constitution. Article I, much longer and more detailed, is devoted to Congress, and it is here that the president's veto power is defined. That power, of course, is checked; it must be utilized within ten days of a bill's passage, and a two-thirds majority of each legislative chamber may join to transform a bill into law despite the president's objections.

More than half of Article II describes the presidential selection process. Presidential powers are then delineated in two concise sections, which can be summarized even more concisely. Namely, the president is commander in chief of the armed forces and of the state militias when they are placed in federal service. He can receive ambassadors and other public officials from other countries. He can negotiate treaties—and appoint judges as well as executive officials. He can grant pardons and commute sentences. The president may demand the written opinion of his department heads on any topic within their purview; and he is to give his own opinion to Congress about legislation he judges "necessary and expedient" as well as to provide the legislature with updates, "from time to time," on "the state of the Union." If Congress is out of session, "on extraordinary occasions" he may bring them back in. And he "shall take care that the laws be faithfully executed."

This short list is truncated further since many of these powers, like the veto, come with an asterisk. The president may suggest laws, but Congress must pass them. The president may conduct wars, but the power to declare war in the first place belongs to Congress. The president has control of his department heads, but Congress decides what departments exist in the first place. The president executes the laws—but within the language, and budget, approved and appropriated by Congress. A president's treaties must be ratified by two-thirds of the Senate and his appointments confirmed by a Senate majority. He may call Congress into session but cannot get them out. Pardons cannot be granted when

impeachment by Congress is the trial at hand. And the president himself may be impeached by majority vote in the House, then removed from office by two-thirds of the Senate.

The framers' immediate concern was to get the Constitution ratified by the states. As a result, much of the document is built on compromise—the "Great Compromise" between large and small states that shaped representation in the House and Senate no less than the not-so-great compromise between northern and southern states that counted each slave as three-fifths of a human being for the purposes of legislative apportionment. As noted previously, the Electoral College is likewise very much a salesman's straddle, allowing proponents of popular election and legislative selection both to tout its provisions to their respective constituencies.

A parallel strategy was simply to be vague, to leave the definition of terms and powers to be worked out in practice. Examples of imprecision are scattered throughout the Constitution—for example, which legislative powers might be "necessary and proper"? But Article II wins out, as legal scholar Edward Corwin has commented, as "the most loosely drawn chapter of the Constitution. To those who think a constitution ought to settle everything beforehand it should be a nightmare."[8] Where does the power to command troops break off from the power to declare war? Which positions require Senate confirmation—and if the Senate gets to approve appointments, does it get to weigh in if the president wants to remove those appointees? What are the "high crimes and misdemeanors" for which a president can be impeached?

This vagueness begins—and is most crucial, perhaps—in the very first sentence of Article II: "The executive power shall be vested in a President of the United States of America." Note that the parallel grant of power in Article I adds a key qualifier, that "all legislative powers *herein granted* shall be vested in a Congress." That might imply that "the executive power" goes beyond the list of powers delineated in the rest of the article. But what is that power, exactly? Are there inherent executive powers of some sort? What do they allow the president to do? On this point the document is silent, and we must turn to history.

In so doing, though, it is worth emphasizing that the terseness of Article II means the historical narrative is animated not by how presidents used constitutional strength but by how they sought to overcome con-

stitutional weakness. On the face of it, the president is hemmed in. He is given powers adequate to his needs but not sufficient for expending much affirmative authority. Even the amendments to the Constitution, to the extent they have affected presidential power, have enervated rather than enhanced that power.[9] Congress is the first branch of government for a reason: executive power is subordinate to legislative power in many ways, including the ultimate power of removal (since Congress can get rid of the president but not vice versa). In short, the president is necessary for others to do their jobs, but his own job is rather undefined. As H. L. Mencken put it in 1926, "No man would want to be President of the United States in strict accordance with the Constitution." And, indeed, for the eighteenth and much of the nineteenth centuries, presidential leadership of government was the exception, not the rule.[10]

But people do want to be president, for the powers of the modern presidency go beyond anything the framers foresaw. By building up a "presidential branch"[11] separate from—and often opposed to—the wider executive branch; by strategically using the powers the Constitution does grant; and, not least, by continually and creatively interpreting constitutional vagueness in their favor, U.S. presidents have built their office into the most powerful executive platform in the world.

ESTABLISHING PRESIDENTIAL POWER: ARE THERE INHERENT POWERS?

The Federalist Era

The *Federalist Papers* partnership of James Madison and Alexander Hamilton did not survive the 1790s. Hamilton became treasury secretary in the new Washington administration, quickly becoming a stalwart of the new Federalist Party, while Madison went to Congress, where he led the faction that would become Thomas Jefferson's Democratic-Republican Party.

As Washington's second term began in 1793, the United States was pressed to take sides in the breaking war between England and France. Washington chose instead to issue a Neutrality Proclamation. But could

he do so? The policy of neutrality made sense to most (indeed, the United States had little power to add to either side of the conflict), but could the president choose such a course without congressional input? Could he decide on his own to implement—or fail to implement—treaty provisions in a manner consistent with a neutral course?

Hamilton, writing as "Pacificus," produced a series of essays defending the proclamation and Washington's related policies. He argued that this was a decidedly executive sphere: "the Legislative Department is . . . charged neither with *making* nor *interpreting* Treaties," and to maintain a state of peace was no change in the law. The power to declare war rested with Congress, true, but it was "on the other [hand] the duty of the Executive to preserve Peace until war is declared; . . . it becomes both its province and its duty to enforce the laws incident to that state of the Nation."

Madison, in turn, insisted that the proclamation was a change in policy equivalent to a new statute or peace treaty. Only legislators could make law or ratify treaties; "all [the president's] acts therefore, properly executive, must pre-suppose the existence of the laws to be executed." Presidents could not end a state of war or implement new policies of peace (many of them altering domestic "code" as well as external relations, Madison held) unless Congress gave its consent. To argue otherwise, he claimed, was to borrow executive powers not from the text of the Constitution but from "*royal prerogatives* in the *British government*."[12]

As that last gibe suggests, the argument really turned on the notion of inherent executive authority. John Locke, in his *Second Treatise* of 1690, had discussed "prerogative," defined as the power of the executive "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it." Legislatures were slow, Locke argued, and the law could not foresee all "Accidents and Necessities" that might arise. Indeed, even where statutes were in place, strict adherence to their letter might do more harm than good in certain cases. Thus the executive needed discretion to implement the law or to set a policy course when law was lacking.

However, Locke's version of prerogative had natural limits. It was only legitimate as it reflected the public commonweal and could only be temporary: executive control in the absence of legislative direction stood only until "the Legislature can be conveniently assembled to provide for it."[13]

Hamilton made a broader claim. He argued that the divergent wording that introduced Articles I and II was clear evidence that "the executive power of the Union is completely lodged in the President." The subsequent discussion of presidential powers in Article II thus merely specified limits on various aspects of that "more comprehensive grant, contained in the general clause." Madison countered that "to see the laws faithfully executed constitutes the essence of the executive authority." From this might be deduced the power to remove subordinate officers responsible for executing the law (itself a question at issue in the first Congress in 1789) but for little else—and certainly not the power to make war, or even peace, unilaterally. "Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded," he argued; to give the president power beyond his specified grants of authority would threaten "a great principle in free government," namely, the separation of policy formulation from its implementation.

This dispute has echoed throughout American history. Reduced to its essence, the question is simple: Is a president limited to the specific powers affirmatively listed in the Constitution, or can he take whatever actions he deems in the public interest so long as those actions are not actually prohibited by the Constitution? President Theodore Roosevelt's version of the Hamilton position put it clearly: "My belief was that it was not only [the president's] right but his duty to do anything that the needs of the Nation required unless such action was forbidden by the Constitution or by the laws." Roosevelt's successor, William Howard Taft, clarified the opposing view. "The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied within such express grant as proper and necessary to its exercise," Taft wrote. "There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest."[14]

The evidence from the framers' debates probably favors Madison. Some scholars of the Constitutional Convention state flatly that the wording difference in the congressional and presidential grants of power is meaningless: "no delegate advanced a theory of inherent power," write David Gray Adler and Michael Genovese. Even James Wilson, the most persuasive advocate of a strong new executive branch, assured del-

egates that the only strictly executive powers under the Constitution should be to carry out the laws and to choose personnel. Indeed, why bother, if the president was vested with vast executive authority, to point out the power of that president to obtain written opinions from his department heads?[15]

Others, however, have suggested other sources for inherent powers, whether called "prerogatives" or not. For example, does the commander-in-chief power carry with it broad authority over warfare? How does the president execute the law "faithfully" if a given statute is, as is so common, vague or inexact—or if the president believes it is unconstitutional? Does the power to execute the laws itself supplement the powers enumerated in Article II, as President Grover Cleveland suggested? Does the presidential oath of office—to "preserve, protect, and defend the Constitution"—likewise carry with it its own, perhaps ironic, extraconstitutional mandates? Is there an implied equivalent of the legislature's charge to do what is "necessary and proper" to implement presidential duties?[16]

Whatever the academic resolution of these debates, in practice, Hamilton's view has decisively won out. Thomas Jefferson, who urged Madison to attack the Pacificus letters, quickly adopted Hamilton's view of executive powers upon attaining them. He purchased the Louisiana Territory without prior congressional approval, ordered offensive naval action against the Barbary powers, and spent unappropriated funds to restock military stores when war with Britain seemed imminent after the U.S. frigate *Chesapeake* was seized in 1807. In an 1810 letter he argued that "to lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." Presidents have long pointed out that they are the only nationally chosen elected official and that they therefore have special status as, in Theodore Roosevelt's phrase, a "steward of the people." Even a president as unassertive as James Buchanan once scolded the House of Representatives by stating that he was "the only direct representative on earth of the people of all and each of the sovereign states. To them, and them alone, is he responsible."[17]

Whether "stewardship" or not, certainly the unitary structure of the presidency helps its occupant vis-à-vis the other branches of govern-

ment. As Hamilton pointed out in *Federalist* No. 70, the "energy" of the executive branch comes in part from a president's formal powers and independence from the legislature, but some comes from "unity" itself. The fact that Congress is a divided body run by collective choices gives presidents inherent advantages of "decision, activity, secrecy, and dispatch." Presidents can make decisions quickly and discreetly (unlike Congress) and can act on them without resort to other branches (unlike Congress or, for that matter, the judiciary). Even if they don't get the last say, presidents often get to make the first move—which itself may shape the landscape over which subsequent decisions are taken. Hamilton pointed out as Pacificus, for example, that "the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision."[18]

The Civil War & After

It was, of course, Buchanan's successor who pushed these various questions to their limits—asking, for example, whether that "antecedent state of things" might be affected by a president's use of powers that clearly went beyond the Constitution's text. As the Civil War began, Abraham Lincoln expanded the volunteer and regular army far above the ceilings set by Congress. He authorized the construction of new warships, sent weapons to Union loyalists in western Virginia, and ordered a blockade of ports in the south. He spent $2 million of unappropriated funds to purchase military supplies. He censored the mail, imposed restrictions on foreign travel, suspended the constitutional right of habeas corpus (thus asserting the right to hold prisoners without charges or trial), undermined Fourth Amendment protections against warrantless searches and seizures, and instituted military tribunals in place of the civilian judiciary. "The process was so casual," note Christopher Pyle and Richard Pious, "that Secretary of State Seward could boast that whenever he wanted someone arrested, all he had to do was ring a little bell on his desk." Later, by executive order, Lincoln ordered that slaves be emancipated, without compensation for abrogating what the Supreme Court had, after all, determined was a personal property right.[19]

For Lincoln these actions were clearly justified by the crisis brought on by Southern secession and the later outbreak of overt warfare. Unlike

Buchanan, he never doubted that he had the duty, and power, to act to preserve the Union and the Constitution that governed it. He did not call Congress into session until July 1861. In so doing he famously asked, "are all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one be violated?" In 1864, with the Civil War raging on, Lincoln defended his actions more broadly still.

> My oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.[20]

Lincoln did not claim that these were powers embodied in the presidency alone but rather that emergency compelled him to act quickly and decisively. His actions, from budgeting to blockade, were steps that Congress could have taken, and Congress later explicitly endorsed them. Nor did Lincoln suspend electoral processes, though he feared he would lose his bid for reelection in 1864. As Arthur Schlesinger Jr. put it, "Lincoln successfully demonstrated that, under indisputable crisis, temporary despotism was compatible with abiding democracy."[21]

In fact, with the crisis passed (and Lincoln dead), Congress soon reasserted itself. Andrew Johnson, who battled with Congress for control of Reconstruction policy, was impeached; his immediate successors were largely willing to allow the legislature to dictate terms. War hero Ulysses S. Grant proved surprisingly malleable as president. For a time, as legislator George Hoar wrote, if senators "visited the White House, it was to give, not to receive, advice."[22]

The Supreme Court, too, which in 1863 had upheld Lincoln's naval blockade and subsequent seizure of foreign merchant ships, decided later that the president had not possessed the power to bypass civilian courts and institute nonjury, military trials in Union territory. The idea that the Constitution could be suspended by some "theory of necessity" was

"pernicious" and "false," Justice Davis wrote in *Ex Parte Milligan*. Indeed, Davis argued, "it could be well said that a country, preserved at the sacrifice of all the cardinal provisions of liberty, is not worth the cost of preservation." Tribunals might be necessary behind enemy lines, but "martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction," loyal to the United States and actively hearing criminal cases.[23]

Still, this judicial rebuke came in 1866, after the war was safely resolved. Davis admitted that "during the late wicked Rebellion, the temper of the times" made it difficult to separate "considerations of safety" from judicial decision making. As Chief Justice William Rehnquist has written, "there remains a sense that there is some truth to the maxim *Inter arma silent leges*"—that the laws are silent during wartime.[24] And even on the legislative side of the ledger, the shorthand convention of presidential torpor is rather underdrawn. Presidents Rutherford B. Hayes, James Garfield, Chester Arthur, and Grover Cleveland, for example, strongly defended presidential appointment and administrative powers against congressional incursion, to popular acclaim. Far from taking legislative advice, Cleveland protested, "I am not responsible to the Senate, and I am unwilling to submit my actions and official conduct to them for judgment."[25]

In short, presidents continued to claim the right to act unilaterally—and did so. In *In re Neagle* (1890), the attorney general argued that the presidential oath must, "by necessary implication," be read to "invest the President with self-executing powers; that is, powers independent of statute." While a dissenting opinion noted that such an oath might perhaps pledge presidential fealty to Article I, Section 8 ("the Congress shall have powers . . . to make all laws"), the Court majority stood with the president, focusing on the requirement that he faithfully *execute* the laws. Could that mandate, the Court asked, be "limited to the enforcement of acts of Congress or of treaties . . . according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?" The answer, said the majority, without undue specificity, must be closer to the latter than the former. In like fashion, the Court held in *In re Debs* that the federal government's power to control interstate commerce and regulate the

mails could not be limited to legislation punishing interference with those processes after the fact. That extra power—the residual between the power utilized by congressional legislation and "the entire strength of the nation"—could be used by the president proactively, in the absence of contrary law, when federal functions were threatened. The post–World War I "Palmer Raids," where supposed communist subversives were searched, detained, and even deported without warrant, provided an example of how far this power could be stretched.[26]

In 1909 President Taft (who had evidently not yet drafted his memoirs) sought to regulate oil exploration on public lands by executive order, effectively amending the statute governing such exploration. When Taft's action was challenged, the Supreme Court held that the president's regulatory power in this area had been accepted frequently over time by Congress and that such historical precedent might govern executive-legislative relations as much as constitutional doctrine. Practice, then, may carry its own weight in "determining the meaning of a statute or the existence of a power."[27] As the twentieth century continued, that practice provided a wide menu of precedent for presidents seeking to exert unilateral power; and presidents continued to add to the selection.

TRIBUNE OF THE PEOPLE?

The resort to inherent executive power was only one aspect of presidents' efforts to overcome their constitutionally weak position. Another stems from the status of presidents (with their vice presidents), noted earlier, as the only nationally elected officials. Most presidents since at least Andrew Jackson have thus claimed a special legitimacy as "tribunes" of the national interest, as opposed to the sectional interests arrayed in Congress. Jacksonian democracy put direct representation of the people at its heart—and the presidency at the heart of that process.[28]

Over time, history, strategy, and technology combined to allow presidents to leverage this credo into capital for leadership. Jackson's own claims were enhanced by developments in the presidential election process, for any notion of the Electoral College as an independent body of deliberative elites never took hold.[29] The framers had not expected

presidential selection to provide the president with the powers of public mandate; as James Ceaser has written, "Without any additional authority deriving from the selection process, the Founders believed that there was little to fear in the way of an imperial presidency." The indirectly elected president was supposed to be able to *resist* public pressures to act if need be. But by 1832 the members of the Electoral College were chosen by direct election in all but one state. Further, the electorate itself within each state had expanded quite dramatically in the early nineteenth century as property restrictions on voting eligibility were gradually dropped. By Jackson's time most white adult males in the United States had the right to vote—a sad fraction of universal suffrage by current standards, to be sure, but impressive for its day. Jackson and his successors could thus claim wide popular support.[30]

That claim was not unconstrained. The mass political organizations that grew during the 1820s and 1830s were premised on making loyalties to party, not person, paramount. One result was that party leaders often chose candidates who were uncontroversial rather than gifted or, at best, gifted at being uncontroversial. British observer Lord Bryce complained that this meant that "great men are not elected president."[31] By the twentieth century, though, the Progressive movement, frustrated by the continuing grip of reform-averse party machines on American politics, urged a wide range of changes to the electoral process. State by state, secret ballots, "Australian ballots" (with all candidates listed together), and primary elections began to appear. These reforms loosened the parties' choke hold on ballot access and nominations and encouraged the creation of candidate-centered campaign organizations. While their success was only partial—it did not reach full bloom until after the 1968 election and the Democratic rules changes it inspired—the Progressives did provide voters with the mechanics to split their tickets and the theoretical justification for so doing: the candidate, not the party label, was what mattered most. Parties were necessary to provide clear policy choice and to bridge the constitutional chasms between the branches. But for Woodrow Wilson and his followers, public opinion was the key to government's legitimacy. For them, a party system was not a goal in itself but rather the means by which the president could exercise popular leadership, translating the will of the people directly through him as its direct representative. Instead of con-

straining the president, the party "would now form around him and adopt his program or 'vision' as its own."[32] This effort to lay a parliamentary system over the actual structure of the federal government met with mixed success. But popular appeals over the head of Congress became a key element in governing.

Such a strategy became even more attractive as new technology for mass communication developed. As railroads carried newspapers (and presidents) across the expanding United States, as the telegraph spawned near-instant transmission of information, and as—perhaps most crucially—the radio gave presidents a direct, unmediated link to the public ear, presidents mated Wilson's theory with ever more ambitious strategies for outreach. The availability of the technology, in turn, encouraged the strategy. The expectation that presidents would communicate with the public directly, and would translate public support into political capital, became a basic part of the office. The scholar Jeffrey Tulis has suggested that the result is nothing less than a "second constitution" for presidents.[33]

LEVERAGING FORMAL POWERS

At the same time presidents learned to use what they had, or claimed to have, in the "first" Constitution. If the formal powers listed in Article II were a bit sparse, presidents nonetheless could use them creatively. In some cases, such a strategy coincided with the notion of "going public" noted previously. For example, presidents are required to give a State of the Union message to Congress and are invited to suggest policy proposals. At first such efforts were resented: Jeffersonian members of Congress who had cooperated with the president were cursed as collaborators, as "toads that live upon the vapor of the palace."[34] But in the twentieth century this began slowly to change. Theodore Roosevelt had a program, if one he kept purposefully general; William Howard Taft sent Congress a series of specific policy proposals and even legislative drafts. In 1913 Wilson became the first president since Jefferson to turn the State of the Union message into a State of the Union *address,* setting the legislative agenda by gathering a joint session of Congress together to hear his programmatic plans. Unlike Jefferson a century before, Wilson

did not stay to hear the congressional reply, much less to reply to that reply. For the first time the press began to mention "administration bills."[35]

Presidents also weighed in at the other end of the legislative process, utilizing their veto power to shape public policy. George Washington had feared that if he let the veto slide into disuse a potentially harmful precedent would be set. He and his immediate successors nonetheless used the tool sparingly and reserved it for laws they felt were unconstitutional. Andrew Jackson, on the other hand, vetoed bills—most notably the reauthorization of the Bank of the United States—with little restraint and because he thought they were bad policy. His twelve vetoes more than doubled the number issued together by the six presidents before him. Though the Senate, outraged, censured Jackson, the president was well within his constitutional rights, and the censure was later expunged. Other presidents followed suit until the veto became a generally accepted part of the legislative routine. John Tyler, with his own vetoes of banking legislation, established that even politically weak presidents could shape policy through the use of executive powers. In the late nineteenth century Grover Cleveland vetoed nearly six hundred bills over his eight years in office, many of them Civil War pension "pork," and was overridden barely 1 percent of the time.[36]

Administrative powers, likewise, were strategically deployed. Article II makes it clear that the president is the head of the executive branch, in charge of his department heads, but the specifics of those departments were left vague. As early as the 1790s, "all major decisions in matters of administration, and many minor ones, were made by the President."[37] James K. Polk, who held office from 1845 to 1849, has been lauded as "the first president to exercise close, day-to-day supervision over the executive departments," even over fiscal matters.[38] In the latter area he was ahead of his time, but by the 1920s the president was required to create a coordinated executive budget to submit to Congress.

"Coordination" in this and other instances really meant "control," and this in turn meant relying on the loyalty of one's executive appointees. Back in the first Congress, James Madison had fought to get presidents the right to fire members of the executive branch without Senate approval, overcoming those who felt that the Senate power of confirming nominees in office should mean similar confirmation upon

their removal from office. For Madison and his allies control of personnel was crucial to presidential accountability. Since the president's appointments were key to helping him carry out his constitutional duty of "taking care that the laws be faithfully executed," they fell within the executive power itself.

As political parties developed and matured, patronage became a critical part of the government. "To the victors belong the spoils" went the Jacksonian slogan; and Jackson again made a mark by removing Treasury Secretary William Duane when Duane refused to follow the president's order to withdraw the federal government's deposits in the Bank of the United States. Jackson then appointed Roger Taney, his attorney general, as treasury secretary, and Taney did Jackson's bidding. Other presidents, notably Abraham Lincoln, continued to play the patronage card, if with a defter hand.

At that point the fight was not yet over, as the Tenure of Office Act aimed at Andrew Johnson indicated. But presidents largely resisted any control over their discretion; as noted earlier, even the oft-maligned post-Reconstruction presidents were quite aggressive, and usually successful, in this area. In the 1926 case *Myers v. U.S.,* the Supreme Court finally confirmed that presidents did indeed hold the power of removal—and thus of controlling the behavior of executive branch officials even when they were confirmed by the Senate.

Administrative strategies were, unsurprisingly, far more salient in a government of six hundred thousand civilian employees (the figure in 1930) than of eleven thousand (the total a century before).[39] Growth in government made power over appointments and removals more critical; it also forced Congress to delegate more powers to the president through statute. Each time an executive agency was created with the power to promulgate regulations, presidential power expanded. While Congress could not constitutionally delegate its legislative powers, the delegation of regulatory authority sometimes amounted to something close, especially when Congress passed vague statutory standards or neglected to conduct adequate oversight of administrative behavior. During wartime, as noted later, delegation reached new heights. For example, the Palmer Raids of 1919 and postal censorship of the left-wing press were carried out under authority granted the executive in the 1917 Espionage and Trading with the Enemy Acts and the 1918 Sedition Act.[40]

Even before the New Deal and World War II exploded the size of government, presidents also managed executive branch behavior through executive orders, proclamations, and other administrative directives. Properly speaking, these regulatory devices are an extension of formal powers, not prerogative powers, since (like appointments) they are a tool for executing the law; thus, authority to issue a given order must be rooted in the Constitution or in statute.[41] While they were not tracked formally until 1895, some fifty thousand executive orders and proclamations may have been issued over time. Many of them have dealt with minor personnel matters. But many others have had substantive impact. Washington's Neutrality Proclamation set off the Pacificus-Helvidius debate. The Louisiana Purchase was consummated by proclamation, as was emancipation of the slaves during the Civil War. Public lands were an especially popular topic, as the *Midwest Oil* case suggests: presidents used executive orders to create Indian reservations, grazing areas, lighthouses, military reservations, and (under Theodore Roosevelt) millions of acres of conservation land. More than seventeen hundred executive orders were issued by Woodrow Wilson alone in the years around World War I.[42]

As this last observation suggests, many of the most important executive orders are those issued in the president's role as commander in chief. The broader point is that war enhances executive authority. Madison happily told Jefferson that the Constitution, "with studied care, vested the question of war in the Legislature." But throughout American history armed conflict has expanded presidential power; each war president, to borrow Corwin's description of FDR, has been "happily free of any mistrust of power when it was wielded by himself."[43]

It is not clear from the Constitution whether the president's formal status as commander in chief carries with it any power outside of a state of war. But presidents have long acted as if it provided a separate grant of authority. From the Barbary Pirates to the Boxer Rebellion to an array of excursions into Mexico and Latin America, presidents have often justified the unilateral use of troops as presidential prerogative—sometimes as a defensive effort to "repel sudden attacks" or to protect American lives or property. James K. Polk's deployment of troops near the border between Mexico and Texas, which successfully aimed to provoke an armed clash leading to broader war, was not unusual except

in the unexpected length of the conflict that ensued. Abraham Lincoln famously denounced Polk's action; but, as noted previously, Lincoln himself was hardly shy in asserting power. "I think the Constitution invests its commander-in-chief clause with the law of war, in time of war," he argued in 1863, later adding, "As commander-in-chief . . . I suppose I have a right to take any measure which may best subdue the enemy," even if this included "things on military grounds which cannot constitutionally be done by Congress." Other presidents agreed. Interestingly, where Lincoln's claims have been justified by the evident crisis of the Civil War, other military actions have been justified by their *lack* of severity, by their supposed standing as police actions rather than as a "real" use of force that would constitute acts of war. William McKinley, Theodore Roosevelt, Taft, Wilson, and Calvin Coolidge, for example, used U.S. troops to rule Cuba, Nicaragua, Haiti, and the Dominican Republic and even to occupy Veracruz, Mexico. Wilson also ordered in March 1917 that all American merchant ships crossing the Atlantic be accompanied by protective armed convoys, despite Congress's rejection of this measure.[44]

In these aspects, the administrative power of the executive reflects and reinforces the importance of presidential initiative, even in areas of congressional authority. As with any first mover in a game where sequence counts, a president's initiatives may reshape in his favor the landscape on which political actors move. While hardly helpless, Congress does in such cases necessarily confront presidential power on less than favorable ground. When the Senate balked at Theodore Roosevelt's cherished plan to have the American battle fleet circumnavigate the globe, TR simply pointed out that he had enough funding to send them halfway and that if Congress chose not to appropriate the remaining amount the fleet would just stay in the Pacific. "There was," he noted, "no further difficulty about the money."[45]

CONSOLIDATING PRESIDENTIAL POWER: THE MODERN PRESIDENCY TO 1965

Even before Franklin Roosevelt took office, then, ambitious presidents could choose from an array of precedential actions that pushed against

congressional power and, finding insufficient resistance, expanded the scope of presidential power. The story confirms the importance of the "living Constitution," a collection of historical experience overlaying the text of the Constitution itself. Not all presidents were strong. But as Woodrow Wilson put it, "the President [was] at liberty both in law and conscience to be as big a man as he can."[46]

From FDR's time forward, these tools became expectations rather than possibilities. They became part of the nature of the office rather than optional instruments. The Great Depression and, on its heels, World War II, followed by the cold war, dramatically raised Americans' expectations of their government and especially of their presidents. The size, scope, and reach of the federal government grew immensely in the forty years after FDR defeated Herbert Hoover in 1932. Richard E. Neustadt, in a play on Wilson's observation, noted that the president could certainly still be big, "but nowadays he cannot be as small as he might like."[47]

As this comment suggests, our current conception of the presidential office was largely shaped by the administration of Franklin Roosevelt and his immediate successors. Changes in the presidency since the New Deal, the political scientist Fred Greenstein concludes, "added up to so thorough a transformation that a modifier such as 'modern' is needed to characterize the post-1932 manifestations of the institution that had evolved from the far more circumscribed traditional presidency." That modern presidency has played out, in the historian William Leuchtenburg's well-known phrase, "in the shadow of FDR."[48]

Greenstein suggests four characteristics by which "modern" presidents can be contrasted with "traditional" presidents: in their ability to use formal and informal powers on their own initiative; in their agenda-setting powers for federal policy-making; in their enhanced staff capacity, adding up to a "presidential bureaucracy"; and in their immense visibility.[49] These areas parallel the discussion of the pre-FDR presidents in the previous section, but Greenstein is right to see a change in kind as well as quantity—what a physical scientist might call a "shift change," as from ice to water—in the post–New Deal, World War II age. Thus the narrative that follows, rather than tracing the history of each administration since FDR, will utilize Greenstein's categories, in reverse order, to organize the discussion.

The "Bully Pulpit" in a Broadcast Age

If Theodore Roosevelt foresaw the use of the presidency as a "bully pulpit," it was his cousin Franklin who spread the good news across the airwaves. By the 1920s, the invention of radio transformed the president's ability to send an unmediated message to the American public. Even the notably laconic Calvin Coolidge took advantage of the novel technology. As radio spread to half of all U.S. households by 1935 and closer to 80 percent by 1940, Franklin Roosevelt proved to be the first master of the medium. His first "fireside chat" a week after his inauguration discussed banking, as he sought to reassure Americans that their financial system was secure: not only did runs on the banks end, but deposits streamed back in from under mattresses and floorboards. Subsequent chats, which Roosevelt delivered at well-spaced intervals during the remainder of his presidency, were likewise reassuring, folksy, and, to the modern ear, relentlessly substantive. The presidency, he commented, is "pre-eminently a place of moral leadership" for "leaders of thought" seeking to clarify big ideas; and he sought to lead by educating the public so that they would see the issues the same way he did.[50]

Reporters were another communicative tool FDR used with brio. Woodrow Wilson was the first president to bring the White House press into his office and to brief them personally, but his relationship with journalists was strained: he considered them "dullards," as Samuel Kernell notes, "and they sensed his condescension." After Harding, Coolidge, and Hoover tightened press access, Franklin Roosevelt opened it wide, holding what he called "delightful family conferences" to provide reporters with a wide range of hard news: his first press conference (of the nearly one thousand he would hold over twelve years) ended with applause from the gathered correspondents. While future presidents were not always as skilled in badinage as FDR, the door to the Oval Office, once unbarred, could not be completely shut.[51]

Television's arrival on the mass market in the 1950s upped the ante further. Truman had already allowed radio broadcasts of his news conferences—thus it was hard for him to talk off the record, as Roosevelt had often done. But now presidents could appear in one's living room in person, and in 1955 Dwight Eisenhower began to allow TV cameras

into press conferences. The story of the impact of TV on the 1960 debates between John Kennedy and Richard Nixon is well known: those listening to the first debate on the radio judged Nixon the winner, while those watching on TV overwhelmingly thought the vigorous JFK had beaten the pallid vice president. Soon television was shaping presidential agendas—in the area of civil rights, for example—but also serving as a means for presidents to seize the public's agenda through what Kennedy aide Ted Sorensen called "direct communication" without "alteration or omission." The mechanics of the broadcast industry helped too. It was far easier for the media to focus on one person than on the inchoate multitudes in Congress.[52]

Certainly Kennedy was confident enough in his broadcast presence to allow live coverage of his press conferences in prime time; 65 million Americans watched the first one. With the concurrent shift to a half-hour nightly newscast, suddenly the president's presence was not a treat but an expectation. It was an expectation Kennedy lived up to, rounding out Jackson's notion of "tribune" or TR's idea of "steward" of the people with not just policy but personality. Alexander Hamilton had claimed in the *Federalist* that presidents would have no "spiritual jurisdiction"—but the outpouring of emotion at Kennedy's (televised) funeral suggested the success he had in forging a faith in the personal presidency.

These developments of technology and strategy gave presidents an advantage in visibility that underlay the other powers traced earlier. If Nixon later aimed at a plebiscitary presidency, the idea was hardly new.

The Institutional Presidency

The forging of a public yet personal presidency was itself supported by a rather impersonal growth in White House bureaucracy. From one secretary in 1933, the White House press office has grown to at least thirty paid staff, themselves part of a much larger White House Office of Communications.[53]

This development exemplifies the general growth of the executive office staff. Until the 1870s presidents had to pay any assistants out of their own pockets and were thus often limited to the services of their unemployed nephews. They had almost nothing in the way of substan-

tive staff help and scarcely enough secretarial help to keep up with the incoming mail. As late as the 1930s, White House staff could barely be described in the plural.

During his first term, Roosevelt relied largely on his so-called Brains Trust, recruited from the private sector and academia, and on staff borrowed from other executive agencies and "detailed" to the White House. In 1936, worried about his capacity for policy development and management, Roosevelt appointed the President's Committee on Administrative Management under public administration luminary Louis Brownlow. The Brownlow Committee famously concluded that "the President needs help." In accordance with the best principles of contemporary administrative science, the committee called unapologetically for strengthening the executive: it proposed new personal staff aides—for a grand total of nine—and tools to enhance the president's coordination of the executive branch, starting with the creation of an Executive Office of the President (EOP) to house presidential staff agencies such as the Bureau of the Budget (BoB). Brownlow also recommended that the president gain much more control over executive branch organization and personnel. While Congress resisted giving the president unbridled control over departmental structure and civil service, in 1939 it did allow the president the authority to hire additional staff and to create the EOP. The "institutional presidency" was born.

The EOP quickly gained in staff and stature. While the White House staff proper remained limited in number for some years, the BoB grew enormously—quintupling in the decade after 1939—and served in many respects as an extension of the president's staff. The two blue-ribbon commissions headed by former president Herbert Hoover in the late 1940s and early 1950s took a tack quite similar to the earlier Brownlow Committee, endorsing increased managerial authority for presidents and spurring executive-centered organizational changes in the departments and regulatory agencies.[54]

Congress also added to the president's institutional resources. In 1946 the Employment Act required the submission of an annual Economic Report and, in principle at least, made the president single-handedly responsible for the American economy; but the statute also created a Council of Economic Advisers (CEA) to gather information for the president on the state of economic policy-making. In 1947 the National

Security Act created a National Security Council (NSC) as well as the Central Intelligence Agency (CIA) and the first unification of the armed services into what would become the Department of Defense. While the NSC as a formal forum for high-level deliberation would prove an intermittent tool of presidential advising, the staff serving the council—or more accurately, the president—became a critical part of the EOP infrastructure.

In the 1950s the CEA was strengthened and a plethora of specialized White House staff aides added, including a legislative liaison office, a science and technology adviser, and staffers devoted to such topics as cold war planning, atomic energy, and public works. In the 1960s the president's policy staff housed in his Special Counsel's office grew markedly. So did the NSC staff, especially after Kennedy aide McGeorge Bundy set up a Situation Room in the basement of the White House's West Wing after the 1961 Bay of Pigs debacle. This new office was staffed around the clock and could receive, transmit, and comment upon the range of classified cable traffic from State, Defense, and intelligence posts. The NSC staff was now located in the White House itself and took on responsibility for the president's day-to-day needs for security advice.[55]

The growth of centralized staffing was made more critical by the enormous growth of the federal establishment starting in the 1930s. The "alphabet soup" of New Deal agencies added thousands of employees and new substantive ingredients to government, rounded out by a new cabinet-level Department of Health, Education, and Welfare in 1953. Even before World War II started, more than a million civilians worked for the federal government, a number that would nearly quadruple by 1945. A larger Executive Office staff was a useful coordinator of this managerial mass, for purposes of policy and patronage both.

As the number of presidential staffers increased, so did the desire of presidents to keep their counsel confidential. "It is essential to efficient and effective administration that employees of the Executive Branch be completely candid in advising each other on official matters," Eisenhower argued in 1954; thus he deemed it "not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed." Less formally, Ike noted, "Any man who testifies as to the advice he gave me won't be

working for me that night." His attorney general, William P. Rogers, came up with the phrase *executive privilege* to justify the refusal of the administration to pass along information to Congress.[56]

In short, while American government had always had an executive branch, it now had a "presidential branch" as well. The development was considered, when it was noticed at all, to be a good thing. Given the demands of the job in the cold war era, staff was a presidential extension that would "giv[e] the incumbent a sporting chance," wrote one political scientist. Still another foresaw "salvation by staff," since, as a third noted, without additional resources the president would be unable to function without "overload and breakdown." The president still needed help—now more than ever.[57]

Formal Powers & Agenda Setting

One of the things the president needed help in doing was setting the public agenda. One means was the public communications strategy sketched already; but for Greenstein, at least, the power of agenda setting is linked more closely to the role of the president in the legislative arena.

Into the 1920s the constitutional invitation to provide Congress with measures the president deemed "necessary and expedient" was not one that legislators thought should be often accepted. Forays by Theodore Roosevelt, Taft, and Wilson into that forum were important but not sustained, as members of Congress denounced the executive's encroachment on legislative prerogatives.

Franklin Roosevelt's approach to the 1933 banking crisis served as a dramatic announcement of new boundaries. On March 5, a day after taking office, Roosevelt issued an executive order temporarily closing the banks (the authority for which was rooted in a World War I law prohibiting trading with the enemy) and called Congress into special session. On March 9 he sent legislators an emergency banking bill, which was passed without having even been formally printed, after forty minutes of debate in the House and little more in the Senate. So began the famous "hundred days," which have become the inevitable, if unfortunate, benchmark for Roosevelt's successors. During this time a flood of proposals rolled out of the executive branch and into law, receiving

remarkable legislative deference. In the House temporary "gag" rules even prevented members from amending administration proposals on the floor.

Yet it was under Harry Truman that the "president's program" truly took hold. Roosevelt's first term was by far his most productive in terms of legislative leadership, and even then Congress initiated much important reform; his second was tainted by the effort to "pack" the Supreme Court; his third and brief fourth were dominated by wartime concerns.[58] By the time Roosevelt died in 1945, the president's involvement in that process was no longer insult, but not yet institution.

However, by the end of 1947, the struggling Truman administration realized that, if the Republican "do-nothing" Congress was to be made a successful electoral foil in 1948, the president needed an affirmative and comprehensive marker of his own. Special legislative messages were therefore packaged for congressional consideration nearly weekly. After Truman's surprise victory this systematic presentation of presidential requests became routine. Indeed, by the time Dwight Eisenhower took office, legislators not only accepted but demanded a presidential agenda. When the new administration was slow in providing one in 1953, a House committee chair angrily admonished Ike: "Don't expect us to start from scratch on what you people want. That's not the way we do things here—*you* draft the bills, and *we* work them over." Eisenhower complied and even created a White House staff devoted to congressional liaison. By 1962 President Kennedy could comment matter-of-factly that "it is a responsibility of the President of the United States to have a program and to fight for it."[59]

Presidents in the 1949–65 period sent between fifty and ninety messages to Congress each year, containing anywhere from sixty-five to more than four hundred separate proposals for legislative consideration.[60] And once bills reached the president's desk, they faced a newly aggressive veto pen. FDR reportedly told members at a cabinet meeting to "find me something I can veto." Even the supposedly passive Eisenhower vetoed nearly two hundred bills in eight years. As he pointed out, the veto made him part of the legislative process. Presidents took full advantage of that.

They also asserted more influence over another critical element of the policy agenda, the budget. A 1921 statute requiring a unified executive

budget finally gave presidents the chance to centralize control over agency spending requests. Upon arriving in the EOP, the BoB became a key instrument for presidents seeking to manage agencies' requests to Congress, both legislative and monetary. That included efforts to control monies on the other side of the budget process—after funds were appropriated. In lieu of a line-item veto, presidents had long withheld occasional spending they considered wasteful; before and during World War II, for example, Franklin Roosevelt annually deferred several hundred million dollars in nonmilitary construction appropriations. The broad practice, if not all its applications, was unchallenged by Congress; by 1950, in fact, statutory language authorized President Truman to impound funds if spending became unnecessary due to "changes in requirements" or "other developments."[61]

Those permissive conditions obviously had the potential for discretionary interpretation favoring presidential priorities. The growth of the executive establishment, however, made such discretion not only more powerful but more necessary. The rapidly expanding administrative state—and the tasks of economic revival, stabilization, and world war placed upon it—brought the need for organization and management to the fore. Thus Congress actively delegated presidents new powers in all areas of policy-making.

In the area of foreign affairs the Supreme Court not only upheld this delegation but endorsed it. The 1936 *Curtiss-Wright* decision famously backed the right of Congress to leave it to the president's discretion when to invoke and implement a neutrality act preventing arms sales to belligerents. It did so in extraordinarily broad language that presidents have come to cherish. This case, wrote Justice Sutherland for the Court, involved the "very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." Many have argued that Sutherland went too far, that the framers had no intention of giving the president exclusive power over much of anything. In that context *organ* is the right word only if by it is meant an instrument whose notes are defined by the other hands on its keys. Still, presidents to this day quote the opinion in their arguments to Congress or courts concerning foreign policy.[62]

The *Curtiss-Wright* decision appeared to be in sharp contrast to the

Court's tone in two cases decided the year before. Those cases had overturned New Deal statutes giving the president discretion over domestic policy. Most famously in the *Schechter* decision, the Court had rejected the notion that Congress could delegate to the president the power to promulgate industrial codes regulating labor conditions such as minimum wages and maximum hours. "Extraordinary conditions may call for extraordinary remedies," wrote Chief Justice Hughes. "But . . . extraordinary conditions do not create or enlarge constitutional power" that would allow Congress to give presidents the authority to write statute. Justice Cardozo's concurrence put it this way: "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing."

But even here the Court was soon to switch gears. Though Roosevelt's efforts to "pack" the Court after the 1936 election failed in Congress, the Court's decisions on New Deal legislation nonetheless became markedly more sympathetic to presidential power and to the expansion of national governmental power generally (for example, through a generous interpretation of the scope of what constituted interstate commerce). The administrative presidency continued apace. As World War II encroached and then exploded, the First and Second War Power Acts granted FDR broad emergency powers that prompted the issuance of nearly three hundred executive orders, including the creation of more than fifty new agencies. Few of these had specific congressional sanction, and thus their operation depended on reflected executive authority rather than statutory authorization. This segues neatly to unilateral action less grounded—if at all—in legislative delegation.[63]

Reliance on Unilateral Authority

"In the event Congress shall fail to act, and act adequately, I shall accept the responsibility, and I will act," proclaimed Franklin Roosevelt on Labor Day 1942. "The President has the powers, under the Constitution, and under Congressional acts, to take measures necessary to avert a disaster."[64]

Roosevelt was seeking a law governing wage and price controls, and he got one. But the speech highlights his willingness to utilize executive authority, broadly defined, with or without congressional approval. The lead-up to World War II provides a number of dramatic illustrations.

With the fall of France in June 1940, Roosevelt declared an "unlimited national emergency" and utilized statutory authority to mobilize the economy, spending more than $15 billion appropriated for military preparedness measures. He also concluded a series of executive agreements, thus evading the Senate ratification needed for treaties. One created provisional governments in Latin America that kept French possessions in the region away from the Vichy government. Another formed a Permanent Joint Board of Defense linking the American and Canadian military staffs. A third, more dramatically, transferred fifty destroyers to Britain in return for eight Caribbean naval bases. Such a transaction violated a 1917 statute prohibiting the transfer of warships to a belligerent nation and also the 1940 Neutrality Act, since the ships were usable military equipment; however, the attorney general's opinion justifying the agreement grounded it in various principles, including the "plenary powers of the President as Commander in Chief of the Army and Navy and as the head of the State in its relations with foreign countries."[65] In January 1941, months before lend-lease legislation finally passed, FDR began to arrange $3 billion in supplies for the Soviet Union, a controversial partner given its earlier alliance with Hitler.

More was in store. An executive agreement with Denmark in April 1941 allowed American forces to occupy Greenland, followed in July by an agreement to defend Iceland as well. Since those U.S. troops needed provisions, the navy was ordered to protect the supply convoys and to sink Axis submarines threatening them. In September, after an American ship heading toward Iceland was attacked by a German U-boat, Roosevelt ordered the navy to shoot on sight. (The U.S. ship, FDR told the public, was simply carrying mail; in fact, it had tracked the submarine and reported its position to the British navy.) In October merchant ships were armed, and the navy was told to provide "neutrality patrols" and to sink Axis ships even if they were not near the convoys. British documents released later indicate that Roosevelt had very deliberately sought to force an incident in the North Atlantic.

All of this, of course, was retroactively legitimated by the Japanese attack on Hawaii and the sheer scale of the evils of the Axis. Congress had shortsightedly misread the stakes, passing arms embargos against England and France in 1939, nearly repealing the draft in 1941, waiting a year to pass lend-lease legislation, cutting funds for new arms, and even resisting naval construction in the Pacific. "The Lockean doctrine of

emergency prerogative had endured," Schlesinger commented, "because it expressed a real, if rare, necessity in a free state. FDR was a Lockean without knowing it." As Richard Pious has concluded, something of a "frontlash" resulted, legitimating future presidents' likewise unilateral endeavors: "American foreign policy became a presidential prerogative as a reaction to presidential successes and the pathetic congressional performance prior to Pearl Harbor."[66]

Roosevelt's successors took full advantage of their new freedom of action. Harry Truman, for example, committed the nation to protecting southern Europe against communism as the cold war began, winning support, in part, by "scaring hell out of the country." He oversaw the creation within the new CIA of an Office of Special Operations, which immediately began covert operations in Italy; in 1949 the director of Central Intelligence saw his powers expanded to include broad spending discretion with little congressional oversight—"a secret arm of the executive, with a secret budget."[67]

When hostilities erupted on the Korean peninsula, Truman immediately committed American forces to the defense of South Korea. Korea would become the first great undeclared war, lasting three years and killing some thirty-seven thousand American servicemen. Truman not only refused to ask for congressional authorization for this action but refused a resolution when it was offered; he felt, as Secretary of State Dean Acheson put it, that to seek legislative support would weaken the presidency by setting a "precedent in derogation of presidential power to send our forces into battle." Extending the principle past the battlefield in 1951, Truman sent four combat divisions' worth of reinforcements to Europe, claiming that the commander-in-chief power allowed him to move troops wherever he liked without congressional approval, even in the absence of hostilities. After extended debate, Congress backed down.[68]

Dwight Eisenhower was more circumspect in committing American combat troops. He resisted pressures to involve the United States in Indochina in the wake of the French colonial collapse there. However, in the face of tensions between Taiwan and Communist China in 1955, he requested (and received) congressional authorization to deploy the armed forces "as he deem[ed] necessary" in the region. No enemy was

named, nor limits set. A similar resolution was passed with regard to the Middle East in 1957.

Eisenhower never used this blank-check authority. He did, however, send some fourteen thousand troops to Jordan for a brief period in 1958, without requesting legislative sanction. And he was far less shy in initiating covert operations around the globe. Most notable were the overthrows of the governments of Iran, Guatemala, and Laos, where Eisenhower feared communist influence. The new Kennedy administration, swayed by these successes, quickly and rather thoughtlessly approved the ongoing planning for the overthrow of the Castro regime in Cuba. When Kennedy refused to add combat troops to the mix, the landing force was routed. The next year, in the wake of this fiasco, Kennedy revamped his advising system, but he did not go so far as to include Congress in those consultations. He also began to send soldiers—termed "advisers"—to an obscure nation called South Vietnam. There was, once again, no declaration of war and no congressional authorization.

The crisis atmosphere of the cold war drove these decisions, and congressional and public acquiescence to them, to the extent that they were known at all. The old battles of the balance of power intersected with the new logic of the nuclear age, with Americans hoping to win hearts and minds without assuring mutual destruction. In 1950 the secret government policy paper NSC-68 laid out the doctrine that "in the context of the current polarization of power a defeat of free institutions anywhere is a defeat everywhere." This expression of what would soon be called the "domino theory" justified initiatives up to and including Vietnam; much of the action it underlay, since secrecy was considered so important to its implementation, was presidential action.[69]

But in light of later events, it is worth noting that this philosophy did not apply only overseas. Six months before the attack on Pearl Harbor, Roosevelt used federal power to break a strike at the North American Aviation factory in California. He also ordered extensive wiretapping, even of his own staff: New Deal stalwarts Tommy Corcoran and Harry Hopkins were among the victims.[70] This sort of political espionage, relished by FBI director J. Edgar Hoover, became a regular tool of power, with a diverse cast of targets including columnist Drew Pearson, Roosevelt cabinet secretary Harold Ickes, and nuclear scientist J. Robert

Oppenheimer (as well as his lawyer). By the 1960s John F. Kennedy used wiretaps to gain information in his battle over steel price hikes and Robert Kennedy to track the press leaks of Justice staffers and the sex life of the Reverend Martin Luther King Jr.

Even though the Supreme Court had sought to limit the use of evidence obtained through wiretapping, FDR overrode this decision after failing to receive legislative authorization. "It is too late to do anything about it after sabotage, assassinations, and 'fifth column' activities are completed," Roosevelt wrote to Attorney General Robert H. Jackson in 1940. "You are, therefore, authorized and directed . . . to authorize the necessary investigating agents that they are at liberty to secure information by listening devices direct to the conversations or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." He hoped Jackson would "limit these investigations so conducted to a minimum and"—also notable in retrospect—"limit them insofar as possible to aliens." But he did not require those restrictions, and he also sought ways to use the military to investigate suspected plots. Had large-scale domestic sabotage broken out during World War II, Jackson later wrote, "there is no doubt in my mind that President Roosevelt would have taken most ruthless methods to suppress it. He had no patience with treason, and he did not share the extreme position about civil rights that some of his followers have taken."[71]

The truth of that last clause is clear from Executive Order 9066, which spurred the detention of some 112,000 Japanese Americans on the West Coast in internment camps, for as long as four years. This decision, of course, was endorsed by Congress and (at least tacitly) by the Supreme Court. But even after hot war turned to cold, Roosevelt's successors continued to expand their capacity for domestic intelligence gathering. Truman expanded the 1940 order to include cases "vitally affecting the domestic security, or where human life is in jeopardy." In 1956 the FBI launched its counterintelligence program COINTELPRO, which included surveillance, forgery, and even the use of infiltrated agents to incite violence, especially by communist groups. This program expanded under the Kennedy administration to monitor civil rights groups, the Black Panthers, and the Ku Klux Klan. Over time, the FBI also became skilled at intercepting the mail and carrying out so-called

black bag jobs—covert burglaries—against suspected individuals or organizations, functions implicitly endorsed by the Truman Justice Department and explicitly by Eisenhower's. By one estimate, between 1942 and 1968, the FBI committed more than 230 illegal entries.[72]

It is worth noting, in this context, the *Youngstown Sheet and Tube* decision of 1952 quoted in chapter 1. In striking down President Truman's seizure of steel mills during the Korean War, the Court did place some limits on executive authority. Wartime authority, the justices held, could not mean infinite executive power: it did not, for example, allow the president to unilaterally seize private property simply because the president did not want to follow the labor arbitration mechanism endorsed by Congress. But even Justice Jackson wrote that "the widest latitude" must be given the president's use of force "when turned against the outside world for the protection of our society"; and several of his colleagues saw no need for that caveat. In a period of permanent cold war, the outside and inside worlds seemed perilously permeable. And in any case, it was up to Congress to protect its own—and the people's—prerogatives.

THE "SAVIOR" PRESIDENCY

And so the story arrived in the 1960s far distant from its starting point in Philadelphia in 1787. Along the way presidents had acquired many tools to work around their constitutionally mandated weakness. They used their formal powers creatively and proactively; they built an executive branch in their own image, with an extensive "presidential branch" to oversee and control it; and they moved unilaterally to use vaguely defined executive powers to reshape the policy landscape, relying on a direct connection with the public to legitimize their actions. Arguably a new framework for American government had been created along the way.

Most mid-century observers welcomed such a development. If thirty years after Nixon's resignation there was concern about the eclipse of Congress, thirty years prior to Nixon most worry went the other way. Arguing that a strong president was a crucial force in overcoming the fragmentation of American democracy in a time of seemingly perpetual

crisis—when "emergencies in policy," by prewar standards, became business as usual—scholars of politics and public administration hailed the rise of a vigorous chief executive.[73] A menacing world required the swift decision-making capacity of centralized leadership. In 1944, for example, Paul Appleby, later dean of Syracuse University's Maxwell School, approvingly noted "the trend to Presidential Government." After all, "what our Government needs most of all is greater unity, and it can have greater unity only around the leadership of the President. . . . [T]he time when Congress has been most in the saddle has been the time of most government inadequacy. I think that Congress has and should always have a veto power rather than a devising, formulating, originating function."[74]

There were some critics, notably Charles Beard, who argued vigorously in a 1948 book that FDR had greatly overstepped his bounds. But this "simply outraged many American intellectuals, including most historians," who stressed that deception of the public was necessary. The dean of the journalism establishment, Walter Lippmann, declared that the national interest was dangerously undermined when Congress and public opinion worked to "devitalize, to enfeeble, and to eviscerate the executive powers." But public opinion actually did little of the sort: a 1959 poll showed that 61 percent of those surveyed thought that presidents should have more power. Only 17 percent chose Congress.[75]

More rigorous scholarship came to the same conclusion. Clinton Rossiter's influential book *The American Presidency,* published in 1956, laid a host of duties at that president's feet, from his role as chief executive to those of chief of state, chief diplomat, chief legislator, commander in chief, chief of party, Voice of the People, Protector of the Peace, Manager of Prosperity, and international coalition leader. "Since Congress is no longer minded or organized to guide itself," Rossiter cautioned, "the refusal or inability of the President to serve as leader results in weak and disorganized government." Indeed, President Eisenhower was criticized for his seeming passivity, for his failure to exercise "the kind of leadership essential to survival." By contrast, "the verdict of history" concerning FDR "will surely be that he left the Presidency a more splendid instrument of democracy than he found it."[76]

Richard Neustadt's landmark book *Presidential Power,* published in 1960, certainly thought so. Using FDR as a template, Neustadt dis-

cussed how presidents could enhance their influence over governmental outcomes and stressed how important it was to the quality of American governance that they do so. "An expert search for presidential influence contributes to the energy of government and to the viability of public policy," Neustadt assured his readers, among them president-elect John F. Kennedy. "[W]hat is good for the country is good for the President, and vice versa." Indeed, in the nuclear age, he would later add, "when it comes to action risking war, technology has modified the Constitution."[77]

A third scholar, James MacGregor Burns, summed up the argument in two book titles. In 1963 he bemoaned *The Deadlock of Democracy;* in 1965 he argued that the solution had to be *Presidential Government.* Only the presidency could provide leadership that overcame fragmentation and indecision. "As a general proposition," he asserted, "the stronger we make the Presidency, the more we strengthen democratic procedures and can hope to realize modern liberal democratic goals." To be sure, he argued, it was important to have a "vigorous, coherent, creative" opposition that could promote an alternative platform—this was all the more important, in fact, as presidential power grew. But in the end, "presidential government, far from being a threat to American democracy, has become the major single institution sustaining it—a bulwark of individual liberty, an agency of popular representation, and a magnet for political talent and leadership."[78]

As of the mid-1960s, then, worry about an "imperial" presidency fell far behind worry about a Congress seemingly unwilling or unable to meet the challenges of the postwar era. The president, as Erwin Hargrove and Michael Nelson conclude, was largely seen as a "savior." Legislators' failure to prepare for World War II; their reluctance to commit to an expanded American role in the wider world after 1945; their slow deliberations in a nuclear age that required dispatch; their fragmented, seniority-dominated committee system that brought dullards to power; their tacit (and often not so tacit) defense of institutionalized racism; their short-sighted, sectional demands for local pork at the expense of wider public goods—looking at all this, many felt that leadership must be vested instead in the executive branch. If, as Edward Corwin summed up long before Watergate, "the history of the presidency has been a history of aggrandizement," that aggrandizement was generally

well received and even applauded. If presidents of the past had sometimes overstepped, a sense of "all's well that ends well" nonetheless prevailed.[79] And for 175 years after the ratification of the Constitution, America's ventures had, by and large, ended well.

But in the spring of 1965, Lyndon Johnson sent U.S. marines ashore in South Vietnam. Soon he asked for $700 million to continue military operations there and announced the deployment of fifty thousand additional servicemen, with more to follow. At the time, fewer than one in five Americans listed Vietnam as an important issue; fewer still, it is safe to say, could locate the place on a map.[80] For presidents, though, it would become an indelible landmark on the panorama of power.