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# THE LAW OF PRESIDENTIAL POWER

## CASES AND MATERIALS

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Peter M. Shane

Harold H. Bruff

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Carolina Academic Press

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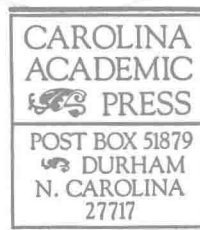
# THE LAW OF PRESIDENTIAL POWER

## Cases and Materials

BY

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*For Martha and Beth*  
R.M.S.

*For W.J.B. and M.M.B.*  
H.H.B.

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## Preface

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This volume offers a set of cases and materials on law and the exercise of presidential power. Although thousands of books and articles exist on the Presidents and on the Presidency, we are aware of no other current volume of primary sources designed to permit lawyers, law students and political scientists a comprehensive review of the issues involved in the application of law to the President's functions. The book is innovative for law schools because its subject matter is not well covered by the mainstream curriculum. It is innovative for undergraduate and graduate courses on the Presidency because of its emphasis on primary materials at the expense of discursive secondary text.

As law teachers, we have found the value of this project for our students to be at least three-fold. First, despite the ever-increasing importance of all aspects of public law in our national life, legal curricula tend to focus on the operation of the courts. These materials, we hope, afford readers a clearer picture of how the executive branch of government operates and of how complex a process is the "execution of the laws." Although bits and pieces of the overall picture may appear in courses on constitutional law and international law, we find that a systematic overview of the Presidency better highlights and puts into context such processes as law enforcement, program administration, budgeting and accounting, and the implementation of foreign and military policy.

Second, as the ever-increasing number of legal cases involving the President attests, the subject of this work has become and is likely to remain a central national concern. The Nixon Presidency precipitated a major shift in legal attitude towards judicial oversight of the Presidency. Even if future administrations prove less troubled, however, the increasing burden that the executive branch shoulders for solving domestic and foreign problems will require citizens to concern themselves ever more with the issues surrounding executive effectiveness and accountability. These materials help to prepare students of law and political science to participate in that debate more knowledgeably.

Finally, a thorough exploration of the applicability of law to the President's functions highlights the crucial non-litigative role of legal counsel that, in all fields, legal curricula tend to underemphasize. Perhaps because most discussion materials in law school classes consist of reported cases, the impression is created that law is determined primarily in the courtroom and that arguing cases is what "real lawyers" do. Most hard legal questions facing the President must be decided, at least in the first instance, within the executive branch and on the basis of relatively little prior judicial guidance. The following materials thus rely substantially on sources other than judicial opinions to which the President's lawyers would resort in order to solve a difficult problem. We have also employed a problem-oriented approach to a number of issues, asking the reader: What would you advise the President on the issue if you were the President's lawyer? This orientation is intended to provide insights into the role of the President's legal counsel that will be useful to those who perform a counseling role in any large institutional setting.

The authors have found this work ideally suited for a three-hour second- or third-year law school course, although we have never attempted to cover each and every topic in class. Neither of us, for example, has found time to delve deeply into Chapter 8, on problems of presidential transitions. The book can be used successfully, however, even in a 2-hour course. Such a course, for example, might focus on the domestic Presidency, employing Chapters 1-5. Alternatively, omitting Chapters 4 and 5 and using Chapters 6 and 7 will produce a course focusing chiefly on the President's foreign affairs and military powers. Teachers interested in surveying all aspects of the Presidency in a 2-hour course may simply excise from each chapter those topics that seem to them least essential. The likeliest suggestions for excision, in our judgment, include Section B of Chapter 3, Sections A(2)-A(5) of Chapter 5, Sections D and E of Chapter 6, and Sections B(2) and C of Chapter 7, as well as Chapters 8 and 9.\*

This work has profited greatly from the suggestions of students, friends, and colleagues. We would like to express our deep appreciation to Larry A. Hammond, Peter Raven-Hansen, Larry L. Simms, and especially to David A. Martin, who all offered helpful insights based on teaching the book in draft. We are also grateful to Jeffrey N. Shane, Deputy Assistant Secretary of State for International Transportation (and brother of one author) for his assistance in creating the case study of the now-defunct Civil Aeronautics Board. Among the students who made special contributions to this book are Greg Schwager, Kelly Schemenauer, David Stamp, Patrick Sullivan and Ruth Walz at Iowa, James Gattuso at UCLA, and Christopher Brancart and Michelle Hoogendam at Texas. We received exceptional typing assistance from Sally Laster and Phyllis Monaghan at Iowa, and from Sally Donaldson and Gretchen Woellner at Texas. Additionally, we owe thanks to our former colleagues at the Office of Legal Counsel at the U.S. Department of Justice for their innumerable insights that have shaped and deepened our thinking on the Presidency.

Three final notes on style: First, although we try to avoid using the masculine generic to describe all people, we continue to use "he" as an occasional pronoun for "the President" because of the historical circumstance that this country has not yet elected a woman to the Presidency. Second, although we have marked textual deletions in the excerpted materials, we often omit, without any printed signal, footnote material and citations to cases or other authorities that may appear in the excerpts. Third, in citing relevant secondary literature, we use forms of citation that are conventional among legal academics, but which may be unusual for political scientists and their students.

PMS  
HHS  
Iowa City, Iowa  
Austin, Texas  
January, 1988

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\*We have tried to organize the volume with sufficient clarity so that teachers using either a 2- or 3-hour format could also re-order the materials to fit their instructional tastes. One colleague, for example, has suggested teaching the impeachment materials in Chapter Eight together with the general materials on accountability in Chapter Three. Also, the executive privilege materials in Chapter Three could be delayed until students learned more of the substantive law surrounding presidential powers from Chapters Four through Seven. The pedagogically defensible permutations are undoubtedly endless.

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