

PRESIDENTIAL POWER AND ACCOUNTABILITY

Toward a Presidential Accountability System



Bruce Buchanan

ROUTLEDGE


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PRESIDENTIAL POWER AND ACCOUNTABILITY

Many analysts now believe that the growth of presidential war power relative to Congress is irreversible. This book was written to contest that view. Its purpose is to identify what would be required to restore presidential war power to constitutional specifications while leaving the president powerful enough to do what is truly necessary in the face of any emergency. Buchanan focuses mainly on diagnosing the origins of the problem and devising practical ways to work toward restoration of the constitutional balance of power between Congress and the president.

The work begins by showing the lack of clear, widely shared standards whose enforcement is needed to sustain the balance of power and draws on the thinking of the founders and political theorists to crystallize such standards. Next it details how, in the absence of standards, agents such as Congress and the Supreme Court with formal influence on presidents and informal agents such as media and public opinion have unwittingly enabled unnecessary power expansion, such as the presidential “wars of choice.”

Of course, change of this magnitude cannot be expected to happen quickly. Remedies necessarily involve a reform architecture intended to unfold gradually, with the first step being simply to start a focused conversation (another purpose of this book). Buchanan moves toward specific remedies by identifying the structure and strategy for a new think tank designed to nudge the political system toward the kind of change the book recommends. Lastly, the book shows how a fictional policy trial could take a practical step toward rebalancing the war power.

This is a crucial examination of presidential power and the U.S. separation of powers system, with a focused effort on making a course correction toward the kind of power sharing envisioned in the Constitution.

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1

INTRODUCTION

Rethinking Presidential Power

Although the Constitution is mentioned often, this book is not intended as a treatise in constitutional law. Instead, it offers new ways to think about an increasingly pressing problem: the erosion of presidential accountability for the use of power. In the process it re-evaluates the workings of the separation of powers and of checks and balances and proposes concrete remedial action. “How to fix it” is not the usual focus of books in the broad subject area of presidential power, but it is the focus here. Given this fact, the book is addressed not just to political scientists and constitutional scholars but to any citizen—whether expert or novice—seriously concerned with the growing imbalance in the separation of powers.

Many now believe that the enlargement of the presidency relative to Congress is irreversible, particularly on matters touching the main concern in this book, which is the war power (Deering, 2005). That pessimistic view is contested here. Without question, new proposals like those introduced below and described in detail in Chapters 5 and 6 are always politically difficult and must overcome other forms of inertia as well. But the specific changes proposed here require no constitutional adjustments. Although they are departures from the familiar they are modest in comparison to the scale of the problem they address. It would be challenging but not impossible to bring them about. They flow directly and logically from the problem diagnosis that generated them. Suggestions for change can be useful thought experiments even if they are not implemented, and that is certainly true of the proposals offered here. But these changes have the potential to do more than just bring intellectual closure to an academic problem diagnosis. Effectively implemented, they can create movement toward rebalancing the war poser.¹

Political thinkers as diverse as John Locke and Abraham Lincoln usefully remind us of what has been missed due to lack of reflection on the corrective potentials of our separation of powers design. Unfortunately, these still useful reminders are

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overlooked by the very people who have power to hold presidents accountable: those who “staff” a group of governmental and nongovernmental institutions I call the *presidential accountability system*, or PAS (defined and discussed below, again in Chapter 2 and in still greater detail in the third chapter). As a result, we have failed to keep the presidency in check at key moments—particularly before the initiation by presidents of major wars that were *optional* rather than *necessary*.

The problem has its origins in the nature of presidential responsibility. Because events have forced presidents since George Washington to manage crises and solve unexpected problems, presidential power has grown beyond the intent of the framers. The reason is that new assertions of power have been treated as permanently enlarging precedents. This practice has driven executive power, ratchet-like, in but one direction: upward—to a point where presidents now feel entitled to decide for themselves whether and when to use military power. To be sure, the presidency must be “sufficient unto any need,” if it is to meet its unique responsibility for protecting the American political system. But presidential power has expanded beyond mere sufficiency to a point that requires rethinking with the intent to calibrate. That is the purpose of this book.

Calibration

To “calibrate” something is to “gauge its deviation from a standard in order to ascertain the proper correction factors.” This may seem unrealistically precise, too “scientific” as an approach to regulating something as emotionally and politically charged as the use of presidential power in real or imagined crises. Yet clear guidance is both needed and available. The standard used here for pinpointing the proper scope of presidential power was suggested by President Lincoln. It involves a dynamic relationship between the idea of “necessity” for presidential action in the face of threat and the constraints of the Constitution. The constitutional limits on presidential discretion may be set aside when emergencies make it necessary. But power so expanded should not be allowed to become permanent through precedent. It must instead “snap back,” like a stretched rubber band, to its original constitutional shape once the crisis has passed. This, in Lincoln’s view, is the essential correction factor because it preserves the constitutional order. It is the standard that underlies the argument to follow.

The Plan of the Book

The first step toward calibration is to identify and describe the two main sources of the current power imbalance. They are:

- incoherent standards and practices for holding presidents to account (Chapter 2)
- an unconscious, uncoordinated presidential accountability system (Chapter 3).

Incoherent standards are the inevitable result of an unconscious, unthinking, uncoordinated PAS. They join to impose great costs on the American political system.

The most important of these costs are unnecessary wars. Chapter 4 offers detailed examples of three such wars—each a presidential war of choice. As remedies, I first propose a new “think tank” designed to bring the PAS to conscious self-awareness (Chapter 5) and then a new congressional procedure modeled on the impeachment process; the policy trial, aimed at making sure that elective wars are in the national interest before Congress lets them happen (Chapter 6). Brief previews of Chapters 2 through 6 follow.

Chapter 2: Incoherent Presidential Accountability

Presidential accountability standards and practices are currently incoherent because the constraints on presidential power are subject to dramatic change by precedent-setting presidential action, as illustrated in this chapter. This makes such standards “crisis-and-president” driven rather than “Constitution” driven. That in turn makes them unsteady and haphazard rather than intentional and stable—the definition of “incoherent” used here. Coherence, on the other hand, requires a way to deal with emergencies that does not create precedent. This can only be achieved through deliberately orchestrated enforcement of the Lincoln standard and related precepts described here. Enforcement is the responsibility of the PAS which includes three official (Congress, Court, and presidential elections) and four unofficial (media, political opposition, public opinion outside elections, and the anticipated judgment of history) “agents of accountability.” These agents already comprise a “system” because each may influence presidential incentives and behavior at any given time, either individually or collectively and whether knowingly or not. They do so by creating a mix of positive and negative incentives for presidents. President Truman’s decision to deploy troops to Korea without congressional assent—the most significant war powers expansion in American history—shows why unconscious, unintentional PAS influence is dangerous. To make such influence conscious and intentional is the only way to achieve coherent performance guidelines. The chapter suggests necessary steps and identifies the American people, sovereign democratic overseers of presidents, as both the linchpin and the weakest link of the PAS. Remedying this weakness is among the most pressing reasons for the proposal to bring the now unconscious PAS to a state of self-awareness. But as the next chapter shows, it is not the only reason.

Chapter 3: The Unconscious Presidential Accountability System

Here we examine, in “agent-by-agent” detail, the unique accountability contributions as well as the dysfunctions and limitations of each (for example the Congress, most powerful of the agents, has largely abandoned vigorous war power oversight). The chapter shows that the various agents collectively possess the tools required for effective oversight but that the uneven and unsynchronized oversight typical of an unconscious and unevenly motivated PAS sharply curtails effectiveness. There are

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two problems in particular. First, the PAS does not now think of itself as a “system.” Instead each agent is primarily driven by its own unique incentives and priorities. Second (as shown by the Truman example in Chapter 2) the agents are not always aware of the signals they send presidents; and when they are aware they rarely try to orchestrate the impact on the president. In the absence of cooperative interaction accountability lacunae inevitably emerge.

Chapter 4: Presidential Wars of Choice

Chapter 4 uses case studies of Korea, Vietnam, and Iraq to show the detailed consequences of the most damaging byproduct of the unconscious PAS: congressional abdication of the war power to the president. Due to the elimination of serious president–Congress consultation stemming from the Korean War precedent, Congress now routinely defers to presidents who insist on the need for military action. What is more, the presidents in the cases reviewed in this chapter initiated wars despite lack of clear provocation (e.g., an attack on the United States) and without a vision of the objective backed by well-specified operational plans. In each of these cases, there was a notable absence of a rigorous vetting process before the choice for war was approved by the president. Congress offered little serious oversight until long after the wars were initiated. It was stirred to do so by shifts in public opinion brought on by mounting costs in American blood and treasure made intolerable by the lack of military success. This has become a tradition of failure, in part attributable to the fact that presidents are left unsupervised at the moment of choice. This is the main reason for the policy trial proposal.

Chapter 5: Bringing the PAS to Life: The Presidential Accountability Project

Presidential wars of choice show that the constitutional and political systems as they currently operate do not effectively hold presidents to account. That is why there is need for a conscious PAS in which both its formal and informal components are sensitive to the need for selective and timely coordination to prevent unnecessary power expansions. To make this possible, an organization must be established first to “market” the PAS concept to PAS members and then to create the necessary coordination mechanisms and oversight expertise.

This is a far-reaching proposal. The aim is to create a new “consultancy” think tank in Washington, DC designed to help PAS members achieve something not previously sought: a level of integrated presidential oversight equal to the demands of calibrating presidential power. Full specification of how this think tank would operate is essential to the actual implementation plan. Many (though not all) of these details appear in Chapter 5—enough to clearly illuminate what real change would require at the level of agent practice. The proposed organization’s major divisions will be a *Policy Board* and a *Research Group*. The *Policy Board* will work to

create agent acceptance of the PAS idea and promote communication and coordination among agents. It will bring the products of the research staff to multi-agent discussions of foreseeable accountability issues. And it will maintain ongoing discussion and refinement of the PAS mission and objectives (e.g., balancing presidential encouragement and restraint, promoting the no-precedent “necessity” doctrine) in light of new circumstances. The mission of the *Research Group* is to apply specialized expertise to various projects identified by the Board. For example, it will assess historically important (e.g., Korea) and more recent accountability cases like the 1990 Gulf War, President Clinton’s 1999 Kosovo air strikes, and President Obama’s use of drones (unmanned strike aircraft) in search of lessons and strategies for improved oversight. It will also address current issues as they unfold (e.g., President Obama’s recent Libyan venture).

Chapter 6: Prospective Accountability for Wars of Choice: Policy Trials

Policy trials illustrate the kind of proposal the Research Group might develop. Such trials would use an established constitutional procedure—impeachment—to put a proposed initiation or escalation of a war (not the president) on trial in Congress before that body approved or disapproved of discretionary military action. The purpose of policy trials is to reduce the likelihood of future poorly conceived military ventures like the Korean, Vietnam, and Iraq wars. They would accomplish this purpose in part by replacing provocative presidential rhetoric aimed at inflaming public opinion with an orderly televised debate on the merits of the president’s war proposal. After exposure to such a debate the mass public audience would be focused and well-briefed enough to give members of Congress something they now lack: the political cover needed to take the risk (when merited) of opposing a president bent on war. Finally policy trials are designed to allow the president to make his/her very best case while requiring that it be done in a disciplined way in give-and-take with equally disciplined critics. To illustrate how policy trials would work, President Obama’s decision to escalate the war in Afghanistan is revisited and subjected to a fictional policy trial.

2

INCOHERENT PRESIDENTIAL ACCOUNTABILITY

We begin with a look at the workings of a disparate collection of actors that share an important distinction: they all contribute in one way or another to how effectively presidents can be held accountable for their performance in office.

I refer to them as the presidential accountability system (PAS). The PAS comprises familiar constitutional and nongovernmental entities, which include *presidential elections*, *Congress*, and the *Supreme Court* within the constitutional structure; and *public opinion*, *news media*, the *political opposition*, and the *anticipated judgment of history* outside it. What do these varied and dissimilar “agents of accountability” have in common? This: whether consciously or deliberately or not, each can influence presidential incentives and behavior.¹

To my knowledge, no one else has suggested that the institutions and entities that make up the PAS might usefully be conceived of as a group whose members jointly create a mix of incentives for presidents. Yet thinking of them as an “assembly” that constitutes a “system” for holding presidents to account is useful because it brings to mind possibilities not usually considered for addressing presidential accountability problems, particularly the unnecessary expansion of presidential power. Because I want to make clear in the first few pages exactly why this topic is important, we start with a brief look at one classic case: President Harry S. Truman’s unilateral 1950 decision to send U.S. troops to Korea.

Truman’s Decision

The details of U.S. involvement in the Korean War are presented in Chapter 4. In focus here is a much narrower look at *why* Harry Truman, a president who was blindsided by the surprise North Korean invasion of the South, so quickly came to believe it was acceptable to respond by sending U.S. troops to repel the invasion

without the formal approval of Congress. Truman's is a cautionary tale because his decision was in large part a consequence of incentives unwittingly created for him by the expectations of human actors within the various agents that make up the PAS. These actors were themselves blindsided by the invasion, and were simply not thinking about how their own reactions might be interpreted by the president or of the net effect on Truman and through him the constitutional balance of power that their unpremeditated reactions might have.

Three of the most influential signals came from the political opposition in and outside Congress, from public opinion, and from the news media. Truman considered involving the Congress. But he soon concluded that it would be better to do what he thought was right quickly and on his own. Why? The first reason was because he knew that neither public opinion nor the news media would oppose bold presidential action. The view was widespread at the time that the invasion of South Korea was a Cold War Soviet ploy to test the United States, and that the United States had to respond immediately (it would later become clear that neither assumption was accurate). The second reason Truman avoided Congress was because he knew a congressional forum to discuss Korea, even though it would surely approve U.S. military action in Korea, was also sure to feature Republican attacks blaming the president for the recent Soviet development of the A-Bomb and the fall of China to the communists. A bold presidential move in Korea, on the other hand, would at least temporarily silence Truman's partisan critics. Third, avoiding Congress was easy because, initially at least, being ignored was acceptable to a majority in that body. Members of the House of Representatives actually stood and cheered when the word reached them that Truman had sent in the troops. Finally, Truman, like many presidents an avid reader of presidential history, was influenced by his sense of what history would expect of a strong president in his situation: decisive action in support of U.S. interests. And he was influenced by his Secretary of State, Dean Acheson, who advised him to protect presidential discretion by acting on his own (Hamby, 1995: 538–39; Cumings, 2010: 12–13).

So, encouraged by green lights from the people and the media, by his own desire to avoid partisan attacks on himself, by his identification with assertive past presidents, and particularly by the absence of a red light from Congress, Truman deployed the military without authorization from that body. In the end, this would have the effect—not explicitly intended by Truman or anyone else, so far as I can discover—of establishing a precedent that effectively shifted the war power from the Congress to the president (Savage, March 22, 2011a: A12).

The Reality of the Unconscious PAS

The PAS conjured here is quite real, in the sense that its component parts, whether knowingly or not, obviously do create a mix of what presidents will perceive as incentives, as the Truman example shows. But unlike social systems consciously designed and continuously refined to sharpen their influence on the behavior of

particular human “targets” (e.g., schools and students; political parties and voters; corporations and customers), the *members of the PAS are not primed to be cognizant of themselves as participants in a shared enterprise with specific goals*. They should be because without shared goals they *cannot* be attuned to the implications for effectiveness of the incentives they now jointly but often unconsciously create for presidents. Effectiveness has no meaning without a goal. Few anywhere within the PAS were giving much thought even to *whether* they were sending signals to the president, let alone to how any signals they might be sending were being interpreted by Truman; or whether those signals were having some intended effect. There was no PAS concept to encourage such thinking; therefore these considerations simply did not arise. They cannot be expected to arise without some prior commitment on the part of the actors to begin thinking in these terms.

Why a Self-Aware PAS is Necessary

The Truman case serves as our introduction to the PAS because it underscores the importance of the influence that its component agents wield. Truman’s decision to invade Korea without congressional approval led to the most significant expansion of presidential war power in American history. The factors that encouraged Truman to bypass Congress show why it is important to strive for a *conscious* PAS. There are multiple sources of influence on presidents, the most significant of which are the agents in the now-unconscious PAS. (See endnote 1.) If the effects of these influences are not to be unwitting and unintentional, ways must be found to integrate them into consistency with one another when necessary and possible, with the intent to send deliberate signals and to avoid unintentional ones.

But again, shared intentions among a group of influential agents require prior agreement on the ends and means of presidential oversight, deeply informed by the record of oversight experience (both part of the mission of the proposed PAP; see Chapter 5). Only this can sensitize agents to the need for vigilance against repetition of past mistakes. Agents also require mechanisms of communication and coordination to facilitate timely signaling when it is called for. *Lacking such things, the unconscious PAS is not equipped to manage events like Korea in a way that allows the president to do what is required without setting precedents that unnecessarily alter the balance of constitutional power.*

Precedents Undermine Accountability

Precedents make coherent accountability impossible. They do so by usurping the power to define what acceptable standards of presidential performance are. The power shifts from the constitutional actors charged with the task—people, Congress, and Court—to the president acting in the name of crisis. For example, Truman’s action overturned the war power standard explicitly stated in the Constitution. “(T)en years after Roosevelt told France that that only Congress could make military

commitments, President Harry S. Truman, confronted by the North Korean invasion of South Korea, sent American forces to war on his own” (Schlesinger, 2004: 53). A presidential act that prior to the Korean crisis was deemed unconstitutional by Truman’s predecessor, and potentially grounds for impeachment, came to be viewed instead as an established presidential entitlement. As a result of an unexpected invasion, a power once thought to be the permanent province of the Congress can now be claimed by any post-Truman president contemplating the need for military action.

The issue seems largely, if not completely, resolved. For example, the debate was briefly rekindled by President Barack Obama’s March 2011 decision to send U.S. fighter jets to Libya to join allies in a military effort to force an end to Libyan government killing of antigovernment rebels. A bipartisan group of U.S. lawmakers argued that the president had exceeded his constitutional authority by ordering American forces to take military action without congressional permission. President Obama and his legal advisors immediately disputed this interpretation. One news account of the dispute notes that since the Korean War presidents of both parties have ordered military action without congressional approval. But it also notes that “(m)ost legal scholars agree that the nation’s founders intended to separate the power to decide to initiate a war from the power to carry it out” and that scholars also say “(t)he divergence between presidential practice for the past 60 years and the text and history of the Constitution make it hard to say whether such action is lawful” Despite President Truman’s assertion that the U.N. Security Council’s permission to act was enough, that claim was disputed at the time. Nevertheless, Truman’s claim “became a precedent. Subsequent presidents added more such precedents” and they continue to do so (Savage, March 22, 2011a: A12). Some experts continue to dispute the constitutionality of such action (e.g., McConnell, January 10, 2012: A13). But those who have occupied or recently sought the presidency consider the question settled. For example, in response to a media request that they express their views, only one of five candidates for the 2012 Republican Party presidential nomination said that a president “should not order a military attack without Congressional permission unless there was an immediate threat ... the other four candidates agreed that a president could do so if he decided it was necessary” (Savage, December 30, 2011b: A1).

Incoherence Defined

Standards set and changed in the way illustrated by the Truman case are not just inconsistent with the Constitution; they are also incoherent. By this I mean that they emerge haphazardly rather than intentionally, disrupting continuity and signaling instability. They reshape the political order of which the presidency is part, sometimes unwisely sacrificing things worth keeping (for example, the constitutional separation of the power to declare war from the power to execute war once declared). And because they emerge, willy-nilly, in haphazard and spontaneous

ways, from unexpected events rather than from deliberate plans they have encouraged an *indiscriminate* escalation of presidential crisis power.

The Origins of Incoherence

What causes incoherence? Four overlapping and interactive sources can be identified. *First* are crisis-driven power expansions that get interpreted as precedents. *Second* are illimitable doctrines of presidential power, espoused and defended by presidents and their associates, which assert that the emergency actions of presidents either cannot be challenged or can be justified outside the Constitution. *Third* is the emergence of a political alliance of the presidency and the people (sometimes called the “democratization” of the presidency) which pits longstanding public receptivity to strong presidential leadership against efforts to curb unnecessary power expansion. *Fourth* is the tendency of Congresses and Courts to follow the lead of the public in tolerating the claims of assertive presidents, with the effect of weakening other PAS agents.

Crisis-Driven Power Expansions

Power expansion didn’t start with Truman. Presidential crisis actions have established precedents dating from the Washington Administration. They have been widely chronicled (see, for example, Small, 1932; Binkley, 1937; Hofstadter, 1948; Rossiter, 1960; Tugwell, 1960; Burns, 1973; Schlesinger, 1973; Goldsmith, 1980; Graff, 1984; McDonald, 1994; Riccards, 1995; and Milkis and Nelson, 2008). Presidents since Truman have picked up his claim to vast inherent powers (Savage, 2007: 20) secure in the knowledge that presidents before Truman had acted with similar boldness and been rewarded for it.

Early Examples

Presidents before Lincoln asserted power in order to address potential threats to the nation (e.g., Washington’s Neutrality Proclamation, aimed at keeping the United States from being swallowed by entanglements in European wars) or to respond to extraordinary opportunity (Jefferson’s reaction to Napoleon’s offer to sell the Louisiana Territory to the United States). Lincoln acted aggressively to repel threats to the survival of the political system posed by the Civil War. What do presidents before and after Lincoln, such as FDR, George Washington, Thomas Jefferson, Theodore Roosevelt, and Woodrow Wilson, have in common with Lincoln himself? They were all seen in their times as controversial figures and by opponents as despoilers of the Constitution while in office. Now, however, they are ranked first through sixth, with Lincoln at the top, in a recent compilation of historian and political scientists surveys conducted between 1948 and 2005 (Ragsdale, 2009: 30). As these “greatness” rankings suggest, what those presidents did has stood the test of time in the judgment of history.