The Fettered Presidency

Legal Constraints on the Executive Branch

L. Gordon Crovitz & Jeremy A. Rabkin, Editors

with a foreword by Robert H. Bork

American Enterprise Institute for Public Policy Research

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Foreword

Robert H. Bork

The chapters contained in this volume demonstrate that the office of the president of the United States has been significantly weakened in recent years and that Congress is largely, but not entirely, responsible. Some recent presidents have failed to defend their office's prerogatives, allowing Congress to establish easements across the constitutional powers of the presidency that time and use may make permanent. This is a deeply worrisome development, for America has usually prospered most in eras of strong presidents, and the state of today's world makes the capacity for strong executive action more important than ever. Many congressmen and commentators would, we may be sure, respond that Congress is merely reasserting its constitutional role after decades of presidential usurpation. That raises the question of how and what we should think about the two branches' constitutional powers.

Of the three branches of the federal government, the founders had least to say about the presidency. Congress was not merely carefully constituted, but in Article I, section 8, its powers were set out one by one with as much specificity as the subject allowed. Judicial power and the heads of jurisdiction were carefully designated and confined in Article III. (There is, of course, the embarrassment that the greatest of all judicial powers, the power to set aside the acts of the people's representatives in the name of the Constitution, is nowhere mentioned, but we have learned to live with that.)

In comparison with the constitutional description of the other two branches, the office of the presidency is generally and vaguely defined. The president is to be vested with "the executive Power," which means among other things, we are told, that he is to be "Commander in Chief" of the armed forces; he may require the opinion in writing of cabinet officers upon any subject relating to their duties; he may make treaties if two-thirds of the Senate concur; and he may nominate a variety of important officers and, with the advice and consent of the Senate, appoint them. He may convene Congress upon

extraordinary occasions, he is to "receive Ambassadors and other public Ministers," and "he shall take Care that the Laws be faithfully executed." There is more, but none of it particularly enlightening.

So far as text is concerned, it would require a spectacular feat of interpretation to infer the scope of the president's authority to use armed force from the bare reference to him as commander in chief. His primacy in foreign affairs must be gleaned entirely from his power to negotiate treaties and receive ambassadors. But text is by no means all that counts. There is history, and that history was shaped by what in constitutional law is called structural reasoning. Reasons drawn from structure are as much a part of the Constitution as is the text, as Chief Justice John Marshall demonstrated long ago in *McCulloch* v. *Maryland*. The respective roles of Congress and the president developed according to their structural capacities and limitations. Congress, consisting of 535 members assisted by huge staffs, is obviously incapable of swift, decisive, and flexible action in the employment of armed force, the conduct of foreign policy, and the control of intelligence operations. The very number of persons involved makes confidentiality difficult, to say the least, and the attribution of responsibility impossible. That is why, as the Supreme Court said in *United States* v. *Curtiss-Wright Export Corp.*, "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."

It appears that the men of Philadelphia and those who ratified their work had only a general notion of what authority and functions properly belong to the new office they were creating. The president was not to be a monarch but neither was he to be the weak figurehead that many governors in the states had become. A prime reason for calling the convention, and a prime reason for ratifying its work, was intense dissatisfaction with the results of legislative dominance in the state governments. A much stronger executive was wanted in the national government, but the vision of what the executive would be and do was misty enough so that the framers and ratifiers were satisfied, or at least made do with, a fragmentary and general listing of heads of authority.

There is, nonetheless, something of a parallel between their treatment of the legislative and the executive powers. Having spelled out with considerable particularity the great powers of Congress in Article I, section 8, the Constitution concluded that subject with a provision indicating an understanding that not all things could be spelled out in advance, for the last power specified is "to make all Laws which shall be necessary and proper for carrying into Execution

the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." In *McCulloch* v. *Maryland*, in which Congress's power to establish a national bank was upheld, Chief Justice Marshall construed that clause with some breadth, pointing out that "we must never forget that is is *a constitution* we are expounding." In language particularly appropriate to executive power, though that was not the immediate subject, Marshall said:

> This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.

It is interesting that this is precisely what Congress has been attempting to do with the president's powers under the Constitution: "to change, entirely, the character of the instrument, and give it the properties of a legal code." The War Powers Act, which disclaims any intention to alter the constitutional powers of the president, specifies in great detail what those powers are, when they may be used, and when Congress, even by its silence, may require the president to withdraw any armed forces he has committed to a region or to combat. This is the equivalent of a presidential proclamation disclaiming any intention to alter the powers of Congress but specifying in great detail what those powers are, including the power to declare war, and stating that the executive will not carry into effect any law or declaration of war that the executive deems beyond the powers the Constitution bestowed on Congress. There is no body of jurisprudence on this subject, but a president is probably under no obligation to carry out a law or declaration that he deems plainly unconstitutional. We tend to think that Andrew Johnson was right to violate the Tenure of Office Act by discharging Edwin M. Stanton as secretary of war without the consent of the Senate. That brought Johnson within one vote of conviction on impeachment in the Senate, but he was right about his powers as president and right to assert them against a congressional statute.

Since we would and should condemn a president who tried to freeze Congress's powers with such a proclamation, shouldn't we also condemn a Congress that did the same to the power of the president as commander in chief and as the nation's leader in foreign affairs to use armed forces abroad? The conduct of foreign policy often requires that troops be committed to action or be placed in areas

where hostilities may commence. The president's powers are not susceptible of definition in advance. Changes in power relations, the shifting nature of alliances and adversarial postures, and, most certainly, the rapid development of military technologies mean that he must often act in ways that no one can foresee even a day in advance, much less in the ages to come.

Some of the contributors to this book express the hope that the constitutionality of the War Powers Act will be decided by the Supreme Court. I think it most unlikely that the Court will ever pass upon the act as a whole. If particular presidential actions are challenged, as was Lincoln's order to blockade the South in the *Prize Cases*, the validity of the actions will necessarily be determined by the Court's view of constitutional powers, since those are not and cannot be altered by the War Powers Act. This makes that act a very peculiar species of law, one that alters nothing. That being so, and since the president is bound to pursue his constitutional duties as the circumstances in the world dictate, the War Powers Act becomes little more than a license for congressional recrimination after the event. It is a means by which those who dislike a particular use of force but hesitate to oppose it on its merits (when it is popular, as was the invasion of Grenada) can attack the president obliquely by ignoring the merits and painting him as a lawbreaker.

While the War Powers Act thus serves no useful purpose, it does weaken the presidency and divert the public debate from the substance of policy to legalisms. Some day, I hope, a strong president will explain to the American people just what the act is, that it cannot detract from his constitutional powers, and that he intends to ignore it whenever its provisions conflict with those powers. This is a task the Supreme Court should not be asked, and if asked, should not undertake, to do for the president.

Many, probably most, Americans are under the impression that questions of constitutional powers are always questions for courts. That is, of course, not true. Some are too important or too vaguely defined to be left to judges; those are best left to the understanding of the contending branches and ultimately to the good sense of the American people. On the subject of the use of armed force, the Constitution suggests the poles of power but leaves most of the intermediate ground for political contention by the branches. The major decisions are reserved for Congress, as shown not only by its power to declare war but by its absolute control of spending. Although the president is commander in chief, Congress is under no constitutional obligation to provide him with a single private to order

about. But once Congress provides the president with armed forces, it cannot interfere with his tactical decisions, and, considering that the deployment of men and materiel is often crucial to the conduct of foreign policy, in the modern world "tactical decisions" may encompass a great deal. Let me use a crude example to illustrate the extremes of power of each branch. Congress could, of course, have refused to declare war after Pearl Harbor, or, if that is too unrealistic, it could have refused to declare war on Germany. It is more debatable whether Congress could have specified that no funds should be spent in prosecuting a war against Germany until Japan was subdued. But surely it is not debatable that Congress's constitutional power would not extend to dictating the site for the invasion of Europe or to ordering that no funds be expended in the defense of Bastogne since it was better that the troops there should surrender.

The War Powers Act is merely the most dramatic example of a congressional attempt to weaken the presidency. Recent years have produced as well intrusive and debilitating congressional oversight of intelligence activities, the combination of budgets and substantive lawmaking in vetoproof continuing resolutions, the removal of part of the president's law enforcement responsibility through the creation of independent counsel in the Ethics in Government Act, vacillating incursions into foreign policy as with the five different Boland amendments that crippled policy toward the hostile Marxist regime in Nicaragua, and much more. We have heard congressmen repeatedly justify their efforts with the statement that Congress is a coequal branch. That it is, but "coequality" does not mean that Congress's functions are or should be the same as the president's any more than the judiciary's should. Each branch is designed for unique functions.

If the allocation of constitutional roles is becoming a mess, what can be done about it? No doubt the courts will occasionally be called upon to rule, but many of the questions are ill suited to judicial resolution. In any event, the Supreme Court's unsurprising but disappointing decision that the independent counsel statute is constitutional in all respects indicates that the Court is not a reliable ally of the presidency even when the president's position is constitutionally correct. The rescue of the proper powers of the presidency will have to be accomplished by strong and determined presidents who can make the case to the American people. The president must now accept the constitutionality of the independent counsel statute, but he should veto the next such enactment unless it applies to Congress as well as to the executive branch. Congress has for too long been allowed to enact legislative restrictions from which it alone is exempt.

The president must make a public issue of congressional attempts to control his legitimate powers, perhaps by refusing to accept some restrictions even at the risk of political damage. It would be a prolonged and bloody fight, but our national well-being requires that it be made.

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