

Teaching the Presidency: Idealizing a Constitutional Office

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From World War II to the present, prominent scholars placed their hopes in the presidency to protect the nation from outside threats and deal effectively with domestic crises. Their theories weakened the constitutional system of separation of powers and checks and balances by reviving an outsized trust in executive power (especially over external affairs) that William Blackstone and others promoted in eighteenth-century England. The American framers of the Constitution studied those models with great care and fully rejected those precedents when they declared their independence from England.

Nevertheless, from the 1940s through the 1960s, Clinton Rossiter, Arthur M. Schlesinger, Jr., Henry Steele Commager, and Richard Neustadt built their professional careers by arguing that it was politically necessary and constitutionally permissible to transfer ever greater power to the president. The unpopularity of the Vietnam War caused some scholars, including Schlesinger, to rethink the wisdom of vesting such power in the executive branch. Following the terrorist attacks of September 11, studies on the presidency have been divided between those who urge the concentration of power in the president in times of emergency, and those who insist that the executive branch lacks both the competence and the authority to exercise power unchecked by Congress, the courts, and the general public.

In the years prior to World War II, there was little effort by social scientists or the public to lionize the American president and manufacture heroic properties. The president was not placed on a pedestal and clothed with wondrous qualities, acting instinctively for the “national interest” and surrounded by advisers with unrivaled expertise and unerring political judgment. Beginning with World War II and continuing into the Cold War, social scientists increasingly singled out the president as the political branch best equipped to protect the nation, not only from foreign threats but in confronting and settling domestic dangers. How well did those evaluations satisfy professional standards of objective and accurate analysis? By concentrating vast power in the presidency,

what damage was done to the American constitutional system that depends on separation of powers and checks and balances?

ROSSITER'S SCHOLARSHIP

Clinton Rossiter's *The American Presidency*, published in 1956 followed by a paperback edition in 1960, promoted an idealized image of executive power. Insisting that he was not recognizing something new, he borrowed this 1861 praise from an Englishman, John Bright, about the US president: “I think the whole world offers no finer spectacle than this; it offers no higher dignity; and there is no greater object of ambition on the political stage on which men are permitted to move.” In Bright's estimate, “there is nothing more worthy of reverence and obedience, and nothing more sacred, than the authority of the freely chosen magistrate of a great and free people; and if there be on earth and amongst men any right divine to govern, surely it rests with a ruler so chosen and so appointed” (Rossiter 1960, 15). President Abraham Lincoln might have been amused by this flight of rhetoric, and there is little reason to think that southern states in 1861 shared Bright's admiration for Lincoln.

Rossiter defined the purpose of his book: “to confirm Bright's splendid judgment by presenting the American Presidency as what I honestly believe it to be: one of the few truly successful institutions created by men in their endless quest for the blessings of free government” (Rossiter 1960, 15). Conceding that the office of the presidency had “its fair share of warts,” he wanted “to make clear at the outset my own feeling of veneration, if not exactly reverence, for the authority and dignity of the President” (ibid., 15–6). Veneration? Reverence? Those words typically express respect, awe, and devotion, describing an office as holy and sacrosanct. Nothing in the American presidency from 1789 to 1956 justified that level of flattery and idolatry.

Rossiter assigned to the president a number of impressive hats: Chief of State, Chief Executive, Commander in Chief, Chief Diplomat, Chief Legislator, Chief of Party, Voice of the People, Protector of the Peace, Manager of Prosperity, and World Leader (Rossiter 1960, 16, 19, 23, 25, 28, 30, 32, 34, 37, 39). He referred to the decision of President Dwight D. Eisenhower in 1957 to appoint James A. Killian, Jr. to the post of Special Assistant to the President for Science and Technology. Rossiter preferred a more permanent post to “acknowledge the President's central position and draw authority directly from his prestige. If we have to have a ‘czar of science’ in Washington in the years ahead, the only candidate I can imagine our swallowing would be the President himself” (ibid., 239). The president as chief scientist? Few social

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scientists in 1956, or today, would conclude that presidents merited that position or the many other titles chosen by Rossiter.

Rossiter was the last doctoral student to work under Edward S. Corwin, the dean of presidential scholars and the public law school. It is puzzling that Rossiter seemed entirely uninterested in placing the president within a system of three coequal branches, each with its own array of checks and balances, each with a duty to fight off encroachments. For Rossiter, the checks that operate on the president are “internal rather than external,” controlled by his “conscience and training, his sense of history and desire to be judged well by it” If a president “knows anything of history or politics or administration, he knows that he can do great things only within ‘the common range of expectation,’ that is to say, in ways that honor or at least do not outrage the accepted dictates of constitutionalism, democracy, personal liberty, and Christian morality” (Rossiter 1960, 70).

Rossiter died in 1970. We will never know how his innate trust in presidential power, judgment, and competence might have changed by observing the performances of Lyndon Johnson in Vietnam, Richard Nixon with Watergate, Ronald Reagan’s involvement in Iran-Contra, the performances of Jimmy Carter and Bill Clinton, George W. Bush’s policies against terrorism after September 11, and Barack Obama’s effort to convert campaign promises into political accomplishments.

The framers placed in Congress the authority to initiate war because they believed that executives, in their search for fame and personal glory, had a natural appetite for war and military initiatives, all of which inflicted heavy costs on the interests and liberties of their people.

In the 1957 edition of *The President: Office and Powers*, Corwin offered a backhand compliment to his former student (perhaps less compliment and more backhand): “Professor Rossiter, whose work on *The American Presidency* became a classic on publication, teaches, in effect, that the presidency is pervaded with a principle of meliorism that guarantees that it will always be just right. His motto is ‘Leave Your Presidency Alone’” (Corwin 1957, 495, n.106). Rossiter could not have missed this mild sarcasm.

Rossiter appeared to be attracted not only to the Englishman John Bright but to the British model of a king who invariably represents the public interest and can be trusted to wield political power in a just manner to safeguard the rights and liberties of the people. Whatever the emotional appeal of that model, America as a nation broke with it decisively in 1776 but the rupture has never been complete. Anglophiles and monarchists remain among us.

REJECTING THE ENGLISH MODEL

Gordon Wood, in *The Radicalism of the American Revolution*, discusses the views of William Blackstone in his *Commentaries* (1765), which refers to the British king as “*pater familias* of the nation.” US presidents are often described as father of the country, but Blackstone meant it literally: the king was the father and the subjects were his children. Wood explained that “to be a subject was to be a kind of child, to be personally subordinated to a paternal dominion.” Subjects of the king were necessarily “weak and infe-

rior, without autonomy or independence, easily cowed by the pagantry and trappings of a patriarchal king” (Wood 1993, 11–12).

There was no comparable reason for Americans to fawn before a US president. Values drawn from the Enlightenment and the colonial experience of struggling for self-government necessarily meant the rejection of Blackstone’s model. To protect the subjects, Blackstone transferred all external powers to the king: declaring war, making treaties, appointing ambassadors, raising armies and navies, and issuing letters of marque and reprisal (Blackstone 1765, 1: 233, 244, 249–50, 254). The Constitution does not give a single one of those prerogatives to the president. They are either vested exclusively in Congress by Article I or shared between the president and the Senate (making treaties and appointing ambassadors).

Unlike England, with its history of monarchy over which Parliament gradually gained some control, America as a national government started with a legislative branch and no other. After America declared its independence from England, all national powers (including executive) were vested in a Continental Congress. The ninth article of the Articles of Confederation provided: “The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war” States could engage in war if invaded by enemies or threatened by Indian tribes (Jensen 1963, 265, 266).

At the Philadelphia Constitutional Convention, the framers explicitly rejected the British monarchy and its control over external affairs. Charles Pinckney spoke in support of “a vigorous Executive but was afraid the Executive powers of (the existing) Congress might extend to peace & war which would render the Executive a Monarchy, of the worst kind, to wit an elective one” (Farrand 1966, 1: 64–65). That sentiment was expressed repeatedly at the convention. Alexander Hamilton admitted that in his “private opinion he had no scruple in declaring . . . that the British Govt. was the best in the world,” but promptly conceded that Blackstone’s model had no application to America and its commitment to republican government (*ibid.*, 288, 292). Pierce Butler wanted to give the president the power to take the country to war against another nation, arguing that the President “will have all the requisite qualities, and will not make war but when the Nation will support it” (*ibid.*, 2: 318). In that sentiment he stood alone. The framers recognized that the president would need “the power to repel sudden attacks,” but certainly not the power to commence war (*ibid.*, 2: 318). The latter decision was left solely to Congress.

The framers placed in Congress the authority to initiate war because they believed that executives, in their search for fame and personal glory, had a natural appetite for war and military initiatives, all of which inflicted heavy costs on the interests and liberties of their people. In Federalist No. 4, John Jay expressed a view commonly held by the framers:

[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people (Wright 2002, 101).

The language here is instructive. Rossiter believed that the president represented the “Voice of the People.” Jay and other framers understood that Americans were not children. They had their own voice and could formulate and express their own interests.

THE PRESIDENCY OF GEORGE WASHINGTON

Americans were fortunate to begin the presidency with George Washington and be guided by his steady hand for eight years. However, nothing in that period suggested that Congress, the Supreme Court, and the American people were ready to slip back into some kind of monarchical system, leaving to President Washington the basic decisions on domestic and foreign policy. Respect for his office? Yes. Adoration and utmost deference? Not at all.

John Yoo, during his academic career and service in the US Department of Justice, has argued that the Declare War Clause did not vest in Congress the authority to initiate war. Rather, a declaration of war merely “performed a primarily juridical function under eighteenth-century international law . . .” (Yoo 1996, 167, 242). Under his interpretation, the president could initiate war and Congress could later issue a declaration to “recognize” what the president had done (see also Yoo 2005). No framer, President, or court in the early decades made that argument. President Washington understood which branch could initiate war: “The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure” (Fitzpatrick 1940, 33: 73).

Article II designates the president as commander in chief, but that title does not carry with it an independent authority to initiate war or to act free of legislative control. Article II provides that the president “shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Congress, not the president, does the calling. Article I grants Congress the power to provide “for calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel invasions.” When Congress passed legislation in 1792 to establish national policy for the militia, it did not leave the decision to use the militia completely up to the president. It provided two statutory checks. The president would first have to be notified by a governor of a military threat “too powerful to be suppressed by the ordinary course of judicial proceedings.” Second, an Associate Justice or federal district judge had to notify the president of those conditions. President Washington followed those statutory procedures to the letter when he used the militia to put down the Whiskey Rebellion in 1794. The following year, Congress removed the judicial check when it revised the legislation (Militia Acts 1792–95; Fisher 2008b).

Washington’s proclamation of neutrality in the war between France and England taught him another lesson about republican government. He directed law officers to prosecute anyone who

violated his proclamation. Jurors balked at this presidential claim that he could make criminal law by issuing proclamations (Wharton 1849, 84–85, 88). Perhaps that process was adequate in England, with monarchical proclamations nailed on trees, but not in America. Jurors in the United States were determined to acquit individuals prosecuted under Washington’s proclamation (*Henfields’s Case*). With criminal action foreclosed, Washington presented the matter to Congress and asked for statutory authority, which he received in 1794 (Neutrality Act).

When Washington invoked the militia act to put down the Whiskey Rebellion in western Pennsylvania, he was offended by citizens meeting privately to express their opposition to federal policy, including the excise tax on alcohol intended for liquor. He wanted Congress to censure these meetings of citizens who “endeavor[ed] to destroy all confidence in the Administration, by arraigning all its acts, without knowing on what ground, or with what information it proceeds and this without regard to decency or truth” (Fitzpatrick 1940, 33: 507).

Washington’s address to Congress on November 19, 1794 took another shot at citizens who met privately to discuss national policy. The government’s operation “might be defeated, [if] certain self-created societies assumed the tone of condemnation” (Fitzpatrick 1940, 34: 29). The Senate quickly supported the president’s objections (Richardson 1925, 1: 160–61). Members of the House of Representatives debated his proposal for five straight days and rejected any heavy-handed rebuke from the national government. Many lawmakers believed their constituents had every right to meet and discuss any public policy of interest to them. James Madison advised: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people” (Madison 1794; Fisher 2008a, 65–72). From this extended and thoughtful debate, we see little deference to even someone as respected as George Washington.

CONSTITUTIONAL LESSONS FROM 1798 TO 1806

The John Adams administration pushed presidential power to the limit by passing the Alien and Sedition Acts of 1798. Anyone who criticized the president, Congress, or the Supreme Court could go to jail. President Adams was given broad powers to seize aliens and deport them, with few procedural safeguards for the accused (Alien and Sedition Acts 1798). The statutes helped cripple the Federalist Party, which developed a reputation for its hostility to popular government, public debate, free press, dissent, civil liberties, and immigrants. The Sedition Act expired in 1801; portions of the Alien Acts survive today.

In defending the warrantless surveillance program that president George W. Bush initiated after September 11, the Justice Department relied in part on the “sole organ” doctrine. The activities of the National Security Agency “are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs” (US Department of Justice 2006). The sole-organ doctrine, regularly cited by those who support independent presidential power in external relations, is *entirely empty*, a canard created by misconceptions on the part of Justice George Sutherland in his 1936 decision in the *Curtiss-Wright* case and repeated ever since (Fisher 2011b, 251–55; Fisher 2006).

Anyone reading the sole-organ speech by John Marshall in 1800, delivered during debate in the House of Representatives,

will understand that he did not argue for inherent or independent powers of the president in foreign affairs (Marshall 1800). Some members of the House wanted to censure or impeach President John Adams for turning over to Great Britain a British citizen charged with murder. However, the Jay Treaty had authorized extradition in cases involving the charge of murder. Adams was therefore not acting on the basis of inherent power but rather on express language in a treaty, with treaties under Article VI regarded as part of the “supreme Law of the Land.” It is the constitutional duty of the president to see that laws be faithfully executed. John Yoo and other advocates of broad presidential power cite the sole organ doctrine but never place the words in context to explain what Marshall meant (Yoo 2009, 291). In his later service as secretary of state and chief justice of the Supreme Court, Marshall never advanced the notion of inherent, plenary, exclusive, or independent powers of the president in external affairs.

Beginning in 1800, the Supreme Court accepted and decided a number of war power cases. Federal courts understood that the decision to initiate war lay always with Congress, not with the president. In 1800, the court held that Congress has a constitutional choice when it initiates wars. It can issue a formal declaration or may pass authorizing statutes, as it did with the Quasi-War between the United States and France in 1798 (*Bas v. Tingy*, 43). In 1801, Chief Justice Marshall spoke for a unanimous Court in underscoring the primary role of Congress over war: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry” (*Talbot v. Seeman*, 28).

What happens in time of war when a presidential proclamation collides with statutory policy enacted by Congress? Writing for a unanimous court, Chief Justice Marshall held that national policy is expressed in a statute, not in a conflicting presidential proclamation (*Little v. Barreme*, 179). In 1806, a circuit court denied that a president or his assistants could authorize military adventures that violated congressional policy, in this case as expressed in the Neutrality Act. The president “cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.” The court asked: “Does [the President] possess the power of making war? That power is exclusively vested in congress” (*United States v. Smith*, 1230).

A LINCOLN DICTATORSHIP?

Little in the history from George Washington to Harry Truman supports a grandiose theory of presidential power. Clinton Rossiter, in *Constitutional Dictatorship* (1948), included a section called “the Lincoln Dictatorship.” He argued that Lincoln was “the sole possessor of the indefinite grant of executive power in Article II of the Constitution” (Rossiter 1963, 225). Lincoln never argued that Article II was “indefinite.” He understood what was in Article I for Congress and in Article II for the president. As Rossiter admits, Lincoln told Congress on July 4, 1861 that he had taken actions, “whether strictly legal or not, . . . under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress” (ibid., 229; Richardson 1925, 7: 3225). With his language “strictly legal or not,” Lincoln publicly admitted that he had acted beyond his legal and constitutional powers. The phrase “constitutional competency of Congress” was a candid admission that Lincoln knew he had exercised legislative powers and needed Con-

gress to pass legislation to retroactively authorize what he had done. Congress passed statutory authority, making legal what had been illegal (Authorizing Act 1861; see Fisher 2010a).

MISLEADING AND FALSE STATEMENTS ABOUT WAR

Although nothing from Washington to Truman provides evidence of a presidential dictatorship, many presidents made misleading and false statements about the need for war. In his first annual message on December 2, 1845, President James Polk advised Congress about diplomatic efforts under way to resolve several disputes with Mexico, “including those of the boundary between Mexico and the United States” (Richardson 1925, 5: 2241). The following spring, he ordered General Zachery Taylor to occupy disputed territory along the Texas-Mexico border. When Polk learned about a military clash between American and Mexican forces, he advised Congress on May 11, 1846 that Mexico had “at last invaded our territory and shed the blood of our fellow-citizens on our own soil” (ibid., 2288). That statement, bursting with rhetorical power, was false. The disputed territory did not belong to the United States. Neither side knew the boundary in that region.

Polk’s message to Congress that “war exists” was similarly false. What existed was not war but hostilities. There can be hostilities without war. It was up to Congress, under the Constitution, to declare that hostilities amount to war, which it did two days later, on May 13 (Declaring War Act 1846). Even after the war was over and a peace treaty signed, Polk admitted on July 6, 1848 that it was necessary to create a “boundary line with due precision upon authoritative maps” to “establish upon the ground landmarks which shall allow the limits of both Republics” (Richardson 1925, 5: 2438). Several weeks later, on July 24, Polk again jettisoned the claim that the initial battle had occurred on American property. When war began, he said, Mexico was “in possession of this disputed territory” (ibid., 2446; see Fisher 2009a).

On February 15, 1898, the American battleship *Maine* blew up while sitting in the Havana harbor. On March 21, a naval board of inquiry concluded that the ship had been destroyed by a mine placed outside the ship. As to the possibility that the ship had been destroyed from an internal explosion of a magazine containing ammunition, the board stated “there had never been a case of spontaneous combustion of coal on board the MAINE” (Naval Board 1898). The American press and much of the public quickly placed the blame on Spain. On April 20, Congress passed a joint resolution demanding the withdrawal of Spanish armed forces from Cuba and directing the president to use military force to carry out the legislative policy (Joint Resolution 1898). On April 25, Congress passed legislation announcing that “war exists” between the United States and Spain, as of April 21 (Declaring War Act 1898).

The naval board failed to acknowledge that other US ships had experienced spontaneous combustion of coal in bunkers. The US Navy’s chief engineer, George W. Melville, doubted that a mine caused the explosion, but he was not asked for his views. He suspected that the disaster came from an internal magazine explosion (Rickover 1995, ix, xvii. 46). Philip R. Alger, the navy’s leading ordnance expert, told the *Washington Evening Star* a few days after the blast that the damage appeared to come from a magazine explosion (ibid., 46). Many US ships, including the *Maine*, had coal bunkers located next to magazines filled with ammunition and other explosives. Only a narrow bulkhead separated the two

compartments. If the coal, by spontaneous combustion, overheated, the magazines were at risk of explosion. An investigative board on January 27, 1898, months before the *Maine* disaster, warned the secretary of the navy about spontaneous coal fires that could detonate nearby magazines (Allen 1998a, 108). From 1804 to 1908, more than 20 coal bunker fires were reported on US naval ships (Rickover 1995, 125). A study sponsored by Hyman Rickover in 1976 determined that the explosion of the *Maine* was, “without a doubt,” internal (ibid.).

In the 1990s, the National Geographic Society commissioned a study by Advanced Marine Enterprises (AME) to prepare a computer model to explore the cause of the explosion. AME agreed that studies indicated that a fire in the ship’s coal bunker could have, within a matter of hours, raised the temperature to ignite nearby gunpowder and trigger a chain reaction in adjacent magazines. AME also suggested that a simple mine, if ignited either by contact or by a wire from shore, “could have sunk the *Maine*. If so, the mine must have been perfectly placed, which under the circumstances would have been as much a matter of luck as skill” (Allen 1998a, 105–06). There was no evidence of a mine or wires from shore, but AME made a number of assump-

nominee of the Democratic Party to be president of the United States (ibid, 17: 32–33). On April 25, 1907, he received an editorial from the editor of the *Wilkes-Barre News* in Pennsylvania describing him as “Presidential Timber.” By the summer of 1909 Wilson was being courted to enter the race as governor of New Jersey, a post he used as a springboard to the White House (ibid., 19: 121, 292, 309–10, 328).

In his *Autobiography*, Theodore Roosevelt presented a theory of presidential power. He regarded himself as “a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin” (Roosevelt 1926, 20: 343). He rejected the view that what was “imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it” (ibid.). That is a highly erroneous understanding of the Constitution. No president before Theodore Roosevelt or after him felt confined to powers expressly authorized. Under the Constitution, the president possesses a combination of enumerated and implied powers, the latter including the power to remove department officials and to withhold from Congress and the public certain documents (Krent 2005, 36–48,

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tions to determine whether a mine was a possible cause. It acknowledged that the results of its analysis “cannot be considered conclusive, as there is no direct evidence supporting several assumptions included in the analysis” (Allen 1998b, 12). Its study “indicates that a coal fire could have been the first step in the *Maine*’s destruction” (ibid.; see Fisher 2009b). Other examples of misleading and false statements from executive officials are provided later in this article (see also Fisher 2010b).

WOODROW WILSON AND THEODORE ROOSEVELT

In the early 1900s, Woodrow Wilson and Theodore Roosevelt spoke ardently about presidential power, but they did not write as detached and objective social scientists. In *Constitutional Government in the United States* (1908), Wilson concluded that whatever the intent of the framers, the president had become “the unifying force in our complex system, the leader both of his party and of the nation. . . . No one else represents the people as a whole . . .” (Wilson 1961, 60, 68). Further: “Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him.” Again: “If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.” Along the same lines: “The President is at liberty, both in law and conscience, to be as big a man as he can” (ibid., 68, 69, 70).

Wilson wrote those words not as an impartial social scientist but as someone with eyes politically fixed on the White House. In February 1907, he delivered a major series of lectures on American constitutional government at Columbia University, the basis for his book (Link 1974, 17: vii). At that point he was president of Princeton University, getting his first taste of executive authority. By February 12, 1907, he understood he was being considered as a

173–87). Roosevelt believed “it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or the laws.” Under that interpretation, “I did and caused to be done many things not previously done by the President and the heads of the departments” (Roosevelt 1926, 20: 347). Here Roosevelt seems to go outside express and implied powers and claim a broader authority, but offered no examples of exercising power in such a bold and ambitious manner. Roosevelt’s rhetoric regularly exceeded his performance in office.

Roosevelt created two presidential models: one for Andrew Jackson and Abraham Lincoln, and the another for James Buchanan, who took the “narrowly legalistic view that the president is the servant of Congress rather than of the people, and can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action” (Roosevelt 1926, 20: 353). No president has read the Constitution that narrowly. Nevertheless, Roosevelt charged that his successor to the White House, William Howard Taft, “took this, the Buchanan, view of the president’s powers and duties” (ibid.). There is nothing to that accusation. It was merely Roosevelt’s self-serving effort to associate himself with Jackson and Lincoln while assigning Taft to the ranks of Buchanan. With a light touch of humor, Taft remarked that the “identification of Mr. Roosevelt with Mr. Lincoln might have otherwise escaped notice, because there are many differences between the two, presumably superficial, which would give the impartial student of history a different impression” (Taft 1925, 144).

Taft explained in his book that he did not confine himself to powers specifically authorized in statutes or in the Constitution: “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" (Taft 1925, 139–40, emphasis added). In Taft's judgment, Lincoln's "claim of right to suspend the writ of habeas corpus . . . was well founded" (ibid., 147). Executive power, Taft said, "is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution" (ibid., 135). Executive power "is limited, so far as it is possible to limit such a power consistent with that discretion and promptness of action that are essential to preserve the interests of the public in times of emergency, or legislative neglect or inaction" (ibid., 156).

ARTHUR M. SCHLESINGER, JR.

It was during World War II that we first see American scholars trumpeting the need for bold and unchecked presidential leadership. Rossiter, part of that crowd, was joined by others. Arthur M. Schlesinger, Jr., ironically credited with exposing "The Imperial Presidency" (the title of his 1973 book), played a major part in manufacturing a larger-than-life US president. His book *The Age of Jackson* (1945) looked to Andrew Jackson as a model for preserving democracy under the 1940s threat of world fascism. He praised Theodore Roosevelt for "usher [ing] in a period of energetic government" and paid tribute to Woodrow Wilson for understanding "the need for executive vigor and government action" (Schlesinger 1949, 188). His three books on *The Age of Roosevelt* praised the activism and leadership of Franklin D. Roosevelt (Schlesinger 1957, 1958, 1960).

Schlesinger's *The Crisis of Confidence* (1969) analyzed the spread of violence in America, including assassinations and urban riots. Although much of the country turned against Lyndon Johnson's war in Vietnam, Schlesinger continued to support a strong presidency. On the choice between Eugene McCarthy and Robert Kennedy for president, Schlesinger criticized McCarthy for promoting "a passive Presidency" and supported Kennedy's embrace of "the more traditional liberal belief in a strong Presidency" (Schlesinger 1969, 217–18). Schlesinger credited McCarthy for raising "searching questions" about the institution of the presidency. Had scholars been promoting "the cult of the strong Presidency" (ibid., 219)? To Schlesinger, the war in Vietnam "was the precipitating issue." Johnson's actions seemed to many to be arbitrary and devious, yet Schlesinger advised Johnson against cutting back on presidential power. As for domestic affairs, the problem "is not too much power but too little" (ibid., 220).

The president did not have in internal affairs "the same constitutional authority he has in foreign policy," and here Schlesinger cites the Supreme Court's decision in *Curtiss-Wright* and its reference to the president "as the sole organ of the federal government in the field of international relations" (Schlesinger 1969, 220). As a historian, Schlesinger should have read John Marshall's sole-organ speech to see if it promoted plenary and exclusive power for the president in the field of external affairs, which clearly it did not. Schlesinger offered several ways to enlarge executive power: (1) "all significant presidential proposals" should reach the floor for debate and vote, (2) an item veto, and (3) authority to adjust tax rates within a specified range to deal with economic fluctuations (ibid., 222–23). Although those actions would transfer legislative power to the president, it did not matter to Schlesinger if they weakened Congress. The "era of congressional government came to an end," he said, because the presidency was "seemed

more accurate and enlightened in perceiving the nation's needs than did the Congress" (ibid., 223).

Turning to foreign affairs, Schlesinger said that Congress was "well placed to assail the myth with which every foreign office seeks to silence critics: that only those who see the top secret cables know enough to make intelligent judgments on questions of foreign policy." The information supplied by American reporters covering the war in Vietnam "was consistently more accurate than that supplied by the succession of ambassadors and generals in their coded dispatches." Schlesinger seemed to be challenging the presumed virtues of a powerful and well-informed president. "The myth of inside information has always been used to prevent democratic control of foreign policy; and, if Congress derides that myth, it may embolden others to doubt the infallibility of Presidents and Secretaries of State" (Schlesinger 1969, 225). Yet he preferred to depend on the president in matters of national security: "It would seem better to continue to regard presidential leadership as the central instrument of American democracy—and to exercise scrupulous care in the choice of Presidents" (ibid., 226).

SCHOLARS REACT TO THE KOREAN WAR

When President Truman went to war against North Korea in 1950, he did not come to Congress for authority to initiate military activities, as had every president before him. Instead, he relied on resolutions passed by the UN Security Council. In 1945 he had pledged in a cable from Potsdam to the Senate, which was then debating the UN Charter, that when he entered into any agreements to send US troops to the UN for collective military action, "it will be my purpose to ask the Congress for appropriate legislation to approve them" (Truman 1945). In this manner, made public, he understood that he had no constitutional authority to act unilaterally. Section 6 of the UN Participation Act of 1945, enacted to implement the military agreements under the UN Charter, provides that these agreements between the United States and the UN "shall be subject to the approval of the Congress by appropriate Act or joint resolution" (UN Participation Act 1945). The statutory language is perfectly clear. The legislative history of the UN Charter and the UN Participation Act underscores full congressional control over the initiation of war against other countries (Fisher 1995a).

Truman's initiative in Korea was quickly defended by Schlesinger and fellow historian Henry Steele Commager, who made short work of constitutional principles by supporting Truman. In a letter published in the *New York Times* on January 9, 1951, Schlesinger sharply criticized Senator Robert Taft for claiming that Truman "had no authority whatever to commit American troops to Korea without consulting Congress and without congressional approval." Taft's statements "are demonstrably irresponsible," concluded Schlesinger. "Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities" (Schlesinger 1951, 28). Schlesinger later acknowledged that his own statements were "demonstrably irresponsible" and that he had "foisted off" his own political prejudices (Schlesinger 1973, 139, 286).

Writing for the *New York Times* on January 14, 1951, Commager criticized members of Congress for claiming that Truman had "usurped" power and "violated the laws and the Constitution of the United States." Those attacks had "no support in law or in

history” (Commager 1951a, 11). The precedents established by the framers, administrations from George Washington to Franklin D. Roosevelt, rulings from the courts, congressional debate, and “learned commentary” left no doubt about the constitutionality of Truman’s initiative: “It is so hackneyed a theme that even politicians might reasonably be expected to be familiar with it” (ibid.). Commager claimed that President Jefferson “inaugurated the war with the Barbary pirates” without acknowledging that Jefferson sought statutory authority from Congress and that Congress passed 10 statutes authorizing military action (Barbary War Statutes).

In another article for the *New York Times*, April 1, 1951, Commager dismissed attacks on presidential power as “misguided and pernicious” and arose “not out of real but out of imagined dangers. It is rooted not in experience but in fears.” Strong presidents, he said, had used executive power boldly without threatening democracy or impairing the constitutional system. “There is, in fact, no basis in our own history for the distrust of the Executive authority” (Commager 1951b, 15). He looked to “long-established traditions of Presidential control” and the president “as the sole organ of the Government in the conduct of foreign relations,” never telling the reader what John Marshall actually meant when he gave his sole-organ speech in 1800 (ibid., 33). These shallow and misinformed analyses by Schlesinger and Commager were later disowned by both men at the height of the Vietnam War, when presidential war-making lost popular support.

One of the few scholars prepared to challenge these ambitious theories of presidential power was Edward S. Corwin. An article in *The New Republic* on January 29, 1951 rebuked both Schlesinger and Commager for ascribing to the president “a truly royal prerogative in the field of foreign relations, and does so without indicating any correlative legal or constitutional control to which he is answerable.” Corwin remarked that “our high-flying prerogative men appear to resent the very idea that the only possible source of such control, Congress to wit, has any effective power in the premises at all” (Corwin 1951, 15). As to Schlesinger’s reference to Jefferson and the Barbary Wars, Corwin correctly noted that when Jefferson reported his military actions to Congress, he explained “that he had been careful to authorize only self-defensive measures on the part of our forces, and that when they had captured one of the pirate vessels they had, after disabling it for committing further hostilities, liberated it with its crew.” Jefferson understood that only Congress had the constitutional authority “to consider whether it would not be well to authorize measures of offense” (ibid.; see Fisher 1994).

By the mid-1960s, a chastened Schlesinger and Commager urged Congress to restore its primacy in going to war and to place effective checks on presidential initiatives. Schlesinger counseled that “something must be done to assure the Congress a more authoritative and continuing voice in fundamental decisions in foreign policy” (Schlesinger and de Grazia 1967, 28). Commager told the Senate Foreign Relations Committee in 1967 that there should be a reconsideration of executive-legislative relations in the conduct of foreign relations (US Senate 1967, 21). When he returned to the committee in 1971, he testified that “it is very dangerous to allow the President to, in effect, commit us to a war from which we cannot withdraw, because the warmaking power is lodged and was intended to be lodged in the Congress” (US Senate 1971, 62). Those scholarly judgments were needed in 1950. In *The Imperial Presidency*, Schlesinger admitted to contributing

“to the presidential mystique” (Schlesinger 1973, ix). It is healthy for scholars to reconsider previous positions and admit errors, but the time for scholarly checks on constitutional violations is when they occur, not almost two decades later (Fisher 2005).

NEUSTADT’S INFLUENCE

Richard Neustadt’s *Presidential Power*, first published in 1960 and reissued as a paperback four years later, had a profound impact among scholars, students, and the public. The book gained broad appeal because of its focus on stories, case studies, and the examination of presidential power in practical terms. The downside of his approach, as explained by Ronald Moe, was to jettison institutional, legal, and constitutional values, divorcing presidential power from Corwin’s framework of public law (Moe 1999; Moe 2004).

It is easy to misread Neustadt. He begins with a modest and attractive theme by defining presidential power as “the power to persuade” (Neustadt 1964, 23). Persuasive power “amounts to more than charm or reasoned argument. . . . For the men he would induce to do what he wants done on their own responsibility will need or fear some acts by him on his responsibility.” The formal powers of Congress and the president “are so intertwined that neither will accomplish very much, for very long, without the acquiescence of the other.” In a phrase that seems consistent with the constitutional system of checks and balances, Neustadt refers to political power as “a give-and-take” (ibid., 43, 45, 47). In probably the most celebrated statement in the book, Neustadt wrote that the framers did not create a government of separated powers. Instead, they “created a government of separated institutions *sharing* powers” (ibid., 42, emphasis in original). Such remarks offer a reassuring and soft glow of mutual accommodation among the branches.

Those comforting and familiar themes appear early in the book. As the reader proceeds deeper into his study, Neustadt urges presidents to take power, not give it or share it. Power is to be acquired and concentrated in the presidency and used for *personal* reasons. Neustadt’s favorite president is Franklin D. Roosevelt (FDR) and he criticizes Dwight D. Eisenhower for failing to seek political power for personal use. “The politics of self-aggrandizement as Roosevelt practiced it affronted Eisenhower’s sense of personal propriety” (Neustadt 1964, 157). Was it Eisenhower’s “personal propriety” or his respect for the constitutional values of separation of powers and federalism? Those questions of public law and constitutional principles did not interest Neustadt. FDR had every right to seek power for his own use and enjoyment: “Roosevelt was a politician seeking personal power; Eisenhower was a hero seeking national unity” (ibid.). Because Eisenhower cared more for national unity than personal power, Neustadt dismissed him as “an amateur” (ibid., 170, 171, 182).

Of the many case studies in the book, one focuses on the Korean War. Neustadt faults Truman for giving too much latitude to General Douglas MacArthur and talks about the Supreme Court’s decision in 1952, striking down Truman’s effort to seize steel mills to prosecute the war. Nowhere does Neustadt ask whether Truman possessed constitutional or legal authority to go to war against North Korea. Certainly Truman made no effort to “persuade” Congress to grant him authority to take the country to war against another country, as all presidents before Truman felt compelled to do. For Neustadt, there was no need for “give-and-take” or “shared power.” It was Truman’s job “to make decisions and to take initiatives.” Among Truman’s private values, “decisiveness

was high upon his list.” Truman’s image of the president was “man-in-charge,” and Neustadt wrote for “a man who seeks to maximize his power” (Neustadt 1964, 166, 171).

To exercise authority, a president needed confidence “that his image of himself in office justify an unremitting search for personal power” (Neustadt 1964, 172). The emphasis here is on personal power, not institutional power or constitutional authority. Such a framework fits the needs of an American president but also Adolf Hitler, Benito Mussolini, and Joseph Stalin. Neustadt again: “The more determinedly a President seeks power, the more he will be likely to bring vigor to his clerkship. As he does so he contributes to the energy of government” (*ibid.*, 174). Neustadt measured success by action, vigor, decisiveness, initiative, energy, and personal power. Absent from his analysis were constitutional checks, separation of power, federalism, sources of authority, and the ends to which power is put. As political scientist John Hart has observed, Neustadt evaluates a president “on the basis of his influence on the outcome, but not on the outcome itself” (Hart 1977, 56).

In an afterword to the 1964 edition, Neustadt explained that the prospect of nuclear war effectively amended the Constitution: “when it comes to action risking war, technology has modified the Constitution: the President perforce becomes the only such man in the system capable of exercising judgment under the

dustry” and objected to Neustadt’s suggestion that if a president “lacks a consuming hunger for the office and a penchant for manipulating people, then he or she is unfit for office” (Cronin 1975, 28, 30). The final chapter of Cronin’s book has a title that would have been inconceivable to Rossiter, Schlesinger, Commager, and Neustadt: “Making the Presidency Safe for Democracy.”

After 1970, it was unclear whether scholars, faced with the abusive record of Vietnam and Watergate, would fully repudiate models of a strong president or just make temporary and reversible adjustments. There was a good deal of the latter. As explained by John Hart, some scholars interpreted the two crises merely as tragic aberrations by the particular occupant of the White House and continued to support expansive models of presidential power (Hart 1977). In a 2005 article, David Gray Adler summarized his review of introductory textbooks on American government and how they describe the allocation of foreign affairs and the warmaking power between the president and Congress. For the most part, these texts taught that American foreign policy is dominated by the president and his advisers (Adler 2005).

From the 1940s to the 1960s, those who consistently critiqued presidential power and defended Congress and republican government tended to be conservatives, including Friedrich Hayek, James Burnham, Willmoore Kendall, and Alfred de Grazia (Hayek

Neustadt measured success by action, vigor, decisiveness, initiative, energy, and personal power. Absent from his analysis were constitutional checks, separation of power, federalism, sources of authority, and the ends to which power is put.

extraordinary limits now imposed by secrecy, complexity, and time.” Under those conditions, the president “remains our system’s Great Initiator. When what we once called ‘war’ impends, he now becomes our system’s Final Arbiter” (Neustadt 1964, 187–88, 189).

No nuclear weapons were used in the Korean War. To Neustadt, presidents could initiate both conventional and nuclear wars. When the book was reissued in 1990 under a different title, Neustadt seemed to alter his model of the president in view of the abuse of executive power during the Vietnam War and Watergate. He now wrote, in a manner entirely different from the tone of his 1960 and 1964 editions: “To share is to limit; that is the heart of the matter, and everything this book explores stems from it” (Neustadt 1990, x). Nothing in his earlier editions advanced those values.

PRESIDENTIAL MODELS AFTER NEUSTADT

In a paper delivered at the 1970 American Political Science Association Annual Meeting, Thomas Cronin poked holes in romantic and idealized models of the presidency. Entitled “The Textbook Presidency and Political Science,” Cronin criticized scholars for promoting “inflated and unrealistic interpretations of presidential competence and beneficence.” Infatuation with the presidency necessarily diminished the role of Congress, the Constitution, checks and balances, separation of power, and democratic processes (Cronin 1970).

Five years later, in *The State of the Presidency*, Cronin developed those themes in a chapter called “The Cult of the Presidency: A Halo for the Chief.” He described the writings of Rossiter as “one of the most lucid venerations of the American presi-

1944, Burnham 1959, Kendall 1960, de Grazia 1967). Kendall’s article in 1960 reviewed some prevailing stereotypes, with intellectuals believing that the executive reflected “enlightened opinion” and Congress representing low principle, reaction, and unintelligence (Kendall 1960, 325). Yet Kendall observed that members of the House, because of the size of their constituency, were more likely to be “talking about *something*, not *nothing*,” and that as the constituency increased in size to the Senate and the president, those elected officials were more likely to find themselves talking about “*nothing*, not *something*, and will also find themselves talking about situations and problems that are too large, too complicated, for them to understand” (*ibid.*, 343, emphases in original). By the 1970s, these conservative voices would be replaced by conservatives and neocons who vigorously championed presidential power, especially in the field of national security: Irving Kristol, Jeffrey Hart, Norman Podhoretz, Charles Krauthammer, Gordon Crovitz, Jeremy Rabkin, and Terry Eastland (Kristol 1974, Hart 1974, Podhoretz 1976, Krauthammer 1987, Crovitz and Rabkin 1989, Eastland 1992).

Among conservative scholars, Joseph Bessette is a refreshing example of someone who values thoughtful consideration of constitutional issues and the deliberative process (Bessette 1994). In a volume edited with Jeffrey Tulis in 1981, he placed presidential power within the framework of a constitutional order (Bessette and Tulis 1981). In 2009, Bessette and Tulis issued a new edition of their book, with many new authors (Bessette and Tulis 2009). Mickey Edwards, who served for many years as a Republican member of the US House of Representatives from Oklahoma, is

another conservative who continues to defend the system of checks and balances and separation of powers. His book *Reclaiming Conservatism* (2008) deplored House and Senate Republicans for functioning as “just another executive branch agency, waiting for orders from the president and his staff” (Edwards 2008, 81). He criticized the Bush administration for its “arrogance of power” and “an unusually high degree of incompetence” (ibid., 95).

Many critiques of presidential power appeared in the 1980s and 1990s. Books by Larry Berman analyzed the miscalculations and deceit of President Lyndon Johnson in escalating the Vietnam War. Manipulations of information helped discredit Johnson and his advisers (Berman 1982; Berman 1989). John Burke and Fred Greenstein demonstrated how Johnson’s style of leadership compared unfavorably to Eisenhower’s and undermined the reality, feasibility, and constitutionality of US national security policy (Burke and Greenstein 1989). H. R. McMaster, an Air Force major, published a scathing critique of how the Johnson administration contributed to failures in Vietnam because of partisan motivations, miscalculations, the timidity of the Joint Chiefs in presenting Johnson with realistic opinions, and a record of lies and deceptions (McMaster 1998).

Stephen Skowronek, in *The Politics Presidents Make* (1993), rejected Neustadt’s argument that previous presidents had a choice between exercising leadership and confining themselves to the role of clerk, “simply fulfilling the constitutional responsibilities of the office.” He said Neustadt “set the modern incumbents apart from their predecessors with a mere caricature of the past. The notion of a prior age when presidents did not *have* to be leaders—an age when vital national interests were only sporadically at the fore and most presidents could rest content with mere clerkship—is nothing more than a conceit of modern times” (Skowronek 1993, 5, emphasis in original). Skowronek did not discuss or analyze the writings of Rossiter, paid little attention to Schlesinger other than brief footnotes (ibid. 468, n.4; 489, n.17; 490, n.22), and mentions Corwin only in one footnote (ibid. 495, n.88).

The University Press of Kansas has published numerous works that explored the presidency within a legal framework and underscored the importance of congressional and judicial checks (Adler and George 1996, Adler and Genovese 2002, Fisher 2004, Fisher 2007a). Alexander DeConde, in 2000, released a trenchant analysis of executive wars, noting that scholars and other writers “built an industry out of the study of the presidency. They gave it fictitious qualities that defied reality” (DeConde 2000, 5).

Aside from the war power, contemporary scholars have explored particular authorities of the president in a manner that places executive power within a rich and balanced system of politics and law. No effort is made to idealize or romanticize presidential virtues. These studies include the work of Mark Rozell on executive privilege, Robert Spitzer on the veto power, Mitchel Sollenberger on the power to nominate, and Jeffrey Crouch on the pardon power (Rozell 2010, Spitzer 1988, Sollenberger 2008, Crouch 2009). Sollenberger and Rozell have a book in production that analyzes presidential “czars” within a broad constitutional framework (Sollenberger and Rozell 2012). All of these scholarly works subordinate presidential power to a higher value: maintaining republican government.

EXECUTIVE CLAIMS FROM VIETNAM TO THE IRAQ WAR

On August 3, 1964, President Johnson ordered the US Navy to retaliate against the North Vietnamese for their attacks on the

US destroyer *Maddox* in the Gulf of Tonkin. One day later he described a second attack, this one against two American destroyers. Questions were immediately raised whether there had been a second attack. On August 4, a US naval commander in the area cabled that his review of the second action “makes many recorded contacts and torpedoes fired appear doubtful. Freak weather effects and over-eager sonarman may have accounted for many reports. No actual visual sightings by *Maddox*. Suggest complete evaluation before any further action” (US Senate 1968, 54). Nevertheless, Congress quickly passed the Tonkin Gulf Resolution to authorize President Johnson to take “all necessary measures” to repel armed attack and prevent further aggression (Tonkin Gulf Resolution 1964). The war sharply escalated in the spring of 1965.

Doubts about the second attack continued to surface. Defense Secretary Robert McNamara announced in 1995 he was “absolutely positive” the second attack had never taken place (Richburg 1995, A21, A25). A study by Edwin Moïse concluded on the basis of official documents and interviews there was no second attack (Moïse 1996). In 2005, the *New York Times* reported that a study by the National Security Agency cast doubt on the second attack, but the research paper was classified (Shane 2005, A1). The agency declassified the study and released it to the public. The analyst concluded that the “second attack” was actually late signals coming from the first (Hanoyk 2005). In short, the second attack used to justify a major war was imaginary, not real.

President George H. W. Bush initially claimed he could go to war against Iraq in 1990 without obtaining authority from Congress. He and other executive officials argued that a resolution adopted by the UN Security Council on November 29, 1990, provided sufficient authority. A constitutional crisis was avoided on January 12, 1991, when Congress passed legislation to authorize military action. In signing the bill, Bush indicated that he could have acted without statutory authority: “As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.” His signing statement did not alter the fact that the resolution passed by Congress specifically authorized him to act. What counted legally and constitutionally was the language in the public law, not what Bush said about it (Fisher 2004, 169–73).

President Bill Clinton used military force against other countries repeatedly without once coming to Congress for authority. Countries on the receiving end of his decisions to bomb and send in American troops included Iraq, Somalia, Haiti, Bosnia, Afghanistan, Sudan, and Yugoslavia (Fisher 2004, 175–201). When Congress considered restrictions on those military initiatives, he objected that any legislative interference would infringe on his constitutional authority to make foreign policy and deploy troops. He promised to “strenuously oppose such attempts to encroach on the President’s foreign policy powers” (*Public Papers of the Presidents* 1993, 2: 1764). Frequently he justified his use of military force by calling it the “right thing to do” (*Public Papers of the Presidents* 1995, 2: 1784). Whether it was the legal thing or the constitutional thing did not seem to matter. Throughout his presidency I wrote frequent critiques of his public statements about the scope

of his war powers (Fisher 1995b, A21–22; 1995c, 21; 1996a, 22–23; 1996b, 214–31; 1998; 2002, 229–53).

On October 7, 2002, in a speech from Cincinnati, Ohio, President George W. Bush explained why military force might be necessary against Iraq. He claimed that Iraq was reconstituting its nuclear weapons program by purchasing aluminum tubes to enrich uranium for nuclear weapons (*Weekly Compilation of Presidential Documents* 2002, 38: 1728). Other executive agencies concluded that the tubes were not part of a nuclear weapons program, but were intended for small artillery rockets. On July 9, 2004, the Senate Intelligence Committee reported that “the information available to the Intelligence Community indicated that these tubes were intended to be used for an Iraqi conventional rocket program and not a nuclear program” (US Senate 2004, 131).

Working jointly with the CIA, the State Department released a “Fact Sheet” on December 19, 2002, objecting that a report that Iraq had issued “ignores efforts to procure uranium from Niger. Why is the Iraqi regime hiding their uranium procurement?” (US Department of State 2002, emphasis in original). The following month, in a State of the Union Address, President Bush announced that the “British Government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.” Why did he rely on British instead of American intelligence? His statement was later discredited when it was discovered that the documentary evidence about Iraq seeking uranium ore had been fabricated. On July 7, 2003, the administration conceded that Bush should not have included the claim about Iraq trying to buy uranium from Africa in his State of the Union Address (Pincus 2003, A1; Sanger 2003, A1).

The State Department “Fact Sheet” also asked: “What is the Iraqi regime trying to hide about their mobile biological weapons facilities?” President Bush mentioned these mobile labs in his State of the Union Address on January 28, 2003. In May 2003, several months after military operations were under way in Iraq, the United States discovered one of these labs, prompting President Bush to announce from Poland: “We found the weapons of mass destruction [WMDs]. We found biological laboratories” (*Weekly Compilation of Presidential Documents* 2003, 39: 690). Experts inspected the labs and concluded that the most likely use for the trailers was to produce hydrogen for weather balloons, not biological weapons (Jehl 2003, A1). In October 2004, US inspector Charles Duelfer said that the trailers could not have been used for a biological weapons program and were manufactured to generate hydrogen for weather balloons (Jehl 2004, A22). Other claims by the Bush administration regarding an alleged link between Iraq and al-Qaeda, the existence of chemical and biological programs, and the capacity of Iraqi unmanned aerial vehicles to deliver WMDs, were similarly empty of substance (US Senate 2004, 154–56, 160–61, 188, 211, 235–36, 253, 286, 295, 322, 338, 346). In September 2004, the UN’s chief weapons inspector found no evidence that Iraq had ever developed unmanned aerial vehicles (UAVs) capable of dispersing chemical and biological weapons. The drones were developed for reconnaissance, not part of a WMD program (Lynch 2004, A28).

PRESIDENTIAL STUDIES AFTER SEPTEMBER 11

The traumatic shock of the terrorist attacks of September 11 provoked two types of scholarly responses. Some studies reiterated the danger of concentrating public policy decisions (especially over war) in the president. Other studies disagreed, concluding that in

times of crisis it is necessary to vest in the president the decisive control over military actions.

Richard Pious in a 2002 article called “Why Do Presidents Fail?”—later expanded to a book in 2008—said it was time to revisit many of Neustadt’s formulations, such as his distinction between the “amateur” president (Eisenhower) who first thinks of the public interest and his political stakes, and the “professional” (FDR) who defines the public interest in terms of his political advantage (Pious 2002; Pious 2008). In his book version, Pious says that Neustadt engaged in a “sleight of hand” by arguing that the president should define public policy “in terms of his own power stakes, because that is the professional way to develop the most viable public policy.” But why, Pious asked, would those he is attempting to persuade want to comply with a policy simply because it is in the president’s personal interest? (Pious 2008, 262). Earlier, in 1984, Pious joined with Christopher Pyle to write an excellent study, *The President, Congress, and the Constitution* (Pyle and Pious 1984). They recently published an update under a new title, bringing together a range of significant materials to analyze not merely presidential power but legitimacy (Pyle and Pious 2011).

In 2005, Andrew Rudalevige published *The New Imperial Presidency*, giving him an opportunity to evaluate the presidential models of Rossiter, Schlesinger, Commager, and Neustadt. Rudalevige has a brief paragraph on Rossiter (Rudalevige 2005, 54), which summarizes but does not analyze that presidential model. He uses the same approach with brief references to Neustadt; they are descriptive, not analytical (*ibid.*, 40, 54–55, 266, 279). There are many references to Schlesinger, but all are laudatory for challenging “The Imperial Presidency” and urging Congress to assert itself (*ibid.*, 4–5, 12, 31, 50, 79, 80, 99, 116, 263, 271, 276). Rudalevige did describe Schlesinger’s previous position as an “advocate of an energetic executive” (*ibid.*, 57) but makes no mention of Schlesinger’s support for Truman’s Korean War or Schlesinger’s later apology for slipshod scholarship. At the end of the book, Rudalevige separates himself from Rossiter, Schlesinger, Commager, and Neustadt by expressing support for an assertive and independent Congress and a public that is actively engaged in challenging both Congress and the president.

James Pfiffner turned his attention (and ours) to presidential lies, big and small. An article published in 2004 critically examined statements by the Bush administration after September 11 designed to promote the war against Iraq (Pfiffner 2004a). Pfiffner followed with a book, also published in 2004, looking more carefully at presidential character and the propensity to deceive (Pfiffner 2004b). In 2008, with his book *Power Play*, Pfiffner repudiated the political model that permits a president to act militarily, on his own, cut free of the system of checks and balances (Pfiffner 2008). Other critiques of unilateral presidential power appeared after September 11 by Charlie Savage, Matthew Crenson and Benjamin Ginsberg, Alasdair Roberts, Gene Healy, Dana Nelson, Peter Shane, and Robert Kennedy (Savage 2007; Crenson and Ginsberg 2007; Roberts 2008; Healy 2008; Nelson 2008; Shane 2009; Kennedy 2010).

At the same time, a number of authors have defended broad presidential power in times of crisis. In *Terror in the Balance* (2007), Eric Posner and Adrian Vermeule look to the executive branch as the only institution of government with the resources, power, and flexibility to respond to threats of national security. Civil liberties are appropriately compromised because they “interfere with

effective response to the threat” (Posner and Vermeule 2007, 4). They wrote the book to “restrain other lawyers and their philosophical allies from shackling the government’s response to emergencies with intrusive judicial review and amorphous worries” about the consequences of executive actions in the face of threats (ibid., 275). Their warning to lawyers, of course, should have silenced them as well. As lawyers, “we do not have any expertise regarding optimal security policy, and so we do not try to argue for or against any particular policy” (ibid., 6). They had “no opinion about the merits of particular security measures after 9/11 . . . We hold no brief to defend the Bush administration’s choices, in general or in any particular case” (ibid., 7). They advised judges to defer to executive decisions “though we have no view about whether these policies are correct” (ibid., 94).

Their penchant for academic modesty covered past events as well, including the detention of more than 100,000 Japanese-Americans during World War II. Posner and Vermeule “do not defend the internment order on the merits, because we lack the necessary expertise to judge, even in hindsight, whether the action was justified, all things considered” (Posner and Vermeule 2007, 113). Why is it better to be agnostic on all matters in the field of national security? On what value basis (and *it is a value*) do Posner and Vermeule favor the concentration of power in the executive and argue that the country is in better hands when that power is left unfettered by legislative, judicial, popular, and international constraints? (Fisher 2007b).

Fatovic puts his hopes on the virtue of citizens capable of assessing the performance of elected leaders and being able and willing to “challenge abuses of the power they entrust to their leaders.” On that note, the framers would likely nod their approval.

Posner and Vermeule promote a similar theme in a second book, *The Executive Unbound: After the Madisonian Republic* (2010). They adopt two entirely different methods of analysis. They realistically and concretely look at the deficiencies of Congress and the judiciary and conclude that neither branch can be entrusted with national security policy. When they turn to the executive branch, and particularly the president, they abandon realism and embrace a view of executive power that is highly idealistic and imaginary. They attribute to presidents an array of talents and capacities rarely seen in any occupant of the office. According to their analysis, the president “knows the range of options available, their likely effects, their expected costs and benefits—thanks to the resources and expertise of the executive branch—and so, if he is well-motivated, he will choose the best measures available” (Posner and Vermeule 2010, 130). They pay no attention to presidential incompetence and errors of judgment in such wars as Korea, Vietnam, and Iraq (Fisher 2010b). Posner and Vermeule advise “normative theorists” to “cease bemoaning the decline of Madisonianism and instead make their peace with the new political order” (Posner and Vermeule 2010, 209). In fact, their book is dedicated to normative theory from start to finish, advocating a strong President checked not by law but by social and cultural constraints. The advice of two law professors is to trust not in law but in public opinion and political constraints, “substituting the rule of politics for the rule of

law” (ibid., 14). Why would anyone want to live in a political system dominated by a president who is unchecked by the rule of law? If the president designated Posner and Vermeule as terrorists and subjected them to indefinite detention, would they have no recourse to the courts? (Fisher 2011a).

Another book generally favorable to independent presidential power is by Benjamin Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (2009). Although the subtitle draws attention to peril, he supports an executive discretion to act “in certain exigencies” outside the law “in ways that the laws either should not or could not have anticipated.” Congress cannot by statute anticipate “the whole variety of responses that may become necessary in certain circumstances” (Kleinerman 2009, 7). After acting outside the law or even against it, the president “must show why such power is necessary,” at which point Congress can decide if the president acted improperly and merits legislative sanctions, including impeachment and removal (ibid., 8, 11, 101, 111–13). History demonstrates that the latter procedure is not a credible constraint.

Kleinerman defines executive power so broadly that he invites and encourages presidential initiatives outside the law: “The constitutional order assumes that the executive can keep us secure in a manner that no other institution can” (Kleinerman 2009, ix). What constitutional or political arguments support that assumption? The framers understood that executives can make the country both secure and insecure, as John Jay explained in

Federalist No. 4 and as many of the framers stated expressly, and repeatedly, at the Philadelphia Convention and the state ratification debates. Part of Kleinerman’s trust in presidential power comes from Justice Sutherland’s complete misreading of the “sole organ” doctrine in *Curtiss-Wright* (ibid., 1–2). Kleinerman does not examine John Marshall’s speech to understand Sutherland’s misconception and distortion. In 2011, Kleinerman wrote a thoughtful analysis of *The Executive Unbound*, explaining how Posner and Vermeule failed “to understand Madison on his own terms” and failed to understand “the true grounds of the system of separation of powers that they spend the book critiquing” (Kleinerman 2011).

Clement Fatovic, in *Outside the Law* (2009), insists that “emergencies sometimes compel the executive to exceed the strict letter of the law” (Fatovic 2009, 2). At various places he appears to accept the legitimacy of “inherent” presidential powers and why it is necessary for citizens to depend on the virtue of the executive (ibid., 6). By the end of the book, however, he concludes that virtue is not only a nebulous standard but that US presidents have demonstrated little capacity for conducting themselves in a manner that justifies placing trust in their judgments and decisions. Fatovic recognizes that the US constitutional system does not depend exclusively or even primarily on the “virtue” of the president. Institutional and structural checks were “designed to operate well enough even without that virtue” (ibid., 224).

In the concluding chapter, Fatovic shifts back and forth on the need of presidents to operate outside the law. “Although the increased reliance on law gives the impression that it is no longer necessary to resort to extralegal action, there may still be good reasons not to abandon the idea of executive prerogative” (Fatovic 2009, 254). Later, he is ready to jettison high hopes for a virtuous president. To Fatovic, presidential conduct over the last half century offered scant evidence of virtue or even competence. Fatovic puts his hopes on the virtue of citizens capable of assessing the performance of elected leaders and being able and willing to “challenge abuses of the power they entrust to their leaders” (ibid., 276). On that note, the framers would likely nod their approval (Fisher 2009c).

Scott M. Matheson, Jr., in *Presidential Constitutionalism in Perilous Times* (2009), advocates “executive constitutionalism,” a presidential attitude that respects the need for statutory authority, judicial checks, and a significant role for the press, academics, public interest groups, and the general public. Executive constitutionalism means “accountability to the Constitution and the people by basing government action as much as possible on the broadest basis of legitimacy—executive action authorized by Congress” (Matheson 2009, 31). The presidency “requires a constitutional conscientiousness that was lacking in the George W. Bush administration” (ibid., 5). One of the “great ironies” of the Bush administration was “the spectacle of the United States promoting democracy and the rule of law as the ultimate answer to chaos

military operations in Libya did not amount to “war.” Later, after the operations exceeded the 90-day limit of the War Powers Resolution (WPR), President Obama was advised by White House Counsel Robert Bauer and State Department Legal Adviser Harold Koh that the operations did not even constitute “hostilities” within the meaning of the WPR (Fisher 2012). Other legal arguments by the executive branch violated basic constitutional principles, including the assertion that military actions in Libya had been “authorized” by the UN Security Council and NATO allies.

During his presidential campaign, Obama was asked by *Boston Globe* reporter Charlie Savage whether the president had constitutional authority to bomb suspected nuclear sites in Iran without congressional authorization. Obama replied: “The President does not have the power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” Other than instances of self-defense, it was “always preferable to have informed consent of Congress prior to any military action” (Obama 2007). Nothing done by Libya in 2011 amounted to an actual or imminent threat to the United States.

Instead of seeking and obtaining congressional authority, Obama announced on March 21, 2011, that US forces “at my direction” had commenced military operations against Libya. He said the military initiatives were “authorized by the United Nations (UN) Security Council” (Obama 2011a). It is legally and constitutionally impermissible to transfer the war powers of Congress to

Other than repelling sudden attacks and protecting American lives overseas, presidents may not take the country from a state of peace to a state of war without seeking and obtaining statutory authority.

and crisis in the Middle East when the President simultaneously claimed powers that would compromise our own commitment to constitutionalism” (ibid., 31).

As is the case with many studies on presidential power, Matheson fails to analyze superficial concepts and doctrines that administrations use to inflate executive power. He refers to the “sole organ” doctrine frequently used to justify unilateral, plenary, independent executive actions, but that doctrine is *utterly empty* as a source of unchecked presidential power. Matheson does note that Justice Sutherland’s decision in *Curtiss-Wright* is “historically flawed” (Matheson 2009, 29), but it is necessary to dissect the vacuity of that doctrine. Matheson rejects as unconstitutional the Torture Memo, the Terrorist Surveillance Program, and many other actions by the Bush administration. Oddly, he concludes with this thought: “Ultimately the nation places its trust in the hands of one person whose constitutional mandate is to keep Americans safe and free” (ibid., 160). That sentence contradicts his earlier position that the Constitution cannot place such trust in a single person and that joint action with at least another branch is needed to satisfy constitutionality (Fisher 2009d).

PRESIDENT OBAMA AND LIBYA

Legal opinions from the Obama administration advanced two remarkable claims for presidential power. A memo by the Office of Legal Counsel on April 1, 2011, concluded that the extensive

an international (UN) or regional (NATO) body. The president and the Senate, through the treaty process, may not surrender power vested in the House of Representatives and the Senate by Article I. Treaties may not amend the Constitution (Fisher 1995a; Fisher 1997; Fisher 2011c).

On March 28, in an address to the nation, Obama stated that the major part of Libyan military operations would be transferred to NATO allies (Obama 2011b). Two days earlier, State Department Legal Adviser Koh spoke of all 28 NATO allies having “now authorized” military actions in Libya (Koh 2011). Like the UN Charter, NATO was created by treaty and no treaty can shift the authorizing function from Congress to outside bodies. That fundamental constitutional principle is safeguarded by Section 8 of the War Powers Resolution. Authority to send US troops into hostilities “shall not be inferred” from a treaty unless Congress passes legislation that specifically authorizes the military action (War Powers Resolution 1973). The authorizing body is always Congress, not the UN Security Council or NATO.

On April 1, 2011, the Office of Legal Counsel (OLC) reasoned that the meaning of “war” is satisfied “only by prolonged and substantial military engagements, typically involving exposure of US military personnel to significant risk over a substantial period” (US Department of Justice 2011, 8). Following that analysis, OLC concluded that military operations in Libya were not “war.” If US casualties can be kept low, no matter the extent of

physical destruction to another nation and loss of life, war to OLC would not exist within the meaning of the Constitution. If another nation sent missiles into New York City or Washington, DC and did so without suffering significant casualties, would we call it war? Obviously we would.

By early June 2011, US military operations in Libya had exceeded the 60-day clock of the War Powers Resolution. The statute requires presidents to begin withdrawing troops and complete that step within the next 30 days. On June 15, in response to a resolution passed by the House of Representatives on June 3 (H. Res. 292), the Obama administration submitted a 32-page report to the House of Representatives. Instead of challenging the constitutionality of the WPR, the administration interpreted the statute to mean that military actions in Libya did not constitute “hostilities” because they did not “involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of US ground troops, US casualties or a serious threat thereof . . .” (Obama 2011c, 25).

This analysis ignores the political context in which the WPR was debated and enacted. Part of the momentum behind passage of the statute concerned the decision of the Nixon administration to bomb Cambodia (Eagleton 1974, 150–83). The massive US air campaign did not involve “sustained fighting or active exchanges of fire with hostile forces,” the presence of US ground troops, or substantial US casualties. Nevertheless, it was understood by all parties that the bombing constituted hostilities and helped prompt Congress to enact statutory restrictions on presidential power.

According to the analysis of the Obama administration, if the United States conducted military operations by bombing at 30,000 feet, launching Tomahawk missiles from ships in the Mediterranean, and using armed drones, there would be no “hostilities” in Libya (or anywhere else) under the terms of the WPR, provided US casualties were minimal or nonexistent. Following the reasoning of the Obama administration, a nation with superior military force could pulverize another country, including the use of nuclear weapons, and there would be neither hostilities nor war (Fisher 2011d; Fisher 2012). Various administrations, eager to press the limits of presidential power, seem to understand that they may not—legally and politically—use the words “war” or “hostilities.” Apparently they recognize that using words in their normal sense, particularly as understood by members of Congress, federal judges, and the general public, would acknowledge congressional preeminence. Other than repelling sudden attacks and protecting American lives overseas, presidents may not take the country from a state of peace to a state of war without seeking and obtaining statutory authority. To sidestep that constitutional principle, presidents have gone to great lengths to explain to Congress and the public that what they are doing is not what they are doing. When President Truman went to war against North Korea in 1950 without coming to Congress for authority, he described the military operations as “a police action under the United Nations.” Other presidents, including Lyndon Johnson and Bill Clinton, have been duplicitous with words and actions in their use of military force (Fisher 2011e).

CONCLUSIONS

Thomas Cronin helped puncture imaginary qualities that other scholars had bestowed on the American president. In a recent book, *On the Presidency* (2010), he reviews the record of 14 presidents from 1920 to 2009 and concludes: “Maybe about three were

successful. At least half a dozen failed in one way or another” (Cronin 2010, 2). He deleted from the list of successful presidents those who were forced from office, impeached, rejected when they sought reelection, or decided to step aside rather than face voter rebuke. Those who survived that winnowing process were three: Franklin D. Roosevelt, Dwight D. Eisenhower, and Ronald Reagan.

That is one realistic measure of the real presidency. Many studies on presidential power rely on imaginary and idealistic qualities. It is unfortunate that so much scholarly guidance came from the works of Schlesinger, Commager, Rossiter, and Neustadt, who looked less to evidence than their own personal and idiosyncratic fancies. The fault is not merely in the deficiencies of their research but in the willingness of the academic profession to tolerate their work for such a long time and to extend repeated and undeserved praise. Some contemporary scholars continue to attribute to the presidency highly romantic qualities of integrity, honesty, and competence rarely seen in those who sit in the Oval Office. ■

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