

Constitutional Corner – Abuse of Executive Power

“[T]he president doesn’t have the authority to simply ignore Congress and say, we’re not going to enforce the laws...,” so said Barack Obama in January 2012. Look at him now.

American presidents have been “stretching” and outright abusing their constitutional powers since our first president took office. They have done so, I believe, because they discover, once elected, that the legitimate constitutional power of the office leaves them powerless to do the “good” that they feel must be done.

The American people, generally lacking an understanding of the legitimate powers granted the President under the Constitution, have turned a blind eye to most of these abuses. As long as the president’s actions seem logical, particularly if they seem designed to produce something beneficial, to some group or another, the average American seems willing to give the President the benefit of the doubt.

Even among constitutional scholars, however, there is doubt as to the limits of presidential power intended by the framers, primarily due to the development of two distinct ways of interpreting Section 1 of Article 2 of the Constitution. One interpretation, encountered in *The Heritage Guide to the Constitution*, holds that Article 2, Section 1, known generally as the “Executive Vesting Clause” (there are similar clauses in Articles 1 and 3), provides the President with a broad range of powers inherent to “executives.”

“The Executive Vesting Clause grants the president the executive power traditionally associated with chief executives.”¹

Unfortunately, what these inherent powers consist of must be conjectured since they are not to be found in the vesting clause itself, which reads:

“The executive Power shall be vested in a President of the United States of America...”

What indeed is the “executive power?”

King George III was the chief executive of Britain and enjoyed great power, including the unilateral power to make war. But the king’s powers were certainly not unlimited, they were limited by certain acts of Parliament, by the English Bill of Rights, Magna Carta, and other documents; nevertheless, they were still clearly the powers of a king. Were these the powers the Framers intended? Clearly, no. An “elective monarch” was discussed at the Constitutional Convention and rejected, for obvious reasons. Yet the possibility that a monarchy could still

¹ *Heritage Guide to the Constitution*, David F. Forte and Matthew Spalding, ed., Regnery Publishing, 2014, p. 237.

have been the outcome of the convention sparked the famous exchange between Benjamin Franklin and an unnamed woman he encountered as he left Independence Hall about “keeping” the republic.²

In 1787, each state had a governor and usually an executive council as well; should we look to these examples as our guide for what constitutes “executive power?” If so, we will find that many, perhaps most of these chief executives had greatly reduced powers.

Standing opposite the “vesting clause” argument is the contention that this clause only designates the title of the president, which it clearly does, and that any specific powers vested in the president are to found later in Article 2, which they are. This is the position taken by Constitutional scholar Rob Natelson in his book: *“The Original Constitution, What it Actually Said and Meant.”* This interpretation is also consistent with legal document construction of the time, and thus I find it more persuasive.

Alexander Hamilton uses ten essays (#67-77) in *The Federalist* to explain the office of the President, the last five focusing exclusively on the powers of the President, each time discussing one or more of the powers specifically mentioned in Article 2. Hamilton does not argue that there is some unenumerated inherent executive power to be found lurking in “emanations from penumbras” (so to speak) in Article Two’s “vesting clause.”³ At least not in 1788.

A mere five years later, however, writing the first of the Pacificus Letters, Hamilton argues that Washington’s Neutrality Proclamation sprang from just such inherent powers (“the more comprehensive grant contained in the general clause”).⁴

To settle the confusion, the Supreme Court declared that the vesting clause does provide the President with at least these inherent powers:

- Removal and supervisory powers over executive officers⁵
- Law enforcement power⁶
- Power over foreign affairs⁷
- Control of prosecutions⁸

² “Good Sir, what have you given us: a Monarchy or a Republic? A Republic, Madam, if you can keep it.”

³ “...what would be ... feared from an elective magistrate of four years’ duration, with the confined authorities of a President of the United States? Federalist #71.

⁴ <http://teachingamericanhistory.org/library/document/the-pacificus-helvidius-debate/>

⁵ *Myers v. United States* (1926)

⁶ *Nixon v. Fitzgerald* (1982)

⁷ *American Insurance Ass’n v. Garamendi* (2003)

⁸ *Morrison v. Olsen* (1988)

Is the Supreme Court the final say on how to interpret the Constitution? As I've said in numerous essays: emphatically, no! But we have to realize that the average American thinks otherwise. They have "drunk the kool-aid" and believe, with Chief Justice Earl Warren, that, "*the federal judiciary is supreme in the exposition of the law of the Constitution.*" Or perhaps they side with Associate Justice Charles Evans Hughes, who said: "*We are under a Constitution, but the Constitution is what the judges say it is.*" Alexander Hamilton thought and wrote otherwise, concluding that the people should be the final arbiters.

Nevertheless, when we examine what the Court has had to say about the non-enumerated powers of the Executive we find something less than rock-solid.

Erwin Chemerinsky asserts in "*Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*"⁹ that an inconsistent approach by the Supreme Court in deciding the limits of inherent power (when the President is acting outside the scope of clearly enumerated powers) has left the lower courts to flounder on their own. Chemerinsky posits these questions as examples:

Can the President unilaterally freeze Iranian government assets in the United States? Can he unilaterally rescind a treaty with Taiwan? May he impound funds appropriated by Congress? May he keep executive correspondence secret from Congress? Can he conduct warrantless wiretaps of domestic organizations to protect national security? "Although in each of these controversies the fundamental issue is identical, the Court has failed to use a consistent approach in dealing with the issue of inherent executive power."

Chemerinsky concludes that "[t]he Supreme Court's ad hoc, unprincipled approach to this power and the confused responses of the lower courts as they attempt to follow the Supreme Court's cases, have contributed greatly to the development of an 'Imperial Presidency'" (borrowing the phrase from the title of Arthur Schlesinger's award-winning book).

And an "Imperial President" is precisely what some in America seem to want. When Barack Obama threatened to exceed his constitutional powers and act if Congress did not, Congressional Democrats actually gave him a standing ovation. I was astounded. Confusion over the limits of presidential power is understandable; disdain for them is not.

So, into these murky waters we plunge: what are the legitimate powers of our Chief Executive, when can we know they are being abused, and what remedies do "We the People" have when this occurs.

⁹ "Controlling Inherent Presidential Power: Providing a Framework for Judicial Review," Southern California Law Review, Vol 56, pp 863-911.

The Legitimate Powers of the President.

The Legitimate Powers of the President are not hard to find, they are spelled out in Sections 2 and 3 of Article 2, and a few select clauses in other parts of the Constitution.

Section 2. The president has power to:

- Be Commander-in-Chief of the United States military, and of the militia of the several States, when they are called into the service of the United States.
- Request the opinion of executive officers.
- Grant pardons.
- Negotiate and make treaties with foreign countries.
- Appoint ambassadors and other ministers, judges and officers of the government, with the advice and consent of the Senate.
- Make temporary appointments to these positions when Congress is in recess.

Section 3. The president has the responsibility to:

- Periodically advise Congress on the state of the union.
- Recommend legislation that he deems “necessary and expedient.”
- Convene, on extraordinary occasions, one or both houses of Congress.
- Adjourn Congress if both houses can’t agree on when to do so.
- Receive ambassadors and other public ministers.
- Commission all the officers of the United States military.

Powers Found Outside Article 2.

Article I, Section 7 grants the President the power to veto bills and resolutions passed by Congress, but also the responsibility to make his objections to such bills known to Congress so that Congress can either make changes to meet the President’s objections or vote to override the veto.

Besides these specifically enumerated powers, and the dubious inherent powers that the Supreme Court has endorsed, it is generally recognized that the President has at least these other powers:

- the implied power to issue orders as necessary and proper to carry into execution his enumerated powers.
- the implied power to spend the money appropriated by Congress.

- the implied power to remove administrators from their offices, even those confirmed by the Senate, unless such removal power is limited by public law.
- the implied responsibility as Commander in Chief to protect the nation from attack.

Examples of Executive Power Abuse

The previously mentioned 1793 Neutrality Proclamation of President Washington warned U.S. citizens “to avoid all acts which may in any manner tend to [go against] this [proclamation].” Where did Washington find power in the Constitution to proscribe the actions of private citizens?

For that matter, where did President Thomas Jefferson obtain the constitutional authority to purchase foreign territory (Louisiana) from the French?

Andrew Jackson defied the Supreme Court and had the Cherokee nation forced onto reservations in Oklahoma.

Abraham Lincoln ordered citizens arrested, proclaimed martial law, seized private property, censored newspapers, emancipated southern slaves, and blockaded southern ports in violation of the Law of Nations.

Warren G. Harding had his “Teapot Dome Scandal”.

Harry Truman tried (unsuccessfully) to seize the nations steel mills to break up a 1952 strike that threatened war production.

Progressives like Teddy Roosevelt and Franklin D. Roosevelt have been called: “serial violators of the Constitution.” Teddy saw himself as a one-man government with little use for Congress or the Supreme Court. He said: *“My belief was that it was not only [the President’s] right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws.”*

FDR treated constitutional restraints on his office as challenges to overcome. When the Court was not seeing things his way, he tried to pack the court with six new justices who would see things differently. He ordered the roundup and detention of thousands of Japanese-American citizens. Even though the Supreme Court sanctioned the action,¹⁰ it stands today as a blight on both the Presidency and the Court. FDR also abused executive authority in order to regulate wages, create federal agencies, and criminalize the possession of gold.

¹⁰ https://en.wikipedia.org/wiki/Korematsu_v._United_States

Richard Nixon's famous quote: "When the President does it, it isn't illegal," should say it all. But he also instituted wage and price controls through executive order, created a list of political enemies and used governmental authority to harass them.

Ronald Reagan's "Iran-Contra Scandal" tainted his presidency.

Bill Clinton's abuse of presidential power is legendary, and not just among interns.

George Bush was challenged over taking the nation to war in Iraq, the use of waterboarding, and for the provisions in the Patriot Act, among others.

If we look hard enough, we can find abuse of power in nearly every presidency.

So what remedies do we have when "Presidents Go Wild?"

Remedies. When Presidents exceed their legitimate powers, what are the remedies?

First, there are the courts. Theoretically, any breach of constitutional power should provide the basis for impeachment, but realistically, many abuses don't rise to that level. So we sue. Not "We the People" unfortunately. The Courts typically throw out individual challenges of the president's actions due to lack of standing. It's a silly, obnoxious concept, and we the people shouldn't allow it, but we do. But the states (and some individuals) occasionally have economic grounds to sue the administration if a decision produces expenses for them, and this grants them standing, so they sue.

The Supreme Court struck down the Obama administration's "recess" appointments to the National Labor Relations Board, conducted while the Senate was formally in session, and the [NLRB v. Noel Canning](#) decision, as it was called, marked the 12th time the Supreme Court unanimously ruled against the Obama administration on the issue of executive power.

But lawsuits are expensive and only states or plaintiffs with deep-pockets can typically afford them. And suits don't prevent the next abuse; only impeachment can potentially do that.

We've impeached two presidents, Andrew Johnson and Bill Clinton, and were preparing to impeach a third, Richard Nixon, when he vacated the office.

Andrew Johnson (our 17th President) was impeached in 1868 for ignoring the *Tenure of Office Act* and instead replacing Secretary of War Edwin Stanton with Major General Lorenzo Thomas (there were 16 other articles of impeachment). He was acquitted in the Senate trial by a single vote.

Bill Clinton (our 42th President) was impeached in 1998 for perjury and obstruction of justice arising from the Monica Lewinsky Scandal. He was acquitted in the Senate on the first charge by 22 votes and on the second by 17 votes.

Section 4 of Article 2 describes a limited set of conditions for impeachment to proceed: "Treason, Bribery, or other high Crimes and Misdemeanors." What are "high Crimes and Misdemeanors?" The Framers left that to us to decide. I believe Barack Obama should have been impeached long ago, despite his being the first mixed-race president of the U.S., but apparently a majority of Congressmen do not agree. Even though impeachment articles against Barack Obama were prepared long, long ago, this Congress has shown that it lacks the political will to impeach this man. The House of Representatives is reluctant to impeach when it is clear they lack the votes to convict in the Senate.

A third remedy is to refuse to re-elect the President. The 2012 election showed us how hard it is to un-elect a president who enjoys a wide base of progressive support, no matter how egregious his disdain for constitutional limits.

Many today feel frustrated by having a president who ignores the limitations on his power yet seems immune to impeachment for his actions.

My recommendations, if you are concerned and feel frustrated by what you've read here:

First, read your Constitution and particularly study Article 2. Study the conversations concerning the presidency in James Madison's notes and the ratification debates. Ensure you can support a discussion on this topic.

Second, there are several good books out on the subject of the president and abuse of power, and many essays on the web. Find them; read them.

Third, sit down and talk with your Congressman about your concerns. Find out whether he or she would ever support articles of impeachment and, if not, why not?

Fourth, lend support to one of the groups promoting impeachment, they are not hard to find.

Fifth, help America better screen its presidential candidates. Encourage debate moderators to stop asking the wrong questions and start asking the right ones, like: "Explain your view of the limits of the President's power in the Constitution." And: "what would you do if Congress refuses to pass legislation that you think is vitally important to the nation's future success?" How about (of a Congressman): "Would you be willing to use impeachment to remove a President who abuses his power?"

Finally, pray for your country and its leaders -- all of them.

Join us on WFYL's "*We the People, the Constitution Matters*" radio show on Friday, 6 May, 7-8am EDT. We will discuss some specific abuses of executive authority that the Obama administration has committed.. Go to www.1180wfyl.com and click on "Listen Live."

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