

The Breakfast Club

Constitutional Minute for 23 November 2024

Pouring Gas on a Fire

A little longer than usual; grab a snack and drink.

One of the greatest deficiencies of the Articles of Confederation was the lack of a real chief executive. It is true there was a person who carried the title of “President,” a title that would form “gotcha” questions 200+ years later (“Who was the first President of the United States? Hint: It wasn’t George Washington”),¹ But the president of the Confederation Congress was little more than an administrator, an essentially powerless individual charged with keeping Congress functioning.

At the Grand Convention, several different ideas for an executive were discussed, ranging from a multi-person panel to a single person, with or without a council to call on for advice. Once it was decided there would be a president, the focus shifted to the powers given this chief executive. It was obvious to everyone in the convention which man would fill this office at its inception, and the experience and character of George Washington undoubtedly influenced the selection of the president’s powers.

“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 the enterprises and assaults of ambition, of faction, and of anarchy.”

So wrote Alexander Hamilton in Federalist 70.

Hamilton then asked the obvious question:

“[W]hat are the ingredients which constitute this energy?”

Which he immediately answers:

“The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.”

It is to the fourth ingredient, *competent powers*, we turn.

There was little disagreement about the overall powers of the President — they were to be minimal -- there would be no King in America. After the primary focus on foreign affairs and, when necessary, acting as Commander in Chief, the president’s chief responsibility, laid out in Article 2, Section 3 was to “take Care that the Laws be faithfully executed.” He would have some exclusive powers (the veto) and other powers he shared with Congress (appointments), but even in the First Congress, as a hint to what lay ahead, there was discussion of the president’s occasional need to “extend his power on some extraordinary occasion, even where he is not strictly justified by the constitution....”²

George Washington’s first four years can be given a bye; the “indispensable man” had to invent things as he went along; his actions would *become* the precedent, and he fully realized this. But in his second administration, Washington, on the advice of Secretary of the Treasury Alexander Hamilton, began exploring the limits of presidential power. Publishing a proclamation ordering American neutrality in the on-again-off-again war between Britain and France is clearly not mentioned as a presidential power in

the Constitution and Washington's controversial action was publicly debated in the Philadelphia newspaper, *Gazette of the United States* by none other than Alexander Hamilton and James Madison.³

President Thomas Jefferson questioned whether or not he had the constitutional power to purchase the Louisiana Territory from France. He wisely asked the opinion of his Secretary of State, and James Madison assured him the President's treaty-making power was broad enough to support the purchase.

However, as befitting the "Father of the Constitution," James Madison was scrupulous in constitutional observance, vigorously arguing for strict constructionism, first as a congressman, and later as the first President to formally ask Congress for a declaration of war, as required by the document he helped write.

The first venture into a true expansion of presidential power is generally laid at the feet of our seventh president, Andrew Jackson. Having been denied the presidency in the contingent election following the 1824 election, in which none of the four candidates achieved an electoral college victory, "Old Hickory" burst into the oval office with a vengeance four years later after one of the most brutal presidential campaigns in early American history. "[H]is political war with South Carolina during the "Nullification Crisis" earned him the nickname "King Andrew."⁴ Jackson sent armed ships to the shores of South Carolina and threatened their use if the state did not comply with federal law. The Nullification Crisis tested whether the United States was a union of sovereign states or a consolidated government, an issue that remains contentious even today.

Sixteenth president, Abraham Lincoln, generally regarded as one of our greatest, believed that in times of emergency, deviations from the president's constitutional powers might temporarily be necessary. Political historians generally give Lincoln a bye -- saving the union is a "once in a lifetime" event, right? Constitutional historians have a contrary view: To "save the union," Lincoln "ignored one law and constitutional provision after another. He assembled the militia, enlarged the Army and the Navy beyond their authorized strength, called out volunteers for three year service, spent public money without congressional appropriation, suspended *habeus corpus*, arrested people "represented" as involved in "disloyal" practices and instituted a naval blockade of the Confederacy."⁵ In his defense, Lincoln wrote in an April 4, 1864, letter to Albert Hodges: "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."⁶

Twenty-sixth president Teddy Roosevelt, America's first "Progressive President," took a totally unique view of presidential power: "The executive power [is] limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers." Rather than a constitution of limited and enumerated powers, as regards the President at least, the document only expresses a few restrictions on his power. "...Roosevelt expanded presidential power far beyond what the founding generation intended, and he did so openly."

"[T]he facts show that President Theodore Roosevelt didn't care much for the Constitution, limited government, private property, or people who were not of white European stock. Roosevelt was an imperialist and defender of the national interest. And he believed it was his job to define that interest. 'I don't know what the people think, I only know what they should think,' said Roosevelt."⁷

"As president, Roosevelt tried to get Colombia to sign a treaty on the construction of the Panama Canal (Panama was then a province of Colombia). The Colombian government said no, and a group of Panamanians, with U.S. help, declared themselves a republic. TR sent gunboats to protect the new

“nation,” and shortly thereafter construction of the canal began. Later boasting of his victory, TR said: ‘I took Panama without consulting the Cabinet’ ...”⁸

Teddy Roosevelt’s successor, our twenty-seventh president, William Howard Taft summed up presidential power this way: “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.”⁹ To that, I can only say: Amen.

And then comes Woodrow Wilson, Mr. “Living Constitution” himself. Wilson believed that a correctly administered government could cure all of societies ills, that government was a “science” best left to the “experts,” and he viewed the Constitution as an obstacle to effective administration.¹⁰ Wilson is also credited with “birthing” the Administrative State.

Teddy’s fifth cousin from another branch of the Roosevelt family, Franklin Delano Roosevelt, faced with the challenges of the Great Depression, followed by WWII, began to increase presidential powers with impunity. As Governor of New York, FDR had famously proclaimed that “The United States Constitution has proved itself the most marvelously elastic compilation of rules of government ever written.”¹¹

One horrendous example of the “elasticity” is an executive order that prohibited hoarding gold and demanded all citizens deposit their gold with the Federal Reserve System. He issued the Executive Order just weeks before taking the country off the gold standard and then proceeded to unilaterally set the price of gold himself. Stymied by a conservative Supreme Court that consistently overturned the Roosevelt administration’s attempts to regulate everything, Roosevelt threatened to “pack the court” with younger, more malleable justices. Congress refused to comply, but the court received the message loud and clear and began finding the New Deal legislation now “constitutional.”

Richard Nixon was re-elected in 1972 after defeating George McGovern in what was generally regarded as one of the largest landslide victories in American history. Despite bringing the Vietnam War he had inherited to a successful if controversial conclusion, Nixon’s administration was scandalized by his actions in the Watergate Affair, which led to the first and only resignation of a sitting U.S. President. Historian Arthur Schlesinger argues that Nixon was “not an aberration but a culmination” of the trend toward an imperial presidency. What would Schlesinger have to say about our 21st Century presidents, particularly Barack Obama’s “[If Congress won’t act,] I have a pen, and I have a phone” statement?

Obama’s “pen” was going to be put to work writing Executive Orders, the “go to” method of expanding presidential power. I wrote [an essay](#) a couple of years ago on Executive Orders which can be downloaded [here](#). I went over the history of executive orders and gave many examples. Rather than repeat myself, I would ask you to read the 2022 essay to understand the background.

What makes the issue of EOs complex is the fact that they are often based (or at least claimed to be based) on laws passed by Congress. Thus you cannot easily tell whether an executive order is constitutional and valid, or an expansion of presidential power without first learning what the specific law on which it is based says and how it says it. Which points to yet another problem with our current political system: vague laws. When Congress passes needlessly vague, ambiguously worded laws, when it delegates its legislative power to the Executive Branch, it only invites presidential mischief.

Since they are easily reversed by the next administration, EOs also create what I would call “presidential ping-pong.” Trump’s [first day in office](#) on January 20th, 2017, was spent undoing the most egregious of Obama’s EOs. Biden’s [first day](#) was spent the same way, and Trump will do likewise on January 20, 2025. While we might applaud the reversal of some of Biden’s EO insanity – giving COVID relief to businesses

based on the “under-served” race of the owner, for example – if a Democrat wins the presidency in 2028, reversing Trump’s EOs will fill the Day One agenda. Stability in government is a virtue; Presidential Ping-Pong is not:

“Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.” James Madison, Federalist #37

"No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability." James Madison, Federalist #62

Sadly, the U.S. presidents who stayed within their constitutional powers, who acted more like George Washington than FDR, are normally ranked as America’s worst.

“No president, no matter how good his intentions, and no matter how pressing the crisis, is justified in exercising powers that the Constitution simply does not give him.”¹²

The bulk of the American people no longer believe this. We have reached the point where the next presidential election is “the most important election in American history.” As Gene Healy reports, citing a New York Times article, “[i]n 2000, only 43 percent of Americans told pollsters it really mattered who won that year’s presidential contest. It’s only gone up since then: 63 percent in 2012, 74 percent in 2016, and 83 percent in 2020.¹³ Note: I could not find a similar poll question about 2024, but the percentage likely increased yet again.

So where does the title of this essay, “Throwing Gas on a Fire” come in?

I’ve mentioned in recent essays the demand, heard off and on since the 1970s, that we replace the electoral college with a national popular vote. If we ever do this, I’m convinced we will be applying the metaphor used in the title of this essay to our political system. Just think of the unofficial titles we’ve bestowed on the President: “Leader of the Free World,” “Voice of the People” (first used by President Andrew Jackson), “Protector of the Peace,” “Chief Legislator,” “Pandemic Protector,” “Consoler-in-Chief,” and let’s not forget: “Defender of Democracy.” To these mostly bi-partisan titles might be added: “Forgiver of Student Indebtedness,” “Opener of Borders,” and “Wrecker of Republics.” All point to powers the Constitution does not give the President.

As I’ve said before, when the public is given the power to elect the President directly rather than indirectly through the Electoral College, no one will be able to stop them from seeing the man as “their President.” They elected “their President” to fix “their problems.” The states will no longer be part of the process except to administer an election under the gaze of the federal government. The people, unfortunately, will still face, once again, the constitutionally limited powers of the U.S. President; but now the people will demand those powers be enlarged, constitutionally if possible, unconstitutionally if Congress won’t propose an amendment. They will turn a blind eye to the instances of unconstitutional overreach of “their” president and we will end up, eventually, with an all-powerful Chief Executive, a King in all but title.

Retaining the Electoral College will not prevent or reverse presidential overreach; but it will help keep the problem from becoming much, much worse.

“A fondness for power is implanted, in most men, and it is natural to abuse it, when acquired.”
Alexander Hamilton¹⁴

Or as Lord Acton more famously put it:

“Power tends to corrupt and absolute power corrupts absolutely.”

Of the rather long list of books presented here, the one that had the greatest impact on me was the last: *The Cult of the Presidency*, by Gene Healy. The author takes a decidedly non-partisan look at the problem, finding fault with Democrat and Republican presidents alike. The problem is not party, it is power! And we best take an honest look at how it has been growing and concentrating over the last century.

Let's not throw gas on the fire.

For further study (in order of publishing date):

- *The Imperial Presidency*, by Arthur M. Schlesinger, Jr., 1973.
- *The Politics of the Presidency*, by Norman Thomas, 1986.
- *Presidential Power and the Constitution*, by Edwin S. Corwin, 1986.
- *Inventing the American Presidency*, by Thomas Cronin, 1989.
- *Lincoln's Constitution*, by Daniel Farber, 2003.
- *Constitutional Conflicts between Congress and the President*, by Louis Fisher, 2007.
- *The Discretionary President, The Promise and Peril of Executive Power*, by Benjamin A. Kleinerman, 2009.
- *FDR Goes to War; how expanded executive power, spiraling national debt, and restricted civil liberties shaped wartime America*, by Burt and Anita Folsom, 2011.
- *Theodore and Woodrow; How Two American Presidents Destroyed Constitutional Freedom*, by Andrew P. Napolitano, 2012.
- *The Politically Incorrect Guide to the Presidents; From Wilson to Obama*, by Steven F. Hayward, 2012.
- *9 Presidents Who Screwed Up America, (and four who tried to save her)*, by Brion McClanahan, 2016.
- *The Cult of the Presidency*, by Gene Healy, 2008, updated 2024.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.
Contact: gary@constitutionleadership.org; 757-817-1216

¹<https://abcnews.go.com/GMA/video/forgotten-president-hint-george-washington-27147224>.

² Congressman Alexander White.

³ See the Pacificus-Helvidius Debates at: <https://oll.libertyfund.org/titles/frisch-the-pacificus-helvidius-debates-of-1793-1794>.

⁴ Brion McClanahan, *9 Presidents Who Screwed Up America, and four who tried to save her*, (Washington, Regnery Publishing, 2016) 18.

⁵ Arthur M. Schlesinger, Jr., *The Imperial Presidency*, (Boston, Houghton Mifflin Company, 1973) 58.

⁶ Accessed 29 Nov 24 at <https://www.presidency.ucsb.edu/documents/letter-albert-g-hodges>.

⁷ Michael Chapman, “TR: No Friend of the Constitution,” *CATO Policy Report*, Vol. XXIV No. 6, November/December 2002, accessed on 25 November 2024 at:

<https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2002/11/chapman.pdf>.

⁸ Ibid.

⁹ Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), 139.

¹⁰ Randolph J. May, “Woodrow Wilson’s case against the Constitution,” *The Federalist Society*, June 1, 2018. Accessed on 1 December 2024 at: <https://fedsoc.org/commentary/fedsoc-blog/woodrow-wilson-s-case-against-the-constitution>.

¹¹ In a radio address on March 2, 1930.

¹² Brion McClanahan, 4.

¹³ Gene Healy, *The Cult of the Presidency*, (Washington, Cato Institute, 2008), xx.

¹⁴ In *The Farmer Refuted*, 1775. Accessed 1 December 2024 at:

<https://founders.archives.gov/documents/Hamilton/01-01-02-0057>.