

The Breakfast Club

Constitutional Minute for 1 June 2021

President or King? Which will it be?

"...what would be ... feared from an elective magistrate of four years' duration, with the confined authorities of a President of the United States?" Alexander Hamilton, Federalist #71

On hearing that General George Washington had resigned his commission and returned home rather than try to capitalize on his nation-wide popularity and possibly set himself up as a king, Britain's George III is quoted as saying that Washington was *"the greatest character of the age."*

The powers of the "President-to-be" were hotly debated at the Constitutional Convention even while Washington, the heir-apparent to becoming the first President, sat at the front of the room. No one, with the possible exception of Alexander Hamilton, wished a return to monarchy, but the secrecy of the convention had led some citizens to speculate on what form of government would finally emerge.¹

In the end, the President was to be at least 35 years of age, 14 years a resident, a natural-born citizen of the country, and to hold a four-year term of office, re-electable without limit. The president was to be elected by Electors, selected by the states, equal in number to the combined representation of each state in Congress. The method of selecting Electors was to be left to each state to decide.

Hamilton wished him to be "energetic:" *"Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against ... faction and anarchy."* Alexander Hamilton, Federalist #70

So, in Hamilton's eyes, an energetic President but with limited powers. Could work.

Legitimate Presidential power derives from three sources: Constitution-specified powers, "traditional" executive powers, and powers provided by acts of Congress.

The Constitution-specified powers, Hamilton's "confined authorities," are found listed in Article 2, Sections 2 and 3.

Three contrasting views of Presidential power:

- "The president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise." William H. Taft
- "The executive power [is] limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers." Teddy Roosevelt

¹ "What form of government have you given us, a republic or a monarchy?" Dr. Franklin was asked as they left the convention hall for the last time.

- “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”
Abraham Lincoln

Taft would have the President limited to specified powers; Roosevelt would have him limited only by specified prohibitions; and Lincoln would have him exceeding his specified powers whenever “indispensable.”

“Traditional executive powers” include the use of Executive Orders. Executive Orders are inherently neither good nor bad absent a view of their intent or operation. “Good” Executive Orders assist with “tak[ing] care that the laws be faithfully executed;” (the President’s “prime directive,” if you will. “Bad” Executive Orders completely ignore the constitutional limits of the presidency and/or the limited powers proved by Congress in legislation and seem to take the view: “Let’s see what I can get away with.”

Every President has issued Executive Orders. Perhaps the most famous Executive Order is *The Emancipation Proclamation*, issued on January 1, 1863, by President Abraham Lincoln. It had no legal effect in the South; only in territory controlled by the Union. Most blacks in the North were already free. It was later legitimized by the 13th Amendment.

Especially troubling, now even more so in light of Governor’s COVID responses, are “Emergency Executive Orders,” both state and federal. Are they constitutional?

The Supreme Court overturned five of FDR’s executive orders (6199, 6204, 6256, 6284 & 6855), one of President Truman’s (the 1952 order attempting to take control of the country’s steel mills), and President Clinton’s 1995 order preventing the federal government from contracting with organizations that had strike-breakers on their payroll. Now, it seems that an Executive Order is legitimate unless some state sues.

The President is elected by the states, not the people. That the states, today, allow their citizens to take part in the process, and even accedes to the apparent wishes of a majority of its citizens, is nice, but not required. So what should we make of the latest attempt to replace the Electoral College with a National Popular Vote?

The National Popular Vote Interstate Compact (NPVIC) proposes states in the compact ignore the vote tally in their state. Instead of summoning the slate of Electors corresponding to the majority vote in the state, they would summon the slate corresponding to the candidate achieving the greatest number of citizen votes nationwide. Sorry, people of Virginia, the people of America want “Mr. X” instead.

In my opinion, a national popular vote will eventually result in an American “King” in all but title. A President placed in power by the votes of citizens nationwide will be expected to do what the people nationwide demand. And he will do it.