

# The (Relatively) Unchecked Growth of Presidential Power

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Before martial law is declared to be the supreme law of the land, and your character of free citizens be changed to that of the subjects of a military king ... let me admonish you in the name of sacred liberty, to make a solemn pause. Permit a freeman to address you, and to solicit your attention to a cause wherein yourselves and your posterity are concerned. The sun never shone upon a more important one. It is the cause of freedom of a whole continent of yourselves and of your fellow men.

Philadelphiensis<sup>1</sup>

The growth in the power of the executive branch of the American government threatens the very foundations of American democracy. The checks and balances built into the system are crumbling, and the United States suffers from a growing executive tyranny that most people mistakenly attribute to the errors of particular presidents, rather than recognizing it as a systemic problem. There are no simple solutions to this problem, but the first step in reaching any solution is to engage people and familiarize them with the problem's existence, causes, and dangers.

## THE FOUNDERS' REPUBLIC

Legend has it that upon leaving the Constitutional Convention of 1787, Benjamin Franklin was approached by a woman who asked: “Well, doctor, what have we got; a republic or a monarchy?” “A republic,” Franklin replied, “if you can keep it”<sup>2</sup> Not everyone in the nascent nation was convinced. A primary cause of opposition to the Constitution was the institution of the presidency, an office that had not existed under the Articles of Confederation. One opponent, writing under the pen name Philadelphiensis, wrote:

Who can deny but the president general will be a king to all intents and purposes, and one of the most dangerous kind too - a king elected to command a standing army. Thus our laws are to be administered by this tyrant; for the whole, or at least the most important part of the executive department is put in his hands.<sup>3</sup>

In reply to such arguments, Alexander Hamilton wrote what has become the classic defense of executive power in the American system:

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 security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy ... A feeble executive implies a feeble execution of government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.<sup>4</sup>

Given that the United States has not (yet) suffered a truly tyrannical government, it would seem that Hamilton got the best of this argument. But the success of his argument in favor of executive power is properly understood only in the context of James Madison's explanation of the constitutional system's overall structure, in which each part is designed to check the others:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that ... the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper place ... Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>5</sup>

As Madison shows us, it is not specific constitutional strictures that are supposed to keep each branch of the government in check, but rather the jealous ambition of the members of the other branches. As long as that jealousy persists and there is both a means to exercise it and political gain in exercising it, each branch will be kept in balance. For example, when President James Polk instigated a skirmish with Mexico along the then-undefined Texas-Mexican border, Congress gave him the Declaration of War that he wanted because that was what the public — their constituents — wanted as well, but later they censured Polk for “unnecessarily and unconstitutionally” beginning a war.<sup>6</sup>

Polk's case demonstrates that contemporary understandings of what presidential actions are legitimate play an important role in shaping Congress' ability to check the president. His decision to order troops to a point south of what Mexico claimed as its northern border is no more egregious than any of the decisions by post-World War II presidents to insert troops into conflicts without a declaration of war. None of those many cases, however, including our military engagements in Korea, Vietnam, Cambodia, Grenada, Panama, Iraq, and Yugoslavia, has resulted in a congressional censure. What was seen as unconstitutional in 1846 is seen as normal today.

## THE IMPERIAL PRESIDENCY

The primary area of danger is the presidents' exercise of their powers in foreign policy. Hamilton clearly recognized the threat to liberty caused by national security issues more than 200 years ago:

Safety from external danger is the most powerful director of national conduct. Even the ardent lover of liberty will, after a time, give way to its dictates. The violent destruction of life and liberty incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.<sup>7</sup>

Today we live in a national security state – a state in which the president stands supreme in any policy issue that can be at least plausibly, and sometimes only implausibly, defined as affecting national security.

The threat has been growing throughout the past century, ever since the United States first became an empire by winning the Spanish-American war and taking Cuba, Puerto Rico, and the Philippines as colonies. However it has accelerated since the 1960s.

- In 1964 Lyndon Johnson lied to the American public about the Gulf of Tonkin incident in order to obtain congressional support for expanding a war that would ultimately cost over 50,000 American lives in a losing effort;
- In 1972 Richard Nixon tried to subvert democracy by literally stealing a presidential election and then tried to subvert justice by having the CIA interfere with the FBI's legal investigation by making a false claim of national security;

- In the 1980s a cadre of National Security Council operatives in the Reagan administration undermined the rule of law and separation of powers by illegally selling weapons to Iran (although Iran had occupied the American embassy in Tehran and held American diplomats hostage for over a year) with the intent of using Iran to influence Hezbollah, which was holding American hostages in Lebanon, and then illegally funneling the money from the weapons sales, which by law should have gone to the U.S. Treasury, to the Contra rebels in Nicaragua in spite of a law banning the use of federal funds to support them;
- Ronald Reagan ordered the invasion of Grenada not only without congressional authorization, but also without any congressional consultation;
- In 1989 George H. W. Bush ordered the invasion of Panama without congressional authorization or consultation;
- In 1991 Bush initiated a war against Iraqi leader Saddam Hussein following the latter's invasion of Kuwait. Bush ultimately received congressional authorization, but only after he had put forces in the field and effectively forced Congress to go along or show its impotence;
- In 1999 Bill Clinton sent troops into the Yugoslavian civil war and became the first president to use military force despite Congress' explicit refusal of authorization for him to do so.<sup>8</sup>

But no presidency in American history has abused executive power under the guise of national security more extensively than the George W. Bush administration. An incomplete list of Bush's abuses of power includes:

- Lying to Congress and the American public about the evidence for Saddam Hussein's possession of weapons of mass destruction in order to have a pretext for invading Iraq;
- Claiming the right to engage in warrantless wiretaps of American citizens' phone conversations;
- Allowing the use of torture on alleged terrorists captured in Afghanistan and Iraq;
- Using "extraordinary rendition" to send prisoners to countries where they would be tortured;
- Claiming that no law – whether American or international – applied to people captured during the "war on terror," a claim that violated America's responsibilities under the Geneva Convention;
- Claiming the power – in explicit defiance of the fifth and sixth amendments of the Constitution – to hold even American citizens in prison indefinitely without a trial, a shocking claim even more shockingly supported by the Supreme Court;<sup>9</sup> and

- Invoking the “state secrets privilege,” which is normally used to withhold evidence that could threaten national security, to prevent wronged people from taking the administration to court in an attempt to hold it accountable.<sup>10</sup>

Under the theory of democratic accountability, the public’s repudiation of Bush in the 2006 elections, during which the Republican party lost control of both chambers of Congress, and the 2008 election, in which his party’s presidential nominee – who ran on a platform nearly identical to Bush’s governing policies – was soundly defeated, should have brought about a change of course. Barack Obama has kept his promise to reverse Bush policies in some areas, such as ordering a review of the Guantanamo Bay prison camp<sup>11</sup> and ensuring that the United States does not continue to torture prisoners;<sup>12</sup> in many other ways, however, he has continued the abuses of executive power begun by his predecessor.

- He has reversed course on extraordinary rendition and using the state secrets privilege to prevent those who claim to have been so transferred so that they could be tortured from suing in the courts;<sup>13</sup>
- He has defended the Bush administration’s use of torture from judicial review on the spurious grounds that “the right to not be tortured, to be treated humanely and to not be detained indefinitely without charge or trial were not clearly established back when [Bush administration] officials violated them”;<sup>14</sup>
- He has changed his position on access to DNA evidence in criminal trials and continued the Bush administration’s position of opposing access to DNA evidence in a Supreme Court case;<sup>15</sup> and
- He has refused to turn over documents that the federal courts ordered the executive branch to produce, claiming – in refutation of all legal history – that it is up to the executive branch, and not the courts, to determine whether plaintiffs need particular evidence to pursue their case, arguing that

the relevant Executive Branch official must determine that plaintiffs’ counsel have a “need to know” the information. In this case, the relevant official, the Director of the National Security Agency (“NSA”), has determined that counsel *do not* have a need to know. This decision is committed to the discretion of the Executive Branch and is not subject to judicial review.<sup>16</sup>

But in the American legal system it is, and always has been, judges who determine whether the parties to a case have a need for certain evidence. Otherwise the executive branch could always obstruct the pursuit of justice by denying plaintiffs access to evidence demonstrating the government’s wrongdoing. The Obama administration’s legal argument is nothing less than a wholesale assault on the foundations of the American system of justice. The current

concept of the presidency is captured in a single statement made by Richard Nixon in his post-presidential interview with journalist David Frost, in which he said, “when the president does it, that means it is not illegal.”<sup>17</sup>

But this is quite obviously a false claim. In a monarchy, the king/queen is the sovereign and source of law. Therefore, what the king/queen does *is* law, and thus he/she cannot violate the law. But in the American system, the chief executive is *not* the sovereign, he/she is *not* the source of law, and so he/she is as bound by the law as any citizen. In the American system, the president is intended to simply be the chief clerk in charge of ensuring that the law is executed as it is meant to be. But today the presidency has slipped the bounds of checks and become a law unto itself.

Nearly forty years ago, historian Arthur Schlesinger warned us of “the imperial presidency,”<sup>18</sup> and yet we still ignore his warning to reign in the executive branch. There are two reasons for this. First, much of the public does not yet recognize the danger, because the growth in power has been so steady. In other words, the leaps have not been noticeable enough to catch the public’s attention. A graphic explanation is helpful here. Figure 1 illustrates how executive power, at a certain point (a step-function), increases suddenly. In this case, public attention would be drawn to that increase and a political reaction might ensue.

Figure 1: Step-Function Growth in Executive Power over Time

Figure 2 shows a case where the increase is gradual, but nonetheless increasing, without any sudden change to attract the public’s attention. In this case, the growth in power is just as great but occurs in a way that does not cause significant alarm and attention.

Figure 2: Steady Increase in Executive Power over Time

It would seem that we have had many warning moments in which presidential power seemed to increase suddenly – Watergate and Iran-Contra, for example – and yet the public has not yet taken notice of this ongoing phenomenon. In those cases, however, the public was lulled into thinking that the crisis was over because Nixon resigned and Reagan publicly admitted the Iran-Contra events. And this lulling of the public consciousness works synergistically with the second reason for the public’s lack of concern: our faith in democratic accountability.

Our ability to “vote the bums” out if we catch them in misdeeds leads us to believe that the dangers inherent in the individual person who holds the office. If that is the case, then we can vote out the bad person and vote in a good person. But democratic accountability no longer functionally exists in presidential politics because, ironically, of the increasing democratization of the presidential selection process. As the presidency has increasingly become “the people’s tribune,” its justification for extending executive power has grown along with the candidates’ ambition.

## THE WILSONIAN REVOLUTION

To understand where we are, it is necessary to look back at from where we have come. It might be tempting just to claim that there has been a slow but steady growth of presidential power since the beginning of the republic. But this is not true and does not help us analyze the problem's causes. Some critics point to Abraham Lincoln, noting that he exercised extraordinary and previously unthinkable powers during the Civil War, not all of which then retreated to their original scope after the great crisis was over.<sup>19</sup> But a look at the post-Civil War presidents does not bear this out, as they are almost as obscure as their pre-Civil War predecessors. They are primarily known for being impeached (Andrew Johnson), assassinated (James Garfield), or for electoral oddities (Rutherford Hayes and Grover Cleveland), rather than for their extensive use of presidential power.

In fact, latter-day Hamiltonians were nervous about the weakness of the presidency, whose occupants functioned more as clerks than leaders.<sup>20</sup> Most notable of them was scholar (and future president) Woodrow Wilson, who in 1885 published *Congressional Government*, an indictment of the, as he saw it, malfunctioning of the federal government. In Federalist 51, Madison had written that, “[i]n republican government, the legislative necessarily predominates,”<sup>21</sup> because it is composed of the people's representatives. No part of our government is closer to the public – at least to their particular subset of the public – than members of the House of Representatives. While the public believes that Congress is out of touch, the reality for the Representatives is that their short, two-year term means that they are engaged in a never-ending campaign for re-election. Remaining aware of their constituents' political values is crucial, and so they pay attention to hometown newspapers (especially the editorials and letters to the editor) and keep a close count of their constituents' phone calls, letters, and e-mails.

The president, in contrast, was meant to be primarily reactive to Congress's actions, executing the laws it passed, fighting the wars it declared, and collecting information so that it could be informed of the state of the union. The president's active power was primarily reserved for times of emergency, such as if an insurrection or an invasion occurred while Congress was not in session. Of course presidents were rarely so subdued, but throughout the nineteenth century Congress was the predominant focal point of the country's national politics.

But in the late nineteenth century Wilson, then a young political scientist, argued that congressionally centered government was severely defective, for since each representative represented only a portion of the country, he/she cared only about his/her constituents' interests rather than the national interest. While it might seem that the sum of all of these interests might add up to the national interest, Wilson argued that they only added up to a disjointed set of competing regional interests. Such a phenomenon was democratically disastrous, because if no one was responsible for the national interest, then there was no one whom the public could hold responsible if the national interest were ignored or undermined.

Only one person, the president, represented the whole country, and so only he/she could take responsibility for the national interest, Wilson argued. Given this reality, the president ought to be endowed with more authority and should take center stage in American politics. As Congress could not see the national interest, it was up to the president to direct them toward it. In short, Wilson turned Madison on his head, essentially arguing that the *executive* ought to predominate in republican government, that the president should *lead* Congress rather than taking his/her lead *from* it. This challenge to the original constitutional understanding of the president's more limited scope has come to be called the "small c" (constitutional) presidency, while the original constitutional understanding is called the "large C" (Constitutional) presidency.<sup>22</sup>

But although Wilson's vision has prevailed and the president has taken center stage and become the vessel into which Americans put all their hopes, dreams, and fears, we still have not achieved political accountability. Presidential power has grown, but our ability to constrain presidents has not. Moreover, presidents increasingly use their enhanced power to promote their *own* interests rather than the public interest. Even more ironically, the reason we cannot hold presidents democratically accountable is because of the increasingly democratic process by which we select them, for an electoral revolution has occurred alongside of, and in conjunction with, the Wilsonian revolution.

### The Electoral Revolution

Wilson's vision was not only anathema to the founders (Hamilton excepted), but its very foundation did not even exist in their time. His understanding of the president as the people's tribune depended on the president being directly elected by the people, something for which the Constitution does not provide. Not only does it interpose the Electoral College, but it specifies in Article II that this institution's members shall be appointed "in such Manner as the Legislature thereof may direct." That is, each state's legislature has the constitutional authority to select the electors on their own, without any involvement by the citizens at all. Obviously no state legislature would dare to exercise this authority today, in fear of its constituents' wrath; in the early days, however, many did. Most of the founders held the following view, as was expressed clearly by Virginia's George Mason, who said: "It would be as unnatural to refer the choice of a Chief [Executive] to the people as it would to refer a trial of colours to a blind man."<sup>23</sup>

Of course it was inevitable that the people would demand that their state legislatures choose a method for appointing the electors that would allow the public's involvement. Although this did not happen immediately, by 1860 all state legislatures allowed the public to choose the electors. This enhancement of democracy had little effect on the presidency, however, for the public then, as now, voted for electors primarily on the basis of party allegiance. In other words, the people voted for the candidate that their party had already selected.

The real electoral revolution was in the direct selection of presidential candidates, because this changed the *type* of person who gained the party's nomination. In the early years of the republic, candidates were nominated by party caucuses: a small elite of party members selected who would run for the presidency under their party's label. By the 1860s, the nominating process had been put in the hands of party conventions, yet another extension of democracy, as active party members demanded the right to participate in selecting their party's candidate. But in both the caucus and convention systems, candidates could not effectively run for the nomination on their own; instead, they had to wait for their party to call them. Anyone aggressive enough to run hard for the nomination was sure to step on the toes of other influential persons who would then do their best to block the nomination. This is why there were so many "dark horse" candidates in the nineteenth century. Political scientists Matthew Crenson and Benjamin Ginsberg, in their important *Presidential Power: Unchecked and Unbalanced*, describe the candidate selection politics of the era:

The parties had developed a preference for obscure candidates, or ... candidates whose political principles were obscure. The need for dark horse candidates was more urgent in the case of the Democrats. Their convention rules required a two-thirds vote for nomination, and determined minorities could therefore veto the candidacies of leaders who espoused policies they found objectionable ... The remedy was to seek out inoffensive nominees ...<sup>24</sup>

As a result, the public was presented with a choice of non-offensive – that is, non self-aggrandizing – candidates so that from the perspective of preventing great abuses of power, it mattered little which one they chose.

Although the founders did not, for the most part, envision either election by the people or political parties, in a very real sense this system continued to support their vision of the president's place because the presidents of that era were dependent on their parties, which were the organizing force in Congress. So, even if indirectly, presidents were prevented from threatening the legislative branch's predominance. But this constitutional equilibrium was destroyed by the next extension of democracy: allowing the public to select the candidates through the direct primary system. The primary system grew in importance throughout the twentieth century until finally, in the 1970s, it came to dominate the candidate selection process and, thereby, dramatically change the type of person who would win the party's nomination. No longer could a non-aggressive party functionary ascend to the office – only those with great ambition could command the attention and resources to successfully make it through the contemporary nominating process. And this new type of candidate was distinctly different from his/her predecessors:

The *motives* of presidents grew more aggressive as the business of becoming chief executive demanded more drive – the "fire in the belly" that modern politicians must feel before they dare to

commit themselves to the rigors of the presidential quest. ...They sought election not just to hold the office, but to make history, and the office as it stood was not usually enough to satisfy them. They were impatient with its bounds and limits, and their efforts to overcome them provided much of the animating force that drove the expansion of presidential power.<sup>25</sup>

It seems as though the public ought to react unfavorably to presidents who seek to break the office's constitutional bounds. But this change in selection process perfectly supports Wilson's ideal of the president as the people's tribune – we have chosen them, and they are doing what we have asked them to do. Presidential elections, both primary and general elections, have become a contest between candidates seeking to outpromise each other as the public has come to believe that the president is the source of all important public policy. Consequently, we choose those candidates with the least restraint on their own belief in their ability to provide for the public, which equates to the candidates with the least desire to allow anything, including the Constitution, to constrain their goals and methods.

It may be asked why Congress no longer effectively holds presidents accountable. The reason is the same problem identified by Wilson – individual Congressmembers are focused on their constituents' interest rather than the national interest. Even the 1998 impeachment of Clinton does not rebut the claim that checks and balances have failed, as he was impeached on charges relating to sexual misconduct rather than to his abuses of executive power.<sup>26</sup> Moreover, most Americans saw his impeachment as politically motivated and Congress failed to convict him.

Most of all, the fact that his immediate successor, George W. Bush, used the threat of the “war on terror” to undermine constitutionally guaranteed rights and invade Iraq on false pretexts is evidence that Clinton's impeachment did nothing to check the growth of presidential power.

#### **CONCLUSION: DEMOCRATIC DEMAGOGUERY VS. THE RULE OF LAW**

If the over-democratization of the presidential selection process itself has unchained executive power, then democracy itself is the source of the problem. As disturbing as this concept is to us today, the founders knew well the dangers of unlimited democracy, which was why they sought to keep this process out of the hands of the masses. Today we have an even better understanding of the dangers of mass democratic politics. Citizens are “rationally ignorant”<sup>27</sup> – the costs of collecting more information about the candidates and about the proper functioning of the system itself are too high, given how little effect any one person can have on political outcomes. Consequently, even as they distrust politicians they remain susceptible to demagogues who appeal to their prejudices, fears, and hopes – and the

successful politicians will be those who are the most determined to win, most aggressive, most in love with the idea of power, and most unwilling to be constrained. And why should they understand the necessity of constraints when the people are sovereign and it is the people who have chosen them? This is the great danger of the Wilsonian revolution, for presidents now believe that any of their actions are justified because their authority comes from the people.

There is no democratic solution to this problem. The public cannot hope to vote into office presidents who will not seek to further expand the office's power, because such people will not aggressively seek the office. No such candidates will ever be made available for the public to select. *Every* serious candidate in the presidential primaries will be of the kind who seeks the office for its power, so that whomever a citizen votes for, he/she is voting for the further expansion of executive power. At the end of the primary process, the public will have the choice of two candidates who share a common desire to wield the power of the presidency. Certainly they think that they will wield this power for good, but wield it they will, and they will seek to increase it as much as possible.

Our only solution is to be found in the rule of law. The presidency must once again be a creation of law and not of politics. But mere statutory law, laws passed by Congress, will not suffice. As George W. Bush demonstrated with his signing statements, no president will obey a statute that he/she believes constrains his/her authority. Only changes to the Constitution can constrain the president and restore balance to the American political system. It is beyond the scope of this paper to suggest what those constitutional changes should be, but we have amended the Constitution twenty-seven times in our history, and while difficult, it is not impossible to do so. But the amendment process, appropriately, requires that a large majority of public support changing our fundamental governing structure. Therefore, the first task is to make the public aware of the problem in order to develop a widespread demand for any change that is necessary.

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<sup>4</sup> Hamilton, Alexander. 1788. *Federalist* 70.

<sup>5</sup> Madison, James. 1788. *Federalist* 51.

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