The Executive Branch

Joel D. Aberbach
Mark A. Peterson
Editors
THE EVOLUTION OF THE PRESIDENCY:
BETWEEN THE PROMISE AND
THE FEAR

Scott C. James

Presidents confront a yawning gulf between the duties of their office and the inadequate formal powers at their command. This fundamental asymmetry is at the heart of the presidency’s historical development. It has yielded an improvisational and opportunistic presidency, one whose incumbents are constantly on the make for short-term advantage in America’s system of shared powers. That presidents remain at a competitive disadvantage in this struggle for influence can be gleaned from contemporary scholarship. Leading students of the office conclude that presidential influence over Congress occurs “at the margins” of the policy process; moments of presidential domination are episodic and contingent at best. Indeed, these studies indicate that the successful exercise of presidential leadership is shaped more by the configuration of situational variables outside the president’s immediate control and less by the personal attributes of a particular incumbent or the institutional organization of his office.

These impediments to effective leadership simply make presidents work harder, prompting them to explore the available mechanisms of political control and to challenge the political and cultural conventions that define appropriate presidential behavior. The results of these leadership efforts have been consequential. Historically, the presidential struggle for political influence has wrought several fundamental changes and, in the process, helped lay the foundations for the modern presidency: a profound conceptual reworking of the office, one that
stresses the popular underpinnings of presidential authority; the rise of a powerful and centralized presidential establishment; and basic alterations in the patterned relationships between presidents and Congress, presidents and the permanent bureaucracy, and presidents and citizens at large. On different occasions, presidential improvisation has also set presidents against public law, the standard operating procedures of government, or the Constitution itself, often in the name of short-term political success.

The purpose of this chapter is to trace the historical emergence of the modern presidency, to isolate its essential features, and to pinpoint the factors driving change over time. The modern presidency is often depicted as emerging virtually full-blown from the actions of Franklin Delano Roosevelt. In fact, its constituent elements emerged piecemeal over the long course of American history, the product of constitutional ambiguities, political and electoral necessity, developments in technology and social organization, and unvarnished presidential ambition. However, the fundamental dynamic driving the development of the presidency is constitutional in nature. It is rooted in a basic polarity between the wide berth for discretionary action implicit in Article II and the modest grant of formal powers attached to the presidential office—or, to put it more succinctly, between a belief in executive leadership and a fear of executive power. The former impels presidents to act; the latter sends presidents scrambling for fresh sources of political influence to sustain their leadership projects. The result has been a process of constitutional change and extraconstitutional innovation central to the presidency's historical development. As Emmet John Hughes has remarked, the Framers did not so much define the contours of executive power as defer the question to the future. The presidential office was left purposefully "to be shaped by the live touch of history."²

Independence, discretion, and wide-ranging responsibility are three constituent features of the modern presidency that help lay the predicate for the contemporary exercise of executive leadership. They have also helped to feed exaggerated characterizations of American government as "presidential government" and America itself as a "presidential nation." While certainly not without empirical referents, such notions overstate the relative power of the office. The modern presidency is not a terribly strong presidency, let alone an imperial one. As an institution, it is inadequately endowed to meet the high contemporary expectations for national leadership; it is not fashioned for success. Of itself, independence does not create its own power resources; discretion does not necessarily yield political influence; and responsibility does not automatically foster its own requisite capacity. In the end, the modern presidency is a curiously paradoxical institution, one in which intrinsic institutional weakness stokes a latent cultural antipathy to executive power, as presidents in urgent search of ever greater political control erode public trust and fuel perceptions of an arrogant and aggrandizing office.

The discussion that follows will trace the evolution of the presidency from the era of the founders to the present day, examining in some detail the administrations of several chief executives deemed critical to the development of the presidential office. This evolution will be presented as a steady accrual of ancient traditions, conceptual innovations, and pragmatic experiments, elements that would be drawn together and synthesized by Franklin Roosevelt and posthumously labeled the "modern presidency." Some of the central scholarly writings on the post-Roosevelt presidency will also be examined, employing that literature as a device both for assessing contemporaneous attitudes toward the new "president-centered government" and for tracking that institution's continued transformation and growth. The conclusion of the chapter will return to a discussion of the paradoxes of the modern presidency and the challenges that confront the exercise of contemporary presidential leadership.

**Founding-Era Contributions**

Critical ideas regarding discretionary executive power are directly traceable to the Framers and, more broadly, to the political culture of the Founding Era. These understandings were rooted both in the ambiguities of the Constitution and in America's British political inheritance. They would provide a welcome cache of legitimacy for presidents seeking to justify ever-widening responsibilities and their authority to exercise independent leadership.

**The Article II Vesting Clause**

Some of the seeds of the modern presidency are sown into the fabric of the Constitution itself, especially the vaguely worded vesting clause that introduces Article II itself. Almost immediately, the founding generation would be forced to grapple with the ill-defined scope of the executive power. By comparison, the vesting clause that opens Article I was a model of exactitude. That article established a Congress of the United States and made clear reference to enumerated "powers herein granted"—language that precisely delineated and delimited the national legislative power. Article II was more open-ended—and by conventional rules of construction, intentionally so. It stated simply that "[t]he executive power shall be vested in a President of the United States." This description of "executive power" was left radically underspecified, though to enthusiasts of a strong presidency it implied a clear residuum of powers beyond those formally "herein granted." By this reading, the subsequent enumeration of particular powers served merely to exemplify the general grant of power contained in the vesting clause, and to delineate a set of specific limitations on that grant, as such in the requirement that presidents seek the advice and consent of the Senate in the making of treaties and executive appointments. Otherwise, the precise scope of the executive power was intentionally left to be interpreted in light of
concrete political exigencies, general constitutional principles, and accepted tenets of free government.

Future presidents would utilize the Vesting Clause, as well as the Take Care Clause and the Presidential Oath of Office (which together suggest the president's broader obligations to uphold the Constitution), to justify a wide berth for presidential actions not explicitly sanctioned by Article II's formal list of presidential powers.

Extra-Constitutional Traditions

Executive Prerogative. Many of the founding generation placed high value on an expansive understanding of the executive power. To them, Article II's underspecification of the executive power promised substantial returns to the commonweal. A well-structured relationship between the executive and the legislature required ample scope for presidential discretion. On this point, two of the founding era's most respected authorities, John Locke and William Blackstone, agreed. Writing in 1689, Locke had adjudged the good of society to require "that several things should be left to the discretion of him that has the executive power."

For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the society."

In the preceding passage, Locke is elucidating the prerogative power, and independent executive action was at the heart of that power. In his most concise formulation, Locke defined executive prerogative as "the power to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it." It was a spontaneous and uncontrolled power, one therefore responsive to contingent circumstances affecting the community welfare. Writing in 1765, a period more contemporaneous with the founding of the United States, William Blackstone concurred in the general utility of the executive prerogative, even if its exact contours were hard to pin down. It was something "singular and eccentrical [sic]." Blackstone wrote, though not necessarily arbitrary, for to be legitimate the prerogative was to be exercised to advance the public good. Because of its potential contributions to the public welfare, Blackstone further denied the authority of the legislature in many circumstances to limit the freedom of executive action. "For it would be of most mischief to consequence to the public," Blackstone wrote, "if the strength of the executive power were liable to be curtailed without its own express consent...."

In light of its historical association with British royal authority, political elites generally shield away from specific use of the term "prerogative." Moreover, the Constitution had denied to the American president many of the specific prerogatives traditionally enjoyed by the British king, such as the right to declare war. Nonetheless, the authority of Locke and Blackstone in the early republic lent credence to the notion that in any well-ordered political system, an independent and discretionary power must be lodged with some leader of high public trust in order to protect and advance the welfare of the community.

Salus Populi and the Limits of the Law. As leaders of high public trust in their own right, it is worth reflecting upon the political deals undertaken by the Framers themselves in pursuit of a new American Constitution. Their actions shed more light onto the contemporaneous norms of leadership from which future presidents might draw. "Publius" (the pseudonym under which James Madison, Alexander Hamilton, and John Jay wrote their essays defending the proposed Constitution) was only conceding the obvious when he admitted that delegates to the Constitutional Convention had exceeded their legal authority both in drafting a new Constitution and in submitting their handwork directly to the people for ratification (instead of to the state legislatures). Such patently unlawful actions led Publius to consider the circumstances under which public-minded officials might legitimately abrogate rules expressly drawn to direct and delimit their own political autonomy. In Publius's formulation, the question was "how far considerations of duty ... [could] surmount any defect of regular authority." Publius's answer was bold and certain: When necessity clashes with the laws, when substance collides with forms, a concern for the public good requires that the latter yield to the former.

Publius grounded his defense of public-spirited lawlessness in the doctrine salus populi suprema lex esto ("the welfare of the people is the highest law"). In invoking the salus populi, he endeavored to tap a reservoir of political values that he and his readers shared in common. Here he argued that "the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim ..." stipulates that where adherence to law jeopardizes the public good, the former must give way to the greater good. Indeed, Publius insisted that a defense of the law and of "ordinary forms" was often a haven for "those who wished to indulge, under these masks, their secret enmity to the substance intended for." Under such circumstances, it might be critical that leadership be seized "by some pantotic and respectable citizen or number of citizens" on behalf of some desirable but "infor- mal and unauthorized propositions."

Though unlawful, Publius considered such actions neither arbitrary nor illegitimate. What legitimated the actions of the Convention attendees—and what legitimates the unpunished actions of any elected official of high public trust—is that they must ultimately submit those actions before the bar of public opinion. Nor could the public's verdict be taken for granted. Voters might register their disapproval by rejecting both action and actor; conversely, they might
sustain both. A public officer could never know for certain which side of the line he was on, but it was the leader's obligation to assume such risk as a part of his charge, to exercise, in Publius's words, "a manly confidence in their country, by whose confidence they had been so peculiarly distinguished."  

We can see the influence of the sahů poupōl at work in the early history of the presidency, specifically in the writings of Thomas Jefferson. In the course of his eight-year presidency, Jefferson had been criticized for undertaking several unilateral actions for which no explicit constitutional authority could be cited. These included the Louisiana Purchase, the Chesapeake affair, and the so-called Burr conspiracy. The criticism cut hard, and the wound had not fully healed by the time Jefferson left office. Now in retirement, the ex-president found occasion to address more fully the question of whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law..." Jefferson's response to this question is revealing for its explicit reliance upon the sahů poupōl. Echoing Publius, the former president wrote:

A strict observance of the written laws is doubtless one of the highest duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

This emphasis on communal danger and self-preservation might seem to delimit the situations under which recourse to the sahů poupōl might legitimately be sought. However, the hypothetical scenario Jefferson subsequently developed to clarify his response is significant for the way it broadened the justification for unlawful presidential action beyond situations of dire necessity to reach more subjective calculations of "public advantage." Jefferson's hypothetical begins with a president who has been presented with an opportunity to purchase the Florida Territories (then in the possession of Spain) "for a reasonable sum." Congress is in recess, and, moreover, once back in session the president anticipates that congressional opponents might stymie timely action, closing the window of opportunity for the purchase. "Ought the Executive, in that case, and with that foreknowledge, to have secured the good of his country, and to have trusted to their justice for the transgression of the law? I think he ought, and that the act would have been approved." In closing, Jefferson reflected on the peculiar obligations of the presidential office and the mandate for independent and discretionary action implicit in them. Like Publius, Jefferson admits that in undertaking actions beyond the law, the president "does indeed risk himself on the justice of the controlling powers of the Constitution..." and of public opin-

ion. Nevertheless, the obligations of his high station require that the risk be taken.

It is incumbent on those only who accept great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.

The English tradition of executive prerogative, the doctrine of sahů poupōl, and the discretion afforded officers of high trust each shaped the latent meaning of Article II's vesting clause. Though its interpretation would continue to be hotly contested, these traditions would be available to presidents seeking to legitimate the exercise of unilateral action. They prescribed independent executive action when, in the president's own judgment, the public welfare demanded it. They suggested a natural right of presidents to be bound by neither constitutional law nor constitutional rule when the commonweal required political leadership. It indicated further that presidential actions undertaken without sanction of law could be legitimated retrospectively by popular acclamation. That is to say, it suggested that the principal constraint on independent presidential action might be plebiscitary in nature, not a reliance on formal constitutional mechanisms.

While the Cat's Away...  

One final aspect of government in the early republic briefly requires our attention. As Figure 1 makes clear, during the first forty years of the Constitution's existence (1789-1829), Congress spent an average of almost two-thirds of a four-year presidential term of office in recess. Indeed, from 1789 to 1807 (the 1st through 9th Congresses) Congress was in session on average only 45.6 percent of a presidential term. By comparison, since 1899 the average Congress has spent close to 90 percent of this same time frame in session.

Governance through the regular promulgation of new law was not considered to be a full time job in the early Republic. Perhaps Locke's dictum still held sway, that "[i]t is not necessary, no nor so much as convenient, that the legislative should be always in being..." However, while legislation was an irregular activity, the administration of the law required the executive's almost continuous presence. The impact of this basic feature of early American government on the development of the presidency was significant and it should not be lost on us. It created a political environment in which presidential independence and discretion could more readily be asserted and their parameters more easily tested—
that specific act of reinvention, Jackson’s “little bank war” produced several novel constitutional doctrines, most of which we take for granted today: that the presidency is an equal and autonomous branch of government; that only the president speaks with a national voice and, as such, more effectively embodies the popular will in politics; and that the president is the responsible head of the administration (and is therefore justified in ensuring that the executive branch is responsive to presidential direction). Each of these constitutional innovations will be examined here. The story of Jackson’s war on the Bank of the United States (BUS) is as dramatic as its constitutional ramifications were transformative. When Congress took up the issue of the Bank’s recharter in 1832, its original twenty-year charter was not due to expire for another four years. Anxious for an election-year issue that could cleave Jackson’s Democratic coalition and prevent his reelection, the Kentucky senator Henry Clay, Jackson’s presidential rival in that election year, arranged to have the recharter brought up for early consideration. Jackson’s opposition to the BUS was widely known, his views having been made clear in two successive annual messages to Congress. Knowing Jackson never to shrink from a fight, Clay maneuvered the anti-Jackson Congress into passing the recharter bill to force a presidential veto. Jackson obliged. Still, more fundamental issues were implicated in the president’s veto; with this action, Jackson had taken direct aim at the Jeffersonian doctrine of legislative supremacy. From this point on, Jackson now insisted, both the president’s policy preferences and his constitutional convictions must be accounted for in the formulation of congressional legislation.

Policy Leadership
Jackson announced his veto of the Bank recharter on July 10, 1832, provoking an immediate and vehement congressional outcry. Prior to Jackson’s administration, presidents had employed the veto power sparingly. Settled practice authorized vetoes where Congress’s authority to legislate in a given area was constitutionally murky, or where hasty consideration produced legislation with remediable technical deficiencies. The overriding constitutional function of the veto was to aid Congress in the performance of its deliberative functions, not to substitute the president’s judgment for the Congress’s on national policy matters.

Jackson directly challenged this practice. In his veto message, Jackson inducted the BUS as “irrepressible” and contrary to “sound policy.” In doing so, the president was directly expressing his personal pragmatic judgment. The Bank was, in his view, an institution not conducive to the national welfare, and legislation inconsistent with his assessment would meet the full force of the president’s power.

In taking these actions, Jackson was in fact asserting a leadership role for the president in the legislative process, signaling his intention to use the veto as a bar-

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The Jacksonian Revolution

The administration of Andrew Jackson (1829–1837) marks the first seminal juncture on the road to the modern presidency. When Jackson vetoed the bill to recharter the Second Bank of the United States in 1832, he set in train a series of events that would alter the constitutional foundations of the presidential office. Not the least of those transformations was the veto itself. But in addition to
gaining chip to force Congress’s hand in the struggle over public policy. The doctrine of congressional supremacy had been breached, with the president no longer willing to accept a constitutional scheme subordinate to the legislative power. Instead, Jackson had vindicated his institutional prerogatives as a coequal and coordinate branch of government, entitled to exercise the full measure of his personal discretion in the formation of national policy. The president, Jackson insisted, was the legislature’s constitutional equal in matters of national policy and it was Congress’s obligation to consult the president’s views prior to legislative deliberations or face the consequences.11

*Popular Mandate*

Jackson concluded his veto message with one last departure from settled practice: a direct appeal to voters. Having denied the authority of Congress to limit the president’s political independence, Jackson fastened onto the upcoming elections as yet another way to legitimate his attack on the BUS. However, Jackson did not invoke the special authority of presidential elections; that still lay in the future. Rather, he asked voters to vindicate his veto by repudiating the sitting Congress and sending new representatives to Washington to sustain the President’s critics. Jackson wrote:

A general discussion will now take place, eliciting new light and settling important questions; and a new Congress, elected in the midst of such discussion, will bear to the Capitol the verdict of public opinion, and I doubt not, bring this important question to a satisfactory result.12

Another important precedent had thus been set. An incumbent president was turning to the electorate to sustain the authority of his policy actions. Unfortunately for Jackson, the new Congress only partly fulfilled his expectations. While the House would soon be under Democratic control, the Senate remained under the sway of anti-Jacksonian forces. Undeterred, Jackson continued his assault on the Bank. Not content to wait four years for its original charter finally to expire, the President moved immediately to withdraw all federal deposits held by the BUS, thus bleeding the institution of its financial life’s blood. But on what authority did Jackson propose to act? The deposits were under the direct control of the Treasury Department, and the First Congress had conferred upon the secretary of the Treasury statuary discretion and direct obligations to the legislature that seemed to defy presidential control.

Once again Jackson turned to voters to justify his course of action. However, now the President shifted his ground. Confronted with the ambiguous results of the most recent congressional elections, Jackson seized upon the special authority of presidential elections, an authority grounded in the uniquely communal act of choosing a chief executive. “We are one people in the choice of President and Vice-President,” Jackson declared. “The people . . . are represented in the executive branch.”13 On September 18, 1833, Jackson notified his Cabinet of his intention to begin removing government deposits from the BUS. He also clarified the specific authority on which he would proceed. The president explained that Bank supporters had timed the recharter effort precisely to make it “a leading question in the election of a President of the United States . . . .” Indeed, “all steps deemed necessary had been taken” by his opponents “to procure from the people a reversal of the President’s decision.” Pro-Bank forces had put the matter before the people, the issue had been fully vetted on both sides, and the people had sustained the president. They had given Jackson a personal mandate to destroy the bank.

It was to compel the President to take his stand that the question was brought forward at that particular time. He met the challenge, willingly took the position into which his adversaries sought to force him, and frankly declared his unalterable opposition to the bank as being both unconstitutional and inexpedient. On that ground the case was argued to the people; and now that the people have sustained the President, notwithstanding the array of influence and power which was brought to bear upon him, it is too late, he confidently thinks, to say that the question has not been decided. Whatever may be the opinions of others, the President considers his election as a decision of the people against the bank.14

*Executive Unity and Responsibility*

Jackson’s war against the Bank also had lasting implications for the organization of the executive branch. In pressing forward his fight to remove the federal deposits from Bank control, Jackson was led to assert yet one further constitutional prerogative. The president insisted that his obligation to “take care that the laws be faithfully executed” required that all cabinet officers be placed in a subordinate relationship to him. Presidential responsibility for executive branch actions required Cabinet unity under presidential direction, and the only way that unity could be achieved was if administrative discretion resided solely with the president.

This doctrine of executive unity and responsibility was not fully elaborated when Jackson took office. As noted earlier, this was particularly true of the Treasury Department, which had enjoyed a close statutory relationship to Congress. The First Congress had granted treasury secretaries a considerable discretion in the execution of their duties; they were personally responsible to the legislature for all departmental actions; and they were required to submit to Congress in writing the reasons behind any such actions taken. This structural breach in the separation of powers set Jackson on a collision course with the Treasury once the president had determined his course of action. To him, the decision regarding where to store the federal deposits was purely an executive
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matter. Moreover, as chief executive, inferior executive officers were duty bound to follow his orders or be replaced by someone who would. In ordering his recess-accepting Treasury secretary to proceed, Jackson insisted: "A secretary, sir, is merely an executive agent, a subordinate. . . ." Jackson had finessed the problem early on by promoting his first secretary of the Treasury to secretary of State, installing a more pliant officer in his stead. However, the new secretary quickly asserted his independence. Jackson protested that any discretion vested in the Treasury secretary’s office was his to exercise by authority of the Constitution, which had vested the whole of the executive power in the president of the United States. The secretary, however, reassured his primary obligation to Congress and, moreover, refused to resign. The following questions were now ripe for resolution: Did the Treasury secretary "execute under the direction and authority of the president" and did he serve at his pleasure? Could the president remove a duly confirmed Treasury secretary without the prior approval of Congress? Jackson answered each question in the affirmative, summarily firing the new secretary and replacing him with Roger Taney, a loyal Jacksonian. Of this action, the historian of public administration Leonard White would conclude: "No single change in the practical operation of the executive branch gave Presidents greater power than this, for the capacity to remove could be used to induce almost universal compliance among officeholders, either by its exercise or by mere threat or expectation of use." 16

Lincoln’s Legacy

Abraham Lincoln’s precise impact upon the development of the presidency has been the subject of considerable dispute. Scholars on all sides of the debate acknowledge the unprecedented expansion of presidential power during the Civil War. Nevertheless, as many have rightly remarked, the transitory nature of this “Lincoln revolution” is equally striking, as is the tenacity with which old forms and practices were reasserted after the war’s end. 17 This reverence for ante-bellum institutional habits appears so comprehensive that one skeptic of Lincoln’s contributions to presidential development, Theodore Lowi, could justifiably remark, "By 1875 . . . you would not know there had been a war or a Lincoln." 18

It is certainly the case that Lincoln was, in many respects, "a Whig in the White House." 19 A staunch member of the Whig Party, Lincoln grew to political maturity amid years of vigorous party opposition to a string of strong Jacksonian presidents and inroads they had cut into traditional congressional prerogatives. Perhaps the clearest exposition of Whig principles had been set forth by President William Henry Harrison in his 1841 inaugural address. In that speech, Harrison expressly repudiated the Jacksonian model of the presidency. He denied the president’s more intimate proximity to the people and trusted Congress’s superior popular foundations. He further disavowed the use of the veto on policy grounds and more broadly condemned presidential interference in the legislative process. Likewise, Harrison rejected the Jacksonian doctrine of Cabinet subordination to the chief executive and promised to seek congressional consent before removing his Treasury secretary from office. 20

Harrison’s views were largely Lincoln’s, and as president, Lincoln put many of these orthodox Whig ideas into practice. In a clear repudiation of Andrew Jackson and subsequent Democratic presidents, Lincoln remained purposefully aloof from the legislative process and exercised his veto power sparingly. 21 He was also deferential to congressional Republicans in the matter of executive appointments and accorded his Cabinet members considerable autonomy in the day-to-day operations of their respective departments. Viewed from this angle, the Lincoln presidency would seem to have done more to retard than to advance movement toward modern presidential practices.

Emergency Powers

Still, to leave the discussion at this is to miss Lincoln’s central contribution to the modern presidency. It is certainly the case that Theodore Roosevelt found more to draw from Lincoln’s presidency than a strict Whig reading allows. What drew Roosevelt to Lincoln was the latter’s elucidation of presidential emergency powers. Indeed, Roosevelt predicated some of his more controversial actions as president on his understanding of what he called “the Jackson-Lincoln theory of the presidency.” As Roosevelt explained it, the theory held “that occasionally great national crises arise which call for immediate and vigorous executive action.” 22 Roosevelt used this Jackson-Lincoln model of executive leadership as the basis for his “stewardship theory” of the presidency.

The course I followed, of regarding the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service, was substantially the course followed by both Andrew Jackson and Abraham Lincoln. 23

This is the Abraham Lincoln we want to recover here. To Roosevelt the lesson was clear: “great national crises” unlocked the latent authority of the president, and it was Lincoln’s presidency that provided the model for the exercise of power under such conditions. After taking office, Lincoln had turned to the doctrine of emergency powers to justify a host of executive actions no otherwise justifiable by a strict reading of the Constitution: actions to blockade Southern ports; calling up the militia, expanding the size of the army and navy, and paying mobilized troops out of the Treasury without congressional appropriation; and suspending the writ of habeas corpus. Lincoln defended each of these actions on the basis of the civil emergency at hand and on a set of constitutional obligations
mandating affirmative action. These included his authority as commander-in-chief, as well as obligations to "take care that the laws be faithfully executed" and to "preserve, protect and defend the Constitution of the United States." In Lincoln's judgment, such affirmative obligations "implied an inherent executive power—a power not specifically itemized in Article II—to take any action necessary to fulfill them."

Lincoln was certainly not the first to recognize the fact that necessity—traditionally understood as military necessity—might require unilateral executive actions outside the boundaries of law. In the waning months of his presidency, Thomas Jefferson, reflecting on the threat posed by Aaron Burr's alleged secessionist movement in the Southwest Territories, would invoke the ancient Roman dictum, "inter arma silent leges" ("in time of war, the laws are silent"). In other words, Jefferson held, "self-preservation is paramount to all law." In Jefferson's judgment there were "extreme cases" in which "the laws become inadequate even to their own preservation, and where the universal resource is a dictator, or martial law." But it was Lincoln who first and most fully explored such "extreme cases" and their implications for presidential power. In a memorandum to the newly inaugurated president, written at Lincoln's behest, Attorney General Edward Bates laid the groundwork for Lincoln's assertion of emergency powers. Bates wrote,

> It is the plain duty of the President (and his peculiar duty above all other departments of Government) to preserve the Constitution and execute the laws all over the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government.

Subsequent presidents would elaborate upon Lincoln's precedent and expand the concept of emergency powers beyond the contexts of formal war and domestic insurrection. In so doing, they would significantly expand the president's field of independent action. To cite just three examples: In 1894, with the country suffering the effects of both economic depression and a massive railway strike, President Grover Cleveland would cite disruptions to interstate commerce and interstate mail service as emergencies justifying the dispatch of federal troops to suppress the strike and restore commercial life and postal service to the nation. Cleveland's deployment of federal troops was all the more significant because he possessed neither formal statutory authority for his actions nor the informal authorization of state and local authorities. Likewise, in 1902, with a Pennsylvania-based, anthracite-coal strike threatening the nation's supply of winter home-heating fuel, Theodore Roosevelt took unilateral steps to resolve the dispute between operators and mine workers. To Roosevelt, "the crisis was only less serious than that of the Civil War." Acknowledging the absence of a clear legal or constitutional basis on which to act, Roosevelt nonetheless took direct personal action to arbitrate the dispute, admitting that had his efforts proved unsuccessful, he was prepared to send the army into Pennsylvania to seize the mines and operate them in receivership until a settlement could be reached. What Theodore Roosevelt was prepared to do in 1902, Harry Truman would do fifty years later, as labor disputes in the steel industry threatened to paralyze the national economy and jeopardize national defense. Receiving private assurances from Chief Justice Fred Vinson that the actions contemplated were indeed constitutional (assurances that would not be vindicated by the fall Supreme Court), Truman signed executive order 10340 on April 8, 1952, directing the secretary of Commerce to take control of some eighty-eight steel mills the following day, explaining to his cautious treasury secretary, John Snyder, that "the President has the power to keep the country from going to hell."
the men holding public office and the men in control of the organization, and appealing directly to the people behind them."

In theory the Executive has nothing to do with legislation. In practice as things are now, the Executive is or ought to be peculiarly representative of the people as a whole. As often as not the action of the Executive offers the only means by which the people can get the legislation they demand and ought to have. Therefore a good executive under the present conditions of American political life must take a very active interest in getting the right kind of legislation, in addition to performing his executive duties with an eye single to the public welfare.... I accomplished this only by arousing the people, and riveting their attention on what was done."

As Roosevelt well understood, whatever control party bosses might have had over legislators, the latter were still, first and foremost, elected officials, and in the last resort the people [i.e., voters] behind these legislators had a still greater control over them. It was a lesson Roosevelt never forgot. "I made up my mind that the only way I could beat the bosses whenever the need to do so arose... was... by making my appeal as directly and as emphatically as I knew how to the mass of voters themselves, so that the people, the men who voted up [sic] would be able to impose their will on their representatives.""}

Roosevelt's campaign as president on behalf of the Hepburn Act provides a useful case study in the lessons he had learned as governor of New York. The Hepburn Act was reform legislation, the purpose of which was to strengthen the regulatory powers of the Interstate Commerce Commission over railroad rate-making practices. For our purposes, what is significant here are the distinctly modern tactics Roosevelt employed to secure railroad reform. "The President used the occasion of his annual message to Congress to frame the basic policy problem and identify its salient dimensions, placing railroad reform firmly on the national agenda. In addition, to make the demand for reform, the attorney general, acting at Roosevelt's behest, coordinated a series of well-publicized lawsuits to fan public indignation with existing railroad practices. In the area of communications, Roosevelt was a pioneer in cultivating newspaper headlines to advance a presidential agenda and strengthen his leadership position. Roosevelt's "literary allies" in popular magazines like McClure's, The Outlook, and The World's Work wrote critical exposés of railroad practices and lambasted the Senate for holding up railroad reform. Roosevelt himself practiced the fine art of leaks, trial balloon, and off-the-record statements. In all, a coordinated and continuous stream of information poured forth from the White House and other federal agencies, fanning the fires for railroad reform. As one contemporary journalist observed: "The campaign of head-lines took on a cumulative frequency—occasionally, indeed, two or more jostled each other on the same front page.""

"In yet another manifes-
the information and the statements of policy which will enable it to form its judgments alike of parties and of men." As president, Wilson took immediate steps to quicken the intercourse between the White House and Capitol Hill. For too long the tradition of submitting presidential messages in writing had dominated executive-legislative communications. The practice had been initiated by Jefferson as a way to buttress the formal separation of powers with an added measure of physical separation (as the two branches were situated at opposite ends of Pennsylvania Avenue). Wilson was convinced that if he could breach the physical separation, appearing directly before Congress to speak on matters of critical import, he could galvanize Congress and electrify the nation. If, as a consequence, the president appeared to dominate the legislature and compromise its autonomy, it was only that—appearance: "If Congress be overborne by him . . . it is only because the President has the nation behind him, and the Congress has not. He has no means of compelling Congress except through public opinion." Like Roosevelt before him, Wilson's presidency was in many ways a prototype of the modern presidency. It was in this period that a subset of congressional legislation first came to be identified as "administration bills"; that is, legislation "either drafted in executive department or known to constitute a part of the president's program." As a matter of regular course, these presidential bills would also be introduced into Congress by friendly committee chairs or other administrative supporters, with administration officials testifying at committee hearings on behalf of the measures and legislative supporters speaking from the floor on behalf of the administration's position. Nor was it unusual for Wilson's chief dispenser of the patronage, Postmaster General Albert Burleson, to be observed at the Capitol counting heads and rounding up support for presidential initiatives. In the case of one World War I measure, the Overman Bill, which granted President Wilson authority to reorganize the War Industries Board, it was Burleson who carried the administrative measure physically to Capitol Hill on the day it was to be introduced, and who met with the measure's supporters in the president's room near the Senate chamber. Writing in the last years of Wilson's presidency, H. C. Black described the nature of the new activist methods of presidential party leadership in the following way:

[The modern president is in constant and free communication with the chairman of important committees in both houses, with the parliamentary leaders of the party, with his individual friends and supporters, and even with those who are most conspicuous in their opposition to his policies. It has become a common practice, no longer exciting surprise or even comment, for the President to summon influential members of either house to conference at the White House, nor is it a secret that the purpose is to settle the details of an administration bill or to concert ways and means for securing its passage, or perhaps to block the pathway of independent insurgents. Nor have the occasions been infrequent in which the President has himself gone to the room set apart for him at the Capitol and there summoned to his presence Senators or Representatives whose strong opposition threatened disaster to some favored measure. The object of such interviews is of course the taking of common counsel for the welfare of the country. But is it not the case that when the legislators return to their seats, their votes reflect the wishes of the executive?]

The Rooseveltian Synthesis

Franklin Delano Roosevelt was elected to office at the height of the greatest national emergency since the Civil War, circumstances which, as Lincoln well knew firsthand, afforded a great latitude to executive leadership. It was Roosevelt's genius to draw upon and synthesize many of the historical elements under review in this chapter, bequesting to his successors both a system and style of governance that would make both independent action and program activism routine features of the post-Roosevelt presidency. Rightly or wrongly, FDR's presidency would be abstracted from its peculiar historical circumstances and held up as an exemplar for students of national political leadership, a benchmark for gauging the success of future presidents. As the historian William E. Leuchtenburg has vividly expressed it, subsequent presidents would operate "in the shadow of FDR."

The Synthesis Deployed

The elements of the Rooseveltian synthesis are best observed in motion. The passage into law of the 1935 Public Utility Holding Company Act (PUHCA) provides a particularly compelling case study of modern presidential leadership in action. The PUHCA was a profoundly controversial measure, fueled by a deep-seated Western animus against the public utilities industry. It was, in the words of Clair Wilcox, a student of American business regulation, "the most stringent corrective measure ever applied to American business." Its politics also shattered Democratic Party unity, splitting it along conservative and liberal lines. The PUHCA forced the corporate restructuring of the public utilities industry and the divestiture of significant amounts of property. It also made the Securities and Exchange Commission (SEC) an effective regulator of electric and gas holding companies. Additionally, beginning on January 1, 1938, the SEC was required to undertake the reorganization of remaining holding companies into single integrated utility systems. Finally, and most controversially, the PUHCA mandated the dissolution of all utility holding companies beyond the second
"degree." This was the so-called mandatory "death sentence" provision, and its retention in any final legislation was insisted upon by Roosevelt.

From the outset, Roosevelt embraced the role of national policy leader, taking full control over the substance and politics of the PUHCA. Where Woodrow Wilson had typically assumed a role of "first among equals" in substantive dealings with his congressional party, Franklin Roosevelt preferred a more complete direction of the policy process. The provisions of the PUHCA were thus authored exclusively in the executive branch along lines laid down by the president. While Sam Rayburn and Burton Wheeler, the respective chairmen of the House and Senate Interstate Commerce committees, were both present in White House during the planning and drafting phases, their presence was largely cosmetic, to help foster the fiction that the PUHCA bill was a congressional measure, written by the relevant committees of jurisdiction. The White House was assisted in its drafting efforts by a growing and skilled cadre of government officials. In the period prior to 1939, before the creation of the Executive Office of the President, Roosevelt drew liberally on the executive branch's considerable talent and resources to burnish his policy leadership stance. In drafting the PUHCA bill, for instance, Roosevelt made extensive use of experts available to him in several executive institutions, including the Treasury Department, the Federal Trade Commission, the Federal Power Commission, and the president's own National Power Policy Committee.

Roosevelt was also a skilled player in the field of opinion leadership. The opening rounds in the battle for reform were joined in a manner familiar at least since the days of Theodore Roosevelt. FDR seized the occasion of his State of the Union address to place the subject of utility holding companies firmly on the national agenda and heighten public awareness of the issues involved. In the aftermath of his address to Congress, the government released voluminous reports detailing the unsavory practices of the power industry and building the case for reform. At the same time, administration officials, congressional allies, and organized supporters took to the road and, in a coordinated series of speeches, newspaper interviews, and radio addresses, made the case for Roosevelt's reform initiative. The president also took his case directly to the people, using the instrument of the "fireside chat" to defend his stringent course of action.

With characteristic exuberance, Roosevelt also took the reins as legislative party leader. In Congress, Roosevelt relied heavily upon administration spokespersons like Edward C. Eicher, a second-term representative from Iowa and staunch New Dealer, to carry his battle for the PUHCA onto the floor of the House. When the House Interstate Commerce Committee stripped Roosevelt's prized death-sentence provision from its legislation, the administration made its case for reinstatement through the device of a dissenting report—officially authored by Eicher—that accompanied the official majority and minority reports out of committee. Likewise, Eicher argued the administration's case for reinstatement before the full chamber and assumed the role of administration whip, mobilizing Democratic supporters of the death sentence to maximize turnout on votes deemed crucial by the White House. It was also Eicher who introduced (and unsuccessfully) an amendment to reinstate the death sentence provision on the floor after its deletion in committee.

In the Senate, Roosevelt relied upon his vice president, John Nance Garner, who in his constitutional guise as president of the Senate turned aside both seniority and the preferences of committee leaders to ensure a conference committee delegation sympathetic to the President's death-sentence provision. FDR also sent expert advisers Benjamin Cohen, who had helped draft the original PUHCA bill, and Dorrive Devane of the Federal Power Commission, to accompany Senate conferees and aid them in swaying recalcitrant House conferences (and to ensure that Interstate Commerce Committee chairman Sam Rayburn did not pursue his own independent compromise). When all else had failed, Roosevelt enlisted the aid of Alabama senator (and future Supreme Court justice) Hugo L. Black to launch an investigation into allegations of improper influence by the power industry. Black's charge was to scandalize the utilities industry, fostering public outrage and helping force House conferees to yield to the Senate on the death sentence. In the end, Roosevelt was forced to accept a watered-down death-sentence provision, one that could still be touted as a victory for Western progressives, but one more fully attuned to the realities of shared authority and countervailing power in American politics.

Roosevelt's tireless action on behalf of the PUHCA illustrates the operation of the modern presidency, its potential for excess, and its limits as an instrument of national leadership. In the end, it is as much a story of personal tenacity as institutional power. Roosevelt was required to pull out all the stops at every conceivable point to avoid outright defeat and salvage a partial, albeit politically important, victory. Clearly, it would be impossible to invest the president's limited political resources at similar levels on every important administrative measure. Indeed, Roosevelt's interventions on behalf of public utilities reform ultimately provoked a strong backlash among congressional representatives angry with Roosevelt's strong-arm tactics and his bold trespass upon their traditional prerogatives. In the end, the House would undertake its own investigation of undue influence—this one against the executive branch—in an effort to embarrass the president and undermine his popular and legislative leadership. The episode underscores the paradox at the heart of the modern presidency, as constitutional inadequacies fed both the appearance and the reality of an increasingly interlocking and aggravating president grasping for personal power and influence. The battle for the PUHCA would ultimately take a toll on Roosevelt's presidency, presaging the diminishing returns his leadership would yield in his second term, when a conservative coalition of Republicans and Southern Democrats would slam the brakes on further New Deal reform initiatives.
The Synthesis Institutionalized

In 1939 Congress passed the Executive Reorganization Act. That landmark legislation had been sponsored by the White House, and though in the end it was considerably less than what Roosevelt had asked for, what he was given would supply permanent organizational support for the president's new leadership role. It has been persuasively argued by Sidney M. Milkis that in institutionalizing national political leadership in the White House, Roosevelt was consciously seeking a way to reduce the president's reliance on traditional party mechanisms. The heterogeneous composition of the Democratic Party and its conflicting ideological impulses cut against the formation of a national and programmatic party under Roosevelt's leadership, inhibiting unified action on liberal reform. Following the president's unsuccessful twelve-state effort to unseat conservative Democrats in the party's 1938 primary contests (he was successful in only two contests, one in Oregon, the other in New York), Roosevelt turned to building up the institutional powers of the executive branch as a way to vindicate liberal leadership. In Milkis's suggestive formulation, Roosevelt sought to institute a series of administrative reforms that would "help the president to govern in the absence of party government."76

The Administrative Reorganization Act of 1939 created the modern Executive Office of the President (EOP). It also established a formal White House Office as a principal subunit within the EOP, staffed with presidential assistants whose sole responsibility was to send to the president's political and policy interests. This legislation also moved the Bureau of the Budget (the precursor of today's Office of Management and Budget) from Treasury to the EOP, strengthening presidential control over the budgetary and programmatic requests of the executive branch. Finally, Roosevelt also successfully extended civil service protection to federal personnel originally brought in to administer New Deal programs from outside the merit system, helping to institutionalize liberal expansionist tendencies within programs now permanently administered by the federal bureaucracy. Though modest in its initial endowment, the dramatic growth in both the size and complexity of the institutional presidency since the 1930s (see Matthew Dickinson in this volume) has provided presidents with an organizational capacity to project their leadership efforts into multiple political arenas simultaneously, progressively undercutting and marginalizing the role historically played by national party organizations.

Scholarly Assessments and Contemporary Trends

Roosevelt's synthesis and its subsequent institutionalization forever transformed both the character of the presidency and the structure of American politics. For better or worse, the president was now the acknowledged centerpiece in national politics—its prime mover—and the exaggerated expectations placed upon executive leadership sent presidents on an extended search for new tools of influence to justify their newfound preeminence. The rise of the modern presidency also stimulated new waves of scholarly interest in the office. Almost immediately, professional students of American politics undertook to assess the pathologies and potentialities of the new president-centered government. Political science scholarship on the post-Roosevelt presidency provides a unique window onto reactions by informed observers of political life to the rise of the modern presidency. These writings are also themselves a marker of the constantly evolving challenges that have confronted the exercise of modern presidential leadership since the New Deal.

Pathologies and Potentials

Writing in the wake of "the Roosevelt revolution," the public law scholar Edward Corwin judged the transformation of legally prescribed roles and relationships wrought by FDR, so comprehensive as to suggest that executive power had finally broken loose from its constitutional moorings. "To Corwin and others of his generation, the study of the Constitution and the laws was the study of a set of formal roles, rules, and standards regulating the actions of public officials, a set of external benchmarks or standards that defined the parameters of legitimate authority and established a bulwark against the aggrandizement of power by government. The problem was that presidential action resisted such formalization and regulation. Writing in 1953, some 166 years after the drafting of Article II, Corwin insisted that the "executive power [unlike the legislative or judicial power] is still indefinite as to function and retains ... much of its original plasticity as regards method."77 [emphasis added]. The intrinsic ambiguity of its provisions meant that its constitutional development fairly "brittles with alternatives." That inherent flexibility made the presidential office spontaneously responsive to emergency conditions and fueled its growth. As Corwin famously stated, "Taken by and large, the history of the presidency is the history of aggrandizement."78 The prevalence of both domestic and international emergencies since 1929, Corwin feared, had finally freed presidents from traditional legal and institutional restraints. Left unchecked, it would culminate in a highly personalized presidency, one in which effective leadership was too dependent on the accident of personality; one in which presidents would be required to consult no other authority save their own conscience as a guide to appropriate action; one which might, in its guise as popular tribune, trample upon the fundamental rights and liberties of non-majorities.

Other scholars eagerly embraced the emerging paradigm of presidential government. For them, effective presidential leadership was now mandatory in American politics. It was also politically safe. In his American Presidency (1956), Clinton Rossiter took direct aim at the Corwinian perspective, arguing that it was
not formal-legal constraints, but rather America’s dense pluralistic network of overlapping restraints, that acted as the primary bulwark against the type of “presidential dictatorship” that so concerned Corwin. Congress, federalism, the party system, the pressure group system, public opinion, the sprawling federal bureaucracy, and the system of private enterprise all operated as checks on a gross and persistent misuse of presidential power. In Rosner’s words, “The power of the Presidency moves as a mighty host only with the grain of liberty and morality.”

To other advocates of presidential leadership, the implications of Rosner’s system of pluralistic checks were less benign. While they might indeed function as effective political safeguards, they also constituted a host of institutional impediments that undercut purposeful presidential leadership. These scholars turned the time-worn problem of constraining presidential power on its head. The impetus now became that of liberating presidents from this system of pluralistic constraints, investigating in particular the personal attributes and organizational requirements needed to effectuate the potential of the modern office. In his seminal work *Presidential Power* (1960), Richard Neustadt tackled this problem head on. In a fragmented system of shared authority, no political actor possessed the authority to command obedience to his dictates; rather the art of leadership lay with techniques of persuasion. In one of his oft-cited passages, Neustadt wrote:

> When one man shares authority with another, but does not gain or lose his job upon the other’s whim, his willingness to act upon the urging of the other rests on whether he conceives the action right for him. The essence of a president’s persuasive task is to convince such men that what the White House wants of them is what they ought to do for their sake and on their authority.”

While the president’s formal powers alone could not provide him with the power to command others, they were still relevant to the politics of persuasion. Neustadt recommended that presidents inventory their formal and informal bargaining advantages and deploy them purposefully—with skill and will—to harness legislative self-interest to presidential goals. In Neustadt’s scheme, the president’s “professional reputation” as a bargainer was the key to presidential policy influence, and this required that legislators routinely anticipate presidential success in the inter-branch bargaining game. In *Creating Public* (1986), Samuel Kernell updates Neustadt’s thesis, helping to clarify important reorientations in the leadership strategies of contemporary presidents. Writing in an era of legislative decentralization, protracted divided government, and intense interest group surveillance of Congress, Kernell identified public opinion leadership, as traditional bargaining techniques, as the principal determinant of presidential policy influence. Employing a classic Neustadtian calculus, Kernell argued that to make bargaining techniques viable, mid-twentieth-century presidents had relied upon informal, backdoor party ties to powerful committee barons, as well as legislative norms of deference and reciprocation. These institutional conditions facilitated interbranch comity and legislative enforcement of bargains struck, making it cost effective for presidents to engage in direct bargaining tactics. By comparison, late-twentieth-century presidents faced a subcommittee system that fragmented power and made every legislator an independent actor and policy entrepreneur. Thus the traditional bargaining approach had become more costly, more time consuming, and less stable. Even with the resurgence of centralized legislative parties, the prevalence of divided government meant that presidents with the wrong party affiliation faced intense congregational resistance when presented with controversial presidential initiatives. Under such conditions, Kernell shows, presidents had rationally traded “bargaining” for “going public” as a principal technique of leadership. Contemporary presidents now had to possess the skill and the will to use their personal popularity as leverage in Congress. Presidents also required sophisticated systems of communications and outreach, allowing them to speak directly with targeted publics, tailor interest-group coalitions to immediate legislative needs, and send administration allies into the districts of critical swing legislators—all on behalf of presidential policy initiatives (see Lawrence Jacobs in this volume).

The Continuing Evolution of the Presidency: Emerging Techniques of Unilateral Policy Leadership

As Kernell’s analysis reminds us, divided government has been the norm for much of the post–World War II era. Indeed, if we include under the rubric of divided government interbranch ideological divisions as well as strictly partisan ones—to take into account the years in which the Conservative Coalition was ascendant in Congress—then the years of unified government have actually been quite few in number. Accordingly, president of all stripes have found it difficult to advance their policy agenda through legislative channels by relying solely on persuasion or opinion leadership. Instead, presidents have sought out additional tools with which to shape policy unilaterally—that is, without seeking Congress’s statutory assent.

The Administrative Presidency. One way presidents have exerted unilateral policy leadership is through techniques of enhanced administrative control. Statements like “operations is policy” and “personnel is policy” express White House recognition of the thin line between policy implementation and policy formulation. In this regard, a distinctive feature in the evolution of the post-FDR presidency has been the diminution of Cabinet independence in personnel and policy matters, as presidents have increasingly centralized administrative appointments in the White House and inserted presidential loyalists into the cockpit of the bureaucratic decision-making processes.
the bureaucracy. By the start of Nixon’s second term in 1973, efforts were well underway to redirect presidential energies away from traditional statutory and administrative practices in favor of enhanced techniques of administrative policy leadership. By systematically placing presidential loyalists in both Cabinet and sub-Cabinet positions—individuals without national reputations and constituency followings, and hence dependent on continued presidential favor for their position—and by seizing control of routine bureaucratic processes (rule making, grant writing, and budgeting), the administration hoped to effect a significant redirection of national policy, without seeking new statutory approval from Congress.

Nixon’s administrative presidency was ultimately cut short by Watergate and its aftermath. However, these techniques were quickly redeployed by Ronald Reagan when he took office in 1981. There were differences of emphasis. Where Nixon had sought to infiltrate the major spending departments—Health, Education, and Welfare; Housing and Urban Development; Labor; Transportation; and Interior—the principal targets of Reagan’s administrative presidency were the major regulatory agencies, especially the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). Regular line departments—such as the Department of Interior—were not ignored. Nevertheless, the administration’s major focus was on reducing the regulatory burdens on American business, with an articulated aim of reducing operating costs, stimulating new investment, and reinvigorating American competitiveness in global markets. Perhaps most significantly, Executive Order 12291 initiated major institutional changes to advance these goals. It gave the Office of Management and Budget (OMB) the authority to review existing regulatory rules, and prohibited federal regulatory agencies from promulgating any new such rules until OMB had conducted its own cost-benefit analysis. By granting OMB final authority over both existing and proposed rules, E.O. 12291 effectively centralized presidential oversight over areas of regulatory policy in which the Reagan administration sought change, especially environmental regulation, workplace safety and health regulation, and consumer protection regulation.

Techniques of unilateral administrative action continue to be employed. In the presidency of George W. Bush, this can be observed in the implementation of his Faith-Based Initiative. Faced with congressional recalcitrance, the Bush administration has used all of the administrative tools at its disposal—the creation of new executive institutions, strategic political appointments, and the promulgation of new regulations and funding protocols—to provide faith-based service providers with expanded access to federal contracts and grants. The White House Office of Faith-Based and Community Initiatives was established with links to units in multiple federal agencies, each with a carefully selected director and staff, empowered to articulate, advance, and oversee coordinated efforts to win
more financial support for faith-based social services."" Additionally, relaxed administrative rules have permitted federally funded, faith-based groups accepting federal monies to take religion into consideration when hiring staff, construct dual-purpose facilities that provide both social services and facilities for religious worship, and use federal job-training vouchers to provide spiritual training for individuals seeking employment in religious institutions, or other faith-based organizations. Finally, federal agencies have simplified grant-application procedures to facilitate participation by smaller faith-based service providers, while many provide grant-application training to these same organizations.

EXECUTIVE ORDERS AND SIGNING STATEMENTS. In search of expanded opportunities for unilateral policy influence, post-World War II presidents have also made innovative use of such traditional instrumentalities as executive orders and presidential "signing statements." Executive orders are directives to government officials and agencies instructing them on some facet of their job conduct. They can be quite straightforward, as when President John Quincy Adams issued an executive order directing members of the military to don black armbands to mark the death of Thomas Jefferson. Nevertheless, since Franklin Roosevelt, executive orders have grown into their own as instruments of unilateral policy leadership, as we saw in the case of Ronald Reagan's Executive Order 12391. In the area of social policy, presidents such as Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush have each used executive orders either to promote or discourage stem-cell research among investigators accepting federal funds. These same presidents have also used executive orders to lift or impose the "gag rule" on family clinics offering abortion-related counseling and referrals.

Of course, presidents have long turned to executive orders to assert leadership in civil rights policy. A few examples can suffice: In 1948, Harry Truman signed E.O. 9881, integrating the American armed forces; in 1957, Dwight Eisenhower signed an executive order sending federal troops into Little Rock, Arkansas, to enforce Supreme Court decisions banning racial segregation in public schools; in 1963, John F. Kennedy issued E.O. 11063 barring racial discrimination in federally subsidized housing (after Congress had blocked the statutory route); in 1965, Lyndon Johnson issued E.O. 11246 directing federal contractors to create minority hiring programs (after Congress had refused to do so in the Civil Rights Act of 1964); and in 1969, Richard Nixon established the so-called "Philadelphia Plan" by executive order, which established racial hiring quotas on federal projects. Bill Clinton's "don't ask, don't tell" policy toward gays and lesbians in the military is only the most recent manifestation of this long tradition of affecting civil rights policy unilaterally through the use of executive orders.

Presidential signing statements are perhaps the most exotic, because most recent, of unilateral leadership tools. These signing statements—presidential messages written for the occasion of signing a bill into law—have been used by recent presidents to assert what has been termed a "quasi-judicial power" over the interpretation of laws passed by Congress. That is to say, recent presidents have sought to exploit statutory ambiguities in legislative statutes to constitute legislative purpose in ways intended to ensure that policy implementation comport more closely with presidential policy goals.

Presidents have also used signing statements to stipulate the constitutional understandings they will employ in administering congressional statutes. In the most dramatic instance, Ronald Reagan asserted the right not to be bound by provisions of law he deemed unconstitutional. The 1984 Competition in Contracting Act (CICA) had empowered Congress's comptroller general to suspend contracts awarded by federal agencies to ensure a competitive bidding process. Reagan's signing statement asserted this provision to be unconstitutional, having granted executive responsibilities to an arm of the legislature. Echoing Andrew Jackson, Reagan maintained further that the president possessed the same authority as the judicial branch to void unconstitutional legislation—that is, to suspend its immediate operation—insisting that his administration would not honor the disputed provisions of the CICA until such time as it was upheld by the Supreme Court. In hearings before the House of Representatives, the Justice Department paraded Chief Justice John Marshall in Marbury v. Madison, arguing that "[i]n case of a conflict between the Constitution and a statute, the President's duty to faithfully execute the law requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land," insisting further that the president had a duty to put his own interpretation of the Constitution ahead of any statute and obey it rather than the statute itself. To implement the president's understanding, OMB issued a government-wide executive order directing all agencies not to obey the act, but rather to "proceed with the procurement process as though no such provisions were contained in the act." While this case was never heard by the Supreme Court, the lower courts did hold against Reagan, arguing that such a practice amounted to an absolute veto on the part of the executive and violated Article III by assuming a role reserved for the judicial branch. Here, with evident satisfaction, the court quoted Marbury v. Madison back to the Administration, citing John Marshall that "it is emphatically the province and duty of the judicial department to say what the law is.""

Conclusion: Between the Promise and the Fear

At the heart of the American presidency are a series of contradictions not soon to be resolved. They can be listed virtually seriatim: A head of executive power is as old as the Constitution itself; yet most citizens today demand a powerful and activist presidency. Presidential power has grown in absolute terms, but its relative influence in American politics bespeaks a much spottier record; crises of an
“imperial presidency” stand virtually side-by-side with ruminations on the “illusion of presidential government.” The conventional model of presidential government presumes unified party control, yet divided government and inter-branch warfare have proved to be much more the norm. The architects of modern presidential leadership conceived of that instrument as a unifying force in American politics, yet ironically its exercise has sparked a proliferation of hostile and competing centers of power. Perhaps most profoundly, and in stark contrast to its origins as an office above party politics, the presidency today manifests a demagogic, aggrandizing, and politicizing impulse, one that feeds public perceptions of presidents as unbound by law, standard operating procedure, and norms of official propriety.

The paradox of the modern presidency is everywhere manifest. Yet it is something with which Americans have not fully come to terms. The reason for this terms clear: the paradox of the American presidency is at root the paradox of the American people. The presidential office is the institutional focal point for American political culture; it both receives and transmits basic data on core American values. The ways in which presidents speak to the nation reveals something essential about our national identity, our political traditions, our future promise, and, within this broad context, the appropriate solutions to our current-day problems. In a similar fashion, the ways in which presidents behave (or misbehave) before the nation both instruct us and remind us of our cultural models of exemplary moral and political behavior.

Presidential elections ritually retrace the original promise of the American experiment and its potentialities for political renewal. However, in office, quickly confirm the cultural ambivalence of their office, a tradition of deep discomfort with the fear of concentrated and unaccountable personal power. To paraphrase political scientist James Morone, the promise of presidential power elicits a dread of that very same power. It is evident everywhere in American history, from Edmund Randolph’s identification of the presidency as the “forts of monarchy” and Whig Party caricatures of “King Andrew” Jackson, to Edward Corwin’s fears of an institutionally unbounded and personalized executive office and Theodore Lowi’s indictment of an “imperial-plebiscitary presidency.” As has often been noted, the discrepancy between the promise of the presidency and the powers attached to it creates an almost unbridgeable “expectations/performance gap,” one that presses presidents to the water’s edge of constitutional propriety. But the complexities of presidential leadership run deeper still. The popular apprehension of executive power leaves contemporary presidents with a series of challenges: how to exercise power without the appearance of being powerful; how to give direction and momentum to governmental processes without appearing to subvert cherished constitutional principles and conventions; how to represent what is exemplary and rare in the American cultural tradition without losing a sense of being one with the people.

Americans actively embrace this tension between the promise and the fear. Indeed, it might be said that not choosing between these two contradictory values constitutes one of our most cherished political traditions. Such a practice expresses the desire for a dynamic and evolving equilibrium between political safety and liberty, on the one hand, and the achievement of collective purposes, on the other. This slurring of cultural contradiction fosters a creative tension in the popular culture, a healthy skepticism of governmental power that stimulates critical engagement and sustains an ongoing national dialogue about its legitimate exercise.

There is, therefore, manifest value in the tradition of not choosing, but it comes at a cost, and these costs should be borne neither lightly nor in ignorance. This tradition is productive of costly political externalities, deleterious by-products of a system that fosters relentless calculating and opportunism by presidents and other political elites, and public cynicism and political disengagement among average citizens. Leadership requires trust, and trust is built upon the effective and responsible exercise of discretionary power. Yet, as noted, American constitutionalism is predicated on the distrust of effective power and its capabilities. Our institutional features purposely discourage timely and efficient governmental action, undercut clear lines of political responsibility, and in the process undermine trust, feeding an abiding public doubt that government can be an effective instrument for the resolution of difficult national problems.

This core cultural contradiction is most clearly manifest in the undersupply of formal resources required to sustain purposive leadership—leadership that for better or worse has, since the era of Franklin Roosevelt, been squarely placed upon the shoulders of the president. As has been suggested in these pages, armed with a few formal resources, presidents have been left to fend for themselves in the struggle for influence in the American political system. What must remain, the subject for future national debate is whether effective political leadership must ultimately be lodged somewhere else. The contemporary structure of Congress and our great political parties make them institutionally incapable of filling that national leadership role. In its 1937 Report of the President’s Committee on Executive Management, the Brownlow Committee wrote, “Those who waiver at the sight of needed power are false friends of modern democracy. . . . Strong executive leadership is essential to democratic government today.” One can reasonably disagree with the Brownlow Committee’s specific conclusions and prescriptions. Yet it seems equally reasonable to conclude that as long as the public continues to demand effective presidential leadership, presidents will rationally respond by doing what they must to succeed within the system they have been given.

Notes
* The author wishes to thank members of the Executive Branch Commission for many excellent comments and helpful suggestions. Special thanks are owed to R. Shep Melson, Charles O. Jones, Hugh Heclo, and Mark Peterson.

2. Hughes, The Living Presidency, quoted in Ralph Ketcham, Presidents above Party.


4. Locke, Two Treatises, 392.

5. Locke, Two Treatises, 393.


8. "Publius" is the pseudonym under which James Madison, Alexander Hamilton, and John Jay wrote their essays in defense of the proposed Constitution, essays that would be published under the title The Federalist Papers. The immediate purpose of these essays was to secure ratification of the Constitution in New York state.


14. Locke, Two Treatises, 415.

15. On Jackson's War with the Second Bank of the United States, see Remini, Andrew Jackson and the Bank War; Remini, Andrew Jackson, vol. 2 and 3.

16. In the first forty years of the Republic, presidents exercised the veto power only ten times; there would be twelve vetoes in the course of Jackson's two terms in office.

17. A statement of conventional presidential practice regarding the veto can be found in "Inaugural Address of William Henry Harrison," in Richardson, ed., Compilation, vol. 3, 1865. That statement reads, "But if either of [the pre-Jacksonian Presidents] ... upon the ground of their being incompetent or not as well adapted as they might be to the wants of the people, the veto was applied upon that of want of conformity to the Constitution or because errors had been committed from a too hasty enactment." (Emphasis added.)

18. Tuls, Rhetorical Presidency.


25. Remini, Andrew Jackson and the Bank War, 123.

60. Corwin, President.
62. Corwin, President, i.
63. Corwin, President, 310.
64. For an exemplary statement, see Burns, *Presidential Government*.
67. On the importance of contemporary veto bargaining to presidential leadership, see Cameron, *Veto Bargaining*.
68. Kernell, *Going Public*.
73. The following discussion relies upon findings contained in Anne Farris, Richard P. Nathan, and David J. Wright, "The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative" (The Roundtable on Religion and Social Welfare Policy, Rockefeller Institute of Government, August 2004).
76. See Tiefert, *Semi-Sovereign Presidency*; Cooper, *By Order of the President*.
81. Ginsberg and Shefter, *Politics by Other Means*.
82. Skowronek, *Politics Presidents Make*; Miltsa, *President and the Parties*.
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86. For a full and insightful discussion of these presidential contradictions and more, see Cronin and Genovese, *Paradoxes of the American Presidency*.

Bibliography


THE EVOLUTION OF NATIONAL BUREAUCRACY IN THE UNITED STATES

Daniel Carpenter

The simple details of American daily life reveal the pervasive presence of the bureaucratic state—the dollars in our wallets, printed by the Treasury Department; the peanut butter we eat, subsidized and regulated by the U.S. Department of Agriculture (USDA); the pain medications we take, approved and governed by the Food and Drug Administration (FDA); the cars we drive, produced in factories regulated by the Occupational Safety and Health Administration (OSHA) and themselves regulated by the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration; the national parks and forests, in which we ski, fish, hike, hunt, climb, and camp, governed by the Forest Service and the Department of Interior; and the $425.3 billion in checks that our elderly and disabled receive annually from the Social Security Administration.

These everyday facts have an enduring history. Despite revisionist accounts and casual impressions, national bureaucracies have figured prominently in American history. Take the case of war. From the early 1800s, through the world wars to the present, American military affairs have been guided through large bureaucracies: the Navy and the Department of War (1789–1947) and the Department of Defense (1947–present). U.S. military and intelligence agencies have spread millions of persons and trillions of dollars in expenditure across the continent and around the globe. These bureaucracies have created new weapons, and even launched the Internet, which was once a network of electronic communications conceived and funded by the Pentagon’s Defense Advanced Research Projects Agency (DARPA). The presence of bureaucratic government in American history is vast, even when we step outside the military. In the early